

Worker Misclassification

Employee or Independent Contractor?

As a general rule, anyone who performs services for you is your employee if you have the right to control both what will be done and how it will be done. To determine the proper classification of a worker, you need to consider all information that provides evidence of the degree of control and independence according to the **IRS's 3 broad categories**:

1

Behavioral control:

Does the employer control or have the right to control what the worker does and how the worker does their job?

2

Financial control:

Are the business aspects of the worker's job controlled by the payer? This includes aspects such as how the worker is paid, who provides tools and supplies, etc.

3

Type of relationship:

Are there written contracts or employee-type benefits such as pension plans, insurance, vacation pay, etc.? Will the relationship continue and is the work performed a key aspect of the business?

You can find more detailed information on the [IRS website](#) and in IRS Publication [15-A: Employer's Supplemental Tax Guide](#).

Worker misclassification describes incorrectly identifying individuals as independent contractors when they are really employees.

House Bill 1407 and Senate Bill 744 of the 2020 Session, which went into effect **January 1, 2021**, outline Virginia Tax's role in addressing misclassification. Under the new law, an individual who performs services for a business for pay will be presumed to be an **employee**. As a result, it is now incumbent on the employer to demonstrate that the individual is an **independent contractor**.

Why Does it Matter?

Virginia's worker misclassification legislation imposes a **civil penalty** for misclassification in the following amounts:

\$

Up to **\$1,000** per misclassified individual found during the **first audit**

\$\$

Up to **\$2,500** per misclassified individual found during the **second audit**

\$\$\$

Up to **\$5,000** per misclassified individual found during the **third audit** or any subsequent audits



In addition to the civil penalties, if misclassifications are found during a **second audit**, then that employer will be **barred from state government contracts** for up to **1 year** and up to **2 years** for any subsequent offenses.

Want More Information?

For information about your rights following an audit, see pages 7-8 of the [Virginia Taxpayer Bill of Rights](#).

Contact Virginia Tax

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You can also visit the Virginia Tax [website](#).