



# Misclassification under the Laws Enforced by WHD



WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

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1-866-4-US-WAGE

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# Protecting Your Rights

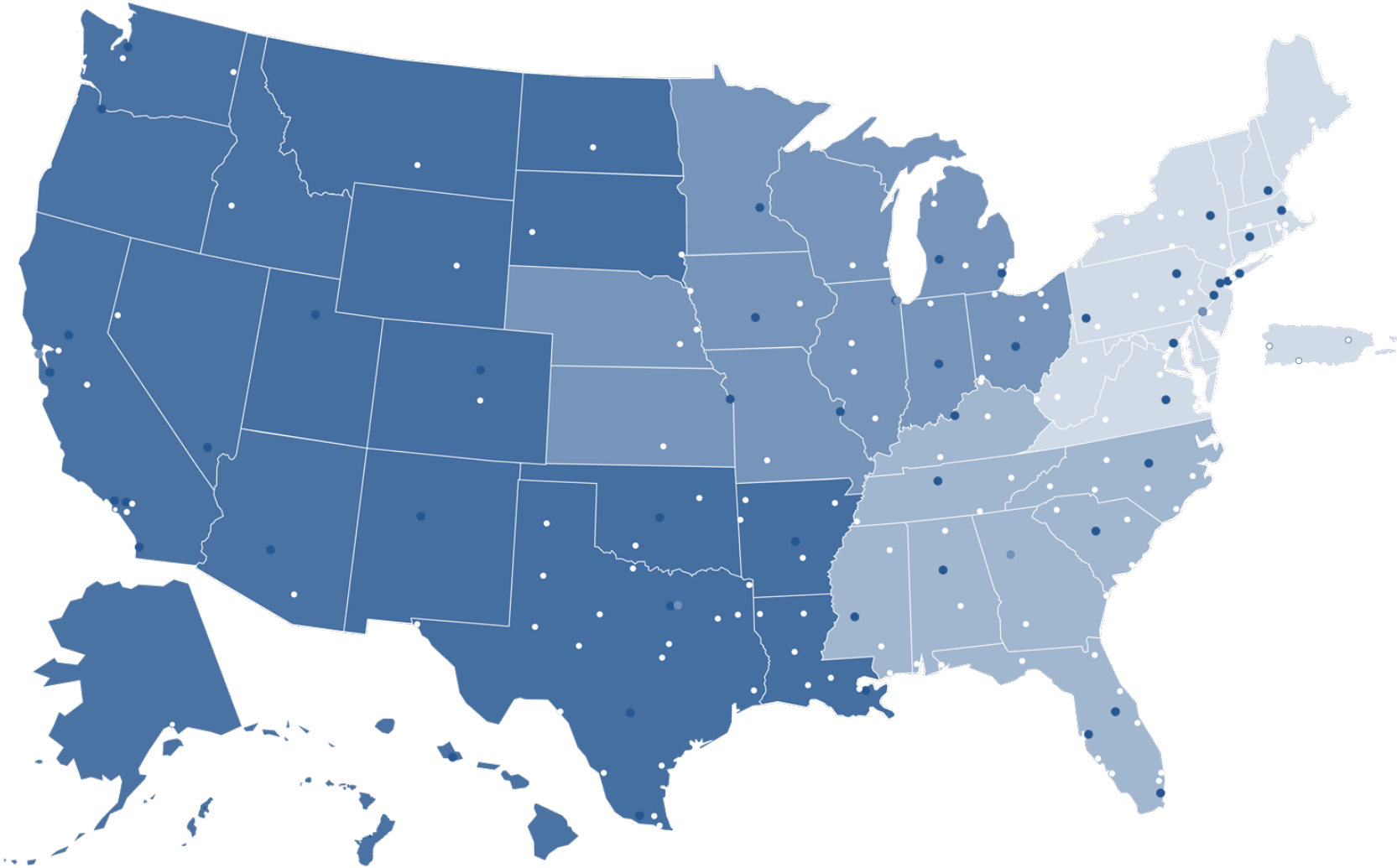
# Enforcing Workplace Protections

- 10 million establishments nationwide and 148 million workers covered
- More than 200 WHD offices throughout the country
- More than 200 languages spoken

# Enforcement Regardless of Status

- Labor laws cover all workers, regardless of immigration status
- Protections apply regardless of immigration status
- WHD does not ask workers about their immigration status

# Helping Workers Across the Country



# Ensuring Fair Pay



**MORE THAN  
\$13.8M**

FOR WORKERS  
IN **HEALTH CARE**



**\$36M+**

FOR WORKERS IN  
**CONSTRUCTION**



**MORE THAN  
\$8.4M**

FOR **AGRICULTURE**  
WORKERS



**MORE THAN  
\$13.4M**

FOR **RETAIL**  
WORKERS



**MORE THAN  
\$34.7M**

FOR WORKERS IN  
**FOOD SERVICE**



**\$6M+**

FOR WORKERS IN  
**GUARD SERVICES**

# Education Promotes Compliance

Education and outreach for workers:

[dol.gov/agencies/whd/workers](https://dol.gov/agencies/whd/workers)

Education and outreach for employers:

[dol.gov/agencies/whd/employers](https://dol.gov/agencies/whd/employers)







# What We Do

# Promoting Compliance and Worker Voice

- **End misclassification** that denies workers access to basic rights and benefits
- **Address retaliation** by protecting the rights of workers who assert their rights
- **Prioritize low-wage workers** and underserved communities facing structural inequities

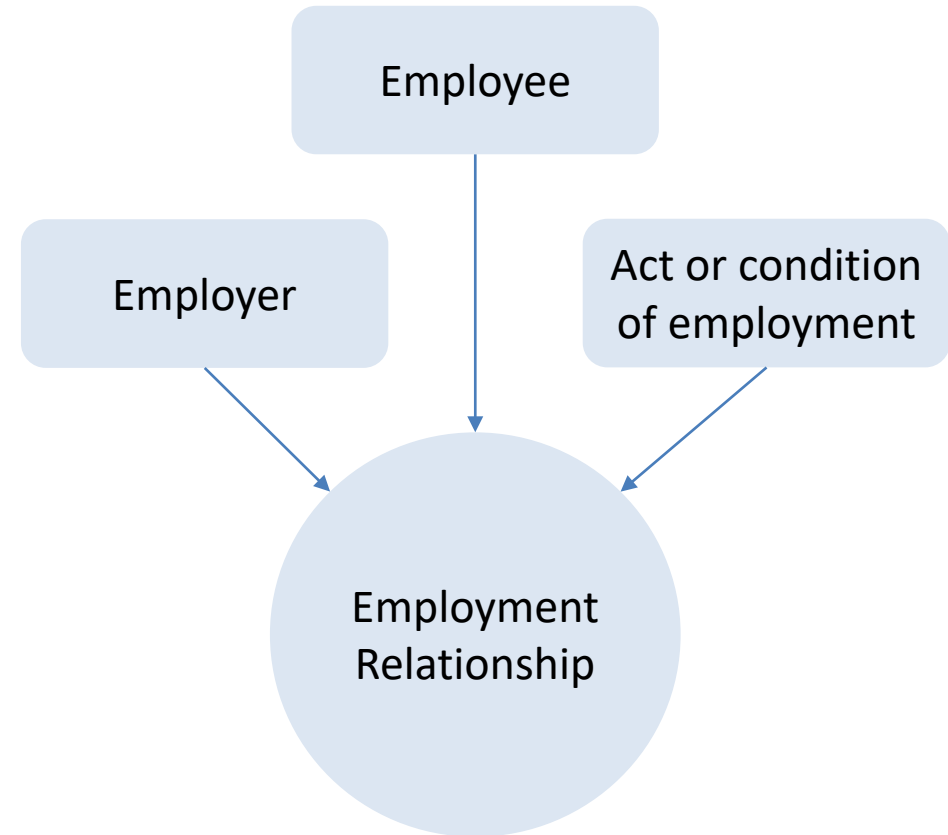


# Understanding Worker Classification Under the FLSA

# What is misclassification?

Misclassification occurs when:

- A worker is considered an employee under the law, but treated as an independent contractor by the employer.
- The FLSA applies whenever there is an employment relationship between an employee and an employer.



# What is misclassification?

Most workers are employees under the FLSA.



# Where Misclassification Occurs

Misclassification can occur in any industry.



# Addressing Inequity

Only employees can

- pursue federal discrimination lawsuits against an employer
- engage in collective bargaining
- pursue disability claims
- assert their right to pregnancy-related leave

**Ending misclassification combats historical inequities faced by women, immigrants, people of color and workers with disabilities.**

# Costs of Misclassification

## Misclassification . . .

- Denies employees the right to minimum wage, overtime pay, and other protections
- Creates tax burdens on misclassified workers
- Creates unfair competition for responsible companies that comply with the law
- Leads to tax revenue loss for the government



# Common Misconceptions

**A worker misclassified as an independent contractor by an employer may really be an employee even if the worker:**

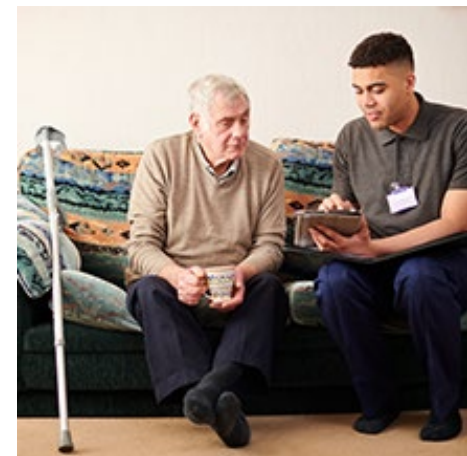
- Agrees to be paid by cash or by check, on the books or off the books.
- Receives a 1099 tax form.
- Signs an independent contractor agreement.
- Is registered as an independent contractor or other business entity under state law.
- Agrees with the employer that he or she is an independent contractor.

# Factors

## How is Misclassification Determined?

No single fact or circumstance determines the status of the worker.

- If economically dependent on the employer, then the worker is an employee
- If in business for him or herself, then the worker is an independent contractor



# Economic Reality

## How is Misclassification Determined?

- The economic reality of the worker's relationship with the employer is examined to determine economic dependence
- Courts generally apply several "economic realities" factors as guides, but factors vary and no one set of factors is exclusive.

# Policy












What is the current WHD policy on enforcing Misclassification?

[WHD Fact Sheet #13](#) is based on current WHD policy.



On January 10, 2024, the U.S. Department of Labor published a final rule Employee or Independent Contractor Classification Under the Fair Labor Standards Act, effective March 11, 2024, revising the Department's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds the Independent Contractor Status Under the Fair Labor Standards Act rule (2021 IC Rule, 86 FR 1168), that was published on January 7, 2021. This guidance will be updated.

# Misclassification Factors

|    | <b>EMPLOYEE</b>   | <b>OR</b>   | <b>INDEPENDENT CONTRACTOR</b>               |
|---|---|---|---|
|    | Working for someone else's business   |  | Running their own business                  |
|   | Paid hourly, salary, or by piece rate   |  | Paid upon completion of project             |
|  | Uses employer's materials, tools and equipment  |  | Provides own materials, tools and equipment |
| Typically works for one employer  |    | Works with multiple clients   |   |
| Continuing relationship with the employer   |   | Temporary relationship until project completed                                      |   |
| Employer decides when and how the work will be performed                            |  | Decides when and how they will perform the work                                     |   |
| Employer assigns the work to be performed   |  | Decides what work they will do  |   |

# 1. Work Integral to the Business

**Is the work performed integral to the employer's business, part of the production process or services the employer is in business to provide?**

If so, the worker is more likely economically dependent on the employer.



## 2. Opportunity for Profit and Loss

**Does the worker make independent business decisions that affect profit and loss?**

If the worker is not free to negotiate terms, fees, and pricing structures, or influence the services and products offered they are more likely to be an employee.

# 3. Investment in Facilities and Equipment



**Has the worker made investments indicating they are in business for themselves or simply purchased tools of the trade that employees usually purchase?**

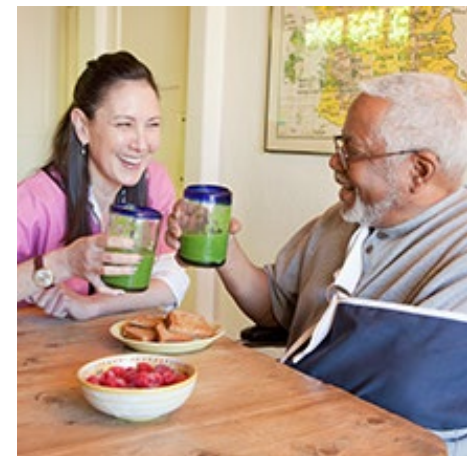
Business investments by independent contractors are generally substantial and are intended to sustain the business beyond any single job a worker performs.



# 4. Skill and Initiative

**Does the worker exercise independent business judgment or initiative?**

Specialized skills alone do not indicate independent contractor status. Independent contractors typically have the ability to work at their own discretion and decide how and when to work.



# 5. Permanency of the Relationship

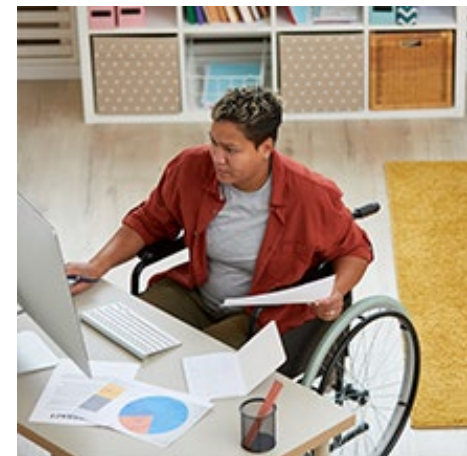
**Does the worker have permanent or indefinite relationship with the employer?**

A permanent or indefinite relationship with the employer suggests the worker may be an employee. A true independent contractor will market or sell services to a variety of users.

# 6. Control

**Who controls the amount of pay, hours of work, and how the work is performed?**

Independent contractors typically exercise control over meaningful aspects of the work such as scheduling, policy and procedures and quality standards.



# 7. Independent Business Organization

**Does the worker operate independently of any one employer?**

Independent contractors typically advertise their business and services, actively seek other contracts and hold out to the public as independent businesses.

# Common Problems

- Off-site workers misclassified because they work at multiple job-sites.
- Teleworkers misclassified because they work from home.
- Highly skilled workers, such as computer programmers, misclassified because of their specialized skills.
- Construction workers misclassified because they purchase their own common tools of the trade.

# Related Problems

- Volunteering services to an employer that are similar to work performed as an employee.
- Trainees or students performing work that must be paid.



# How We Can Help

# How to File a Complaint

- Complaints can be submitted by phone.
- Complaints can come from third parties.
- Complaints are confidential.
- WHD does not ask workers about their immigration status.
- No fee to file a complaint.





# Complaint Intake Information

## **Employee's name**

- Contact information
- Address and phone number
- Employee's duties/work
- Circumstances or actions that caused potential violation of the law
- Copies of pay stubs or personal hours worked records if available

## **Employer's name**

- Point of contact
- Address and phone number

This information is not required, but helps develop the case.

# Who May File a Complaint?

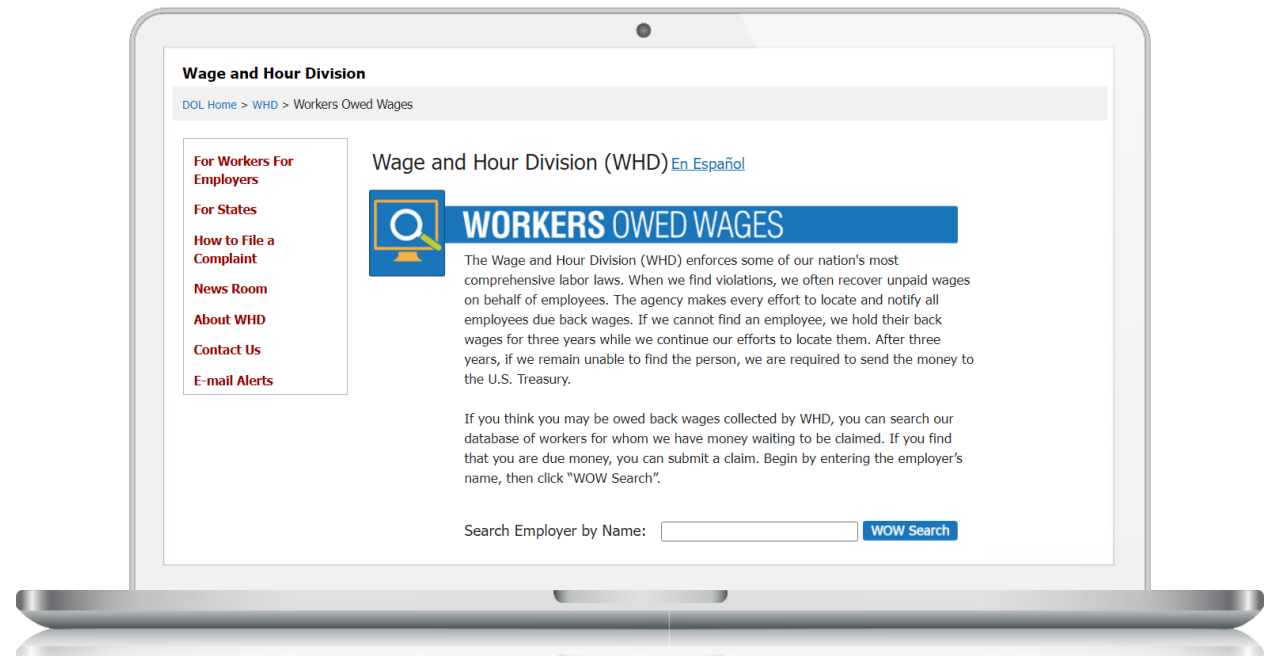
- Current and former employees
- Parent/Guardian
- School officials
- Other employers
- Advocacy groups
- Other agencies



# Online Resources

- Workers owed back wages may be difficult to locate
- WHD searches for these workers
- “Workers Owed Wages” provides online access for workers and advocates to search our database

[dol.gov/wow](https://dol.gov/wow)



# Online Resources

## **Misclassification Website - [Misclassification of Employees as Independent Contractors](#)**

- [Myths About Misclassification](#)
- [Get the Facts on Misclassification Under the FLSA \(Spanish\)](#)
- [Fact Sheet 13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act \(FLSA\) \(Spanish\)](#)
- [Elaws: Independent Contractors](#)
- [Know Your Rights Video Series: Misclassification as an Independent Contractor](#)

# Other Online Resources

- [Worker.gov](https://www.worker.gov)
- [IRS.gov](https://www.irs.gov)
- [Workcomp.gov](https://www.workcomp.gov)



# Contact Us

- Visit [dol.gov/agencies/whd](https://dol.gov/agencies/whd)
- Call our toll-free information and helpline at:  
1-866-4US-WAGE (1-866-487-9243)

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