**Classifying Workers (W-2 vs. Indep. Contractor) FAQ**

**WORKER CLASSIFICATION FAQ**

Workers can be classified in several ways, to include being an intern, a volunteer, an independent contractor, and a W-2 employee.  It is important to review each position and situation to ensure that your company is complying with both federal and state wage and hour law, as well as IRS requirements.

**1.What is a Consultant/Independent Contractor (generally a 1099 employee)?**

This person is self-employed and pays associated taxes; they are not subject to the benefits and privileges of employment but have more control over their work and their method of doing that work.  In general, this person works on short-term, full or part-time projects, or on an ongoing basis for multiple companies.  The tasks this person performs are generally not a key part of the company’s business operations, which is why an organization might choose to go outside the company for this talent.  The worker can generally get the work done however they wish and at whatever time they wish, and do not have tools or other support offered by your organization.  Certain states, such as California, have stricter requirements for classification as an independent contractor.

It is the employer’s responsibility to classify a worker as an employee or a contractor.  It is not the employee’s option to choose to work independently.  There are multiple factors to be reviewed to determine a worker’s status, and to therefore prevent liability for back benefits or taxes.  These factors are outlined in the US DOL Wage & Hour Division Fact Sheet #13: <https://www.dol.gov/whd/regs/compliance/whdfs13.htm>

**2.When do you have to pay interns?**

Most interns should be paid.  Only in rare cases where interns meet the following seven factor test, may they be unpaid and treated on different terms to regular employees.  Otherwise, treat the intern as an employee and pay them.

**DOL Primary Beneficiary Test:**

The DOL has a primary-beneficiary test which considers the extent which the following 7 factors are met when trying to determine if someone is an intern. These are not yes/no questions, but overall the intern should be receiving the primary benefit of the relationship.

1. Both parties understand that the intern is not entitled to compensation.
2. The internship provides training that would be given in an educational environment.
3. The intern’s completion of the program entitles him or her to academic credit.
4. The internship corresponds with the academic calendar.
5. The duration of the internship is limited to the period in which they internship educates the intern.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

If unpaid interns do not meet the test, then they will be considered employees under the FLSA, and backpay, benefits, etc. could be awarded.  It is important that companies only work with unpaid interns through an accredited program and under the conditions outlined by the IRS.

It is important to note that all interns may be eligible for certain benefits and are covered under Workers’ Compensation if they are paid (and in North Carolina, they generally are covered if unpaid).

**3.Who may be considered a Volunteer?**

* Volunteers may only be employed in non-profit or governmental organizations.  They are unpaid.
* If volunteers are compensated, it may cause issues with your classification of the volunteer.  Compensation may include significant “gifts” or housing.  Misclassification could result in backpay, benefits, etc. being awarded.
* Volunteers should not be assigned to do a job that someone else in the company would normally do.
* There are very specific rules from the IRS on volunteer classification, and additional rules on “internal volunteers” which are employees of a non-profit who also volunteer for the non-profit.
* Internal volunteers should not volunteer during their normal work hours, nor volunteer in a position in which they work already.
* Volunteers are not covered by Workers’ Compensation or most other employment laws.

**4. What is a W-2 Employee?:**

This is an individual who works for your organization in regular employment, be it short-term (fill-in or temporary), full-time or part-time.  The employee handbook policies and benefits information are all relevant to this employee.  The company has full control of the workers’ responsibilities and is responsible for employment taxes, workers’ compensation, etc.  These employees may be exempt or non-exempt from overtime pay.

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