

Tax Misclassification: Lost Employment Benefits for Disabled Workers



National Council on Disability

March 6, 2025



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Tax Misclassification: Lost Employment Benefits for Disabled Workers

National Council on Disability, March 6, 2025
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National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

Letter of Transmittal

March 6, 2025

President Donald J. Trump
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Mr. President,

The National Council on Disability (NCD) recently concluded a policy investigation examining the definition of “employment” under the Internal Revenue Code (IRC) and the legal implications of a 1965 revenue ruling that may be applied inappropriately to misclassify employees with disabilities as “rehabilitation clients.” I am pleased to present you with our findings and preliminary recommendations in this report. NCD is concerned that the misclassification of these putative employees leaves them ineligible to participate in employer-sponsored benefits plans and could jeopardize their participation in the Internal Revenue Service’s antipoverty programs, which provide cash benefits directly to low-income taxpayers. NCD identified employment dispute cases where these outdated exemptions were erroneously applied in a manner to deny employment benefits.

The IRS’s revenue ruling 65-165 creates an opportunity for employers, specifically, sheltered workshop employers, to maintain a segregated payroll system that results in labeling these putative workers as “rehabilitation clients” or “independent contractors” for federal employment tax purposes. NCD’s investigation uncovered online bulletins with posts from tax attorneys and accountants explaining how this 1965 loophole allows sheltered workshops to misclassify workers with disabilities as “rehabilitation clients” long after their rehabilitation program has concluded.

For these reasons, NCD concludes that Revenue Ruling 65-165 and similar tax exemptions reflect an outdated employment model of segregation and institutionalization that existed in the 1960s when the ruling was adopted. Today, these types of exemptions undermine Congress’s goals to create equal employment opportunities for all workers.

Policymakers have an opportunity to promote an equitable tax system—one that rightly enables people with disabilities to avail themselves of the full panoply of employment benefits when their work is clearly employment and not rehabilitation.

Respectfully,

A handwritten signature in blue ink, appearing to read "Shawn Kennemer".

Shawn Kennemer
Acting Chair, Vice-Chair

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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Acronym Glossary

ADA	Americans with Disabilities Act of 1990
CIE	competitive integrated employment
DOJ	Department of Justice
DOL	Department of Labor
EITC	Earned Income Tax Credit
ERISA	Employee Retirement Income Security Act
FEMA	Federal Emergency Management Agency
FICA	Federal Insurance Contributions Act
FLSA	Fair Labor Standards Act
FUTA	Federal Unemployment Tax Act
GAO	Government Accountability Office
IDEA	Individuals with Disabilities Education Act
IRC	Internal Revenue Code
IRS	Internal Revenue Service
LAB	Louisiana Association for the Blind
MBI	Medicaid Buy-In
MOU	memorandum of understanding
NCD	National Council on Disability
OASDI	Old Age, Survivors, and Disability Insurance
OSERS	Office of Special Education and Rehabilitation Services
PBGC	Pension Benefit Guaranty Corporation
POMS	Program Operations Manual System
SSI	Supplemental Security Income
WIOA	Workforce Innovation and Opportunity Act

Executive Summary

Worker misclassification occurs when employers mislabel employees as independent contractors or as another nonemployee status. Businesses have been known to misclassify their employees in order to avoid their employment-related obligations under federal and state employment laws, avoid mandatory federal and state payroll taxes, and avoid providing federal and state employment benefits and protections. Federal agencies recognize this as a serious problem and have directed their efforts to address worker classification issues over the years, including increased allocations of department resources toward enforcement efforts and coordinated multiagency initiatives to address misclassification.¹ In 2022, House and Senate Appropriations Committees recognized the steady increase in reports of workers misclassified as independent contractors, calling it “a development that transfers costs of doing business to workers, denies them the rights and protections of bedrock workplace protections, and depletes Federal coffers by limiting payroll taxes.”²

In this investigation, NCD examined the definition of “employee” under the Internal Revenue Code (IRC) and the legal implications of a 1965 Revenue Ruling that may be applied inappropriately to keep people with disabilities

off employers’ payrolls by misclassifying these putative employees as “rehabilitation clients” or “independent contractors.” NCD conducted this investigation to highlight the magnitude and severity of worker misclassification and its impact on people with disabilities and their employment benefits.

NCD made the following key findings:

- The misclassification of people with disabilities in sheltered workshops is not an uncommon occurrence but likely a systemic problem due to lingering historical perceptions about the employability of people with disabilities.
- Revenue Ruling 65-165 may be inappropriately applied to exclude these putative employees from workshops’ payrolls, leaving them ineligible for many key employer-sponsored benefits.
- While people with disabilities in sheltered workshops may be classified as “employees” for purposes of protections under the Fair Labor Standards Act, this does not guarantee employment status for federal employment tax purposes.
- Sheltered workshops may be incentivized to misclassify people with disabilities to avoid paying payroll taxes and workers’ compensation insurance and avoid providing

health insurance. This may include the continuance of unnecessary rehabilitation services to maintain their rehabilitation client status even after the training program has been completed.

- People with disabilities who are misclassified for federal and state employment tax purposes are ineligible for unemployment insurance and for workers' compensation and must pay the full FICA tax, purchase their own health insurance, or rely on Medicaid.
- The misclassification of people with disabilities in sheltered workshops results in a loss of revenue to federal and state governments due to the subsequent reduced collection of employment taxes.
- Worker misclassification allows sheltered workshop employers to transfer their financial burden and responsibilities onto their putative employees with disabilities.
- Sheltered workshops that properly classify people with disabilities for tax purposes face disadvantages in contract bidding as a result of their higher labor and administration costs compared to workshops that misclassify.

NCD's investigation highlights how worker misclassification can create a segregated payroll system that is detrimental to workers with disabilities who choose employment in sheltered workshops. This report concludes that improved federal oversight, random payroll audits, and criminal prosecutions of willful employment tax fraud is needed. In addition, federal and state legislatures should repeal laws that exclude people with disabilities from the term "employment" as they reflect outdated social concepts of people with disabilities. While this report provides policymakers with initial recommendations for incorporating modern disability policies into tax policies, this will not fully address NCD's concerns. Education and outreach campaigns directed to the tax community and taxpayers with disabilities are imperative to ensure that workers receive the proper employment classification. Resolving the worker misclassification problem means not only addressing individual worker complaints or court cases but also implementing a combination of prevention, inspection, and the collective understanding that workers with disabilities should receive equal employee benefits and protections.

Introduction

The National Council on Disability (NCD) examined outdated tax provisions that may be intentionally or unintentionally applied in a way that prevents certain taxpayers with disabilities from attaining full employment status, leaving them ineligible for employment benefits and protections. NCD is an independent, bipartisan federal agency charged with providing advice to the President, Congress, and federal agencies on matters affecting the lives of people

with disabilities. NCD is required to review and evaluate on a continuing basis policies, programs, practices, and procedures concerning people with disabilities conducted or assisted by federal departments and agencies in order to assess their effectiveness

in meeting the needs of people with disabilities.³

NCD also regularly reviews and evaluates new and emerging disability policy issues at the federal, state, and local levels.⁴

The impetus for NCD's investigation began during the COVID-19 pandemic in late 2020, when many businesses were forced to shut down and employees were required to stay at home. Attorneys for a blind woman who worked

at the Louisiana Association for the Blind (LAB) contacted NCD about a Louisiana unemployment appeal determination. Although the woman and her attorneys had thought she was an employee of the LAB, the Louisiana Workforce Commission disagreed and concluded that she was a rehabilitation client for unemployment purposes and therefore ineligible for benefits. For this reason, despite having worked at the LAB for decades just like any other employee, earning

minimum wage or higher, she was ineligible for unemployment benefits when the workshop closed due to COVID-19.⁵

NCD immediately started researching whether this was an isolated incident or a systemic problem.

NCD's preliminary investigation found that for decades, the LAB has been disputing the employment status of other blind employees to deny their claims for unemployment benefits. NCD's research next identified an outdated Revenue Ruling from 1965, specific to sheltered workshops, that may be inappropriately applied to classify people with disabilities as either rehabilitation clients or independent contractors

NCD's research soon identified an outdated Revenue Ruling from 1965, specific to sheltered workshops, that may be inappropriately applied to classify people with disabilities as either rehabilitation clients or independent contractors and not employees.

and not employees. NCD is concerned that this Revenue Ruling may be inappropriately applied to exclude these putative employees from the workshop's payroll, leaving them ineligible for many key employer benefits. NCD's investigation uncovered online bulletins used by tax attorneys and accountants to examine how this 1965 loophole allows sheltered workshops to misclassify workers with disabilities as "rehabilitation clients" for federal employment tax purposes in order to keep these putative employees off of the payroll.⁶

While the woman and her attorneys thought she was an employee, the Louisiana Workforce Commission disagreed and concluded that she was a rehabilitation client and ineligible for benefits. NCD has met with the Taxpayer Advocate Service, an advisory body within the Internal Revenue Service (IRS), to discuss the need to reexamine and revoke Revenue Ruling 65-165, 1965-1 C.B. 446, and related tax provisions and policies to ensure an equitable tax system that includes people with disabilities.

Section 1: An Inclusive Tax System Should Reflect the Evolution of Current Disability Policies and Promote Equal Employment Opportunities and Benefits to People with Disabilities Who Work

The prevailing conception of disability overall and the employment of people with disabilities has evolved since the 1960s.

Cultural assumptions have changed, driven by the work of the disability rights movement and the evolution of the education system, ultimately leading to people with disabilities being able to succeed in their jobs. These changes in turn resulted in shifts in policy at every level of government. The

fundamental assumption behind federal policies promoting employment for people with disabilities has shifted from one that relied on models of paternalist protection to one that is predicated on equality of

access, opportunity, and esteem. Since 1990, the Americans with Disabilities Act (ADA) has given people with disabilities increased employment opportunities and better outcomes to achieve independence. Today's employment landscape for people with disabilities affirms their right

to be free from discrimination by providing reasonable accommodations to promote their independent living, a fundamental improvement from the 1960s, when institutionalization was the norm and Congress concluded that people with disabilities could not compete in the general labor market in the community.

During this time, the Internal Revenue Service implemented its 1965 Revenue Ruling in support

of the social norms at that time and to assist sheltered workshops in determining the employment status of people with disabilities. Congress meanwhile, began directing its legislative efforts toward transforming

social norms via direct federal support for the employment of people with disabilities in the community. Prior to 1965, two of the most prominent federal legislative attempts to support employment for people with disabilities were Section 14(c) of the Fair Labor Standards Act of

Today's employment landscape for people with disabilities affirms their right to be free from discrimination by providing reasonable accommodations to promote their independent living.

1938 and the Wagner-O'Day Act of 1938. Both pieces of legislation were predicated on the sheltered workshop model of employment, in which people with disabilities work in separate workplaces from workers without disabilities. NCD's analysis of the IRS's 1965 Revenue Ruling related to the employment status of people with disabilities in sheltered workshops reveals that it still reflects outdated social expectations from the 1930s to 1960s.

Since 1965, Congress's approach to employment of people with disabilities has changed markedly. In 1973, Congress passed the Rehabilitation Act, which for the first time extended federal antidiscrimination protections to some workers with disabilities. Congress then reauthorized the Individuals with Disabilities Education Act (IDEA), ensuring that students with disabilities receive a free and appropriate public education intended to transition them into the workforce, a fundamental change from prior expectations of people with disabilities. These social advancements were followed up by the landmark passage of the ADA in 1990. The ADA's Title I prohibits discrimination in the terms and conditions of employment for workers with disabilities and is applicable regardless of where people with disabilities work or how much they are paid. This legislative advancement marked the clear intent of Congress that workers with disabilities experience working conditions substantively equal to those of any other worker.⁷ The Supreme

Court expanded the impact of this legislation, principally by requiring that people with disabilities be able to live and work in the most integrated setting appropriate to their needs.⁸

Congress took a further step toward realizing that policy goal in 2014, when it adopted the Workforce Innovation and Opportunity Act (WIOA). WIOA shifted the focus of vocational rehabilitation and other job training and support programs for people with disabilities toward achieving competitive integrated employment (CIE). CIE is defined as work that is compensated at or above the minimum wage and customary wage rate, takes place in the community, and

presents workers with opportunities for advancement.⁹ These changes permitted people with disabilities to fully participate in integrated workplaces with adequate accommodations, rather than requiring either separate workplaces or a

legal status separate from other employees.

These changes led to a decline in the reliance on the sheltered workshop model of employment for people with disabilities and an increase in their transition into competitive integrated employment. There have been steady declines in the numbers of workers in sheltered workshops under the subminimum wage program,¹⁰ while the employment rate for people with disabilities remains at record highs.¹¹ These changes have aligned with the preferences of people with disabilities.

NCD found that outdated tax policies such as Revenue Ruling 65-165 may create a barrier

NCD found that outdated tax policies such as Revenue Ruling 65-165 may create a barrier for people with disabilities from attaining the full employment status and benefits that Congress envisioned under current disability laws.

for people with disabilities from attaining the full employment status and benefits that Congress envisioned under current disability laws. For this reason, within 90 days of this report, the Commissioner of the Internal Revenue Service should convene an interagency workgroup, composed of all relevant agency representatives, to identify other outdated tax provisions that may be used to prevent people with disabilities from attaining employment status for tax purposes. This workgroup should engage in robust discussions to fully understand how changes in tax provisions and related policies could impact eligibility for government safety net programs, how to incorporate tax strategies into benefits planning, and how to grow wealth through the IRS's antipoverty programs. To ensure that the interpretation of federal tax law does not again fall out of line with the realities of the lives of working Americans with disabilities and the prevailing legal environment, NCD recommends the establishment of a national disability advisory council within the IRS. An advisory council would allow the IRS to obtain ongoing and emerging

perspectives on issues critical to people with disabilities from workers with disabilities, employers, and other informed voices. The council should have a diverse membership, including people with disabilities and disability advocates who come from geographically and professionally diverse backgrounds.

The Federal Emergency Management Administration (FEMA) established a similar advisory council in 2017 in response to calls to more fully consider the experiences of people with disabilities in responding to emergencies.¹² The FEMA advisory council includes representatives from state, local, tribal, and territorial governments; the private sector; and nongovernmental organizations. Since its creation, the advisory council has produced annual reports containing recommendations that have shaped FEMA policy on numerous subjects. This approach, uniting experiences from within government, the private sector, and advocacy, could support the IRS in better serving the unique needs of taxpayers with disabilities.

Section 2: Employee Misclassification has a Detrimental Economic Impact on Employees While Maximizing Employers' Revenues

The proper classification of individuals as “employees” is necessary for them to be eligible for many federal and state employment benefits and protections. Many of these benefits (such as Social Security retirement and unemployment benefits) are available only to those who attain employment status. Yet courts and administrative bodies apply varying tests for making employment classification determinations for different employment laws. The most high-profile example of conflicting employment determinations is the FedEx Ground cases (FedEx), which have resulted in years of repeated litigation over the independent contractor or employment status of FedEx delivery drivers.¹³ NCD’s investigation uncovered that LAB, like FedEx, also has a long-standing history of disputing the employment status of its employees with disabilities.¹⁴

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Businesses have been known to misclassify their employees to avoid their employment-related obligations under federal and state employment laws, avoid mandatory federal and state payroll taxes, and avoid federal and state unemployment insurance taxes. To address this problem, federal agencies have directed their efforts to identify worker classification issues, including increasing department resources toward enforcement efforts and coordinating multiagency initiatives to address misclassification.¹⁵ In 2022, House and Senate Appropriations Committees recognized the steady increase in reports of workers misclassified as independent contractors, calling it “a development that transfers costs of doing business to workers,

denies them the rights and protections of bedrock workplace protections, and depletes Federal coffers by limiting payroll taxes.”¹⁶

Historically, comprehensive national studies that examine employers’ tax records, employees’ IRS W-2 information, and nonemployees’ 1099 information are rarely performed, making it difficult to determine the full extent of employee misclassification nationwide.¹⁷ For example, a 2009 report conducted by the U.S. Government Accountability Office (GAO) had to rely on an IRS study for the 1984 tax year, which estimated that a total of 3.4 million employees were misclassified.¹⁸ This resulted in an estimated revenue loss of \$1.6 billion in 1984, which equaled \$4.47 billion when adjusted for inflation to 2009, the year that GAO published its report.

Based on NCD’s investigation, the IRS should consider the sheltered workshop model of employment to be an industry prone to worker misclassification and provide heightened oversight over these employers. Furthermore, the Tax Division of the Department of Justice should consider the sheltered workshop model of employment to be an industry prone to worker misclassification and pursue criminal investigations and prosecutions against sheltered workshops that willfully fail to comply with their employment tax responsibilities for people with disabilities, as well as individuals who aid and assist them in failing to meet those responsibilities. Because Revenue Ruling 65-165 could promote the intentional or unintentional misclassification of workers with disabilities



as rehabilitation clients or independent contractors, NCD recommends that GAO and the IRS conduct a comprehensive national study that examines sheltered workshops' tax records, their employees' IRS W-2 information, and nonemployees' 1099 information for the past 10 years to identify putative employees

who should receive employment benefits retroactively, such as the blind worker whom LAB erroneously classified as a client for unemployment benefits purposes. This study will provide objective and reliable information on the full extent of the questionable classification issue.

Section 3: Under a 1965 Revenue Ruling, Which the IRS Continues to Apply Today, People with Disabilities in Sheltered Workshop Employment Attain Employment Status Only After Completing the Workshop’s Employment Training Program and are Therefore not Employees for Federal Employment Tax Purposes During the Training Period¹⁹

The IRS attempted to resolve questions over the employment status of people with disabilities in sheltered workshop settings through a Revenue Ruling issued in 1965. Revenue Ruling 65-165 describes three fact patterns involving people with disabilities who perform services in sheltered workshop programs. The ruling, which is still in effect today, holds that individuals are not employees in two out of the three fact patterns. If the IRS determines that “control and direction exercised” over the individuals is “for the purpose of rehabilitation and therapy” and that no employment relationship is intended, then the individuals are not employees for tax purposes. Under this analysis, only individuals with “working conditions, pay scales, and employee benefits comparable to those available in private industry, are employees.”²⁰ Since then, the IRS has issued a general memorandum and employment status determination rulings to

nonprofit organizations seeking confirmation that no employment relationship existed because they provide vocational and rehabilitation training services on behalf of consumers or clients with disabilities.²¹ Notably, there is no time limit on trainee or client status, so people can work for decades without ever becoming an employee. Upon reviewing the broad application of the IRS’s holding in Revenue Ruling 65-165, NCD is concerned that this analysis creates an unintended opportunity that may indefinitely perpetuate consumer or client status for people with disabilities. Under this analysis, these workers, or putative employees, experience delays in their transition from rehabilitation client to employment status or never transition into employees at all. In other words, the misclassification of these workers may allow or even encourage sheltered workshops to keep these putative employees off the payroll for federal and state employment tax purposes.

NCD is concerned that sheltered workshops may continue providing rehabilitation services inappropriately and even against an employee's will to keep that individual in rehabilitation client status and not an employee.²² Removing these outdated tax provisions like Revenue Ruling 65-165 will contribute to the progress of people with disabilities into CIE. These outdated provisions remain a barrier to progress for these workers' employment goals.

A Revenue Ruling is the IRS's interpretation or explanation of the tax laws issued by the IRS.²³ Revenue Rulings typically describe a set of hypothetical facts and state the IRS's legal conclusions based on those facts.²⁴ They are generally exempt from the notice and comment requirements of the Administrative Procedure Act as being an interpretive rule.²⁵ The IRS relies on Revenue Rulings to promote the uniform application of the tax laws and assist taxpayers in voluntary compliance.²⁶ Most importantly, Revenue Rulings allow the public to review past interagency communications that the IRS uses as precedents.²⁷

Revenue Rulings are unique in that they serve as a centralized bank of IRS interpretations that promote the uniform application of the law.²⁸ While Revenue Rulings do not have the same level of force and effect as Treasury Department regulations,²⁹ the Supreme Court has said that Revenue Rulings reflect the IRS's longstanding,

reasonable, and consistent interpretation of a Treasury regulation that should attract "substantial judicial deference."³⁰

Little information is available about the origin of Revenue Ruling 65-165, which is exempt from the notice and comment process. Because it was adopted during a time when the institutionalization

of people with disabilities was acceptable, NCD reasonably believes disability advocates at that time requested that the IRS issue this ruling to

protect people with disabilities from the burdens and responsibilities of employment. Federal law and policy surrounding the employment of people with disabilities has evolved since 1965. NCD's 2019 report *A Cursory Look at AbilityOne*³¹ described in detail the social and legal progress away from segregation and toward integration and competitive wages. In that report, NCD referred

to outdated programs and policies that create barriers to employment as relics that are inconsistent with current federal law and policy.³² Due to the evolution of disability policy toward full integration, independence, and self-sufficiency for people

with disabilities, Revenue Ruling 65-165 too is a relic that is inconsistent with current federal law and policy when it is applied inappropriately to deny employment status and benefits to people with disabilities.

NCD has reviewed past IRS employment status determinations and met with national

A Revenue Ruling is the IRS's interpretation or explanation of the tax laws issued by the IRS.

The Supreme Court has said that Revenue Rulings reflect the IRS's longstanding, reasonable, and consistent interpretation of a Treasury regulation that should attract "substantial judicial deference."

disability advocacy groups, who shared stories of instances of employee misclassification where employees received 1099 forms for nonemployee compensation. NCD is concerned that courts and the Department of Treasury will afford “significant weight” to Revenue Ruling 65-165, which provides outdated guidance to taxpayers. NCD recommends that the Department of Treasury revoke Revenue Ruling 65-165, as it undermines current disability policy and creates a barrier to employment.

NCD also recommends that Congress include provisions to address worker misclassification for people with disabilities in future legislation to address misclassification. For example, the Payroll Fraud Prevention Act of 2018³³ should be amended to include language directing the IRS to promulgate new regulations to determine employee or rehabilitation client status. The bill already has joint referrals to the Education and Labor Committee and Ways and Means Committee and covers FICA tax status. NCD recommends that Senate and House committees

of jurisdiction hold hearings to identify outdated tax provisions and their impact on people with disabilities seeking employment. The House Ways and Means Committee previously examined how the misclassification of independent contractors leaves them ineligible for most of the basic benefits and protections provided in the workplace.³⁴ NCD believes the time is ripe for the

Committee to examine the misclassification of people with disabilities as rehabilitation clients and determine those who may be owed back taxes and benefits because their employer did not properly classify them as employees.

A less ambitious and controversial recommendation might be to include a provision in Sec. 6 of the Payroll Fraud Prevention Act of 2018, which directs targeted audits of high misclassification industries. This section could be amended to add language directing the Department of Labor (DOL) and IRS to do targeted audits of misclassification in this area. These audits should review tax records and not be based on entities’ subjective self-reports.

NCD recommends that the Department of Treasury revoke Revenue Ruling 65-165, as it undermines current disability policy and creates a barrier to employment.

Section 4: While not Common for Most Employment Relationships, It is Possible for an Individual to be an Employee Under the Fair Labor Standards Act While Not an Employee Under Other Federal Employment Laws, Including Federal Employment Tax Purposes

“Employee” can be defined differently by different employment statutes, which can be confusing and prevent employees from knowing and asserting their rights. Federal agencies apply different tests to determine employment status that may conflict and can result in employment status under one federal law but not another.

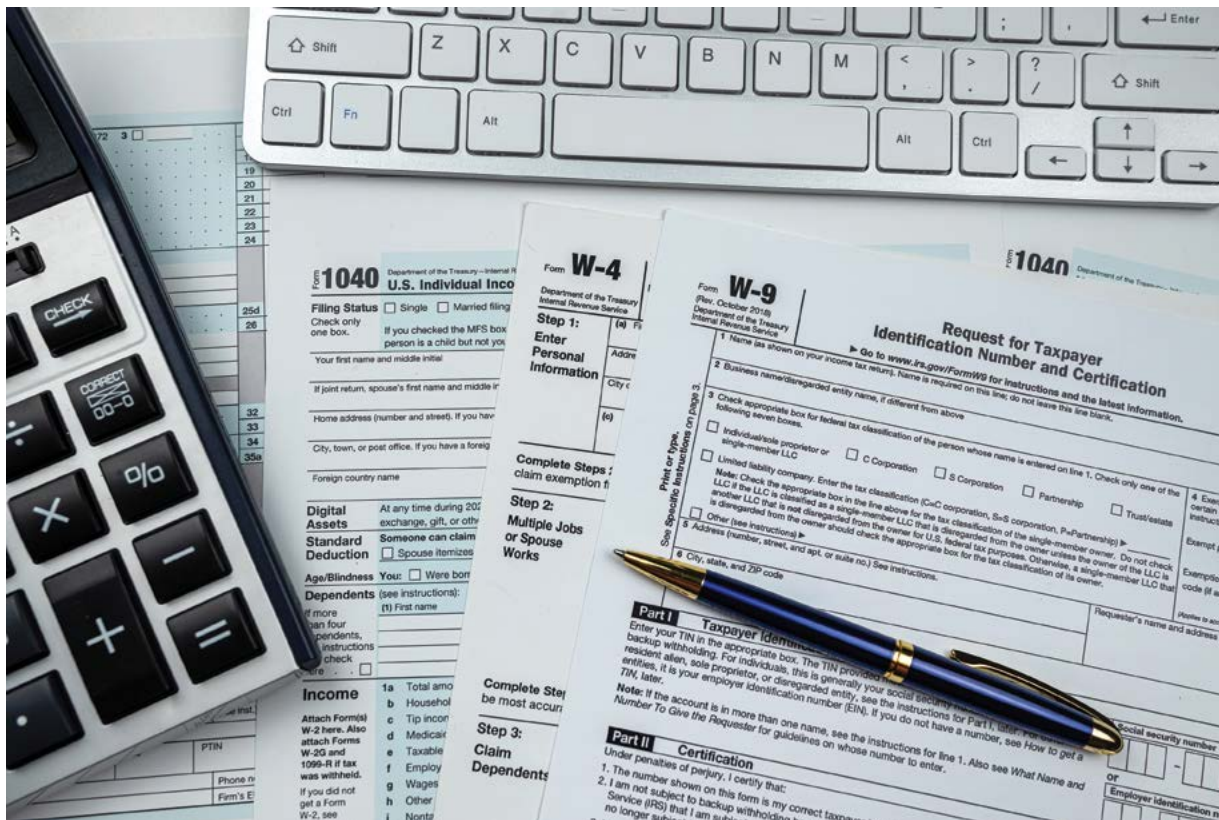
As a result, certain people with disabilities who are, in substance, employees are denied the benefits and protections of employment status. The unresolved question of employment status caused by Revenue Ruling 65-165 is detrimental to people with disabilities and their families who reasonably believe they are “employees” entitled to the full array of meaningful employment benefits and protections. NCD is concerned that people with disabilities

who choose sheltered employment may be unaware that they may not be “employees” for payroll purposes, and the compensation they receive may be classified as “awards” or “stipends,” not as “wages” with all the attendant

benefits. Moreover, some individuals and/or their tax preparers might wrongly conclude that their annual amount received reported on a Form 1099-MISC is subject to self-employment taxes, meaning that the employers transferred their tax burden and obligation onto the

putative employee. NCD is concerned that sheltered workshops that properly classify people with disabilities as employees for tax purposes are financially disadvantaged in contract bidding as a result of their higher labor and administration costs compared to workshops that misclassify.

The unresolved question of employment status caused by Revenue Ruling 65-165 is detrimental to people with disabilities and their families who reasonably believe they are “employees” entitled to the full array of meaningful employment benefits and protections.



When in doubt, the IRS has procedures that allow any employer and, to a lesser degree, employee to request an employment status determination by submitting IRS Form SS-8, "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding."³⁵ Upon receipt, the IRS reviews all the information provided, and an SS-8 technician applies the tax law, including Revenue Rulings, to the facts and circumstances submitted with Form SS-8 to determine whether the worker

is performing services as an employee. When appropriate, the IRS issues a determination letter. If the worker has requested the determination, the determination letter is issued to both the worker and the employer; however, if the employer has requested the determination, the determination letter is issued only to the employer without the putative employee's knowledge. Determination letters are binding on the IRS based on the facts presented.³⁶

Section 5: Unlike the DOL's Economic Reality Test, the IRS Relies on the Common Law Test to Determine Employment Status for Federal Employment Tax Purposes

The Fair Labor Standards Act (FLSA) governs minimum wage, overtime, and recordkeeping requirements for employees.³⁷ Courts have recognized that in reference to FLSA's wide scope, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules.³⁸ Variations of the Economic Realities Test examine six factors: (1) "the degree of control exercised by the alleged employer over the business operations," (2) "the relative investments of the alleged employer and employee," (3) "the degree to which the alleged employee's opportunity for profit and loss is determined by the employer," (4) "the skill and initiative required in performing the job," (5) "the permanency of the relationship," and (6) "the degree to which the alleged employee's tasks are integral to the employer's business."³⁹

The IRS, however, applies a 20-factor test, which is detailed in Revenue Procedure 87-41.⁴⁰ While these two tests appear similar, the goal of the Economic Realities Test is to determine whether the worker is dependent on the employer.⁴¹ No actual or formal control is required

under this test, unlike the IRS's 20-factor analysis, which outlines the following:

1. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. Training: Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. Services rendered personally: If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).

5. Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises, or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
6. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
7. Set hours of work: The establishment of set hours for the worker indicates employee status.
8. Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, this shows the worker is not



- free to follow his or her own pattern of work and indicates employee status.
11. Oral or written reports: A requirement that the worker submit regular reports indicates employee status.
 12. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.
 13. Payment of business and/or traveling expenses. If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
 14. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.
 15. Significant investment: Investment in facilities used by the worker indicates independent contractor status.
 16. Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
 17. Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, this generally indicates independent contractor status.
 18. Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, this indicates independent contractor status.
 19. Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee.
 20. Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, this indicates employee status.

Section 6: The Federal Unemployment Tax Act and Several States have Codified Provisions that may Exclude People with Disabilities in Sheltered Workshops from the Definition of “Employee”

Unemployment benefits provide a meaningful financial safety net for individuals and their families when they become unemployed for reasons outside of their control (e.g., recession, COVID-19 shutdowns, slowing demand from economic cycles). These benefits provide financial stability during economic cycles that individuals and their family members rely on when faced with the cash flow challenges of unemployment. During the COVID-19 pandemic, these benefits were enhanced by the Federal Government and saved many unemployed individuals and their families from experiencing housing, food, and health care insecurity and other consequences of unemployment and impoverishment.

The Federal Unemployment Tax Act (FUTA) imposes an excise tax on total wages paid by employers. Employers are then entitled to a credit

of up to 90 percent of their FUTA tax liability for contributions to a certified state unemployment compensation program.⁴² An amount equal to the proceeds from this tax is deposited in the Unemployment Security Administration Account of the federal Unemployment Trust Fund. This

Unemployment benefits provide a meaningful financial safety net for individuals and their families when they become unemployed for reasons outside of their control (e.g., recession, COVID-19 shutdowns, slowing demand from economic cycles).

fund then makes this money available to assist certified states in administering their unemployment compensation programs.⁴³

Section 3309(b)(4) of the Internal Revenue Code allows a state to exclude certain services from the definition of

“employment” that would otherwise be covered under that state’s unemployment compensation program. The federal provision permits, but does not require, states to adopt this exemption. Specifically, Section 3309(b)(4) allows states to exempt or exclude services performed in a facility conducted for the purpose of carrying out

a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market.

During this investigation, NCD identified several states that have provisions either identical or similar to Section 3309(b)(4) that can leave people ineligible to receive state-administered employee benefits.⁴⁴ For example, in a 2009 Oklahoma unemployment decision, the state determined that

unemployment benefits were unsuitable for people with disabilities, stating:

Congress and the Oklahoma Legislature have struck the balance in favor of promoting the viability of rehabilitative and remunerative services over the possibility of consumers getting an unemployment check.⁴⁵ Congress created alternative means of support for unemployed individuals with disabilities through supplemental security income (SSI) because temporary unemployment benefits are poorly suited to help individuals with disabilities. Therefore, Goodwill consumers who become unemployed are not without a monetary remedy should they be unable or unwilling to perform the tasks assigned.⁴⁶

NCD's investigation also found that LAB, the impetus for NCD's tax policy research,

has disputed the employment status of other employees for decades in order to deny their claims for unemployment benefits. In a 2006 case, LAB argued:

In allowing states to relieve this type of charitable organization from the financial burden of contributing to or reimbursing an unemployment compensation fund to finance unemployment compensation benefits to these individuals, the statute provides a substantial incentive for charitable organizations to offer

rehabilitative services and remunerative work to disabled individuals who might be unable to obtain gainful employment elsewhere.⁴⁷

At the time of both the 2006 and 2020 Louisiana unemployment

decisions, the language of Louisiana Revised Statute 23:1472(12)(F)(III)(d) was nearly identical to the federal statute.⁴⁸ NCD is concerned that employees in other states have been denied unemployment benefits in the past and that this issue is widespread. NCD is aware that on June 11, 2021, the state of Louisiana passed House Bill 259, which is perceived to have the intent to prevent AbilityOne employees from being misclassified. The statute was amended as follows:

[T]he term "employment" does not apply to service performed in a facility conducted for the purpose of carrying out a program of rehabilitation for an individual whose

Section 3309(b)(4) of the Internal Revenue Code allows a state to exclude certain services from the definition of "employment" that would otherwise be covered under that state's unemployment compensation program.

earning capacity is affected by an injury or a developmental, intellectual, physical, or age-related disability or providing remunerative work for an individual who because of his physical or intellectual capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; ***however, if an individual's employment is otherwise defined as employment under this Paragraph and the individual is performing work under the AbilityOne Program or a successor program under the laws of the United States, the individual's employment shall be considered employment under this Paragraph. (Emphasis added).***

NCD is concerned that absent from House Bill 259 are any employment protections for the state-level preferential purchase program for goods produced by people with disabilities, called the Louisiana State Use Council. In other words,

under state law, someone making products for the state government might be classified as a rehabilitation client, while someone making the same product in the exact same way for a federal purchaser may be an employee. This is legislative absurdity that can only be intended to complicate employment determinations through expensive and lengthy legal or administrative adjudicating processes. Louisiana should remove this exemption in its entirety. NCD is furthermore concerned that the misclassified woman from LAB still has not received her retroactive unemployment benefits.

Due to the detrimental impact and irreparable financial harm this can have on people with disabilities, Congress should repeal 26 U.S.C. Section 3309(b)(4) from FUTA, which exempts work performed by people with disabilities in sheltered workshops from the term "employment." Likewise, states like Louisiana and Oklahoma that have adopted identical or similar exemptions should remove those provisions in their entirety.

Section 7: The Misclassification of Employees can Jeopardize Eligibility for Social Security Retirement Benefits Governed by the Federal Insurance Contributions Act

The Federal Insurance Contributions Act (FICA)⁴⁹ is one of the taxing statutes designed to fund Social Security benefits.⁵⁰

The FICA tax is imposed upon wages⁵¹ and is deducted by the employer from each wage payment to an employee.⁵² Employers are required to deduct and withhold FICA taxes from the employees' wages on their behalf.⁵³ Included within the FICA tax are Old Age, Survivors, and Disability Insurance (OASDI) and Medicare Hospital Insurance (HI).⁵⁴ The tax withheld from wage payments to employees is subject to a matching FICA tax assessed on the employer.⁵⁵ Employment status is therefore critical in determining the applicability of the FICA tax.⁵⁶ In 2024, the OASDI Social Security tax rate was 6.2 percent,⁵⁷ and the Medicare tax rate was 1.45 percent. Employers and their employees are each responsible for

paying 7.65 percent, for a total of 15.3 percent of wages. NCD is concerned that employers transfer their tax burden onto employees when they are misclassified as nonemployees, whether as rehabilitation clients or independent contractors. The putative employee is then

responsible for paying the entire 15.3 percent FICA tax on their compensation. Because employees must pay into Social Security to earn work credits, NCD is concerned that employers, due to outdated employment policies, may circumvent their responsibilities and not accurately

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document work credits earned when they misclassify people with disabilities. Instead, the misclassification allows sheltered workshop employers to transfer their financial burden and responsibilities onto their putative employees with disabilities. This is also detrimental to “good

actors,” employers that properly classify people with disabilities for tax purposes but then are disadvantaged for contract bidding purposes as a result of their higher labor and administration costs compared to workshops that misclassify. For these reasons, the Office of Special

Education and Rehabilitation Services (OSERS) should clarify that the meanings of “employee” and “wages” as used in the definition of CIE under WIOA have the same meanings of “employee” and “wages” as used for federal employment tax purposes.

Section 8: The Misclassification of People with Disabilities and/or their Wages for Federal Employment Tax Purposes May Leave them Ineligible to Participate in the IRS's Antipoverty Programs Intended for Working Low-Income Families

The misclassification of people with disabilities as “rehabilitation clients” for federal employment tax purposes may leave these vulnerable taxpayers ineligible for federal antipoverty programs provided through the federal income tax system. Specifically, the federal Earned Income Tax Credit (EITC), a refundable tax credit created to reduce the disincentive to work caused by the imposition of Social Security taxes, provides financial assistance to qualifying low-income workers and relief to low-income families hurt by rising food and energy prices.⁵⁸ It has been referred to as the largest cash assistance, antipoverty program in the United States.⁵⁹ The Joint Committee on Taxation estimates that total federal tax expenditures for fiscal years 2022 to 2026 for the EITC alone would be \$311.6 billion.⁶⁰ Others suggest that the purpose of the credit is to help lift families above the poverty line and encourage people to work.⁶¹

Unlike other tax credits, the EITC is “refundable” meaning that if the amount of the

credit exceeds the taxpayer’s federal income tax liability or taxes owed, the excess is paid directly to the taxpayer.⁶² The EITC is different from other federal benefit programs for low-income families because it requires earnings.⁶³ NCD is concerned that misclassifying employees as rehabilitation clients also results in their earnings being misclassified as “awards or incentives,” which are not considered wages. This could leave them ineligible to participate in the EITC program, potentially losing the opportunity to receive annual cash assistance.

According to tax year 2022 data from the IRS, the most recent year for which tax data was available at the time of this investigation, approximately 23 million workers and families received \$57 billion in EITC payments, with an average amount nationwide of \$2,541.⁶⁴ To be eligible for the 2025 tax year, taxpayers’ adjusted gross income must be less than \$68,675 for married couple filing jointly with three or more qualifying children.⁶⁵ The EITC will range from \$649 for families with no qualifying children to

\$8,046 for families with three or more qualifying children in 2025.⁶⁶ People with disabilities and their families could benefit from the financial assistance provided through the IRS such as the EITC, the Child Tax Credit, and Additional Child Tax Credit which working families with disabilities can combine to maximize their annual tax refund (not discussed in this report).

NCD's investigation found pervasive "tax hesitancy," meaning that people with disabilities were misinformed or unaware that federal law excludes tax refunds as income and as a resource for 12 months in determining eligibility under Federal programs or State or local programs funded with Federal funds. Specifically,

Notwithstanding any other provision of law, any refund (or advance payment with respect to a refundable credit) made to any individual under this title shall not be taken into account as income, and shall not be taken into account as resources for a period of 12 months from receipt, for purposes of determining the eligibility of such individual (or any other individual) for benefits or assistance

(or the amount or extent of benefits or assistance) under any Federal program or under any State or local program financed in whole or in part with Federal funds.⁶⁷

The Social Security Administration has implemented a corresponding policy in its Program Operations Manual System (POMS).⁶⁸ NCD found that people with disabilities may be underutilizing the IRS's antipoverty programs due to an erroneous belief that tax refunds

may jeopardize their eligibility to remain on federal and state safety net programs. During NCD's investigation, one advocate informed NCD that they were instructed to not file their income taxes at all. This is problematic as this undoubtedly makes

these taxpayers ineligible for the EITC, assuming they meet the other eligibility requirements. It is therefore imperative that financial planning and benefits counseling for people with disabilities who rely on government safety net programs encourage these working taxpayers to participate in the federal antipoverty income tax programs and receive all available cash benefits.

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Section 9: Understanding Employment Classification for Tax Purposes is a Necessary First Step in Understanding Eligibility to Receive Employer-Sponsored Benefits Not Covered Under the FLSA

While the FLSA governs certain employment benefits, the Employee Retirement Income Security Act (ERISA) governs employer-sponsored welfare benefit plans.⁶⁹ Employers make tax-deductible contributions into these plans to provide employees (or their beneficiaries) with medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death, or unemployment.⁷⁰ With limited exceptions, ERISA covers all employee benefit plans sponsored by employers or employee organizations.⁷¹ ERISA does not apply the FLSA's Economic Realities test to determine "covered employees." Instead, the courts have determined that a modified version of the federal common law of agency be applied to determine whether an individual is an employee under ERISA.⁷²

NCD is concerned that the misclassification of employees as rehabilitation clients or independent contractors may exclude them from being reported on the payroll for employee benefits governed by ERISA.

ERISA requires employers (or plan administrators) to report on an annual basis detailed financial, actuarial, and other information to the DOL, the Pension Benefit Guaranty Corporation (PBGC), and the IRS,⁷³ the three agencies that administer ERISA. To reduce the duplication of reporting, however, the DOL, PBGC, and IRS have designated the Form 5500 Series (Form 5500) as the consolidated annual report for employee benefit plans.⁷⁴ Form 5500 need only be filed with the IRS to satisfy the annual reporting requirements of all three agencies,⁷⁵ as the IRS then forwards a copy of the report to the DOL and PBGC.⁷⁶ NCD is concerned that the misclassification of employees as rehabilitation clients or independent contractors may exclude them from being reported on the payroll for

employee benefits governed by ERISA. OSERS should clarify that the meaning of “benefits” as used in the definition of CIE under WIOA includes tax-deferred employer-sponsored benefits. Form 5500s for sheltered workshops are publicly

available. Disability advocates can review these forms to find the types of employee benefits offered and the number of covered employees reported to the DOL, IRS, and PBGC.

Section 10: The Medicaid Buy-In Program Can Assist People with Disabilities Who Rely on Health Care Services Only Available Through Medicaid

NCD is aware that properly reclassifying people with disabilities as employees may have unexpected and unintended consequences on their eligibility to remain on safety net programs like Medicaid. Reclassifying people from rehabilitation client to employee may require adding the employee to employer-sponsored health plans while making them ineligible for health benefits provided under Medicaid. For this reason, NCD strongly encourages Congress to take serious consideration of the

NCD strongly encourages Congress to take serious consideration of the recommendations from NCD's 2023 Progress Report, Toward Economic Security: The Impact of Income and Asset Limits on People with Disabilities, which examined ways to expand and improve Medicaid Buy-In (MBI) programs.

recommendations from NCD's 2023 Progress Report, *Toward Economic Security: The Impact of Income and Asset Limits on People with Disabilities*,⁷⁷ which examined ways to expand and improve Medicaid Buy-In (MBI) programs. These state-optional programs, which allow workers with disabilities to access Medicaid community-based services not available through other insurers, are currently only available in 41 states including the District of Columbia.⁷⁸

Section 11: The IRS Should Conduct a Comprehensive Investigation of the Extent of Misclassified Employees in Sheltered Workshops

NCD is aware that some sheltered workshops may be confused about the proper employment classification of people with disabilities and has discussed this concern with the IRS to encourage a national survey that is directed to sheltered workshops. NCD understands that the reliability and accuracy of a national survey may be limited to subjective and voluntary self-reports. For this reason, the national survey should be only a preliminary step. As with other industries prone to misclassification, identifying and correcting employee

misclassification minimizes lost tax revenue that is needed to fund federal programs. The IRS should conduct random employment tax audits to identify employment worker classification. In the past it has identified “questionable worker classification issues” through an analysis of “1099 information returns” that businesses filed on behalf of their independent contractors against the income tax returns filed on behalf of

“employees” of the business. The IRS may also utilize its Employment Tax Examination Program which extracts and analyzes Miscellaneous Income (Form 1099-MISC) and Wage and Tax Statements (Form W-2) forms filed by employers. The extracted data are analyzed for indications of a worker misclassification issue. Under this program, the IRS applies criteria such as

As with other industries prone to misclassification, identifying and correcting employee misclassification minimizes lost tax revenue that is needed to fund federal programs.

deriving all or most of one’s income from a single business payer (a strong indicator of misclassification) to estimate the percentage of workers who were misclassified. The IRS may apply stringent

criteria (e.g., at least \$10,000 of income all from a single business payer) suggests misclassification, which can be confirmed through an IRS audit. NCD recommends that either Congress or GAO request that the IRS conduct a similar study of sheltered workshops and compare the business and individual tax information. As an alternative, the IRS may utilize its Employment Tax Examination Program.

Section 12: DOL and IRS Should Jointly Investigate the Employment Status of People with Disabilities in Sheltered Workshops

On December 14, 2022, the DOL and IRS renewed their 2011 Memorandum of Understanding for Employment Tax Referrals (MOU).⁷⁹ Under this MOU, the two agencies agree to coordinate their efforts to investigate worker misclassification.⁸⁰

The MOU facilitates information sharing between the two agencies by establishing a

system for referrals from the DOL's Wage & Hour Division to the Small Business/Self-Employed Specialty Employment Tax unit to assist in the identification of emerging and ongoing employment tax compliance issues related to misclassification.⁸¹ This may be the latest MOU between federal agencies focusing on perceived widespread worker misclassification in the labor market.

Section 13: The IRS Should Identify and Remove Outdated Tax Policies and Procedures that Allow Employers to Inappropriately Deny Employment Status to People with Disabilities

In most cases, the employer–employee relationship is clear. Employers generally understand their obligation to withhold taxes from their employees’ pay and match their Social Security and Medicare contributions. These obligations do not extend to nonemployees, however. While the employment status may be more apparent in other industries, sheltered workshops may be unclear of the tax treatment of people with disabilities as they transition from being a client receiving employment services and training and into their new role as an employee

of the workshop once the employment training program is completed. This may be due to the workshops’ historical purpose of protecting people with disabilities in an institutional setting. Many sheltered workshops from 1965 still operate today and likely have relied on Revenue Ruling 65-165 for decades. In order to avoid further irreparable harm to people with disabilities, Congress and the IRS should reexamine tax policies that have historically excluded people with disabilities from the benefits of an equitable tax system.

Summary of Key Recommendations

Congress

- Congress should remove Section 3309(b) (4) from the Internal Revenue Code, which exempts people with disabilities in sheltered workshops from the term “employment” under the Federal Unemployment Tax Act.
- Congress should examine ways to expand and improve the Medicaid Buy-In (MBI) program.
- The Senate and House committees of jurisdiction should hold hearings to identify outdated tax provisions and their impact on people with disabilities seeking employment.
- Congress should amend the Payroll Fraud Prevention Act of 2018 directing the IRS to promulgate new regulations to determine employee or rehabilitation client status for sheltered workshops as well as direct the DOL and IRS to conduct targeted audits of sheltered workshops’ tax records and not be based on these entities’ subjective self-reports.

Internal Revenue Service

- The IRS and the Tax Division of the Department of Justice should consider the sheltered workshop model of employment to be an industry prone to worker misclassification and exercise heightened

oversight and employment tax fraud enforcement.

- The IRS should conduct random employment tax audits, focusing on employment tax issues like worker classification.
- The IRS should conduct a comprehensive investigation of the extent of misclassified employees in sheltered workshops.
- GAO and the IRS should conduct a comprehensive national study that examines sheltered workshops’ tax records, their employees’ IRS W-2 information, and their nonemployees’ 1099 information for the past 10 years to identify putative employees who should receive employment benefits retroactively.
- The DOL and IRS should jointly investigate the employment status of people with disabilities in sheltered workshops.
- The IRS should identify and remove outdated tax policies and procedures that allow employers to inappropriately deny employment status to people with disabilities.
- The IRS Commissioner should convene an interagency workgroup composed of relevant agency representatives to identify other outdated tax provisions that may be used to prevent people with disabilities

from attaining employment status for tax purposes and how these changes could impact eligibility for government safety net programs.

- A disability advisory council should be established within the IRS that includes people with disabilities to obtain ongoing and emerging perspectives on issues critical to these taxpayers with disabilities.
- The IRS should utilize its Employment Tax Examination Program to analyze sheltered workshops' Miscellaneous Income (Form 1099-MISC) and Wage and Tax Statements (Form W-2) and apply criteria such as deriving all or most of one's income from a single business payer and/or receiving \$10,000 from a single sheltered workshop in order to estimate the percentage of people with disabilities who are misclassified as rehabilitation clients and perform an IRS audit when appropriate.
- Improved oversight.

Department of Justice

- The Tax Division of the Department of Justice should consider the sheltered workshop model of employment to be an industry prone to worker misclassification and pursue criminal investigations and prosecutions against sheltered workshops that willfully fail to comply with their

employment tax responsibilities for people with disabilities, as well as individuals who aid and assist them in failing to meet those responsibilities.

The Office of Special Education and Rehabilitation Services

- OSERS should clarify that the meanings of "employee" and "wages" as used in the definition of CIE under WIOA have the same meanings as used for federal employment tax purposes.
- OSERS should clarify that the meaning of "benefits" as used in the definition of CIE under WIOA includes tax-deductible employer-sponsored benefits.
- Financial planning and benefits counseling for people with disabilities who rely on government safety net programs should encourage employees with disabilities to participate in the IRS's federal antipoverty programs.

State Legislatures

- States that have incorporated into their state statutes language identical or similar to that in 26 U.S.C. Section 3309(b)(4) that exempts people with disabilities in sheltered workshops from the term "employment" should repeal these provisions in their entirety.

Endnotes

- 1 *E.g.*, Memorandum of Understanding Between the U.S. Department of Labor and the Internal Revenue service, Employment Tax Referrals (December 14, 2022) *available at*: <https://www.dol.gov/sites/dolgov/files/WHD/MOU/MOU-WHD-IRS-22-signed.pdf>.
- 2 <https://www.appropriations.senate.gov/imo/media/doc/LHHSFY23REPT.pdf>.
- 3 *See* 29 U.S.C. §781 (a)(5)-(6).
- 4 29 U.S.C. § 781(a)(10).
- 5 *S.C. v. Louisiana Association for the Blind*, Louisiana Workforce Comm. Appeal Decision June 4, 2020, Determination No. 6912049.
- 6 *E.g.*, Intuit Accountants, “No W-2 Wages for Goodwill Industries,” *available at*: Answered: No W-2 wages from Goodwill Industries? – Intuit Accountants Community (last accessed December 10, 2024) and TaxProTalk, “Sheltered Workshop – Earned Income for Sec. 32?,” *available at*: TaxProTalk.com • View topic – Sheltered Workshop – Earned Income for Sec 32? (last accessed December 10, 2024).
- 7 42 U.S.C. 12101(a)(7).
- 8 *Olmstead v. L. C. ex rel. Zimring*, 527 U.S. 581 (1999).
- 9 34 CFR § 361.5.
- 10 Association of People Supporting Employment First, Trends and Current Status of 14(c), (July 2023) <https://apse.org/wp-content/uploads/2023/09/APSE-14c-Update-REV-0723.pdf>.
- 11 U.S. Department of Labor, Bureau of Labor Statistics, “Economic News Release: Persons with a Disability: Labor Force Characteristics Summary” (February 22, 2024) *available at*: <https://www.bls.gov/news.release/disabl.nr0.htm>.
- 12 Federal Emergency Management Administration, U.S. Department of Homeland Security Federal Emergency Management Agency National Advisory Council Charter (2023) *available at*: https://www.fema.gov/sites/default/files/documents/fema_nac-charter_2023.pdf.
- 13 *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. 2009) (holding delivery drivers to be independent contractors for purposes of the National Labor Relations Act); *Tumulty v. FedEx Ground Package Sys.*, 2005 U.S. Dist. LEXIS 26215, at *2 (W.D. Wash. Mar. 4, 2005) (holding FedEx to be a joint-employer of certain drivers for purposes of the Fair Labor Standards Act and Washington Minimum Wage Act); *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. Rptr. 3d 327, 335 (2007) (holding a class of drivers to be employees of FedEx for purposes of California labor law); *Craig v. FedEx Ground Package Sys.*, 335 P.3d 66, 92 (Kan. 2014) (holding delivery drivers to be employees for purposes of the Kansas Wage Payment Act); *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 297 (Wash. 2012) (holding drivers to be independent contractors for purposes of the Washington Minimum Wage Act).
- 14 *Infra.* at note 33.
- 15 *E.g.*, Renewed Memorandum of Understanding between the U.S. Department of Labor and the Internal Revenue Service (December 15, 2022) *available at*: <https://www.dol.gov/newsroom/releases/whd/whd20221215-0#:~:text=WASHINGTON%20E%80%93%20The%20U.S.%20Department%20of,and%20protections%20under%20the%20law..>
- 16 U.S. Senate Committee on Appropriations, Explanatory Statements for Department of Labor, Health and Human Services, and Education and Related Agencies Appropriations Bill 2023 *available at*: <https://www.appropriations.senate.gov/imo/media/doc/LHHSFY23REPT.pdf>.

- 17 Government Accountability Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention (August 2009) *available at*: <https://www.gao.gov/assets/gao-09-717.pdf>.
- 18 *Id.*
- 19 *Priv. Ltr. Rul.* (PLR) 9809831 (Feb. 27, 1998), and PLR 9804023 (Jan. 23, 1998); *but see* PLR 9417008 (Apr. 29, 1994) (participants with disabilities in sheltered workshop program were not employees where they earned subminimum wages, did not support themselves with their earnings, and the services they performed did not displace regular employees).
- 20 Rev. Rul. 65-165, 1965-1 C.B. 466; *see also* Internal Revenue Service Memorandum (Sept. 25, 1997) Assistant Chief Counsel Employee Benefits and Exempt Organizations CC: EBEO Subject: Employment Tax Status of Disabled Workers.
- 21 *E.g.*, PLR 200703019 (I.R.S. October 23, 2006); PLR 9809031 (1997); PLR 9138016 (1991); PLR 9332039 (1993); PLR 9349005 (1993); PLR 9417008 (1994).
- 22 *B.W.b Constr. Corp. v. Taylor*, 1997 Va. App. LEXIS 13, *1 (affirming that workshop claimant did not unjustifiably refuse to cooperate with vocational rehabilitation by failing to regularly attend the sheltered workshop program).
- 23 *See* Treas. Reg. Section 601.201(a)(6) (as amended in 1983); *Id.* Section 601.601(d)(2)(i)(a) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14.
- 24 Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14.
- 25 *See Gibson Wine Co. v. Snyder*, 90 U.S. App. D.C. 135, 194 F.2d 329 (D.C. Cir. 1952); *Eastern Ky. Welfare Rights Org. v. Simon*, 165 U.S. App. D.C. 239, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976).
- 26 Rev. Proc. 89-14, 1989-1 C.B. 814, 814-15; *accord* Publications Handbook, *supra* note 30, Paragraph 211.
- 27 *Id.*
- 28 Judicial Deference to Revenue Rulings: Reconciling Divergent Standards, 56 Ohio St. L.J. 1037, 1046.
- 29 *See* 26 C.F.R. § 601.601(d)(2)(v)(d).
- 30 *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994)).
- 31 National Council on Disability, *A cursory look at the AbilityOne Program* (February 22, 2019) *available at*: <https://www.ncd.gov/report/a-cursory-look-at-abilityone-1/#:~:text=SCOPE%20AND%20PURPOSE%3A%20In%20this,federal%20disability%20law%20and%20policy>.
- 32 *Id.*
- 33 Payroll Fraud Prevention Act of 2018, H.R. 6189, 115th Congress.
- 34 Hearing on Worker Misclassification: Misclassification Denies Workers Critical, Basic Benefits; Joint Hearing Before the House Committee on Ways and Means Subcommittees Income Security and Family Support and Select Revenue Measures (May 8, 2007).
- 35 Internal Revenue Service, About Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (March 19, 2024) *available at*: <https://www.irs.gov/forms-pubs/about-form-ss-8>.
- 36 IRM 750.1 *available at*: https://www.irs.gov/irm/part7/irm_07-050-001r (last accessed May 31, 2024).
- 37 *See* Fair Labor Standards Act, 29 U.S.C. §§ 206-207, 211.
- 38 *Shultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1270 (10th Cir. 1970).
- 39 *Karlson v. Action Process Serv. & Priv. Investigations, LLC*, 860 F.3d 1089, 1093 (8th Cir. 2017) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)).
- 40 *See Sharp v. Board of Trs.*, 2013 N.J. Super. Unpub. LEXIS 1550, *6-13.
- 41 *Cejas Commer. Interiors, Inc. v. Torres-Lizama*, 260 Ore. App. 87, 95.
- 42 26 U.S.C. §§ 3301 & 3302.
- 43 *Id.*

- 44 *E.g.*, Alabama (Code of Ala. § 25-4-10(b)(21)(d)); Connecticut (Conn. Gen. Stat. § 31-222(III)(V)(iii)); Delaware (19 Del. C. § 3302); District of Columbia (D.C. Code § 51-101(iv)(III)); Illinois (820 ILCS 405/220(D)(3)); Missouri (§ 288.034 R.S.Mo.); Montana (39-51-204); New York (Labor Law § 563(2)(d)); Oklahoma (40 Okl. St. § 1-210); South Carolina (S.C. Code Ann. § 41-27-260(c)); Virginia (Va. Code Ann. § 60.2-213); Virgin Islands (24 V.I.C. § 302); and Wisconsin (Wis. Stat. § 108.02(2)).
- 45 *Okla. Goodwill Indus. v. Okla. Emp't Sec. Comm'n*, 2009 OK 55, ¶ 18, 219 P.3d 540, 544-45.
- 46 *Id.*
- 47 *Tyler v. Smith*, 472 F. Supp. 2d 818, 822-823.
- 48 *Id.*
- 49 26 U.S.C.S. § 3101.
- 50 42 U.S.C.S. § 401 *et seq.*
- 51 26 U.S.C. §3121(a).
- 52 26 U.S.C. §3102(a).
- 53 26 U.S.C. §3402(a)(1).
- 54 26 U.S.C. §§3101, 3111.
- 55 26 U.S.C. §3111.
- 56 26 U.S.C. §3121(d).
- 57 Internal Revenue Service, *Topic no. 751, Social Security and Medicare Withholding Rates*, available at: <https://www.irs.gov/taxtopics/tc751>.
- 58 See *Sorenson v. Sec'y of the Treasury of the United States*, 475 U.S. 851, 864, 106 S. Ct. 1600, 89 L. Ed. 2d 855 (1986) (*citing* the legislative record); *In re James*, 406 F.3d 1340, 1344 (11th Cir. 2005) (*quoting Sorenson*, 475 U.S. at 864).
- 59 House Budget Comm. Majority Staff, *The War on Poverty: 50 Years Later* app. II: Tables (2014), [http://budget.house.gov/UploadedFiles/War on Poverty Full Inventory. xlsx](http://budget.house.gov/UploadedFiles/War%20on%20Poverty%20Full%20Inventory.xlsx) (showing that the federal government spent \$59 billion on the EITC in 2012, more than any other antipoverty program except for the Supplemental Nutritional Assistance Program and Medicaid); see Joint Comm. on Tax'n, JCX-3-17, *Estimates of Federal Tax Expenditures for Fiscal Years 2016-2020*, tbl. 1 (Comm. Print 2017), available at: <https://www.jct.gov/publications.html?func=startdown&id=4971> (showing an estimated tax expenditure of \$73.4 billion in 2017).
- 60 Joint Comm. on Tax'n, JCX-22-22, *Estimates of Federal Tax Expenditures for Fiscal Years 2022-2026*, tbl. 1 (Comm. Print 2022), available at: <https://www.jct.gov/getattachment/46c5da1a-424b-4a6f-bf6e-e076845b168d/x-22-22.pdf>.
- 61 Department of the Treasury, Internal Revenue Service, *Publication 596 Earned Income Credit (EIC) For use in preparing 2023 Returns*, available at: <https://www.irs.gov/pub/irs-pdf/p596.pdf> (last accessed November 26, 2024).
- 62 Staff of House Ways and Means Comm., 108th Cong., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 13-36* (Comm. Print 2004) (hereinafter "Green Book").
- 63 *Id.*
- 64 Internal Revenue Service, *Statistics for Tax Returns with the Earned Income Tax Credit (EITC)* available at: <https://www.eitc.irs.gov/eitc-central/statistics-for-tax-returns-with-eitc/statistics-for-tax-returns-with-the-earned-income#2020%20Tax%20Returns%20by%20State%20with%20EITC%20Claims>.
- 65 Internal Revenue Service, *Earned income and Earned Income Tax Credit (EITC) tables* (November 26, 2024) available at: <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables>.
- 66 Internal Revenue Service, *Earned income and Earned Income Tax Credit (EITC) tables* (November 26, 2024) available at: <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables>.
- 67 26 USCS § 6409.

- 68 Social Security Administration, *SI 01130.676 Federal Tax Refunds and Advance Tax Credits for SSI Resources* (December 7, 2023) available at: <https://secure.ssa.gov/poms.nsf/lnx/0501130676>.
- 69 29 U.S.C.S. §§ 1001-1381.
- 70 29 U.S.C.S. § 1002(1).
- 71 29 U.S.C.S. § 1003(a).
- 72 See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992).
- 73 ERISA §§ 101(b)(4), 103, 104, 4065, 88 Stat. 840, 841, 847, 1032; I.R.C. §§ 6068, 6059.
- 74 *Rubin v. Commissioner*, 103 T.C. 200, 213.
- 75 *Id.*
- 76 *Id.*
- 77 National Council on Disability, Toward Economic Security, *The Impact of Income and Asset Limits on People with Disabilities* (October 31, 2023) available at: <https://www.ncd.gov/report/2023-progress-report-toward-economic-security-the-impact-of-income-and-asset-limits-on-people-with-disabilities/>.
- 78 KFF, *Status of State Medicaid Expansion Decisions* (November 17, 2024) available at: <https://www.kff.org/status-of-state-medicaid-expansion-decisions/>.
- 79 Memorandum of Understanding Between the U.S. Department of Labor and the Internal Revenue service, *Employment Tax Referrals* (December 14, 2022) available at: <https://www.dol.gov/sites/dolgov/files/WHD/MOU/MOU-WHD-IRS-22-signed.pdf>.
- 80 *Id.*
- 81 *Id.*



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