

# STATEMENT OF SCOPE

Department of Workforce Development

## **Rule No.**

Chapter DWD 21, Wis. Admin. Code

## **Relating to**

Willful Misclassification

## **Rule Type**

Permanent

## **Detailed Description of the Objective of the Proposed Rule**

This rule will create ch. DWD 21 to define what constitutes willful misclassification of an employee as an independent contractor rather than an employee, with the intent to evade laws related to worker's compensation, unemployment insurance (UI) or wage and hour.

## **Description of Existing Policies Relevant to the Rule, New Policies Proposed to be Included in the Rule, and an Analysis of Policy Alternatives**

Under existing laws, employers classify and treat each worker as an employee or an independent contractor. This classification determines whether or not the employer has obligations under the laws on unemployment insurance, worker's compensation, minimum wage and overtime. Under existing laws, the classification of a worker may be reviewed and changed by the department, based on standards in the law.

2009 Wisconsin Act 288 (Act 288) created a penalty for intentional misclassification and has directed the Department of Workforce Development (DWD) to promulgate rules defining what constitutes the willful misclassification of an employee as a nonemployee by an employer. An employer subject to the willful misclassification penalty under Act 288 includes an employer engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing or similar construction projects or engaged in the painting or drywall finishing of buildings or other structures.

DWD is considering defining willful misclassification to include an employer that intentionally continues to classify a worker as an independent contractor after the department provided a final determination finding the worker to be an employee of that employer.

The alternative to proceeding with this rule is to do nothing. If the department does not define what constitutes willful misclassification, the department rules will be inconsistent with state statute.

## **Detailed explanation of statutory authority for the rule, including the statutory citation and language**

Section 111.327, Stats., provides "Any employer described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures who willfully and with intent to evade any

requirement of this subchapter misclassifies or attempts to misclassify an individual who is an employee of the employer as a nonemployee shall be fined \$25,000 for each violation. The department shall promulgate rules defining what constitutes a willful misclassification of an employee as a nonemployee for purposes of this section and of ss. 102.07 (8) (d) and 108.24 (2m)."

**Estimate of amount of time that state employees will spend developing the rule, and other resources necessary to develop the rule**

The total amount of staff time is estimated to be 40 hours.

**List with description of all entities that may be affected by the proposed rule**

The entities that may be affected by the proposed rule are employers engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects, or engaged in the painting or drywall finishing of buildings or other structures that knowingly misclassifying employees as independent contractors.

**Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule**

The U.S. Department of Labor (USDOL) enforces the Fair Labor Standards Act, 29 U.S.C. 201. USDOL has the authority to investigate worker misclassification in virtually all types of businesses within the United States, with relatively few exceptions. By contrast, Wisconsin statutes limit penalties for willful misclassification of employees to employers that are involved in the construction industry.

The U.S. Internal Revenue Service (IRS) also investigates worker classification cases. The IRS is granted this authority in the Internal Revenue Code.

**Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses)**

The proposed rule is anticipated to have a positive impact on businesses, including small businesses, who properly classify their employees, by reducing the impact of employers that knowingly misclassify employees as independent contractors and accordingly do not pay unemployment insurance taxes, avoid workers compensation insurance and do not withhold state, federal and social security taxes.

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