

# Classifying the People in Your Workforce

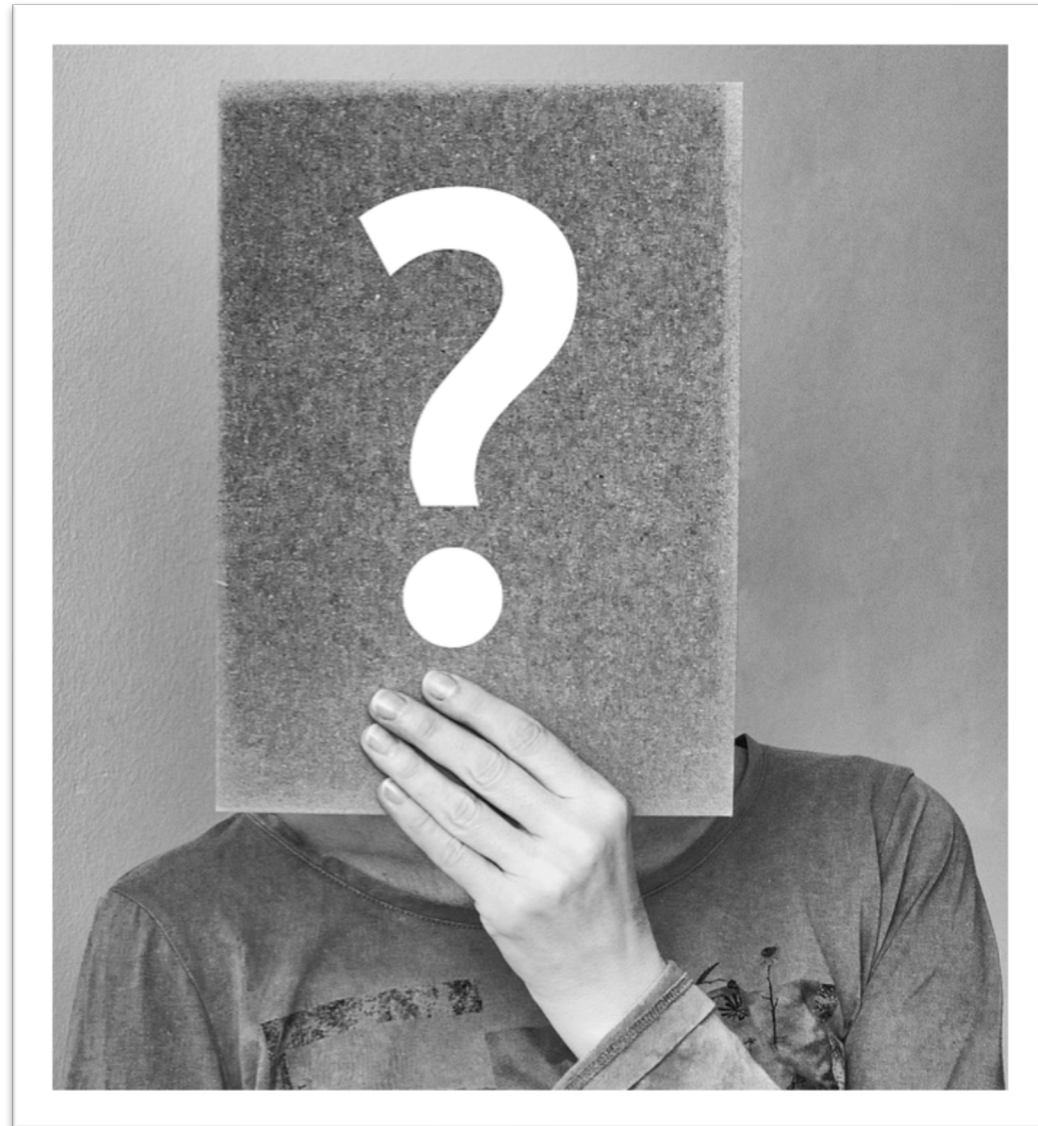
*Employees, Independent Contractors,  
Interns, and Volunteers*

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**HORTON**  
Management Law



# Worker Categories



- **Employee**
- **Independent Contractor**
- **Intern**
- **Volunteer**

# Employee

- W-2
- Payroll taxes
- Compensation: Hourly/Salary/Commissions/Bonuses
- Benefits (Health insurance, retirement, time off)
- Supervision/Management

# Employer

- Controls the when, where, and how the services are being performed
- Provides facilities, equipment, tools and supplies
- Directly supervises the services
- Sets the hours of work and rate of pay
- Provides training
- Evaluates job performance
- Has the right to hire and fire



# Independent Contractor

- 1099
- Compensation: Fee based
- No Benefits
- Responsible for own insurance and taxes

# **“Economic Realities” Test**

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- The extent of which services rendered are an integral part of the principal’s business;
- The permanency of the relationship;
- The amount of the investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor’s opportunities for profit and loss;
- The amount of initiative, judgement, or foresight in open market competition with others required for the success of the claimed independent contractor; and
- The degree of independent business organization and operation.

**The extent of which services rendered are an integral part of the principal's business.**

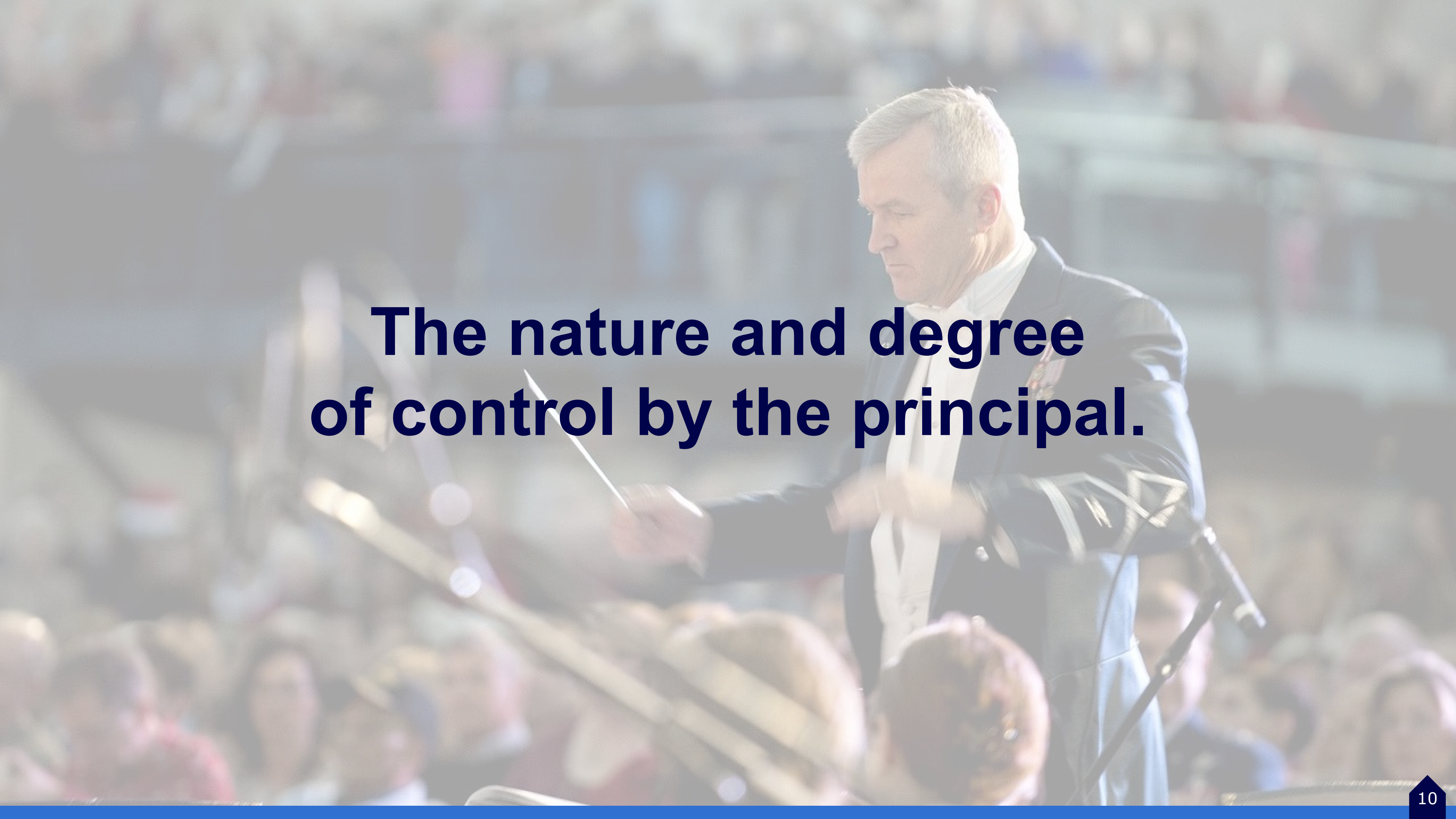


**The permanency of the relationship.**





**The amount of investment  
in facilities and equipment.**

A conductor in a blue suit and white shirt is leading an orchestra. He is holding a baton and looking down at the musicians. The background is a blurred audience.

**The nature and degree  
of control by the principal.**



**The opportunities for profit and loss.**



**The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.**

# The degree of independent business organization and operation.



# **“ABC” Test**

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A- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

B- The worker performs work that is outside the usual course of the hiring entity's business.

C- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

# INTERNS



# “Primary Beneficiary” Test

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The extent to which:

- The intern and the employer clearly understand that there is no expectation of compensation.
- The internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
- The internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
- The internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
- The intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.



# New York Test

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Primary Beneficiary factors and these additional ones must ALL apply

- Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
- The trainees or students do not receive employee benefits
- The training is general and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program.
- The screening process for the internship program is not the same as for employment and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program.
- Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

# Volunteers

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- Work for public service, religious, or humanitarian objectives
- Limited to non-profit entities, including public (government) sector
- No contemplation of compensation



# How Employers Get in Trouble

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- An individual believes they have been misclassified as an independent contractor and files a complaint with either the U.S. DOL or a state DOL.
- An individual that was treated as an independent contractor files for unemployment benefits, triggering an audit or inquiry against the company.
- An individual that was treated as an independent contractor was injured while working on a project and files a worker's compensation claim.
- The state or federal DOL or IRS audits all company employees and independent contractors.

# IRS Penalties – Unintentional Misclassification

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- \$50 for each W-2 that the employer failed to file for a misclassified employee
- Penalties of 1.5% of the worker wages, plus 40% of the FICA (social security and Medicare) that the employer failed to withhold from the employee wages
- Employer must also pay as a match of 100% of the FICA taxes that the employer should have paid for the employee wages.
- Interest accrued on all penalties from the date that they should have been deposited.
- Tax penalty equal to .5% of the unpaid tax liability for each month of up to 25% of the total tax liability.

# IRS Penalties – Deliberate Misclassification

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- Additional fines up to 20% of all wages paid, plus 100% of the FICA taxes (both the employer and employee's share)
- Criminal penalties of up to \$1,000 per misclassified worker and one year in prison
- The individual responsible for the withholding taxes, can also be held personally liable for uncollected tax, regardless of the organizational structure of the company.

# Other Penalties

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- Unemployment/Worker's Compensation penalties
- Minimum Wage/Overtime
- Health Insurance/Retirement contributions
- Fines (I-9, Wage Notice Forms, etc.)
- Criminal prosecution



# OOPS . . . . Misclassification Settlements

- Flowers Food: \$9 million to 900 distributors
- Lyft: \$27 million to drivers
- Uber: \$100 million to 365,000 drivers (rejected by judge as “not fair, adequate and reasonable”)
- FedEx: \$228 million to 2,300 drivers in California

# Don't Risk It

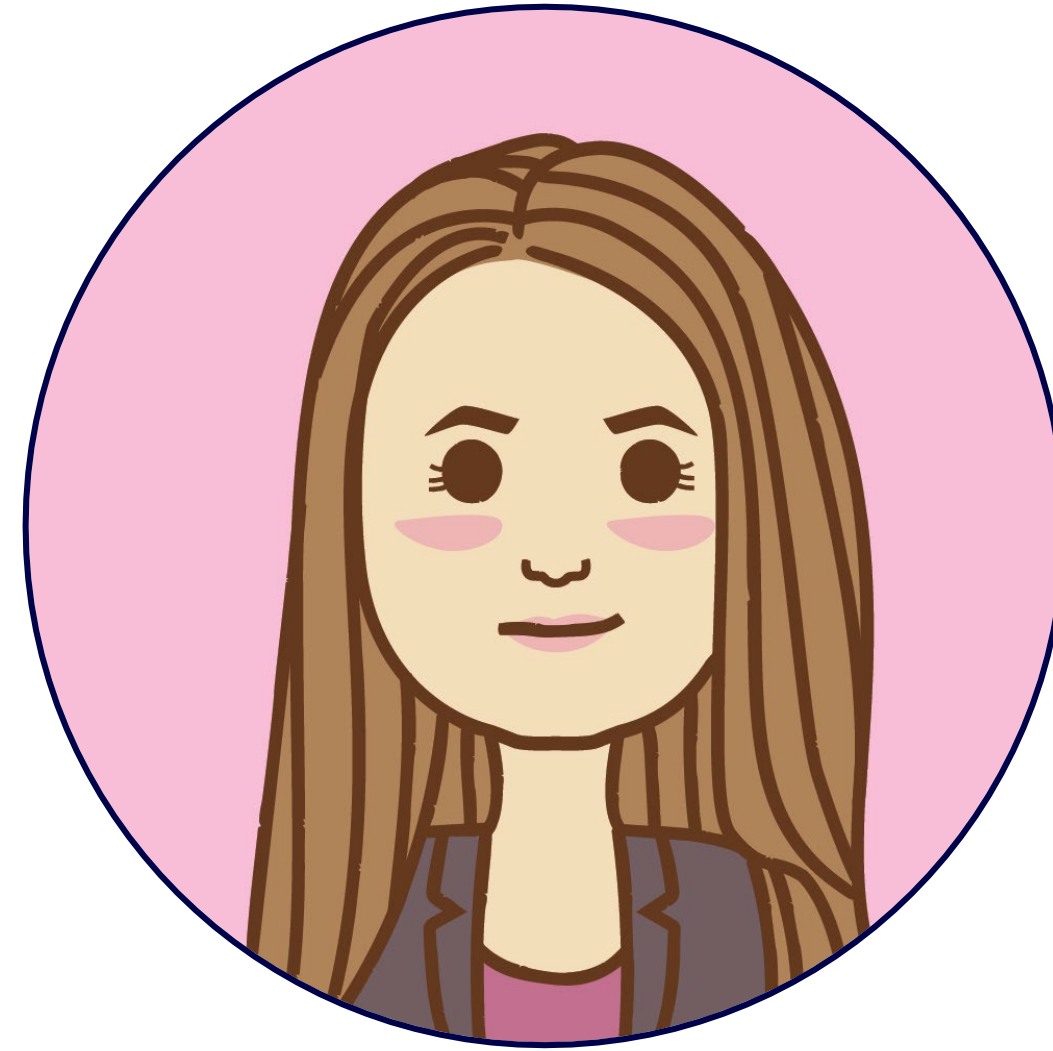
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- Conduct a thorough analysis before allowing any individual to provide services to the company without setting them up as a W-2 employee.
- If you proceed with an IC arrangement, document it with a written agreement



# Independent Contractor Agreement

- Clearly state that the parties intend relationship to be that of an IC
- Address compensation and billing, insurance, and indemnification
- Clarify the duration of the relationship
- Explain that IC has behavioral & financial control over services to be performed



**Thanks for your time!**

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**Questions?**

# Classifying the People in Your Workplace

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