

# Employee Classification Act

Annual Report | July 2021 – June 2022

**NEBRASKA**

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## Background and Purpose

NDOL efforts enforce labor standards and deter labor violations that result in the misclassification of employees as independent contractors. To determine proper classification of workers, employees or independent contractors, the Internal Revenue Service (IRS) and state tax agencies apply common law criteria and controlling state statutes to examine the degree of control a company has over that worker. Proper classification entitles employees to the protections of wage and hour laws, employment discrimination laws, and unemployment and workers' compensation insurance. The focus on proper classification is also recognized as a revenue-generating measure for federal and state governments. Employers who abide by the law, report quarterly wages, and pay unemployment insurance and other taxes owed, are put at a competitive tax disadvantage by employers who misclassify workers as independent contractors.

A misclassification investigation is initiated when workers, businesses, or government agencies provide tips, referrals, or leads through the online application on the website, the hotline, and as a result of general telephone or walk-in inquiries regarding the law. The agency also conducts employer and worker interviews during random worksite visits. Educational information on the Employee Classification Act (ECA) and the penalty for violation to employers and workers is provided during worksite visits and field audits. Investigations are particularly directed at industries that have higher rates of violations, such as construction, transportation, childcare, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.

Additionally, NDOL makes referrals and collaborates with the Nebraska Department of Revenue (NDOR) and Workers Compensation Court (WCC) to ensure the collection of required taxes, interest and penalties, and affords employees the protections of law under the ECA. Other enforcement actions may be taken to protect Nebraska workers and help businesses properly classify workers.

NDOL works to improve proper classification of workers through continual review of its programs. The success of proper employee classification is grounded in the careful, detailed investigation and audit process of the Contractor Registration/Classification Unit and Unemployment Insurance Tax field representative staff. The investigators are thorough in their observations at the work site, including their interviews with workers and management. Field representatives are diligent in their review of often voluminous and complex financial records. The goal is to gather evidence from all interested parties to ensure a complete picture of the business operation and relationships between the employer and workers.

## Misclassification Investigative Programs

NDOL investigates misclassification in two program areas: Contractor Registration/Employee Classification and Unemployment Insurance Tax.

1. The Employee Classification Unit in the Contractor Registration program investigates possible ECA violations, creating and assigning a file for every valid tip, referral, and lead received. Assigned files are prioritized and their resolution depends upon the complexity of the issues, the level of evidence gathered, and the cooperation of the workers and employer. The investigative determination is based on all available evidence. The employer ultimately receives a determination letter in the mail advising them if workers have been misclassified and if any unemployment insurance taxes, related penalties and interest are owed. The UI Tax division also investigates UI benefit claims that lack wage credits as a means of identifying misclassified workers.

- Sixteen UI Tax program field representatives conduct employer wage verification audits utilizing a web-based audit process that loads 1099 extract information into an audit application. The 1099 data identifies employers who issued between one and 50 1099s. Data from the 1099 extract files for targeted industries identifies potential employers for misclassification audit purposes. Data can also be refined to identify specific trades within North American Industry Classification System (NAICS) codes.

The federal government’s emphasis on employee misclassification prevention is underscored by audit measures outlined in the Unemployment Insurance Program Letter (UIPL) 30-10 from the United States Department of Labor (USDOL), requiring state unemployment insurance agencies to align federal and state practices by conducting audit and investigative programs to detect employers that misclassify or fail to properly report compensation to workers with the effect of excluding employees from protections of law.

## Contractor Registration Unit Activities

### Website/Hotline

NDOL maintains a web page that provides narrative of the law, links to required postings (English and Spanish versions), and the ECA Report Form, allowing for the confidential reporting of suspected violations of employee classification. The web page features links to sources of information regarding worker misclassification, including contractor registration, the WCC, NDOR, and the IRS (SS-8 Determination of Status Form).

The web page is located at [dol.nebraska.gov/LaborStandards/WorkerRights/EmployeeClassificationAct](http://dol.nebraska.gov/LaborStandards/WorkerRights/EmployeeClassificationAct).

## Employee Classification/Contractor Registration Unit

### Cases and Investigations

Initiated By	Cases	Citations Issued	# of Misclassified Workers	Cases w/ Fines Collected	Fines Collected	Cases Payment Pending	Fine Payment Pending	Cases w/ Unpaid Citations	Fine Amount Unpaid
Construction Site Visits	57	42	156	31	\$56,650	1	\$600	11	\$20,500
Hotline	16	5	12	3	\$2,150	1	\$1,600	2	\$2,000
Wage Claim	7	4	5	0	\$0	0	\$0	4	\$2,500
Website	4	0	0	0	\$0	0	\$0	0	\$0
<b>TOTALS</b>	<b>84</b>	<b>51</b>	<b>173</b>	<b>34</b>	<b>\$58,800</b>	<b>2</b>	<b>\$2,200</b>	<b>17</b>	<b>\$25,000</b>

For the reporting period of July 1, 2021 through June 30, 2022, the Employee Classification/Contractor Registration units opened 84 misclassification investigations. Investigations were initiated by wage claims filed with the Department, construction site visits, NDOL’s website, and the hotline. Fifty-one of 84 cases resulted in a determination of worker misclassification with a total of 173 violations. Cases worked during the reporting period yielded a collection of \$58,800 in fines for violations. A total of \$2,200 in fines are pending payment, while \$25,000 have not been paid. Fifty employers with violations were shared with the Department of Revenue, Worker’s Compensation Court, and the NDOL Unemployment Insurance division for additional analysis and investigation.

# Unemployment Tax Field Representative Audit Program

The field representatives in NDOL's UI Tax division provide education and services to more than 64,024 employers who report wages quarterly and pay related unemployment insurance taxes. Field representatives also work with new employers to ensure they get unemployment insurance accounts set up correctly when they start a business and understand their quarterly reporting and unemployment insurance tax payment obligations.

From July 1, 2021– June 30, 2022, UI Tax field representatives completed 363 audits, resulting in 715 workers who were originally classified as contractors being added to the employer's tax/wage files with an additional \$44,980.00 in tax collections.

Employers who have active UI tax account numbers may be involved in the audit process when a UI benefit claim is filed by a worker who has not been reported to the UI tax/wage system. NDOL representatives investigate whether the worker's services are that of a contractual nature or have been misclassified as such by the employer. For the state fiscal year, 39 misclassified workers were identified through this process, which resulted in \$2,400 in tax collections.

UI Tax representatives' audit assignments were curtailed from 1-1-22 until 6-30-22 until the new audit programs was developed in NEworks.\*

The UI Tax collections unit works with employers to collect the unpaid taxes and sets up payment plans as appropriate.

## Audit Activity

State Fiscal Year	Audits Completed	Workers Misclassified	Additional Tax Collected
2018	1,001	2,080	\$131,358.82
2019	1,019	2,930	\$184,900.47
2020	959	2,339	\$145,717.22
2021	765	2,820	\$103,438.92
2022	363*	715*	\$44,980.00*

## **Outcome of NDOL Referrals**

LB 563 from the 2010 session of the Nebraska Legislature provides that the Commissioner of Labor shall share any violations of the Employee Classification Act with the Nebraska Workers' Compensation Court. The Compensation Court shall then refer any such violation reasonably believed to be a violation of the Nebraska Workers' Compensation Act to the appropriate prosecuting authority for appropriate action. (See LB 563, Sec. 8, which is codified at Neb. Rev. Stat. §48-2908.)

The Department of Labor shall also provide an annual report to the Legislature regarding compliance with and enforcement of the Act, to include the number of referrals to the Compensation Court, and the appropriate prosecuting authority, and the outcome of such referrals. (See LB 563, Sec. 9, which is codified at Neb. Rev. Stat. §48-2909.)

## **Workers' Compensation Court**

NDOL referred 50 cases to Nebraska Workers' Compensation Court (WCC) in fiscal year 2021-22. Eleven businesses were found to be in compliance with workers' compensation coverage requirements.

Of the remaining 39 cases:

- 4 have been referred to the Attorney General's office.
- 8 purchased workers' compensation coverage after they were cited. They may be referred to the Attorney General's office for further investigation.
- 27 are currently under investigation.

The court provided education regarding independent contractor issues to each employer who was contacted.

## **Nebraska Department of Revenue**

For the reporting period of July 1, 2021 – June 30, 2022, the Nebraska Department of Revenue (NDOR) received 50 referrals from NDOL. No updates were provided regarding reviews conducted or additional revenue collected.