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Feb. 3 2011 — 9:08 am

Some Control Won't Convert Independent Contractors To Employees

Think of the independent contractor vs. employee line as a sheet of ice on a pristine winter lake. Skate lightly and you'll sail by smoothly. Tread heavily and you'll end up very cold, very wet and very unhappy. Contractor vs. employee disputes are messy and hard to describe to anyone who doesn't do them for a living.

In fact, who is an employee and why it matters can take on nearly religious fervor. But when you come right down to it, a lot of it is basic. Classically, an employee is someone working full time for wages, only for you, and doing what you say where, when and how you direct. Conversely, an independent contractor does a one-time job for you for a fee on his own schedule with his own tools, in his own way.

But given the blended roles, work habits and lifestyles of today's new economy, these polar extremes meet in a very gray middle more times than you can imagine. The stakes are large and varied. Most obviously, employers pay wages to employees and must withhold taxes. Independent contractors are obligated to pay their own expenses and taxes.

Employers also normally have liability for the acts of their employees. That means if an employee driver causes an accident the employer is typically fully liable. If the same individual is an independent contractor, the employer is much less likely to have liability. An employer must comply with wage and hour laws, nondiscrimination, the provision of

benefits, and other employment laws covering its employees, but in most cases is not required to do so for independent contractors.

An employer has unemployment insurance and worker's compensation obligations for employees. In contrast, companies have great discretion in how they treat independent contractors. And the list goes on. For more, see [Independent Contractor-Versus-Employee Issues Arise in Multiple Contexts](#).

Although the stakes are huge, determining who is an employee can be tough and can involve multiple legal tests. The IRS has a [test](#) and there are many other tests in play. See [Who Cares About Contractor vs. Employee Status?](#) Much of the debate is about **control**, and which details impact the kind of "control" that makes a worker an employee.

But some control isn't fatal. Take the case of [Empire State Towing and - Recovery Ass'n v. Commissioner of Labor](#). There, the question was whether a towing company had to pay unemployment insurance for a lawyer it hired to do legal and lobbying work. If he was an employee, it did. If he was an independent contractor, it did not.

The judge ruled him to be an employee, but the Court of Appeals said no. He maintained a database for the association, did mailings out of his own office and did not work exclusively for the association. The lawyer could sign checks, but he had to get a co-signer over \$500. He also had to submit periodic reports and attend meetings.

The appellate court said the test was about the company's *overall* control. There was no evidence the towing company controlled everything the lawyer did. Thus, the lawyer was not an employee. The court also noted that he was a professional subject to ethical rules and responsibilities. All of that made him a contractor for New York State Labor Law purposes.

If you are an employer, you may think small dollar disputes are not worth fighting. However, fighting even small worker status disputes can make sense. One adverse result often leads to another, so assuming that some small disputes aren't worth the effort or expense can be shortsighted. See [Independent Contractor vs. Employee: Domino Effect of](#)

[Recharacterization](#). Congress is looking to toughen up these rules further, so beware. See [White House On Contractor vs. Employee: There Will Be Blood](#).

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.