



## Employment Classification for Farmers Market Managers

### › What

*Employment classification refers to the type of classification given to a worker. Employment classification affects whether an employer has to abide by certain employment and labor laws.*

### › Why

*Understanding employment classification can help farmers markets avoid risks such as violating federal and state employment and labor laws, fines, and litigation costs.*

### › Who

*Federally, the U.S. Department of Labor enforces employment and labor laws. State departments of labor enforce state employment and labor laws.*

### › How

*Titles do not determine employment status. Employment classification is determined by the facts and circumstances of an individual case. There are different tests that help determine whether a worker is classified as an employee or an independent contractor.*

## What role do market managers play?

Farmers market managers—also known as market operators, market coordinators, market assistants, and other similar titles—are often the main point of contact for a farmers market team on market day. Although specific duties may differ between markets, market managers generally oversee market day operations, marketing efforts, vendor relations, customer relations, and food access programs and often serve as the contact for administrative matters.

Markets should have a written job description for their market manager. (This is a part of good recordkeeping!)<sup>1</sup> Many sample market manager job descriptions can be found online, such as on the Farmers Market Coalition Resource Library,<sup>2</sup> but markets should keep in mind that every market is unique, and what works for one market may not work for another, particularly when the markets don't share similar governance structures. Markets may want to check with their state farmers market association<sup>3</sup> as they create a job description for their market manager.

## Why is employment classification for market managers important?

The legal relationship between a farmers market and its market manager is determined by the **facts and circumstances** of the relationship and not the market manager's **title**. Understanding how to properly classify a market manager can help a farmers market manage the risks of employee misclassification.

The **risks** of violating employment and labor laws include fines and costs associated with going to court. Proper employment classification can also ensure a fair working environment where the work of market managers is justly compensated and protected.

## What are potential employment classifications for market managers?

For-profit markets (sole proprietorships,<sup>4</sup> partnerships,<sup>5</sup> limited liability companies,<sup>6</sup> corporations,<sup>7</sup> and cooperatives<sup>8</sup>) may have market managers who are employees or independent contractors, but they cannot legally have market managers who are volunteers. Nonprofit<sup>9</sup> markets may have market managers who are employees, independent contractors, or, under limited circumstances, volunteers.

### Employees

In an employer-employee relationship, the employer has a right to control what and how things are done. An employer-employee relationship requires employers to follow federal and state employment laws and involves additional administrative processes. For example, employers must follow minimum wage, workers' compensation, and unemployment insurance laws, as explained in more detail in the Farmers Market Legal Toolkit's Employment and Labor Law Risks Overview.<sup>10</sup> *Read below to understand how to determine whether a worker is an employee or independent contractor.*

### Independent Contractors

An independent contractor is self-employed and offers their services for a fee. Independent contractors control what and how things are done and are only required to present a finished result to the individual or group that hired them. When an independent contractor is hired, there is less of an administrative burden since taxes and other filing requirements of the employer-employee relationship do not apply. *Read below to understand how to determine whether a worker is an employee or independent contractor.*

### Volunteers

Under federal employment law, a for-profit entity generally may not have volunteers.<sup>11</sup> A nonprofit entity may have volunteers, yet there are several legal limitations to the amount and type of work a volunteer can do for a nonprofit entity. Volunteers should not play an essential role or commit a significant amount of time to a farmers market, as explained in more detail in the Employment and Labor Law Risks Overview<sup>12</sup> and in a forthcoming resource.

## Who enforces employment classification?

The U.S. Department of Labor enforces most federal employment laws. State departments of labor enforce most state employment laws. Employers must comply with both federal and state employment laws; where they differ, employers must comply with the law that is most protective of the worker. The U.S. Internal Revenue Service enforces laws requiring employers to pay certain federal taxes for employees but not independent contractors.

## What are the risks of employee misclassification?

There are several risks associated with the misclassification of an employee as an independent contractor (or volunteer):

- A federal or state agency may order payment of penalties.
- A federal or state agency may order payment of back taxes, including payroll and unemployment taxes, with interest.
- A misclassified employee may sue for unpaid wages and benefits. Liability for these costs can fall on the farmers market itself, as well as on any individual director or officer who played a role in the misclassification or failure to pay wages and benefits.
- Insurance, including commercial general liability (CGL), directors and officers liability (D&O), and even employment practices liability (EPL), generally does not cover penalties, back taxes, or unpaid wages and benefits.

The costs for paying penalties, employee-related taxes, and potential litigation can add up and be a serious threat to the success of a farmers market. The best way to manage this risk is by understanding employment classification and properly classifying market managers and other farmers market workers.

## What determines a market manager's employment classification?

Proper classification of workers is purely fact-based—each situation is unique and requires an understanding of the facts surrounding a particular worker's duties and responsibilities. **Titles do not determine the classification of a worker.** Regardless of the relationship a farmers market and a market manager may believe they have, the market manager's classification is based on the facts of how the manager completes their duties and responsibilities.

To manage the risks associated with employee misclassification, farmers markets should understand how different classifications are determined. An employer-employee relationship is assumed under the law, unless one can prove the worker is an independent contractor.

There are different tests that exist to determine whether a worker is an employee or an independent contractor, including the **economic realities test**, the **right-to-control test**, and the state-adopted **ABC test**.

- ❶ The **economic realities test** helps determine a worker's classification for federal employment law purposes.
- ❷ The 20-factor or **right-to-control test** helps determine a worker's classification for federal tax purposes.
- ❸ Many states use a version of the **ABC test** to help determine a worker's classification for purposes of state employment, workers' compensation, and unemployment insurance laws.

These tests are truly guides that require a balancing of the factors considered to determine whether a worker is an employee or independent contractor. In any given situation, certain factors may weigh more heavily than others. Markets that want to classify their market manager as an independent contractor should ensure the market manager meets the criteria under all of the tests, so the market complies with federal and state employment and tax laws.

## ① Employment Classification Based on Economic Realities Test

*As a matter of economic reality, does the worker depend on the employer's business or is the worker in business for themselves?*

- How much control does the employer have over the work?
- How large an investment has the worker made in equipment and facilities?
- How much opportunity for profit and loss does the worker have?
- How permanent or temporary is the working relationship?
- How much skill is required to do the work?
- How important is the work to the employer's business?
- How much opportunity does the worker have to do similar work for other businesses?

Courts have created the **economic realities test**<sup>13</sup> to analyze whether a worker is an employee or independent contractor under federal employment law. The economic realities test weighs a set of factors to determine the worker's economic dependence on the employer. Specifically, the economic realities test weighs these five factors: degree of control over the work; investment in equipment and facilities; worker's economic opportunities for profit and loss; permanency

of the work relationship; and skills required to complete the work. The U.S. Department of Labor balances the factors of the economic realities test as well as others to determine whether a worker is an employee or an independent contractor. Some of these additional factors include how integral the services of the worker are to the business and the ability of the worker to have a business outside of the services they are hired to provide.



## ② Employment Classification Based on Right-to-Control Test

### ***Behavioral Control***

- Does the employer determine when and where the worker works?
- Does the employer determine what the tools or equipment the worker uses?
- Does the employer determine who to hire or assign to help with the work?
- Does the employer determine where the worker purchases supplies and services?
- Does the employer determine whether the work must be done by a specific person?
- Does the employer determine what order or sequence the work is done in?
- Does the employer give the worker detailed instructions?
- Does the employer evaluate the worker's performance or just the finished result?
- Does the employer give the worker training on how to do the work?

### ***Financial Control***

- Does the worker make a significant investment in tools or equipment?
- Does the worker have unreimbursed business expenses?
- Does the worker have an opportunity to make a profit or loss?
- Does the worker make their services available to other employers?
- Is the worker paid by the hour, week, or month, or is the worker paid a flat fee?

### ***Type of Relationship***

- Is there a written contract between the employer and the worker?
- Does the employer provide the worker with employee benefits?
- Is the relationship of indefinite duration or limited duration?
- Does the worker provide services that are a key aspect of the employer's business?

The U.S. Internal Revenue Service (IRS) provides a **right-to-control test**<sup>14</sup> (formerly known as the 20-factor test) to determine whether a worker is an employee or independent contractor for federal tax purposes. Generally, the test is divided into three categories: behavioral factors, financial factors, and the type of relationship that exists between the employer and the

worker. The test is a guide for examining the entire relationship between the employer and the worker.

Essentially, the focus of the right-to-control test is on the degree of control over the worker's responsibilities and the worker's abilities to engage in other work.

### ③ Employment Classification Based on ABC Test

- Is the worker free from the employer's control and direction?
- Does the worker do work that is outside the employer's regular course of business?
- Does the worker do business separate from the work they do for the employer?

Most states have adopted a version of the **ABC test** to determine whether a worker is an employee or independent contractor for purposes of the state's employment, workers' compensation, and unemployment insurance laws. Some states may differ on the language for some of these factors, but the ABC test generally considers three factors:

- How much control and direction the employer has over the worker

- Whether the worker does the regular business of the employer
- Whether the worker does business separate from the work they do for the employer

***The ABC test is quite specific and often, under this test, workers are considered employees and not independent contractors.*** It is important that farmers markets refer to state employment and labor laws to determine the most appropriate factors to consider in classification.

## How does this apply to farmers markets and market managers?

Consider the following hypothetical example:

- Farmers Market A hired Manager B to manage its weekly farmers market.
- Farmers Market A's board spent two weeks training Manager B to manage the market according to its 30-page manual.
- Among other duties, the board trained Manager B to draft an email with 10 specific categories of information to market vendors and customers, get approval from the board for the draft, and then send the approved email to market vendors and customers three days before market day each week.
- The board also trained Manager B to draft a report with 10 specific categories of information to review with the board three days after market day each week.

- Manager B spent close to 40 hours a week working on the email, report, and the other duties the board assigned them.

Under the economic realities test, the IRS 20-factor right-to-control test, and the ABC test, Manager B likely is an employee. Farmers Market A exercises the level of control that characterizes an employment relationship. Even if Farmers Market A and Manager B believe and want them to be an independent contractor, based on the fact that Farmers Market A has significant control over the way they perform their duties, they are likely an employee.

## Classifying a new market manager

Proper classification is a good risk management practice and should be considered before hiring a market manager. This is an opportunity for a farmers market to decide how much control it wants over how the market is managed. Being clear about a market

manager's classification before hiring can lead to better working relationships within the market and allow the market to focus on the goals it has for the market and community.

## Reclassifying an existing market manager

If a farmers market realizes that a market manager whom it treated as an independent contractor is actually an employee, the farmers market must comply with employment and labor laws. Any taxes due should be paid, and employment and labor laws should be complied with. The IRS offers a program called the [Voluntary Classification Settlement Program](#),<sup>15</sup> a limited amnesty program to help entities that willingly wish to properly classify their workers reduce their liability for payroll taxes, interest, and penalties.

If a farmers market wants to change their market manager from an employee to an independent contractor, the market should proceed cautiously to reduce the level of control it exercises over the market manager and make any other changes necessary to ensure there is no employment relationship under any of the tests. Additionally, the farmers market cannot fire the market manager from being an employee just so that they may later become an independent contractor.

### Key Takeaways

- Proper employment classification of market managers is important to avoid the risks of employment and labor law violations.
- Proper employment classification is purely fact-based. The facts surrounding the work and how the work is done are legally relevant, rather than what the parties call their relationship. Titles do not matter; facts do!
- The economic realities test is the legal test that determines whether a worker is an employee or independent contractor for federal employment law purposes.
- The right-to-control test is the legal test that helps determine whether a worker is an employee or independent contractor for federal tax purposes.
- Farmers markets should review their state employment and labor laws to understand what test their state uses to determine whether a worker is an employee or independent contractor.

## Disclaimer

This resource provides general legal information for educational purposes only. It is not meant to substitute, and should not be relied upon, for legal advice. Each farmers market's circumstances are unique, state laws vary, and the information contained herein is specific to the time of publication. Accordingly, for legal advice, please consult an attorney licensed in your state.

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## Endnotes

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- 2 Resource Library, Farmers Mkt. Coal., <https://farmersmarketcoalition.org/education/resource-library> (last visited Sept. 22, 2023).
- 3 State Farmers Market Associations and Network Organizations, Farmers Mkt. Coal., <https://farmersmarketcoalition.org/networking/state-associations> (last visited Sept. 22, 2023).
- 4 Farmers Market Legal Toolkit, Sole Proprietorships, Ctr. for Agric. & Food Sys., <https://farmersmarketlegaltoolkit.org/business-structures/sole-proprietorships> (last visited Sept. 22, 2023).
- 5 Farmers Market Legal Toolkit, Partnerships, Ctr. for Agric. & Food Sys., <https://farmersmarketlegaltoolkit.org/business-structures/partnerships> (last visited Sept. 22, 2023).
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- 10 Farmers Market Legal Toolkit, Employment and Labor Law Risks, Ctr. for Agric. & Food Sys., <https://farmersmarketlegaltoolkit.org/risks/employmentlabor-law-compliance> (last visited Sept. 22, 2023).



## Endnotes (continued)

- 11** Volunteers, U.S. Dep't of Labor, <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited Sept. 22, 2023).
- 12** Farmers Market Legal Toolkit, Employment and Labor Law Risks, Ctr. for Agric. & Food Sys., <https://farmersmarketlegaltoolkit.org/risks/employmentlabor-law-compliance> (last visited Sept. 22, 2023).
- 13** Wage and Hour Division, Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), U.S. Dep't of Labor, <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> (last visited Oct. 12, 2023).
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- 15** Voluntary Classification Settlement Program, Internal Revenue Serv., <https://www.irs.gov/businesses/small-businesses-self-employed/voluntary-classification-settlement-program> (last updated July 5, 2023).