

Vanishing Independent Contractor

DuPage County Bar
Association —
Labor and Employment

Presented by:

David Fish

200 E. 5th Avenue, Ste. 123

Naperville, IL 60565

www.fishlawfirm.com



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The Vanishing Independent Contractor

Employee Misclassification Update To DuPage County Bar Association

David Fish
The Fish Law Firm, P.C.
200 E. 5th Avenue, Suite 123
Naperville, IL 60563
www.fishlawfirm.com

I. Illinois -- Tough Standard For Business (“Easy as 1-2-3” For Workers)

“Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it's proven in any proceeding where such issue is involved that:

1. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
2. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
3. Such individual is engaged in an independently established trade, occupation, profession, or business.”

II. Federal - Department of Labor’s Pro-Employee View

“In order to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the multi-factorial “economic realities” test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself. A worker who is economically dependent on an employer is suffered or permitted to work by the employer. **Thus, applying the economic realities test in view of the expansive definition of “employ” under the Act, most workers are employees under the FLSA.** The application of the economic realities factors must be consistent with the broad “suffer or permit to work” standard of the FLSA.”

III. Enormous Liability For Misclassification:

- A. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.**
- B. Illinois Minimum Wage Law, 820 ILCS § 105/1 et seq.**
- C. Illinois Wage Payment and Collection Act (i.e., for deductions)**
- D. Employee Classification Act, 820 ILCS § 185/1**
- E. Illinois Prevailing Wage Act, 820 ILCS § 130/0.01 et seq.**
- F. Family Medical Leave Act, 29 U.S.C. § 2601 et seq.**
- G. ERISA**
- H. Workers' Compensation (\$500 per day fine/minimum \$10,000 and Criminal Penalties)**
- I. Unemployment Insurance trust contribution (24% Interest)**
- J. Department of Revenue**