

Contractor or Employee? It Could Be an Expensive Decision

NBAA Publication



[NBAA Flight Plan interview with employment law expert Gregory Ripple](#)

February 13, 2012

As flight operations are often pushed to “do more with less,” in the current economic climate, the use of contract labor is on the rise. But so is the misclassification of workers who should be considered employees rather than contractor or contingency labor. In a remarkably complex environment where there are almost as many different definitions of contract labor as there are governmental entities trying to regulate the practice, a flight operator’s failure to properly classify an employee could be costly.

With that in mind, NBAA has developed a webinar for Members to help them pick through the myriad regulations, so they can make the proper determination on whether a worker should be classified as an employee or a contractor.

“What analysis you apply depends on where you are in the country, or what agency you’re dealing with,” explained webinar participant Gregory Ripple, an employment law expert at the firm of Miller Johnson in Grand Rapids, MI. The IRS definitions are different than those used by the Department of Labor. Those are different than the definitions used by the various states.

The government estimates approximately 3.5 million workers are misclassified as contractors when they should in fact be termed employees. The Government Accountability Office estimates that costs the federal government alone approximately \$4 billion in lost tax revenue, because contractor wages are not subject to withholding. Estimates of state losses are almost as high at a time when economic conditions have forced governments to maximize their revenue streams.

As a result, the U.S. Department of Labor is investing \$12 million in 2012 to hire 100 new investigators, beefing up enforcement and filing more lawsuits against employers suspected of misclassifying workers.

Added to this mix of varying standards and increasing enforcement are ancillary issues, such as insurance coverage.

“There are many different rules defining the extent to which the operators or owners are liable for the actions of anyone who operates their aircraft,” said Tim McSwain, chief claims officer at Allianz Group in New York. Insurance policies might not cover contract employees unless they are specifically included.

Even though there are dozens of agencies with their own definitions classifying contractors and employees, Ripple told webinar attendees there are some general guidelines by which employers can begin to make the proper determination:

- The worker is free from control or direction in the performance of the work.
- The work is done outside the usual course of the company’s business and is done off the premises of the business.
- The worker is customarily engaged in an independent trade, occupation, profession, or business.

If the worker meets those criteria, then he is likely classified as a contractor. But in many cases, Ripple said, the determination is not so easy to make.

“Take the case of replacement pilots,” he offered. “When the primary pilot is sick or on vacation, companies will often hire replacement pilots. From the employer’s perspective, these are contractors. But from the IRS perspective, that pilot is performing the exact same function as a full-time employee. The only difference is the number of hours worked. That’s a borderline situation.”

While many contractors are misclassified by aviation businesses, Ripple said that’s certainly not always the case. But the IRS takes a jaundiced view of those who make the improper classification because “that’s the way everyone else does it on this field” or “that’s what the worker requested.”

Ripple said he hears that all the time. “In those situations, the IRS is likely to say, ‘Give me their names and phone numbers,’ because they’ll be next on the list of people the government wants to talk to.”

<http://www.nbaa.org/admin/personnel/independent-contractors/20120213-contractor-or-employee-expensive-decision.php>