



National Employment
Law Project

**NELP Summary of Independent Contractor Reforms
New State and Federal Activity
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Catherine K. Ruckelshaus
Sarah Leberstein
National Employment Law Project
212-285-3025 x 306 or 313
cruckelshaus@nelp.org; sleberstein@nelp.org

Misclassifying employees as independent contractors (or “1099-ing” them, so-called because of the IRS Form 1099 issued to independent contractors), is a problem prevalent in many industries. This practice, as well as the related tactic of paying workers off the books, can save employers as much as 30% of payroll and related taxes otherwise paid for “employees.” If undetected, employees miss out on unemployment insurance, workers’ compensation, fair pay, and other workplace protections. Misclassification undercuts the competitiveness of law-abiding businesses. For more information on these practices and their impacts on workers and the economy, see *Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification*, NELP’s 2010 Congressional testimony.¹

The following is a select summary of recent independent contractor reform activity in the states and at the federal level, including state Attorney General enforcement actions, studies reporting on the costs and prevalence of independent contractor abuses, and legislative activity.²

¹ Available at <http://www.nelp.org/page/-/Justice/2010/MisclassTestimonyJune2010.pdf?nocdn=1>. See also, *Providing Fairness to Workers Who Have Been Misclassified as Independent Contractors*, available at <http://www.nelp.org/page/-/Justice/IndependentContractorTestimony2007.pdf>; *Independent Contractor Misclassification Imposes Huge Costs on Workers and State Treasuries*, available at <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>.

² This publication updates earlier versions that collect state actions going back several years. For earlier versions, see *Combating Independent Contractor Misclassification in the States: Models for Successful Reform*, at http://nelp.3cdn.net/a7199e02c9a2dff987_g4m6bhinn.pdf; the 2008 Update, at http://nelp.3cdn.net/ed7571b66f5e2cc263_fom6bn8pp.pdf; and the 2009 Update, at <http://www.nelp.org/page/-/Justice/SummaryIndependentContractorReformsJuly2009.pdf>, and the 2010 update at <http://www.nelp.org/page/-/Justice/2011/2010IndependentContractorReformUpdate.pdf?nocdn=1>.

³ Special thanks to Lenore Palladino for her research and writing on this year’s update.

NELP has compiled a 50-state chart of legislative activity in the 2010 and 2011 sessions.³ We welcome news from advocates on executive orders, studies, and legislative activity in their states; we will include it in our updated charts, and we are happy to assist advocates with legislative and policy reforms. Contact us at sleberstein@nelp.org or cruckelshaus@nelp.org.

State Attorney General and Department of Labor Efforts.

Independent contractor misclassification problems have continued to receive growing attention at the state level, in part due to studies showing billions of dollars of lost revenues, as described below. These studies have spurred state Attorneys General and Departments of Labor from several states to pursue independent contractor abuses. Some examples include:

- **Massachusetts:** In the past year the Attorney General continued her aggressive enforcement efforts targeting independent contractor abuses in a range of industries, including a tax fraud case against a Dedham construction company that resulted in \$100,000 in fines and restitution. The AG's office also reached a ground-breaking \$3 million settlement with FedEx Ground to settle claims that the company misclassified drivers as independent contractors. MA's Joint Task Force on the Underground Economy and Employee Misclassification recovered nearly \$6.5 million through its enforcement efforts: \$2 million in new unemployment insurance taxes; \$1.6 million in overdue taxes through review and investigation; \$1.8 million in fines, and \$1 million in other funds recouped through civil and criminal actions.³
- **New York:** In the past year, the Joint Enforcement Task Force on Employee Misclassification (JETF) identified over 18,500 instances of employee misclassification, discovered over \$314 million in unreported wages, assessed over \$10.5 million in unemployment taxes, over \$2 million in unpaid wages and over \$800,000 in workers' compensation fines and penalties. The JETF carried out its work through coordinated assignments, systematic referrals and data sharing between agencies, as well as joint enforcement sweeps involving a coordinated visit and worksite inspection by JETF members. The JETF conducted 14 joint sweeps in 2010, focusing its efforts on construction sites, restaurants, and retail establishments.⁴
- **Connecticut:** The Department of Labor issued 23 Stop-Work orders against subcontractors working on a \$26 million HUD project after finding that the firms had misclassified their employees and failed to have adequate workers' compensation insurance.⁵ In the fiscal year ending June 30, 2011, the CT DOL issued a total of 159 Stop-Work orders to employers who did not comply with the state's workers' compensation laws.⁶

³ Massachusetts' Joint Enforcement Task Force 2010 Annual Report available at http://www.mass.gov/Elwd/docs/dia/task_force/ar_2010.pdf.

⁴ New York's Joint Enforcement Task Force February 2011 Report available at: [http://www.labor.ny.gov/ui/PDFs/2011%202011%20Misclassification%20Report%20to%20the%20Governor%20\(4\)%20\(2\).pdf](http://www.labor.ny.gov/ui/PDFs/2011%202011%20Misclassification%20Report%20to%20the%20Governor%20(4)%20(2).pdf).

⁵ See http://www.myrecordjournal.com/meriden/article_5f479d98-5a28-11e0-973e-001cc4c03286.html.

⁶ See <http://www.ctdol.state.ct.us/communic/2011-9/9-1-112011WageRecovery.pdf>.

- **California:** California’s new Attorney General, Kamala Harris, engaged stakeholders in a new “Civil Rights Enforcement Work Group,” with a recommendation that an official inter-agency Task Force be established to address the problem of independent contractor misclassification.⁷
- **Utah:** The Utah Attorney General’s Office and Labor Commission launched an investigation into a new misclassification scheme, whereby a Limited Liability Corporation (LLC) offered, for a fee, to reclassify construction firms’ employees as “owners” of the LLC for an advertised 18-26% savings in labor costs. The construction firms then contracted with the workers as “owners,” rather than employing them directly. The AG described this practice as a potential abuse of the state’s LLC Act.⁸
- **Florida:** A working group comprised of representatives from the Chief Financial Officer’s Division of Insurance Fraud, Office of Financial Regulation, the Attorney General’s Office, and the construction and money service industries launched an investigation into a scheme by construction firms and subcontractors to evade payment of workers’ compensation premiums, thereby cheating workers out of protection and underbidding competitors. The firms paid a fee to “borrow” a certificate of workers’ compensation insurance bought by a shell company at a minimal level of coverage. The firms sought to evade detection by using money service businesses for transactions with the shell company.⁹

Inter-Agency Task Forces and Studies.

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and commissions to study the magnitude of the problem and coordinate and strengthen enforcement mechanisms. State-level studies have helped advocates make the case for needed reforms by showing the prevalence of the problem and the attendant losses of millions of dollars in state workers’ compensation, unemployment insurance, and income tax revenues. For a round-up of state and federal studies, see <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>. This past year, several more states enacted or proposed measures to assess the costs of misclassifying employees as independent contractors, to study the underground economy, and to coordinate investigation and enforcement efforts.

Sample executive orders issued and legislation passed in the last year include:

- **Virginia:** Senate Joint Resolution No. 345 directs the Joint Legislative Audit and Review Commission to conduct a study of employee independent contractor misclassification, including (1) a review of the status of misclassification; (2) the

⁷ See <http://smartoncrimepolicy.org/civilrightsenforcement.html>.

⁸ See Report by Lori Prichard, *KSL 5 News Investigates Potential Worker Misclassification in the Construction Industry* (March 26, 2010), available at <http://www.ksl.com/?nid=148&sid=10934339>.

⁹ Available at <http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=3924>.

consequences to the workforce; (3) the amount of revenue lost due to misclassification; and (4) recommended strategies to combat the problem. The due date for the report is first day of next regular session of the General Assembly.¹⁰

- **New Hampshire:** The Governor issued Executive Order 2010-3, charging the Department of Labor with coordinating state agency efforts to identify and investigate misclassification and establishing an information-sharing system among the agencies. The Order establishes a Joint Agency Task Force on Employee Misclassification Enforcement, comprising the Commissioners of these agencies and the Attorney General, charged with examining and evaluating enforcement mechanisms; identifying barriers to information-sharing under current law and proposing actions to overcome these barriers; working cooperatively with business, labor and community groups to reduce misclassification, including through a public website;¹¹ and issuing a public report each year.¹²
- **Utah, SB 11:** In March, the Governor signed the Worker Classification Coordinated Enforcement Act, amending a 2008 law that created an independent contractor database and an enforcement task force. The law creates a worker classification coordinated enforcement council, whose members include the Labor Commissioner or designee, the Department of Commerce, the Department of Workforce Services, Tax Commission and Attorney General. The task force is charged with coordinating enforcement and regulatory efforts and studying the issue, and must report on (a) how to reduce costs due to misclassification; (b) how to educate the public on classification requirements; (c) how to facilitate information-sharing between agencies; and (d) the need for a database.¹³

State Legislation Addressing Independent Contractor Misclassification.

State legislation introduced or passed in the last legislative sessions proposed a variety of solutions to the independent contractor problem. Some examples are provided below.¹⁴

1. The Simple Fix: Laws that create a presumption of “employee” or “employer” status for those performing or receiving labor or services for a fee.

The most effective laws combating independent contractor misclassification are those that are the simplest to administer. Creating a presumption of employee status, either for all labor and employment laws, or by individual law, is one example of a “simple fix.”¹⁵ The best

¹⁰ Available at <http://lis.virginia.gov/cgi-bin/legp604.exe?111+ful+SJ345ER>.

¹¹ <http://www.nh.gov/nhworkers>.

¹² Available at <http://www.governor.nh.gov/media/orders/documents/2010-03.pdf>. In 2008, the NH Legislature created the Task Force to Study Employee Misclassification.

¹³ Available at <http://le.utah.gov/~2011/bills/sbillenr/sb0011.pdf>.

¹⁴ While only a handful of examples are provided here, NELP has information on additional bills introduced or passed in the states in the past year; contact us for specific information about any legislation proposed and enacted in your state if you do not see it listed.

¹⁵ Similarly, laws can create a presumption of employer status.

standard requires employers to overcome this presumption by showing that: (a) an individual is free from control or direction over performance of the work, both under contract and in fact; (b) the service provided is outside the usual course of the business for it is performed; and (c) an individual is customarily engaged in an independently established trade, occupation or business. This “ABC” test for non-employee status is the most objective and the most difficult for employers to manipulate.

A presumption can help avoid problems that arise with efforts to harmonize the definitions of “employee” under each individual employment or labor law, as discussed below.

Of the presumption bills introduced in the last legislative sessions, the Ohio and Virginia legislation provide the strongest and most comprehensive protections for workers.

Sample Bills Introduced:

- **Ohio, HB 137:** The bill would enact a standard definition of “employee” throughout the labor code, defining employee as an individual who performs services for compensation unless the individual meets a 7-step test that incorporates the ABC test factors. It states that an employer’s failure to withhold taxes from an individual’s pay, or to report wages paid to an individual for workers’ compensation and unemployment compensation purposes, shall not be considered in determining whether that individual is an employee. The bill would provide for civil and criminal penalties for misclassification of an employee; create a private right of action for employees, labor organizations, and other interested parties; bar state agencies from contracting with an employer that has committed multiple misclassification violations; and prohibit retaliation against any individual who exercises any right to oppose misclassification.¹⁶
- **Virginia, Worker Misclassification Act:** The bill would establish a presumption that an individual performing services for remuneration is an employee unless the individual meets the ABC test. The bill would provide for the imposition of criminal and civil penalties, Stop-Work orders, and debarment from public contracting against employers who misclassify. The bill also would give employees who have been misclassified a private right of action. The bill would prohibit retaliation, and would create a rebuttable presumption that retaliation has occurred when adverse action is taken against a worker within 90 days of exercising any right to protest misclassification.¹⁷
- **North Carolina, HB 790:** The bill would create a presumption of employee status that could be overcome if the worker satisfied the ABC test, and it would clarify that “It is not necessary for the amount of control to extend to all the details of the physical performance of the duties performed by an individual for an employer to consider the individual an employee of the employer.” The bill would prohibit retaliation; contains a non-waiver provision; would create a private right of action with a three year statute of limitations; and would require that employers that classify their workers as independent

¹⁶ Available at http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_137.

¹⁷ Available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+SB34>.

contractors post notices in English and Spanish advising the workers of their rights under the bill.¹⁸

2. Sector-specific laws that target industries with rampant independent contractor misclassification, such as construction and delivery.

Some legislatures aimed “presumption” bills or other new enforcement mechanisms at particular sectors with persistent independent contractor abuses. Of the proposals, the acts passed in Pennsylvania and Delaware provide the strongest and most comprehensive protections for workers.

Laws Passed:

- **Pennsylvania, Construction Workplace Misclassification Act:** The Act creates a rebuttable presumption of employee status for workers in the **construction industry** for the purposes of the state’s workers’ compensation and unemployment insurance laws. The presumption can be overcome if the worker satisfies the ABC test, and the law includes specific criteria for when an individual is “customarily engaged in an independently established trade, occupation, profession or business,” including that the individual must carry \$50,000 in liability insurance for the life of the contract. The law prohibits retaliation and provides for Stop-Work orders as well as penalties per each day of the violation.¹⁹
- **Delaware, Workplace Fraud Act:** The act provides that an employment relationship is presumed to exist in the **construction services industry** whenever work is performed by an individual for remuneration, unless the employer demonstrates that the individual meets the ABC test, or an alternate enumerated test. The new law provides for civil penalties, administrative fines, Stop-Work orders, and possible debarment from public contracting against employers that knowingly misclassify employees as independent contractors. The act also creates a private right of action for employees and a prohibition on retaliation. Additionally, it prohibits an employer or person from knowingly incorporating or forming a corporation or other business entity for the purpose of evading the provisions of this law.²⁰
- **Maine, Act Concerning Independent Contractors in the Trucking and Messenger Courier Industries:** This law creates a rebuttable presumption of employee status for workers in the **trucking and messenger service industries**. To be considered an independent contractor, the individual must satisfy the following factors: (1) owns the motor vehicle or holds it under a lease agreement; (2) is responsible for the maintenance of the motor vehicle; (3) is responsible for substantially all of the operating expenses of the motor vehicle; (4) is responsible for paying the operator’s personal expenses; (5) is responsible for supplying the necessary services to operate the motor vehicle; (6) is

¹⁸ Available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H790v1.pdf>.

¹⁹ Available at <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=953319&mode=2>

²⁰ Available at [http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/$file/legis.html?open).

compensated based on the factors directly related to the work performed; (7) substantially controls the means and manner of performing the services related to the business; and (8) enters into a written contract.²¹

Sample Bills Introduced:

- **California, A 950:** This bill would deem **drayage truck drivers** to be employees of the entity or persons who arranges for or engages their services for purposes of all California laws that govern employment, including workers' compensation and unemployment insurance, occupational safety and health laws, and provisions that prohibit retaliation and discrimination against employees. The bill passed the Assembly Labor Committee on 5/4/11.²²
- **Kansas, H.2131:** The bill would create a presumption of employee status for workers in the **construction industry**, which could be overcome if the worker satisfies the ABC test, or, in alternative to the "C" prong of test ("engaged in an independently established trade") satisfied a 12-factor test establishing "legitimate" sole proprietor or partnership status.²³
- **New York, A. 8506:** This bill would create a presumption of employee status for workers in the **commercial goods transportation industry**, which could be overcome if the worker satisfied the ABC test, or, alternatively, qualified as a "separate business entity" pursuant to a 12-part test. It would require employers to post a notice informing workers of their rights under the law; subject violating employers to civil and criminal penalties; and contains an anti-retaliation provision. The bill was introduced at the end of the 2010-2011 session and carried over to the 2011-2012 session.²⁴
- **New Jersey, A. 4146:** This bill would create a presumption of employee status for workers in the **drayage trucking and parcel delivery trucking industry**, which could be overcome if the worker satisfied the ABC test. The definition would apply to prevailing wage, unemployment compensation, temporary disability benefits, state tax, and the wage and hour laws. The bill would provide for criminal penalties, including fines and imprisonment; authorize the Labor Commissioner to assess administrative penalties of up to \$2,500 for a first violation and up to \$5,000 for subsequent violations; provide for a private right of action for misclassified workers and for representatives, including labor unions; and prohibit retaliation and provide that adverse action taken against a person within 90 days of the person's exercise of these rights raises a rebuttable presumption of retaliation.²⁵

²¹ Available at http://www.mainelegislature.org/legis/bills/bills_125th/chappdfs/PUBLIC176.pdf.

²² Available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0901-0950/ab_950_bill_20110218_introduced.html.

²³ Available at http://www.kslegislature.org/li/b2011_12/year1/measures/documents/hb2131_00_0000.pdf.

²⁴ Available at http://assembly.state.ny.us/leg/?default_fld=&bn=A08506&term=2011&Summary=Y&Text=Y

²⁵ Available at http://www.njleg.state.nj.us/2010/Bills/A4500/4146_I1.PDF.

- **Washington, HB 1701:** This bill would impose financial penalties on **construction contractors** that misclassify employees as independent contractors. The bill would make it a violation, under certain circumstances, for a construction contractor to engage more than two independent contractors to work on the same task on a single job site. The rationale for this provision is that if a number of workers are working on the same task at the same site, they must be under another party's direction and control, and thus cannot be exempt independent contractors. The bill would leave in place a 7-part test for determining independent contractor status.²⁶

3. Laws that authorize civil actions by losing bidders or private attorneys general.

Some legislatures passed laws or proposed bills authorizing private attorney general actions to allow members of the public to recover civil penalties or other monies owed due to independent contractor misclassification.

Laws Passed:

- **Massachusetts, S 2375:** Signed by the Governor in August 2010, the Act provides for a private Attorney General action by any three private persons against an employer that has failed to comply with the workers' compensation law, including by independent contractor misclassification. The plaintiffs are entitled to recover 25 percent of the amount not paid by an employer due to non-compliance, plus liquidated damages, and the remainder is deposited into the Workers' Compensation Trust Fund.²⁷

Sample Bills Introduced:

- **Ohio, HB 137:** The bill would permit aggrieved parties to file a complaint with the Director of Commerce or to file suit if the aggrieved party reasonably believes that the employer is in violation of any of the bill provisions. Aggrieved party is defined to include: (1) an employee; (2) an employer association; (3) an interested party; and (4) a labor organization. In any civil action brought by an aggrieved party to enforce the penalty, the court must award the aggrieved party 10% of the amount of the penalty owed by the employer, with the remaining amount paid to the Director.²⁸
- **New York, A 3258:** The bill would create a private right of action for contractors against winning bidders that knowingly misclassify one or more of their employees as independent contractors to avoid paying workers' compensation premiums. The bill would permit the plaintiff to recover monetary damages in an amount not less than ten percent of the winning bid, as well as costs and attorneys' fees.²⁹

²⁶ Available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1701.pdf>.

²⁷ Available at <http://www.mass.gov/legis/bills/senate/186/st02pdf/st02375.pdf>.

²⁸ Available at http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_137.

²⁹ Available at http://assembly.state.ny.us/leg/?default_fld=&bn=A03258&term=2011&Text=Y

4. Laws that increase penalties or provide for Stop-Work orders for independent contractor misclassification.

Some legislatures have increased the penalties imposed for various violations of labor and employment laws related to misclassification of employees as independent contractors, or have introduced Stop-Work orders to address such violations.

While penalty provisions can be useful, by themselves they are not sufficient to combat abuses because the penalties are typically only recoverable by a public enforcement agency with limited resources. Stop-Work orders are effective when used aggressively, but again can only be invoked by public enforcement agencies. Any penalty enhancements must therefore be accompanied by a private right of action for aggrieved workers and their advocates, including unions and community groups, to ensure meaningful protection against independent contractor abuses.³⁰

Sample Bills Introduced:

- **Massachusetts, S 968:** The bill would authorize the imposition of Stop-Work orders against an employer for failure to withhold and pay payroll taxes, and for failure to make required unemployment insurance contributions. It would also provide for penalties, debarment, and liens against the violating employer, and allows for actions brought by losing bidders. Employees affected by a Stop-Work order pursuant to this law would be entitled to be paid at their regular rate of pay, and at least at the minimum wage, for the first ten days of work lost pursuant to an order.³¹
- **Kansas SB 157:** The bill would authorize the Attorney General to investigate allegations of independent contractor misclassification and would provide for a penalty of \$50 per day per misclassified employee up to a maximum of \$50,000. Note that the bill also proposes to adopt the IRS test for employee-employer relationship into the state law, which would weaken the existing state law definitions of covered employees. The bill went to the Senate Commerce Committee on 5/13/2011.³²
- **California, SB 459:** The bill would create a statutory violation for willful misclassification of individuals as independent contractors. It would prohibit charging a fee to or making deductions from the compensation of individuals who have been misclassified. It would subject employers to civil penalties ranging from \$5,000 to \$15,000 per violation, and penalties of between \$10,000 and \$25,000 where the Labor and Workforce Development Agency or court determines that there is pattern or practice of misclassification violations. It would authorize the Labor Commissioner to assess civil and liquidated damages. It would also require the agency to notify the Contractors'

³⁰ Laws should also provide for attorney's fees for the prevailing plaintiffs in order to enable low-wage workers to get attorneys to bring their claims.

³¹ Available at <http://www.malegislature.gov/Bills/187/Senate/S00968>.

³² Available at http://www.kslegislature.org/li/b2011_12/year1/asures/documents/sb157_00_0000.pdf.

State License Board of a violator that is a licensed contractor, and require the board to initiate an action against the licensee. The bill was enrolled on 9/12/2011.³³

5. Initiatives to stem the formation of LLCs and other business entities for the purpose of evading labor and employment laws.

Some states are beginning to crack down on a new form of independent contractor abuse, whereby employers require workers to form or become a partner of a Limited Liability Corporation (LLC) or other shell business form in order to get work. The employer avoids employing the worker and becoming subject to labor and employment laws by contracting with the worker in his or her capacity as an owner of or partner in the shell company.

State reports:

- **Minnesota:** According to a report by Minnesota's Advisory Task Force on Employee Misclassification, thousands of construction workers have recently formed LLCs but may not meet the legal test for LLCs or comply with legal obligations imposed on legitimate business entities. This trend could be in response to new tougher state restrictions on misclassification, and due to the fact that the MN workers' compensation and unemployment laws contain exemptions for business entities registered with the State, such as certain LLCs and closely held corporations.

Laws Passed:

- **Delaware, Workplace Fraud Act:** This law contains a provision prohibiting an employer or person from knowingly incorporating or forming a corporation or other business entity for the purpose of evading the provisions of the Act.³⁴
- **Utah, SB 35:** The law clarifies that it constitutes workers' compensation insurance fraud to knowingly, recklessly, or intentionally misclassify an employee as a sole proprietor, an owner, a partner, an officer, or a member in a limited liability company. The law also creates a rebuttable presumption that an unincorporated entity required to be licensed under the Utah Construction Trades Licensing Act is the employer of each individual who holds an ownership interest in the entity.
- **Utah, SB 0191:** In addition to requiring that all workers' compensation waivers be issued by the Utah Labor Commission, the bill permits the Commission to investigate the legitimacy of a business entity's decision not to cover an owner, partner, corporate officer, or director as an employee under its worker's compensation policy.

³³ Available at <http://www.leginfo.ca.gov/bilinfo.html>.

³⁴ Available at [http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/$file/legis.html?open).

Sample Bills Introduced:

- **Texas, HB 2989:** This bill contains a provision making it a violation for a person to knowingly form or assist in the formation of a corporation, partnership, Limited Liability Corporation, or other business entity, or to pay or collect a fee for use of one of these entities, for the purpose of facilitating a violation of the independent contractor misclassification laws.³⁵
- **Louisiana, HB 535:** This bill would make it unlawful for an individual to knowingly form or assist in the formation of a corporation, partnership, Limited Liability Corporation, or other business entity for fraudulent purposes. Offending parties would be subject to a fine of \$2000 for the first violation, and \$10,000 for each subsequent violation.³⁶
- **North Carolina, HB 790:** This bill contains a provision prohibiting a person from incorporating or forming or assisting in the incorporation of formation of a corporation, partnership, Limited Liability Corporation or other entity, or paying or collecting a fee for use of one of these entities, to facilitate independent contractor abuses or evade detection of any the bill's provision.³⁷

When Advocating for Independent Contractor Reforms, Look Out for Efforts to Undermine Employee Coverage or Workplace Standards Enforcement.

1. **Laws that “harmonize” the definitions of “employee” or “independent contractor” under state labor and employment laws in such a way that coverage is actually narrowed for employees.**

Employer groups often push “clarification” bills, purportedly to clear up confusion and multiplicity of disputes over employee status. However, many of these proposals propose to use the convoluted common-law tests for employee status that are easy for employers to manipulate (such as the IRS “20-factor” test).³⁸ The effect is to water down more expansive laws that make it easier for workers to claim that they are employees.

Sample Laws Passed:

- **Maine, Act to Modify the Laws Regarding Status as an Independent Contractor:** This Act revises the definition of independent contractor for purposes of the state's UI and workers' compensation law, replacing the statute's ABC test with an A and B or C

³⁵ Available at <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB02989I.pdf#navpanes=0>.

³⁶ Available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=742071>.

³⁷ Available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H790v1.pdf>.

³⁸ The IRS now groups these 20 “common law” factors into 3 main categories. See <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>.

test. The new test sunsets in 2012. A work group is charged with developing a new test and recommending it to the legislature in January 2012.³⁹

Sample Bills Introduced:

- **Vermont, H 247:** The bill proposes to establish a common definition of independent contractor for the workers' compensation and unemployment insurance laws. The bill would replace the ABC test currently used in the unemployment law, and the test (not ABC) currently used in the workers' compensation statute, with a test incorporating many of the IRS common law factors.⁴⁰

2. Laws that narrow the definition of employee for workers in specific sectors.

Employers in particular industries often seek to carve out independent contractor exemptions for their workers from the broad definitions of employee in certain labor and employment laws.

Laws Passed:

- **Maryland, Chapter 625:** This law expands an existing narrowly-defined exemption for messengers from the state's unemployment insurance system to encompass a broad range of delivery service workers, creating a rule that these workers are independent contractors if they have signed an independent contractor agreement containing certain provisions with their employer.⁴¹

Sample Bills Introduced:

- **New York, A 1852:** This bill would repeal an existing chapter of the labor law that currently provides for the inclusion of models under the labor standards and workers' compensation laws. In its place, it would provide for an exemption from the labor laws for models who meet a several factor "control" test.⁴²

3. Laws that add anti-immigrant provisions to independent contractor misclassification bills.

States may introduce bills pairing misclassification reforms with measures requiring employers to use the federal E-Verify electronic databases to verify work authorization, to check the immigration status of employees, or creating punitive sanctions for those who employ undocumented workers. These measures only serve to force workers further underground, hindering enforcement efforts against employers.

³⁹ Available at http://www.mainelegislature.org/legis/bills/bills_125th/chappdfs/PUBLIC292.pdf.

⁴⁰ Available at <http://www.leg.state.vt.us/docs/2012/bills/Intro/H-247.pdf>.

⁴¹ Available at http://mlis.state.md.us/2011rs/chapters_noln/Ch_625_sb0685T.pdf.

⁴² Available at <http://assembly.state.ny.us/leg/?bn=A01852&term=2011>.

Sample Bill Introduced:

- **New York, A 6793:** In addition to providing for a standardized definition of “employee” in the tax, workers’ compensation and labor laws, this bill would also require undocumented workers to pay state income tax and would provide that if the worker fails to pay the tax then his or her employer will instead be responsible for complying with the income tax law in the place of the undocumented worker. The Bill was held for consideration in the Labor Committee.⁴³

4. Laws that repeal taskforces or study commissions.

Politicians in several states have exploited budget concerns to justify repeal of independent contractor taskforces or study commissions.

- **Maine, Executive Order 10 FY 11/12:** In January, Governor LePage signed an executive order abolishing the state’s task force, created in 2009 to study worker misclassification and discourage employers from misclassifying employees as independent contractors. The order states “there is no need for a task force, an extra layer of bureaucracy,” and that the “existence of a task force... has created uncertainty within the business community.”⁴⁴

Federal Action Addressing Independent Contractor Misclassification

- **Payroll Fraud Prevention Act:**⁴⁵ The bill was introduced in the House in April 2011 by Senator Brown, and would amend the recordkeeping requirements of the Fair Labor Standards Act (FLSA) to require employers to keep records relating to non-employees who perform services for remuneration. The bill would also require an employer to provide notice in writing of a worker’s classification and to keep accurate classification of the worker as either an employee or non-employee; would establish a presumption that an individual is an employee under the FLSA if the employer violates these recordkeeping and notice requirements; and would provide for the imposition of civil penalties. The bill would also amend the Social Security Act to require state unemployment insurance programs to implement investigative procedures and establish penalties for misclassification; would require the Department of Labor (DOL) to measure state performance in this independent contractor misclassification enforcement when conducting unemployment compensation tax audits; would require information sharing within the DOL regarding possible independent contractor abuses under the FLSA, and authorize the sharing of such information with the IRS; and would require that targeted

⁴³ Available at http://assembly.state.ny.us/leg/?default_fld=&bn=A06793&Summary=Y.

⁴⁴ Available at

http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=186554&v=article2011

⁴⁵ Available at <http://www.govtrack.us/congress/billtext.xpd?bill=s112-770>

audits conducted by the Wage & Hour Division include industries with frequent incidence of employee misclassification. The bill was referred to the HELP committee in April 2011.⁴⁶

- **Taxpayer Responsibility, Accountability and Consistency Act:** The bill was introduced by Senator Kerry in 2009.⁴⁷ This proposal would amend the Internal Revenue Code to modify the rules giving employers a “safe harbor” when they misclassify employees as independent contractors, and would permit the IRS to issue guidance on the subject. A provision like this bill is vital to serious reform seeking to combat independent contractor abuses.⁴⁸
- **Department of Labor Employee Misclassification Initiative:** The Department of Labor has initiated a multi-agency initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification. The Initiative was launched in 2010. In the DOL’s 5-Year Strategic Plan, the Department commits to a comprehensive initiative focused on enforcement, working closely with the Treasury Department. The Department plans: targeted Wage & Hour Division investigations in industries with the most substantial independent contractor abuses, and training for investigators on the detection of misclassified workers; targeted efforts to recoup unpaid payroll taxes due to misclassification, including a pilot program to reward states with the most success at detecting and prosecuting employers that misclassify; coordination with the states on enforcement litigation against multi-state employers that routinely abuse independent contractor status; training for Occupational Safety and Health inspectors on misclassification issues; and legislative changes requiring proper classification, providing penalties for misclassification, and restoring protections for employees who have been improperly classified.⁴⁹ In addition, the Obama Administration’s budget for 2011 sought \$25 million for the DOL’s Misclassification Initiative to target misclassification with additional enforcement personnel and competitive grants to state unemployment insurance programs to address independent contractor abuse.
- The Internal Revenue Service recently announced the launch of the **Voluntary Worker Classification Settlement Program**, which will enable employers to resolve past worker misclassification problems by voluntarily reclassifying their workers prospectively and making a minimal payment covering past payroll tax obligations rather than waiting for

⁴⁶ Available at <http://www.govtrack.us/congress/bill.xpd?bill=s112-770>. The Payroll Fraud Prevention Act precursor, the Employee Misclassification Prevention Act (EMPA), was introduced in April 2010. See, <http://www.nelp.org/page/-/Justice/2010/MisclassTestimonyJune2010.pdf?nocdn=1>; http://www.dol.gov/sec/media/congress/20100617_Harris.htm.

⁴⁷ <http://www.govtrack.us/congress/billtext.xpd?bill=s111-2882>

⁴⁸ A major bar to effective enforcement against independent contractor abuses is the safe harbor provision in the Internal Revenue Code, at Section 530 of the Revenue Act of 1978, 26 U.S.C. § 7436. Currently, employers decide whether their workers are employees or independent contractors with little scrutiny from the IRS and no consequences. Under current law, an employer who is found by the IRS to have misclassified its workers can have all employment tax obligations waived. Section 530 also prevents the IRS from requiring the employer to reclassify the workers as employees in the future. Among other factors, a business can rely on its belief that a significant segment of the industry treated workers as independent contractors, thereby perpetuating industry-wide noncompliance with the law.

⁴⁹ See http://www.dol.gov/sec/media/congress/20100310_appropriations.htm.

an IRS audit. To be eligible, the employer must have (1) consistently treated the workers in the past as nonemployees; (2) filed all required Forms 1099 for the workers for the previous 3 years; and (3) not currently be under audit by the IRS, the Department of Labor or a state agency concerning the classification of these workers. Employers accepted into the program will pay an amount equaling just over one percent of the wages paid to the reclassified workers for the past year.⁵⁰

⁵⁰ See <http://www.irs.gov/newsroom/article/0,,id=246203,00.html>.