

## JOINT ENFORCEMENT COMMISSION ON EMPLOYEE MISCLASSIFICATION

### Worker/Employee Misclassification Issue in Connecticut:

#### *Questions and Answers*

**1. What is worker/employee misclassification?**

Misclassification occurs when an employer incorrectly defines a worker as an “independent contractor” rather than an employee. Although misclassification can happen inadvertently, it is more often used to circumvent the law.

**2. Are there any guidelines to help employers classify workers correctly?**

Yes, although determination of a worker’s status is often complex. Connecticut agencies use different rules and tests to determine employment status as different agencies are responsible for separate aspects of law.

For example, the Connecticut Department of Revenue Services refers to “common law rules.” The Connecticut Department of Labor’s Unemployment Compensation Division uses the “ABC” test and, for determining a covered claim, the Workers’ Compensation Commission considers other factors.

**3. What is the “ABC Test”?**

The ABC Test applies three factors (A, B, and C) for determining a worker’s employment status. To be considered an “independent contractor,” an individual must meet **all three** of the following factors:

**A.** The individual must be free from direction and control (work independently) in connection with the performance of the service, both under his or her contract of hire and in fact; **B.** The individual's service must be performed either outside the usual course of business of the employer or outside all the employer's places of business; and **C.** The individual must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service performed.

It is important to note that factor A, which incorporates many of the common law factors (see “Common Law Rules” noted in question 4) will not be satisfied if the person for whom the service is performed retains the right to exercise direction and control over the service, even when the right is not used. Also, bear in mind that an individual who forms a business in response to an offer of work as an independent contractor will not meet the “customarily engaged” or the “independently established” criteria of test C.

#### **4. What are “Common Law Rules”?**

Under the common law rules, an employer-employee relationship exists when the business for which the services are performed has the right to direct and control the worker who performs the services. This control refers not only to the result to be accomplished by the work, but also the means and details by which that result is accomplished. Three major categories should be considered when determining the correct classification of a worker. These are behavioral control, financial control, and the relationship of the parties.

##### **Behavioral Control:**

Behavioral control refers to the right to direct and control the details and means by which the worker performs the required services. Factors considered include:

- When to do the work.
- Where to do the work.
- What tools or equipment to use.
- What workers to hire to assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a specified individual (including ability to hire assistants).
- What routines or patterns must be used.
- What order or sequence to follow.

##### **Financial Control:**

Economic aspects of the relationship between the parties are analyzed in determining worker classification. Factors that demonstrate financial control include :

- Does the worker have a significant investment in facilities and equipment?
- Are the worker’s business expenses reimbursed?
- Does the worker make the services available to the relevant market?
- How is the worker paid?
- Does the worker have an opportunity for profit or loss?

##### **Relationship of the Parties:**

The relationship of the parties is important because it reflects the parties’ intent concerning control. These factors include:

- Intent of parties. Is there a written contract?
- Tax Forms. Does the worker receive a Form W-2 or 1099-MISC?
- Incorporation. Is the worker providing services as a recognized corporate entity?
- Employee benefits. Does the worker receive employee benefits traditionally associated with employee status?

- Discharge and/or termination. What are the circumstances under which a worker can terminate their relationship?
- Long-term relationship.
- Regular business activity. Are the services provided by the worker a key aspect of the regular business of the company?

Relevant evidence in **all three** categories must be weighed to determine the worker's status.

## 5. Why should misclassification matter to workers, employers, taxpayers, and the government?

*For workers:*

Workers misclassified as *independent contractors* can experience a loss of certain employment protections and benefits. These may include:

- Ineligibility for unemployment compensation.
- No workers' compensation coverage if hurt on the job.
- No overtime pay, minimum wage earnings or below, and often a job without health benefits.
- Incorrect payment of various state and federal employment taxes such as social security, federal and state unemployment and income tax that could result in a worker's liability to pay applicable taxes with interest and penalties if not reported properly.

*For employers:*

Employers who illegally misclassify workers:

- Create an unfair business climate where law-abiding employers cannot compete against employers who intentionally undercut them by not paying all taxes and benefits for workers.
- Do not pay lawful, employment-related taxes on workers– resulting in higher taxes for other employers who follow the law.
- Could be liable for back assessments and substantial penalties.

*For taxpayers and government:*

- Taxpayers pay more than their share when legally irresponsible employers avoid paying them.
- Government loses much needed tax revenue.
- Government paid entitlement programs for benefits that could be provided by an employer – provided by taxpayers for benefits even though no cost was incurred by businesses.