

Indiana Department of Labor Report to Pension Management Oversight Commission on Employee Misclassification



September 29, 2010

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To: Members of the Pension Management Oversight Commission

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Indiana

Department of Labor

Advancing the safety, health and prosperity of Hoosiers in the workplace

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Employee Misclassification Report – What We Did

At the conclusion of the 2009 legislative session, the Indiana Department of Labor was tasked with the responsibility of recommending guidelines and procedures to address the problem of employee misclassification in the commercial construction industry. It was to be a comprehensive report within a set of parameters set by the legislature.

After nearly six months of information gathering, analysis and policy development, the Department of Labor is pleased to present the set of recommendations to the Pension Management Oversight Commission for review. After comments are provided, we will present a revised set of recommendations to the legislative council concerning any legislative changes needed to implement the proposal.

Many states have wrestled with this issue, and continue to struggle with a balanced solution. Our analysis was aided by many reports, review of statutes enacted elsewhere, and interviews with Department of Labor staff across the country. This report was prepared with the assistance of many individuals, but primarily by the undersigned, along with Rick Ruble, General Counsel for the IDOL, and Kathryn Wall, legislative liaison for the IDOL.

Respectfully submitted,

Lori A. Torres,
Commissioner
Indiana Department of Labor

CONTENTS

I. Executive Summary of Recommendations.....	5
II. Legislative Authority.....	6
III. Methodology of the IDOL.....	6
IV. Definition of the Issue.....	7
V. Survey of Other States.....	8
VI. Federal Initiatives.....	15
VII. Recommendations.....	17
VIII. Conclusion.....	25
Appendix.....	26

ABBREVIATIONS

AGI	Adjusted Gross Income
DOL	Department of Labor
DOR	Department of Revenue
DWD	Department of Workforce Development
GAO	General Accounting Office
IC	Independent Contractor
IDOA	Indiana Department of Administration
IDOL	Indiana Department of Labor
IRS	Internal Revenue Service
LLC	Limited Liability Company
MOU	Memorandum of Understanding
PMOC	Pension Management Oversight Commission
QETP	Questionable Employment Tax Practices
UI	Unemployment Insurance
WCB	Worker's Compensation Board
WHD	Wage & Hour Division of Department of Labor

I. Executive Summary of Recommendations

The IDOL has developed a set of recommendations to address the issue of employee misclassification. The agency has given due regard to the following factors:

- the charge of the general assembly
- the perceived size of the problem
- the potential return on investment
- the long common law history in Indiana between employers and employees
- the conservative nature of regulating the conduct of employers
- the state of Indiana's economy
- the relatively recent effective date of Ind. Code 22-1-1-22, 22-3-1-5, 6-8.1-3-21.2 and 22-4.1-4-4 (requiring confidential information sharing between the four primary agencies)
- the experience of other states in trying to administer large regulatory schemes
- the experience of other states utilizing a task force or interagency approach, and
- the response and potential preemption by the federal government

Accordingly, the recommendation of IDOL is that an interagency initiative be undertaken with representatives of DWD, DOR, the Indiana Attorney General's Office, WCB, the Indiana Secretary of State's Office and IDOL.

An interagency Memorandum of Understanding (MOU) would document the initiative and the commitment of the agencies. Each agency should designate a point of contact for the initiative. The efforts of the active participants would continue to be funded by each agency's traditional funding source, and the participants should jointly develop a strategy to investigate complaints and tips. Coordination and full cooperation need to be a hallmark of the investigative officers. Each agency needs to be prepared to allocate some human resource capital towards the goal of reducing misclassification. Each agency should keep accurate performance metrics individually and collectively they should be aggregated, in order to ascertain the success of the initiative.

Eliminating barriers to communication is critical to the success. With the recent passage of the information sharing statutes (effective January 1, 2010) and other initiatives listed herein, and with emphasis by the points of contact to all levels of the stakeholder agencies, it is believed that this can significantly impact the trend of misclassification.

Furthermore, it is clear that the penalties for failing to comply with the Worker's Compensation laws are insufficient. This report recommends that those penalties be substantially increased. No additional statutory penalties for failing to properly report or contribute to the Unemployment Insurance Trust Fund or to properly report or pay corporate, individual or withholding taxes were recommended.

Finally, a serious effort should be undertaken to educate employers about their respective obligations, and the serious consequences for failing to meet those obligations. While many employers consciously choose to avoid their obligations, a significant number of employers do not understand the complexities of misclassification. Many employers believe that they can choose at their discretion how to label their workers. Better communication tools and available information need to be developed for use by employers, particularly small businesses. Additionally, workers need to be empowered to understand their rights, and enabled to report suspected misclassification.

II. Legislative Authority

On March 13, 2010, a joint house and senate Conference Committee adopted Senate Bill 23. On March 25, 2010 Governor Daniels signed Senate Enrolled Act 23 which required the Indiana Department of Labor (“IDOL”) to develop guidelines and procedures for investigating questions and complaints concerning employee classification and a plan for implementation of those guidelines and procedures. SEA 23 required IDOL to make a presentation to the Pension Management Oversight Commission (“PMOC”) not later than October 1, 2010, and to make recommendations to the legislative council concerning any required legislative changes by November 1, 2010. IDOL was required to implement any adopted rule by August 1, 2011.

SEA 23 became effective July 1, 2010 and is codified at Ind. Code 22-2-15-1 to 6. The Act imposes strict parameters and required elements to which the IDOL must adhere in developing its guidelines and procedures, including the requirement to address who is eligible to file a complaint, appropriate penalties, a mechanism to share data among state agencies, recordkeeping requirements and investigative procedures. It also limits the application of guidelines and procedures to public and private construction and exempts residential construction and owner/operators that provide a motor vehicle and driver under certain conditions. The guidelines should address remedies for both employers and misclassified employees. The Act also specifies in some detail the precise elements of any test in determining who is an employee versus who qualifies as an independent contractor. The act also permits IDOL to include other elements in its recommendations.

III. Methodology of IDOL

As a result of the Act described above, in an effort to be responsive to all construction stakeholders, IDOL held two public sessions in Indianapolis on April 23 and April 28, 2010. All members of the public were invited with specific invitations sent to major stakeholders, including the Indiana State Building and Construction Trades Council, the Indiana Builders Association, Indiana Chamber of Commerce, Indiana Manufacturers Association, Indiana Construction Association, AFL-CIO, members of the General Assembly and other state agencies with a stake in this subject matter. In addition, written

comments and suggestions were invited for submission at any time prior to May 15, 2010 either electronically or by regular mail. Mass notices of the public sessions and the opportunity for public comments were sent electronically by the agency's departmental newsletter to more than 5000 subscribers, as well as placed on the home page of the agency's website.

Ten people appeared and provided public comments during the two sessions, and subsequent written comments were received on behalf of six entities. Additional stakeholders attended the public sessions but tendered no written or verbal comments.

After reviewing the input of the stakeholders affected by any legislative or administrative change, IDOL set out to understand how the issue had been addressed in other states. Following a comprehensive review of other states' proposed solutions, IDOL sought input from the DOR, WCB and the Unemployment Insurance Division of DWD.

Finally, this report was prepared for presentation to PMOC. Following this presentation, IDOL is required by statute to make recommendations in an electronic format to the legislative council concerning any legislative changes needed to implement the guidelines and procedures developed under Ind. Code 22-2-15, including a budgetary recommendation for the implementation of the guidelines and procedures and a funding mechanism.

IV. Definition of the Issue

States across the country have identified the misclassification of employees as independent contractors as a problem from multiple perspectives. Workers, businesses and government are all disadvantaged in varying degrees and ways by worker misclassification. Worker misclassification occurs when a worker who meets the statutory or common law definition of an employee is treated as a self employed worker or independent contractor. Whether by agreement, out of ignorance or misunderstanding, or intentionally, there are employers who fail to properly claim a worker as an employee. An employer does not avoid its obligation by failing to acknowledge a worker as an employee, but enforcing compliance with the law can be made more difficult.

Workers are disadvantaged when they are deprived of minimum wage or overtime pay and are forced to pay the employer's portion of withholding taxes. Furthermore, they are left with no recourse if they are injured on the job, as they have no worker's compensation coverage, and are not protected by occupational safety and health rules which also cover only employees. Those same workers have no access to the protection of the Americans with Disabilities Act, Age Discrimination in Employment Act and Family Medical Leave Act, among others. Some misclassification is discovered only when a worker is injured and seeks worker's compensation coverage, only to find that none exists. Other misclassification is an intentional act on behalf of both the employer

and the employee to avoid the reporting of wages and payment of tax obligations. Less sophisticated workers may not understand that despite an employer's attempt to characterize them as non-employees, if they meet the definition, the employer is required to meet its obligations for them.

Employers are disadvantaged when competitors misclassify employees and accordingly have lower labor costs. They lose work to these employers who are seemingly rewarded for their misclassification. These employers generally fail to keep records required of employers in Indiana. Additionally, those same employers avoid the need to document a worker's right to work legally in the U.S. and Indiana.

Governments are disadvantaged when employers fail to pay premiums to the Unemployment Insurance Trust Fund for individuals deemed employees by UI law. Governments also are harmed by the failure of an employer to withhold taxes on an employee, particularly due to the increased challenges of recovering taxes due directly from an individual. Furthermore, those individuals that are injured on the job without the workers compensation safety net to which they are entitled often becomes users of other social services as a result of those injuries and their inability to work.

Academic studies, surveys and other published reports vary on the extent of the problem, with some estimates varying from ten to thirty percent of all workers being misclassified.¹ In Indiana, with the statute only permitting this effort to include commercial construction, logically there will be a lower economic impact because only a segment of the business sector is subject to any additional regulation. The task of IDOL has been to balance the extent of the problem, the charge of the legislature and the additional regulation foisted upon construction businesses in the state of Indiana.

V. Survey of Other States

Information was gathered from across the country from states with both Republican and Democrat governors and legislatures. State responses have been varied. We reviewed state treatment of the issue from California, Colorado, Iowa, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Nevada, New Hampshire, New Jersey, New Mexico and Ohio. We reviewed countless studies, reports and summaries estimating the dollar amount of the problem, alternatives for addressing it and compiling state statistics.

Some states have yet to address the issue in any way, other than through existing enforcement measures. Others have signed interagency Memoranda of Understanding, or formed task forces and/or are operating under some type of executive order. Still other

¹ See Independent Contactors: Prevalence and Implications for Unemployment Insurance Program (Rockville, Md: U.S. Department of Labor, February 2000).

states have enacted legislative changes, including an independent obligation not to misclassify employees as independent contractors. Legislative solutions also include a presumption that a worker is an employee, reconciliation of differing definitions of “employee,” or providing for additional fines over and above the fines issued for non-reporting or non-payment to the DOR or unemployment insurance division. Some states direct complaints to the labor department, whereas others receive complaints in similar divisions or through a joint task force comprised of representatives from various departments. In most states, any new legislation has been passed only within the last year or two, making evaluation of effectiveness difficult.

Illinois is one example of a state that enacted a completely new, comprehensive regulatory structure specifically addressing worker misclassification. The Illinois Classification Act (Public Act 095-0026) took effect on January 1, 2008.² The Illinois Department of Labor adopted administrative rules authorized by the Act.³ However, the future of the Illinois Classification Act is uncertain as the constitutionality of the Act is currently being challenged in the Illinois state courts.

The Illinois Classification Act establishes a presumption that a worker is an employee unless the worker meets the criteria laid out in Act. The Act provides for civil penalties, criminal penalties and enhanced penalties for willful violation. The Act also creates a private right of action for any aggrieved person or interested party.

Contractors are required to maintain certain records for each individual that performs services for the contractor, including their names, addresses, phone numbers, Social Security numbers, Individual Tax Identification Numbers and Federal Employer Identification Numbers; all invoices, billing statements or other payment records, including the dates of payments, and any miscellaneous income paid or deductions made; copies of all contracts, agreements, applications and policy or employment manuals; and federal and State tax documents.

The Illinois Classification Act is currently being challenged by a contractor on constitutional grounds in the Illinois state courts. Rhonda and Jack Bartlow are spouses and general partners in a partnership that has been doing business as Jack’s Roofing since 1977. The Illinois Department of Labor initiated an investigation of Jack’s Roofing and in April 2009 notified the Bartlows that Jack’s Roofing had failed to properly classify ten subcontractors in violation of the Act. The Department of Labor proposed a fine of more than \$1.5 million dollars. Jack’s Roofing sued, seeking to enjoin the Department of Labor from enforcing the Act against Jack’s Roofing. The trial court denied Jack’s request for a Temporary Restraining Order (“TRO”) and Jack sought interlocutory appeal. The appellate court reversed the trial court order denying the TRO and remanded

² 820 ILCS 185/1-999

³ 56 ILL Adm. Code 240

the case back to the trial court, directing it to enter a TRO preventing the Department of Labor from enforcing the Act until the Court can conduct a hearing on Jack's motion for an injunction.⁴ The case is presently in the trial court awaiting further action. It appears that the future of the Illinois Classification Act may depend upon how this case progresses through the Illinois courts.

Like Illinois, state legislatures in **Delaware, Maryland, Colorado** and **Minnesota** also enacted bodies of law establishing new regulatory schemes specifically to address worker misclassification. Some of these new regulatory structures have had unanticipated or undesirable longer-term consequences.

In Illinois, passage of the Illinois Classification Act appears to have created a new market for consultants and advisors whose advertising offer seminars and advice to either help contractors understand the Illinois Act or restructure their business to avoid coverage of the Act. Utah is struggling with contractors forming LLCs to subvert the purposes of proper classification. Minnesota is also presently wrestling with trying to fix the Minnesota Legislature's apparently unsuccessful legislative attempt to address worker misclassification.

In **Minnesota**, in 2007, in response to a study commissioned by its Legislative Audit Commission, the legislature passed a law⁵ requiring all independent contractors working in the construction industry to secure an exemption certificate from the Department of Labor and Industry. This legislation created a presumption of employment, in which a worker was presumed to be an employee if no exemption certificate had been issued. A nine factor test determining IC status existed by law, but following the passage of the new legislation, the nine factors had to be proven before an Independent Contractor Exemption Certificate was issued by the DOL. Nine staff were hired in anticipation of 25,000 to 30,000 requests for independent contractor certificates, and funding was made available through a dedicated fund of application fees. Penalties were set at up to \$5,000 per violation, and the application fee was set at \$150. Additionally, the Minnesota Legislature, supported by the DOR, passed a law requiring that entities hiring independent contractors withhold 2% of each payment to cover some portion of the income tax owed.

Instead of working as anticipated, it was discovered that the application process was burdensome and intrusive, and few applications were received. Many contractors took the route of forming a Limited Liability Company (LLC) with fewer intrusive burdens of proof and even additional protections and favorable treatment (such as no proof of IC status and no 2% withholding on payments). All but two of the investigative staff were

⁴ Rhonda Bartlow and Jack Bartlow d/b/a Jack's Roofing v. Catherine M. Shannon as Director of Labor, 927 N.E. 2d 88, Ill App. (2010).

⁵ Minnesota Statutes 181.723

laid off, and the agency essentially now simply processes the applications, with few to no resources available for investigative efforts. In 2010, the state is now looking at trying to fix the unsuccessful enforcement attempt, and has set up a task force to try to address issues along the interagency model.

Several other states have taken both executive and legislative action within the past three years to address worker misclassification. **Iowa, Maine, Massachusetts** and **New Jersey** have all created task forces or study committees as well as enacting new legislation to address worker misclassification.

Among the states that took multiple approaches to addressing the issue is Maryland. The State of **Maryland** took both executive and legislative action to address worker misclassification in 2009. Governor O'Malley established the Joint Enforcement Task Force on Workplace Fraud by Executive Order on July 14, 2009 and the Maryland General Assembly passed the Workplace Fraud Act of 2009 which took effect October 1, 2009⁶.

The principal charge of the executive level task force is to coordinate agency efforts to address worker misclassification. At its first meeting, the task force created three workgroups of front-line staff dedicated to enforcement, education and outreach and information sharing. During its first few months of existence, the task force was able to break down or bridge many of the traditional barriers preventing agencies from sharing information. Maryland Deputy Commissioner of Labor Lowry described the information sharing as “essential” to the successful investigation of worker misclassification.

Maryland committed significant resources to investigating worker misclassification. The Maryland Department of Labor created ten (10) new staff positions devoted to worker misclassification, including three investigators, two auditors, one attorney, and four support staff, with an annual budget of approximately \$700,000. At present, nine of those ten positions are filled.

The Maryland Workplace Fraud Act created a separate new violation for worker misclassification in the construction and landscaping industries. The Act establishes a presumption that a worker is an employee, unless the employer proves otherwise. The Act requires employers to provide a “notice” to independent contractors explaining their classification and requires businesses to maintain records of all independent contractors with which they do business. The Act requires employers who are found to have “improperly misclassified” workers to pay restitution and come into compliance with all applicable laws within 45 days and provides for civil penalties of up to \$5,000 per worker

⁶ See Md. Code Ann., Lab. & Empl., § 3-901, et. seq.

for “knowing” misclassification. The Act also establishes a private right of action for workers and anti-retaliation provisions for workers who complain.

Some states have not passed new legislation, but have established task forces to study the issues, but other states have established task forces to undertake joint investigations and to coordinate state efforts. **California** has long had a task force that works joint investigations.

New York is one of the states that adopted the task force model. Colleen Gardner, New York Labor Commissioner, testified at a June 17, 2010 Senate committee hearing, and outlined the approach taken in New York. She provided a snapshot of the results of the New York State Joint Enforcement Task Force on Employee Misclassification. Her testimony highlighted the “unprecedented level of collaboration it has achieved among state agencies and local governments throughout New York. Beginning with its creation in September 2007 through the end of March 2010, the Task Force’s efforts have resulted in 67 enforcement sweeps in a dozen cities throughout the State, which identified nearly 35,000 instances of employee misclassification, discovered over \$457 million in unreported wages, identified more than \$13.2 million in unemployment insurance taxes due and discovered over \$14 million in unpaid wages.”

The New York Task Force consists of the state DOL, Workers’ Compensation, the Attorney General’s office, New York DOR and the New York City Comptroller’s Office. The Executive Order forming the Task Force charged the task force with:

- sharing information and referrals among agency partners about suspected employee misclassification violations, and pooling and targeting investigative and enforcement resources to address them;
- identifying significant cases of employee misclassification, which should be investigated jointly;
- developing strategies for systematically investigating employee misclassification in industries in which misclassification is most common;
- facilitating the filing of complaints;
- working cooperatively with business, labor and community groups to identify and prevent misclassification;
- soliciting the cooperation and participation of local District Attorneys and other law enforcement agencies and referring appropriate cases for criminal prosecution; and
- proposing appropriate administrative, legislative and regulatory changes to prevent employee misclassification from occurring

New York reports that some 5,600 tips or leads have been jointly investigated by task force agencies, and that the coordination has made a tremendous impact on its ability to track down, investigate and prosecute those employers who seek to avoid their legal responsibilities. A copy of the most recent task force report is included in the appendix.

Michigan is another example of a state that established an executive-level task force to study worker misclassification and make recommendations for legislative action. Michigan Governor Granholm established the Michigan Interagency Task Force on Employee Misclassification by executive order in February 2008. The executive order appointed representatives from the Michigan Department of Labor & Economic Growth, the Unemployment Insurance Agency, the Wage and Hour Division, the Workers Compensation Agency, the Business services Division within OMB, and the Discovery and Tax Enforcement Division within the Department of the Treasury.

The task force was directed to study worker misclassification, develop ways of improving communication and public awareness, coordinate enforcement mechanisms, and make recommendations for legislative action where needed. The major activity for the task force in 2008-2009 was a series of five public hearings held around the state.

The Michigan Task Force issued its second report to Governor Granholm in July 2009. The 2009 Task Force report concluded by recommending that the following steps be taken to address worker misclassification in Michigan:

- Legislation should be introduced along the lines of that proposed in Pennsylvania that clearly identifies misclassification of employees in the construction and commercial carriers industries as conduct subject to civil and criminal sanction. In the future, Michigan should consider expanding coverage beyond these two industries.
- Legislation should be introduced to protect individuals making complaints regarding employee misclassification.
- Legislation should be introduced requiring that all employment-oriented training programs at the high school and post-high school levels in Michigan require mandatory training on employee rights and responsibilities.
- Create training courses and related materials.
- Introduce legislation removing any statutory or regulatory barriers to cross agency communication on misclassification efforts.
- Create and implement Memoranda of Understanding between the involved agencies facilitating information exchange.
- Create a central clearing house to:
 - a. Receive complaints or inquiries regarding employee misclassification from all communication sources.
 - b. Direct complaints to various state agencies that have appropriate subject jurisdiction.
 - c. Co-ordinate efforts by various agencies to investigate and pursue violations of employee classification.
 - d. Monitor the progress of investigations and make information public where appropriate.

Not every state that has considered the issue has found that the most reasoned approach is a full court press consisting of new regulatory requirements. Several states have found that simple efforts can produce big returns in combating misclassification.

Iowa established a task force to study the issue, and in 2008, it tendered a report to its governor with many of the recommendations reflecting action taken here in Indiana. It recommended improved public education (describing it as “critical”), information sharing between state agencies, execution of the data sharing agreement with the IRS, retaining the common law definition of “employee” across all agencies, and increased funding for the UI audits in its workforce development agency. It should be noted that the increased budget request was at a time before the current recession put serious limitations on the ability for any state to increase executive agencies’ budgets.

Kansas is an example of a state where minor changes facilitated more efficient and effective identification and investigation of worker misclassification. A minor legislative change enabled the Kansas Department of Labor (where its UI and WCB is housed) and the Kansas Department of Revenue to share information and enforce existing employment security, revenue, and worker’s compensation laws to combat worker misclassification. The agencies also partnered in a program of public outreach and education and jointly maintain an internet website devoted to worker misclassification where viewers can find information about worker misclassification and submit “tips” on suspected misclassification.

Like many other states, Kansas has existing laws concerning revenue, unemployment insurance, and worker’s compensation insurance. However, statutory barriers preventing the agencies from sharing information impeded the identification and investigation of worker misclassification.

In 2006 the Kansas Legislature amended the Kansas Employment Security Law to prohibit any person from knowingly and intentionally misclassifying an employee as an independent contractor for purpose of avoiding either state income tax withholding and reporting requirements or state unemployment insurance contributions reporting requirements.⁷ More importantly, the Legislature also eliminated the statutory barrier preventing the Kansas Department of Labor and the Kansas Department of Revenue from sharing certain information.

The Kansas Department of Labor reports that the arrangement appears to be working, allowing the Department of Labor and the Department of Revenue to investigate, correct, and if necessary, punish employee misclassification with almost no new appropriations or funding and the addition of only 2 – 3 additional employees to investigate misclassification.

⁷ See K.S.A. 44-766

Ohio is a state that has undertaken a fair amount of research and study, and settled on using a Memorandum of Understanding to establish a task force like group in coordinating the efforts of various state agencies. Its efforts were led by the Ohio Attorney General, and the state hopes to recover more than \$20 million in UI payments, and \$36 million in forgone state income tax revenues.

Like Michigan, the states of **New Hampshire, Rhode Island, Washington** and **Nevada** all established some form of group to study the subject of worker misclassification. In Nevada, Senate Concurrent Resolution No. 26 established a subcommittee to study employee misclassification. The committee met three times during the 2009 – 2010 interim between legislative sessions and took anecdotal evidence on the subject of employee misclassification. The Nevada subcommittee plans to submit five (5) bill draft requests to the Nevada Legislature in 2011. In summary, those requests or recommendations are to: (1) create a task force on employee misclassification, (2) adopt a uniform definition or “test” to distinguish employees and contractors, (3) create civil penalties for anyone who advises an employer to misclassify, (4) create a private right of action for misclassified workers, and (5) implement specific fines for employers who misclassify employees.

VI. Federal Initiatives

The several states are not the only genesis of efforts on this front. Federal initiatives include both legislative and regulatory solutions, including simply providing more funding for certain investigatory and enforcement work. On the legislative front, a number of proposals have been advanced in the House and the Senate. Presently pending in Congress is the **Employee Misclassification Prevention Act** (S. 3254/H.R. 5107) sponsored by Sen. Sherrod Brown D-Ohio in the Senate and Rep. Lynn Woolsey D-California in the House. This bill would amend the Fair Labor Standards Act by tightening the reporting requirements for businesses that employ independent contractors, raising a presumption of a worker being an employee in the absence of such records and raising penalties for misclassification. It would require businesses to keep records on all independent contractors and provide written notification to them that includes the DOL web address for reporting misclassification, the phone number and address of the local DOL office, and a message encouraging employees to report misclassification to the DOL. Certain penalties for misclassification would be doubled, and civil penalties permitted up to \$1,100 per individual misclassified. Finally, the bill would require state UI audits to address misclassification, and require all DOL agencies to report misclassification to the WHD. The most recent hearing on the bill took place in the Senate on June 17, 2010 in the Health, Education, Labor and Pension Committee.

Federal DOL also developed a proposal sent over to Congress this past May entitled the **Unemployment Compensation Integrity Act**, which would enable states to retain a

percentage of delinquent employers' UI taxes to increase efforts to identify worker misclassification. It has not been introduced.

Finally, the **Taxpayer Responsibility Accountability Act of 2009** (S. 2882/H.R. 3408) would amend the IRS code by increasing misclassification penalties and requiring employers to presumptively classify a new hire as an employee, unless the company can demonstrate why the worker should be considered an independent contractor by referring to a written opinion or IRS finding about a similarly-situated employee. It also creates an appeals process for any independent contractor who would like to petition to be classified as an employee. Finally, the bill requires any payments of \$600 or more made to companies to be reported to the IRS. It is pending in the Ways and Means Committee.

Absent a congressional mandate, DOL has its own proposals to address employee misclassification. Deputy Secretary of Labor, Seth Harris, testifying in front of the Senate Committee on Health, Education, Labor and Pensions on June 17, 2010, outlined a number of agency wide initiatives and resources that would be dedicated to preventing employers from intentionally or inadvertently misclassifying employees as independent contractors. They included adoption by the WHD of new rules under the Fair Labor Standards Act, which would require each employer, before claiming to be using an independent contractor, to perform a written analysis and provide a copy of that written analysis to the affected independent contractor or employee. Similar rules are being developed for adoption by the Occupational Safety and Health Administration and the Office of Federal Contract Compliance Programs.

The President's Fiscal Year 2011 budget proposes \$25 million for a DOL initiative that will include close cooperation with the Treasury Department's Internal Revenue Service (IRS) to address worker misclassification.

Federal DOL is working with the Vice President's Middle Class Task Force and the Department of Treasury on a multi-agency initiative to develop strategies to address worker misclassification. The President's budget request for fiscal year 2011 included \$12 million for WHD's increased enforcement of wage and overtime laws in cases where employees have been misclassified, as well as for additional funding for the Office of the Solicitor and OSHA for their work in this area.

It also included \$10.95 million to provide grants to states to increase capacity to identify and address worker misclassification in Unemployment Insurance programs through targeted employer audits and enhanced information sharing to enable detection. States that are the most successful will receive high performance bonuses that can also be used to further reduce worker misclassification. WHD is currently considering how best to use its proposed funding for a targeted enforcement strategy, a decision primarily informed

by the agency's experience that misclassification is particularly prevalent in industries with large numbers of low-wage, vulnerable workers.

Deputy Secretary Harris' testimony also emphasized that more outreach and education would be undertaken to inform vulnerable employees of their rights regarding misclassification

The **“Questionable Employment Tax Practices” program (QETP)** of the IRS has enabled 39 states signing memorandums of understanding with the IRS to participate in a two-way exchange of information. Indiana has not yet signed such an agreement and is evaluating the steps necessary to enter into the agreement. Participating states are now able to receive tax information and audit leads from the IRS, which allows them to target their state UI employer audits via an alternative method.

While the success of federal legislative changes cannot be known, it shouldn't be underestimated the momentum the effort has, especially at federal DOL.

VII. Recommendations

Based upon the specific charge of Ind. Code 22-2-15 (see appendix), IDOL was required to develop guidelines and procedures for investigating questions and complaints concerning employee misclassification, and a plan for implementing such suggestions. This report has attempted to address each of the law's requirements to best addresses the issues in Indiana regarding commercial construction. As a result of some of the proscriptions in Ind. Code 22-2-15, no other industry is contemplated as being regulated under this report. Furthermore, the department is mindful of the specific requirements of Ind. Code 22-2-15-2 and 3, which require the department to address at least:

- a) allowing any aggrieved person to be able to file a complaint;
- b) appropriate penalties;
- c) collaborative information sharing and enforcement work among the various state agencies;
- d) recordkeeping by construction contractors;
- e) appropriate investigative procedures;
- f) providing a remedy for employers who are intentionally targeted for frivolous, harassing or retaliatory reasons;
- g) providing a remedy for employees against whom retaliatory, adverse action is taken as a result of a complaint or investigation;
- h) use of a certain 20 part IRS test (Section 3401(c)) for determinations of which workers are employees and which workers are independent contractors.

Several matters bear mentioning. First, the attempt to reconcile the differing definitions of “employee” is fraught with danger. The DWD, the agency which administers the Unemployment Insurance Trust Fund and makes unemployment insurance eligibility determinations, is closely regulated by the federal government, primarily DOL. Changes to definitions of who is an eligible employee, versus an independent contractor, should not be made casually, nor is it advisable to risk the millions of dollars by which the Indiana Unemployment Insurance Trust Fund is funded, simply to reconcile the various definitions of who is an “employee.” Narrowing the definition during this economic time to match the other agencies carries itself a burden on Indiana workers that no doubt wasn’t intended by the drafters of the legislation.

The DWD definitions are the most expansive, with Workers’ Compensation using common law definitions developed by the courts throughout Indiana’s long history. The IDOL and DOR have used the federal IRS definition listed in Ind. Code 22-2-15-3, as it is important for DOR to be aligned with the IRS in administering Indiana’s tax code. It should also be noted that the IRS also has to analyze the “safe harbor” provision of Section 530 of the Small Business Job Protection Act of 1996, further complicating a straight forward and identical test between these agencies. Any attempt to make these four agencies use a single, consistent definition will cause disruption in the other agencies, sufficient to alleviate the overall good that can come from enhanced enforcement and investigative efforts, despite differing technical definitions. Frankly, though expressed differently, only in a handful of cases will an employer be entitled to classify a worker as an independent contractor for one reason, but an employee for another reason. Despite slightly different definitions, the identification by one agency of a misclassification issue can still serve as a springboard for other agencies to review the submissions by a specific employer.

Second, as enumerated above, there are multiple efforts on the federal level, some of which may be binding on all Indiana employers and employees that would preempt expansive state legislation. Care should be taken not to duplicate the efforts and subsequently double the penalties upon employers against whom enforcement is envisioned.

Choices for how to best address the matters enumerated in the statute include a broad, independent set of statutes that make failing to appropriately treat workers as employees an independent offense, for which monetary and other penalties can be levied. These are in addition to penalties currently permitted under the UI, Revenue and WCB laws, all of which allow monetary penalties to be assessed. This avenue was not recommended by the department for the following reasons:

- monetary penalties already exist (and can be strengthened if need be) in these agencies’ statutory enabling laws

- Indiana has a long history of being an employment at will state, where autonomy is a hallmark of the employer/employee relationship
- the probability that congress or federal DOL will enact some type of legislation or regulatory scheme to address misclassification
- the interest in the relevant state agencies to work together to address these issues
- the carving out of only commercial construction companies subject to such burdensome regulatory language seems to suggest that the legislature intended for less draconian measures to be exhausted first
- the success demonstrated in other states by a coordinated approach
- the funding realities required of a new regulatory, enforcement and review scheme.

Found in the appendix is a compilation prepared by Matthew Capece of the United Brotherhood of Carpenters and Joiners. This was tendered at one of the public comment sessions, and has been found to be comprehensive in its approach at listing the various state solutions enacted. Additionally, links to a variety of executive orders have been attached in order for the reader to see a sampling of such orders.

The IDOL looked at many other states' actions in formulating its response. In reviewing the reports of task forces formed in other states in the last three years, it is clear that such interagency initiatives can be successful. The task force reports for New York and Iowa have been included in the appendix.

Who May File a Complaint

Under most interagency initiative models, any person can provide a tip or complaint. One need not be “aggrieved,” or have a private right of action. In fact, one of the issues with imposing a new, independent violation for employee misclassification as a DOL violation is the debate that ensues over who can trigger a full out investigation. Particularly where legislation requires an investigation of some type, no matter the interest or lack of credible evidence that may exist, there is rightfully a concern over what indicia of reliability must be presented. The interagency initiative model allows each agency to receive all types of tips, complaints and evidence, and sort through it based upon prioritizing and assessing the evidence submitted. Additionally, the cumulative effect of multiple agencies and their resources enable a more effective investigation, whereas IDOL would need to be significantly funded with scarce general fund dollars if it were responsible for all of the investigation and enforcement activities.

The amount, type and source of the evidence forming the complaint should remain fluid from agency to agency. Clearly, DOR may choose not to institute an income tax audit, even with overwhelming evidence of misclassification, where an alleged independent contractor has paid its share of income tax. Despite the fact that WCB may commence an

investigation if it becomes apparent that workers compensation coverage has not and continues not to be carried by an employer on that same misclassified independent contractor. Part of the irreconcilable rhetoric in this discussion is how we protect honest contractors from disreputable third parties with ulterior motives of harassment, as well as protecting concerned and disadvantaged workers from retaliation for reporting such concerns. Allowing each agency to gauge for itself the return on investment, given its unique set of targets, on whether and how to respond to a given complaint gives both sides some comfort in knowing that overreaching will be minimized. The key, however, is to open up the dialogue between the agencies, so that investigative work by one agency need not be repeated by another.

The single most effective state agency at identifying and then having sufficient power to actually assess and collect unpaid dollars is DWD through its UI audits. Additionally, these positions are funded 100% by the federal government. The Indiana experience in uncovering misclassification in UI reporting has Indiana ranked among the highest in the nation at identifying and rooting out misclassification. DWD has received national recognition for its successes in this area. DWD invested about 26,000 hours of audit time in 2009, and added nearly 9,000 workers to the employment rolls of contributory employers.⁸ This clearly evidences success on the part of DWD in identifying misclassified employees, representing information and a skill set that can be shared with the other state agencies.

Finally, the experience of Minnesota demonstrates that the return on investment does not allow IDOL or another single agency alone to bring in sufficient revenue to fund the activities needed. Rather, that simply dilutes the strength of the enforcement activities.

Data and Information Sharing

With the passage of Ind. Code 22-1-1-22 (DOL), 22-3-1-5 (WCB), 6-8.1-3-21.2 (DOR) and 22-4.1-4-4 (DWD) (effective only since January 1, 2010) and the establishment of an interagency core working group, there are new channels for information sharing and data collection. Due to the large number of audits conducted by DWD, it would be helpful if DOL, WCB and DOR had access to the results for future targeting, as well as to document compliance with other state labor and revenue laws.

In each state that has seen success in identifying worker misclassification, a critical component has been the elimination of barriers to information sharing between state agencies. Indiana proactively addressed this in the 2009 session, but the laws are in their infancy, and it is clear that the four affected agencies have not reached their potential in

⁸ This data is across all industries, not just construction, which represents about 19% of workers identified.

this regard. For example, WCB judges each hear several cases a year involving suspected employee misclassification (estimated by the individual board members to be between two to ten per year), but none of those cases were referred to DWD, DOR or DOL from the board member. The formation of the working group and regular updates between representatives and the sharing of that information with those charged with investigating, auditing or adjudicating cases will lead to better results in the future.

A federal GAO report dated August 2009 addressing employee misclassification notes the difficulty with IRS information sharing, but reports that joint interagency initiatives and the free flow of information from federal agencies and among state agencies are highly recommended as contributing to the identification and control of employee misclassification.

Record Keeping

IDOL is not recommending that employers be required to create or retain additional records than that which is already required by DOR, UI, WCB or DOL existing laws (see Ind. Code 22-1-1-15 as an example).

Investigative and Enforcement Powers

Another issue addressed by the legislation passed last year is the requirement that IDOL maintain the same inspection, investigative and enforcement powers under a misclassification enforcement effort as it has in enforcing other labor laws. The commissioner of labor has broad powers to enter workplaces and conduct the necessary investigation to ensure that the employer is in compliance with the various labor laws of the state. See Ind. Code 22-1-1-8, 11, 15, 16 and 17. Nothing herein should be construed to limit those powers.

Likewise, DOR and DWD have substantial power and authority to conduct both their fact finding missions, and penalize noncompliant employers and taxpayers. DOR can assess a ten percent penalty for underpayment of tax and a one hundred percent penalty for not filing or for fraud. Interest, collection fees, sheriff's fees and attorney fees can all be added. DOR has a right to levy bank accounts and place liens on real and personal property to collect unpaid tax and assessments. It has subpoena power and broad authority to complete investigations and audits. DOR also has the authority to issue jeopardy assessments for taxpayers that are deemed to be at risk.

DOR also annually receives a list of the AGI for all Indiana Taxpayers from the IRS. IRS also receives every Form 1099 which it compares to taxpayers' federal returns. DOR receives from the IRS a list of all identified discrepancies. DOR simply bills the taxpayer if the taxpayer fails to report the 1099 on their Indiana return.

DWD likewise can impose ten percent penalty of the tax due (fifty percent in the case of fraud), and assess interest, as well as increase the rate of the taxpayer up to the maximum of 5.6%.⁹ Collection fees, attorney fees and the like can also be assessed and collected against the employer. Furthermore, there is already a check of UI tax liability by IDOA and DWD before awarding any contracts or grants. No employer with UI liabilities is eligible for grants or state contracts. DWD has consistently met or exceeded audit targets set by federal DOL.

Accordingly, Indiana state agencies already possess tools to enable effective inquiry and reduction of misclassification.

Remedies for Employers and Employees

A particularly difficult part of the mandate of Ind. Code 22-2-15 is to provide a remedy for an employer and a misclassified employee in response to retaliation or frivolous and harassing complaints. Historically, Indiana has been very reluctant to extend protections to employees. In fact, there are few instances, legislatively or judicially approved, where such protections exist. Of course, Indiana has adopted civil rights protections at the state level, mostly generated initially by federal protections. Additionally, Indiana provides for protection for an employee who reports or participates in an inspection for occupational health and safety violations.

In the wage and hour arena, however, few legislative protections have been adopted. One of those is found in Ind. Code 22-2-2-11. It provides that no employer can discriminate against an employee who institutes an action or participates in an action to recover payments constituting minimum wage. Additionally, Ind. Code 22-5-3-3 protects whistleblowers who report violations of municipal, state or federal law, or the misuse of public resources against or regarding any employer under a public contract. Nevertheless, the penalty for both such violations by the employer is a civil infraction, an action brought by the local county prosecutor. And while a private right of action can be maintained by the employee against the employer, a civil infraction is not a serious threat to most employers.

Judicially, courts have likewise imposed few restrictions on employers. In *Frederick H. Groce v. Eli Lilly & Company*, 193 F.3d 496; 1999, the federal court stated:

The Supreme Court of Indiana has carved out only two public policy exceptions [*503] to the "venerable at will employment doctrine." See *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980). It has held that an employee-at-will could bring a claim for retaliatory discharge

⁹ SB 23 changed the penalty rate to a statutory +2% that will be effective in 2011 without further delay. The change allows for a consistent penalty for late payers. (Right now if an employer is already at the 5.6% rate there is effectively no penalty while if an employer at 1.1 is late their tax rate would increase by 500%).

against his employer when he was discharged for (1) filing a [**18] worker's compensation claim, see *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N. E.2d 425, 427-28 (Ind. 1973), or (2) refusing to commit an illegal act for which he would be personally liable, see *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 392-93 (Ind. 1988); see also *Walt's Drive-A-Way Serv., Inc. v. Powell*, 638 N.E.2d 857, 858 (Ind. App. 1994). The Supreme Court of Indiana has expressed its reluctance to broaden exceptions to the doctrine. See *Wior*, 669 N.E.2d at 177 n.5 ("Generally, we are disinclined to adopt generalized exceptions to the employment-at-will doctrine in the absence of clear statutory expression of a right or duty that is contravened."). In *Orr*, 689 N.E.2d at 717, the state supreme court emphasized that "the presumption of at-will employment is strong, and this Court is disinclined to adopt broad and ill-defined exceptions to [it]." Indiana appellate courts reiterate that the public policy exception continues to be narrowly construed. See, e.g., *Dale v. J.G. Bowers, Inc.*, 709 N.E.2d 366, 368 (Ind. Ct. App. 1999); *Campbell*, 413 N.E.2d at 1061. Therefore, [**19] the vast body of Indiana law consistently has upheld the vitality of the employment-at-will doctrine, the narrowness of any public policy exception, and the conviction that revision of the long-standing at-will doctrine is best left to the Indiana legislature. See *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 934 (Ind. 1986).

Like the federal court, IDOL is loathe to propose statutory remedies not already approved by the legislature eroding the employment at will doctrine. Any employee working on a public project is protected by Ind. Code 22-5-3-3. For those commercial construction employees, misclassified as independent contractors (a very small segment out of the nearly three million working Hoosiers), the legislature should consider carefully whether a legislative change to title 22 is merited.

As indicated in the earlier discussion about the nature and type of evidence necessary to invoke an investigation, given the interagency cooperative model proposed by IDOL, and the lack of an independent statutory violation for misclassification, it is respectfully suggested that no separate remedy is required for an aggrieved employer.

Education, Outreach and Compliance Assistance

Finally, it is clear that insufficient education, outreach and training have been conducted on the topic of employee misclassification. Many employers don't even know that the law dictates who is an employer according to various factors. More work on this front will also aid in resolving this issue. Many states have engaged in a cooperative effort to bring attention to this issue. Most states, particularly with a task force, have a website and/or a tip line or hotline, where complaints can be made. Those tipsters or

complainants can be anonymous or identified. There should be continuity in the information presented on the agencies' various websites. The assistance of the secretary of state with respect to education of small business owners would also be helpful. Indiana has reached out to small businesses in a number of ways, and this effort should be added to the information given to them. Such an information campaign can only help stem the problem. Copies of various styles of "intake forms" in various media are attached in the appendix. It is suggested that the working group come to some consensus as to a uniform method to accept complaints.

Legislative Changes

Because the WCB is proscribed by statute in assessing penalties, it is necessary for its statutory authority be increased to include imposition of more than just nominal civil infraction penalties. Legislative changes to allow the Board to impose monetary fines for failure to have coverage before a worker is injured should be adopted. This would allow the Board to proactively combat misclassification (among other issues) and enable it to use the tips and complaints received from other agencies. Without this change, the Board may only sanction an employer once an employee is injured. A second subsequent violation for failure to have coverage should subject the employer to an enhanced penalty.

Ind. Code 22-3-4-13(a) limits the fine that can be imposed by the Board to Fifty Dollars against an employer who fails to send a written record of all injuries resulting in a lost work day, or a fatality, to its insurance carrier (or to the Board directly in the event of self insurance) within seven days. It is suggested that the statute should permit the Board to impose a more substantial penalty for failure to timely send notice of an injury.

Memorandum of Understanding

The recommendation of IDOL is that, in order to enhance and continue the evolving working relationship and coordination between state agencies, that a formal MOU be executed between the stakeholder agencies identified herein. The MOU should address the parties, the mission, the expectations of each agency, the specific performance metrics to be tracked, the confidentiality requirements or barriers and provide for regular meetings and updates between the signatories.

Administrative Rule Changes

None are suggested or identified at this time.

Funding (or Budgetary Recommendations)

The recommendation is that each agency be responsible for providing investigators and administrative staff sufficient to participate in the overall enforcement activities. This recommendation does not contemplate additional general fund resources be allocated to this initiative. The experience in other states has not consistently shown that penalty revenue (or certificate/application revenue in Minnesota) can support the activities required for one agency to take on the significant burdens of all investigation, enforcement and post enforcement (appeal, review, and collection) activities. Given the competing interests for state revenue, including education funding, the recommendation is for each agency to continue to allocate a portion of its budget to take on misclassification specific investigative and enforcement duties.

Additionally, if successful, it is anticipated that general fund revenue will increase through the expanded base of wages, taxes and assessed penalties. UI recoveries would go to the UI trust fund, not the general fund. No data to date is available on which to estimate the amount of potential additions to the general fund or UI trust fund as a result of the implementation of this initiative.

VIII. Conclusion

IDOL has conducted a six month long research and analysis effort in its attempt to meet the requirements of SEA 23, the pertinent part of which is codified at Ind. Code 22-2-15 et seq. We have reviewed reports from advocacy groups, task forces and other government entities and heard from several legislators. IDOL staff, as well as the commissioner of labor, interviewed many individuals from across the country in identifying recommendations to present to PMOC. We have presented a balanced, thorough and realistic report within the parameters given by law. We engaged many private sector stakeholders, and have been open and transparent with our progress. No conclusion was reached until we completed all of our fact finding. We used information and facts provided to us by our sister state agencies, and this communication has been, and will continue to be helpful as we address this issue.

APPENDIX

TABLE OF CONTENTS

IDOL statutes:

Indiana Code 22-2-15-1 to 6 - <http://www.in.gov/legislative/ic/code/title22/ar2/ch15.html>

Indiana Code 22-1-1-22 - <http://www.in.gov/legislative/ic/code/title22/ar1/ch1.html>

Indiana Code 22-1-1-8 - <http://www.in.gov/legislative/ic/code/title22/ar1/ch1.html>

Indiana Code 22-1-1-11 - <http://www.in.gov/legislative/ic/code/title22/ar1/ch1.html>

Indiana Code 22-1-1-15 to 17 - <http://www.in.gov/legislative/ic/code/title22/ar1/ch1.html>

Indiana Code 22-2-2-11 - <http://www.in.gov/legislative/ic/code/title22/ar2/ch2.html>

Indiana Code 22-5-3-3 - <http://www.in.gov/legislative/ic/code/title22/ar5/ch3.html>

WCB statutes:

Indiana Code 22-3-1-5 - <http://www.in.gov/legislative/ic/code/title22/ar3/ch1.html>

Indiana Code 22-3-4-13 - <http://www.in.gov/legislative/ic/code/title22/ar3/ch4.html>

DWD statutes:

Indiana Code 22-4.1-4-4 - <http://www.in.gov/legislative/ic/code/title22/ar4.1/ch4.html>

DOR statutes:

Indiana Code 6-8.1-3-21.2 - <http://www.in.gov/legislative/ic/code/title6/ar8.1/ch3.html>

Compilation of state by state activities addressing Employee Misclassification by the Carpenters and Joiners Union

Intake Questionnaires

Task Force Reports

New York 2010

http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf

Iowa 2008

www.iowaworkforce.org/misclassificationfinal.pdf

IC 22-2-15

Chapter 15. Guidelines and Procedures for Investigating Questions and Complaints Concerning Employee Classification

IC 22-2-15-1

"Department"

Sec. 1. As used in this chapter, "department" refers to the department of labor created by IC 22-1-1-1.

As added by P.L.110-2010, SEC.22.

IC 22-2-15-2

Development of guidelines and procedures concerning employee classification; contents; exemptions; plan for implementation

Sec. 2. (a) The department shall develop guidelines and procedures for investigating questions and complaints concerning employee classification and a plan for implementation of those guidelines and procedures.

(b) The guidelines and procedures must do the following:

(1) Cover at least the following:

(A) Who is eligible to file a complaint. The guidelines and procedures must allow any aggrieved person to file a complaint and must indicate what evidence is needed to initiate an investigation.

(B) Applicable and appropriate penalties, taking into consideration:

- (i) the financial impact on both employers and misclassified employees; and
- (ii) whether the employer has previously misclassified employees.

(C) Mechanisms to share data with appropriate state agencies to assist those agencies in determining compliance with and enforcing state laws concerning misclassified employees and to recoup contributions owed, depending on the level of culpability.

(D) Record keeping requirements for contractors, including any records necessary for the department to investigate alleged violations concerning misclassification of employees.

(E) Investigative procedures.

(2) Apply to public works and private work projects for the construction industry (as described in IC 4-13.5-1-1(3)), including demolition.

(3) Apply to any contractor that engages in construction and is authorized to do business in Indiana.

(4) Provide a remedy for an employer or a misclassified employee in response to:

- (A) any retaliation that occurs as the result of an investigation or a complaint; and
- (B) any complaints that the department determines are frivolous or that are filed for the purpose of harassment.

(5) Provide that in carrying out this chapter the department has the same inspection, investigative, and enforcement powers that the department has in enforcing the labor laws of this state, including powers described in IC 22-1-1.

(c) The guidelines and procedures may include other elements as determined by the department.

(d) The department shall exempt the following from the guidelines and procedures developed under this chapter:

(1) Residential construction of a single family home or duplex if the builder builds less than twenty-five (25) units each year.

(2) An owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to IC 8-2.1-24-23, 45 IAC 16-1-13, or 49 CFR 376, to a motor carrier.

As added by P.L.110-2010, SEC.22.

IC 22-2-15-3

Use of Internal Revenue Code definitions; use of Internal Revenue Service factors

Sec. 3. In developing the guidelines and procedures under this chapter, the department shall use:

(1) the definition of "employee" used in Section 3401(c) of the Internal Revenue Code; and

(2) the following factors used by the Internal Revenue Service to determine whether a worker is an independent contractor:

(A) Instructions. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

(B) Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

(C) Integration. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See *United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

(D) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

(E) Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one (1) worker hires, supervises, and pays the other assistants under a contract under which the worker agrees to provide materials and labor and

under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593 1955-2 C.B. 610.

(F) Continuing relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See *United States v. Silk*.

(G) Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

(H) Full time required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

(I) Doing work on employer's premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.

(J) Order of sequence set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.

(K) Oral or written reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

(L) Payment by hour, week, month. Payment by the hour, week, or month generally points to an employer-employee relationship, if this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. See Rev.

Rul. 74-389, 1974-2 C.B. 330.

(M) Payment of business and traveling expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business or traveling expenses or business and traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

(N) Furnishing of tools and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

(O) Significant investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

(P) Realization of profit or loss. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

(Q) Working for more than one (1) firm at a time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one (1) person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

(R) Making service available to general public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

(S) Right to discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

(T) Right to terminate. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309.

(U) Any other guidelines under IC 22-3-6-1(b) and IC 22-3-7-9(b)(5).

As added by P.L.110-2010, SEC.22.

IC 22-2-15-4

Presentation to pension management oversight commission

Sec. 4. The department shall make a presentation to the pension management oversight commission not later than October 1, 2010, outlining the proposed guidelines and procedures.

As added by P.L.110-2010, SEC.22.

IC 22-2-15-5

Recommendations to legislative council

Sec. 5. The department shall before November 1, 2010, make recommendations in an electronic format under IC 5-14-6 to the legislative council concerning any legislative changes needed to implement the guidelines and procedures developed under this chapter, including a budgetary recommendation for the implementation of the guidelines and procedures and a funding mechanism, to the extent possible, which must include a fee.

As added by P.L.110-2010, SEC.22.

IC 22-2-15-6

Rule adoption and implementation

Sec. 6. After considering any recommendations by the pension management oversight commission, the department shall convert the guidelines and procedures to rules by adopting rules under IC 4-22-2 before August 1, 2011. The department shall implement the rules before August 1, 2011.

As added by P.L.110-2010, SEC.22.

IC 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.

IC 22-1-1-8

Commissioner of labor; general powers and duties

Sec. 8. The commissioner of labor may do the following:

(1) Make or cause to be made all necessary inspections to see that all of the laws and rules enacted or adopted for that purpose and that the department is required to enforce are promptly and effectively administered and executed.

(2) Collect, collate, and publish statistical and other information relating to working conditions in this state and to the enforcement of this chapter and such rules as may be necessary to the advancement of the purposes of this chapter, but no publicity of any information involving the name or identity of any employer, employee, or other person, firm, limited liability company, or corporation shall be given. It shall be unlawful for the commissioner or any person to divulge, or to make known in any way not provided by law, to any person the operation, style of work, or apparatus of any employer, or the amount or sources of income, profits, losses, expenditures, or any part thereof obtained by him in the discharge of his official duties.

(3) Except as otherwise provided by law, employ, promote, and remove clerks, inspectors, and other employees as needed or as the service of the department of labor may require, and with the approval of the governor, within the appropriation therefor, fix their compensation and to assign to them their duties. Employees of the department are covered by IC 4-15-2.

(4) Promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees, for the purpose of avoiding strikes, lockouts, boycotts, blacklists, discrimination, and legal proceedings in matters of employment. The commissioner may appoint temporary boards of arbitration, provide for the payment of the necessary expenses of the boards, order reasonable compensation paid to each member engaged in arbitration, prescribe and adopt rules of procedure for arbitration boards, conduct investigations and hearings, publish reports and advertisements, and do all other things convenient and necessary to accomplish the purpose of this chapter. The commissioner may designate an employee of the department to act as chief mediator and may detail other employees, from time to time, to act as his assistants for the purpose of executing this chapter. Any employee of the department who may act on a temporary board shall serve without extra compensation.

(Formerly: Acts 1945, c.334, s.8.) As amended by P.L.37-1985, SEC.22; P.L.8-1993, SEC.269.

IC 22-1-1-11

Commissioner of labor; powers and duties

Sec. 11. The commissioner of labor is authorized and directed to do the following:

(1) To investigate and adopt rules under IC 4-22-2 prescribing what safety devices, safeguards, or other means of protection shall be adopted for the prevention of accidents in every employment or place of employment, to determine what suitable devices, safeguards, or other means of protection for the prevention of industrial accidents or occupational diseases shall be adopted or followed in any or all employments or places of employment, and to adopt rules under IC 4-22-2 applicable to either employers or employees, or both for the prevention of accidents and the prevention of industrial or occupational diseases.

(2) Whenever, in the judgment of the commissioner of labor, any place of employment is not being maintained in a sanitary manner or is being maintained in a manner detrimental to the health of the employees therein, to obtain any necessary technical or expert advice and assistance from the state department of health. The state department of health, upon the request of the commissioner of labor, shall furnish technical or expert advice and assistance to the commissioner and take the steps authorized or required by the health laws of the state.

(3) Annually forward the report received from the mining board under IC 22-10-1.5-5(a)(5) to the legislative council in an electronic format under IC 5-14-6 and request from the general assembly funding for necessary additional mine inspectors.

(4) Administer the mine safety fund established under IC 22-10-12-16.

(Formerly: Acts 1945, c.334, s.11.) As amended by P.L.37-1985,

SEC.24; P.L.2-1992, SEC.738; P.L.187-2003, SEC.1; P.L.28-2004, SEC.158; P.L.35-2007, SEC.2.

IC 22-1-1-15

Labor information; wages and hours; records

Sec. 15. (a) Every employer, employee, owner or other person shall furnish to the commissioner of labor any information which the commissioner of labor is authorized to require, and shall make true and specific answers to all questions, whether submitted orally or in writing, which are authorized to be put to him.

(b) Every employer shall keep a true and accurate record of the name, address or occupation of each person employed by him, and of the daily and weekly hours worked by each such person and of the wages paid each pay period to each such person. Provided however, That the record of the daily and weekly hours worked or of the wages paid shall not be required for any person employed in a bona fide executive, agricultural, domestic, administrative or professional capacity or in the capacity of an outside salesman. No employer shall make or cause to be made any false entries in any such record.

(Formerly: Acts 1945, c.334, s.15.)

IC 22-1-1-16

Investigations; right of entry

Sec. 16. The commissioner of labor and his authorized representative shall have the power and the authority to enter any place of employment for the purpose of collecting facts and statistics relating to the employment of workers and of making inspections for the proper enforcement of all of the labor laws of this state, including IC 5-16-7. No employer or owner shall refuse to admit the commissioner of labor or his authorized representatives to his place of employment.

(Formerly: Acts 1945, c.334, s.16.) As amended by P.L.35-1990, SEC.41.

IC 22-1-1-17

Investigations; depositions; subpoenas; production of books and papers; contempt

Sec. 17. The commissioner of labor and any officer or employee of the department of labor designated by the commissioner, in the performance of any duty, or the execution of any power prescribed by law, may administer oaths, certify to official acts and records, and, where specifically ordered by the governor, take and cause to be taken depositions of witnesses, issue subpoenas, and compel the attendance of witnesses and the production of papers, books, accounts, payrolls relating to the employment of workers, documents, records, and testimony. In case of the failure of any person to comply with any subpoena lawfully issued, or on the refusal of any witness to produce evidence or to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of any circuit or superior court upon application of the commissioner or any officer or employee of the department of labor and a showing of the probable materiality of books, records, and papers, or, in the case of a witness, that he is believed to be possessed of information material to the examination, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements, of a subpoena issued from a court or a refusal to testify therein.

(Formerly: Acts 1945, c.334, s.17.) As amended by P.L.37-1985, SEC.26.

IC 22-2-2-11

Violations

Sec. 11. (a) An employer or his agent who:

(1) discharges or otherwise discriminates in regard to tenure or condition of employment against any employee because the employee has:

(A) instituted or participated in the institution of any action to recover wages under this chapter; or

(B) demanded the payment of wages under this chapter;

(2) pays or agrees to pay any employee less than the minimum wage prescribed by section 4 of this chapter; or

(3) fails to keep records required by section 8 of this chapter;

commits a Class C infraction.

(b) An employer or the employer's agent who knowingly or intentionally violates section 4 or 8 of this chapter commits a Class A infraction.

(c) An employer or the employer's agent who violates section 4 of this chapter, having a prior unrelated judgment for a violation of section 4 of this chapter, commits a Class B misdemeanor.

(d) An employer or the employer's agent who violates section 8 of this chapter, having a prior unrelated judgment for a violation of section 8 of this chapter, commits a Class B misdemeanor.

(Formerly: Acts 1965, c.134, s.11.) As amended by Acts 1978, P.L.2, SEC.2202; P.L.37-1985, SEC.28; P.L.133-1990, SEC.3.

IC 22-5-3-3

Protection of employees reporting violations of federal, state, or local laws; disciplinary actions; procedures

Sec. 3. (a) An employee of a private employer that is under public contract may report in writing the existence of:

- (1) a violation of a federal law or regulation;
- (2) a violation of a state law or rule;
- (3) a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13); or
- (4) the misuse of public resources;

concerning the execution of public contract first to the private employer, unless the private employer is the person whom the employee believes is committing the violation or misuse of public resources. In that case, the employee may report the violation or misuse of public resources in writing to either the private employer or to any official or agency entitled to receive a report from the state ethics commission under IC 4-2-6-4(b)(2)(G) or IC 4-2-6-4(b)(2)(H). If a good faith effort is not made to correct the problem within a reasonable time, the employee may submit a written report of the incident to any person, agency, or organization.

(b) For having made a report under subsection (a), an employee may not:

- (1) be dismissed from employment;
- (2) have salary increases or employment related benefits withheld;
- (3) be transferred or reassigned;
- (4) be denied a promotion that the employee otherwise would have received; or
- (5) be demoted.

(c) Notwithstanding subsections (a) through (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information, including suspension or dismissal, as determined by the employer. However, any employee disciplined under this subsection is entitled to process an appeal of the disciplinary action as a civil action in a court of general jurisdiction.

(d) An employer who violates this section commits a Class A infraction.

As added by P.L. 32-1987, SEC.3. Amended by P.L. 9-1990, SEC.14.

IC 22-3-1-5

Information sharing concerning construction workers misclassified as independent contractors

Sec. 5. (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 worker's compensation board of Indiana shall cooperate with the:

- (1) department of state revenue established by IC 6-8.1-2-1;
- (2) department of labor created by IC 22-1-1-1; and
- (3) department of workforce development established by IC 22-4.1-2-1;

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 worker's compensation board of Indiana 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.3.

IC 22-3-4-13

Reports of injuries and deaths; violations of article

Sec. 13. (a) Every employer shall keep a record of all injuries, fatal or otherwise, received by or claimed to have been received by the employer's employees in the course of their employment. Within seven (7) days after the occurrence and knowledge thereof, as provided in IC 22-3-3-1, of any injury to an employee causing death or absence from work for more than one (1) day, a report thereof shall be made in writing and mailed to the employer's insurance carrier or, if the employer is self insured, delivered to the worker's compensation board in the manner provided in subsections (b) and (c). The insurance carrier shall deliver the report to the worker's compensation board in the manner provided in subsections (b) and (c) not later than seven (7) days after receipt of the report or fourteen (14) days after the employer's knowledge of the injury, whichever is later. An employer or insurance carrier that fails to comply with this subsection is subject to a civil penalty of fifty dollars (\$50), to be assessed and collected by the board. Civil penalties collected under this section shall be deposited in the state general fund.

(b) All insurance carriers, companies who carry risk without insurance, and third party administrators reporting accident information to the board in compliance with subsection (a) shall:

(1) report the information using electronic data interchange standards prescribed by the board no later than June 30, 1999; or

(2) in the alternative, the reporting entity shall have an implementation plan approved by the board no later than June 30, 2000, that provides for the ability to report the information using electronic data interchange standards prescribed by the board no later than December 31, 2000. Prior to the June 30, 2000, and December 31, 2000, deadlines, the reporting entity may continue to report accidents to the board by mail in compliance with subsection (a).

(c) The report shall contain the name, nature, and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the accident causing the alleged injury, the nature and cause of the injury, and such other information as may be required by the board.

(d) A person who violates any provision of this article, except IC 22-3-5-1, IC 22-3-7-34(b), or IC 22-3-7-34(c), commits a Class C infraction. A person who violates IC 22-3-5-1, IC 22-3-7-34(b), or IC 22-3-7-34(c) commits a Class A infraction. The worker's compensation board in the name of the state may seek relief from any court of competent jurisdiction to enjoin any violation of this article.

(e) The venue of all actions under this section lies in the county in which the employee was injured. The prosecuting attorney of the county shall prosecute all such violations upon written request of the worker's compensation board. Such violations shall be prosecuted in the name of the state.

(f) In an action before the board against an employer who at the time of the injury to or occupational disease of an employee had failed to comply with IC 22-3-5-1, IC 22-3-7-34(b), or IC 22-3-7-34(c), the board may award to the employee or the dependents of a deceased employee:

- (1) compensation not to exceed double the compensation provided by this article;
- (2) medical expenses; and
- (3) reasonable attorney fees in addition to the compensation and medical expenses.

(g) In an action under subsection (d), the court may:

- (1) order the employer to cease doing business in Indiana until the employer furnishes proof

of insurance as required by IC 22-3-5-1 and IC 22-3-7-34(b) or IC 22-3-7-34(c);

(2) require satisfactory proof of the employer's financial ability to pay any compensation or medical expenses in the amount and manner and when due as provided for in IC 22-3, for any injuries which occurred during any period of noncompliance; and

(3) require the employer to deposit with the worker's compensation board an acceptable security, indemnity, or bond to secure the payment of such compensation and medical expense liabilities.

(h) The penalty provisions of subsection (d) shall apply only to the employer and shall not apply for a failure to exact a certificate of insurance under IC 22-3-2-14 or IC 22-3-7-34(i) or IC 22-3-7-34(j).

(Formerly: Acts 1929, c.172, s.66; Acts 1937, c.214, s.5; Acts 1943, c.136, s.6.) As amended by Acts 1978, P.L.2, SEC.2210; Acts 1982, P.L.135, SEC.1; P.L.145-1986, SEC.1; P.L.28-1988, SEC.40; P.L.170-1991, SEC.11; P.L.75-1993, SEC.3; P.L.1-1994, SEC.108; P.L.235-1999, SEC.4; P.L.1-2007, SEC.159; P.L.1-2010, SEC.85.

IC 22-4.1-4-4

Information sharing concerning construction workers misclassified as independent contractors

Sec. 4. (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 shall cooperate with the:

- (1) department of labor created by IC 22-1-1-1;
- (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 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.4.

IC 6-8.1-3-21.2

Information sharing concerning construction workers misclassified as independent contractors

Sec. 21.2. (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 shall cooperate with the:

- (1) department of labor created by IC 22-1-1-1;
- (2) worker's compensation board of Indiana created by IC 22-3-1-1(a); and
- (3) department of workforce development established by IC 22-4.1-2-1;

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 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.1.

State Legislation and Executive Orders Regarding Misclassification Fraud

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State Legislation or Executive Order	Year Became Law	Description
California <u>Unemp Ins. Code Sec. 329</u>	1995	Statute creates a joint enforcement task force on the underground economy composed of various state agencies .
<u>SB 869 An Act Relating to Enforcing the Requirement to Carry Workers' Compensation</u>	2007	Compares companies registered with unemployment and workers compensation records to identify employers without compensation coverage. Penalties from investigations reinvested in administration and enforcement
<u>SB 313 An act amending Labor Code Section 3722 increasing penalties for no workers compensation</u>	2009	This legislation applies to all industries. It increases the penalty for not having workers' compensation coverage from a minimum of \$1,000 per employee to \$1,500 per employee.
Colorado <u>HB 1366 An Act Concerning Workers' Compensation Coverage for Workers in the Construction Industry</u>	2007	Requires all construction workers, including independent contractors, to have compensation coverage, unless the independent contractor is incorporated or an LLC or the work is being done by an owner/occupant of a residence. Penalty revenues go to enforcement
<u>HB 1310 An act concerning the misclassification of employees as independent contractors for purposes of the Colorado Employment Security Act</u>	2009	Punishes misclassification of employees as independent contractors in all industries. Employment is presumed as in the state unemployment code. Non-willful violators must pay back taxes and interest. Willful violators face fines per employee that increase for a subsequent violation.
Connecticut <u>Sec. 52-57e Action for Damages From Violations of Workers Compensation or Unemployment Compensation Laws</u>	1990	The law provides a cause of action for companies that lose a bid due to their competitor violating knowingly workers compensation or unemployment compensation laws. Employment status is determined by the Internal Revenue Code.
<u>PA 7-89 An Act Concerning Penalties for Concealing Employment or Other Information Related to Workers' Compensation Premiums</u>	2007	Establishes stop work orders against employers for workers' compensation premium fraud due to misclassification or for not having compensation insurance. Makes not having compensation a felony. (Premium fraud had already been a felony.)

State Legislation or Executive Order	Year Became Law	Description
Connecticut cont. <u>PA 8-156 An Act Establishing a Joint Enforcement Commission on Employee Misclassification</u>	2008	An enforcement task force on misclassification for all industries is established that includes the labor commissioner, chair of the workers compensation commission, attorney general and the chief state's attorney. The law also creates an advisory board of employee and employer representatives.
Delaware <u>SS 1 for SB 68 An Act to Amend Workers' Compensation Code</u> <u>HB 230 Workplace Fraud Act</u>	2007 2009	<p>The law provides that independent contractors cannot be exempt from workers' compensation coverage.</p> <p>Prohibits the failure to properly classify an individual as an employee in the construction industry. The Act creates a presumption of employment. Punishment includes fines per employee which increase for willful and repeat violators, stop work orders, debarment and withholding of payments on public works projects. Co-conspirators are fined as well as the use of shell corporations. The Act allows private suits, and requires notice to workers classified as independent contractors in English and Spanish. Civil penalty money to be used for enforcing the Act.</p>
Florida <u>Sec. 440-140 Competitive Bidders Civil Actions</u> <u>S 50A Workers' Compensation Reform and Additional Penalties</u> <u>HB 561, Section 10 Forfeiture</u>	1993 2003 2006	<p>The statute allows a bidder on a construction project that loses a bid due to its competitor violating workers compensation laws to bring suit for liquidated damages and attorney fees.</p> <p>The law contains numerous revisions to workers compensation including: limiting exemptions to workers compensation coverage and extending coverage to independent contractors in the construction industry; increasing criminal penalties for employers committing premium fraud and who violate stop work orders. Civil penalties for violating stop work order are increased. An employer's second violation is a deemed a "knowing violation." Employers are fined \$5,000 for each employee misclassified as an independent contractor, and stop work orders are allowed for premium fraud as well as failure to secure coverage.</p> <p>Forfeiture assets to be deposited into a fund for the operations of the Insurance Fraud Division.</p>

State Legislation or Executive Order	Year Became Law	Description
Florida (cont.) <u>S 2158 An Act Tightening Regulation of Check Cashing Businesses</u>	2008	The law contains numerous provisions designed to crack down on use of check cashing stores in money laundering schemes. Check cashing stores have proven to play a central role in hiding unreported cash transactions to escape employment tax and workers compensation coverage laws.
Illinois <u>PA 95-0026 Employee Classification Act</u>	2007	The Act punishes the failure to properly classify a worker as an employee in the construction industry. A presumption of employment is created. It allows private suits. Provides for agency and private enforcement. Violations can result in restitution to the worker, criminal penalties, civil penalties per worker and debarment. Punishments increase for willful violations.
Indiana <u>SB 478 An act concerning cooperation among agencies on misclassification cases</u> <u>SB 23 An act concerning unemployment taxes and misclassification in the construction industry</u>	2009 2010	This act applies to the construction industry. It requires the departments of labor, workforce development, revenue and the workers' compensation board to on misclassification cases by sharing information. The bill creates guidelines for anti-misclassification regulations directed at the construction industry. The state labor department is directed to develop the regulations.
Iowa <u>Exec. Order 8 Independent Contractor Reform Task Force</u> <u>HA 1785 Budget funding of investigations</u>	2008 2009	The executive order creates a task force made of representatives from the governor's office, workforce development, revenue, economic development and the labor commissioner to study misclassification and make recommendations. The state budget provides up to \$750,000 for the fiscal year to "enhance efforts to investigate employers that misclassify workers.
Kansas <u>Sec. 44-766 Employer Misclassification of Employees</u>	2006	Prohibits employers from intentionally misclassifying employees as independent contractors in order to avoid requirements under state income tax and unemployment tax laws. The statute allows revenue to disclose tax-return information to the dept. of labor.

State Legislation or Executive Order	Year Became Law	Description
Louisiana <u>HB 554 An Act Relative to Discontinuance of Business Operations and Penalties for Failure to Carry Workers Compensation Insurance</u>	2008	Amends current law by requiring courts to order a non-compliant employer to secure workers compensation insurance and pay a fine up to \$10,000 within ninety days. If the employer fails to do either, the court will issue an order to the employer to cease business operations until the employer has insurance and has paid its fines in full.
Maine <u>EO 23 FY08/09 An order establishing the joint enforcement task force on employee misclassification</u> <u>LD 1456 An act to ensure construction workers are protected by workers' compensation insurance</u>	2009 2009	<p>The executive order creates an enforcement task force for misclassification cases in all industries. The task force includes: DOL agencies, workers comp. board, attorney general, administrative & financial services, revenue, professional & financial regulation and insurance.</p> <p>General contractors or construction managers on state college work must disclose to the contracting agency the names of all subcontractors and independent contractors. A construction worker is presumed to be an employee and must be covered by workers' compensation, unless the worker satisfies a definition of independent contractor or hauls materials in a vehicle weighing more than 7,000 pounds.</p>
Maryland <u>HB 819/SB 909 Workplace Fraud Act</u> <u>EO 01.01.2009.09 The Joint Enforcement Task Force on Workplace Fraud</u>	2009 2009	<p>Prohibits the failure to properly classify an individual as an employee in the construction and landscaping industries. The Act creates a presumption of employment. Punishment includes fines per employee which increase for willful and repeat violators. Co-conspirators are fined as well as the use of shell corporations. The Act allows private suits, and requires notice to workers classified as independent contractors in English and Spanish.</p> <p>The executive order creates an enforcement task force to investigate misclassification in all industries. The task force is comprised of the representatives of the following departments: labor, unemployment tax, workers compensation, the attorney general, comptroller, insurance and any other government agency that they want to add.</p>

State Legislation or Executive Order	Year Became Law	Description
<p>Massachusetts <u>GL 149 Sec. 148B Fair Competition for Bidders on Construction</u></p> <p><u>S 1059 An Act to Clarify the Law Protecting Employee Compensation</u></p> <p><u>Exec. Order 499 Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification</u></p>	<p>2004</p> <p>2008</p> <p>2008</p>	<p>The law prohibits the failure to properly classify an individual as an employee in the construction industry. It creates a presumption of employment and includes standards for independent contractor status. Violators face civil or criminal penalties and debarment.</p> <p>The law provides for private and class action suits regarding prevailing rate, overtime and minimum wage violations. Recovery includes treble damages, costs and attorney fees.</p> <p>The executive order creates an enforcement task force to investigate misclassification in all industries. It includes representatives from the labor department, revenue, industrial accidents, attorney general, occupational safety, public safety, licensing, apprenticeship and unemployment tax.</p>
<p>Michigan <u>Exec. Order 2008-1 Interagency Task Force on Employee Misclassification</u></p>	<p>2008</p>	<p>An executive order creating and enforcement task force to investigate misclassification in all industries. The task force is made of representative from the department of labor, workers compensation, unemployment, tax enforcement and business services.</p>
<p>Minnesota <u>Sec. 181.722 Misrepresentation of Employment Relationship Prohibited</u></p> <p><u>Chapt. 135, HF 122, Sec. 15 Defining Independent Contractor Status and Requiring Certification</u></p> <p><u>Chapter 154 HF 3201 Article 3 Income Taxes, Sec. 8 and 9</u></p>	<p>2005</p> <p>2007</p> <p>2008</p>	<p>This law prohibits employers from misrepresenting an employment relationship or from failing to report individuals as employees. Agreements to misclassify an employee as an independent contractor are prohibited. Employment is determined by unemployment and workers' compensation laws. A construction worker can bring a suit for damages against an employer who violates the law. A court finding a violation of the law must report it to the labor commissioner. The labor commissioner shall report to other state and federal agencies.</p> <p>This law creates a presumption of employment for workers compensation, unemployment and other labor laws in the construction industry. To be considered an independent contractor a worker must hold a certificate from the department of labor. Certificates can be cancelled by the individual or revoked by the state if the individual no longer meets the independent-contractor criteria. The depart. of revenue has to be notified of violations.</p> <p>The law requires a 2 percent withholding of state income taxes from compensation paid to unincorporated independent contractors in the construction industry.</p>

State Legislation or Executive Order	Year Became Law	Description
<p>Minnesota (cont.) <u>SF 1476 Sec. 11 Workers' compensation reform bill section regarding data sharing between agencies</u></p> <p><u>HF 2088 Provisions for funding of investigators and creation of a task force</u></p>	<p>2009</p> <p>2009</p>	<p>The section expands the information that can be shared between enforcement agencies and the workers compensation commissioner to determine employment status and compliance with workers' compensation laws. The law also allows the commissioner to request information pursuant to state agency agreements.</p> <p>The state budget provides for two years worth of funding for additional personnel to enforce the independent contractor certificate program. It also creates a misclassification advisory task force for the construction industry. The task force is composed of representatives of labor, employment and economic development, revenue, attorney general, county prosecuting attorneys, construction unions, construction employers, employees and independent contractors. A report is required to the legislation before its term expires.</p>
<p>Missouri <u>HB 1549T Addressing Immigration and Misclassification</u></p>	<p>2008</p>	<p>Misclassification provisions were added to this immigration bill. It requires every employer in the state with 5 or more employees to file 1099 forms with the state for its independent contractors. Failure to repeatedly and knowingly file the forms results in misdemeanor charges and fines. Employment is defined by the IRS twenty factor test. Violations can result in an injunction and fines per worker.</p>
<p>Montana <u>Secs. 39-71-415 to 419 Independent Contractor Certification for Workers Compensation</u></p> <p><u>HB 65 § 1 An Act Generally Revising Workers' Compensation Law</u></p>	<p>2005</p> <p>2007</p>	<p>To be free of the requirement to cover with workers compensation, a person must fall into an exempt category or be a certified independent contractor. Certifications can be revoked if the degree of direction and control creates employment status or if there was a misrepresentation in the application.</p> <p>Section 1 of the Act gives workers compensation investigators access to construction sites to investigate compliance with coverage requirements.</p>
<p>Nebraska <u>LB 208 An act relating to workers compensation premium fraud</u></p> <p><u>LB 563 Employee Classification Act</u></p>	<p>2009</p> <p>2010</p>	<p>This new law makes workers compensation premium fraud a fraudulent insurance act.</p> <p>Misclassification of employees is prohibited in the construction and delivery industries. It creates a presumption of employment. Violators face civil penalties per misclassified employee. Those penalties increase for subsequent offenses. Also, information on violations is shared with other departments, and violators must pay all state taxes owed. Posting of a notice about the Act is required.</p>

State Legislation or Executive Order	Year Became Law	Description
Nevada <u>SCR 26 Senate Concurrent Resolution providing for an interim study on employee misclassification</u>	2009	The resolution forms a legislative subcommittee that a member of the public, a non-union contractor and a union construction representative. They are charged with studying and reporting on the scope of misclassification, and finding a processes to identify misclassification and legal recourses for affected employees.
New Hampshire <u>SB 92 An Act Relative to the Definition of Employee and Clarifying the Criteria for Exempting Workers from Employee Status</u>	2007	The law creates a uniform definition of employment for workers compensation, workplace protections, whistleblower and minimum wage laws. Penalties are deposited into a dedicated enforcement fund.
<u>HB 336 An Act Requiring Notice of the Classification of Employee and Independent Contractor</u>	2007	Requires employers to post information about criteria for classifying workers as employees and independent contractors.
<u>HB 337 An Act Relative to Penalties for Failure to Have Workers' Compensation and Continually Appropriating a Special Fund</u>	2007	The Act increases civil penalties for failure to secure compensation coverage, and persons with responsibility to disburse funds or salaries are held personally liable. The penalties are deposited into a designated enforcement fund.
<u>HB 426 An Act relative to workers' compensation and resolution of disputes involving employment status</u>	2007	The insurance commissioner can investigate and hold hearings to resolve disputes between employers and their workers' compensation carriers about whether workers are employees or independent contractors.
<u>HB 471 An Act Relative to Workers' Compensation Compliance in the Construction Sector and Continually Appropriating a Special Fund</u>	2007	Officers, directors or LLC members of a construction company who do on-site construction work cannot be excluded from compensation coverage. Requires all contractors, sub-contractors and independent contractors on state projects to provide proof of workers' compensation coverage. The number of employees or independent contractors and their compensation classification codes on such projects also must be disclosed. Violations can result in civil penalties and debarment. Civil penalties go to a workers' compensation enforcement fund.
<u>HB 692 An Act Relative to Workers Compensation</u>	2008	The legislation amends HB 471 passed in 2007. HB 692 re-establishes exemptions from workers compensation coverage for up to three officers of a corporation or members of a limited liability company.
<u>SB 500 An Act Relative to Certain Insurance Fraud and Establishing a Task Force on Employee Misclassification</u>	2008	The Act increases the penalty for the failure to carry workers' compensation to a class B felony. It requires insurers to have written or electronic signatures on insurance, including workers' compensation, applications. A person convicted of insurance fraud will be debarred from public works projects ordered to pay restitution to the insurance carrier. A

State Legislation or Executive Order	Year Became Law	Description
New Hampshire (cont.) <u>SB 78 An act regarding contractor accountability and disclosure in public works construction procurement</u>	2009	<p>misclassification study task force is established that includes the labor commissioner, unemployment, insurance, revenue, attorney general, labor unions, construction contractors, other business owners and insurance carriers.</p> <p>General contractors on state college work must disclose to the contracting agency the names of all subcontractors and independent contractors. The disclosure must include workers compensation carriers, be posted on the project and must be updated.</p>
New Jersey <u>S 468 Withholding Taxes From Payments to Unincorporated Contractors</u> <u>C:34:20-1 et. seq. An Act Concerning the Classification of Construction Employees for Certain Purposes and Supplementing Title 34 of the Revised Statutes</u> <u>Exec. Order No 96 Governors Advisory Commission on Construction Industry Independent Contractor Reform</u> <u>A 3569, S 2498 An act concerning certain violations of workers' compensation requirements</u>	2006 2007 2008 2009	<p>Payments made to unincorporated contractor for improvements made to real property are subject to a 7 percent withholding. The requirement does not apply to a governmental entity, homeowner, tenant, or if a person receives from its unincorporated contractor proof of its registration with the division of revenue.</p> <p>The Act makes unlawful the failure to properly classify a worker as an employee in the construction industry. For construction work it creates a universal presumption of employment and a uniform definition under state law—with the exception of the workers compensation. Knowing violations result in criminal penalties. Other penalties include debarment, restitution, suspension of contractor registration, stop-work orders and fines. Fines go to an enforcement and administrative fund. The Act allows private-causes of action for workers.</p> <p>The order establishes an advisory commission of representatives from labor & workforce development, the attorney general, treasurer and eight public representatives from labor unions, developers and contractors. The purpose is to create make recommendations to enhance law enforcement and cooperation between state and federal agencies.</p> <p>An employer that fails to provide workers' compensation coverage, misrepresents workers as independent contractors otherwise commits premium fraud face stop work orders and criminal penalties that increase if the violation is willful.</p>
New Mexico <u>SB 657 Employer, Employee Relationship in the Construction Industry and Independent Contractors</u>	2005	<p>The law creates a presumption of employment in the construction industry and standards for independent contractor status. An employer violates the law if it intentionally treats or lists an employee as an independent contractor. Employers who violate the law face criminal penalties, suspension or revocation of licenses.</p>

State Legislation or Executive Order	Year Became Law	Description
New York <u>Exec. Order 17 Misclassification Task Force</u>	2007	The order forms an enforcement task force of all industries made of representatives from the labor department, attorney general, taxation and finance, workers compensation board, workers compensation fraud and New York City comptroller.
<u>A 6163 An Act to Amend the Workers' Compensation Law, §§52D, 141A</u>	2007	Establishes stop work orders, debarment and criminal penalties for employers who don't have workers' compensation or who commit premium fraud.
Oregon <u>HB 2815 A bill for an act relating to compliance with laws-creating an enforcement task force</u>	2009	The bill establishes and enforcement task force of all industries composed of: the departments of justice, revenue, employment, consumer and business services, labor and industries, the governor, the construction contractor board, and other agencies the governor designates.
Rhode Island <u>S 3099/H 7907B Creating a special joint commission to study the underground economy and employee misclassification</u>	2008	The Act creates a study commission composed of legislators, industry representatives and the department of labor, workers' compensation, workers' compensation advisory board, business regulation and taxation. The purpose is to study the underground economy issue findings and recommendations to the General Assembly.
South Carolina <u>SB 332 An Act Reforming Workers Compensation, Sections 3, 4, 5</u>	2007	The law clarifies that a false statement or misrepresentation to gain a lower insurance premiums includes misclassification of employees. Penalties for workers compensation fraud increase with amount of money involved. The Attorney General can hire a forensic accountant.
Tennessee <u>SB 1784 An Act Regarding Contractor Licensing</u>	2007	Any applicant for a license or renewal of a license must supply an affidavit that the applicant maintains general liability and workers' compensation insurance coverage.
<u>HB 1645 An Act Relative to Requiring Workers Compensation Coverage for Sole Proprietors</u>	2008	The law requires workers' compensation coverage in the construction industry for sole proprietors and independent contractors. Contractors using independent subcontractors would have to cover them with workers compensation insurance. Some exemptions exist for work done for home owners.
Utah <u>SB 189 Independent Contractor Database Act</u>	2008	The law creates an independent contractor enforcement council. The council is made of representatives from departments of commerce, labor, workforce services and technology

State Legislation or Executive Order	Year Became Law	Description
Utah (cont.)		services. The purpose is to create a database that will track independent contractors and compare information between agencies. Also, to study cost of misclassification, and to coordinate enforcement efforts.
Vermont <u>S 196 An Act Relating to Failure to Insure for Workers' Compensation Coverage by Employers and Contractors</u>	2007	The Act gives the state the authority to require a contractor (other than residential), to submit a "compliance statement" with the number of employees, hours, classification codes and the name of the insurance carrier and agent. Failure to comply or filing false information results in fines and other penalties. Also the state will study establishing a proof-of-coverage website, the extent of misclassification and its cost and the effectiveness of state laws to counter misclassification.
<u>S 345 An Act Related to Lowering the Cost of Workers' Compensation Insurance</u>	2008	The law adds workers compensation fraud into the insurance fraud chapter and creates a joint enforcement task force that expires in 2010.
<u>H 313 Vermont Recovery and Reinvestment Act of 2009</u>	2009	In addition to many other things, this act addresses employment law enforcement. State transportation agencies are required to establish contract procedures to minimize misclassification of employment codes and employees as independent contractors by requiring contractors disclose information, such as, past compliance issues and lists subcontractors and workers. This information can be shared with other state agencies. Agencies are required to debar contractors that violate classification requirements. Employers committing premium fraud face fines up to \$20,000. The department of labor is required to refer violations to banking, insurance, securities and health care for enforcement. An employer, subcontractor or independent contractor can be required to provide a compliance statement, that includes such information as the number of employees, dates of workers compensation policies, hours worked and lists of independent contractors. Also, as an attachment, the insurance policy declaration pages are required. Failing to provide accurate information results in fines up to \$5,000 per week.
Washington <u>HB 2010 An Act Relating to Bidder Responsibility</u>	2007	The Act states that bidders and bidders' subcontractors on public works contracts must comply with registration, tax and workers compensation laws. It also gives municipalities the power to adopt criteria to judge bidder responsibility.
<u>SB 5373 An Act relating to unemployment coverage and obligations</u>	2007	Sec. 4 defines who a bona fide officer is for exemption from unemployment. Sec. 8, et. seq. settles co-employment coverage for professional employer organizations and client employers and establishes reporting and registration requirements.

State Legislation or Executive Order	Year Became Law	Description
<p>Washington (cont.) <u>SB 5926 An Act Relating to Creating a Joint Legislative Task Force to Review the Underground Economy in the Construction Industry</u></p> <p><u>HB 3122 An Act Relating to Consolidating, Aligning, and Clarifying Exception Tests for Determination of Independent Contractor Status</u></p> <p><u>HB 1555/ SB 5614 Addressing the recommendations of the joint legislative task force on the underground economy in the construction industry</u></p> <p><u>HB 1554/ SB 5613 An act authorizing the department of labor and industries to issue stop work orders</u></p> <p><u>Sub SB 5904/HB 1786 An act defining independent contractor for purposes of prevailing wage</u></p>	<p>2007</p> <p>2008</p> <p>2009</p> <p>2009</p> <p>2009</p>	<p>A study task force of the underground economy in construction is created to formulate a state policy to address it. Members include legislators, contractor and employee representatives and representatives from the department of labor and industries.</p> <p>This law applies a uniform definition of independent contractor in the unemployment and workers compensation codes. It also applies other recommendations of the underground economy task force.</p> <p>This bill addresses recommendations made by the underground economy task force. Among other items it requires contractors to have a list of subcontractors and their registrations available for the department of labor and industries (L&I). Towns and county may verify registration by a contractor seeking a business license. Retainage can be kept by a public body to pay unemployment taxes and workers' compensation premiums. The law also creates a task force to conduct a continuing study of the underground economy in all industries. L&I and employment security are required to report each year to the legislature on the effectiveness of laws passed to address the underground economy.</p> <p>The department of labor and industries is given the power to issue stop work orders against construction contractors for failing to carry workers' compensation.</p> <p>The bill creates a presumption that an individual is a laborer, worker or mechanic under the state's prevailing rate law with a modified/extended version of the ABC test.</p>
<p>Wisconsin <u>Act 28, Secs. 1778q and 2155m Budget act regarding misclassification and contractor registration</u></p>	<p>2009</p>	<p>In Sec. 1778q, the state's withholding tax law is amended to provide that a construction employer that willfully provides false information to the department of revenue or misclassifies or tries to misclassify a worker as a non-employee is fined \$25,000 for each violation. Section 2155m states that a person, with some exceptions, can't hold himself out as a contractor without being registered with the department of commerce. Violators face forfeiture.</p>

Index

Budget items for enforcement

Iowa HA 1785 (2009), HF 2088 (2009)

Certification required to be an independent contractor

Minnesota Chapt.135 § 15 (2007), Montana for workers compensation §39-71-419.

Conspirators, other than direct employer, specifically punished:

Florida §440.105, Delaware HB 230 (2009), Maryland SB 909 (2009)
A flaw of the Illinois bill is that it specifically says that contractors will not be liable for the actions of their subcontractors. PA95-0026 §10(f) (Ill. 2007) It may only mean that there isn't strict liability, so existing conspiracy laws will apply. It will take a judge to figure that one out.

Databases to be used to identify violators

All of the task forces are studying or requiring information sharing by agencies. Some, though, get technical and specifically require use or creation of databases. See Utah SB 189 (2008). Also, see California SB 869 (2007) which requires comparing companies registered with unemployment tax to those with workers' compensation coverage.

Disclosure of workers' compensation coverage

Maine LD 1456 (2009), New Hampshire HB 471 (2007) SB 78 (2009), Oklahoma SB 306 (2009), Vermont H 313 (2009), Washington HB 1555/SB 5614 (2009).

Failure to classify as an employee punished

Delaware HB 230(2009), Illinois PA95-0026 (2007), Maryland SB 909 (2009), Massachusetts GL 149-§148B, New Jersey C:34:20-1 et.seq. (2007).

Information on violations of the law must be shared by state agencies

See, task forces, and misclassification and failure to properly classify, also, Indiana SB 478 (2009), Minnesota SF 1476 (2009), Vermont H

313 (2009).

Misclassification as an independent contractor punished

Colorado HB1310(2009), Connecticut PA 7-89 (2007), Florida §440.107(7)(f) , Indiana SB23 (2010), Kansas §44-766 (2006), Minnesota Sec. 181.722 (2005), Missouri HB1549T (2008), Nebraska LB563 (2010), New Mexico SB657 (2005), Wisconsin Act 28 (2009).

Penalty revenue to enforcement

Again, there are many states that allow for penalty money to fund enforcement. This is a list of newer actions: Colorado HB 1366 (2007), Connecticut §31-69a (1994) also in PA 7-89 (2007), Delaware HB 230 (2009), Florida HB 561 §10 (2006), Illinois PA95-0026 (2007), New Hampshire SB 92 (2007), New Jersey A4009 (2007).

Penalties, in general

There are a variety of penalties, including criminal, civil, administrative, debarment, loss of licenses and stop work orders.

Presumptions of employment

Many states have presumptions of employment, especially in their unemployment codes, like Louisiana, Tennessee, Maryland and others. This is a list where the presumptions were either established or re-affirmed: Colorado HB 1310 (2009), Delaware HB 230 (2009), Illinois PA95-0026 (2007), Maine LD 1456 (2009), Maryland SB 909 (2009), Minnesota Chapt. 135 §15 (2007), Montana for workers compensation if no independent contractor certification §39-71-419 (2005), New Jersey A4009 (2007), Massachusetts §149-148B.

Private cause of action allowed for effects of misclassification or non-reporting

There are many states that, for instance, allow employees to bring private suits to collect unpaid wages. Below are statutes that apply more directly to the effects of misclassification fraud. Here are samples of laws that allow employers to bring suit for unfair competition: Connecticut §52-570e (1990), Delaware HB 230 (2009), Florida §440-140

(1993). Here are statutes that allow employees to bring suit: Illinois PA95-0026 (2007), Maryland SB 909 (2009), Minnesota §181.722 (2005), New Jersey A4009 (2007).

“Shell” company use to violate the law is prohibited

Delaware HB 230 (2009), Maryland SB 909 (2009).

Stop work orders

California Labor Code §3710.1, Connecticut PA 7-89 (2007), Delaware 230 (2009), Florida §440-107, Massachusetts GL 152§25C, New Jersey A4009 (2007) A 3569.S 2498 (2009), New York A 6163 (2007), Washington HB 1554/SB 5613.

Task Forces

California Unemp Ins Code §329 (1995), Connecticut PA 8-156 (2008), Iowa (study) EO 8 (2008), Maine EO 23FY08/09, Maryland SB 909 (2009), Massachusetts EO 499 (2008), Michigan EO 2008-1 (2008), Minnesota SF 1476 (2009), Nevada (study) SCR 26 (2009), New Hampshire (study) SB 500, New Jersey EO 96 (2008), New York EO 17 (2007), Oregon HB 2815 (2009), Rhode Island (study) S 3099/H 7907B (2008), Utah SB 189 (2008), Vermont S 345 (2008), Washington (study) SB 5926 (2007) (study) HB 1555/SB 5614 (2009) and Wisconsin (study, done by internal collaboration). There are other states, like Louisiana, West Virginia and Wisconsin that have assembled task forces without legislation or executive orders

Tax withholding from independent contractors in the construction industry

Minnesota Chapt. 154 HF 3201 (2008), New Jersey S 468 (2006).

“Universal” definitions of employment

New Hampshire SB 92 (2007), New Jersey A4009 (2007), Minnesota Chapt.135 § 15 (2007), Washington HB 3122 (2008).

Workers compensation coverage required, with some exceptions, for independent contractors

There are numerous states that require employers to have workers compensation insurance for independent contractors/sole proprietors, but then apply exemptions. Listed here are more recently created laws: Colorado HB 1366 (2007), Delaware SS1 (2007), Florida §440-02(15) (c)(3) or S 50A (2003), Montana (if not a certified independent contractor) §39-71-419, New Hampshire (on public construction work) HB 471 (2007), Tennessee HB 1645 (2008).

Workers’ compensation premium fraud

Many states punish workers-compensation premium fraud specifically or as an insurance fraud. These are newer state laws addressing the problem: Louisiana HB 554 (2008), Nebraska LB 208 (2009), New Hampshire SB 500 (2008), New Jersey A 3569/S 2498 (2009), South Carolina SB 332 (2007), Vermont S 345 (2008) H 313 (2009).

Workers’ compensation, no coverage penalties

All states have laws that punish employers with civil or criminal penalties for not having coverage. Other than through stop work orders, here are states that have increased penalties: California SB 313 (2009).

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND INDUSTRIAL DEVELOPMENT
JOINT ENFORCEMENT TASK FORCE ON THE UNDERGROUND ECONOMY
AND EMPLOYER MISCLASSIFICATION

Task Force Referral Form

Thank you for contacting the Underground Economy Task Force. We take your allegation(s) of employer misclassification and other workplace fraud seriously. Take Force investigators will review the information provided to determine whether an investigation is warranted. You may be contacted if further information is needed.

Please help us by providing all known information about the company or entity you suspect of committing fraud or another violation.

* 1a. Company Name (Doing Business As Name if known)

* 1b. Type of Business
Areas (please select one):

2. Employer Name _____	3. Soc. Security/Fed ID# _____
4. Business Address/PO Box _____	* 5. City/State/Zip Code _____
6. Telephone Number _____	7. E-Mail Address or Company Website _____
8. Provide the location if known where this business may be conducting operations. _____	
* 9. What are the conditions/factors you believe to be fraudulent or in violation of the law, including work hours, wage violations, cash payments, etc. _____	

Confidential Information

The Task Force will make every effort to protect your identity and will not reveal the source of these allegations to the employer in the course of any investigation. If you would like an investigator to contact you for additional information, please provide us with your contact information. **(This information will remain confidential).**

10. Name _____	11. Address _____
12. Telephone Number _____	13. E-Mail _____

14. Are you aware of others who may wish to speak to the Task Force regarding violations, fraud and abuse?

Yes No

15. If yes, please provide their contact information

mandatory fields

NOTE: Should you become aware of any information relating to this allegation that you believe provides further evidence of fraud and/or misclassification, please notify the Task Force either by e-mail at underground@dia.state.ma.us or send to: Underground Economy Task Force, Department of Industrial Accidents, 600 Washington St., Boston, MA 02111.

**Tel. # 877-96-LABOR
(877-965-2267)**

Misclassification means treating workers as *independent contractors* when legally they should be employees. If you think an employer is violating the law by misclassifying workers we want to know about it. All allegations, including those filed anonymously, are taken seriously. This information will be shared with Task Force partner agencies for further action. Be as specific as possible.



Why do you suspect misclassification? Please be specific.

[Empty text box for describing suspected misclassification]

Report Misclassification Form

Misclassifying company's name: [Text box]

Doing business as (DBA): [Text box]

Name(s) of business owner(s): [Text box]

Company's business address or PO Box: [Text box]

Company's other locations or worksites: [Text box]

Company's telephone (if known): [Text box]

How did this come to your attention? Please be specific.

[Empty text box for describing how the issue was discovered]

When are the worker(s) in question typically on the worksite?

[Empty text box for describing worker presence on site]

How are the workers paid?
[Dropdown menu]

Are the workers working more than forty (40) hours in a week?

- Yes
- No

If Yes, are they paid time-and-a-half for overtime work?

- Yes
- No

Are wages paid when due?

- Yes
- No

Are workers paid under the table?

- Yes
- No

Are unauthorized deductions being taken out of wages?

- Yes
- No

Are workers receiving a pay stub or record of deductions?

- Yes
- No

Company's Federal Employer ID number or Social Security number (appears on W-2 or 1099 form): [Text box]

Is there anything else we should know?

[Empty text box for additional information]

Your contact information (you may leave blank to send form anonymously):

Full Name: [Text box]
Mailing Address: [Text box]
City: [Text box]
State: Maine [Dropdown menu]
Phone: [Text box]
Email: [Text box]

Submit

If you prefer to mail this form rather than send it electronically, please print it and send it to:
Task Force on Employee Misclassification
47 State House Station
Augusta, ME 04333-0047

TASK FORCE COMPLAINT FORM

Please complete the following document, providing as much information as possible, and then mail or e-mail to one of the addresses below. Task Force members will review the information provided to determine if an investigation is warranted. You may be contacted if further information is needed.

1. Company Name (include "doing business as" name if known)

2. Type of Business

(a) Construction

(b) Landscaping

(c) Other

_____ (please specify)

3. Employer Name:

4. Business Address/PO Box:

5. Business Telephone Number:

6. E-Mail Address or Company Website:

7. Provide the location(s) if known where this business may be conducting operations:

8. What are the conditions that you believe to be fraudulent or in violation of the law? (Including work hours, non-payment of wages, cash payments, etc.)

Optional Information

If you would like to be contacted, please provide us with your contact information. The Task Force will make every effort to protect your identity and will not reveal the source of these allegations to the employer in the course of any investigation.

9. **Name:** _____

10. **Address:**

11. **Telephone Number(s):** _____

12. **E-Mail Address:** _____

13. **Are you aware of others who may wish to speak to the Task Force regarding the alleged violations or fraud?**
(a.) Yes
(b) No

If yes, please provide their names and contact information:

**Mail completed form to:
Joint Enforcement Task Force on Workplace Fraud
Maryland Department of Labor, Licensing and Regulation
500 N. Calvert Street, Suite 401
Baltimore, Maryland 21202**

OR e-mail to: fraudtaskforce@dllr.state.md.us

Employer is under reporting/concealing payroll or misclassifying worker(s) as independent contractors.
 If so, please provide:

- the occupation(s) involved:
- the number of workers:
- and how the payroll is being concealed:
- Explain / Other:

If you are an employee of the business you suspect of fraud, please indicate:

Date you started working there: _____ How many hours you work per week: _____

Your occupation with the business: _____

The date the fraudulent activity began: _____

Additional Comments: _____

I represent the following organization (if applicable):
 (please provide name of organization) _____

Website address: _____

Submitter information

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: () - ext. _____ Cell phone: () - ext. _____

E-mail address: _____

This form may be faxed to (518) 485-6172 or mailed to:

New York State Department of Labor
 Liability and Determination, Fraud Unit
 State Office Campus, Building 12, Room 356
 Albany, New York 12240-0001



ILLINOIS DEPARTMENT OF LABOR

1 West Old State Capitol Plaza, 3rd Floor

Springfield, Illinois 62701-1217

Telephone: 217/782-1710

EMPLOYEE CLASSIFICATION ACT COMPLAINT FORM

820 ILCS 185/1-999

COMPLAINANT INFORMATION

NAME: _____ DAY PHONE # _____
 ADDRESS: _____ CELL PHONE # _____
 CITY: _____ STATE: _____ ZIP CODE: _____
 ORGANIZATION (if appropriate): _____
 EMAIL ADDRESS: _____ FAX # _____

ARE YOU FILING THIS COMPLAINT ON YOUR OWN BEHALF? Yes No IF NO, LIST ON WHOSE BEHALF THE COMPLAINT IS BEING FILED:
 INDIVIDUAL/ORGANIZATION NAME: _____ DAY PHONE # _____
 ADDRESS: _____ CELL PHONE # _____
 CITY: _____ STATE: _____ ZIP CODE: _____
 EMAIL ADDRESS: _____ FAX # _____
 HAVE YOU OR ANYONE ELSE FILED A CIVIL ACTION IN COURT REGARDING THIS MATTER? Yes No Unknown

CONTRACTOR INFORMATION

COMPANY/CONTRACTOR: _____ DOING BUSINESS AS: _____
 OWNER: _____ DAY PHONE # _____
 ADDRESS: _____ FAX # _____
 CITY: _____ COUNTY: _____ STATE: _____ ZIP CODE: _____
 NATURE OF BUSINESS: _____ FEIN NUMBER: _____
 TYPE OF BUSINESS ORGANIZATION OF CONTRACTOR? Sole Proprietorship Partnership Corporation Limited Liability Company (LLC) Unknown

NATURE OF COMPLAINT

LOCATION OF WORK/SERVICE PERFORMED:
 ADDRESS: _____
 CITY: _____ COUNTY: _____ STATE: _____ ZIP CODE: _____
 DATE VIOLATION(S) OCCURRED: _____

TYPE OF WORK/SERVICES PERFORMED: Please be specific regarding the type of work or services performed, such as electrical, plumbing, carpentry, etc.

STATEMENT OF FACTS OF ALLEGED VIOLATIONS: Please attach additional sheets as necessary. Also include any documentation relevant to the alleged violations.

I hereby certify that the above information is true and accurate to the best of my knowledge and belief.

Signature: _____ Date: _____

Are workers classified as independent contractors? Yes No Unknown

How are workers paid? Check one or more.

- Cash
- Personal Check
- Payroll Check
- Combination
- Other _____

Do workers receive a pay stub? Yes No Unknown

Are workers paid all wages owed? Yes No Unknown

Are you aware of others we should contact? Yes No Unknown If yes, complete contact information below.

Please enter name(s) and contact information

Do you want this information to be kept confidential? Yes No Unknown

How may we contact you if we have questions?

Name _____

Address _____

City _____ State _____ Zip Code _____

Email _____

Phone _____ Cell Phone _____

[Print Form](#)

KANSAS

REPORT MISCLASSIFICATION

Business Information

To report a misclassification issue, please complete the following form. The required fields are marked with an asterisk (*). These fields must be completed in order to submit your misclassification issue.

Business Name: _____

Business Address: _____

Business City: _____

Business State:
None Selected ▼

Business Telephone #: _____
xxx-xxx-xxxx

Business Type: _____

Business Contact Name (e.g. Owner, Boss, Supervisor): _____

Job Site Address (Street/Location): _____

Job Site City: _____

Job Site State:
Kansas ▼

When did you observe this or when did it occur?

Explain what occurred:

Contact Information

Providing this contact information will assist in completing a more thorough investigation. It is our policy to keep such information confidential to the maximum extent allowed by law.

Your First Name:

Your Last Name:

Your Street Address:

Your City:

Your State:

Your Telephone #:

Your Email Address:

Copyright 2006

Iowa Workforce Development (IWD) Misclassification Report Form

If you think you or someone else is treated as an independent contractor instead of an employee, you can report this to IWD's Misclassification Unit.

Do you perform services for this company? Yes No

Individual/Company: _____ Doing Business As: _____

Day Phone # _____

Owner: _____

Cell Phone # _____

Address: _____

Fax # _____

City: _____ County: _____ State: _____ Zip Code: _____

Email Address _____

Location of Work Site(s): Same as Above

Address: _____

City: _____ County: _____ State: _____ Zip Code: _____

Date Problem Occurred: _____ Is the worksite active now? Yes No How many workers at this site? _____

Type of Work/Services Performed: Be clear about the type of work or services performed, such as carpentry, construction, food service, delivery, trucking, etc.

Statement of Facts of Alleged Violations: Describe what is going on at this workplace. Tell us the facts.