

ETAP no longer operates. At the field level, employment tax audits and ETAP assessments in the past several years have been nonexistent, based on anecdotal evidence.

Without an incentive to comply, household employers will continue to cut costs by not paying taxes. If the Congress wishes to change the situation, one solution is simple: Make taxpayers check a box on their IRS Form 1040, confirming that they paid over \$1,200 to a household worker and listing the name(s) and social security numbers of the workers. This would be similar to the means of claiming a dependent on the return. If the IRS is unable to audit any of these returns, at least it could send those taxpayers who answered yes a checklist of the reporting requirements. The IRS could provide the list to the state divisions of employment security the names of the employers and workers so that the states could confirm that employers were paying unemployment contributions. This solution would restore an incentive to classify household workers correctly.

## COUNTERPOINT: HOUSEHOLD WORKERS—NOT YOUR ORDINARY EMPLOYEE

by Jerome Borison, Denver, CO

To the less sophisticated, the world seems black and white when it comes to identifying who are employees and who are not: workers who provide their services to others on a regular

basis are employees and workers who provide services to others on a job-by-job basis are self-employed or independent contractors.

Needless to say, life is not so easy. Classification of workers is one of the more difficult issues in the world of employment law. The problem surfaces in big businesses and small. In this article, I will limit my discussion to household workers, who include Nannies, nurses, maids and groundskeepers. (To the extent I attach a gender to the household worker, it will be the feminine, realities being what they are.)

For purposes of this Counterpoint, I am making five assumptions:

- That we are addressing household workers who work either full-time or near full-time for the particular service recipient, rather than those who work a few hours per week for many families.
- That with the exception of a few high profile people, most homeowners/parents treat household workers as independent contractors. For these purposes, however, I am also assuming that if the right worker is found, the homeowner is willing to classify the worker as an employee if she insists on it rather than telling her to take it or leave it, as so often happens in the business world.
- That most of the workers are relatively low paid and do not have spouses who have jobs where significant fringe benefits are made available.
- That the amount paid the household worker does not include what I refer to as an “independent contractor premium,” *i.e.*, an additional amount of base pay to cover the shift from the service recipient to the worker of certain employment costs, such as Social Security and medical insurance.
- That the homeowner is not using the classification to assist the worker in not reporting her income. What I mean by this is that in contrast to an employment relationship, with respect to which the homeowner must file a Form W-2 with the IRS, in an independent contractor relationship, the homeowner, not being in a trade or business, has no obligation to file a Form 1099. Clearly the latter classification would aid a worker who did not wish to report all of her income.

It is also important to understand both what I do not and what I do intend to discuss in this Counterpoint. I do not intend to spend much time with the question of who would prevail in a legal challenge of the classification should the IRS or one’s state unemployment or worker’s compensation division raise the issue. We all know the drill here, starting with the common law definition, through the IRS’ 20-factor test in Rev. Rul. 87-41, 1987-1 C.B. 296, and the approach taken in the IRS Training Manual drafted in mid-1996 (*see* [http://www.irs.gov/plain/bus\\_info/training.html](http://www.irs.gov/plain/bus_info/training.html) and 96 TNT 153-35) and ending with a plethora of case law. I’ll leave that for others.

Rather, where I want to devote my energies is in raising the readers’ awareness of some of the equitable and extra-legal issues, tax and otherwise, that confront a household worker who has been classified as an independent worker. These matters go

beyond the question of whether it is right to pay such low sums to people



in whose hands we entrust the lives of our young or old.

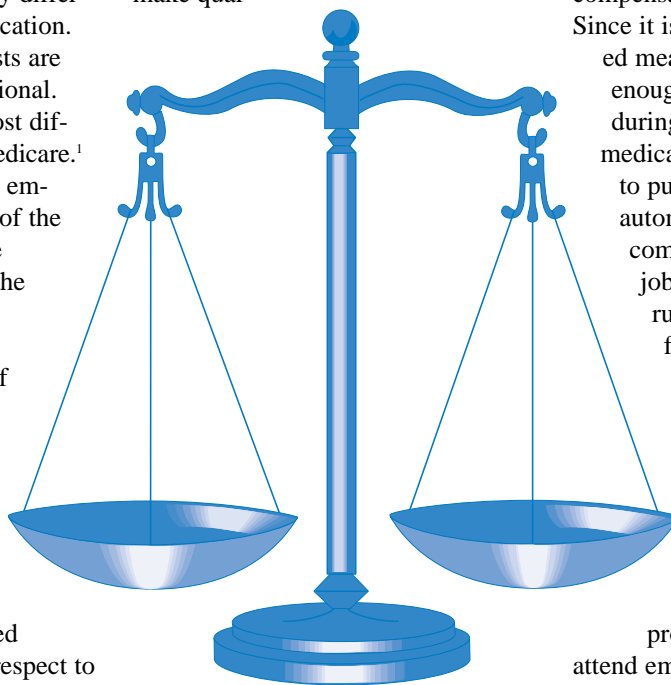
As with businesses, the classification issue between a homeowner and a household worker usually boils down to a matter of dollars and cents. Several costs are significantly different depending on the classification. Some of those additional costs are mandatory and some are optional.

The biggest mandatory cost difference is Social Security/Medicare.<sup>1</sup> If the worker is treated as an employee, she is liable for half of the contribution (7.65%) and the employer is responsible for the other half (7.65%). (These payments are categorized as FICA.) On the other hand, if the worker is an independent contractor, she is liable for both halves of the contribution (15.3%), being both worker and employer. (This payment is categorized as SECA and is reported on the Schedule SE.) With respect to a full-time worker paid \$7.00 per hour, the difference amounts to a savings of about \$1,100 per year to the homeowner. Other mandatory costs include unemployment insurance and worker's compensation.

As compared to businesses with more than a minimal number of employees, where the anti-discrimination rules apply, some additional costs associated with a household worker are optional, regardless whether the worker is an independent contractor or employee. These include medical insurance,<sup>2</sup> contributions to a retirement plan, and holiday, vacation and sick leave.

The savings to the homeowner are obvious. So why care? Let's start with Social Security and Medicare.

In the short-run, the classification requires the worker to have enough *chutzpah* (or tax advice), discipline and financial resources (in excess of those needed to meet her daily costs of living) to make quar-



terly estimated tax payments. If she does not, as one might expect with lower paid people who come to the U.S. from elsewhere, it is likely that the tax due when she files her Form 1040 will be so great as to cause her problems with the Collection Division of the IRS. In the long-run, depending on whether the worker was able to make her contributions to Social Security, she may be denied the only retirement resources available to her.

In addition, the impact of not having the package of financial protections attendant with employee status—unemployment compensation, worker's compensation, sick leave and medical insurance—is profound

for people paid at or near the minimum wage. Should the worker who is classified as an independent contractor be laid off, get sick or hurt on the job, she would not have adequate insurance or a means of obtaining compensation during that period.

Since it is unlikely a person of limited means would have set aside enough money to cover expenses during time lost from work or for medical bills or to hire an attorney to pursue a legal claim (versus automatically collecting worker's compensation if injured on the job), the results are usually ruinous. Who would like to find themselves or their loved ones without savings and income for any period of time? Who would be willing for themselves or their loved ones to live at or near the poverty line and also have to go without the protections and benefits that attend employee status?

The homeowner often times has most of the bargaining power when negotiating with someone who will work in the house. The homeowner can nickel and dime a household worker into some very terrible alternatives. Hopefully, this short piece has helped to demonstrate that the typical independent contractor - employee paradigm that one confronts in the more faceless business world should be softened in the more personal relationship that exists between a homeowner and a household worker. ■

1. With certain important exceptions, the income tax liability is the same regardless of the classification. Thus, one's income tax liability frequently is not at stake in reclassification disputes. This is especially true for lower income persons.

2. With respect to health insurance, household workers, whether an employee or independent contractor, may have trouble finding coverage since they are not part of a large employer group. This is especially true if she or someone in her family has a pre-existing condition that makes them uninsurable. In addition, even if available, it may be costly. Unless the "independent contractor premium" is adequate and coverage is obtainable, a worker who needs medical insurance for herself and her family may not be able to afford to work as a household worker or would have to accept the fact that they will end up on Medicaid or other public health care.