

**WISCONSIN**



**DWD**

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# Worker Misclassification

EQUAL RIGHTS DIVISION

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# “Employee” Defined

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## Labor Standards (Wage & Hour) Cases

Wisconsin’s labor standards laws include several definitions of “employee.”

- Wis. Stat. §103.001(5) defines an employee as any person who may be required or directed by any employer in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.
- Wis. Stat. §104.01(2)(a) of the Wisconsin minimum wage law defines an employee as every individual who is in receipt of or is entitled to any compensation for labor performed for any employer (some specific exclusions are indicated in the statute).



# “Employee” Defined

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- ▶ Wis. Stat. §109.01(1r) of the Wisconsin wage payment act defines an employee as any person employed by an employer, except that "employee" does not include an officer or director of a corporation, a member or manager of a limited liability company, a partner of a partnership or a joint venture, the owner of a sole proprietorship, an independent contractor, or a person employed in a managerial, executive, or commissioned sales capacity or in a capacity in which the person is privy to confidential matters involving the employer-employee relationship.



# Labor Standards Laws

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Independent contractor, though mentioned in the wage payment law, is not defined. ERD looks to the common law “Economic Realities” test.

➤ This is a six part test using many factors similar to those examined under other laws. A determination must be based on all of the relevant circumstances.

1. The degree of control exercised by the purported employer
2. The worker’s opportunity for profit or loss based upon his/ her managerial skill
3. The worker’s investment in equipment or employment of helpers
4. The degree of special skill required
5. The degree of permanence of the relationship
6. Whether the services constitute an integral part of the business



# Labor Standards Laws

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- ▶ The Division also looks to the US Department of Labor, Wage & Hour Division (WHD) for guidance in this area since minimum wage and overtime requirements under Wisconsin law and the Fair Labor Standards Act (FLSA) are similar.
  - ▶ WHD Fact Sheet 13 spells out the federal test, which is a form of the “Economic Realities” test. Among the factors courts have considered significant:
    1. “Integral Part”
    2. Permanency of the relationship
    3. Investment in facilities & equipment
    4. Nature & degree of control
    5. Opportunity for profit or loss
    6. Amount of initiative, judgment, or foresight in open market competition required
    7. Degree of independent business organization & operation



# Labor Standards Examples

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## ▶ Painter

- ▶ 19-year-old woman finds work as a painter
- ▶ Purported employer states she was “breaking away” from her father’s construction company and forming her own painting business.
- ▶ Worker states she was hired as an employee to paint (employer was a leasing consultant and had properties that needed painting).
- ▶ Purported employer paid her on a per job basis and employed her as needed. She was instructed where to report and given supplies.
- ▶ Company alleged she “bid” on projects, but had no proof of that.
- ▶ ERD found her to be an employee.



# Labor Standards Examples

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## ▶ Trucking Industry

- ▶ A trucking firm put out job solicitations in many areas where individuals apply for work, including Indeed.com.
- ▶ When worker was hired, was given a contract to sign and asked to sign up to form a Limited Liability Company registered with the State of Wisconsin.
- ▶ Worker didn't want to do this, but went to work anyway. He hadn't signed anything.
- ▶ Contract contained a duties clause saying he "will provide truck driving as required by Company."
- ▶ Trucking firm wouldn't pay him until he signed the paperwork. He refused and filed a claim with the Equal Rights Division.



# “Employee” Defined

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## Civil Rights Cases

- ▶ The statutory definition of "employee" states that an "employee" does not include any individual employed by his or her parents, spouse, or child. Wis. Stat. §111.32(5).
- ▶ The definition of “employer” is fairly broad, covering the state and local governments and “any other person engaging in any activity, enterprise or business employing at least one individual.” It excludes social or fraternal clubs under ch. 188, with respect to jobs for which the club seeks to employ or employs a member, if the job is advertised only within the membership. Wis. Stat. §111.32(6).
  - ▶ Because these definitions are so broad, case law fleshes this out.



# Civil Rights Laws

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➤ The ERD uses a hybrid common law “right of control” / “economic realities” test adopted by federal courts. *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979). Adopted by Wisconsin courts in *Moore v. LIRC*, 175 Wis.2d 561, 569 (Ct. App. 1993)

➤ Right to control the means and manner of the worker’s performance is the most important factor.

➤ There are eleven additional factors that the court must consider.

1. Direction
2. Skill
3. Equipment
4. Time worked
5. Payments
6. Termination
7. Annual Leave
8. “Integral Part”
9. Retirement
10. SSA Taxes
11. Intentions



# Civil Rights Case Law

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## Economic Realities Test

*Spirides v Reinhardt* , 613 F.2d 826 (D.C. Cir. 1979)

- Despina Spirides was a foreign language broadcaster for Voice of America 's Greek Service from 1968 to 1974. She worked pursuant to a "Purchase Order Vendor " contract and was treated as independent. Her contract was renewed each year.
- In 1974, the Greek Service decided not to renew Spirides ' contract since it had hired two female foreign nationals as employees.
- Spirides felt this was sex discrimination and filed a complaint with EEO office of the agency.
- The agency dismissed without investigation



# Civil Rights Case Law

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## *Spirides*

- Spirides appealed to the Appeals Review Board of the Civil Service Commission, which found the agency had failed to investigate & therefore violated civil service rules; remanded to the agency.
- EEO Office at the agency again found no evidence of sex discrimination. She appealed to a hearing before a complaints examiner. That examiner found discrimination, but the agency refused to follow the remedy, asserting that Spirides was an independent contractor. A second appeal to the Appeals Review Board affirmed the dismissal.
- She filed an appeal in the District Court. The District Court agreed that Spirides was an independent contractor.



# Civil Rights Case Law

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## *Spirides*

- She appealed to the Court of Appeals.
- The agency argued that Spirides was not an employee because she was not “appointed to the civil service. ”
- The Court disagreed, first noting that as a remedial statute Title VII of the Civil Rights Act of 1964 should be liberally construed.
- The Court then enumerated the “economic realities ” test ... essentially saying that although Spirides was not a civil service employee by way of appointment, she was treated like one, based upon the record. This relied significantly on the application of the common law of agency.
- The **right to control the means and manner** of performance of work is key.



# Civil Rights Case Law

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## *Spirides*

- Spirides was provided an office by the agency.
- She worked there for five years.
- The agency provided all the materials for her work.
- She worked for the same supervisor who gave her instructions about voice inflection, reading tempo, and inflection.
- There were gaps in the fact -finding, so the matter was remanded for further proceedings.



# Civil Rights Examples

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*Sneed v. Milwaukee Board of School Directors*, ERD Case No. CR200201543 (June 17, 2003).

- Lois Sneed entered into a professional services contract with the Milwaukee Board of School Directors to provide services as a hearing interpreter for deaf and hearing impaired students. She was terminated from her position. Sneed appealed her termination, claiming that she was an employee and not a contractor. In her petition for review to the Labor and Industry Review Commission (LIRC), Sneed cited an IRS ruling in which the IRS set forth several factors it uses to determine if a worker is an independent contractor.
- The LIRC rejected these arguments stating that Wisconsin adopted the *Spirides* test for determining whether an individual is an employee under the Wisconsin Fair Employment Act.



# Civil Rights Examples

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- *Ingram v. Bridgeman Machine Tooling and Packaging, Inc.*, ERD Case No. CR200301821 (June 27, 2005).
  - Gary Ingram was hired as a placement, recruitment, and retention specialist by Bridgeman Machine Tooling. Ingram filed a complaint alleging that he was fired in retaliation for filing a complaint about minimum wage problems.
  - The deciding issue in this case was whether Ingram provided his services as an employee or independent contractor. The LIRC stated that Ingram, as the plaintiff, had the burden of proof as to whether he was an employee or an independent contractor.
  - The LIRC then found that Ingram failed to prove the existence of an employment relationship and dismissed.



# Questions?

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