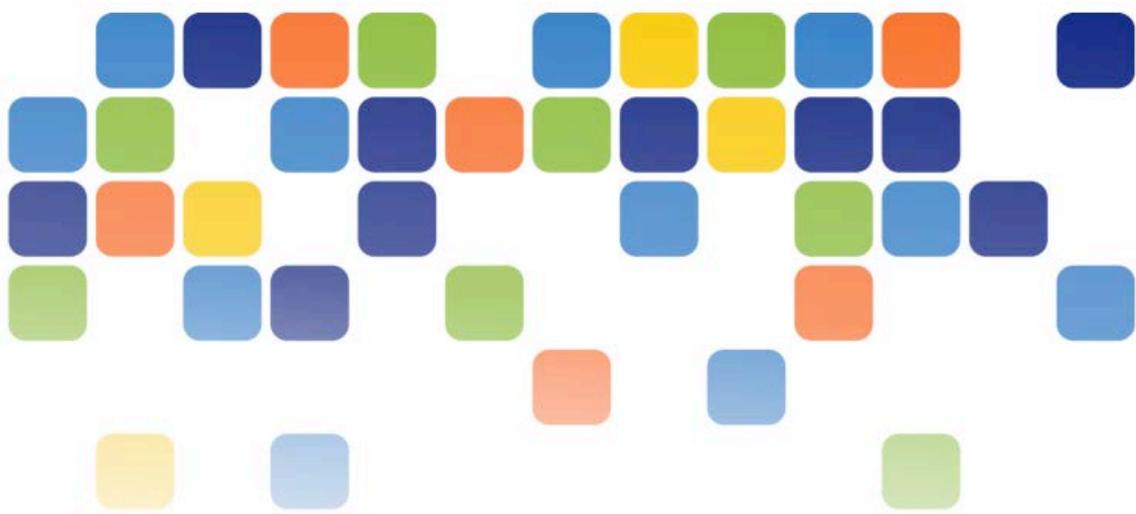


# Employee Misclassification and Independent Contractor v. Employee

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*Vice President of Claims, York Risk Services Group*

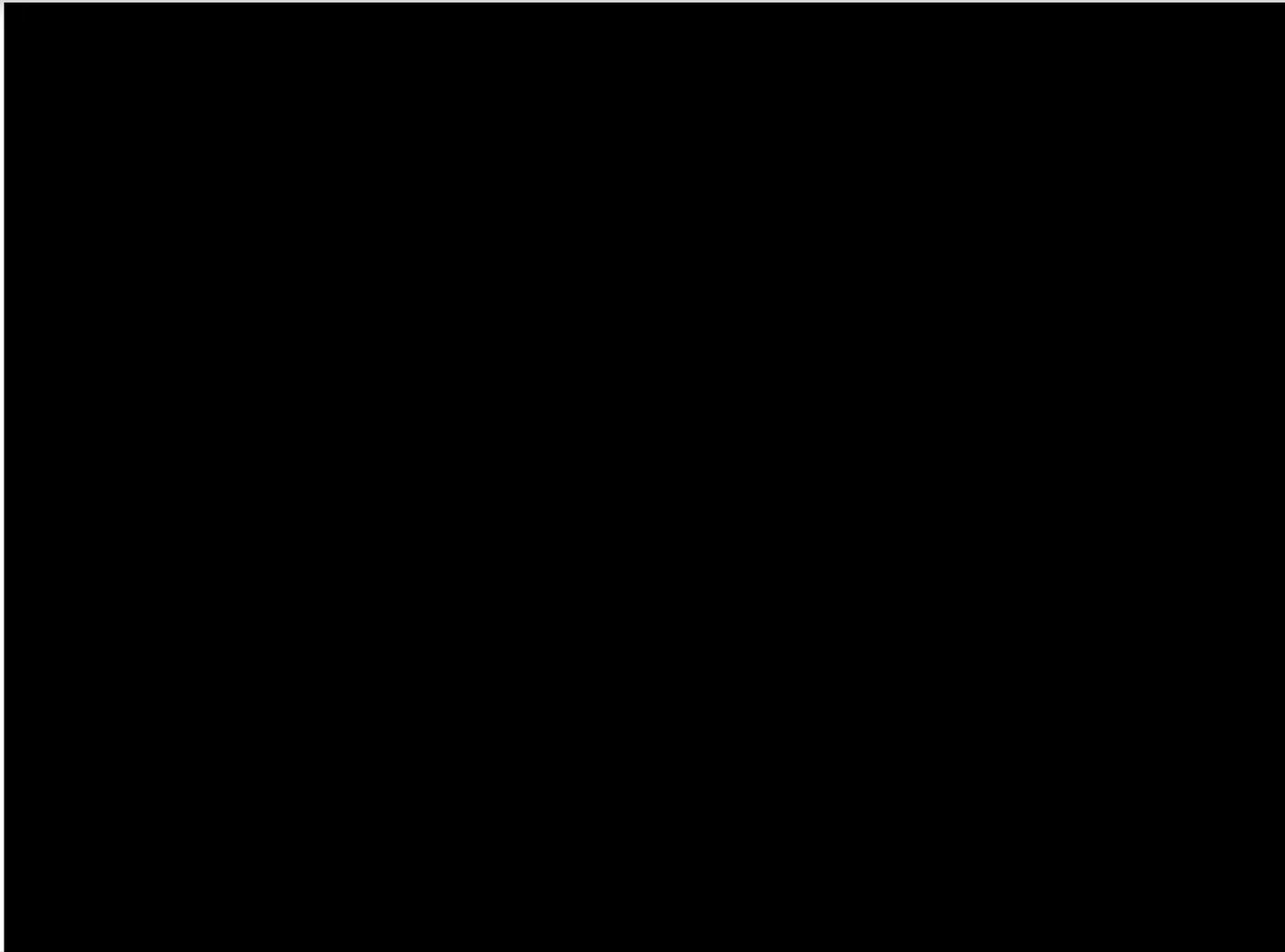


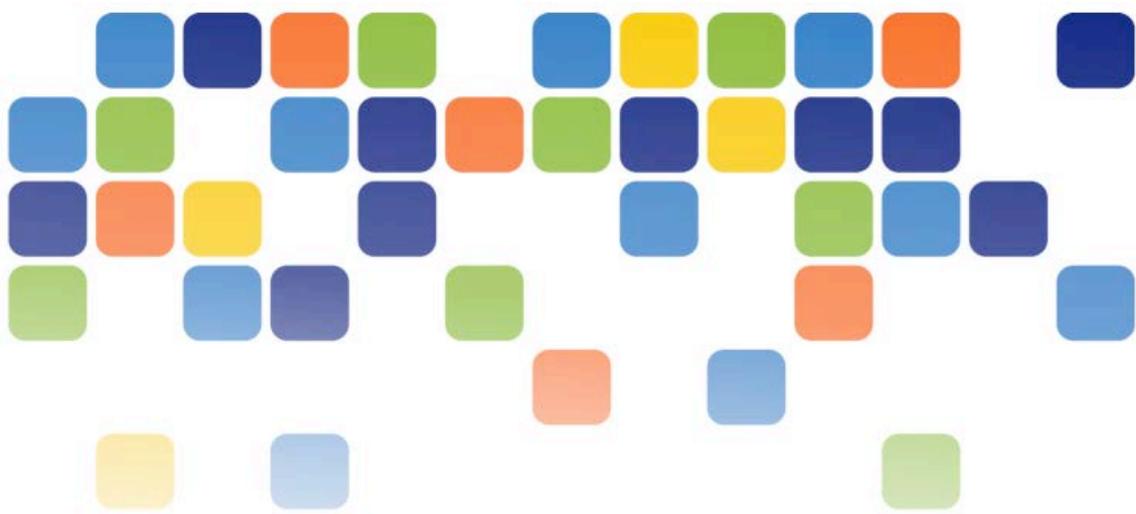
# Employee Misclassification

# Employee Misclassification

- **A Video Overview of Employee Misclassification**

# Video





# Employee Misclassification

# Employee Misclassification

## Employee Misclassification is big and growing

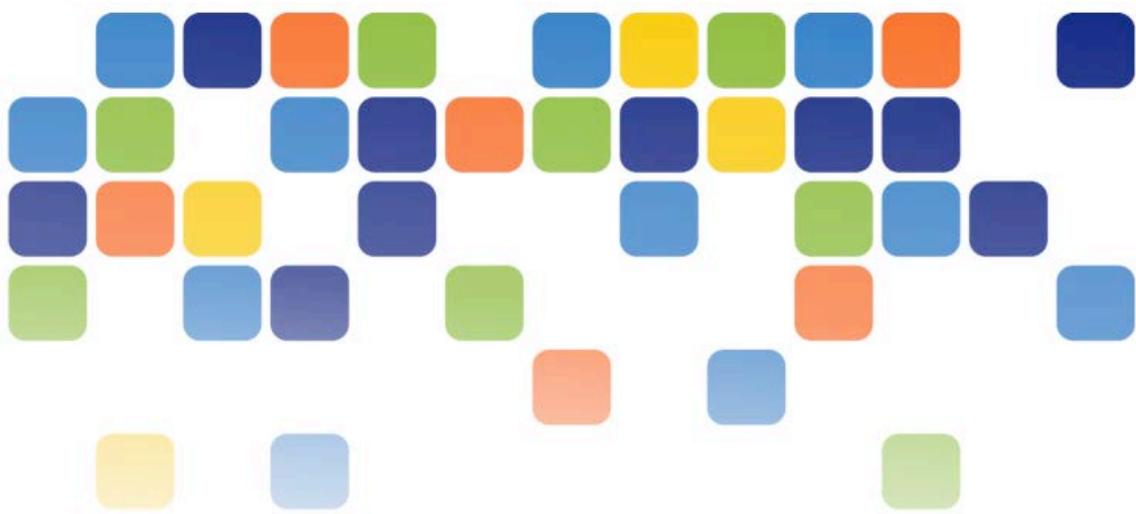
- **Studies indicate 30% of employers misclassify**
  - A 2000 US DOL study found **30% of employers** misclassified employees as independent contractors
- **Studies also indicate it is increasing**
  - 2005 BLS study - misclassification **increased 15%** over 4 years
  - 2007 New Jersey audit – **up to 42% of employers misclassified**
  - A 2010 Washington State Underground Economy Benchmark report found **62% of audited employers misclassified** workers

# Employee Misclassification

## Why should you care?

- **It hurts everyone**
  - Family, friends, state and local government, honest employers
- **Claim reasons**
  - Need to be aware of how common it is
  - Should not rely on what employer reports



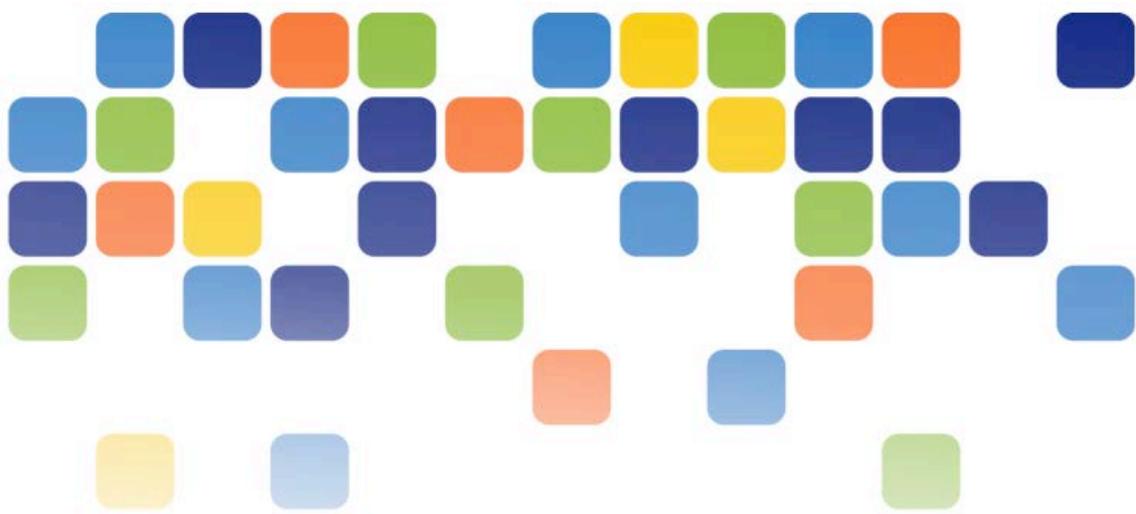


# What is an Independent Contractor?

It depends –

on where you are and what the law is

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# **Virginia law on Independent Contractor vs. Employee**

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# Virginia on “Independent Contractor”

- **Determining independent contractor vs. employee**
  - Guidance from the Act
  - Guidance from the Courts
- **Consider case law**



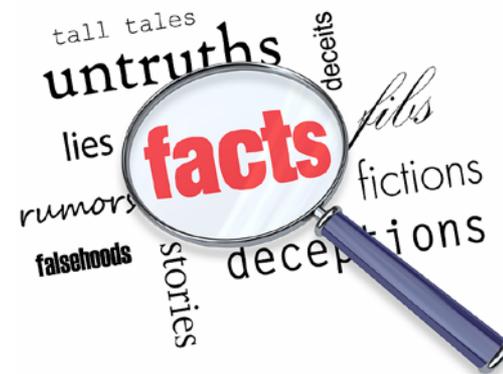
# Guidance from the Act

- **“Independent contractor” is not defined in the Act**
- **Employee is broadly defined**
  - Every person in the service of another
  - Any contract of hire, written or implied
  - Includes undocumented workers, minors, trainees, part-time or temporary workers



# Court Guidance

- Most of our guidance is from the Courts
- “What constitutes an employee is a question of law; but, whether the facts bring a person within the law’s designation, is usually a question of **fact.**”
  - Baker v. Nussman & Cox, 152 Va. 293, 298, 147 S.E. 246, 247 (1929)



# Court Guidance continued

- **Virginia workers' compensation hearing decisions address independent contractor vs. employee**
  
- **The elements of an employment relationship<sup>1</sup> are**
  1. Selection and engagement of the worker
  2. Payment of wages
  3. Power of dismissal; and
  4. Power of control of the worker's actions\*

**“The power of control is the most significant indicium of the employment relationship.”**

<sup>1</sup>Richmond Newspapers Inc. v. Gill, 224 Va. 92, 98, 294 S.E.2d 840, 843 (1982)



# Court Guidance continued

- **Dillon Construction v. Carter** 55 Va. App. 426, 686 S.E.2d 542, (2009)
  - Skilled carpenter was injured working for Dillon Construction
- **Facts**
  - Carter employed by Dillon as a carpenter until 2006
  - Dillon employed him as an “Independent Contractor” after 2006
  - Carter paid his own taxes; he brought his own small tools to work
- **Findings**
  - Carter was treated like any other Dillon skilled carpenter
  - Carter performed the same work before and after 2006
  - Employer can’t simply designate an “independent contractor”
  - Carter found to be a covered employee under the Act.

# Court Guidance continued

## ■ **Richmond Newspapers, Inc. v. Gill**

224 Va. 92, 294 S.E.2d 840 (1982)

### ■ **The facts**

- Newspaper entered into agreement with Gill; could terminate
- Gill was a route carrier, delivered papers to customers
- Gill purchased papers wholesale and sold them to customers
- Newspaper had the right to control Gill's delivery route
- Newspaper required prompt delivery of the papers
- Newspaper required Gill maintain a minimum level of circulation
- Gill died delivering papers



***Independent contractor or employee?***

# Court Guidance continued

- **Richmond Newspapers, Inc. v. Gill, continued**
- **Findings**
  - Court determined Newspaper had the power to ***control results***
  - **Did not control manner or means of how work was performed**
  - Gill was found to be independent contractor
  - This doesn't mean all route carriers are independent contractors
- **Consider Hann v. Times- Dispatch Pub. Co.**  
166 Va. 102, 184 S.E. 183 (1936)
  - Court determined route carrier to be an employee

# Analyze the Facts

- **Purvis v. Porter Cabs, Inc.** 38 Va. App. 760, 568 S.E.2d 424 (2002)
  - Porter hired drivers
  - Porter could fire drivers
  - Porter Cabs on each cab
  - Drivers had to follow rules
  - Drivers could choose own route
  - Drivers earned a portion of each fare
- **Test**
  - Employer had the right to control the worker, was not required to exercise control.
- **Finding:**
  - Employee



# Additional guidance

## A few more points from Court guidance

- **“No hard and fast rule exists for determining if a person is an employee of a company as opposed to an independent contractor.”** Creative Designs Tattooing Assocs. v. Estate of Parrish, 56 Va. App. 299, 308, 693 S.E.2d 303, 308 (2010)
- **The label that the parties put on their relationship is not controlling.** Virginia Employment Comm’n v. A.I.M. Corp., 225 Va. 338, 347, 302 S.E.2d 534, 539 (1983)
- **“If the [worker] is free to adopt [the] means and methods as he chooses to accomplish the result, he is not an employee but an independent contractor.”** Virginia Employment Comm’n v. A.I.M. Corp., 225 Va. 338, 347, 302 S.E.2d 534,540 (1983)



# Claim considerations

**Employee misclassification is happening, so -**

- **Perform an independent investigation**

- Do not get caught up with designations or manner of pay
- Are there similarly situated workers that are employees?
- Who provides the tools or equipment?
- How much skill or expertise is involved in the work?



- **Always review the four important question areas:**

1. Was worker selected
2. Did worker earn pay or wages? (or commission...or other remuneration?)
3. Could worker be dismissed?
4. Does employer have the ability to exert control over the worker?

# Questions?

**Index Cards or bulletin board by registration desk**

**OR**

**Contact the Commission's Insurance Department:**

- [vwcinsurance@workcomp.virginia.gov](mailto:vwcinsurance@workcomp.virginia.gov)
- Toll free - 877-664-2566