One potential area of cost savings for local governments is using independent contractors to perform municipal functions, often in areas like engineering, planning, assessing, human resources, and legal assistance. Contracting these services may be less expensive than hiring employees to perform the same work.

However, municipal employers must ensure that the worker is legally classified as an independent contractor. Misclassifying an individual can be expensive and result in liability for:

- back pay, including overtime;
- health and disability insurance;
- Wisconsin Retirement System (WRS) benefits;
- unemployment and workers’ compensation;
- income taxes and penalties; and
- damages and attorneys’ fees.

In April, Governor Evers created a joint task force comprised of representatives from various state agencies, including the Department of Revenue (DOR) and the Department of Workforce Development (DWD), which includes unemployment, workers’ compensation and equal rights divisions. The purpose of the task force is to coordinate investigation and enforcement of workers misclassified by Wisconsin employers.

### The Economic Realities Test

There is no one standard to determine if a worker is a contractor or an employee. Different factors are used by various regulatory agencies such as the Internal Revenue Service, U.S. Department of Labor, and the Wisconsin DOR and DWD.

In a generic sense, the different tests used by these agencies and by courts employ a six-factor “economic realities” assessment. These six factors are:

- the extent to which the service rendered is an integral part of the employer’s business;
- the permanency and duration of the relationship;
- the nature and degree of the employer’s control over the worker and the work to be performed;
- the worker’s investment in equipment, materials, and staff required to complete the work;
- whether the work requires a special skill; and
- the degree to which the worker has the opportunity for profit or loss.

An independent contractor agreement between the employer and the worker does not determine the type of relationship that exists. The law prohibits employees from waiving their legal rights to such things as wage and hour provisions, WRS, unemployment, workers’ compensation, and protections afforded under anti-discrimination laws; thus, employees cannot relinquish those by agreement. Further, paying a worker on a 1099, rather than a W-2, does not make that worker an independent contractor.

### Simpkins v. DuPage Housing Authority

The Seventh Circuit Court of Appeals, the federal circuit covering Wisconsin, recently decided Simpkins v. DuPage Housing Authority, which is instructive on these points. In Simpkins, the DuPage Housing Authority hired Anthony Simpkins to perform general carpentry and maintenance work. Even though he worked full-time hours exclusively for DuPage, Simpkins and DuPage executed an independent contractor agreement. Simpkins later requested to be reclassified as an employee, but DuPage refused. He subsequently filed suit against DuPage to recover unpaid
overtime and disability benefits, claiming to be an employee under the Fair Labor Standards Act and Illinois state law.

Applying the economic realities test to the facts, the Seventh Circuit found evidence in the record indicating that DuPage had a high level of control over Simpkins’ work, often telling him what to do and when to do it. There was evidence that DuPage purchased many of the tools Simpkins needed to perform his work. The court observed that Simpkins did not have any special skills, noting that employers typically hire an independent contractor because of their specialized skills. Ultimately, the court found the parties’ independent contractor agreement was insufficient to overcome the other evidence in the record suggesting that Simpkins was legally an employee.

While these situations must be evaluated on a case-by-case basis, generally persons who own their own business, possess expertise in a specialized field, carry business insurance, provide their own tools and equipment, and work for multiple clients are correctly classified as independent contractors. On the other hand, as in the Simpkins case, workers who do not own a business, work exclusively for one entity, do not purchase the necessary equipment or carry business insurance, and have less control over when and how the work is performed, will likely be legally regarded as employees.

Wisconsin’s Workers’ Compensation Act

The Wisconsin Workers’ Compensation Act (WCA) provides an important exception to the economic realities test. The WCA has a nine-factor assessment, and all nine factors must be met before a worker can lawfully be considered an independent contractor. "To be considered an independent contractor and not an employee, an individual must meet and maintain all nine of the following requirements:

- Maintain a separate business.
- Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (A Social Security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8) of the Act.)
- Operate under specific contracts.

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• Be responsible for operating expenses under the contracts.
• Be responsible for satisfactory performance of the work under the contracts.
• Be paid per contract, per job, by commission or by competitive bid.
• Be subject to profit or loss in performing the work under the contracts.
• Have recurring business liabilities and obligations.
• Be in a position to succeed or fail depending on business expenses and income.\(^2\)

Wisconsin Stat. § 102.16(5) specifically prohibits workers from waiving their rights under the WCA. This means that a worker who is injured in the course of performing work for the employer will be entitled to workers’ compensation if all nine factors are not met, even if the parties have an independent contractor agreement. This is also true even if other state or federal regulators find a relationship to be appropriately categorized as an independent contractor arrangement.

**Conclusion**

Given the state’s priority of detecting and enforcing against improper worker classifications,\(^3\) organizations should consider auditing any current workers deemed to be independent contractors. The WCA’s nine-factor assessment provides a solid guide for assessing a worker’s classification. Employers should contact employment counsel for assistance with making the appropriate assessments under the various other laws that may apply to their organization.

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\(^3\) See https://content.govdelivery.com/accounts/WIGOV/bulletins/2540de8.