

Maddin Hauser's
Employment Law
Symposium

**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”
- Classification depends upon context
- Workers can be employees for one purpose and independent contractors for another purpose

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

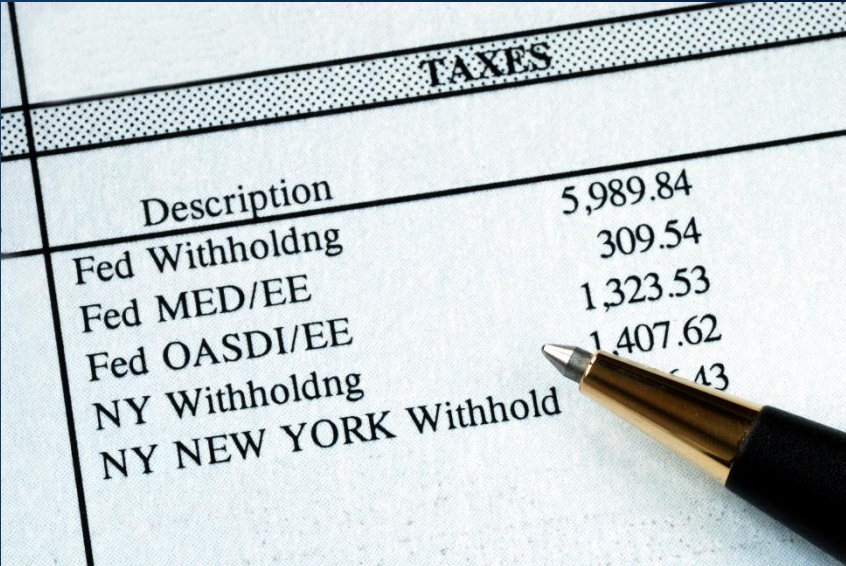


BASICS OF WORKER CLASSIFICATION

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	
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

Common-law Agency Test (10 factors):

- 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.

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

- **2024 Independent Contractor Rule**
 - Effective March 11, 2024
 - Employers must re-evaluate worker classifications under FLSA
 - Will impact trucking, healthcare, and gig work, among other industries
- ***U.S. v. R&SL, Inc.***
 - ALJ ruling issued January 6, 2022
 - Staffing company assessed over \$1.5M penalty for the untimely and improper completion of Form 1-9 following audit

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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THANK YOU



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