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‘Tis The Season For Unemployment (Benefits)

I know that title sounds Scrooge-like and full of Humbugs but it's true: the controversial tax deal between President Obama, Democrats and Republicans to extend the vaunted [Bush tax cuts](#), [patch the AMT](#) and temporarily fix the estate tax was swapped for more [unemployment benefits](#). If the bill does pass, the unemployment benefits will certainly be a part. That made me think of a fundamental truth: unemployment benefits are only for people once employed *as employees*.

Yet you might be surprised at how many unemployment benefits go to workers who were actually independent contractors and not employees, at least by name. How can this happen? Simple.

A terminated independent contractor applies for unemployment benefits. The company that previously used the independent contractor may not contest the claim. Whether or not the company contests the claim, the unemployment authority in question may rule in the worker's favor awarding the benefits.

The lines can blur between independent contractors and employees.

Even if the employer has a written agreement calling for the worker not to be an employee and agreeing to independent contractor status, the agency can rule for the worker, recharacterizing the relationship as that of employer-employee. In that case, the worker gets the unemployment benefits.

To be fair, some employers flatly abuse the “independent contractor” label, and recharacterization is plainly appropriate in some cases. But some unemployment benefits are paid to people who truly were independent contractors and who probably should not be recharacterized in this way.

How do you tell if someone is an employee regardless of what they may be called? It’s not easy. The IRS factors are widely used. See [IRS Gives 10 Tips On Employees vs. Independent Contractors](#). However, most unemployment tests are much more weighted in favor of finding employee status. In fact, there are many different tests in play, and that can be confusing. See [Who Cares About Contractor vs. Employee Status?](#)

The risk to companies from these characterization questions can be significant. In some cases there can even be [criminal liability](#). For employers who have other workers in the same “independent contractor” category as the worker claiming benefits, this can be the straw that broke the camel’s back. Or if you prefer, it can be the first domino to fall. Agencies exchange information, and one dispute often leads to others.

The status of a worker as an independent contractor or an employee is important for federal income and employment taxes (think IRS and Social Security Administration). It also affects state income and employment taxes. Then there’s the U.S. Department of Labor and the state counterpart agencies. Many states have Departments of Industrial Relations, OSHA agencies, and more.

Of course, there are also pension and fringe benefit issues, involving both governmental agencies (many are jointly administered by the IRS and the Department of Labor), private parties and insurance companies. Another big category is workers’ compensation benefits. Despite the generic “worker” name, workers’ comp benefits almost invariably are only for employees, not for independent contractors. Characterization questions—is this injured worker really an independent contractor or an employee—occur all the time.

Civil liability (for accidents or injuries the worker might cause) can also be dramatically different. You generally aren’t liable for injuries your independent contractor causes while working for you. In contrast, for

acts of your employees, you have full liability. See [Independent Contractor or Employee?](#)

The bottom line? If you're an employer and have independent contractors, you should consider how good your written agreement is with your contractors and how closely you follow it. For drafting tips, see [Drafting Independent Contractor Agreements](#). Also, when deciding whether to contest claims, consider the potential domino effect in the future.

Finally, know that there's more scrutiny today. Laws on using contractors are likely to be revised. See White [House On Contractor vs. Employee: There Will Be Blood](#).

For more, see:

[Beware Personal Liability For Employee Taxes](#)

[All Lawyers Need To Know About Independent Contractor Basics](#)

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