



Misclassification-related jurisdiction of the Minnesota Department of Labor and Industry

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DLI authority related to misclassification

- Violations of Minnesota Statutes § 181.722 (general)
- Violations of Minn. Stat. § 181.723 (construction)
- Wage theft resulting from misclassification
- Failure to maintain appropriate workers' compensation coverage

Minn. Stat. § 181.722 – DLI authority

- **Overview:** No employer shall misrepresent the nature of its employment relationship with its employees. Minn. Stat. § 181.722, subdivisions 1-2.
 - “An employer misrepresents the nature of its employment relationship with its employees if it makes any statement regarding the nature of the relationship that the employer *knows or has reason to know* is untrue and if it fails to report individuals as employees when legally required to do so.” Minn. Stat. § 181.722, subd. 1.
- **Applicable industries:** All industries.
- **DLI enforcement mechanism:** A compliance order under Minn. Stat. § 177.27, subd. 4.

Minn. Stat. § 181.722 – DLI authority, continued

- **Remedies:** “Any employer who is found by the commissioner to have repeatedly or willfully violated a section or sections identified in subdivision 4 shall be subject to a civil penalty of up to \$1,000 for each violation for each employee.”
Minn. Stat. § 177.27, subd. 7.

Minn. Stat. § 181.722 – the test

- “For purposes of this section, the nature of an employment relationship is determined using the same tests and in the same manner as employee status is determined under the applicable workers’ compensation and unemployment insurance program laws and rules.” Minn. Stat. § 181.722, subd. 3.

Workers’ compensation rules – Chapter 5224

Contains tests for more than 30 specific occupations and general criteria for nonspecified occupations

Minnesota Rules 5224.0330 – **Control factors:** authority over individual’s assistants; compliance with instructions; oral or written reports; place of work; personal performance; existing of continuing relationship; set hours of work; training; amount of time; simultaneous contracts; tools and materials; expense reimbursement; satisfying requirements of regulatory and licensing agencies

Minn. R. 5224.0340 – **Factors to be considered, in addition to factors of control:** right to discharge; availability to public; compensation on job basis; realization of profit or loss; termination; substantial investment; responsibility; services fundamental to business

Control is the most important factor.

Unemployment insurance rules

Minn. R. 3315.0555 – **Factors:** the right or the lack of the right to control the means and manner of performance; the right to discharge the worker without incurring liability for damages; the mode of payment; furnishing of materials and tools; and control over the premises where the services are performed

The first two factors are the most important.

Minn. Stat. § 181.722 – other entities with enforcement authority

- The Office of the Minnesota Attorney General, under Minn. Stat. §§ 181.1721, 8.31
- A private right of action is available for construction workers

Minn. Stat. § 181.723 – DLI authority

- **Overview:** Minn. Stat. § 181.723 governs the employee-employer relationship and the independent contractor classification in the construction industry.
- **Applicable industries:** The construction industry.
- **DLI enforcement mechanism:** A licensing or administrative order as allowed by Minn. Stat. §§ 326B.081-.085.
 - To violate § 181.723, a person must knowingly – meaning the person knew or could have known with the exercise of reasonable diligence – misclassify an individual as an independent contractor.
 - Issuing a compliance order under Minn. Stat. § 177.27, subd. 4 is **not** an available enforcement mechanism.
- **Remedies:** Monetary penalties, injunctive relief, stop orders, license revocation or suspension.

Minn. Stat. § 181.723 – the test

- **Element test under § 181.723 – an individual is an independent contractor only if the individual:**
 - (1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;
 - (2)(i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
 - (3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
 - (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;
 - (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;

Minn. Stat. § 181.723 – the test, continued

- (6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffer a loss under the contract to perform services for the person;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the individual’s business depends on the relationship of business receipts to expenditures.
- “An individual who is not registered, if required by § [326B.701](#), is presumed to be an employee of a person for whom the individual performs services in the course of the person’s trade, business, profession, or occupation. The person for whom the services were performed may rebut this presumption by showing that the unregistered individual met all nine factors in this paragraph at the time the services were performed.” Minn. Stat. § 181.723, subd. 4.

Minn. Stat. § 181.723 – other entities with enforcement authority

- The Office of the Minnesota Attorney General under Minn. Stat. §§ 181.1721, 8.31.
- A private right of action is available for construction workers under Minn. Stat. § 181.722.
- Entities with authority to prosecute crimes: “Except as otherwise provided by law, a person who violates an applicable law is guilty of a misdemeanor.” Minn. Stat. § 326B.082, subd. 16.

Wage theft resulting from misclassification – DLI authority

- **Overview:** Misclassification of employees may result in employees not receiving all wages owed to them.
- **Applicable industries:** All industries.
- **DLI enforcement mechanism:** A compliance order under Minn. Stat. § 177.27, subd. 4; or a wage demand under Minn. Stat. § 181.101 and corresponding daily penalties if applicable.
- **Remedies:** Back wages, daily penalties, and liquidated damages. A repeat or willful violation of a section is subject to a civil penalty of up to \$10,000 for each violation for each employee.

Wage theft resulting from misclassification – the test

“An independent contractor is not an employee. Parts 5224.0330 and 5224.0340 [the workers’ compensation test] shall be used to determine whether an employment relation exists, except that control of the method and manner of performance is **not** the most important factor. All factors must be weighed to determine whether the worker is economically dependent upon the business to which the worker provides services.” Minn. R. 5200.0221 [emphasis added].

Minn. R. 5224.0330 – **Control factors:** authority over individual’s assistants; compliance with instructions; oral or written reports; place of work; personal performance; existing of continuing relationship; set hours of work; training; amount of time; simultaneous contracts; tools and materials; expense reimbursement; satisfying requirements of regulatory and licensing agencies

Minn. R. 5224.0340 – **Factors to be considered, in addition to factors of control:** right to discharge; availability to public; compensation on job basis; realization of profit or loss; termination; substantial investment; responsibility; services fundamental to business.

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Wage theft resulting from misclassification – other entities with enforcement authority

- The Office of the Minnesota Attorney General under Minn. Stat. §§ 177.45, 8.31.
- A private right of action.
- Criminal prosecution for wage theft, to the extent appropriate.

Failure to maintain appropriate workers' compensation coverage – DLI authority (penalty authority)

- **Overview:** Every employer is generally responsible for providing workers' compensation coverage to its employees. If an individual is misclassified as an independent contractor, that person might not realize they are entitled to workers' compensation benefits for a work-related injury or illness.
- **Applicable industries:** All industries.
- **DLI enforcement mechanisms:** Penalties under Minn. Stat. § 176.181.
- **Remedies:** A penalty of \$1,000 per employee per week during which the employer was not in compliance.
 - Minn. R. 5220.2865: Sets forth process for determining penalty amount.

Uninsured workers' compensation claim – DLI authority (payment from SCF)

- **Overview:** “When any employee sustains an injury arising out of and in the course of employment while in the employ of an employer, other than the state or its political subdivisions, not insured or self-insured as provided for in this chapter, the employee or the employee’s dependents shall nevertheless receive benefits as provided for in this chapter from the special compensation fund.” Minn. Stat. § 176.183.
- **Applicable industries:** All industries.
- **DLI enforcement mechanisms:** Payment by the Special Compensation Fund (SCF) under § 176.183, subd. 1.
- **Remedies:** When an employer is uninsured, SCF must pay appropriate workers’ compensation benefits to the affected employee.

Uninsured workers' compensation claim – DLI authority (SCF recovery of funds from employer)

- **Overview:** The Special Compensation Fund is required to commence an action against a “liable employer” to recover the benefits paid unless the commissioner determines no recovery is possible.
- **Applicable industries:** All industries.
- **DLI enforcement mechanisms:** Commencing an action against a “liable employer” to recover the benefits paid under § 176.183, subd. 2, plus a 65% penalty.
- **Remedies:** “Where the liable employer is found after the hearing to be not insured or self-insured as provided for in this chapter, the compensation judge shall assess and order the employer to pay all compensation benefits to which ...

Uninsured workers' compensation claim – DLI authority (SCF recovery of funds from employer), continued

- ... the employee is entitled, the amount for any actual and necessary disbursements expended by the special compensation fund, any actual and necessary disbursements of the employee paid or reimbursed by the special compensation fund, any attorney fees paid to the employee's attorney by the special compensation fund, and a penalty in the amount of 65 percent of all compensation benefits ordered to be paid." Minn. Stat. § 176.183, subd. 2.

Workers' compensation coverage – enforcement mechanisms outside the scope of DLI's jurisdiction

- A misclassified worker can file a workers' compensation claim against the employer that misclassifies them as an independent contractor. Any such claim may be filed with the Office of Administrative Hearings and heard by a compensation judge.
 - “[A] person who creates or executes any fraudulent scheme, artifice, or device to enable the person to execute work without being responsible to the worker under this chapter, is deemed an “employer” and is subject to the liabilities which this chapter imposes on employers.” Minn. Stat. § 176.205.
- An administrative penalty and order for restitution by the Minnesota Commerce Fraud Bureau (CFB) for premium fraud. Minn. Stat. §§ 45.0135, subd. 9(a)(2), and 60A.951, subd. 4.

The workers' compensation test

- Chapter 5224 contains tests for more than 30 specific occupations and general criteria for nonspecified occupations.
- Minn. R. 5224.0330 – **Control factors:** authority over individuals' assistants; compliance with instructions; oral or written reports; place of work; personal performance; existing of continuing relationship; set hours of work; training; amount of time; simultaneous contracts; tools and materials; expense reimbursements; satisfying requirements of regulatory and licensing agencies.

The workers' compensation test, continued

- Minn. R. 5224.0340 – **Factors to be considered, in addition to factors of control:** right to discharge; availability to public; compensation on job basis; realization of profit or loss; ability to terminate working relationship without incurring liability for noncompletion; substantial investment; responsibility; services fundamental to business.

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Thank you