



House Labor & Industry Committee

Public Hearing on Construction Industry Misclassification:
Verification of Employee Work Authorization and
Misclassification Task Force

Testimony of Tom Breslin

Regional Area Manager

Keystone Mountain Lakes Regional Council of Carpenters

April 29, 2019

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Rep. Cox, Rep. Harkins, members of the Labor and Industry Committee, my name is Tom Breslin and I come before you today as Representative of the Keystone Mountain Lakes Regional Council of Carpenters.

On behalf of our 20,000 plus members in Pennsylvania I am pleased to be here today and appreciate the opportunity to offer input on two issues of vital concern to our membership. First, for the record our union, is the largest Construction Trade Union in Pennsylvania representing both skilled tradespersons and apprentices.

We applaud the committee for elevating E-Verify and misclassification for public discussion and furthermore applaud the committee for considering these two issues simultaneously for there is great synergy between the two. We support the efforts being made to advance both E-Verify and misclassification legislation and look forward to working with the sponsors Rep. MacKenzie and Rep. Galloway and the entire committee in reaching a final product.

The presence of fraud in the construction industry is a major issue. Estimates suggest that state and local budgets are being short changed hundreds of millions of dollars in tax revenues, that are not being collected. Allow me to be clear, this is **NOT** an issue between contractors who are associated with unions and those who are not. This is an issue between honest employers who pay their taxes and meet legal obligations and those who do not, thus creating unfair competitive advantages for those who choose to cheat the system. In addition, many of those incorrectly being classified as Independent Contractors are not legally authorized to work in the United States.

The Carpenters union casts no judgement towards these individuals and recognize they are very much being exploited by unscrupulous contractors and labor brokers. But the fact remains that people not legally eligible to work in the United States are taking away work opportunities from those who are eligible. Expansion of the Federal and state E-Verify program would help in that it would hold all contractors in the construction field accountable for ensuring that those they employ are entitled to work in our great country.

But like all well-meaning efforts, the results are only as good as the oversight and enforcement that takes place. Any final product must provide adequate resources for enforcement and penalties sufficient enough to serve as a deterrent to fraudulent and illegal action.

We are equally supportive of advancing legislation to create a misclassification task force. It is our view that such a task force would be more appropriately entitled a "Tax Fraud Task Force", for there exists some confusion over what Misclassification really is.

Some may be of the belief that misclassification is about paying an individual as a laborer, hypothetically when they in fact are carpenters or electricians. Misclassification is about calling someone an Independent Contractor when in fact those individuals do not in any way meet the definition.

This practice allows contractors to avoid paying required Federal and State taxes as well as paying into the Unemployment Compensation Fund and providing workers comp coverage, and Liability insurance could all add up to a 40% advantage over honest contractors.

By skimping out on these obligations, contractors create an uncompetitive business environment that impacts all honest employers and their workers. This practice can make an honest contractor into a dishonest contractor just to be able to compete.

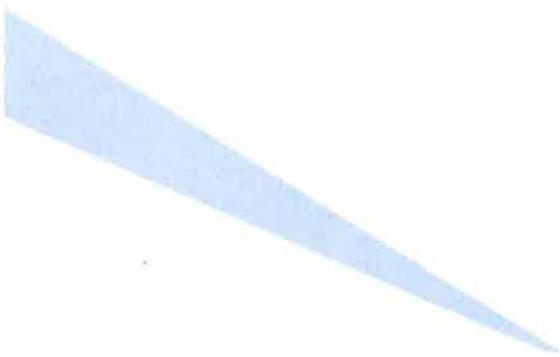
Ladies and Gentlemen, that is called fraud. Nothing more, nothing less. If contractors and their employees paid their fair share of taxes, Pennsylvania and the Federal Government could have more revenue to take care of our veterans, rebuild our infrastructures, schools, hire more police, firefighters or teachers and even pay down the state debt that this commonwealth is in dire need of.

Approximately a decade ago a law, Act 72, was enacted in Pennsylvania that defined Independent Contractors. To many, including my union, enforcement of that law and the penalties attached have not proven effective in combating the practice.

Establishing the Misclassification Task Force will bring focus and coordination of resources to combating this illegal activity not here to for seen.

Thank you for this opportunity to speak before the committee. We look forward to working with you as you move forward.

Tom Breslin
Business Agent
Keystone Mountain Lakes Regional Council of Carpenters



(In)dependent Contractor Misclassification

Excerpt from **report by the Economic Policy Institute** • By **Françoise Carré** • June 8, 2015

Misclassification is most common in industries where it is most profitable (such as construction, where workers' compensation insurance premiums are high), and in industries with scattered worksites where work is performed in isolation.

It appears that IC misclassification spreads under one or both of the following conditions: (1) where it is most profitable to commit fraud (i.e., where avoiding mandated costs results in significant savings, such as in construction, where workers' compensation insurance premiums are high, and in other sectors where injuries are common), and (2) where the business organization is such that the practice is easy to conceal and employer responsibility hard to pin down. The latter is the case in long subcontracting chains (another characteristic of construction), where the work is project-based, where companies rise and fall, and where there is a high rate of turnover of employers (or "bosses").

Tax fraud in the construction industry affects all of us," Spencer said. "That's money that can take care of our veterans, rebuild roads, bridges and schools, pay police, firefighters or teachers, or pay down the national debt. It can shore up Medicare and Social Security so people can retire in dignity. We are being cheated out of all of that because of the high degree of tax fraud."

Employers steal billions from workers' paychecks each year

Survey data show millions of workers are paid less than the minimum wage, at significant cost to taxpayers and state economies

Excerpt from the report by Economic Policy Institute • By David Cooper and Teresa Kroeger • May 10, 2017

We look specifically at instances of such wage theft in the 10 most populous U.S. states: California, Florida, Georgia, Illinois, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Texas.

While federal labor protections have been left to erode, the agency charged with enforcing wage and hour laws has been stretched increasingly thin. In 2015, the Wage and Hour Division (WHD) of the U.S. Department of Labor—the agency responsible for investigating minimum wage violations—employed roughly the same number of investigators as it did nearly 70 years ago: WHD employed 1,000 investigators in 1948 and *fewer* than 1,000 in 2015 (Galvin 2016a; U.S. DOL 2017a). Yet today, the agency is expected to protect a workforce nearly six times larger than it did in the 1940s—22.6 million in 1948 and more than 135 million in 2015 (Galvin 2016a; U.S. DOL 2017b). In 1948, there was one investigator for every 22,600 covered workers; today it is one per every 135,000 workers. As the number of investigators per worker has shrunk, so has the agency's ability to effectively police violations of labor law: from 1980 to 2015, the number of cases investigated by the agency decreased by 63 percent (NELP 2008; U.S. DOL various years).

NOTICE TO ALL BUSINESSES WHAT IS WORKER MISCLASSIFICATION?

Misclassification of a worker occurs when a worker is treated as contract labor when the law does not allow for such classification. Arkansas law determines the proper classification of a worker for unemployment insurance (UI) tax purposes. A.C.A. § 11-10-210(e)(1)(2)(3), commonly referred to as the 1,2,3 test, is applied to determine the correct classification of a worker. The presumption is that a worker is an employee unless the business entity paying the worker can establish all three parts of the test as follows:

"Service performed by an individual for wages **shall be** deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Director that:

1. Such an individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact, and
2. Such service is performed either outside the usual course of the business for which the service is performed or is performed outside all the places of business of enterprise for which the service is performed: and
3. Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

If the employer cannot establish that the worker meets all three parts of the test, the worker must be classified as an employee and UI taxes reported and paid.

Examples indicating that a worker should be classified as an employee and not as contract labor:

- Worker is given a work schedule.
- Worker is supervised.
- Worker is provided training.
- Worker is given instructions in the performance of the duties.
- Worker's pay is not negotiated.
- Worker performs a service at the employer's place of business or at places designated by the employer for an extended period of time.
- Worker performs the service as a representative of the employer.
- Worker uses the employer's tools, equipment and/ or supplies.

- Worker is not established in own business of the same nature as the employer.

Many employers mistakenly think as long as workers are given a W-2 or a 1099 at the

end of the year, they are within the law. This is not true.

WHY DO EMPLOYERS MISCLASSIFY?

Tax and Insurance Fraud: Employers call their workers "independent contractors" to avoid taxes, insurance costs, and payroll deductions. They pay independent contractors in lump sums and claim they will report worker's annual earnings on a 1099.

Gaming the System: Businesses say they do not have to pay taxes or insurance including UI taxes on contract labor, but nearly all such workers meet the legal definition of being employees for UI tax purposes.

Illegal Profits: The misclassification scheme helps companies avoid normal payroll taxes, so they do not pay Social Security or Medicare, workers' comp., or unemployment insurance, all of which are required by law.

IS THIS CRIME OR CONFUSION?

Unchallenged Crime: Misclassification is lawlessness, not confusion. Most businesses know what they are doing and think that they can get away with it.

Nationwide: Misclassification occurs in all 50 states.

WHY DOES IT MATTER?

Unfair to Honest Businesses: Responsible, law-abiding employers are at a competitive disadvantage; many must choose between staying afloat or breaking the law.

Billions of Lost revenue: Federal, state, and local governments are cheated out of many kinds of revenue.

Higher Insurance Costs: Hospitals are obligated to provide care for all, so workers' comp., and health insurers must raise premiums to make up for the uncovered workers who are injured on the job.

Crimes: Misclassification involves many crimes: tax evasion, mail and insurance fraud, grand theft, wage and hour violations, and money laundering.

BE AWARE!

Nationwide efforts have begun to rectify the misclassification of workers and states are taking steps to assure proper classification of workers.

The Department of Workforce Services has recognized that misclassification is occurring within its UI program. Steps are being taken to increase investigations with regard to misclassification of workers within the UI tax program and to bring offending employers into compliance with the law.

Source: Arkansas Department of Labor