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Tax Payment/Withholding

Abraham Lincoln reportedly asked, “If you call a dog’s tail a leg, how many legs does a dog have?” His answer was, “Four. Calling a dog’s tail a leg does not make it a leg.” Similarly, when businesses classify workers, they must consider a variety of factors. Simply labeling a worker as an independent contractor is insufficient and may expose the business to potential worker classification audits by both state and federal agencies. In this article, using the Ninth Circuit’s FedEx Ground case as a guide, Bruce Ely and Sims Rhyne discuss salient issues for businesses and their tax advisers when classifying workers.

Worker Classification Litigation on the Rise—An Analysis of the Ninth Circuit’s FedEx Case and Its Lessons for Tax Practitioners

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Worker classification audits expose businesses to far more than just liability for uncollected federal employment taxes. Businesses can be exposed to liability for unpaid state payroll taxes, state worker’s compensation and unemployment charges and benefits, penalties and fines for federal Wage and Hour law violations, and unfunded health insurance, fringe benefit and retirement plan obligations. The recent decision of the Ninth Circuit Court of Appeals in the class action suit, *Alexander et al. v. FedEx Ground Package System, Inc.*, Nos. 12-17458, 12-17509 (9th Cir. Aug. 27, 2014), as well as the recent increase in worker classification audits by both federal and state agencies, highlights the importance of properly classifying workers and the potential exposure a business may have if it

has misclassified workers—innocently or not.

Using *FedEx Ground* as a guide, this article will discuss several important issues for businesses and their tax advisers, including: (1) whether contractual language labeling a worker as an independent contractor is sufficient; (2) what constitutes true relinquishment of “control;” and (3) the potential exposure to multiple worker classification audits by different state and federal agencies and the differing standards that may apply.

I. Alexander et al. v. FedEx Ground Package System, Inc.

A. The Court’s Analysis of FedEx’s Operating Agreement and Internal Policies

If there was any uncertainty about how the Ninth Circuit would interpret California labor law in *FedEx Ground*, the opening paragraph of the court’s opinion laid that to rest:

The drivers must wear FedEx uniforms, drive FedEx-approved vehicles, and groom themselves according to FedEx’s appearance standards. FedEx tells its drivers what packages to deliver, on what days, and at what times. Although drivers may operate multiple delivery routes and hire third parties to help perform their work, they may do so only with FedEx’s consent.

Given that opening statement, the court not surprisingly agreed with the 2,300 or so plaintiff-drivers that they were in fact FedEx’s employees, at least under California labor law.

At issue in *FedEx Ground* was the right the company possessed to control the drivers under the “FedEx Operating Agreement” and other various policies and procedures applicable to the drivers, and whether that right transformed workers FedEx long considered to be independent contractors into employees. Under California law, the principal test for determining an employment relationship is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”¹ In addition to the so-called “manner and means” test, California courts also consider secondary factors in making an employee/independent contractor determination, one of which is “[t]he right [of the business] to terminate [workers] at will, without cause.”² Other factors include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually performed under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for

the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.³

The court began its analysis of the manner and means test by stating that “the label placed by the parties on their relationship is not dispositive, and subtleties are not countenanced.”⁴ Rather, the determinative factor is “what the contract, in *actual effect*, allows or requires.”⁵ According to the court, the FedEx Operating Agreement and other FedEx policies and procedures “unambiguously allow FedEx to exercise a great deal of control over the manner in which its drivers do their jobs.” Thus, the court found that this factor—the right to control—strongly favored FedEx’s drivers, and a finding that the drivers were employees under California labor law.⁶

Under the Operating Agreement, FedEx had the right, and apparently so exercised that right, to control the appearance of its drivers and their vehicles, which according to the court, “clearly constitute[d] control over [the] drivers.”⁷ FedEx required its drivers to comply with its personal appearance standards and wear a FedEx uniform, which included a FedEx logo shirt, uniform pants, dark shoes and socks and if the driver chose to wear a jacket or cap, such article must have a FedEx logo.⁸ In addition, FedEx required its drivers to be “clean shaven, [have their] hair neat and trimmed, [and be] free of body odor.”⁹ If a driver did not satisfy these requirements, a FedEx manager could “refuse to let [the] driver[] work.”¹⁰

While the FedEx Operating Agreement required each driver to provide their own vehicle, each vehicle was required to meet FedEx’s requirements for size, paint color, markings and appearance. Specifically, FedEx required its drivers “to paint their vehicles a specific shade of white, mark them with the distinctive FedEx logo, and to keep their vehicles ‘clean and presentable [and] free of body damage and extraneous markings.’”¹¹ FedEx also dictated the vehicle’s dimensions, including the packaging shelves inside the vehicle.¹² Like the personal appearance requirements, Fe-

³ *Id.* at 14-15 (citing *Borello*, 769 P.2d at 404).

⁴ *Id.* at 15 (citing *Borello*, 769 P.2d at 405); *see also id.* at 34-35 (Trott, J. concurring) (stating that the bottom line is that “[l]abeling drivers ‘independent contractors’ in FedEx’s Operating Agreement does not conclusively make them so when viewed in light of (1) the entire agreement, (2) the rest of the relevant ‘common policies and procedures’ evidence, and (3) California law”).

⁵ *Id.* (emphasis added).

⁶ *Id.* In a press release released following the Ninth Circuit’s decision, FedEx stated that it planned to seek an en banc review of the ruling. FedEx added that it has used a different operating agreement since 2011 and now contracts with independent companies that treat their drivers as employees.

⁷ *Id.* at 16 (citing *Ruiz v. Affinity Logistics Corp.*, No. 12-56589 (9th Cir. June 16, 2014)).

⁸ *Id.* at 11.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 16.

¹² *Id.*

¹ *Alexander et al. v. FedEx Ground Package System, Inc.*, Nos. 12-17458, 12-17509 (9th Cir. Aug. 27, 2014) (quoting *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989)).

² *Id.* at 14.

dEx managers could prevent drivers from working if their vehicles did not meet FedEx's specifications.¹³

In addition to controlling the appearance of the drivers and their vehicles, FedEx also controlled the time its drivers could work. While the Operating Agreement did not allow FedEx to set specific work schedules for its drivers down to the minute, the court explained that FedEx had "a great deal of control over the drivers' hours."¹⁴ Each workday was structured so that each driver's workload was between 9.5 and 11 hours.¹⁵ And even though drivers could hire helpers to perform deliveries to reduce the driver's total workload, the court found that FedEx managers could "adjust drivers' workloads to ensure that they never have more or less work than can be done in 9.5 to 11 hours."¹⁶ In addition, drivers were not supposed to leave the FedEx terminal until all their packages for delivery were available, and could not return to the terminal until after a specified time.¹⁷ Finally, if drivers wanted their vehicles loaded, they were required to leave them at FedEx's terminal overnight.¹⁸

Even though FedEx argued to the contrary, the court found that FedEx could and in fact did control aspects of how and when the drivers delivered their packages. FedEx assigned each driver a specific service area, which FedEx could reconfigure in its sole discretion.¹⁹ Also, because FedEx negotiated the delivery window for packages directly with its customers, it had control over what packages the drivers must deliver and when.²⁰ Finally, the Operating Agreement required drivers to comply with FedEx's standards of service, which included requirements to "foster the professional image and good reputation of FedEx and to conduct all business activities with proper decorum at all times."²¹

FedEx pointed out that there were aspects of the drivers' work that it did not control. Drivers were not required to follow specific routes or deliver packages in a specific order.²² In addition, drivers were not required to follow a FedEx manager's recommendation after a ride-along evaluation.²³ The court rejected these arguments, stating that the "right-to-control test does not require absolute control" and employee status "may still be found where a certain amount of freedom is inherent in the work."²⁴ The lack of control over drivers' routes, delivery routines and evaluations, the court found, did not counteract the extensive control that FedEx exercised over the drivers.²⁵

B. FedEx's Counter Arguments

FedEx first argued that it only sought to control the results of its drivers' work, not the manner and means by which the drivers achieved those results. The court

¹³ *Id.*

¹⁴ *Id.* at 17.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (internal quotations omitted).

²² *Id.* at 17-18.

²³ *Id.* at 18.

²⁴ *Id.* (citing *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 44 (Ct. App. 2007)).

²⁵ *Id.*

agreed, in part, with FedEx's argument that results refers to the timely and professional delivery of packages.²⁶ However, the court concluded that "no reasonable jury could find that the results sought by FedEx includes detailed specification as to the delivery driver's fashion," nor could a reasonable jury "find that the results . . . include having all of [FedEx's] vehicles containing shelves built to exactly the same specifications."²⁷

In support of this conclusion, the court cited another case, *Estrada v. FedEx Ground Package System, Inc.*, involving FedEx and the same Operating Agreement, where the California Court of Appeal found that a class of delivery drivers were employees based on "FedEx's control over every exquisite detail of the drivers' performance."²⁸ FedEx tried to distinguish *Estrada* on two grounds: (1) that the class excluded multiple-route drivers, who were the drivers at issue in the present case, and (2) that the evidentiary record in *Estrada* was fundamentally different.²⁹ The court rejected these distinctions, stating that the Operating Agreement at issue in both cases "grants . . . identical rights to both single-route and multiple-route drivers" and that while "*Estrada* is not dispositive here, the *Estrada* court's reasoning is nonetheless apposite."³⁰

C. Entrepreneurial Opportunity

FedEx's key counter argument centered on the entrepreneurial opportunities it provided to its drivers, arguing that the Operating Agreement gives drivers "flexibility and entrepreneurial opportunities that no employee has."³¹ The court addressed this argument by discussing *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the case that developed the multifactor test for determining worker classification under California law. The court stated that, "A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers."³²

In *Borello*, S.G. Borello & Sons hired agricultural workers under a written "sharefarmer" agreement, which characterized the parties as "principal and independent contractor rather than employer and em-

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 19 (citing *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007)). The National Labor Relations Board ("NLRB") recently concluded that FedEx Home Delivery drivers were employees rather than independent contractors, finding that FedEx exercised control over the drivers' work, that the drivers were not in a distinct business, that the drivers' work was done under FedEx's direction, and that the drivers needed no special skills. See *FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., and International Brotherhood of Teamsters, Local Union No. 671*, Cases 34-CA-012735 and 34-RC-002205 (Decisions and Orders of the N.L.R.B. Sept. 30, 2014). Importantly, the NLRB declined to adopt the D.C. Circuit's 2009 decision involving FedEx Home Delivery because of its reliance on the "entrepreneurial opportunities" available to FedEx's drivers, discussed *supra*.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting *Borello*, 769 P.2d at 408).

ployee.”³³ The workers agreed to harvest crops for S.G. Borello & Sons, with the assistance of their family members, and the amount of land available to harvest was contracted out to the workers on a first-come, first-served basis.³⁴ Among the workers’ freedoms and responsibilities were:

- They were totally responsible for care of the plants in their assigned plots during the harvest period.
- They were required to furnish their own tools and own transportation to and from the harvest field.
- The method and manner of harvesting the plants was up to the discretion of the worker; however, they were required to use accepted agricultural practices to yield the maximum harvest.
- They could set their own hours.
- They were free to determine when to pick the crop in order to maximize profitability.³⁵

In addition, Borello could not fire the workers during the harvest, and Borello had no recourse over a worker if the worker abandoned the field.³⁶ Despite the autonomy enjoyed by the workers, the California Supreme Court concluded that S.G. Borello & Sons retained “all necessary control over the harvest portions of its operations,” and that the workers were employees under California law.³⁷

FedEx next argued that the ability of its drivers to take on multiple routes and hire third parties to assist with the deliveries was inconsistent with a finding of employee status.³⁸ In making this argument, FedEx relied on a recent D.C. Circuit Court of Appeals decision, which found that the entrepreneurial opportunities FedEx gives its drivers “clearly outweighed” the evidence favoring a finding that the drivers were employees.³⁹ The Ninth Circuit disagreed with the D.C. Circuit’s analysis and its shift away from the right-to-control test to the “entrepreneurial opportunity” test.⁴⁰ The court found that there was no indication under California law that the “longstanding right-to-control test [had been replaced] with the new entrepreneurial-opportunities test developed by the D.C. Circuit.”⁴¹ Rather, the entrepreneurial opportunities given to a worker “do not undermine a finding of employee status” under the applicable California case law.⁴²

To bolster its analysis, the Ninth Circuit discussed a trio of recent California cases addressing the issue of entrepreneurial opportunity. In *Arzate v. Bridge Terminal, Inc.*, the California Court of Appeal found that truck drivers’ responsibility to provide their own trucks, pay for related expenses and ability to lease other trucks and hire other drivers “did not override other

factors in California’s multi-factor analysis” to support a finding that the drivers were independent contractors.⁴³ In *Narayan v. EGL, Inc.*, the Ninth Circuit concluded that drivers were employees under California law, even though the drivers “retained the right to employ others to assist in performing their contractual obligations” because the company had to approve all assistants.⁴⁴ In *Ruiz v. Affinity Logistics Corp.*, the Ninth Circuit found that drivers were employees where the company “retained ultimate discretion to approve or disapprove . . . helpers and additional drivers.”⁴⁵

Applying the reasoning of these decisions to FedEx’s drivers, the Ninth Circuit found that the entrepreneurial opportunities available to FedEx’s drivers were equivalent to those in *Narayan* and *Ruiz*. FedEx’s Operating Agreement allows drivers to operate multiple routes or vehicles “only if FedEx consents, and only if doing so is consistent with the capacity of the driver’s terminal.”⁴⁶ In addition, drivers must be in “good standing” with FedEx before being able to assign their contractual rights, and the replacement driver must be “acceptable to FedEx.”⁴⁷ The court also found that there was no language in FedEx’s Operating Agreement that limited FedEx’s discretion to withhold consent to additional vehicles or routes or to decide whether a replacement driver was “acceptable.”⁴⁸ Importantly, the court concluded that failure to exercise such unfettered discretion will not characterize a worker as an independent contractor; rather, what is important is that the right, and therefore the control, exists.⁴⁹

D. Secondary Factors

Because of its finding that FedEx controlled the manner and means by which drivers performed their work, the court quickly dispensed with the secondary factors, finding that none of them “sufficiently favors FedEx to allow a holding that plaintiffs are independent contractors.”⁵⁰ The court then concluded that “[t]he most important factor of the right-to-control test [i.e., the manner and means test] thus strongly favors employee status.”⁵¹ Thus, the court held that the drivers were, as a matter of California labor law, FedEx’s employees, reversed the district court’s grant of summary judgment, and remanded the case with instructions to enter summary judgment in favor of the drivers on the issue of employment status.⁵²

³³ *Borello*, 769 P.2d at 401.

³⁴ *Id.* at 402.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 408, 410 (emphasis in original).

³⁸ *Id.* at 24.

³⁹ See *FedEx Home Delivery v. Nat’l Labor Relations Bd.*, 563 F.3d 492 (D.C. Cir. 2009) (holding that “[t]he ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties’ intent expressed in the contract, augurs strongly in favor of independent contractor status”).

⁴⁰ *FedEx Ground Package System*, Nos. 12-17458, 12-17509 at 24.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 121 Cal. Rptr. 3d 400, 405-06 (Cal. App. 2011).

⁴⁴ 616 F.3d 895, 902 (9th Cir. 2010).

⁴⁵ No. 12-56589 (9th Cir. June 16, 2014) (stating that the drivers “did not have an unrestricted right to choose [its helpers], which is an important right that would normally inure to a self-employed contractor”).

⁴⁶ *FedEx Ground Package System*, Nos. 12-17458, 12-17509 at 25.

⁴⁷ *Id.*

⁴⁸ *Id.* at 25-26.

⁴⁹ *Id.*

⁵⁰ *Id.* at 26. (citing *Borello*, 769 P.2d at 404; *JKH Enters., Inc. v. Dep’t of Indus. Relations*, 48 Cal. Rptr. 3d 563, 579-80 (Ct. App. 2006)).

⁵¹ *Id.* at 31.

⁵² *Id.* at 32.

II. Potential Impact of FedEx Ground on Worker Classification

There are several important takeaways for businesses and tax practitioners from the Ninth Circuit's opinion in *FedEx Ground*. One may not agree with the ruling and may point out which appeals court was involved and the pro-labor precedent in California on which the court relied, but simply labeling a worker as an independent contractor in an agreement entered into by the parties is likely insufficient to satisfy the inquiry into whether a business has the right to control a worker. The Ninth Circuit quickly dispensed with the notion that a label is sufficient, stating that it was clear under California labor law that "the label placed by the parties on their relationship is not dispositive."⁵³ This is good advice for businesses seeking to properly classify workers as independent contractors. Businesses need to ensure that the reality of the work relationship is truly that of business and independent contractor; simply labeling a worker as an independent contractor is insufficient under state or federal law. It is still helpful, however, to have contracts with workers clearly state that the parties intend that the workers be classified as independent contractors and that the business timely files a Form 1099-MISC with the Internal Revenue Service (and in some cases, with certain state agencies as well) when it is obligated to do so.⁵⁴ However, both the contract and the relationship itself should demonstrate that the business does not control the manner and means by which the workers accomplish the contractually-required result.

Second, businesses should review their agreements with and their internal policies and procedures that apply to independent contractors to ensure that the business has sufficiently relinquished control over the manner and means by which a worker performs his or her duties. Based on the Ninth Circuit's analysis of FedEx's Operating Agreement and other policies and procedures, FedEx apparently exerted significant control over its drivers, not just as to the result to be accomplished, but also over the manner and means used to accomplish the result. FedEx controlled the drivers' uniforms and general appearance, the color, markings and storage capacity of the drivers' vehicles and how and

⁵³ *Id.* at 15. *See also id.* at 34. The concurrence makes the point that labels are insufficient, even stronger than the majority opinion, by quoting President Lincoln and Justice Cardozo: Abraham Lincoln reportedly asked,

"If you call a dog's tail a leg, how many legs does a dog have?" His answer was, "Four. Calling a dog's tail a leg does not make it a leg." Justice Cardozo made the same point in *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62 (1935), counseling us, when called upon to characterize a written enactment, to look to the "underlying reality rather than the form or label."

Id. at 34.

⁵⁴ While not discussed in the *FedEx Ground*, it's likely that labels do matter in the converse situation: if the worker is characterized by the business as an employee. In this situation, the business would not only have to prove that the relationship itself is one of business and independent contractor, but also overcome the presumption that they intended the relationship to be one of employer-employee.

when the drivers delivered packages. While there were some areas that FedEx did not control (e.g., FedEx did not require certain delivery routes and did not require drivers to deliver packages in a certain order), this "relinquishment" of control was insufficient, at least in the court's eyes.

What is unclear from the court's one-sided analysis in *FedEx Ground* is how much control a business must relinquish. Certainly businesses should look to the facts in *FedEx Ground* for guidance on the issue, but businesses must be aware of the differing standards between state and federal law and the agencies tasked with determining worker classification. This risk is compounded for a business operating in multiple states, not only because of the different state laws, but also the different state regulatory bodies tasked with policing this issue. For example, a business using independent contractors in the Alabama and Georgia markets could have to contend with at least six different agencies on the federal and state level, each of which may have different standards or interpretations of those standards for determining worker classification: the Internal Revenue Service, the U.S. Department of Labor, the Alabama Department of Revenue, the Alabama Department of Labor, the Georgia Department of Revenue and the Georgia Department of Labor.

Third, while not mentioned in *FedEx Ground*, businesses should be aware that satisfying one agency's test for worker classification does not necessarily protect them from audits by other agencies on the same issue.⁵⁵ In its December 2009 Form 10-Q filed with the Securities and Exchange Commission, FedEx Corporation disclosed to its shareholders that the Internal Revenue Service had confirmed "that no assessment of federal employment tax would be made with respect to any independent contractors at FedEx Ground (including those providing the FedEx Home Delivery service) for calendar year 2002 or for calendar years 2004 through 2006."⁵⁶ While it is unclear from the SEC filings why the IRS withdrew its assessment for those years,⁵⁷ it is

⁵⁵ For example, consider the test the Internal Revenue Service applies in worker classification disputes. Under section 3121(d) of the Internal Revenue Code of 1986, as amended, the term "employee" is defined in part to include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Treas. Reg. §31.3121(d)-1(c)(2) expands on this definition by stating that "[g]enerally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also how it shall be done. That is, 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."

⁵⁶ FedEx Corporation, Quarterly Report (Form 10-Q) (Dec. 18, 2009). *See also* FedEx Corporation, 2009 Summary of Annual Report 22 (2009) (stating that the IRS in October 2008 "withdrew its tentative assessment of tax and penalties for the 2002 calendar year (\$319 million plus interest) against FedEx Ground relating to the classification of FedEx Ground's owner-operators for federal employment tax purposes").

⁵⁷ FedEx could have defended an IRS audit using the safe harbor afforded by Section 530 of the Revenue Act of 1978. If FedEx satisfied the requirements of Section 530, the Service would have been prevented from examining the relationship between FedEx and its workers, and would not have analyzed the common law factors to determine if the workers were in fact independent contractors.

clear that successfully defending an IRS worker classification audit does not necessarily protect a business from being exposed to claims by other federal or state agencies that the particular workers are employees and the expense of defending against those claims.

The importance of properly classifying workers cannot be understated. Businesses that misclassify workers are subject to audits at both the federal and state level on issues ranging from uncollected employment taxes to unemployment compensation and worker's compensation to unfunded retirement plan obligations and improper exclusion from other employee benefit plans such as stock options.⁵⁸ In addition to federal and state employment taxes, business should be aware of the new excise tax penalties imposed on employers who do not provide adequate health insurance to full-time employees under the Affordable Care Act.⁵⁹ For purposes of the section 4980H excise tax penalties, the common law test (i.e., the 20-factor test) applies but Section 530 relief is not available.⁶⁰ It is clear that those agencies are increasingly likely to inform other federal and state agencies of the results of their investigation and of any

⁵⁸ Looking only at the potential employment tax liability, a business that is found to have misclassified workers could be responsible for both portions of state and federal employment taxes for all years the worker was misclassified, as well as interest and penalties. The tax exposure alone can grow exponentially depending on the number of workers the business has "misclassified." See, e.g., *Central Motorplex, Inc. v. Comm'r*, T.C. Memo 2014-207 (Oct. 7, 2014) (finding employer liable for unpaid employment taxes, failure to timely file penalty, and penalty for failure to deposit employment taxes); *Broadway Cab LLC v. Employment Department*, 265 Or. App. 254 (Ct. App. 2014) (finding that taxi drivers employed by the taxpayer were employees and thus not exempt from Oregon unemployment insurance tax).

⁵⁹ See I.R.C. § 4980H.

⁶⁰ See Treas. Reg. § 54.4980H-1(a)(15), (21).

assessment, especially in light of information sharing⁶¹ and the \$10.2 million in grants recently given to state departments of labor by the U.S. Department of Labor.⁶² Given the multitude of different agencies that have authority to determine worker classification and the potentially staggering monetary exposure, businesses should carefully examine their classification of their workers, with the aid of counsel, and if workers are indeed misclassified or it's likely that a court would so find, implement measures to reclassify those workers in a way that limits the business's exposure for past years of misclassification.

⁶¹ As part of its Misclassification Initiative, the U.S. Department of Labor entered into a memorandum of understanding with the Internal Revenue Service on September 19, 2011, the purpose of which was to "help reduce the incidence of misclassification of employees as independent contractors, help reduce the tax gap, and improve compliance with federal labor laws." Under this initiative, 16 state departments of labor entered into memorandums of understanding with the U.S. Department of Labor, with Alabama being the most recent state to join. According to the U.S. Department of Labor's website, the MOUs "will enable the Department to share information and to coordinate enforcement efforts with participating states in order to level the playing field for law-abiding employers and to ensure that employees receive the protections to which they are entitled under federal and state law."

⁶² See *\$10.2M awarded to fund worker misclassification detection, enforcement activities in 19 state unemployment insurance programs*, U.S. Dep't of Labor Press Release (Sept. 15, 2014), available at <http://www.dol.gov/opa/media/press/eta/ETA20141708.htm>. Under this grant program, \$2 million in grants was split between Maryland, New Jersey, Texas, and Utah for "their high performance or most improved performance in detecting incidents of worker misclassification." The remaining \$8.2 million was distributed to 19 states in competitive grants.