

EMPLOYMENT LAW –

1099 v. W-2
FLSA

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Independent Contractor v. Employee

- What is the difference between an independent contractor and an employee?
 - Must withhold income taxes, Social Security and Medicare taxes and pay unemployment tax on wages paid to an employee
 - Employers are typically liable for acts of employees while acting in the course and scope of employment (“vicarious liability”)
 - An individual is an independent contractor if the company has the right to control or direct only the **result** of the work and not what will be done or how it will be done

1099 - Independent Contractor

- **What is an Independent Contractor?**
- IRS test
 - Degree of Control and Independence
 - Behavioral evidence: How much control does company have over what the worker does or how the worker does his job?
 - Financial evidence: How is the worker paid? Are expenses reimbursed? Who provides the “tools of the trade”?
 - Type of relationship: Is there a written contract?

1099 - Independent Contractor

- **What other evidence is considered in determining degree of control and independence?**
 - Does the worker receive benefits (insurance, vacation)?
 - Will the relationship continue for a period of time or for a specific service or project?
 - Is the work performed a “key aspect” of the company’s business?

1099 - Independent Contractor

- **Tennessee test**

- Control and Independence: an independent contractor
 - Is “free from direction and control”
 - Has necessary skills, training, supplies and tools to complete the job
 - Has a business location
 - Performs services for multiple customers
 - Sets own hours
 - Sets own price for services

W-2 Employee

- **Tennessee Test**
 - **Independence and Control: an employee**
 - Has the means and manner of work controlled by the company
 - May receive training by the company
 - Works only for the company
 - Has hours or work location set by the company
 - Receives compensation set by the company
 - Uses the tools, equipment and supplies provided by the company
 - May quit working for the company at any time without recourse
 - May be required to wear specific attire, such as a uniform or shirt with company logo

Investigating Potential Misclassifications

- **Who investigates potential misclassifications?**
 - US Department of Labor
 - IRS
 - Tennessee Department of Labor
 - Tennessee Employee Misclassification Education and Enforcement Fund Program
 - State and local courts

Consequences of Misclassification

- **What are the consequences of misclassification?**
 - Liable for employment taxes for the worker
 - FLSA claims for unpaid wages, minimum wage, overtime compensation, and/or benefits, going back up to 3 years
 - EEOC or THRA claims regarding discrimination or FMLA violation
 - Tennessee penalties to EMEEF for misclassification
 - Tennessee penalties to the Department of Labor or Unemployment Insurance for unpaid state taxes on wages or for failure to acquire workers compensation insurance for misclassified workers

Consequences of Misclassification

- **What are the consequences of misclassification?**
 - Failing to provide W-2 forms can result in back taxes of as much as 41.5% of the worker's wages, going back up to 3 years
 - Federal penalties for payroll taxes, Social Security and Medicare taxes
 - Penalties for failure to keep I-9s for each employee
 - Class action lawsuits

Fair Labor Standards Act

- **What is the FLSA?**
 - Federal law that establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers
 - Overtime eligible employees must be compensated with overtime pay or compensatory time for all hours worked over 40 in a single workweek
 - All overtime eligible employees must fill out a time and attendance record

Fair Labor Standards Act

- **Who determines if a position is overtime eligible?**
 - US DOL criteria, enforced by Wage and Hour division
- **What are the standards for overtime?**
 - Employees will receive overtime pay at the rate of 1.5 times the employee's regular rate for all hours worked in excess of 40 during each work week. (PTO does not count as time worked).

Fair Labor Standards Act

- **What qualifies for exemption from overtime pay?**
 - Specific job duties **and** salary level must meet all US DOL requirement
- **What is the salary basis test?**
 - New US DOL rule goes into effect on **January 1, 2020** : Standard Salary Level increased from \$455 to \$684 per week (**\$35,568 per year**); Highly Compensated Employee level increased from \$100,000 to \$107,432 per year

Fair Labor Standards Act

- **What else changed about the salary basis test?**
 - Employers will be allowed to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level
 - Special salary levels for workers in US territories and motion picture industry were also revised
 - The intent is to update the standard salary and HCE levels “more regularly” in the future.

Fair Labor Standards Act

- **What else changed about the salary basis test?**
 - If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given 52 week period to retain exempt status, the employer may make a “catch-up” payment within one pay period of the end of the 52 week period. This payment may be up to 10% of the total standard salary level for the preceding year.

Fair Labor Standards Act

- **What is the job duty exemption test?**

- Executive
- Administrative
- Professional
- Computer
- Outside Sales

These are unchanged in the new rule.

Questions?

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