

PHILANTHROPY NEW YORK

BEST PRACTICES IN SURVIVING A DEPARTMENT OF LABOR AUDIT

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AUDIT RISK

- Federal or State Departments of Labor
- Looking for:
 - minimum wage
 - all hours paid
 - overtime
 - misclassification as independent contractor
- Penalties: back pay/benefits/interest/civil penalties

CLASSIFYING YOUR WORKFORCE

Paid Workers

- Employees
 - Paid Interns/Trainees
- Independent Contractors

Unpaid Workers

- Volunteers
 - Unpaid Interns/Trainees

EMPLOYEES VS. INDEPENDENT CONTRACTORS

Why is proper classification important?

- Organizations: Financial liabilities for failure to meet legal obligations.
- Workers: Ineligibility for benefits and protections under State and Federal laws burdens misclassified workers.
- Government: Billions of dollars in lost tax revenue.
- Increased enforcement action.

EMPLOYEES VS. INDEPENDENT CONTRACTORS

Employees

- Organization “controls” - i.e., establishes what work will be done and how it is done.
- Organization withholds income taxes and pays Social Security, unemployment, and Medicare taxes on wages.
- Note: organization owns copyrightable materials created by employees within the scope of their employment
- Receives a W-2 statement.

EMPLOYEES VS. INDEPENDENT CONTRACTORS

Independent Contractors

- Generally controls the “when, where and how” of his/her work.
- Employers do not withhold or pay any taxes on payments to the contractor.
- Organization must issue a 1099 to an independent contractor that receives \$600 or more in payments annually.
- NB: part-time does not mean IC!!!

LEGAL OBLIGATIONS OF EMPLOYERS

Employees, but not independent contractors, are covered by:

- Workers Compensation
- NYS Disability Coverage
- Unemployment Insurance Law
- Wage and Hour Laws
- Anti-Discrimination Laws
 - NYC law does cover independent contractors

LEGAL OBLIGATIONS OF EMPLOYERS

- **Applicable Employment Laws:**
 - Federal: Federal employment tax laws, anti-discrimination laws such as the Americans with Disabilities Act and Title VII of the Civil Rights Act, Family Medical Leave Act, Genetic Information Nondiscrimination Act, Affordable Care Act, and Fair Labor Standards Act;
 - NYS: Unemployment Insurance Law, Workers Compensation Law, Disability Benefits Law, wage and hour laws, including the Minimum Wage Law and the Wage Theft Prevention Act, and Human Rights Law.
- **Employee Benefits Plans.**

PENALTIES FOR MISCLASSIFICATION

- **Tax Payment and Tax Withholding Violations**
 - back taxes plus interest; possible civil and criminal penalties.
- **Willful Failure and 100% Penalty**
 - possible 100% penalty on responsible persons.
- **Wage and Hour Violations**
 - Significant fines and penalties.
- **Benefits, UI, Workers Comp**
 - significant penalties; audit of entire workforce.

PROPER CLASSIFICATION

- Depends on the facts and circumstances surrounding the individual's work.
- General Rule: An individual is an independent contractor if the organization has the right to control or direct only the result of the work and not the means and methods of accomplishing the result.
- Factors Used by the IRS and NYS Department of Labor
 - 3 main categories: (1) behavioral control, (2) financial control, and (3) relationship of the parties.
 - NYS DOL guidance: <http://www.labor.ny.gov/ui/dande/ic.shtm>
 - IRS guidance: <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>

FACTORS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

Organization has right to control the **method, manner, and means** by which the work is done, *even if not exercised*:

- designated working hours;
- when, where and how to perform the job;
- providing tools;
- requiring compliance with performance policies;
- providing a salary and benefits; giving an individual a title; reimbursing expenses.

FACTORS INDICATIVE OF AN INDEPENDENT CONTRACTOR RELATIONSHIP

- Contractor is “engaged” to produce a result, and controls manner and methods by which work is accomplished
- Contractor is in business:
 - business cards, website, advertising.
 - free to provide services to other organizations, competitive or noncompetitive.
 - provides own facilities or equipment.
- *Independent contractor relationship is documented in a well-written agreement.*

TAKEAWAYS

- Workers are either employees, independent contractors, or volunteers.
- Interns should be paid employees or volunteers if not true interns.
- Document nature of any relationship.
- Maintain appropriate selection and management processes.
- Get legal assistance to correctly classify or reclassify.

QUESTIONS?

This presentation is meant to provide general information only, not legal advice.

If you have questions about a particular individual's proper classification or need assistance in structuring relationships with independent contractors, please contact:

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Or visit www.lawyersalliance.org for further information.