Employee versus Independent Contractor

A Note Before We Begin…

- This presentation is designed to provide information – not a specific determination for your situation

- Worker classification determinations are made on a case by case basis, depending on the specific facts and circumstances

Worker Classification

Workers may be:

- Independent Contractors
- Employees
- How do you know

Resources

- Pub 1779
- www.irs.gov

Employee Defined:

- Under the common law standard:
  - An employee-employer relationship exists when the business has the right to direct and control the worker

IRC 3121(d) and Reg. 31.3121(d)-1

Independent Contractor Defined

- An individual who performs service under an arrangement
- The taxpayer has the legal right to control & direct only what must be done (i.e. the results)
- No control over how the work is performed

Public Officials

- Mayor
- Legislator or elected representative
- County commissioner
- Judge/justice of the peace
- County/city attorney, marshal, sheriff, constable
- Registrar of deeds
- Tax collector or assessor
- Road commissioner
- Board members

Categories of Evidence

- When determining if the worker is an employee or independent contractor, the courts consider facts that fall into 3 categories:
  - Behavioral Control
  - Financial Control
  - Relationship of the Parties

Behavioral Control

- Instructions
  - when and where to do the work
  - what tools or equipment to use
  - what work must be performed
- Training
  - procedures to follow & methods to be used
- Evaluation Systems
  - measures compliance with performance standards

Financial Control

- Significant Investment
- Unreimbursed Expenses
- Services available to the public
- Opportunity for profit and loss
- Method of Payment
  - hourly, weekly basis – evidence of employee
  - Flat Fee – evidence of Independent Contractor

Relationship of the Parties

- Written contracts
  - Showing intent for both parties
- Employee benefits
  - Insurance, paid vacation, vehicle
- Permanency of the relationship
- Discharge/Termination

Example: Elected Officials

Mayor and Council Members are paid $100/month. How should their earnings be reported?

- Elected officials are specifically identified as employees under tax law
- $1,200 reported as wages on Form W-2 for mayor and council members
- FICA and income tax withholding, as applicable, are reported

Form SS-8

- If you're unsure whether a worker is an employee or independent contractor:
  - Complete Form SS-8 and
  - Send it to IRS for determination
- IRS will request information from worker and payer
- There is no fee

SS-8 Form

Form **SS-8**
(Rev. May 2014)
Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

► **Information about Form SS-8 and its separate instructions is at *www.irs.gov/formss8*.**

OMB. No. 1545-0004

For IRS Use Only:
Case Number:

Earliest Receipt Date:

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's fax number	Firm's website	Worker's alternate telephone number	Worker's fax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ► _____

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I–V. All filers of Form SS-8 must complete all questions in Parts I–IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

Part I General Information

1 This form is being completed by: ☐ Firm ☐ Worker; for services performed _____ (beginning date) to _____ (ending date).

2 Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get workers' compensation benefits, or you were audited or are being audited by the IRS). _____

3 Total number of workers who performed or are performing the same or similar services: _____.

SS-8 Receipt Process

- Form SS-8 is reviewed
- If incomplete, the Form SS-8 is returned with an explanation or a request for additional information
- Don’t leave answers blank
  - Enter Unknown or
  - Does not apply

Form SS-8 Determinations

- Determination letters are binding on the IRS based on the facts presented
- May be modified or revoked for various reasons
- Not considered an audit or examination, but may lead to one if the taxpayer takes a position contrary to the determination

Not valid reasons to treat as IC

- The following are **<u>not</u>** valid reasons to treat worker as an Independent Contractor:
- Part-time
- Only going to work a few weeks or months
- Will hire as employee if work out
- Retired and rehired
- Don’t want to pay overtime
- Money came from a grant
- Do not want to pay into PERS

Independent Contractor

Forms and Filing Requirements:

- Secure Form W-9 *before* paying the vendor
- File Forms 1099-MISC and 1096
- File Form 945 for Backup Withholding

Resource:

- TIN Matching Article
- TIN Matching Webinar

FIRE System

Filing Information Returns Electronically

- The system is available 24 hours a day, 7 days a week

- Those required to file 250 or more information returns for any calendar year, **must** file electronically

Wages

- The term “wages” means all compensation for employment unless the law grants a specific exception
- Wages may be paid in cash, or in other forms
- Noncash wages are measured by their fair market value

Employee

Forms and Filing Requirements

- Secure Form I-9
- Secure Form W-4 *before* paying employees
- File Forms W-2 and W-3

Resource:

- www.irs.gov/Individuals/IRS-Withholding-Calculator
- www.ssa.gov/employer/

Employee

- Form 941, *Employer's Quarterly Federal Tax Return*
- Form 944, *Employer's Annual Federal Tax Return*

Resource:

- www.eftps.gov/eftps - Electronic Federal Tax Payment System

Voluntary Classification Settlement Program (VCSP)

- Agree to reclassify as employees for future periods
- Partial relief from past employment taxes
- The application and process are simple
- Entities pay just 10% of tax computed on favorable rates
- No penalties or interest
- Audit protection for past years on workers being reclassified

VCSP Form

- Complete Form 8952, *Application for Voluntary Classification Settlement Program*
- File 60 days prior to treating workers as employees
- IRS will review application and prepare a closing agreement (if applicable)

VCSP Eligibility

Eligible Entities

- Must be currently treating workers as nonemployees
- Must have filed 1099s for nonemployees
- Cannot be under employment tax audit
- Can be tax-exempt organizations or government entities

VCSP Resources

Resources:

- VCSP Website
- Announcement 2012-45

References

- Available at irs.gov
- Publication 1779 (tri fold) Independent Contractor or Employee
- Publication 963, Federal-State Reference Guide, Chapter 4
- Publication 1976, 1 page

  Section 530 Relief Requirements

Revenue Ruling 87-41

- It has 20 questions to help determine worker status
- It helps with the 3 categories of evidence
- There is not a certain # of yes to be an employee
- Need to look at the overall picture

Form 1099

Payments of $600 or more per year (add together every payment, from every dept.)

- Services (including parts & materials)
- Sole proprietor, partnership, trusts
- Excludes corporations unless:
  - Medical & Health Care Payments
  - Payments to Attorneys

LLC

- LLC = Limited Liability **Company**
  - Not necessarily a corporation
- Could be corporation, partnership or disregarded entity (sole proprietor)
- Use current version of W-9 (Dec. 2014)
  - Has separate line for LLC

Form 1099 Misc.

Sole Proprietors or Single Member LLC

- Recipient's Name
  - Individual name on 1st line
  - DBA or LLC name on the 2nd line (optional)
- Recipient's Identification Number
  - Enter SSN or EIN (IRS prefers SSN)
  - Even if use EIN use individual name on line 1

Penalties on Form 1099

- Failure to File Correct Information Returns
  Failure to Furnish Correct Payee Statements
- Each penalty is per information return
- $50 if filed within 30 days
- $100 if filed 31 days late – Aug. 1
- $260 if filed after 8/1 or not at all
- Adjusted for inflation as of 1/1/16

Instructions for Form 1099

- IRS.GOV
- In the search box at the top right type:
- General Instructions for Information Returns

Question

- Line 1 Name is John Doe
- Line 2 business Name is Doe Tree Service
- Line 3 sole proprietor box is checked
- EIN is entered for the TIN
- How should the Form 1099 be prepared for Recipient’s name and TIN?

Answer

Recipient's Name:
John Doe
Doe Tree Service

EIN

- The individual name must be on Line 1
- It is optional to put the DBA name on the 2nd line
- The EIN can be used with the individual name

TIN Matching

- E-service product on the IRS website
- Matches TIN and name combinations with IRS records prior to submitting forms
- Publication 2108-A or
- IRS.gov and enter TIN Matching
- Should receive fewer CP2100 notices
  - Use Publication 1281 BUW for missing & incorrect name/TIN

Change in Due Date

- Form W-2, W-3, 1099 and 1096
- Due date is now January 31 and not February 28 or March 31 if electronic
- Due date is now the same for giving to worker and filing with IRS/SSA
- Starts in 2017 so for 2016 tax returns
- Consolidated Appropriations Act, 2016

Department of the Treasury

Internal Revenue Service

www.irs.gov