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HOUSE OF REPRESENTATIVES

COMMONWEALTH *of* PENNSYLVANIA

House Democratic Policy Committee Hearing

Worker Misclassification
Subcommittee on Labor, Energy, and Development
Friday, January 27, 2023 | 11 a.m.
Representative Anita Kulik

OPENING REMARKS

11 a.m. Chairman Ryan Bizzarro (D-Erie)

Rep. Anita Kulik (D-Allegheny)

Rep. Nick Pisciotto (D-Allegheny)

PANEL ONE

11:10 a.m. Christopher Hallock, Senior Deputy Attorney General
Pennsylvania Office of Attorney General, Fair Labor

Q & A with Legislators

PANEL TWO

11:40 a.m. Drew Simpson, Regional Manager
Eastern Atlantic States Regional Council of Carpenters

Joseph Hughes, Director of Government Relations
International Union of Painters and Allied Trades District Council 57

Q & A with Legislators

Tour to follow for interested members

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Remarks and Testimony can be found by scanning the QR Code below:



Pennsylvania Acting Attorney General Michelle Henry

Testimony submitted to House Democratic Policy Committee

For the hearing entitled,

“House Democratic Policy Committee Hearing on Worker Misclassification”

January 27, 2023

Presented by

Christopher S. Hallock, Chief Deputy Attorney General,
Fair Labor Section

Chairman Bizzarro and all members of the Committee, thank you for inviting me to testify today. My name is Christopher Hallock, and I am the Chief Deputy Attorney General of the Fair Labor Section at the Office of Acting Attorney General Michelle Henry.

In 2017, during his tenure as Attorney General, Governor Shapiro established the Office's first ever Fair Labor Section. We are tasked with protecting working Pennsylvanians and law-abiding employers. Since our inception, we have met with a large number of workers, employers, stakeholders, and companies across the Commonwealth to hear about the challenges they are encountering. Those interactions have made clear to our office that employee misclassification is one of the most widespread, pressing problems facing Pennsylvania's workforce. In fact, worker misclassification is a problem the entire country is experiencing. Misclassification robs workers of the wages they earned and precludes them from essential protections the law confers on employees. In addition, it unfairly benefits cheating employers and drains state and local coffers of desperately needed revenue.

Workers that are classified as independent contractors are not covered by the standard protections of the modern workplace. A misclassified worker is not entitled to minimum wage or overtime, protection from discrimination, family and medical leave, the right to organize, workers' compensation, unemployment compensation, and more. They are not entitled to employment benefits like medical insurance or retirement contributions. They are responsible for paying the full payroll tax contribution to Social Security and Medicare. Those legitimately operating an independent business can negotiate contracts and secure insurance and other benefits. Misclassified workers, however, are left with the worst of both worlds—all of the precarity of the independent contractor, but none of the control.

Misclassification transcends industries. A survey of state and federal studies by the National Employment Law Project found high rates of misclassification among workers in the janitorial, home care, real estate, tech, local delivery, and trucking industries.¹ It has long been a well-known problem in the construction industry, and led to Pennsylvania enacting Act 72—the Construction Workplace Misclassification Act—in 2011. With the emergence of the platform or “gig” economy, the problem is expanding exponentially. This is particularly concerning given the projections for the number of people expected to work in this sector in the future.² It is becoming all too common for platform-

¹ National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Cost on Workers and Federal and State Treasuries*, 2 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

² Sacha Mehlhase, *Making the Most of the Gig Economy*, Law Technology Today (Sept. 24, 2020) <https://www.lawtechnologytoday.org/2020/09/making-the-most-of-the-gig-economy/>.

companies to take advantage of their position to shackle anyone wanting to work for them with inequitable and constantly changing terms under the guise of an independent contractor relationship. This dynamic allows companies to evade the legal obligations of a traditional employer while retaining all the advantages. A 2021 study found drivers for Uber and Lyft take home as little as \$4.82/hour in Boston, far less than minimum wage, after factoring in expenses and time between customers.³

The effects of misclassification are felt far beyond the homes of those being misclassified. The Keystone Research Center estimated that the Commonwealth lost between \$37.5 and \$136.7 million dollars in unemployment compensation tax, income tax, and workers' compensation premiums in 2016 as a result of misclassification in the construction industry alone.⁴ As early as 2000, long before the expanded prevalence of misclassification, a U.S. Department of Labor commissioned study found that between ten and thirty percent of the employers they audited misclassified workers—likely an underestimate.⁵ The Pennsylvania Department of Labor & Industry's Center for Workforce Information and Analysis recently estimated that fifteen percent of Pennsylvania employers misclassify their employees.⁶ Implementing a solution to the problem of worker misclassification is imperative.

Not all employers that misclassify employees do so intentionally. In our Commonwealth, there is no uniform definition of employee or independent contractor. The Workers' Compensation Act applies one standard, Act 72 another, and the Unemployment Compensation Act, another still.⁷ In addition, a body of common law has developed its own criteria for determining employee status for

³ Ken Jacobs and Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour*, 2 Univ. of Cal. Berkeley, Institute for Research on Labor and Employment (Sept. 29, 2021), <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/>.

⁴ Stephen Herzenberg and Russell Ormiston, *Illegal Labor Practices in the Philadelphia Construction Industry: an Assessment and Action Plan*, 4 (Keystone Research Center, Dec. 2018), https://www.keystoneresearch.org/sites/default/files/KRC_Illegal_Labor_in_Construction_Final.pdf.

⁵ Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

⁶ *Hearing on H. 716 Before the H. Comm. On Labor & Indus.*, 203d General Assembly (2019) (statement of Deputy Sec. of Labor & Indus. Jennifer Berrier) https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2019_0064_0005_TSTMNY.pdf.

⁷ 77 P.S. § 22; 43 P.S. § 933.4; 43 P.S. § 753.

wage and hour purposes.⁸ The result is a patchwork of standards that most workers and employers, especially small businesses, have difficulty understanding and applying.

In its final report issued in December of 2022,⁹ the Statewide Joint Task Force on the Misclassification of Employees proposed common sense, consensus-based solutions to the problem of misclassification. We strongly urge the General Assembly to adopt the Task Force’s fifteen recommendations.

The Task Force recommended that a uniform definition of “employee” be applied across all of Pennsylvania’s labor and employment laws. Due to the unique nature of the construction industry, Act 72’s articulation of the test should be preserved for construction workers. In general, however, the Task Force recommended that the General Assembly consider adopting a streamlined, multifactor test for employee status. Under this test, the three factors examined to determine status are whether:

- 1) The individual is free from control or direction over their work, both under the contract of service and in fact;
- 2) The individual’s work is outside the usual course of business of the employer; and
- 3) The individual is customarily engaged in an independently established trade, occupation, profession or business.

Indeed, Act 72 essentially implements this test, though it provides construction-specific elements to consider for part (3). The test’s ease of application—in contrast to the current mosaic of tests—would simplify compliance for employers, and help them to avoid the confounding scenario in which it is possible for a worker to be considered an employee under one statute and an independent contractor for another. At the same time, it would provide workers with robust protection from misclassification, ensuring that only those truly in business for themselves are classified as independent contractors, level the playing field for law-abiding businesses, and bolster the Commonwealth’s tax receipts.

Next, The General Assembly should enable more robust civil enforcement, and increase civil penalties for misclassification. The Pennsylvania Department of Labor & Industry (“DLI”) should be empowered with a broader range of enforcement tools. Although Act 72 currently provides for stop-work orders, the process for issuing one is so ponderous that, to date, no such order has

⁸ See, e.g., *Com. Dept. of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873-74 (Pa. Commw. Ct. 2003), *aff’d*, 859 A.2d 1253 (Pa. 2004) (applying the economic realities test).

⁹ Statewide Joint Task Force on the Misclassification of Employees, *Final Report* (2022) available at <https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Documents/Act-85-Final-Report.pdf>

ever been issued. In keeping with a broader law that would be applicable across industries, stop-work orders should evolve into cease-operations orders, and the process for obtaining the orders should be streamlined. Under the current statute, it takes, at a minimum, approximately one month to obtain a stop-work order. Often, a construction project has concluded by then, or at least the portion of work completed by the violating employer. The prospect of a cease-operations order will not serve as a powerful deterrent against misclassification until it is a credible threat. DLI should be able to issue a cease-operations order more quickly while still providing notice and an opportunity for the employer to contest it. Additionally, DLI needs the authority to debar employers that misclassify employees from bidding on or participating in state-funded or supervised construction or procurement contracts. Debarring employers that misclassify employees would also underscore the Commonwealth's commitment to working only with contractors that operate within the parameters of the law. To assist with the costs of this increased civil enforcement, DLI should be permitted to assess investigative costs and counsel fees against employers found in violation of the law, and should be provided with additional resources to hire additional investigative and support staff. One possible way to provide more resources is to allocate a portion of the penalties assessed against employers who misclassify workers to support the administrative and enforcement costs of the Bureau of Labor Law Compliance.

With regard to enforcement in criminal cases, the General Assembly should enhance criminal penalties for employers that misclassify employees, and maintain concurrent jurisdiction for criminal prosecution among the Office of Attorney General and District Attorneys. The maximum penalty an employer currently faces, even if they have previously been convicted of misclassifying employees, is conviction for a second-degree misdemeanor, resulting in a maximum \$5,000 fine and up to two years in prison. That misclassification remains a widespread problem in the construction industry, colloquially referred to as simply "the cost of doing business," is a clear indicator that current penalties do not have a sufficient deterrent effect. The Task Force recommended strengthening penalties in order to enhance the deterrent effect. The Office of Attorney General recommends making a first offense in which an employer knowingly misclassifies employees a first-degree misdemeanor,¹⁰ and escalating to a third-degree felony¹¹ for second and subsequent offenses. Additionally, it should be easier to impute culpability for misclassification by supplier employers

¹⁰ Punishable by a maximum \$10,000 fine and up to five years in prison. 18 Pa.C.S. §§ 1101(4) & 1104(1).

¹¹ Punishable by a maximum \$15,000 fine and up to seven years in prison. 18 Pa.C.S. §§ 1101(3) & 1103(3).

onto end-user employers,¹² when appropriate. The current standard for imputing culpability makes it virtually impossible to hold end-user employers who contract with supplier employers that they know misclassify workers accountable. If end-user employers could not simply feign ignorance of the practices of unscrupulous supplier employers, the demand for supplier employers known to misclassify employees would be eliminated. Because these cases are resource intensive, criminal enforcers should be authorized to recover counsel fees and investigative costs from those who are convicted of or plead guilty or *nolo contendere* to criminal charges of misclassification.

Testimony before the Task Force made it clear that labor brokers are a large driver of misclassification within the construction industry, purposely operating below the radar in order to evade enforcers. To address this issue, the Task Force recommended creating a comprehensive system for registering and bonding labor brokers.

Legislation should also address the need for streamlining communications and sharing information between relevant agencies. A number of Commonwealth agencies, including the Office of Attorney General, DLI, and the Department of Revenue, all play roles in rooting out misclassification. However, statutory strictures placed on some agencies that prevent them from sharing information and the concomitant lack of a formal system for sharing information prevent the agencies from working together to identify patterns and repeat offenders. If the agencies were able to more freely share information, it would increase efficiency in enforcement efforts. To that end, the Task Force recommended authorizing an interagency working group to coordinate enforcement strategies and – where appropriate – to share information, including FEIN numbers. Further, the Task Force recommended expanding statewide clearance programs to require that state agencies pull or not renew current licenses if an employer has not paid all penalties associated with knowingly misclassifying employees.

As a complement to expanded enforcement measures, the General Assembly should provide resources for public agencies to conduct public education campaigns. Broad public education about worker misclassification will assist employers who wish to abide by the law to understand what their obligations are, and will also assist misclassified workers to recognize that they have been misclassified and what resources are available to them.

Finally, the Legislature should consider authorizing misclassified employees to pursue a private right of action. Private rights of action are a common feature of labor and employment laws, and already exist in Pennsylvania's Wage Payment and Collection Law and Minimum Wage Act.

¹² In the construction context, they are generally referred to as labor brokers and prime contractors, respectively.

Permitting private actions would relieve DLI of some of its overwhelming civil enforcement burden and create an additional deterrent against misclassification. Specifically, we recommend authorizing plaintiffs to recover remedies and penalties for misclassification currently available under the Wage Payment and Collection Law, which would provide courts and litigants a familiar framework for assessing claims of misclassification.

Unchecked employee misclassification has had, and continues to have, a devastating effect on Pennsylvania. It robs employees of the wages, benefits, and protections they are entitled to, forces law-abiding employers to compete on an uneven playing field, and drains badly needed state and local revenues. The Office of Attorney General urges the General Assembly to take action to rectify this urgent matter.

On behalf of Acting Attorney General Henry, thank you for the opportunity to testify today.



Eastern Atlantic States REGIONAL COUNCIL OF CARPENTERS

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January 27, 2023

Official Remarks

House Democratic Policy Committee's Subcommittee on Labor, Energy, & Development

Drew Simpson, Regional Manager of the Eastern Atlantic States Regional Council of Carpenters

(Pittsburgh) Representatives Ryan Bizzaro, Nick Pisciotano, Anita Kulik and distinguished members of the House Democratic Policy Committee's Subcommittee on Labor, Energy, and Development, good morning and thank you for allowing me to make remarks today. My name is Drew Simpson and I am a Regional Manager for the Eastern Atlantic States Regional Council of Carpenters. In Pennsylvania alone we represent roughly 20,000 of the best trained and most skilled construction workers in the United States. In addition to my role as a representative for my union, I had the distinct honor to serve as Senator Jay Costa's appointee to the Joint Task Force on the Misclassification of Employees.

Our union is happy to host this Committee today at our Eastern Atlantic States Regional Council of Carpenters offices in Pittsburgh to continue the important conversation the Task Force has started regarding the misclassification of employees and the use of labor brokers with the hopes that this will eventually move beyond conversation to legislative action.

As you know, the Task Force, created by Act 85 of 2020, was a bipartisan group of seven, four appointees representing labor, and business, and one each from the offices of the Department of Labor and Industry (Chair of the Committee), the Department of Revenue, and the Attorney General's Office. We were tasked with investigating employee misclassification and developing recommendations on how to address and reduce this unlawful practice in our great Commonwealth.

As part of our efforts, we submitted two reports to the General Assembly:

- An annual report on March 1, 2022 with 15 unanimously approved recommendations; and



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- A final report on December 1, 2022 reaffirming our 15 unanimously approved recommendations and incorporating what we had learned since our March 1st annual report.

A quick note for the committee: As a carpenter, most of my testimony will be geared towards misclassification in the construction industry. However, as someone who served on the Task Force, our monthly meetings took us into all aspects of the workforce, including the gig economy, and allowed my colleagues and I to hear testimony from numerous stakeholders on this issue. It is obvious that misclassification happens beyond the construction industry, and I am committed to ensuring, as you should be, the adoption of all 15 recommendations.

Let's start with the numbers published by the Task Force, which I have included with my testimony, and you can also find on page 12 of the Task Force's final report. As you can see from the numbers, misclassification is a serious problem in Pennsylvania.

I'd like to draw your attention to the estimated losses of revenue to the UC Trust Fund and the General Fund:

- \$91 million annual lost revenue to the UC Trust Fund (3rd quarter of 2021 to the 2nd quarter of 2022).
- \$6.4 million to 124.5 million estimated range of lost revenue due to the General Fund due to misclassification in tax year 2019.

As you can see from these numbers in particular, misclassification is tax fraud.

Independent contractors are not afforded the same rights as employees and that means they aren't as "expensive" as employees. By misclassifying an employee as an independent contractor, a corrupt contractor can evade state, local, and federal taxes. They also avoid paying Workers' Compensation and Unemployment Compensation premiums, in other words, they commit insurance fraud as well. Furthermore, in research conducted by UC Berkely's Labor Center, they found that "28% of families of construction workers in Pennsylvania are enrolled in one or more safety net programs at a cost to the state and federal government of \$428 million per year. Compared to all Pennsylvania workers, construction workers are more than twice as likely to lack health insurance (7% compared to 16%).¹

In other words, these fraudulent schemes allow corrupt contractors to illegally lower their labor costs to underbid law-abiding contractors, meaning these contractors profit off the backs of



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workers many times through taxpayer dollars. Then, they push the cost of this work back onto the taxpayer. These corrupt contractors exploit our workers and then hand us the bill.

We have an entire class of workers being victimized. I wish I could say it was as simple as just registering labor brokers, increasing enforcement, or providing misclassified employees with a private right of action. But as you can see from the Task Force's reports, this issue is complex, and there is no silver-bullet policy fix. Instead, the only way to protect those who can't speak for themselves is to take on misclassification from every angle and use every tool at our disposal. Those tools included, but were not limited to, allowing State Agencies to share information, giving the Attorney General's Office legal jurisdiction over this issue and allowing agencies to keep monies from fines collected, which will allow for more investigators to be hired in the Department of Labor and Industry.

Just as each of you were elected to speak on behalf of your constituents, the union was built to speak on behalf of the workers who are not able to speak for themselves, and I know that we are all invested in giving Pennsylvanians the opportunity to make family sustaining wages in a safe environment so that our communities can thrive.

I look forward to our continued partnership as you deliberate on the Task Force's 15 policy recommendations and consider potential legislative fixes. Thank you again for taking the time to hold this meeting today and inviting me to testify. I'm happy to take any questions.