

Independent Contractor v. Employee: A Chance For Employers To Right A Wrong . . .Classification

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If you have been improperly labeling your employees as independent contractors, then a new IRS program gives you the opportunity to reclassify those workers as employees at a relatively minor cost. With the introduction of the **“Voluntary Classification Settlement Program (the “VCSP”)**, the IRS is providing this opportunity as a “last chance” for employers to come into compliance before it becomes more vigilant about proper classification in the future.

Have you improperly classified a worker as an independent contractor instead of an employee?

In general, the answer turns on whether the employer controls what the worker does and how he or she does it. This determination is based on a set of "factors," which the IRS outlines [here](#) under the heading "common law rules." If an employer has this type of control, then the worker is an employee. As you will notice, this is not a bright line test; rather, it based on the unique facts and circumstances of each situation. If you have questions about proper classification, your tax professional will be able to guide you through the factors. You can also request a determination from the IRS via [Form SS-8](#).

Why is proper classification important to you and, more importantly, the IRS?

When employers improperly classify their employees as independent contractors, the IRS loses out on revenue. This is because, for employees, employers must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. For independent contractors, employers do not generally have to withhold or pay any taxes on payments.

Who is eligible for the VCSP?

The VCSP is available to employers who (i) currently treat workers as independent contractors and want to prospectively treat the workers as employees; (ii) have filed all required Forms 1099 for the workers for the previous three years; and (iii) are not currently under audit by the IRS, the Department of Labor or a state agency concerning the classification of these workers. The Program is open to businesses, tax-exempt organizations, and government entities.

What are the penalties and other terms of the VCSP?

An employer accepted into the VCSP will pay 10 percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year. However, no interest or penalties will be due, and the employer will not be audited on payroll taxes related to these workers for prior years. Finally, participating employers will, for the first three years under the program, be subject to a special six-year statute of limitations, rather than the usual three years that generally applies to payroll taxes.

How do I participate in the VCSP?

Interested employers can apply for the program by filing [Form 8952](#). Applications for the VCSP must be made at least 60 days before they want to begin treating a worker as an employee.

If you believe you are improperly classifying an employee as an independent contractor, the Program provides an excellent opportunity to bring yourself into compliance.

If you have any questions please feel free to call the [tax professionals](#) at Einhorn Barbarito