



**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**

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The second meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification was held on Monday, April 5, 2010, at 9 a.m. in Room 4412 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/interim75th2009/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](mailto:publications@lcb.state.nv.us); telephone: 775/684-6835).

**SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:**

Senator Shirley A. Breeden, Chair  
Fran Almaraz  
Yindra Dixon  
Warren Hardy

**SUBCOMMITTEE MEMBER PRESENT IN CARSON CITY:**

Assemblywoman Bonnie Parnell, Vice Chair

**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 welcomed members, presenters, and the public to the second meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification. She gave a brief overview of the Subcommittee's purpose and duties, explaining that based on previous testimony the problem of employee misclassification does exist in Nevada and is not specific to any one industry. She further explained that recommendations must be submitted to the Subcommittee staff for consideration by the Subcommittee during its final meeting and work session scheduled for June 10, 2010.

## **APPROVAL OF MINUTES OF THE MEETING HELD ON JANUARY 22, 2010, IN LAS VEGAS, NEVADA**

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

MS. DIXON MOVED TO APPROVE THE MINUTES OF THE JANUARY 22, 2010, MEETING HELD IN LAS VEGAS, NEVADA. THE MOTION WAS SECONDED BY MS. ALMARAZ AND PASSED UNANIMOUSLY.

- Chair Breeden read into the record a memorandum from Christopher G. Nielson, Deputy Director, Department of Taxation regarding the potential number of independent contractors in Nevada based on available tax data. (Please see [Exhibit B.](#))

## **OVERVIEW OF MODEL LEGISLATION CONCERNING EMPLOYEE MISCLASSIFICATION AND INDEPENDENT CONTRACTOR ISSUES**

- Catherine Ruckelshaus, Legal Co-Director, National Employment Law Project, New York, New York, referenced a state legislative roundup of recent independent contractor reform activity, which contains model legislation and language that may be useful in preparing recommendations for Nevada's 2011 Legislative Session. Ms. Ruckelshaus mentioned there are currently 31 states with legislation to determine employee misclassification. She stated that the most effective laws are those that are simplest to administer and offered examples of changes that would effectively address independent contractor reform. Ms. Ruckelshaus opined that legislation providing for a presumption of employment and incorporating the ABC Test are the most effective. In addition, she shared some examples of states that have created task forces to address worker misclassification as independent contractor. Finally, she shared that some states focus on group-specific laws, such as the construction industry. (Please see [Exhibit C.](#))
- Dan Reilly, State Legislative and Political Director, Department of Field and Political Action, International Brotherhood of Teamsters, Washington, D.C., presented model legislation concerning worker misclassification ([Exhibit D](#)). Mr. Reilly offered some examples of penalties that could be filed against an employer who fails to properly classify a worker: (1) increased penalty and escalating penalty for intentional and

unintentional employee misclassification; (2) loss of rights to contractual bidding for 3 to 5 years; (3) civil penalty for continual abuse; (4) provisions allowing for a private right of action; and (5) prohibited use of independent contractors.

- Ms. Dixon asked Ms. Ruckelshaus for further explanation regarding enforcing new legislation and administering the changes effectively.

Responding to Ms. Dixon, Ms. Ruckelshaus explained there are different approaches in creating legislation to address one industry or all industries and that making changes to all industries that utilize independent contractors is more effective.

Discussion ensued between the Subcommittee members and Ms. Ruckelshaus regarding the responsibility of each agency for enforcing laws and processing funds if new legislation is enacted. Responding to the Subcommittee, Ms. Ruckelshaus explained that in most states each agency enforces its own laws and collects fines for penalties incurred. Mr. Reilly added fines collected as a result of employee misclassification should be allocated to agencies with enforcement responsibility.

- Mr. Hardy discussed legislative language that supports a private right of action for workers or their representatives in cases of employee misclassification.
- Ms. Ruckelshaus stated she will report back to the Subcommittee concerning states that have included such language in their legislation and provide an example.

There was discussion regarding the practice by accountants and attorneys who advise employers to misclassify their employees as independent contractors, and employers who then require employees to incorporate as independent contractors. Ms. Ruckelshaus explained the practice is widespread. Mr. Reilly stated that legislation should include penalties to discourage employers and service providers from engaging in this activity. Ms. Parnell suggested focusing on the use of the words “advising” and “advertising.” Ms. Almaraz requested a copy of the advertising being given to employees.

#### **INFORMATIONAL BRIEFING ON EXPERIENCES WITH RECENT LEGISLATION TO ADDRESS EMPLOYEE MISCLASSIFICATION IN COLORADO**

- Dennis Creese, Business Representative and Organizer, International Union of Painters and Allied Trades, District Council 15, Denver, Colorado, shared the process of pursuing legislation to address employee misclassification in Colorado, and mentioned three reasons such legislation should be considered in Nevada: (1) employers; (2) revenue stream; and (3) workers. (Please see [Exhibit E.](#))
- Mr. Hardy queried if a private right of action clause is included in Colorado’s legislation.

- Mr. Creese explained the labor law poster notifies employees of their rights, but does not specifically inform them about private right of action.

## **DISCUSSION WITH THE STATE CONTRACTORS' BOARD ON THE MISCLASSIFICATION OF EMPLOYEES AND USE OF INDEPENDENT CONTRACTORS**

- George Lyford, Director of Investigations, State Contractors' Board, explained the investigative process when a report is received regarding employee misclassification. When an investigation takes place, the State Contractors' Board requires that any person working on a project is identified as either an employee of a licensed contractor or an independent licensed contractor. A criminal citation is issued to an unlicensed contractor. Frequently, the employer will explain that the person is an independent contractor or a Form 1099 has been filed with the Internal Revenue Service (IRS), United States Department of the Treasury; or the independent contractor may claim to be operating under the advice of an accountant or lawyer. Mr. Lyford shared some of the statistics regarding actions taken in the last year on unlicensed contractors.

Discussion ensued between Mr. Lyford and the Subcommittee regarding the investigation process, the cost of an investigation, and the penalties assessed to deter an employer from becoming a repeat offender. Mr. Lyford explained the average fine is \$1,000 plus additional administrative charges per contractor. He explained each case is unique and the penalty is determined by the evidence or any extenuating circumstances (i.e., repayment of fines, homeowner damage). Mr. Lyford further advised he was not aware of any repeat offenders because the penalty would require the employer's license to be revoked.

Further discussion ensued between Mr. Lyford and Mr. Hardy regarding the determination of licensure and the use of the ABC Test. Mr. Hardy queried if additional legislation would assist the State Contractors' Board in pursuing a greater number of violators. Mr. Lyford explained that the State Contractors' Board does not utilize the ABC Test to determine licensure; the employer and/or employee is either licensed or not licensed. He further advised that pursuing aggressive penalties would assist in resolving some of the illegal behavior. Mr. Lyford shared examples of unlicensed contractors who have been advised by an accountant or attorney to misclassify workers as independent contractors and explained when facing those ethical issues he refers the employer to the Nevada State Board of Accountancy or the State Bar of Nevada.

- Linda J. Eissmann read into record a statement from Gustavo "Gus" Nuñez, P.E., Manager, State Public Works Board, regarding employee misclassification. (Please see [Exhibit F.](#))

## **STAFF BRIEFING ON THE FEDERAL MISCLASSIFICATION INITIATIVE AND UNITED STATES DEPARTMENT OF LABOR FISCAL YEAR 2011 BUDGET WITH FUNDS EARMARKED TO ADDRESS EMPLOYEE MISCLASSIFICATION AND THE USE OF A TASK FORCE TO STUDY EMPLOYEE MISCLASSIFICATION IN OTHER STATES**

- Linda J. Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau, summarized federal efforts to address the misclassification of employees as independent contractors and findings in a 2009 report from the U.S. Government Accountability Office that identified misclassification as a violation of the law. As a result of the report, the IRS will audit 2,000 employers a year over the next three years in order to focus on federal employment taxes and worker misclassification.

Ms. Eissmann also provided an overview of the Federal Fiscal Year 2011 Budget, which proposes a joint effort by the U.S. Department of Labor and U.S. Department of Treasury to eliminate incentives for employers to misclassify employees. The proposal enhances the ability of each agency to levy penalties, funds a “Misclassification Initiative” to strengthen and coordinate federal and state efforts on prohibitions against worker misclassification, and includes funds for competitive grants to states.

- Ms. Eissmann provided a brief summary of task forces on employee misclassification in five states (Maine, Massachusetts, Michigan, New Hampshire, and New York). (Please see [Exhibit G.](#))

## **DISCUSSION WITH NEVADA’S LABOR COMMISSIONER CONCERNING REPORTING REQUIREMENTS AND STATISTICS AVAILABLE FROM NEVADA’S OFFICE OF LABOR COMMISSIONER AS THEY PERTAIN TO THE ISSUE OF EMPLOYEE MISCLASSIFICATION**

- Chair Breeden briefly reviewed the testimony of Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry, during the Subcommittee’s first meeting on January 22, 2010, regarding penalties on employers found to be misclassifying employees. She said the data compiled by the Office of Labor Commissioner concerning these penalties could assist the Subcommittee members in preparing recommendations for the 2011 Session of the Legislature.
- Michael Tanchek, previously identified, reviewed a spreadsheet containing certain information about employee misclassification claims filed in Nevada. Mr. Tanchek explained that not all of the information requested at the previous Subcommittee meeting is available because the data is not separated by back wages and penalty payments. (Please see [Exhibit H.](#))

Discussion ensued among the Subcommittee members regarding collection of data to determine back wages and penalties and the investigation process for determining the amount of penalty assessed. Mr. Tanchek explained that his office is an enforcement

agency that determines nonpayment of wages. His office assesses the penalty to be determined by the time lapse of unpaid wages and how far the claim has progressed through the investigation process. The penalty assessed is a deterrent to the employer and usually eliminates a repeat offense. His agency does not focus on the issue of determining if a worker is or is not an independent contractor. He further explained that back wages and any penalty assessed is paid to the worker. Discussion continued with Subcommittee members inquiring about claims and the investigative process. Mr. Tanchek reviewed the investigation process and clarified that the agency is reactive and driven by substantiated claims, explaining that in less than five hours a Claim Investigator determines if a violation has occurred and the extent of the violation.

Further discussion ensued with the Subcommittee members regarding the Office of Labor Commissioner's investigative process, priorities, and staffing needs. Ms. Parnell urged Mr. Tanchek to present the issues affecting his agency to the Legislature with an objective for growth and a plan to meet current labor issues affecting Nevada employees.

- Chair Breeden queried the audit and compliance process for prevailing wage projects.

Mr. Tanchek responded that prevailing wage projects are complaint driven and any audits and investigations are completed by the public body that awards the contract. The Labor Commissioner's office oversees the investigation and the results are then given to the Labor Commissioner for review.

Discussion ensued among Subcommittee members regarding recent audits of the Office of Labor Commissioner by the Audit Division of the LCB. Ms. Eissmann, previously identified, mentioned that the last audit of the Office of Labor Commissioner was completed in 2001 and the next audit is scheduled for spring or summer of 2010. The Subcommittee requested that staff prepare a letter to the Audit Division recommending that the upcoming audit of the Office of Labor Commissioner address: (1) separate penalty amounts, back wage amounts, and specific identification of misclassified employees; (2) the process for receiving, investigating, and resolving complaints specific to employee misclassification; and (3) whether fees and penalties are being properly charged and collected.

- Chair Breeden asked if the Office of Labor Commissioner has ever assessed an administrative penalty.
- Mr. Tanchek responded that during the last couple of years the Office of Labor Commissioner has assessed approximately \$15,000 in administrative penalties on several different employers each year. He explained that the objective of his agency is ensuring that payments are made to employees who have been misclassified, and focusing on administrative fees would delay this process.

## **SOLICITATION AND SUBCOMMITTEE DISCUSSION OF POSSIBLE RECOMMENDATIONS REGARDING EMPLOYEE MISCLASSIFICATION IN NEVADA IN ADVANCE OF THE JUNE 10, 2010, SUBCOMMITTEE MEETING AND WORK SESSION**

- Warren Stender, Operative Plasterers' and Cement Masons' International Association, Local Union No. 797, discussed the leniency of the prevailing wage self-audit process. He suggested that State law be amended to require that: (1) the Labor Commissioner assess the cost of an investigation to the contractor in violation; (2) every public works job site maintain a daily sign in sheet for workers; (3) a current audit of the trust funds to which the bidding contractor plans to make contributions be provided to the awarding body; and (4) the bidding contractor participate in a State-approved apprenticeship program. (Please see [Exhibit I.](#))
- Ms. Parnell asked Mr. Tanchek if the additional penalties referenced in NRS 338.090(2)(b) are assessed in each case.

Discussion ensued between the Subcommittee and Mr. Tanchek regarding the additional penalties referenced in NRS 338.090(2)(b). Mr. Tanchek explained that Mr. Stender omitted the "forfeiture provisions" and explained that there is a difference between public works projects and prevailing wage projects in the monitoring process.

- Bill Brooks, Business Representative, Sheet Metal Workers' International Association, Local Union No. 88, submitted proposed amendments to Chapter 338 ("Public Works") of NRS. Mr. Brooks shared his interpretation of the effects of not enforcing the penalties for violations of the State's prevailing wage laws. (Please see [Exhibit J.](#))
- Ms. Dixon suggested an additional request be added to the letter being sent to the Audit Division of the LCB to investigate the additional penalties being levied by the Labor Commissioner and paid by the violating employer, to include back wages from these claims.

Discussion ensued between the Subcommittee and Mr. Tanchek regarding the use of the term "misclassification."

- Mr. Tanchek discussed the definition of employee misclassification in prevailing wage projects and public works projects and explained they have two separate meanings.
- Ms. Almaraz read the statute creating the Interim Subcommittee and pointed out it did not specify between public works projects or prevailing wage projects but to include all worker misclassification in the State.

## **PUBLIC COMMENT**

- Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, suggested comprehensive legislation to: (1) clearly define who is an employee and who is a legitimate independent contractor; (2) require companies that use independent contractors to submit reports to the State on at least an annual basis; (3) require the retention of employment and independent contractor records for no less than three years; (4) change the information on the federal and State labor law posters that include the definitions of employee and independent contractors; (5) require the labor law posters be placed in the area where work is being performed; (6) provide for third-party reporting of violations and a mandatory investigation by the appropriate agency when a claim has been filed; (7) establish a formula and follow through process for random audits of all employers to ensure they are following the law; and (8) establish a minimum fine of \$5,000 for each employee found to be misclassified for the first instance with escalating fines, loss of the ability to conduct business for a prescribed period of time, and possible criminal penalties up to and including jail time for subsequent violations of the law. (Please see [Exhibit K.](#))

Discussion ensued among the Subcommittee members regarding other states' legislation including fines, escalating jail time, and other sectors of the workforce. Mr. Mallory explained the laws will vary because not every state offers prevailing wage on state projects. He opined most states have addressed one or the other but not both in the same legislation but suggested that the checks and balances be put in place to create accountability.

- JoAnna Golden, Political Director, Service Employees International Union (SEIU), addressed misclassification as it relates to the health care industry. Ms. Golden referred specifically to traveling nurses and explained the large cost to a hospital with very little stake in the community. It is the opinion of the SEIU that hospitals must hire the appropriate number of staff with the classification of "nurse" not "independent contractor" to avoid paying taxes and workers' compensation.
- Richard Carrillo, Business Representative, Plumbers and Pipefitters UA Local 525, shared how employee misclassification affects a service technician in the Heating Ventilation and Air Condition industry.
- Ms. Eissmann reviewed the process and timeline for Subcommittee members to submit recommendations for consideration and explained the process of preparing the work session document.



## **ADJOURNMENT**

There being no further business to come before the Subcommittee, the meeting was adjourned at 12:59 p.m.

Respectfully submitted,

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Tracey Wineglass  
Senior Research Secretary

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Linda J. Eissmann  
Principal Research Analyst

APPROVED BY:

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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 memorandum dated April 1, 2010, read into the record by Senator Shirley A. Breeden, Chair, from Christopher G. Nielson, Deputy Director, Department of Taxation, regarding the number of independent contractors in Nevada.

[Exhibit C](#) is a document dated July 2009, titled “NELP Summary of Independent Contractor Reforms, New State Activity” presented by Catherine K. Ruckelshaus, Legal Co-Director, National Employment Law Project, New York, New York.

[Exhibit D](#) is a copy of model legislation concerning worker misclassification, presented by Dan Reilly, State Legislative and Political Director, Department of Field and Political Action, International Brotherhood of Teamsters, Washington, D.C.

[Exhibit E](#) is the written testimony of Dennis Creese, Business Representative and Organizer, International Union of Painters and Allied Trades, District Council 15, Denver, Colorado.

[Exhibit F](#) is a statement dated April 2, 2010, read into the record by Linda J. Eissmann, Principal Research Analyst, Research Division, LCB, of Gustavo “Gus” Nuñez, P.E., Manager, State Public Works Board, regarding employee misclassification.

[Exhibit G](#) is a document titled “Task Forces on Employee Misclassification” prepared by Linda J. Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau.

[Exhibit H](#) is a spreadsheet prepared by Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry, containing the number of payments, amount of payments, average payment amount, and the number of employee misclassification claims filed in Nevada for Fiscal Years 2005-2006 through 2008-2009 and from July 2009 through February 28, 2010.

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

[Exhibit J](#) is a letter dated April 2, 2010, to Senator Breeden regarding “Proposed Amendments to Enforcement Provisions of State Prevailing Wage Law”, from Bill Brooks, Business Representative, Sheet Metal Workers’ International Association, Local Union No. 88, Las Vegas.

[Exhibit K](#) is the written testimony of Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, Las Vegas, dated April 5, 2010.

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](http://www.leg.state.nv.us/lcb/research/library/feedbackmail.cfm) or telephone: 775/684-6827.