Don’t Ignore That Noise Under the Hood

ACA focuses new attention on the full-time employee vs. contractor debate.

I have always loved those “you can pay me now or you can pay me later” AAMCO commercials that end with the familiar beep-beep, the company’s unofficial jingle. It resonates for me, especially in the compliance space, because a little bit of legal assistance today should save you a whole lot of legal heartache and expense down the road.

The example du jour is the “guidance” issued by the Department of Labor in July purporting to reiterate the test that must be satisfied for a worker to be treated as an “independent contractor.” The department notes most workers are misclassified as independent contractors when they are actually employees. Issued on the heels of DOL’s attempt to update overtime pay exemptions, the guidance appears to signal the agency’s intent to ramp up independent-contractor enforcement efforts.

Although DOL’s jurisdiction is limited to the Fair Labor Standards Act, it historically has worked closely with the IRS to define the scope of who is treated as an independent contractor and to enforce the law. IRS penalties for misclassification have been limited to employment-related tax obligations and other related punishments.

But the employer-mandate obligations contained in the Affordable Care Act greatly expand the scope of potential misclassification penalties. Under the ACA’s employer-mandate provisions, an employer with more than 50 full-time workers (or full-time equivalents) must offer minimum essential coverage to 95% of those who work at least 30 hours on average each week. There is a lower threshold in 2015, and the transition rules are different, which may ease the burden during the first year an employer is subject to the mandate.

If an employer fails to do this, it is subject to the ACA “A” penalty—$2,000 for each full-time employee. The penalty is based on the overall number of full-time employees regardless of whether any received coverage offers.

It’s critical your firm and clients audit your independent-contractor relationships to ensure they satisfy the Department of Labor’s guidance. This guidance delineates the following six factors that should be used to make any such assessment:

1. Are the worker’s contributions an “integral part” of the employer’s business? Generally, if they are, the worker likely should be treated as an employee regardless of the magnitude of his role or whether he works remotely.
2. Is the worker’s opportunity for profit or loss based on or affected by his managerial skill? This >>
**LEGAL**

> goes to the question of whether the independent contractor has a separate business he is managing, which is at the heart of any Labor Department inquiry. Ask yourself: Does the independent contractor truly have a separate and distinguishable business? The department’s guidance emphasizes choosing to work more hours to earn more profit is not enough to classify anyone as an independent contractor.

3. How do the relative investments of the employer and the worker in the worker’s business compare? The Labor Department cautions that, to assess a worker’s investment, it must be compared to that of the employer to determine if it would be enough to designate someone as an independent contractor.

4. Do the worker’s job duties require special skills and initiative? While a worker’s professional and managerial skills, judgment and assertiveness can indicate he is an independent contractor, those skills generally must be asserted in an independent fashion to do so. Even complex technical skills, such as information-technology skills, are not sufficient to indicate someone is an independent contractor. That’s because many times those skills can be taught.

5. What is the degree of permanency in the work relationship? The more permanent/ indefinite the length of the relationship, the more likely the worker is not an independent contractor. The Labor Department warns, however, that not having a permanent or indefinite work relationship does not make an individual an independent contractor. Short-term or seasonal employment may be characteristic of a particular industry, in which case the person still likely is an employee.

6. What is the nature and degree of control exercised and retained by the employer? Generally, when the worker, rather than the employer, actually controls important and meaningful aspects of his job duties, there is greater likelihood he is an independent contractor. Nevertheless, Labor cautions employers should not over-emphasize the “degree of control” in their analysis since there are lots of other important indicators involved.

Each of these factors is discussed in detail in the guidance. What will frustrate you is that no factor is dispositive and there really are no clear rules other than the Labor Department’s admonition that most individuals who are treated as independent contractors are inappropriately classified.

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**INDUSTRY NEWS TICKER**

**HYPERION** Hires Oliver Corbett as CFO. He succeeds Eric Fady who is leaving the company. Corbett joins from Towegate where he was interim CFO. **Howden U.K.** CEO Adrian Colosso retired at the end of July. He came out of retirement in 2013 to join Howden and has spent 40 years in the industry. www.howdengroup.co.uk

**INTEGRO** Agrees to be acquired by Odyssey Investment Partners. Deal expected to be completed in Q4. Integro management will stay put, and some management and employees will remain shareholders. Pricing and other terms not announced.  

**All Risks** Makes a Bang in Shootout for Soldiers Event

Maybe it’s not what you think! All Risks raised more than $50,000 to support National Specialty Programs SVP Chris McGovern in the Shootout for Soldiers—a June fundraising event to support the Wounded Warrior Project and other veterans charities. The 24-hour lacrosse tournament was started in 2012 by a group of high school students from The Boys’ Latin School of Maryland and has raised more than $500,000 since its inception. This year, the event raised $201,300 and had 1,600 participants. McGovern played in all 24 games.

“If I can give up 24 hours of my life, it’s an easy decision. In my mind, there’s no better cause than supporting people who defend our freedoms. I just have a tremendous amount of respect for the people who keep our country safe. These guys are out there on the front lines putting their lives at risk so we can do what we want to do. I don’t think there’s any more worthy a cause.”

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**THE GOOD LIFE**

**JLT Specialty** Hires Joe Taccetta as EVP. He will be part of the aerospace practice management team. He joins from Global Aerospace, where he was SVP and practice leader for airlines claims department. **JLT Specialty** Hires Tom Phelan as SVP, North America. He joins from Willis Re, where he was SVP. **JLT Specialty** Hires Joe Addison as EVP and member of U.S. executive committee, based in Atlanta. He joins from Aon, where he was CEO of entertainment practice. **Lockton** Hires Robert Benvenuto as EVP and member of U.S. executive committee. He joins from Aon Risk Solutions, where he was most recently EVP. www.jlt.com