Employee vs. Independent Contractor
Overview

- Why Is It So Important?
- What Laws Do We Need to Be Concerned About?
- What Are the Differing Criteria in Determining What Is An “Independent Contractor”?
- Common Pitfalls and Mistakes
- Penalties
Why Is It So Important?

You are responsible to and for the actions of your employees – do you know who they really are?

One size does not fit all

- Not all laws define independent contractors the same way;
- Differ by subject matter;
- Can differ between federal vs. state law;
- “More than 1099ing someone”
What Laws Do We Need to Be Concerned About?

There are many laws that protect or provide benefits to employees…some of these include:

- Workers Compensation laws
- Unemployment Compensation laws
- Wage and Hour laws
- Federal and state tax laws

Many require employers to pay taxes or assessments on “employees”
Independent Contractor Criteria

While they are not the same, they share one thing in common:

- There is not a single bright line answer
- All provide for factors to consider in evaluating a relationship between parties
- Evaluating the factors should be done collectively
 IRS - Common law test:

- Most well-known test

- Considered by IRS in evaluating employee vs. independent contractor

- Factors broken down into 3 categories:
  - Behavioral
  - Financial
  - Type of Relationship

- Relevant for companies in knowing whether to generate “W-2” or “1099” in reporting income;
Independent Contractor Criteria

IRS - Common law test:

- Behavioral Factors:
  - Type and degree of instruction
  - What is the level of evaluation of the work performed?
  - Is training provided?
Independent Contractor Criteria

IRS - Common law test:

- Financial Factors:
  - Significant investment in equipment?
  - Unreimbursed expenses?
  - Opportunity for profit or loss?
  - Services available to market?
  - Method of payment?
Independent Contractor Criteria

IRS - Common law test:

- Type of relationship:
  - Written contract?
  - Employee benefits?
  - Permanency of relationship?
  - Services provided is key to the business?
Common Pitfalls

Ask yourself:

- Individuals providing same services as independent contractors as others are providing as employees?

- Did company retain right to exercise direction and control over service regardless of whether the right was exercised?
Common Pitfalls

Ask yourself:

- Individuals providing services for an employer that are not reflected on the employer’s business records?

- Individuals providing service who are paid “off the books,” “under the table,” in cash or provided no documents reflecting payment?
Ask yourself:

- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity;

- Alleged independent contractors do not pay income taxes or employer contributions to the state unemployment agency.