

Hiring independent crews is not for every operator

by Margaret Vernet

Mr. Lombardo's article appears very well researched, since he explored the information in depth and used materials right from the source—the IRS. Anyone interested in this topic should go to the official IRS site (www.irs.gov) and review other primary-source material about this employment issue.

I believe Mr. Beck has missed the mark in his remarks of Section 530, and his comparison of a pilot to a plumber isn't an appropriate analogy. One thing that is clear from this exchange is that the issue of independent contractor status is not "one size fits all." The determination depends on the individual facts and circumstances of each situation, and these articles are provided for informational purposes to assist in your analysis. They are not intended as legal advice, and readers must analyze how these matters relate to their individual circumstances.

IRS Section 530 provides businesses with relief from federal employment tax obligations if certain requirements are met. It does not discourage employers from hiring contractors instead of employees, as Mr. Beck expresses. Section 530(e) of the IRS publications "clarifies that the first step in any case involving whether that firm has employment tax obligations of an employer with respect to workers is determining whether the firm meets the requirements of Section 530" (emphasis added).

The Section 530 relief provision directly from IRS Publication 15 and 15-A states, "If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the worker. *You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977*" (emphasis added).

What is a substantially similar position? According to *IRS Technical Guidelines for Employment Tax Issues*, "A substantially similar position exists if the job functions,

duties and responsibilities are substantially similar and the control and supervision of these duties are substantially similar."

In other words, it would be difficult for a company to establish that an individual is an independent contractor if it has employees performing substantially the same function. For example, if a flight department employs pilots and also uses the services of "independent contractor" pilots, it would have difficulty establishing independent-contractor status.

This problem was addressed in *Vizcaino v. Microsoft* (9th Cir. 1996), in which the court held that certain workers could not be excluded from Microsoft's benefit plans because they were common-law employees, not independent contractors. In this case, the workers were integrated into Microsoft's workforce, working on teams side by side with employees, sharing the same supervisors and performing the same job duties and functions as the employees.

Microsoft required that they work on site, they received admittance card keys, office equipment and supplies from the company. The court acknowledged that it must examine a number of different factors to determine independent-contractor status, and upon review of those factors, the workers were determined to be part of the workforce and therefore employees.

The IRS 20-Question Test

Mr. Beck refers to the "20-question" test and expresses that "nobody in the world can pass all 20 questions." The test was never intended to be applied the way Mr. Beck suggests. It does not require that a worker "pass all 20 questions" to be considered an independent contractor. Rather, it is an analytical tool to help the fact-finder balance the factors weighing for or against a finding that an individual is an independent contractor.

According to *IRS Technical Guidelines for Employment Tax Issues*, the 20-factor test is an analytical tool used to ascertain control. It's important to know:

- there is no "magic number" of relevant evidentiary factors;
- whatever the number of factors used, the factors merely point to facts to be used in evaluating the extent of the right to direct and control; and
- as in any examination, all relevant information needs to be explored before answering the legal question of whether the right to direct and control associated with an employment relationship exists.

The 20 questions reflect the number of objective pieces of information identified

as relevant by analyzing the approaches that courts have developed in making employee-status determinations. (The questions do not appear to be available on the IRS site, which may be why the site Mr. Beck mentions is not from this source. The IRS instead refers to Publications 15 and 15-A for facts that provide evidence of the degree of control.)

Supervisory Control

Courts have held that the degree of supervision necessary to demonstrate control is only "such supervision as the nature of the work requires."

From Publication 15 and 15-A and *Technical Guidelines for Employment Tax Issues*, "Employee Status under Common Law," generally, a worker who performs services for you is your employee if you have the right to control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient that the employer has the right to do so. The designation or description of the parties as anything other than that of employer-employee is immaterial.

Contractual designation of a worker as an independent contractor cannot outweigh evidence regarding the actual relationship between worker and business. What governs is the substance of a relationship, and consequently employers cannot contract away their employment tax liabilities.

We, as an industry, aren't engaging in a discussion of this important topic to compare the hiring of a plumber, homebuilder, gardener or pool boy to that of a contingent pilot or flight attendant as in Mr. Beck's analogy. These individuals, caretakers, yard workers, cleaning people and *similar domestic workers* are addressed in IRS Publication 926 Household Employer's Tax Guide.

We're talking about a firm, a business, a company, a flight department, not a household. The subject is whether the services of contingent pilots and/or flight attendants are those of employee or independent contractor.

While we are not aware of recent reported cases on this issue, at least one court analyzing whether a pilot for Eastern Air Lines was an independent contractor held that he should have been classified as an employee. (*Selman*

v. *Califano* [10th Cir. 1980]). We are not suggesting that the facts in this case are identical to those presented by Mr. Beck; however, the case illustrates how a court could interpret a pilot's work as that of an employee.

Independent Judgment

The Eastern pilot emphasized that in flying an airplane he must exercise independent judgment in many instances, and otherwise the FAA, not the company, controls how he flies the airplane. The court responded that "the use of independent judgment, and the accompanying loss of some control by the employer, is a characteristic of all professional services."

The court also stated, "It is uncontroverted that the FAA extensively regulates how the pilot is to fly the plane. Since both the airline and the pilot are subject to the regulations, and therefore neither completely controls the means by which the job is accomplished, this fact is at least neutral."

Addressing the issue of whether the pilot had a substantial investment in the facilities required to do his job, the court stated, "It is clear that Eastern furnishes the vast majority of the 'tools' required by an airline pilot, and has made the investment in the aircraft and the terminal, booking and administrative facilities. [The pilot] furnishes his own uniform, a flight bag and a tool kit, which are minimal by comparison."

When a plumber is engaged to go to a flight department to perform services, plumbing services are not a key aspect of the regular business of the flight department, nor would the plumber be performing the same or similar service as that of the employees of the flight department.

Mr. Beck uses the analogy of the plumber and the pilot again in the scenario "once the pilot closes the cabin door," referring to the lack of direction given to each. The contingent pilot is engaged to perform the same or similar duties as that of the regular employee pilot of the flight department. The plumber is not. The contingent pilot is instructed when and where to do the work, what tools or equipment to use, where to purchase supplies and services, and what order or sequence to follow. The plumber is not.

The contingent pilot's services are a key aspect of the regular business of the flight department. The plumber's are not. A contingent pilot typically is hired as second-in-command or copilot and is under the direction and control of the pilot-in-command or captain employee of the flight department, as is a contingent

flight attendant, including after the cabin door is closed.

State Regulations

Every state has positions on worker status as well. More than half the states refer to them as ABC Tests. The three prongs are:

A. The worker is free from control or direction in the performance of the work.

B. The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed.

C. The individual is customarily engaged in an independent trade, occupation, profession or business.

Service is considered subject employment unless all three conditions are met.

Mr. Beck also doubts Corporate Aviators carries workers' compensation coverage in all states, saying it would be cost-prohibitive, and expresses interest in knowing how we do that. It's simple: we pay a huge amount of money—up front—and obtain coverage. There are five monopolistic states that must be applied to independently for coverage should a business have an exposure in one of them, and we obtain those as needed. Mr. Beck must be referring to this in his doubts.

Mr. Beck commented on workers' compensation and liability insurance on the NBAA Air Mail forum. His comment about workers' comp is "It is simply not possible for the small business folks to cover all states." His comment regarding liability insurance is "forget that, too; the lawyers will come after you no matter what." Well, maybe they will, but that's not a legitimate reason not to be responsible and carry appropriate business insurance to protect the interest of workers and "deep-pocket" customers alike.

The IRS has placed employment tax evasion on its 2005 Dirty Dozen List. The commissioner of the IRS, Mark Everson, recently made remarks about the importance of the independent contractor issue.

Articles have been written recently on this issue both in *AIN* and in other well known, respected aviation publications and are consistent with the content in Mr. Lombardo's well written article.

A number of factors must be considered to determine whether someone is an employee or an independent contractor in the eyes of the IRS, and this determination requires an individualized assessment based on the facts and circumstances of a particular situation. Under certain circumstances, a company may have worker status

determined by filing IRS Form SS-8.

There is a significant amount of potential liability at stake if a pilot or flight attendant is misclassified as an independent contractor. In addition to tax issues and workers' comp, employers also face the possibility of a misclassified worker making a claim for the value of benefits he would have received as an employee. While there may be arguments on both sides of this issue, a company must carefully weigh the factors for and against a particular designation and remember that it has the burden of proving its determination was the right one. □

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