



Worker Misclassification: Talking Points

Core Message

Worker misclassification harms workers, compliant businesses, and the tax revenue streams of government. Workers in Virginia are taken advantage of by being inaccurately labeled as independent contractors instead of as employees. Law abiding Virginia businesses that correctly classify workers are less competitive against businesses that misclassify their workers. Misclassified workers are generally paid less and lose many worker protections. The default classification for workers is to be employees; only if specific criteria are met can a worker be an independent contractor.

When Democrats took control of the state legislature in January 2020, they passed legislation to protect workers against unscrupulous employers misclassifying them as independent contractors.

Democrats Deliver: Worker Protections

Right to bring civil suit against employer

Enables a worker to bring a civil suit against an employer who knowingly misclassified the worker. Additionally, this legislation creates the presumption that a worker is an employee, unless the IRS guidelines for an independent contractor are met. (HB 984, 2020).

Protection against retaliation

Protects workers from retaliation by employer should the worker file a worker misclassification complaint against an employer. (HB 1199, 2020).

Background

Worker misclassification has been known to be a problem in Virginia for many years, but it wasn't until Democrats took control of both chambers of the legislature that steps were taken to address this issue.

The Virginia legislature is assisted by a watchdog entity called the Joint Legislative Audit and Review Commission (JLARC), which evaluates state programs and agencies. A JLARC report from 2012 concluded that worker misclassification is prevalent throughout the Commonwealth. That report recommended making employee misclassification illegal. Progress on deterring this practice finally started with the 2020 legislative session.

Read Local Majority's complete report: [*Worker Misclassification in Virginia*](#)

Holding Businesses Accountable for Misclassifying Workers

As of January 1, 2021, the penalties for misclassification can be as high as \$1,000 for each misclassified worker for a first offense. The maximum fine for a second offense is \$2,500 per worker, and for a third offense, this penalty can be up to \$5,000. In certain egregious cases, an employer can be prevented from being awarded a contract from public entities. (HB 1407, 2020).

With passage of this bill, the IRS "twenty factor" test is now being explicitly used in VA.

<https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

Defining an Employee

Generally speaking, a worker is an employee, if his or her employer:

- Furnishes tools, materials, and equipment needed to do the work,
- Sets the hours of work,
- Withholds payroll federal and state income taxes and Social Security taxes,
- Receives direction and training from the employer about how to do the work,
- Is paid by the hour, week, or month instead of at the completion of the job.