

## Employee Classification

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Time	Notes
:00	<ul style="list-style-type: none"><li>• This podcast is going to focus on Employees vs. Independent Contractors.</li><li>• We aren't going to get into staffing agency and PEO issues. That may be another podcast. Let us know if there is interest.</li></ul>
:56	<p>IRS relies on "common law" definition of employees. They have moved from 20-factor test and now look at three aspects of the relationship.</p> <ul style="list-style-type: none"><li>• <b>Behavioral control.</b> Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:<ul style="list-style-type: none"><li>○ Instructions that the business gives to the worker</li><li>○ Training that the business gives to the worker</li></ul></li><li>• <b>Financial control.</b> Facts that show whether the business has a right to control the business aspects of the worker's job include:<ul style="list-style-type: none"><li>○ The extent to which the worker has unreimbursed business expenses</li><li>○ The extent of the worker's investment</li><li>○ The extent to which the worker makes his or her services available to the relevant market</li><li>○ How the business pays the worker</li><li>○ The extent to which the worker can realize a profit or loss</li></ul></li><li>• <b>Type of relationship.</b> Facts that show the parties' type of relationship include:<ul style="list-style-type: none"><li>○ Written contracts describing the relationship the parties intended to create</li><li>○ Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay</li><li>○ The permanency of the relationship</li><li>○ The extent to which services performed by the worker are a key aspect of the regular business of the company</li></ul></li></ul> <p>See <a href="#">IRS Pub 15-A: Employer's Supplemental Tax Guide</a>.</p>
2:22	<p>There's a lot of ambiguity in determining whether someone is a common law employee or an independent contractor. Don't get too clever in the gray areas.</p>

<p>2:54</p>	<p>A determination that someone is an employee for federal tax purposes may not apply under other laws.</p> <ul style="list-style-type: none"> <li>• Different laws define the employment relationship differently.</li> <li>• The Internal Revenue Service definition (just discussed) generally controls for ERISA and the Affordable Care Act.</li> <li>• Civil Rights laws tend to favor definitions that use “joint employers” where one employee may have two or more employers.</li> <li>• Recent California Wage and Hour case is all about determining whether someone is an employee for purposes of the California Wage and Hour law.</li> <li>• The California case adopts a strong presumption that a worker is an employee for purposes of the California law. It’s possible to have a worker who is an “employee” under the California Wage &amp; Hour law and an “independent contractor” under the Internal Revenue Code, ERISA or the Affordable Care Act.</li> </ul> <p>Our advice</p> <ul style="list-style-type: none"> <li>• It is sometimes (not always—see below for comments on insurance coverage) better to assume common law employee status.</li> <li>• Don’t get too clever.</li> </ul>
<p>5:20</p>	<ul style="list-style-type: none"> <li>• Common law status is generally required for preferred tax treatment under the Internal Revenue Code: <ul style="list-style-type: none"> <li>○ group health plan</li> <li>○ group term life insurance</li> <li>○ cafeteria plans</li> <li>○ HRAs</li> </ul> </li> <li>• Affordable Care Act – Employer Mandate.</li> <li>• Insurance coverage usually only extends to common law employees: <ul style="list-style-type: none"> <li>○ Most employer sponsored insurance plans limit coverage to common law employees of the employer.</li> <li>○ An employer who enrolls an independent contractor in an insurance plan may end up acting as the insurer when the carrier denies the claim.</li> </ul> </li> <li>• Other – determining whether employer subject to certain laws: <ul style="list-style-type: none"> <li>○ Determining whether various laws apply, e.g., COBRA, FMLA, Medicare Secondary Payer</li> <li>○ Employment tax liability</li> <li>○ FLSA compliance</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ Workers compensation</li> <li>○ Coordination among benefits, payroll, finance/accounting</li> </ul>
6:36	<ul style="list-style-type: none"> <li>● Craft your story and stick with it. Try to stay consistent.</li> <li>● When in doubt, see advice from employment lawyers.</li> <li>● Put the parties' intention in writing – but don't think that solves everything.</li> <li>● Inform insurance carrier of your position and/or seek their approval – remember that insurers may not always agree with "presumption" of employment status.</li> <li>● Collaborate and share information with others in your organization who might work with payroll withholding, Workers Compensation, Temp Agencies, etc.</li> <li>● Avoid creating inconsistent fact patterns such as: <ul style="list-style-type: none"> <li>○ providing benefits to independent contractors, or</li> <li>○ classifying independent contractors as employees on your payroll system because there isn't a better data field</li> </ul> </li> <li>● Don't overestimate your ability to influence the outcome.</li> <li>● Explain risk to your boss / client.</li> </ul>