

Avoiding ACA Mandate Can Bring Misclassification Woes

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The Affordable Care Act (ACA), beginning in 2014, will require that employers with 50 or more full-time employees provide each one with health insurance - or face a potentially steep fine. With the Treasury Department's recent announcement that employers' 2013 staffing levels will be used to determine the mandate's application, a recent Wall Street Journal article discussed the hiring of independent contractors as one tactic that many small businesses might consider in an effort to avoid the ACA's employer mandate.

Employers considering this approach should know that classifying a worker as an "independent contractor" is not the end, or even the beginning, of the analysis of that worker's status – and that it can produce problems for that employer. The employee-independent contractor determination is very fact-intensive and depends on both the terms and conditions of the worker's contract and the actual on-site working conditions. If the "independent contractor" is working at your business location, under the supervision of your managers, alongside your other employees, using company equipment, and subject to the same rules and policies as your other employees, then there is at least a strong possibility that the "independent contractor" will be considered an employee under the law.

The Treasury Department's most-recently proposed regulations retain the traditional, common-law test to determine whether a worker is an "employee" for purposes of the employer mandate. Based on this evaluation, the ideal independent contractor performs specialized work on a per-job basis, exercises his or her own discretion and is not subject to the employer's direction or control in performing the work, and operates his or her own independent business that also services other clients. The more a specific employment situation departs from that model, the more likely it is that the worker will be found to actually be an employee.

While the ACA gives employers an incentive to not classify workers as "employees," other laws punish employers for misclassifying workers as "independent contractors." The Maryland Workplace Fraud Act, for example, subjects employers to liability for actual damages and civil penalties of up to \$5,000 for misclassifying employees as independent contractors. Misclassification can also be penalized by the relevant tax, unemployment insurance and worker's compensation authorities across jurisdictions.