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Holding the Line

Misclassification

State solutions to the U.S. worker rights crisis

Report • By Nina Mast • November 17, 2026

Economic Policy Institute 40 YEARS THE WORKING PEOPLE'S THINK TANK • Washington, DC

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What do federal laws say about employee status and worker misclassification?

Misclassification occurs when an employer wrongly classifies an employee as an independent contractor. This problem is pervasive and widespread: As many as 10–30% of employers misclassify their workers.

The way a worker is classified has serious implications for their labor rights and economic security. Federal, state, and local labor laws provide extensive protections for employees that are not available to independent contractors. Workers misclassified as independent contractors:

- Are not protected by the Fair Labor Standards Act (FLSA), which ensures workers are paid at least the federal minimum wage and receive overtime pay (150% of their regular pay rate for work in excess of 40 hours per week);
- Are not protected by the National Labor Relations Act (NLRA), which ensures workers' rights to form unions and bargain collectively to improve their working conditions;
- Are not eligible for unemployment insurance or workers' compensation;
- Do not qualify for paid sick or family leave, and are extremely unlikely to receive employer-provided health insurance or retirement benefits;
- Are not covered by antidiscrimination and sexual harassment protections in most states.

Workers misclassified as independent contractors also must assume the full financial cost of Social Security and Medicare contributions, rather than split these costs evenly with their employer.

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How is employee status determined? Legal tests and their nuances

There are various legal tests for determining employee status for the purpose of coverage under federal worker protection laws, such as the FLSA and NLRA, as well as tax laws. Likewise, states have adopted a range of their own definitions and tests for determining employee status under various state worker protection and tax policies.

At the federal level, interpretations of these tests have varied across different presidential administrations. The Democratic Obama and Biden administrations defined "employee" more broadly under both the FLSA and NLRA, while Trump's first-term Department of Labor (DOL) and National Labor Relations Board (NLRB) appointees applied a more restrictive definition that denied more workers the protections afforded by employee status. The current Trump DOL recently issued a final rule that formally rescinds Biden-era guidance and makes it easier for employers to misclassify workers as independent contractors.

The three most common tests are (1) the "common law" test, (2) the "economic realities" test, and (3) the "ABC test," though some jurisdictions combine elements of multiple tests.

Common law test: Derived from court decisions over the years, the common law test uses a long list of factors for evaluating whether an individual is an employee or independent contractor. There are several versions of this test, including the "Restatement (Second) of Agency" and the Internal Revenue Service's 20-factor test. Typically, a test that includes a long list of factors is a version of common law. The common law test is primarily concerned with the "right to control" how the work is performed and has been criticized for being insufficiently protective, overly subjective, and open to manipulation. However, it is the most prominently applied test at the state level, and it is also used by the NLRB to determine whether a worker is eligible for organizing and collective bargaining rights under the National Labor Relations Act.

Economic realities test: A broader six-factor[1] test used to determine employee status, derived from the Fair Labor Standards Act definition of "employ," which is "to suffer or permit to work." Under this definition, most workers are considered employees. U.S. DOL has typically utilized this test to determine eligibility for wage and hour protections.

ABC test: The ABC test is the strongest standard for determining independent contractor status, offering more protections than either the Biden-era version of the economic realities test or the common law test. Unlike weaker standards, the ABC test establishes a presumption that an individual performing services for an employer is an employee—not an independent contractor—unless the employer can establish each of three factors:

- The work is done without the direction and control of the employer ("absence of control");
- The work is performed outside the usual course of the employer's business ("outside usual course of business"); and
- The work is done by someone who has their own independent business or trade doing that kind of work ("customarily engaged").

What are the threats to existing protections against illegal worker misclassification?

Current federal threats include:

- **A weaker federal interpretation for determining employee status**: The Trump administration is conducting its final review of an independent contractor rule that will expand misclassification and formally rescind the Biden administration's 2024 final rule, which provided a strong interpretation of the legal test for determining independent contractor status. The proposed version of Trump's rule was estimated to cost workers over $3.7 billion annually and to rob federal and state social insurance funds of at least $357 million annually. Even before finalizing the rule, Trump's DOL had instructed its staff to stop utilizing the 2024 rule.

- **Legislation to weaken the definition of "employee" under federal law:** A bill before Congress proposes changing the FLSA and NLRA definitions of "employee" to exclude more workers from protections under these laws by making it easier to classify them as independent contractors.

- **Attacks on immigrant workers:** The Trump administration's mass deportation agenda has terrorized communities, and past research suggests that anti-immigrant attacks sow fear in workplaces, leading to increased labor abuses in industries where immigrants tend to work and where misclassification is already rampant (e.g., construction, landscaping, and cleaning). Trump has also eliminated deferred action for workers who report labor abuses, removing safeguards against retaliation that were intended to enable workers to come forward and report violations (including misclassification) without fear, regardless of their immigration status.

- **Diminished resources for federal enforcement**: Trump has gutted the federal workforce, including at DOL agencies that enforce workers' rights, such as the Wage and Hour Division (WHD), the Occupational Safety and Health Administration (OSHA), and the Mine Safety and Health Administration. And his budget bill proposed cutting $72 million from WHD and OSHA despite both agencies already being understaffed and underfunded. Trump's budget bill also slashed federal funding to states. New DOL enforcement guidance instructs agency staff to take a more permissive approach to enforcement and instead focus on "compliance assistance." A memo issued earlier this year by the NLRB general counsel urges investigators not to pursue "enhanced remedies" against employers that commit unfair labor practices and to prioritize settlement over litigation of such cases. Trump's recently confirmed secretary of labor has voiced support for more business-friendly regulations and employer self-audits.

- **Ongoing industry attempts to erode labor standards:** Industry groups representing employers that especially benefit from misclassifying workers as independent contractors—such as gig work and construction employers—have relentlessly attacked state-level ABC tests[2] and sought to weaken the legal definition of

"employment" to permanently exclude their workers from federal and state protections not available to independent contractors.[3]

- One of the latest manifestations of this agenda is the push by app-based companies—which classify their workers as independent contractors to avoid providing benefits—for "portable benefits" schemes (i.e., savings accounts that can be used for health care and other expenses). Portable benefits legislation has proliferated in at least 11 states in the past two years,[4] offering limited benefits to few workers while allowing platform companies to keep avoiding providing workers legitimate employment benefits.

Federal legal frameworks for protecting against worker misclassification are limited in their applicability to begin with, and now even these limited protections are under threat. The FLSA and NLRA apply legal tests to determine employee status under these two laws, while many other protections and benefits workers may be eligible for are determined at the state level.

How can states maintain and strengthen labor standards and enforcement?

The erosion of employee classification standards has serious consequences for states. Misclassification not only hurts workers but also deprives federal and state social insurance funds of the revenue needed to support injured, unemployed, and older workers. At a time when states are facing budgetary shortfalls prompted by the Trump administration's massive tax cuts and its gutting of the federal workforce and federal programs, lost revenue from misclassification will constrain them even further. To safeguard workers' right to proper classification under state wage and hour laws, states should, at a minimum: analyze the costs of misclassification, meaningfully enforce their existing standards, and—where possible—seek to enshrine in state law the interpretation of the six-factor economic realities test adopted by the Biden administration. Ideally, states should endeavor to go further and implement the even stronger ABC test for determining employee status. States should also pair a strong ABC test with additional protections against misclassification and robust enforcement.

Addressing misclassification will ensure that workers are paid at least the minimum wage for their work and made eligible for benefits to which they are legally entitled. It will also ensure that states receive the necessary revenue to support workers and state agencies charged with enforcing worker protections.

Getting started: Key questions to investigate how your state treats misclassification

Legal standards on employee classification (and mechanisms for enforcing these standards) vary considerably across and even within states. For example, a state may have a strong legal standard for determining employee status for the purposes of unemployment insurance benefits but not for protections under state wage and hour laws. Additionally, misclassification is typically addressed by amending state statutes through the legislative process, but some states have also used the administrative rulemaking process to clarify state agencies' interpretation of existing legal standards, depending on the underlying statute and scope of state agencies' authority.

Here are some key questions to investigate the legal landscape in your state:

- How is the term "employee" defined in relevant state laws, including the laws governing workers' compensation, unemployment insurance, and wage and hour protections? Within your state's wage and hour laws, are there any industry-specific provisions related to misclassification, such as in construction?
- What are the legal tests used to determine whether a worker is an employee for the purposes of coverage under each law? Different interpretations may apply to different laws, and the test may not be spelled out in statute. You may need to search your state's labor agency website.
    - For example, Wisconsin applies a two-part test to unemployment insurance but applies the economic realities test to wage and hour laws (the economic realities test is not in statute but is instead based on an interpretation of common law).
- In addition to statutory tests, does your state have administrative rules and regulations that provide guidance when interpreting legal tests?
    - For example, New Jersey has a statutory ABC test covering six state statutes—including unemployment compensation, wage and hour, and earned sick leave—and recently adopted new regulations to codify the state's longstanding interpretation of the test and provide more detailed regulatory guidance on how the ABC test applies.
- What remedies are available to illegally misclassified workers under state law? These remedies may be covered in a standalone section of a state's employment statute.
    - For example, in Minnesota, remedies available to misclassified workers are not covered under "Payment of Wages" but under a separate "Misclassification of Employees" section.
- Has your state already conducted research regarding the cost of misclassification to workers and the state? If so, that analysis may provide useful statistics for advocating for better enforcement or a stronger legal test.

Step I: Enforce existing standards, assess costs, and ensure legal test is at least as strong as 2024 Biden rule

Vigorously enforce existing standards and take note of their weaknesses

While state laws defining employee status vary considerably, a legal test is only as strong as its enforcement. Regardless of a state's particular test, strong enforcement of the law is essential. (Specific recommendations for robust enforcement are covered in Step II.) For example, though Minnesota does not have an ABC test, lawmakers, the labor agency, and the attorney general have taken significant steps to address misclassification and expand remedies for workers subject to illegal misclassification. In Minnesota, employers who misclassify workers can be penalized for the violation and required to pay back wages, overtime, and other compensation workers lost as a result. Workers can also sue their employer directly to enforce their right to proper classification.

Investigate the costs of misclassification to workers and social insurance funds

If their state has not already done so, lawmakers can propose legislation creating a task force to study the impact of illegal misclassification and then make policy recommendations to the legislature. Given the high costs of misclassification to workers and social insurance funds, these studies can help create a sense of urgency and build support for further action on misclassification protections among lawmakers who may not otherwise see it as a priority.

These task forces can be created by legislation, executive order, or existing agency authority. For example, in 2020, Louisiana lawmakers passed a resolution requesting that the Department of Revenue establish a Misclassification of Employees Task Force to study the costs of misclassification and recommend ways for the legislature to address them. In 2008, Iowa Governor Chet Culver initiated a misclassification task force to study the issue and report its findings to him. And in 2023, Minnesota Attorney General Keith Ellison formed an Advisory Task Force on Worker Misclassification; its policy recommendations formed the basis of 2024 legislation that made it easier for workers to report misclassification, established a private right of action to recoup denied wages, increased penalties for violations, and improved government coordination on misclassification investigations.

Task forces to study the impact of misclassification can also lead to more cross-agency coordination to crack down on misclassification and other violations that often occur alongside it (see Step III for more on interagency coordination). By vigorously enforcing their existing standards and investigating the costs of misclassification, states can still address harm and deter violations, regardless of how strong those standards are.

Adopt the economic realities test in common law states

States can ensure that their employment laws include a test for determining independent contractor status that is at least as strong as the six-factor economic realities rule issued to apply to the FLSA during the Biden administration. The six-factor economic realities test is stronger than the common law test and overly simplistic "right to control" tests used by many states because it determines independent contractor status by asking whether the worker is in fact in business for themselves. For example, while one 2026 proposed bill in Kentucky (HB 449) would enshrine an ABC test in the state's wage and hour code, a narrower and less ambitious but perhaps more feasible bill (SB 117) would prohibit misclassification on publicly funded construction projects—excluding workers in all other industries—and would use the six-factor economic realities test instead of an ABC test to determine whether a worker was misclassified. The economic realities test may be an option for lawmakers to consider in states where adopting an ABC test is not immediately feasible.

Step II: Establish a strong ABC test and pair it with robust enforcement

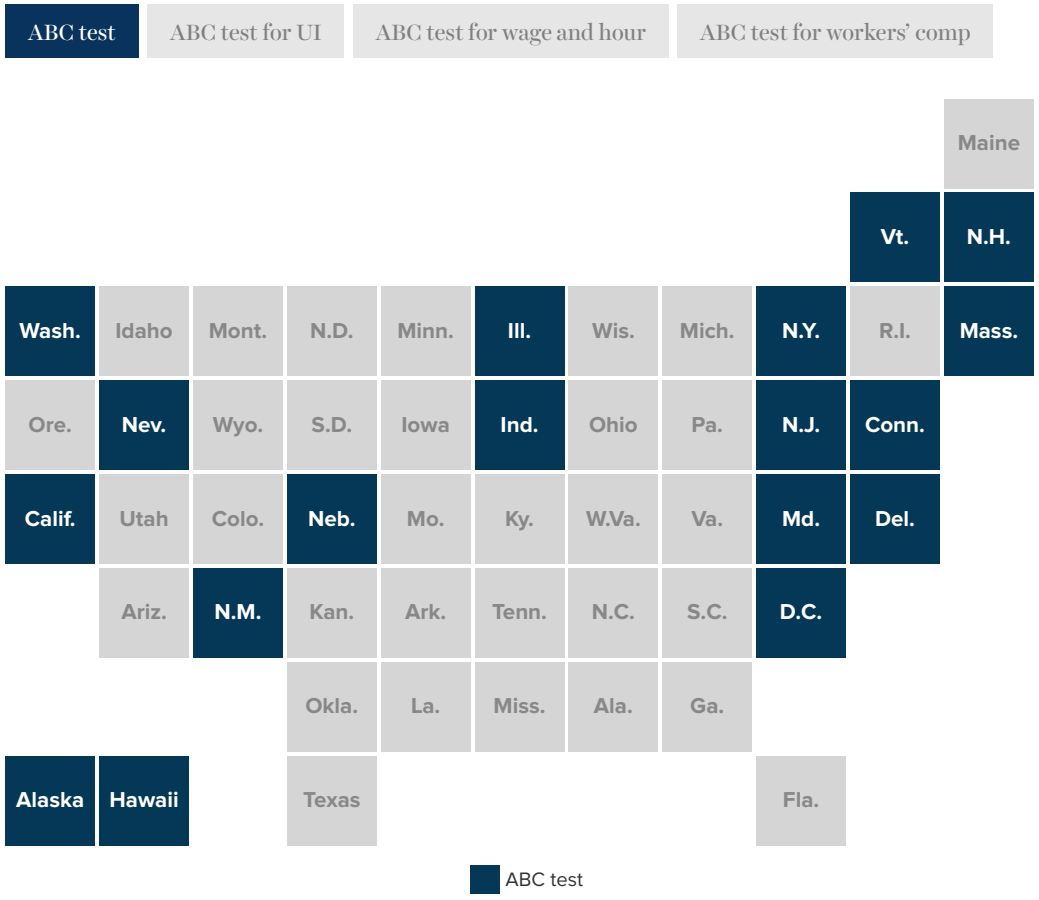
A strong legal test for determining employee status is fundamental to asserting workers' right to proper classification and provides a strong basis for enforcement. The ABC test is the strongest standard for determining employee status. It differs from other tests of employee status (such as the common law test used under the NLRA and by the IRS, and the economic realities test used under the FLSA) because the ABC test presumes that workers are employees, places the burden on the employer to prove otherwise, and provides a clear, narrow definition of independent contractor status. The test seeks to determine whether an individual is truly in business for themselves, which reduces the likelihood that workers are misclassified and lose protections they should be guaranteed under the law as employees. States should adopt the ABC test in as many of their labor protection statutes as possible.

The ABC test has not yet been adopted at the federal level, though legislation has been proposed. For example, the federal Protecting the Right to Organize (PRO) Act would enshrine the ABC test in at least one federal law (the National Labor Relations Act) for purposes of determining workers' organizing and bargaining rights but has not yet passed both chambers of Congress. Even if the ABC test were someday widely adopted at the federal level, state ABC tests would still be needed to address exclusions from federal protections and ensure adequate enforcement.

Eighteen states and the District of Columbia currently use the ABC test for determining employee status for certain workplace laws, but the strength of states' classification standards varies widely (see **Figure A**). Even within states with ABC tests, some apply the test only to workers in certain industries, and most of these states have adopted the test only for the purpose of determining unemployment insurance eligibility—and not for wage and hour protections or workers' compensation. Most states do not have ABC tests and

Figure A

States that have adopted the ABC test for various worker protection laws



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Note: Determining whether a state's legal test qualifies as an ABC test can be complicated, especially in cases where state legislation and/or court decisions have altered tests over time. For example, while Louisiana state code includes an ABC test for UI (See La. R.S. 23:1472(12)(E)), we do not include it in the table above since this test was functionally rendered obsolete by a 2021 law (Act 455) that added a presumption of independent contractor status to state code. We also do not include tests that exclude one prong of the ABC test entirely (for example, A&C or A&B tests), but we do include ABC tests that allow workers to satisfy prong B of the test in two ways.

Source: EPI analysis of state legislation.

apply weaker tests to determine employee status or have implemented components of an ABC test that fall short of the full test (see Figure A), and almost no state has made progress on advancing ABC tests in the past three years.

Some states have recently taken action to implement an ABC test or strengthen their existing one. For example, in addition to pursuing strong, innovative enforcement strategies to combat misclassification, New Jersey's labor department proposed a new administrative rule in 2025 to codify into state law the agency's existing interpretation of the state's ABC test for preventing independent contractor misclassification. And in 2026, lawmakers in Kentucky proposed establishing a new ABC test in state wage and hour law.

States should seek to apply ABC tests to as many worker protection statutes as possible and limit carveouts that exclude certain workers based on their industry or occupation—the goal is to protect all workers with the simplest, most effective standard possible. However, focusing on a particular problem industry may be more politically feasible and can ensure some of the most vulnerable workers are protected while advocates build pressure to expand the test's coverage. For example, several states have implemented an ABC test for the construction industry—long known for its reliance on illegal misclassification—covering all relevant standards, including wage and hour laws, unemployment insurance, workers' compensation, and income tax.

Lawmakers and advocates should also beware of legislation intended to weaken existing ABC tests or undermine the ABC test's presumption that a worker is an employee *unless the employer can prove otherwise*. For example, a 2026 bill introduced on the heels of New Jersey's new misclassification rule proposes eliminating the B and C factors in the state's ABC test, effectively replacing the ABC test with a much weaker, single-factor "right to control" test. Additionally, a 2026 West Virginia bill (HB 4571) proposes establishing an ABC test designed to prevent the state from being deprived of income tax revenue, but the test presumes a worker is an independent contractor *unless* the employer demonstrates that the worker is in fact an employee (a true ABC test requires employers to prove a worker is an independent contractor, not an employee).

For states with no existing ABC test, lawmakers can propose legislation to establish a standard and provide remedies for misclassified workers within a single proposal. For example, the 2026 Kentucky bill mentioned above (HB 449) proposed enshrining an ABC test in state wage and hour code and proposed new remedies for misclassified workers, including back wages, liquidated damages, and the right to pursue legal action against their employer.

A strong legal standard must be paired with action to enforce the law, and there are numerous policy options to strengthen workers' rights and improve the enforcement of the state's misclassification standards. Lawmakers can:

- Establish specific penalties for misclassification and make them sufficiently high to deter violations. Under the FLSA, the act of misclassification carries no penalty. Instead, aggrieved workers are limited to remedies for minimum wage and overtime violations uncovered during an investigation. States can address this gap in federal law by making misclassification a standalone violation and establishing penalties for misclassification, as Minnesota does. Lawmakers can also amend their statutes to direct penalties toward enforcement, as New Jersey does.
- Increase the remedies for workers, including by making aggrieved workers eligible for compensatory damages in addition to back wages, and establishing a private right of action for workers to pursue legal action against offending employers, as Minnesota does.
- Encourage workers to report labor abuses by extending the timeframe for filing wage and misclassification claims and by establishing anti-retaliation protections that include a "rebuttable presumption" of retaliation.

    - Rather than putting the onus on workers to prove they faced retaliation, a "rebuttable presumption" of retaliation assumes adverse action taken shortly after protected activity was retaliatory unless the employer can prove otherwise (see Pennsylvania's Construction Workplace Misclassification Act).
- Where state law authorizes these approaches, use "stop work" orders and "hot goods" provisions to prohibit employers from continuing work or profiting from the shipment of goods produced using illegally misclassified workers.
    - New Jersey's Construction Industry Independent Contractor Act was recently used to stop work by four subcontractors after investigators found wage theft and multiple labor law violations affecting 15 workers. In 2026, the New York Senate passed a bill that would permit "stop work" orders to be implemented for willful misclassification in any industry.
    - In the spirit of a "hot goods" provision, California's labor code pertaining to the garment industry requires manufacturers to be registered with the state; if apparel is manufactured without registration, state labor enforcers may confiscate the garments and destroy or dispose of them.
- Require employers to provide workers with transparent statements of their employment status and a justification for their classification, as was proposed in the 2011 Employee Misclassification Prevention Act.

In the past two years, at least 15 states have proposed legislation or administrative rules to strengthen workers' right to proper classification and state agencies' enforcement of misclassification laws (see **Appendix Table 1**).

Step III: Implement innovative strategies to strengthen workers' right to proper classification

Beyond the remedies described in Step II, which focus on holding employers accountable and expanding worker protections, state lawmakers and agencies can implement the below actions to more effectively combat misclassification and prevent misclassification from happening in the first place:

Establish interagency coordination and enforce protections against misclassification

Misclassification is pervasive across many industries, but often states and cities lack the resources to address the issue comprehensively. States across the country have created interagency task forces with dedicated resources, staff, and partnerships with worker organizations, enabling them to more effectively crack down on misclassification in targeted industries. These task forces allow the state to pool efforts and expertise and use its limited resources more efficiently to address misclassification as well as other labor violations that frequently occur alongside misclassification. For example, last year, Washington's attorney general established a worker rights unit to combat wage theft and

misclassification through strategic litigation, increased collaboration with state agencies, and partnerships with legislators to advance new worker protections. Interagency misclassification enforcement task forces have delivered significant results for workers and the state. For example, in 2018, in a one-year period Tennessee's Employee Misclassification Education and Enforcement Fund and Uninsured Employers Fund unit found over 250 workers' compensation and misclassification violations and assessed nearly $6 million in penalties for the violations. The programs also helped over 1,250 employees gain workers' compensation coverage for work-related illnesses and injuries. The same year, audits conducted by Oregon's interagency task force on misclassification discovered over $73 million in unreported payroll and resulted in the reclassification of nearly 7,000 workers.

Create a presumption of employee status for workers

One simple and effective way to deter misclassification in states without an ABC test is to create a presumption of employee status, meaning that workers are presumed to be employees unless proven otherwise. For example, New Mexico does not apply an ABC test to determine eligibility for wage and hour protections, but the state does apply a presumption of employee status to workers in the construction industry. Construction contractors that improperly report employees as independent contractors are subject to criminal penalties.

Additional recommended resources

- Misclassifying workers as independent contractors is costly for workers and social insurance systems [full report] and state fact sheets (Economic Policy Institute)
- Public Task Forces Take on Employee Misclassification: Best Practices (National Employment Law Project)
- Misclassification in Construction: The Original Gig Economy (Cornell University Industrial & Labor Relations Review)

Acknowledgements

The author is grateful to EPI Senior Fellow Lynn Rhinehart for her expertise and guidance.

Appendix

Appendix Table 1

State legislative proposals to address misclassification (2025-2026)

State	Bill number	Bill details	Status	Year
Arizona	HB 2463	Establishes Employee Misclassification and Payroll Tax Fraud Advisory Task Force for construction industry	Failed	2026
Colorado	HB 1001	Wage theft bill that adds a penalty structure for employers that illegally misclassify workers	Enacted	2025
Delaware	SB 63	Holds contractors liable when their subcontractors misclassify workers and allow the state's DOL to enforce compliance	Enacted	2025
Illinois	HB 2794	Amends the Employee Classification Act to establish joint and several liability among developers, general contractors, and subcontractors	Failed	2026
Iowa	HF 2385	An Act prohibiting the misclassification of employees as independent contractors, providing penalties, and including applicability provisions	Failed	2026
Kentucky	HB 449	Creates an ABC test and adds new remedies for workers who are illegally misclassified, including back wages, liquidated damages, and a private right of action	Failed	2026
Kentucky	SB 117	Proposes prohibiting misclassifying in the construction industry, adding penalties and other enforcement actions for violations, and implementing anti-retaliation protections	Failed	2026
Massachusetts	SD 1802	Strengthens wage theft enforcement and makes misclassified workers eligible to seek remedies	Failed	2025
Michigan	SB 6	Creates an ABC test for wage and hour determinations, allows employees to ask for wage information for similarly situated employees, adds civil and criminal penalties for misclassification. Initial proposal weakened to an economic realities test	Failed	2025
Minnesota	SF 17	Budget bill: requires state agencies to conduct an analysis of the costs of misclassification in 2027 and every 6 years thereafter	Enacted	2025

Appendix Table 1 (cont.)

State	Bill number	Bill details	Status	Year
New Jersey	Final rule	Clarifies the statutory ABC test for determining whether a worker is an independent contractor or employee	Enacted	2026
New York	S 1514	Relates to issuing stop-work orders for misclassification of employees	Failed	2026
Pennsylvania	SB 72	Amends the Construction Workplace Misclassification Act to add penalties, provide for private right of action; adds retaliation protections	Failed	2025
Virginia	HB 2561	Extends the timeframe for filing wage and misclassification claims and holds employers liable for damages awarded in lawsuits	Vetoed	2025
Virginia	HB 238	Makes employers that misclassify their workers liable for remedies, damages, and other relief pursued through civil actions	Enacted	2026
Washington	SB 6302	Requires the labor agency to investigate misclassification of drywall and painting workers on public projects if at least three workers are employed as independent contractors	Enacted	2026
Wisconsin	AB 1160	Makes all employers in the state subject to penalties for willful misclassification (instead of just public infrastructure construction and finishing workers)	Failed	2026

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Source: Author's analysis of state legislation related to misclassification.

Notes

1. The six factors are: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the potential employer's business; and (6) skill and initiative.

2. See, for example, New Jersey A1184 (failed in 2026).

3. See, for example, Nebraska LB 229 (enacted in 2025).

4. See Alabama SB 86 (2025), Georgia HB 987 (2026), Idaho H 645 (2026), Kentucky HB 732 (2026), Louisiana HB 301 (2026), Massachusetts HB 1108 (2026), Nebraska LR 414 (2026), Rhode Island H 7365 (2026), West Virginia SB 269 (2025) and HB 4009 (2026), Wisconsin SB 269 (2025), and Wyoming SF 41 (2026).