



Classifying Your Employees: *Who's Who in the Office*

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OVERVIEW

Classification: Why does it matter?

The Paid and Unpaid Workforce

Practical Considerations



WHO'S WHO IN THE OFFICE?

Individuals providing services are either:

- Employees
 - regular full time
 - regular part time
 - temporary
 - seasonal
- Independent Contractors, *Or*
- Volunteers
- True "interns" provide limited service



LEGAL OBLIGATIONS

- Employees (partial list)
 - 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
 - NYC: Human Rights Law, Fair Chance Act, Earned Sick Time Act



LEGAL OBLIGATIONS

- Independent Contractors
 - NYC Human Rights Law (if no EE's)
 - NYC Freelance Isn't Free
- Interns
 - NYC Human Rights Law
 - NYS Human Rights Law
- Volunteers
 - Tort claims



PAID WORKFORCE: WHO IS AN EMPLOYEE?

Individuals over whom you have direct control and direction

- Must pay minimum wage/overtime
- Must withhold taxes
- Must provide Workers Comp, Disability, Unemployment Insurance
- Must comply with protective laws
- May be eligible for private benefit plans



PAID WORKFORCE: WHO IS AN INDEPENDENT CONTRACTOR?

Independent Contractors

- Generally in business and 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.



PAID WORKFORCE: WHO IS AN INDEPENDENT CONTRACTOR?

Legal theories tend to blur. Real test:

- 1) the extent to which the hiring party has the right to control the "manner and means" by which the worker completes his/her assigned task, and
- 2) whether, as a matter of "economic reality" the individual is truly in business for him/herself and can control the opportunity for profit and loss.

Determination of proper relationship is made after analysis of numerous factors *regardless of written documents.*



PAID WORKFORCE:

Factors Indicating Worker Status

EMPLOYEE

- No right to determine method, manner and means to do the work
- Subject to direct supervision
- Services are integral part of business
- Does not provide facilities, equipment, tools, or supplies

INDEPENDENT CONTRACTOR

- Discretion as to how to produce product or service
- Not subject to supervision
- Services are not integral even if important
- Significant investment in tools, equipment and supplies



PAID WORKFORCE:

Factors Indicating Worker Status

EMPLOYEE

- Does not have right to set own schedule
- Must render service personally
- Needs permission for absence
- Employer provides training
- May not compete with employer
- Attends staff meetings

INDEPENDENT CONTRACTOR

- Self-schedules subject only to project deadline
- May hire another to perform the work
- May take time off at own discretion
- Does not need training; usually has special expertise
- May provide services to competing organizations
- Does not attend meetings

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PAID WORKFORCE:

Factors Indicating Worker Status

EMPLOYEE

- Holds title
- Employer furnishes business cards
- Uses employer's email
- Economically dependent on employer
- Employer sets rate of pay
- On the payroll
- Reimbursed for expenses and routine business travel

INDEPENDENT CONTRACTOR

- No title with engaging organization
- Has own business cards
- Is not on the organization's email
- Multiple clients
- Negotiates rates
- Submits invoice
- Absorbs routine expenses as part of ability to control profit



PAID WORKFORCE: INDEPENDENT CONTRACTOR AGREEMENTS

Independent Contractors Must Have a Contract!

Recommended Provisions:

- Independent contractor relationship
- Contractor's responsibilities and scope of services
- Organization's reasonable satisfaction with deliverables
- Contractor controls manner, means, details and methods of work
- Organization cannot and will not supervise, direct or control the manner, means, details or methods used by contractor



PAID WORKFORCE: INDEPENDENT CONTRACTOR AGREEMENTS

- Contractor controls his/her time and skills not devoted under the agreement
- Fees for services, project deadline, and requirement for contractor to submit an invoice to organization for payment
- No employer-employee type compensation or benefits (e.g., salary, bonus, health coverage, accident insurance, worker's compensation)
- No claim by contractor against the organization for payment of any employee compensation or benefits
- Organization is not responsible for reimbursement of expenses



PAID WORKFORCE: INDEPENDENT CONTRACTOR AGREEMENTS

- Company will not contribute to Social Security, unemployment insurance or federal, state or local withholding taxes with respect to the contractor
- Contractor is solely responsible and liable for payment of any and all taxes and insurance that he/she may owe to any governmental authority
- Contractor will comply with all applicable laws with respect to its employees
- Contractor and its employees have proper skill, training, experience and licenses to perform services
- Indemnification provisions
- Contractor's works belong to the company in perpetuity
- Confidentiality



PAID WORKFORCE: MISCLASSIFYING INDEPENDENT CONTRACTORS

- **Tax Payment and Tax Withholding Violations**
 - Employers may owe for back taxes plus interest that should have been paid or withheld. Also, for certain violations there may be civil and criminal penalties.
- **Willful Failure and 100% Penalty**
 - The IRS may sanction a 100% penalty on certain persons responsible for willful failure to withhold or to pay over portions of the employee's tax liabilities.
- **Wage and Hour Violations**
 - Significant fines and penalties may be imposed for failure to pay proper wages, particularly if overtime hours are involved.
- **Benefits**
 - Misclassification related to benefits plans, unemployment insurance, workers compensation, and other programs may lead to significant penalties and may trigger investigation of entire workforce.



VOLUNTARY RECLASSIFICATION

- *Never do this without advice of counsel*
 - Cost including benefits eligibility
 - retroactivity
 - Employee communications
- PRO
 - Statute of limitations stops running
 - Control over risk of loss
 - Regulators tend to be lenient if self-audit
- CON
 - cost of reclassification (prospective/retroactive)
 - may trigger audit



VOLUNTARY GOVERNMENT PROGRAMS

- If you believe your organization may be incorrectly classifying employees as independent contractors, contact an attorney to discuss:
 - voluntary reclassification and/or
 - application for IRS and any similar state law programs
- Your organization will need to consider the consequences of reclassification vs. failure to do so.



INDEPENDENT CONTRACTORS: TAKEAWAYS

- Independent Contractors are running their own business with limited input from their clients.

Get legal assistance to:

- understand status of your paid workers;
- review/draft independent contractor agreement;
- if in doubt, conduct audit to ensure proper classification; and
- take appropriate corrective measures.



UNPAID WORKFORCE: WHO IS A VOLUNTEER?

A volunteer is an individual who

- completely willingly and for personal satisfaction
- provides services for a nonprofit organization (charitable, civic, educational, or religious mission)
- with no expectation of compensation.



UNPAID WORKFORCE: WHO IS A VOLUNTEER?

The following does not count as "compensation":

- Reimbursement of expenses
- Benefits (usually volunteer firefighters, etc.)
- Nominal payments unrelated to productivity
- Payments by third party



UNPAID WORKFORCE: WHO IS A VOLUNTEER?

As with independent contractors, misclassification creates risk!

- A person providing services, if not a volunteer or independent contractor, is an employee.
- Failure to pay an employee and provide statutory benefits may result in penalties and potential criminal sanctions.
- Therefore crucial to document relationship.



UNPAID WORKFORCE: VOLUNTEER LIABILITY ISSUES:

- **Harm *caused* by a volunteer**
 - Vicarious liability
 - Respondent superior
 - Negligent hiring/retention
- **Harm *suffered* by a volunteer**
 - “On the job” injury or illness
 - Physical harm/emotional distress
 - Employees, clients, other volunteers



VOLUNTEERS: TAKEAWAYS

- Create formal processes for volunteers
- Don't use volunteers as "tryouts"
- Avoid temptation to give expensive gifts
- Unpaid "interns" should be treated as volunteers if no internship program.
- Your employees may volunteer services but NOT to do their REGULAR work.
- Always document nature of the relationship.



WHO IS AN INTERN?

Interns may be paid or unpaid.

- Paid interns should be paid at least minimum wage.
- Paid interns are temporary employees.
- "Stipends" must represent either pay for services or reimbursement of expenses.
- If intern receives only reimbursement for expenses, intern is "unpaid" i.e. money does not represent compensation.



WHO IS AN INTERN?

Legal Test for lawful for-profit internship program

- Is the intern the primary beneficiary?
 - strict six-factor test no longer applies
- Factors to be ***considered***:
 - the intern and the employer clearly understand that there is no expectation of compensation
 - the internship provides training similar to that which would be given in an educational environment, including the clinical work
 - the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.



WHO IS AN INTERN?

- the internship accommodates the intern’s academic commitments/academic calendar.
 - the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
 - the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
 - the intern and the employer understand that the intern is not entitled to a paid job at the conclusion of the internship.
- Nonprofit internships are “generally permissible”



WHO IS AN INTERN?

- **NYS DOL Guidelines on Interns in Nonprofits:**
 - Must keep records describing duties/hours
 - Volunteers
 - Trainees (similar to Federal guidelines)
 - Students (only educational, charitable, or religious NFP's)
 - need not be course-related



INTERNS: TAKEAWAYS

- Unpaid Internships Must Benefit Intern!
 - Create structure
 - Academic credit
- Use volunteers if can't create educational experience.
- Treat paid Interns like temporary employees
- **Document:** have written agreement with intern/parent/school



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!



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Questions?

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