

OnTrack

We keep you ERISA fit!

OnTrack informs you of benefit plan hot topics in a concise and timely manner. The information presented will be focused on critical ERISA matters, with a spotlight on explaining the issues in plain English, pointing out items that will be most impactful, and helping you develop steps that can assist in complying with changing regulations.

With 408(b)(2) Disclosures in Hand, What's Next?

Guest writer: David Witz, AIF, GFS Managing Director FRA/Plan Tools

Now that July 1, 2012 has passed and assuming the responsible plan fiduciary ("RPF") has received their 408(b)(2) disclosures, many Plan Sponsors are asking "What's next?"

The RPF has two options:

- Compare the disclosures to the regulations to confirm they are complete, or
- Retain the services of a professional to conduct the analysis on their behalf.

Failure to conduct this analysis may make the RPF personally liable for a prohibited transaction if it is determined the disclosures are incomplete. The analysis is so complex, few RPFs have the knowledge, skill and expertise to prepare this analysis. An RPF's best option is to retain a professional if the RPF cannot conduct a comprehensive analysis.

In preparation for the analysis, the RPF must assemble all 408(b)(2) disclosures including all contracts, service agreements and documents referenced in the 408(b)(2) disclosures. It also behooves the RPF to send a letter to each covered service provider ("CSP") requesting any information they know is missing. It is recommended that the professional send a request for additional information to each service provider even if they are not a CSP.

The purpose of the letter is to:

- Establish a documented process to confirm the disclosures are complete,
- Request information needed or confirmation of facts from each service provider,
- Reduce liability for the RPF, and
- Obtain a response from the service provider that can be relied upon in good faith.

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Check It Out!

- ✓ 2013 IRS COLA limits are now available at: www.irs.gov/Retirement-Plans/COLA-Increases-for-Dollar-Limitations-on-Benefits-and-Contributions
- ✓ Short publication called "Maximize Your Retirement Savings-Tips on Using the Fee and Investment Information From Your Retirement Plan" available on the DOL/EBSA website: www.dol.gov/ebsa/publications/feedisclosurestips

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If a CSP fails to respond within 90-days, the RPF has 30-days to report the CSP to the DOL. Failure to report a CSP, even if the CSP provides the required information during the 30-days following the 90-day grace period, may cause the RPF to become jointly liable for the prohibited transaction.

Once a determination is made that all disclosures from each CSP are complete, a determination must be made whether fees are reasonable for services rendered.

This requires a two-step process:

- Compare fees, and
- Document the reasons you believe fees are reasonable.

To conduct a proper comparison, the RPF must either be able to benchmark fees and/or engage in a formal request for proposal (“RFP”) process. Benchmarking is certainly the most efficient, unbiased, conflict free and cost effective approach assuming the data is from an independent source. Preparation of the benchmarking report can be conducted by any incumbent service provider as long as the incumbent service provider does not have discretionary authority and control over plan assets and uses that authority to retain and pay himself/herself a fee that he/she sets and approves, and then declares their fee as reasonable.

Finally, with the benchmarking report in hand, the RPF must document why the RFP believes fees are reasonable. The documentation does not have to be meticulously detailed, but it must be sufficient to establish that the RPF believes fees are reasonable for services rendered. Keep in mind, reasonableness is not defined as the lowest or even the average fees. Instead, the RPF has the right to make a subjective decision based on objective facts.



From an Audit Perspective

If they haven't already been making requests during the 2011 audit, your auditors should be making fee disclosure related requests in the 2012 audits. Your auditors may:

- Request copies of your fee disclosures from your covered service providers (408(b)2).
- Request copies of your fee disclosures to your participants (404(a)).
- Make inquiries regarding whether the Plan has received complete disclosures from all covered parties.
- Make inquiries regarding what your process was to determine if the disclosures were accurate and complete.
- Provide you with a management letter or verbal guidance on avoiding prohibited transactions.

Worker Classification: If it walks like a duck, and quacks like a duck...

Guest writer: Karen Hsu Ford, CPA, MST, CEBS-Managing Member, HsuBox Consulting, LLC

In today's tough economic times, hiring independent contractors instead of employees can be a seductive solution to staffing shortages – and a ripe opportunity for abuse. Knowing this, federal and state agencies are sharing information about worker classification issues – that is, whether workers are truly employees or independent contractors – more than ever before.



In 2011, the Department of Labor (DOL), the Internal Revenue Service (IRS) and eleven states executed a memorandum of understanding to share information about worker classification issues identified. This increased information sharing makes it far more likely that any issues your organization has will come to the attention of various regulators, and that those regulators will then monitor your correction efforts.

Given this context, worker classification is an increasingly urgent issue for all kinds of companies. Understanding the legal tests that apply can help you determine whether hiring a contractor is right for you – and save you time, trouble and money down the road.

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Federal and State Oversight

When it comes to worker classification, federal agencies and states each have their own priorities, and they apply their own test criteria to reflect their concerns. You will likely have to contend with a number of tests but start with the IRS and your State.

Internal Revenue Service

The IRS is concerned with federal income taxes (liability and documentation), payroll taxes (FICA and FUTA), and classification of unreimbursed business expenses. The test focuses on the facts and circumstances in the following three categories:

- **Behavioral control.** – This includes any training or instruction, how work is assigned and reported, where the work is done, whether a specific individual is being hired, approvals required for other individuals to perform the work, etc.

The critical element of behavioral control is the company's right to control behavior, whether or not that control actually is exerted.

- **Financial control.** – Relevant factors include who pays for worker expenses, what services are available, and financial investment in the work. Also considered is the number of clients for whom a worker provides services. For example, if a worker has a consulting agreement with one client and that is the worker's only contract that may indicate an employer-employee relationship even though there is a contract indicating otherwise.

The critical element of financial control is who bears the risk of profit or loss.

- **Relationship between the parties.** – Consider how the relationship is established, duty of loyalty, permanency of the relationship, how the relationship is terminated, and benefits offered whether or not those benefits are elected.

The critical element of the relationship between the parties is whether the worker has more employee-type rights or contractor-type rights.

For more information on IRS tests and tools, see <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-%28Self-Employed%29-or-Employee%3F>.

States

States are typically concerned with state unemployment and workers' compensation (employees)/personal injury claims (independent contractors). Many States use what is known as the "ABC" test. This test is similar, but more stringent than the IRS and most other federal tests; however, it cannot take the place of the others. For a worker to be an independent contractor under the ABC test, the position must meet the following three criteria:

- The worker is free from control and direction. Consider how far removed the worker is from the company's formal reporting structure and the degree to which the worker's projects and tasks are managed prior to completion.
- The worker is customarily engaged in an independent business of the same nature as the worker does for the company.
- Work performed outside the company's normal course of business is conducted off the company's premises.

Finally...

You will need to pay attention to the tests and concerns of the Department of Labor (health and welfare, and pension benefits and the Fair Labor Standards Act), Equal Employment Opportunity Commission (non-discriminatory hiring and employment practices) and Department of Homeland Security (immigration status).

As with the other tests used by regulators, the factors are not a checklist – they are intended to guide the investigation of the specific facts and circumstances that apply to each worker or group of similarly situated workers. Adding to the complexity, the courts may use modified or unique tests to settle these cases.

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When and How To Evaluate

All of these tests can seem overwhelming, even for a small company. Where and how do you begin?

Worker classification determinations need to be evaluated throughout the business cycle, and adjustments may need to be made over time as circumstances change. Ideally, worker classification determinations should be made when a new position is being established, when a worker's classification is being changed, or when a new worker is coming into an existing position.

Filling a New Position. When a new position is being established, the normal procedures should include developing a job description (for employees) or scope of work (for contractors).

Changing a Worker's Classification. Either an independent contractor becomes an employee or an employee becomes an independent contractor. Very often, the change indicates the worker should have been an employee both before and after the change, especially when there is very little change in the nature, method, or supervision of the worker's duties. Occasionally, there may be a bona fide change, e.g., due to a change in duties or exclusion from the reporting structure, and in these cases the organization should carefully and clearly document the change in circumstances and business rationale.

The critical distinction here is that the classification should follow the design of the position, not the individual person assigned.

Filling An Existing Position. Like a change in worker's classification, if an employee is being replaced by an independent contractor, or vice versa, the company must carefully document why a change is occurring because the presumption is that the nature of the work and worker classification have not changed.

The Bottom Line

As always, finding the issues and fixing them before one of the regulators does is best, but it is also a significant undertaking. Start asking questions and get help now. Your first steps should be to identify the positions that are at risk for misclassification and get them corrected. Then you can focus on fixing your processes to ensure future workers are handled appropriately. Your proactive action will reduce costs and administrative burdens – that is a seductive solution worth your time!



From an Audit Perspective

These types of issues may not necessarily be identified through normal corporate or plan audit procedures, but they can certainly impact all your plans and operational compliance. Typically, plans excluded contract employees. Should there be improper classifications of employees, you may find that there are issues with eligibility and contributions with the plans that need to be reviewed.

Healthy Living

Monique Elliott, CPA, Whitfield Elliott, PLLC



Between our professions and families, I would guess that most of us struggle to find ways to have a healthy lifestyle. It is easy to fall into the trap of “not having time”, “doing it tomorrow”, or “I am too tired”. Healthy living does not need to be this huge insurmountable goal or pass/fail approach.

I find that if I can incorporate little things on a daily basis, it all adds up to more success than if I gave up due to the above excuses. I think it is important to recognize that our lives are the sum of our days. Therefore, the habits we incorporate into each and every day makes up our lifestyles. Here is a short list of some easy small things I try to incorporate into my daily lifestyle that you might consider.

- **Keep a water bottle filled at your desk.**

Sometimes you may think you are hungry but you are actually thirsty! Water helps eliminate toxins, and will just make you feel better. I try to drink 20 ounces before work, then at least two 20 ounce bottles at work, and one in the evening.

- **Bring healthy snacks to work with you.**

It can be difficult to break away from your work. If you keep healthy snacks around to nibble on it may help you cut down or eliminate the “bad” snacking. (You know what I mean!) Pre-cut veggies, fruit, greek yogurts all are great for a quick fix!

- **Watch your posture.**

How you sit at your computer can impact the strain on your body and lead to feelings of pain and/or fatigue. I try to actively work on straightening my shoulders and not slouching. Consider stretching while you are on the phone or typing on the computer. It is also important to look away from your computer every 20 minutes or so to avoid eye strain (which also leads us to feel tired by the end of the day).

- **Don't skip meals!**

This is old hat, but skipping meals never works. All you do is decrease your metabolism. Your body will save the calories for energy. Drinking more water and using those healthy snacks to get you through the day is much more effective. By the way, exercise does boost metabolism.

- **Incorporate a daily ritualistic healthy activity.**

I used to think that I didn't have time for this, and it is still a struggle for me. However, I have found that the struggle is usually more mental than logistic. For example – it takes me half an hour or less to walk two miles at a brisk pace. If I really can't even make time for that, what is stopping me from doing 50 sit-ups when I wake up and again before I go to sleep? Something is better than nothing...always. Interesting fact—our body uses about 10 percent of the calories from the food we eat to process that food. The other 90%? Up to you!

Contact Us



Please email melliott@whitfieldelliott.com with any questions or comments and if you would like to add/remove names from the subscription.

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