by Daniel M. Isard, MSFS

1.800.426.0165
danisard@theforesightcompanies.com

ICCFA Magazine spotlight

➤Isard is president of The Foresight Companies LLC, a Phoenix-based business and management consulting firm specializing in mergers and acquisitions, valuations, accounting, financing and customer surveys.

➤He is the author of several books, and frequently speaks at industry conventions.

More from this author

➤Educational information, including copies of this article, can be found at ***www.theforesightcompanies.com***

➤You can follow Isard on Twitter at *@f4sight,* LinkedIn and "like" The Foresight Companies on Facebook.

Editor's note

The Cemetery Impossible column is written by the staff of The Foresight Companies. **If you have a question you want to be featured in this column, please send it to danisard@f4sight.com.** Dan Isard or a member of his staff will call you to get more information and a recommendation will be provided via this column, helping not only you but also others who are facing similar challenges.

HUMAN RELATIONS

Do you know what an employee is? Are your salespeople employees? What about your grounds workers? If you're not sure, you could be setting yourself up for trouble in the human resources department.

Cemetery Impossible

Exempt, non-exempt and contracted workers

Dear Dan,
I manage a 100-year-old 80-acre cemetery. I employ about 30 people. My father retired about 10 years ago, and I admit I am doing things much the way he did. I also admit that the world is evolving, and I suspect my human resource knowledge is weak.

Dad always treated our sales team as advance and outside salespeople, and they are all on commission only. They get a 1099.

Our landscapers work for us full time, but he treated them as "contractors" and gave them each a 1099.

Our office staff consists of three people, full-time employees we classify as exempt. There are not many times a year when they work overtime—around the holidays and when we have special on-site promotional events. I am a salaried, full-time employee. Our retirement plan covers me and the office staff.

With that said, what do you perceive we are doing right or wrong?

HR Deficient in Dorchester

Dear HRDD,
Congratulations, you are doing almost everything wrong! I rarely see a situation this clearly screwed up. Let's start with some basics.

What is a "full-time employee"? This sounds like a simple term to define, but the trick is, this is really two terms, not one.

Let me start with the definition of an employee. According to Merriam-Webster dictionary, an employee is "someone employed by another, usually for wages or salary, and in a position below the highest executive level." By this definition, your office staff and sales staff are employees.

The definition can vary by employer. It should be published in your company's employee handbook, assuming your father had one. Typically, a company requires 35 to 40 hours per week to be defined as full-time. There are other tests that determine full-time employment by month or partial year.

Full-time vs. part-time is an important distinction, as full-time employment makes someone eligible for benefits such as retirement and health insurance. You provide benefits to four of your 30 employees.

The money you save on the other 26 is due to the fact that you deem them contractors or outside salespeople. This is your determination and may not necessarily agree with the determination of the Department of Labor (DOL) or the Internal Revenue Service (IRS).

Each employee needs a job description for the job you have hired them to do. If two or more people are doing the same job they can be covered by the same job description. Having a job description for all employees protects your company.

There are two federal government organizations you must appease. The IRS wants to make certain it gets accurate information and the proper tax collection on income and earnings. The DOL regulates the workplace conditions of employees as controlled by their employers. While the IRS is about money, the DOL is about work environment.

The IRS gets into this discussion from two angles. First, they want to make sure tax payments are collected. Taxes include taxes on income and benefits, such as FICA, FUTA and other wage benefits.

For your three office employees, you have the obligation of collecting these payments and remitting them on behalf of the covered employees and making the matching payments of the wage and benefit tax.

Employees covered by 1099s have the obligation of paying their own taxes and benefits. By categorizing someone as a

contractor or outside salesperson, you do not pay the "matching" tax or benefit cost.

Classifying some employees as 1099s pushes the obligation of tax collection to them. The IRS understands a business may use contractors, but in some cases, "contractors" are being defined to save you money and not meet the letter of the law.

There is a 21-point test to determine if someone is a contractor or an employee. Without going through all 21 points, you can get an idea by asking yourself these questions:

a. Do you control the hiring and firing of the individual or does the contractor?

b. Do you limit who the contractor can also work for?

c. Does the contractor have a company, or is the contractor an individual?

d. Do you supply the tools to the contractor to do their work?

e. Do you set the hours during which and methods by which the work is being performed?

Clearly, you are in control of your landscaping crew. Therefore, they would undoubtedly be employees and not independent contractors. The IRS would hold you accountable for the collection of any taxes and benefit payments. The DOL would also say that you govern workplace safety, including making sure that all OSHA regulations are followed.

You did not share this in your letter, but your insurance company would certainly be assessing you for workers compensation. If you are paying workers compensation, then the members of your landscaping crew are undoubtedly classified as employees.

As to your advance sales team, I think you fail the test of outside sales. You probably don't want them selling for your competitor, you provide them leads, you give them confidential information, you tell them what terms and conditions they can agree to a sale and may have additional restrictions on what they do.

The IRS would expect you to treat these people as inside sales employees. This means their compensation can be commission-based, but not commission only. As employees, they have to be paid at least minimum wage and can receive commissions on top of that.

IRS and DOL jointly look at these employees for retirement benefit issues. The retirement plan has to include all full-time employees. If they are excluded, then it is possible your entire plan can be invalidated, or you may owe a large deposit to catch-up benefits not funded in the past. This is a very draconian penalty.

Any deduction claimed by your company in the past (within the statute of limitations period) can also be lost. That may require refiling corporate and maybe even shareholders' personal tax returns.

The benefit issue is a big concern. A full-time employee is determined by the number of hours they work within a week or a calendar month. There are different thresholds for different benefits.

A general rule of thumb is an employee employed on average at least 30 hours of service per week, or 130 hours of service per month, generally is going to be covered by benefits.

The inclusion for health insurance is going to be set by your health insurance carrier. I have seen this range from 32 hours a week to 1,600 hours a year.

Your health insurance carrier may have an additional requirement dealing with the percentage of employees included in the plan, versus those opting out. If you assume four out of your total of 30 people are included in the plan, you are probably not meeting your health insurer's requirement for a percentage-of-coverage test.

You believe your office staff is exempt. I think this is probably reaching. While the laws change from time to time as far as how exempt and non-exempt employees are determined, the Fair Labor Standards Act describes who can be considered exempt. There are about 10 different ways a person can be deemed to be exempt, but based on my experience with cemeteries, your office staff is probably non-exempt.

This means if your office staff works overtime (more than 40 hours in a consistently applied period) you owe them time and a half for the period over 40 hours.

With all this being said, what can you do to change now? I would recommend a few steps: Get an employee handbook in place that is specific to your business. Don't use a general handbook, as the cemetery business is different from an accounting firm, for example.

Present the handbook to employees and tell them that, based upon this document, you are making some changes to the status of employees. You are going to redefine exempt versus non-exempt status and inside versus outside sales and contractor status of workers.

Prepare for the fact that this is going to give most workers a raise, as their compensation will increase due to overtime, tax savings and/or benefit inclusion.

This is a fresh start. Treat it as such. ❐