



**NEVADA LEGISLATURE
LEGISLATIVE COMMISSION'S SUBCOMMITTEE
TO STUDY EMPLOYEE MISCLASSIFICATION
(Senate Concurrent Resolution No. 26, File No. 100, *Statutes of Nevada 2009*)**

SUMMARY MINUTES AND ACTION REPORT

The third and final meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification was held on Thursday, June 10, 2010, at 9 a.m. in Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 2135 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. A copy of this set of "Summary Minutes and Action Report," including the "Meeting Notice and Agenda" ([Exhibit A](#)) and other substantive exhibits, is available on the Nevada Legislature's website at <http://www.leg.state.nv.us/interim/75th2009/committee/>. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (e-mail: publications@lcb.state.nv.us; telephone: 775/684-6835).

SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Senator Shirley A. Breeden, Chair
Fran Almaraz
Yindra Dixon

SUBCOMMITTEE MEMBER PRESENT IN CARSON CITY:

Assemblywoman Bonnie Parnell, Vice Chair

SUBCOMMITTEE MEMBER ABSENT:

Warren Hardy

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Linda J. Eissmann, Principal Research Analyst, Research Division
Heidi A. Chlarson, Principal Deputy Legislative Counsel, Legal Division
Darcy L. Johnson, Deputy Legislative Counsel, Legal Division
Tracey Wineglass, Senior Research Secretary, Research Division

OPENING REMARKS

- Chair Breeden called the third and final meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification to order and thanked the Subcommittee members, staff, presenters, and the public for participating in this legislative process and noted the procedures for Subcommittee business and testimony.
- Chair Breeden introduced a letter into the record from Mike Yadon, Senior State and Local Government Affairs Representative, FedEx Corporation. (Please see [Exhibit B.](#))

PUBLIC COMMENT

- Paul Enos, President, Nevada Motor Transport Association, shared his concern regarding the ABC Test as it applies to the independent contractor in the trucking industry. He explained the model for the trucking industry in regards to hiring independent contractors and stated that the trucking industry requires strict regulation through the Department of Federal Motor Carrier Safety Administration, United States Transportation. He clarified if the ABC Test designates the independent contractor cannot be in the same "industry" as the company being served this could create less asset-based companies and create more brokerage companies.

There was discussion among Ms. Almaraz, Ms. Dixon, and Mr. Enos regarding other states' application of the ABC Test. Mr. Enos emphasized that the interpretation of a recent law to address employee misclassification in Colorado by Colorado's Department of Labor and Employment, Division of Labor, created a scenario where an independent contractor was able to collect unemployment from the company he served because he was in the same "industry" as the company he served. Ms. Almaraz noted legislation in Nevada could be written to alleviate the problem that was created in Colorado. Mr. Enos suggested using the Internal Revenue Service (IRS) 20 Factor Test to determine if a person is an employee or independent contractor.

- David Kersh, Government Affairs Director, Carpenters/Contractors Cooperation Committee, offered a recommendation to use model legislation from the National Conference of Insurance Legislators (NCOIL) in which an employer fails to secure workers' compensation for its employees and to define the use of the word "secure" in *Nevada Revised Statutes* 616D.110 to address the violation of workers' compensation laws. (Please see [Exhibit C.](#))
- Donna Clark, Chief of Contributions, Unemployment Insurance Program, Department of Employment, Training and Rehabilitation, offered a suggestion that the terms "employee" and "independent contractor" be crafted carefully to alleviate additional conflict or loopholes in legislation.
- Cynthia A. Jones, Administrator, Unemployment Insurance Program, Department of Employment, Training and Rehabilitation, supports Ms. Clark's suggestion and noted

that having a presumptive law such as the ABC Test which requires the employer to prove the person is not an “employee” or “independent contractor” is easier to interpret than defining the terms in statute.

There was a discussion between Ms. Dixon and Ms. Jones regarding the monetary impact to the State if the ABC Test or the definition is placed into legislation. Ms. Jones noted that the ABC Test is currently used and would not create a fiscal impact. She stated the intent is to have consistency with all state programs when there is a question of how to determine when there is an employee/employer relationship.

- Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters (IBT), noted that three states (Michigan, Nebraska, and Vermont) have passed legislation addressing “bad acting employers.” He noted that all industries should be considered when preparing the recommendations for legislation. The IBT supports the use of the ABC Test because it provides clear distinction between an employee and independent contractor. He indicated that the IRS 20 Factor Test is used specifically for tax code purposes and favors the independent contractor and the employer. The IBT suggests proposed legislation concerning employee misclassification include: (1) strong financial penalties against bad acting employers; (2) private right of action language to allow a misclassified worker to forego filing a claim with the State Labor Commissioner; (3) a prohibition against the use of contracts intended to misclassify a worker as an independent contractor; (4) State interagency cooperation; and (5) a funding mechanism.

There was general discussion between Ms. Dixon and Mr. Reilly regarding suggestions to discourage the practice of employee misclassification and ways to approach the issue in a proactive manner. Mr. Reilly stated that educating State agencies, employers, and employees would reduce the practice of employee misclassification.

- Gustavo “Gus” Nuñez, P.E., Manager, State Public Works Board, addressed the Subcommittee regarding issues concerning employee misclassification on public works projects. Mr. Nuñez explained that the State Public Works Board is not prepared to facilitate issues concerning employee misclassification.
- Ms. Parnell opined there should be an equal opportunity for a company and an independent contractor to bid on a public works project. She stated that consideration should be given for the overhead paid by a company versus the independent contractor who subcontracts work for a lower cost.

Responding to Ms. Parnell, Mr. Nuñez explained the bidding process, timelines, and licensing requirements for an independent contractor to bid on a public works project. He also noted that independent contractors are required to supply a list of the subcontractors working on the project within a certain time frame. Mr. Nuñez further explained that in his view the checks and balances are in place and any classification

discrepancy would be uncovered through weekly reports. He emphasized that the tools are in place to enforce Chapter 341 (“State Public Works Board”) of NRS.

- Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry offered his support of the comments made by Mr. Nuñez and added that the requirements and controls in place by the State Public Works Board are strictly enforced.
- Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, stated that independent contractors use subcontractors that are not identified on a certified payroll report to complete work on prevailing wage projects. Mr. Mallory offered the following recommendations to the Subcommittee: (1) clarify the NRS to assist the employee and employer in determining worker classification; and (2) establish automatic presumption of employee status. (Please see [Exhibit D.](#))
- Dino DiCianno, Executive Director, Department of Taxation, stated that changes to the definition of “employee” will impact the modified business tax (MBT). Independent contractors are not subject to the MBT because they are not considered an employer. Mr. DiCianno addressed recommendations contained in the work session document concerning implementation of fines and penalties on employers who misclassify employees as independent contractors and penalties against anyone who advises a client to misclassify employees as independent contractors for the purpose of avoiding taxes and benefits. He expressed concern regarding who would adjudicate the fines and explained there is a communication level that must exist between agencies to allow the Department of Taxation to verify returns against the MBT.

Discussion ensued between the Subcommittee and Mr. DiCianno regarding suggestions to enhance the interagency communication and improve the recommendations to the 2011 Legislature. Mr. DiCianno explained that Chapter 612 (“Unemployment Compensation”) of NRS states an independent contractor must pay wages that are subject to the MBT. Mr. DiCianno offered to be a member of any task force or statewide study to create a funding mechanism by which claims of misclassification can be reported and investigated. Further discussion indicated that the Department of Taxation currently bills for a misclassified employee if notified by the Labor Commissioner after the investigation process. Mr. DiCianno further explained if the Department of Taxation is made responsible for fines and penalties related to employee misclassification additional staff would be required to manage the process, including appeals and investigations.

- Warren Stender, Operative Plasterers' and Cement Masons' International Association, Local Union No. 797, Las Vegas, supports Mr. Mallory's comments on prevailing wage projects. Mr. Stender further questioned the facts in the document prepared by Mike Yadon, previously identified. (Please see [Exhibit E.](#))
- Mr. Mallory (previously identified) suggested that responsibility for enforcing recommendations being considered by the Subcommittee be assigned to the Office of the Attorney General because it is the top law enforcement agency in the State. Mr. Mallory noted that most State agencies have an attaché within the Office of the Attorney General to assist with legal issues affecting the agency. He suggested that any investigation be conducted by the Office of the Attorney General and once a determination of a violation occurs, the final action would determine the agency responsible for implementing the appropriate action.
- Responding to Mr. Mallory, Mr. Tanchek explained that Chapter 607 ("Labor Commissioner") of NRS states that enforcement issues not delegated to any other agency are assigned to the Office of the Labor Commissioner.

WORK SESSION—DISCUSSION AND POSSIBLE ACTION ON RECOMMENDATIONS TO:

- Define "employee" and "independent contractor" in NRS and include those definitions in State labor law posters;
- Implement fines and penalties on employers who misclassify employees as independent contractors;
- Provide for a process and associated funding mechanism by which claims of misclassification may be reported and investigated, which may include creation of a task force and/or statewide study of the problem in Nevada;
- Standardize the statutory test to determine whether an individual is an employee or independent contractor;
- Require annual reports, retention of employment records, and random audits of employers that use independent contractors;
- Prohibit agreements between employers and workers that result in the misclassification of that worker as an independent contractor;
- Require a provision of health insurance by employers who use large numbers of independent contractors in their workforce;
- Adopt model legislation from the National Conference of Insurance Legislators known as the Construction Industry Workers' Compensation Coverage Act;

- Implement penalties against anyone who, in a professional capacity, advises a client to misclassify employees as independent contractors for the purposes of avoiding taxes and benefits;
- Allow for legal action in cases of misclassification and recovery of legal expenses; and
- Authorize the State Public Works Board to oversee issues concerning employee misclassification on public works projects.

“WORK SESSION DOCUMENT”

The following “Work Session Document” was prepared by the staff of the Legislative Commission’s Subcommittee to Study Employee Misclassification. It is designed as an outline to assist the Subcommittee members in making decisions concerning recommendations to be forwarded to the Legislative Commission and ultimately to the 2011 Session of the Nevada Legislature. The recommendations contained herein were either submitted in writing to the Subcommittee, discussed during one of the Subcommittee’s meetings, or suggested by a member of the Subcommittee for consideration at the final meeting.

The possible actions identified in this document are in no particular order and should not be construed as having the support of the Subcommittee or its individual members. Rather, they are compiled so the members may review and discuss them during the work session to decide if they should be adopted, changed, rejected, or further considered. The recommendations are numbered for ease of reference during discussion at the final meeting.

To be adopted, recommendations must be approved by a majority of the Subcommittee members present.

In accordance with NRS 218D.160, the Subcommittee may recommend no more than five bill draft requests that relate to matters within the scope of the study. The requests must be submitted no later than July 1, 2010 (NRS 218E.205). Other items not requiring legislation, such as requests for letters, may be sent by the Chair of the Subcommittee. The “Work Session Document” can be viewed as [Exhibit F](#).

OVERVIEW OF RECOMMENDATIONS

- Chair Breeden directed staff to provide a brief overview of the full list of recommendations before the Subcommittee began its deliberations.

RECOMMENDATION NO. 1—*Enact legislation providing clear definitions in NRS for “employee” and “independent contractor.” (Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerma and Holsberry, in a letter submitted to the record, January 22, 2010. See Tab B of [Exhibit F](#) for additional information on this issue.)*

- Ms. Eissmann (previously identified) gave a brief review of the definitions of employee and independent contractor currently being used for unemployment compensation and workers' compensation coverage and explained that specific definitions must be determined. (See *Tab A* of [Exhibit F](#).)

RECOMMENDATION NO. 2—Enact comprehensive legislation to:

- Clearly define “employee” and “independent contractor”;**
 - Require annual employment reports to the State by companies who use independent contractors;**
 - Require retention of employment and independent contractor records for at least three years;**
 - Require that the information on State labor law posters include definitions of employees and independent contractors, and that the posters be placed in the area where work is performed or employees congregate, depending on the job site;**
 - Allow for third-party reporting of violations and mandate investigation by the appropriate State agency (for unemployment insurance, workers' compensation coverage, labor violations, or tax evasion) when a misclassification claim is filed;**
 - Create a formula to randomly audit all employers to ensure compliance with the laws concerning employee misclassification as independent contractors; and**
 - Implement a fine of \$5,000 per employee on each employer found to be misclassifying employees for the first offense, with subsequent offenses subject to increasing fines up to \$50,000, loss of ability to do business for a prescribed period of time, and possible criminal penalties up to and including jail time. (Proposed by Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, April 5, 2010, meeting and correspondence. See *Tab C* of [Exhibit F](#) for additional information on this topic.)**
- Ms. Eissmann reviewed the comprehensive legislation suggested by Jack Mallory (previously identified) and suggested the Subcommittee discuss the details of his suggestions.

RECOMMENDATION NO. 3—Enact comprehensive legislation to:

- Ensure the ABC test is applied in all tests for unemployment insurance (and by extension the MBT) and workers' compensation coverage to determine whether an employee is a legitimate independent contractor;**

- b. Assign stricter penalties on employers who knowingly misclassify workers as independent contractors including a fine of \$15,000, debarment for 3 years on public contracts, and 3.5 years in jail for the first offense, with a graduated penalty for each subsequent offense. For those who unknowingly misclassify employees as independent contractors, the fine should be \$2,500 per employee;
 - c. Provide for a private right of action by an individual, group, or third party organization (including labor organization) to pursue civil penalties against employers who misclassify their employees as independent contractors. This should include allowing misclassified employees to seek unpaid back wages as well as legal fees;
 - d. Prohibit agreements between employers and workers that result in the misclassification of that worker;
 - e. Establish a coordinated process or system among appropriate State agencies to ensure the State is adequately prepared to review instances of misclassification, including information sharing, resource sharing, and joint investigations; and
 - f. Implement a funding mechanism (either through a line-item budget or a small fee on registered independent contractors) to ensure necessary resources for investigations and litigation against employers who misclassify workers. *(Suggested by Fran Almaraz, Subcommittee member, correspondence to staff, May 12, 2010, and by Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, April 5, 2010, meeting and correspondence. See Tab D of [Exhibit F](#) for additional information on this topic.)*
- Ms. Eissmann, reviewed the suggestions presented by Ms. Almaraz and discussion ensued among Subcommittee members regarding funding mechanisms and the procedures involved in creating a budget line item for collection of fees, fines, and penalties. Further discussion added Mr. Mallory (previously identified), and Mr. Reilly (previously identified) regarding independent contractor business license requirements.

RECOMMENDATION NO. 4—Enact legislation similar to Colorado’s HB 09-1310, approved in 2009, which contains two primary provisions: (a) a means to investigate complaints of employee misclassification with associated penalties; and (b) a statewide study of the extent of the problem. *(Discussed by the Subcommittee at its April 5, 2010, meeting. See Tab E of [Exhibit F](#).)*

- Ms. Eissmann summarized the content of Colorado’s HB 09-1310 that would require Nevada’s Unemployment Insurance Program to accept, investigate, and enforce complaints of employee misclassification.

RECOMMENDATION NO. 5 — Enact legislation creating a streamlined means in NRS by which complaints of worker misclassification can be submitted (via e-mail, online, or regular mail) and forwarded to the appropriate entity for investigation. This could also include formally creating a task force of agencies involved in aspects of misclassification, which would not only share information but also meet in an advisory capacity to make reports and recommendations to the Legislature. *(Discussed by the Subcommittee, at its April 5, 2010, meeting. See Tabs F and G of [Exhibit F](#).)*

- Ms. Eissmann briefly reviewed legislation from Indiana and New Hampshire that summarized the delegation of responsibilities between state agencies to create a task force that would focus on employee misclassification.

RECOMMENDATION NO. 6—Enact legislation adopting the National Conference of Insurance Legislators’ (NCOIL) Construction Industry Workers’ Compensation Coverage Act model legislation. *(Mentioned in general discussion by the Subcommittee at the April 5, 2010, meeting. See Tab I of [Exhibit F](#).)*

- Ms. Eissmann shared background information regarding model legislation provided from NCOIL and explained some of the content provided in the legislation.

RECOMMENDATION NO. 7—Enact legislation providing for a civil or criminal penalty against any person (including attorneys, accountants, and human resource specialists) who knowingly advises an employer to misclassify employees as independent contractors. *(Suggested by Assemblywoman Bonnie Parnell, Vice Chair, at the April 5, 2010, meeting. See Tab H of [Exhibit F](#).)*

- Ms. Eissmann provided an example of California legislation that prohibited a person, for pay, from knowingly advising an employer to misclassify employees as independent contractors.

RECOMMENDATION NO. 8—Enact legislation providing for a private right of action for workers or their representatives in cases of employee misclassification. *(Discussed by the Subcommittee during testimony of Catherine Ruckelshaus, Legal Co-Director, National Employment Law Project, at the April 5, 2010, meeting. See Tab J of [Exhibit F](#).)*

- Ms. Eissmann shared a letter from Catherine Ruckelshaus (previously identified) that summarizes the states with independent contractor misclassification laws that provide a private right of action.

RECOMMENDATION NO. 9—Enact legislation providing for reimbursement of legal expenses to the claimant by the employer if the employer knowingly misclassified the claimant. *(Suggested by Andrew J. Kahn, Attorney, McCracken, Sterman and Holsberry, Attorneys at Law, Las Vegas, in a letter submitted to the Subcommittee at the January 22, 2010, meeting. See Tab B of [Exhibit F](#).)*

- Ms. Eissmann referenced a letter provided to the Subcommittee by Andrew J. Kahn at the first meeting of the Subcommittee which addresses the issues that a misclassified employee encounters when pursuing a case against an employer.

RECOMMENDATION NO. 10—Enact legislation mandating provision of health insurance by companies regularly using large independent contractor workforces. *(Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted to the Subcommittee at the January 22, 2010, meeting. See Tab B of [Exhibit F](#).)*

- Ms. Eissmann shared the issues regarding health care coverage for misclassified workers. She explained the Subcommittee would have to recommend a specific definition for the size of the workforce.

RECOMMENDATION NO. 11—Add provisions to NRS that would allow oversight by the State Public Works Board concerning worker misclassification as independent contractors on public works projects. *(Suggested by Assemblywoman Bonnie Parnell, Vice Chair, in response to concerns raised by witnesses regarding public works projects.)*

- Ms. Eissmann mentioned comments made by Mr. Nuñez (previously mentioned) regarding additional NRS language that would require oversight of worker misclassification by the State Public Works Board.
- Mr. Tanchek (previously identified) shared his support for the private right of action on behalf of the independent contractor and explained some of the issues the State Labor Commissioner’s office has had to address regarding the subject.
- Chair Breeden asked the Subcommittee for discussion regarding the recommendations reviewed by Ms. Eissmann. Due to the similar nature of some recommendations and those with multiple parts, the Subcommittee’s deliberations took several recommendations out of order and many were discussed together. Actions were withheld until all recommendations had been discussed.

DISCUSSION OF RECOMMENDATIONS

Discussion ensued among Subcommittee members concerning whether it is better to define the terms “employee” and “independent contractor” or to expand the use of the ABC Test to other areas of labor law. Ms. Parnell addressed the definitions as they apply to interagency usage and suggested amending current legislation to include the Division of Industrial Relations, Department of Business and Industry. Heidi A. Chlarson, Principal Deputy Legislative Counsel, Legal Division, LCB, explained that current statute only includes use of the ABC Test to determine unemployment compensation and the MBT. Ms. Parnell suggested adding the use of ABC Test in relation to workers’ compensation.

- Donald E. Jayne, Administrator, Division of Industrial Relations, Department of Business and Industry, explained his agency currently uses IRS guidelines and that use of the ABC Test is a policy decision for the Legislature.

Subcommittee members queried if the effects of using the ABC Test would create a challenge for the agency or assist in determining employee misclassification.

- Responding to the Subcommittee, Mr. Jayne stated that use of the ABC Test would be accepted and could be helpful in determining employee misclassification if shared through interagency involvement. However, he did not know if it was more beneficial than the policy currently in place.

Subcommittee members inquired about combining Recommendation Nos. 2d and 3a to create legislation that would expand the use of the ABC Test in NRS 612.085 (currently used for unemployment insurance and by extension for the MBT) to include application for the purposes of workers' compensation. The Subcommittee discussed the use of State labor law posters displayed in areas where work is performed or employees congregate.

- Ms. Dixon opined regarding Recommendation No. 4 that the Colorado model allows the Subcommittee to address any areas that are potential loopholes to be reviewed and eliminated from the Nevada legislation.

Discussion on Recommendation No. 5 involved Subcommittee members deliberating the creation of a Task Force on Employee Misclassification. The Subcommittee suggested the following duties of the Task Force: (a) ensure communication among member agencies; (b) receive and review audits conducted by agencies concerning employees who are misclassified; (c) create a structure for fees and penalties levied in the cases of employees misclassified as independent contractors; and (d) make reports to the Legislature.

- Ms. Dixon opined regarding Recommendation No. 6 that legislation be expansive across all industries except for the need to be industry-specific due to industry requirements for independent contractors.

There was discussion regarding Recommendation No. 7 which included defining the term "knowingly" and drafting legislation to impose a civil penalty against anyone who "knowingly" misadvises an employer to misclassify employees as independent contractors.

- Heidi A. Chlarson, previously identified, explained to Subcommittee members that the term "knowingly" could be defined in statute to provide clarification of the term, but it is not required that the term be defined.

- Ms. Parnell asked Ms. Chlarson for clarification of the California language that referred to “severally liable” and how this language would assist Nevada. (See *Tab H of Exhibit F* for additional information on this issue.)
- Ms. Chlarson explained that the California language would find the employee and employer equally liable if fines and penalties were imposed.
- Ms. Parnell shared that this would require language that referred to joint liability.
- Ms. Dixon opined including a definition for private right of action would allow workers the ability to enforce their rights under the law.

As a result of a discussion among the Subcommittee members, it was agreed that Recommendation Nos. 3c, 8, and 9 be combined to draft legislation to provide for a private right of action for workers who are misclassified and provide for reimbursement of legal expenses to the claimant by the employer. The private right of action becomes available to the worker after 120 days from the date a complaint is filed with the appropriate agency.

Discussion on Recommendation No. 10 revealed Subcommittee members’ concerns regarding mandating health insurance coverage without economic stability in the current employment market.

- Ms. Parnell explained in regards to Recommendation No. 11 that based on testimony from Mr. Nuñez (previously identified), oversight concerning worker misclassification currently exists in the bidding process by the State Public Works Board.

Subsequent discussion between the Subcommittee and Ms. Clark (previously identified) and Mr. Mallory (previously identified) centered on Recommendation Nos. 2f and 6 that create a formula to randomly audit all employers for compliance and establish auditing procedures which are focused on finding hidden wages and misclassified employees. Ms. Clark shared that identification of employee misclassification is discovered through the benefit claims investigation and that the confidentiality clause could be revised in order to facilitate shared information with other State agencies. Mr. Mallory stated that a random audit is an additional deterrent to companies against employee misclassification.

RECOMMENDATIONS FOR LEGISLATIVE MEASURES

RECOMMENDATION NO. 5—Enact legislation creating a streamlined means in NRS by which complaints of worker misclassification can be submitted (via e-mail, online, or regular mail) and forwarded to the appropriate entity for investigation. This could also include formally creating a task force of agencies involved in aspects of misclassification, which would not only share information but also meet in an advisory capacity to make reports and recommendations to the Legislature. (Discussed by Subcommittee at its April 5, 2010, meeting. See Tabs F and G of [Exhibit F](#) for additional information on this issue.)

- The Subcommittee discussed possible membership of the Task Force to include five State agencies:

1. Labor Commissioner or designee;
2. Administrator of the Division of Industrial Relations (representing the Workers' Compensation Program), Department of Business and Industry, or designee;
3. Administrator of the Employment Security Division, Department of Employment, Training and Rehabilitation, or designee;
4. Executive Director of the Department of Taxation or designee; and
5. Attorney General or designee;

and representatives of the following five groups to be appointed by the Legislative Commission from names submitted by the legislative leadership and the Governor:

6. A large employer (more than 500 employees);
7. A small employer (less than 500 employees);
8. An independent contractor;
9. A labor organization; and
10. The general public.

- The Subcommittee **TOOK THE FOLLOWING ACTION:**

MS. DIXON MOVED TO APPROVE RECOMMENDATION NO. 1 TO CREATE A TASK FORCE COMPRISED OF TEN MEMBERS, INCLUDING FIVE STATE AGENCIES AND FIVE REPRESENTATIVES APPOINTED BY THE LEGISLATIVE COMMISSION FROM NAMES SUBMITTED BY

THE MAJORITY LEADER OF THE SENATE, MINORITY LEADER OF THE SENATE, SPEAKER OF THE ASSEMBLY, MINORITY LEADER OF THE ASSEMBLY, AND THE GOVERNOR. THE MOTION WAS SECONDED BY ASSEMBLYWOMAN PARNELL AND PASSED UNANIMOUSLY.

RECOMMENDATION NOS. 3a—Ensure the ABC test is applied in all tests for unemployment insurance (and by extension the MBT) and workers’ compensation coverage to determine whether an employee is a legitimate independent contractor. *(Suggested by Fran Almaraz, Subcommittee member, correspondence to staff, May 12, 2010, and by Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, April 5, 2010, meeting and correspondence. See Tab D of [Exhibit F](#) for additional information.)*

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

MS. ALMARAZ MOVED TO DRAFT LEGISLATION THAT EXPANDS THE USE OF THE THREE-PART “ABC TEST” IN NRS 612.085 TO INCLUDE WORKERS’ COMPENSATION. THE MOTION WAS SECONDED BY MS. DIXON AND PASSED UNANIMOUSLY.

RECOMMENDATION NO. 7—Enact legislation providing for a civil or criminal penalty against any person (including attorneys, accountants, and human resource specialists) who knowingly advises an employer to misclassify employees as independent contractors. *(Suggested by Assemblywoman Bonnie Parnell, Vice Chair, at the April 5, 2010, meeting of the Legislative Commission’s Subcommittee to Study Employee Misclassification [S.C.R. 26, File No. 100, Statutes of Nevada 2009].)*

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

ASSEMBLYWOMAN PARNELL MOVED TO RECOMMEND LEGISLATION TO IMPOSE A CIVIL PENALTY AGAINST ANYONE WHO KNOWINGLY ADVISES AN EMPLOYER TO MISCLASSIFY EMPLOYEES AS INDEPENDENT CONTRACTORS. THE MOTION WAS SECONDED BY MS. ALMARAZ AND PASSED UNANIMOUSLY.

- Chair Breeden called to reconsider Recommendation No. 3a.

(2d) Require that the information on State labor law posters include definitions of employees and independent contractors, and that the posters be placed in the area where work is performed or employees congregate, depending on the job site. *(Proposed by Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, April 5, 2010, meeting and correspondence. See Tab C of [Exhibit F](#) for additional information on this issue.)*

- The Subcommittee discussed amending Recommendation No. 3a to include Recommendation No. 2d:
- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

MS. ALMARAZ MOVED TO AMEND HER MOTION ON RECOMMENDATION NO. 3a, TO DRAFT LEGISLATION THAT EXPANDS THE USE OF THE THREE-PART “ABC TEST” IN NRS 612.085 AND TO INCLUDE WORKERS’ COMPENSATION AND INFORMATION CONCERNING THE DIFFERENCE BETWEEN “EMPLOYEE” AND “INDEPENDENT CONTRACTOR” ON STATE LABOR LAW POSTERS IN WORK AREAS. THE MOTION WAS SECONDED BY MS. DIXON AND PASSED UNANIMOUSLY.

RECOMMENDATION NOS. 8, 3c, and 9—(8) Enact legislation providing for a private right of action for workers or their representatives in cases of employee misclassification. *(Discussed by the Subcommittee during testimony of Catherine Ruckelshaus, Legal Co-Director, National Employment Law Project, April 5, 2010.)*

(3c) Provide for a private right of action by an individual, group, or third party organization (including labor organization) to pursue civil penalties against employers who misclassify their employees as independent contractors. This should include allowing misclassified employees to seek unpaid back wages as well as legal fees. *(Suggested by Fran Almaraz, Subcommittee member, correspondence to staff, May 12, 2010, and by Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, April 5, 2010, meeting and correspondence.)*

(9) Enact legislation providing for reimbursement of legal expenses to the claimant by the employer if the employer knowingly misclassified the claimant. *(Suggested by Andrew J. Kahn, Attorney, McCracken, Sterman and Holsberry, in a letter submitted January 22, 2010.)*

- Ms. Parnell noted her concern regarding the right of an employee to have immediate access to legal action without exhausting an administrative process. Discussion ensued among the Subcommittee regarding the administrative process required by employees who are misclassified and at what point are they able to utilize their private right of action.
- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

MS. DIXON MOVED THAT LEGISLATION BE DRAFTED TO INCLUDE A PRIVATE RIGHT OF ACTION FOR WORKERS WHO ARE MISCLASSIFIED AND PROVIDE FOR REIMBURSEMENT OF LEGAL EXPENSES TO THE CLAIMANT BY THE EMPLOYER AVAILABLE AFTER 120 DAYS FROM THE DATE A COMPLAINT IS FILED WITH

THE APPROPRIATE AGENCY. THE MOTION WAS SECONDED BY MS. ALMARAZ AND PASSED WITH ASSEMBLYWOMAN PARNELL VOTING NAY.

RECOMMENDATION NOS. 2g and 3b—(2g) Implement a fine of \$5,000 per employee on each employer found to be misclassifying employees for the first offense, with subsequent offenses subject to increasing fines up to \$50,000, loss of ability to do business for a prescribed period of time, and possible criminal penalties up to and including jail time. *(Suggested by Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, April 5, 2010, meeting and correspondence.)*

- Mr. Mallory testified on the extent and impact of worker misclassification at both meetings of the Subcommittee and was of the opinion that comprehensive legislation would help to address the problem.

(3b) Assign stricter penalties on employers who knowingly misclassify workers as independent contractors including a fine of \$15,000, debarment for 3 years on public contracts, and 3.5 years in jail for the first offense, with a graduated penalty for each subsequent offense. For those who unknowingly misclassify employees as independent contractors, the fine should be \$2,500 per employee. *(Suggested by Fran Almaraz, Subcommittee member, correspondence to staff, May 12, 2010, and by Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, April 5, 2010, meeting and correspondence.)*

Discussion ensued among Subcommittee members regarding the difference between civil and criminal penalties. Ms. Parnell explained that with the current state of the economy she would not support imposing large fines which could put an employer out of business.

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

MS. ALMARAZ MOVED TO DRAFT LEGISLATION TO IMPLEMENT CIVIL PENALTIES ON EMPLOYERS WHO MISCLASSIFY THEIR EMPLOYEES AS INDEPENDENT CONTRACTORS OF \$5,000 PER EMPLOYEE FOR THE FIRST OFFENSE, \$15,000 PER EMPLOYEE FOR THE SECOND OFFENSE, AND \$25,000 PER EMPLOYEE AND LOSS OF ABILITY TO DO BUSINESS FOR A PERIOD OF THREE YEARS ON THE THIRD OFFENSE. MS. DIXON SECONDED THE MOTION WHICH PASSED WITH ASSEMBLYWOMAN PARNELL VOTING NAY.

RECOMMENDATION NO. 1—Enact legislation providing clear definitions in NRS for “employee” and “independent contractor.”

No Subcommittee action was taken on Recommendation No. 1.

RECOMMENDATION NOS. 2a, 2b, 2c, 2e, and 2f—Enact comprehensive legislation to:

- a. Clearly define “employee” and “independent contractor”;**
- b. Require annual employment reports to the State by companies who use independent contractors;**
- c. Require retention of employment and independent contractor records for at least three years;**
- e. Allow for third-party reporting of violations and mandate investigation by the appropriate State agency (for unemployment insurance, workers’ compensation coverage, labor violations, or tax evasion) when a misclassification claim is filed; and**
- f. Create a formula to randomly audit all employers to ensure compliance with the laws concerning employee misclassification as independent contractors.**

No Subcommittee action was taken on Recommendation Nos. 2a, 2b, 2c, 2e, and 2f.

RECOMMENDATION NOS. 3b, 3d, 3e, and 3f—Enact comprehensive legislation to:

- b. Assign stricter penalties on employers who knowingly misclassify workers as independent contractors including a fine of \$15,000, debarment for 3 years on public contracts, and 3.5 years in jail for the first offense, with a graduated penalty for each subsequent offense. For those who unknowingly misclassify employees as independent contractors, the fine should be \$2,500 per employee;**
- d. Prohibit agreements between employers and workers that result in the misclassification of that worker;**
- e. Establish a coordinated process or system among appropriate State agencies to ensure the State is adequately prepared to review instances of misclassification, including information sharing, resource sharing, and joint investigations; and**
- f. Implement a funding mechanism (either through a line-item budget or a small fee on registered independent contractors) to ensure necessary resources for investigations and litigation against employers who misclassify workers.**

No Subcommittee action was taken on Recommendation Nos. 3b, 3d, 3e, and 3f.

RECOMMENDATION NO. 4—Enact legislation similar to Colorado’s HB 09-1310, approved in 2009, which contains two primary provisions: (a) a means to investigate complaints of employee misclassification with associated penalties; and (b) a statewide study of the extent of the problem.

No Subcommittee action was taken on Recommendation No. 4.

RECOMMENDATION NO. 6—Enact legislation adopting the National Conference of Insurance Legislators’ (NCOIL) Construction Industry Workers’ Compensation Coverage Act model legislation.

No Subcommittee action was taken on Recommendation No. 6.

RECOMMENDATION NO. 10—Enact legislation mandating provision of health insurance by companies regularly using large independent contractor workforces.

No Subcommittee action was taken on Recommendation No. 10.

RECOMMENDATION NO. 11—Add provisions to NRS that would allow oversight by the State Public Works Board concerning worker misclassification as independent contractors on public works projects.

No Subcommittee action was taken on Recommendation No. 11.

ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 2:15 p.m.

Respectfully submitted,

Tracey Wineglass
Senior Research Secretary

Linda J. Eissmann
Principal Research Analyst

APPROVED BY:

Shirley A. Breeden, Chair

Date: _____

LIST OF EXHIBITS

[Exhibit A](#) is the “Meeting Notice and Agenda,” provided by Linda J. Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB).

[Exhibit B](#) is a letter dated June 4, 2010, from Mike Yadon, Senior State and Local Government Affairs Representative, FedEx Corporation, Sacramento, California introduced into testimony by Senator Shirley A. Breeden, Chair.

[Exhibit C](#) is written testimony provided by David Kersh, Government Affairs Director, Carpenters/Contractors Cooperation Committee, Las Vegas.

[Exhibit D](#) is the written testimony of Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, Las Vegas.

[Exhibit E](#) is the written testimony of Warren Stender, Operative Plasterers’ and Cement Masons’ International Association, Local Union No. 797, Las Vegas.

[Exhibit F](#) is the “Work Session Document,” provided by Linda J. Eissmann, Principal Research Analyst, Research Division, LCB.

This set of “Summary Minutes and Action Report” is supplied as an informational service. Exhibits in electronic format may not be complete. Copies of the complete exhibits, other materials distributed at the meeting, and the audio record are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the Library online at www.leg.state.nv.us/lcb/research/library/feedbackmail.cfm or telephone: 775/684-6827.