Legal Requirements That Influence Control of Independent Contractors and Employees

By Robert W. Wood

Robert W. Wood examines the legal requirements assessing whether a worker is an independent contractor or an employee.

There are many legal tests for assessing whether a worker is an independent contractor or an employee. The distinction is important under federal, state and local tax laws. It affects contract and tort liability exposure, and raises issues of federal and state labor law compliance and liability. Plus, it can impact insurance, employee benefits and myriad other issues.[1]

Worker classification is not determined merely by labels. Various government agencies, as well as the courts, can make their own assessment of who is an employee. In appropriate cases, the government can retroactively recharacterize the worker, so the stakes can be huge. The courts have long been divided on how to define and interpret these rules. Even today, there is no single test for determining worker status.

The IRS and a variety of state and federal agencies make worker status determinations, so a worker may be classified as an employee for one purpose, and as an independent contractor for another. Quite apart from tax status, workers classified as employees have a variety of rights under federal labor and employment laws. Most of these laws do not extend to those classified as independent contractors. Consequently, issues of statutory coverage and liability may turn on whether a person is found to be an employee.

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Determinations of independent contractor status vary under federal statutes including Title VII of the Civil Rights Act of 1964,[2] the Age Discrimination in Employment Act,[3] the Rehabilitation Act of 1973,[4] the Fair Labor Standards Act,[5] the National Labor Relations Act,[6] *etc.* For example, for purposes of Title VII, a number of circuit courts have adopted an "economic realities" test. This test, involving an analysis of the economic realities of the work relationship,[7] applies general principles of agency law and considers all circumstances surrounding the work relationship. No one factor is determinative, but the extent of the employer's right to control the means and manner of performance is important.

Many Tests

Even the U.S. Supreme Court has invoked differing standards. In *Nationwide Mutual Insurance, Co. v. Darden,*[8] the U.S. Supreme Court applied agency law to rule that if a worker is the employer's agent, the worker is an employee. In *United States v. Silk,*[9] the Supreme Court focused instead on economic realities, evaluating whether workers are integral to the employer's business, investments the workers make in the business, and whether workers stand to gain or lose from their efforts.[10]

Varying methodologies have evolved, including the common law right to control standard, agency law criteria,[11] the economic realities test,[12] so-called ABC tests under state unemployment law, the IRS's 20-factor test,[13] *etc.* Although each test has its own nuances, the most common underpinning evaluates the company's right to control the worker. If

the employer has the right to control and direct the individual's work, not only as to the desired result, but also as to the method, manner and means by which that result is achieved, the worker is probably an employee.

Exactly what is meant by control over the method, manner and means of production is not clear. Usually one looks to objective indices. For example, if the employer provides training, instructions, tools, and a place to work, the IRS (or another agency or court) may assume the employer has the right to control the worker.

Unemployment Law

Determining which test applies for what purpose can be vexing. The IRS 20-factor test may be the most well known, but for purposes of state unemployment tax, less than half the states use common law criteria for evaluating independent contractor versus employee status. The remaining states use a simple "ABC" test, applied broadly and inclusively. In order to avoid employee status under the ABC test, one of the following must occur:

A. The worker must be free from control or direction in the performance of the work.
B. The work must be done outside the usual course of the firm's business, and must be done off the business premises.
C. The worker must customarily be engaged in an independent trade, occupation, profession or business.

Unless the worker can meet at least one of these three indices, the worker is likely to be considered an employee. Twenty-two states use the ABC test for purposes of unemployment tax, and 10 states use two of the three ABC factors. Eighteen states and the District of Columbia use common law criteria.

IRS

Many people facing employee versus independent contractor distinctions think first and foremost about the IRS. Although it is based on the common law, the IRS promulgated its own 20-factor test.[14] These 20 factors include training and instructions given the worker, use of assistants, continuing relationship, set hours of work, full-time work, where the work takes place, method of compensation, reimbursement of expenses, exclusivity of the working relationship and right to discharge and terminate the relationship. The IRS also evaluates whether the worker is provided with tools and materials, makes a significant investment and has the potential to realize a profit or suffer a loss.

Gradients of Control

Although tests for assessing worker status have differing formulations, the tighter the company's right to control the worker, the more likely he will be considered an employee. Most of the classification methodologies also evaluate the degree to which the worker's function is integrated into the company's operations, the worker's special skills, the longevity of the relationship, the company's ability to terminate the relationship, *etc.* These and other factors are used as earmarks of traditional employment status.

A court or agency must determine the worker's true status by evaluating the governing contract and business records. Printed contracts and other niceties are relevant, but the court or agency must also evaluate the interactions between the company and the worker. If the worker is micro-managed and subject to the employer's unfettered control, an "independent contractor" label in a contract will probably not save the worker from being recast as an employee.

Legal Requirements

Worker classification involves a fact-intensive determination and the legal authorities are varied and voluminous. Because virtually everything is relevant in making the critical characterization determination, legal and regulatory requirements impacting the working relationship should also be considered. For example, suppose a trucking company mandates that its drivers drive for a maximum of eight consecutive hours, then taking required rest. This rule may appear to be one facet of employer control, which, along with myriad other contract provisions, rules, practices and experiences, will all be relevant in assessing whether the putative employer has exercised (or reserved the *right* to exercise) sufficient control over the worker to dictate employee status.

However, on the same facts, suppose that the eight-hour driving maximum emanates from federal or state transportation rules. In that event, can this requirement fairly be attributed to the company as a badge of control? It is actually surprising that this

point has not come up more frequently in the case law. In the few cases to consider such a point, the answer appears to be no.

If an employer's compliance with laws and regulations does not constitute control over a worker, one must also consider degree. Employers may subject their workers to requirements that *exceed* prescribed regulations. Imposing stricter requirements than those imposed by law may be intentional on the part of the employer. Alternatively, the employer may unwittingly impose higher standards than the law requires.

For example, suppose an employer requires workers to check in with the company not less than once every 24 hours, because federal or state law imposes such a requirement. Suppose, then, that the applicable law changes to require workers to check in only once every 48 hours. Assume that the employer is ignorant of this change, and continues to require 24-hour check-in.

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Should this enhanced level of "control" be considered in assessing the worker relationship? Does it matter if the employer exercised due diligence in attempting to keep itself abreast of such legal and regulatory changes? Does it matter if the worker's status is being examined two weeks after the pertinent legal change was made, perhaps making it easier to understand the employer being dilatory in effecting the change from 24- to 48-hour check-in? What if five years elapse after the legal change, but the employer still fails to conform its internal rules to the legal requirements?

Such questions of degree abound. How one answers these questions is important, and is to some degree subjective. Any of these fact patterns may provide at least a modicum of evidence that the employer wields some degree of control over the worker. Yet, clearly, some degree of employer rule-making beyond bare legal requirements should not necessarily constitute sufficient control to import employee treatment to the worker. Nuances will be important, as will how the employer presents its own rules for workers in the context of the larger legal regimen.

Case Law and Legal Control

Although one may think first of the IRS when it comes to worker status controversies, it does not appear that this issue has been expressly discussed in tax cases. It has, however, come up with some consistency in federal labor and employment law decisions. For example, in *National Labor Relations Board v. Associated Diamond Cabs, Inc.*,[15] the court had to determine whether Miami taxi drivers were independent contractors or employees.

As part of its analysis, the court evaluated the impact of Miami City Code regulations on taxi drivers. The City of Miami required taxi drivers to fill out "trip sheets" to record all trips made, their origin and destination, the fares charged and the time of each trip. At the end of each day, the drivers submitted their trip sheets to the company, which were retained for City inspection. The court found that such trip sheets did not evidence control by the company.

In fact, the court said government regulations constitute supervision not by the employer, but by the City. In effect, the law controlled the driver, not the employer. The court went so far as to say that rules imposed by governmental regulations do not evidence control by an employer, noting that:

> [e]mployer imposed regulations that incorporate governmental regulations do not evidence an employee-employee relationship, unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control.[16]

As a result, the court found that the regulations failed to evidence control by the company.

Similarly, in *K&D Auto Body, Inc. v. Div. of Employment Security*,[17] the court considered the impact of compliance with federal drug testing laws on worker classification. K&D Auto Body treated its tow truck drivers as independent contractors. K&D owned the trucks, and required the drivers to sign agreements affirming their independent contractor status. Relying on the IRS's 20-factor test, the Missouri Labor and Industrial Relations Commission found the drivers to be employees.

K&D appealed, and one of the issues on appeal was the impact of drug testing. Because K&D could require the drivers to take random drug tests, the Missouri Division of Employment Security claimed K&D

could require the drivers to comply with its instructions, indicating employment. The court, however, stated that:

> [r]easonable efforts to insure compliance with government regulations do not evidence control 'unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control.'[18]

Of course, the mere fact that a particular class of workers is regulated does not give the employer *carte blanche* to impose rules going beyond legal requirements. Conversely, where an employer precisely matches its own rules with legal requirements, the worker may nevertheless be viewed as an employee because of the presence of *other* facts. An overall examination of written documents and of the actual pattern of practice between company and worker are still required.

In *K&D Auto Body*, the company had not required more from its workers than the law required. Thus, this particular factor indicated that these workers were *bona fide* independent contractors. However, as the remaining factors demonstrated an employer/employee relationship, the court held the truck drivers to be employees.

The *Air Transit* Case

In *Air Transit v. National Labor Relations Board*,[19] a cab company sought reversal of an NLRB decision ruling its cab drivers to be employees. Air Transit was a Virginia corporation providing taxicab services at Dulles Airport. The Federal Aviation Administration (FAA) gave Air Transit the exclusive right to operate taxicab service between Dulles and locations in the Washington Metropolitan area. Air Transit agreed to provide safe, efficient taxicab service from a fleet of at least 60 vehicles at Dulles.

Air Transit used the services of approximately 100 taxicab drivers who provided their own vehicles and picked up passengers from a designated cab line at Dulles. Air Transit put a uniformed dispatcher at the head of the line to direct passengers and help with their luggage. The drivers were charged a fee of $72 a week by Air Transit for participation in the feed line, but Air Transit did not receive any share of the drivers' earnings.

The drivers did not report their earnings to Air Transit; did not keep trip sheets, manifests or other accounts of their earnings; and had absolute control over their schedules. Drivers did not receive benefits, vacation time, sick leave, workmen's compensation or unemployment insurance from Air Transit. All drivers were personally responsible for their own accounting and self-employment taxes, and received no training.

However, Air Transit drivers were subject to many rules, some mandated by Air Transit's contract with the FAA, and some required by Virginia law. Drivers had to use a radio dispatch system, wear name tags, maintain taxicabs in safe operating condition, display certain language and Air Transit's telephone number on the taxicab, display rate information, possess a valid driver's license and license their vehicles for use in Loudoun County, Virginia. Air Transit also enforced rules that were not required by the FAA contract or Virginia law, including requirements that drivers charge a flat rate fee for certain customers, post a notice in their vehicles about how to file passenger complaints, and purchase greater insurance coverage than was required by Virginia law. The NLRB claimed that such controls signified an employer-employee relationship.

The court noted that the classification of the drivers as employees or independent contractors was determined by common law agency principles. Further, the court noted that the right to control test must consider the "totality of circumstances," no one factor being decisive. The appeals court ruled that the cab drivers were independent contractors for the following reasons:

- Air Transit did not exercise substantial control over the means and manner of the drivers' work performance.
- The drivers made substantial personal investments in their work activities.
- The drivers were substantially independent in their operations.

Most of the factors the NLRB saw as "control" were mandated by Air Transit's contract with the FAA or were required by Virginia law. The court said the few remaining factors indicating that the drivers might be employees were grossly outweighed by factors suggesting they were independent contractors. Although Air Transit did exercise *some* control over the drivers beyond legal regulations, the court found them "clearly insufficient" to support a finding that the taxicab drivers were employees.

The *Local 777, Democratic Union Organizing Committee* Case

Local 777, Democratic Union Organizing Committee v. NLRB[20] involved two cab companies providing taxicab service in Chicago. The NLRB ruled the cab

drivers to be employees not independent contractors.[21] The court reversed, ruling that the facts were insufficient to support employee status.

The court based its decision on common law agency, holding that the cab drivers were not employees because the cab companies did not have the right to control the detail, means and methods by which the cab drivers conducted their operations. Each cab driver signed a lease with the cab company under which the driver paid a fixed fee to obtain the lease (*e.g.*, $22 for a day lease, $15 for a night lease) and an hourly fee for late returns. The driver leased the cab for two days at a time, or three days on weekends, and was required to sign a separate lease for each lease term.

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The driver agreed to be the sole driver, not to sublease the cab, to inspect the vehicle at the beginning of the lease term and report any defects, and to return the cab at the end of the lease in good condition with a full tank of gas. The company provided the taxicab, the cab license, liability insurance, antifreeze, oil, towing service, tires and maintenance. The lease agreement disclaimed an employer-employee relationship, stating that the drivers were not required to operate the taxicabs in a prescribed manner, to accept calls or dispatches, to report their location during the lease period or to keep the cab in a designated location.

The drivers were required to comply with all applicable laws, ordinances, rules and regulations. Chicago municipal regulations and state law governing taxicab drivers required taxicabs to be operated regularly to meet the public demand for service, the meter flag to be kept down when the cab was carrying passengers and that everyone requesting a ride be picked up no matter what, unless the cab was occupied. The municipal code established fare rates in the City of Chicago, prohibited cabs from carrying passengers in the front seat and prohibited refusing to transport passengers from the airport to any suburb. Municipal regulations went so far as to regulate courtesy to passengers, appearance and attire of drivers and drivers' conduct at cab lines. The regulations prohibited drivers from using drugs, carrying weapons, loitering in public areas outside their cabs, leaving their cabs unattended and violating traffic laws.

The court examined the 13 factors on which the NLRB based its finding of employment status, asking whether they were sufficient to prove the companies' right to control the detail, means and methods of the drivers' operations. The lease expressed an intent to create an independent contractor relationship. The drivers did not work for hire, for wages or salaries or under direct supervision. They were not paid by the cab company. They depended solely upon their own efforts, and the profits derived from the difference between the fares they charged and the cost of leasing and operating the cab.

The drivers' conduct was never controlled by the cab companies; the drivers were not required to operate in any prescribed manner, to report the location of the cab, to buy gas from the cab company, to accept any calls or dispatches or to keep their cab in a designated location. In addition, the drivers were on their own once they left the garage and were free to prospect for fares in any manner they chose. The only requirements the cab company enforced was an agreement to pay a daily rate for the lease of the cab, to use care and skill in driving and to comply with applicable laws and regulations. With respect to these factors involving government control, the court went on to say:

> The general insistence that the driver comply with the law is not the type of control of a driver that will create an employee relationship since the source of the control is statutory law and municipal regulations.[22]

The court found no evidence of pervasive control and thus no employment status. The court found that the companies did not control the drivers, noting that the NLRB itself, in its prior decision, said, "nearly every facet of a driver's work and conduct is fixed by governmental rule and regulation."[23]

Government control did not create an employee relationship under federal law. The few minor controls that were present, the court held, were too insubstantial to treat the drivers as employees of the cab companies. Finally, the D.C. Circuit pointed out that the NLRB has long recognized that government regulations are evidence of government rather than employer control.[24]

The *SIDA of Hawaii* Case

In *SIDA of Hawaii, Inc. v. NLRB*,[25] a company formed by independent taxicab owner-operators argued that its members were independent contractors. The appeals court agreed with SIDA, holding that the NLRB overlooked accepted principles of agency law that supported the company's treatment of the drivers as independent contractors. SIDA was a self-governing trade association formed by independent taxicab owner-operators. Its purpose was to preserve the taxicab owner-operators' independence, while providing a collective body to compete with the larger taxi companies in bidding for the right to operate at Honolulu airport.

SIDA was headed by a seven-person, nonsalaried Board of Directors, all of whom were drivers. An operations committee made up of six drivers handled driver and passenger complaints, and had the authority to suspend or terminate drivers who violated SIDA regulations. The company's only salaried employees were a general manager, radio dispatchers and line operators who regulated the cab queues at the airport. SIDA had an exclusive state contract to provide metered taxi service at Honolulu airport. Any qualified applicant could be a member of SIDA by owning a suitable vehicle, having a valid license and having a personal appearance acceptable to the general manager. If the applicant was approved, he signed a Standard Independent Drivers Contract with SIDA.

Using common law agency principles, the court found an absence of actual control by SIDA for the following reasons:

- The drivers made substantial personal investment in their taxicab activities, purchasing and maintaining their own vehicles; obtaining all necessary city and state permits; paying their own income taxes, health insurance, Social Security, unemployment benefits and auto insurance; and paying a monthly stall rental fee to SIDA along with a $0.50 trip fee for each trip made out of the airport.
- The drivers were substantially independent in their operations. They were free to not work for SIDA when they chose, could work for other cab companies, could make their own arrangements with clients and were not limited to operate in a particular area. Further, fares were not determined by SIDA but by local ordinances, which were collected and retained by the drivers. The most supervision SIDA carried out was at the airport, but even that was limited to line operators who only maintained order in the cab queues. SIDA's only connection with the drivers was by radio. SIDA did not pay compensation to the drivers, did not withhold, and kept no income tax records for them.
- The drivers' contract specifically provided for an independent contractor relationship.

The NLRB argued the drivers' contract, plus SIDA's rules and regulations and means of enforcing them, were strong evidence of the company's control over the drivers. The court disagreed, viewing the rules and regulations as designed to enforce standards of conduct to promote the good image of SIDA for the benefit of both the drivers and SIDA. Many of SIDA's regulations merely incorporated requirements imposed by its commercial contracts and certain state and local ordinances. This included the presence of line operators at the airport, liability insurance requirements, and rules regarding the drivers' personal appearance. The Ninth Circuit in *SIDA* observed:

> The Board has itself noted that the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship.[26]

The drivers were independent in their operations, and SIDA merely performed administrative functions providing facilities and opportunities to the drivers for a price. Under the principles of agency law, the court found the owner-operators to be independent contractors.

The *Meyer Dairy* Case

Meyer Dairy, Inc. v. NLRB[27] involved the NLRB status of milk distributors as independent contractors or employees. Meyer Dairy Distributors Association ("the Association") was a group of milk distributors that petitioned the NLRB for certification to bargain with its putative employer, Meyer Dairy Company ("the Company").[28] The Company countered that Association members were independent contractors. The NLRB found the Association members ("the Distributors") to be employees, and the Company appealed to the Tenth Circuit.

Meyer Dairy Company processed and sold milk and related items, employing salaried personnel such as office help, production and maintenance workers, supervisors and wholesale and retail route drivers.

The Company also contracted with retail distributors who agreed to purchase the Company's products exclusively at prices fixed by the Company, and to sell the products to customers in specified areas. The Distributors, or "milk men," delivered dairy products to customers over fixed routes.

They provided their own special trucks for delivery, paid all costs and expenses of operation, and could hire helpers if needed. The Company provided Distributors with suggested retail prices, but they were not required to adhere to them. The Distributors' contract set standards Distributors were required to maintain. If they failed to meet the standards, their contract could be terminated. These requirements were designed to meet health and cleanliness standards, and to promote sales of the Company's products. The contract required Distributors:

> to maintain standards of delivery which will comply with the regulations and policies of public health authorities and meet the standards as established by the [Company] and consistent with standards of corporations, firms and individuals competitively engaged in similar dairy products business in the Greater Kansas City area.[29]

Distributors had no other obligations to the Company except to pay for the products they purchased. The Company did not pay them any compensation or tell them to act a certain way. Distributors had complete control over their sales and decisions regarding credit, were responsible for losses from retail sales, paid their own income and Social Security taxes, controlled their vacation time, and provided their own self-retirement plans, medical and liability insurance.

The Distributors had the option to purchase vehicles and parts from the Company, and to have repair work done (at their expense) in the Company garage. If a Distributor used a Company employee or vehicle, he had to pay the Company for its use. The Company provided printed material and forms for promotional purposes and help in handling and selling its products.

The court noted that the NLRB and the courts should apply general agency principles in employer versus independent contractor determinations. The court found the Distributors owned and operated their individual businesses for profit, which depended on their own sales efforts, and that the Distributors did not collect any money for the Company. The Company paid no salary, commission or expenses, and had no investment in the Distributors' operation. The only benefit the Company experienced from the relationship was the profit from the products the Distributors purchased.

> No one said determining employee versus independent contractor status was easy.

The court found that the Distributors were essentially holders of franchises to sell Meyer Dairy products within a specified area. They were not controlled by the Company except to maintain certain standards required by state law, and thus were independent contractors.

The *Global Home Care* Case

In *Global Home Care, Inc. v. State, Department of Labor & Employment Security*,[30] the Florida Department of Labor and Employment Security ruled that live-in aides were employees. Global Home Care appealed. The Florida Court of Appeal reversed, holding Global Home Care's lack of control over the aides rendered them independent contractors. Notably, the court held that Global Home Care's compliance with state regulations did not constitute supervision of the aides.

Global Home Care was a home health care agency providing health care and other in-home services to clients. The aides' primary functions were to provide companionship to the client and carry out household chores the client requested, such as preparing food, dressing the client, running errands and attending to nonmedical needs. Aides signed a contract with Global designating them as contract personnel and independent contractors. Each aide agreed to provide home care "in coordination with and/or by supervision of others," to keep records, and to provide Global with a weekly report of services provided.

They were required to have a valid driver's license and car insurance, and were responsible for maintaining and paying for their own licenses, personal insurance and tax liabilities. The aides were given an initial orientation covering such topics as their job description, time entries, progress notes, dress code and their contract. Global gave an orientation packet to the aides covering its policies, practices and re-

quirements, and included instructions, reminders and guidelines for job conduct and work performance.

When a client needed a live-in aide, Global contacted one of its aides to offer the assignment, which the aide was free to accept or decline. The aides determined their availability for work, could solicit similar work with other agencies and could work elsewhere contemporaneously as long as there was no conflict. If an aide accepted a job, Global initially advised the aide of the client's needs and requirements, but it was the client and the aide together who determined exactly how the service was performed.

The aides were paid weekly at a daily rate depending on experience, capability and what the client was willing to pay, though Global set the rate the client would ultimately pay. The client signed weekly time sheets for the aide, who submitted them to Global. Global billed the client based on the time sheets and collected payment from the client. No taxes or other deductions were taken from the aide's pay, and the aide received no fringe benefits.

Global was governed by Florida law and was regulated by the Florida Department of Health and Rehabilitative Services. To comply with Florida Department of Health and Rehabilitative Services regulations, Global sent registered nurses to its clients' homes at least once every three months, to oversee the services provided to the clients. The nurses' visits were irregular and unscheduled, and the aide did not have to be present. The nurses did not direct the aides on the job, but instead questioned the clients concerning their condition and circumstances, whether they had any complaints, problems, etc.

Although the court noted that this case was complicated by the fact that Global had to comply with Florida statutory and Department of Health and Rehabilitative Services requirements to maintain its home health agency license, Florida law nevertheless contemplated that an agency could meet the requirements while still using independent contractors. The court cited *Associated Diamond* for the principle that "regulation imposed by governmental authorities does not evidence control by the employer" for the purpose of determining whether a worker is an employee or an independent contractor.[31] The court also cited *Local 777* for the notion that governmental regulations constitute supervision not by the employer but by the state.[32]

Interestingly, the Department asserted that Global exercised control over the mode of work even if it was merely meant to comply with state regulations. This included informing aides of its policies and personnel requirements, submitting progress reports, on-site supervision by the nurses and providing aides with written general instructions, reminders and guidelines. The court found that if Global was to comply with legal regulations, it must impose certain restrictions on the aides.

The Department also pointed to aspects of the work relationship that were not attributable to state regulations, including dress code and time sheet requirements. Nevertheless, the court said these minimal guidelines "can hardly be deemed control." The time sheet requirement did not manifest control over the actual performance of the aide's work, but rather was an administrative form providing a basis for the amount of compensation. In the court's view, Global did not control the aides beyond state regulations.

The court held the aides to be independent contractors, primarily because the aides worked for other agencies; the aides worked at a site away from the company's supervision; and the clients provided the necessary materials and a work place. The aides were engaged only as needed on a temporary, per-job basis, and both parties intended to create an independent contractor relationship. Moreover, the majority of control Global exercised over its aides was done to comply with state requirements for home health care. Other aspects of control that the Department found to exist in the work relationship were deemed too minimal to be significant.

Control in Excess of Regulations

In *Associated Diamond*, *Air Transit*, *Local 777*, *SIDA of Hawaii*, *Meyer Dairy* and *Global Home Care*, the employers did not wield control significantly in excess of the pertinent regulations. They merely imposed standards that followed federal or municipal regulations. In *K&D Auto Body*, the control went well beyond compliance with the law. The courts in these cases suggest that to have workers reclassified as employees based on employer mandates going beyond legal requirements, an employer must wield pervasive control, which exceeds to a significant degree the scope of the government imposed control.

This is curious, for it may suggest that an employer could have extra latitude in its worker relationships where *some* controls over the worker's conduct are imposed by law. In the typical worker status dispute, virtually everything about the relationship is relevant.

Why, then, should the employer's law-based rules (which are based in law but go *beyond* applicable legal rules) only taint the relationship if the employer wields pervasive control, exceeding to a significant degree the scope of the government imposed control?

One possible explanation for this phenomenon is the complexity of the worker status milieu, which is already clouded with extreme detail and the maxim that virtually everything is relevant. The court in *Global Home Care* recognizes the dimension and complexity compliance with laws adds to the worker status mix. The cases that have considered this issue appear to want to take a reasoned, realistic view of how much a putative employer exceeds legal requirements. This may merely be another way of saying that some kind of rule of reason must be applied.

Indeed, it would not seem to make sense for an employer's imposition of rules infinitesimally larger than legal requirements to be viewed as fatal to a claim of independent contractor status. Conversely, one would hope that no special latitude (no special allowance for employer controls just because there is also a legal framework) would apply in this context either. Arguably, the legal or regulatory environment should be entirely neutral to the employee versus independent contractor characterization question, at least if the employer's regimen of rules exactly tracks the legal requirements.

The same should arguably be true for an employer's rules that are reasonably designed to track legal requirements, even though they may vary to some small or inconsequential extent. Rules imposed by law, which the employer's own rules track, should neither make it more likely nor less likely that the worker will be recharacterized. Assuming that the employer merely conforms (and requires his workers to conform) to the law, this should be a neutral factor.

Evaluating Extra Controls

Employers that subject workers to requirements and standards in excess of legal requirements should be scrutinized. Thus, in *National Labor Relations Board v. Deaton, Inc.*,[33] the court considered the status of interstate courier drivers. The court analyzed Interstate Commerce Commission (ICC) and Department of Transportation (DOT) regulations. These federal agencies closely regulate interstate truck lines.

For example, each truck traveling in interstate commerce must be certified. The goal of such registration is to promote safe operation of trucks, and to ensure continuous financial responsibility so that truck-related losses receive compensation.[34] The court recognized that the regulations are designed to protect the highway-traveling public, as well as the segment of the public directly using trucking services. The court further stated that the holder of the certificate possesses and exercises control over all trucks operating under a particular certificate.[35]

The court in *NLRB v. Deaton* focused on the *holder* of the certificate, noting that the certificate holder did not necessarily own the truck. In fact, the court suggested that "[c]ontrol over trucks involves control over drivers."[36] The court found it to be unnecessary to decide whether the ICC-mandated controls alone would be sufficient to establish employee status. The court analyzed the substantial nexus of control required by federal regulations, but found that the facts established the existence of "additional control" voluntarily reserved by the employer.

Thus, although ICC regulations required Deaton to make certain inquiries, Deaton more thoroughly checked out all drivers, including work references, police record and driving record. Based on those inquiries, Deaton evaluated whether the driver met its qualifications. Moreover, there were other respects in which Deaton went beyond legal requirements.

For example, ICC regulations forbade any disqualified person from driving commercial motor vehicles. Deaton's practice of assessing whether a driver was a "good risk" involved a subjective, employer-like inquiry. The court found this inquiry to be different in quality from merely ensuring that the driver was not barred by law from commercial driving. Based on the control exerted by the company over the drivers, the court found the drivers to be employees. As in *K&D Auto Body*, the employer went too far.

Amorphous Regulations

The cases illustrate that an overlay of legal controls on work performance can make already tough independent contractor versus employee characterization determinations tougher still. However, this problem can be exacerbated where legal or regulatory standards are amorphous. For example, how should one evaluate a requirement that sales people receive training that is "thorough and adequate?"[37]

It is easy to say that rules from regulatory bodies ought not to bespeak employment.[38] However, particularly in the case of such amorphous standards, exactly what is *required* by the government's rules may not be clear. In such a circumstance, it may be

particularly difficult to apply a fair view of whether the employer is merely trying to duplicate legal requirements or is seeking more.

Conclusion

No one said determining employee versus independent contractor status was easy. This is particularly true where an overlay of legal requirements is in place, and one must constantly ask whether the genesis of rules is or is not governmental. In theory, however, rules imposed by law should be neutral to contractor-employee determinations. The fact that a putative employer incorporates into its own rules for workers controls required by a government agency should not establish an employer-employee relationship.[39]

In fact, the courts have consistently held that governmental regulations do not evidence control by the employer for the purpose of determining a worker's status.[40] Regulations imposed by the government constitutes supervision not by the employer but rather by the state.[41]

Note that an employer may add über-law controls for *bona fide* administrative reasons. It is unclear if this does or should preclude independent contractor status. For example, suppose a multi-state employer requires independent contractor and employee painters alike to wear protective gear when spraying. Further, suppose that such protection is not required in two of the 15 states in which the employer operates.

Uniformity and ease of administration may explain the company's uniform policy. Although technically this may make the employer's safety rules not within the protective umbrella of legal requirements in the two nonconforming states, perhaps this kind of discrepancy should not be held against the company in a worker classification dispute. Alternatively, perhaps it should be held against the company only in these two states.

As a technical matter, this fact pattern may be evidence of non–legally mandated control by the employer in those two states. Yet, a rule of reason might suggest that this is a uniform, reasonable and administrable response to varying state requirements. Such a rule of reason may suggest that the minor respects in which the employer has exceeded the legally mandated controls should not create any adverse interference against the employer.

Conversely, though, there may well be situations in which legal requirements are used as a subterfuge for control which the employer wants to exercise or to reserve. If the facts suggest that an employer is using an overlay of government regulation as an excuse to impose controls that not only track such government requirements, but also impose much more significant controls, more careful analysis will be required. In fact, in cases of apparent duplicity, employers should arguably face a particularly strenuous recharacterization gauntlet, with any minimal expansion of the controls beyond legal requirements being strictly construed against the employer.

At the very least, where employers face worker status issues, the presence of laws and regulations that impact that relationship must be considered. Unfortunately, it will be a complicating factor in an already complex analysis. The case law (at least in the labor and employment law field) demonstrates that a legal regime should not be treated as employer control, but rather as control by the pertinent legal authority. This can make the worker status question—already murky and difficult—even tougher to discern. How applicable these authorities are in federal and state tax cases, tort cases, *etc*., is also unclear.

There do not seem to be established standards for evaluating such legal controls and variations in them. While in general such legal controls should be discounted in making worker status determinations, the extent to which variations between an employer's rules and legal requirements should be examined, and particularly whether any such variations will be strictly construed against the employer, are largely unclear.

We can expect these issues to arise. The authorities thus far have examined this issue in the context of federal labor and employment laws. However, it seems likely that the same issues will arise in federal and state tax cases, state tort law cases, *etc*. Although I have suggested some bases of analysis here, most of the questions I am raising do not have answers. That may mean, as with so much else in the field of employee versus independent contractor classification, that we will have inconsistent results.

Endnotes

1 This discussion is not intended as legal advice, and cannot be relied on for any purpose without the services of a qualified professional.

2 42 USC §§2000e–2000h-6 (1994 & Supp.).

3 29 USC §621 *et seq.*

4 29 USC §§701 *et seq.*

5 29 USC §§201–19.

6 29 USC §§151–68.

7 *Spirides v. Reinhardt*, 613 F2d 826 (D.C. Cir. 1979).

8 *Nationwide Mutual Ins., Co.*, 503 US 318 (1992).

9 *U.S. v. Silk*, 331 US 704 (1947).

ENDNOTES

[10] *Id.*, at 716–18.
[11] *See, e.g.*, Restatement (Second) of Agency, §220 (1957) (the principal element of the common-law test is the extent of one party's right to direct and control the performance of the other); *see also Air Couriers Int'l et al. v. Employment Dev. Dep't et al.* (Apr. 12, 2007), 150 Cal. App. 4th 923.
[12] *See Silk, supra* note 9.
[13] Rev. Rul. 87-41, 1987-1 CB 296.
[14] *Id.*
[15] *NLRB v. Assoc. Diamond Cabs, Inc.*, 702 F2d 912 (11th Cir. 1983).
[16] *Id.*, at 922.
[17] *K&D Auto Body, Inc. v. Div. of Employment Security*, 171 S.W.3d 100 (Mo. App. W.D. 2005).
[18] *Id.*, at 106, quoting *Travelers Equities Sales, Inc. v. Div. of Employment Sec.*, 927 S.W. 2d 912, 918 (Mo. App. W.D. 1996), quoting *NLRB v. Associated Diamond Cabs, Inc.*, 702 F2d 912, 922 (11th Cir. 1983).
[19] *Air Transit v. NLRB*, 679 F2d 1095 (4th Cir.1982).
[20] *Local 777, Democratic Union Org. Comm., Seafarers International Union of North America, AFL-CIO v. NLRB*, 603 F2d 862 (D.C. Cir. 1978).
[21] *Yellow Cab Co.*, 229 N.L.R.B. 1329 (1977).
[22] *Supra* note 20, at 901.
[23] *Supra* note 21, at 1331.
[24] *See, e.g., Reisch Trucking and Transportation Co., Inc.*, 143 NLRB 953, 957 (1963); *Portage Transfer Co., Inc.*, 204 NLRB 787 (1973).
[25] *SIDA of Hawaii, Inc. v. NLRB*, 512 F2d 354 (9th Cir. 1975).
[26] *Id.*, at 359.
[27] *Meyer Dairy, Inc. v. NLRB*, 429 F2d 697 (10th Cir. 1970).
[28] *Meyer Dairy, Inc., subsidiary of Milgram Food Stores, Inc.*, 178 N.L.R.B. 454 (1969).
[29] *Supra* note 27, at 702.
[30] *Global Home Care, Inc. v. State, Dep't of Labor & Employment Secur., Div. of Unemployment Compensation*, 521 So. 2d 220 (Fla. Dist. Ct. App. 2d Dist. 1988).
[31] *Id.*, at 222, citing *NLRB v. Associated Diamond Cabs, Inc.*, 702 F2d 912, 922 (11th Cir. 1983).
[32] *Id.*, at 222, citing *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F2d 862, 875 (D.C. Cir. 1978).
[33] *NLRB v. Deaton, Inc.*, 502 F2d 1221 (5th Cir. 1974), *cert. denied*, 422 US 1047 (1975).
[34] *Id.*, at 1224.
[35] *Id.*, at 1225.
[36] *Supra* note 33, at 1225.
[37] Cal. Code of Regulations, Title 10, Ch. 5, Subdivision 7.5, Section 2695.6 (applying to insurance sales persons).
[38] *See K&D Auto Body, Inc. v. Div. of Employment Sec.*, 171 S.W.3d 100 (Mo. App. W.D. 2005).
[39] This has been observed in a myriad of cases involving the NLRB. *See NLRB v. Associated Diamond Cabs, Inc.*, 702 F2d 912 (11th Cir. 1983); *Local 777, Democratic Union Org. Comm., Seafarers International Union of North America v. NLRB*, 603 F2d 862 (D.C. Cir. 1978); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975); *Meyer Dairy, Inc. v. NLRB*, 429 F2d 697 (10th Cir. 1970); *Air Transit v. NLRB*, 679 F2d 1095 (4th Cir.1982).
[40] *NLRB v. Associated Diamond Cabs, Inc.*, 702 F2d 912, 922 (11th Cir. 1983).
[41] *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F2d 862, 875 (D.C. Cir. 1978); *Global Home Care, Inc. v. State, Dep't of Labor & Employment Secur., Div. of Unemployment Compensation*, 521 So. 2d 220 (Fla. Dist. Ct. App. 2d Dist. 1988).