

# FACT SHEET

## Worker Misclassification

### What are the differences between an employee and an independent contractor?

An employee is subject to the direction and control of the employer, who determines, when, where and how work is performed. Generally, if you have set hours, use “employer owned equipment”, and don’t get to decide whether to accept or turn down a particular job, you are probably an employee. You are also likely an employee if your work constitutes a primary part of the employer’s business model, and you work only for one employer. An independent contractor usually owns or operates their own 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. Employees have taxes withheld from their paychecks and have legal protections such as the minimum wage law, unemployment benefits, and workers’ compensation insurance.

**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 if you lose your job, 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 (1.5 times your hourly rate) if you work more than 40 hours per week

(not all workers are eligible for this higher rate, but many are).

### 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*. Virginia law presumes workers are employees, unless proven otherwise using IRS guidelines.

### 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) 225-8328 or email [geoff.garner@vec.virginia.gov](mailto:geoff.garner@vec.virginia.gov)
- Talk with an attorney about filing a civil claim. Find a suitable attorney at [www.wagetheftva.org](http://www.wagetheftva.org).

### 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>.

### Can a person 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.)