

MISCLASSIFICATION IN THE CROSS HAIRS: INDEPENDENT CONTRACTORS UNDER FIRE

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Some businesses and other organizations have long conducted at least a part of their activities through workers they have not treated as employees. The labels for these individuals are seemingly endless, but among them are such monikers as “contract labor,” the oxymoronic “contract employees,” “freelancers,” and the one we use here, “independent contractors.” Convergent trends are drawing unprecedented attention to whether, whatever such workers are called, they are employees within the definitions of the myriad laws to which that status is relevant.

Those trends include both the still-growing wave of wage-hour claims and the perception in government that the independent contractor concept is curtailing tax revenues and other required payments tied to employment status. Workers question why they are not paid overtime only to be told that they are not “employees” and thus are not covered by overtime laws. Organizations classifying workers as independent contractors might neither withhold taxes from those individuals’ compensation nor remit the payroll taxes and other required employment-related sums.

Whether independent contractorship is invoked more broadly or more frequently now than in the past probably is hard to know with any reasonable confidence. However, it *is* certain that enforcement officials and individual workers are increasingly likely to contend that the classification is incorrect.

Misclassification can lead to a variety of serious legal consequences. An illustrative few include the potential for such things as liability for failing to withhold and to pay the employer’s share of payroll taxes; exposure for failing to include the individuals in employee benefits plans; the tax disqualification of retirement plans; and back wages, add-on damages, and penalties for failing to comply with wage-hour

requirements. Moreover, tough proposals are in the works that are designed both to uncover misclassification and to impose even heavier penalties upon transgressors.

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