Independent Contractors and Employee Misclassification in the Construction Industry

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I. Congressional Research Service reports (3/10/11) that for the last period for which statistics have been gathered and analyzed by the Government Accountability Office (2005) independent contractors (all industries) accounted for 7.4% of the U.S. workforce and 24% of the contingent workforce of 42.6 million.

- IRS Test – 20 factors test is still viable, but the IRS has been moving to a three-part analysis consisting of

    - ✓ *Behavioral Control* (asking whether the company controls or has the right to control what the worker does and how the worker does his job).
    - ✓ *Financial Control* (asking whether the business aspects of the worker's job are controlled by the employer such as how the worker is paid, whether the worker's expenses are reimbursed, who provides tools/supplies, etc.).
    - ✓ *Type of Relationship* (asking whether there are written contracts or employee-type benefits). Will the relationship continue and is the work performed a key aspect of the business.

- CRS reports that the IRS estimated a net tax gap (i.e., what should have been paid vs. what was paid voluntarily and via enforcement and other late payments) at more than $290 billion, to which misclassification contributes.

- On federal level, the government plans to tackle this issue through more stringent policing of employers' classification of workers through budgetary, legislative, regulatory and enforcement approaches. The U.S. Department of Labor (DOL) fiscal year 2011 budget sought $25 million to target misclassification, of which half was to pay for additional Wage and Hour inspectors and Solicitor's Office lawyers and the other half was to go to the states to aid their enforcement efforts. The Wage and Hour Division emphasized enforcement of employee classification rules and in FY 2009 recovered $2.6 million in misclassified employees. Also, the DOL and President Obama support the

modification of Section 530 of the Revenue Act of 1978 and the Employee Misclassification Prevention Act.

II. Federal legislation aimed specifically at the employee misclassification did **not** pass and has **not** yet been reintroduced

- **Fair Playing Field Act of 2010 [S. 3786, endorsed by Senator John Kerry (D- Mass) and Representative Jim McDermott (D-Wash.)]**

- Section 530 of the Revenue Act of 1978 (Safe Harbor provision) – 1978 Congress adopted this provision so that the IRS could not collect employment taxes from a misclassification if the employer reasonable misclassified. "Safe Harbor" was amended and extended indefinitely by subsequent legislation. Currently, the requirements for the Safe Harbor are:

    - ✓ *Reasonable Basis* – for treating the workers as non-employees, including (a) court cases or IRS Rulings, (2) prior IRS audit where such workers were not reclassified, (3) industry practice with similar workers, or (4) some "other reasonable" basis (advice of attorney or accountant with knowledge of the specific facts of the employer's business);
    - ✓ *Substantive Consistency* – treatment of similarly situated workers as independent contractors; and
    - ✓ *Reporting Consistency* – federal tax filings (including information returns) must be consistent with treatment as non-employees.

- In September 2010 the "Fair Playing Field Act of 2010" was introduced to allow the IRS to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to issue regulations and to end the "Safe Harbor" provision. Act did not pass (and has not been reintroduced).

- Not to be undone by that failure, CRS reports that in his 2012 budget, the President proposed to "increase certainty with respect to worker classification" by modifying Section 530 to: (a) permit the IRS to require prospective reclassification of workers who are misclassified as Independent Contractors, and (b) issue generally applicable guidance on the proper classification of workers under common law standards "in a neutral manner" on an industry or job-specific basis. "Priority for the development of guidance would be given to industries and jobs in which application of the common law test has been particularly problematic, where there has been a history of worker misclassification, or where there have been failures to report compensation paid". The proposal would be effective upon enactment, but prospective reclassification of those covered by the current special provision would not be effective until the first calendar year beginning at least one year after date of enactment. The transition period could be up to two years for independent contractors with existing written contracts establishing their status. Stay tuned . . .

- U.S. Treasury estimates that this proposal will yield $8.71 billion for FY2012 through FY2021

- **Employee Misclassification Prevention Act (EMPA) [S. 3254, endorsed by Senators Sherrod Brown (D-Ohio) and Lynn Woolsey (D-Calif.)]**

    - introduced in 2010 to amend FLSA to provide tools to address misclassification;

    - misclassification would be a freestanding violation of FLSA;

    - written notice to all workers of their classification and the ramification of such a classification;

        - if employer fails to give the worker the notification then the worker is an employee;

    - civil money penalties for misclassification;

    - website for DOL where it summarizes the rights of employees under this Act and other appropriate information and where workers could ask questions;

    - Act referenced the definition of "employee" as it applies to the FLSA, which has been the "economic realities" test;

    - Act did not pass, and has not been reintroduced.

III. State legislatures have long been and remain today much more active in this arena, particularly with respect to the construction industry (Attachment A).

IV. Independent Contractors and Employee Misclassification in the Construction Industry

- **CBA Coverage and Contributions** – generally speaking, true Independent Contractors are NOT covered by CBAs and an employer may NOT be required to and may not legally contribute to pension and welfare funds (absent a participation agreement) "on behalf of" such persons because they are NOT employees.

    - *Mazzei v. Rock-N-Around Trucking,* 246 F. 3d 956 (7th Cir. 2001). Contributions can lawfully be required if "measured by" the number of hours an Independent Contractor works. Owner operators who used the Commerce Commission License of the signatory contractors were nonetheless true Independent Contractors, and CBA language requiring contributions "for" or "on behalf of" such drivers was unlawful and unenforceable under 302(c).

    - *Chicago Plastering Institute v. W. A. Duguid Co.,* 761 F.Supp. 1345 (N.D. Ill. 1991). A plastering foreman who had his own sole proprietor business doing "side plastering jobs" for his employer, for which he, in turn, often hired (on a 1099 basis) other union plasterers with whom he worked, was deemed a

legitimate "subcontractor" so that the "alter ego/single employer" claims brought by the union funds failed.

- The issue—**what is a true Independent Contractor**? Answers vary depending on the law (and jurisdiction) in question - here are Illinois standards under various laws:

- **Wages and Benefits**: In the context of minimum wage and overtime statutes, Illinois and Federal courts most likely will favor the broader "economic realities test" and not the common law "right of control" test to determine whether an individual is an "employee." Section 210.110 of the Illinois Department of Labor Administrative Code enumerates the six factors of the economic realities test as the following:

    - ✓ The nature and degree of control of the manner in which the work is to be performed
    - ✓ Opportunity for profit or loss
    - ✓ Investment in equipment or materials
    - ✓ The individual's special skill
    - ✓ The permanency and duration of the working relationship
    - ✓ Whether the employee's services are integral to the employer's business

- **Construction Industry**: The Illinois Employee Classification Act (ECA), 820 ILCS 185/1 addresses employee misclassification in the construction industry. The ECA was pushed hard by the Building Trades who have used it (either through the IDOL or by union lawsuits) to go after nonunion companies. ECA applies to all Contractors (including Subcontractors) engaged in construction work in Illinois—and that includes not just what we all know as typical jobsite construction work, but it also covers "maintenance" and "landscaping", as well as *moving construction related materials on the job site to or from the job site."*

    Since Illinois' ECA took effect in 2008 –

    - ✓ The IDOL has reportedly found 3,400 violations and assessed penalties of $1.3 million.
    - ✓ The IL Attorney General's Office, in its first enforcement action under the ECA and with the assistance of the Bricklayers, reached settlements with several companies and individuals charged with fraudulently classifying employees as independent contractors. The defendants in those cases were the owners of multiple masonry and tuckpointing companies – penalties totaled more than $79,000 and each was barred from public work for a period of four years.
    - ✓ The Carpenters Union sued a Michigan-based contractor who allegedly hired and paid workers/employees on a 1099 basis in violation of ECA), and ultimately a consent decree was entered barring that contractor from engaging in the construction industry in the State of Illinois for a period of five years from the date of the entry of the decree. The Carpenters Union agreed to pay $60,000 to the plaintiffs. *Chicago Regional Counsel of Carpenters v. Joseph*

J. Sciamanna, Inc., 2008 WL 4696162 (N.D. Ill. Oct. 23, 2008) and *Chicago Regional Counsel of Carpenters v. Joseph J. Sciamanna, Inc.,* 2009 WL 1543892 (N.D. Ill. June 3, 2009).

- ✓ IBEW Local 134 filed suit against Northern Illinois Telecom Inc. alleging that the misclassified an unknown number of communications electricians as independent contractors for at least two years---the suit accuses Northern Illinois Telecom of directing employees to sign documents stating they are independent contractors, or risk having their hourly wage reduced. Northern Illinois Telecom employs CWA members (not IBEW) and it said that the union's suit is retaliation for the Company winning contracts that otherwise would have been awarded to IBEW contractors. *International Brotherhood of Elec. Workers, Local Union No. 134 v. Northern Illinois Telecom, Inc.*, No. 10-CH-16060 (Ill. Cir. Ct. Apr. 13, 2010).

It is this private right of action by any "interested entity" and the prospect that unions and/or trust funds will increasingly use this law to litigate Independent Contractor issues that makes the Illinois law unique, and makes it imperative that the Safe Harbor of using **bona fide** corporations and LLCs to perform work on a subcontract or vendor basis imperative.

The Presumption of Employee Status

Under the ECA, **an individual** performing services for contractors not as a sole proprietorship (i.e., an unincorporated "company" or "d/b/a") **are statutorily presumed to be "employees"** unless the contractor can prove that (s)he meets the "ABC test":

- ✓ (A) the individual is free from control and direction of the contractor;
- ✓ (B) the individual's service is **outside the "usual course of service performed by the contractor"**; and
- ✓ (C) the individual is engaged in an "independent established trade, occupation, profession or business" **or** is "a legitimate proprietor or partnership." 820 ILCS 185/10(b)-(c).

This is not a balancing test. All three criteria (the "ABC test") must be satisfied to meet this exception. That poses a real challenge for the factor of proving that the individual performs services outside the "usual course of service performed by the contractor." The definition of that term provided by the applicable regulations is as follows:

> "Usual course of services" means that the services rendered by the individual are necessary to the contractor's business and not simply incidental to the business. The fact that the services are customarily or routinely provided by an individual is not dispositive on the issue of whether the services are actually necessary to the contractor's business. In addition, if a task is performed by both a contractor's employees as

well as its independent contractors, the task is considered to be in the usual course of the contractor's services.

- *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.,* 3:05-MD-527RM, 2010 WL 2243246 (N.D. Ind. May 28, 2010) – "When considering the employer's usual course of business, Illinois courts focus on whether the individual performs services that are necessary to the business of the employer or merely incidental." *Id.* Grant of summary judgment on wage claims by IL-based FedEx Ground drivers under the IL Wage Act.

- *Carpetland U.S.A., Inc. v. Illinois Dept. of Employment Sec.*, 201 Ill. 2d 351, 386, 776 N.E.2d 166, 186 (2002) - "[W]hen considering the usual course of the business of the employing unit, the focus should not be on whether the services are provided habitually, customarily, or routinely. Rather, the key to this inquiry is whether the services are necessary to the business of the employing unit or merely incidental. This is consistent with the guidance given in the Administrative Code that services "not necessary to the employing unit's business" are outside the usual course of business. 56 Ill. Adm.Code § 2732.200(f)(1) (2001). The washing of windows or mowing of grass for a business is incidental. But when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. See *Murphy,* 387 Ill. At 417, 56 N.E.2d 800. When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business. See *O'Hare-Midway Limousine Service, Inc.,* 232 Ill.App.3d at 113, 173 Ill.Dec. 171, 596 N.E.2d 795." Court finds carpet measures to be employees, but carpet installers to be Independent Contractors, as Carpetland's "usual course of business" was limited to the retail sale of floor coverings, rather than their installation.

Sole Proprietorships and/or Partnerships

As for what constitutes a legitimate **sole proprietorship/partnership** under ECA, the Act subjects them to a 12-part test designed to determine whether they are indeed legitimate business entities. They must satisfy **all 12** of the following enumerated standards, and if they do not, then the ABC test is applied to the service provider to determine whether he or she is an employee or an Independent Contractor:

(1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;

(2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(3) the sole proprietor or partnership has a **substantial investment of capital** in the sole proprietorship or partnership **beyond ordinary tools and equipment and a personal vehicle**;

(4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;

(5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;

(6) the sole proprietor or partnership includes services rendered **on a Federal Income Tax Schedule** as an independent business or profession;

(7) the sole proprietor or partnership performs services for the contractor **under the sole proprietorship's or partnership's name**;

(8) when the services being provided require a license or permit, **the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's nam**e;

(9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor **and reports the employees' income to the Internal Revenue Service**;

(11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and

(12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

The Safe Harbor

Safe Harbor: Under IDOL's regulations, ECA does not reach relationships with a bona fide corporation or LLC.

In determining whether a **corporation is bona fide**, the agency will consider a number of factors, including whether the corporation is capitalized; has issued corporate stock; holds itself out as a corporation, maintains a corporate bank account (does not intermingle corporate funds with personal funds), books, and records (including meeting minutes and current tax returns); has filed articles of incorporation and is in good standing as either an Illinois or foreign corporation.

In determining whether an **LLC is bona fide**, the agency will consider a number of factors, including whether the LLC has assets, maintains a company bank account (does not intermingle company funds with personal funds), holds itself out as an LLC,; makes necessary tax filings; has filed articles of incorporation and is in good standing as either an Illinois or foreign LLC.

V. Remedies and Penalties under the ECA

- Collection of any wages, benefits, or other compensation for the misclassified worker;
- Civil penalties for a "first offense" of up to $1500 per violation, extending up to $2500 per violation for repeat offenders (each person and each day constitutes a separate violation)
- Debarment of 4 years for repeat offenders.
- "Interested parties" or individuals who sue under the private right of action provisions can collect liquidated damages in an amount equal to the unpaid wages/benefits, compensatory damages in the amount of $500 per violation, and attorneys fees and costs.
- Willful violations are a Class C misdemeanor or if repeated within 5 years, a Class 4 felony.
- Punitive damages in the amount of any penalty assessed are also available for willful violations.

These are in addition to the other consequences that can typically attach to such misclassifications, including:

- Taxes: back payroll tax contributions, as well as local, state, and federal government's claims for back income taxes and penalties
- Social Security: payment of 100 % of the employee's Social Security Contributions
- Insurance Premiums: retroactive premium payments for individuals who should have had coverage
- Unemployment insurance: claims for FUTA contributions
- Other Penalties: monetary punishments for failing to keep "employee" records
- Benefits: retroactive entitlement to a number of employee benefits, including workers' disability compensation, unemployment, vacation, pension, and stock options.

Attachment A

Illinois Employee Classification Act (ECA) Compared to Other State Misclassification Laws

- ECA is very similar to the other State Misclassification laws that are listed below in that there is a presumption of an employer/employee status, enacted to recapture lost tax revenue and allowing state agencies to have broad investigative and enforcement powers

- ECA is different in that it allows for a private right of action with the right to backpay, lost benefits, and liquidated damages.

Massachusetts Independent Contractor/Misclassification Law, M.G.L. c. 149, s. 148B

- First version of the law was passed in 1990 and has undergone several amendments with the most recent change in 2004; this law applies to a variety of industries including the construction industry

    - The law has a rebuttable presumption that every worker is an employee unless a three pong test is satisfied.

    - To rebut the presumption of employment, the employer must prove: 1) the worker is free from control and direction of the hirer; 2) the worker performs services outside the usual course of business for the hirer; and, 3) the worker customarily engages in that type of trade or business.

    - The burden of proof is on the employer/hirer, and the inability of an employer/hirer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee.

Oregon Independent Contractor Law, ORS 670.600

- This law defines "independent contractor" for the following state agencies: Landscape Contractors Board, Department of Revenue, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board

- Workers may be properly classified as independent contractors when they are (1) free from direction and control, beyond the right of the service recipient to specify the desired result and, (2) licensed under ORS 671 or 701 (State Landscape Architect Board or Landscape Contractors Board and State Board of Architect Examiners or Construction Contractors Board) if licensure is required for the service, and (3) responsible for other licenses or certificates necessary to provide the service and (4) customarily engaged in an "independently established business."

Pennsylvania Construction Workplace Misclassification Act, HB 400

- Passed into law in 2010 for the construction industry and went into effect on February 11, 2011

    - An independent contractor must have the following: (1) have a written contract to perform services; (2) be free from the hiring party's control or direction when performing such services; and (3) be customarily engaged in an independently established trade, occupation, profession or business.

        - In order to be "customarily engaged in an independently established trade, occupation, profession or business," the hired party must meet all of the following six criteria: (1) possess the essential tools for the job, independent of the person for whom the services are performed; (2) realize a profit or loss as a result of performing the services; (3) perform the services through a business he owns, at least in part; (4) maintain an independent business location; (5) either perform similar services for another hiring party while meeting the first four requirements or credibly hold himself out as able to perform similar services; and (6) maintain individual liability insurance during the term of the contract of at least $50,000.

New Jersey Construction Industry Independent Contractor Act, N.J.S.A. 34:20-1

- Passed in 2007

    - Broadly defines an "employer" to include partnerships, associations, corporations and other legal business entities who are "primarily engaged in the business of, or enters into a contract for, making improvements to real property," any subcontractors and lower-tier contractors.

    - Presumption that employer/employee relationship exists unless the following is met: (1) the individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact; (2) the service is either outside the usual course of the business for which the service is performed, or is performed outside of all the places of business of the employer for which the service is performed; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business.

    - Violations of this act can result in civil and criminal penalties such as being fined up to $1,000 or imprisoned for up to 90 days, or both.

Maryland Workplace Fraud Act, SB 909

- Passed in 2009 for the construction and landscaping industries

    - MD wanted to address the financial harm to the state and to businesses that were properly classifying their employees and were competing at a disadvantage

    - Presumption is that the an employer/employee relationship exists unless the employer can demonstrate that the worker is exempt using a test that is similar to the ABC test

- Authorizes the Commissioner of Labor and Industry to initiate an investigation, permits information-sharing between state agencies and provides penalties

Wisconsin Employee Misclassification Bills, SB 672 and Assembly Bill 929

- Senate Bill 672 and Assembly Bill 929 which both address misclassification of employees was signed into law in May 2010

  - Senate Bill 672 requires the Wisconsin Department of Workforce Development to educate employers and employees about the proper classification of workers, as well as receive and investigate complaints alleging the misclassification of employees.

  - This bill also provides that the Department may require an employer to provide proof that it is maintaining records of all persons working for the employer, workers' compensation coverage for its employees, and records of the hours worked by, wages paid to and any deductions made from wages to employees. If the Department finds that an employer has misclassified an employee, the Department may order the employer to stop work and pay a forfeiture.

  - Assembly Bill 929 amends a current law by adding persons engaged in the painting or drywall finishing of buildings or other structures to the other trades in the construction industry defined as employers under the law. The current law provides for penalties for willful misclassification of employees with the intent to evade any requirement of laws relating to income tax withholding, worker's compensation, unemployment insurance, or employment discrimination and a fine of $25, 000.00 for each violation.

New Mexico Misclassification Law, SB 657

- Passed in 2005 targeting misclassification in the construction industry

  - Creates a presumption of employee status for workers in the construction industry unless the following is met:

    (1) the person providing labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

    (2) the person providing labor or services is responsible for obtaining business registrations or licenses required by state law or local ordinance for the person to provide the labor or services;

    (3) the person providing labor or services furnishes the tools or equipment necessary to provide the labor or services;

    (4) the person providing labor or services has the authority to hire and fire employees to perform the labor or services;

(5) payment for labor or services is made upon completion of the performance of specific portions of a project or is made on the basis of a periodic retainer; and

(6) the person providing labor or services represents to the public that the labor or services are to be provided by an independently established business. A person is engaged in an independently established business when four or more of the following circumstances exist:

(a) labor or services are primarily performed at a location separate from the person's residence or in a specific portion of the residence that is set aside for performing labor or services;
(b) commercial advertising or business cards are purchased by the person, or the person is a member of a trade or professional association;
(c) telephone or email listings used for the labor or services are different from the person's personal listings;
(d) labor or services are performed only pursuant to a written contract;
(e) labor or services are performed for two or more persons within a period of one year; or
(f) the person assumes financial responsibility for errors and omissions in labor or services as evidenced by insurance, performance bonds and warranties relating to the labor or services being provided.

- Provides penalties for improperly reporting an employee as an independent contractor and requires state Labor Department to administer and enforce the standards.

Delaware Workplace Fraud Act of 2009, HB 230

- Passed into law in 2009 addressing misclassification in the construction industry

- Creates a presumption of employee status in the construction services industry unless the hired worker meets the following requirements for independent contractor status: (1) performs the work free from the employer's control and direction over the performance of the employee's services; (2) is customarily engaged in an independently established trade, occupation, profession or business; and (3) performs work which is outside of the usual course of business of the employer for whom the work is performed.

- Provides for administrative remedies, a private right of action, and civil penalties against an employer who knowingly misclassifies an employee as an independent contractor

New Hampshire Labor Code, 2009 New Hampshire Code Section 275:42

- In 2008, NH Department of Labor revised its definition for Independent Contractor

- Presumption that employer/employee status exists unless the elements of the following 12 point test is satisfied:

(A) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.
(B) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
(C) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
(D) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.
(E) The person holds himself or herself out to be in business for himself or herself.
(F) The person has continuing or recurring business liabilities or obligations.
(G) The success or failure of the person's business depends on the relationship of business receipts to expenditures.
(H) The person receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.
(I) The person is responsible in the first instance for the main expenses related to the service or work performed. However, this shall not prohibit the employer or person offering work from providing the supplies or materials necessary to perform the work.
(J) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
(K) The person supplies the principal tools and instrumentalities used in the work, except that the employer may furnish tools or instrumentalities that are unique to the employer's special requirements or are located on the employer's premises.
(L) The person is not required to work exclusively for the employer.

State Task Forces

New York: In September 2007, the NY State Joint Enforcement Task Force on Employee Misclassification was formed. It brought together six agencies: Labor Commissioner, the Attorney General, the Commissioner of Taxation, the Workers' Compensation Board, the Workers' Compensation Fraud Inspector General, and the NYC Comptroller. This task force has discovered $607 million in unreported wages, 44,000 misclassified employees and recovered more than $18.3 million in unemployment insurance taxes.

Connecticut: The Joint Enforcement Committee on Employee Misclassification was established in 2008, which includes officials from the Attorney General and Chief State's Attorney, the Labor and Revenue Services Departments and the Workers' Compensation Commission. Also, state enforcement officers are allowed to show up randomly at a construction site and stop work order if they find that employee lack workers' compensation coverage because of misclassification. 300 stop work orders have been issues and $90,000 in civil penalties has been collected.

Indiana, Senate Enrolled Act 478: This statute allows for the sharing of information concerning the classification of individuals as independent contractors in the construction industry between the state Departments of Labor, of State Revenue, of Workforce Development, and the Worker's Compensation Board

Iowa: In July 2008, Gov. Culver signed an Executive Order establishing the Independent Contractor Reform Task Force, which is comprised of representatives from the Department of Labor, the Dept. of Economic Development, the Dept. of Revenue, the Governor's office, and the Labor Commissioner

Maine: In January 2009, Gov. Baldacci signed an executive order to establish a task force comprised of representatives from the Department of Labor, Workers' Compensation Board, Office of the Attorney General, Department of Administrative & Financial Services, and Professional & Financial Regulations

Nevada: Resolution that provides for an interim study on misclassification

Ohio, Memorandum of Understanding: This memo was signed in December 2008/January 2009 by the Department of Job and family Services, Department of Taxation, and the Bureau of Workers' Compensation to share confidential information in order to identify employers who misclassify employees as independent contractors

Vermont: In April 2009, the Workers' Compensation Employee Classification, Coding and Fraud Enforcement Task Force issued a 2008-2009 progress report. In 2007, it reported that an estimated 10 to 14 percent of Vermont employers misclassified their employee as independent contractors.

Action Taken by State Attorney Generals

California: Sept. and Oct. 2008, AG Edmund Brown sued five trucking companies for misclassifying their truck drivers as independent contractors

Connecticut: Feb. 2009, AG Richard Blumenthal called for a state false claims act to "clarify and strengthen" his authority to sue fraudulent contractors for monetary damages

Massachusetts: AG Martha Coakley has issued numerous fines to construction and painting companies for violating the Massachusetts Independent Contractor/Misclassification Law and the Massachusetts Wage and Hour Laws.

New York: Sept. 2008, the New York Joint Enforcement Task Force on Employee Misclassification, which comprises AG Andrew Cuomo, the New York State Dept. of Labor ad the Workers' Compensation Board, made its first criminal prosecution when it arrested a pizzeria owner for failing to secure workers' compensation coverage, pay overtime wages and make required contributions to the State Unemployment Insurance Fund.

- In Jan. 2009, New York passed SB8715/AB11759 which established when livery cab drivers are considered employees or independent contractors of livery bases

Ohio: Feb. 2009, AG Cordray issued a report on the economic impact of misclassified workers in Ohio. The report estimated that worker misclassification cost the state $100 million in unemployment insurance and more than $510 million in workers compensation premiums and about $180 million in forgone state income tax revenues.

Pending State Bills

Kansas, SB229/HB2281: creates a rebuttable performance of employee status for a person working for a construction contractor and allow an interested party to file a complaint.

Minnesota, HF1794: provides a standard definition of independent contractor for truck-driver-operators

Kentucky, HB392: prohibits misclassification in the construction industry and presume employee status unless certain factors are met