

Information on Worker Misclassification

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What is worker misclassification?

- Misclassification is when an employer calls their worker an ‘independent contractor’ and gives them a 1099 (with no taxes taken out) instead of a W-2 (with taxes taken out) even though the worker is really an employee.

Why is misclassification important?

- When workers are misclassified by their employers as independent contractors, they lose out on key benefits that employees enjoy (like minimum wage, overtime, the right to join a union, workers’ comp, among others) and they pay more in taxes than they should.

What is the federal tax impact of misclassification?

- When workers get a 1099-MISC (or 1099-NEC as it soon will be), they are on the hook for both the employer and employee’s shares of Social Security and Medicare taxes for the full 15.3% self-employment tax. Especially for low-income taxpayers, 15.3% of your net 1099 income can be onerous particularly since it is not taken out of your paycheck.
- On the other hand, employees who get W-2s have their worker share of Social Security and Medicare tax withheld (7.65%) from their paycheck while their employer on their own behind the scenes takes care of the employer portion (7.65%) of Social Security and Medicare taxes.
- 1099ed workers can claim expenses on their returns (employees no longer can) **but** a) this could mean lower Social Security credit because your Social Security earnings are based on your net income/not gross income if you bring it down with expenses & b) you may still end up paying more in Social Security & Medicare tax overall even if you claim expenses – and there’s a risk you could be audited for claiming them

How can I tell if I’ve been misclassified?

- If you get a 1099 but you work under the direction and control of a supervisor/manager/boss, you’re most likely a misclassified employee.

What criteria does the IRS use?

- The IRS uses a 20-factor test to determine if someone is an employee or independent contractor. This test relies on various factors; no single one is determinative, it’s based on totality of circumstances, analysis of the facts, a balancing act; it mainly boils down to one central question: **what is the level of external control over your job.**
 - If your boss controls the METHODS and MEANS by which you get your work done – not just that it’s DONE but also HOW it’s done – then you are an employee!
 - These 20 factors aforementioned include:
 - Training
 - Instruction
 - Set hours of work
 - Full time required
 - Oral or written reports
 - Furnishing of tools and materials
 - Right to discharge

- Payment by hour, week, month

How can I challenge my misclassification before the IRS?

- File a Form SS-8 before the IRS SS-8 Unit (do not attach it to your tax return); the SS-8 is not anonymous so your employer will find out you filed an SS-8
- The SS-8 does not apply to a group of workers; it is binding on you, the individual worker
- It is a four-page packet with questions based on these 20 factors that gets to behavioral control, financial control, relationship between the parties in your job
- You make your case for why you're really an employee (including accompanying documentation) by making clear you worked under the direction and control of a supervisor, for instance.
- Filing the SS-8 gives you the RIGHT to list the 1099 misclassification income as WAGES on your 1040 tax return so you can only owe the 7.65% employee share of Social Security and Medicare taxes
- The SS-8 is also appropriate when you get paid in cash instead of on a W-2 → which is a form of misclassification itself! Make sure to include a cover letter in this circumstance.

What is the tax consequence of filing the SS-8?

- It means you only pay the correct share of tax: a key pillar of the Taxpayer Bill of Rights
- It means you only have to pay your worker's share of taxes! You file a Form 8919 to account for just your employee share of taxes with your Form 1040.
- If you get paid on a W-2 and a 1099 in the same year for the same job (and there's no meaningful distinction between the type of work for which you got the two different forms), you should NOT file a Form SS-8. You just have to file an 8919 with your tax return; on the 8919, you would account for just the employee share of Social Security and Medicare taxes on the 1099 income.
- You could go back and claim a refund for the last three years or for payments made in last 2 years, whichever is later.
 - You could file a Form 1040X (an amended return), after filing your SS-8, with an 8919 to claim a refund of the employer's share of Social Security and Medicare tax you wrongly paid if you were misclassified and actually paid the full self-employment tax.
 - If you were wrongfully 1099ed for a 2017 job and you paid at the time the 15.3% self-employment tax on that 1099 income on your 2017 return, you have until April 2021 (three years from when the 2017 return was due) to file a 1040X to get back the 7.65% employer share of that tax (but be sure to file the SS-8 first!)
- You can always reduce a prior tax debt; first, you'd have to file then SS-8, then you can file an amended return (and can get into collection alternatives)

What is the SS-8 process like?

- The SS-8 Unit will acknowledge receipt and may ask for supplementary documentation.
- The SS-8 Unit will send a blank SS-8 to the employer with a chance for them to reply with their version of the facts.
- The SS-8 Unit will do an analysis/investigation, could take 6 months to 1 year plus.

- The SS-8 Unit will issue a determination or similar ruling that says you're an employee or independent contractor (nothing you need to do then if you already have adjusted your returns as such).
 - Employer will have to pay employer share of taxes; you can get a refund for employer share of self-employment tax if you paid it – it's up to IRS to enforce collection of taxes and potential penalties

What if the SS-8 Unit disagrees with me?

- No way to appeal really. You can ask for a redetermination.

What can I do beyond SS-8 filing?

- You could in addition to that file a complaint with the U.S. Department of Labor Wage and Hour Division or with your state department of labor.
- If you owe the self-employment tax after getting 1099ed, you file a tax return reporting the 1099 income as self-employment income, you don't file an SS-8, and then you're unable to afford to pay the taxes you owe, you will get collection notices.
- At a certain point, if you continue to not be able to pay those taxes, you will get a Collection Due Process notice – it gives you 30 days, before the IRS takes collection action otherwise, to request an informal hearing to contest the taxes you owe.
- You may be able to appeal the tax liability through this Collection Due Process hearing where you can make clear you were wrongfully 1099ed. Even if the IRS officer in that hearing disagrees with you, you can appeal that determination to the U.S. Tax Court.
- If your preparer underreported or did not report you 1099 income and you were misclassified, you may ultimately receive a Statutory Notice of Deficiency that gives you 90 days to petition the U.S. Tax Court. You may then find yourself contesting your tax burden in the Tax Court.
- You can also anonymously report your employer for not paying their proper share of taxes through filing a Form 211 whistleblower form and/or a Form 3949-A to confidentially report an employment tax violation

How can I protect myself against possible employer retaliation?

- The Taxpayer First Act of 2019 provides whistleblowers with protection against retaliation if you file an administrative claim against another party for not paying the correct share of taxes.

What do I need to know about misclassification under Pennsylvania law?

- With regard to state income tax, there is no meaningful difference because we all pay 3.07 percent of our income towards the state income tax. If your employer did not withhold those taxes, you are ultimately liable still for paying those taxes on your state return.
- Under Act 72, misclassified construction workers can file an online form to challenge their misclassification before the Pennsylvania Department of Labor and Industry.
- If you are a misclassified worker not in the construction industry, you can contact the Office of Unemployment Compensation Tax Services (within the PA Dept. of Labor and Industry) to report your misclassification. The Department will investigate and could ultimately fine and penalize the employer if the employer misclassified workers.

What about the city of Philadelphia?

- You ultimately are liable for city wage taxes even if they are not withheld from your pay so there may be a need to file an earnings tax return with the city to account for these

taxes. However, you can always report your employer for misclassification before the Philadelphia Mayor's Office of Labor (expected to become a city Labor Department).