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# HOT TOPIC ALERT

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## Contractors: Independent or Not So Much

### Feeling Judgement About Employment Status

People can work as employees or as independent contractors, depending on the arrangement they have with their employers. There are pros and cons on both sides. Employees receive more protection against workplace ills and have more of their expenses (and taxes) covered, but independent contractors have more freedom to take other work and delegate their tasks.

But it's not as simple as just signing an independent contractor agreement. Sometimes, so-called independent contractors are held to be "employees" by the courts, regardless of what the parties agreed. This outcome occurs if the company treated the contractor as an employee in all but name, usually by close direction of the contractor's activities.

Independent contracting is important to the real estate industry, but some judges are taking a second look at agent-broker relationships. These cases come from a variety of sources, including third parties. For instance, in *Schwinn v. Long & Foster Real Estate, Inc.*, 362 Fed. Appx. 357 (4th Cir. 2010), two motorcyclists were injured when a real estate agent collided with them. They sued the real estate broker because the agent was returning to the broker's office from a work-related appointment when the accident occurred. If the agent were considered an employee of the broker, the broker would have been liable for the work-related accident. The broker successfully argued that the agent was an independent contractor. In addition to an existing independent contractor agreement, the broker did not control the agent's work. Therefore, the broker was not liable for the accident (although the agent was still on the hook!).

Continuing on the insurance theme, in *Re/Max v. Wausau Ins. Co.*, 162 N.J. 282 (2000), an insurance company changed a broker's workers' compensation premiums because it determined that the broker's agents were effectively employees. The broker disputed the insurer's findings, saying that the agents were independent contractors under individual agreements. New Jersey's top

court held that the agents *were* employees; the broker's contractor agreement stating that agents were "in business for themselves, but not by themselves" was not enough to overcome an employment finding.

The independent contractor might even challenge his or her own contractor status. In a recent Massachusetts case, *Monell v. Boston Pads, LLC*, 31 Mass. L. Rep. 382 (2013), unhappy salespeople sued their brokerage for back wages and overtime. They argued that the broker controlled the sales force to the extent that they should be considered employees—requiring regular office hours and training, for example. On June 3, 2015, the Massachusetts Supreme Court affirmed the lower court's decision in the case *Monell v. Boston Pads, LLC* regarding classification of real estate agents as independent contractors. Prior to this ruling, the state's highest court also ruled on a single interim issue: whether the state's independent contractor law applied to real estate agents. The court held that the statute did not apply to the agents, because a more specific real estate brokerage law applied instead. That law says that agents may enter into commission-only contracts with brokers. The court stated that the law showed that the state legislature intended for real estate agents to be independent contractors in spite of broker control factors that would qualify them as employees under the more general provision.

Currently, California courts are presiding over several ongoing actions involving independent contractor concerns. *Cruz v. Redfin Corp.* and *Bararsani v. Coldwell Banker* both center on whether real estate agents were employees for tax purposes. If the IRS finds independent contractors are actually employees, their brokers would owe wages and back taxes, as well as penalties (see more about the tax consequences see [NAR's Independent Contractor Status in Real Estate-2015 White Paper](#)).

While most of the recent decisions have upheld the independent contractor relationship, the amount of judicial attention makes it more likely that some agents, somewhere, will be ruled to be employees. The articles in this Alert will help you know the criteria and the legal landscape to make the best decisions.

### **If It Walks Like a Duck, and Quacks Like a Duck, Is It an Employee?**

With courts increasingly willing to find employment relationships, how can you make sure that independent contractor agents do not qualify as employees? Using case law and tax rulings as a guide, here's a checklist that can start your analysis.

- 1. How Bossy Are You?** If you say when, where, and how the work is to be completed or provide close oversight, those actions tend to support an employment relationship.
- 2. Do You Require Training?** If your company trains workers in specific methods and insists on particular means of performing tasks that are covered in the training, that suggests employment.
- 3. Does the Worker Provide Reports?** The more that a company requires status reports, the more the company looks like an employer.

4. **THIS Person and No One Else?** Requiring a specific individual—rather than that person’s employees or assistants—do the work makes the work more employee-like. Contractors can re-assign work, as long as it gets done.
5. **How Long Has This Been Going On?** The more continuous a relationship is, the more it looks like employment. Full-time work (as opposed to part-time tasks that would allow someone to take other jobs) is also an employment factor.
6. **Easy Come, Easy Go?** Workers that have to report at specific times are more likely to be employees.
7. **Does the Worker Have a Bookkeeper?** If a worker can experience a profit or loss from their work, he or she is more likely to be a contractor. Employees receive a pre-determined compensation. Likewise, bearing expenses rather than having them reimbursed by the employer makes a worker more like a contractor.
8. **Don’t Touch My Stuff?** Did the company provide all the tools and resources the worker needed to do the job? Contractors generally provide their own tools and materials.
9. **Your Place or Mine?** If a worker must report to a specific location or office, and has a dedicated workspace, that tends to show an employment relationship. Contractors are more likely to have set up their own facilities. (Compare this to the regular business hours required in the *Monell* case in the leading article above.)
10. **Did You Really Mean It?** The intent of the parties is an important issue. If the company and the worker have a signed agreement showing the worker as an independent contractor, that helps avoid an employment finding. But the agreement must be in writing, and other factors must also show he or she is really a contractor.

### **When It Absolutely, Positively Has to Get There in the Hands of a Contractor**

For a good example of how convoluted the independent contractor issue can be, you only need to look at the legal activities of one corporation—FedEx. FedEx classifies its drivers as independent contractors. After all, they manage their own routes, and can employ subcontractors to assist with their work. They can even sell their route on to a third party. But the company also exerts a lot of control over drivers, from procedures right down to what they wear.

Courts in different jurisdictions have ruled in a variety of ways, based on the cases brought before them. This list is just a recent and very partial slice of FedEx employee status litigation, but it shows how complicated and far-reaching contractor/employee status can be.

**Wells v. FedEx Ground** (Eastern Federal District of Missouri 2013)—former drivers claimed they had actually been employees, meaning that FedEx would be responsible for paying their past

expenses and overtime. The federal court refused to find that the drivers were independent contractors outright, and allowed the case to proceed to trial.

**FedEx Home Delivery v. National Labor Relations Board** (Federal Court of Appeals for the District of Columbia 2009)—drivers wanted to unionize, but FedEx argued they could not do so because they were independent contractors and not employees entitled to organize. The court agreed with FedEx.

**Johnson v. FedEx Home Delivery** (Eastern Federal District of New York 2011)—Johnson claimed racial discrimination in violation of Title VII, which protects employees against illegal employment actions on the basis of race. FedEx countered that Johnson was not an employee, and therefore could not claim Title VII applied. The court agreed with FedEx.

**Rocha v. FedEx Corp.** (Northern Federal District of Illinois 2014)—Rocha and others alleged, among other claims, that FedEx's attempts to maintain independent contractor status amounted to illegal racketeering. The complaint was dismissed.

**Craig v. FedEx Ground** (Kansas State Supreme Court 2014)—in this state supreme court decision, the court held that full-time drivers were employees for purposes of the Kansas Wage Payment Act, even if they held more than one route.

**Anfinson v. FedEx Ground** (Washington State Court of Appeals 2010)—FedEx contractors sued under state minimum wage laws for back wages, overtime, and uniform reimbursement. At trial, the workers lost, but the court of appeals overturned the ruling and sent the case back to the lower court for further proceedings.

**Coleman v. FedEx Ground** (Western Federal District of Kentucky 2013)—the court approved a class action settlement involving drivers operating out of a Kentucky terminal or in Kentucky; as part of the terms of the agreement, FedEx admitted nothing with regard to its employment practices.

### **Independent Contracting: The Wave of the Future?**

In the 1990s, many leading scholars predicted a [rise in contracting for the 21<sup>st</sup> century](#). Such [reports continue to be published](#), but are these predictions borne out by the evidence? It depends on where you look.

Since sole proprietorships make up 75% of all businesses nationwide, [Entrepreneur magazine](#) used that group as an indicator of whether contracting was on the rise. Using IRS figures, the magazine noted that the percentage of spending by these businesses on contract labor rose 2.9% between 2003 and 2011—even though spending declined in other areas. [An article in New Geography](#) credits 99% of total

employment increases between 2000 and 2011 to self-employment, based on Bureau of Economic Analysis statistics.

But Harvard Business Review is more skeptical. In [Where Are All the Self-Employed Workers?](#), Justin Fox argues that we have not seen an overall rise in contracting as a livelihood. He notes that the total number of self-employed workers remained the same in reports from 2000 and 2014 (14.4 million in both cases). And using the Bureau of Labor Statistics data, the article goes on to show an actual slight decrease in the overall percentage of workers who contract (from around 9% in 2000 to closer to 7% in 2014).

Commentators also disagree on whether the trend (if any) is good or bad. [Professor Robert Reich](#) points to the growing number of Uber drivers, whose contractor status belies the company's valuation of \$40 billion (compared to General Motors at \$60 billion). Professor Reich believes the rise of contracting is symptomatic of severe cost control by corporations. [Professor Wendell Cox](#), on the other hand, sees value in self-employment for semi-retired baby boomers and those with entrepreneurial vision.

While data can be found to support just about any perspective, the real answer probably lies somewhere in between. Many workers turned to contracting during the Great Recession, and some remain in that mode, while others have turned to other options. Some people have a mix of work activities, incorporating employment with their own side ventures. In real estate, contracting is an important means of delivering the best and most independent service to home owners, buyers, and sellers.

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