WORK SESSION DOCUMENT

LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY EMPLOYEE MISCLASSIFICATION

(Senate Concurrent Resolution No. 26, File No. 100, *Statutes of Nevada 2009*)

June 10, 2010

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 *Nevada Revised Statutes* (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.

RECOMMENDATIONS

Clarifying "Employee" and "Independent Contractor" in NRS

1. **Enact legislation providing clear definitions in NRS for "employee" and "independent contractor."** *(Note: No specific definitions were suggested by the sponsor.)*

   Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted to the record, January 22, 2010

   Background: In order to draft this recommendation, specific definitions must be determined.

   For the purposes of unemployment compensation, these terms are not specifically defined in statute. However, an individual is considered an independent contractor if three specific conditions are met in NRS 612.085. This is commonly referred to as the ABC test. If the three conditions are *not* met, the individual is presumed to be an employee for the purposes of unemployment insurance as well as application of the Modified Business Tax (MBT).

   For the purposes of workers' compensation coverage, NRS defines an independent contractor as a person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of a person's work only and not as to the means by which such result is accomplished (NRS 616A.255). Statute further defines an "independent enterprise" for purposes of worker's compensation coverage as someone who holds a business or occupational license in his or her own name, or owns, rents, or leases property used in furtherance of the business (NRS 616B.603).

Comprehensive Legislation

2. **Enact comprehensive legislation to:**

   a. **Clearly define "employee" and "independent contractor."** An employee would be any individual who performs work under direct control of an employer (using the ABC test as a guide). The definition of independent contractor would generally be an individual who must be properly licensed, bonded, and insured to do the work for which they are contracted (similar to subcontractors or consultants);

   b. **Require annual employment reports to the State by companies who use independent contractors.** These reports would be consistent with those currently required for unemployment insurance by Nevada's Department of Employment, Training and Rehabilitation, and would require disclosure of all individuals paid with an Internal Revenue Service Form-1099 (used for payment to independent contractors) and all contracts signed with independent contractors;

c. **Require retention of employment and independent contractor records for at least three years;**

d. **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;**

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;**

f. **Create a formula to randomly audit all employers to ensure compliance with the laws concerning employee misclassification as independent contractors** *(Note: Details concerning a funding mechanism to support the audits and the entity tasked with conducting the audits would need to be determined)*; **and**

g. **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.** *(Note: Details would need to be provided.)*

Suggested by Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, April 5, 2010, meeting and correspondence

Background: To approve this recommendation, the Subcommittee must agree on details concerning the audit suggestion and provide guidance on the implementation of the increasing fine from $5,000 to $50,000 and other penalties.

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

3. **Enact comprehensive legislation to:**

a. **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;**

(Note: Details for subsequent offenses were not provided. As an alternative, a first offense could be a misdemeanor, a second offense could be a gross misdemeanor, and subsequent offenses could become felony violations.)

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.** *(Note: Independent contractors are not currently required to register; a registration procedure would be required to implement this suggestion.)*

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

Background: The ABC test is found in NRS 612.085, as mentioned under Recommendation No. 1, and currently applies only to unemployment compensation in Nevada (and by extension, for application of the MBT).

Misclassification Complaints, Studies, and Coordinated Agency Efforts

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, April 5, 2010

Background: Colorado's law provides that the Division of Employment and Training in the Department of Labor and Employment (the state's Unemployment Insurance Program) is responsible for accepting and investigating complaints regarding employee misclassification and for enforcing the requirements of the law. The measure further allows any person to

file a written complaint alleging misclassification and sets forth a process and timeline for investigating and rendering a determination regarding each complaint.

If an employer is found to have willfully disregarded the law, the law allows for a fine of up to $5,000 per misclassified employee for the first offense. For second and subsequent offenses, the fine is increased to $25,000 per misclassified employee and issuance of an order prohibiting the employer from contracting with the State of Colorado for a period up to two years. An appeals process is provided.

A report must be submitted to the Legislature with information concerning the complaints received and the outcome of the investigations.

Further, the law provides for a statewide study of the issue of employee misclassification, including estimates on the amount of revenue lost to the state and an analysis of the extent of the problem.

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.**

Concept discussed by the Subcommittee, April 5, 2010

Background: Streamlined notification could mirror legislation in Indiana (*Indiana Code* 22-1-1-22). Although the law is specific to construction contractors, the complaint reporting process is apparently working very effectively. The law requires the Department of Labor to cooperate with the Department of Workforce Development, Department of State Revenue, and Worker's Compensation Board by sharing information concerning any suspected improper classification by a contractor of an individual as an independent contractor. The law further provides that all information shared is confidential and may not be published or open to public inspection. Any officer or employee who knowingly or intentionally discloses this confidential information is guilty of a misdemeanor.

Although many states have a created task force through executive order, New Hampshire is an example of one created through legislation (Senate Bill 500, Sections 378-7 through 378-11). It is also an advisory, not enforcement, task force.

The New Hampshire Task Force on Employee Misclassification was created in 2008 and focuses on the extent of misclassification; relative levels of misclassification on different industries and regions of the state; and the impact of misclassification on worker protections, revenue, and funding. Further, the Task Force is required to report its findings and, if necessary, develop a statewide strategy to begin to address the issues identified, including recommendations for legislation.

Membership consists of 16 members including appropriate agencies, 2 legislators, and private sector representatives appointed by the Governor.

Model Legislation

6. Enact legislation adopting the National Conference of Insurance Legislators' (NCOIL) Construction Industry Workers' Compensation Coverage Act model legislation.

Mentioned in general discussion, April 5, 2010

Background: Stemming from 2009 Tennessee and West Virginia laws, the model mandates workers' compensation in the construction industry with the exception of sole proprietors on residential projects and homeowners, and holds primary contractors liable for the uninsured employees of any subcontractor hired. The legislation establishes auditing procedures, provides penalties for insurance fraud, and enhances state enforcement authority, based on provisions of Florida workers' compensation statutes.

Originally proposed as a broad-based workers' compensation bill dealing with all employments, the model was narrowed to hone in on construction—an area of widespread abuse. An NCOIL Subcommittee held seven conference calls between the NCOIL Summer and Annual Meetings to develop the model. On the conference calls, legislators rejected a nine-point test for independent contractor status and synchronized model definitions with already established language in state workers' compensation, disability, and unemployment statutes. *(Note: NCOIL is an organization of state legislators whose main area of public policy interest is insurance legislation and regulation. Most legislators active in NCOIL either chair or are members of the committees responsible for insurance legislation in their respective state houses across the country.)*

Penalties, Fines, and Employer Responsibilities

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, April 5, 2010, meeting

Background: Testimony on January 22 indicated that employers are being advised to cut costs and avoid taxes by classifying their employees as independent contractors. Testimony referenced recent legislation in California (Senate Bill 1583) that would have prohibited a person, for pay, from knowingly advising an employer to misclassify employees as independent contractors. The prohibition did not extend to attorneys or to persons advising their employers. Although the bill was passed in both the House and Senate, it was vetoed by the Governor.

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

   Background: During Ms. Ruckelshaus' testimony on April 5, private right of action was discussed. Ms. Ruckelshaus subsequently sent a letter with information concerning those states with employee misclassification laws that provide a worker or the worker's representative an independent right to go directly to court to enforce the worker's rights under the law. The states with such a right include Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, and New Hampshire.

   Other states allow a worker the right to go directly to court only after he or she has exhausted remedies at the agency level. These states include Colorado, Louisiana, Montana, New Mexico, and Washington.

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, Stemerman and Holsberry, in a letter submitted January 22, 2010

   Background: Testimony at both meetings has referenced the difficulty of misclassified workers to pay for legal expenses associated with actions against employers.

10. **Enact legislation mandating provision of health insurance by companies regularly using large independent contractor workforces.** *(Note: Size of workforce not specified.)*

    Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted January 22, 2010

    Background: Testimony at both meetings described the problem of misclassified workers being denied access to employer health plans. Health care costs are among the expenses employers avoid by misclassifying employees.

    In order to adopt this recommendation, the specific size of the workforce must be determined.

Public Works

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.

Background: Senate Concurrent Resolution No. 26 tasks the Subcommittee with determining the scope of employee misclassification in Nevada and making recommendations for State processes to identify and address misclassification. Witnesses requested changes to prevailing wage laws on public works projects; however, prevailing wage concerns are not within the scope of the Subcommittee's charge. Therefore, this recommendation has been modified to address the misclassification of employees as it pertains to public works projects.

List of Attachments

Tab A	NRS definitions of "employment," "independent contractor," and "independent enterprise"
Tab B	Letter with recommendations from Andrew Kahn
Tab C	Recommendations submitted by Jack Mallory
Tab D	Recommendations submitted by Fran Almaraz and Dan Reilly
Tab E	Colorado House Bill 09-1310
Tab F	Indiana Code 22-1-1-22, Section 22 and correspondence from Rick Ruble, Deputy Commissioner, General Counsel, Indiana Department of Labor
Tab G	New Hampshire Senate Bill 500
Tab H	NCOIL *Construction Industry Workers' Compensation Coverage Act*
Tab I	California Senate Bill 1583 bill text, Governor's veto message, and synopsis of bill with arguments for and against passage
Tab J	Letter concerning State independent contractor provisions with private rights of action from Catherin Ruckelshaus of NELP

NRS Definitions of Employment, Independent Contractor, and Independent Enterprise

NRS 612.085 "Employment": Services deemed employment unless specific facts shown. Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that:

1. The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;

2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and

3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

[Part 2:129:1937; renumbered in error 2.19:129:1937, 1945, 299; A 1949, 257; 1951, 253; 1951, 474; renumbered 2.9:129:1937 and A 1955, 698]—(NRS A 1993, 1804)

NRS 616A.255 "Independent contractor" defined. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the person's work only and not as to the means by which such result is accomplished.

[14:168:1947; 1943 NCL § 2680.14]—(Substituted in revision for NRS 616.105)

NRS 616B.603 Independent enterprises.

1. A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:

(a) The person enters into a contract with another person or business which is an independent enterprise; and

(b) The person is not in the same trade, business, profession or occupation as the independent enterprise.

2. As used in this section, "independent enterprise" means a person who holds himself or herself out as being engaged in a separate business and:

(a) Holds a business or occupational license in his or her own name; or

(b) Owns, rents or leases property used in furtherance of the business.

3. The provisions of this section do not apply to:

(a) A principal contractor who is licensed pursuant to chapter 624 of NRS.

(b) A real estate broker who has a broker-salesperson or salesperson associated with the real estate broker pursuant to NRS 645.520.

4. The Administrator may adopt such regulations as are necessary to carry out the provisions of this section.

(Added to NRS by 1991, 2392; A 1995, 2136)—(Substituted in revision for NRS 616.262)

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BEFORE THE INTERIM STUDY COMMITTEE

OF THE NEVADA LEGISLATURE

January 22, 2009

TESTIMONY OF ANDREW KAHN ON MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS

I am an attorney and a partner in McCracken Stemerman & Holsberry, which is the largest law firm in Nevada representing workers in labor and employment matters. We would like to offer the Committee with some of our real-world experience in dealing with the issue of misclassification of employees as independent contractors. We have been asked on a number of occasions by workers in Nevada to pursue misclassification claims, but have turned down most of these cases, not because we believe these workers were properly classified as contractors, but rather because the remedies provided for under current Nevada law are too weak to make the case economically rational for our firm to pursue. (We have taken several such cases in other states). To my recollection we have only taken on one such case in Nevada, an action on behalf of delivery drivers: the problems it has run into illustrate the infirmities of existing Nevada laws on this subject.

The first of such weaknesses: there is no clear statutory or regulatory definition of "employees" versus "independent contractors" in Nevada law except in the workers compensation field. In that field the focus of the statutory definition is on whether the company and the worker are in different industries, whereas in other fields of employment law the common-law definition presumably governs which instead looks at the amount of control the company has over the worker. While the workers comp statutory definition is clearer and more worker-friendly, in that arena employers have a strong argument that the workers comp administrative process is workers' exclusive remedy. Workers comp claimants' attorneys generally cannot afford to pursue the issue in that forum. Thus injured workers have repeatedly reported to us great difficulties in finding a comp attorney willing to take on this issue. Seriously-injured workers are not in a position to act as their own attorneys. Failure to enforce this law not only adversely impacts these workers, it impacts the public because medical bills for their injuries become a burden upon public agencies or hospital charity cases, and their economic survival is often a matter of welfare benefits.

In other arenas where presumably the common-law definition of employee status applies, there is almost no published Nevada caselaw defining this. Courts and agencies elsewhere have relied on the IRS 20-factor test as indicators of control. These are often fact-intensive issues which necessitate discovery and an evidentiary hearing rather than being resolvable through briefs and affidavits – making it difficult to persuade any lawyer to take such a claim. At the same time, workers generally cannot handle claims on this issue on their own without legal representation (for example, few workers know of the existence of the 20-factor test and know what the various factors mean in terms of the caselaw, such as "ancillary function" and "continuity").

Of course, some workers are just happy to get work even if it is misclassified and lacking workers comp, minimum wage, etc. – but this just hurts responsible employers trying to compete with the unethical companies relying on such an illegally-substandard workforce. Responsible employers who suffer from unfair competition from companies engaging in misclassification can perhaps sue for injunction and economic damages, but have no ability to recover their legal expenses even if they prove misclassification occurred, so understandably they rarely take such action.

Workers lose access to unemployment benefits by being misclassified as contractors. They end up on publicly-funded welfare benefits instead. The unemployment comp system provides no employer reimbursement of legal expenses for claimants even if the employer knowingly misclassified the claimant (instead the victim, the unemployed worker, would have to pay counsel out of his meager unemployment benefits). I know of no attorneys who can afford to represent workers in unemployment claims on this issue.

Another thing workers lose by not being deemed employees is access to employer health and pension plans. However, in light of the Microsoft misclassification court decision a few years ago, most plans have rewritten their eligibility rules so that only admitted employees are eligible to participate. As a result, under existing law companies can freely dump healthcare costs for their workforce onto public agencies by calling all their workers contractors. The only potential solution I see to this particular problem is to enact a state law mandating provision of health insurance by companies regularly using large independent contractor workforces.

Workers also lose the protection of wage and hour laws by being classified as contractors. Theoretically the Labor Commissioner's office could pursue wage-hour violations for misclassified employees, but that office is hopelessly overburdened with cases, and also refuses to take class actions. A private attorney can take a wage case to court, but the potential recovery is almost never worth the time and expenses required to

pursue wage cases involving misclassification. (For example, for every deposition taken, the attorney must pay a court reporter several hundred dollars out of pocket.) All wage cases start with the problem that unlike other cases in the courthouse, the victims are generally not in a position to recover punitive damages nor emotional distress damages. With misclassification that gap has a greater impact because of the fact-intensive nature of many common-law definitions of employee status, making extensive depositions and other discovery and trial likely. Most workers are not about to file suits on their own and be able to handle the ensuing barrage of legal procedures, which include an inevitable motion to dismiss at the outset, followed by dozens of formal interrogatories, requests for admissions, depositions, etc.

To make it even harder to pursue these cases, the defendant companies typically resist class action treatment of this issue (even though the tax agencies and workers comp agencies approach this issue on a group basis all the time). Hence in the case we helped drivers bring, the defendant corporation removed the case to federal district court, and that court has refused to certify a class for most claims in the case, on the grounds that Nevada law does not clearly endorse reliance upon the right of control as shown by the company's documents, but instead may allow the company to get off on the ground that it did not regularly exercise that right for every individual worker. In other words, this employer is likely to escape liability simply because the Legislature and agencies have not been clear enough in defining the distinction between employee and contractor (and Nevada courts do not publish more than a small handful of decisions).

One avenue we are trying in the drivers' case is the Nevada False Claims Act (NFCA), because an employer who misclassifies workers is underpaying the State on the payroll tax and not paying on them into the workers compensation system. The State was notified of the potential underpayments here, and it chose not to take any action. It is my understanding that it rarely takes any action in these misclassification situations, because the costs of pursuing the misclassification issue exceed the potential tax recovery and it has no legal staff available to pursue this issue. Nevada law should be changed to make sure the wrongdoer pays for the State's expenses in collecting.

The NFCA poses one major obstacle to our pursuing issues like this: we will have to prove the company acted intentionally or with "reckless disregard" or "deliberate ignorance." NRS 357.040(2). We think we have a good shot – as various courts and agencies had previously ruled this company's drivers were actually employees but the company kept on calling them contractors – but one has to ask why the NFCA imposes this burden of proving what "evil" secretly lay in the heart of the employer just to get the State the money it is due in taxes from this employer. It's one thing to require proof of bad intent before imposing penalties, but it's absurd to require such proof in order to get the taxes due paid up.

We acknowledge that reliance on the courts to address the misclassification issue is problematic: our drivers case has been pending for more than 3 years and no trial date is in sight. Administrative remedies could be superior, if either the agencies had the staff to deal with claims or the wrongdoers were faced with paying the legal fees of workers and employers who prove misclassification. The expense on agency staff or private counsel could be minimized by providing clearer statutory definitions of "employment" comparable to that in the workers comp statute.

Another thing workers lose by not being classified as employees is the right under the National Labor Relations Act (NLRA) to get together to protest their working conditions. The real-world problems which misclassified workers face in enforcing this right is that NLRB staff are the exclusive remedy (who are overburdened) and the remedies for retaliation are paltry – after several years, an order of reinstatement with backpay (minus all interim earnings). By contrast to ordinary discrimination laws, under the NLRA there is no private right of action, nor recovery for losing one's home or car or other damages like legal expenses, and no penalties at all. Thus employers regularly fire workers who organize. Moreover, courts have generally refused to provide any wrongful discharge remedies to independent contractors, even ones who reasonably believed they were employees. Thus an "independent contractor" who is still working in the same industry has to be incredibly brave to protest misclassification. Nevada law could easily be fixed to protect such whistleblowing.

The legal remedies against misclassification in other states are often superior to those available under Nevada law. We are happy to work with your Committee on possible solutions to these problems. We can be reached most easily at 800-622-0641.

Testimony of Jack Mallory, Director of Government Affairs, IUPAT District Council 15 4/5/10

Good Morning Madam Chair and members of the Committee. I previously testified regarding the impact of misclassification of workers as it affects the construction industry.

Today I would like to briefly speak about potential resolutions to the problem here in the State of Nevada.

You heard Mr. Dennis Creese speak about the actions taken in the State of Colorado during its 2009 Legislative Session. In my opinion, CO did a lot towards closing the gap in this area, but I do not believe that they have gone far enough.

I believe that worker misclassification is continuing today, particularly in sectors of the market that do not police themselves. Legitimate contractors are pushed out of the market: they cannot compete with contractors who continue to break the law and reduce their labor costs by as much as 30% by not paying various employment related taxes or providing workers compensation insurance. Workers are still exposed to potential financial and physical devastation because of the lack of unemployment compensation and workers compensation insurance. Companies who misclassify their employees as independent contractors are not subject to citations and fines for violation of Federal and State OSHA laws. This problem is exacerbated by two facts:

1. We are currently in a "down economy". Workers are afraid to step up and complain about the way that they are treated.
2. Workers are largely unaware of the fact that they are in fact employees and not independent contractors.

In front of you today, I have presented a lot of information. The packets contain copies of a summary of States that are taking action on misclassification, S 2882 and HR 3408 which have been introduced in the 111th Congress, a copy of CO HB 09-1310 as introduced in 20009, a copy of IN SB 385 introduced in 2009, PA HB 400 introduced in 2009, RI H5049 and S0643 introduced in 2009, NY A00403 introduced in 2009, KY HB 392 and Executive Orders from the Governors of the States of NJ, MA, MI and IA that all seek to address this problem. They all contain good ideas but all contain, what are in my opinion, flaws.

In addition to the examples I have submitted, many people are aware of recent actions by the Department of Labor and the Internal Revenue Service:

1. The DOL has hired an additional 300 investigators to address this issue. It should be noted that DOL will act on third party complaints of violations.
2. The IRS has recently launched a nationwide Employee Misclassification Audit Campaign where they will randomly audit 6000 businesses over the next three years.

While the actions of other States and various Federal Agencies are a good start, I believe that there are problems at various levels. I believe that any potential Legislation that takes up this issue in 2011 should contain the following provisions:

1. A clear definition of who is an employee and who is a legitimate independent contractor.
2. Reporting requirements for companies who use independent contractors that are submitted to the State on at least an annual basis.

3. Requirements for retention of employment and independent contractor records for no less than 3 years.
4. Changing the information on the required State and Federal Labor Law posters that include the definitions of employee and independent contractors.
5. A requirement that the Labor Law posters be placed in the area where work is being performed.
6. The ability for third party reporting of violations and a mandatory investigated by the appropriate agency when a claim has been filed.
6. A formula and follow through of random audits of all employers to ensure that they are following the law.
7. A minimum fine of $5000 for each employee found to be misclassified for the first instance and escalating fines, loss of the ability to do business for a prescribed period of time and possible criminal penalties up to and including jail time for subsequent violations of the law.

Thank you for allowing me to testify before the committee today. If you have any questions, I would be happy to attempt to answer them.

Eissmann, Linda

From: Jack Mallory [jmallory@iupatdc15.org]
Sent: Friday, May 28, 2010 9:57 AM
To: Eissmann, Linda
Subject: RE: Recommendations for Employee Misclassification

Linda, I'll try to answer your questions in order:

1. Employee would be any individual who performs work under direct control of an employer (the ABC test that had been discussed by others during the two previous hearings). The definition of Independent Contractor could vary from industry to industry, but generally, I would say that to be an IC, an individual would have to be properly licensed, bonded and insured to do the work that they are under contract for (i.e. Subcontractors, Consultants/Firms etc...)
2. Annual Reports are already provided on employees to DETR, they wouldn't be eligible for unemployment otherwise. If I recall correctly, the reports would require disclosing all individuals paid with a 1099, all contracts (including sub-contracts) with Independent Contractors.
3. By formula, I generally mean creating some random method of choosing companies to audit. I do mean all employers and it was intended to mean compliance with the legislation on independent contractors/worker misclassification. It could be as simple as ensuring that the employer had submitted the reports required by item #2 and verifying that individuals who were paid with a 1099 weren't employees (ABC test) and that IC's listed on the report were in fact properly licensed (etc...). This could also require an audit of the employer's payroll records and Accounts Receivable/Payable records. If there are violations found, there should be a mechanism for other State Agencies to get involved (DETR, Insurance Commission, Business Licensing, etc...). I also believe that if there is a claim filed against a company for misclassifying its employees, the company should be audited to ensure that all misclassifications are discovered and dealt with appropriately.
4. I didn't have a specific amount in mind when I drafted my proposal. If I recall correctly, the proposal for first offenses was $5k per employee that was misclassified. As far as increasing fines go, let's say $50k. I think that the legislation should have some significant teeth to it as an effort to curb the misclassification of workers. As far as enforcement goes, I think that it would be appropriate to have this in the AG's jurisdiction. There will probably be some argument about whether or not it should be covered by the Labor Commissioner's office instead, but this is just my opinion.

Ultimately, a lot of the specifics regarding the application of the law and enforcement would end up being created through regulation, but I also believe that there needs to be a good starting point with the understanding that the final result will probably look somewhat different than it would if/when introduced.

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"The worst crime against working people is a company which fails to operate at a profit." - *Samuel Gompers*

"For me, I have no political ego in this thing with respect to any other leader and what they might feel is appropriate or necessary in what they're going to try to do... We need everybody on the front lines." - *Marc Morial*

Submitted by Fran Almaraz and Dan Reilly

Teamsters Union Recommendations – Nevada (May 11, 2010)

- **Scope** – Any proposed legislation must consider worker misclassification in all industries with a particular focus on the package delivery industry.

- **ABC Test** – As is already used in state statutes, legislation should ensure the model ABC test is applied in all tests to consider whether an employee is a legitimate independent contractor. This test used by more than 25 states across the nation – is the most effective way to ensure workers are no longer misclassified.

- **Penalties** – To effectively deter bad-acting employers from misclassifying workers, strong penalties must be in place, both financially and otherwise. The IBT calls on employers whom knowingly misclassify workers to be fined no less than $15,000 per employee and 3.5 years in jail for a first offense. Subsequent offenses should increase these penalties. For those who unknowingly misclassify workers, fines should be no less than $2,500 per employee.

  Additional penalties should include debarment for no less than three years for any bad-acting employer who currently has any public contract.

- **Private Right of Action** – Recognizing that states may be unable to assist every individual claim of misclassification in a timely fashion, legislation should allow for an individual, group of individuals, or a third party organization (including labor organizations) to pursue civil penalties against a bad-acting employer. A private right of action should allow misclassified employees to seek unpaid back pay as well as legal fees, among other items.

- **Prohibition of Agreements** – Proposed legislation must include a provision which prohibits agreements between bad-acting employers and workers which results in the misclassification of that worker.

- **Inter-agency MOU** – To ensure bad-acting employers are being investigated, some form of agreement – whether through an executive order or a memorandum of understanding amongst appropriate agencies – must be developed to ensure the state is properly prepared to review instances of misclassification. Inter-agency coordination should include sharing of information and resources, as well as joint investigations into claims of misclassification.

- **Funding Mechanism** – A short-term funding mechanism must be implemented to ensure the state has the necessary resources to investigate and litigate against bad-acting employers. This could be through a line-item budget or a small fee on registered independent contractors.

Colorado

CHAPTER 406

LABOR AND INDUSTRY

HOUSE BILL 09-1310

BY REPRESENTATIVE(S) Levy, Apuan, Court, McCann, Pace, Ryden, Casso, Fischer, Frangas, Gagliardi, Green, Merrifield, Middleton, Scanlan, Soper, Labuda, Todd;
also SENATOR(S) Heath, Carroll M., Groff, Shaffer B.

AN ACT

CONCERNING THE MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS FOR PURPOSES OF THE "COLORADO EMPLOYMENT SECURITY ACT", AND MAKING AN APPROPRIATION THEREFOR.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 72 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

8-72-114. Employee misclassification - investigations - enforcement - advisory opinions - rules - employee misclassification advisory opinion fund - statewide study - report - definitions - legislative declaration - repeal. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT:

(a) MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS IN VIOLATION OF THE "COLORADO EMPLOYMENT SECURITY ACT" AND, IN PARTICULAR, THE PROVISIONS OF ARTICLE 70 OF THIS TITLE DEFINING THE EMPLOYMENT RELATIONSHIP, MAY POSE A SIGNIFICANT PROBLEM IN THIS STATE AND LEADS TO UNDERPAYMENT OF EMPLOYMENT TAXES THAT EMPLOYERS ARE OBLIGATED TO PAY THE STATE FOR COVERED EMPLOYMENT.

(b) BUSINESSES THAT MISCLASSIFY EMPLOYEES GAIN AN UNFAIR COMPETITIVE ADVANTAGE OVER BUSINESSES THAT PROPERLY CLASSIFY EMPLOYEES AND PAY APPROPRIATE TAXES TO THE STATE.

(c) WHEN EMPLOYEES ARE MISCLASSIFIED, THE PROTECTIONS AVAILABLE TO PROPERLY CLASSIFIED EMPLOYEES AGAINST ECONOMIC INSECURITY ARE UNAVAILABLE TO THOSE MISCLASSIFIED EMPLOYEES, AND THE STREAM OF REVENUE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

THAT SHOULD BE PAID TO THE STATE TO PROVIDE PROTECTIONS TO MISCLASSIFIED EMPLOYEES IS NOT AVAILABLE.

(2) AS USED IN THIS SECTION:

(a) "ACT" MEANS THE "COLORADO EMPLOYMENT SECURITY ACT".

(b) "COMPLAINANT" MEANS THE PERSON WHO FILES A COMPLAINT WITH THE DIVISION PURSUANT TO THIS SECTION.

(c) "DIRECTOR" MEANS THE DIRECTOR OF THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(d) "DIVISION" MEANS THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(e) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(f) "MISCLASSIFICATION OF EMPLOYEES" MEANS ERRONEOUSLY CLASSIFYING A PERSON AS AN INDEPENDENT CONTRACTOR, FREE FROM CONTROL AND DIRECTION OF THE EMPLOYER IN THE PERFORMANCE OF SERVICE FOR THE EMPLOYER, WHEN THE EMPLOYER CANNOT SHOW AN EXCEPTION, PURSUANT TO SECTION 8-70-103 (11), TO THE GENERAL RULE THAT SERVICE BEING PERFORMED FOR THE EMPLOYER IS PRESUMED TO BE EMPLOYMENT FOR PURPOSES OF THE ACT.

(g) "RESPONDENT" MEANS THE PERSON AGAINST WHOM A COMPLAINT IS FILED PURSUANT TO THIS SECTION.

(3) (a) THE DIVISION SHALL BE RESPONSIBLE FOR ACCEPTING AND INVESTIGATING COMPLAINTS REGARDING MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE REQUIREMENTS OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES AND PAYMENT OF TAXES.

(b) ANY PERSON MAY FILE A WRITTEN COMPLAINT WITH THE DIVISION ALLEGING THAT A PERSON ENGAGED IN EMPLOYMENT IS BEING MISCLASSIFIED BY AN EMPLOYER AS AN INDEPENDENT CONTRACTOR. THE COMPLAINANT SHALL SPECIFY IN THE COMPLAINT THE FACTS SHOWING THAT THE PERSON CLASSIFIED AS AN INDEPENDENT CONTRACTOR IS ENGAGED IN EMPLOYMENT, AS DEFINED IN ARTICLE 70 OF THIS TITLE.

(c) THE DIRECTOR MAY INVESTIGATE A COMPLAINT FILED PURSUANT TO THIS SUBSECTION (3) AND SHALL FOCUS ON THE INVESTIGATION OF THE MOST EGREGIOUS COMPLAINTS OR THOSE COMPLAINTS ALLEGING INTENTIONAL ACTS OF MISCLASSIFICATION OF EMPLOYEES UNDERTAKEN IN ORDER TO GAIN A COMPETITIVE ADVANTAGE OR TO AVOID THE PAYMENT OF TAXES.

(d) NO LATER THAN THIRTY DAYS AFTER RECEIPT OF A COMPLAINT, THE DIRECTOR SHALL DETERMINE WHETHER OR NOT AN INVESTIGATION IS WARRANTED. IF THE DIRECTOR DETERMINES THAT AN INVESTIGATION IS WARRANTED, THE DIRECTOR SHALL NOTIFY THE COMPLAINANT AND RESPONDENT THAT AN INVESTIGATION WILL BE CONDUCTED AND SHALL CONDUCT THE INVESTIGATION IN ACCORDANCE WITH THE

ACT. THE RULES ADOPTED PURSUANT TO THE ACT, AND THE COMPLAINANT AND RESPONDENT SHALL COOPERATE AND PROVIDE INFORMATION AS NECESSARY TO FACILITATE THE INVESTIGATION.

(e) (I) UPON CONCLUSION OF AN INVESTIGATION, THE DIRECTOR SHALL ISSUE A WRITTEN ORDER EITHER DISMISSING THE COMPLAINT OR FINDING THAT THE EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION OF EMPLOYEES AND HAS FAILED TO PAY APPROPRIATE TAXES FOR COVERED EMPLOYMENT AS DEFINED IN ARTICLE 70 OF THIS TITLE.

(II) IF THE DIRECTOR FINDS THAT AN EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION OF EMPLOYEES, THE DIRECTOR SHALL ORDER THE EMPLOYER TO PAY BACK TAXES OWED AND INTEREST.

(III) UPON A FINDING THAT THE EMPLOYER, WITH WILLFUL DISREGARD OF THE LAW, MISCLASSIFIED EMPLOYEES, THE DIRECTOR MAY:

(A) IMPOSE A FINE OF UP TO FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE FOR THE FIRST MISCLASSIFICATION WITH WILLFUL DISREGARD, AND FOR A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH WILLFUL DISREGARD, A FINE OF UP TO TWENTY-FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE; AND

(B) UPON A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH WILLFUL DISREGARD, ISSUE AN ORDER PROHIBITING THE EMPLOYER FROM CONTRACTING WITH, OR RECEIVING ANY FUNDS FOR THE PERFORMANCE OF CONTRACTS FROM, THE STATE FOR UP TO TWO YEARS AFTER THE DATE OF THE DIRECTOR'S ORDER. UPON THE ISSUANCE OF SUCH ORDER, THE DIRECTOR SHALL NOTIFY STATE DEPARTMENTS AND AGENCIES AS NECESSARY TO ENSURE ENFORCEMENT OF THE ORDER.

(f) THE DIRECTOR SHALL PROVIDE A COPY OF THE WRITTEN ORDER TO THE RESPONDENT. THOSE PORTIONS OF THE WRITTEN ORDER THAT ARE NOT CONFIDENTIAL UNDER THE ACT SHALL BE A PUBLIC RECORD.

(g) AN EMPLOYER SHALL HAVE THE RIGHT TO APPEAL THE DIRECTOR'S ORDER IN ACCORDANCE WITH SECTION 8-76-113.

(4) (a) AN EMPLOYER MAY REQUEST A WRITTEN ADVISORY OPINION FROM THE DIRECTOR CONCERNING WHETHER THE EMPLOYER SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE FOR PURPOSES OF COMPLYING WITH THE ACT. THE EMPLOYER SHALL PROVIDE THE DIRECTOR WITH INFORMATION NECESSARY FOR THE DIRECTOR TO ISSUE AN ADVISORY OPINION.

(b) UPON RECEIPT OF A REQUEST AND PERTINENT INFORMATION FROM AN EMPLOYER, THE DIRECTOR SHALL ISSUE AN ADVISORY OPINION TO THE EMPLOYER, INDICATING WHETHER THE EMPLOYER SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE IN ORDER TO COMPLY WITH THE ACT. AN OPINION ISSUED PURSUANT TO THIS SUBSECTION (4) IS ONLY ADVISORY, BASED ON THE INFORMATION PROVIDED BY THE EMPLOYER AND THE DIRECTOR'S UNDERSTANDING OF THE CIRCUMSTANCES AT THE TIME ISSUED, AND IS NOT BINDING ON THE DIVISION, THE EMPLOYER, OR ANY OTHER STATE OR LOCAL GOVERNMENTAL ENTITY.

(c) THE DIRECTOR SHALL PROMULGATE RULES IN ACCORDANCE WITH ARTICLE 4 OF TITLE 24, C.R.S., ESTABLISHING THE PROCESS FOR ISSUING AN ADVISORY OPINION AND THE FEES TO BE CHARGED THE REQUESTING EMPLOYER TO COVER THE DIRECTOR'S AND DIVISION'S COSTS IN PROVIDING THE ADVISORY OPINION. ANY FEES CHARGED PURSUANT TO THIS SUBSECTION (4) FOR THE COSTS ASSOCIATED WITH ISSUING AN ADVISORY OPINION SHALL BE DEPOSITED IN THE EMPLOYEE MISCLASSIFICATION ADVISORY OPINION FUND, WHICH FUND IS HEREBY CREATED. MONEYS IN THE EMPLOYEE MISCLASSIFICATION ADVISORY OPINION FUND SHALL BE SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY FOR THE PURPOSES OF THIS SUBSECTION (4). INTEREST DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEYS IN THE FUND SHALL BE CREDITED TO THE FUND. AT THE END OF ANY FISCAL YEAR, ALL UNEXPENDED AND UNENCUMBERED MONEYS IN THE FUND SHALL REMAIN IN THE FUND AND SHALL NOT BE CREDITED OR TRANSFERRED TO THE GENERAL FUND OR ANY OTHER FUND.

(5) THE DIRECTOR, BY ALL MEANS REASONABLE AND WITHIN BUDGETARY CONSTRAINTS, SHALL PUBLICIZE THE COMPLAINT PROCESS ESTABLISHED IN THIS SECTION AND ITS AVAILABILITY TO THOSE WHO HAVE DISCOVERED MISCLASSIFICATION OF EMPLOYEES. THE DIRECTOR SHALL DEVELOP AND MAKE AVAILABLE FREE OF CHARGE TO EMPLOYERS A NOTICE EXPLAINING THE RIGHTS OF EMPLOYEES TO BE PROPERLY CLASSIFIED AND THE AVAILABILITY OF A COMPLAINT PROCESS PURSUANT TO THIS SECTION. EMPLOYERS SHALL POST THE NOTICE CONSPICUOUSLY IN THE WORKPLACE OR OTHERWISE WHERE IT CAN BE SEEN AS EMPLOYEES COME OR GO TO THEIR PLACES OF WORK.

(6) (a) THE EXECUTIVE DIRECTOR SHALL CONDUCT A STATEWIDE STUDY OF THE ISSUE OF EMPLOYEE MISCLASSIFICATION, WHICH SHALL INCLUDE, WITHOUT LIMITATION, THE FOLLOWING INFORMATION:

(I) THE STATE DEPARTMENTS, DIVISIONS, AND AGENCIES THAT ARE AFFECTED BY EMPLOYEE MISCLASSIFICATION;

(II) THE AMOUNT OF STATE REVENUE THAT IS LOST OR NOT COLLECTED DUE TO THE MISCLASSIFICATION OF EMPLOYEES;

(III) ESTIMATES OF HOW WIDESPREAD THE PROBLEM OF EMPLOYEE MISCLASSIFICATION IS AND WHETHER PARTICULAR INDUSTRIES ARE MORE LIKELY TO ENGAGE IN THE MISCLASSIFICATION OF EMPLOYEES;

(IV) CONSIDERATION OF WHETHER STATE LAW SHOULD SPECIFY A UNIFORM DEFINITION OF THE EMPLOYMENT RELATIONSHIP AND, IF SO, HOW IT SHOULD BE DEFINED; AND

(V) ANY OTHER ISSUES THE EXECUTIVE DIRECTOR DETERMINES APPROPRIATE.

(b) THE EXECUTIVE DIRECTOR SHALL DEVOTE DEPARTMENT RESOURCES AS NECESSARY TO COMPLETE THE STATEWIDE STUDY.

(c) THE EXECUTIVE DIRECTOR SHALL SEEK PUBLIC INPUT AND MAY CONDUCT PUBLIC HEARINGS OR APPOINT STUDY GROUPS AS NECESSARY TO OBTAIN INFORMATION NECESSARY TO COMPLETE THE STUDY.

(7) NO LATER THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE EXECUTIVE DIRECTOR SHALL SUBMIT A REPORT ON THE STATEWIDE STUDY CONDUCTED PURSUANT TO SUBSECTION (6) OF THIS SECTION TO THE BUSINESS, LABOR, AND TECHNOLOGY COMMITTEE OF THE SENATE AND THE BUSINESS AFFAIRS AND LABOR COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OR THEIR SUCCESSOR COMMITTEES. THE REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE DIVISION TO INVESTIGATE COMPLAINTS OF EMPLOYEE MISCLASSIFICATION AND ENFORCE THIS SECTION, SPECIFYING AT LEAST THE FOLLOWING:

(a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE DIVISION PURSUANT TO THIS SECTION;

(b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY THE DIRECTOR;

(c) THE OUTCOME OF THE COMPLAINTS THAT WERE INVESTIGATED, INCLUDING WHETHER ANY EMPLOYERS WERE FOUND TO HAVE MISCLASSIFIED EMPLOYEES AND THE AMOUNT OF TAXES, INTEREST, OR FINES IMPOSED AGAINST SUCH EMPLOYERS;

(d) A RECOMMENDATION REGARDING WHETHER THE DIVISION'S FUNCTIONS PURSUANT TO THIS SECTION SHOULD BE CONTINUED, MODIFIED, OR REPEALED; AND

(e) ANY OTHER ISSUES OR INFORMATION THE EXECUTIVE DIRECTOR DEEMS APPROPRIATE.

(8) SUBSECTIONS (6) AND (7) OF THIS SECTION AND THIS SUBSECTION (8) ARE REPEALED, EFFECTIVE JULY 1, 2012.

SECTION 2. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the unemployment revenue fund created in section 8-77-106 (1), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine hundred seventy-five dollars ($975) cash funds, or so much thereof as may be necessary, for the implementation of this act.

(2) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the employee misclassification advisory opinion fund created in section 8-72-114 (4) (c), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine thousand eight hundred forty dollars ($9,840) cash funds and 0.2 FTE, or so much thereof as may be necessary, for the implementation of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 2, 2009

Indiana Code 22-1-1-22

Information sharing concerning construction workers misclassified as independent contractors

Sec. 22. (a) This section applies after December 31, 2009.

(b) As used in this section, "contractor" means:

(1) a sole proprietor;

(2) a partnership;

(3) a firm;

(4) a corporation;

(5) a limited liability company;

(6) an association; or

(7) another legal entity;

that engages in construction and is authorized by law to do business in Indiana. The term includes a general contractor, a subcontractor, and a lower tiered contractor. The term does not include the state, the federal government, or a political subdivision.

(c) The department of labor shall cooperate with the:

(1) department of workforce development established by IC 22-4.1-2-1;

(2) department of state revenue established by IC 6-8.1-2-1; and

(3) worker's compensation board of Indiana created by IC 22-3-1-1(a);

by sharing information concerning any suspected improper classification by a contractor of an individual as an independent contractor (as defined in IC 22-3-6-1(b)(7) or IC 22-3-7-9(b)(5)).

(d) For purposes of IC 5-14-3-4, information shared under this section is confidential, may not be published, and is not open to public inspection.

(e) An officer or employee of the department of labor who knowingly or intentionally discloses information that is confidential under this section commits a Class A misdemeanor.

As added by P.L.164-2009, SEC.2.

Eissmann, Linda

From: Ruble, Rick [RRuble@dol.IN.gov]
Sent: Thursday, June 03, 2010 12:31 PM
To: Eissmann, Linda
Subject: Worker Misclassification

Ms. Eissmann:

The purpose of this message is to provide you my personal observations concerning the operation and effect of an Indiana law requiring certain Indiana state agencies to share information concerning suspected misclassification of workers in the construction industry.

The Indiana General Assembly has been considering the problem and effects of employee misclassification for the past three or four years.
During the 2009 session, the legislature passed, and Governor Daniels signed Public Law164-2009, which was codified in three different statutory sections; at Indiana Code 22-1-1-22, Indiana Code 22-4.1-4-4, Indiana Code 22-3-1-5, and Indiana Code 6-8.1-3-21.2, respectively, and took effect January 1, 2010.

Functionally, this law delegated identical responsibility to the Indiana Department of Labor, Indiana Department of Revenue, Indiana Department of Workforce Development, and Indiana Worker's Compensation Board to share information concerning suspected misclassification of workers in the construction industry.

In compliance with this law, I developed a very simple information sharing network between the respective state agencies involved.

Since each state agency had differing definitions of the term "employee" and different statutory authority and responsibility, this information sharing arrangement allows each agency the discretion and flexibility to investigate in a manner and to the extent that is warranted based upon the reliability of the "tip" and the severity of the potential violation.

Since January 1, 2010 we have shared information on fourteen (14) instances of suspected employee misclassification. Most of the tips received (13 of 14) were received by the Indiana Department of Labor, which shared the information with the other state agencies. The Indiana Department of Labor initiated some type of investigation in approximately six (6) of the fourteen (14) cases, since those situations were potentially covered by the authority of the Department of Labor. I requested and received confirmation that both the Indiana Worker's Compensation Board and the Indiana Department of Workforce Development initiated some type of investigation based upon thirteen (13) of those fourteen (14) shared tips. I do not presently have information concerning what, if any corrective or regulatory action was taken in each case.

It is my opinion that this information sharing system is simple, quick, flexible, confidential, and allows each respective agency the discretion and flexibility to investigate and take whatever action is warranted, based upon the facts and circumstances of each situation.

If you need additional information, please contact me.

Rick J. Ruble
Deputy Commissioner
General Counsel
Indiana Department of Labor

402 West Washington Street, Room W195
Indianapolis, Indiana 46204
Phone: (317) 233-8744
Fax: (317) 234-4449

New Hampshire

CHAPTER 378

SB 500-FN – FINAL VERSION

03/13/08 0827s

16Apr2008... 1291h

06/05/08 2122eba

2008 SESSION

08-2706

01/10

SENATE BILL ***500-FN***

AN ACT relative to certain insurance fraud and establishing a task force on employee misclassification.

SPONSORS: Sen. Hassan, Dist 23; Sen. Barnes, Dist 17; Sen. DeVries, Dist 18; Rep. Goley, Hills 8; Rep. Holden, Hills 7

COMMITTEE: Commerce, Labor and Consumer Protection

AMENDED ANALYSIS

This bill:

I. Increases the penalties for insurance fraud. This bill also increases the penalty for employers who fail to secure workers' compensation.

II. Establishes a task force on employee misclassification.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

03/13/08 0827s

16Apr2008... 1291h

06/05/08 2122eba

08-2706

01/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eight

AN ACT relative to certain insurance fraud and establishing a task force on employee misclassification.

Be it Enacted by the Senate and House of Representatives in General Court convened:

378:1 New Paragraph; Administrative Services; Duties of the Commissioner. Amend RSA 21-I:13 by inserting after paragraph XIV the following new paragraph:

XV. Maintain a list of persons who have been prohibited from participating in public works projects under RSA 638:20. Such list shall be a public record under RSA 91-A.

378:2 Workers' Compensation; Liability of Employer Failing to Comply. Amend RSA 281-A:7, VI to read as follows:

VI. Any employer, individual, or corporate officer required to secure payment of compensation under this chapter who ***purposely, as defined in RSA 626:2, II(a),*** fails to secure such payment shall be guilty of a [~~misdemeanor~~] ***class B felony.***

378:3 Insurance; Claim Forms. Amend RSA 402:82 to read as follows:

402:82 [~~Warning Notice on~~] Claim Forms ***and Applications.***

I. All insurance claim forms shall contain a statement that clearly states in substance the following: "Any person who, with a purpose to injure, defraud, or deceive any insurance company, files a statement of claim containing any false, incomplete, or misleading information is subject to prosecution and punishment for insurance fraud, as provided in RSA 638:20." [~~However, the lack of such a statement shall not constitute a defense against prosecution under RSA 638:20.~~]

II. No insurance company or producer shall accept an application for workers' compensation or property or casualty insurance, unless the application includes:

(a) A written or electronic signature of the producer, unless the transaction does not involve a producer; and

(b) A written or electronic signature of the applicant.

III. The lack of the information required by paragraphs I and II shall not constitute a defense against prosecution under RSA 638:20 or any other criminal statute.

IV. "Electronic signature" shall have the same definition as under RSA 294-E:2.

V. "Written signature" means an original signature or a duplicate copy made by photocopying, facsimile, or other means similar and does not include stamped signatures.

378:4 New Section; Workers' Compensation; Certificates of Insurance. Amend RSA 412 by inserting after section 37 the following new section:

412:37-a Certificates of Insurance. Every certificate of insurance issued or presented in this state pursuant to a workers' compensation insurance policy shall contain the following information:

I. All states for which such statutory coverage is provided;

II. Names of all executive officers or members who are excluded, if any, pursuant to RSA 281-A:18-a, or a

notation that no executive officers or members are excluded; and

III. Names of all sole proprietors or partners who have elected to be covered under the policy or a notation that no sole proprietors or partners are covered.

378:5 Insurance Fraud; Definitions Added. RSA 638:20, I and I-a are repealed and reenacted to read as follows:

I. In this section:

(a) "Bidding" includes a bid made as any contractor, general contractor, or subcontractor.

(b) "Financial interest" means any direct or indirect interest in the entity, whether as an owner, partner, officer, manager, employee, agent, consultant, advisor, or representative, but does not include an employee who does not participate in management of the entity and ownership in a mutual or common investment fund that holds securities unless the person participates in the management of the fund.

(c) "Insurance policy" includes an actual or purported insurance policy.

(d) "Insurer" includes any insurance company, health maintenance organization, or reinsurance company, or broker or agent thereof, or insurance claims adjuster.

(e) "Participating in public works projects" means bidding or working on any public works project or holding any financial interest in any entity bidding or working on any public works project.

(f) "Public works project" means any construction project financed by public funds.

(g) "Statement" includes, but is not limited to, any notice, statement, proof of loss, bill of lading, receipt of payment, invoice, account, estimate of property damages, bill for service, diagnosis, prescription, hospital or doctor records, x-rays, test results, or other evidence of loss, injury, or expense.

378:6 New Paragraphs; Insurance Fraud; Penalties. Amend RSA 638:20 by inserting after paragraph V the following new paragraphs:

VI. In addition to any other penalty authorized by law, any person convicted of violating subparagraphs II(a), (b), or (d) relative to a workers' compensation insurance policy shall, as a condition of his or her sentence, be prohibited from participating in any public works projects for a period of no less than one year and no more than 3 years and shall be ordered to pay restitution to its workers' compensation carrier, as determined by the sentencing court. Any person convicted of a third or subsequent violation may, as a condition of his or her sentence, be permanently banned from participating in any public works projects. For the purposes of this paragraph, "restitution" means the difference between the premium actually charged and the premium amount that would have been charged if accurate information had been provided to the carrier, provided that the carrier is not compensated by the offender more than once.

VII. The commissioner of the department of administrative services shall maintain a list of persons who have been banned from participating in public works projects under this section. Such list shall be a public record under 91-A.

378:7 Task Force Established. There is established a task force to study employee misclassification.

378:8 Membership and Compensation.

I. The members of the task force shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Two members of the house of representatives, appointed by the speaker of the house of representatives.

(c) The commissioner of the department of labor, or designee.

(d) The commissioner of the department of employment security, or designee.

(e) The commissioner of the department of insurance, or designee.

(f) The commissioner of the department of revenue administration, or designee.

(g) The attorney general, or designee.

(h) A member of each of 2 labor unions representing building trades, appointed by the governor.

(i) A member of an organization representing contractors in the residential construction industry, appointed by the governor.

(j) A member of an organization representing contractors in the non-residential construction industry, appointed by the governor.

(k) A small business owner from outside the construction industry, appointed by the governor.

(l) A large business owner from outside the construction industry, appointed by the governor.

(m) Two representatives of insurance carriers, appointed by the governor.

II. Legislative members of the task force shall receive mileage at the legislative rate when attending to the duties of the task force.

378:9 Duties. The task force shall study employee misclassification.

378:10 Chairperson; Quorum. The members of the task force shall elect a chairperson from among the members. The first meeting of the task force shall be called by the first-named senate member. The first meeting of the task force shall be held within 45 days of the effective date of this section. Six members of the task force shall constitute a quorum.

378:11 Report. The task force shall make interim reports of its findings and any recommendations for proposed legislation on or before December 1, 2008, October 1, 2009, and June 1, 2010, and a final report of its findings and any recommendations for proposed legislation on or before December 1, 2010 to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library.

378:12 Contingency. If HB 1367 of the 2008 regular legislative session becomes law, then RSA 21-I:13, XV as inserted by section 1 of this act shall be renumbered as RSA 21-I:13, XVII.

378:13 Effective Date.

I. Sections 7-12 of this act shall take effect upon its passage.

II. The remainder of this act shall take effect January 1, 2009.

Approved: July 11, 2008

Effective Date: I. Sections 7-12 shall take effect July 11, 2008

II. Remainder shall take effect January 1, 2009.

NCOIL
National Conference of Insurance Legislators
...for the states

Construction Industry Workers' Compensation Coverage Act

Approved by the NCOIL Executive Committee on November 22, 2009.

Table of Contents

Section 1. Summary

This Act mandates workers' compensation coverage in the construction industry, with certain exemptions; establishes auditing procedures; specifies liability; provides penalties for insurance fraud; and addresses enforcement powers.

Section 2. Definitions

A. "Employee" means any entity as defined by *[Insert Applicable Reference to State Definition].*

B. "Employer" means any entity as defined by *[Insert Applicable Reference to State Definition].*

C. "Partner" means any person as defined by *[Insert Applicable Reference to State Definition].*

D. "Principal Contractor" and "subcontractor" mean any entity as defined under *[Insert Applicable State Agency].*

E. "Sole proprietor" means any entity as defined under *[Insert Applicable Reference to State Definition].*

Section 3. Coverage Requirements

A. Every person engaged in the construction industry, including principal contractors, intermediate contractors and subcontractors shall be required to carry workers' compensation insurance, regardless of the number of employees, unless exempted as indicated in subsections (C) and (D).

Drafting Note: States may want to consider the cost impact of this subsection on sole proprietors and self-employed small contractors. Options to consider include exemptions for individuals with high-quality health insurance plans, the use of deductibles to bring down insurance costs, and monthly premium payment plans.

B. For purposes of this Section, "a person engaged in the construction industry" means any person or entity assigned to the Contracting Group as those classifications are designated by the rate service organization designated by the *[Insert State Department of Insurance].*

Drafting Note: For the purposes of this Act, the [Insert State Department of Insurance] could use standard industrial classification codes and the definitions thereof developed by the National Council on Compensation Insurance (NCCI) and the U.S. Department of Labor Bureau of Labor Statistics (BLS) North American Industry Classification System (NAICs) codes to meet the criteria of the term "construction industry" as set forth in this Act.

C. A sole proprietor or partner engaged in the construction industry shall not be required to carry workers' compensation on themselves if they are doing work directly for the owner of the property pursuant to Section 3(D), but shall be required to carry workers' compensation insurance on any subcontractor, employee or worker not otherwise covered by a policy of workers' compensation; however, if a sole proprietor or partner is working as an intermediate contractor or subcontractor then workers' compensation insurance shall be required on themselves.

D. The provisions of this Section shall not apply to individuals performing work on their own property. As used in this subsection (D), an individual is a natural person.

Drafting Note: States may want to look to state definitions of employer, employee, and existing treatment of homeowners on residential projects to avoid duplicating and conflicting language.

Section 4. Liability

A. Every principal contractor shall be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers' compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the principal contractor rather than the *[Insert State Uninsured Employer Fund]*, if applicable, should be responsible for the payment of statutory benefits.

B. If an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers' compensation coverage or was not an approved self-insured employer, and the principal contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the principal contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the principal contractor, provided that an intermediate subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, become the principal contractor for the purposes of this section.

C. 1. The contractor and subcontractor shall provide proof of continuing coverage to the principal contractor throughout the term of the contract between the contractor and subcontractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the principal contractor and the subcontractor.

2. A subcontractor who allows coverage to lapse because of non-payment during a contract but fails to notify a contractor under Subsection (C) becomes liable to the injured employee and subject to all recovery of payments, plus administrative costs and attorneys' fees.

D. 1. If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the *[Insert State Uninsured Employer Fund]*, if applicable, both the principal contractor and subcontractor are jointly and severally liable for any payments made by the *[Insert State Uninsured Employer Fund]*, and the *[Insert State Insurance Commissioner]* may seek recovery of the payments, plus administrative costs and attorneys' fees, from the principal contractor, the subcontractor, or both.

2. A principal contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys' fee and costs.

Section 5. Employer/Contractor Disclosure Requirements

A. Employers shall make available to their workers' compensation insurance carrier all records necessary for the payroll verification audit and permit the auditor to make a physical inspection of the employer's operation.

B. A principal contractor may require a subcontractor to provide evidence of workers' compensation insurance.

C. An insurance carrier may require each employer to submit a copy of the quarterly earning report at the end of each quarter to the insurance carrier and submit self-audits supported by the quarterly earnings reports and the rules adopted by the state agency providing unemployment tax collection services. The reports must include an attestation by an officer or principal of the employer attesting to the accuracy of the information contained in the report.

D. A principal contractor may require a subcontractor to be able to produce on demand at their principal place of business information required by Section 5(B).

Section 6. Payroll Audit Procedures

A. In no event shall employers in the construction class, generating more than the amount of premium required to be experience rated, be audited less than annually. A minimum of ten percent of employers in the construction class that do not generate more than the amount of premium required to be experience rated will be inspected annually and audited, if necessary. The annual audits required for construction classes shall consist of physical onsite audits.

B. Payroll verification audit rules must include, but need not be limited to, the use of state and federal reports of employee income, payroll and other accounting records, certificates of insurance maintained by subcontractors, and duties of employees.

C. Upon conclusion of an employer audit, the insurance carrier shall report to the *[Insert State Workers' Compensation Department or Appropriate Agency]* any unresolved employee or independent contractor misclassification, any uncovered or unreported employees, and any other violation of this Act.

Section 7. Penalties

A. For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of Section 3. However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.

B. In addition to any other penalty prescribed by this section, the department shall assess against any employer who has failed to secure the payment of compensation as required by Section 3 a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this section within the preceding 3-year period or $750, whichever is greater.

C. 1. Any person that knowingly submits an initial application, renewal application, or certificate of insurance as proof of coverage, that is false, forged, misleading, or incomplete information for the purpose of avoiding or reducing the amount of premiums for workers' compensation coverage is subject to a civil penalty, per violation, not less than *[Insert Applicable Amount]*.

2. In determining intent, the *[Insert Appropriate State Agency]* shall consider whether a person or organization in a similar size and type of business could reasonably be expected to understand that information being submitted was false or likely to mislead. In assessing the amount of the civil penalty, the *[Insert Appropriate State Agency]* shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following:

    a. the nature and seriousness of the misconduct;

    b. the number of violations;

    c. the persistence of the misconduct;

    d. the length of time over which the misconduct occurred;

    e. the willfulness of the defendant's misconduct; and

    f. the defendant's assets, liabilities, and net worth.

3. The *[Insert Appropriate State Agency]* may also require, as civil penalty, that the entity repay any compensation received through such violation, with interest at the rate of *[Insert Applicable Percentage]*.

Drafting Note: States can insert references to existing criminal penalties in their workers' compensation or insurance fraud codes.

D. 1. Whenever the *[Insert State Workers' Compensation Department or Appropriate Agency]* determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this Act has failed to secure the payment of workers' compensation required by this Act or to produce the required business records under Section 5 within five (5) business days after receipt of the written request of the *[Insert State Workers' Compensation Department or Appropriate State Agency]*, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the *[Insert State Workers' Compensation Department or Appropriate State Agency]* of a stop-work order on the employer, requiring the cessation of all business operations. If the *[Insert State Workers' Compensation Department or Appropriate State Agency]* makes such a determination, the *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall issue a stop-work order within 72 hours.

2. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance; provided that, if the employer cannot be found and served under due diligence the department may execute service by publishing the stop work order for one week in a news publication having general circulation in the *[names of cities]* metropolitan areas.

3. A stop-work order may be served with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The order shall remain in effect until the *[Insert State Workers' Compensation Department or Appropriate State Agency]* issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this Act and has paid any penalty assessed under this section.

4. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this section and has agreed to remit

periodic payments of the penalty pursuant to a payment agreement schedule with the *[Insert State Workers' Compensation Department or Appropriate State Agency]*. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due.

5. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* may require an employer who is found to have failed to comply with the coverage requirements of Section 3 to file with the *[Insert State Workers' Compensation Department or Appropriate State Agency]*, as a condition of release from a stop-work order, periodic reports for a probationary period that shall not exceed 2 years that demonstrate the employer's continued compliance with this section. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall by rule specify the reports required and the time for filing under this subsection.

E. Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity, including spouses, that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

F. It shall be unlawful for any person to knowingly violate a stop-work order issued by the *[Insert State Workers' Compensation Department or Appropriate State Agency]* and it is punishable as a felony of the third degree.

G. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall assess a penalty of not less than $1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

H. Any agency action by the department under this section, if contested, must be contested as provided in *[Insert State Chapter Relating to Judicial or Administrative Review]*.

Section 8. Enforcement

The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall have the authority to enforce the requirements of this Act.

Drafting Note: States may wish to consider the following enforcement provisions:

A. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under [Insert State Statute], the [Insert State Workers' Compensation Department or Appropriate State Agency] shall have the power to:

1. Conduct investigations for the purpose of ensuring employer compliance.

2. Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.

3. Examine and copy business records.

4. Administer oaths and affirmations.

5. Certify to official acts.

6. *Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.*

7. *Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.*

8. *Enforce the terms of a stop-work order.*

9. *Levy and pursue actions to recover penalties.*

10. *Seek injunctions and other appropriate relief.*

B. *The [Insert State Workers' Compensation Department or Appropriate State Agency] shall designate representatives who may serve subpoenas and other process of the [Insert State Workers' Compensation Department or Appropriate State Agency] issued under this Act.*

C. *The [Insert State Workers' Compensation Department or Appropriate State Agency] shall specify by rule the business records that employers must maintain and produce to comply with this Act.*

D. *Any law enforcement agency in the state may, at the request of the [Insert State Workers' Compensation Department or Appropriate State Agency], render any assistance necessary to carry out the provisions of this section, including, but not limited to, preventing any employee or other person from remaining at a place of employment or job site after a stop-work order or injunction has taken effect.*

E. *The [Insert State Workers' Compensation Department or Appropriate State Agency] shall adopt rules to administer this section.*

Drafting Note: States could use part or all of penalties in Section 7 to offset enforcement and other expenses incurred by the implementation of this Act.

Section 9. Severability

If any section, paragraph, sentence, clause, phrase, or any part of this Act passed is declared invalid, the remaining sections, paragraphs, sentences, clauses, phrases, or parts thereof shall be in no manner affected and shall remain in full force and effect.

Section 10. Effective Date

This Act shall take effect immediately.

Drafting Note: States would benefit by comparing data from different state agencies, e.g. Unemployment and Workers' Comp Departments, to help identify problem employers.

California

BILL NUMBER: SB 1583 ENROLLED
BILL TEXT

PASSED THE SENATE AUGUST 20, 2008
PASSED THE ASSEMBLY AUGUST 14, 2008
AMENDED IN ASSEMBLY JUNE 25, 2008
AMENDED IN SENATE APRIL 15, 2008

INTRODUCED BY Senator Corbett

FEBRUARY 22, 2008

An act to add Section 2753 to the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 1583, Corbett. Employment: independent contractors.

Existing law creates a rebuttable presumption that certain workers performing services for which a license is required are employees rather than independent contractors.

This bill would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt from the provisions regarding joint and several liability a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2753 is added to the Labor Code, to read:

2753. (a) A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor.

(b) This section does not apply to the following persons:

(1) A person who provides advice to his or her employer.

(2) An attorney authorized to practice law in California or another United States jurisdiction who provides legal advice in the course of the practice of law.

BILL NUMBER: SB 1583
VETOEDDATE: 09/28/2008

To the Members of the California State Senate:

I am returning Senate Bill 1583 without my signature.

Existing law governing the difference between an employee and an independent contractor is confusing to employers. As the Legislature has failed to address this confusion, many employers turn to consultants for help in determining how best to classify individuals for employment purposes. The new liability imposed by this bill will make consultants wary of providing services to businesses, leaving these employers without any guidance in an increasing litigious environment. I encourage the Legislature to focus on addressing the confusion caused by current law, not punishing those trying to create and grow jobs in California.

Sincerely,

Arnold Schwarzenegger

BILL ANALYSIS

Date of Hearing: June 17, 2008

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 1583 (Corbett) - As Amended: April 15, 2008

As Proposed To Be Amended

SENATE VOTE: 23-16

SUBJECT: EMPLOYMENT: INDEPENDENT CONTRACTORS

KEY ISSUE: SHOULD PERSONS ENGAGED IN THE BUSINESS OF PROVIDING ADVICE TO EMPLOYERS REGARDING THE CLASSIFICATION OF WORKERS BE SUBJECT TO JOINT LIABILITY WITH THE EMPLOYER IF THEY ARE FOUND TO HAVE KNOWINGLY MIS-ADVISED THE EMPLOYER TO TREAT AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR?

SYNOPSIS

This bill provides that a person who knowingly advises another person for money or other valuable consideration to treat a worker as an independent contractor to avoid employee status for the worker shall be jointly and severally liable with the employer for such remedies as currently provided by law if the worker is not found to be an independent contractor. Proponents argue that misclassification of employees as independent contractors poses a serious threat to workers rights because it severs the employment relationship, strips workers of all employee rights, makes it harder for legitimate businesses to compete, and costs the state millions on lost tax revenue.

While many employers want to follow the law, supporters state, there is an industry of consultants that promotes intentional misclassification of workers. Supporters contend that these consultants should be held accountable when they advise employers to engage in misclassification. Opponents representing a variety of business interests argue that the bill lacks appropriate definition, sweeps too broadly, fails to consider causal connections between advice given and action taken, and places the advisor and the employer in adversarial positions

SUMMARY: Regulates consultants that knowingly advise an employer to misclassify an employee as an independent contractor. Specifically, this bill:

1) Provides that a person who knowingly advises an employer (other than his or her own employer) to treat a worker as an independent contractor to avoid employee status for the

worker shall be jointly and severally liable with the employer if the worker is not found to be an independent contractor.

2) Exempts attorneys authorized to practice law in California or another United States jurisdiction who provides legal advice in the course of the practice of law.

EXISTING LAW:

1) Provides numerous and comprehensive requirements, rights, and remedies relating to the employer-employee relationship, including, but not limited to, wages and other compensation, working hours, workers' compensation, labor code violation actions, employment contracts, and working conditions standards. (Labor Code Sections 200 et seq., 500 et seq., 2698-2699.5, 2700 et seq., and 3200 et seq.)

2) Provides that any grower or farm labor contractor who enters into a contract or agreement in violation of law, is subject to a civil action by an aggrieved worker for any claims arising from the contract or agreement that are a direct result of any violation of any state law regulating wages, housing, pesticides, or transportation committed by an unlicensed farm labor contractor. (Labor Code Section 1695.7.)

3) Provides that a person or entity that enters into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided may be held civilly liable for violations and is subject to specified penalties. (Labor Code Section 2810.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: The author explains the reason for the bill as follows: "Misclassification poses a serious threat to workers rights and stopping it is a top priority for the Labor Movement. It severs the employment relationship, strips workers of all employee rights, makes it harder for legitimate businesses to compete, and costs the state millions on lost tax revenue. Many employers want to follow the law, but there is an industry of consultants that promotes intentional misclassification of workers. These consultants should be held accountable when they advise employers to engage in misclassification."

According to the author, "This bill is intended to reduce misclassification by holding consultants accountable for their role in promoting misclassification schemes. As contingent work has been on the rise, there has also been an increase in consultants who develop elaborate misclassification schemes and advise employers how to implement them. Under current law, if a consultant advises an employer to misclassify workers as independent contractors and the employer is held liable, the consultant has no liability. This bill would extend joint liability to a consultant who knowingly advises an employer to misclassify workers and that employer is held liable."

The sponsor, California Labor Federation, and other supporters state that the determination whether a worker is an employee or independent contractor is important for a number of reasons, including the worker's rights and remedies under state and federal law, federal and state tax consequences for the employer, and the level of tax revenues for the state and federal government. (See Employment Development Department (EDD) website, (ww.edd.ca.gov.) The Internal Revenue Service (IRS) provides that "[t]o determine whether a worker is an independent contractor or an employee under common law, you must examine the relationship between the worker and the business. All evidence of control and independence in this relationship should be considered. The facts that provide this evidence fall into three categories - Behavioral Control, Financial Control, and the Type of Relationship itself." The EDD has developed a guide, worksheets, and forms to assist businesses in determining whether a worker is an employee or independent contractor.

A number of reports in the last several years have chronicled the societal consequences of and impacts upon American workers of misclassification of workers as independent contractors versus employees. For example, in 2006, EDD conducted over 5,000 audits and investigations, which resulted in approximately 3,400 assessments/fines (almost $114 million) based upon employer misclassification of workers as independent contractors. Several states and the General Accounting Office that have conducted studies of the issue report substantial increases in misclassification of workers as independent contractors, with a resulting loss in such things as unpaid workers' compensation premiums and income tax revenues.

In addition, firms that consult with and advise employers on how to classify individuals as independent contractors, as opposed to employees, have begun to spring up over the last several years. An example of this is a company called NICA, Inc. out of Massachusetts that reports that 30% of its business is in California, and which reportedly advises employers on how to classify couriers and others as independent contractors. The Los Angeles Times reported in December 2005 that EDD is investigating NICA and others for wrongfully advising companies on how to classify workers as independent contractors in order to avoid such things as unemployment and workers' compensation insurance, payroll taxes, and Social Security contributions.

This bill is intended to address the problem of consultants that wrongfully advise companies to misclassify workers as independent contractors.

Supporters contend that workers should have recourse against consultants who create and market these schemes to employers. It is also in the interest of employers to hold unscrupulous consultants accountable, supporters contend, because most employers want to follow the law and these consultants often prey upon small employers struggling to find ways to cut costs and increase profits.

<u>This Bill Creates No New Penalties or Right To Recovery Against Employers, But Simply Extends Joint Liability to Consultants For Existing Remedies.</u> An employer is liable under existing law for treating employees as independent contractors because that misclassification results in the violation of a variety of wage and hour obligations and other laws. Section 2 of this bill provides simply that consultants who advise an employer to wrongly treat an employee as an independent contractor would

share the employer's liability for that wrong jointly and severally with the employer. Nothing in this section imposes any new or different liability on the employer itself.

No Liability Unless A Consultant Knowingly Advised An Employer to Misclassify An Employee. The bill provides that a consultant would be liable only if he or she knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual. This liability would be jointly with the employer for the remedies currently provided by law as a result of the misclassification.

Determination of Misclassification. SB 1583 would only provide for joint and several liability for a consultant and employer if an individual has been adjudged by an administrative, court, or other legal proceeding to be an employee and not an independent contractor.

The sponsor writes that "if a consultant advises an employer to misclassify workers as independent contractors and the employer is found to have misclassified, giving rise to liability to the worker and the state, the consultant would be jointly liable. [T]his bill does not impose new liability on employers; instead, it simply says that, if an employer is found to have misclassified based upon the advice of a consultant, that consultant will be jointly liable."

Similar Liability For Others Who Knowingly Assist Another To Avoid A Legal Obligation. Supporters argue that this measure may be likened to Civil Code Sections 1714.4 and 1714.41, which provide that any person or business entity that knowingly assists a child support obligor who has an unpaid child support obligation to escape, evade, or avoid paying court-ordered or court-approved child support is liable for three times the value of the assistance provided, such as the fair market value of the obligor's assets transferred or hidden.

Licensed Attorneys Exempted. This bill would provide that its provisions do not apply to an attorney authorized to practice law in California or another United States jurisdiction who provides legal advice in the course of the practice of law.

The author advises that she requested and received from the State Bar of California a review of the bill's provision exempting attorneys authorized to practice law. According to the author, while the State Bar takes no position on the bill, its letter opines that attorneys authorized to practice law should be exempted from the bill's provisions for a number of reasons, including that California's Rules of Professional Conduct regulate attorney conduct in the state. Therefore, should an attorney run afoul of the rules of professional conduct, and case law interpreting those rules, he or she would be subject to an array of sanctions, including disbarment.

ARGUMENTS IN OPPOSITION: A coalition of business groups writes in opposition to the measure, arguing:

> This bill proposes to create an unjustified civil liability for "advisors" who provide advice to another person in reference to the potential employment status of an individual; namely

whether it is appropriate to contract with an individual as an independent contractor versus hiring the individual as an employee. In essence, SB 1583 proposes to hold an "advisor," along with the decision-maker, jointly and severally liable for misclassifying an individual as an independent contractor, if it is later determined that the individual was misclassified.

Specifically, we are opposed to the bill because it:

Does not define "advisor" - except to exclude attorneys (even those not licensed in California). An advisor could be an employee or independent contractor of the business.

Does not recognize/exempt others, either within (e.g., fellow employees) or outside the business (e.g., HR consultants), as having sufficient experience, knowledge and skills to offer employment versus contractual recommendations to the business.

Makes no distinction as to the intent, weight or breadth of the "advice" provided and the extent to which such "advice" should have been reasonably considered in determining the employment or contractual status of the individual, nor does it make a distinction between the advice provided and how the advice is (or isn't) applied by the business/decision-maker in reference to the actual utilization of the independent contractor.

Does not consider the influence/authority of the advisor with respect to the actual implementation of the advice. In many cases, the advisor has no control over how the advice is actually put into practice. The implementation may be significantly different than the advice given. Additionally, the advisor likely has no authority or ability to remedy an erroneous implementation of the advice, given that under California law, the determination of independent contractor" status is always long after-the-fact.

Places the advisor and the advisee (business) in adversarial positions when ruling on the potential liability of the advisor. Additionally, if the so-called "advisor" is an employee of the purported employer, this bill gives the employer the sole option to "indemnify" the advisor, or not. The advisor is at the mercy of the business in this situation.

Does not indicate by what process (administrative or judicial) the initial misclassification ruling is rendered.

Creates two new Labor Code violations, therefore creates new private rights of action pursuant to the Private Attorney General Act (PAGA), not only to seek an initial misclassification ruling without a prior determination by a state agency but also (or concurrently) to address advisor liability.

Provides a private right of action to address alleged misclassifications (with or without a prior determination of state agency) and, unlike last year's SB 622, does not include a

willful misclassification standard. All that is required is that the advisor knowingly advises an employer to treat an individual as an independent contractor to avoid employee status. The fact is, any time someone makes a decision to contract with an independent contractor, they knowingly do so as an alternative to hiring an employee based on any number of factors known at the time of the decision.

The decision to classify an individual as an independent contractor is not an easy one. Guidelines provided by enforcement agencies such as the Employment Development Department and the Department of Industrial Relations are ambiguous and confusing and do not lead a business to reach a conclusion with which they can be confident is correct.

Each agency evaluates classification subject to a case by case interpretation and each agency may reach a different conclusion. Each of these agencies has their own penalty and fee structure when they find an occurrence of misclassification. There is no clear path to definitive classification.

Determining status as an independent contractor versus an employee is daunting for many businesses because the process is so ambiguous and complex, providing no certainty for decision-making. SB 1583 is the wrong approach - instead of imposing new penalties and liabilities, the process should be revised with ways to improve the ability of business to make and be confident that they have made sound business decisions.

Author's Amendments Addressing Opposition Concerns. In response to concerns expressed by opponents, the author reasonably proposes to clarify the scope and intent of the bill as follows:

Delete section 1 entirely so that there is no question but that the bill simply requires consultants to share the employer's existing liability and does not create any new liability for employers.

Clarify that the bill does not apply to employees who advise their employer, by amending section 2 as follows:

b) This section does not apply to:

(1) A person who provides advice to his or her own employer;

(2) An attorney authorized to practice law in California or another United States jurisdiction who provides legal advice in the course of the practice of law.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation (sponsor)
American Federation of Television & Radio Artists
American Federation of State, County and Municipal Employees
California Applicant Attorneys Association
California Association for Health Services at Home
CA Conference Board of the Amalgamated Transit Union
CA Conference of Machinists
California Professional Firefighters
CA Rural Legal Assistance Foundation
CA Teamsters Public Affairs Council
Communications Workers of America
Consumer Attorneys of CA
Engineers and Scientists of CA
IBEW Local 340 (Sacramento)
IBEW Local Union 595 (Dublin)
International Longshore & Warehouse Union
Maintenance Cooperation Trust Fund
National Employment Project
Plumbers & Pipefitters Local Union No. 447
Professional & Technical Engineers, Local 21
Sacramento Central Labor Council
State Building and Construction Trades Council
Strategic Committee of Public Employees, LIUNA
United Food and Commercial Workers Union Western States Council
UNITE HERE!

Opposition

American Fence Contractors' Association, California Chapter
Associated General Contractors
California Apartment Association
California Chamber of Commerce
California Delivery Association
California Fence Contractors' Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Manufacturers and Technology Association
California Trucking Association

Civil Justice Association of California
Consulting Engineers and Land Surveyors of California
Engineering Contractors' Association
Flasher/Barricade Association
Lumber Association of California and Nevada
Marin Builders' Association
Messenger Courier Association of the Americas
National Federation of Independent Business

Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

NELP

Delivering Economic Opportunity

April 6, 2010

Via email and regular mail

Linda Eissmann
Principal Research Analyst
Legislative Counsel Bureau
401 S. Carson Street
Carson City, NV 89701

Re: State independent contractor provisions with private rights of action

Dear Ms. Eissmann:

Thank you again for the opportunity to present testimony to the Nevada Legislative Commission's Subcommittee to Study Employee Misclassification on April 5th. As promised during the question and answer portion of the testimony, I have prepared a short summary of those states with independent contractor misclassification laws on the books that provide a private right of action for workers or their representatives. Please forward this information to the Commission.

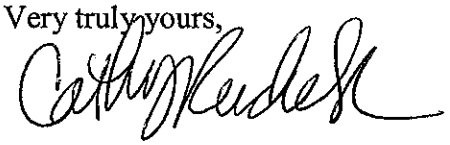
A review of the independent contractor misclassification laws' remedies and enforcement sections shows that they generally fall into one of two categories: (1) either the new law forbids or tightens the independent contractor rules within a specific law (like the state's workers compensation act or state unemployment insurance act), or (2) the law applies across several or all labor and employment statutes in the state, including wage and hour, unemployment insurance, workers compensation, disability, etc.

Laws in category one generally provide the same remedies as are already found in the state's workers compensation or unemployment insurance laws, which typically mean that the remedies and enforcement occur once an individual has filed a complaint at the agency, or the agency conducts an audit or investigation under its enhanced powers upon learning of possible violations. Typically, these laws do not afford a worker the right to go directly to court to enforce rights, until he has exhausted remedies at the agency level. States in this category include: WA (in 2008); CO (in 2007 and 2009); LA (2008); MN (2007, 2009); MT (2005); NM (2005).

Laws in category two provide a worker or his or her representative a separate and independent right to go to the agency or to court to enforce rights under the law. States in this category include: DE (2009); IL (2007); MD (2009); MA (2008); MN (2005), NJ (2007); NH (2007).

Please do not hesitate to contact me with any further questions.

Very truly yours,



Catherine Ruckelshaus
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