

April 28, 2016

Making Sense of the Employee Classification Puzzle

Presented by Regan Debban, Benefit Comply &
Bob Seng, Dorsey & Whitney

ACA & Benefits Compliance Update

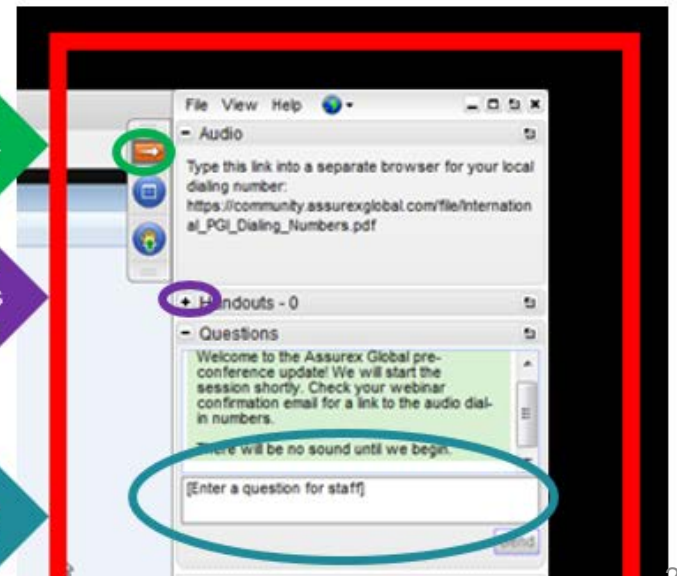
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- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
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Objectives

- Explain why “worker classification” is in the news
- Propose a checklist approach to managing this topic
- Learn to use labels very carefully
- Apply what we have learned to the Affordable Care Act (ACA)

Why is “Worker Classification” in the Headlines?

Why is “Worker Classification” in the Headlines?



When Will Labor Laws Catch Up With the Gig Economy?

Companies such as Uber will get regulated eventually—but whether that's the best way to help on-demand workers is still being debated.



SundayReview | EDITORIAL

Defining ‘Employee’ in the Gig Economy

By THE EDITORIAL BOARD JULY 18, 2015

There is a long history of businesses that try to deprive workers of the protections and benefits they are entitled to under the law by wrongly treating them as independent contractors, rather than employees. Now, some workers and regulators are accusing companies like Uber, which connects cars with passengers on mobile apps, of doing the same thing to the thousands of drivers, couriers and others who work for them.

Agricultural businesses, textile mills, construction firms and other enterprises have often classified workers as contractors to lower their costs by, for example, not paying workers the statutory minimum wage and overtime, not making Social Security contributions and not offering workers’ compensation for on-the-job injuries. Just last month, FedEx [agreed to pay](#) \$228 million to settle a class-action suit brought by truck drivers who said their classification as independent contractors was wrong because they were required to work [10 hours a day](#), wore company uniforms and drove trucks that carried the company’s logo.

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BUSINESS

Employees vs. Independent Contractors: U.S. Weighs In on Debate Over How to Classify Workers

Labor Department guidance comes amid confusion over how to distinguish employees, independent contractors

Why is “Worker Classification” in the Headlines?

- National Labor Relations Board is attempting to create a broad “joint employer” approach to managing the National Labor Relations Act
- President Obama’s 2015 budget included significant funding to combat worker misclassification
- Uber recently settled an employee classification lawsuit for \$100 million

Why is “Worker Classification” in the Headlines?

- The way we define work has changed
- Different businesses are taking very different approaches to staffing
- The ACA has had an impact

A Checklist Approach

A Checklist Approach

- A checklist approach is recommended:
 - Identify your workers
 - Learn the laws (that you need to learn) and identify your greatest risks
 - Review your benefit plans for risk and clear definitions
 - Make it boring – develop an annual review process

A Checklist Approach

- Identify Workers (people who support your business)
 - Regular office workers
 - Employees who work mostly from home
 - Staffing company employees
 - Independent contractors
 - Tech centers

A Checklist Approach

- Learn the laws & identify risk - Example #1

Fair Labor Standards Act (FLSA)

Employer

- Horizontal joint employer
- Vertical joint employer
- Single employer

Employee

- “Economic realities” test

What happens if I get it wrong?

- Wage and hour violations
- FMLA violations

A Checklist Approach

- Learn the laws & identify risk – Example #2

Tax Code	
Employer	<ul style="list-style-type: none">• Only one employer
Employee (21 factors)	<ul style="list-style-type: none">• Behavioral control• Financial control• Relationship of parties
What happens if I get it wrong?	<ul style="list-style-type: none">• Tax withholding penalties• ACA penalties• Qualified retirement plan problems

A Checklist Approach

- Learn the laws and identify risk (continued)
 - Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA)
 - State laws
 - Note: CA imposes civil penalties for willful misclassification of employee as an independent contractor
 - Employment-based visa rules
 - Etc.

A Checklist Approach

- Review your benefit plans
 - Define the class of workers who participate
 - Understand who pays for mistakes
 - Review communications carefully and make sure they are consistent with other documents such as certificates of coverage, stop-loss policies, hire letters and employment agreements

A Checklist Approach

- Review your benefit plans – Sample grid

	Who Participates?	Key Concerns
401(k) plan	Employees who complete 1,000 hours of service in any year	<ul style="list-style-type: none">• Who do I let in the plan?• Who do I look at for nondiscrimination testing?
Group Health Plan	All full-time employees	<ul style="list-style-type: none">• How do we identify full-time employees?• Do we satisfy 4980H?• Is our plan definition of employee consistent with our stop-loss definition?• What about those staffing agency people?

A Checklist Approach

- Do an annual review
 - Create a checklist based on the greatest risks to your company
 - Experiment with how to organize
 - There is no perfect example

A Checklist Approach

- Do an annual review – Example

Federal Tax Withholding Annual Review -- 2016

Regular office workers	These are our common law employees. We are withholding taxes.
Coders	We have concluded that the coders are all independent contractors.
Cybersecurity guy	He is employed by our staffing agency. They assure us that they are doing his employment tax withholding.
Yoga Teacher	Hmmm? Independent contractor?

A Checklist Approach

- Review
 - Identify all of the individuals who provide services to your business
 - Learn the laws and identify risks that matter the most to your workforce
 - Review your benefit plans and get precise about who is eligible
 - Develop an annual checklist that works with your risk profile

Use Labels Carefully

Use Labels Carefully

- One label doesn't work for all laws
- A worker might have two employers for purposes of the NLRA or FLSA rules
- But the same worker can only have one employer for the Affordable Care Act and federal tax withholding rules

Affordable Care Act (ACA) Implications

ACA

- Primary Components
 - Individual Mandate
 - Medicaid Expansion
 - Market Reform
 - Employer Mandate

ACA

- Employee Classification

Applicable Large Employer (subject to §4980H)	Any controlled group of companies with 50 or more full-time equivalents (FTEs)
Applicable Large Employer Member (for reporting purposes)	Any corporate entity with an EIN
Employee	Common law standard
What happens if I get it wrong?	<ul style="list-style-type: none">• Big 4980H penalties• Civil lawsuits

ACA

- Employee Classification – At Least 3 Layers under the ACA
 - Is the employer subject to ACA (specifically §4980H)?
 - Who are the common law employees?
 - Which common law employees are full-time?
 - Aside: what about those staffing company employees?

ACA

- Labels

Label	Definition	Why Care?
Employee	Determined under common law standard found in Treas. Reg. 31.3401-1(b)	Starting point for identifying “full-time employees”
Employer	The person that is the employer of an employee under the common law standard. See Treas. Reg. 3121(d)-1(c)	This is the entity that has liability under ACA

ACA

- Labels (continued)

Label	Definition	Why Care?
Full-Time Employee (§4980H)	An “employee” who is employed an average of at least 30 hours of service per week	Offers of coverage to this group avoid the 4980H penalties.
Part-time employee (§4980H)	A new employee who is reasonably expected to be employed on average less than 30 hours per week	Employer may use measurement periods to determine whether offer of coverage is required

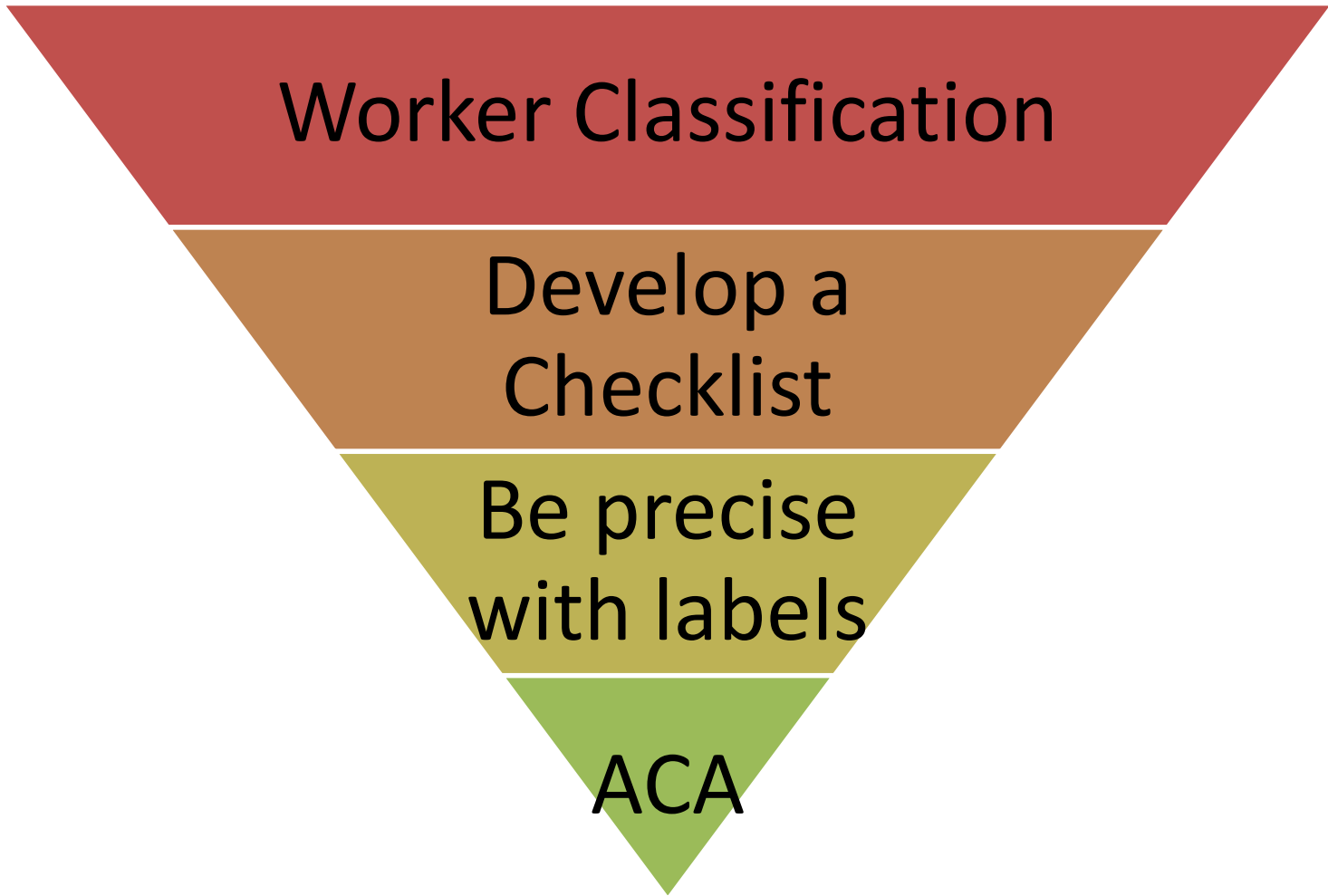
ACA

- Labels (continued)

Label	Definition	Why Care?
Variable Hour Employee (§4980H)	Based on facts and circumstances, employer cannot determine whether the employee is reasonably expected to be employed on average 30 hours per week	Employer may use measurement periods to determine whether offer of coverage is required
Seasonal Employee (§4980H)	Employee hired into a position for which customary annual employment is 6 months or less	Employer may use measurement periods to determine whether offer of coverage is required
Temporary Staffing Firm Employee (§4980H)	Employee of staffing firm	Offer of coverage by staffing firm may count as offer of coverage by employer

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Summary



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Thank you.