

WISCONSIN



DWD

Worker Misclassification

EQUAL RIGHTS DIVISION

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Equal Rights Division - Overview

- ER enforces over 40 laws covering labor standards and civil rights in employment, housing, and public accommodations.
- Last year, ER processed over 4,000 complaints and recovered over \$1.1 million in wages owed to Wisconsin workers.
- ER conducts outreach and serves as a resource to Wisconsin employers and entrepreneurs.



2009 Report of the Worker Misclassification Task Force

- The 2009 Report defined misclassification generally and discussed enforcement efforts. The ERD portion related to enforcement is short. It:
 - Acknowledged that ERD encounters misclassification.
 - Noted that definitions of “employee” differ from those under other laws.
 - Explained that employee paycheck stubs are to include certain pay calculation and that there is a penalty for failing to do so.
 - Explained that employers are required to maintain records related to hours worked and wages paid.



Updates Since 2009

- There have been no law changes in regard to the laws enforced by ERD. In 2011 or 2012, the Department put together an excellent resource: <https://dwd.wisconsin.gov/worker-classification/>, a Worker Classification web page that helps individuals decide whether misclassification has occurred.
 - ERD laws are divided between “Labor Standards” and “Civil Rights”.
 - We provide our statutory definitions of “employee,” and information about the common law tests that have developed in both areas.



ERD Enforcement - Misclassification

Labor Standards (Wage & Hour) Cases

- ERD does not have initiatory powers except when child labor is involved, and so, ERD cannot affirmatively seek out misclassification cases.
- Although we do not keep statistics on this, in wage and hour matters, we receive approximately 15 complaints a month where worker classification is an issue.
 - We accept all wage claims filed and wait for employer to raise the issue during the course of our investigation. If a purported employer tells us that the relationship was not employment, we investigate that as an initial matter.
 - We consider statutory definitions and a six part “economic realities” test.



ERD Enforcement - Misclassification

Economic Realities Test

- **Part One:** The degree of control exercised by the employer;
- **Part Two:** The worker's opportunity for profit or loss based upon his/her managerial skills;
- **Part Three:** The worker's investment in equipment or employment of helpers;
- **Part Four:** The degree of special skill required for the work;
- **Part Five:** The degree of permanence of the relationship between the parties;
- **Part Six:** Whether the services constitute an integral part of the employer's business.



ERD Enforcement - Misclassification

- We have a Memorandum of Understanding (MOU) with the US Department of Labor, Wage and Hour Division (WHD) under which we can refer misclassification matters to DOL. This helps workers who do not want to file a complaint.
 - We have referred matters to them when the workers are reluctant to file complaints.
 - We are aware of WHD success in some of these wage matters.



ERD Enforcement - Misclassification

Common industries where we find misclassification issues (as reported by investigators):

- Construction industry
- Trucking
- Entertainers (and sometimes they are independent)
- Exotic dancers
- Small businesses
- Seasonal businesses
- Home health industry
- Cleaning companies
- Gyms / Personal trainers



ERD Enforcement - Misclassification

Civil Rights Complaints

- Individuals who believe they have been discriminated against file complaints under the Wisconsin Fair Employment Act (WFEA). The definitions of employer and employee under the WFEA are limited, so case law has also shed light on interpreting the WFEA.
- Under the Civil Rights Laws we enforce, we look to the hybrid common law right of control test / economic realities test that was adopted by federal courts. *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).
- The test looks to the purported employer's right to control the means and manner of the worker's performance as the most important factor, but also considers eleven additional factors.



ERD Enforcement - Misclassification

Eleven Additional Factors

1. The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision.
2. The skill required in the particular occupation.
3. Whether the "employer" or the individual in question furnishes the equipment used and the place of work.
4. The length of time during which the individual has worked.
5. The method of payment, whether by time or by the job.
6. The manner in which the work relationship is terminated: i.e. by one or both parties, with or without notice and explanation.
7. Whether annual leave is afforded.
8. Whether the work is an integral part of the business of the employer.
9. Whether the worker accumulates retirement benefits.
10. Whether the "employer" pays social security taxes.
11. The intention of the parties.



ERD Enforcement - Misclassification

- In the Civil Rights process, the question of coverages is a question of law often left to the Administrative Law Judges (ALJs) to decide after hearing.
- ALJs report that they rarely hear cases involving a classification issue. Again, we do not have statistics on use of affirmative defenses, so this is simply our impression.



Questions?

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