



BEYOND THE MIC

with AEM



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Correct Worker Classifications

Hosted by Leah Davis, Tamara Hastings & Brenna Ramy

EPISODE

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NOTE: Because of the nature of ever-changing human resources, payroll, and tax regulations, all information discussed herein is subject to change. Please reach out to us to discuss your organization's unique challenges so that we can provide you with up-to-date information and help you find the solutions.

With a new season approaching, many employers find themselves getting ready to bring on summer interns, seasonal workers, or temp hires. But no matter what season it may be, your HR department should understand the nuances between different worker classifications and how to implement them.

In this episode of Beyond the Mic, Tamara Hastings, Leah Davis, and Brenna Ramy discuss some of the main worker classifications – interns, seasonal workers, temp hires, and volunteers – to help you understand when and how each of these types of workers are employed and what the correct classification should be if you take on employees in this capacity. With Independent contractor rules being in flux in 2021, this topic could be incredibly relevant for you and your employees this year!

Meet the Hosts



Leah Davis, CPA

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As President of the AEM Workforce Solutions team, Leah uses her background in public accounting, business ownership, and Human Resources and payroll support to provide her team with a strong foundation of knowledge and experience. She enjoys helping clients grow and learn, no matter where they are in their HR journey.



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Brenna enjoys working with leaders to determine the most effective employment model to meet business needs and strategic direction. She has over fifteen years of Human Resources experience in the industries of hospitality, retail, multifamily housing, and consulting.



Tamara Hastings, PHR

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Tamara brings over nine years of experience working closely with business leaders, managers, and employees in a wide variety of HR functions. She has also previously owned and operated her own small business and brings that experience and knowledge with her as she works with clients.

Episode Transcript

Tamara Hastings: Welcome to our podcast beyond the mic. I'm Tamara Hastings, a Senior Associate at AEM Workforce Solutions. And today I'm back with Leah Davis, President of the Workforce Solutions team, and also Brenna Ramy, a Senior Manager on the Workforce Solutions team. One thing we really try to focus on when selecting topics for our podcast is choosing ones that are relevant. And I'm excited about today's topic because it's certainly relevant to this time of year with summer approaching. Because of that, it's one I anticipate many of you are thinking about right now, and potentially struggling with.

So let's get to it. Today we're talking about Correct Classifications for Workers. We'll talk about interns, seasonal employees, and volunteers. There's so much to this topic already and so many nuances, and it becomes even more complicated with independent contractor rules being in flux in 2021. So let's start talking about interns and seasonal workers. I know, thinking back to when I was in college, it wasn't uncommon to see companies hiring unpaid interns. So the goal here was that companies were getting work completed by an intern in exchange for providing inexperienced workers with experience to add on their resumes. So Brenna, Leah, our internships, particularly unpaid ones, legal and are they an option that employers should consider?

Brenna Ramy: No. Just kidding. It's a really good question, and very timely, like you said, given this time of year. I joke with my no, but the answer is it's not really a joke. So what I like to start with employers is that interns and who is considered truly an unpaid intern is a very small group of people. So in general seasonal workers, and when we talk seasonal workers and internships, and those used to be somewhat interchangeable, like you said, years and years ago, interns and seasonal workers, everybody was an intern and everybody was getting quote-unquote value from their internship has really become much more narrow in the internship label, and seasonal worker has become much more broad.

For the purposes of today, let's say a seasonal worker is somebody who works only during one season, and that could be season of weather, or more accurately season of work for a business or an employer. So it doesn't have to be set, tied to a summer season. It could be if you think about a location in agriculture business, for example, might have a season of work. That's not attached to a traditional weather season, right? It's just a season of labor that needs to be completed. Seasonal workers, somebody who has a predicted beginning and end time based on a season of business and only happens either once or it happens every year at a certain time, right? So the difference between a seasonal and a temp worker would be a seasonal worker as that's happening regularly, right? So there's some predictive ability to say every year around this time seasonally, we're going to have this kind of work that needs to happen.

Brenna Ramy (Cont): A temp worker would be somebody who you say, I have this specific project or thing that needs to be done. It only needs to happen occasionally, or maybe even just once, and so I'm going to bring somebody in to do this project or the scope of work, and then that's done. Seasonal is different. A good example of this in the hospitality industry would be banquet workers. So traditionally most hospitality or hotel places can predict they have a busier season where we need more banquet servers. So wedding seasons, or if you're in a travel area, that's a destination, you can predict that. That's not temporary, that's seasonal and you can look and see our business goes up and then it goes down.

Interns: somebody calls me and says, Brenna, we have five interns that we're going to hire this year and we've got this great pool of candidates and we can do that unpaid because it's an internship, right? So they're going to be learning a lot. And I say, great, but my first question is always this: what school are they coming from? What's their educational program that they're a part of? A really good rule of thumb is an unpaid internship needs to be attached to a formal curriculum through an actual educational facility program school that they're getting credit for. And that in order for them to actually graduate from their program or finish the class, they have to have the credits from this internship. That's kind of the guiding light on an unpaid internship. Everything else you can do paid internships with a lot of different options, right? You can get much more creative with a paid internship. It can be something that's not attached to a credit or an actual graduation program. Those are used much more differently, but unpaid, there's very specific rules around it. I hate to say this because as such a Debbie downer, but your unpaid internship can't be like making copies and getting coffee and organizing files and doing all the down and dirty work that nobody wants to do. Or you're like, someone's got to do it, and so you give it to the internship.

Leah Davis: When I think of internships, I always think, I wonder if those Enron shredders were paid interns? A good rule of thumb too, and you touched on this, if it's not for the benefit of the employee primarily. So if there's not work that the employer needs to do to get that intern there. So whether that's submitting reports with that student's professor or advisor, if they don't have to do some sort of internship evaluation at the end of the job to make sure that that student can report back on what they've learned, it's probably not a legitimate internship or a qualifying internship is the right word.

Brenna Ramy: A hundred percent Leah, I would say I'm just going to be honest, because we love honesty on this podcast, we're always, you know, the next one coming up or telling the down and dirty HR dirty secrets. So here's one of mine early that the last I've only done one unpaid internship in the last 15 years because it changed a while ago. The last one I did was such a pain that I thought it's not worth it because the paperwork that we had to do every week to submit to the student, to give to their professor, it was part of a coursework, and in order to graduate, they had to do a whole class that was an unpaid internship. The amount of paperwork, the amount of reporting, the amount of follow-up, the amount of coordinating all of the activities that this person needed to do to meet their requirements, to make sure they learned everything they needed to do was really a lot of work actually.

Brenna Ramy (Cont): So it really ended up, when we looked at it and kind of did a review afterwards, the amount of work that we had to do to make sure the student got what they needed, ended up being more than the value that we got of it as an unpaid internship. If they're valuable, there's a time and a place, but as a general rule, the unpaid ones, we're talking just unpaid, tend to be a lot of work, and they're primarily for the benefit of the students/unpaid intern.

Leah Davis: And one of the questions I get a lot too is: I have to pay them, do I have to pay a minimum wage? Is there like a credit for interns or anything like that? And the short answer is, the rules are very specific. There are some situations, both the federal and many state minimum wage laws have carve-outs or specific criteria for paying a full-time student or a youth worker under age or 20 as sometimes the federal law is at 20. There are situations where you can pay employees less than federal or state minimum wage, whichever you're regulated by, but they're very state specific and fact specific so employers need to check that out. I think the reality too is recruiting, finding interns to work.

Brenna Ramy: Let us know where you find those candidates because most employers we're seeing can't even find somebody for above minimum wage, much less at minimum wage, much less below minimum wage. When we get to that question, when we are like, can you and will you be able to are two separate questions. So maybe start with: is it even practical for you to think about it. But you're right, you can in some scenarios.

Our recommendation Tamara, if you were going to sum up unpaid internships or internships in general, think about what are you looking to get from your internship. So is it a future recruiting tool? Are you looking to build relationships with a certain college, a certain graduation program, a certain network, are you looking to get supportive work for senior level workers and build relationships, development tools, whatever it might be, or are you doing it as an act of service in your community? So sometimes we see that. Think about why you're doing an internship, what is the benefit of it, and then be really educated on the unpaid rules around it because they are very, very narrow. So understand them and don't go into it thinking, it's fine, we've called it an internship so it must be unpaid. Untrue.

Tamara Hastings: No, that's great. I really appreciate that, and you know, these are really difficult terms and we throw them around a lot. And so I appreciate the honest take on it and the everyday take on it, and the reality is, the recruiting is really challenging for this right now, and I really appreciate you talking about the experience of having the unpaid intern. While it sounds nice that day-to-day reality and the paperwork makes it really challenging, that allows employers to really think through their options and what they want to do.

So let me throw another one at you. Let's talk about volunteers and this will really be important for our nonprofit organizations especially. So for volunteers, we can just find people who are passionate about what we're doing and want to help out for free and get them started, right? No, it's never that simple. So talk to me about volunteers and what we need to be thinking about for them.

Leah Davis:

So different from an unpaid intern, who's doing the work in some cases for credits or certification or licensure requirements, volunteers, again, like you said Tamara, we get calls from employers all the time. Like, I have so-and-so and we're putting on this event, and I've got these people that want to volunteer. That's fine. And the answer is, it's very nuanced. So a couple of guide rails for all employers to just keep in mind.

So one: employers in the for-profit sector can't have volunteers. They need to know that. Nonprofits, this is an opportunity that is very specific to nonprofits and public sector employers. So if we carve out the for-profit sector and we're just talking about volunteers in the nonprofit and the public sector, when can they have volunteers? The rules really are, you can't displace workers who are getting paid. So you can't displace employees with volunteers. You can't have employees volunteering to do work that is basically the same or similar to the work that they do for pay. So we can't have employees saying nine to five, my job is to do this work, and I'm working for this for-profit and I'm really passionate about it, and we're really busy and we're growing in. What I'm going to do is I'm just going to work instead of eight hours a day, I'm going to work 10 hours a day, but those last two hours doing the same thing, but those last two hours we'll call volunteer time. You can't do that. So what we see a lot of times for true volunteer situations is people who are not employees, who are not getting paid by the public sector employer or the nonprofit, they'll just pop in to volunteer for things. So they're never getting paid by the organization. They're helping with events or doing communications or fundraising, but they're never on the payroll, and that works.

The other thing that is if employees want to volunteer, the most common thing that we see is maybe you've got someone in your operations team, their accountant, for example, they're getting paid and they're on payroll doing that work, but they'd like to volunteer for your organization's events on the weekend. Maybe they're taking registrants at a 5k fundraiser or something like that. That's fine because it's different from their normal day to day work. So I think those are some good guide rails.

And then the only other thing I would say from a payroll perspective, we a lot of times get nonprofit employers who want to say thank you to their best volunteers by paying them, or I want to give them some money just as a goodwill. So you can reimburse expenses for volunteers. So if they have mileage, if they have expenses, you can reimburse those. You want to keep those receipts so that they're tax deductible and they're not taxable to the employee, but anything per the IRS, that's more than nominal, and I've got air quotes around nominal, because again, that's wonderful how nobody ever defines that. But if any of those payments to your volunteers even get close to something that looks like federal minimum wage in terms of amount of pay per hour or amount of benefit that you're giving them per hour, it's going to be considered more than nominal, and you've just made them an employee. So if they're volunteers, they really do need to just be volunteers, and just kind of let it be what it is, or you're going to end up in some payroll tax trouble.

Brenna Ramy: And the kind that you really don't want to be in. Leah, we've talked a lot about on some of our other podcasts about risk tolerance. So what's our risk of following a compliance rule, a guideline, what's our risk if we get this wrong? And this is an area that with interns, with volunteers, we'll wrap this up here in a minute with independent contractors, all of these areas are high risk because they're all regulated by multiple agencies and they always are all in, it's not a "good faith effort, try better, next time we'll come back and check in a year." It's a "you got that wrong, here is the fine for our agency one, here's the fine for agency two, here's the fine for agency three. And while we're here, we'll just audit everything because we found one thing." So this is an area that does have a pretty high risk of eventually getting found, right? So it could be found through multiple ways, it could be found through an IRS audit, through a report by an employee, through somebody files a complaint. And that once they find one, they're in and they're going to look at everything. So it's an area that we, even for the most risk tolerant organizations, have our stop sign up and we're saying, this is an area you probably want to get right and really not live in the gray on.

Leah Davis: And for nonprofits and public sectors, making sure that they're being good stewards of that, of their dollars. In the public sector, it's public funds in the nonprofit sector a lot of times it's donor and grant funds. It's just bad PR to get some of this wrong for those types of organizations.

Tamara Hastings: And I think we see a lot of times too, an organization has an idea or a concept and they're excited and they want to get rolling with this, but it's good to know that this is one of those areas where it's best to just stop and slow down and think through everything and make sure you're getting it right from the start because of that risk level. Very helpful.

And Brenna, I know you mentioned independent contractors and so that's where we're going next. So I keep hearing about the independent contractor rules, potentially changing. We've heard different stories on this throughout 2021, and I know that you in particular, get this question a lot. So in a nutshell, can you give us an update on independent contractor rules and where they stand?

Brenna Ramy: I took the nutshell and I broke it with a hammer because I was sick of the nutshell. I don't want this nutshell anymore. Just kidding. So let me preface my independent contractor answer, and tying together a little bit, this volunteer hours and say independent contractors, just like volunteer hours, is the responsibility of the employer and it doesn't matter what the volunteer employee and independent contractor want.

So often like Leah and you were both saying Tamara, in the nonprofit world, for example, people are very committed to the cause, what it supports, the program. So often you might have an employee who works for you and says, I know I've already gotten paid and I hit my hours, whatever it might be, but I want to volunteer. I feel so passionate about this, that I want to volunteer. So don't worry, don't pay me. The answer to that question is always, it doesn't matter what they want. It's the employers, the nonprofit, the public organization, it's their responsibility to pay that correctly and to follow the law, even when the employee is saying, no I don't want to be paid for it. It doesn't matter.

Brenna Ramy (Cont): Same rules at an independent contractor evaluation. We often hear a lot that employers say, we did, we actually think they're an employee, but the person wants to be an independent contractor. It's better for their personal tax status. We hear that a lot, right? It's better for them. They've done the math and they make more money if they're an independent contractor or it's better for their family and their taxes at the end of the year, if they're an independent contractor. So we're just going to let them. And my answer to that is always no, no, no, no, no. As many times as they possibly can say, because the obligation falls on the employer to accurately classify independent contractors. So that's my negative nelly intro to this to say it doesn't matter. You're just responsible for being knowledgeable. The known or should have known standard is always on the employer when we talk about this type of stuff.

I will say, I can clear the water a little bit for the sediment in the independent contractor world, somebody took like a big boat paddle to the bottom of the lake and just stirred it up. And for honestly like nine months, it's been this, will they, won't they is something passing what's going to happen. So there was some legislation under President Trump's Presidency that was submitted, that was going to change and really simplify the independent contractor rules. I won't even get into it because what happened in just the last month, actually, I think it was like May 6th, that officially under President Biden's Administration, they have closed the book on that and said we're not going to pass that. So they've officially said we're closing down that proposed legislation, that's not going to happen. So President Trump's Administration made some legislation proposals that were going to change it, make it easier. Initially those were just paused for a review and now they've officially been put to bed. So no changes in the independent contractor analysis. So when we talk analysis, that's like a whole podcast on its own, truly, there's all these factors and all of these things you want to look at.

So what I would say is if someone says, what should I know? I should say A, you should know it's your job as the employer to be the knowledge, to be the experience, to be the educator and to know all of the different agencies. So we have the Department of Labor, we have IRS, we have all of these different agencies that give their own opinions and then there's federal and state versions of those things too. I think the other day we were doing an educational program with some HR leaders, and did we end up on over 30 factors? So when you combine the IRS, the state and the federal factors, it's a lot. We're not going to cover those today.

What I will say is you need to know, need to understand the implications. It's very high risk, and if you are listening to this podcast and you are in HR or business owner, or oftentimes an IT or accounting professional that happened to be handed the beautiful bucket of HR in their role, and you've never done an analysis of your 1099s to say, who are we paying as an independent contractor? So if you don't even know where to start, pull your 1099s and look and see. What we use as a very basic, easy way to kind of spot check it is, is who is paying the independent contractor? Let's say you have an independent contractor. Do they make money other places? Is all of their money made from your public, private, or nonprofit organization. If the answer is only from you, what's their risk? It's one of the analysis factors. The other thing is who's controlling their work? So does your business tell them when they work, how they work, where they work, what they need to do, how they need to manage their schedule. That's an employee, right?

Brenna Ramy (Cont): So those are kind of some basic factors and simplifies all of those 30 plus factors down to some basic gatekeeper ones that you can start with a conversation, and start looking and kind of digging in and peeling back the layer.

Leah Davis: It's all about control. When I think about independent contractors, I always think of that analogy: if it walks like a duck, quacks like a duck, looks like a duck. If it looks like an employee, acts like an employee, does all the things that a normal employee does, and if you can't tell the difference on face value or just on the face of the arrangement, they're probably not a contractor. I think that's important. And then Brenna talked about going through your 1099 list. That's the first thing an auditor is going to do is say, let's see those 1099s, and it's such an easy audit. So this is top of mind for your regulators at your state unemployment agencies at your state income tax agencies. The IRS has this top of mind because it's easy to find, it's quick, reclassifications that result in a lot of tax income that they're trying to grab. So I think if employers start with these decisions from a place of, this is an employee, if I'm going to pay someone for work, it is an employee unless I can really establish that it isn't by going through these contractor rules.

Brenna Ramy: I'm telling all my worst stories, but the good news is after 20 years of HR, I have literally thousands of things that happen in the world of HR that I just shake my head at. But an example of this, in an independent contractor world is, we had a business that they were determining who is an independent contractor, who is an employee, and they have a specific person that they went back and forth on. And they had this documented email chain back and forth with the employee saying, we think you should be an employee, we'd like to reclassify you, here's what we're going to do. And the employee in his own words, in this email chain saying, I've actually done the math and I really want to stay an independent contractor, here's why I want to stay an independent contractor. Pushing and saying no, this is what I want to be. The relationship is very good. They leave him as an independent contractor, as all these stories go in the end, the employee leaves and the relationship's not so good. And what do you think the very first claim they filed was? I was misclassified. They owe me, they paid me incorrectly, I was truly an employee. And you know what? The employee won and the employer to us was like, this is cut and dry. It will be super easy and we're not worried, I have this email chain. And we were like, it's not the employee's job to classify themselves correctly. It's your job. And it was very clearly an employee. And so even though they had this email chain with the employee saying, I don't want to be an employee, I want to be an independent contractor. It just doesn't matter. So it's very easy to get, I don't want to say caught, but to be found out and to be discovered at some point that you're incorrect. So do the work when you can control it and you have the option to correct, and don't just wait for it to be bad. It will be.

Tamara Hastings: I think that story is super helpful. It reminds me of a few things that have gotten me pretty far in my HR career is just relying on these sayings. And one is, and we always say this, that no one likes us, we're not very popular for this, but it's always fine until it's not. And that story is a great example of that. And we always have to be thinking about that worst case scenario, or what happens when that relationship, or I guess if, that relationship breaks down, and then we're also thinking about the employee can't give up their rights to certain things. And that's something that's really important. Just remembering that people are going to come to you and say, this is a great situation, we can work this out, let's just make it okay. You have to remember that that responsibility is on you, and that you can't let them waive their rights to those things. Even if they're volunteering, they're excited about it, and it seems like a good situation. Relying on those kind of phrases have really helped me through some of those scenarios.

Thank you both so much. This was a huge heavy topic and classifying workers is really challenging. There's a lot of nuances to it. So I really appreciate you boiling it down and using examples that make sense so that we can kind of wade through this tough topic.

Brenna, I know you kind of mentioned this and I'm super excited. I've been waiting the entire podcast to tell you about next month's topic. So next month we are talking about hygiene. So most of us in HR or as business owners, we've been there. That awful day, when you have to have that really difficult conversation with someone in the workplace about their hygiene. It's never fun, it's not fun for you or the other person, but there are ways to navigate these conversations in ways that are effective and compassionate, and can come out and make the relationship between you and the employee better, even in some situations, or maybe you find out there are things going on that you didn't know about, and you can really help the employee through this and offer some other things. So next month, we're going to go through with some war stories of our own, and talk about how to have these challenging conversations in the most positive way we can. So thanks for joining us again, and we'll be back next month.

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