

**Bulletin No. 11-07**



## **Employee Misclassification**

*Legislative Counsel Bureau*



**January 2011**



**EMPLOYEE MISCLASSIFICATION**

**BULLETIN NO. 11-07**

**JANUARY 2011**



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## SUMMARY OF RECOMMENDATIONS

### LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY EMPLOYEE MISCLASSIFICATION

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

The following is a summary of the recommendations approved during the 2009-2010 Interim by the Legislative Commission's Subcommittee to Study Employee Misclassification. The following bill draft requests (BDRs) will be submitted to the 76th Session of the Nevada Legislature in 2011.

#### BILL DRAFT REQUESTS

1. Draft legislation to create a Task Force on Employee Misclassification to ensure communication among member agencies, receive and review audits conducted by agencies concerning employees who are misclassified, create a structure for fees and penalties levied in the cases of employees misclassified as independent contractors, and make reports to the Legislature.

Membership of the Task Force will be comprised of ten members, including five State agencies:

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

and representatives of the following five groups:

- A large employer (more than 500 employees);
- A small employer (less than 500 employees);
- An independent contractor;

- A labor organization; and
- The general public.

The representatives of the five groups indicated will be appointed by the Legislative Commission from names submitted by the Majority Leader of the Senate, Minority Leader of the Senate, Speaker of the Assembly, Minority Leader of the Assembly, and the Governor. **(BDR 53-164)**

2. Draft legislation to expand the use of the three-part “ABC Test” in *Nevada Revised Statutes* 612.085 (currently used for unemployment insurance and by extension for the Modified Business Tax) to include application for the purposes of workers’ compensation. The measure will also require inclusion of information concerning the difference between an employee and an independent contractor on State labor law posters posted in areas where work is performed or employees congregate. **(BDR 53-168)**
3. Draft legislation to impose a civil penalty against anyone who knowingly advises an employer to misclassify employees as independent contractors. **(BDR 53-167)**
4. Draft legislation to provide for a private right of action for workers who are misclassified and provide for reimbursement of legal expenses to the claimant by the employer. The private right of action becomes available to the worker after 120 days from the date a complaint is filed with the appropriate agency. **(BDR 53-166)**
5. Draft legislation to implement a fine on employers who misclassify their employees as independent contractors of \$5,000 per employee for the first offense, \$15,000 per employee for the second offense, and \$25,000 per employee and loss of ability to do business for a period of three years on the third offense. **(BDR 53-165)**

**REPORT TO THE 76TH SESSION OF THE NEVADA LEGISLATURE  
BY THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE  
TO STUDY EMPLOYEE MISCLASSIFICATION**

**I. INTRODUCTION**

The 75th Session of the Nevada Legislature approved Senate Concurrent Resolution No. 26 (File No. 100, *Statutes of Nevada 2009*), creating the Legislative Commission's Subcommittee to Study Employee Misclassification.

The Subcommittee was directed to determine the scope of the problem of employee misclassification in Nevada, including: (1) the implications and scope of economic losses for employees and lost revenues for the State and local governments; (2) proposals for State processes to identify employee misclassification; (3) potential penalties for employers engaging in employee misclassification; and (4) legal recourse for affected employees.

The Subcommittee was comprised of five members: (1) one member of the Senate; (2) one member of the Assembly; (3) one representative of management who works for an entity in the construction industry that has not signed an agreement with a labor union; (4) one representative from the construction industry who is a member of a labor union; and (5) one representative of the general public.

The five members of the Subcommittee were:

Senator Shirley A. Breeden, Chair  
Assemblywoman Bonnie Parnell, Vice Chair  
Fran Almaraz (construction industry/labor union representative)  
Yindra Dixon (public representative)  
Warren Hardy (construction industry/nonlabor representative)

Staff services from the Legislative Counsel Bureau (LCB) were provided by:

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

The Subcommittee held three meetings, including a work session, during the 2009-2010 Legislative Interim. All meetings were open to the public and were videoconferenced between the Grant Sawyer State Office Building in Las Vegas and the Legislative Building in Carson City.

As a result of these hearings, the Subcommittee adopted five recommendations for bill drafts to be considered by the 2011 Legislature. The recommendations would: (a) create a task force to coordinate State efforts intended to reduce employee misclassification; (b) expand the use of the three-part test in *Nevada Revised Statutes* (NRS) 612.085 (often referred to as the “ABC Test”) to other areas of employment law; (c) impose a civil penalty against anyone who advises an employer to misclassify employees as independent contractors; (d) provide for a private right of action for misclassified workers including reimbursement of legal expenses; and (e) implement a graduated penalty against employers who misclassify their workers.

## **II. BACKGROUND**

Employee misclassification occurs when a worker who is otherwise an employee under the law is treated and labeled as a self-employed worker, often referred to as an independent contractor. The resulting misclassification deprives the employee of labor and employment law protections, as well as other benefits to which he or she would be entitled if considered an employee. This practice may be an attempt by employers trying to avoid their legal obligations under federal and state labor, employment, and tax laws including the laws governing minimum wage, overtime, unemployment insurance, workers’ compensation insurance, temporary disability insurance, wage payment, and federal income tax.

Many workers do not know that they have been misclassified until they file an employment-related claim and are denied benefits.

National studies suggest that employee misclassification could be a significant problem throughout the United States with adverse consequences. For tax year 1984, the Internal Revenue Service (IRS) estimated that employers misclassified a total of 3.4 million employees, resulting in an estimated revenue loss of \$1.6 billion. A 2000 study of nine states commissioned by the United States Department of Labor’s (DOL) Employment and Training Administration found that 10 percent to 30 percent of employers audited in nine states misclassified at least some employees. Among the most common reasons were to avoid paying workers’ compensation premiums and not being subject to workplace injury and disability claims.

Although employee misclassification itself is not a violation of the law, it is often associated with labor and tax law violations. At the federal level, the DOL’s detection of misclassification generally results from its investigations of alleged violations of federal labor law, particularly complaints involving nonpayment of overtime or minimum wages.

Various studies show that misclassification results in millions of dollars of lost revenue to individual states each year. For example, a University of Missouri study identified a loss of \$346 million to the State of Illinois in 2006. A 2007 audit in New York found \$682 million in lost revenue. An Ohio audit in 2009 found \$159 million in financial losses to the state.

As a result, many states have already adopted legislation or signed executive orders to address the problem of employee misclassification.

The misclassification of employees as independent contractors has serious adverse effects on the residents, businesses, and economy of Nevada. This practice: (a) increases the uncertainty of collecting unemployment taxes; (b) unfairly shifts the tax burden to the overwhelming majority of Nevada employers who adhere to federal and state labor laws; (c) allows employers who misclassify their employees an unfair competitive advantage over law-abiding businesses; and (d) undermines fundamental laws intended to ensure employees receive the wages to which they are entitled as well as legally required employment insurance, workers' compensation, and other workplace protections.

### **III. TOPICS DISCUSSED BY THE SUBCOMMITTEE DURING THE 2009-2010 INTERIM**

The following is a summary of the topics discussed by the Subcommittee during the 2009-2010 Interim. (Additional detail is contained in the meeting minutes, available online at: [www.leg.state.nv.us/Interim/75th2009/Committee/Studies/EmpMisclass/?ID=52](http://www.leg.state.nv.us/Interim/75th2009/Committee/Studies/EmpMisclass/?ID=52).)

#### **A. Impact on Workers and Employers**

Workers who are misclassified as independent contractors are deprived of federal labor protections such as those provided through the DOL's Occupational Safety and Health Administration and established by the Fair Labor Standards Act (FLSA), the National Labor Relations Act, and various discrimination laws. Misclassified workers are often denied basic employment benefits such as overtime premiums, minimum wages, health insurance, and pension plans. Because unemployment insurance premiums and payroll taxes are not paid by employers on their behalf, workers have no recourse if they are injured or discriminated against in the workplace. In fact, many of them do not know they have been misclassified by an employer until they have a workers' compensation or unemployment claim and then realize the payroll taxes have not been paid on their behalf.

Employers who misclassify their workers are often able to underbid those employers who properly provide benefits and pay necessary taxes and fees. Studies estimate that employers can significantly reduce their labor costs by as much as 30 percent by misclassifying their employees as independent contractors. Thus, employers who misclassify their employees see a cost savings that gives them a competitive advantage.

## **B. Existing State Law and the Impact on State Programs, Policies, and Revenue Structures**

### **Unemployment Insurance**

The Employment Security Division (ESD) of the Department of Employment, Training and Rehabilitation oversees Nevada's Unemployment Insurance Program (Chapter 612 of NRS). Unemployment insurance is a benefit for employees financed by a payroll tax on employers to provide temporary partial income replacement to workers who become unemployed through no fault of their own. The taxes are set aside in a trust fund and can only be used to pay benefits. The amount of weekly benefits is determined by an individual's earnings in previous employment and is not based on need.

For the purposes of unemployment compensation, the terms "employee" and "independent contractor" are not specifically defined in statute. However, NRS 612.085 presumes an individual is an employee unless three specific conditions are met:

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 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, and is of the same nature as that involved in the contract of service.

This presumptive test is commonly referred to as the ABC Test. If all three of the 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). Otherwise, if any of the conditions are met, the individual is considered an independent contractor.

The Unemployment Insurance Program becomes aware that workers are misclassified in one of five ways:

- Benefit claim investigations;
- Employer audits;
- Interagency referrals;
- Public tips; and
- Internet registration process.

According to testimony (January 22, 2010), current ESD records indicate that 12.4 percent of benefit claims investigations involved misclassification and 2.7 percent of audited employment was misclassified, providing a conservative estimate of approximately 31,000 Nevadans that may be misclassified. From these numbers, the estimated annual revenue lost to the Unemployment Trust Fund is approximately \$8.2 million.

Nevada's unemployment insurance law does not provide a direct penalty for the misclassification of workers as independent contractors. However, employers may face indirect penalties such as penalty interest for late reports and payments, and criminal penalties ranging from a misdemeanor to a category C felony for providing false statements, failing to disclose materials, failing to make contributions, and other willful violations of the law.

### **Workers' Compensation**

With few exceptions, Nevada industrial insurance law (Chapters 616A, 616B, 616C, and 616D of NRS) requires employers with one or more employees to maintain workers' compensation insurance. However, employers are not required to provide workers' compensation coverage to an independent contractor or "independent enterprise."

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 the person's work only and not as to the means by which such result is accomplished (NRS 616A.255). For purposes of workers' compensation coverage, statute further defines an "independent enterprise" 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).

The Workers' Compensation Section of the Division of Industrial Relations within the Department of Business and Industry ensures that employers are in compliance with mandatory coverage provisions and that workers' compensation benefits are delivered to employees.

Nevada law provides a specific penalty for employee misclassification as it relates to workers' compensation insurance. A person who knowingly misrepresents the classification or duties of an employee is guilty of a gross misdemeanor (NRS 616D.220). The Office of the Attorney General's Fraud Control Unit for Industrial Insurance has primary jurisdiction to investigate and prosecute persons and employers who misclassify employees (NRS 228.420).

An employer who does not adequately provide workers' compensation coverage for its employees is subject to an administrative fine up to \$15,000 (NRS 616D.120).

The Division of Industrial Relations conducts compliance investigations for insurance coverage. In the course of the investigations, investigators have encountered cases of employee misclassification as independent contractors. In most of these cases, the employers have not obtained workers' compensation insurance, often in an attempt to evade the law and

save on the expense of coverage. Injured workers not covered by workers' compensation insurance are paid benefits by the Division of Industrial Relations from the Uninsured Employers' Claim Account in accordance with NRS 616C.220.

### **Modified Business Tax**

The primary source of potential lost revenue to Nevada from the misclassification of employees as independent contractors is to the MBT. This tax requires every employer who is required to pay unemployment insurance to self-report and pay to the Department of Taxation a tax on the gross wages paid by an employer to an employee less certain deductions (such as health care). Independent contractors are not subject to the MBT because they are not defined as employees under unemployment insurance provisions and the presumptive ABC Test. Thus, employers who misclassify their employees avoid paying the MBT on those workers.

### **C. Legislation and Reform Activities in Other States**

Several states have created task forces to address the issue of employee misclassification. Some are advisory while others have enforcement responsibilities (such as the ability to investigate complaints or issue stop work orders). Task forces in Maine, Massachusetts, Michigan, New Hampshire, and New York are among recent efforts and demonstrate varying authorities and duties.

Common among the task forces are the following duties: (1) enhanced cooperation and collaboration among various state agencies with an interest in misclassification issues; (2) improved reporting opportunities for workers who believe they are misclassified (such as in the form of tip lines, online forms, or toll-free telephone numbers); (3) streamlined processes for handling complaints; (4) increased public education and outreach; (5) evaluation of the impact of misclassification within each state; and (6) the ability to make recommendations for legislation.

In addition to the use of task forces, several states have taken specific measures to address employee misclassification in their states. Among them:

- In 2009, Colorado enacted legislation addressing the misclassification of employees as independent contractors for the purposes of the "Colorado Employment Security Act." The bill contains two primary provisions: (1) a means to investigate complaints of employee misclassification with associated penalties; and (2) a statewide study of the extent of the problem.
- Delaware's Workplace Fraud Act of 2009 increases penalties on construction employers who knowingly misclassify employees as contractors in order to evade federal and state taxes and wage and hour laws.

- Maryland's Workplace Fraud Act of 2009 creates a presumption of employee status for employees working in the construction and landscape industries. The measure provides criteria for determining whether a worker is an employee or an independent contractor, authorizes the Commissioner of Labor and Industry to initiate necessary investigations, permits information-sharing among state agencies, and establishes certain presumptions and evidentiary considerations.

#### **D. Federal Efforts to Curb Employee Misclassification**

In 2009, a report by the U.S. Government Accountability Office, titled *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, identified the misclassification of employees as independent contractors not only as a violation of the law, but often associated with labor and tax law violations.

The report identified several options for addressing employee misclassification. Among them were the following:

- Making misclassification a violation under the FLSA;
- Allowing employees to challenge a classification determination in the U.S. Tax Court;
- Requiring each independent contractor to apply for a separate business tax identification number; and
- Revising Section 530 of the Revenue Act of 1978 to narrow certain relevant definitions, and lifting the ban on the IRS from issuing regulations or revenue rulings, thereby clarifying the status of individuals for employment tax purposes.

Over the next three years, the IRS will audit 2,000 employers a year as part of its National Research Program. The audits will focus on federal employment taxes and worker misclassification.

#### **2011 Federal Budget**

As part of the proposed budget for federal Fiscal Year (FY) 2011, the DOL and the U.S. Department of the Treasury will pursue a joint proposal that eliminates the incentives for employers to misclassify employees and enhance the ability of each agency to levy penalties. It is estimated that the proposal will increase Department of the Treasury receipts by more than \$7 billion over the next ten years.

The DOL requested budget includes an additional \$25 million to add 100 additional enforcement personnel and to provide competitive grants to states for addressing misclassification. Of that amount, \$11.25 million is requested for the competitive grants to

state unemployment insurance agencies to increase capacity in order to focus on misclassification, and to reward states that are most successful or show the most improvement at detecting and prosecuting misclassification.

Before any funds are made available, Congress must first pass the FY 2011 appropriations bill and approve the requested funds.

### **Misclassification Initiative**

The FY 2011 federal budget also includes nearly \$11 million for a multiagency initiative designed to strengthen and coordinate federal and state efforts to enforce statutory prohibitions against employee misclassification. The Misclassification Initiative will support new, targeted efforts by the DOL's Employment and Training Administration to recoup unpaid payroll taxes and promote the innovative work of states on this problem.

This initiative includes state audits of problem industries supported by federal audits, enforcement activities, litigation against major employers that cross state lines, and additional interagency cooperation between the DOL and the IRS at federal and state levels.

### **Bills Pending in Congress**

Two bills were introduced in Congress in 2009 to address the misclassification issue by focusing on revising Section 503 "Safe Harbor" provisions of the *Internal Revenue Code*. In July 2009, the Taxpayer Responsibility, Accountability, and Consistency Act (H.R. 3408 and S. 2882) was introduced in the House of Representatives. In December 2009, a similar measure was introduced in the Senate.

This act would limit the use of the safe harbor provisions, and would require either a written determination from the U.S. Department of the Treasury that an individual was not an employee or would require an IRS examination with the same conclusion.

In 2010, two more companion bills were introduced in Congress. The Employee Misclassification Prevention Act (H.R. 5107 and S. 3254) proposes to aid the DOL by:

- Making worker misclassification a violation of the FLSA, thereby making the practice against the law for the first time.
- Codifying in the FLSA an employer's obligation to provide their workers with notice of how the worker is classified. Failure to give notice would establish a legal presumption that the worker is an "employee."
- Authorizing civil monetary penalties for recordkeeping violations to provide an enforcement tool not only against misclassification, but against all FLSA recordkeeping violations.

As of this writing, the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 and the Employee Misclassification Prevention Act are still pending in Congress.

Also in 2010, the Unemployment Compensation Integrity Act was delivered to Congress by the DOL. The act contains provisions that would enable states to retain a percentage of delinquent employer unemployment insurance taxes, including those resulting from misclassification, to use for increased efforts to identify worker misclassification. As of this writing, the legislation has not yet been introduced.

#### **IV. SUBCOMMITTEE RECOMMENDATIONS**

The following is a summary of the recommendations approved during the 2009-2010 Interim by the Legislative Commission's Subcommittee to Study Employee Misclassification. The following bill draft requests (BDRs) will be submitted to the 76th Session of the Nevada Legislature in 2011.

##### **Recommendation No. 1**

The Subcommittee agreed to encourage and facilitate improved coordination among State agencies that manage related programs impacted by employee misclassification, with involvement from employer representatives, labor groups, and others.

##### *Action Taken*

**Draft legislation to create a Task Force on Employee Misclassification to ensure communication among member agencies, receive and review audits conducted by agencies concerning employees who are misclassified, create a structure for fees and penalties levied in the cases of employees misclassified as independent contractors, and make reports to the Legislature.**

**Membership of the Task Force will be comprised of ten members, including five State agencies:**

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

5. **Attorney General or designee;**
- and representatives of the following five groups:**
6. **A large employer (more than 500 employees);**
7. **A small employer (less than 500 employees);**
8. **An independent contractor;**
9. **A labor organization; and**
10. **The general public.**

**The representatives of the five groups indicated will be appointed by the Legislative Commission from names submitted by the Majority Leader of the Senate, Minority Leader of the Senate, Speaker of the Assembly, Minority Leader of the Assembly, and the Governor. (BDR 53–164)**

### **Recommendation No. 2**

The Subcommittee voted to recommend application of the presumptive three-part test for employee status (the ABC Test) to workers' compensation coverage, thereby making it consistent with the existing application to unemployment insurance and the MBT.

#### *Action Taken:*

**Draft legislation to expand the use of the three-part “ABC Test” in NRS 612.085 (currently used for unemployment insurance and by extension for the Modified Business Tax) to include application for the purposes of workers' compensation. The measure will also require inclusion of information concerning the difference between an employee and an independent contractor on State labor law posters posted in areas where work is performed or employees congregate. (BDR 53–168)**

### **Recommendation No. 3**

The Subcommittee expressed its concern regarding individuals who encourage employers to misclassify their employees as independent contractors in order to avoid paying applicable taxes and voted to recommend legislation to create a penalty for this practice.

#### *Action Taken*

**Draft legislation to impose a civil penalty against anyone who knowingly advises an employer to misclassify employees as independent contractors. (BDR 53–167)**

#### **Recommendation No. 4**

The Subcommittee voted to give workers the right to sue their employers if they are misclassified and to recover associated legal expenses if the existing administrative process does not provide a timely remedy.

#### *Action Taken*

**Draft legislation to provide for a private right of action for workers who are misclassified and provide for reimbursement of legal expenses to the claimant by the employer. The private right of action becomes available to the worker after 120 days from the date a complaint is filed with the appropriate agency. (BDR 53-166)**

#### **Recommendation No. 5**

In order to strongly discourage employers from misclassifying employees as independent contractors and underscore the seriousness of this offense in Nevada, the Subcommittee voted to request legislation to establish applicable fines.

#### *Action Taken*

**Draft legislation to implement a fine on employers who misclassify their employees as independent contractors of \$5,000 per employee for the first offense, \$15,000 per employee for the second offense, and \$25,000 per employee and loss of ability to do business for a period of three years on the third offense. (BDR 53-165)**

### **V. ADDITIONAL SUBCOMMITTEE ACTION**

At the Subcommittee's second meeting on April 5, 2010, members agreed on the following action:

- **The Subcommittee requested that staff prepare a letter to the Audit Division of the LCB recommending that the upcoming audit of the Office of Labor Commissioner, Department of Business and Industry, address: (1) separate penalty amounts, back wage amounts, and specific identification of misclassified employees; (2) the process for receiving, investigating, and resolving complaints specific to employee misclassification; and (3) whether fees and penalties are being properly charged and collected.**



**VI. APPENDICES**

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**APPENDIX A**

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



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

Senate Concurrent Resolution No. 26—  
Senator Horsford

FILE NUMBER.....

SENATE CONCURRENT RESOLUTION—Providing for an  
interim study on employee misclassifications.

WHEREAS, Certain employers in Nevada may improperly classify persons they hire as “independent contractors,” when those workers should be classified legally as “employees”; and

WHEREAS, The practice of employee misclassification can be an attempt by some employers to avoid their legal obligations under federal and state labor, employment and tax laws, including the laws governing minimum wage, overtime, unemployment insurance, workers’ compensation insurance, temporary disability insurance, wage payment and federal income tax; and

WHEREAS, The practice of employee misclassification has serious adverse effects on the residents, businesses and economy of Nevada because this practice: (1) increases the uncertainty of collecting unemployment taxes; (2) unfairly shifts the tax burden to the overwhelming majority of Nevada employers who adhere to federal and state labor laws; (3) allows employers who misclassify their employees an unfair competitive advantage over law-abiding businesses; and (4) undermines fundamental laws intended to ensure employees receive legally required employment insurance, workers’ compensation and other workplace protections; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislative Commission is hereby directed to appoint an interim subcommittee to determine the scope of the problem of employee misclassification in this State, including ramifications in terms of economic losses for employees and lost revenues for this State and for local governments, proposals for state processes to identify employee misclassification, potential penalties for employers engaging in employee misclassification and legal recourse for affected employees; and be it further

RESOLVED, That the interim subcommittee must consist of five members as follows:

1. One member of the Senate;
2. One member of the Assembly;
3. One representative of management who works for an entity in the construction industry that has not signed an agreement with a labor union;
4. One representative from the construction industry who is a member of a labor union; and



5. One representative of the general public; and be it further  
RESOLVED, That the Legislative Commission shall submit a  
report of the results of the study and any recommendations for  
legislation to the 76th Session of the Nevada Legislature.

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**APPENDIX B**

Subcommittee Letter



**SHIRLEY BREEDEN**

SENATOR  
Clark No. 5



**DISTRICT OFFICE:**  
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Fax No.: (775) 684-6522  
[www.leg.state.nv.us](http://www.leg.state.nv.us)

**State of Nevada**  
**Senate**

**Seventy-fifth Session**

April 30, 2010

Paul V. Townsend  
Legislative Auditor, Audit Division  
Legislative Counsel Bureau  
401 South Carson St.  
Carson City, Nevada 89701

Dear Mr. Townsend:

The Legislative Commission's Subcommittee to Study Employee Misclassification (Senate Concurrent Resolution No. 26, File No. 100, *Statutes of Nevada 2009*) is aware that your office will soon undertake an audit of Nevada's Office of the Labor Commissioner. As you know, we have discussed various aspects of the Labor Commissioner's role in collecting and investigating labor complaints, the various penalties and fees collected by the Labor Commissioner and their disbursement, and the management system used by that office to track certain data.

The Subcommittee met on April 5, 2010, and agreed unanimously to request that your office include in your audit a review of specific items of concern and interest to us. Although we realize the audit will not be completed before the Subcommittee concludes its work this interim, we believe this information will be useful in the deliberation of upcoming legislation and will be relevant to future legislative committees.

On behalf of the Subcommittee, I request that the audit include the following:

- An evaluation of the process used by the Labor Commissioner for receiving, investigating, and resolving complaints;
- A determination as to whether the Labor Commissioner is imposing and collecting fees, penalties, and back wages pursuant to his statutory authority. This determination

Paul V. Townsend

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April 30, 2010

- would include, without limitation, the amount of fees and penalties levied by the Labor Commissioner, if any, and the amount of back wages paid by employers; and
- A determination of whether the Labor Commissioner's management information system ensures that reliable labor-related data is received, maintained, and reported, and whether this system needs to be updated or refined so as to delineate specific information concerning the misclassification of workers.

Thank you for addressing our request. Should you have any questions or require clarification, please do not hesitate contacting our committee staff, Linda Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB).

Sincerely,

A handwritten signature in cursive script that reads "Shirley Breeden".

Shirley A. Breeden, Chair  
Nevada State Senator

SAB/gn:W100750

cc: Assemblywoman Bonnie Parnell, Vice Chair  
Heidi Chlarson, Legal Counsel, LCB

## APPENDIX C

### Suggested Legislation

The following Bill Draft Requests will be available during the 2011 Legislative Session, or can be accessed after “Introduction” at the following website: <http://leg.state.nv.us/Session/76th2011/BDRList/>.

- |            |   |
|------------|---|
| BDR 53-164 | Creates Task Force on Employee Misclassification.   |
| BDR 53-165 | Authorizes civil penalties against employers who misclassify employees as independent contractors.                                      |
| BDR 53-166 | Creates a private right of action against employers for workers who are misclassified as independent contractors.                       |
| BDR 53-167 | Authorizes civil penalties against anyone who knowingly advises an employer on how to misclassify employees as independent contractors. |
| BDR 53-168 | Amends definition of “independent contractor” for purposes of workers’ compensation law.  |

