DON'T LET DRIVERS TAKE YOU TO THE CLEANERS

Robert W. Wood*

"Whoa! Give it to the girl. I'm an independent contractor. Tax purposes!" Seinfeld fans may recognize this line from an episode in which Jerry is involved in a mix-up with a maid service.[1]

The slimy boss avoided payroll taxes by purporting to make his maids independent contractors. Seinfeld surely did not intend to raise serious tax issues, but, as Shakespeare noted, many a truth is said in jest. Even Mae West once quipped that there are no withholding taxes on the wages of sin.[2] Everyone understands independent contractor issues, it seems.

The $64,000 question is: When may you permissibly classify workers as independent contractors, and what are the stakes? It is not merely a tax issue, but a huge employee benefits issue, and a liability issue. And the list goes on.

Classifying workers is not discretionary based on the employer or employee's wishes or even on agreement. The IRS publishes guidelines to aid employers in determining when a worker is an independent contractor or employee. Employers can face major tax, interest and penalty liabilities to the IRS, liabilities to state taxing authorities, and serious liabilities to their own workers.

The liability does not necessarily start with the IRS. Indeed, worker lawsuits are becoming more common. Recently, Federal Express Ground (FedEx) was found to have mischaracterized drivers after a large class of their own delivery drivers sued to be

---

* *Robert W. Wood practices law with Robert W. Wood, P.C., in San Francisco. He is the author of many books, including* Legal Guide to Independent Contractor Status, *(Aspen, 3d Ed. 2005), and* Taxation of Damage Awards and Settlement Payments *(Tax Institute 3d Ed. 2005), available at www.damageawards.org.*

---

[1] Seinfeld Episode #176 "The Maid," Season 9, aired April 30, 1998.

[2] http://home.earthlink.net/~paugal/taxquotes.html.

reclassified as employees.[3] The case made the front page of the *Wall Street Journal.*[4] This problem is certainly not limited to the trucking, shipping or transport field.

In fact, this kind of legal dispute can occur in nearly every industry, affecting nearly every stratum of employee. Disputes involve virtually every class of workers, from highly paid computer programmers at Microsoft,[5] to exotic dancers at strip clubs.[6] Recently, a group of highly paid partners in a global law firm complained to the EEOC, which sued the firm claiming that partners of the law firm were really employees, and thus were entitled to various federal protections.[7]

Yet, there may be special dangers in the transport field. Of course, trucking long-haul drivers, who haul goods from terminal to terminal, are governed by the ICC motor carrier rules and regulations, so they provide different fact situations from package pick-up and delivery.[8] With other segments of the transport industry, such as the package pickup and delivery involved in the *FedEx* case, the employer's understandable desire for control may make independent contractor status difficult.

There is a history of such big-ticket disputes in transport. Clearly, it is not mere tax issues that motivate companies to organize delivery drivers as contractors rather than employees. The employee benefit dollars of employment can be prohibitive. And with drivers, fear of liability for accidents can also be huge.

There have been a host of cases involving taxicab drivers. In a number of early court decisions, taxicab drivers were held to be employees[9]. After this, taxicab companies generally began to hire drivers in an arrangement in which the driver leases

---

[3] *Anthony Estrada v. FedEx Ground,* Los Angeles Superior Court # BC 210130 with Judge Howard Schwab presiding. Although liability was determined, the damages phase of trial is pending.

[4] Langley, "Drivers Deliver Trouble to FedEx By Seeking Employee Benefits," *Wall Sreet Journal*, Jan. 7, 2005, p. A1.

[5] *See, Vizcaino v. Microsoft,* 97 F3d 1187 (9th Circuit 1996).

[6] *See,* Wood, "Exotic Dancers Win Tax Disputes," Vol. 94, No. 4 *Tax Notes,* Jan. 28, 2002.

[7] *See,* Waldmeir, "Suit to Test Status of Law Firm Partners," *Financial Times,* Feb. 7, 2005, p. 3. *See,* also, "It's Partners versus Partnership," *Business Week* (Feb. 7, 2005), p. 9.

[8] ICC motor carriers might be statutory employees depending upon specific facts and circumstances. I.R.C. § 3121 (d)(2) and (d)(3)(A).

[9] *See, Jones v. Goodson,* 121 F2d 176 (10th Circuit 1941).

his cab from the company. Where drivers were not required to drive at all as long as they paid the stated lease payments, drivers have qualified as contractors[10].

Nevertheless, if the arrangement between the driver and the company contemplates a minimum in receipts by the driver, or the compensation to the cab company is a percentage of the driver's receipts, the relationship of employer/employee is likely. In one case, the court stressed that where the cab company is compensated as a percentage of the driver's gross receipts, the driver must account to the cab company. That accounting, said the court, necessarily implies a right to control, which is inconsistent with contractor status.[11]

Whether a truck driver is classified as a common law employee depends on how closely the working relationship meets the common law criteria. Characteristics of particular interest include ownership of the truck, the procurement of licenses, the existence of an independent office, advertising to the public, payment of business expenses, following instructions, and keeping of records.

Some trucking companies attempt to make drivers independent contractors by requiring them to lease or purchase trucks from the company. However, when the company retains title to the trucks and exercises control over the drivers by restricting their activities and providing instructions, the company is generally seen as an employer.

Example: A company engages Phil Blue to haul products to its customers. The company has legal ownership and control of the truck. Phil can be required (on an hour's notice) to make deliveries at times and places specified by the company. Refusal can jeopardize his relationship with the company. He has to operate and maintain the equipment and provide the necessary operators and helpers. He is not allowed to use the company's equipment to haul for others. He is paid on a tonnage basis and is not guaranteed a minimum amount of compensation. He has to pay the operators and helpers out of his tonnage receipts, and pays for all insurance coverage required by the company. Phil and any operators or helpers engaged to assist him are employees of the company.[12]

---

[10] *See, Yellow Cab Co. v. Magruder,* 49 F Sup 605 (District of Maryland 1943), affirmed 141 F2d 324 (4th Circuit 1944).

[11] *See, Air Terminal Cab, Inc. v. U.S.,* 478 F2d 575 (8th Circuit 1973).

[12] Employer's Tax Guide, IRS Publication 15, Cir. E (1991).

Much of the lore involving truckers' status comes down to details of control. For example, in *Moore v. United States*,[13] a business owner was held to have no reasonable basis for treating his truck drivers as independent contractors, since he controlled the drivers' work and furnished their vehicles.

Consequently, he was held liable for payroll taxes and penalties. In another case,[14] a truck driver performed services for a company under an agreement that purported to establish an independent contractor relationship. The agreement called for the taxpayer to receive 40 percent of the gross revenue generated by his activities. He was also required to assume all operating expenses except for repairs in excess of $100. The IRS concluded that the driver was an employee. Similarly, in *Love v. United States,*[15] truck drivers were ruled to be employees, the court rejecting the argument that the drivers' ability to choose their own routes evidenced operational independence.

LAW OF INDEPENDENT CONTRACTORS

Many factors aid in determining whether a worker is an independent contractor or employee.

There are many tests, some applicable for purposes of labor law, federal tax, state tax (in all 50 states!), ERISA, workers' compensation, etc., and they are not all consistent.

If workers are treated as independent contractors, but they are truly employees, then the employer may be liable to the workers for a range of damages, as well as potentially catastrophic tax liabilities to the IRS and state taxing authorities. While FedEx's damages are not yet determined, they could be enormous.

Who qualifies as an independent contractor, and who must be treated as an employee? If your treatment of a worker turns out to be wrong, what are likely damages that you as the employer may face? Do state laws play a factor? Every employer of independent contractors should have a grip on this evolving morass.

---

[13] 2-2 U.S. Tax Cas. (CCH) ¶ 50,401 (E.D. Mich. 1992).

[14] IRS Technical Advice Memorandum 9307003.

[15] 957 F2d 1350 (7th Circuit 1992)

Several bodies of law aid in determining whether a worker is an employee or independent contractor. The NLRB uses one test based on case law.[16] The IRS uses 20 factors to determine if a worker is an independent contractor or employee,[17] although the underlying issue is the employer's "right-to-control" the worker.[18]

If an employer possesses the right to direct the workers as to the work to be done and exactly how it shall be done, then most likely an employer/employee relationship exists. State law also plays a role in determining proper classification. In California, the courts generally apply the *Borello* test,[19] and it was used in the *FedEx* case.

These various tests have different emphases, although there is a common focus. This "right to control" standard is the common law approach to determining worker classification.[20] The analysis focuses on the employer's right to control the means of production. Factors such as employer-provided training, instruction, tools and a place to work are relevant. The more the employer controls the worker's actions, the more likely it is that the worker is an employee.

IRS' 20 FACTORS

The IRS' 20 factors are:[21]

> (1) instruction; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationships; (7) set hours of work; (8) full-time required; (9) performing work in an employer's premises; (10) order of sequence set; (11) oral or written reports; (12) payment by hour, week, or month; (13) payment of business or travel expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making

---

[16] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992).

[17] IRS Revenue Ruling 87-41, 1987-1 C.B. 296.

[18] Treas.Reg. 31.3121(d)-1(c)(1), 31.3401.

[19] *See,* S.G. Borello & Sons v. Dept. of Industrial Relations, 48 Cal. 3d 341 (1989).

[20] *See,* Robert W. Wood, *Legal Guide to Independent Contractor Status*, (Aspen, 3rd ed. 2005), Section 1.06.

[21] IRS Revenue Ruling 87-41, 1987-1 C.B. 296. For further discussion regarding the twenty factors see Wood, *Legal Guide to Independent Contractor Status*, (Aspen, 3rd ed. 2005), Section 3.02[A].

services available to general public; (19) right to discharge; and (20) right to terminate.

Factors 1 through 11 and 17, 19 and 20 relate to supervision and control over an employee. Instructing, training and integrating employees into a business organization are some of the most common characteristics of an employer/employee relationship.

Other factors are hiring, supervising, paying assistants, setting hours of work, performing work on an employer's premises, working for only one firm (or company) at a time, the right to discharge and the right to terminate. Employers set rules, instil responsibility and monitor the working performance of their employees. These are normal expectations an employee has when working for someone else.

In contrast, independent contractors are in business for themselves, generally (although not always) working for multiple companies, having their own equipment, their own skills, etc. Their "job" should appear to be more like an outside consultant. Therefore, factors 12 - 18 illustrate workers who are in business for themselves.

It is relevant how the worker is paid, whether he is reimbursed for expenses, and who provides tools and materials. Employees generally expect their employer to cover those costs. Independent contractors expect otherwise. Since independent contractors operate their own business, evidence of a significant investment (and the possibility of realizing a profit or loss) is essential. Working for more than one client at a time, and especially making services available to the general public, suggests that a worker is operating his own business.

Confused? It's understandable. There is no litmus test for analyzing the factors, and no minimum or maximum number of factors for achieving either contractor or employee status. This is an intensely factual analysis, and that can get messy.

STATUTORY EMPLOYEES

There are a few clear rules, though. Statutory employees are workers that will be classified as an employee regardless of the factual considerations surrounding the worker's environment.[22] A statutory employee, like a common law employee, is subject to FICA and FUTA, but income tax withholding is optional.[23] The four categories of statutory employees are:

---

[22] IRC § 3121 (e).

[23] *Id.*, at Section 3.03[A].

1) Agent-drivers or commission drivers that distribute meat, vegetables, bakery products, beverages (other than milk), or laundry or dry cleaning.

2) Full-time life insurance salespersons.

3) Home workers that perform under a set of criteria on furnished specifications on materials provided (that are required to be returned to the principal).[24]

4) Full-time traveling or city salespersons soliciting orders from wholesalers or retailers for merchandise for resale or for supplies used in their business operations.[25]

Not only must statutory employees belong to one of the above groups, they must also meet all three of these requirements:

1) Any contract of service requires that the worker personally perform the desired task;

2) The worker does not have a substantial investment in the facilities; and,

3) There is an ongoing relationship between the employee and the business for which the work is being performed.[26]

Statutory employees do not have authority to delegate substantial portions of work, and the work relationship must be continuous. However, if the worker does not fall into the statutory definition, the worker could still be an employee under the law.

OTHER CONSIDERATIONS

While the IRS's 20 factors and the statutory employee guidelines may be the driving force behind worker classification, they are not the only factors to consider. The parties' intentions and prevailing custom in the industry are also important.[27] Custom in the

---

[24] For an example see, "Nanny Taxes, Keeping Clean with the IRS" Joe Cooke, http://momstoday.com/resources/articles/nannytaxes.htm.

[25] *See,* Wood, *Legal Guide to Independent Contractor Status*, (Aspen, 3d ed. 2005), Section 3.03[A].

[26] *Id.*

[27] *See, Powers v. United States*, 424 F.2d 593 (Ct. Cl. 1970); *Ewing v. Vaughan*, 169 F.2d 837 (4th Cir. 1948).

industry is relevant, but is no guarantee of protection from reclassification.[28] Reliance on common industry practice does not remove the risk of a reclassification by the IRS, state government or through a worker reclassification lawsuit. If two parties operate under the belief a certain relationship exists, this belief can aid in properly classifying workers.[29] However, the IRS, a state taxing agency, or a court can reclassify workers.

Even an iron-clad contract cannot prevent a court from reclassifying workers.[30]

STATE TAX ISSUES

Every state has state unemployment taxes (commonly referred to as state unemployment insurance or, SUI). An employer is not responsible for paying SUI for workers that are independent contractors. Therefore, a reclassification of workers will result in employers having to make payments to the state SUI accounts. States use one of three tests to determine if a worker is an employee or an independent contractor, the common law "right to control" test which is similar to the IRS, a so-called ABC test, or a combination of the two.

The ABC test has only three factors.

1) The worker is free from control or direction in the performance of work.

2) The work is done outside the usual course of the firm's business and is done off the premises of the business.

3) The worker is customarily engaged in an independent trade, occupation, profession, or business.[31]

States using the ABC test require only one of the three factors be present to classify the worker as an independent contractor.

---

[28] *See, Ewing v. Vaughan*, 169 F.2d 837 (4th Cir. 1948); *Bonney Motor Express, Inc. v. United States*, 206 F. Supp. 22 (E.D. Va. 1962).

[29] *See, Harris v. Comm'r*, TC Memo 1977-358 (1977); *Illinois Tri-Seal Prods., Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965).

[30] In the *FedEx* case the drivers all agreed, in writing, to their status as independent contractors, yet the court still found the drivers to be employees.

[31] *See*, Wood, *Legal Guide to Independent Contractor Status*, (Aspen, 3d ed. 2005), Section 1.09.

BORELLO *TEST IN CALIFORNIA*

Like many states, California has its own test. In *Borello*,[32] the California Supreme Court enunciated California's test for an employment relationship: whether an employer retains the right to control the manner and means of accomplishing the employer's desired result.[33] Several factors that resemble the IRS's 20 factors are used to make this determination:

> (1) whether the worker is engaged in a distinct occupation or business; (2) whether the work is in the kind of occupation usually done under the direction of the principal or by a specialist without supervision; (3) whether skill is required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the principal; and (8) whether or not the parties believe they are creating a relationship of employer-employee.[34]

This test, like the IRS's test, focuses on control over the employee.

THE FEDEX *CASE*

The *FedEx*[35] case is significant primarily because the relationship between FedEx and each driver was defined by an agreed-upon contract, and because that contract (and the body of company policy and behavior that developed under it) was incredibly detailed.

---

[32] *See, S.G. Borello & Sons v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989).

[33] *Id.*, at 341.

[34] *See, Metropolitan Water District of Southern California v. Superior Court* (Cargill) (2004) 32 Cal 4th 491, 9 Cal. Rptr 3d 857 (concurring opinion citing *Borello*); *Arriaga v. County of Alameda*, (1995) 9 Cal 4th 1055, 40 Cal. Rptr 2d 116; (relying on *Borello*). *See also, Laeng v. Workers Comp.* (1972) 6 Cal 3d 771, 100 Cal Rptr 377; *LA County v. Worker's Comp Appeal Bd,* (1981), 30 Cal 3d 391, 179 Cal Rptr 214.

[35] FedEx Ground (FedEx) is a package delivery service that operates throughout the United States. FedEx began as a division of Roadway Services called Roadway Package System (RPS). RPS revolutionized the industry by using bar codes and automated sorting which provides pertinent information to customers regarding their shipment. Following an acquisition, RPS was renamed FedEx Ground.

In addition, this case involves a class of workers seeking reclassification, rather than being a result of an IRS or state audit. The court in *FedEx* applied the *Borello* standard, since the case was brought in California and the class was of California drivers.

Yet, since the *Borello* test is merely a California variant of a federal employee test that effectively spans the country with only minor variations, the learning of *FedEx* seems nearly universal. There were many factors that led to the court's determination that the FedEx drivers are employees rather than independent contractors.

If FedEx had followed the steps outlined above, I believe FedEx would probably have treated these drivers as employees from the start. There would have been no lawsuit, no damages, no reclassification.

The court found that the FedEx drivers do not operate separate businesses, do not engage in any outside business and are not engaged in third party package delivery. The drivers do not have an opportunity for gain or loss. All this despite the fact that FedEx required all their drivers to purchase their own vehicles and bear their own expenses. Yet, FedEx required the vehicle to bear the FedEx logo. In addition, the drivers performed their jobs under direct FedEx supervision and guidance in almost every aspect of their work. The drivers had no prior training or experience; the drivers received all training directly from FedEx.

Under any of the prevailing tests, the right to control and direct the worker is most important in determining worker classification. The employer need not actually exercise any control over the employee. The element is satisfied if the employer merely retains the right to do so.[36]

In analyzing control, the court in FedEx concluded that FedEx "not only has the right to control, but has close to absolute actual control over the [workers] based upon interpretation and obfuscation."[37] The court considered the contract the drivers signed with FedEx, but set it aside and termed it a "contract of employment."[38]

---

[36] *See, Crowd Management Services, Inc. v. United States*, 74 AFTR 2d 94-6372 (9th Cir. 1994).

[37] *See, Estrada v. Fed Ex Ground*, No. BC 210130, Superior Court of California, County of Los Angeles, a copy of the opinion may be obtained an the plaintiffs' attorneys webpage: www.leonardcarder.com under "Breaking News."

[38] The court in *FedEx* cited *Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, in which it was determined that a contract that labels workers independent contractors does not prevent a court from considering the contract to create an employer/employee relationship.

In assessing overall control, the court noted that FedEx performed daily appearance inspections of the drivers' personal appearance and the vehicle's appearance. The drivers were required to cover a certain geographic area, they were not free to postpone work for a day and are required to work a set number of hours daily, beginning no later than 8:00 am. The drivers had to make the pickups and deliveries in a specific vehicle, wearing a specific uniform, and complete FedEx forms for each pickup/delivery. FedEx provided extensive training, and even after, performed regular supervisory rides with drivers, during which the supervisor would even go so far as to time the driver on each task.

WHAT GIVES?

Even with no background in this area of the law, would anyone believe these FedEx drivers were not employees?

Their day was micro-managed by FedEx supervisors. Plus, they were integral to FedEx's operations. FedEx paid a fixed amount to each driver for daily use of their vehicle, and FedEx provided a "Contractor Assistance Program" to get cheaper costs for its drivers, organizing purchases (for truck batteries, truck body repair, rear truck bumpers, painting, maintenance, rear doors – even retreading of tires) and deducting these amounts from "contractor" paychecks. FedEx retained control over use of the truck, restricting the drivers from removing the truck at night. The truck's base plate had to be registered to FedEx, which required the driver to lease the truck back to FedEx.

There were more elaborate devices in place, too. The drivers did not have a risk of loss, with no commission and no share of revenues. The drivers received no compensation for new business, and were protected from loss by an "assistance program."

Although FedEx did not expressly prohibit the drivers from delivering packages for other companies, if they were to use their truck then all the markings had to be concealed. In fact, none of the drivers ever worked for any other delivery company. FedEx's rules simply made it too difficult.

Some of you may be scratching your heads wondering just how FedEx got into this problem in the first place. After all, having a detailed contract with the drivers, one that was extraordinarily innovative in its byzantine system of checks and balances, would seem to be bulletproof, wouldn't it? FedEx engaged high-powered lawyers to create a system that was expressly designed to withstand scrutiny as an independent contractor relationship with the drivers.

Unfortunately, FedEx also wanted to have an extraordinary degree of control over every facet of the drivers' job performance. Daily inspections of uniforms and trucks, micro-management of delivery schedules, a clever truck financing system that made these drivers far less independent than they needed to be, and many other details simply made it impossible for the court to conclude that these were truly independent contractors.

Referring to the extraordinary control that FedEx terminal managers had over drivers, the court in *FedEx* referred to testimony about one terminal manager who told drivers, "I'm God and I can do whatever I want." Bear in mind that, as in sexual harassment suits, what managerial employees say is darned important.

Indeed, the court seemed to suggest that the very fact that FedEx had gone to such extraordinary lengths to try to shore up independent contractor treatment here actually worked against FedEx, smacking of something disingenuous, or perhaps worse. The court used the term "obfuscation" for what FedEx was doing, putting in place a system centered on a "vague and platitudinous" contract that on many specific points might look as if the drivers were contractors, but viewed collectively, made them anything but.

Apart from what your contract says, if you get in a dispute, what actually happens is just as important as what the contract says. Testimony of workers, contractors, management, even customers, can be pivotal. Just as with any other dispute, you may have to contend with different perceptions, and even testimony motivated by animus. You may have managerial employees who believe they are doing the right thing for your company, and who believe their actions and words are authorized, but who overstep the bounds you've set for them. Still, their actions can cause you liability.

POTENTIAL PROBLEMS FOR EMPLOYERS

If your own company suffers a reclassification of workers, there can be several problems. You'll owe taxes and penalties to the IRS and the state(s). It is difficult to know just how debilitating these tax liabilities might be. Not only could there be liability for failure to withhold income taxes (essentially like paying all of the employees' tax for all of the years in question!), but the IRS can impose huge penalties, too.

Then there are the employment taxes, Social Security (FICA) and federal unemployment tax (FUTA). Employers are required to match each employee's Social Security tax, and this liability can be enormous. As but one example, if 100 delivery drivers were paid $50,000 a year for 10 years, the FICA tax alone would be

$3,825,000.[39] Plus, the IRS can assess a penalty of 20 percent of the FICA that should have been paid, and a 1.5 percent penalty of wages paid to each employee.[40] Under this horrifying scenario, taxes and penalties could total more than $4 million. On top of this, of course, there would be attorneys' fees, balance sheet adjustments and, if the employer is publicly traded, reporting requirements.

A company facing reclassification may also be liable for costs the workers paid during the entire period of the misclassification. That can be years. These costs can include participation in retirement plans (including catch-up payments for lost years), medical, dental and life insurance costs, etc.

Speaking of retirement plans, not only can a worker-status dispute force you to make additional contributions to plans, but in some cases, plans can actually lose their tax qualified status, *i.e.* be disqualified by the IRS. That is a disaster. There is also the issue of raises, bonuses, stock options, profit sharing and other benefits afforded to employees that may now have to be given to the putative independent contractors.

Plus, since independent contractors are not employees, they are not afforded many of the legal protections employees have under federal or state law. A few of these laws include, Title VII of the *Civil Rights Act* of 1964[41], the *Age Discrimination in Employment Act*[42] the *Rehabilitation Act* of 1973,[43] the *Fair Labor Standards Act*[44] and the *National Labor Relations Act.*[45] If a worker is later reclassified as an employee, new rights and causes of action may arise. That issue is at the center of the dispute noted earlier over law firm partners as putative employees.[46]

---

[39] The $3,825,000 figure is the result of: $50,000 salary multiplied against the 7.65% FICA rate, which equals $3,825, which is multiplied by100 (number of employees), which equals $382,500 which is multiplied by 10 years totaling $3,825,000.

[40] IRC Section 3509(a)(1)-(2)

[41] 42 U.S.C. Sections 2000e-2000h-6 (1994 and Supp.).

[42] 29 U.S.C. Sections 621-624.

[43] 29 U.S.C. Sections 701-7961

[44] 29 U.S.C. Sections 201-219

[45] 29 U.S.C. Sections 151-168.

[46] Waldmeir, "Suite to Test Status of Law Firm Partners," *Financial Times,* Feb. 7, 2005, p. 3.

WHAT TO DO?

Independent contractor laws are far from black and white. Not only are there numerous laws defining the employment relationship, there are so many authorities within each test that the eyes glaze over. Risks from reclassification are tremendous. Yet, determining to treat every worker as an employee is certainly an overreaction.

Some maxims do emerge, so here goes:

- Generally, having some workers classified as employees and some as independent contractors when these persons all do the same job, will not work.

- If you run your business without *any* employees, and have all essential functions of your business performed by contractors, this also will not work.

- If you so control your workers that every facet of their job performance is controlled by you, and they have no independence and no discretion in performing their duties, they are employees.

Given the high stakes of mischaracterization, conducting an independent audit of your operations with workers is a great way to head off trouble. Such an audit, typically conducted by a lawyer or consultant, involves a review of your operations and the way you interact with workers, both contractually and in fact. It can involve only a limited class of workers in one particular facility, or a broad class of workers company wide.

The result may be mere tweaking of your contract (or actual practice) with particular workers (perhaps deleting one requirement from a particular class of workers' contracts), or a more wholesale suggestion for some type of more radical transition (say, reclassifying all your mechanics to employee status). Generally, such audits are painless and relatively inexpensive, and can ward off huge (and almost unfathomable) liabilities. They are, in the worker classification field, the rough equivalent of an annual medical checkup. Just do it.

Clearly, setting up agreements (with either employees or independent contractors) makes good sense so there is no misunderstanding about status (or so that such misunderstandings and disputes are less likely and less vitriolic).

Using existing authorities to construct a contractual arrangement that works from both a tax and liability perspective is wholly appropriate.

But, one lesson of the *FedEx* case is that a system that is byzantine in its complexity, full of platitudes about workers as contractors when they seem anything but – basically, a system that is overall, just a bit too cute – may be regarded as just that.