

# John Willumsen

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**THE BUILDER:** Please tell us about the Fair Labor Standards Act (FLSA).

**WILLUMSEN:** The FLSA is federal legislation that dates back to 1938. Along with federal regulations that accompany it, they together established a federal minimum wage and a requirement of overtime pay for non-exempt workers. They set forth recordkeeping requirements and youth employment standards, and they apply to essentially all workers.

There are exceptions, such as domestic workers and agricultural workers. But even though it's federal legislation, it applies to most Rhode Island workers because the U.S. Supreme Court says the act applies to people who are engaged in commerce, and they consider all commerce to be interstate commerce.

So, that's the application.

**THE BUILDER:** What is a "misclassified" employee?

**WILLUMSEN:** A misclassified employee is a worker who meets the criteria for an employee-employer relationship, but is instead termed an independent contractor.

The criteria are set forth in a test that arises from the FLSA, and it's the same test we use here in Rhode Island. It's called the Economic Realities Test. Over the years there have been different federal regulations that tweak the factors of this test, and the Supreme Court has added shape and contour to the analysis. But at its core, it turns on the nature and degree of control of an individual's work, where an employer has really significant and clear control over the nature, the time and place, and the output of someone's work that leans towards the establishment of an employer-employee relationship, as opposed to the hiring of an independent contractor.

When an entity controls a worker's time, location, and provides them with uniforms or equipment, or provides really detailed in-

struction on what they're supposed to do in their job, it's likely that an employer-employee relationship exists. And if that person were labeled an independent contractor, that person would be misclassified.

**THE BUILDER:** Independent contractors (subcontractors) have always been crucial in the residential construction industry. The nature of the work is that the sub shows up at the jobsite at a certain time, follows instructions from the general contractor, an engineer or whomever. How does that work within the standards you've just described?

**WILLUMSEN:** I think that would point to many of the other factors that are considered in the economic realities test.

What you're really looking at is: Do these people have their own business enterprises or do they really exist as workers with an exclusive, one-to-one relationship with the employer that we're analyzing? Do they come to work for them almost every day of the year? Do they have other clients?

It's absolutely true that a sub on a construction site is going to be brought in to fill drywall here on X, Y, Z days over the next three months. And that might be their exclusive employment for those three months. But if they then move on to someone else's jobsite to do the same thing there, or a different aspect of work they perform, those are the types of indications that we're looking for when it comes to true independent contractor status.

It's the notion that someone really has hung up a shingle and is ready to take on clients rather than being nestled within someone else's business as a full-time or part-time employee.

**THE BUILDER:** There's an opinion among some contractors that government has moved the goalposts on these standards from time to time over the years, muddying the waters. Is that a fair criticism?

**WILLUMSEN:** I think it's fair to say there have been many attempts to move the goalposts. Often, as you see the presidential administration flip between parties, you'll see different regulations proposed to try to either emphasize the employee relationship or

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emphasize a person's right to be an independent contractor.

Many of those regulations don't end up enacted. They take a very long time. There's a lot of comment. Court cases often hold them up without any resolution because, while they're pending, a new administration comes in and withdraws them. And the tests that we use: Unfortunately they're not crystal clear in their application.

There are other states that use the very restrictive "ABC" test that came out of California. It's much more specific. For example, if the independent contractor is performing the same work as the prime contractor in California and a few other states, that would almost always mean they're an employee. You have to bring in someone with a different line of work.

In Rhode Island, we don't follow such a strict test for a variety of reasons. It's not prescribed in statute, so we adhere to the federal test, the economic realities test. And it can be harder to immediately shut the book on whether someone's an independent contractor or an employee.

That's why we try to focus our efforts on intentional misclassification, more so than gray areas where the employer has a perfectly good-faith belief that this is an independent contractor.

**THE BUILDER: What's the best way for an employer to avoid misclassification?**

**WILLUMSEN:** I think about this a lot. I believe that the vast majority of Rhode Island employers want to do the right thing and have figured out how to protect themselves.

They do that by taking stock of what the people who work for them do.

The Dept. of Labor and Training (DLT) isn't looking to do any kind of gotcha-style investigations. We're not trying to interpret the law so technically as to be able to find a violation where someone is earnestly acting in good faith, in their belief that someone's an independent contractor.

So, the best way to avoid it is for an employer to understand the basics of the economic realities.

Bear in mind that an independent contractor is a fellow business whose services you go out and procure for a time, whereas an employee is someone you bring on as really a just a cog in your own machine. I don't say that in a demeaning way, but just to try to delineate a little bit.

If you're unsure about someone, ask yourself, "Do I think this person is a fellow business owner, a fellow business entity, or is it someone who really is just part of my team and that's all they do?"

**THE BUILDER: How many cases of misclassification does**

**DLT deal with in an average year?**

**WILLUMSEN:** On average, the DLT investigates 115 misclassification matters per year.

**THE BUILDER: In August, the national media picked up on 2023 legislative changes to Rhode Island's independent contractor registration law, incorrectly reporting that there is a \$50 annual fee to register and that not to do so is a felony. What's the real story behind S-0427B?**

**WILLUMSEN:** That legislation is much more narrow than many people outside the state are interpreting it. First of all, filing the independent contractor registration form has been required for many years. With this year's legislative changes, independent contractors have to file it annually instead of just once.

That registration goes into a database maintained by our Workers' Compensation Division. It's just a tool that helps them understand who should be covered under whose workers' compensation insurance.

It's not determinative of whether someone is an independent contractor. That still reverts to the Economic Realities Test. You can file this registration form and still be found to be an employee.

The only change is that individuals have to renew it every year. There's no fee associated with it. There was at one point before the bill was amended, but as it stands, there's no fee.

**THE BUILDER: And is it really a felony not to file the form every year?**

**WILLUMSEN:** No! In fact, there's no enforcement or penalty associated with not filing it. It just makes our lives easier here at DLT.

For enforcement, we rely largely on complaints, credible tips that we investigate before determining that the tips are credible. Our resources are directed toward identifying instances of intentional or egregious bad action.

We're looking for people who are trying to get a competitive advantage over the vast majority of honest businesses by misclassifying someone to artificially lower your costs. You don't have to pay taxes. You don't have to include them in your workers' compensation premium. If you want to double down on bad acts, you can skirt minimum wage and overtime, and continue to lower your costs. So that's what we're looking for.

*Find out more at [DLT.ri.gov/regulation-and-safety/worker-misclassification](https://www.dlt.ri.gov/regulation-and-safety/worker-misclassification)*

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