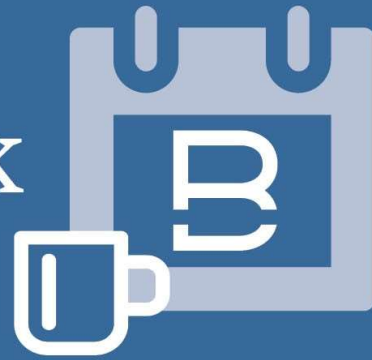


# The Work Week

Bassford Remele Employment Practice Group



**March 18, 2024**

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## **Worker Classification: The New DOL Final Rule, Current State Law, and Proposed Changes to Minnesota's Construction Classification Law**

[Daniel R. Olson](#) and [Beth L. LaCanne](#)

Worker classification is a potential minefield for employers. Employers must grapple with competing federal and state laws and, for employers with workers in multiple states, potential conflicting state laws in the various states in which they operate. Complicating matters further, recently, the Department of Labor (“DOL”) issued a final rule that effectively reverts to the classification rules in effect before 2021. Additionally, Minnesota legislators have proposed legislation that, if enacted, will further change the worker-classification laws in the construction industry. As the legal landscape continues to evolve, understanding and complying with these divergent standards become paramount for employers seeking to mitigate risk and foster a harmonious relationship with their workforce.

### **DOL Final Rule**

The DOL is tasked with enforcing the Fair Labor Standards Act (“FLSA”) which guarantees an employee’s right to fair pay. The FLSA applies to employers who have annual sales of \$500,000 or more, or who are engaged in interstate commerce, which courts have interpreted quite broadly such that the FLSA applies to nearly every employer. One component of the FLSA is ensuring employers are not improperly classifying workers as independent contractors to avoid the reach of the FLSA.

As covered in [a previous edition of The Work Week](#), effective March 11, 2024, the DOL will utilize a six-factor test to determine whether a worker is an employee or an independent contractor. The six-factor test looks at the totality of the circumstances by giving each factor equal weight. The six factors are: (1) the opportunity for profit/loss depending on managerial skill; (2) the investments by the worker and potential employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of employer’s control over performance of the work and working relationship; (5) the extent to which the work performed is an integral part of an employer’s business; and (6) the skill and initiative of the worker. These factors should be familiar because they have been part of the worker classification analysis for many years, albeit with different application.

## Minnesota's Classification Statute and Proposed Changes

Similar to the new DOL revised rule, Minnesota applies the "right to control" test to determine employee classification. Under the right-to-control test, courts apply the following five factors to determine whether an individual is an employee or an independent contractor: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials and tools; (4) the control of the premises where the work is to be done; and (5) the right of the employer to discharge the individual. Again, classification is based on the totality of circumstances for these five factors.

Minnesota's classification law applies differently to the construction industry, however. For the construction industry, an individual is considered an independent contractor only if all nine of the following factors are met: (1) the individual maintains a separate business with its own office, equipment, materials, and other facilities; (2) the business holds or has applied for a federal employer identification number or has filed self-employment income tax returns with the IRS within the past year; (3) the individual operates under a contract to perform specific services for specific amounts of money under which the individual maintains control over the means of performance; (4) the individual incurs the main expenses related to the services performed; (5) the individual is responsible for the completion of the services and is liable for any failure thereunder; (6) the individual is paid on a per-job or competitive-bid basis; (7) the individual may either suffer a loss or make a profit under the contract to perform services; (8) the individual has recurring business liabilities and obligations; and (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

In addition to [the pending employment legislation](#) covered two weeks ago, the [Minnesota legislature is also considering a bill](#) that will expand this nine-factor test to a fourteen-factor test. Though some of the current nine factors would be modified slightly by the bill, the proposed legislation would also require an individual to meet five new criteria to be considered an independent contractor: (10) the individual's business provides W9 forms as required by the IRS; (11) the business has a current certificate of good standing with the Minnesota Secretary of State; (12) the business maintains an unemployment-insurance account; (13) the business maintains workers'-compensation insurance; and (14) the business holds all requisite licenses, registrations, and certifications as required by law.

The effect of the proposed legislation will make it more difficult for construction companies to designate individuals as independent contractors. Additionally, the proposed legislation also increases the penalties for construction companies who misclassify individuals as independent contractors. If passed, construction companies that misclassify an individual would be liable for the following: compensatory damages, including (but not limited to) the value of unpaid overtime, shift-differential, vacation pay, sick time, health insurance, life and disability insurance, retirement contributions, and social security and Medicare contributions; and a civil penalty of at least \$5,000 but no greater than \$10,000 per violation. These increased penalties are in addition to [potential prosecution from the Attorney General's Office for wage theft](#).

At [Bassford Remele](#), our Employment Law team routinely advises and represents clients regarding worker classifications, and closely monitors changes to laws and regulations. We will continue to monitor pending legislation throughout the 2024 legislative session, including the significant alterations to the construction-classification laws covered above.

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