

WORK STRUCTURES

# *Dynamex and Beyond:*

## *The Legal and Policy Landscape of Worker Classification*

February 26, 2019

# Agenda

- What is “misclassification” and who does it affect?
- What are the consequences of being misclassified for workers?
- What are the costs of misclassification to the government and the economy?
- How are legislatures, agencies, and the courts responding, and how does the *Dynamex* decision and the “ABC test” address the problem?

# What is misclassification?

Misclassification can take several forms:

- Employers call employees “independent contractors,” even when the workers are not running their own businesses;
- Employers require employees to form a limited liability corporation or franchise company-of-one as a condition of getting a job;
- Employers pay workers off the books, without any payroll treatment at all.

Workers are sometimes required to sign boilerplate contracts attesting to independent contractor status, even where the functional relationships do not reflect true independence.

# Why does misclassification matter?

Employers in an increasing number of industries misclassify their employees as independent contractors. This practice:

- Denies workers the **protection** of workplace laws
- Deprives Social Security, Medicare, unemployment insurance, and workers' compensation funds of **billions** of dollars
- Reduces federal, state and local **tax revenues**

BUT

- Saves those who misclassify as much as 30% of payroll and related taxes otherwise paid for “employees.”

# Who does misclassification affect?

Employee misclassification is a persistent problem in many of our economy's growth industries, including:

- Home care
- Janitorial
- Trucking
- Construction
- Hospitality
- Security
- The rapidly-growing app-based “on-demand” economy

# Who does misclassification affect?

TABLE 7. Common occupations held by independent contractors at main job, California, 2013-2015

## Typically low-wage occupations

Janitors, maids and housekeepers  
Personal care aides, home health aides, childcare workers  
Grounds maintenance workers  
Retail sales workers  
Material moving workers (for example, in car washes and waste management services)  
Cooks  
Dry cleaning and laundry workers, tailors, sewing machine operators  
Animal care workers

## Typically low- to mid-wage occupations

Construction trades workers  
Beauty salon, barber shop and nail salon workers  
Truck and taxi drivers  
Car repair mechanics  
Customer service representatives

## Typically mid- to higher-wage occupations

Business operations specialists (for example, in management, scientific, and technical consulting services)  
Financial specialists (for example, in accounting and tax preparation)  
Operations specialties managers (for example, in financial institutions)  
Counselors and social workers  
Advertising, marketing, public relations, and sales managers

## Typically higher-wage occupations

Doctors, nurses and other health practitioners  
Lawyers and judges  
Computer occupations  
Top executives (for example, in construction, real estate, and management consulting)  
Psychologists  
Architects and surveyors  
Engineers

Note: Wage groupings based on earnings of wage & salary workers, not independent contractors; see endnote 17 for details.  
Source: Authors' analysis of American Community Survey

# Consequences for workers

Misclassification depresses workers' income, deprives them of essential workplace protections and social insurance benefits

Table 1. Worker Protection Laws	
Employee	Independent Contractor
Minimum wage and overtime	None
Workers' compensation	None, or worker pays
Unemployment insurance	None
Anti-harassment <sup>10</sup> and discrimination	None
Right to form a union and collectively bargain <sup>11</sup>	None
Employer-provided retirement benefits	None

# Consequences for workers

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Table 2. Costs to Worker	
Employee	Independent Contractor
Employer and worker each pay 7.65% of payroll for FICA and FUTA. Employer generally makes payroll deductions. <sup>12</sup>	Worker pays entire 15.3% self-employment rate. <sup>13</sup> Worker also usually responsible for quarterly tax filings.
Employer pays workers' compensation taxes.	Worker responsible for insurance (or costs arising from workplace injuries).
Employer usually cannot deduct from pay any required work expenses such as uniforms, materials, etc.	Worker responsible for operating costs such as gas, tools, etc.



# Costs to the government: National

- A 2009 report by the U.S. Government Accountability Office estimated independent contractor misclassification **cost federal revenues \$2.72 billion** in 2006.
- A 2000 study commissioned by the U.S. Department of Labor found that between **10% and 30%** of audited employers misclassified workers.
- Researchers found that misclassifying just 1% of workers as independent contractors annually results in a **\$198 million** hit to unemployment insurance (UI) trust funds.

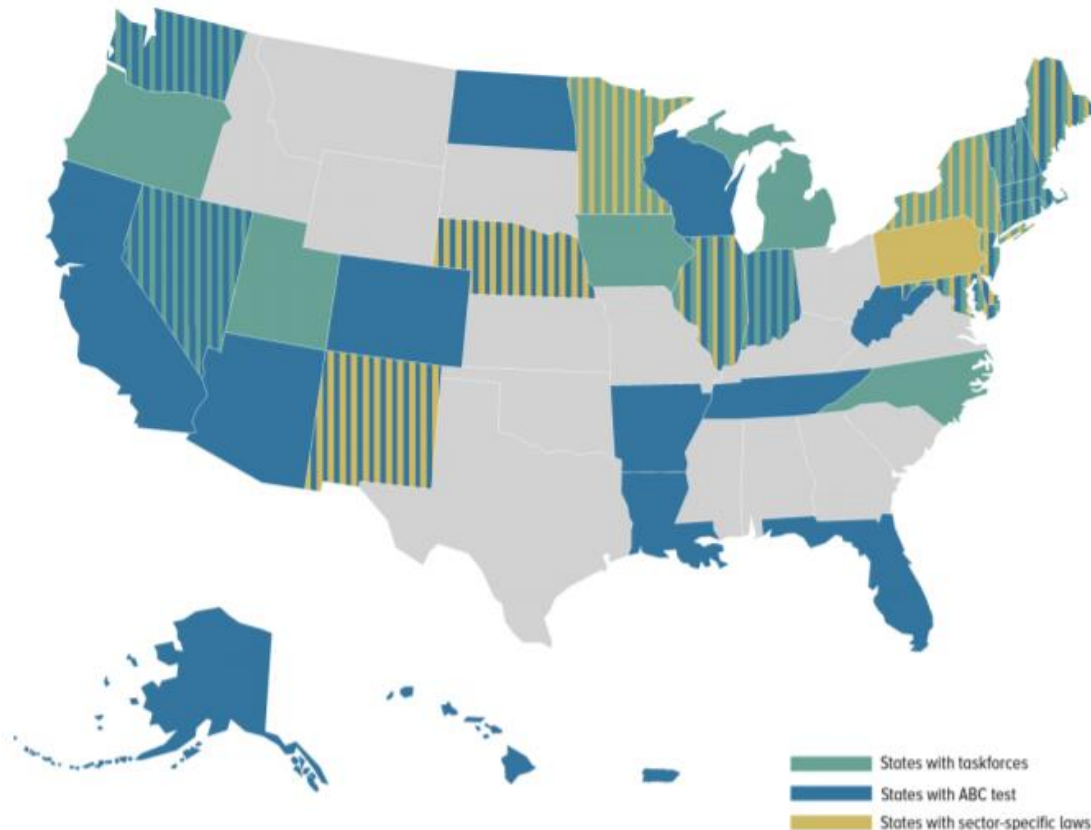
# Costs to the government: California

- In 2017, California's Employment Development Department Tax Audit Program conducted 7,937 audits and investigations, resulting in **assessments totaling \$249,981,712**, and identified **461,279 unreported employees**.
- The Division of Labor Standards Enforcement website notes that misclassification costs the state **\$7 billion** annually.

# Passing on costs to other businesses

- Employers who correctly classify workers are at a competitive disadvantage because their misclassifying counterparts have artificially low labor costs.
- A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers' compensation premiums to law-abiding businesses annually.

# What are legislatures, agencies and courts doing?

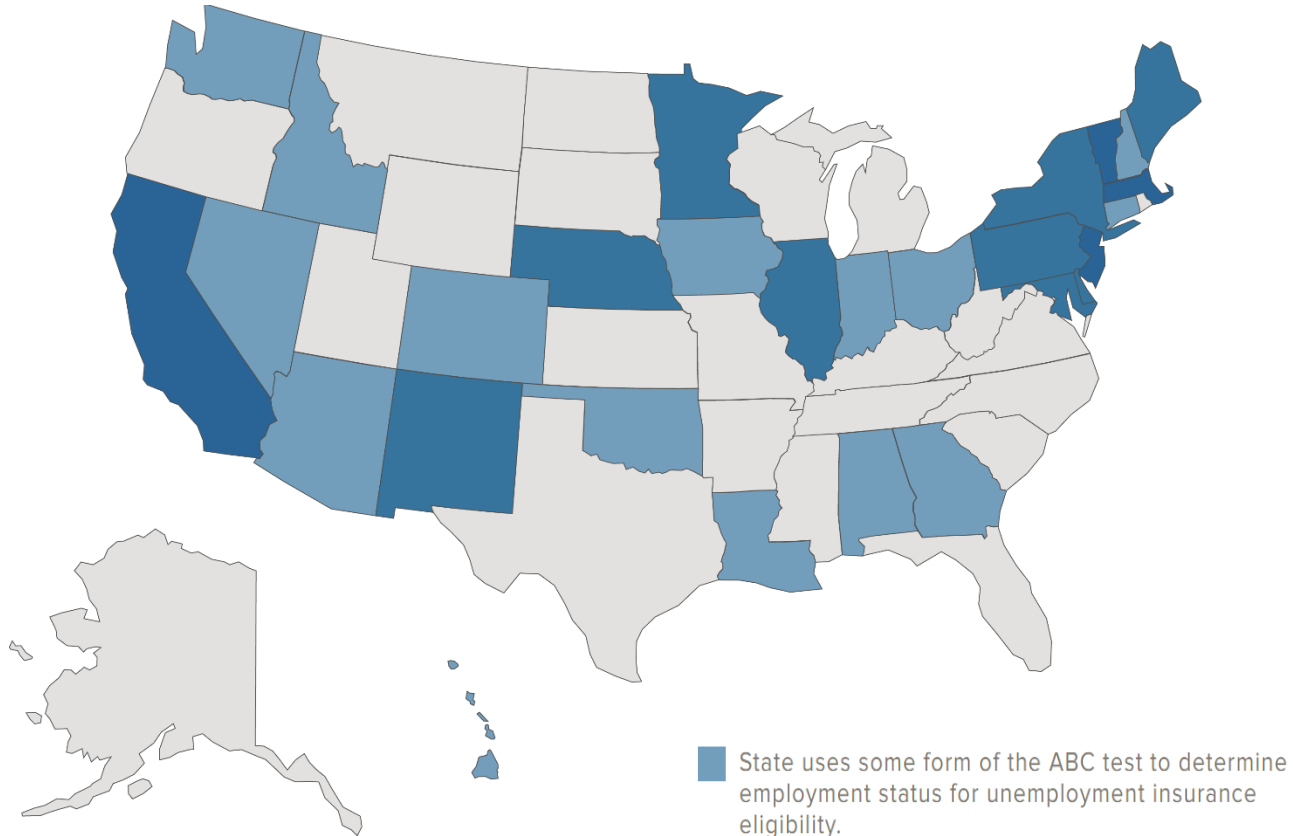


# The 2018 *Dynamex* decision

“[W]e conclude that unless the hiring entity establishes **(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity’s business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business,** the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders.”

in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors”]  
<[https://digitalcommons.ilr.cornell.edu/key\\_workplace/2/](https://digitalcommons.ilr.cornell.edu/key_workplace/2/)> (as of Apr. 30, 2018).

# More than half of states use an ABC test



- State uses some form of the ABC test to determine employment status for unemployment insurance eligibility.
- State uses ABC test in some sectors, and may also use some form of the ABC test to determine employment status for unemployment insurance eligibility.
- State uses ABC test to determine employment relationships for wage and hour laws.

# More than half of states use an ABC test

- Given what employee status confers, a simple ABC test, which creates a **presumption** of employee status, is an effective way to combat misclassification:
  - It is **harder for employers to manipulate**
  - It is **easier** for workers to understand
  - It would lead to more **predictable** outcomes
- A person's rights on the job and ability to access our most basic social insurance programs should not depend on their employer's preference to save costs.

# What's happening around the world?



## Uber loses appeal over driver employment rights

Drivers should be classed as workers with access to paid holidays and minimum wage



▲ Uber said it would challenge the latest ruling at the supreme court after being given leave to do so. Photograph: Laura Dale/PA

Judges have dismissed Uber's appeal against a [landmark employment tribunal ruling that its drivers should be classed as workers](#) with access to the minimum wage and paid holidays.

## AUSTRALIAN LAWYERS ALLIANCE

### Opinion

#### Gig economy decision – Fair Work Commission finds delivery riders are employees

24th Jan 2019

Technological innovation has led to the emergence of flexible work arrangements in the 'gig economy', also known as the 'share economy' – where workers are typically engaged under a contract *for* services rather than a contract *of* service, usually via online platforms or apps.

Flexible work arrangements, which were once considered unconventional, have become prevalent in Australia's ever evolving economy, and this change is driving the expansion of how we characterise contracts of employment with regards to independent contractors.

Whether the people working for these gig economy businesses are employees or independent contractors is key to defining their rights and obligations in areas such as tax, superannuation and instances of dismissal.

Going to the very heart of this issue is the recent decision of the Fair Work Commission (FWC) which found that Mr Klooger, a food delivery worker engaged by Foodora, was an employee and therefore entitled to bring an unfair dismissal claim.



# Resources

- **National Employment Law Project**

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- Policy Brief:

<https://www.nelp.org/publication/independent-contractor-vs-employee/>

- Fact Sheet:

<https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>



# Thank You

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