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Independent Contractor vs. Employee Update



Learning Objectives

- Define Independent Contractor and Employee
- Multifactor Tests
- View from the Courts
- Fair Labor Standards Act (FLSA)
- Section 530 Relief and
- Settlement Programs (CSP and VCSP)
- Consequences of Misclassification



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Independent Contractor or Employee

Are You An Employee Or An Independent Contractor?

	Indicators of an Employee	-OR-	Indicators of an Independent Contractor
	Working for someone else's business		In business for themselves
	Generally, can only earn more by working additional hours		Can increase profit through business decisions
	Typically uses the employer's materials, tools and equipment		Typically provides their own materials, tools and equipment and uses them to extend market reach
	Typically works for one employer or may be prohibited from working for others		Often works with multiple clients
	Continuing or indefinite relationship with the employer		Temporary relationship until project completed
	Employer decides how and when the work will be performed		Decides how and when they will perform the work
	Employer assigns the work to be performed		Decides what work or projects they will take on

These are general concepts. All relevant facts about the work relationship should be considered as a whole, and the existence or absence of any particular fact does not require a particular outcome.

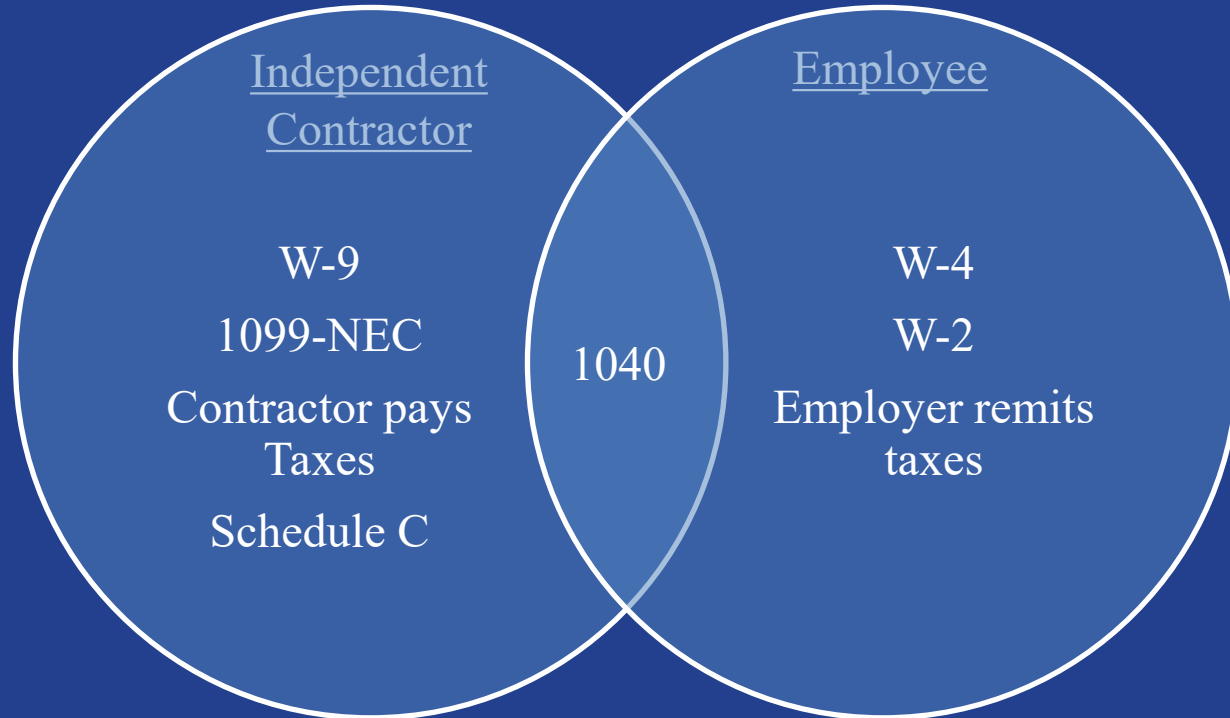
Why does correct classification matter?

- Affect on the gig economy worker
- Tax Revenue
- Employee Benefits
- Government Programs Eligibility
- Protections for worker who is misclassified





Independent Contractor vs. Employee





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IRS Common Law

IRS Common Law Factors

- Behavioral control: covers facts that show if the business has a right to direct and control what work is accomplished and how the work is done, through instructions, training, or other means.
- Financial control: covers facts that show if the business has a right to direct or control the financial and business aspects of the worker's job.
- Relationship of the parties: covers facts that show the type of relationship the parties had.





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Multi Factor Tests



Revenue ruling 87-41

20 Factor Test

- 1-Instructions
- 2-Training
- 3-Integration
- 4-Services rendered personally
- 5-Hiring, supervising and paying assistants
- 6-Continuing relationship
- 7-Set hours of work
- 8-Full-time required
- 9-Performing work on the employer's premises
- 10-Order or sequence set
- 11-Oral or written reports
- 12-Payment by hours, week, month
- 13-Payment of business and/or traveling expenses
- 14-Furnishing of tools and materials
- 15-Significant investment
- 16-Realization of profit or loss
- 17-Working for more than one company at a time
- 18-Making service available to the general public
- 19-Right to discharge
- 20-Right to terminate

Santos v. Comm'r, T.C. Memo. 2020-88.

Key Facts:

- Leticia C. Santos owned Campos Cleaning Co., an unincorporated business
- Campos Cleaning provided cleaning services to apartment complexes
- Santos hired workers to clean apartments
- IRS determined workers were employees; Santos owed \$125,799 in employment taxes (2008-2010)

Issue:

- Should Santos' workers be classified as employees or independent contractors for Federal employment tax purposes?



Santos v. Comm'r, T.C. Memo. 2020-88.

Factors Considered:

- Right to control (most important)
- Investment in work facilities
- Opportunity for profit or loss
- Right to discharge workers
- Relationship permanency
- Parties' belief about relationship





Santos v. Comm'r, T.C. Memo. 2020-88.

Key Findings:

- Santos did not exercise sufficient control over workers; Santos rarely supervised cleaning work directly.
- Workers used own supplies and transportation, set own pace, could decline jobs or hire assistants. Workers had prior experience; needed no training. Many had only limited, transitory relationships with Santos.
- Santos issued workers Forms 1099-MISC

Decision for Petitioner (Santos)

Cardiovascular Center LLC v. Comm'r, T.C. Memo. 2023-64.

Key Facts:

- Workers included an office manager (Janine Smith) and medical assistants
- Workers were paid hourly, submitted timesheets, and received cashier's checks
- Petitioner did not file Forms 1099 or W-2 or pay employment taxes for the workers

Issue:

- Were the workers employees or independent contractors during the tax periods at issue?



Cardiovascular Center LLC v. Comm'r, T.C. Memo. 2023-64.

Factors Considered:

- Degree of control exercised by principal over worker
- Which party invests in work facilities
- Worker's opportunity for profit or loss
- Whether principal can discharge worker
- Whether work is part of principal's regular business
- Permanency of relationship
- Relationship the parties believed they created



Cardiovascular Center LLC v. Comm'r, T.C. Memo. 2023-64.

Key Findings:

- Petitioner exercised significant control over workers
- Petitioner provided facilities, tools and supplies
- Workers had no opportunity for profit or loss, were paid set hourly rate
- Work performed was part of petitioner's regular business
- Workers had a permanent, long-term relationship with petitioner

Decision for Respondent (IRS)





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Fair Labor Standards Act (FLSA)



Fair Labor Standards Act (FLSA)

- DOL issued new regulations, published January 10, 2024

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>

- Effective March 11, 2024
- Intended to protect workers
- Provides updated guidance on proper classification



Fair Labor Standards Act (FLSA)

- Economic Reality Six Factors:
 - Opportunity for profit or loss depending on managerial skill
 - Investments by the worker and the potential employer
 - Degree of permanence of the work relationship
 - Nature and degree of control
 - The extent to which the work performed is an integral part of the potential employer's business
 - Skill and initiative.

Pediatric Impressions Home Health, Inc. v. Comm'r, T.C. Memo. 2022-35.

Key Facts:

- Petitioner provided at-home nursing services, hiring nurses to perform the services
- Petitioner unilaterally began treating many nurses as independent contractors starting in 2016
- Nurses' job duties and petitioner's supervision remained the same after the change

Issue:

- Whether the nurses were properly classified as petitioner's employees for employment tax purposes during 2016-2018



Pediatric Impressions Home Health, Inc. v. Comm'r, T.C. Memo. 2022-35.

Factors Considered:

- The 5th Circuit considers 5 factors to determine worker classification:
 - Degree of control exercised by alleged employer
 - Worker's opportunity for profit/loss
 - Relative investments of worker and alleged employer
 - Permanency of relationship
 - Skill/initiative required in job performance



Pediatric Impressions Home Health, Inc. v. Comm’r, T.C. Memo. 2022-35.

Key Findings:

- Control: Petitioner exercised significant control over nurses
- Profit/Loss: Nurses had little opportunity for profit/loss
- Investments: Petitioner made the main investments
- Permanency: Indefinite, permanent working relationship
- Skill/Initiative: Petitioner responsible for business aspects requiring skill/initiative

Decision for Respondent (IRS)





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Section 530 Relief



Section 530 Relief

- A relief provision that terminates a taxpayer's employment tax liability with respect to an individual not treated as an employee
- provides relief from employment tax liabilities for the service recipient, regardless of the proper classification of the workers
- Applies to taxpayers in cases involving determinations of employment status, i.e. worker classification cases
- Does not determine a worker to be an independent contractor

Section 530 Relief

- The Employer
 - Provides relief from employment tax liabilities associated with the class of workers for which relief has been granted.
- The Worker
 - Section 530 Relief does not change status of worker – the worker can still be determined to be employee through some other means (i.e. SS-8 determination)



Section 530 Relief

- Statutory Requirements:
 - Reporting Consistency – The taxpayer must have timely filed the requisite information returns consistent with its treatment of the worker as a non-employee
 - Substantive Consistency – If the taxpayer or predecessor treated the worker, or any worker holding a substantially similar position, as an employee at any time after December 31, 1977, the taxpayer will not be eligible for relief.
 - Reasonable Basis – The taxpayer must have reasonably relied on one of the following three “safe harbors”: 1) prior audit; 2) judicial precedent; or 3) industry practice





IRC § 3121(d)(3)

(d) EMPLOYEE

For purposes of this chapter, the term “employee” means—

- (1) any officer of a corporation; or
- (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or
- (3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—
 - (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;
 - (B) as a full-time life insurance salesman;
 - (C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or
 - (D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term “employee” under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or

REDI Foundation, Inc. v. Comm'r, T.C. Memo. 2022-34.

Key Facts:

- Richard M. Abraham founded The REDI Foundation in 1980 as a 501(c)(3)
- Abraham served as board member and officer, had complete control over online real estate development course offered through the Foundation
- Abraham frequently worked 60+ hours/week on the course, which was the Foundation's only activity and source of income in 2014
- Foundation paid Abraham \$120,000 in 2014 but did not file employment tax returns or treat him as an employee

Issue:

- Whether Abraham should be classified as an employee of the Foundation for employment tax purposes in 2014



REDI Foundation, Inc. v. Comm'r, T.C. Memo. 2022-34.

Factors Considered:

- Statutory definition of employee includes any corporate officer
- Exception for officers who perform only minor services and receive no remuneration
- Whether officer provides services in dual capacity as both employee and independent contractor
- Common law factors like degree of control are obviated by statutory employee status



REDI Foundation, Inc. v. Comm'r, T.C. Memo. 2022-34.

Key Findings:

- Abraham provided significantly more than minor services that generated the Foundation's entire revenue
- No evidence of valid independent contractor relationship separate from Abraham's role as officer
- Foundation's lack of control over Abraham does not override his statutory employee status as an officer

Decision for Respondent (IRS) (Abraham was an employee)





Form SS-8

- Requested only in order to resolve federal tax matters
- Request a determination of the status of a worker
- Workers and businesses can file

Form SS-8
(Rev. December 2023)

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

OMB No. 1545-0044
For IRS Use Only:
Case Number:
Earliest Receipt Date:

Department of the Treasury
Internal Revenue Service
Go to www.irs.gov/FormSS8 for instructions and the latest information.

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named below to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named below. The information can only be disclosed to assist with the determination process. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. If you do not want this information disclosed to other parties, do not file Form SS-8.

IMPORTANT THINGS YOU SHOULD KNOW

- The Form SS-8 must be fully completed. If you provide incomplete information, we may not be able to process your request.
- All questions in Parts I through IV must be explained with clear concise answers.
- Part V must be completed if the worker provides a service directly to customers or is a salesperson.
- If you cannot answer a question, enter "Unknown" or "Does not apply."
- If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.
- You MUST include copies of the Forms W-2, 1099-MISC, and/or 1099-NEC for each year you are contesting. See instructions.

Name of firm (or person) for whom the worker performed services
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)

Worker's name
Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)

Trade name
Firm's tax number
Firm's telephone number (include area code)

Worker's daytime telephone number
Worker's alternate telephone number
Worker's fax number
Worker's social security number
Firm's website
Firm's employer identification number
Worker's employer identification number (if any)

Note: If the worker is paid for services performed for a business or individual not listed above, enter the name, address, and taxpayer identification number of that business/individual who paid the worker, if known. Explain the relationship between the firm and the business/individual who paid the worker.

Part I General Information

1 This form is being completed by: ☐ Firm ☐ Worker
for services performed from beginning date ____/____/____ to ending date ____/____/____.

Caution: Filing Form SS-8 does not prevent the expiration of the time in which a claim for refund must be filed.

2 Explain your reasons for filing this form.
☐ You received a bill from the IRS ☐ You believe you erroneously received a Form 1099 or Form W-2
☐ You are unable to get workers' compensation benefits ☐ You were audited or are being audited by the IRS
☐ Other (specify) _____

Don't complete this form if payment was received for reasons unrelated to Form SS-8. See instructions.

Did you remember to answer all questions and refer to the Instructions for Form SS-8 at www.irs.gov/pub/irs-pdf/ss8.pdf?

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 16106T Form SS-8 (Rev. 12-2023)

Form SS-8 Determination

Form 14430-A (July 2013)		Department of the Treasury - Internal Revenue Service	
SS-8 Determination—Determination for Public Inspection			
Occupation Construction/Technical Services/Trades	Determination: ☒ Employee ☐ Contractor		
UILC	Third Party Communication: ☒ None ☐ Yes		
I have read Notice 441 and am requesting:			
☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"			
☐ Delay based on an on-going transaction			
☐ 90 day delay			
For IRS Use Only:			

Facts of Case

The worker is seeking a determination of worker classification for services performed for the firm as an autobody apprentice from June 2022 until December 2022. The worker filed a Form SS-8 when they erroneously received a 1099-NEC instead of a W-2.

The worker states that they were an employee of the firm because they performed all duties under the full direction of the firm owner using the shop's tools and their work hours were determined by the owner. There were no written agreements between the parties.

The firm states that they provide autobody and paint services. The worker provided general contract labor and auto repair services to the firm. The firm classified the worker as an independent contractor because the worker's schedule was based off their availability as they were still attending school and planned to move after graduation.

The firm states that they told the worker which project was theirs. The firm assigned projects to the worker as they came in, depending upon the worker's skill level and time availability. The shop manager determined the methods by which job duties were performed and assumed responsibility for problem resolution. There were no reports required of the worker. The worker's hours varied as their time was limited due to time restraints and availability. All services were performed at the firm's premises. The firm did not require the worker to attend any meetings or to perform services personally. Helpers and substitutes were not applicable. The worker states that they gained hands on experience through the work at the direction of the firm owner. The firm owner gave the worker job assignments, determined how they were to be performed, and assumed responsibility for problem resolution. The firm required the worker to provide verbal reports on progress of assigned tasks. Services were performed Monday through Thursday from 7am until 11am, and 8am until 4pm on Friday. The worker also performed services on some Saturdays when directed by the firm owner. The worker's job routine involved working on daily projects as directed by the owner using the shop's tools. Projects would vary day to day and the owner would deem priorities. All services were performed at the firm's shop premises. The owner provided direction as needed throughout the day. The firm required the worker to personally perform services.

- <https://www.irs.gov/businesses/ss-8-determinations-of-worker-classification>
- Computer Services Personnel
- Office Workers
- Tradespersons
- Companion Sitters



Form 8919 *Uncollected Social Security and Medicare Tax on Wages*

- Report employees share of the uncollected Social Security and Medicare taxes due on compensation

Form 8919		Uncollected Social Security and Medicare Tax on Wages		OMB No. 1545-0074	
Department of the Treasury Internal Revenue Service		Attach to your tax return. Go to www.irs.gov/Form8919 for the latest information.		2023 Attachment Sequence No. 61	
Name of person who must file this form. If married, complete a separate Form 8919 for each spouse who must file this form.				Social security number	

Who must file. You must file Form 8919 if all of the following apply.

- You performed services for a firm.
- You believe your pay from the firm wasn't for services as an independent contractor.
- The firm didn't withhold your share of social security and Medicare taxes from your pay.
- One of the reasons listed below under **Reason codes** applies to you.

Reason codes. For each firm listed below, enter in column (c) the applicable reason code for filing this form. If none of the reason codes apply to you, but you believe you should have been treated as an employee, enter reason code G and file Form SS-8 on or before the date you file your tax return.

A I filed Form SS-8 and received a determination letter stating that I am an employee of this firm.

C I received other correspondence from the IRS stating that I am an employee.

G I filed Form SS-8 with the IRS and haven't received a reply.

H I received a Form W-2 and a Form 1099-MISC and/or 1099-NEC from this firm for 2023. The amount on Form 1099-MISC and/or 1099-NEC should have been included as wages on Form W-2. (Don't file Form SS-8 if you select reason code H.)

(a) Name of firm	(b) Firm's federal identification number (see instructions)	(c) Enter reason code from above.	(d) Date of IRS determination of correspondence (MM/DD/YYYY) (see instructions)	(e) Check if Form 1099-MISC and/or 1099-NEC was received.	(f) Total wages received with no social security or Medicare tax withholding and not reported on Form W-2
1				☐	
2				☐	
3				☐	
4				☐	
5				☐	
6	Total wages. Combine lines 1 through 5 in column (f). Enter here and on Form 1040, 1040-SR, or 1040-NR, line 1g.				6
7	Maximum amount of wages subject to social security tax.				7
8	Total social security wages and social security tips (total of boxes 3 and 7 on Form(s) W-2, railroad retirement (RRRA) compensation (subject to the 6.2% rate), and unreported tips subject to social security tax from Form 4137, line 10. See instructions).				8
9	Subtract line 8 from line 7. If line 8 is more than line 7, enter -0- here and on line 10.				9
10	Wages subject to social security tax. Enter the smaller of line 6 or line 9.				10
11	Multiply line 10 by 0.082 (social security tax rate).				11
12	Multiply line 6 by 0.0145 (Medicare tax rate).				12
13	Add lines 11 and 12. Enter here. Include as tax on your annual tax return (Schedule 2 (Form 1040), line 6; Form 1040-SS, Part I, line 6; or Form 1040-SS (sp), Part I, line 6). See the instructions there.				13

For Paperwork Reduction Act Notice, see your tax return instructions. Cat. No. 377308 Form 8919 (2023)



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Settlement Programs

Collection Settlement Program (CSP)

- I.R.M 4.23.6
- An optional settlement program for taxpayers who are under a federal employment tax audit
- May be eligible if not qualified for relief under Section 530
- Permits the prospective reclassification of workers as employees in an examination if certain criteria are met
- Under IRC 3509, the program allows employment tax liability to be reduced for the past non-employee treatment





Collection Settlement Program (CSP)

- All 1099's for independent contractors must be filed
- Must treat workers as employees going forward
- Must still be in business

Collection Settlement Program (CSP)

Exhibit 4.23.6-1
CSP Analysis Chart

Item	Were Required Forms 1099 Timely Filed?	Does TP Meet the Substantive consistency Test?	Does TP Meet the Reasonable Basis Test?	Is TP Entitled to Section 530 Relief?	Are Workers Employees?	Type of CSP Offer
1.	Yes	Yes	Yes	Yes	Yes ¹	Taxpayer Option
2.	Yes or No	Yes or No	Yes or No	No ²	No	None
3.	No	Yes or No	Yes or No	No	Yes	None
4.	Yes	No	No	No	Yes	100% CSP Offer
5.	Yes	No	Yes	No	Yes	100% CSP Offer
6.	Yes	No	Colorable ³	No	Yes	100% CSP Offer
7.	Yes	Yes	No	No	Yes	100% CSP Offer
8.	Yes	Yes	Colorable ³	No	Yes	25% CSP Offer
9.	Yes	Colorable ³	No	No	Yes	100% CSP Offer
10.	Yes	Colorable ³	Yes	No	Yes	25% CSP Offer
11.	Yes	Colorable ³	Colorable ³	No	Yes	25% CSP Offer

- Generally, the examiner would not make a determination on worker status if the Taxpayer is entitled to section 530 relief. However, the taxpayer may state that the belief that the workers are employees and request a CSP agreement.
- At least one of the tests in the previous three columns is "No" .
- "Colorable" means the taxpayer's argument has some merit but not sufficient enough to fully meet the test.

Collection Settlement Program (CSP)

- Settlement Offers:
 - 100% Offer - full employment tax adjustment for the most recent tax year under examination computed using IRC 3509(a), if applicable
 - 25% Offer - 25% for the most recent tax year under examination, computed using IRC 3509(a), if applicable
 - No Assessment CSP Offer - If a taxpayer clearly meets the reporting and substantive consistency requirements and satisfies the reasonable basis test, the requirements of section 530 are fully met



Voluntary Collection Settlement Program (VCSP)

- I.R.M 4.23.20
- Allows taxpayers to voluntarily reclassify their workers as employees for future tax periods for employment tax purposes
- Taxpayer will pay 10 percent of the amount of employment taxes that would have been due on compensation paid to the workers being reclassified for the most recent tax year.
- Taxpayer will not be liable for any interest and penalties on the payment under the VCSP and will not be audited for employment tax purposes for prior years with respect to the worker classification of the workers.



Voluntary Collection Settlement Program (VCSP)

Form 8952 (Rev. November 2023) Department of the Treasury Internal Revenue Service		Application for Voluntary Classification Settlement Program (VCSP) Do not send payment with Form 8952. Go to www.irs.gov/Form8952 for instructions and the latest information.		OMB No. 1545-2215
Caution: Taxpayer must make certain representations in order to be eligible to participate in the VCSP. These representations can be found in Part V on page 2.				
Part I Taxpayer Information				
1 Taxpayer's name		2 Employer identification number (EIN)		
3 Number and street (or P.O. box number if mail is not delivered to a street address)			Room/Suite	
4 City, town or post office, state, and ZIP code				
5 Telephone number	6 Website address (optional)			
7 Fax number (optional)	8 Email address (optional)			
9 Type of entity. Check the applicable box: ☐ Sole proprietorship ☐ Cooperative organization described in section 1381 of the Internal Revenue Code ☐ Joint venture ☐ Tax-exempt organization ☐ Partnership ☐ State or local government (for worker class or position not covered under a section 218 agreement) ☐ C corporation ☐ Other (specify here) _____ ☐ S corporation				
10 Are you a member of an affiliated group? ☐ Yes ☐ No If "Yes," complete the common parent information on lines 11-14. If "No," skip to Part II.				
11 Name of common parent of the affiliated group		12 EIN of common parent		
13 Number and street (or P.O. box number if mail is not delivered to a street address) of common parent				
14 City, town or post office, state, and ZIP code of common parent				

- Complete and submit an application, using Form 8952, Application for Voluntary Classification Settlement Program
- The application should be filed at least 120 days from the date the taxpayer wants to begin treating its workers as employees.



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Consequences of Misclassification

Consequences of Misclassification

- Employer must pay back taxes for misclassified employee plus interest
- Potential additional fines and penalties if local government deems conduct was willful
- Employer must retroactively pay any unpaid wage or overtime and provide any owed benefits
- Damage to employer reputation



Recent Misclassification Cases

- **Nike:** Currently lawsuit alleges misclassification of thousands of works worldwide. Potential tax fines and class-action lawsuits totaling over \$530 million in damages.
- **Arise Virtual Solutions:** U.S. Department of Labor has asked a federal court to force a Florida-based customer service provider for major national brands, including Barnes & Noble, Comcast, Disney and Walgreens, to pay back wages and liquidated damages to more than 22,000 workers after investigators found the employer misclassified employees as independent contractors and denied them their legally required minimum wage and overtime pay.





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Questions?