



National Employment
Law Project

**NELP Summary of Independent Contractor Reforms
New State Activity
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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 ones 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 rules. These practices undercut the competitiveness of law-abiding businesses. For more information on these practices and their impacts on workers and the economy, see *Providing Fairness to Workers Who Have Been Misclassified as Independent Contractors*, NELP’s 2007 Congressional testimony.¹

The following is a select summary of recent independent contractor reform activity in the states, including executive orders, resolutions, state-funded studies reporting on the costs and prevalence of independent contractor abuses, and legislative activity.² In general, legislative activity this year has remained fairly consistent with last year’s level. From July 2008 to June 2009, at least eight states have enacted statutes aimed at independent contractor problems, while over twenty states introduced bills in their legislatures.

¹ Available at <http://www.nelp.org/page/-/Justice/IndependentContractorTestimony2007.pdf>. See also, “Size and Cost of Misclassification Fraud and Unreported Pay: Survey of National and State Studies,” available at http://www.leg.wa.gov/documents/joint/ueci/091008/FactSheetOnStudies_MattCapese.pdf; and a February 2009 report by the Treasury Inspector General for Tax Administration, available at <http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf>.

² This publication updates earlier versions, collecting bills as going back several years. For earlier versions, see NELP, *Combating Independent Contractor Misclassification in the States: Models for Successful Reform*, http://nelp.3cdn.net/a7199e02c9a2dff987_g4m6bhinn.pdf and a 2008 Update at http://nelp.3cdn.net/ed7571b66f5e2cc263_fom6bn8pp.pdf.

NELP has compiled a comprehensive 50-state chart of legislative activity in the 2008-2009 sessions; contact us for more information. NELP welcomes 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 cruckelshaus@nelp.org.

Attorneys General Target Employers Who Misclassify Employees.

Independent contractor misclassification problems have continued to receive growing attention from our legislators due to the efforts of organized labor and worker advocates at the state level. Their actions have spurred Attorneys General from several states to pursue independent contractor abuses.

- **California:** In September and October 2008, California Attorney General Edmund Brown sued five trucking companies for knowingly misclassifying their truck drivers as independent contractors. The Attorney General's office first authorized a task force to investigate trucking companies at Long Beach and Los Angeles Ports in February 2008, after years of advocacy work by the Coalition for Clean & Safe Ports (an alliance of environmental, labor, faith-based, community and public-health organizations).³
- **Connecticut:** In February 2009, Attorney General Richard Blumenthal submitted testimony at the state General Assembly in support of reforms to deter corruption in state contracting. Blumenthal called for a state false claims act to “clarify and strengthen” his authority to sue fraudulent contractors for monetary damages. Blumenthal also supported an act that would increase, from two to five years, the maximum ban on state work for contractors who defraud taxpayers on transportation and public works projects.⁴
- **Massachusetts:** Over the past year, Attorney General Martha Coakley addressed the independent contractor problem by issuing numerous fines to construction and painting companies for violating the Massachusetts Independent Contractor/ Misclassification Law and the Massachusetts Wage and Hour Laws.⁵

³ See, <http://ag.ca.gov/newsalerts/release.php?id=1625&> and <http://ag.ca.gov/newsalerts/release.php?id=1606>. For more information about the Coalition for Clean & Safe Ports campaign, see <http://www.cleanandsafeports.org/>.

⁴ Available at <http://www.ct.gov/ag/cwp/view.asp?A=3673&Q=433038>.

⁵ For examples of just a few of these citations, see http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009_06_16_garcia_settlement_agreement&csid=Cago, http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009_06_18_orlando_bourke&csid=Cago, http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2008_08_06_olympic_plea&csid=Cago, and [http://www.mass.gov/?pageID=cagopressrelease&L=4&L0=Home&L1=Government&L2=Departments+and+Divisions+\(EOLWD\)&L3=Joint+Task+Force+on+the+Underground+Economy+a](http://www.mass.gov/?pageID=cagopressrelease&L=4&L0=Home&L1=Government&L2=Departments+and+Divisions+(EOLWD)&L3=Joint+Task+Force+on+the+Underground+Economy+a)

- **New York:** In September 2008, Attorney General Andrew Cuomo, the New York State Department of Labor, and the Workers' Compensation Board arrested the owner of a pizzeria for failing to secure workers' compensation coverage, pay overtime wages and make required contributions to the State Unemployment Insurance Fund. The employer was also charged with submitting false statements to the Workers' Compensation Board and the Department of Labor. This was the first criminal prosecution resulting from an investigation conducted by the New York Joint Enforcement Task Force on Employee Misclassification. According to the New York State Commissioner of Labor Patricia Smith, "This arrest is a striking example of how far the state is willing to go to reverse years of lax enforcement and protect the basic rights of workers under the labor law. . . . This Joint Enforcement Task Force is a powerful and unprecedented tool that will seek out employers who misclassify and cheat their workers out of required pay, benefits and protections."⁶
- **Ohio:** Attorney General Cordray released a report in February 2009 on the economic impact of misclassified workers in Ohio. The report estimates that the extent of annual costs from worker misclassification may be \$100 million for unemployment insurance, more than \$510 in workers compensation premiums and almost \$180 million in forgone state income tax revenues. It also estimates that misclassification has cost cities and villages more than \$100 million in local income tax revenues in 2006, and cost school districts \$7.8 million in 2008.⁷
- **Multistate Initiative, FedEx Independent Contractor Misclassification:** In June 2009, Attorneys General from eight states (Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, Rhode Island and Vermont) joined together to bring FedEx Ground in line with state employee classification laws. The Attorneys General sent a letter to FedEx Ground to express their concern that the company was misclassifying its drivers as independent contractors. The letter asks FedEx Ground to work with the states to address changes to the company's business model, ensure proper classification of workers and provide compensation to the states for past illegal practices.⁸

Creation of Task Forces and Committees to Study Independent Contractor Misclassification.

Similar to last year, a growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem and coordinate and strengthen enforcement mechanisms. State-level studies have

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⁶ Available at http://www.oag.state.ny.us/media_center/2008/sep/sep23a_08.html.

⁷ Available at http://www.ag.state.oh.us/press/09/02/20090218_AG_MisclassifiedWorkerReport_Final.pdf.

⁸ Available at <http://www.ag.state.oh.us/press/09/06/letter2FedEx.pdf>. See also <http://www.billingsgazette.net/articles/2009/06/26/news/state/46-fedex.txt>.

helped advocates “make the case” for needed reforms by showing the prevalence of the problem and the attendant losses of millions of dollars to state workers’ compensation, unemployment insurance, and income tax revenues. For examples of studies from previous years, *see* <http://www.nelp.org/page/-/Justice/IndependentContractorTestimony2007.pdf>. This past year, several more states have collected data on the staggering costs of misclassifying employees as independent contractors.

Several states (e.g., Indiana, Nebraska, Oregon and Rhode Island) left pending bills creating task forces or study commissions.

- **Indiana, Senate Enrolled Act 478:** This statute, effective July 1, 2009, provides 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.⁹
- **Iowa:** Governor Culver signed Executive Order #8 in July 2008, establishing the Independent Contractor Reform Task Force comprising representatives from the Department of Labor, the Department of Economic Development, the Department of Revenue, the Governor’s office, and the Labor Commissioner.¹⁰ The task force issued its report on December 17, 2008.¹¹
- **Maine:** Governor Baldacci signed an Executive Order in January 2009 to establish a task force comprising representatives of the Department of Labor, Workers’ Compensation Board, Office of the Attorney General, Department of Administrative & Financial Services, and Professional & Financial Regulations. The task force will issue annual reports on the problem.¹²
- **Nevada:** Senate Concurrent Resolution #26, delivered to the Secretary of State in June 2009, provides for an interim study on misclassification. The committee will consist of one Senate member, one Assembly member, one representative of management who works for an entity in the construction industry that has not signed an agreement with a labor union, one representative from the construction industry who is a member of a labor union, and one representative from the general public.¹³
- **Ohio, Memorandum of Understanding:** A memorandum of understanding signed December 2008/January 2009 by the Department of Job and Family Services, Department of Taxation, and the Bureau of Workers’ Compensation to share confidential

⁹ Available at <http://www.in.gov/legislative/bills/2009/SE/SE0478.1.html>.

¹⁰ Available at http://www.governor.iowa.gov/news/2008/07/attachments/Executive_Order_8.pdf.

¹¹ Available at <http://www.iowaworkforce.org/MisClassificationFinal.pdf>.

¹² Available at http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=66730&v=Article.

¹³ Available at http://www.leg.state.nv.us/75th2009/Bills/SCR/SCR26_EN.pdf.

information in order to identify employers who misclassify employees as independent contractors.¹⁴

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

State Legislation Addressing Independent Contractor Misclassification.

Legislators proposed and/or passed a variety of solutions to the independent contractor problem. Examples of each type of legislative remedy are included below in separate categories.

1. The Simple Fix: Laws that create presumptive “employers” or “employees” 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.” Similarly, laws can create a **presumption of employer status**. These presumptions can help skirt problems that arise with efforts to change definitions of “employee” under each individual employment or labor law.

Law Passed:

- **Maryland, Workplace Fraud Act of 2009:** The statute, which will take effect in October 2009, creates a presumption of employee status for those working in construction or landscaping services, broadly defined. It creates a 6-factor test to determine whether a worker is an employee or an independent contractor, authorizes the Commissioner of Labor and Industry to initiate an investigation, permits information-sharing between state agencies, and provides for penalties.¹⁵

Sample Bills Introduced:

- **Delaware, Workplace Fraud Act of 2009:** The bill creates a presumption of employee status in the construction services industry, provides for administrative remedies, a private right of action, and civil penalties against an employer who knowingly misclassifies an employee as an independent contractor. It permits information-sharing among public agencies relating to independent contractor abuses.¹⁶

¹⁴ Available at

http://www.ag.state.oh.us/press/09/02/20090218_Agreement_for_misclassified_workers.pdf.

¹⁵ Available at http://mlis.state.md.us/2009rs/chapters_noln/Ch_188_sb0909E.pdf.

¹⁶ Available at:

<http://www.legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230?Opendocument>.

- **Kansas, SB229/HB2281:** These bills would create a rebuttable presumption of employee status for a person working for a construction contractor and allow an interested party to file a complaint. These bills also provide for civil and criminal penalties.¹⁷

2. **Sector-specific laws that get at the worst abuses in the industries with rampant independent contractor misclassification.**

In addition to the “presumption” bills noted above (all of which pertain specifically to construction and related sectors), some legislatures aimed rules at sectors with persistent independent contractor abuses.

Law Passed:

- **New York, SB8715/AB11759:** This law, which took effect in January 2009, established clear rules to determine when livery cab drivers in New York City, Westchester, and Nassau County are considered employees or independent contractors of livery bases. The new law also calls for the creation of a fund to give independent contractor livery drivers and their families workers’ compensation benefits in cases of severe injury or death.¹⁸

Sample Bills Introduced:

- **Minnesota, HF1794:** This bill provides a standard definition of independent contractor for truck-driver-operators.¹⁹
- **Kentucky, HB 392:** This bill prohibits misclassification of employees in the construction industry; it presumes employee status unless certain factors are met.²⁰

When Advocating for Independent Contractor Reforms, Consider the Following Issues.

- **Provide for a private right of action for the aggrieved worker(s) and the worker’s representative, including unions or community groups.** This is key to supplement public sector enforcement by agencies that are strapped for resources and cannot bring enforcement actions for all claims brought, and to protect workers who fear retaliation if they complain. The 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.
- **Provide for strong anti-retaliation protections for workers who complain.**

¹⁷ Available at <http://www.kslegislature.org/bills/2010/229.pdf> and <http://www.kslegislature.org/bills/2010/2281.pdf>.

¹⁸ Available at http://www.state.ny.us/governor/press/press_0725083.html.

¹⁹ Available at

<https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1794.0.html&session=ls86>.

²⁰ Available at: <http://www.lrc.ky.gov/record/09rs/hb392.htm>

- **Provide for monetary damages per worker misclassified in an amount likely to deter future violations.**
- **Provide for debarment remedies if the violating employers are state public contractors.**
- **Provide for penalties to those advising employers to misclassify employees as independent contractors.**

Sample Bill Introduced:

- **California, SB1583:** This bill prohibits a person, for pay, from knowingly advising an employer to misclassify employees as independent contractors. The prohibition does not extend to attorneys or to persons advising their employers. Although this bill was passed both by the House and Senate, it was vetoed by the governor.²¹

But, look out for:

- **Anti-Immigrant Provisions Added to Independent Contractor Bills:** Several states, including Missouri,²² West Virginia,²³ and Illinois,²⁴ introduced bills pairing misclassification reforms with measures requiring employers to use the federal work authorization program, or E-verify, to check the immigration status of employees, and to create punitive sanctions for those who employ undocumented workers. These laws only serve to force workers further underground, exacerbating enforcement efforts against employers.

²¹ Available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1551-1600/sb_1583_bill_20080825_enrolled.html.

²² Available at <http://www.house.mo.gov/billtracking/bills081/biltxt/truly/HB1549T.HTM>.

²³ Available at

http://www.legis.state.wv.us/Bill_Text_HTML/2009_SESSIONS/RS/Bills/hb2469%20intr.htm.

²⁴ Available at <http://www.ilga.gov/legislation/96/HB/09600HB4142.htm>.