

June 21, 2018

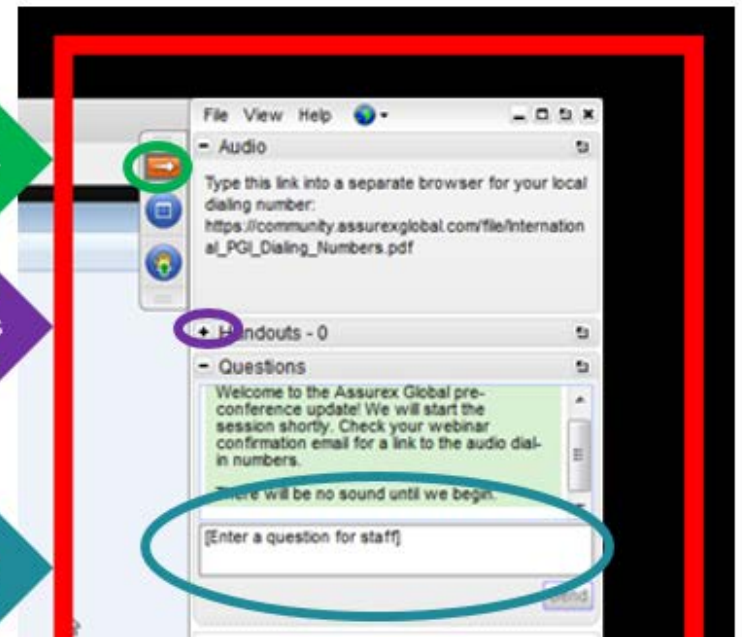
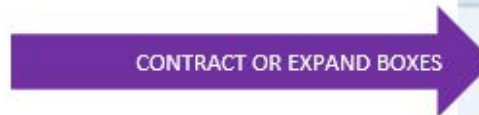
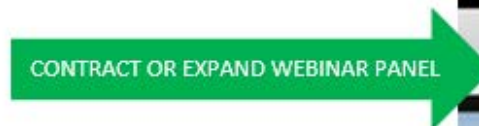
# Employees vs. Independent Contractors

(Why it Matters and What the Future Looks Like)

Presented by Benefit Comply  
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## Employees vs. Independent Contractors

- Welcome! We will begin at 3 p.m. Eastern
- 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.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



## Employees vs. Independent Contractors

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- MJ Insurance
- Parker, Smith & Feek, Inc.
- PayneWest Insurance
- Pritchard & Jerden
- R&R/The Knowledge Brokers
- RCM&D
- RHSB
- The Rowley Agency
- Starkweather & Shepley Insurance Brokerage
- Sterling Seacrest Partners
- Woodruff Sawyer
- Wortham Insurance & Risk Management

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# Agenda

## Employee vs. Independent Contractor

- Overview
- Examples
- Why does it matter?
- It's complicated
- MEWAs and Association plans
- Peering into the Future

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## Employee vs. Independent Contractor: Overview

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# Employee vs. Independent Contractor – High Level Differences



Employee	Independent Contractor
Receives W-2 income	1099 income
Eligible for benefits	Not eligible for benefits
Annual reviews	Not part of formal employee annual review
Expenses reimbursed	Different process, if any, for reimbursing expenses

# Employee vs. Independent Contractor – High Level Differences



**Agency Temps**

**Onsite Vendor Staff**

<b>Employee</b>	<b>Independent Contractor</b>
Receives W-2 income	1099 income
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# IRS Definition

- The IRS has traditionally relied on a 20-factor test
- In recent years the IRS has moved to a review of 3 areas:
  1. Behavioral Control
  2. Financial Control
  3. Type of Relationship
- The review looks at the degree of:
  - control (suggesting employee status), and
  - independence (suggesting independent contractor status)



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## Employee vs. Independent Contractor: Examples

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# Employee vs. Independent Contractor – Examples

## **IRS Publication 15-A: Employer's Supplemental Tax Guide**

- Includes current IRS definition of common law employee
- Provides examples in different industries:
  - Building and Construction
  - Trucking
  - Computer
  - Automobile
  - Attorney
  - Taxicab
  - Salesperson

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# Employee vs. Independent Contractor – IRS Pub 15-A, Building & Construction Industry

## Example #2

- Milton Manning, an experienced tile setter, orally agreed with a corporation to perform full-time services at construction sites.
- He uses his own tools and performs services in the order designated by the corporation and according to its specifications.
- The corporation supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers' compensation insurance on him.

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# Employee vs. Independent Contractor – IRS Pub 15-A, Building & Construction Industry

## Example #2

- He doesn't have a place of business or hold himself out to perform similar services for others.
- Either party can end the services at any time.
- **Milton Manning is an employee of the corporation.**

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# Employee vs. Independent Contractor – IRS Pub 15-A, Computer Industry Example

- Steve Smith, a computer programmer, is laid off when Megabyte, Inc., downsizes.
- Megabyte agrees to pay Steve a flat amount to complete a one-time project to create a certain product.
- It isn't clear how long that it will take to complete the project, and Steve isn't guaranteed any minimum payment for the hours spent on the program.
- Megabyte provides Steve with no instructions beyond the specifications for the product itself.

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# Employee vs. Independent Contractor – IRS Pub 15-A, Computer Industry Example

- Steve and Megabyte have a written contract, which provides that Steve is considered to be an independent contractor, is required to pay federal and state taxes, and receives no benefits from Megabyte.
- Megabyte will file Form 1099-MISC, Miscellaneous Income, to report the amount paid to Steve.
- Steve works at home and isn't expected or allowed to attend meetings of the software development group.
- **Steve is an independent contractor.**

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# Employee vs. Independent Contractor – IRS Pub 15-A, Trucking Industry Example

- Rose Trucking contracts to deliver material for Forest, Inc., at \$140 per ton.
- Rose Trucking isn't paid for any articles that aren't delivered.
- At times, Jan Rose, who operates as Rose Trucking, may also lease another truck and engage a driver to complete the contract.
- All operating expenses, including insurance coverage, are paid by Jan Rose.

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# Employee vs. Independent Contractor – IRS Pub 15-A, Trucking Industry Example

- All equipment is owned or rented by Jan and she is responsible for all maintenance.
- None of the drivers are provided by Forest, Inc.
- **Jan Rose, operating as Rose Trucking, is an independent contractor.**



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## Employee vs. Independent Contractor: Why Does it Matter?

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# Employee vs. Independent Contractor – Why does it matter?

**Common Law Employee status is generally required for preferred tax treatment under the Internal Revenue Code**

- Group medical plans
- Group term life insurance
- Cafeteria Plans
- HRAs

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# Employee vs. Independent Contractor – Why does it matter?

**Common Law Employee status is generally required for preferred tax treatment under the Internal Revenue Code**

- Group medical plans
- Group term life insurance
- Cafeteria Plans
- HRAs

**These tax benefits are generally NOT available directly to:**

- Independent contractors
- >2% shareholders
- Partners
- LLC members

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# Employee vs. Independent Contractor – Why does it matter?

## Affordable Care Act!!!

- The employer mandate requires that Applicable Large Employers make offers of coverage to 95% of their full time Common Law Employees or pay a penalty tax
- No ... the employer mandate has NOT disappeared

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# §4980H Collection Efforts

- **Two Separate Employer Mandate Rules and Penalties**
  - §4980H(a)
    - ALEs must offer minimum essential coverage to 95% (70% in 2015) of full-time employees and their dependent children each month
    - Penalty applies if any full-time employee enrolls through a public Exchange and qualifies for a tax subsidy (receives a PTC)
    - 2017 Penalty - \$188.33/mo. (\$2260/yr) times number total number of full-time employees not counting first 30 (first 80 in 2015)
  - §4980H(b)
    - ALEs must offer coverage that provides minimum value AND is affordable to all full-time employees each month
    - Penalty applies for each full-time employee who enrolls through a public Exchange and qualifies for a tax subsidy (receives a PTC)
    - 2017 Penalty - \$282.50/mo. (\$3390/yr) for each full-time employee who purchases subsidized coverage through a public Marketplace/Exchange

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# Affordability – Employer Mandate

- **Solve for (a) first:**
  - You must be able to answer the question “Has the employer set eligibility rules so that there will never be more than 5% of full-time employees not offered coverage in a given month?”
- **§4980H(a) payment examples – 250 full-time employees**
  - Margin of error – 12.5 full time employees (5% of 250)
  - What if you classify 15 actual full-time employees as independent contractors and do not offer coverage?
  - Offers coverage to less than 95 of FT for one month:
    - $220 \times \$188.33 = \$41,133.33$
  - Offers coverage to less than 95% of FT for entire year:
    - $220 \times \$2260.00 = \$497,200.00$

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# Employee vs. Independent Contractor – Why does it matter?

## Insurance Coverage

- Most employer sponsored insurance policies limit coverage to common employees of the plan sponsor
- An Employer who enrolls an independent contractor in an insurance plan may end up acting as the insurer when the carrier denies the claim

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# Employee vs. Independent Contractor – Why does it matter?

## Other Implications

- Determining whether other laws apply, e.g., COBRA, FMLA, Medicare Secondary Payer
- Employment tax liability
- Workers compensation
- Coordination between benefits, payroll, finance/accounting, etc.



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# Employee vs. Independent Contractor – Why does it matter?

## Advice for minimizing risk

- Seek advice from employment lawyers
- Put the parties' intention in writing
- Inform insurance carrier of your position and/or seek their approval
- Collaborate and share information with others in your organization who might work with payroll withholding, Workers Compensation, Temp Agencies, etc.
- Don't overestimate your ability to influence the outcome
- Explain risk to your boss / client


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## Employee vs. Independent Contractor: it's complicated

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# Employee vs. Independent Contractor – it's complicated

**Part of what makes this confusing is that  
different laws define employees in  
different ways.**



See next slide for  
example!



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# Employee vs. Independent Contractor – it’s complicated

The same worker may be classified as an "employee" for CA wage and hour law and an independent contractor under the Internal Revenue Code.

Law	Test
California Wage & Hour Law <i>(as interpreted in 2018)</i>	Worker is presumed to be an employee unless hiring entity establishes worker: <ul style="list-style-type: none"><li>• is free from direction and control of hiring entity</li><li>• performs work outside of hiring entity’s business</li><li>• is customarily engaged in an independently established trade or business that is the same as the work performed for the hiring entity</li></ul>
Internal Revenue Code	To determine whether a worker is a common law employee, the IRS reviews numerous facts in three general areas: <ul style="list-style-type: none"><li>• Does the hiring entity generally have “<b>behavioral control</b>” over the worker?</li><li>• Does the hiring entity have “<b>financial control</b>” over the worker?</li><li>• What “<b>type of relationship</b>” exists?</li></ul>

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# Employee vs. Independent Contractor – it's complicated

## Our Advice

### Don't worry about new and different definitions

- Many of you will be hearing about how the California case has changed the way we define "employee" in the U.S.
- Blog posts and articles will say that it is now much more likely that a worker is a common law employee unless the business can prove otherwise.
- That's not true. Ignore this – for now.

### Do worry about employee classification

- You will create bad facts if you provide benefits to Workers who you (or someone else in your business) want to treat as Independent Contractors
- Wishing and hoping someone is an Independent Contractor (when they really aren't) can cause all sorts of problems:
  - ACA penalties
  - No coverage under insurance
  - Failure to understand that a law (example: Medicare Secondary Payer Rules) applies to you
  - Etc.

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# Employee vs. Independent Contractor – it's complicated

## A few words about joint employment ...

- “Joint Employment” is a concept used in Civil Rights law and some other laws where the objective is to have more than one responsible party.
- The closest most employee benefits professionals will come to joint employment issues is when they are applying FMLA rules.
- There is no such thing as “joint employment” under ERISA or the Tax Code.

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## Employee vs. Independent Contractor: MEWAS and Association Plans

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# Employee vs. Independent Contractor – MEWAs & Association Plans

## MEWAs

- Employer-sponsored Group Health Plans with non-employees as Participants will generally be treated as MEWAs
- ERISA preemption goes away partly for insured MEWAs
- ERISA preemption goes away almost entirely for self-funded MEWAs
- State regulation over MEWAs may be significant (or non-existent), depending on the particular State
- Large group or small group status will almost always be determined at the “employer” level rather than the “association” level



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# Employee vs. Independent Contractor – MEWAs & Association Plans

## Proposed Association Plan Rules

- Lower threshold for forming an association that will be treated as the “Employer”
- Providing insurance to groups of workers is a legitimate basis for forming association
- Large group or small group status is determined at the “Association” level rather than the “Employer” level
- States will continue to have authority to regulate self-funded MEWAs
- The proposed rule prohibits premium differences between individual employers based on health status
- Rules currently under review at Office of Management and Budget

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# Employee vs. Independent Contractor – MEWAs & Association Plans

## Proposed Association Plan Rules – Our Take

- The proposed rules don't really change the definition of "employee" for purposes of ACA and other benefits rules.
- There will likely be a number of new benefit offerings when the proposed rules are finalized.
- Review all offerings very carefully with your Broker.

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## Employee vs. Independent Contractor: Peering into the future

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# What Does the Future Look Like?

- **States** will look for ways to increase the chance that “gig workers” will be classified as employees for State law reasons such as employment tax collection.
- **Employers** will look for ways to include “gig workers” and independent contractors in their benefit plans without increasing the risk that those workers will be classified as employees
- **Association plans** will become more popular

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- Kapnick Insurance Group
- Lipscomb & Pitts Insurance
- LMC Insurance & Risk Management
- Lyons Companies
- The Mahoney Group
- MJ Insurance
- Parker, Smith & Feek, Inc.
- PayneWest Insurance
- Pritchard & Jerden
- R&R/The Knowledge Brokers
- RCM&D
- RHSB
- The Rowley Agency
- Starkweather & Shepley Insurance Brokerage
- Sterling Seacrest Partners
- Woodruff Sawyer
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