Employee or Contractor
How to decipher the difference
Hello!

I’m Elizabeth (Liz) Thompson
she/her
I’m here because I have an unpopular opinion...
   I like HR
AGENDA AND GOALS
AGENDA AND GOALS

Define Key Worker Categories
How to Classify Contractors and Employees
Setting Organizational Policies and Practices
Risks of Worker Misclassification
Share Resources
Determination of the [employer-employee] relationship cannot be based on isolated factors or upon a single characteristic, but depends upon the circumstances of the whole activity.

-US Department of Labor
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DEFINE

Key Worker Categories
DEFINITIONS

**Independent Contractor**
Someone who is hired for a specific set of tasks over a time frame. They are self-employed and operate their business/service independently from the organization that hired them.

**Employee (FT/PT)**
Someone who works for and is managed by board or staff of an organization and has an ongoing and essential role in the operations of that organization.

**Temporary Employee**
Someone who works for and is managed by board or staff of an organization over a time frame determined by the organization.
DEFINITIONS: EXAMPLES

Independent Contractor
- Artist Commission
- Exhibition Installation
- Maintenance Repair
- Workshop Facilitator
- Bookkeeper
- Teaching Artist
- Event Staff

Employee (FT/PT)
- Operations Assistant
- Events Coordinator
- Executive Director
- Programs Manager
- **Bookkeeper**
- **Teaching Artist**

Temporary Employee
- Intern
- **Bookkeeper**
- **Teaching Artist**
- **Event Staff**
Classify
Independent Contractors and Employees
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES

Type of Relationship

Behavioral Control

Financial Control
Type Relationship
Refers to facts that show how the worker and organization perceive their relationship to each other.
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
TYPE OF RELATIONSHIP

Factors
- **Written contracts**
- Employee benefits
- Permanency of the relationship
- Services provided as key activity of the organization

<table>
<thead>
<tr>
<th>INDEPENDENT CONTRACTOR</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract Outlining Scope of Work</td>
<td>Offer Letters, Position Descriptions</td>
</tr>
</tbody>
</table>
When do workers sign a contract drafted by the organization instead of just sending a proposal and invoice themselves?
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
TYPE OF RELATIONSHIP

Organizational Contracts v. Proposals and Invoicing

- IRS has no preference.
- Set organizational protocols to determine a process.

What about memorandum of understandings (MOU)?
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
TYPE OF RELATIONSHIP

Factors

- Written contracts
- Employee benefits
- Permanency of the relationship
- Services provided as key activity of the organization

<table>
<thead>
<tr>
<th>Factors</th>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid Time Off</td>
<td>Ineligible</td>
<td>Eligible</td>
</tr>
<tr>
<td>Insurance Coverage</td>
<td>401(b) Retirement Contributions</td>
<td>Ineligible</td>
</tr>
</tbody>
</table>
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
TYPE OF RELATIONSHIP

Factors

- Written contracts
- Employee benefits
- **Permanency of the relationship**
- Services provided as key activity of the organization

<table>
<thead>
<tr>
<th>INDEPENDENT CONTRACTOR</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specified Period</td>
<td>Indefinitely (Unless Temporary)</td>
</tr>
</tbody>
</table>
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
TYPE OF RELATIONSHIP

Factors

- Written contracts
- Employee benefits
- Permanency of the relationship
- Services provided as key activity of the organization
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES

Behavioral Control

Type of Relationship

Financial Control
Behavioral Control

Refers to whether there is a right to direct or control how the worker does the work.
### Factors

- **Type of instructions given**
  - Degree of instruction
  - Evaluation systems
  - Training

<table>
<thead>
<tr>
<th></th>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determines when, where and how to do the work</td>
<td>Self</td>
<td>Organization</td>
</tr>
<tr>
<td>Provides tools and equipment to do the work</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determines workers to assist with the work</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Factors

- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

### CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES

**BEHAVIORAL CONTROL**

<table>
<thead>
<tr>
<th>Factors</th>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less/None</td>
<td>Less/None</td>
<td>More</td>
</tr>
</tbody>
</table>
## Classify: Internal Revenue Service (IRS) Categories

### Behavioral Control

#### Factors
- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

<table>
<thead>
<tr>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Measured by outcomes</td>
<td>Measured by progress and outcomes</td>
</tr>
</tbody>
</table>
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES
BEHAVIORAL CONTROL

Factors

- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

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<thead>
<tr>
<th>INDEPENDENT CONTRACTOR</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self</td>
<td>Organization</td>
</tr>
</tbody>
</table>
## Events Responsibilities

<table>
<thead>
<tr>
<th>Provide lighting and sound tech support for the annual awards celebration.</th>
<th>Coordinate tech needs for program events.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Set up event space for the alumni potluck with seating for 50 people.</td>
<td>Assist with event setup in accordance with organizational and facility policies.</td>
</tr>
<tr>
<td>Identify areas of improvement for event registration processes.</td>
<td>Improve and manage event registration processes.</td>
</tr>
</tbody>
</table>
## Teaching Artist Responsibilities

<table>
<thead>
<tr>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Develop and facilitate a 1.5 hour workshop on zine making.</td>
<td>Develop workshops for the season that incorporate the organization’s exhibition themes.</td>
</tr>
<tr>
<td>Participate in a promotional video about the program.</td>
<td>Develop program promotional material.</td>
</tr>
<tr>
<td>Serve as a mentor for one youth group project.</td>
<td>Lead youth group project and coordinate mentor component.</td>
</tr>
</tbody>
</table>
CLASSIFY: INTERNAL REVENUE SERVICE (IRS) CATEGORIES

Type of Relationship

Behavioral Control

Financial Control
Financial Control
Refers to whether or not the organization has the right to control the economic aspects of the worker’s job.
Factors

- **Significant investment**
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

<table>
<thead>
<tr>
<th>INDEPENDENT CONTRACTOR</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>More</td>
<td>Less</td>
</tr>
</tbody>
</table>
## Factors

- **Significant investment**
- **Unreimbursed expenses**
- **Opportunity for profit or loss**
- **Services available to the market**
- **Method of payment**

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<tr>
<th>Factors</th>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>More/All</td>
<td></td>
<td>Less/None</td>
</tr>
</tbody>
</table>
Factors

- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

<table>
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<tr>
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<th>INDEPENDENT CONTRACTOR</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss</td>
<td>High Loss Probability</td>
<td>Low / No Loss</td>
</tr>
<tr>
<td>Probability</td>
<td></td>
<td>Probability</td>
</tr>
</tbody>
</table>
Factors

- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

INDEPENDENT CONTRACTOR

EMPLOYEE

Yes

Limited
### Factors
- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

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<tr>
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<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Method of payment</td>
<td>Flat Fee or Hourly</td>
<td>Regular Intervals</td>
</tr>
<tr>
<td>Taxes Withheld</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
INTERNAL REVENUE SERVICE (IRS) CATEGORIES

Type of Relationship

Behavioral Control

Financial Control
Policies and Practices

Bringing on Independent Contractors and Employees
Personnel Policy

- Categories of employees
- Outside employment and organizational representation
- Payday procedures
- Workday hours
- Workplace conditions
- Employee benefits descriptions
- Employee performance protocols
POLICIES AND PRACTICES FOR EMPLOYEES ONLY

- staff@ email list
- Organizational chart
- Bio and photo on website
- Access to payment methods
- Sign personnel policy
- Sign up for benefits and payroll
- Develop a performance plan
- Solidify work schedule
POLICIES AND PRACTICES FOR EMPLOYEES AND CONTRACTORS - DEPENDING

- Individual organizational email
- Access to the office / facility
- Dedicated working space
- Provide equipment
- Business cards
- Access to internal platforms, systems, etc.
- Sign relevant HR documents
- Participate in staff meetings / activities
Misclassification
For Independent Contractors and Employees
10-20% Of employers misclassify at least one employee

30% Estimated cost increase to classify workers as employees

More than 50% Of the workforce is comprised of freelancers
CONSEQUENCES: MISCLASSIFICATION

May be held liable for employment taxes for the misclassified worker

The government has been known to target organizations for audits that show substantial payments to independent contractors.
But what if someone asks to be classified as an independent contractor?
Summary

How to Decipher the Difference Between Independent Contractors and Employees
Determination of the [employer-employee] relationship cannot be based on isolated factors or upon a single characteristic, but depends upon the circumstances of the whole activity.

-US Department of Labor
INTERNAL REVENUE SERVICE (IRS) CATEGORIES

- Behavioral Control
- Type of Relationship
  - What type of contracts are used?
  - How permanent is the relationship?
  - How essential is the work?
- Is evaluation about progress, outcomes, or both?
- How much instruction is needed?
- Does the organization provide training?
- How is the worker paid?
- Financial Control
  - How much investment does the worker have?
  - Will the worker incur unreimbursed expenses?
  - Can the worker freely provide services to the market?
Resources
RESOURCES

CultureWorks

**Internal Revenue Service (IRS)**
Form SS-8

PA Department of Labor

Philadelphia Foundation’s **Key Skills Hub**

Philadelphia Volunteer Lawyers for the Arts (PVLA)

**Philly Nonprofit HR Group (Philly NPHR)**
*Conduct regular meetups to discuss HR challenges and share resources*
*Must be with a nonprofit in Greater Philadelphia and in a role that manages HR*
*Connect with Liz if interested*

**Society for Human Resource Management (SHRM)**

US Department of Labor
Thanks!

ANY QUESTIONS?

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