



# 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

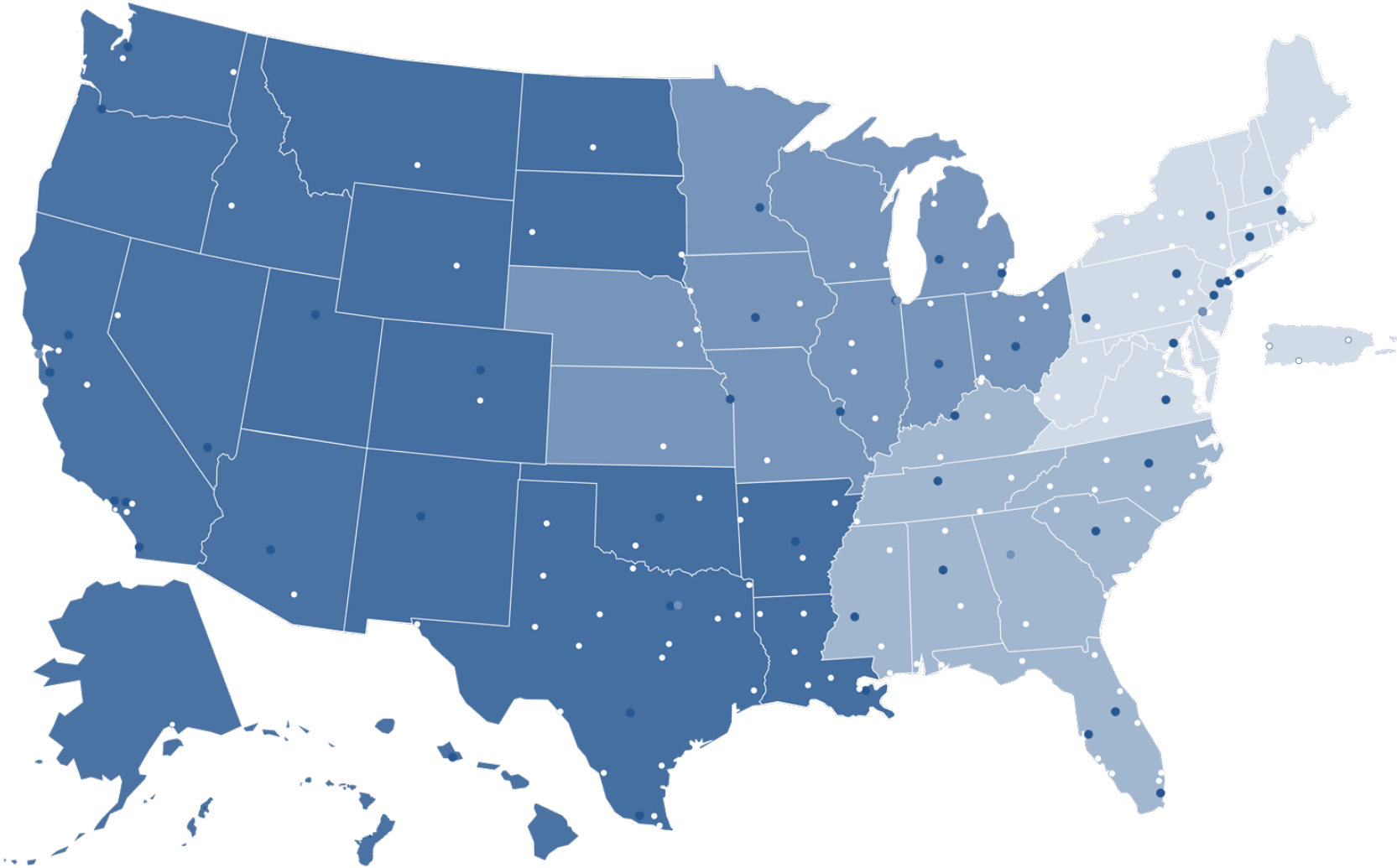
# Enforcing Workplace Protections

- 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

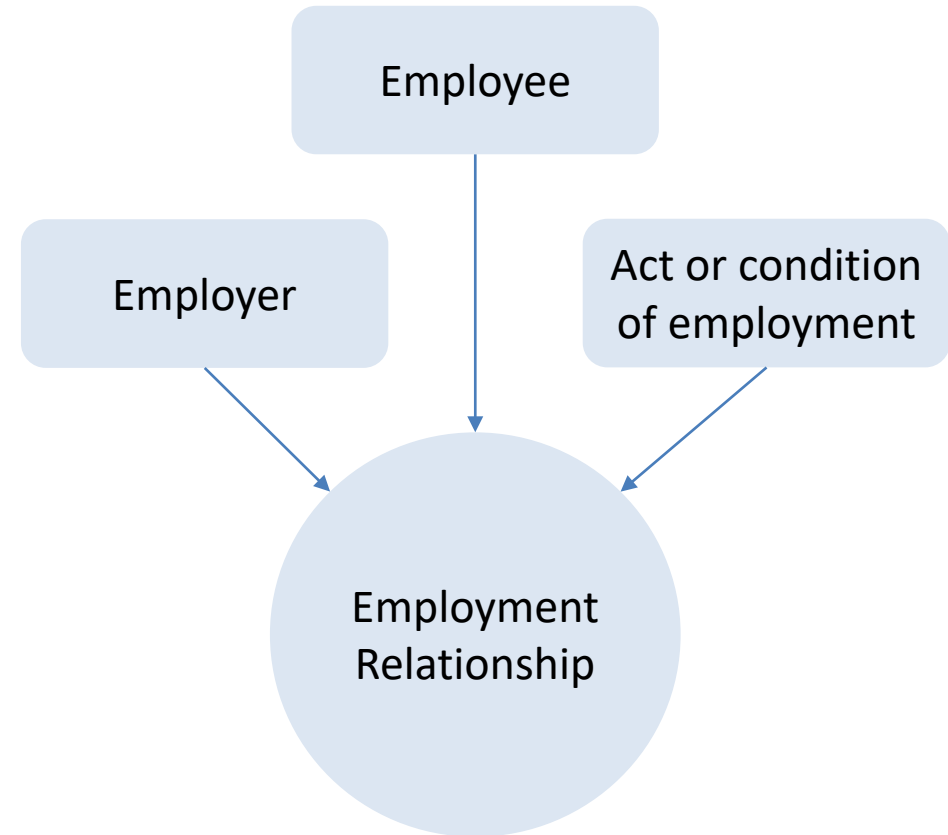


# Understanding Worker Classification Under the FLSA

# 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.



# 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?**

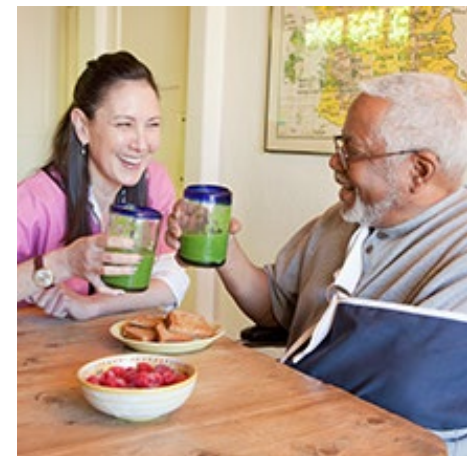
Business investments by independent contractors are generally substantial and are intended to sustain the business beyond any single job a worker performs.



# 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

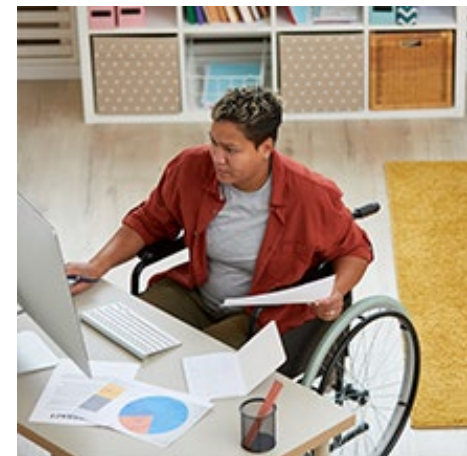
**Does the worker have permanent or indefinite relationship with the employer?**

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?

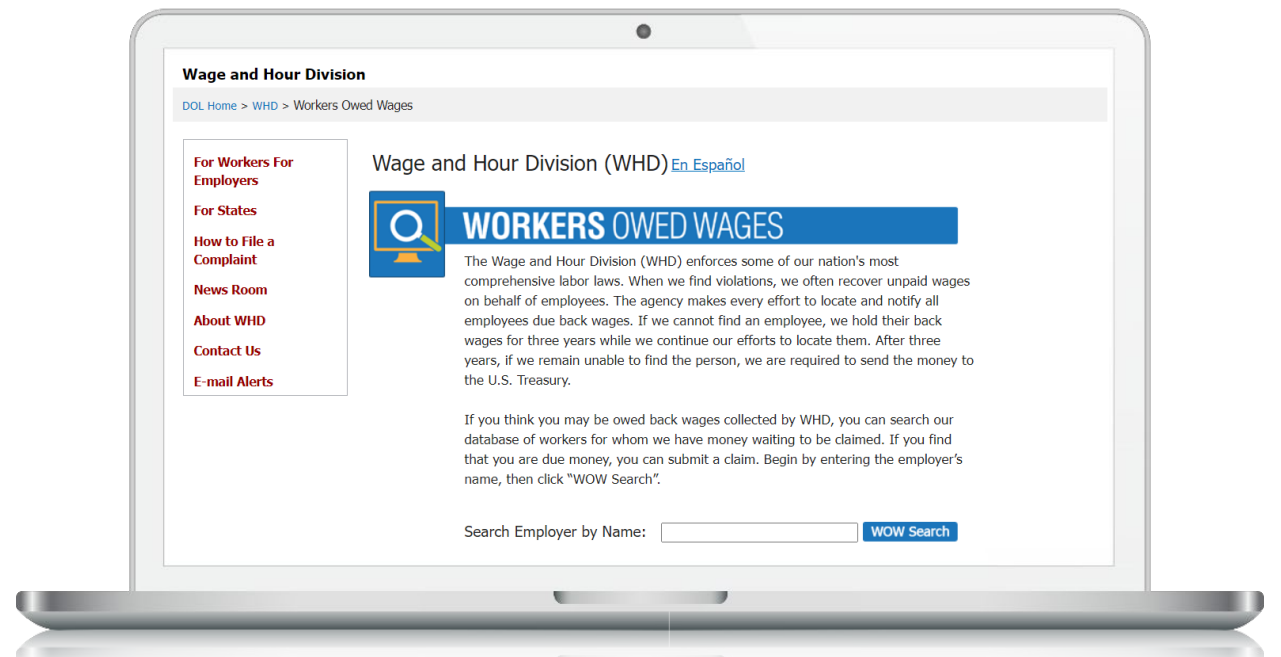
- Current and former employees
- Parent/Guardian
- School officials
- Other employers
- Advocacy groups
- Other agencies



# 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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