Employee misclassification occurs when an employer “misclassifies” an employee as an independent contractor. The misclassification issue currently is a trending topic of importance, and Occupational Safety and Health Administration (OSHA) compliance officers are making it part of their inspections to make inquiries regarding the classifications of workers.

Recently, OSHA prosecuted a case against J and M Miller Construction LLC, Fort Wayne, Ind., alleging J and M Miller Construction was the employer of certain workers engaged in violations of various OSHA standards. The company is not a member of NRCA.

J and M Miller Construction argued the individuals violating OSHA standards all were self-employed and J and M Miller Construction had no employees working on the job sites.


As a result of the first inspection, J and M Miller Construction was issued a citation alleging a serious violation of 1926.501(b)(13) for failing to ensure its employees working 6 feet or higher above a lower level were using fall protection. J and M Miller Construction also was issued a citation alleging a serious violation of 1926.503(a) for failing to provide a training program for employees who might be exposed to fall hazards.

As a result of the second inspection, J and M Miller Construction was issued a citation alleging a serious violation of 1926.95 for failing to ensure its employees used proper eye protection while operating pneumatic guns. The company also was issued another citation alleging a violation of 1926.451(b)(2) for failing to ensure each scaffold and walkway was at least 18 inches wide. J and M Miller Construction also was issued a citation alleging another serious violation of 1926.501(b)(13).

At the first inspection, when the compliance officer arrived on-site, he asked to speak with “the boss on site.” That person later was identified as Jonas Miller with J and M Miller Construction. At the second inspection, when the compliance officer arrived on-site, one of the workers identified himself as Peter Martinez and who “was somewhat in charge and also drove the rest of the crew to the site.” Martinez also stated he worked for J and M Miller Construction.

As part of the second inspection, the compliance officer obtained an Independent Contractor Agreement signed on behalf of J and M Miller Construction. The agreement was produced by Carter Lumber Co., Kent, Ohio, the development company for the inspection site. The agreement executed by J and M Miller Construction identified J and M Miller Construction as a subcontractor to Carter Lumber, and,
importantly, it also included a representation that J and M Miller Construction would perform the work with its own employees and not subcontract any of the work.

J and M Miller Construction contested all the citations resulting from the two inspections. The central issue in each case was whether J and M Miller Construction was an employer at the time of the inspections.

OSHA had the burden of proving J and M Miller Construction was the employer of the affected workers at each site. The analysis of whether the affected workers were employees of J and M Miller Construction or self-employed independent contractors involved consideration of what are commonly referred to as the Darden factors.

The Darden factors stem from a U.S. Supreme Court case, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 316 (1992), in which the court held the term “employee” in a federal statute should be interpreted under common law principles unless the particular statute specifically indicated otherwise. The court looked primarily to the hiring party’s right to control the manner and means by which the product was accomplished to decide whether the party in question was an employer.

In this instance, the administrative law judge divided the Darden factors between conditions that existed at the actual work sites and the putative employer’s procedures relating to payment, benefits and taxes. When the judge focused on the conditions at the work sites, he relied on the testimony from the compliance officers to hold J and M Miller Construction was the employer of the affected workers.

Regarding the first inspection, the compliance officer testified to the following:

1. Miller, owner of J and M Miller Construction, directed the work on-site.
2. Miller established the work time at the site and paid the employees.
3. Miller supervised the workers on the roof.
4. The workers owned some of their own hand tools, but the larger tools required for framing activities, such as ladders and scaffolds, were provided by J and M Miller Construction.
5. Miller provided the vehicle used to transport the work crew to the work site, which removed any discretion the crew members had about when and how long they worked.

The compliance officer for the second inspection offered the following in support of the argument J and M Miller Construction employed the affected workers:

2. Martinez had worked for J and M Miller Construction for three or four months.
3. When Miller was not present on the job site, Martinez was in charge.
4. The crew arrived at the work site in a truck driven by Martinez, which removed any discretion the crew members had about when and how long they worked.

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5. Martinez owned the trailer parked at the work site. The trailer contained ladders and hand tools. Miller owned some of the tools; Martinez owned the others.

6. Miller directed the work of the crews, obtained the contract and provided crew members with the site information to enable them to perform work for him at the work site.

As it concerned the Darden factors relating to compensation and tax treatment, the administrative law judge noted the Independent Contractor Agreement executed by J and M Miller Construction stated J and M Miller Construction had exclusive responsibility to pay its employees their wages and benefits and to withhold taxes. Testimony at the hearing also revealed J and M Miller Construction did pay the workers at each of the sites subject to inspection, though the payment method was not addressed.

The administrative law judge also found it persuasive the Independent Contractor Agreement executed by J and M Miller Construction included a provision whereby J and M Miller Construction agreed not to assign or subcontract the agreement or any portion of the work without Carter Lumber’s prior expressed written consent. The absence of any evidence that J and M Miller Construction requested permission to subcontract the work at the second inspection helped support the judge’s conclusion the workers were J and M Miller Construction’s employees.

When reaching his conclusion the affected workers at each inspection were employees of J and M Miller Construction, the judge expressly stated he found the following factors to be significant:

1. Miller identified himself as the boss.
2. Martinez stated he was in charge when Miller was not present.
3. Miller directed the workers.
4. Miller provided the vehicle for transporting the crew at the first work site.
5. Martinez provided the vehicle for transporting the crew at the second work site.
6. Miller paid the workers and owned the ladders and scaffolds used at the sites.

When reviewing the misclassifications of employees, OSHA’s analysis involves a review of the totality of the circumstances, and you can expect OSHA to explore those circumstances in any investigation it believes a misclassification has occurred. The best way to avoid an employee misclassification is to engage a truly independent, established business and avoid exerting the level of control over that business, which would enable OSHA to argue the workers are your employees.