

# You Can't Pretend An Employee is a Contractor

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By Guest Blogger Andy Schmidt.

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People often ponder what ingredients are actually inside a Tastykake. But have you ever wondered who the workers are that make these products and get them to your store? Flowers Foods Inc. is the parent company of Lewiston-based Lepage Bakeries. They make Tastykakes and also brands like Wonder and Nature's Own. You might have assumed that the guy driving the Lepage Bakeries' vehicle to your local store was a Lepage employee. [But according to a class action lawsuit in North Carolina, Flowers Foods classifies distribution workers as independent contractors instead of employees, even when they work full time getting Tastykakes to store shelves.](#)



According to the lawsuit, the independent distributors of Flowers products in North Carolina are really employees because Flowers' subsidiary controls their routes, product selection, and marketing. The workers allege that because of this misclassification, they were denied wages for all the time worked, overtime premiums, and had illegal deductions taken from their pay. The court in North Carolina recently granted a motion to certify the independent contractors as a class to bring their claims together. But the workers will still have to prove that they were actually employees.

The attorney for the Flowers workers in North Carolina told [Mainebiz that he thinks the ruling will affect Flowers' distributors in other states.](#)

Without independently evaluating the specific facts for Lepage's delivery distributors in Maine, we can't know if they follow the same business practices or if they are actually employees. But what we do know is that misclassifying employees as independent contractors is a serious problem in Maine. We all support the idea of small business people working hard and taking risks to start and run their own enterprises. But that doesn't mean companies can just say all of their line employees are independent business people. If bosses can just pretend all employees are contractors, then they can avoid any laws covering minimum wage, overtime, worker's compensation, and unemployment. The entire concept of a workers' union becomes impossible.

Fortunately, under Federal law and Maine law misclassifying employees as independent contractors is illegal. My friend Jeff Young [blogged about similar issues in a post about NFL cheerleaders last summer](#).

While every situation is fact intensive, the courts in Maine will weigh these four factors in deciding whether a worker is truly an "independent contractor":

- (1) the degree of control an employer exercises over the workers;
- (2) the workers' opportunity for profit or loss and their investment in the business;

(3) the degree of skill and independent initiative required to perform the work; and

(4) the extent to which the work is an integral part of the employer's business.

The fourth factor is often crucial. A law firm can certainly hire an independent contractor to fix their electrical system. But a full time paralegal is almost certainly an employee because his work is at the core of the business operations.

If your boss labels you a contractor but you work forty or more hours in a week for her, there is a good chance that you are really an employee. And most, but not all, employees are owed overtime pay when they work more than forty hours.

If we believe in minimum wages, overtime, worker's compensation, and union rights, we must stand up to misclassification.

The good thing is that if you believe you might be misclassified as an independent contractor, you can complain to the Federal or State Departments of labor. You can often find a labor attorney willing to take the case without upfront costs because the employer is required to pay your attorneys' fees if you show you weren't paid correct wages. There are anti-retaliation laws that protect you when you assert your rights. And under Maine's wage law, you have a full six years to bring a claim.

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