



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.

► p.24

## Building Communities. It's what we do.



**Debt Issuance & Management**

**Financial Management Planning**

**Economic Development & Redevelopment**

**Investment & Treasury Management**

**Arbitrage Consulting**



**EHLERS**  
LEADERS IN PUBLIC FINANCE

---

✉ info@ehlers-inc.com
☎ 1 (800) 552-1171
🌐 www.ehlers-inc.com

## Bigger. Better. Stronger.

Our clients come first. That's why we've expanded our footprint and only hire the best problem solvers. Consult with us today.



Municipal Engineering

Structural Engineering

Transportation/Traffic Construction Services

Stormwater Management

Ecological Services

Landscape Architecture

Surveying

Grant Assistance

GIS



**raSmith**

CREATIVITY BEYOND ENGINEERING

Brookfield, Milwaukee, Appleton, Madison, Cedarburg, Mount Pleasant

raSmith.com | 262-781-1000

- 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.”<sup>2</sup>

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,<sup>3</sup> 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.

### Employees 353

If you’d like to suggest a topic for HR Matters or if you have a question, please email the League at [league@lwm-info.org](mailto:league@lwm-info.org)

2. Wis. Stat. § 102.07(8); see [https://dwd.wisconsin.gov/dwd/publications/wc/WKC\\_13324\\_p.htm](https://dwd.wisconsin.gov/dwd/publications/wc/WKC_13324_p.htm).  
3. See <https://content.govdelivery.com/accounts/WIGOV/bulletins/2540de8>.



## Learn More!

Lisa Bergersen will be presenting *Deep Dive HR 101* at the League’s 121st Annual Conference on Wednesday, October 23 from 9:00 to 11:00 a.m.

One-Day Registration is available! Register now using the Registration Form on page 28 of this magazine or register online <https://www.lwm-info.org/731/Annual-Conference>



Excellence in Engineering  
Since 1946.

Madison  
608.251.4843  
Milwaukee  
414.271.0771

[www.strand.com](http://www.strand.com)



2857 Bartells Drive  
Beloit, Wisconsin 53511  
608.365.4464  
[www.rhbatterman.com](http://www.rhbatterman.com)

engineers surveyors planners



Nielsen Madsen + Barber  
CIVIL ENGINEERS AND LAND SURVEYORS  
Municipal / Transportation / Land Surveying  
Airports / Planning / Construction Management  
Racine, Wisconsin ■ (262) 634-5588 ■ [www.nmbssc.net](http://www.nmbssc.net)



engineers • architects • surveyors

560 Sunrise Drive  
Spring Green, WI 53588  
608-588-7484

310 E. Jackson Street  
Wisconsin Rapids, WI 54494  
715-424-2424

[www.JewellAssoc.com](http://www.JewellAssoc.com)