

Employee vs. Independent Contractor

Discussion on the legal issue; laws, rules, pros and cons, IRS forms.;

1. Who decides?

Only the Workers Compensation Board of Indiana (Board) and the Indiana courts can determine whether or not a worker is an independent contractor or employee. The decision can only occur after a workplace accident. The state will examine the characteristics of the relationship at the time of injury.

2. How are employees and independent contractors defined?

The Indiana WC statute defines an employee as follows:

"Employee means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer." *Reference IC 22-3-6-1 (b)*

The statute only defines an independent contractor in connection with the construction trades:

"A person is an independent contractor in the construction trades and not an employee under IC 22-3-2 through IC 22-3-6 if the person is an independent contractor under the guidelines of the United States Internal Revenue Service." *Reference IC 22-3-6-1 (b) (7) and IC 22-3-7-9 (b) (5)*

The [Indiana Code](#) is available on the State of Indiana website at this address:
<http://www.state.in.us/legislative/ic/code/>.

3. Laws and Rules

Even though we don't really know the status of a worker before an injury, we do know the laws and rules that come into play when coverage and premium issues arise, as explained below.

a. Independent Contractor in the Construction Trades

Effective July 1, 1993, the law defines a worker as an independent contractor in the construction trades if he/she meets the guidelines of the IRS (See statute quote above in section 2).

The [WC Board of Indiana](#) maintains a webpage for [Independent Contractors](#). The U.S. Department of Labor provides information on the building trades on a web page titled [Construction trades and related workers](#).

In its Form SS-8, the Internal Revenue Service has identified 46 factors under the categories of Behavioral Control, Financial Control, Relationship of the Worker and Firm, and a section for Service Providers or Salespersons. The factors are used as guidelines to determine whether sufficient control is present to establish an employer-employee relationship. [Please see the link to the IRS form at the bottom of this document.]

Indiana law requires that a sole proprietor or partner:

- who is an independent contractor in the construction trades, and
- who does not elect to include himself as an employee,

- must file the [WORKER'S COMPENSATION CLEARANCE CERTIFICATE APPLICATION](#) with the Indiana Dept. of Revenue.

Reference [IC 22-3-2-14.5](#)

IC 22-3-2-14.5

Sec. 14.5. (a) As used in this section, "independent contractor" refers to a person described in IC 22-3-6-1(b)(7).

(b) As used in this section, "person" means an individual, a proprietorship, a partnership, a joint venture, a firm, an association, a corporation, or other legal entity.

(c) An independent contractor who does not make an election under IC 22-3-6-1(b)(4) or IC 22-3-6-1(b)(5) is not subject to the compensation provisions of IC 22-3-2 through IC 22-3-6 and must file a statement with the department of state revenue in accordance with IC 6-3-7-5 and obtain a **certificate of exemption**.

(d) Together with the statement required in subsection (c), an independent contractor shall **file annually** with the department documentation in support of independent contractor status before being granted a certificate of exemption. The independent contractor must obtain clearance from the department of state revenue before issuance of the certificate.

(e) An independent contractor shall pay a filing fee in the amount of fifteen dollars (\$15) with the certificate filed under subsection (g). The fees collected under this subsection shall be deposited in the worker's compensation supplemental administrative fund and shall be used for all expenses the board incurs.

(f) The worker's compensation board shall maintain a data base consisting of certificates received under this section and on request may verify that a certificate was filed.

(g) A certificate of exemption must be filed with the worker's compensation board. The board shall indicate that the certificate has been filed by stamping the certificate with the date of receipt and returning a stamped copy to the person filing the certificate. A certificate becomes **effective as of midnight seven (7) business days after the date file stamped** by the worker's compensation board. The board shall maintain a data base containing the information required in subsections (d) and (f).

(h) A person who contracts for services of another person not covered by IC 22-3-2 through IC 22-3-6 to perform work must secure a copy of a stamped certificate of exemption filed under this section from the person hired. A person may not require a person who has provided a stamped certificate to have worker's compensation coverage. The worker's compensation insurance carrier of a person who contracts with an independent contractor **shall accept a stamped certificate in the same manner as a certificate of insurance**.

(i) A stamped certificate filed under this section is binding on and holds harmless from all claims:

(1) a person who contracts with an independent contractor after receiving a copy of the stamped certificate; and

(2) the worker's compensation insurance carrier of the person who contracts with the independent contractor.

The independent contractor may not collect compensation under IC 22-3-2 through IC 22-3-6 for an injury from a person or the person's worker's compensation carrier to whom the independent contractor has furnished a stamped certificate.

As added by P.L.75-1993, SEC.2. Amended by P.L.202-2001, SEC.3.

To document its approval of the clearance certificate, the state issues [Form WC-999](#).

The benefit, or purpose of the certificate of exemption establishes that no premium will be charged to the general contractor because the independent contractor has affirmed that:

- he carries workers compensation coverage if he has employees, or
- he is a sole proprietor or partner (not employee) and exempted from WC cover

Corporate Officer

Note that the Clearance Certificate form asks for a yes or no answer to "My independent contractor business is incorporated and I am an officer of that corporation." If the answer is yes, then the person is not eligible for the exemption since he or she is an employee of the corporation. Corporate officers cannot exclude themselves in Indiana. The Board rejects the application.

The Board cautions that an employer who procures independent contractor certificates for workers who are, in fact, employees may not be held harmless in a worker's compensation action.

Volume of Clearance Certificates Processed by Board:

2008 - 5,132

2009 - 5,126

[House Enrolled Act 1553](#)

The Indiana General Assembly passed and the Governor signed (on May 10, 2001) House Enrolled Act 1553 effective July 1, 2001 that affects independent contractors in several ways:

- Homeowners are exempt from getting a certificate of insurance from a contractor 22-3-2-14(a)].
- Indiana Department of Revenue must clear status of an independent contractor (\$ fee). [The Indiana Department of Revenue website](#) contains [Information Bulletin #86](#) the [WORKER'S COMPENSATION CLEARANCE CERTIFICATE APPLICATION](#) (WCE-1, St Form #45899).
- Independent contractor certificate (formerly called affidavit) with WC Board is effective 7 days after stamped (now a \$15 fee).
- Contractor who assists employees in filing a false statement for independent contractor status commits a Class D felony. [IC 6-3-7-5\(m\)](#)

b. Other Independent Contractor Definitions

The statute does not provide any other definition for independent contractors. Indiana case law provides more information on defining independent contractors (see section 5 "Employee or independent contractor factors" of this document below for more info).

Prior to 2005, the [Indiana Department of Labor website](#) had this FAQ on the matter:

[How do I know if I worked as an employee or an independent contractor?](#)

"You are an employee if your employer supervises your work, sets your hours and provides you with the necessary equipment to do your work. An independent contrac

not supervised, works at his/her own discretion, and supplies his/her own tools. In addition, an independent contractor files a federal 1099 Tax Form and a worker's compensation affidavit claiming personal responsibility for any injuries that may occur on the job."

c. Construction Trades

The workers compensation statute does not provide a definition of "construction trades." As a guide, the WC Board provides a list of eligible building trades in its "[Notice to Independent Contractors](#)." The NCCI manual of *Classification Codes and Statistical Codes* organizes codes into schedules and groups. Schedule 26 "Miscellaneous Construction" and Schedule 27 "Erection" contain many business classification codes that could be considered in the construction trades, but may not completely match the intended definition of the Indiana General Assembly.

d. Subcontractor

The statute says a contractor is liable for coverage for an uninsured subcontractor. So, the insurer will charge premium for this coverage. *Reference IC 22-3-2-14:*

(c) Any contractor who shall sublet any contract for the performance of any work, to a subcontractor subject to the compensation provisions of IC 22-3-2 through IC 22-3-6, without obtaining a certificate from the worker's compensation board showing that such subcontractor has complied with section 5 of this chapter, IC 22-3-5-1, and IC 22-3-5-2, shall be liable to the same extent as such subcontractor for the payment of compensation, physician's fees, hospital fees, nurse's charges, and burial expenses on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

e. Sole Proprietor

A sole proprietor is excluded, however he/she may elect coverage as an employee under the Act if the owner is actually engaged in the proprietorship business. If the owner makes this election, the owner must serve written notice of the election. Ind. Code §22-3-6-1(b)(4). If the owner of a sole proprietorship is an independent contractor in the construction trades and does not elect coverage, the owner must obtain a Certificate of Exemption under Ind. Code §22-3-2-14.5.

f. Premium

The workers compensation policy permits the insurer to charge premium for "all other persons...that could make us liable" for workers compensation benefits unless "...you give us proof that the employers of these persons lawfully secured their workers compensation obligations." This may include workers whom the employer may think are independent contractors. Also, an insurer may audit an insured's records within three years after the policy period ends and make premium adjustments. So, an employer could be obligated to pay premium to an insurer up to four years after the fact if it discovers workers that could make it liable. *Reference the NCCI Policy Forms Manual, Workers Compensation and Employers Liability Insurance Policy, Part Five, C. Remuneration, 2.*

However, if an apparent "independent contractor" worker fails to file the certificate of exemption, the carrier, if questioned, should still perform the IRS tests to determine if the person is truly an independent contractor and not an employee. If the tests support the position that the person is an independent contractor and not an employee, then there would be reasonable proof that there is no employer/employee relationship that would

create a workers comp liability. However, the issue of liability for an uninsured subcontractor would apparently still exist even though there may not be an employer/employee relationship.

The rule for premium charge for subcontractors is in the *Basic Manual*, Rule 2.H., page R18 (old Rule IX.C). It requires the insured to provide "satisfactory evidence that the subcontractor has workers compensation insurance in force covering the work performed for the contractor. The following documents may be used to provided satisfactory evidence:

- Certificate of insurance for the subcontractor's workers compensation policy
- Certificate of exemption
- Copy of the subcontractor's workers compensation policy"

g. Recordkeeping

The workers compensation policy requires the insured to "keep records of information needed to compute premium." Merely completing an IRS 1099 form versus a W2 form is most likely not enough to convince the insurance company auditor that a worker is an independent contractor. The following records are helpful in determining if an insured should be charged premium for a worker:

- payroll amounts of a contractor
- contract price
- sole proprietor or partner election for coverage
- certificate of insurance
- certificate of exemption (if in construction trades)

h. Contracts Void

22-3-9-5. Contract exempting employer void - Setoff for benefits paid.

"Any contract, rule, regulation, bylaw, or device whatsoever, the purpose, intent, or effect of which would be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; ..."

4. Problem: worker injured, no coverage

Participants at the September 14, 1998 meeting discussed possible legislation on independent contractor issues. The main issue deals with the scenario when a **worker is injured on the job and there is no coverage**. How can this situation be eliminated?

The "no coverage" situation at time of injury can occur for several reasons:

- worker is a sole proprietor, partner or LLC member and has decided to not be covered;
- worker is an independent contractor and due to his/her status as a sole proprietor, partner or LLC member, has decided to not be covered;
- worker is an employee but was treated as an independent contractor prior to the injury, consequently no coverage was in force for the employer.

Some workers are specifically excluded from coverage and some have options to include themselves. For an explanation, please refer to the ICRB CompClues document titled

"Excluded Workers."

5. Employee or independent contractor factors

So, the question remains for all apparent independent contractors, whether in the construction trades or not, "Is the worker an employee or independent contractor?" It appears the most reasonable approach to answering the question is by applying the IRS guidelines for determining independent contractor status. IRS Publication 15-A and Form SS-8 contain the detail information. The Indiana statute does not define independent contractor outside the construction trades.

For a recent court cases on the matter, refer to the attached PDF files.

[Byron Carter v. Property Owners Insurance Company, No. 27A02-0511-CV-01035, Court of Appeals of Indiana; May 3, 2006](#)

[Carter v Property 5-3-06.PDF]

[Nickels v. Bryant, No. 57A03-0501-CV-7, Court of Appeals of Indiana; December 30, 2005](#)

[Nickels v Bryant.PDF]

[Howard v. U.S. Signcrafters, No. 93A02-0308-EX-704, Court of Appeals of Indiana; July 9,](#)

[Howard v US Signcrafters.PDF]

[Excerpt from both *Carter v. Property Owners Ins Co* and *Howard v. U.S. Signcrafters*:](#)

In these cases, the Court of Appeals applied a ten-factor test:

- the extent of control which, by the agreement, the master 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 worker 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; and
 - whether the principal is or is not in business.
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[Excerpt from *O&I v. Honeycutt*, No. 93A02-0302-EX-132, Court of Appeals of Indiana; Nov. 19, 2003](#)

"Our Supreme Court has recognized the most important factors to be:

- (1) right to discharge;
 - (2) mode of payment;
 - (3) supplying tools or equipment;
 - (4) belief of the parties in the existence of an employer-employee relationship;
 - (5) control over the means used in the results reached;
 - (6) length of employment; and
 - (7) establishment of the work boundaries
- GKN Co.*, 744 N.E.2d at 402

Further, the right to control the manner and means by which the work is to be accomplished is the single most important factor in determining the existence of an employee-employer relationship. *Id.* at 403. Nonetheless, that factor is not dispositive. *Id.* Additionally, the factors should be weighed against each other as part of a balance test as opposed to a mathematical formula in which the majority wins. *Id.* at 402."

If the answer is that the worker is an employee, then the workers compensation statute applies (and all of its provisions such as the exclusive remedy doctrine). The employer is responsible for benefits. If the employer has no coverage, that's a problem. The statute provides for double benefits and up to a \$10,000 fine against the employer.

If the answer is that the worker is an independent contractor and not an employee, then the workers compensation statute does not apply. The injured worker has civil, criminal, and negligence remedies available. The worker's health insurance would probably not respond since most policies exclude work-related injuries.

The courts have not been fooled by the appearance of a contractual relationship when none in fact exists. If a person has nothing to show for the alleged "independent contractor" status but a document, or title to equipment used on the job, and in every other respect he looks like an "employee," then most likely the courts will rule he/she is an employee.

The U.S. Department of Labor website contains a page dealing with [Independent Contractors](#) in its section on "elaws - Fair Labor Standards Act Advisor" which provides similar information.

To visually help step through the decision process, we have created a [flowchart](#) of "yes and no" questions.

6. What if all workers covered?

If the law provided benefits to all workers, then currently excluded workers such as sole proprietors, partners, LLC members, and independent contractors would need to procure workers compensation coverage or self-insure the liability. The next question posed is "What would be the impact if the law provided benefits to all workers?"

The Board receives about 5,100 Clearance Certificates of Exemption per year. We also speculated there are about 40,000 subcontractors in the state that may work full-time or part-time and pay taxes. The impact would be that somewhere between 5,100 to 40,000 workers would need to buy workers compensation policies. Self-insurance is probably not a viable option.

7. Premium Impact

To determine the premium impact, let's take a carpenter, rated under code 5403 as an example (please see Exhibit below). The January 1, 2011 advisory rate is \$6.38. The sole proprietor, partner, or LLC member fixed payroll amount per year is \$50,700. The premium charge for one person for a one year policy would be \$3235 [(6.38 x 50,700 / 100) + 250]. Extending the premium charge for one worker out to 5,100 workers and 40,000 workers, the premium impact would be about \$18 million and \$139 million, respectively.

Premium for one carpenter

Code	Rate	Payroll	Premium

5403	\$	6.38	\$	50,700	\$3,235
				Expense Constant	\$ 250
				Total	\$3,485

Multiple carpenters

No.	Premium	Total 2009 Indiana Premium	% of total
5,100	\$ 17,771,766	\$ 620,000,000	3%
40,000	\$ 139,386,400	\$ 620,000,000	22%

8. Observations

If legislation were passed to include all workers, the fixed payroll amount rule for sole proprietors, partners, LLC members would most likely need to be revised. Instead, we may attempt to capture actual payroll for these types of workers, however, we know that due to the nature of small businesses that are sole proprietorships or partnerships, identifying actual payroll can be difficult. That's why a fixed payroll amount is currently used.

We do not anticipate any revision in advisory rates would be appropriate if such legislation were enacted. Although we would expect more workers, more payroll, and more losses to enter into the system, they would be spread among the many construction and service classifications, and at the same levels and ratios currently realized. This new experience would eventually work its way into the ratemaking experience period (a five-year history) and so future advisory rates would contemplate this exposure.

Legislators or the WC Board may also want to specifically address how benefits are determined for part-time workers. Are average weekly wages based on one part-time job at time of injury or a combination of jobs that the worker may be performing?

9. Other States

The Insurance Risk Management *Manual of Rules, Classifications, and Interpretations for Workers Compensation Insurance* indicates that 35 states provide that sole proprietors or partners may elect to include or exclude themselves from the workers compensation law. Most states use some form of a fixed payroll amount, although six states provide for a minimum and maximum payroll limit similar to the rule for executive officers.

Also see section 12 "Misclassified Workers" below

10. Pros and Cons

From a liability perspective, an employer may want to seek advice from legal counsel on the advantages and consequences of the approach to treating workers as either employees or independent contractors. Shown below is a table, which lists the pros and cons to both approaches.

Approach	Pros	Cons
Employee	-WC provides exclusive remedy -claim cost defined by statute	pay premium for all workers

	-costs easier to quantify	
Independent Contractor	avoid premium for these workers	-subject to law suits -other liabilities may apply -total costs harder to quantify -subject to penalties if no WC coverage in place

11. Links to IRS Documents

For more information on employer-employee relationships, refer to Chapter 2 of [Publication 15](#) , *Circular E, Employer's Tax Guide* and Chapter 2 of [Publication 15-A](#) (PDF), *Employer's Supplemental Tax Guide*. If you would like the IRS to issue a determination, you may submit [Form SS-8](#) (PDF), *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*.

References

- [IRS Summertime Tax Tip 2009-20](#), Employee vs. Independent Contractor – Ten Tips for Business Owners
- [Publication 15](#) , *Circular E, Employer's Tax Guide*
- [Publication 17](#), *Your Federal Income Tax*
- [Publication 505](#), *Tax Withholding and Estimated Tax*
- [Publication 15-A](#) (PDF) , *Employer's Supplemental Tax Guide*
- [Publication 1779](#) (PDF) , *Independent contractor or Employee...*
- [Tax Topic 762](#), *Independent contractor vs. employee*
- [Form SS-8](#) (PDF), *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*.

Revenue Ruling 87-41: The Twenty Factors

To help determine whether a worker is an employee under the common law rules, the IRS identified 20 factors in Revenue Ruling 87-41 that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. Not all the factors must be present to find an employee/employment relationship. The factors are guides to assess whether an individual is an employee or an independent contractor.

Although we could not find Ruling 87-41 on the IRS website, many links to the ruling are available on the internet. It appears the criteria used in Form SS-8 is the most current information.

12. Misclassified Workers

The word "misclassification" has recently (2007) been used in Congress to describe when employees are misclassified as independent contractors. Beyond tax avoidance, also at

issue is that such workers are excluded from coverage under key laws designed to protect them: group health insurance, pension, unemployment and workers compensation insurance.

As of October 2008, Massachusetts, Michigan, New Hampshire, New York, and Vermont have established task forces focusing on the problem of employers inappropriately classifying employees as independent contractors.

The Government Accounting Office (GAO) issued a white paper titled "[Employee Misclassification](#)" dated 5/8/2007.

Below is a summary of actions taken on the matter.

a. Congress

[H.R.623](#) -- National Commission on State Workers' Compensation Laws Act of 2011 (introduced 02/10/11)

H.R.623 Sec. 2. Findings excerpt:

"Serious questions exist concerning the fairness and adequacy of present workers' compensation laws in light of the growth of the economy, changing nature of the labor force, misclassification of workers as independent contractors, and as leased employees...

Past bills on the subject as of March 2011:

- "The Employee Misclassification Prevent Act"— HR 5107 in the House and S. 3254 in the Senate
- "The Taxpayer Responsibility, Accountability and Consistency Act of 2009"— HR 3408 and S. 2882
- "Fair Playing Field Act of 2010" (H.R. 6128 and S. 3786)

Sources:

- [OpenCongress.org](#)
- A section of the Library of Congress website, named [THOMAS](#)

A Forbes blog site has more information on employee vs. independent contractor issues: <http://blogs.forbes.com/robertwood/2010/09/17/white-house-on-contractor-vs-employee-there-will-be-blood/>

An AFL-CIO web article dated 5/27/08 titled

["Independent Contractor"—Another Word for Employer-Free Ride](#)" referenced new legislation (H.R. 6111) that toughens penalties and cracks down on employers who take away workers' benefits and rights by misclassifying them as ["independent contractors"](#) instead of regular employees.

"There are more than 10 million workers classified as independent contractors and studies show a large percentage for those workers—as many as 3.4 million—are misclassified and should be regular employees. A Massachusetts study found 11.4 percent of the state's construction workers had been misclassified as independent contractors between 2001 and 2003. And an Illinois study found that misclassification had increased by 55 percent between 2001 and 2005."

b. Maine Law & Report

Law

Legislative Document 1456, An Act To Ensure that Construction Workers are Protected by Workers' Compensation Insurance. Under the new law effective 1/1/2010, a person performing construction work at a job site is presumed to be an employee of the hiring agent for the purpose of workers' comp, unless the individual meets the definition of a construction subcontractor.

Report

Problems resulting from construction employee misclassification as independent contractors are highlighted in a briefing paper dated 03/12/07 released by the UMaine Bureau of Labor Education, titled "[High Cost of Misclassified Workers in Maine's Construction Industry](#)." The study estimates that 11% of "Maine's construction workers are routinely misclassified as independent contractors - a practice that, while saving some employers money, is illegal and raises employee-related costs for other companies who obey the law and classify their employees properly."

c. New York Report

A *New York Times* article dated 6/9/07 titled "[Investigating Mislabeling of Workers](#)" references a Cornell University report from February 2007 saying that 704,000 of the 7 million private-sector workers in New York State were misclassified as independent contractors and that as a result the state was being shortchanged \$175 million in unemployment insurance taxes each year. The report also urged New York to do what a three-year-old Massachusetts law does: create a presumption that every worker is an employee, unless demonstrated otherwise.

d. New York Executive Order

Gov. [Eliot Spitzer](#) created an interagency task force on 9/10/07 to step up action against companies that wrongly classify employees as independent contractors to skirt wage and tax laws. See *New York Times* article dated 9/11/07 and titled "[State Takes Aim at Evaders of Wage and Tax Laws](#)."

e. Illinois Law Protects Construction Industry

Illinois Gov. Rod Blagojevich signed legislation on 8/6/07 intended to increase protections for workers in the state's construction industry by preventing the practice of misclassifying them as independent contractors.

This law presumes an individual performing work for a construction contractor is an employee unless the following set of criteria, known as the ABC test, is met:

- The individual is free from control or direction over the performance of the contract;
- the service performed is outside the usual course of business of the contractor; and
- the individual is in an independently established trade, occupation, profession or business.

There are also exceptions to the ABC test for legitimate sole proprietors or partnerships. *Lincoln Daily News* 8/8/07 [Go to the Full Story...](#)

f. New Hampshire Law HB 471

A Concord Monitor online article dated 10/21/07 titled [Small contractors caught short by change in law](#) explains a new law effective 9/14/07. The law requires "any individual . . . who is actively engaged in on-site work on any construction site within the state of New Hampshire" to be covered by worker's compensation insurance. Previously, up to three executive officers of a limited liability company could waive themselves from coverage.

Apparently some contractors avoid having to pay for WC insurance by making one or two employees principal members of the LLC and hiring subcontractors to do the rest of the work. Many of those subcontractors also establish LLCs and avoid having to cover themselves under worker's compensation insurance, then turn around and hire more subcontractors with the same business model. It's a long chain that is designed to circumvent the law.

The NH Task Force on Employee Misclassification issued its first report on December 1, 2008. The report indicated that the task force is still at the beginning of a lengthy fact-finding process aimed at determining whether employee misclassification creates a serious problem in New Hampshire and, if so, to what degree. The task force is expected to issue further interim reports of its findings and recommendations for proposed legislation with a final report due by December 1, 2010.

g. Pennsylvania Proposed Bill

A Philadelphia Business Journal [online article](#) dated 6/10/08 reports a House bill would establish the presumption that workers in construction or trucking are employees and place the burden on employers to prove otherwise to the Department of Labor and Industry.

To classify a worker as an independent contractor, an employer would have to show the worker is free from control or direction to perform the service, the service is outside the usual course of the business and the person is customarily engaged in an independently established trade, occupation, profession or business.

h. Maryland Workplace Fraud Act of 2009

SB 909, the [Workplace Fraud Act of 2009](#) effective October 1, 2009:

- Prohibits employers from failing to properly classify individuals who receive remuneration for work performed
- Authorizes the Commissioner of Labor & Industry to initiate investigation of suspected violations
- Requires the Commissioner to enforce specified provisions
- Establishes the method of determining the existence of employer/employee relationship for the purpose of proper classification

i. Nebraska Insurance Fraud Act

[LB 208](#) effective 05/26/09 would add to the list of Fraudulent Insurance Acts found under 28-631 and 44-6604 of the Nebraska Statutes:

"(j) Knowingly and with the intent to defraud or deceive provides false, incomplete, or misleading information to an insurer concerning the number, location, or classification of employees for the purpose of lessening or reducing the premium otherwise chargeable for workers' compensation insurance coverage;"

A violation of this section under Sec. 28-631 is a Class IV felony (5yrs/\$10,000/Both)

j. Michigan Study

A [Detroit News online article](#) dated 9/30/09 mentions a 2008 statewide study which showed that 30% of Michigan employers underreport payroll by misclassifying workers. In the construction industry alone, 26% of employers misclassify.

k. Tennessee Study

A [study](#) conducted by researchers from Middle Tennessee State University and Tennessee Tech concluded that more than **one in five construction workers (38,680) in Tennessee were misclassified** as independent contractors or paid under the table in Tennessee in 2006. This cost the state nearly \$15 million in unemployment taxes and **\$92 million** in workers' compensation premiums.

l. Oklahoma Bill

Senate Bill 1384 targets organizations that misclassify employees as independent contractors was approved by the Oklahoma House of Representatives in April 2010. It directs three state agencies to share information in order to identify employers who fraudulently classify workers in order to evade taxes and workers' compensation claims.

m. New York State Construction Industry Fair Play Act The Act is effective 10/29/10 and is aimed at correcting employee misclassifications in the construction industry.

The Act includes a three-point test to determine if a worker is an independent contractor or employee. The law assumes all construction workers are employees unless the following three criteria are met:

- they are "free from control and direction in performing the job, both under his or her contract and in fact;"
- their services "must be performed outside the usual course of business which the service is performed;" and
- they are "customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue."

Construction industry employers are required to provide workers with notification of their classification status.

In a press statement, Governor Paterson said, "Studies have shown that up to 15 percent of New York's construction industry is misclassified at any given time. It deprives the government of tax revenue at a time when it is sorely needed and places an unfair burden on law-abiding employers who play by the rules. It often deprives New York's workers of crucial benefits such as overtime pay, workers' compensation and unemployment insurance. This new law will be a powerful tool that hopefully will clean up this practice once and for all."

The Act provides for a business entity exception, which allows for a sole proprietor, partnership, corporation, or person to be classified as an independent contractor provided the entity satisfy a 12-part test for a separate business entity.

n. Indiana SEA 23

Under Senate Enrolled Act 23, codified in IC 22-2-15-1 to 6, the Indiana Department of Labor issued its report to the Indiana Pension Oversight Commission on Employee Misclassification, dated September 29, 2010.

[Click here](#) for excerpts from the Commission minutes, which includes the full report in the exhibit.

Quick summary of the minutes:

- Indiana is losing between \$250-400 million in income and payroll taxes annually
- estimates that as many as 16.8% of all employees in the state are misclassified as independent contractors
- impact of misclassification includes a pricing edge for employers cheating the system by decreasing payroll costs by as much as 10% to 20%
- employee misclassification is really about tax evasion
- the Commission recommended that the Department of Revenue, the Department of Labor, the Department of Workforce Development, and the Worker's Compensation Board submit by November 1, 2010, a joint report on the following:

(1) An estimate of the potential revenue recoverable annually by the state through the enforcement of existing statutory provisions concerning worker misclassification.

(2) An estimate of the annual costs of enforcement to recover the revenue estimate provided in (1), above.

(3) An estimate of the amount of additional potential expenditures for state benefits, such as unemployment insurance and worker's compensation benefits, resulting from the reclassification of workers as employees as the result of the enforcement efforts described in (1), above.

(4) Recommendations concerning the funding of the estimated annual enforcement costs provided in (2), above, including a mechanism for paying for the additional costs of enforcement and compliance.

o. Utah SB35 signed 04/26/11

Gov. Gary Herbert signed [SB35](#) that addresses worker misclassification in the construction trade. The bill defines what an employee is and what an owner is, and establishes rules about who can be classified as a worker versus an owner of an LLC business. To be classified as an owner, a person must be an active manager, hold at least 8 percent ownership interest, or not be subject to workplace supervision.

p. USDOL coordinates with states and IRS

According to a Washington Post [online article](#) published 09/19/11, has signed agreements with 9 states and the IRS to share information to crack down on businesses that improperly label workers as independent contractors or as non-employees. The states are Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington, with New York and Illinois expected to sign up in the near future.

13. Presentation

PowerPoint presentation titled "[2008: An Independent Contractor Odyssey](#)" presented to the Big I state convention 11/17/08.

Related Files

[Board Forms](#) , [Employee Leasing & PEOs](#) , [Excluded Workers](#) , [Guide To Indiana Worker's Compensation](#) , [Trucking](#)

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