

# The Advisor Lookout®

... Compliance Information for the Financial Professional and Broker Dealer

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## Employee or Independent Contractor?

*IRS Update eliminates the guesswork*

### ■ Feds make it easier for workers to complain

The past few years have been big for “The Fight Against (fill in your cause)” campaigns. People have joined forces to combat everything from cancer to illegal drugs to terrorism and unsolicited commercial e-mail. Now the IRS has jumped onto the bandwagon, fighting against employers that misclassify workers as independent contractors (IC).

### ■ Whose side are workers on?

What’s surprising, though, is the agency’s biggest ally in this fight may be some of your workers. It’s easier than ever for them to contact the IRS, claim they’re employees, and leave your company saddled with misclassification penalties and their share of employment taxes. Now your workers can submit the new Form 8919, *Uncollected Social Security & Medicare Tax on Wages* if your company treated them as independent contractors and they think that they should be employees (Continued on back).

**View the EmployShare VIDEO at [www.employshare.com](http://www.employshare.com)**

## Pitfalls of Employee Leasing Arrangements for Financial Advisors; IRS & DOL on the hunt and Encouraging employees to come forward!



Why do many financial advisors and broker dealers (BD’s) participate in leasing deals or (PEO’s)?

### **It’s the group benefits.**

For years BD’s have tried to find ways short of directly employing independent advisors to help the independents obtain large group benefits. This usually led them to PEO’s or Employee Leasing deals. If you carefully look at the history of these deals, you will see that there are many established high caliber PEO’s offering services to a variety of industries.

You will also see that the PEO industry has had more than its share of problems over the years, many which are related to tax scams, insolvency, misclassification of employees, State unemployment violations, and ERISA and MEWA violations.

In addition, leasing deals usually do not provide essential employer compliance guidance to protect the advisor and BD from any of these violations.

### **What is your liability?**

The IRS and DOL have specific guidelines that most leasing deals violate. This creates certain vicarious liabilities for the BD and financial advisor.

### **A closer look:**

Leasing deals require an agreement stating that you agree to terminate your employees and let the leasing company hire them as employees leased to you (continued on back).

### (Pitfalls of Employee Leasing Continued)

The leasing agreement may use such terms co-employment; loosely defining who hires and fires your leased employees and who controls their day to day activities.

### Publication 15A and Circular E

In accordance with DOL regulations and IRS guidelines in the above documents, the advisor remains the employer of record in almost all cases and is liable for any violations as well as wrongful employment actions. In addition, the advisor remains liable for all payroll taxes collected by the leasing company and unpaid for any reason as well as unpaid state taxes, workers' compensation claims, medical insurance claims, and pension plan violations. In addition, the **ADVISOR** AND the referring **BROKER DEALER** may have vicarious liability for any and all actions of the leasing company (See DOL and IRS regulations as well as EEOC and SEC guidelines related to your specific situation and leasing deal).

### Who really is the responsible employer?

The DOL and IRS have consistently held that if an employee performs services for you under your supervision, guidance, direction, and control, then you are the employer. It's no doubt many still do not believe this and in some cases, even attorneys, consultants, and some state agencies have

convinced you that a properly executed leasing agreement assigning the leasing company as the employer gives you a safe harbor from prosecution.

Do not buy into this theory unless you want to put your business at risk. Ask an experienced attorney if you can write an agreement that will permit you to violate federal law?

You will ultimately be responsible and accountable because you cannot write an agreement to supersede or violate federal law.

### Leased Employees Pension and Your SEP

IRS Publication 560 Small Business Pension Plans makes it clear that leased employees which are your common law OR NOT your common law employees are considered yours for pension plan purposes and must be included in any pension plan testing.

All financial advisors and broker dealers should already understand the serious consequences of pension violations.

*More to follow on these serious issues.*

To request a copy of any of the IRS publications mentioned in this document, write or call to Jake at [jbarsottini@employshare.com](mailto:jbarsottini@employshare.com)  
-Toll-free: 888-601-7293  
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(Employee or Independent Contractor continued)

### Big incentives to blow the whistle

If a worker meets certain criteria, the taxes may then be credited to his/her social security records. Criteria include:

- Co-workers perform services in a similar capacity under the same direction and control, but are treated as employees
- The worker filed a Form SS-8 with the IRS, regardless of whether a response was received, and
- The person was previously treated as an employee and now performs services in a similar capacity and under basically the same direction and control, but instead is treated as an independent contractor.

### Even more Ammo for workers

The IRS isn't the only agency in on the action. Workers are also being encouraged to contact the feds about potential misclassifications including exempt v non-exempt under the FLSA. A report from the General Accounting Office (GAO) urges the DOL to more carefully examine potential misclassifications.

State unemployment agencies and workers' comp bureaus are piggy backing with the IRS to gang-audit employers for unpaid taxes, comp premiums, and even unpaid overtime. The fines and penalties are staggering, not to mention the negative ripple effect on your employees.

Article reprint from  
'Keep Up to Date on Payroll™', April 1, 2008 issue

### In coming issues of The Advisor Lookout:

- ▶ Safe harbor your retirement plan to take advantage of legitimate tax savings
- ▶ Prevent employee misclassification violations without increasing costs to your practice
- ▶ Take full advantage of your corporate entity to protect your practice and reduce taxes
- ▶ Why Employer Practices Liability Insurance (EPLI) is necessary to protect your financial assets