



PLANNING ADVISORY NOTICE

Employee Misclassification and Labor Burden Rates

The subject matter of this Planning Advisory Notice (PAN) is extremely complicated. The authors only intend to provide a general overview of the Federal rules and regulations. Compliance with state rules and regulations only increases the complexity of employee classification and is not a subject explored in this PAN. The laws and regulations governing employee classification issues are always evolving due to decisions by the Supreme Court, legislation passed by Congress, and by regulators at the Federal level. This PAN is not providing any legal or tax advice or guidance and is only meant to provide information. **This PAN should not be the basis of any decision making; readers should consult with their own attorneys and tax advisors.**

This PAN will be the lead in a series that revolves around identifying what is the Federal definition of an employer, who are its employees, and what are the responsibilities each has to the other.

this series is intended to raise awareness not to take the place of sound legal or tax advice.

The effective recognition of an individual's employment status is critical to the success of the telecommunications industry. Our industry is deploying, installing, maintaining, and restoring the telecommunications infrastructure that our society relies upon. For this work to proceed in a quality and safe manner, it is necessary that the proper roles and responsibilities are assigned. Having someone work as an independent contractor when they are actually an employee is detrimental to the individual, the company engaging the services, and to the industry as a whole. Because our industry is comprised of teams working together fulfilling their responsibilities, the misclassification of employees and independent contractors has the potential to impact more than just the individual.

Before reviewing the responsibilities employers have with respect to their employees (and vice versa) the first undertaking is to determine if an individual is an employee or independent contractor (sometimes referred to as a "1099 contractor"). A common misconception is that certain isolated factors or characteristics are determinative in the employee vs. independent contractor examination. For instance, an individual operating under a corporation, limited liability corporation (LLC), or sole proprietorship does not as a matter of course decide the issue; under certain circumstances an individual operating as an entity could still be considered an employee. Nor does the fact that an individual signs an Independent Contractor Agreement imply that the individual must be an independent contractor. Similarly, the fact that an employer classifies an individual as an

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While this premise may seem simple, there are a myriad of statutes and regulatory requirements that have the potential to cause considerable risk and liability for employers, employees, and end users in the telecommunications industry if these parties are not properly versed in their roles and responsibilities. All readers are encouraged to identify the legal requirements where they conduct business;

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independent contractor and pays for services pursuant to a 1099 structure does not necessarily mean that this individual is not an employee. These examples are used to illustrate the fact that there is not a single factor that automatically classifies an individual as an employee or independent contractor. Instead, all incidents of the relationship must be assessed and considered with no isolated factor being decisive on the issue¹.

The Supreme Court has routinely applied a common law agency test to distinguish between an employee and independent contractor. Using this approach, over time the Court has outlined significant elements to determine an individual's classification (**NOTE: these elements do not carry equal weight in the consideration**). Some of these elements are:

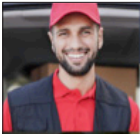







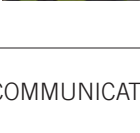



1. Is the worker integral to the company's business?
2. Does the worker supervise company employees or entire segments, departments, or processes of a company?
3. Exclusivity. Does the worker only work for one company?
4. Permanency of the relationship. How long has the worker provided services to the company?
5. Does the worker use his/her own tools and equipment to perform the work?
6. Does the worker or the company supply the materials and supplies utilized to complete the work?
7. Control over the work. Who decides when work is completed and how the work is completed?
8. Does the company provide training to the worker or pay for training/certification programs?
9. Does the worker participate in company benefit programs such as paid-time-off; sick pay; per diem; 401K and retirement programs; medical, dental and vision insurance; bonus programs; tuition reimbursement; or any

other benefits that only employees would normally receive?

10. Is the worker entitled to overtime or holiday pay?

The Federal government has resources you can use to inform yourself. One source for information on the misclassification of employees and independent contractors is the Wage and Hour Division website: *Misclassification of Employees as Independent Contractors* (<https://www.dol.gov/agencies/whd/flsa/misclassification>). As a reminder, like the Federal Occupational Safety and Health Administration (OSHA), the Wage and Hour Division (WHD) is a subset of the Department of Labor. Both OSHA and the WHD were created by Congress, through legislation, to protect the health and well-being of the nation's workforce. Specifically, OSHA was created to ensure safe and healthful working conditions by setting and enforcing workplace safety standards and to also provide training, outreach, and education to employers and employees. The WHD was created to administering and several labor laws including the Fair Labor Standards Act (FLSA). OSHA and WHD are important to the telecommunications industry because the men and women who serve in these agencies are tasked with assisting us in not only keeping our field personnel safe and healthy but also our worksites and antenna supporting structures free from hazards that may cause serious harm and death. A main tenant of OSHA and the WHD is outreach and education not just enforcement; please familiarize yourself with the wealth of guidance made available by the Department of Labor, specifically, we invite you to visit the Quick Links and FAQ sections that are published by both OSHA (<https://www.osha.gov/faq#v-nav-infoworkers>) and the WHD (<https://www.dol.gov/agencies/whd/workers>).

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	EMPLOYEE	OR	INDEPENDENT CONTRACTOR
	Working for someone else's business		Running their own business
	Paid hourly, salary, or by piece rate		Paid upon completion of project
	Uses employer's materials, tools and equipment		Provides own materials, tools and equipment
	Typically works for one employer		Works with multiple clients
	Continuing relationship with the employer		Temporary relationship until project completed
	Employer decides when and how the work will be performed		Decides when and how they will perform the work
	Employer assigns the work to be performed		Decides what work they will do

As mentioned previously, the misclassification of individuals (and single-member LLC's) as independent contractors when they are in fact employees is detrimental to the individual, the employer, and to those working with the individual in the industry. Entities that are improperly engaging individuals and entities as independent contractors may do so for a myriad of reasons, some of which may arise from a misunderstanding or changes in the relationship as it matures over time. It is a violation of wage and hour rules, and many contracts, to improperly classify and engage labor for a project. Misclassification of an individual at work may result in the loss of reputation, citations, and the inability to work for a client in the future due to contractual violations. Individuals have a personal responsibility to ensure proper classification as an independent contractor and should use this PAN to begin your search for more information relevant to your unique circumstances. Included in this PAN are some resources and links to help you become more educated and better equipped to find answers relevant to you. An employment law or tax specialist from your jurisdiction is the best source for answers that relate to you and your circumstances. If you believe a misclassification has occurred, a great first step is to have a conversation with the employer. This will provide an opportunity for both parties to explain why they think a certain classification is appropriate. If a discussion with the employer does not work, you can always reach out to the Internal Revenue Service (IRS) to request a formal determination of your classification. One of the ways to achieve this is to file Form SS-8 (there is no filing fee) with the IRS who will then reach out to the employer to gather additional information and make a determination of status (<https://www.irs.gov/pub/irs-pdf/fss8.pdf>). Employers may also file a Form SS-8 with the IRS. Contacting an attorney or accountant for assistance is also an option that businesses and individuals should explore when they deem it necessary.

The remaining portions of this PAN focus on some of the responsibilities and duties of the employer and employee. It would be remiss to not start with safety. It is the employer's responsibility to comply with all OSHA rules and regulations which require employers to provide employees with a worksite that is free from recognized hazards that are causing or likely to cause serious harm, it is the employees responsibility to engage in the training, follow company rules, and ask questions when they don't understand. Employers are tasked with this responsibility and to comply with OSHA standards issued under the Act; employees are to comply with the employer's training and supervision. OSHA provides nu-

merous resources for employers and employees in the telecommunications industry: OSHA, Communications Towers (<https://www.osha.gov/communication-towers>). Additionally, employers must comply with a wide range of labor laws under the governance of the WHD, including the FLSA, FMLA, Davis-Bacon Act, and other various acts that are aimed at promoting a safe and healthful workplace; employees must also recognize the cost and efforts that employers must invest to comply with these statutes and manage this information. Compliance with these laws and regulations is not always easy; there is a burden taken on by employers to comply, both from a time and cost perspective. Please visit this link for WHD guidance on the FMLA: <https://www.dol.gov/agencies/whd/fmla>.

By way of example, consider this possible situation of where an individual chooses to leave their employer, where they were classified as an employee, to work for another entity as an independent contractor in order to make \$1.50 more an hour. The issue this individual would not be understanding was the difference between being an employee as opposed to an independent contractor. As an independent contractor, they would have no workers' compensation coverage, no committed training, potentially less effective PPE and equipment, and would be required to pay their own payroll and withholding taxes. Now if this person ended up falling from a structure and was disabled as a result of the fall, then consider how tragic it would be; there would be no workers' compensation, no insurance, and even though the individual was disabled, they still would have to pay self-employment taxes on what they were paid prior to the fall. The above example is meant to assist individuals in asking the right questions and to provide awareness of what is required when deciding to become an independent contractor, as opposed to an employee when that choice is present.

Some elements that are not often considered properly when factoring cost of a project are the direct costs associated with employment. It is important to understand these costs as they can become very costly if an employee is misclassified as an independent contractor and an employer must later remit payment for these costs in addition to fines and penalties and any ancillary costs such as consultation and additional legal fees. Some overlooked project costs are payroll taxes and withholdings associated with employees. One of the responsibilities of employers is to withhold and

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pay a portion of, on top of compensation to employees, payroll taxes such as Federal Insurance Contributions Act (FICA), federal and state unemployment taxes referred to as FUTA and SUTA, state-mandated workers compensation payments, and other additional Medicare and payroll taxes. In total, these additional payroll taxes may end up costing the employer an additional 15% to 20%+ on top of wages. In addition to these direct costs, employers should anticipate additional indirect costs as they will likely need to hire additional employees or pay a third-party to perform these compliance, withholding, and reporting functions.

In addition to payroll costs, there are also direct cost burdens associated with employee benefits such as medical, dental, and vision insurance, health and life insurance, personal protective equipment (PPE), and training costs. To visualize the additional expenses an employer may incur for each employee, a hypothetical Labor Burden Worksheet is provided in Exhibit A on the next page. Please note that various rates do change year to year and each state may impose varying obligations; as such, the example below is only meant to serve as an illustrative example only.

For an accurate assessment you need to work with your own unique data and amounts and/or consult a legal or tax professional.

Exhibit A illustrates that, after factoring in direct costs and payroll taxes and withholdings, employers may

be responsible for providing a labor burden rate that is double the cost of an employee's hourly rate. Moreover, the example on the next page does not take into consideration indirect costs such as standard overhead such as management, AR, AP, insurance, utility expenses for offices and warehouses, office supplies, leases and mortgages on company property, and fuel for field personnel vehicles and equipment. Again, the reader should consult a professional experienced with your unique situation.

In conclusion, this industry is comprised of unique teams harmoniously fulfilling their roles and responsibilities. If we have the

improper classification, it impacts the ability of individuals and employers to perform quality work in a safe fashion. However, it goes beyond that; it erodes our industry from within when individuals and employers who are doing the right thing are forced to compete with others that are not abiding by the rules and regulations governing our industry. We all struggle, and honest mistakes can happen; but if you are in an environment where you are not being supported as an employee when you believe you should be classified as such, it is your right to seek assistance.

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EXHIBIT A
Hypothetical Labor Burden Worksheet

Labor Burden Worksheet									
Fill in all the RED boxes to get an accurate Hourly Cost of an emp									
		Date	12/29/21		Employee: Tower Tech				
SECTION 1	Annual Gross Pay								
	Hours	X	Weeks	X	\$ Rate =	\$ Annual Wage			
A. Regular	40		52		\$28.00	\$58,240			
B. Over Time	0		52		\$42.00	\$0			
C. Double Time	0		52		\$56.00	\$0			
D. Bonus/Incentive Pay	0					\$0			
E. Other Compensation (Profit Sharing)						\$0			
F. Total Annual Pay						\$58,240			
SECTION 2	Burden Uplift								
A. FICA (Payroll Tax Social Security and medicare)			7.65%	X 1.F	=	\$4,455			
B. FUTA			0.80%	X 1.F	=	\$466			
C. SUTA (Indiana Rate?)			3.40%	X 1.F	=	\$1,980			
D. Work. Comp. (Varies each state)			5.00%	X 1.F	=	\$2,912			
E. Additional Medicare			0.90%	X 1.F	=	\$524			
F. Other (Fudge Factor)			5.00%	X 1.F	=	\$2,912			
SECTION 3	Sub Total Lines 1E thru 2F		\$71,490						
SECTION 4	Add Health and Life Insurance		\$350.00	X 12 Months	=	\$4,200			
SECTION 5	Other benefit Costs		\$100.00	X 12 Months	=	\$1,200			
	Equipment (PPE) Costs		\$1,250.00			\$1,250			
SECTION 6	Total Annual Cost (Add 3 - 5)		\$76,890						
The Total at Line 6 is the total annual cost of the employee to the company. This cost will be divided by the total productive hours to yield a burdened hourly rate to be used for job costing and estimating.									
SECTION 7	Total Annual Hr. (40 Hr. X 52 Weeks)		2080						
	Working days per yr. = 2080/8		260						
	A. Holiday Pay		7	Days X 8 Hours		56			
	B. Vacation Pay		10	Days X 8 Hours		80			
	C. Sick Pay		2	Days X 8 Hours		16			
	D. Training		10	Days X 8 Hours		80			
	E. Breaks	0.50	Hr. X	Wrk. Days per Yr.		130			
	F. Idle Time	1.50	Hr. X	Wrk. Days per Yr.		390			
	G. Other	0.00	Hr. X	Wrk. Days per Yr.		0			
	H. non-Bid overtime			(nbOT X 52 X .33)		0			
	I. Productive Hours					1328			
SECTION 8	Over time Hours		0						
SECTION 9	Total Productive Hours		1328						
	Effective Total Hourly Employee Cost								
	Line 6 (Total Annual Cost)		\$76,890						
	Divided By								
	Line 9 (Total Productive Hours)		1328						
	Hourly Cost		\$57.90						
BURDEN FACTOR (hr. rate/hr. cost)		2.07							
(BURDEN FACTOR) X (HR.RATE) = HOURLY COST		\$57.90							
Note: This rate is the employee burden rate as long as the factors do not change. When any of the factors used in this rate change a new rate should be computed.									