

Breakfast **Bites**[®]

**STAY CLASSY:
WHY WORKER CLASSIFICATION MATTERS,
COMMON MISCLASSIFICATIONS,
AND THE LATEST TRENDS**

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Overview

- The Basics of Worker Classification
- The Consequences of Misclassification
- The Latest Developments in Worker Classification Cases and Law

BASICS OF WORKER CLASSIFICATION

BASICS OF WORKER CLASSIFICATION



- Defining “employee” vs. “independent contractor”
- IRS, FLSA, NRLA, & Michigan law
- Contracts labeling workers as “independent contractors” are NOT enough

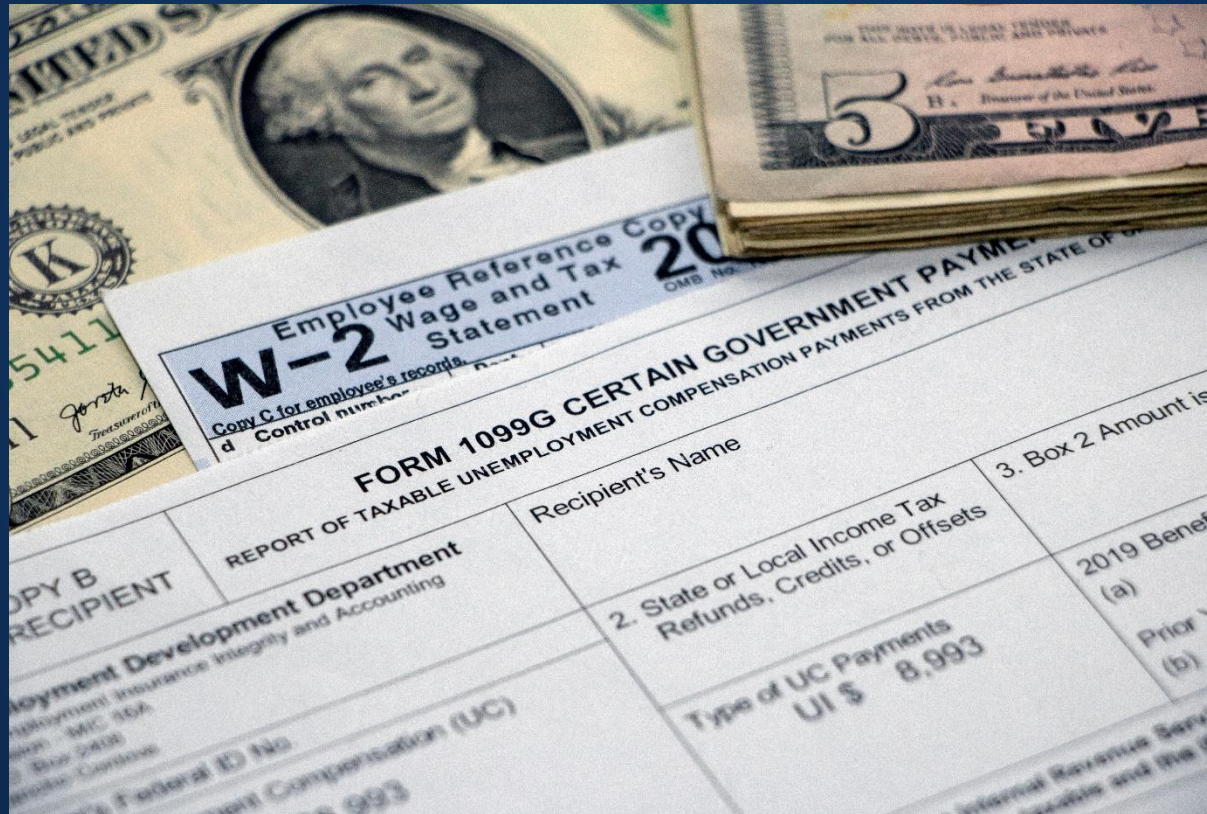
BASICS OF WORKER CLASSIFICATION

Control: The Unifying Principle

- Employees: with respect to the work to be done by the worker, the employer controls both the “what” and the “how.”
- Independent Contractors: employers control only the “what.” The “how” remains at the discretion of the independent contractor.

BASICS OF WORKER CLASSIFICATION

Internal Revenue Service

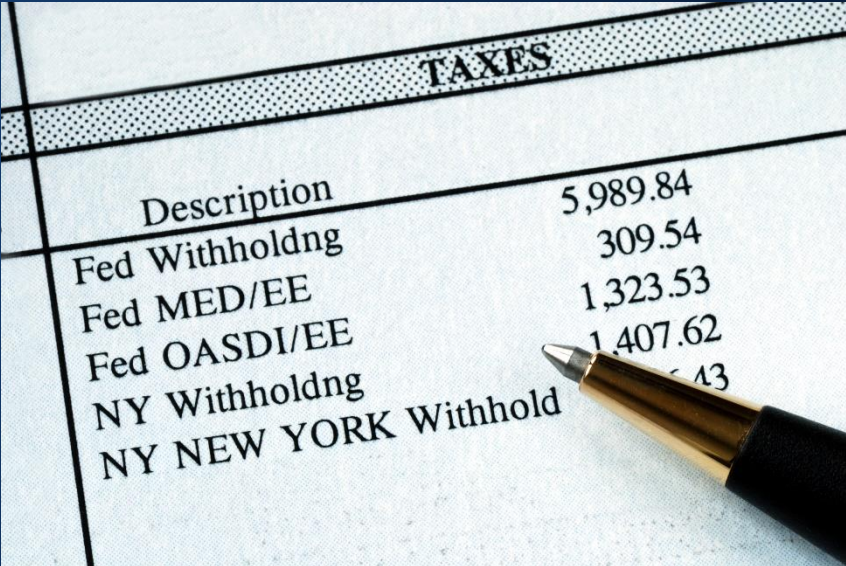


BASICS OF WORKER CLASSIFICATION

Tax Obligations for Employers of Employees

Withhold and/or Pay:

- Federal Income Tax Withholding (FITW)
- Social Security and Medicare Taxes (FICA)
- Federal Unemployment Tax (FUTA)
- State Unemployment Tax



TAXES	
Description	Amount
Fed Withholding	5,989.84
Fed MED/EE	309.54
Fed OASDI/EE	1,323.53
NY Withholding	1,407.62
NY NEW YORK Withhold	6.43

BASICS OF WORKER CLASSIFICATION

Tax Obligations for Employers of Independent Contractors



BASICS OF WORKER CLASSIFICATION

IRS 20-Factor Test

- Revenue Ruling 87-41
- Weighs all 20 factors in determining whether a worker is an employee or an independent contractor
- No one factor is determinative

BASICS OF WORKER CLASSIFICATION

The 20 Factors

- Instructions
- Training
- Integration
- Services Rendered Personally
- Hiring, Supervising, and Paying Assistants
- Continuing Relationship
- Set Hour of Work
- Full-Time Required
- Work Done on Premises
- Order or Sequence Set
- Oral or Written Reports
- Payment by Hour, Week or Month
- Payment of Expenses

BASICS OF WORKER CLASSIFICATION

The 20 Factors (continued)

- Furnishing of Tools and Materials
- Significant Investment
- Profit or Loss
- Working for More than One Firm at a Time
- Making Service Available to the General Public
- Right to Discharge
- Right to Terminate (by Worker)

BASICS OF WORKER CLASSIFICATION

IRS 3-Factor Test

- New and improved
- Groups the 20 factors into three categories:
 - Behavioral Control
 - Financial Control
 - Relationship Factors

BASICS OF WORKER CLASSIFICATION

Behavioral Control

- Instructions
- Training
- Services Rendered Personally
- Hiring, Supervising, and Paying Assistants
- Continuing Relationship
- Set Hours of Work
- Full-Time Required
- Work Done on Premises
- Order or Sequence Set
- Oral or Written Reports

BASICS OF WORKER CLASSIFICATION

Financial Control

- Payments by Hour, Week, or Month
- Payment of Expenses
- Furnishing of Tools and Materials
- Significant Investment
- Profit or Loss

BASICS OF WORKER CLASSIFICATION

Relationship Factors

- Integration
- Working for More Than One Firm at a Time
- Making Services Available to General Public
- Right to Discharge
- Right to Terminate (by Worker)

BASICS OF WORKER CLASSIFICATION

Statutory Employees

- Even if a worker is an “independent contractor” under the 3-Factor test, the worker may nevertheless be treated as a “statutory employee” for tax withholding purposes.
- Employers must withhold Social Security and Medicare taxes from the wages of statutory employees.

BASICS OF WORKER CLASSIFICATION

Statutory Employees

- Compensated Corporate Officers of Exempt Organizations
- Certain Drivers
- Certain Salespersons
- Certain Home Workers

BASICS OF WORKER CLASSIFICATION

Fair Labor Standards Act (FLSA)



The Department of Labor has published guidance on how to analyze who is an employee or independent contractor under the FLSA.

- **2021 IC Rule** (*now superseded*)
- **2024 IC Rule** (*effective March 11, 2024*)

BASICS OF WORKER CLASSIFICATION

The 2021 Independent Contractor (“IC”) Rule

- Two “Core” Factors Test
 1. the nature and degree of control over the relevant work
 2. the individual’s opportunity for profit or loss
 3. the amount of skill required for the work
 4. the degree of permanence of the working relationship
 5. whether the work is part of an integrated unit of production
- Recently superseded by the 2024 IC Rule (up next!)

BASICS OF WORKER CLASSIFICATION

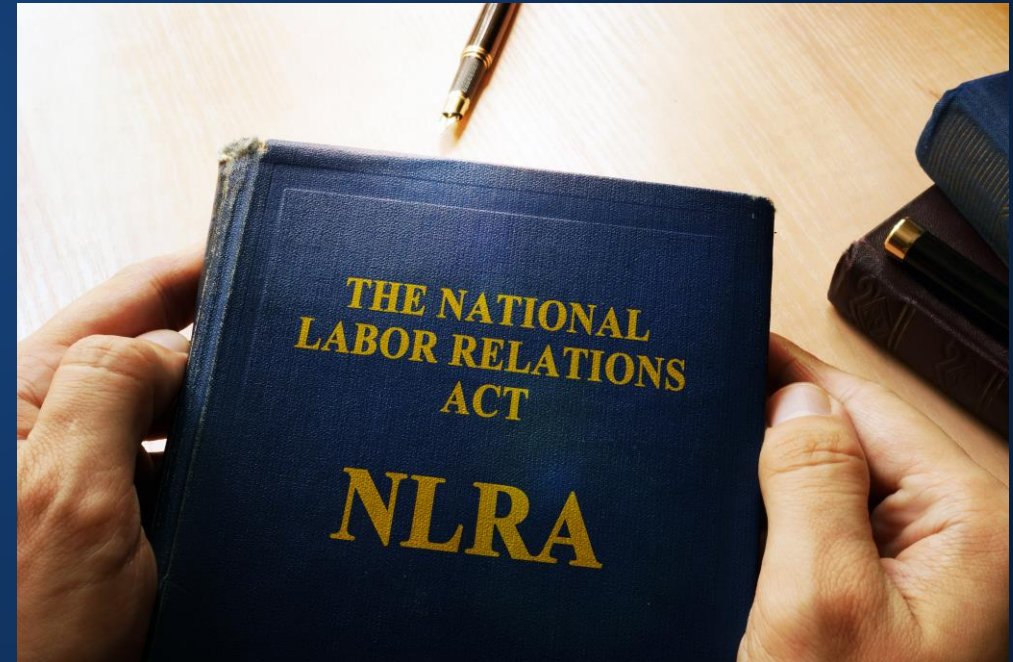
The 2024 IC Rule

- Effective March 11, 2024
- “Economic Realities” Test
 1. The opportunity for profit or loss depending on managerial skill
 2. Investments by the worker and potential employer
 3. The degree of permanence of the work relationship
 4. The nature and degree of control over performance of the work and working relationship
 5. The extent to which the work performed is an integral part of the potential employer’s business
 6. The skill and initiative of the worker

BASICS OF WORKER CLASSIFICATION

National Labor Relations Act (NLRA)

- Covered employees have the right to join a union, engage in collective bargaining, and engage in protected “concerted activity”
- Applies to employees at union and non-union workplaces
- Does NOT apply to independent contractors



BASICS OF WORKER CLASSIFICATION

National Labor Relations Act (NLRA)

It shall be an unfair labor practice for an employer to refuse to hire, or fire or to otherwise discriminate against an employee in regard to any term or condition of employment in order to discourage membership in any labor organization . . . or to

. . . interfere with, restrain or coerce employees in the exercise of their rights to form or assist labor unions and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

BASICS OF WORKER CLASSIFICATION

“Concerted Activity” means activity that furthers union organizing:

- Speaking with other employees
- Distributing literature
- Writing letters
- Holding meetings
- Petitions

BASICS OF WORKER CLASSIFICATION

“Concerted Activity” also means speaking or complaining on behalf of other employees about terms and conditions of employment, including:

- Wages and benefits
- Working conditions
- Excessive overtime
- Occupational safety
- Harassment and bullying

BASICS OF WORKER CLASSIFICATION

Other “Concerted Activity”:

- Strikes
- Walk outs
- Pickets
- Boycotts
- Media Pressure
- Legislative pressure

NLRA CASE STUDY – “CONCERTED ACTIVITY”

Hartford, CT – NLRB Case No. 34-CA-12576

- Employer: American Medical Response of Connecticut, Inc. (“AMR”)
- After a work-related incident, an AMR employee (“Souza”) criticized her supervisor (“Filardo”) in a post on Facebook, which prompted other employees to reply to the posting. The employee was suspended the next day and later fired.
- After an investigation, the NLRB issued a complaint alleging that Souza was unlawfully fired because she engaged in protected concerted activity when she criticized her supervisor on Facebook. The Complaint also alleged that the company’s handbook contained several unlawful provisions, including the company’s “Blogging and Internet Posting Policy.”
- Prior to a hearing, the company agreed to revise the provisions in the handbook, which were alleged to be unlawful. The company also reached a private settlement with Souza regarding her termination.

NLRA CASE STUDY – “CONCERTED ACTIVITY”

The Facebook Comment

The evening following the work incident, Souza posted several comments on her Facebook page concerning her confrontation with Filardo. (Many of Souza’s coworkers and supervisors have access to her Facebook page and regularly use the site to communicate, including to criticize management).

- Souza: “Looks like I’m getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor.”
- Current AMR supervisor: “What happened?”
- Current AMR employee: “What now?”
- Souza: “Frank being a [***].”
- Former AMR employee: “I’m so glad I left there,”
- Current AMR employee: “Ohhh, he’s back, huh?”
- Souza: “Yep he’s a scumbag as usual.”

The thread ended with the current AMR employee telling Souza to “[c]hin up!”

NLRA CASE STUDY – “CONCERTED ACTIVITY”

AMR’s Policy on “Blogging and Internet Posting”

- Employees are prohibited from posting pictures of themselves in any media . . . which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the [Company] in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee’s superiors, co-workers and/or competitors.

NLRB Findings:

- AMR’s Blogging and Internet Posting policy violated the NLRA “because it would prohibit an employee from engaging in protected activity.”
- “for example, an employee would be prohibited from posting a picture of employees carrying a picket sign depicting the Company’s name, or wearing a t-shirt portraying the company’s logo in connection with a protest involving the terms and conditions of employment.”

NLRA EMPLOYEE VS IC TEST

Common-law Agency Test

- The extent of control, which by agreement, the employer may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.

NLRA EMPLOYEE VS IC TEST

UPDATES

Prior Test (2019)

- Common-law agency factors considered.
- NLRB placed special emphasis on whether a worker has “entrepreneurial opportunity.”
- The more opportunity workers possess, the more likely they are independent contractors.

New Test (June 13, 2023)

- Continues to use common-law agency factors.
- Entrepreneurial opportunity is merely one additional consideration.
- Weight should only be given to actual (not merely theoretical) entrepreneurial opportunity.
- Example: if a worker’s daily work does not have an “entrepreneurial dimension,” then the NLRB will not deem any underlying contracts merely permitting entrepreneurialism as sufficient to deny workers employee protections under the NLRA.

BASICS OF WORKER CLASSIFICATION

ERISA

(Employee Retirement Income Security Act)

- Sets minimum standards for most voluntarily established retirement and benefit plans in the private sector.
- ERISA-governed plans define the participants who are eligible to participate in the benefits they provide.
- Whether a worker is classified as an employee or a contractor often determines their eligibility in the plan.
- Courts have applied common-law agency factors to determine independent contractor versus employee status.

BASICS OF WORKER CLASSIFICATION

Michigan Unemployment Insurance Agency

Applies the IRS 3-Factor Test:

- Behavioral Control
- Financial Control
- Relationship Factors



BASICS OF WORKER CLASSIFICATION

Michigan Worker's Disability Compensation Act (MWDCA)

Utilizes a statutory three-part test which weighs whether:

- Worker maintains a separate business
- Worker holds himself or herself out and renders service to the public at large
- Worker is or is not an employer under MWDCA

CONSEQUENCES OF MISCLASSIFICATION

CONSEQUENCES OF MISCLASSIFICATION

How Do Misclassification Issues Arise?

- Routine audit
- Contractor's failure to pay income taxes
- Worker applies for Social Security benefits
- Worker "blows the whistle"

CONSEQUENCES OF MISCLASSIFICATION

Consequences for Employers

- Tax Liabilities
- Wage Claims
- ERISA Exposure
- FMLA Violations
- I-9 Violations





LATEST DEVELOPMENTS AND TRENDS

LATEST DEVELOPMENTS

- ***U.S. Dep't of Labor v. Reliance Staffing LLC, Fahim Uddin***
 - February 2, 2024
 - A Michigan staffing company was required to pay a total of \$181,531—representing \$90,765 in overtime wages and an equal amount in liquidated damages – to 70 registered nurses, licensed practical nurses, and certified nursing assistants.
 - The court found the employer violated the FLSA when it misclassified workers as independent contractors when, in fact, they were employees. By doing so, the employer failed to pay overtime wages at time and one-half their hourly rate of pay for hours over 40 in a pay period.

LATEST DEVELOPMENTS

- **Michigan House Bill 4390**
 - Introduced April 13, 2023
 - Proposes new test for “independent contractor” that closely mirrors California’s ABC Test and increases employer penalties for worker misclassifications
- **New York City’s Minimum Pay Rule**
 - December 2023
 - NY State Supreme Court upheld new legislation that increases the minimum wage for app-based delivery workers in New York City from \$7.09 to \$19.96 per hour.
 - Attempts by Uber, DoorDash, and GrubHub to challenge the legislation have been unsuccessful

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