



Written Testimony of Deputy Secretary Jennifer L. Berrier

Department of Labor & Industry

Before the House Labor & Industry Committee

June 3, 2019

Good afternoon Chairman Cox, Chairman Harkins, and members of the House Labor & Industry Committee. I am grateful for the opportunity to participate in this hearing to discuss a suite of House bills that aim to aid in Act 72 enforcement. The Department of Labor & Industry (L&I) is on the forefront of combatting the harmful practice of misclassifying employees as independent contractors on construction sites and appreciates the General Assembly's initiatives to provide additional resources and tools.

Contractors who purposefully misclassify their employees as independent contractors not only dodge their responsibility to pay federal, state, and local taxes, but also avoid providing fair wages, health benefits, and retirement benefits to those employees. As a result of misclassification, the commonwealth and local municipalities lose out on much-needed revenue and hard-working employees and their families may be robbed of adequate income, benefits, and the assurance that they can access safety net programs should they become injured on the job or experience a layoff.

Employers who misclassify employees as independent contractors have an unfair advantage over law-abiding employers. These employers are not paying mandatory payroll taxes such as Social Security, Medicare, and unemployment insurance. They are also not paying workers' compensation premiums, health insurance, or overtime pay. With this unfair advantage, law-abiding contractors are more easily underbid by dishonest contractors, making it more difficult for good, honest contractors to be successful and thrive in the Commonwealth. It is crucial for us to protect and reward contractors who follow the rules and pay their fair share.

Since Governor Wolf took office, the department has stepped up its efforts to detect and prevent misclassification under Act 72. Measuring from 2015, the department has fined over 700 contractors and collected over \$1.6 million in penalties. In 2018, L&I's Bureau of Labor Law Compliance (BLLC) collected nearly \$567,000 in fines from more than 200 contractors, a 57% uptick from the previous year. Investigators also conducted over 400 on-site investigations of construction sites last year, which represents a 71% increase in productivity over the prior year.

The department's improvement in Act 72 enforcement is the direct result of an internal task force comprised of BLLC, Unemployment Compensation Tax Services, and the Bureau of Workers' Compensation. As a usual course of business, UC Tax Services performs audits of many Pennsylvania businesses throughout the year, including audits of construction firms. These audits may reveal whether employers have misclassified employees as independent contractors. Pursuant to departmental policy, UC Tax Services then refers its findings to BLLC, which in turn issues fines for Act 72 violations. Similarly, the Workers' Compensation Office of Adjudication flags and reports misclassified employees discovered

through workers' compensation disputes to BLLC. Lastly, BLLC identifies Act 72 violations through construction worksite visits. During visits, investigators interview workers on the construction site, review payroll information as appropriate, and distribute educational materials on labor laws to construction workers.

Under our task force, UC Tax Services identified more than \$41 million in under-reported wages since 2018, and found nearly 2,100 misclassified employees in the construction industry. It is important to point out that while Act 72 is limited to the construction industry, our UC Tax Services offices can pursue unpaid unemployment compensation taxes and impose penalties against employers in any industry who fail to comply with the requirements of the Unemployment Compensation Act. Across all industries, 2018 audits by UC Tax Services discovered over 22,000 unreported employees that generated nearly \$7.2 million in additional unemployment compensation contributions.

While we should certainly acknowledge these successes, there remain significant barriers to curbing misclassification on construction sites. Despite L&I's efforts to break down silos within the department and maximize its resources, there are weaknesses in Act 72 that permit the underground economy in the construction industry to thrive. More prevalently, L&I has been visiting jobsites and finding out-of-state labor brokers who have 30-40 workers on a jobsite performing construction work while paying these workers as independent contractors and failing to provide adequate safety equipment and apparatus. Many of these workers are vulnerable, low-skilled individuals with barriers to employment who are exploited because of their desire to work.

In its current state, Act 72 does not provide L&I with the tools to effectively investigate and penalize out-of-state labor brokers and enforce the Act. There is no record keeping requirement, nor does the Act give L&I the authority to investigate records. Additionally, the stop-work order authority is ineffective because it requires an order to show cause to be filed with the opportunity for a response. This process takes at least 20 days, which in the construction world means that jobsite work could be completed or nearly completed by the time a stop-worker order is issued. Furthermore, the penalty of a \$1,000 fine is not a deterrent to these brokers. They benefit more by misclassifying workers, paying cash wages, and ignoring their legal responsibilities.

Act 72 is especially hard to enforce because misclassified workers have a disincentive to report violations when they are paid in cash under the table. In many cases, workers are reliant on this pay and unwilling to jeopardize their ability to earn income to support themselves or their families. Unfortunately, L&I typically hears from these misclassified workers only when an employer withholds pay or when they attempt to file for workers' compensation or unemployment compensation benefits.

For these reasons, L&I welcomes changes to Act 72 that provide greater resources to L&I investigators, impose record-keeping requirements, increase the immediacy of the stop-work order process, strengthen penalties for violators, and hold general contractors responsible for the actions of its subcontractors on jobsites. L&I is appreciative for the introduction of a number of bills by House members that would attack this issue head-on and provide us with additional resources and tools so we can improve our ability to investigate and impose meaningful penalties. L&I remains committed to protecting all law-abiding contractors and workers in Pennsylvania.

Thank you for the opportunity to testify today.