



Worker Misclassification

11TH ANNUAL NEVADA WORKERS' COMPENSATION EDUCATIONAL CONFERENCE



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What is Worker Misclassification?



Office of the
Labor Commissioner
Department of
Business and Industry
"Growing Business in Nevada"

Office of the Labor
Commissioner
Labor Commissioner
Brett Harris



US Department of Labor
**Wage and Hour District
Director**
Gene Ramos



Department of Employment,
Training and Rehabilitation,
Employment Security Division
**Compliance/Audit
Investigator III**
Claudia Bueno



Division of Industrial
Relations, Workers'
Compensation Section
**Compliance/Audit
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**The Office of the Labor
Commissioner**

Employee Misclassification in Nevada

**Presented By:
Nevada Labor Commissioner
Brett Harris**

Introduction

Employee misclassification is a common problem in our “gig economy” where everyone has a side hustle. This presentation will explore what employee misclassification is under Nevada law, identify common red flags of misclassification, and outline the procedure for a misclassification claim in the Office of the Labor Commissioner. It will also discuss Nevada legislation concerning misclassification that passed into law from the 2023 Legislative Session.

Office of the Labor Commissioner

ENFORCEMENT RESPONSIBILITIES

- Wage & Hour Complaints
- Meal & Break Complaints
- **General Complaints**
- Prevailing Wage Project Regulation
- Apprenticeship Utilization Act Regulation
- Minor Employment



LICENSING RESPONSIBILITIES

- Private Employment Agencies
- Professional Employer Organizations
- Public Works Project Numbers
- State Apprenticeship Council

GENERAL EMPLOYMENT COMPLAINTS

Non-wage related violations

- Meal and Rest breaks
- Failure to keep records
- **Employee Misclassification**
 - Definition
 - Employee vs. Independent Contractor Test
 - Penalties
 - SB145



Employee Misclassification Defined NRS 607.216

The practice by an employer of improperly classifying employees as independent contractors to avoid any legal obligation under state labor, employment and tax laws, including, without limitation, the laws governing minimum wage, overtime, unemployment insurance, workers' compensation insurance, temporary disability insurance, wage payment and payroll taxes.

NRS 608.400 Misclassification Prohibited

NRS 608.400 Misclassification prohibited; administrative penalties; notice and opportunity for hearing.

1. An employer **shall not**:

(a) Through means of coercion, misrepresentation or fraud, require a person to be classified as an independent contractor or form any business entity in order to classify the person as an independent contractor; or

(b) Willfully misclassify or otherwise willfully fail to properly classify a person as an independent contractor.

Employer/Employee Relationship

Employer

Every person having control or custody of any employment, place of employment or any employee.

NRS 608.011

Employee

Male and female persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.



NRS 608.010




Who is presumed to be an Independent Contractor?



NRS 608.0155







Independent Contractor Test Part 1

- 
- Possess employer identification number (“EIN”); or
 - Applied for EIN; or
 - Filed self-employment income tax return in the previous year



Independent Contractor Test Part 2

- Contractor required to hold a necessary state or local business license; and
- Maintain necessary occupational license, insurance, or bonding



Independent Contractor Test Part 3

Control of at least 3 of the following:

- ▶ Means, manner, and result of the work;
- ▶ Time the work is performed;
- ▶ Who work is performed for;
- ▶ Hiring employees to assist with work;
- ▶ Substantial capital investment in the business

Employee vs. Independent Contractor

Employees

- ▶ Receive W2
- ▶ No individual business license
 - ▶ Can include professional license
- ▶ Employer controls time, manner, place, and results of work
- ▶ No substantial capital investment

Independent Contractors

- ▶ Tax Evidence of Self-Employment
 - ▶ EIN
 - ▶ Receive 1099
- ▶ Separate Business/Entity License
- ▶ Controls time, manner, place, performance, and results of work
- ▶ Substantial capital investment



“ The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth...does not automatically create a presumption that the person is an employee.

”

NRS 608.0155(3)



Misclassification Red Flags:



- Business controls the schedule
- Business requires uniforms
- Business dictates when and/or where work happens
- Business prohibits other work
- Business forbids the individual to employ help for the work they are performing

Employee Misclassification Claims



Claim

- Filed with OLC
- Claim file prepared
- Assigned Claim Number and Investigator
- Notice of Claim mailed to Respondent allowing 15 days to respond

Investigation

- ▶ Reviews submitted documentation from Complainant
- ▶ Requests and reviews documentation from Respondent (Employer)
- ▶ Issues Determination for Misclassification Violation or Close Claim
- ▶ Determination can be objected to, which leads to Hearing and Final Order

Penalties

- ▶ Liable to misclassified person for:
 - ▶ Lost Wages
 - ▶ Lost Benefits
 - ▶ Economic Damages
- ▶ Administrative Penalty
 - ▶ First Offense: Warning
 - ▶ SB 145
 - ▶ Changed July 1, 2023
 - ▶ Subsequent Offense: \$5,000
 - ▶ Willful & Intentional

PENALTIES

- Administrative Penalties for Violations of NRS 608.400:
 - ▶ First Misclassification: Warning
 - ▶ Subsequent Misclassification(s): \$5,000 per violation
 - ▶ Changed by SB 145
- NRS 608.410 allows the Labor Commissioner to, after an opportunity to be heard, assess additional damages to the employee resulting from misclassification:
 - ▶ Lost wages;
 - ▶ Lost benefits;
 - ▶ Economic damages

2023 Legislation on Misclassification

Senate Bill 145: Effective July 1, 2023

- ▶ Requires continued reporting between multiple agencies on misclassification claims
 - ▶ OLC
 - ▶ Division of Industrial Relations
 - ▶ Employment Security Division at DETR
 - ▶ Department of Taxation
 - ▶ Attorney General
- ▶ Modified penalty structure for Employee Misclassification
 - ▶ Eliminates penalties on any first-time misclassification offense;
 - ▶ Mandates \$5,000 penalty for any subsequent misclassification violation.
- ▶ Permits Labor Commissioner to assess administrative penalties and investigative costs for violations of Nevada labor law;
- ▶ Eliminates Misclassification Task Force which brought forth the recommendations of the bill.



Thank you



Office of the Labor Commissioner

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Misclassification under the Laws Enforced by WHD

Presented by Gene Ramos – District
Director, Las Vegas District Office



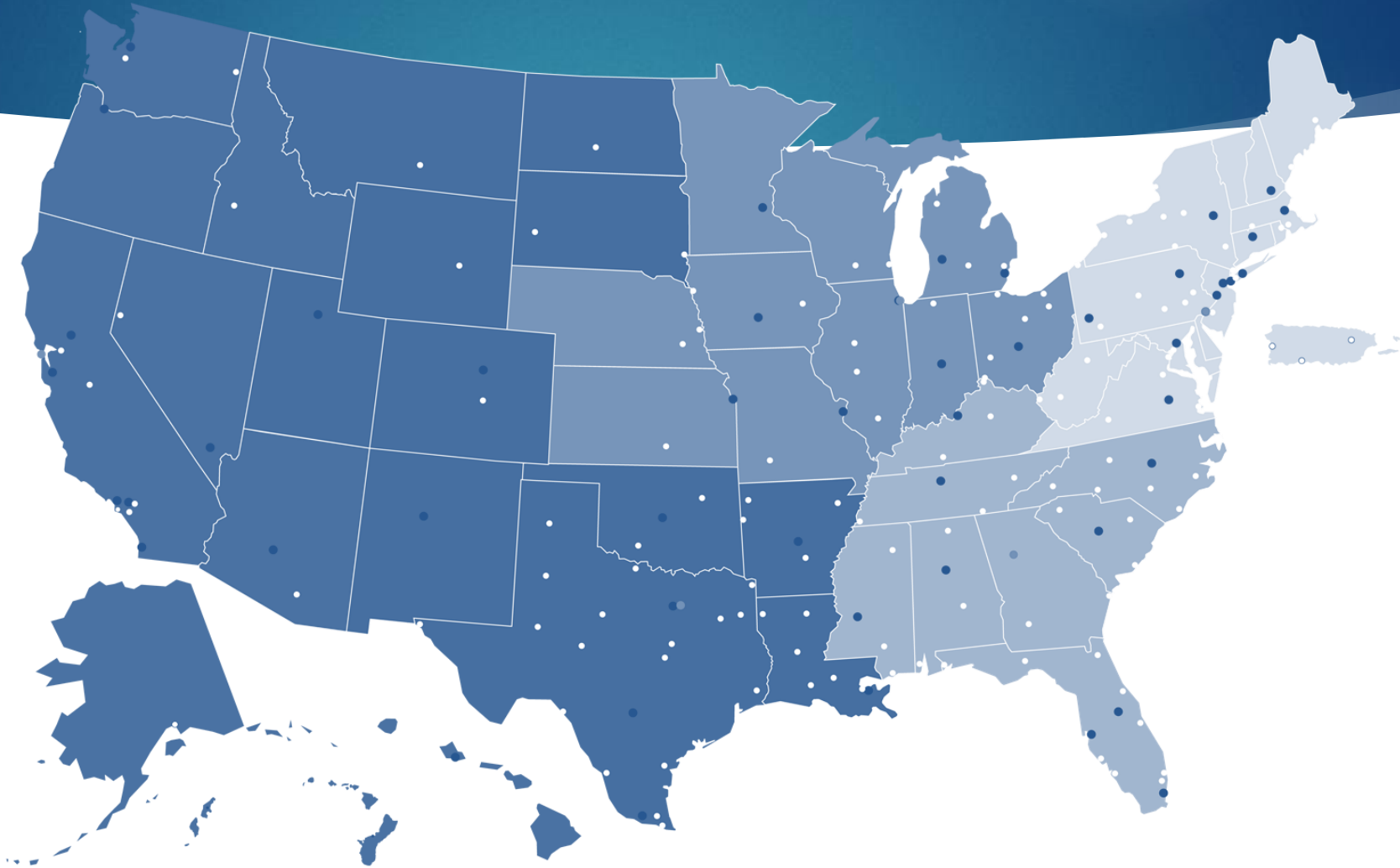
WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/agencies/whd
1-866-4-US-WAGE

Disclaimer

- ▶ This presentation is intended as general information only and does not carry the force of legal opinion.
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Offices Across the Country



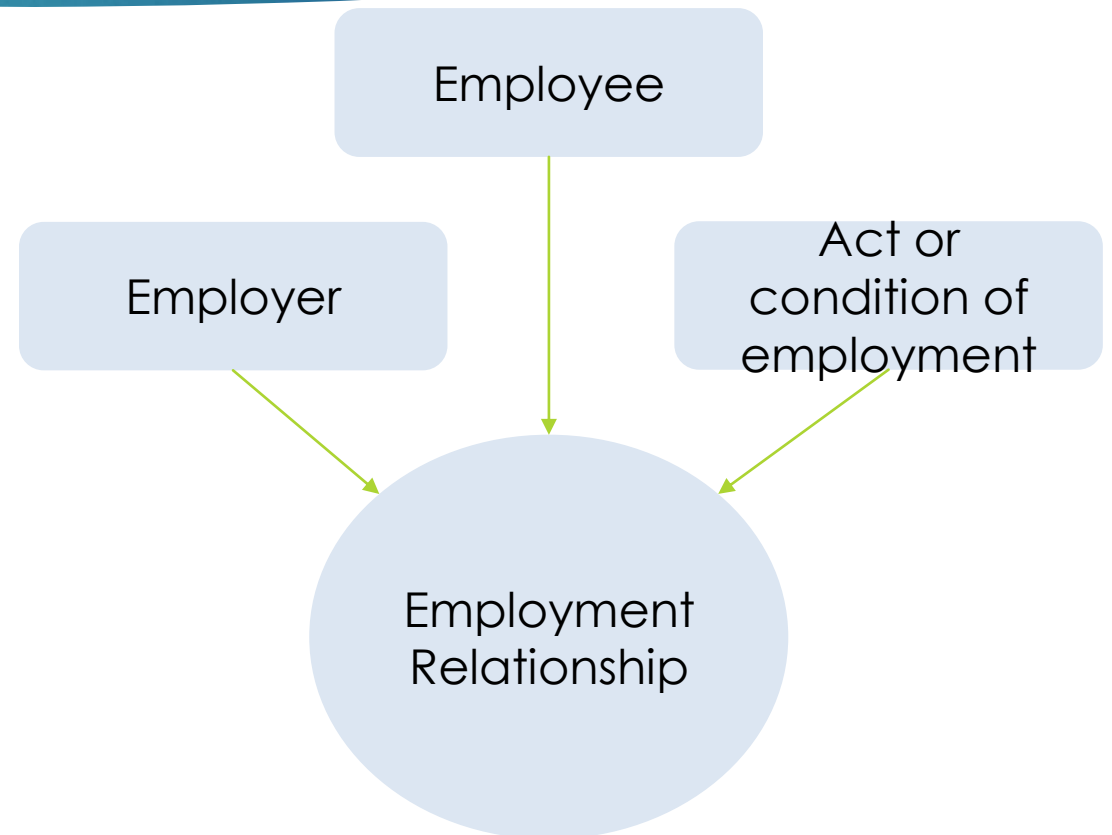


Understanding Worker Classification Under the FLSA

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

 EMPLOYEE	OR	INDEPENDENT CONTRACTOR
	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

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

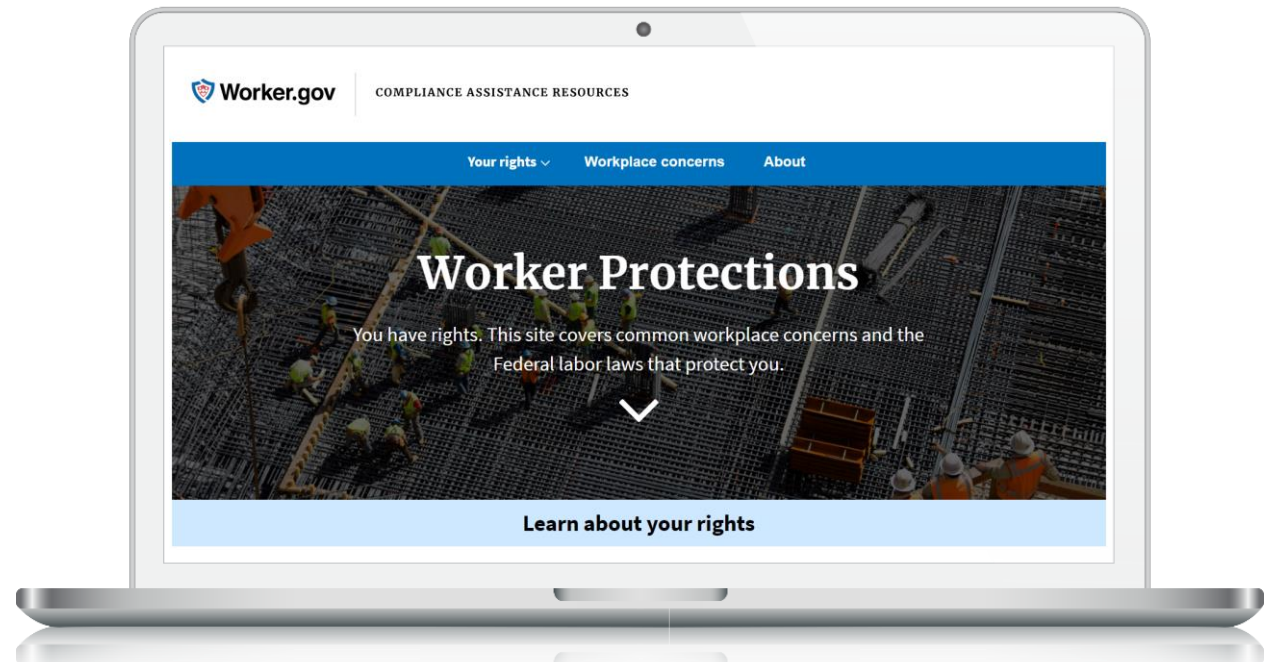
- Volunteering services to an employer that are similar to work performed as an employee.
- Trainees or students performing work that must be paid.

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)



Connect with Us

- ▶ Visit dol.gov/newsroom/digital
- WHD Twitter: twitter.com/whd_dol
- DOL Facebook: facebook.com/departmentoflabor
- DOL YouTube: youtube.com/user/USDepartmentofLabor
- DOL Blog: blog.dol.gov

Contact Us

- Visit dol.gov/agencies/whd
- Call our toll-free information and helpline at:
1-866-4US-WAGE (1-866-487-9243)
- Las Vegas District Office:
 - 333 Las Vegas Blvd. South, Ste. 5520, Las Vegas, NV 89101
 - 702-928-1240

STATE OF NEVADA

Misclassification of Workers for Unemployment Insurance

Department of Employment, Training and Rehabilitation
Employment Security Division

Claudia Bueno,
Compliance Audit Investigator III
September 2023

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Unemployment Insurance

- UI law was enacted to provide temporary partial income replacement to workers who become unemployed through no fault of their own.
- Benefits are financed.
- by a payroll tax on employers.
- Taxes are set aside in a trust fund that can only be used to pay benefits.

Unemployment Benefits

- Unlike welfare, entitlement to Unemployment Insurance benefits is not based on need.
- The amount of weekly benefits are determined by an individual's earnings in previous employment.

Definitions:

Misclassified Workers

- ▶ For Unemployment Insurance purposes, any worker that should be classified as an employee by an employer, but is not.

Definitions:

Employers

- Generally, any employing unit that has paid wages for employment in Nevada of \$225 or more during a calendar quarter.
- ▶ Pursuant to federal and state law, special thresholds exist for non-profit, agricultural and domestic employers.

Definitions:

Employment

- Service for wages under any contract of hire, written or oral, express or implied.
- ▶ Unless specifically excluded, payment for personal services is presumed to be employment and is subject to unemployment taxes.

Nevada UI Law: Independent Contractors

- ▶ Nevada Unemployment Compensation law does not define the term Independent Contractor.
- Nevada UI law uses a three-part test that is commonly referred to as the “ABC test”.
- ▶ Under the ABC test, payment for personal services is deemed to be employment unless all three provisions of NRS 612.085 are met.

Nevada UI Law: Burden of Proof

- To exclude services, the burden of proof rests on the employer to demonstrate that all three conditions of the ABC test are met.
- ▶ A written contract or the issuance of a 1099 form does not, in itself, establish Independent Contractor status for Unemployment Insurance purposes.

Nevada Revised Statute (NRS)

612.085

NRS 612.085 “Employment”: Services deemed employment unless specific facts shown.

Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that:

1. The person has been and will continue to be free from control or direction over the performance of services, both under his contract of service and in fact;
2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; **and**
3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

Misclassified Workers:

Methods of Discovery

- ▶ Benefit Claim Investigations
 - Employer Audits
- ▶ Inter-Agency Referrals
- ▶ Public Tips
- ▶ Internet Registration Process

Misclassified Workers: Impact on UI Benefits

- A Wage Protest (Obstructed Claim) is assigned to a local filed office and an investigation is conducted.
- Process will delay payment of benefits.
- Claimants and employers both may appeal determinations.

Misclassified Workers: A Growing Business Trend

- Focused primarily with construction in the past.
- Currently, misclassification is seen across all industry types – delivery services, cosmetology services, mortgage companies, etc.
- Third party companies advise employers how to make employees independent contractors.

Misclassified Workers:

Not just Independent Contractors

Misclassification of workers comes in several different forms:

- Independent Contractors – most common
- Misclassification of payments
- Misuse of legal entities
- Referral service
- Misuse of legitimate statutory exclusions

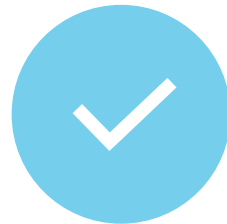


Thank you!

State of Nevada, Division of Industrial Relations, Workers' Compensation Section

WCS Mission Statement:

Impartially serve the interests of Nevada employers and employees by providing assistance, information, and a fair and consistent regulatory structure focused on:



Ensuring the timely and accurate delivery of workers' compensation benefits



Ensuring employer compliance with the mandatory coverage provisions

What is the Employer Compliance Unit?

01

The Employer Compliance Unit (ECU) is responsible for ensuring that employers comply with the mandatory coverage provisions.

02

The ECU conducts employer site visits and the employer must provide evidence of coverage in compliance with NRS 616A.495.

03

If an employer fails to provide or maintain coverage for workers' compensation, then an order to cease business operations will be issued in accordance with NRS 616D.110.

What is an Employer Compliance Site Visit?



Uninsured Employer Investigations



Cancellation/Lapse in Coverage Investigations
(National Council on Compensation Insurance, NCCI, provides monthly cancellation list)



Affirmation of Compliance (Form D-25)



Referrals or Complaints
Random site visits

Evidence of Compliance

Pursuant to 616A. 495 Each employer shall ensure that a copy of the employer's:

- Policy of industrial insurance – Declaration Page, if the employer is insured by a private carrier
- Certificate issued by the Commissioner pursuant to NRS 616B.312 if the employer is self-insured

or

- Certificate issued by the Commissioner pursuant to NRS 616B.359 and of a certificate or letter issued by the association of self-insured public or private employers

This information **must** be available at all times for inspection by the agent of the Administrator.



When is Workers' Compensation Required?

If an Employer/Employee relationship exists, a Workers' Compensation Policy is **ALWAYS** required!

Who Requires Coverage?

**Unless excluded by statute,
“...Every person, firm, voluntary
association and private
corporation, including any public
service corporation, which has in
service any person under a
contract of hire” needs coverage.
(NRS 616A.230)**

Definitions:

Employer:

"...Every person, firm, voluntary association and private corporation..." that has someone working for them. (NRS 616A.230)

Employee:

"...every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed ..." (NRS 616A.105)



"1099" status has NO bearing on "employee" classification under workers' comp law

Worker Misclassification



Employer misclassification of workers is a growing problem.



Worker Misclassification occurs when employers misclassify their employees as “independent contractors” in order to eliminate the employer/employee relationship.



A 1099 or contract does not always eliminate the employer/employee relationship



Employers must examine their employment relationships before deeming their employees as “independent contractors”

Worker Misclassification

- NRS 616B.603 pertains to Independent Enterprises and should be considered to determine if you could be deemed an employer under this provision.

In order to not be deemed the employer under the “independent enterprise exemption,” 1) You must not be “in the same trade, business, profession or occupation” as the person or business with whom you contract, and 2) The person or business with whom you contract must be an independent enterprise. Otherwise, workers’ compensation coverage is required.

Incorrectly deeming employees as independent contractors can lead to serious consequences.



Workers' Compensation **MYTHS** and **REALITIES**

Myth: Family and/or part-time employees do not require coverage

Reality: WC coverage is required

Myth: The subs that I hire should have their own coverage, so I won't worry about workers' compensation insurance.

Reality: If you are a licensed contractor, you should know that you may be determined to be the employer of independent contractors, subcontractors and their employees for purposes of providing workers compensation insurance coverage.

Note: If an employee of a subcontractor or an independent contractor has a work-related injury and the employer has not secured industrial insurance, the principal contractor will be responsible for the actual cost of the claim, plus administrative fees.

Uninsured Employer Consequences

- Employers who fail to secure and maintain a workers' compensation policy for their employees will be charged with an administrative fine up to \$15,000.
- Employers will pay a premium penalty for the time the employer was uninsured.
- Employer will be held financially responsible for all costs relating to an uninsured claim.
- Possible criminal prosecution from the Attorney General's Office

Workers' Compensation Requirements

WCS Mission Statement:


Generally, unless excluded by statute, “...Every person, firm, voluntary association and private corporation...which has in service any person under a contract of hire,” needs coverage.

Employers should consult with their attorney, insurance agent/broker, or carrier regarding the specifics of their situation and their options regarding workers' compensation.


Coverage Verification Service



<https://dir.nv.gov/WCS/home/>



Nevada Division Of Industrial Relations

1 [LOGIN](#)

Employer

FEIN

Address

State *
Nevada

Coverage Date *
05/25/2023

Employer Name *

☒ Contains

☐ Starts With

SEARCH

CLEAR

Limitation of Information

The information provided on this web page is a segment of policy information reported to the [Nevada Division of Industrial Relations, Workers' Compensation Section](#) by private workers' compensation insurance carriers. Reporting delays, inaccuracies and omissions may affect the reliability of the coverage information provided. Self-insured employers and associations of self-insured employers are not included in the data. See "Self-Insured Search Tools" below.

Self-Insured Search Tools

[Search individual Self-Insured Employers using the Self-Insured Employer look-up tool](#)

[Nevada Division of Insurance Self-Insured Employer List](#)

[Search individual employers/members of a Self-Insured Association using the Association Member look-up tool](#)

[Nevada Division of Insurance Associations of Self-Insured Employers List](#)

Other Useful Links

[Nevada Division of Industrial Relations, Workers' Compensation Section](#)

[Nevada Business Search - Silverflume](#)

[Nevada State Contractors Board License Search](#)

Additional Information on the WCS Website:



Employer Coverage
Requirements



Posting Requirements



Employer Information Page



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