

If It Quacks Like a Duck, Is It an Employee?

Determining the Wage Status of Workers
Under the Fair Labor Standards Act
and IRS Regulations

Topics Covered Today

- Employees vs. Independent Contractors
- Temporary Employees vs. Regular Employees
- Employees vs. Volunteers
- Exempt vs. Non-Exempt Employees

Employees vs. Independent Contractors



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Federal Wage and Hour Laws

- The Fair Labor Standards Act (FLSA) requires:
 - Minimum wage
 - Overtime
 - Reimbursement for business expenses

Employee Status



- Federal wage and hour laws apply only to “Employees,” not to “Independent Contractors”
- Independent contractors are not covered by workers’ compensation or unemployment insurance.

Hypothetical

- Maya works for a shelter and is responsible for housekeeping duties.
- Is she an employee or an independent contractor?
- Do we have enough information to decide?



So, How Do We Decide?

Employee?

Independent Contractor?

← Maya →

Employee Status Checklist

1. The extent to which the services rendered are an integral part of the principal's business;
2. The permanency of the relationship;
3. The amount of individual investment in facilities and equipment;
4. The opportunities for profit and loss for the person doing the work;



Employee Status Checklist

5. The degree of independent business organization and operation;
6. The nature and degree of control by the principal; and
7. The degree of independent initiative, judgment or foresight exercised by the one who performs the services.

Remember, it is the job that determines the status, not the person.

The Spectrum

Independent
Contractor

Employee

- Sets own schedule
- Little supervision
- Buys own tools
- Submits invoices

- Shelter sets schedule
- Close supervision
- Shelter provides tools
- Submits time cards

Spectrum

- Independent Contractor

- Employee



- Therapist

- Clerical worker

- Lawn Service

- Administrator

- Plumber

- Cook

Back to Our Hypothetical



- Maya works for a shelter and is responsible for housekeeping duties.
- Based on these facts, do we know enough about Maya's job to know whether she is an employee or an independent contractor?
- What do we need to know about the job?

Maya's job



- Maya comes in every other day.
- She sets her own schedule, but she tells the shelter administrator when she will be there.
- She is paid by the hour.
- The shelter pays for the cleaning supplies.
- The administrator does spot checks to make sure Maya is doing a good job.

Independent Contractors: 20 Questions

1. Is the individual's work vital to the company's core business?
2. Did the company train the individual to perform tasks in a specific way?
3. Do you (or can you) instruct the individual as to when, where, and how the work is performed?
4. Do you (or can you) control the sequence or order of the work performed?
5. Do you (or can you) set the hours of work for the individual?



Independent Contractors: 20 Questions, cont.

6. Do you (or can you) require the individual to perform the work personally?
7. Do you (or can you) prohibit the individual from hiring, supervising, and paying assistants?
8. Does the individual perform regular and continuous services for you?
9. Does the individual provide services on a substantially full-time basis?
10. Is the company the sole or major source of income for the individual?



Independent Contractors: 20 Questions, cont.

11. Is the work performed on your premises?
12. Do you (or can you) require the individual to submit regular reports, either written or oral?
13. Does the company pay the individual by the hour, week, or month?
14. Does the company pay the individual's travel and business expenses?
15. Are tools or equipment furnished for the individual?



Independent Contractors: 20 Questions, cont.

16. Does the individual have a significant investment in facilities, tools or equipment?
17. Can the individual realize a profit or loss from his or her services to the company?
18. Does the individual make his or her services to the general public?
19. Can the individual terminate the relationship without liability?
20. Does the company have the right to discharge the individual at any time?



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A Scenario

Rosa is fluent in Spanish and has recently begun working at the local crisis intervention helpline helping to interpret calls from and to communicate with Spanish-speaking clients. When Rosa began her position, she was trained on how to answer calls, how to assess the needs of callers, and when and how to refer callers to the necessary resources. Rosa is "on call" Wednesday to Sunday for eight hours each day and on her "off" days as she is needed. If no call comes in, she is not required to report to the helpline center. When a call does come in, Rosa is paid for the amount of time she spends with the caller. If Rosa must meet with the client at a different location, Rosa is responsible for her travel expenses, but she is still compensated for the time she spent assisting the Spanish-speaking client.

What Is Important Here?

Rosa is fluent in Spanish and has recently begun working at the local crisis intervention helpline helping to interpret calls from and to communicate with Spanish-speaking clients. When Rosa began her position, she was trained on how to answer calls, how to assess the needs of callers, and when and how to refer callers to the necessary resources. Rosa is "on call" Wednesday to Sunday for eight hours each day and on her "off" days as she is needed. If no call comes in, she is not required to report to the helpline center. When a call does come in, Rosa is paid for the amount of time she spends with the caller. If Rosa must meet with the client at a different location, Rosa is responsible for her travel expenses, but she is still compensated for the time she spent assisting the Spanish-speaking client.

Temporary Employees vs. Regular Employees

Temporary Employees

- Covered by federal wage and hour laws
- Employer determines how long the person is employed.
- Otherwise, the same as an employee.

Volunteers vs. Employees

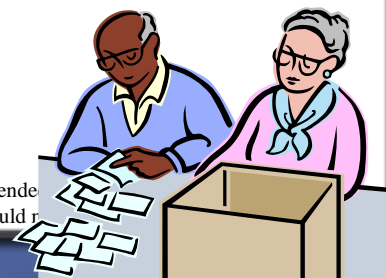
Volunteers vs. Employees

Similarities

- The rights of the individual with the organization
- The application of OSHA policies
- Insurance coverage
- The requirement to comply with the organization's code of conduct

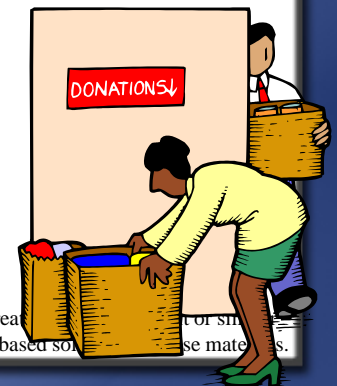
- Ali is a graduate student who is studying to be a social worker. He has one masters degree and is working on his second.
- He volunteers three afternoons a week as an assistant shelter director.
- Ali's school placed him with you and he receives a stipend each semester.
- During his shifts, he handles problems that the director would normally handle.
- He is the only reason that the director has time to focus on fund-raising.
- Is Ali an employee or a volunteer?

- The Department of Labor follows the Supreme Court's guidance in the case of individuals serving as unpaid volunteers.
- Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives (without contemplation of pay) are NOT employees.



Can One Person Be an Employee AND a Volunteer?

- An employee of a nonprofit may volunteer at his or her own employer if
 - The employee's services to the nonprofit are truly voluntary (no promises or threats)
 - The volunteer activities are different from the employee's regular duties.
 - The employee knows the volunteer work is unpaid (whether in cash or in kind)
 - The activities are predominately for the employee's own benefit
 - The employee does not take the place of a regular employee or do work that usually would be done by another employee
 - The employee does not "volunteer" during his or her regular working hours or usual overtime hours
 - The time spent volunteering is minimal when compared to the employee's regular hours.



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An unpaid “intern” is not covered by the FLSA in the following circumstances:

- Intern training is similar to vocational or academic training;
- Training is for the benefit of the intern;
- The intern does not displace regular employees;
- The employer provides training but derives no immediate advantage from the intern’s activities;
- The intern is not necessarily entitled to a job at the end of his training; and
- The employer and intern understand that the intern is not entitled to wages for the time spent in training.

- So, is Ali an employee or a volunteer?
- If the shelter pays his stipend, he is an employee.

- Volunteers are not compensated for their work time.
- In most cases, an organization will reimburse a volunteer for any required travel activities, and/or other necessary and reasonable out-of-pocket expenses incurred in carrying out an assignment.

Can you tell the difference?

Imagine that an employer asks its employees to volunteer to work at a 5K race sponsored by the employer. Must the employees be compensated for the time they spend at the race?



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Can you tell the difference?

So, the employer here must compensate employees spent volunteering during their normal working hours or when the volunteer work performed is similar to their regular duties. The employer need NOT compensate employees for time spent performing work that is not similar to their regular duties if that work is voluntarily performed outside of their normal hours.

FLSA Exemptions from Overtime

Examples of Exemptions from Minimum Wage and/or Overtime

- Executive Employees
- Administrative Employees
- Learned or Creative Professionals
- Computer Professionals
- Outside Sales

Questions?