



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

SUMMARY MINUTES AND ACTION REPORT

The first meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification was held on Friday, January 22, 2010, at 9 a.m. in Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 2134 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. A copy of this set of "Summary Minutes and Action Report," including the "Meeting Notice and Agenda" ([Exhibit A](#)) and other substantive exhibits, is available on the Nevada Legislature's website at <http://www.leg.state.nv.us/interim/75th2009/committee>. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (e-mail: publications@lcb.state.nv.us; telephone: 775/684-6835).

SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Senator Shirley A. Breeden, Chair
Assemblywoman Bonnie Parnell, Vice Chair
Fran Almaraz
Yindra Dixon
Warren Hardy

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

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

OPENING REMARKS

- Chair Breeden provided opening remarks and introduction of Subcommittee members and staff and briefly discussed the purpose of the Legislative Commission's Subcommittee to Study Employee Misclassification.

REVIEW OF SENATE CONCURRENT RESOLUTION NO. 26 PROVIDING FOR AN INTERIM STUDY ON EMPLOYEE MISCLASSIFICATION

- Linda J. Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB), gave an overview of the Subcommittee's purpose and reviewed the duties. (Please see [Exhibit B.](#))

DISCUSSION OF THE IMPACT OF EMPLOYEE MISCLASSIFICATION ON EMPLOYERS AND EMPLOYEES WITHIN THE PRIVATE SECTOR

(As directed by Chair Breeden, this agenda item was taken out of order.)

- Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, provided an overview of the practice of employee misclassification and the negative effects of misclassification on the federal, state, and local economies across the country. Mr. Reilly discussed the lack of protection for misclassified workers as it applies to the construction industry. He also addressed the positive effects on the employer, the benefits and savings, and why the practice takes place. Mr. Reilly suggested an executive task force of State agencies and departments be created to enforce these unlawful practices. (Please see [Exhibit C.](#))

Responding to questions from members regarding the definition of independent contractor and the gray area in defining a worker as independent, Mr. Reilly explained the most frequently used test is the ABC Control Test, which employs the following controls: (1) Is the individual free from control of the employer; (2) Is the individual's service outside the usual course of business; and (3) Is the industry an independently established trade.

- Ms. Dixon explained the ABC Control Test is similar to the test of the Internal Revenue Service (IRS) that helps an individual decide if they should be classified as an employee or an independent contractor. She stated there are questions that determine "employee" from "independent contractor," such as if fees or contracts are negotiated with the employer and specific criteria impacting the industry.

Responding to questions from Ms. Dixon, Mr. Reilly explained that employees of FedEx Ground Services do not have opportunities to negotiate. He said that

employees are often asked to sign forms stating they are independent contractors working for the company. If the employee does not sign the form, he may be fired.

OVERVIEW OF RECENT LEGISLATION, STUDIES, AND VARIOUS REFORM ACTIVITIES TO ADDRESS EMPLOYEE MISCLASSIFICATION AND INDEPENDENT CONTRACTOR ISSUES IN OTHER STATES

- Catherine Ruckelshaus, Legal Co-Director, National Employment Law Project (NELP), explained the objective of NELP. Ms. Ruckelshaus offered the resources of NELP to assist in configuring solutions and creating good models for policy reform. She mentioned that employee misclassification occurs in many sectors of the economy, such as home health, janitorial services, and hospitality workers. Ms. Ruckelshaus summarized recent independent contractor reform activity in other states. She noted that:
 1. From July 2008 to June 2009, at least eight states have enacted statutes aimed at independent contractor problems. Over 20 states introduced bills in their legislature.
 2. Attorney General offices in California, Connecticut, Massachusetts, New York, and Ohio are pursuing independent contractor abuses.
 3. Many states are creating inter-agency task forces and committees to study independent contractor abuses.
 4. State legislation has been drafted addressing independent contractor misclassification.
 5. Laws should provide for a private right of action for the aggrieved workers and the worker's representative, including unions or community groups. (Please see [Exhibit D.](#))

Responding to a question from Ms. Dixon regarding the hurdles that state agencies face in determining employee misclassification, Ms. Ruckelshaus explained that state agencies have different laws to enforce. She explained that presumptive laws were in place for specific purposes, but the minimum wage and overtime laws were meant to cover everyone.

- Linda J. Eissmann, previously identified, discussed the application of employee misclassification laws in Colorado, Delaware, and Maryland as states that have adopted laws most recently but also differently. (Please see [Exhibit E.](#))

Responding to a question from Ms. Dixon regarding the choice of the construction industry by the states of Delaware and Maryland, Ms. Eissmann explained the Delaware decision

was an addendum to previous legislation, but stated she would research the decision of those states to focus on the construction industry.

Ms. Parnell was of the opinion that if legislation is drafted it not be too specific to individual groups and would prefer it reach a wider spectrum of industries.

OVERVIEW OF EXISTING NEVADA LAWS THAT ADDRESS EMPLOYEE MISCLASSIFICATION

- Heidi A. Chlarson, Principal Deputy Legislative Counsel, Legal Division, LCB, discussed employee misclassification and issues related to Nevada’s Department of Employment, Training and Rehabilitation (DETR), and Nevada’s Department of Taxation. Ms. Chlarson identified the *Nevada Revised Statutes* (NRS) that define “independent contractor” and “subcontractor” and the penalties involved in employee misclassification as it relates to worker’s compensation coverage, unemployment compensation, and the modified business tax (MBT). (Please see [Exhibit F.](#))

DISCUSSION OF THE IMPACT OF EMPLOYEE MISCLASSIFICATION ON STATE PROGRAMS, POLICIES, AND REVENUE STRUCTURES

- Donna Clark, Chief of Contributions, Unemployment Insurance Program, DETR, provided an overview and history of the Unemployment Insurance Program and reviewed unemployment benefits, audits and investigations, the impact on the Unemployment Trust Fund, and the MBT. She discussed third-party administrator companies that advise employers on how to make employees independent contractors. (Please see [Exhibit G.](#))

Ms. Clark explained how unemployment insurance is financed and how employee benefits are determined. She further explained an employer must employ several conditions to determine if a worker can be classified as an independent contractor. Though the primary focus has been in the construction industry, many other industries experience employee misclassification and many forms of misclassification exist. Ms. Clark stated that DETR determines a misclassified worker by use of the following methods:

1. Benefit claim investigations;
2. Employer audits;
3. Inter-agency referrals;
4. Public tips; and
5. Internet registration process.

Responding to a question from Assemblywoman Parnell regarding the importance of categorizing the forms of misclassification in legislation, Ms. Clark opined that the

ABC Test and the presumptive employment test are reliable; however exploring other view points by naming specific business models might be helpful.

Discussion ensued between Ms. Dixon and Ms. Clark regarding unemployment claims and the complaint process for an employee who believes he is being misclassified. Ms. Clark explained that the priority for DETR is to focus on the payment of the unemployment insurance claim. She further explained that if an employee files a claim for unemployment and his wages are not on file, a benefit claims investigation of the employer is pursued, with some nonregistered employers discovered in this manner. Chair Breeden adding to the discussion asked if a timeline was in place for responding to misclassification complaints. Ms. Clark explained that unemployment claims investigations are the priority and require field services to respond within ten days. Commenting further, she explained the response time for an employer complaint is contingent on the workload.

- Christopher G. Nielson, Deputy Executive Director, Department of Taxation, discussed sales and use taxes, business license fees, and the MBT as they relate to the revenue loss to the State and local governments. He reviewed the history and mechanics of these sources of revenue and the current procedures and challenges in capturing the MBT. Mr. Nielson noted that future plans of the Department of Taxation include participation in the Nevada Business Portal, utilizing the software DiscoverTax®, and refining the definition of employment, employer, and employee. (Please see [Exhibit H.](#))

Responding to Ms. Dixon regarding the ability to determine possible breaks in continuity from a person's personal income tax by using State income tax records and information from the IRS, Mr. Nielson explained that if State income tax records were available, more registered taxpayer information would be available; businesses are the only registered taxpayer in the State. He noted that data collected would allow for queries on certain risk factors to determine if a person is an independent contractor or not reporting certain taxes. He explained this information is provided by the Employment Security Division (ESD), DETR.

- Chair Breeden inquired about available data from the IRS and the statistics of those independent contractors paying taxes based on that data. She also asked about the checks and balances used to identify employers who are paying what they need to pay based on their number of employees.
- Mr. Nielson responded that he will provide the statistical data to the Subcommittee if it can be queried from the database. He stated that the primary checks and balances is the ESD feed, which determines if an independent contractor has never registered for unemployment insurance and then files for unemployment insurance as an employee. This information is sent to the Department of Taxation and a bill for the MBT is generated.

- Donald E. Jayne, Administrator, Division of Industrial Relations (DIR), and Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry, reviewed the mission and enforcement functions of the Worker's Compensation Section of the DIR and addressed the use of regulatory tools. Mr. Jayne noted NRS 616A.105 defines an "employee" or "workman" and NRS 616A.255 defines "Independent Contractor." The compliance investigators often find cases of employee misclassification and employers not in compliance with workers' compensation insurance laws. The highest financial impacts are those claims for uninsured employers who are paid from the Uninsured Employer's Claim Account. Mr. Jayne concluded by focusing on unpaid insurance premium taxes paid to the State General Fund and uninsured employer claims. (Please see [Exhibit I.](#))
- Mr. Tanchek explained the IRS 20 Factor Test that is utilized by the Department of Business and Industry to assist in the determination of employee versus independent contractor. He added that the rule of thumb is independent contracting is a business-to-business relationship and emphasized the use of "independent." (Please see [Exhibit J.](#))

Discussion ensued among Subcommittee members regarding abuse of employee and employer relationships. Mr. Tanchek explained that the employer exercises custody and control over employees in the place of employment, but the independent contractor is free to come and go based on the terms and conditions of their agreement with the employer.

- Assemblywoman Parnell asked how follow up takes place in the Department of Business and Industry and their process in handling calls.
- Mr. Tanchek explained that a complaint is resolved by working through the process of resolution.

Responding to the Subcommittee regarding the course of action taken and the penalties assessed when a complaint is filed, Mr. Tanchek explained the penalty depends on the nature of the complaint. Based on the determination, the corrective action is assessed. The most common penalty is for an unpaid wage violation.

- Chair Breeden asked Mr. Tanchek to query the data for the past two years to assess the type of penalties that are occurring and when the last \$5,000 penalty was enforced. She also asked about the timeline involved in carrying out investigations.
- Mr. Tanchek explained an investigation is completed on a case-by-case basis. He noted the 19-member staff handles approximately 400 cases each, which consist of debt collection and additional cases of complaints for the State of Nevada, which include wage and prevailing wage laws. Mr. Tanchek also explained that the phone bank only tracks the number of open cases and averages 28,000 calls annually.

DISCUSSION OF THE IMPACT OF EMPLOYEE MISCLASSIFICATION ON EMPLOYERS AND EMPLOYEES WITHIN THE PRIVATE SECTOR

- Victoria King, Vice President of Public Affairs, United Parcel Service (UPS), discussed the law as it applies to UPS and the trucking industry. Ms. King reviewed the adverse effects of employee misclassification on the package delivery industry and the relationship between independent driver contractors and those drivers employed by UPS. She acknowledged the loss of tax revenue at the state and federal level as well as the cost to the taxpayer for uninsured workers. (Please see [Exhibit K](#))
- Ms. Dixon inquired if UPS has a legitimate independent contractor relationship within the business structure and asked Ms. King to demonstrate the differences between Federal Express and UPS.
- Ms. King stated the UPS business is one company and noted the business model that Federal Express has implemented creates a great expense to their workers. Ms. King said the Federal Express business section is employee operated; however, the ground business is operated by independent contractors. Ms. King noted that owner/operators are the backbone of the trucking industry and are legitimate independent contractors who can decide their own work schedule. She also explained the owners of UPS always wanted to ensure that all employees were properly represented.
- Bruce D. Mac Rae, Director of Public Affairs, Pacific Region, UPS, added that each management employee has worked his way up through the system. The goal of UPS is fairness and equal treatment for all employees. He noted that UPS is represented by the International Brotherhood of Teamsters for package delivery.
- Ms. Almaraz inquired about the significant competitive advantage of a company using independent contractors over a company that employs its workers.
- Ms. King explained a company that employs its workers must compete with a company that is not paying Social Security, healthcare, or disability insurance. Mr. Mac Rae further explained that payroll costs and benefits are the greatest fees an employer pays.
- Bruce King, Pete King Nevada Corporation, expressed his concern regarding misclassified employees as they relate to independent contractors in the construction and carpet industry. Mr. King gave an overview of the problems of the construction industry ([Exhibit L](#)). Continuing, he shared some of the damages incurred by the labor leasing services and offered the following solutions:

1. Defining laws at the State level regarding employee/independent contractor relationships; and
2. Greater use of the Nevada State Contractors Board to enforce current and new laws set forth by the Legislature. (Please see [Exhibit M.](#))

Responding to Assemblywoman Parnell's question about the ability to bid for jobs because of the disadvantage to bid against the labor leasing services, Mr. King explained that the ability to offer a lower bid because of the illegal use of misclassified employees creates a disadvantage for "legal" employers. He explained these actions are more prevalent in the private industry because public works jobs require that a mandatory payroll be submitted. Mr. King further explained the inability to report the illegal use of misclassified employees.

Discussion ensued between Committee members and Mr. King regarding the licensing process as it applies to employers versus independent contractors and the licensing barriers to the Nevada State Contractors Board. Mr. King explained by utilizing the IRS 20 Factor test, an independent contractor must meet all of the criteria to have a license to complete a job. In addition an employer must have a supervisor manage the project. Mr. King explained that a \$5,000 penalty is not a deterrent for illegal use of misclassified employees; however, losing a business license would be a greater penalty.

- Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, voiced support for employees in job-related disputes and for those in his labor union pursuing legislative reforms that strengthen state and federal laws which impact the employer-employee relationship. He discussed ways in which unscrupulous contractors avoid state and federal laws. He disagreed with Mr. King's previous testimony regarding the comparison of employee misclassification as it applies to public works. Mr. Mallory discussed the fairness of the statutory waiver received by temporary agencies and provided a copy of the IRS 20 Factor test. (Please see [Exhibit N](#) and [Exhibit O.](#))
- Jack Mallory, previously identified, provided a written statement from Andrew J. Kahn, Attorney, McCracken, Stemerma and Holsberry, Attorneys at Law. Mr. Mallory reviewed some of the issues that the legal system encounters regarding employee misclassification and the struggle to effectively represent clients with the current laws in place. (Please see [Exhibit P.](#))

COMMITTEE DISCUSSION OF FUTURE MEETINGS

- Chair Breeden announced that future meetings of the Subcommittee will continue with a discussion of the topic of employee misclassification. She noted the final meeting will focus on evaluating solutions and determining the appropriate recommendations to forward to the Legislature for consideration during the 2011 Legislative Session.

PUBLIC COMMENT

- Mr. Hardy offered a disclaimer statement regarding his title. He stated he is no longer President of the Associated Builders and Contractors in Las Vegas, and said he currently owns a consulting firm called The Hardy Consulting Group.
- Warren Stender, Business Agent, Operative Plasterers' and Cement Masons' International Association (OPCMIA), Local No. 797, explained the OPCMIA is available to union and nonunion workers to promote healthy work practices. He discussed the contractor's use of misclassification on prevailing wage work by using "laborers" as opposed to "cement mason" and the hiring of "nonexempt workers." He expressed his appreciation for the testimony of Mr. King and Mr. Mallory that supporting the efforts of the construction industry.

Discussion ensued concerning infraction remedies. Mr. Stender noted that with supporting evidence, such as dated photographs to present to the Labor Commissioner, there could be reasonable justification of a violation of prevailing wage law.

In response to Mr. Hardy's statement about employee misclassification not being intentional on most prevailing wage work as opposed to the private sector, Mr. Stender stated in his case the investigation process of the Nevada State Contractors Board was not efficient and a final determination was not based on good data.

There was discussion between Ms. Almaraz and Mr. Stender regarding the use of "nonexempt workers" and the process used to acquire the workers. Mr. Stender responded that many of the foremen will hire a "nonexempt worker"; if additional laborers are needed, the foremen will hire the family members of the "nonexempt worker."

- Randy Soltero, Sheetman Metal Workers International Association, explained the cost he and his office staff incur investigating misclassified workers on public works contracts. He further discussed the wages assigned to different crafts for prevailing wage projects and the lack of enforcement of the penalties assessed in the Office of the Labor Commissioner. He asked that the Subcommittee be expanded to investigate all levels of employee misclassification in both the private and public sector.

Responding to Ms. Dixon's question regarding statistics on the number of employees affected annually and the investigation process, Mr. Soltero stated his staff reviews approximately 200 cases each year focusing on the sheet metal worker classification. He stated he receives and examines certified payroll reports and talks to workers regarding the nature of their employment. Mr. Soltero noted many workers are fearful to say anything.

- George Logan, Organizer, Iron Workers Local 433, explained that employee misclassification is flagrant in the building industry and prevailing wage projects. He suggested that licensing is a good idea to track and document workers.

ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 1:38 p.m.

Respectfully submitted,

Tracey Wineglass
Senior Research Secretary

Linda J. Eissmann
Principal Research Analyst

APPROVED BY:

Senator Shirley A. Breeden, Chair

Date: _____

LIST OF EXHIBITS

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

[Exhibit B](#) is Senate Concurrent Resolution No. 26, which defines the membership, rules, and duties of the Legislative Commission’s Subcommittee to Study Employee Misclassification, provided by Linda J. Eissmann, Principal Research Analyst, Research Division, LCB.

[Exhibit C](#) is the written testimony of Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, dated January 22, 2010.

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

[Exhibit E](#) is a document dated January 22, 2010, titled “Recent Legislation of Other States to Address Employee Misclassification,” prepared by Linda J. Eissmann, Principal Research Analyst, Research Division, LCB.

[Exhibit F](#) is the written testimony of Heidi Chlarson, Principal Deputy Legislative Counsel, Legal Division, LCB.

[Exhibit G](#) is a Microsoft PowerPoint presentation titled “Misclassification of Workers for Unemployment Insurance,” presented by Donna Clark, Chief of Contribution, for the Unemployment Insurance Program, Department of Employment, Training and Rehabilitation, dated January 22, 2010.

[Exhibit H](#) is the written testimony of Christopher G. Nielson, Deputy Executive Director, Department of Taxation, dated January 22, 2010.

[Exhibit I](#) is the written testimony of Donald E. Jayne, CPCU, Administrator, Division of Industrial Relations, Department of Taxation, dated January 22, 2010.

[Exhibit J](#) is a document titled “Independent Contractor or Employee?” provided by Michael Tanchek, State Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry.

[Exhibit K](#) is the written testimony of Victoria King, Vice President, UPS Public Affairs, United Parcel Service, dated January 22, 2010.

[Exhibit L](#) is the written testimony of Bruce King, Pete King Nevada Corporation, Henderson, dated January 22, 2010.

[Exhibit M](#) is a document titled “BP Developers, Inc.,” provided by Bruce King, Pete King Nevada Corporation, Henderson.

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

[Exhibit O](#) is a document titled “IRS 20 Factor Test – Independent Contractor or Employee?” provided by Jack Mallory, Director of Government Affairs, IUPAT, District Council 15, Las Vegas.

[Exhibit P](#) is the written testimony of Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, Attorneys at Law, Las Vegas, on the misclassification of workers as independent contractors, submitted by Jack Mallory, Director of Government Affairs, IUPAT, District Council 15, Las Vegas, dated January 22, 2009.

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