



National Employment
Law Project

Summary of Independent Contractor Reforms
State and Federal Activity
July 2008

Catherine K. Ruckelshaus
Legal Co-Director, National Employment Law Project
212-285-3025 x 306 - cruckelshaus@nelp.org

The following is a select summary of recent independent contractor reform activity in the states, including executive orders, studies reporting on the costs and prevalence of independent contractor abuses, and legislative activity at the state and federal level.¹ Overall, activity at all levels has increased significantly this year, as more and more states and Congress attempt to address this growing problem. During the 2007-2008 legislative sessions, at least five states have enacted statutes aimed at independent contractor problems, while more than twenty states introduced bills in their legislatures. Three bills were introduced at the federal level. The increasing attention to independent contractor misclassification is thanks in large part to the efforts of organized labor and worker advocates at the state level.

By labeling employees independent contractors (or “1099-ing” them, so-called because of the IRS Form 1099 issued to independent contractors), subcontracting out to other entities, or paying workers off the books in cash, businesses stand to gain upwards of 30% of payroll and related taxes otherwise paid for “employees.” Employees miss out on unemployment insurance, workers compensation, and fair pay rules. These cost-saving practices undercut the competitiveness of law-abiding businesses. For background on these practices and their impacts on workers, the economy, and tax revenues, see NELP’s recent Congressional testimony.²

NELP has a 50-state chart of legislative activity in the 2007-2008 sessions; contact us for more information. NELP welcomes news from advocates on executive orders, studies, and legislative activity in their states; we will circulate it if you forward it to cruckelshaus@nelp.org.

¹ This publication updates an earlier version, collecting bills as of December 2005. For the earlier publication, see NELP, *Combating Independent Contractor Misclassification in the States: Models for Successful Reform*, <http://www.nelp.org/docUploads/COMBATING%20INDEPENDENT%20CONTRACTOR%20MISCLASSIFICATION%2Epdf>. Special thanks to NELP intern Cristina Gallo for help on this document.

² Available at <http://www.nelp.org/docUploads/IndependentContractorTestimony2007.pdf>, and <http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=5874>.

Governors convene task forces to study employee misclassification by executive order.

A handful of states' governors have signed executive orders calling attention to the problem of independent contractor misclassification and creating inter-agency task forces to study the magnitude of the problem and coordinate and strengthen enforcement mechanisms. In some states, these task forces were created legislatively.

- **Massachusetts:** Governor Patrick signed Executive Order #499 in March 2008, creating a task force chaired by the Director of the Department of Labor and including representatives from eight other state agencies.³ In addition, the Massachusetts state Attorney General has made independent contractor abuses a priority.⁴
- **Michigan:** Governor Granholm signed Executive Order #2008-1 in February 2008, creating a task force housed within the Department of Labor and Economic Growth and including representatives of three divisions within the department and representatives from the Departments of Treasury and Management and Budget.⁵ The task force issued its first annual report on July 1st.⁶
- **New Jersey:** Governor Corzine signed Executive Order #96 in January 2008, creating an advisory commission to develop a statewide approach to solving misclassification in the construction industry and to implement the state's 2007 Construction Industry Independent Contractor Act, P.L.2007, c.114.⁷ The commission includes representatives from buildings trades unions, the state AFL-CIO, contractors, and developers.
- **New York:** Former Governor Eliot Spitzer signed Executive Order #17 in September, 2007, following a study looking at audits of state employment records and finding up to 10% of workers may have been misclassified.⁸ The task force created by the Order is headed by the Director of the state Department of Labor and members include the state's Attorney General, and the Comptroller of the City of New York. The task force issued its first report in February.⁹

³ Available at http://www.mass.gov/Agov3/docs/Executive%20Orders/executive_order_499.pdf.

⁴ For other examples of recent Massachusetts Attorney General activity, see http://www.mass.gov/?pageID=cagoterminal&L=2&L0=Home&L1=Workplace+Rights&sid=Cago&b=terminalcontent&f=workplace_independent_contractor_advisory&csid=Cago

⁵ Available at <http://www.michigan.gov/gov/0,1607,7-168-21975-184817--,00.html>.

⁶ Available at http://www.michigan.gov/documents/dleg/R08_07_01Rrt_to_the_Gov_240789_7.pdf.

⁷ Available at <http://www.state.nj.us/infobank/circular/eojsc96.htm>.

⁸ Available at <http://www.state.ny.us/governor/press/ExecutiveOrderNo17.pdf>.

⁹ <http://www.labor.state.ny.us/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf>.

A number of research studies and reports from state commissions show high costs of independent contractor misclassification in the states.

An important first step in enacting state legislation is to define the problem and its magnitude. 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 to state workers’ compensation, unemployment insurance, and income tax revenues. For examples of studies from previous years, see <http://www.nelp.org/docUploads/IndependentContractorTestimony2007.pdf>. This past year, several more states have collected data on the staggering costs of misclassifying employees as independent contractors, and New Hampshire passed legislation mandating such a study.

- **Michigan:** The Department of Labor and Economic Growth issued “Misclassification of Wages: A Problem that Hurts Everyone,” a fact sheet, in November 2007.¹⁰ The report describes enforcement efforts by the state’s Unemployment Insurance Agency, including information-sharing with the IRS. The state’s new task force issued its first report to Governor Granholm on July 1st.¹¹
- **Minnesota:** The Office of the Legislative Officer issued a report on misclassification in November 2007, stating that 14% of employers subject to unemployment insurance taxes misclassified at least one worker in 2005.¹²
- **New York:** The state’s new Task Force on Employee Misclassification reported on its initial accomplishments in February 2008.¹³ As of year-end 2007, it had recovered \$19.4 million in back wages on behalf of employees and \$856,000 in unpaid taxes through 16 completed unemployment insurance tax investigations and another \$3,020,000 in unpaid wages through 17 labor standards investigations.¹⁴ It also established an employment fraud hotline and website.
- **Vermont:** The Department of Labor issued a study on misclassification in the workers’ compensation system, as required by a 2007 law.¹⁵
- **American Rights at Work:** ARAW published “FedUp with FedEx: How FedEx Tramples Workers’ Rights and Civil Rights,” in October 2007.¹⁶ The paper notes that the company has misclassified 15,000 employees as contractors, forcing those with valid workplace grievances to prove they are employees before they can vindicate their rights as workers, especially the right to organize.

¹⁰ Available at http://www.michigan.gov/documents/uia/misclass_wages_08-30-07_pdf_207328_7.pdf.

¹¹ Available at http://www.michigan.gov/documents/dleg/R08_07_01Rrt_to_the_Gov_240789_7.pdf.

¹² Available at <http://www.auditor.leg.state.mn.us/ped/pedrep/missclass.pdf>.

¹³ Available at

<http://www.labor.state.ny.us/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf>.

¹⁴ *Supra*, note 13.

¹⁵ No link is available.

¹⁶ Available at <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/fedupwithfedex.pdf>.

State and federal legislators introduce bills addressing independent contractor misclassification.

Legislation introduced and/or passed this past legislative session proposed a variety of solutions to the misclassification problem with many bills incorporating a host of mechanisms. Examples of each type of legislative remedy are included below in separate categories.¹⁷

Also of note this year was the attention to employer misclassification at the federal level. The House introduced two bills which take different approaches to the problem while the Senate introduced another.

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.

Laws Passed:

- **Washington, HB3122:** The statute, which took effect in June, creates a presumption of employee status for coverage under the state’s workers’ compensation and unemployment insurance statutes.¹⁸

Sample Bills Introduced:

- **Rhode Island, H7097:** The bill created a presumption of employee status and levied administrative penalties for independent contractor misclassification.¹⁹
- **Massachusetts, H311:** A public hearing was held in June on the bill, which creates a presumption of employee status, and it is still pending in committee.²⁰

2. Sector-specific laws that get at the worst abuses in the industries with rampant independent contractor misclassification, like construction and day labor.

¹⁷ NELP has information on bills introduced in all states; contact us for specific information about any legislation proposed in your state if you do not see it listed.

¹⁸ Available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Session%20Law%202008/3122-S.SL.pdf>.

¹⁹ Available at <http://www.rilin.state.ri.us/BillText08/HouseText08/H7907.pdf>.

²⁰ Available at <http://www.mass.gov/legis/bills/house/185/ht00pdf/ht00311.pdf>.

Laws Passed:

- **Colorado, HB07-1366:** The law mandates workers' compensation coverage for all on-site construction workers requiring that any person contracting for construction work directly provide coverage or proof of coverage, such as a certificate, from the construction contractor.²¹
- **Minnesota, § 181.723:** The law, passed last session, applies only to the construction industry and creates the presumption of an employee-employer relationship, unless an individual is granted an "exemption certificate" issued by the state, certifying that the individual meets all the criteria of the 9-part test for an independent contractor.²²

Sample Bills Introduced:

- **Louisiana, HB1083/1387:** The bill created a presumption of employee status for workers in the construction industry and subjected violators to criminal penalties.²³
- **New York, S4925:** The bill creates a presumption of employee status for workers in the construction industry and subjects intentional or unintentional violators to criminal and/or civil penalties along with possibility of debarment for up to five years.²⁴ It also provides employees with a private right of action, including treble damages and attorney's fees. No action has been taken on the bill since January.

3. Specific changes to workers' compensation and unemployment insurance statutes to target independent contractor abuses.

Laws Passed:

- **Colorado, HB07-1366:** The law mandates workers' compensation coverage for all onsite construction workers by requiring that any person contracting for construction work directly provide coverage or proof of coverage, such as a certificate, from the construction contractor.²⁵

Sample Bills Introduced:

- **Vermont, H0799:** This bill categorized persons who contract with independent contractors as "employers" of that contractor if the contractor fails to provide workers' compensation.²⁶

²¹ Available at

[http://www.leg.state.co.us/clics/clics2007a/csl.nsf/billcontainers/E777C06E675EF3D487257251007B6F30/\\$FILE/1366_enr.pdf](http://www.leg.state.co.us/clics/clics2007a/csl.nsf/billcontainers/E777C06E675EF3D487257251007B6F30/$FILE/1366_enr.pdf).

²² Available at https://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP_SEC&year=2007§ion=181.723.

²³ Available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=472593>.

²⁴ Available at <http://assembly.state.ny.us/leg/?bn=S04925&sh=t>.

²⁵ Available at

[http://www.leg.state.co.us/clics/clics2007a/csl.nsf/billcontainers/E777C06E675EF3D487257251007B6F30/\\$FILE/1366_enr.pdf](http://www.leg.state.co.us/clics/clics2007a/csl.nsf/billcontainers/E777C06E675EF3D487257251007B6F30/$FILE/1366_enr.pdf).

²⁶ Available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/intro/H-799.HTM>.

4. State agency collaboration and data sharing.

In 2007, the IRS, along with the Department of Labor (DOL) and representatives of several states, created the Questionable Employment Tax Practices Initiative (QETP). QETPs are defined by the IRS as “employment tax schemes or practices that have no objective other than to avoid federal and/or state employment taxes.” Approximately 30 states have signed on to the initiative, which is a collaborative program seeking to identify illegal practices and increase voluntary compliance among employers. QETP encourages sharing of audit reports and tax data and coordinated enforcement efforts.²⁷

Laws Passed:

- **New Hampshire, SB500-FN:** The statute, which took effect in May, creates a task force with a heavy focus on the construction industry and composed of members of the legislature, Departments of Labor, Employment Security, Insurance, and Revenue Administration, the attorney general, building trades unions, contractors, insurance carriers, and business owners.²⁸
- **Connecticut, Public Act 08-156:** Effective July 1st, Connecticut's enforcement commission includes representatives from the Departments of Labor, Revenue Services, and Workers' Compensation Commission, and the attorney general, with the first report due in 2010.²⁹ The statute also creates an advisory board to advise the enforcement commission on misclassification in the construction industry specifically, with representatives from the legislature, and from labor and management in the industry.
- **Utah, SB189:** The statute creates the Independent Contractor Enforcement Council and charges it with designing a database by July 2009 that can be used by a host of state agencies to cross-reference data from various agencies to ensure that those labeled independent contractors are not misclassified.³⁰

Sample Bills Introduced:

- **Maryland, HB1590:** This bill provided for information-sharing between the Department of Labor, Licensing, and Regulation, the Department of Budget and Management, the Secretary of State, the Comptroller, and other state agencies.³¹ The bill also created a presumption of an employee-employer relationship and included a private right of action for employees, with treble damages and attorney's fees at the judge's discretion.
- **Vermont, H0802:** This bill authorized the Departments of Labor, Banking, Insurance, Securities, Health Care Administration, and Taxes to work collaboratively to adopt rules coordinating

²⁷ For more information about QETP and a list of participating states, see <http://www.irs.gov/newsroom/article/0,,id=175455,00.html>.

²⁸ Available at <http://www.gencourt.state.nh.us/legislation/2008/sb0500.html>.

²⁹ Available at <http://www.cga.ct.gov/2008/ACT/Pa/pdf/2008PA-00156-R00SB-00454-PA.pdf>.

³⁰ <http://le.utah.gov/~2008/bills/sbillint/sb0189.htm>.

³¹ Available at <http://mlis.state.md.us/2008rs/bills/hb/hb1590f.pdf>.

investigation and enforcement, facilitate information-sharing and the filing of complaints, and increase public awareness of the practice.³²

5. Employee notification of independent contractor status and posting requirements.

Sample Bills Introduced:

- **California, SB1490:** The bill requires persons who contract with independent contractors to provide the individuals written notice of their status as independent contractors including impact of that status on tax liability, eligibility for labor and employment protections, and the individual's right to obtain a determination from the state's Employment Development Department that they are properly classified.³³
- **Indiana, HB1269:** The bill would permit "interested parties" to sue on behalf of independent contractors, defining "interested parties" as anyone "with an interest in compliance" with the law, in addition to creating a presumption of employee status.³⁴
- **Kentucky, SB256:** In addition to creating a presumption of employee status and providing a private right of action, this construction-sector-specific bill would have required builders and other construction contractors with 1 or more employees to post a notice summarizing the provisions of the Act in a "conspicuous place" in both English and Spanish.³⁵
- **Nebraska, LB1016:** The state's Proper Employee Classification Act would have required employers to post, in English and Spanish, a notice stating that all workers have a right to be properly classified; that workers or other interested parties have the right to sue their employer if they are misclassified for the amount of unpaid taxes, the difference in compensation, and attorney's fees, and that retaliation is prohibited.³⁶

6. Federal independent contractor legislation introduced in 2007-2008.

Three federal bills aimed at independent contractor abuses were introduced this session; one in the Senate and two in the House.

- **Independent Contractor Proper Classification Act of 2007 (ICPC), S. 2044** aims to tighten the existing safe harbor in the tax code to allow the IRS to require employers to reclassify workers that they have misclassified as independent contractors in the past; eliminates the ban on the IRS issuing regulations or revenue rulings on employee/independent contractor status, and eliminates the ability of employers to rely on others in the industry misclassifying employees as a basis for continuing to misclassify their employees. If enacted, S. 2044 would

³² Available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/intro/H-802.HTM>.

³³ Available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1451-1500/sb_1490_bill_20080327_amended_sen_v98.pdf.

³⁴ Available at <http://www.in.gov/legislative/bills/2008/IN/IN1269.1.html>.

³⁵ See <http://www.lrc.ky.gov/record/08RS/SB256.htm> to download text.

³⁶ Available at <http://uniweb.legislature.ne.gov/FloorDocs/Current/PDF/Intro/LB1016.pdf>.

also create an administrative process for workers to ask for an evaluation of their proper classification, requires safeguards against employer retaliation and payment of attorney's fees to employees who were misclassified. It also directs the IRS to inform the Department of Labor of misclassification practices and requires the IRS and DOL to issue annual reports on misclassification and their efforts to curtail the practice.

- **The Employee Misclassification Prevention Act of 2008 (HR 5804)** amends the Fair Labor Standards Act to clarify that employee records must reflect the worker's accurate status. It would require state unemployment insurance agencies to conduct audits to identify employers who are misclassifying employees, and allows the Department of Labor (DOL) and the Internal Revenue Service (IRS) to refer incidents of misclassification to one another. In addition, it mandates the (DOL) to develop a system to track and monitor states' effectiveness in identifying employers who misclassify.
- **The Taxpayer Responsibility, Accountability, and Consistency Act (HR 5803)** would revise and amend relevant sections of the Internal Revenue Code and the Revenue Act of 1978 to ensure that a misclassification of workers could only occur as a result of cheating, and the bill would increase the penalties imposed by the IRS on a business found to be cheating.

7. Things to include as a priority in independent contractor laws:

- **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, to enable low-wage workers to get attorneys to bring their claims.

Existing law, for example:

- **Illinois:** The Day Labor Act³⁷ provides for private right of action and permits "any party" to seek penalties under the act. The state's Minimum Wage Act³⁸ also has private right of action, as do many other state and federal laws.
- **Arizona:** Several of the recently-passed state minimum wage ballot initiatives also contain these provisions, such as Arizona's minimum wage law.³⁹ Arizona's law also provides for a representative cause of action, which is useful when workers are afraid to

³⁷ 820 ILCS 175/95, available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2417&ChapAct=820 ILCS 175/&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Day+and+Temporary+Labor+Services+Act..>

³⁸ 820 ILCS 105/12, available at <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=082001050K12>.

³⁹ Available at http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/prop202.htm.

come forward to file their own claims.⁴⁰ Representatives may include unions or community advocacy groups, in addition to individuals.

➤ **Provide for strong anti-retaliation protections for workers who complain.**

Existing law, for example:

- **San Francisco, CA:** SF Minimum Wage Ordinance, with the strongest anti-retaliation provision in the country, creates a rebuttable presumption that any adverse action taken against a complaining worker is retaliatory if it occurs within 90 days of a worker's complaint.⁴¹

➤ **Provide for monetary damages per worker misclassified in an amount likely to deter future violations.**

Existing law, for example:

- **Illinois:** See the state's Day Labor law, 820 ILCS 175/70(a).⁴²
- **Massachusetts:** The state's Wage Payment Collection Law provides for individual liability and treble the amount of unpaid wages as damages.⁴³

➤ **Provide for debarment remedies if the violating employers are state public contractors.**

Existing law, for example:

- **Massachusetts:** See the state's Fair Competition for Bidders on Construction of Public Works Act.⁴⁴

8. **Things to watch out for (they sound good but can be bad):**

- **Laws that purport to "simplify" the myriad definitions of "employee" or "independent contractor" under state labor and employment laws.** Employer groups often push "clarification" bills, purportedly to clear up confusion and multiplicity of disputes over employee status. Many of these proposals end up watering down the more expansive laws that make it easier for workers to claim they are "employees" and use the stricter common-law test for employee status that is easier for employers to manipulate (like the IRS "20-factor" test).

Existing law, for example:

⁴⁰ Ohio's Minimum Wage ballot initiative and San Francisco's Living Wage law also contain representative causes of action, available at <http://www.sfgov.org/site/uploadedfiles/olse/mwo/MWOrdinance.pdf>.

⁴¹ *Supra* note 39.

⁴² *Supra* note 36.

⁴³ Available at <http://www.mass.gov/legis/laws/mgl/149-150.htm>.

⁴⁴ Available at <http://www.mass.gov/legis/laws/mgl/149-148b.htm>.

- **Oregon:** OR enacted SB 323 ostensibly to simplify the myriad definitions of “employee” under its various labor and employment laws. The final version did not alter the minimum wage act’s definition (the best for workers), thanks to a late intervention by worker advocates. But, it’s not a “simple” definition, and the factors determining whether a worker is an “employee” are susceptible to manipulation by employers.⁴⁵
- **Laws that only create criminal penalties or criminal violations** (misdemeanors or felonies) for independent contractor misclassification, and do not provide for private right of action for workers to bring civil claims. Because criminal violations must be brought by prosecutorial arms of state agencies, resources are limited and the burden is on the prosecutor to prove the violation. As a result, few criminal actions are brought and the law does not have much of a practical impact.

Existing law, for example:

- New York: Unfair Wages Prohibition Act, Art. 19, § 662.⁴⁶ This law *has not been used once* by the state DOL since its enactment in 1997.
- **Anti-Immigrant Provisions Added to Independent Contractor Bills:** Several states, including Iowa, Indiana, Kansas, and Missouri, 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. Missouri’s bill, the only to pass, is more far-reaching, designating the state’s highway patrol to enforce immigration laws, prohibiting sanctuaries, denying public benefits, licenses, and bail, requiring verification of status upon arrest.⁴⁷

⁴⁵ Available at <http://landru.leg.state.or.us/05reg/measures/sb0300.dir/sb0323.en.html>.

⁴⁶ Available at <http://caselaw.lp.findlaw.com/nycodes/c54/a45.html>.

⁴⁷ Available at <http://www.house.mo.gov/billtracking/bills081/biltxt/truly/HB1549T.HTM>.