

**44-768. Determination of classification of worker as an employee or independent contractor; circumstances for reasonable basis of classification; imposition of penalties, when.** The secretary shall make the determination of employment required by K.S.A. 44-703(i)(3)(D), and amendments thereto, by examining the totality of the circumstances in which the individual renders service and shall exercise strict impartiality in the conduct of any such determination.

(a) The secretary shall first seek to determine whether the business in question has a reasonable basis upon which it relied when it determined the classification of a worker as an employee or independent contractor. If a reasonable basis is found, the classification shall be deemed valid subject to the provisions of K.S.A. 44-703(i)(3)(D), and amendments thereto. A business has a reasonable basis for its classification of workers if:

(1) Any of the following circumstances are present:

(A) The business reasonably relied upon a judicial decision regarding employment classification matters rendered by a federal or state court of competent jurisdiction in the state of Kansas;

(B) the business previously received a ruling from the internal revenue service, the department of revenue, or the department of labor validating the business' classification of workers;

(C) the business has been previously audited by the internal revenue service, the department of revenue, or the department of labor at a time when the business classified workers similarly situated in the same manner to those workers currently in question, and such audit did not result in reclassification of those workers so similarly situated; or

(D) the business reasonably relied on the application of worker classifications customary among a significant segment of its industry; and

(2) The business showed consistency in its practices by:

(A) The business classified the worker in question and any similarly situated worker in the same manner; and

(B) the business has consistently and properly reported to the appropriate taxing authorities wages or payments to the workers in question and those similarly situated.

(b) If a reasonable basis as articulated herein cannot be ascertained, then when making a determination the secretary shall then consider the following factors:

(1) Must the individual comply with specific instructions from the business regarding when, where, and how to perform services so provided?

(2) Are the activities of the individual integrated into the ongoing operations of the business?

(3) If needed to accomplish the desired end result, does the individual have the responsibility to hire, supervise and pay assistants?

(4) Must the individual work exclusively for the business in question?

(5) Is payment by the business to the individual for services contingent on completion of established benchmarks or tasks?

(6) Does the individual provide significant tools, materials or other equipment used in the accomplishment of the desired end result?

(7) Is the individual responsible for any expenses incurred in the performance of services?

(8) Can the individual suffer a loss in the course of performing services?

(c) The secretary shall seek to educate the business by assisting the business in identifying facts which may establish either classification.

(d) If imposition of a penalty or interest could otherwise be imposed by this act due to a misclassification of a worker, before imposition of such assessment, the secretary shall consider the appropriateness of the penalty or interest to the business charged with the violation of misclassifying a worker given the circumstances in which the misclassification occurred, including whether or not a reasonable basis for the classification exists. If a reasonable basis for the classification exists, then the secretary shall not impose penalties or interest or seek recovery of back taxes for the time period prior to the secretary's determination that a reasonable basis exists.

(e) This section shall be a part of and supplemental to the employment security law.

**History:** L. 2011, ch. 81, § 2; July 1.