MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS

OFFICE OF THE COMMISSION AUDITOR

FEDERAL, STATE AND LOCAL LAWS GOVERNING MISCLASSIFICATION OF EMPLOYEES

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Introduction

This memorandum responds to a request from Commissioner Barbara J. Jordan, representing District 1, for the Office of the Commission Auditor (OCA) to conduct research regarding legislation governing the misclassification of employees as independent contractors. More specifically, the scope of the research was limited to federal, state, and local laws and mandates relating to employee misclassification, including associated penalty and enforcement frameworks.

Employers often misclassify employees in error; however, some employers intentionally misclassify employees in order to reduce labor costs as standard payroll-related costs (e.g., Social Security and Medicare taxes, income taxes, unemployment insurance, workers' compensation, pension and health benefits) are inapplicable to workers classified as independent contractors. Not only does such a misclassification hurt state and federal governments as they lose out on significant revenue sources, but the competitive marketplace is compromised as these employers are then able to charge lower prices, due to lower salaries, than their law-abiding competitors. In the construction industry, for example, employers who avoid workers' compensation costs are able to underbid employers who correctly classify their employees.[1]

Employee misclassification causes significant harm to workers as well, as employees categorized as independent contractors are not entitled to fundamental workplace protection laws, such as the Fair Labor Standards Act, the American with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act and the National Labor Relations Act.[2] In the workplace safety context, employers are required to comply with OSHA (Occupational Safety and Health Administration) regulations to protect the health and safety of employees but are exempt from those regulations when independent contractors are dealing with the same hazardous materials.[3] Misclassified employees also face an increased tax burden; receive no overtime pay; and are often ineligible for unemployment insurance and disability compensation.[4]

OCA's research efforts found that one of the biggest difficulties in determining whether a worker should be classified as an employee or as an independent contractor lies in the complex tests that are used to make the decision. These tests derive from a variety of sources including common law, governmental agency regulations and federal and state statutes.[5] This memorandum addresses classification tests generally; tests utilized under federal statutes involving the classification of employees as independent contractors; illustrative statutory schemes enacted in select states to combat deliberate employee misclassification; and local governments' response to worker misclassification.

History of Federal and State Governments' Response to Employee Misclassification

The regulation of the employer and employee relationship began in 1913 with the Organic Act, which established the U.S. Department of Labor (DOL). The department's purpose is not only to protect the interests and rights of wage earners but also to administer those rights fairly in order to

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[1] http://dpeaflcio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors/

[2] https://mckinneylaw.iu.edu/ilr/pdf/vol50p673.pdf

[3] *Id.*

[4] http://dpeaflcio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors/

[5] https://mckinneylaw.iu.edu/ilr/pdf/vol50p673.pdf

protect businesses and the public at large. In an attempt to improve the workplace, the government passed the Fair Labor Standards Act of 1938 (FLSA), providing a minimum standard for all workplaces. As time passed, Congress enacted multiple amendments to the FLSA to keep the Act current and effective.[6]

Although the FLSA covers most industries, it does not protect workers from all unfair practices, and therefore, at times, federal agencies and state governments have taken actions to provide greater protection for workers. This includes protection from misclassification for employees. For instance, at the federal level, the Internal Revenue Service (IRS) and DOL signed a Memorandum of Understanding (MOU) in 2011 for a joint initiative to improve compliance with laws and regulations administered by the IRS and DOL.[7] Per the agreement, the two entities would coordinate national outreach activities relating to worker classification and other issues of mutual interest.[8] The DOL's Wage and Hour Division has also signed similar MOUs to facilitate information sharing with their counterpart agencies in more than a dozen states.[9]

In recent years, multiple bills related to misclassification have been introduced in the U.S. Congress, e.g., the Taxpayer Responsibility, Accountability and Consistency Act; Fair Playing Field Act; Employee Misclassification Prevention Act; and Payroll Fraud Prevention Act. However, none of the bills have been enacted.[10] States have also responded to reports of widespread misclassification by passing stricter legislation. Between 2004 and 2012, 22 states have modified their statutory definitions of independent contractors or transformed penalties for the misclassification of employees.[11]

The DOL announced in 2014 an award of approximately $10 million dollars to 19 states, funding worker misclassification detection and enforcement activities. Namely, the funds were intended to identify instances where employers improperly classified employees as independent contractors or failed to report the wages paid to workers.[12] The DOL renewed the $10 million funding in 2015.[13] The initiative and funding to combat employee misclassification had proved effective at recovering funds from companies that violate law.

Tests Used to Determine Worker Classification

Numerous tests are used by both federal and state governments to determine a worker's classification. These tests include a variety of factors that are individually weighed or proved to determine a worker's classification as an "employee" or "independent contractor." The same worker may be properly classified as an "employee" under one test and "an independent contractor" under another, highlighting the lack of uniformity in this area of law and resulting in uncertainty for both employers and workers. This section of the memorandum sets forth the primary classification tests applied both at the federal and state levels.

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[6] https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8.htm
[7] https://www.dol.gov/whd/workers/MOU/irs.pdf
[8] *Id.*
[9] http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=jlasc
[10] https://www.congress.gov/
[11] http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=jlasc
[12] https://www.dol.gov/newsroom/releases/eta/eta20141708
[13] *Id.*

The Common Law Test

The common law test (i.e., the right-to-control test) stems from the master-servant relationship as understood from the common law of agency. Under this test, the employer's right to control the manner and means by which the outcome is accomplished by the employee is the primary factor in determining the employee's classification. An employer does not have to actually exercise his or her right to control an employee's work; the existence of such a right alone is sufficient to justify a classification of "employee." The U.S. Supreme Court has held many factors as relevant to a right to control analysis, including:

- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provision of employee benefits; and
- the tax treatment of the hired party.[14]

The ABC Test

The ABC Test is a broader version of the right-to-control test utilized by a number of states. Under the ABC Test, a worker is presumed to be an employee. If an employer wishes to defeat this presumption and classify an individual as an independent contractor, he or she must prove three conditions:

(a) the individual is free from any direction or control in performing the services;
(b) the services are performed outside the usual course of the employer's business or are performed away from any of the employer's regular business locations; and
(c) the individual is customarily engaged in an independent trade, occupation, business or profession.[15]

The IRS Test

The IRS utilizes the common law standard that focuses on a business's control over a worker. The test contains 20 factors separated into three categories – behavioral control; financial control; and the relationship of the parties. The behavior control factor shows whether there is a right to direct or control how the worker does his or her work. Financial control involves the level of investment, expense and opportunity for profit or loss available to an individual. The relationship of the parties involves whether the individual receives common employee benefits such as insurance, pension, or paid leave and whether a written contract exists showing the intention of the parties. The existence of common employee benefits tends to indicate that the individual is an employee.[16]

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[14] https://mckinneylaw.iu.edu/ilr/pdf/vol50p673.pdf
[15] *Id.*
[16] https://www.irs.gov/pub/irs-utl/x-26-07.pdf

Tests Utilized by Federal Statutes

On the federal level, there are many statutes involving the classification of employees as independent contractors. These statutes typically utilize their own standards and tests for classification purposes. Two of these statutes are the National Labor Relations Act, of which the National Labor Relations Board (NLRB) helps administer and determine what standards will apply, and the FLSA.

The NLRB has usually applied the common law right to control test; however, it has slightly shifted recently to focusing primarily on the party's entrepreneurial opportunity for gain or loss. Under this approach, the failure to take advantage of such an opportunity is not conclusive. Instead, it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.[17]

The FLSA applies a different test, which is centered upon the language of the Act itself. An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA, an employee, as distinguished from a person engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law master-servant standards.[18]

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- the extent to which the services rendered are an integral part of the principal's business;
- the permanency of the relationship;
- the amount of the alleged contractor's investment in facilities and equipment;
- the nature and degree of control by the principal;
- the alleged contractor's opportunities for profit and loss;
- the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
- the degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such factors as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by state/local government are not considered to have a bearing on determinations as to whether there is an

[17] https://mckinneylaw.iu.edu/ilr/pdf/vol50p673.pdf
[18] https://www.dol.gov/whd/regs/compliance/whdfs13.htm

employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.[19]

State Legislative Efforts

The matter of employee misclassification is typically addressed more specifically at the State level, where jurisdictions generally enact legislation creating a presumption of employee status for an individual performing work for an employer. These state laws also generally outline civil penalties (e.g., fines) for companies that misclassify employees; provide a private right of action for the aggrieved worker to bring suit; and establish task forces to investigate and facilitate the adjudication of suspected cases of employee misclassification.

Florida

Under Florida statutory law, an employee is defined as any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for-hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors. Employee includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within the state, whether or not such services are continuous.[20] The law includes an independent contractor working or performing services in the construction industry under its definition of employee as well as all persons who are being paid by a construction contractor as a subcontractor.

In Florida, to satisfy the definition of an independent contractor, at least four of the following criteria must be met:

(1) the independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
(2) the independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
(3) the independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
(4) the independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
(5) the independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or
(6) the independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.[21]

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[19] https://www.dol.gov/whd/regs/compliance/whdfs13.htm

[20] http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0440/Sections/0440.02.html

[21] *Id.*

Should four of the preceding criteria not be met, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(1) the independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;
(2) the independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;
(3) the independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;
(4) the independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;
(5) the independent contractor may realize a profit or suffer a loss in connection with performing work or services;
(6) the independent contractor has continuing or recurring business liabilities or obligations; and
(7) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.[22]

The individual claiming to be an independent contractor has the burden of proving that he or she is an independent contractor.

There are penalties assessed on an employer that misclassifies its employees as independent contractors under the Florida Administrative Code. Under Section 69L-6.018, *Misclassification of Employees as Independent Contractors*, an employer who fails to secure compensation as required for each employee classified by the employer as an independent contractor but who does not meet the criteria of an independent contractor specified under Florida law, shall be assessed a penalty in the following amount: (a) $2,500 per misclassified employees for the first two misclassified employees (per site); and (b) $5,000 per misclassified employees after the first two misclassified employees (per site).[23]

Misclassifying employees to lower premiums or treating employees as subcontractors when they are not to hide or conceal payroll is a criminal violation of Section 440.105 of the Florida Statutes, constituting a felony of the first, second or third degree depending on the monetary value of the fraud as provided in s. 775.082, s. 775.083, or s. 775.084.[24] In 2014, Florida received a grant in the amount of $31,792 from the U.S Department of Labor to assist in the continued detection and enforcement of independent contractor misclassification.[25]

To report intentional employee misclassification in Florida, the individual contacts the Florida Department of Revenue by mail, fax, e-mail or telephone. The state's Department of Revenue website has posted the relevant contact information to report violations.[26] Florida's Department of

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[22] *Id.*
[23] https://www.flrules.org/gateway/RuleNo.asp?ID=69L-6.018
[24] https://www.nahb.org/-/media/Sites/NAHB/Research/independent-contractors/FLORIDA.ashx?la=en&hash=77D8151BD77A562B8053D5E7E5AB5BAD7947EE06
[25] https://www.dol.gov/newsroom/releases/eta/eta20141708
[26] http://floridarevenue.com/taxes/taxesfees/Pages/rt_employee.aspx

Financial Services Investigative and Forensic Services/Bureau of Workers' Compensation Fraud investigates suspected criminal violations of Florida's workers' compensation laws.[27]

Illinois

Illinois enacted the Illinois Employee Classification Act (ECA) in 2007, specifically intended to address the practice of misclassifying employees as independent contractors in the construction industry. ECA accomplishes this objective by setting a presumption of an employer-employee relationship, requiring an employer to affirmatively prove a worker is an independent contractor for the worker to be classified as such. To prove classification of an independent contractor, an employer must meet a three-part test. This test requires an employer to show that the worker is:

(1) free from control or direction of the employer;
(2) the services performed by the individual are outside the usual course of services performed by the contractor; and
(3) the individual is engaged in an independently established trade, occupation, profession or business. Employers are required to report up-to-date records for each individual who performs services for the employer in an attempt to ensure correct classification based on the nature of the work.[28]

If an employer violates the terms of ECA by failing to keep adequate records, failing to affirmatively prove a worker's independent contractor status, or by other means, the employee has the ability to bring suit under a private right of action. If a violation is determined, employees can recover remedies including:

(1) the amount of any wages, salary, employment benefits, or other compensation denied or lost, plus an equal amount in liquidated damages;
(2) compensatory damages and an amount up to $500 for each violation of ECA;
(3) all legal or equitable relief appropriate in the case of unlawful retaliation; and
(4) attorney fees and costs.[29]

Employers found in violation of ECA can face civil penalties and criminal penalties, including enhanced penalties for willful violations.

The Interagency Misclassification Task Force was established in 2012 to investigate employee misclassification.[30] The Illinois Department of Employment Security issued a report stating that, as of 2013, Illinois ranked second in the nation as having the highest number of misclassified employees.[31] Aggrieved individuals may file a complaint through the Illinois Department of Labor to report instances of worker misclassification.[32]

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[27] https://www.myfloridacfo.com/Division/DIFS/WCFraud/default.htm

[28] http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2898&ChapAct=820%26nbsp%3bILCS%26nbsp%3b185/&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Employee+Classification+Act.

[29] *Id.*

[30] https://www.naswa.org/assets/utilities/serve.cfm?gid=AD11A981-5206-4799-AB83-CA3B45814E9D&save=1&dsp_meta=0

[31] *Id.*

[32] https://www.illinois.gov/idol/Employees/Pages/Employer-Misclassification-of-Workers.aspx

California

The California Labor Code provides a presumption affecting the burden of proof that a worker performing services for which a license is required is an employee rather than an independent contractor. Under the California Labor Code, the employer has the burden of proof for classification as an independent contractor, which requires satisfactory proof of the following factors:

(1) an individual has the right to control and discretion as to the manner of performance of the contract for services in the result of the work;
(2) the individual is customarily engaged in an independently established business; and
(3) the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.

A bona fide independent contractor status is further evidenced by the presence of the following cumulative factors:

- substantial investment other than personal services in the business;
- holding out to be in business for oneself;
- bargaining for a contract to complete a specific project for compensation by project rather than by time;
- control over the time and place the work is performed;
- supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees;
- hiring employees;
- performing work that is not ordinarily in the course of the principal's work;
- performing work that requires a particular skill;
- holding a license pursuant to the Business and Professions Code;
- the intent by the parties that the work relationship is of an independent contractor status; or
- that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.[33]

The California Labor Code makes it expressly unlawful to willfully misclassify an individual as an independent contractor and imposes civil penalties, liquidated damages and other disciplinary actions against violators.[34] The fines that can be levied against an employer range between $5,000 and $15,000, per violation. The fines may be increased to no less than $10,000 and no more than $25,000, for each violation for repeat violators.[35]

The enforcement of California's worker misclassification statute lies with the California Labor and Workforce Development Agency. Initially, complaints are filed with the Agency, which prompts an investigation from the Labor Commission.[36] If the Commission finds a likely violation, it may initiate an administrative hearing or bring a civil suit.

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[33] http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=2750.5.
[34] http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120SB459
[35] *Id.*
[36] http://www.labor.ca.gov/Private_Attorneys_General_Act.htm

New York

The state of New York enacted the *New York State Construction Industry Fair Play Act* in 2010, creating a new standard for determining whether an individual is classified as an employee or an independent contractor within the construction industry.[37] The new standard presumes that individuals performing services for a contractor shall be classified as employees unless they meet all three criteria within the law. The employer may not consider an employee an independent contractor unless he/she meets all of the following criteria:

(1) the individual is free from control and direction in performing the job, both under contract and in fact;
(2) the individual is performing services outside of the usual course of business for the company; and
(3) the individual is engaged in an independently established trade, occupation or business that is similar to the service they perform.[38]

The law imposes fines to employers for willful employee misclassification ranging between $2,500 for the first violation and $5,000 for the second violation within a five-year period. Furthermore, employers may be subject to criminal prosecution, fines of up to $50,000 and debarment from performing public works.[39]

In July 2016, the governor of New York signed Executive Order 159 to establish the Joint Task Force on Worker Exploitation and Employee Misclassification in order to investigate the practice of employee misclassification; coordinate with state agencies to ensure enforcement of laws violated when employee misclassification occurs; and develop legislative proposals and tools to combat employee misclassification. The Task Force works alongside other agencies such as the State Attorney's Office, the Comptroller of New York City, the Department of Taxation and Finance and the New York Department of Labor. The Task Force identified approximately 26 thousand cases of employee misclassification and $316 million of unreported wages in 2014.[40] The Task Force has a fraud hotline available to the public to report employee misclassification. Complaints relating to employee misclassification may also be filed online at the state's Department of Labor website for investigation by the Task Force.[41]

Massachusetts

The Commonwealth of Massachusetts' misclassification law creates a presumption of an employer-employee relationship, i.e., an individual performing any service shall be considered to be an employee. Under the Massachusetts law, the employer bears the burden of proof if it wants to classify a worker as an independent contractor. In order to properly classify someone as an independent contractor, an employer must meet a three-prong test:

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact;
(2) the service is performed outside the usual course of the business of the employer; and

[37] https://labor.ny.gov/formsdocs/ui/P738.pdf
[38] https://www.nysenate.gov/legislation/laws/LAB/A25-B
[39] https://www.nysenate.gov/legislation/laws/LAB/861-E
[40] https://www.labor.ny.gov/agencyinfo/pdfs/misclassification-task-force-report-2-1-2015.pdf
[41] https://labor.ny.gov/secure/fraud-employer/

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[42]

In 2008, the governor signed Executive Order 499 establishing the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification. The Task Force was established to combat the underground economy and employee misclassification by fostering compliance with the law by educating business owners and employees about applicable requirements, and conducting joint, targeted investigations and enforcement actions against violators. The Commonwealth defines 'Underground Economy' as those individuals and businesses that utilize schemes to conceal or misrepresent their employee population to avoid one or more of their employer responsibilities related to business laws and regulatory requirements.[43]

In 2014, Chapter 144 "An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms," was signed into law which codified the Joint Task Force on the Underground Economy, making it a permanent fixture under the Executive Office of Labor and Workforce Development as the Council on the Underground Economy (CUE).[44]

The Joint Task Force is the enforcement body as it relates to employee misclassification. The Joint Task Force was able to recover approximately $20 million dollars as a result of referrals and cooperative oversight during the 2014 reporting period. Furthermore, the Task Force uncovered 450 cases of misclassified workers and $5.5 million in unreported wages.[45] Aggrieved persons may report employer fraud to the CUE by calling or via e-mail. The contact information for the CUE is available at its website.[46]

Texas

The state of Texas's Unemployment Compensation Act (TUCA) does not explicitly address the issue of employee misclassification. However, the Texas Workforce Commission (TWC), the state agency charged with overseeing and providing workforce development services to employers and job seekers, uses a 20-point common law-derived test to determine if an individual can be properly classified as an independent contractor.[47] The 20-point test is summarized below:

(1) Instructions: An employee receives instructions about when, where and how the work is to be performed.
(2) Training: Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.
(3) Integration: Services of an employee are usually merged into the firm's overall operation; the firm's success depends on those employee services.
(4) Services rendered personally: An employee's services must be rendered personally; employees do not hire their own substitutes or delegate work to them.
(5) Hiring, supervising & paying helper: An employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds.

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[42] https://www.mass.gov/service-details/independent-contractors
[43] https://blog.mass.gov/jobs/underground-economy/ma-joint-task-force-recovers-millions-in-revenue-by-targeting-employer-fraud-and-worker-misclassification/
[44] https://www.mass.gov/files/2017-07/cue-annual-report-2015.pdf
[45] https://www.mass.gov/files/2017-07/jtf-annual-report-2014.pdf
[46] https://www.mass.gov/orgs/the-council-on-the-underground-economy-cue
[47] http://www.twc.state.tx.us/files/businesses/form-c-8-employment-status-comparative-approach-twc.pdf

(6) Continuing relationship: An employee often continues to work for the same employer month after month or year after year.
(7) Set hours of work: An employee may work "on call" or during hours and days as set by the employer.
(8) Full time required: An employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the employee's time.
(9) Location where services performed: Employment is indicated if the employer has the right to mandate where services are performed.
(10) Order or sequence set: An employee performs services in the order or sequence set by the employer. This shows control by the employer.
(11) Oral or written reports: An employee may be required to submit regular oral or written reports about the work in progress.
(12) Payment by the hour, week, or month: An employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.
(13) Payment of business & travel expense: An employee's business and travel expenses are either paid directly or reimbursed by the employer.
(14) Furnishing tools & equipment: Employees are furnished all necessary tools, materials, and equipment by their employer.
(15) Significant investment: An employee generally has little or no investment in the business. Instead, an employee is economically dependent on the employer.
(16) Realized profit or loss: An employee does not ordinarily realize a profit or loss in the business. Rather, employees are paid for services rendered.
(17) Working for more than one firm at a time: An employee ordinarily works for one employer at a time and may be prohibited from joining a competitor.
(18) Making service available without liability: An employee does not make his or her services available to the public except through the employer's company.
(19) Right to discharge without liability: An employee can be discharged at any time without liability on the employer's part.
(20) Right to quit without liability: An employee may quit work at any time without liability on the employee's part.

An aggrieved party may contact TWC by phone or e-mail in order to report employee misclassification. The contact information is available on its website.[48] TWC has the authority to assess a fine on employers that it has found to have misclassified employees. Most of TWC's budget is funded through federal sources.

North Carolina

Section 95-25.2 of the North Carolina State Statutes defines an employee as any individual employed by an employer.[49] Chapter 96, Article 1, of the North Carolina State Statutes defines an independent contractor as an individual who contracts to do work for a person and is not subject to that person's control or direction with respect to the manner in which the details of the work are to be performed or what the individual must do as the work progresses.[50] In order to combat and prevent the abuse of employee misclassification, the state of North Carolina enacted the Employee Fair Classification Act (EFCA), Chapter 143, Article 82, in 2017, which established the Employee Classification Section within the Industrial Commission and the information-sharing practices created in Executive Order No. 83.[51] The EFCA refers to Section 95-25.2 for the

[48] http://www.twc.state.tx.us/businesses/classifying-employees-independent-contractors
[49] https://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/BySection/Chapter_95/GS_95-25.2.pdf
[50] https://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/BySection/Chapter_96/GS_96-1.pdf
[51] https://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2017-2018/SL2017-203.pdf

definition of employee but does not explicitly define an independent contractor. The EFCA does not levy penalties nor does it create a private right of action against an individual or entity engaged in employee misclassification.

In 2012, the Governor of North Carolina issued Executive Order 125, establishing the Task Force on Employee Misclassification to investigate allegations of employee misclassification.[52] The purpose of the Task Force is to enhance coordination and communication among state agencies and to identify effective mechanisms to combat unlawful misclassification of employees. In Fiscal Year 2017, the Task Force reported approximately 13,000 cases of misclassified employees and approximately $1.4 million of back wages assessed based on the complaints received.[53] Suspected employee misclassification can be reported anonymously to the North Carolina Industrial Commission at its website.[54] State agencies such as the Department of Labor, Department of Revenue and Department of Commerce will ensure enforcement actions pursuant to respective statutes as it relates to violations of agency statutes. It is the responsibility of each agency to report to the director of the Employee Classification Section on a quarterly basis the outcome of all claims of worker misclassification.

Local Laws against Employee Misclassification

On the local level, very little has been achieved, legislatively, to address the misclassification of employees. OCA surveyed the Codes of Ordinances of the following jurisdictions and found no codified employee misclassification ordinances: Hillsborough County, Florida; Pinellas County, Florida; Orange County, Florida; DeKalb County, Georgia; Westchester County, New York; Cook County, Illinois; New York City, New York; and San Francisco City, California. However, OCA found that Los Angeles County's Wage Enforcement Ordinance includes a provision instructing the public to refer violations of wage and hour laws that are the responsibility of other enforcement agencies, such as misclassification of independent contractors, to the appropriate authority for investigation.[55]

In a related matter, a news article, published by the Miami Herald on July 9, 2017, reported that a local construction company, Related Group, is under federal investigation regarding a low-income housing project, Edificio Pineiro. The investigation is focused on determining if the Related Group hired subcontractors that were not paying employment taxes in order to lower their costs. Related Group is the largest developer of luxury condos in South Florida and the firm has participated in or won many Miami-Dade County affordable housing projects over the years. The U.S. Attorney's Office and IRS are investigating the project's cost structure to determine if Related augmented bills and retained profits illegally, violations which could bring criminal charges; the inquiry is in the initial stage. The Herald estimated that employee misclassification, in the construction industry alone, costs Floridian tax payers nearly $400 million per year.[56]

Recourse for Aggrieved Employees

Employees who believe that their worker status has been misclassified have the following recourse: in some states, they can bring their complaint to a task force; in other cases, they can

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[52] http://digital.ncdcr.gov/cdm/ref/collection/p16062coll5/id/12312

[53] http://www.ic.nc.gov/2017AnnualReport.pdf

[54] http://www.ic.nc.gov/EmployeeClassificationSection.html

[55] https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances?nodeId=TIT8COPRBUWARE_DIV4WARE_CH8.101WAEN_8.101.020FIPU

[56] http://www.miamiherald.com/news/local/community/miami-dade/article159788874.html

lodge a complaint with the local office of the Department of Labor; and in many instances, they bring a lawsuit against their employer. A number of these lawsuits have resulted in positive outcomes for the employees, including in cases involving Uber drivers, FedEx drivers, construction workers, newspaper carriers, and exotic dancers.

In May 2017, FedEx announced that it had reached a $227 million joint settlement of independent contractor misclassification class action lawsuits across 19 states. The District Court for the Northern District of Indiana granted final approval of the settlements, with payments to the 12,627 driver-plaintiffs residing in Indiana and 18 other states ranging from $250 to more than $116,000.[57] In March 2017, a federal judge in Florida ruled in favor of a group of exotic dancers in their case against two South Florida clubs, finding that the dancers were employees, not contractors under the FLSA.[58] In April 2016, Uber decided to settle a class action lawsuit alleging employee misclassification brought against it by drivers in California and Massachusetts for $100 million. Because the case did not go to trial, the independent contractor dispute question was not resolved.[59]

Summary Table of Employee Misclassification Legislation

The following table summarizes information on several states' legislation relating to employee misclassification, including enforcement schemes established such as investigatory task forces and/or state agencies.

State Government	Legislation	Department to File Claim	Task Force Established
Florida	Chapter 440, Florida Statutes, Workers' Compensation; Florida Administrative Code Section 69L-6.018, Misclassification of Employees as Independent Contractors	Florida Department of Revenue	Department of Financial Services Investigative and Forensic Services/Bureau of Workers' Compensation Fraud
Illinois	820 Illinois Compiled Statutes 185, Employee Classification Act (ECA)	Illinois Department of Labor	Interagency Misclassification Task Force
California	California Labor Code Section 2750.5, Contract of Employment	California Labor and Workforce Development Agency	Department of Industrial Relations, Labor Enforcement Task Force

[57] http://www.talentwave.com/fedex-worker-misclassification-case-settled-for-227-million/

[58] https://www.bpblaw.com/news/2017/march/florida-judge-rules-in-favor-of-exotic-dancers-i/

[59] http://www.motherjones.com/mojo/2016/04/uber-announces-it-will-pay-100-million-drivers-historic-class-action-settlement

New York	Article 25-B, New York State Construction Industry Fair Play Act	Joint Task Force on Worker Exploitation and Employee Misclassification	Joint Task Force on Worker Exploitation and Employee Misclassification
Massachusetts	Chapter 149, Section 148B, General Laws, Persons performing service not authorized under this chapter deemed employees	Joint Task Force on the Underground Economy and Employee Misclassification	Joint Task Force on the Underground Economy and Employee Misclassification
Texas	Labor Code Chapter 201, Title 4, Texas Unemployment Compensation Act (TUCA)	Texas Workforce Commission	Texas Workforce Commission
North Carolina	Chapter 143, Article 82, Employee Fair Classification Act	North Carolina Industrial Commission	Task Force on Employee Misclassifications

Conclusion

OCA's research findings reveal that most laws directly tackling misclassification exist at the state level and have the following components in common: private right of action; civil penalties; and a rebuttable presumption of an employer-employee relationship. Of the states surveyed, the tests used among them to determine an individual's proper classification as an employee or independent contract revolve around the ABC test which presumes a worker to be an employee unless the employer can prove the following three conditions: (1) the individual is free from any direction or control in performing the services; (2) the services are performed outside the usual course of the employer's business or are performed away from any of the employer's regular business locations; and (3) the individual is customarily engaged in an independent trade, occupation, business or profession. In order to combat abuse of employee misclassification, states tend to establish interagency tasks forces to investigate violation of state laws and to enforce laws related to employee misclassification. The results from investigative efforts by state departments as well as the task forces established to investigate employee misclassification have led states to recover millions of tax dollars due to unreported wages and unpaid unemployment insurance taxes.