

FACT SHEET



Am I misclassified as an independent contractor?

What is worker misclassification? Worker misclassification, also called payroll fraud, is when an employer improperly classifies a worker as an *independent contractor* instead of as an *employee*. As of July 1, 2020, Virginia has many new laws that crack down on this illegal practice. Virginia law presumes workers are employees. The law says, "If an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party that pays that remuneration unless such individual or his employer demonstrates that such individual is an independent contractor" under IRS guidelines.

Why does it matter? If you are paid as an independent contractor, you:

- Pay double employment taxes – your share and the employer share.
- Cannot get unemployment until you prove you were misclassified.
- Are not eligible for employee benefits like health insurance and retirement savings if offered by the employer.
- Are not covered by workers compensation, which means you could have trouble getting help if you are injured on the job.
- Will not get paid overtime if you work more than 40 hours per week (not all workers are eligible for this premium, but many are).

What's the differences between an employee and an independent contractor? Employees have taxes withheld from their paychecks and have legal protections such as the minimum wage law, unemployment benefits, and workers'

compensation insurance. An employee is subject to direction and control of employer, who determines, when, where and how work is performed. An independent contractor usually owns or operates a business and has insurance and often licensing. Independent contractors usually are paid by a piece or job rate and provide their own tools or materials.

Who investigates misclassification? The Virginia Employment Commission (VEC) investigates possible misclassification. There is a presumption that the person is an employee, but an employer can argue that the worker is an independent contractor based on the preponderance of evidence using the 20-point IRS test. See the VEC website for more information:

<https://www.vec.virginia.gov/employers/employee-or-independent-contractor>.

What should you do if you have been misclassified? If you believe that you have been misclassified or your employer refuses to reclassify you, you can:

- Call the VEC investigative unit at (804) 371-4218 or email geoff.garner@vec.virginia.gov
- Talk with an attorney about filing a civil claim. Find a suitable attorney at www.wagetheftva.org.

Can I be fired for complaining? It is illegal to fire or retaliate against you for filing a complaint about misclassification. (It can happen, but you can recover your wages and damages if it does.)