

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY



PARKER | SMITH | FEEK

Q&A FROM ASSUREX GLOBAL WEBINAR

JUNE 21, 2018

EMPLOYEES VS. INDEPENDENT CONTRACTORS - WHY IT MATTERS AND WHAT THE FUTURE LOOKS LIKE

Q. We're looking into offering a benefit subsidy to independent contractors for seed reps as an incentive instead of taking traditional jobs that offer benefits. Is this allowed?

A. It's fine to offer extra pay, but it won't be tax-preferred. Be careful to reserve rights to change it and to explain that it should not be construed as an "employee benefit."

Q. Comment made – The longer they are independent contractor the more likely they are employees - please explain

A. A longer period as an independent contractor suggests that the worker is doing something integral to the business. That's a factor that suggests "employee" under the IRS guidelines. Experience also suggests that, as an independent contractor has an extended relationship, its more likely that business will start to treat the individual as an employee – whether intentionally or by mistake. A few examples would be invitations to employee events or recognition awards.

Q. healthcare example - a doctor is employed with a hospital but our company pays this doctor to interpret tests. Do we have a contract with the hospital or the doctor?

A. You would have some flexibility here. The hospital may have rules that prevent the doctor from "side-jobs." If the relationship is directly with the doctor, then you should spell out the terms and conditions in a "contractor agreement." Given the doctor's professional status, it would be easier to argue that the doctor is an independent contractor. Other factors that would support independent contractor status would be if the doctor does the work on their own schedule (favors independent contractor) and uses their own tools, e.g., computer, (favors independent contractor).

Q. So if we have partners who are not paid out of payroll, then they should not be on the Group Medical Plans?

A. First, individuals may still be deemed a common law employee even if they are not on the company payroll.

Next, paying someone outside of the company payroll is a good fact pointing in the direction of an independent contractor relationship. Think of that as "one step forward." It would be a gigantic step back to then add that worker to the group medical plan. This would either (1) suggest that the individual is really an employee, or (2) turn the group health plan into a MEWA.



Q. What if you have insurance adjusters that work on commission and no hours are tracked, how would that work to know how to offer benefits?

A. The first step is to develop an internal position around how you classify these workers – as employees or independent contractors. The most typical approach would be to offer benefits only if they are employees. There are some complex rules under ACA (see 4980H of the Internal Revenue Code) that you would use to determine whether they are full-time or not. You may also develop some of your own rules to determine which employees (if you decide they are employees) are eligible for benefits.

Q. Can you provide some examples on sales, outside sales?

A. This is pretty general question. Outside sales where you have someone that is more like a “sales rep” tend to be independent contractor relationships. In cases such as this the “outside salesperson” has lots of autonomy and often works for more than one business. Their pay is almost exclusively commission. An “inside salesperson” would typically have a base salary, an internal boss, maybe an office or a company car (or company computer) and sell only for the employing entity.

Q. Can you really lay off an employee then hire them as an independent contractor for the same work they held as an employee?

A. You probably can't do that. If it's too good to be true, it is usually too good to be true.

Q. How to process in the case that a worker makes a bad service for my customer and I have a recall that I have to send another worker to fix his job. I can deduct the cost of a contractor but if it is an employee... Could I charge the lost cost to my employee?

A. This is really a “wage and hour” question that will be regulated under your State law. Those laws generally provide some protection for employees on facts like this. Such protections are generally not available to independent contractors.

Q. If an employer has a signed agreement from the worker where they acknowledge they are an independent contractor, and in fact the employer has full control over their activities, will the signed independent contractor agreement rule the classification? They are provided a 1099 and receive no benefits.

A. Having a contract helps - but it is no guarantee and does not change things if all other factors point to an employee. This sounds like an aggressive approach.

Q. If your employee/contract runs very close to the “line” is there a sense of which way it would be safer to err towards?

A. It really depends. In many cases it's safer to treat the person as an “employee.” Where that can become aggressive is where a company wants to treat someone as an “employee” so that the worker can get access to employee benefits. In close cases, you might gain some protection by seeking clarification from the carriers that they will treat the individual as an employee.



Q. Is it risky to have an employee retire and then come back as an independent contractor?

A. That depends on how close what you are having them do resembles their old job.

Q. Please give a definition of common law employee status again.

A. The first step in answering this question is a question. What law are you asking about? Let's assume you are asking whether a worker is an employee or an independent contractor for purposes of the Internal Revenue Code. In that case you should look to the IRS website which provides very useful information. Here is a link: <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

You will see that the IRS looks at 3 areas: behavioral (more control increases likelihood of an employment relationship); financial (as control over the finances shifts to the worker, the chances of an independent contractor relationship increase); type of relationship (the manner in which the parties document the relationship and the history of the relationship would be important factors here). There is no quick answer on the close cases.

Q. We have a relationship with a company who provides a delivery service, they provide the driver and truck and we load with our product to deliver to our customers. Do you feel this is at risk to be classified as an independent contractor?

A. It sounds more like the delivery service is a "vendor" to your business, much like an accounting firm or an outsourced IT function. Beware that this is a pretty quick answer based on a short set of facts.

Q. We have had a concrete vendor who was underinsured and which was added to our workers comp insurance. Does this mean their workers are our employees?

A. Coverage under your worker compensation policy is a fact that would suggest these are your employees. If they are not your employees, then the Workers Comp carrier would have a good reason to reject claims.

Q. What is a gig worker?

A. This is NOT a term of art. Gig workers are typically workers who work temporary "gigs," sometimes more than one at a time.

Q. Does that mean that the subsidy must be recorded on the 1099? If so, does the subsidy not create employee/employer relationship?

A. This looks like a partial question. If it is about a subsidy provided by an employer to an independent contractor, then yes, it goes on a 1099. If it is a type of pay typically provided to employees, it could be a factor tilting in the direction of an employment relationship.

Q. if they are using the employer's equipment they are employees, most likely

A. Using a company's equipment (e.g., computer, tools, diagnostic equipment) tends to point in the direction of an employment relationship. This would be different if the company charges a bona fide fee for use of the equipment.

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY



PARKER | SMITH | FEEK

Q. Independent contractor required to use a provided laptop with secure connection. Still IC?

A. The fact that a secure laptop is required makes this a little less likely to be a strong factor favoring an employment relationship. But no guarantees.

Q. What about long term temp office workers?

A. It's easier to argue that the long term temp workers are NOT employees if they are supplied by a third party vendor. It's harder to argue that long term temp office workers are not employees if hired directly by the business.

Q. What if your insurance adjusters are 1099's and work for other companies, who would be responsible for offering benefits?

A. Under the ACA, the common law employer is responsible for providing offers of coverage or paying penalties. Beyond that, most laws don't require that an employer provide benefits. Rather, it's a matter of design and human resource decision-making.

Q. If a hospital hires a doctor to moonlight in the emergency department, provides no benefits to the doc, and the doc only works occasional shifts at her own choice (no requirement of specific number of shifts, etc.), and the moonlighter has another regular job, can the moonlighter be an independent contractor and be paid on a 1099?

A. There aren't enough facts here to make a good determination. Many hospitals deal with this issue by hiring E.R. doctors through a third party organization, making them employees of a vendor.

Q. We're looking into offering a benefit subsidy to independent contractors for seed reps as an incentive instead of taking traditional jobs that offer benefits. Is this allowed?

A. That could be OK - but be careful - the carrier may not be require to cover them.

If we report the subsidy on the 1099, to be taxed... Is that allowed?

Q. Can you say something about the practice of treating someone as a W-2 employee for some duties, but then hiring them "on the side" to perform independent contracting work (perhaps in an area unrelated to their "real" job)?

A. This sounds aggressive. If the worker is non-exempt, there may also be overtime issues.

Q. If a contractor fits all of the criteria of IC and operates under their own Corporation, but their "client" wants to give them a company email address, title, and business cards – would this compromise their contractor status?

A. Yes. It would compromise the independent contractor status.

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY



PARKER | SMITH | FEEK

Q. A CPA has advised that this issue usually faces when an Independent Contractor reports being misclassified to the IRS. Is this true, or is the IRS on the lookout for this?

A. In our experience this issue is much broader and is a common question during employment tax audits.

Q. Worker A and worker B are independent contractors. Employer is considering offering to treat both worker A and worker B as employees (i.e. benefits, taking taxes, etc.). Worker B wants to continue to be an independent contractor and not be treated as an employee. Can the employer treat worker A and worker B differently if they are doing the exact same work?

A. Very very difficult – if they are both doing the same thing the same way, it is not anyone's choice...

Q. I'm sorry,... to clarify... both are truly independent contractors. They do the same type of work but have complete control over how they do it, when they do it, who they do it for, etc. They are truck drivers who only "rent" their trucks and trailers from us in exchange for 35% of the load pay.

A. There are a lot of things to consider, so I can't say for sure, but it sounds like these are likely independent contractors.

This communication is distributed for informational purposes and on the understanding that the author has not been engaged by the recipient to render legal or accounting advice or services. While every effort has been taken in compiling this information to ensure that its contents are accurate, the author cannot accept liability for the consequences of any reliance placed upon it. Readers should always seek legal counsel or professional advice before entering into any commitments.

IRS Circular 230 Disclaimer: Any U.S. federal tax information provided in this document is not intended or written to be used, and it cannot be used (i) for the purpose of avoiding tax penalties, or (ii) in promoting, marketing or recommending to another party, any partnership or other entity, investment plan, arrangement or other transaction addressed herein.