

# MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS IN INDIANA: A STATE LEGISLATIVE SOLUTION

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## INTRODUCTION

Most workers in the United States are under the assumption that the Nation's many employment laws protect them.<sup>1</sup> Unfortunately, for millions of misclassified workers these assumptions are misplaced.<sup>2</sup> What many fail to realize is that employment "protections are directly linked to their status as 'employees.'"<sup>3</sup> A simple classification as an "independent contractor" means that an individual is not entitled to fundamental workforce protection laws like the Fair Labor Standards Act ("FLSA") of 1938,<sup>4</sup> the Americans with Disabilities Act of 1990,<sup>5</sup> the Age Discrimination in Employment Act of 1967,<sup>6</sup> the Family and Medical Leave Act of 1993,<sup>7</sup> or the National Labor Relations Act.<sup>8</sup>

Workers are not the only ones harmed by misclassification, however. When employers misclassify their employees, "the conditions for a fair and competitive marketplace are sabotaged."<sup>9</sup> Companies that misclassify their employees as independent contractors can avoid paying many normal payroll-related costs, which can reduce employers' labor costs by as much as thirty percent.<sup>10</sup> These employers are then able to charge lower prices than their law-abiding

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1. *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification: Hearing on S. 3254 Before the Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 2 (2010) (statement of Seth D. Harris, Deputy Secretary, U.S. Dep't of Labor), <http://www.help.senate.gov/imo/media/doc/Harris4.pdf> [<https://perma.cc/A4EU-7QJA>].

2. *Id.*

3. *Id.*

4. 29 U.S.C. §§ 201-219 (2012).

5. 42 U.S.C. §§ 12101-12213 (2012).

6. 29 U.S.C. §§ 621-634 (2012).

7. *Id.* §§ 2601-2654.

8. *Id.* §§ 151-169; see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 5-6 (2009), <http://www.gao.gov/assets/300/293679.pdf> [<http://perma.cc/6SST-6RXA>].

9. Michael P. Kelsay & James I. Sturgeon, *The Economic Costs of Employee Misclassification in the State of Indiana*, UNIV. MO.-KAN. CITY DEP'T ECON. 2 (Sept. 16, 2010), [http://www.isbctc.org/Uploads/UploadedFiles/docs/Misclassification\\_in\\_Indiana\\_Full\\_Study\\_\\_9-10.pdf](http://www.isbctc.org/Uploads/UploadedFiles/docs/Misclassification_in_Indiana_Full_Study__9-10.pdf) [<http://perma.cc/68Q6-ZZ9J>].

10. *Leveling the Playing Field*, *supra* note 1, at 2-3.

competitors, which ultimately force the competitors out of the market.<sup>11</sup> This avoidance of payroll-related costs also hurts state and federal governments, as they lose out on significant sources of revenue.<sup>12</sup> Employers are not required to pay or withhold many payroll-related expenses if an employee is classified as an independent contractor, including Social Security and Medicare taxes, income taxes, unemployment insurance, workers' compensation, pension and health benefits, and others.<sup>13</sup>

According to a 2012 report by the National Employment Law Project, as many as ten to thirty percent of employers misclassify their employees as independent contractors, amounting to several million potentially misclassified workers nationwide.<sup>14</sup> Some misclassification occurs because of good faith misapplication of complex classification standards.<sup>15</sup> However, a large amount is deliberate.<sup>16</sup> Employers intentionally misclassify their employees as independent contractors in an attempt to circumvent Social Security and Medicare tax requirements, workers' compensation premium payments, and workplace injury and disability-related disputes.<sup>17</sup> Many employers are willing to take the risk of misclassifying their employees if it means they can avoid the significant cost of liability for workplace injury and disability-related disputes.<sup>18</sup> Unfortunately, the risk is not very high, as it is all too easy for employers to misclassify and get away with it.<sup>19</sup>

If penalties for misclassification were stronger, reasoning seems to suggest that employers would be less likely to risk intentionally misclassifying their employees in this manner. Unfortunately, federal legislative attempts to address the issue have been unsuccessful, leading many states to enact their own misclassification statutes.<sup>20</sup> The purpose of this Note is to study these different state misclassification statutes, specifically those enacted in Illinois, California, and Minnesota, and ultimately propose legislation aimed to address the misclassification problem in Indiana. This Note begins by addressing the misclassification problem as a whole, but focuses primarily on how the problem affects Indiana. Part I discusses misclassification itself, detailing the causes,

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11. *Id.* at 3.

12. Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP'T L. PROJECT 1-3 (Aug. 2012), <http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf> [<http://perma.cc/94CX-9MRP>].

13. Kelsay & Sturgeon, *supra* note 9, at 13.

14. Leberstein, *supra* note 12.

15. *Leveling the Playing Field*, *supra* note 1, at 1.

16. *Id.*

17. LALITH DE SILVA ET AL., PLANTIMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS 92 (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf> [<https://perma.cc/55T7-DXPE>].

18. *Id.*

19. *Leveling the Playing Field*, *supra* note 1, at 3.

20. *See* DE SILVA ET AL., *supra* note 17, at 72-75.

consequences, and history of the problem as a whole. Part II focuses specifically on the consequences of misclassification in Indiana. Part III details federal legislative efforts to curb misclassification. Part IV discusses state efforts, including the steps Indiana has already taken in comparison with statutes enacted in Illinois, California, and Minnesota. Taking the misclassification statutes from other states into account, Part V proposes general legislative solutions to address the issue in Indiana.

## I. THE MISCLASSIFICATION PROBLEM

### A. *Uncertain Classification Tests*

One of the biggest difficulties in determining whether a worker should be classified as an employee or as an independent contractor lies in the complex tests that are used to make the decision.<sup>21</sup> These tests derive from a variety of sources including the common law, governmental agency regulations, and federal and state statutes.<sup>22</sup> Unfortunately, there is little uniformity in the application of these differing tests, because they are used in very specific situations.<sup>23</sup> For example, the Internal Revenue Service (“IRS”) test,<sup>24</sup> used specifically for tax purposes, utilizes twenty factors to determine if an employer directs and controls its workers, while state unemployment insurance programs use whichever test the state itself dictates by statute,<sup>25</sup> and federal statutes like the Fair Labor Standards Act utilize a six-factor economic reality test.<sup>26</sup> This lack of uniformity, coupled with the complexity of the tests themselves, causes significant uncertainty for employers when attempting to properly classify their employees.<sup>27</sup> This uncertainty can, and often does lead to good-faith misclassification of employees as independent contractors.<sup>28</sup>

1. *The Common-Law Test.*—The common-law test, or the “right-to-control” test, stems from the “master-servant relationship” as understood from the common law of agency.<sup>29</sup> Under this test, the employer’s right to control the manner and means by which the outcome is accomplished by the employee is the primary factor in determining the employee’s classification.<sup>30</sup> An employer does not have to actually exercise his or her right to control an employee’s work; the existence of such a right alone is sufficient to justify a classification of

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21. See Jenna A. Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 106 (2009).

22. See *id.*

23. DE SILVA ET AL., *supra* note 17, at 15-19.

24. *Id.* at 17-18.

25. See *id.* at 20-22.

26. Moran, *supra* note 21, at 116-18.

27. DE SILVA ET AL., *supra* note 17, at 14.

28. *Leveling the Playing Field*, *supra* note 1, at 1.

29. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992).

30. DE SILVA ET AL., *supra* note 17, at 15-16.

“employee.”<sup>31</sup> Unfortunately, whether an employer possesses the right to control is a complex and often litigated issue.<sup>32</sup> The Supreme Court has held many factors are relevant to a right to control analysis, including:

the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>33</sup>

Additionally, the Court has held “[s]ince the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’”<sup>34</sup> The common-law test is frequently used when the term “employee” is circular, and the accompanying statute does not provide much guidance to determine when an individual should be classified as such.<sup>35</sup>

2. *The ABC Test.*—The ABC Test is a broader version of the right-to-control test utilized by a number of states.<sup>36</sup> Under the ABC Test, a worker is presumed to be an employee.<sup>37</sup> If an employer wishes to defeat this presumption and classify an individual as an independent contractor, he or she must prove three conditions<sup>38</sup>:

- (A) The individual is free from any direction or control in performing the services;
- (B) The services are performed outside the usual course of the employer's business or are performed away from any of the employer's regular business locations;
- (C) The individual is customarily engaged in an independent trade, occupation, business, or profession.<sup>39</sup>

3. *The IRS Test.*—The IRS utilizes a “common law standard that focuses on

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31. *Id.*

32. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 152 (2015).

33. *Nationwide Mut. Ins. Co.*, 503 U.S. at 323-24.

34. *Id.* at 324 (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968)).

35. *Id.* at 323-24 (determining the common law right to control test was appropriate because ERISA's “nominal definition of ‘employee’ as ‘any individual employed by an employer’ is completely circular and explains nothing”).

36. DE SILVA ET AL., *supra* note 17, at 16-17.

37. Moran, *supra* note 21, at 109.

38. *Id.*; *In re FedEx Ground Package Sys., Inc.*, 273 F.R.D. 516, 525 (N.D. Ind. 2010).

39. Moran, *supra* note 21, at 109.

a business's control over a worker."<sup>40</sup> The test contains twenty factors separated into three categories—behavioral control, financial control, and the relationship of the parties.<sup>41</sup> The behavior control factor shows whether there is a right to direct or control how the worker does his or her work.<sup>42</sup> If a worker receives extensive instructions regarding how, when, or where to perform his or her work duties, or is provided with training regarding procedures and methods to perform the work, then he or she is more likely to be considered an employee.<sup>43</sup> Financial control involves the level of investment, expense, and opportunity for profit or loss available to an individual.<sup>44</sup> If an individual has invested significant resources into his or her work, is not reimbursed for some or all business expenses, and has the opportunity to make a profit or incur a loss, he or she is more likely to be considered an independent contractor.<sup>45</sup> Not all the financial control factors need to be present for a proper classification as an independent contractor, however.<sup>46</sup> The relationship of the parties involves whether the individual receives common employee benefits such as insurance, pension, or paid leave and whether a written contract exists showing the intention of the parties.<sup>47</sup> The existence of common employee benefits tends to indicate that the individual is an employee.<sup>48</sup>

4. *Tests Utilized by Federal Statutes.*—Many federal statutes involve the classification of employees and independent contractors.<sup>49</sup> These statutes typically utilize their own standards and tests for classification purposes.<sup>50</sup> Two of these statutes are the National Labor Relations Act, of which the NLRB helps administer and determine what standards will apply, and the FLSA.<sup>51</sup> While these are not the only federal statutes that involve classification tests, they help demonstrate the variety and complexity that is common among them.

The NLRB has usually applied the common law right to control test; however, it has slightly shifted recently to focusing primarily on the party's entrepreneurial opportunity for gain or loss.<sup>52</sup> The Board chose to change its analysis because the multitude of common law factors were often "far too broad and produced 'unwieldy' or inaccurate results."<sup>53</sup> Under this approach, the failure

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40. DE SILVA ET AL., *supra* note 17, at 17-18.

41. Moran, *supra* note 21, at 110-12.

42. IRS, INDEPENDENT CONTRACTOR OR EMPLOYEE, No. 1779 (2012), <http://www.irs.gov/pub/irs-pdf/p1779.pdf> [<https://perma.cc/28NH-PXYT>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Moran, *supra* note 21, at 113.

50. *Id.*

51. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009); Moran, *supra* note 21, at 113.

52. *FedEx Home Delivery*, 563 F.3d at 502; Moran, *supra* note 21, at 114-16.

53. Moran, *supra* note 21, at 114-16.

to take advantage of such an opportunity is not conclusive.<sup>54</sup> Instead, “it is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.”<sup>55</sup> In *FedEx Home Delivery v. NLRB*, the court held FedEx drivers’ ability to own their routes—being able to sell them, trade them, or just plain give them away—was a sufficient entrepreneurial opportunity to justify classifications of the drivers as independent contractors.<sup>56</sup> As the court stated, “[O]pportunities cannot be ignored unless they are the sort workers ‘cannot realistically take,’ and even ‘one instance’ of a [worker] using such an opportunity can be sufficient . . . .”<sup>57</sup>

The FLSA applies a different test, which is centered upon the language of the Act itself.<sup>58</sup> The Act previously stated that an employee is “any individual employed by an employer,” and utilized a six-factor “economic reality test.”<sup>59</sup> An amendment replacing this vague standard with a more concise version was attempted, but unsuccessful, by the Payroll Fraud Prevention Act of 2015.<sup>60</sup> Under the economic reality test, “if a worker is financially dependent upon one business for a substantial part of her or his livelihood, then an employer-employee relationship exists.”<sup>61</sup> To determine whether a worker is financially dependent, courts have used some of the IRS common-law factors,<sup>62</sup> including:

- (1) the nature and degree of control a business has over the way the worker performs a job;
- (2) the extent to which the services rendered are an integral part of the business;
- (3) the permanency of the relationship between a business and a worker;
- (4) the amount of a worker’s investment in facilities and equipment;
- (5) a worker’s opportunity for profit and loss; and
- (6) the amount of initiative, judgment, or foresight that a worker needs to show or use in order to be successful in open market competition with others.<sup>63</sup>

5. *Indiana’s Tests*.—Indiana utilizes a variety of classification tests. The statute, agency, or legal theory being applied dictates which test will be used. For the theory of vicarious liability, courts have adopted a ten-factor analysis as

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54. *FedEx Home Delivery*, 563 F.3d at 502.

55. *Id.*

56. *Id.*

57. *Id.* (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995)).

58. *Moran*, *supra* note 21, at 116-18.

59. *Id.* at 116.

60. *See Payroll Fraud Prevention Act of 2015*, S. 1896, 114th Cong. (2015).

61. *DE SILVA ET AL.*, *supra* note 17, at 18.

62. *Id.*

63. *Id.*

described in the Restatement (Second) of Agency.<sup>64</sup> The factors that help courts distinguish employees from independent contractors under this theory are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>65</sup>

When applying these factors, no single one is dispositive; however, courts hold the “extent of control” to be the most important.<sup>66</sup>

Indiana Worker’s Compensation Law defers to the “guidelines of the United States Internal Revenue Service” to determine if a person is an independent contractor or an employee.<sup>67</sup> This means that workers’ compensation cases involve an analysis of the twenty IRS factors previously described.<sup>68</sup> Indiana also defers to the IRS for state tax revenue purposes.<sup>69</sup> Instead of relying on IRS guidelines, however, the state uses section 3401(c) of the Internal Revenue Code,<sup>70</sup> which states:

- (c) Employee. – For purposes of this chapter, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term “employee” also includes an officer of a corporation.<sup>71</sup>

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64. Walker v. Martin, 887 N.E.2d 125, 131 (Ind. Ct. App. 2008).

65. *Id.*

66. *Id.*

67. IND. CODE § 22-3-6-1(b)(7) (2016).

68. IRS, *supra* note 42.

69. IND. CODE § 6-3-1-6 (2016).

70. *Id.*

71. 26 U.S.C. § 3401(c) (2012).

For unemployment insurance purposes, Indiana utilizes a three-factor test similar to the “ABC Test.”<sup>72</sup> This test begins with a presumption that an individual is an employee, “irrespective of whether the common-law relationship of master and servant exists.”<sup>73</sup> To defeat this presumption, all of the following must be shown “to the satisfaction of the department”<sup>74</sup>:

- (1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract of service and in fact.
- (2) The service is performed outside the usual course of the business for which the service is performed.
- (3) The individual:
  - (A) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or
  - (B) is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort.<sup>75</sup>

The fact that different tests are used in Indiana, in other states, and by federal agencies and statutes shows the complexity and lack of uniformity surrounding the classification of employees and independent contractors. It is no wonder why many employers find it difficult to make proper classifications. While an employer may correctly classify a worker as an independent contractor under the ABC test, the same classification may be improper under a different test like the IRS's twenty-factor test.

### *B. Large-Scale Consequences of Misclassification*

Misclassification is a serious problem that negatively impacts workers, market competitors, federal and state governments, and society as a whole.<sup>76</sup> When employees are misclassified as independent contractors they are considered self-employed.<sup>77</sup> Being self-employed, they are not eligible for unemployment compensation, and they must pay the full amount of their Social Security and Medicare taxes, estimated income taxes, and workers' compensation.<sup>78</sup> These costs are typically paid by an employer, but only in an employer-employee relationship.<sup>79</sup> Thus, when workers are classified as independent contractors,

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72. IND. CODE § 22-4-8-1(b) (2016).

73. *Id.*

74. *Id.*

75. *Id.*

76. DE SILVA ET AL., *supra* note 17, at 2-4.

77. *Id.* at 2.

78. *Id.*

79. *Id.*



these costs fall entirely upon the workers' shoulders. Workers also lose out on significant labor protection laws when they are misclassified as independent contractors.<sup>80</sup> Employees are able to organize in unions and are covered by fundamental workforce protection laws like the FLSA,<sup>81</sup> the Americans With Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Family and Medical Leave Act of 1993, while independent contractors are not.<sup>82</sup> Laws like these provide employees protections that limit the hours they can work, set minimum wages they can be paid, and set safety standards that must be met.<sup>83</sup> In the workplace safety context, employers are “required to comply with OSHA [Occupational Safety and Health Administration] regulations to protect the health and safety of employees, but [are] exempt from those regulations when independent contractors are dealing with the same hazardous materials.”<sup>84</sup>

Competitors are negatively affected by misclassification due to the unfair marketplace advantage it affords employers who misclassify.<sup>85</sup> Classifying employees as independent contractors allows employers to reduce their labor costs by as much as ten to twenty percent.<sup>86</sup> This reduction in labor costs allows misclassifying employers to outprice their competitors, effectively driving competitors out of the market.<sup>87</sup> A loss of competition is harmful to consumers and the market as a whole.<sup>88</sup> The market and society are also harmed by misclassification because it allows employers to avoid vicarious liability for the actions of their employees.<sup>89</sup> Generally, a principal is not liable for the negligence of an independent contractor, meaning this theory of vicarious liability is not applicable in a misclassification setting.<sup>90</sup> There are five exceptions to this rule in Indiana:

- (1) where the contract requires the performance of intrinsically dangerous work;
- (2) where the principal is by law or contract charged with performing the specific duty;
- (3) where the act will create a nuisance;
- (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and

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80. *Id.*

81. Department of Professional Employees AFL-CIO, *Misclassification of Employees as Independent Contractors*, Fact Sheet 2014, at 2, (Oct. 2014), <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2014.pdf> [<https://perma.cc/VSZ8-7ZL7>].

82. Moran, *supra* note 21, at 118-19.

83. *Id.* at 122.

84. *Id.*

85. Kelsay & Sturgeon, *supra* note 9, at 15.

86. *Id.*

87. *See id.*

88. *See id.*

89. Bauer, *supra* note 32, at 141.

90. Walker v. Martin, 887 N.E.2d 125, 134 (Ind. Ct. App. 2008).

(5) where the act to be performed is illegal.<sup>91</sup>

These exceptions are rarely utilized, however, as can be seen in *Walker v. Martin*.<sup>92</sup> Society as a whole suffers when employers are not held liable for the negligent actions of their employees, especially when those actions result in serious harm to the public.

State and federal governments lose out on significant sources of revenue from the collection of taxes that are typically paid by employers in an employer-employee relationship.<sup>93</sup> This loss in government revenue includes a decreased collection of Social Security and Medicare taxes, income taxes, unemployment insurance, workers' compensation, and pension and health benefits.<sup>94</sup> These costs are shifted to the individual worker, who is unlikely to fully claim or pay income and other taxes.<sup>95</sup> Federal and state governments lose billions of dollars in tax revenue due to the underreporting by independent contractors.<sup>96</sup>

### *C. Why Are Employers Misclassifying?*

There are a number of explanations for why employers misclassify their employees as independent contractors so frequently. Some of the misclassification is due to good faith misapplication of the complex and numerous tests that govern employee classification.<sup>97</sup> Unfortunately, much misclassification is intentional.<sup>98</sup> One of the largest reasons employers misclassify workers is to avoid paying Social Security and unemployment insurance taxes for workers.<sup>99</sup> The savings from avoiding these taxes, along with Medicare taxes, reduces employers' labor costs by as much as twenty to forty percent.<sup>100</sup> These savings average \$3,710 for an employee earning \$43,007 annually.<sup>101</sup>

Another reason employers misclassify is due to the employment protections they are not required to provide their employees, which in turn leads to further savings on labor costs.<sup>102</sup> Independent contractors are not entitled to fundamental workforce protection laws like the FLSA, the Americans with Disabilities Act of

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91. *Id.*

92. *Id.* at 125. In *Walker v. Martin*, a timber delivery driver was found to be an independent contractor after he was involved in a car accident that killed an automobile passenger. *Id.* at 134. None of the five exceptions applied, meaning the employer was not held liable for the delivery driver's actions. *Id.* at 137-38.

93. See Kelsay & Sturgeon, *supra* note 9, at 9.

94. *Id.* at 3.

95. *Id.*

96. Bauer, *supra* note 32, at 140.

97. *Id.* at 141.

98. *Id.*

99. Department of Professional Employees AFL-CIO, *supra* note 81.

100. *Id.*

101. *Id.*

102. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8.

1990, the Age Discrimination in Employment Act of 1967, and the Family and Medical Leave Act of 1993.<sup>103</sup> By ignoring these laws, employers do not have to abide by minimum wage requirements, overtime requirements, and Occupational Safety and Health Administration (“OSHA”) standards.<sup>104</sup> Human rights and anti-discrimination protections are also included within the labor laws.<sup>105</sup> Employers are free from abiding by laws enforced by the Equal Employment Opportunity Commission, which protects the civil rights of employees by prohibiting discrimination based on age, race, gender or disability.<sup>106</sup>

The remaining reasons employers misclassify their employees lie in the areas of union organizing, healthcare costs, and citizenship verification. Union organizing is affected by misclassification due to the language of the National Labor Relations Act.<sup>107</sup> The National Labor Relations Act, which affords significant organizing power and protections to workers, does not cover independent contractors.<sup>108</sup> Thus, employers are able to “thwart union organizing or dilute bargaining units by misclassifying workers.”<sup>109</sup> Health care costs are lowered for employers when they misclassify.<sup>110</sup> Independent contractors are typically not allowed to enroll in employer-based health and pension plans.<sup>111</sup> Employers are able to save large amounts of money by not providing these benefits.<sup>112</sup> Employers are able to save even more by misclassifying, because they are able to utilize foreign labor.<sup>113</sup> They are not required to verify that their workers are U.S. citizens or covered by a work visa if those workers are independent contractors.<sup>114</sup> This allows employers to ignore labor laws and exploit immigrant workers without having to face legal repercussions from doing so.<sup>115</sup>

## II. CONSEQUENCES OF MISCLASSIFICATION IN INDIANA

Industry-targeted Indiana state audits for the years 2007-2008 found that 47.5%<sup>116</sup> of audited employers misclassified employees as independent contractors.<sup>117</sup> According to a study by the University of Missouri-Kansas City

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103. *Id.*

104. *Id.*

105. Department of Professional Employees AFL-CIO, *supra* note 81.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. 73,629 employers statewide in 2007 and 72,299 employers statewide in 2008.

117. Kelsay & Sturgeon, *supra* note 9, at 5.

Department of Economics, “the rate of misclassification in Indiana would be higher than in those states with a low level of targeted or non-random audits.”<sup>118</sup> Overall, an estimated 16.8% of employees were misclassified as independent contractors in Indiana during 2007-2008, amounting to 418,086 estimated misclassified workers throughout the state.<sup>119</sup> A U.S. census bureau analysis projected that nonfarm wage and salary employment would increase by 10.6% for the period 2008-2018, an annual increase of one percent.<sup>120</sup> These projections for growth seem to suggest that the misclassification problem will only get worse in the coming years.<sup>121</sup> Additionally, states generally audit less than two percent of employers each year, so these audit figures may be significantly undercounting the number of misclassified employees.<sup>122</sup> This classification is more of a common occurrence than a random one.<sup>123</sup> Employers who were caught misclassifying in 2007-2008 did not misclassify only one or two employees.<sup>124</sup> They misclassified a substantial portion of their workforce, equal to about 29.5%.<sup>125</sup> The construction sector in particular faces high levels of misclassification.<sup>126</sup> Eight thousand, two hundred employees of audited employers who were found to have misclassified for the period 2007-2008 were in the construction sector, and 24,891 total workers were misclassified within the construction industry for the same period.<sup>127</sup>

The financial impact of misclassification on individual workers within Indiana is also a large problem. Workers do not receive minimum wage or overtime pay when they are misclassified as independent contractors.<sup>128</sup> They are also forced to pay the full Social Security and Medicare taxes on their net earnings, pay quarterly estimated income taxes, pay for their medical insurance, pay for their workers' compensation insurance,<sup>129</sup> and report and pay income taxes on compensation they receive.<sup>130</sup> Unfortunately, many misclassified workers fail to report their full compensation on tax returns, and thus fail to pay the full amount of owed income and other taxes.<sup>131</sup> In addition, as is the case with federal and other state governments, Indiana state and local governments are deprived of

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Leberstein, *supra* note 12, at 2.

123. Kelsay & Sturgeon, *supra* note 9, at 5.

124. *Id.*

125. *Id.*

126. *Id.* at 4.

127. *Id.* at 5.

128. IND. DEP'T OF LABOR, REPORT TO PENSION MANAGEMENT OVERSIGHT COMMISSION ON EMPLOYEE MISCLASSIFICATION 7-8 (Sept. 29, 2010), [http://www.in.gov/dol/files/IDOL\\_PMOC\\_Report\\_9\\_29\\_10.pdf](http://www.in.gov/dol/files/IDOL_PMOC_Report_9_29_10.pdf) [https://perma.cc/6RS2-54HM].

129. See DE SILVA ET AL., *supra* note 17, at 2.

130. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 10.

131. See *id.* at 10-11.

significant amounts of income tax revenue when employers misclassify their workers.<sup>132</sup> Local governments receive about \$1.5 billion in income tax revenues annually.<sup>133</sup> When applying estimates adjusted for the average local tax rate of 1.16%, lost local tax revenue for the ninety-one local governments that collect local income tax is approximately \$4.7-\$6.7 million annually.<sup>134</sup> This loss occurs because independent contractors typically under-report their personal income due to not having their taxes withheld.<sup>135</sup> Independent contractors are also permitted to deduct certain expenses that employees are not permitted to deduct, such as expenses for automobiles, homes, medical insurance, retirement plans, and business trips.<sup>136</sup> These numerous deductions and failure to properly report income lead to an estimated annual revenue loss of between \$147.5 million and \$245.8 million for the Indiana state government for 2007-2008.<sup>137</sup>

In addition to the loss of income tax revenue, the Indiana state unemployment insurance system is negatively affected by misclassification.<sup>138</sup> This occurs because employers who misclassify employees as independent contractors do not pay any unemployment insurance.<sup>139</sup> When employers fail to pay premiums due to the Unemployment Insurance Trust Fund, Indiana's unemployment insurance system loses significant revenue.<sup>140</sup> This loss was estimated at \$30.4 million in 2008.<sup>141</sup> A 2000 report detailing misclassification's effects on unemployment insurance suggested,

[A]n increase in the unemployment rate could cause enormous increases in independent contractor-related issues that would have to be investigated. The additional claims would also drain the [unemployment] trust fund, and this drain would most likely have to be offset by assigning higher contribution rates to those employers that correctly classify their workers and pay their taxes.<sup>142</sup>

When employers misclassify they also avoid paying workers' compensation premiums.<sup>143</sup> According to a 2000 report by Planmatics, avoiding these high premiums is the primary reason employers misclassify.<sup>144</sup> This causes higher

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132. Kelsay & Sturgeon, *supra* note 9, at 31-33.

133. *Id.*

134. J. REP. OF THE IND. DEP'T OF WORKFORCE DEV., LABOR, REVENUE, AND THE WORKER'S COMP. BD., WORKER MISCLASSIFICATION IN INDIANA 6 (2010), <http://www.in.gov/legislative/igareports/agencyarchive/reports/DWD22.pdf> [<http://perma.cc/BWH7-SLZB>].

135. Kelsay & Sturgeon, *supra* note 9, at 31.

136. *Id.*

137. *Id.* at 32.

138. *Id.* at 6.

139. *Id.* at 30.

140. *Id.* at 6.

141. *Id.*

142. DE SILVA ET AL., *supra* note 17, at 76.

143. Kelsay & Sturgeon, *supra* note 9, at 33-34.

144. *Id.*

premiums for honest employers who do not misclassify, which places them at a significant competitive disadvantage.<sup>145</sup> In the construction industry for example, employers who avoid workers' compensation costs are able to underbid employers who correctly classify their employees.<sup>146</sup> When workers classified as independent contractors are hurt, they routinely change their status to employee in order to get coverage under the company's workers' compensation system.<sup>147</sup> This classification switches results in the payment of workers' compensation benefits even though no premiums were ever collected.<sup>148</sup>

### III. STATE LEGISLATIVE EFFORTS

#### *A. Illinois*

Illinois enacted the Illinois Employee Classification Act ("ECA") in 2007, specifically intended "to address the practice of misclassifying employees as independent contractors" in the construction industry.<sup>149</sup> The ECA accomplishes this objective by setting a presumption of an employer-employee relationship, requiring an employer to affirmatively prove a worker is an independent contractor for the worker to be classified as such.<sup>150</sup> To prove the classification of an independent contractor, an employer must meet a three-part test.<sup>151</sup> This test, which is similar to the previously mentioned ABC test, requires an employer to show that the worker is "(A) free from control or direction of the employer; (B) the service[s] performed by the individual [are] outside the usual course of services performed by the contractor; and (C) the individual is engaged in an independently established trade, occupation, profession or business."<sup>152</sup> Employers are required to report up-to-date records for each individual who performs services for the employer in an attempt to ensure correct classification based on the nature of the work.<sup>153</sup>

If an employer violates the terms of the ECA by failing to keep adequate records, failing to affirmatively prove a worker's independent contractor status, or by other means, the employee has the ability to bring suit under a private right of action.<sup>154</sup> If a violation is determined, employees can recover remedies including:

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145. *Id.*

146. *Id.* at 34.

147. *Id.*

148. *Id.*

149. 820 ILL. COMP. STAT. 185/3 (2016).

150. *See id.* 185/10(b).

151. Jane P. Kwak, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. LEGIS. 295, 309 (2012-2013).

152. *Id.* at 310.

153. *See* 820 ILL. COMP. STAT. 185/43 (2016).

154. *See id.* 185/60.

- (1) the amount of any wages, salary, employment benefits, or other compensation denied or lost, plus an equal amount in liquidated damages;
- (2) compensatory damages and an amount up to \$500 for each violation of the ECA;
- (3) all legal or equitable relief appropriate in the case of unlawful retaliation; and
- (4) attorney's fees and costs.<sup>155</sup>

Employers who are found to have violated the Act can face civil penalties and criminal penalties, including enhanced penalties for willful violations.<sup>156</sup>

Despite its stringent attempts to address the issue of misclassification, the ECA has been met with criticism from certain groups since its inception. According to Jeffrey Risch, Chair of the Illinois Chamber of Commerce's Employment Law & Litigation Committee, the ECA's penalties for misclassifying can cripple employers and destroy businesses.<sup>157</sup> Risch argues that if a court or the Illinois Department of Labor decides to pursue the maximum penalties available, a business will usually go bankrupt or be forced to close down.<sup>158</sup> Further criticism has come from law review articles and other commentary that has also characterized the ECA's penalties as unfair and unnecessary.<sup>159</sup> Critics have also pointed to the Act's application to private as well as public projects.<sup>160</sup> According to these critics, private individuals who hire workers to complete small construction projects on their own home could face penalties if they fail to prove that the worker should be classified as an independent contractor.<sup>161</sup>

These criticisms highlighting the staggering amount of penalties, and the serious effect they can have on businesses that are found in violation of the ECA, have real merit. It seems quite plausible that if the maximum penalties are levied, most employers will not be able to afford to stay in business. Fortunately, however, the ECA allows some discretion when administering penalties, meaning the maximum amount does not always have to be ordered.<sup>162</sup> Nevertheless, the Illinois Department of Labor has levied significant penalties against some businesses under the ECA, most notably in *Bartlow v. Costigan*, in which a small

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155. Kwak, *supra* note 151, at 311.

156. See 820 ILL. COMP. STAT. 185/40, 185/45, 185/35, 185/60, 185/55 (2016).

157. Kwak, *supra* note 151, at 313.

158. *Id.*

159. *Id.*; Markus May, *A Look at the Illinois Employee Classification Act*, ILL. STATE BAR ASS'N CORP., SEC. & BUS. LAW FORUM, Vol. 53, No. 2 (Feb. 2008).

160. Kwak, *supra* note 151, at 313.

161. *Id.*

162. See 820 ILL. COMP. STAT. 185/40(a) (2016). An employer who violates the ECA "shall be subject to a civil penalty *not to exceed* \$1,000 for each violation found . . . . In determining the amount of a penalty, the Director shall consider the appropriateness of the penalty to the employer or entity charged, upon the determination of the gravity of the violations." *Id.*

construction firm unsuccessfully challenged the constitutionality of the ECA.<sup>163</sup> The company, Jack's Roofing, had misclassified ten workers as independent contractors for periods ranging from eight to 160 days.<sup>164</sup> Due to the ECA's penalty structure, which considers each day that each worker is misclassified a separate violation,<sup>165</sup> the firm faced a potential penalty of \$1.6 million.<sup>166</sup> While \$1.6 million may seem high, it is important to note that penalties like this are necessary and effective in deterring intentional or repeated misclassification.<sup>167</sup>

### *B. California*

California has also enacted a statute targeted at reducing worker misclassification.<sup>168</sup> Unlike Illinois' ECA, however, Section 226.8 of the California Labor Code ("Section 226.8") is not limited to the construction industry.<sup>169</sup> The statute makes it expressly unlawful to willfully misclassify an individual as an independent contractor in all industries.<sup>170</sup> California courts have not yet had the opportunity to address what circumstances constitute a "willful" misclassification; however, some commentators have asserted that a "well-reasoned good faith misclassification would likely fall short of the standard."<sup>171</sup> Additionally, California law has detailed a number of statutory employees who must be classified as employees regardless of whether they would be considered independent contractors under the California common law right-to-control test.<sup>172</sup> These statutory employees include:

- 1) Any officer of a corporation is an employee of that corporation.
- 2) An agent or commission driver who distributes meat products, vegetable products, fruit products, bakery products, beverages (other than milk), laundry, or dry cleaning for someone else.
- 3) A full-time life insurance salesperson who sells primarily for one company.
- 4) A home worker who works by guidelines of the person for whom the work is done, with materials furnished by and returned to that person or to someone that person designates.

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163. 13 N.E.3d 1216, 1219 (Ill. 2014) (holding the ECA is not unconstitutionally vague).

164. *Id.*

165. See 820 ILL. COMP. STAT. 185/40(a) (2016).

166. *Bartlow*, 13 N.E.3d at 1219.

167. Kelsay & Sturgeon, *supra* note 9, at 37.

168. See CAL. LAB. CODE § 226.8 (2016).

169. *Id.*

170. See *id.* (describing willful misclassification is defined as "voluntarily and knowingly misclassifying that individual as an independent contractor").

171. *Penalties for Misclassifying Workers as Independent Contractors*, JUST. & DIVERSITY CTR. B. ASS'N S.F., <https://www.sfbar.org/forms/jdc/emp-ic-memo.pdf> [<https://perma.cc/9LYX-PNP2>] (last visited Jan. 26, 2017).

172. *Id.*



5) A traveling or city salesperson (other than an agent-driver or commission-driver) who works full time (except for sideline sales activities) for one firm or person getting orders from customers. The orders must be for merchandise for resale or supplies for use in the customer's business. The customers must be retailers, wholesalers, contractors, or operators of hotels, restaurants, or other businesses dealing with food or lodging.

6) The author of a commissioned or specifically ordered work is a statutory employee of the person commissioning the work if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.

7) Any person with a membership interest in a Limited Liability Company (LLC) treated as a corporation for federal income tax purposes is an employee of that LLC.

8) Any unlicensed contractor performing services requiring a contractor's license is an employee of the licensed or unlicensed contractor who hired the unlicensed contractor.<sup>173</sup>

Violators of the statute are subject to civil penalties, civil and liquidated damages, and other disciplinary actions against their professional licenses.<sup>174</sup> The fines that can be levied against a violating employer are between \$5000 and \$15,000 per violation,<sup>175</sup> and between \$10,000 and \$25,000 for employers engaged in a "pattern or practice" of violating the law.<sup>176</sup> Violating employers are also required to display a notice of the violation in a prominent location on their website for at least one year.<sup>177</sup> If the employer does not have a company website, it must display notice of the violation in each location where the violation occurred, in a prominent area accessible to all employees and the general public.<sup>178</sup>

The enforcement of Section 226.8 lies with the California Labor and Workforce Development Agency.<sup>179</sup> Initially complaints are filed with the Agency, which prompts an investigation from the Labor Commissioner.<sup>180</sup> If the Commissioner finds a likely violation, he or she may initiate an administrative hearing or bring a civil suit.<sup>181</sup> Filing a complaint with the Labor and Workforce Development Agency is the only remedy for misclassified workers, as California

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173. *Id.*

174. *See* CAL. LAB. CODE § 226.8 (2016).

175. *See id.* § 226.8(b).

176. *See id.* § 226.8(c).

177. *See id.* § 226.8(e).

178. *See id.*

179. *See id.*

180. *See id.*

181. *Id.* § 226.8(g)(3).

courts have not interpreted Section 226.8 to include a private right of action.<sup>182</sup>

*C. Minnesota*

A Minnesota statute aimed at reducing the level of employee misclassification in the state was enacted in 2007.<sup>183</sup> The statute contains provisions similar to those found in Illinois' ECA, and California's Section 226.8. Like the ECA, the law is targeted specifically toward the construction industry,<sup>184</sup> and provides for a presumption of an employer-employee relationship.<sup>185</sup> If employers wish to properly classify a worker as an independent contractor they must be able to meet the requirements of a statutory nine-factor test.<sup>186</sup> This test allows an individual to be classified as an independent contractor 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;
- (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.<sup>187</sup>

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182. *See* Noe v. Super. Court, 187 Cal. Rptr. 3d 836 (Cal. Ct. App. 2015).

183. *See* MINN. STAT. § 181.723 (2016).

184. *Id.* § 181.723 subdiv. 2.

185. *Id.* § 181.723 subdiv. 3-4.

186. *Id.* § 181.723 subdiv. 4.

187. *Id.*

In addition to this employee-employer presumption, the statute imposes a scienter requirement similar to Section 226.8.<sup>188</sup> To be held in violation of the law, an employer must have knowingly misrepresented or misclassified an individual as an independent contractor.<sup>189</sup>

When the statute was first enacted in 2007, employers were required to receive an exemption certificate from the Department of Labor and Industry if they wished to defeat the employer-employee presumption.<sup>190</sup> Originally, nine staff members were hired to go through the numerous exemption certificate applications.<sup>191</sup> Funding for this process was made available through application fees of \$150.<sup>192</sup> “Instead of working as anticipated, it was discovered that the application process was burdensome and intrusive, and few applications were received.”<sup>193</sup> This shortage of applications left the department in need of funds, leading to all but two staff members being terminated.<sup>194</sup> With very few resources available to the remaining staff members, investigative efforts were infrequent and ineffective.<sup>195</sup> These problems in enforcing the Minnesota statute highlight the importance of sufficient funding for any attempt to curb misclassification.

#### *D. Indiana*

Unlike Illinois, California, and Minnesota, Indiana has not enacted any meaningful laws aimed specifically at decreasing misclassification. “Historically, Indiana has been very reluctant to extend protections to employees. In fact, there are few instances, legislatively or judicially approved, where such protections exist.”<sup>196</sup> Nevertheless, Indiana has adopted some legislation that works to help employees. Indiana Code Section 22-1-1-22 establishes an information sharing system concerning construction workers misclassified as independent contractors.<sup>197</sup> The statute requires the Indiana Department of Labor (“IDOL”) to cooperate with the Indiana Department of Workforce Development (“IDWD”), the Indiana Department of State Revenue (“IDSR”), and the Worker’s Compensation Board of Indiana (“IWCB”) “by sharing information concerning any suspected improper classification . . . of an individual as an independent contractor.”<sup>198</sup> Indiana Code Section 22-2-2-11 protects workers from retaliation for collecting wage payments and makes it an infraction for an employer to fail to keep records, or “pay[] or agree[] to pay any employee less than the minimum

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188. *Id.* § 181.723 subdiv. 7(c)(2); *see also* CAL. LAB. CODE § 226.8 (2016).

189. MINN. STAT. § 181.723 subdiv. 7(c)(2) (2016).

190. IND. DEP’T OF LABOR, *supra* note 128, at 10.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 10-11.

195. *See generally id.* (refers to lack of ability to enforce investigations under the statute).

196. *Id.* at 22.

197. IND. CODE § 22-1-1-22(c) (2016).

198. *Id.*

wage.”<sup>199</sup> Additionally, the state passed a law in 1999 permitting the Unemployment Insurance Agency to conduct joint audits in partnership with additional state agencies.<sup>200</sup>

These laws certainly show some effort to protect workers in the state from being taken advantage of and exploited. However, Indiana does not possess an independent statutory violation for misclassification.<sup>201</sup> Instead, the state relies on powers already granted to the IDOL, IDWD, and IDOR.<sup>202</sup> The IDOL possesses inspection, investigative, and enforcement powers to enforce misclassification in the same vein as other labor laws.<sup>203</sup> The IDOR and IDWD have the capacity to engage in “fact finding missions, and penalize noncompliant employers and taxpayers.”<sup>204</sup> The IDOR can assess a ten percent penalty for individuals and employers who underpay their taxes, and a 100% penalty for failure to file or for fraudulently filing.<sup>205</sup> Additionally, the IDOR has subpoena power and the authority to complete broad investigations and audits.<sup>206</sup> These powers are significant, but unfortunately only involve the issue of misclassification if the misclassification touches on their primary directive. There exists no independent remedy for aggrieved employees, or fines and penalties for misclassifying employers.<sup>207</sup>

#### IV. WHAT TYPE OF LEGISLATION SHOULD INDIANA ENACT?

In order to reduce misclassification across the state, Indiana should enact legislation aimed specifically at the issue. Taking ideas from the three state statutes discussed above enacted in Illinois, California, and Minnesota, the following is a proposal for what effective Indiana legislation could include. These are merely broad principles that should shape the way this legislation is crafted, and is not an attempt to fully flesh out the specific details and intricacies that a statute typically requires.

##### *A. Private Right of Action*

Enacting legislation possessing a private right of action, which would allow aggrieved employees to assert claims of misclassification against their employers, is the first important step in reducing misclassification across Indiana. Similar to the Illinois ECA, a private right of action would allow for harmed employees to bring suit against their employers without having to rely on the state

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199. *See id.* § 22-2-2-11.

200. DE SILVA ET AL., *supra* note 17, at 79.

201. IND. DEP’T OF LABOR, *supra* note 128, at 22-23.

202. *Id.* at 21-23.

203. *Id.* at 21.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 22-23 (describing there is a lack of statutory violation for misclassification in Indiana).

government.<sup>208</sup> As attempts at reducing misclassification in Minnesota show, government agencies can become underfunded and understaffed.<sup>209</sup> By placing the power to bring claims in the hands of private citizens, Indiana can lessen the burden on governmental agencies, which are costly and sometimes ineffective.<sup>210</sup>

Additionally, a private right of action would give aggrieved employees the opportunity to recover the full spectrum of losses they suffer when misclassified. Providing for remedies similar to the ECA by allowing for the collection of “the amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of [misclassification],”<sup>211</sup> would help these employees become whole. Without their own ability to bring suit against employers, workers may never be able to recover these damages, as employers are subject only to civil penalties “currently permitted under the UI, Revenue and WCB laws.”<sup>212</sup> Civil penalties are effective deterrents; however, they are paid to the government and do not help compensate those who have been harmed.<sup>213</sup> Determent is an important step in reducing misclassification, but should not be prioritized over compensating employees who have been victimized.

#### *B. Education and Outreach Campaign*

Many employers do not know the intricacies of employee classification law,<sup>214</sup> and many employees are not aware of the protections they lose from being misclassified.<sup>215</sup> A 2010 report by the Indiana Department of Labor to the Pension Management Oversight Commission on employee misclassification echoed this idea.<sup>216</sup> One of the IDOL’s primary recommendations was to implement education, outreach, and compliance assistance.<sup>217</sup> The IDOL found it clear that Indiana lacked sufficient education, outreach and training on the topic of misclassification.<sup>218</sup> This lack of knowledge necessitates educational campaigns aimed at informing both employers and employees of the intricacies and consequences of misclassification.

These outreach campaigns should also work to assist the government agencies tasked with receiving, and investigating misclassification complaints.

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208. See 820 ILL. COMP. STAT. 185/60 (2016).

209. IND. DEP’T OF LABOR, *supra* note 128, at 10-11.

210. See *generally id.* at 19-20. IDOL would need increased funding for assigned investigation of all misclassification. *Id.* at 19. DWD invested a record 26,000 hours of audit investigation and 9000 employees assigned to such tasks in 2009. *Id.* at 20.

211. 820 ILL. COMP. STAT. 185/60(a)(1) (2016).

212. See IND. DEP’T OF LABOR, *supra* note 128, at 17-19.

213. *Fact Sheet #44: Visits to Employers*, WAGE & HOUR DIVISION, U.S. DEP’T OF LAB. (Jan. 2015), <http://www.dol.gov/whd/regs/compliance/whdfs44.htm> [perma.cc/6Z6U-566X].

214. IND. DEP’T OF LABOR, *supra* note 128, at 23-24 (discussing inefficient education).

215. *Leveling the Playing Field*, *supra* note 1, at 2-3.

216. IND. DEP’T OF LABOR, *supra* note 128, at 23-24 (discussing inefficient education).

217. *Id.*

218. *Id.* (referencing Indiana information campaign regarding misclassification).

Indiana has already enacted legislation to facilitate information sharing and cooperation among the IDWD, IDOR, IDWD, and the WCB.<sup>219</sup> Indiana Code Section 22-1-1-22 is a commendable start; however, more must be done to assist these agencies. As recommended by the IDOL in its report, the state should also create a “website and/or a tip line or hotline, where complaints can be made . . . [and t]here should be continuity in the information presented on the agencies’ various websites.”<sup>220</sup> Funding for this type of assistance could be included with funding for educational campaign and outreach in a misclassification statute. Combined, these steps could go a long way in instructing the public about their employment rights, misclassification, and the ways to stop it.

### *C. Civil Penalties*

Civil penalty provisions are important to include in a misclassification statute because they provide set penalties for violations without having to get too deep into the litigation of damages. Certain penalties are already levied by different agencies for violations of state law that intersect with misclassification.<sup>221</sup> For example, the IDOR can assess a ten percent penalty for the underpayment of taxes and a 100% penalty for not filing or for fraudulently filing taxes.<sup>222</sup> Typically when employers misclassify employees as independent contractors they are subject to a fine under this IDOR penalty power.<sup>223</sup> These fines, however, are not levied due to the employer’s misclassification; it is only ancillary to the tax issue.<sup>224</sup> There are no civil penalties aimed specifically toward classification violations.<sup>225</sup>

### *D. Presumption of Employer-Employee Relationship*

A standard common between the misclassification statutes enacted by Illinois and Minnesota is a presumption of an employer-employee relationship.<sup>226</sup> Beginning with a presumption of an employer-employee relationship takes the task of initial classification out of the hands of employers, removing their ability to misclassify employees in good faith due to complex classification tests. An employer-employee presumption also removes the need for a “willful” violation requirement, as it would be the state itself that is making the classification determination. In this situation, an employer could not classify a worker as an independent contractor without a designation from the state agency tasked with

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219. IND. CODE § 22-1-1-22(c) (2016).

220. IND. DEP’T OF LABOR, *supra* note 128, at 23-24.

221. *See generally id.* at 21-24 (describing investigative agency power and applicable remedies for employees and employers).

222. *Id.* at 21.

223. *Id.*

224. *Id.* at 21-22.

225. *Id.* at 23 (describing no Indiana independent statute exists regarding classification violations).

226. *See* MINN. STAT. § 181.723 subdiv. 3-4 (2016); 820 ILL. COMP. STAT. 185/10(b) (2016).

reviewing classifications.

When starting with the presumption of an employer-employee relationship, state agencies must be fully prepared to handle the incoming petitions from employers to classify their employees as independent contractors. Without proper funding, staffing, and training, a situation similar to what happened in Minnesota could occur, where the state agency is unable to keep up with requests, and fails to investigate petitions sufficiently.<sup>227</sup>

#### CONCLUSION

The problem of employee misclassification is a large one that plagues all of the United States. In particular, Indiana is harmed by misclassification through a loss of tax revenue, decreases in the state unemployment insurance and workers' compensation funds, and the loss of individual financial resources.<sup>228</sup> With a lack of federal legislation addressing the issue, many states have taken preventive and restitution measures into their own hands.<sup>229</sup> Illinois, California, and Minnesota are a few of the states that have enacted statutes targeting misclassification in their respective marketplaces.<sup>230</sup> The minimal legislation and task force initiatives that Indiana has utilized so far have not addressed the issue thoroughly, as worker misclassification has shown high levels stemming since 2008.<sup>231</sup> Whether it is in the form of private rights of action, civil penalties, or a presumption of an employer-employee relationship, Indiana must join other states by implementing effective legislation aimed at reducing and compensating for employee misclassification.

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227. IND. DEP'T OF LABOR, *supra* note 128, at 10-11.

228. *See generally id.* at 7-8 (defining the issue of misclassification).

229. *Id.* at 8-15 (documenting a survey of other states' approaches to the issue of misclassification).

230. *Id.* at 8-12.

231. *See Kelsay & Sturgeon, supra* note 9, at 25-29.