

The Small Business Nightmare: Misclassification of Employees as Independent Contractors and Misclassification of Non-Exempt Employees as Exempt under the Fair Labor Standards Act

**Strategic Solutions for Solo & Small Firms
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TABLE OF CONTENTS

	<u>Page</u>
Misclassification of Employees as Independent Contractors	1
I. Why Businesses Prefer Independent Contractor Status	1
II. The Government Has Noticed	2
III. The High Risks of Being Wrong	4
IV. Factors to Determine Whether an Individual is an Employee or an Independent Contractor	5
V. Contract Drafting Tips	8
Misclassification of Non-Exempt Employees as Exempt	10
Conclusion	11

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

I. WHY BUSINESSES PREFER INDEPENDENT CONTRACTORS

In the modern workplace, the use of independent contractors has flourished. For a company, the use of independent contractors has numerous benefits.

A. Taxes. By classifying a worker as an independent contractor, an employer does not need to withhold income taxes, and relieves itself of the obligation to pay, among others, the employer's and employee's share of Social Security taxes, payroll taxes, and unemployment insurance taxes. *See, e.g.* I.R.C. §3509, Minn. Stat. § 268.035, subd. 15 (1).

B. Benefit Plans. Generally, independent contractors are not eligible for benefits under the principal's employee benefit plans (such as health insurance or pension benefits). Typically, such employee benefits cost employers between 15% - 30% of an employee's base pay.

C. Workers' Compensation. Under the Minnesota Workers' Compensation Act, only employees are eligible to collect compensation for work-related injuries. Minn. Stat. § 176.021. Independent contractors are not eligible. Minn. Stat. § 176.011, subd. 9.

D. No Minimum Wage or Overtime Pay Requirements. Independent contractors, unlike employees, are not subject to the requirements of the Fair Labor Standards Act, including overtime. *See* 29 U.S.C. §§ 206, 207. Likewise, workers who are properly classified as independent contractors are not employees and therefore are not entitled to overtime pay under Minnesota law. Minn. Stat. § 177.25.

E. Liabilities. In general, an employer is vicariously liable for acts committed by an employee that are within the scope of the employee's employment. *See Laurie v. Mueller*, 78 N.W.2d 434 (Minn. 1965). This can include torts, negligence, and acts in furtherance of the employment. *See* Stephen F. Befort, *Employment Law & Practice* 2d, 17 Minnesota Practice Series §8.2 (2003). Conversely, a principal generally is not liable for the actions of an independent contractor because independent contractors are "not subject to any control or right of control with respect to their physical conduct in carrying out the undertaking." *Urban ex rel. Urban v. American Legion Post 184*, 695 N.W.2d 153, 160 (Minn. Ct. App. 2005) (quoting *Frankle v. Twedt*, 47 N.W.2d 482, 487 (1951)).¹

¹ However, if an agency relationship has been formed, the principal will likely be liable for the individual's actions, even if the individual is an independent contractor. *Pastor v. Florey*, No. C9-99-1743, 2000 WL 388062 *4 (Minn. App. April 18, 2000) ("an independent contractor may be an agent of the hirer for purposes of vicarious liability if there is a fiduciary relationship, and continuous subjection to the will of the principal.")

F. Indemnification. Minn. Stat. § 181.790 generally requires an employer to indemnify its employees in certain situations.² In addition, there are several other statutes that provide for the indemnification of certain types of employees.³ An independent contractor, however, is not an employee and is therefore not indemnified by statute for actions performed, even within the scope of the individual's duties under the independent contractor agreement.

G. Fewer Legal Protections. Many laws that protect employees do not apply to independent contractors. *See, e.g.*, 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111(4) (ADA); Minn. Stat. § 181.932, Subd. 2 (Minnesota Whistleblower Statute).

H. Flexibility. By using independent contractors, businesses can more easily respond to market conditions. When they are busy, they retain more contractors. When they are slow, they terminate some contractors.

II. THE GOVERNMENT HAS NOTICED

Among others, businesses that improperly classify workers as independent contractors deprive workers of federal, state and local employment-related protections, put businesses that properly classify workers as employees at a competitive disadvantage, and deprive the government of tax revenues. Not surprisingly, governmental agencies have stepped up their efforts in recent years to ensure employees are not being misclassified as independent contractors. For example:

A. Federal Agencies.

1. The federal Government Accountability Office (GAO) has estimated that the government loses more than 2.7 billion dollars each year in unpaid social security, unemployment, and income taxes as a result of independent contractor misclassification. (GAO Report 07-859 (May 8, 2007)).

2. Beginning in November 2009, the Internal Revenue Service began conducting random audits of companies, with a special focus on independent contractor misclassification. (IRS Headline Volume 280 (Nov. 9, 2009)).

3. According to a study commissioned by the federal Department of Labor, up to 30% of companies in the US misclassify workers as independent contractors. (GAO Report 09-717 at 11-13).

²The employer is obligated to “defend and indemnify its employees for civil damages, penalties, or fines claimed or levied against the employee, when the employee was acting in the performance of the duties of the employee's position; was not guilty of intentional misconduct, willful neglect of the duties of the employee's position, or bad faith; and has not been indemnified by another person for the same damages, penalties, or fines.”

³For example, under Minn. Stat. §302A.521, employees (including directors and officers) of corporations are indemnified in certain situations. Minn. Stat. §317.521 provides for the indemnification of directors, officers, and employees of non-profit corporations in similar language as listed above. Minn. Stat. §322B.699 similarly indemnifies directors, officers, and employees of Minnesota Limited Liability Companies.

4. In 2010, Congress increased spending for the Department of Labor by more than \$600,000,000, in order to increase enforcement. The Department of Labor's wage and hour division has already added over 250 investigators to focus on wage and hour compliance issues, and the Department of Labor has proposed a 2011 budget which includes a 25 million dollar program called the "Misclassification Initiative". (Budget of the U.S. Government, Fiscal Year 2011, at 100).

B. Pending Federal Legislation. Various bills have been introduced in Congress or proposed by the Obama administration to enhance enforcement powers for classification in various federal agencies, to make it more difficult for businesses to defend against misclassification claims, and to increase penalties. *See, e.g.*, The Fair Playing Field Act of 2010, S. 3786, H.R. 6128 (111th Congress); The Employee Misclassification Prevention Act of 2010, S. 3254, H.R. 5107 (111th Congress).

C. Minnesota Agencies.

1. In late 2006, the Minnesota Department of Revenue's withholding division implemented a new audit program that targeted worker classification. Out of the first 37 audits that it completed, 24 (65%) resulted in reclassification of at least one worker from independent contractor status to employee status. Among the 24 audited employers that misclassified workers, the amount of taxable payroll associated with the reclassified employees (\$10,000,000) was nearly twice the payroll originally reported to the Department of Revenue (\$5,700,000). (Office of the Legislative Auditor. "Misclassification of Employees as Independent Contractors." Evaluation Report Nov. 2007 at 16).

2. In November 2007, the Minnesota office of the legislative auditor reported an estimated 14% of employers subject to Minnesota unemployment insurance taxes misclassified at least one worker in 2005, which it estimated to be 17,500 employers who were out of compliance. Moreover, the legislative auditor indicated that this estimate was likely quite low, since it did not account for businesses that do not treat any workers as employees. (Office of the Legislative Auditor. "Misclassification of Employees as Independent Contractors." Evaluation Report Nov. 2007 at 15).

3. The legislative auditor recommended that the Minnesota Department of Employment and Economic Development, the Minnesota Department of Labor and Industry and the Minnesota Department of Revenue work together to coordinate definitions, legislation, audits, and investigation relating to worker classification, and to increase litigation options and various penalties. Further, it recommended that the three departments establish procedures to routinely share information about identified instances of misclassification and work together and with the legislature to address them. (Office of the Legislative Auditor. "Misclassification of Employees as Independent Contractors." Evaluation Report Nov. 2007 at 33-36).

D. Minnesota Legislation.

1. In 2005, the Minnesota Legislature enacted Minn. Stat. §181.722, which forbids misrepresentation by an employer of the employment relationship. The law prohibits an employer (1) from misrepresenting the nature of the relationship to any government unit or to its employees and (2) from requesting or requiring an employee to enter into an agreement that

results in misclassification. The statute provides that the nature of the employment relationship is determined by the tests used under applicable workers' compensation and unemployment insurance laws.

2. In 2010, the Minnesota Legislature enacted amendments to Minn. Stat. § 268.035, Subd. 23a(g) and Minn. Stat. § 268.085, Subd. 16(d).

III. THE HIGH RISKS OF BEING WRONG

Because of the benefits, many employers incorrectly classify some individuals as independent contractors.

A. Numerous Avenues to Challenge. An employer's classification of an individual as an independent contractor may be challenged in a number of contexts: audits from the IRS, state taxing authority, Department of Labor, pension authorities, and other governmental agencies; in claims by workers for workers' compensation or unemployment benefits; in private lawsuits where the actions of the worker are sought to be attributed to the putative employer; in actions from labor organizations; and individual or class action law suits.

B. Use of Independent Contractor Agreements. Many companies believe that having a written contract which states that the relationship is an independent contractor relationship insulates them from liability. They are wrong. While a written agreement is recommended and can be helpful, if the relationship itself is actually an employer-employee relationship then it will not matter that the contract says otherwise. "The labels that the parties give themselves is not determinative; the relationship is determined by the law, not the parties." *Moore Associates, LLC. v. Commissioner of Economic Security*, 545 N.W.2d 389, 393 (Minn. App. 1996); *Speaks, Inc. v. Jensen*, 243 N.W.2d 142,145 (1976).

C. Statutory Obligations and Penalties. Misclassifying a person as an independent contractor can result in significant liabilities and penalties – potentially even criminal sanctions. For example:

1. **Fair Labor Standards Act.** The Fair Labor Standards Act ("FLSA") and similar state statutes require employers to pay employees certain minimum wages and require overtime to be paid to non-exempt employees under specified circumstances. Such requirements do not apply to independent contractors. Employers who violate the federal FLSA or the Minnesota Fair Labor Standards Act are liable for, among others, retroactive assessment of unpaid minimum wage and overtime payments, as well as double damages, penalties, and payment of the employee's attorneys' fees. 29 U.S.C. 216(b); Minn. Stat. § 177.27.

2. **Tax.** If the IRS finds that an employer has misclassified an employee as an independent contractor, the employer will be obligated to pay back taxes, as well as interest and potential penalties. IR-2004-47, April 5, 2004. Also, if the issue was raised by an individual "blowing the whistle," that person may be entitled to be a whistleblower fee of up to 30 percent of the amount of tax, interest, and penalties ultimately collected by the IRS. (Tax Relief and Health Care Act of 2006 (P.L. 109-432).

3. **Benefit Plans.** If, as a result of being misclassified as an independent contractor, an individual is not eligible to receive employee benefits, the employer risks the disqualification of its benefit plans. This is a potentially catastrophic risk, as it affects all employees and not merely the employee who was misclassified.

4. **Workers' Compensation.** Failure to provide workers' compensation insurance coverage where required by law can result in substantial financial penalties, including the assessment of \$1,000.00 per week of non-compliance for each uninsured employee. Minn. Stat. §176.181, subd. 3. In addition, an employer that willfully and intentionally fails to provide such coverage is guilty of a gross misdemeanor. Minn. Stat. § 176.181, subd. 5.

5. **Unemployment.** If an employer makes a false statement knowing it to be false or without a good faith belief as to its correctness in order to prevent or reduce the amount of unemployment coverage to an individual or the payment required by the employer (such as the classification of an employee as an independent contractor to reduce payments), the employer will be subject to a \$500 penalty or 50 percent of the reduced unemployment benefits or payment required, whichever is greater. Minn. Stat. § 268.184.

6. **Insurance.** Insurance companies are likely to deny an employer's coverage (e.g. workers' compensation, employment practices liability, other liability) relating to an "independent contractor" who was not disclosed as an "employee" at the time of the insurance application. Insurance carriers are even more likely to refuse to pay for penalties resulting from improper classification.

IV. FACTORS TO DETERMINE WHETHER AN INDIVIDUAL IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

There are seemingly endless statutory, regulatory and common law definitions of independent contractors and tests to determine who is an employee who is an independent contractor. When analyzing an issue, it is critical to make sure you carefully review all applicable guidelines. For example:

A. **IRS.** The IRS has historically applied a 20 factor analysis to be used as a guide to determine the status of a worker. Although no single factor is more important than the others, the most important aspect of the relationship is the degree of control exercised over the worker. Workers are generally considered employees if they:

1. Must comply with the employer's instructions about work.
2. Receive training from, or at the direction of, the employer.
3. Provide services that are integrated into the employer's business.
4. Provide services that must be rendered personally.
5. Participate in hiring/firing and compensation decisions.
6. Have a continuing working relationship with the employer.
7. Must follow set hours of work.
8. Work full time for the employer.
9. Do their work on the employer's premises.

10. Must do their work in a sequence set by the employer.
11. Must submit regular reports to the employer.
12. Receive payments of regular amounts at set intervals.
13. Receive payments for business and/or travel expenses.
14. Rely on the employer to furnish tools and materials.
15. Lack major investment in facilities used to perform services.
16. Cannot make a profit or suffer a loss from their services.
17. Work for one employer at a time.
18. Do not offer their services to the general public.
19. Can be fired by the employer.
20. May quit work at any time without incurring liability.

IRS Rev. Rul. 87-41 (IRS 1987).

The 20 factors are intended to indicate whether the principal has a sufficient degree of control over the worker such that an employer-employee relationship exists. In general, the greater the control exercised by the principal, the more likely the worker will be found to be an employee.

B. Economic Realities Test and the FLSA. Courts analyzing the employment status of an individual in an FLSA action have created and utilized the “economic realities test.” The factors initially established in *United States v. Silk*, 331 U.S. 704 (1947) (“the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision”) have evolved into a five factor test: the degree of control exercised by the business; the extent of the relative investments of the worker and the business; the degree to which the worker’s opportunity for profit or loss is determined by the business; the skill and initiative required in performing the job; and the permanency of the relationship. *Brock v. Mr. W Fireworks*, 814 F.2d 1042 (5th Cir.), *cert. denied*, 484 U.S. 924 (1987). Some jurisdictions add a sixth factor to the inquiry: whether the service rendered by the worker is an integral part of the alleged employer’s business. *See Brock v. Superior Care*, 840 F.2d 1054 (2d Cir. 1988); *Donovan v. DialAmerica Mktg.*, 757 F.2d 1376 (3d. Cir.), *cert denied*, 474 U.S. 919 (1985); *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987); *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

C. Federal Common Law Right to Control Test and National Labor Relations Act. Federal courts have generally applied the common law agency or "right to control" test. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. ins. Co. v. Darden*, 503 U.S. 318 (1992), which considers several factors: the alleged employer's right to control the manner and means by which the individual's work is accomplished; the skill required to perform the individual's duties; the source of tools and instrumentalities needed to perform the duties; the location where work is performed; the duration of parties' relationship; the businesses' right (or lack thereof) to assign additional projects; the individual's discretion over when and how long to work; the method of payment; the individual's role in hiring and paying assistants; whether the work is part of alleged employer's regular business; whether "employee benefits" are provided; and the tax treatment of the individual.

Since the 1947 Taft-Hartley amendments to the National Labor Relations Act, which contained

provisions excluding independent contractors from its coverage, the National Labor Relations Board (“NLRB”) has applied the common law "right of control" test to determine whether particular classes of individuals are employees or independent contractors for purposes of NLRA coverage.

D. Minnesota Common Law. Minnesota courts will consider: who has the right to control the means and manner of performance; the mode of payment; who furnishes the material or tools; who controls the premises where the work is done; and the company’s right to discharge. *Goodnature v. Mower County*, 558 N.W.2d 19, 21 (Minn. Ct. App. 1997). The right to control the means and manner of performance generally carries the greatest weight. *Id.*; *see also Speaks, Inc. v. Jensen*, 243 N.W.2d 142, 144 (Minn. 1976) (observing that an employee “undertakes to achieve a given result under an arrangement with another who has authoritative control over the manner and means in which and by which the result shall be accomplished” while an independent contractor “agrees to achieve a given result but is not subject to the orders of another as to the method or means to be used.” (internal quotation omitted)).

E. Minnesota Regulations

Generally, Minnesota agencies have adopted the economic realities tests as a means to determine whether an individual is an independent contractor or an employee. Pursuant to Minnesota Rule 5200.0221, “all factors must be weighed to determine whether the worker is *economically dependent* upon the business to which the worker provides services.”(Emphasis added). *See also* Minnesota Rule 5224.0340 (listing other factors to determine independent contractor status); Minnesota Rule 5224.0330 (discussing the issue of the control of an individual’s performance).

The Minnesota Court of Appeals recently summarized Minnesota common law and Minnesota Rule 3315.0555, as follows:

Traditionally, five factors are used to determine whether a worker is an employee or an independent contractor: "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964). Of these five factors, the two most important are "the right or the lack of the right to control the means and manner of performance," and the right or the lack of the right "to discharge the worker without incurring liability." Minn. R. 3315.0555, subp. 1 (2009).

The Minnesota Rules also provide additional factors to be considered when determining whether an employment relationship exists, including: (1) whether the individual makes services available to the public; (2) whether the individual is compensated on a job basis or by the hour; (3) whether the individual is in a position to realize a profit or loss as a result of the services offered; (4) whether the individual may end the relationship without incurring liability; (5) whether the individual made a substantial investment in the facilities used to perform the services; (6) whether the individual works simultaneously for multiple firms; (7) whether the individual is accountable for his or her own actions while working; and (8) whether the services performed by the individual are in the course of the employer's organization, trade or business.

Minn. R. 3315.0555, subp. 2 (2009). *St. Croix Sensory Inc. v. Dept of Employment and Econ. Dev.*, No. A09-1627 (Minn. Ct. App. 2010).

Notwithstanding the general nature of the foregoing, the factors to be applied may vary depending upon the departmental agency that is involved. For example: Minnesota Rule 3315.0555 (Minnesota Department of Employment and Economic Development); Minnesota Rule 5224.0010 – 5224.0340 (Minnesota Department of Labor & Industry) (including workers' compensation). Further, the specific job at issue may have its own unique factors that need to be applied to determine whether a person in that position is an employee or independent contractor. *See, e.g.*, Minnesota Rule 5224.0010 – 5224.0340 (defining independent contractors for purposes of workers' compensation for various positions).

F. Industry Specific Requirements

To make the process even more challenging, some industries have their own, specific requirements to determine whether someone is an independent contractor. For example:

1. Commercial or Residential Building Construction or Improvements. Minn. Stat. §181.723, which took effect on Jan. 1, 2009, is used to determine whether an individual who performs commercial or residential building construction or improvements is an independent contractor. Among others, to be an independent contractor, such an individual must obtain an “independent contractor exemption certificate” from the Commissioner of Labor & Industry. To obtain such a certificate, an individual must, among others, satisfy nine separate requirements. Minn. Stat. §181.723, Subd. 5(8).

2. Trucking or Messenger/Courier. Minn. Stat. § 176.043, which took effect on August 1, 2009, is used to determine independent contractor status for people operating a car, van, truck, tractor or truck-tractor that is licensed and registered by a governmental motor-vehicle agency is an employee unless seven factors, as specified in the statute, are present.

V. CONTRACT DRAFTING TIPS

While a written independent contractor agreement is not a binding determination that an independent contractor relationship exists, a well written and applied independent contractor agreement can help avoid problems and minimize the risks. Among others, a good independent contractor agreement should address the following:

A. Define the Relationship. Clearly state that the intention of the parties is to have an independent contractor relationship, and not an employer-employee relationship. Stress, in language appropriate for the circumstances, that the hiring entity does not have control or responsibility with respect to the daily expectations of the independent contractor and his/her/its employees, but rather, is only interested in the end result. The contractor should also use his/her/its own tools and equipment, and schedule his/her/its work times.

B. Compensation. State that wages will not be paid and withheld on a W-2 basis, and that the contractor will be paid on a 1099 basis. Confirm that the independent contractor has complete and total responsibility to withhold, administer and pay all applicable federal, state and local employment and income taxes. Moreover, it is better to pay by the project than by the hour.

C. Employee Benefits. State clearly that the independent contractor has full responsibility to maintain and administer any and all benefit plans for him/her/it and the independent contractor's employees, and that the independent contractor and his/her/its employees are not eligible for the company's employee benefits.

D. Workers' Compensation. Expressly state that the independent contractor, and not the employer, is obligated to provide workers' compensation insurance, and to comply with all applicable workers' compensation laws and regulations.

E. Maintenance and Retention of Payroll and Benefit Records. The contract should include language requiring the independent contractor to maintain and complete records as legally required with respect to wages, benefits and personnel actions, and to comply with all applicable federal, state and local laws regarding such records.

F. Other Legal Compliance. The contract should expressly state that the independent contractor, and not the hiring entity, has full responsibility for other legal obligations, such as licensing obligations, permit obligations, compliance with state or federal immigration, environmental, import or other rules and regulations, employment laws, etc.

G. Insurance. The contract should clearly state that the independent contractor is obligated to obtain and provide all required insurance, which relates in any way to the services which he/she/it is rendering. Also consider adding the hiring entity as an additional insured, and/or requiring certificates of insurance.

H. Warranties, Representations and Indemnification. Although each situation may vary, it is always important to clarify, up front, who is responsible, legally and otherwise, for what. Often, it is appropriate to have the hiring entity defend and indemnify the independent contractor for certain risks, while the independent contractor defends and indemnifies the hiring entity for others.

I. Supervision, Direction and Control. The agreement should clearly state that the independent contractor is responsible for, and the employer of, its employees and/or subcontractors. It, and not the hiring entity, should retain and exercise supervisory responsibilities and obligations with respect to its employees and subcontractors, including day-to-day control and direction, performance reviews, evaluations, and promotions, and any termination decisions.

J. Termination. Avoid "at-will" language, as this implies an employment relationship. If there will be a penalty if the contractor fails to perform, that should be stated.

MISCLASSIFICATION OF NON-EXEMPT EMPLOYEES AS EXEMPT

Some employees, including “white collar” employees (executive, administrative and professional employees), are exempt from the minimum wage and/or overtime requirements of the federal FLSA.⁴ 29 CFR §541. Many employers wrongly believe that by paying an employee on a salary basis (as opposed to an hourly wage), that employee is exempt. While paying somebody a salary is, in most cases, one requirement for an employee to be exempt, that alone is not enough. Rather, to be exempt, employees must also perform exempt duties. The Department of Labor has a series of “Fact Sheets” that discuss many of the basic requirements to establish that an individual is exempt. The Fact Sheets can be found at: <http://www.dol.gov/whd/fact-sheets-index.htm>.

A. **Executive Exemption** (29 CFR §541.100, et seq.)

1. Salary of at least \$455 per week.
2. Primary duty is to manage the enterprise, or a customarily recognized department or subdivision.
3. Customarily and regularly directs the work of two or more full-time (or equivalent) employees.
4. Authority to hire and fire or recommendations are given particular weight.

B. **Administrative Exemption** (29 CFR §541.200, et seq.)

1. Salary (or fee) of at least \$455 per week.
2. Primary duty is to perform office or non-manual work directly related to the management or general business operations of the company or its customers.
3. Exercises direction and independent judgment with respect to matters of significance.

C. **Learned Professional Exemption** (29 CFR §541.300, et seq.)

1. Salary (or fee) of at least \$455 per week.
2. Primary duty is to perform work that requires advanced knowledge (meaning work that is predominantly intellectual) and includes work requiring the consistent exercise of discretion and judgment.
3. The advanced knowledge must be in a field of science or learning.
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

⁴ This section is based on the Federal Fair Labor Standards Act. Minnesota also has minimum wage and overtime requirements. Exemptions under Federal and Minnesota law are often similar, but the definitions and how to apply the exemptions may vary. When applying these exemptions, be sure to review the Minnesota (or other applicable state’s) definitions to ensure compliance with both state and federal law. In some cases, federal law allows an exemption which Minnesota does not allow (for example, for certain computer professionals).

D. Creative Professional Exemption (29 CFR §541.302)

1. Salary (or fee) of at least \$455 per week.
2. Primary duty is to perform work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

E. Outside Sales Exemption (29 CFR §541.500, et seq.)

1. Primary duty is to make sales or obtain orders or contracts for service or for the use of facilities for which a client or customer will pay consideration.
2. Must be customarily and regularly engaged away from the employer's place of business.

F. Computer Employee Exemption (29 CFR §541.400, et seq.)⁵

1. Salary (or fee) of at least \$455 per week or an hourly wage of at least \$27.63.
2. Employed as a computer systems analyst, computer programmer, software engineer or similar skilled worker in the computer field.
3. Primary duty must be:
 - a. Application of systems analysis techniques and procedures to determine hardware, software or system specifications;
 - b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs;
 - c. The design, documentation, testing, creation or modification of computer programs relating to operating systems; or
 - d. A combination of the above.

G. Highly Compensated Employee (29 CFR §541.601)

An employee who performs office or non-manual work and is paid total annual compensation of at least \$100,000 (and at least \$455 per week on a salary or fee basis) is exempt if the employee customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee.

CONCLUSION

Companies need to exercise caution when classifying employees as non-exempt or when classifying an individual as an independent contractor. The risks of being wrong are substantial, including legal exposure, financial exposure, and expenditure of time.

⁵ Minnesota does not have a computer employee exemption.