Employee vs. Independent Contractor

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Center for Agricultural Law and Taxation
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Our Class

• It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors
• Before they can determine how to treat payments made for services, they must first know the business relationship that exists between the parties performing the services
• In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered

Paperwork

<table>
<thead>
<tr>
<th>Employee</th>
<th>Independent Contractor</th>
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</thead>
<tbody>
<tr>
<td>W-4</td>
<td>W-9 or similar statement</td>
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<tr>
<td>W-2/W-1</td>
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<td>Form 1096 Transmittal for all Form 1099's</td>
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<tr>
<td>Iowa or State W-4</td>
<td>OSHA rules – Federal and State level</td>
</tr>
<tr>
<td>New Employee Notification with state for child support recovery</td>
<td>Form 945 – if Backup Withholding applies</td>
</tr>
<tr>
<td>W-941 and W-942</td>
<td>Some states may require workman’s compensation</td>
</tr>
<tr>
<td>Form 941 with State Schedule A</td>
<td>Workman’s Compensation</td>
</tr>
<tr>
<td>Matching the Form 941 with Forms W-2/ W-3 to avoid a CAWR Report</td>
<td>Meeting the Department of Labor rules and regulations</td>
</tr>
<tr>
<td>State of Iowa W-2 Summary Report</td>
<td>OSHA rules – Federal and State level</td>
</tr>
<tr>
<td>Form 1095-C if applicable for health insurance</td>
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Employment Per the IRC

- § 3121(d)(2) Employee under Common Law Text – also Revenue Ruling 87-41
- § 3401(c) Officer, employee, elected governmental official
- § 1.1402(c)-2(b) Holder of public office is not self-employed

Agencies Involved

- Internal Revenue Service
- Social Security Administration
- Immigration
- State Revenue Departments
- State Unemployment Departments
- Department of Labor Wages and Hour
- Child Support recovery units
- Department of Labor Occupational Safety and Heath Administration
- State Occupational Safety and Heath Administration
- Insurance Policies - Various Providers

Common Law Rules

- Behavioral
- Financial and
- The Type of Relationship
- Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
Common Law Employee

• Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done
• This is so even when you give the employee freedom of action
• What matters is that you have the right to control the details of how the services are performed

Example

• James is a tax preparer employed on a full-time basis by Bob’s Tax and Audit Service
• He works 6 days a week, and is assigned certain days and times
• He interviews clients, prepares tax returns, assists with questions and mentors others in the firm as needed
• Because of his experience, he requires only minimal assistance in performing his job
• James is paid a commission as well as an hourly wage and is eligible for bonuses
• Bob, the owner, pays the cost of health insurance and group-term life insurance for James and other employees
• James is an employee of Bob’s Tax and Audit Service

Independent Contractor

• People such as:
  – Doctors
  – Dentists
  – Veterinarians
  – Lawyers
  – Accountants
  – Contractors
  – Subcontractors
  – Public stenographers
  – Auctioneers
• Who are in an independent trade, business, or profession in which they offer their services to the general public are generally independent contractors
• However, whether these people are independent contractors or employees depends on the facts in each case
Let’s Look at Another Example

- Thomas has a Lawn and Garden Service and does landscaping, mowing, pruning of trees and other similar services
- Thomas provides the supplies needed at each job site to perform the work
- When a customer calls, Thomas provides an estimate of the cost of his services to perform the work and provides an invoice for payment
- Thomas’s services are available to the public and his add is posted in newspapers and in telephone directories and on the internet

Scenario One

- Thomas has 4 full time employees and on Monday one of those employees calls in sick
- Thomas’s neighbor is unemployed so Thomas asks the neighbor to “help him out” for the day
- Let’s take a look at the 20 factors have define the 3 overall factors

Thomas Provides the Following:

- Instruction and training
- Supervising and paying
- Thomas integrated the work into the work flow
- Set hours of work
- Payment by hour, week or month
- Furnishing tools and materials for neighbor to perform the job
- The neighbor is only working for him
- Thomas has the right to terminate or discharge
- And in this case, Thomas provided transportation to the worksite as the neighbor had no car and
- The work was performed at the site of the job
The Neighbor Provided the Following:

• Their services

The Neighbor Had NO:

• Training for the service performed
• No continuing relationship – possibly
• Did not set the hours of work
• Was not expected to supervise or provide written reports
• Went to work in Thomas's vehicle
• Did not furnish any tools or materials
• Had no investment in the business where a profit or loss may result involving risk
• Was only working for Thomas and no one else, thus not making any service available for the public

Is The Neighbor an Employee?
Scenario Two:

- Thomas has a Lawn and Garden Service and does landscaping, mowing, pruning of trees and other similar services
- Thomas provides the supplies needed at each job site to perform the work
- When a customer calls, Thomas provides an estimate of the cost of his services to perform the work and provides an invoice for payment
- Thomas’s services are available to the public and his add is posted in newspapers and in telephone directories and on the internet

Is Thomas an Independent Contractor?

General Rule

- The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done
- The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax
**Thomas**

- Controls what will be done and how it will be done at the job site

**Independent Contractor**

- If the client is an independent contractor, they are self-employed
- They are not an independent contractor if they perform services that can be controlled by an employer (what will be done and how it will be done)
- This applies even if they are given freedom of action
- What matters is that the employer has the legal right to control the details of how the services are performed
- If an employer-employee relationship exists (regardless of what the relationship is called), individuals are not an independent contractors and the earnings are generally not subject to Self-Employment Tax
- However, the earnings as an employee are generally subject to FICA (Social Security tax and Medicare) and income tax withholding

**Independent Contractor**

- Makes their own schedule
- Buys their own products
- Has a published phone number for the business
- Furnishes their own supplies
- Furnishes their own equipment
- Makes a profit or loss as a result of their own business decisions
- Offers services to the public
- Operates an established business
- Bills for services
- Sometimes does not have to personally perform the work
- Has roots in the local business community
### Factors
Rev. Rul. 87-41

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<th>Factors</th>
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<td>Instructions</td>
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<td>Training</td>
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<td>Integration</td>
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<td>Services rendered personally</td>
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<td>Hiring, supervising and paying</td>
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<td>Continuing relationship</td>
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<td>Set hours of work</td>
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<th>Factors</th>
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<td>Full time required</td>
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<td>Doing work on employer’s premises</td>
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<td>Order or sequence set</td>
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<td>Oral or written reports required</td>
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<td>Payment – how paid</td>
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<tr>
<td>Payment of business or travel expenses or benefits</td>
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<tr>
<td>Furnishing tools and materials</td>
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<td>Investment</td>
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<td>Profit or Loss – Risk</td>
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<tr>
<td>Working for More than one firm at a time</td>
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<td>Services are available to the general public</td>
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<td>The right to discharge</td>
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<td>The right to terminate relationship</td>
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Statutory Employees

• If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees)
  – A driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is an agent or is paid on commission
  – A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company
  – An individual who works at home on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work to be done
  – A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments
    • The goods sold must be merchandise for resale or supplies for use in the buyer’s business operation
    • The work performed for you must be the salesperson’s principal business activity.

Statutory Employees
Three Conditions

• Withhold Social Security and Medicare taxes from the wages of statutory employees if all three of the following conditions apply:
  – The service contract states or implies that substantially all the services are to be performed personally by them
  – They do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities)
  – The services are performed on a continuing basis for the same payer

Statutory Nonemployees

• There are three categories of statutory nonemployees:
  – Direct sellers
    • The marketing and selling of products directly to consumers away from a fixed retail location
  – Licensed real estate agents and
    • Direct sellers and licensed real estate agents are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:
      – Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked, and
      – Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes
  – Certain companion sitters
    • Companion sitters who are not employees of a companion sitting placement service are generally treated as self-employed for all Federal tax purposes
The Common-Law Test
Social Security Handbook

- 802.1 What is the common-law test?
  - The person an individual works for has the right to tell them what to do, how, when, and where to do the job
  - There are several factors, or elements, which indicate such control over the details of your work
  - These are discussed in §§804-823 and 802.2
- What if the relationship to the employer meets the common-law test?
  - The individual is considered an employee if the relationship with the employer meets the common-law test
  - Even if the employer does not give orders on what to do, how, when, and where to do the job, he or she only needs the right to do so for an individual to be considered an employee

Behavioral

- Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Does the worker receive instructions?
  - What is the degree of instruction?
- Does the worker receive training?
- Is there an evaluation system in place that measures how the work is performed or does the system just evaluate the end result?

Types of Instructions Given

- When and where to do the work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services
- What work must be performed by a specified individual
- What order or sequence to follow when performing the work
Degree of Instruction

- The more detailed the instructions, the more control the business exercises over the worker
- The more detailed instruction indicate that the worker is an employee
- Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor
- What if there is little instruction given or no instructions provided?
  - Dig a hole 6' deep and 6' wide
  - No instruction is given on how they dig the hole, it could be done by machinery, or by hand with a shovel
  - The amount of instruction needed varies among different jobs
- Even if no instructions are given on how to dig the hole, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved

Degree of Instruction

- Some businesses may lack the knowledge to instruct some highly specialized professionals
- The task may require little or no instruction
- The KEY is whether the business has retained the right to control the details of a worker’s performance or instead has given up that right

Training

- Does the business provides the worker with training on how to do the job?
  - This indicates that the business wants the job done in a particular way
  - This is strong evidence that the worker is an employee
  - Periodic or on-going training about procedures and methods is even stronger evidence of an employer-employee relationship
- Independent contractors ordinarily use their own methods
Financial

- Financial control refers to facts that show whether or not the business has the right to control the economic aspects of the worker’s job
- The financial control factors fall into the categories of:
  - Significant investment
  - Unreimbursed expenses
  - Opportunity for profit or loss
  - Services available to the market
  - Method of payment
  - Significant investment

No Magic Number

- An independent contractor often has a significant investment in equipment
- However, in many occupations, such as construction, workers spend thousands of dollars on the tools and equipment they use and are still considered to be employees
- There are no precise dollar limits that must be met in order to have a significant investment
- Furthermore, a significant investment is not necessary for independent contractor status as some types of work simply do not require large expenditures

Financial

- Unreimbursed expenses
  - Independent contractors are more likely to have unreimbursed expenses than are employees
  - However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business
- Independent contractors often have fixed ongoing costs that are incurred regardless of whether work is currently being performed
### Opportunity for Profit or Loss

- The opportunity to make a profit or loss is another important factor.
- If a worker has a significant investment in the tools and equipment used and if the worker has unreimbursed expenses, the worker has a greater opportunity to lose money.
- Having the possibility of incurring a loss indicates that the worker is an independent contractor.

### Services Available to the Market

- An independent contractor is generally free to seek out business opportunities.
- Independent contractors often:
  - Advertise
  - Maintain a visible business location
  - Are available to work in the relevant market.

### Method of Payment

- An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time.
- This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission.
- An independent contractor is usually paid by a flat fee for the job.
- However, it is common in some professions, such as law, to pay independent contractors hourly.
Type of Relationship

- Discharge/termination—either business or worker can end the relationship before the job is completed
- Employee benefits (beyond monetary compensation)
- Intent of parties/written contracts that indicate both parties believe they are in an employer-employee relationship
  - IRS or Job Service may ignore this document if the individual is deemed to be an employee
  - An independent contractor “contract” may be deemed invalid
- Worker’s services are a part of business’s regular business activity

Type of Relationship

- Type of relationship refers to facts that show how the worker and business perceive their relationship to each other
- The factors, for the type of relationship between two parties, generally fall into the categories of:
  - Written contracts
  - Employee benefits
  - Permanency of the relationship
  - Services provided as key activity of the business

Type of Relationship

Employee Benefits

- Employee benefits include things like:
  - Insurance
  - Pension plans
  - Paid vacation
  - Sick days
  - Disability insurance
- Businesses generally do not grant these benefits to independent contractors
- However, the lack of these types of benefits does not necessarily mean the worker is an independent contractor
Type of Relationship
Permanency of the Relationship

• If you hire a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship

Type of Relationship
Services Provided as Key Activity of the Business

• If a worker provides services that are a key aspect of the business
• It is more likely that the business will have the right to direct and control his or her activities
• For example, if a law firm hires an attorney, it is likely that it will present the attorney’s work as its own and would have the right to control or direct that work
• This would indicate an employer-employee relationship

Paperwork

Employee
• W-4
• W-9
• W-2/W-3
• Form 941-X 4 times a year
• Form 940-X 1 times a year
• SUTA-X 4 times a year
• Iowa or State W-4
• New Employee Notification with note for child support
• W-4/W-3 in Iowa and state
• Federal Income Tax and State Income Tax
• Matching of Social Security and Medicare
• Form 1099-MISC
• Form 1096 Transmittal for all Form 1099’s
• Form 945 – if Backup Withholding applies

Independent Contractor
• W-9 or similar statement
• Form 1099-MISC if $600 or more in a calendar year
• Form 1096 Transmittal for all Form 1099’s
• Meeting the Department of Labor rules and regulations
• OSHA rules – Federal and State level
• Form 945 – if Backup Withholding applies
• Note: All states have different requirements
### Differences Between Employee Vs Independent Contractor

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<tr>
<td>• Form W-4</td>
<td>• Form W-9</td>
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<tr>
<td>• Withhold Income Tax</td>
<td>• File Form 1099/1096 Misc if paying $600.00 or more annually</td>
</tr>
<tr>
<td>• Withhold Social Security and Medicare</td>
<td>• Some states may require New Independent Contractor Identification Form (connected to child support)</td>
</tr>
<tr>
<td>• File 4 Quarterly Form W-2 or 1 Annual Form 444</td>
<td>• Some states may require workman’s compensation</td>
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<tr>
<td>• File Form 940</td>
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<tr>
<td>• File State Withholding / Reconciliation reports</td>
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<td>• File local unemployment office forms</td>
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<tr>
<td>• File Form W-2</td>
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<td>• File Form W-3</td>
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<tr>
<td>• File Form 2095-C if applicable</td>
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<tr>
<td>• File New Employee identification form</td>
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<tr>
<td>• Must have workman’s compensation in most states</td>
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**Form SS-8**

![Form SS-8 Image]

**Form SS-8**

![Form SS-8 Image]
## Misclassification Consequences

- Liable for workers' payroll taxes, rate of 100%
- [http://www.dol.gov/whd/workers/misclassification/#stateDetails](http://www.dol.gov/whd/workers/misclassification/#stateDetails)
- Unpaid overtime
- Unpaid taxes
- Un-provided benefits
- A discrimination claim, or claims under other laws that protect employees but not contractors (i.e., the FMLA)
- Possible workman compensation issues
Filing Requirements W-2
2017 (2016 Tax Year)

• New due date for filing with SSA
• The due date for filing 2016 Forms W-2, W-2AS, W-2CM, W-2GU, W-2VI, W-3 and W-3SS with the SSA is now January 31, 2017 whether you file using paper forms or electronically
• Extensions of time to file Form W-2 with the SSA are no longer automatic
• For filings due on or after January 1, 2017, you may request one 30-day extension to file Form W-2 by submitting a complete application on Form 8809, Application for Extension of Time to File Information Returns, including a detailed explanation of why you need additional time and signed under penalties of perjury
• The IRS will only grant the extension in extraordinary circumstances or catastrophe

Filing Requirements Forms 1099 Misc
2017 (2016 Tax Year)

• New filing date
  – The PATH Act requires Form 1099-MISC to be filed on or before January 31, 2017, when you are reporting nonemployee compensation payments in box 7
  – Note they are due to IRS the same day as they are due to the entity
• Other 1099 forms, file by February 28, 2017, if you file on paper, or by March 31, 2017, if you file electronically
• Exceptions to reporting
  – New exceptions to reporting were added by P.L. 114-14 (compensation for disability or survivor’s benefits for public safety officers) and P.L. 114-113 (compensation for wrongful incarceration

W-2 Penalties

• Penalties have increased
• Higher penalties apply for:
  – Failure to file correct Forms W-2 by the due date,
  – Intentional disregard of filing requirements,
  – Failure to furnish Forms W-2, and
  – Intentional disregard of payee statement requirements
• The higher penalty amounts apply to returns required to be filed after December 31, 2015 and are indexed for Inflation
• New penalty safe harbor
  – Forms W-2 with incorrect dollar amounts may fall under a new safe harbor for certain de minimis errors
Backup Withholding Issues

- Payments Subject to Backup Withholding
  - Rents, non-employee compensation for services, royalties, reportable gross proceeds paid to attorneys, and other fixed or determinable gains, profits, or income payments that are reportable on Form 1099-MISC, Miscellaneous Income
  - Backup withholding does not apply to wages or pension payments

- Requirement for Payer To Secure a TIN
  - For all payees, you must make an initial solicitation for a TIN when the payee opens an account or when the transaction occurs
  - Use Form W-9, Request for Taxpayer Identification Number, to request the taxpayer identification number

Backup Withholding Issues

- The payer must withhold at a flat 28% rate in the following situations:
  - No TIN is provided
  - The IRS notifies the payer that the TIN provided is incorrect
  - The IRS notifies the payer to start withholding on interest or dividends because the taxpayer has underreported interest or dividends on the income tax return
  - The IRS will do this only after it has mailed the taxpayer four notices over at least a 120-day period
  - Failure to certify that an individual is not subject to backup withholding for underreporting of interest and dividends
  - Form 945, Annual Return of Withheld Federal Income Tax is used to report Backup Withholding
    - Deposit rules may apply

Changes to the Iowa Farm and Urban Tax Schools

- It has been a season of change – this is good
- Our Fall and Winter Tax Schools are changing – this is good
- September 9, 2016 – Farm Tax Seminar
- All Farm issues All day
- For the winter tax schools, farm issues may come up but we will center on other issues important to your practice, including ethics for early bird attendees at some sessions
Please Welcome
Phil Harris

- Professor, Agricultural and Applied Economics – University of Wisconsin – Madison
  - J.D., University of Chicago, 1977
  - M.A., Economics, University of Chicago, 1975
  - B.S., Economics, Iowa State University, 1973
- His research program focuses on business and tax planning for agricultural producers
- The program includes information on the choice of entity for organizing a farm business and for transferring a farm business to the next generation
- Income, estate and gift tax consequences as well as non-tax issues

Phil Harris

Phil Harris

Phil Harris

CALT Speaker

- September 9, 2016 Farm Tax Seminar
- The session will also be available via webinar
- Instructor – Farm and Urban Tax School
- November 21 – 22 – Waterloo
- December 12 – 13 - Ames

Fall Tax Schools

- Though they are named the Farm and Urban Tax Schools the schools cover more than farm issues
- Common return issues for all kinds of returns are covered
- All kinds of business entities
- Problematic issues
- Sometimes we even get into issues that you many encounter only once or twice a year or tax season
- The Tax Schools are a blend of diverse topics of interest to all tax professionals
- This year: New instructors with diverse backgrounds
- Your adventure awaits at Iowa State’s Center for Agricultural Law and Taxation
Farm Tax Schools 2016

- November 2, 2016 to December 13, 2016
- 8 Locations in Iowa and Online Webinar
- Save the Date for the 2016 Annual Farm and Urban Income Tax Schools
- The program is intended for tax professionals and is designed to provide up-to-date training on current tax law and regulations
  - November 2-3: Maquoketa
  - November 7-8: Red Oak
  - November 9-10: Sheldon
  - November 14-15: Mason City
  - November 17-18: Ottumwa
  - November 21-22: Waterloo
  - December 5-6: Denison
  - December 12-13: Ames and Live Webinar

Summer Webinars

- S Corporation Reasonable Compensation
- ABLE Accounts
- Travel, Meals and Entertainment
- Preparing for a Gambling Audit
- Your Client Dies, What's Next?
- Innocent Spouse
- Above the Line Deductions
- Roth IRA's
- Net Operating Losses
- The Portability Election
- IRS Return Preparer Penalties Overview
- Miscellaneous Income
- New Developments

Summer Webinars

- Cancellation of Debt
- Tax Research with Limited Resources
- Injured Spouse
- IRS Representation
- Let's Talk Dependents
- Inventory Issues
- Preparing for an IRS Audit
- Getting your Client Right with IRS
- Appeals – How to Write Your Appeals Request
- Start Up Costs
- Hobby Losses
<table>
<thead>
<tr>
<th>Beginning Tax Preparers Class</th>
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<tr>
<td>• CALT is working on offering a basic class for NEW tax preparers this fall in October</td>
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<tr>
<td>• The week long webinar will cover the basics an individual needs to know such as:</td>
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<td>- Requirement to file</td>
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<td>- Dependents</td>
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<td>- Filing Status</td>
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<td>- Itemized deductions</td>
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<td>- Earned Income Tax</td>
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<td>- Education Credits</td>
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<td>• Other issues a first or second year preparer needs to know as well as a refresher for others who need to brush up on issues</td>
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<td>• The class will be a week long or more and will be offered at a special rate</td>
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<tr>
<th>The Scoop</th>
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<td>• Throughout the filing season two Scoops will be held on Scoop Dates</td>
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<td>- 8:00 – 8:30 am Central time</td>
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<td>- 12:00 – 12:30 Central time</td>
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<td>• This assists with accommodating our west coast practitioners</td>
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<td>• The same information will be shared at both sessions</td>
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<td>• You have the option of registering for whatever session suits your schedule</td>
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<td>• <a href="https://www.calt.iastate.edu/calendar-node-field-seminar-date/month">https://www.calt.iastate.edu/calendar-node-field-seminar-date/month</a></td>
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