

1099s – Reporting, Penalties and Amnesty

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1099s – Reporting, Penalties and Amnesty

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Our Agenda



- Introduction
- Employee vs. Contractor
- Rules
- What is Our Risk?
- Penalties
- Amnesty and Considerations
- Resources and Tips

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Important Issues

- Who is an employee?
 - Do you have independent contractors that really are employees?
- Did you file appropriate 1099s?
 - New Penalties
 - Attorney rules
- Are you required to withhold from contractors?

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Employee vs. Contractor




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Background – Ongoing Tug-of-War

- IRS wants everyone to be an employee
 - Taxes withheld and submitted by employer
 - Don't have to rely on / wait for estimated payments
 - Reduced deductibility of business expenses



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CB Background – Ongoing Tug-of-War

- Worker wants to be an independent contractor
 - Belief that “everything” can be written off as business expense
 - No employee business expense limitations
 - No taxes taken out, get full payment for work done



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CB Background – Ongoing Tug-of-War

- Employer wants to have independent contractors rather than employees
 - No withholding (we will talk about exceptions later)
 - No matching social security and medicare
 - No unemployment
 - No workers' compensation (possibly!)
 - No benefits
 - Not governed by overtime or minimum wage laws



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CB Background – Ongoing Tug-of-War

- Labor Secretary estimates employers can knock 20 – 30 % off labor costs by classifying employees as independent contractors



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CB Classification Confusion

- Distinction not always black and white
 - Lack of clarification resulting in confusion
 - Confusion results in it being easier just to ignore the rules
 - Easy solution – when unclear, call them independent contractors



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CB Current Law

- Starts with common-law rules
 - Anyone who performs services for you is an employee,
 - If you have the right to control what will be done and how it will be done
 - The right matters!
 - Even if you give the employee freedom of action
- 20 factors – Revenue Ruling 87-41

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CB Current Law

- 1996 – IRS MSSP gave further guidance:
 - Critical factors
 - Significant factors
 - Factors that are largely irrelevant
- Ultimately about control!

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Rules

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Requirements - Services

- Most common area is for *services*
 - 1099 for payment for services in the amount of \$600 or greater during the course of a year
 - Applies to individuals
 - Applies to partnerships
 - Applies to LLCs
 - Generally does not apply to corporations

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Special Requirements - Attorneys

- Rules are different for attorneys than for other service providers
 - The 1099 filing requirement for payments of at least \$600 applies to all attorneys including those who are incorporated
 - Any entity that pays an attorney or law firm \$600 or more during the course of a year should file a Form 1099 for the payments

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Electronic Filing

- If you file 250 or more of any information return, you must file electronically
 - Applies on a form by form basis
 - Applies to original returns and corrected returns separately

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Due Dates

Form	Title	What To Report	Amounts To Report	To IRS	To Recipient (unless indicated otherwise)
1099	Mortgage Interest Statement	Mortgage interest (including points) and certain mortgage insurance premiums you received in the course of your trade or business from individuals and reimbursements of unpaid interest.	\$600 or more	February 28*	February 28**
1099-MISC	Miscellaneous Income	Rent or royalty payments; prizes and awards that are not for services, such as winnings on TV or radio shows. Payments to crew members by owners or operators of fishing boats including payments of proceeds from sale of catch. Section 408A income from nonqualified deferred compensation plans (NQDCs). Payments to a physician, physician's corporation, or other supplier of health and medical services, issued mainly by medical assistance programs or health and accident insurance plans. Payments for services performed for a trade or business by people not treated as its employees. Examples: fees to subcontractors or directors, rental property expense payments, and golden parachute payments. Fish purchases paid in cash for resale. Crop insurance proceeds. Substitute dividends and tax-exempt interest payments reportable by brokers. Gross proceeds paid to attorneys.	\$600 or more, except \$10 or more for royalties All amounts All amounts \$600 or more \$600 or more \$600 or more \$600 or more \$10 or more \$600 or more	February 28*	February 28** February 31** February 15** February 15**

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What is Our Risk?

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CB **Our Risk**

- Not considering someone an employee
 - Part time staff
 - Extra work
- Not filing
 - Contractors
 - Attorneys
 - Rents
- Not withholding
- Not electronically filing

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CB **Risk**

- IRS form 8919
 - Issued in 2007
 - Allows worker to claim they should have been employee
 - Used when it hits worker in pocketbook!
 - When they have to pay their own matching social security and medicare

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Form **8919** | **Uncollected Social Security and Medicare Tax on Wages**
Department of the Treasury | Internal Revenue Service
▶ See instructions on back. ▶ Attach to your tax return.

Name of person who must file this form. If married, complete a separate Form 8919 for each spouse who must file this form. Social sec

Who must file. You must file Form 8919 if all of the following apply.

- You performed services for a firm.
- The firm did not withhold your share of social security and Medicare taxes from your pay.
- Your pay from the firm was not for services as an independent contractor.
- One or more of the reasons listed below under *Reason codes* apply to you.

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CB **If reclassified as employee**

- Liability for:
 - Social Security and Medicare
 - Income taxes, if can't prove employee paid
 - Unemployment
 - Workers' Compensation
 - Benefits?
 - Disqualification of plans?

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CB **Backup Withholding**

- If you aren't provided with a Taxpayer Identification Number (TIN) you are required to withhold 28% of the payments as backup withholding

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CB **Electronic Filing**

- Our industry – 1098s
 - If you file 250 or more, filing must be electronic




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Penalties



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Not Filing




- If you don't file
 - Penalties as high as \$100 per required information return
- If the IRS determines that it was due to “intentional disregard of the law”
 - No maximum penalty

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Failing to Timely File




- Penalty for failure to file by due date
 - File within 30 days of the due date
 - \$30 per return; maximum of \$75,000 (for small businesses)
 - File more than 30 days after due date, but file by August 1
 - \$60 per return; maximum penalty of \$200,000 (for small businesses)
 - File after August 1
 - Same penalty as not filing

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Failing to Timely File



- There are additional penalties if you don't furnish the worker with a 1099
 - Graduated
 - Based on when ultimately provided to worker
 - Intentional disregard - \$250 per return with no maximum

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Penalty Relief

- Section 530 of the 1978 Revenue Act:
 - Must meet all three requirements
 - Reasonable basis
 - Substantive consistency
 - Reporting consistency

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Amnesty and Considerations

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Why Consider Amnesty

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- In 2009, Government Accounting Office indicated that for 2006 misclassifications cost \$2.72 billion in lost federal taxes, unemployment and state workers' compensation premiums
- IRS has indicated they are going to pursue this matter even more seriously

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Amnesty

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- New Internal Revenue Service initiative (VCSP)
 - Voluntary Classification Settlement Program
- VCSP
 - Firms pay 10% of the employment taxes due for the reclassified workers for the past year
 - No interest or penalties due
 - Entity will not be audited for employment taxes for prior years with respect to the worker classification of the workers

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Amnesty

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- To be eligible, the company must:
 - Have consistently treated the workers as non-employees
 - Have filed required 1099 tax forms for the past three years, and
 - Not be under a worker classification audit by federal or state agencies

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Amnesty

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- Additionally, entity must agree to:
 - Treat the workers as employees for future periods, and
 - Extend the statute of limitations for employment taxes for the first, second and third calendar year after the date the taxpayer begins treating workers as employees under the VCSP

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Amnesty from the FAQs

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- Application for the VCSP made on Form 8952 ("Application for Voluntary Classification Settlement Program")
- 8952 should be filed at least 60 days from the date the taxpayer wants to begin treating its workers as employees
- Taxpayer does not have to reclassify all of its workers
- All workers in the same reclassified work category must be treated as employees

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Amnesty

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- Program open to all companies
- IRS expects most of the amnesty applicants to be smaller entities
 - Generally have less personnel and a "looser" structure

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CB **The Decision**

- Should you apply for amnesty?
 - Decision is different in each case
 - Depends on how secure your position is for treating the worker as an independent contractor
 - Consideration should be given to other federal and state statutes (including pension and benefit rules, etc.)

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Resources and Tips

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CB **Caution**

- The IRS's announcement indicated that the VCSP is part of an effort to rein in misclassification
- Within days of the announcement of the amnesty program, officials from the Labor Department, IRS and seven states announced that they have agreed to work together to curb abuse

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CB **Tip #1**

- Consider obtaining W-9 for ANY independent contractor to:
 - Get Taxpayer Identification Number
 - Confirm not subject to backup withholding
 - To confirm contractor is a corporation**Remember** not filing or filing without TIN is subject to penalties
- If no TIN, withhold backup withholding (even if under \$600 for year)

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Form W-9 Request for Taxpayer Identification Number and Certification

Give Form to the requester. Do not send to the IRS.

Name (as shown on your income tax return)

Business name/disregarded entity name, if different from above

Check appropriate box for federal tax classification:

Individual/sole proprietor S Corporation Partnership Trust/estate

Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) Exempt payee

Other (see instructions)

Address (number, street, and apt. or suite no.)

City, state, and ZIP code

List account number(s) here (optional)

Requester's name and address (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see How to get a TIN on page 3.

Social security number

Employer identification number

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CB **Tip #2**

- Have independent contractor agreements prepared and signed
 - Simply having one will not win the issue
 - Not having one is a serious weakness
- Address as many of the 20 common law indicators as possible, making it clear the particular factor supports independent contractor treatment

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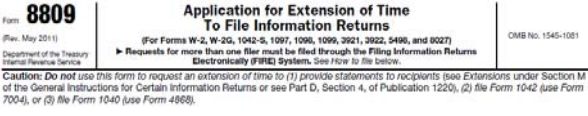
CB **Tip #3**

- TIN Matching (for authorized payer or agent)
 - Allows matching TIN and name with IRS records prior to filing forms
 - Reduces errors, backup withholding notices and penalties

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CB **Tip #4**

- Form 8809 Extension
 - Extension to file Federal copy



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CB **Another Trap**

- Nominee amounts
 - If you receive a 1099 for amounts that belong to another person, you are required to file a 1099 for the other owners
 - Security interest belonging to individual reported to entity

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CB **Finally**

- An unrelated item
 - New form 1099 K
 - Reporting of Merchant Card and Third-Party Network Payments

The IRS is going after eBay type businesses

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CB **Upcoming Webinars** www.czarbeer.com

Winter & Spring 2012		
Jan. 19, 2012	7 pm	What You Need to Know About Management Reports
Feb. 7, 2012	7 pm	Long Term Planning - The Key to Successful Properties
Mar. 5, 2012	7 pm	Understanding Condominium Financial Statements
Apr. 18, 2012	7 pm	Board Member Responsibilities
May 25, 2012	6 pm	Understanding Cooperative Financial Statements

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CB **Questions?**

- Send an email to: info@czarbeer.com
- Put "1099s" in the subject

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Excerpt from Revenue Ruling 87 – 41

Please see full text and consult with your tax advisor

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer- employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. *Instructions.* A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the *right* to require compliance with instructions.
2. *Training.* Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
3. *Integration.* Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
4. *Services Rendered Personally.* If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
5. *Hiring, Supervising, and Paying Assistants.* If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.
6. *Continuing Relationship.* A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.
7. *Set Hours of Work.* The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
8. *Full Time Required.* If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and implicitly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.
9. *Doing Work on Employer's Premises.* If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

Excerpt from Revenue Ruling 87 – 41

Please see full text and consult with your tax advisor

10. *Order or Sequence Set.* If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.
11. *Oral or Written Reports.* A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.
12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.
13. *Payment of Business and/or Traveling Expenses.* If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.
14. *Furnishing of Tools and Materials.* The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer- employee relationship.
15. *Significant Investment.* If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.
16. *Realization of Profit or Loss.* A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
17. *Working for More Than One Firm at a Time.* If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.
18. *Making Service Available to General Public.* The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
19. *Right to Discharge.* The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
20. *Right to Terminate.* If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

October 1996 IRS MSSP
Please see full text and consult with your tax advisor

The following summarizes the division of the factors under the 1996 Market Segment Specialization Program guide from the Internal Revenue Service:

Critical Factors

1. Continuing relationship
2. Training
3. Guild or union benefits

Significant Factors

1. Establishment of business presence
2. Risk of Loss
3. Control over worker activities
4. Instructions at the job site

Factors not generally applicable

1. Working for more than one employer
2. Working full time (does not necessarily indicate worker status)
3. Reports (do not determine worker status)
4. Right to discharge
5. Right to terminate
6. Integration
7. Personal services (requirement that services be provided personally)