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## Employee, Independent Contractor or Volunteer: Status Matters

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## Topics We Will Cover Today

- Most nonprofits retain personnel who serve as full and part-time employees, independent contractors and volunteers.
  - Which staff belong in each grouping?
  - Does it really matter? Why?
- We'll discuss:
  - How to avoid common classification mistakes
- Also:
  - May an employee of a nonprofit also volunteer?
  - What key factors render "independent contractor" status a poor choice?
  - What steps are recommended to identify and remedy errors in classification?



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## Agenda

- What is an **Employee**? What is a **Volunteer**? What is an **Independent Contractor**?
- Why does properly classifying personnel matter?
- What are the 2 most common mistakes in classification?
- What are key risk management strategies to managing classification risk? **ANALYZE – STRATEGIZE - REMEDY**



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## What is an Employee?

- IRS – “anyone who performs services for you is your employee **if you can 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.”

➢ [www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Employee-Common-Law-Employee](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Employee-Common-Law-Employee)




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## What is an Independent Contractor?

- “The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.”

▪ SOURCE: [www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Defined](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Defined)




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## What is a Volunteer?

- “a person who does work without getting paid to do it”

➢ SOURCE: [www.merriam-webster.com/dictionary/volunteer](http://www.merriam-webster.com/dictionary/volunteer)

- Issues:

- Is the employer liable for volunteer misconduct?
- Can an employer pay a volunteer a “little something”
- Are payments to volunteers taxable income?
  - Non-cash gifts generally aren’t taxable income, but gift certificates and cash are taxable income to the recipient.
  - The FICA threshold is \$100 a year; if volunteers are compensated with \$100 gift certificates, they will owe FICA of 5.65% and the organization will owe 7.65%.
  - If you say ‘thank you’ by giving cash or gift cards, make sure you also provide a report showing that they received taxable income.
  - BEST PRACTICE: advise volunteers that they will need to include cash gifts from the nonprofit in reported, taxable income.




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## Does it Matter?

There is NO regulatory risk (fines, penalties, etc.) for improperly classifying an IC as an employee

Downsides:

- cost to the employer
- exposure to liability claims under *respondeat superior*\*
- exposure to workers compensation claims
- paperwork burden, exposure to discrimination claims



\* "Let the master answer"




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## When It Matters!



There is SIGNIFICANT regulatory risk if you classify an employee as an independent contractor and you have no reasonable basis for doing so.

- Employment taxes for that worker (and penalties)
- See Internal Revenue Code section 3509 for more information.




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## Why does Classification Matter?

Employers owe certain duties to employees: the duty to withhold income taxes, withhold and pay Social Security and Medicare taxes, and the duty to pay unemployment tax on wages paid to an employee. An Employer is legally responsible for the actions of an employee working within the scope of their role/employment.




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## Why Does Classification Matter?

- Retaining an **Independent Contractor** involves some shifting of risk/responsibility for harm.
- **Volunteers** enjoy legal protection that employees and contractors do not, under the Volunteer Protection Act and similar state laws. Volunteers generally **DO NOT** enjoy protection under anti-discrimination laws.
  - But they must be true volunteers!



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## Which Role Makes Sense?

- **Employee** – role for which funding is likely to be available for the indefinite future; role that has minimum educational and experience requirements; role that requires being available, hands on, and willing to perform other duties as required; professional development and promotional opportunities
- **Volunteer** – role for which regular funding is unlikely to be available; flexibility in terms of skills, background, requirements; role that will provide equal or greater reward and enjoyment to the volunteer
- **Independent Contractor** – short term, special expertise, results valued over being around to help as needed



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## Top Classification Mistakes



- Classifying an employee as an independent contractor
- Classifying a worker as BOTH an employee and a volunteer

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## Mistake #1 – IC designation

- Why do we make this mistake?
  - Convenience
  - Belief that it doesn't matter
- When does the mistake come to light?
  - Worker dissatisfaction:
    - Perceived discrimination or harassment
  - Worker injury
  - Legal claim against worker



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## Mistake #2 – Asking employees to volunteer

- Why do we make this mistake?
  - We can't afford to pay, but need the work done
  - We believe that dedicated employees should be willing to do extra
- When does the mistake come to light?
  - Worker dissatisfaction:
    - Perceived discrimination or harassment
    - Perceived lack of fairness
  - Worker injury while "volunteering"
  - Post-termination



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## Classification Risk Management

- **ANALYZE** - Review current positions in your nonprofit
  - Do the documents match the classification decision?
  - Do employees have job descriptions
  - Do all independent contractors have a contract?
  - Do volunteers have a volunteer agreement or volunteer position description?
- **STRATEGIZE** - Identify positions that may be misclassified
- **REMEDY** – decide the sequence of steps to reclassify, and consider communications strategy



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## Mistake #1

### ANALYZE: 2 Issues and 3 Factors

**Two Issues:**

- degree of control
- independence

**Three Factors:**

- **Behavioral** (what and how): Does the nonprofit either control or have the right to control what the worker does and how the worker does his or her job?
- **Financial**: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- **Type of Relationship**: Is there a written contract between the nonprofit and the worker? Does the worker receive benefits (i.e. pension plan, insurance, vacation pay, etc.)? Is the relationship temporary, or expected to continue? Is the role temporary (e.g., fixing a broken machine) or ongoing (e.g., answering the phones, managing the development department)



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## Weigh the Factors

- You need to weigh ALL of the factors to classify properly!
- Don't be surprised if one factor leads to the conclusion: employee, while another leads to the conclusion: independent contractor
- No one factor counts more than the others.



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## Classify properly: 1-2-3

- Look at the entire relationship
- Consider the degree or extent of the right to direct and control
- Document each of the factors used in coming up with the determination



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## STRATEGIZE

- How did the misclassification occur? Was it accidental or intentional?
- What is the potential legal exposure to the organization?
- What time/effort will be required to remedy the errors?
- What does the nonprofit's labor lawyer say?



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## Last Resort Help!

- If you can afford to wait six months, and...
- You're still unclear whether a worker is an employee or an independent contractor, complete and file:
  - [Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding \(PDF\)](#)
- Keep in mind that the form may be filed by either the nonprofit OR the worker. The IRS will review the facts and circumstances and officially determine the worker's status.



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## REMEDY - one option

- [Voluntary Classification Settlement Program](#)
- Relatively new IRS program gives employers right to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat their workers (or a class or group of workers) as employees.
- Employer must:
  - meet certain eligibility requirements,
  - apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and
  - enter into a closing agreement with the IRS.



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### What are the terms of the “deal”?

- Employer: agrees to prospectively workers as employees for future tax periods.
- IRS agrees:
  - Employer owes only 10% employment tax liability that would have been due on compensation paid to the workers for the most recent tax year
  - Employer will not be liable for any interest and penalties on the amount
  - Employer will not be subject to an employment tax audit with respect to the worker classification of the workers being reclassified under the VCSP for prior years.
- RESOURCE: [www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program](http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program)




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### Mistake #2 - ANALYZE Employees who volunteer

- Do we strongly encourage or even REQUIRE employees to volunteer?
- “According to FLSA section 6, an employer must pay all employees not less than the minimum wage for all hours worked. As indicated in 29 C.F.R. § 785.44 (copy enclosed), “[t]ime spent in work for public or charitable purposes at the employer’s request, or under his direction or control, or while the employee is required to be on premises, is working time. However, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked,” so long as the volunteer activities are not the same or similar to the activities the employee is employed to perform.”




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### DOL Opinion Letter

- “Therefore, it is our opinion that the employer must compensate employees for the hours spent volunteering during their normal working hours or when the volunteer work performed is similar to their regular duties. “
- “As for those employees at the race who perform duties that are not similar to their regular duties and that are voluntarily performed after their normal working hours, those employees’ volunteer activities are not considered hours worked for the purpose of the FLSA.”




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## STRATEGIZE

### Three factors are key:

- Not similar to regular duties
- Performed outside regular work hours
- Employees invited to volunteer, but there are no ramifications if an employee chooses not to participate




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## REMEDY

- Update your policies as needed
- Emphasize voluntary nature of volunteer service
- Invite questions, complaints or concerns from employees and volunteers




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## To complicate things further...

- A new term - **Contingent Worker**
- *Contingent employment* = flexible work arrangements or alternatives to traditional full-time work arrangements through which individuals are hired by, and work for, a single employer.
- Examples: temporary work, employee leasing, self-employment, contracting, and home-based work, as well as part-time work.
- Contingency work implies changes in three traditional notions of employment:
  - **Time** - something different from an eight-hour, five-day work week.
  - **Permanency** - something other than a permanent relationship between an employer and worker.
  - **Social contract** - something different from the traditional reciprocal rights, protections, and obligations between the worker and the employer (Christensen and Murphree, 1988).

SOURCE: [www.dol.gov/ebsa/adcoun/contrpt.htm](http://www.dol.gov/ebsa/adcoun/contrpt.htm)




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## One more complication...

- **Statutory Employees** – an employer has a duty to withhold Social Security and Medicare taxes for statutory employees if all three of the following conditions apply:
  1. The service contract states or implies that substantially all the services are to be performed personally by them.
  2. They do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities).
  3. The services are performed on a continuing basis for the same payer.
- [www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Statutory-Employees](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Statutory-Employees)




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## Helpful Resources

- DOL Employment Law Guide  
<https://www.dol.gov/compliance/guide/index.htm>
- IRS Worker Classification Webinar  
[www.irsvideos.gov/ProperWorkerClassificationWebinar/](http://www.irsvideos.gov/ProperWorkerClassificationWebinar/)
- Tax Information for Charities and Non-Profits  
[www.irs.gov/Charities-&-Non-Profits](http://www.irs.gov/Charities-&-Non-Profits)




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## More Resources

- [State Liability Laws for Charitable Organizations and Volunteers – 4th Edition](#) (@ nonprofitrisk.org)

### Center Articles:

- [Volunteer or Employee: Do You Know the Difference?](#)
- [Tempting but Dangerous: Paying Volunteers 'A Little Something'](#)
- [Keeping Volunteers Safe from Harm](#)
- [Insurance for Volunteer Programs](#)
- [How Lifestyle Figures in an Appropriate Mentor Match](#)
- [Survey Sheds Light on Screening Practices of Volunteer Organizations](#)
- [Risk on the Road: Managing Volunteer Driver Exposures](#)




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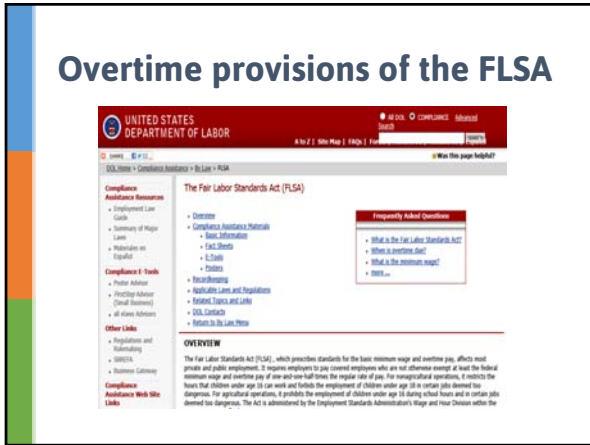
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**Thank you!**

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