



National Employment  
Law Project

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**NELP Summary of Independent Contractor Reforms  
State and Federal 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 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.<sup>1</sup>

The following is a select summary of recent independent contractor reform activity in the states, including attorney general enforcement actions, studies reporting on the costs and prevalence of independent contractor abuses, and legislative activity.<sup>2</sup> In general, legislative activity this year has remained fairly consistent with last year’s level. From July 2009 to June 2010, at least nine states have enacted statutes aimed at independent contractor misclassification problems, while over fourteen states introduced independent contractor bills in their legislatures.

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<sup>1</sup> 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 Federal and State Treasuries,” available at <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>.

<sup>2</sup> 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](http://nelp.3cdn.net/a7199e02c9a2dff987_g4m6bhinn.pdf); the 2008 Update, at [http://nelp.3cdn.net/ed7571b66f5e2cc263\\_fom6bn8pp.pdf](http://nelp.3cdn.net/ed7571b66f5e2cc263_fom6bn8pp.pdf); and the 2009 Update, at <http://www.nelp.org/page/-/Justice/SummaryIndependentContractorReformsJuly2009.pdf>.

Federal legislation and administrative activity on independent contractors has also increased in the last year, in part due to the flurry of activity in the states. A short summary of federal actions is also included.

NELP has compiled a 50-state chart of legislative activity in the 2009 and 2010 sessions.<sup>3</sup> 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 [cruckelshaus@nelp.org](mailto: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. This has spurred Attorneys General and Departments of Labor from several states to pursue independent contractor abuses. Some examples include:

- **Arkansas:** In March 2010, the Attorney General joined an ongoing multi-state inquiry into possible misclassification of FedEx delivery drivers. The Attorney General issued a demand to FedEx requesting information to aid evaluation of whether the company is properly classifying its workers in Arkansas.<sup>4</sup>
- **Illinois:** In August 2009, the Attorney General reached an agreement to settle claims against five Chicago-area construction firms that were falsely classifying employees as independent contractors. The companies agreed to pay fines of more than \$79,000. They were also barred from participating in any publicly-funded construction projects for the next four years.<sup>5</sup>
- **Massachusetts:** In the past year the Attorney General continued her aggressive enforcement efforts targeting independent contractor abuses, initiating actions against several employers in a range of industries. For example, in September 2009, the Attorney General announced an indictment against a temporary labor company for violations of state wage and hour laws as well as for insurance and tax fraud. Investigation into the company began after the state's Joint Enforcement Task Force on the Underground Economy and Employee Misclassification received several complaints. The company operated mainly on a cash basis, and allegedly failed to disclose \$11 million in payroll to its workers' compensation carrier and to the Department of Revenue for unemployment insurance contributions.<sup>6</sup> In February 2010, the Attorney General reached a settlement with four restaurant meal delivery companies accused of misclassifying their drivers as independent contractors.<sup>7</sup> In April, the Attorney General

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<sup>3</sup> Special thanks to Emily Werth for her research and writing on this year's update.

<sup>4</sup> Available at [http://ag.arkansas.gov/newsroom/index.php?do:newsDetail=1&news\\_id=301](http://ag.arkansas.gov/newsroom/index.php?do:newsDetail=1&news_id=301).

<sup>5</sup> Available at [http://www.illinoisattorneygeneral.gov/pressroom/2009\\_08/20090810ides.html](http://www.illinoisattorneygeneral.gov/pressroom/2009_08/20090810ides.html).

<sup>6</sup> Available at

[http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009\\_09\\_23\\_vuong\\_indict&csid=Cago](http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009_09_23_vuong_indict&csid=Cago).

<sup>7</sup> Available at

[http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2010\\_02\\_01\\_restaurant\\_settlement&csid=Cago](http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2010_02_01_restaurant_settlement&csid=Cago).

settled with a construction company accused of misclassifying employees on construction projects and failing to maintain accurate payroll records. The company agreed to pay a \$25,000 penalty for the violations, and to be debarred from contracting for new public projects for six months.<sup>8</sup>

- **New York:** In June 2010, the Department of Labor announced the results of several enforcement sweeps at publicly-funded construction projects undertaken in the past year by the New York state Joint Enforcement Task Force Task Force on Employee Misclassification. In each case penalties were assessed and/or stop work orders were issued against contractors on the projects.<sup>9</sup>

### **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 committees 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 to 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, or to coordinate investigation and enforcement efforts.

Several states (e.g., Indiana, Nebraska and Vermont) left pending bills which would create study commissions or otherwise authorize reports on the costs of independent contractor misclassification. Four other states (California, Iowa, Massachusetts, and Oklahoma) left pending bills that would authorize state agencies to share information about misclassification and coordinate enforcement.

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

- **Maryland:** The Governor issued Executive Order 01.01.2009.09 creating the Joint Enforcement Task Force on Workplace Fraud. The Task Force will coordinate misclassification enforcement efforts by member agencies, and will report annually to the Governor on its progress and on its recommendations for legislative or regulatory reforms.<sup>10</sup>
- **Oregon:** Senate Bill 2815, signed by the Governor in July 2009, establishes an Interagency Compliance Network of the Department of Justice, Department of Revenue, Employment Department, Bureau of Labor and Industries, Construction Contractors Board, and other relevant state agencies. The Network is charged with establishing consistency in

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<sup>8</sup> Available at <http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=20100423allproconstruction&csid=Cago>.

<sup>9</sup> Available at [http://www.labor.ny.gov/pressreleases/2010/June14\\_2010\\_1.shtm](http://www.labor.ny.gov/pressreleases/2010/June14_2010_1.shtm);  
[http://www.labor.ny.gov/pressreleases/2010/June09\\_2010.shtm](http://www.labor.ny.gov/pressreleases/2010/June09_2010.shtm);  
[http://www.labor.ny.gov/pressreleases/2010/June08\\_2010.shtm](http://www.labor.ny.gov/pressreleases/2010/June08_2010.shtm).

<sup>10</sup> Available at <http://www.dsd.state.md.us/comar/comarhtml/01/01.01.2009.09.htm>.

classification determinations, sharing information, developing and implementing coordinated investigation methods, engaging in public outreach, and releasing biennial reports.<sup>11</sup>

- **Utah:** In March 2010, the legislature enacted a study resolution authorizing the appropriate committee(s) to conduct a study and make recommendations for 2011 legislative action relating to the state's previously-created independent contractor database, independent contractor licensing requirements, and the prevalence of misclassification and its fiscal impact on the state, on workers, and on law-abiding employers.<sup>12</sup>
- **Vermont:** Act No. 142, signed by the Governor in June 2010, includes several provisions designed to improve enforcement of employee classification requirements by requiring the creation of an online system to report suspected misclassification, agency information sharing and coordination, and regular reporting by relevant state agencies to the legislature.<sup>13</sup>

### **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.<sup>14</sup>

#### **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.”<sup>15</sup> The best 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 Rhode Island legislation provides the strongest and most comprehensive protections for workers.

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<sup>11</sup> Available at <http://www.leg.state.or.us/09reg/measpdf/hb2800.dir/hb2815.en.pdf>.

<sup>12</sup> Available at <http://le.utah.gov/~2010/bills/sbillenr/sjr015.htm>.

<sup>13</sup> Available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT142.pdf>.

<sup>14</sup> 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.

<sup>15</sup> Similarly, laws can create a presumption of employer status.

### Sample Bills Introduced:

- **New York, A 6793:** The bill amends the Tax Law to require that the Department of Taxation and Finance promulgate rules defining and establishing a procedure for determining whether a person is an employee. The bill specifies that an ABC test must be used to identify those individuals who are not employees. The bill also amends several sections of the Workers' Compensation and Labor Laws to provide that an employee includes any person determined to have that status by the Department of Taxation and Finance, in accordance with the same ABC test.<sup>16</sup>
  - **Ohio, SB 195:** The bill enacts a standard definition of "employee" throughout the labor code which provides that an employee is an individual who performs services unless the individual meets the ABC test. 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 provides civil and criminal penalties for misclassification of an employee. The bill creates a private right of action for employees, labor organizations, or other parties interested in compliance with proper classification. The bill also bars state agencies from contracting with an employer that has committed multiple misclassification violations. The bill prohibits retaliation against any individual who exercises any right to oppose misclassification, and imposes civil and criminal penalties as well as creating a private right of action to enforce the anti-retaliation provision.<sup>17</sup>
  - **Rhode Island, H 7092 and S 2334:** The bill establishes a presumption of employee status in the Workers' Compensation and Employment Security Laws unless the individual providing services meets a modified ABC test. Even where an individual files a notice of designation as an independent contractor with the Division of Workers' Compensation, this is not determinative unless the individual also meets the statutory criteria. Misclassifying employers may be barred from participating in state or municipal funded contracts. The bill also requires the posting of information for workers about their right to be properly classified and the detrimental consequences of misclassification.<sup>18</sup>
  - **Virginia, Worker Misclassification Act:** The bill establishes a presumption that an individual performing services for remuneration is an employee unless the individual meets a three-part test. The bill provides for the imposition of criminal and civil penalties, stop work orders, and debarment from public contracting against employers who misclassify. The bill also gives employees who have been misclassified a private right of action. The bill prohibits retaliation, and creates a rebuttable presumption that retaliation occurred whenever adverse action is taken against a worker within 90 days of exercising any right to protest misclassification.<sup>19</sup>
- 2. Sector-specific laws that target industries with rampant independent contractor misclassification, such as construction and delivery.**

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<sup>16</sup> Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A06793&Summary=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A06793&Summary=Y).

<sup>17</sup> Available at [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_SB\\_195](http://www.legislature.state.oh.us/bills.cfm?ID=128_SB_195).

<sup>18</sup> Available at <http://www.rilin.state.ri.us/BillText10/HouseText10/H7092.pdf>.

<sup>19</sup> Available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+SB34>.

Some legislatures aimed “presumption” bills or other new enforcement mechanisms at particular sectors with persistent independent contractor abuses.

The acts passed in Delaware and Nebraska provide the strongest and most comprehensive protections for workers.

#### **Laws Passed:**

- **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 one of two multi-factor tests. The act provides for civil penalties, administrative fines, stop work orders, and possible debarment from public contracting. The act also creates a private right of action for employees. The act includes a prohibition on retaliation.<sup>20</sup>
- **Maine, Public Law, Chapter 452 LD 1456:** The act provides that an individual performing **construction** work is presumed to be an employee of the hiring agent for workers’ compensation purposes unless the individual meets one of two statutory tests. The act specifies penalties for failure to secure workers’ compensation for employees. It also requires the general contractor on state-funded construction projects to disclose a list of all subcontractors and independent contractors on the job site.<sup>21</sup>
- **Nebraska, Employee Classification Act:** The act establishes presumptions that individuals performing **construction labor or delivery services** are employees unless they meet certain criteria. The act imposes fines for misclassification, and requires employers contracting with the state to attest that all employees are properly classified.<sup>22</sup>
- **Wisconsin, Act 292:** The act permits the Department of Workforce Development to investigate **construction** industry employer misclassification under state laws regarding recordkeeping, workers’ compensation, new hire reporting, and unemployment insurance. The act incorporates the existing definitions of “employee” in the statutes and regulations that govern each of these requirements. The DWD may issue a stop work order and impose penalties.<sup>23</sup>

#### **Sample Bills Introduced:**

- **Indiana, HB 1120:** The bill provides that an individual providing services to a **construction** contractor is considered an employee unless the individual meets one of three tests. The bill provides for monetary penalties to be imposed by the Departments of Labor, Revenue, and Workforce Development and the Workers’ Compensation Board. The bill also prohibits retaliation and creates a private right of action to enforce this prohibition.<sup>24</sup>

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<sup>20</sup> 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).

<sup>21</sup> Available at [http://mainelegislature.org/legis/bills/bills\\_124th/chappdfs/PUBLIC452.pdf](http://mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC452.pdf).

<sup>22</sup> Available at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB563.pdf>.

<sup>23</sup> Available at <http://www.legis.state.wi.us/2009/data/acts/09Act292.pdf>.

<sup>24</sup> Available at <http://www.in.gov/legislative/bills/2010/HB/HB1120.1.html>.

- **Iowa, HF 2421:** The bill provides that an individual is deemed an employee of a contractor on a **public improvement project** for prevailing wage purposes unless certain criteria are met. Under this bill, any individual thus classified as an employee is also an employee under the Workers' Compensation, Occupational Safety and Health, Wage Payment Collection, and Employment Security-Unemployment Compensation Laws.<sup>25</sup>
- **New York, Construction Industry Fair Play Act:** The bill enacts a presumption that any person performing services for a **construction** contractor is an employee unless the person meets one of two tests. The bill requires posting and notice of rights, and provides for penalties as well as debarment from public contracting for misclassification. The bill also provides that this presumption shall be used for all determinations of a construction worker's employment status under the Labor and Workers' Compensation Laws. The bill prohibits retaliation, and subjects employers who retaliate to civil penalties and a private cause of action.<sup>26</sup>
- **Oklahoma, Employee Classification Act:** The bill provides that an individual performing services for a **construction** contractor is an employee unless he meets one of two tests. The bill provides for penalties and also allows a private civil action.<sup>27</sup>

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

Some legislatures proposed allowing contractors who lose a competitive bidding process to bring suit against a winning contractor who has engaged in independent contractor misclassification.

#### Sample Bills Introduced:

- **New York, A 3522:** The bill allows any person whose bid for a construction project has been rejected to sue a winning bidder that has failed to pay required taxes or secure required insurance. The bill provides for damages of not less than ten percent of the amount of the successful bid.<sup>28</sup>
- **Rhode Island, H 7092 and S 2334:** The bill allows any person that loses a bid for a construction contract to bring an action against another person who was awarded the contract because of cost advantages achieved by deliberate misclassification of employees for the purpose of avoiding workers' compensation premiums.<sup>29</sup>

Some legislatures proposed authorizing private attorney general actions that would allow members of the public to recover the civil penalties or other monies owed due to misclassification.

The Massachusetts bill provides the strongest protection against misclassification.

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<sup>25</sup> Available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&ga=83&hbill=HF2421>.

<sup>26</sup> Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A08237&Summary=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A08237&Summary=Y).

<sup>27</sup> Available at [http://webserver1.lsb.state.ok.us/2009-10bills/SB/sb1937\\_engr.rtf](http://webserver1.lsb.state.ok.us/2009-10bills/SB/sb1937_engr.rtf).

<sup>28</sup> Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03522&Summary=Y&Actions=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03522&Summary=Y&Actions=Y&Text=Y).

<sup>29</sup> Available at <http://www.rilin.state.ri.us/BillText10/HouseText10/H7092.pdf>.

### Sample Bills Introduced:

- **Massachusetts, S 2375:** The bill 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.<sup>30</sup>
- **Ohio, HB 523:** An employee, labor organization, or losing bidder on a public construction contract may bring a civil action to enforce the civil penalties for misclassification. The plaintiff can retain ten percent of the penalty owed by the employer.<sup>31</sup>
- **Rhode Island, H 7868:** The bill authorizes a private attorney general action by an aggrieved employee to collect the civil penalties imposed for violations of minimum wage and overtime laws. The employee can retain 25 percent of the amount recovered, while 75 percent goes to the Department of Labor and Training for enforcement and education activities.<sup>32</sup>

#### 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 misclassification.<sup>33</sup>

#### Laws Passed:

- **Connecticut, Public Act No. 10-12:** This act increases the monetary penalty for misclassifying an employee in order to pay lower workers' compensation premiums to \$300 for each day that the violation occurs.<sup>34</sup>
- **Maine, Public Law Chapter 649, LD 1565:** The act provides that if the Workers' Compensation Board determines that a construction contractor knowingly failed to secure

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<sup>30</sup> Available at <http://www.mass.gov/legis/bills/senate/186/st02pdf/st02375.pdf>.

<sup>31</sup> Available at [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_HB\\_523](http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_523).

<sup>32</sup> Available at <http://www.rilin.state.ri.us/BillText10/HouseText10/H7868.pdf>.

<sup>33</sup> 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.

<sup>34</sup> Available at <http://www.cga.ct.gov/2010/ACT/PA/2010PA-00012-R00HB-05204-PA.htm>.



workers' compensation for its employees, a stop work order shall issue at the worksite where the violation occurred.<sup>35</sup>

- **Vermont, Act. No. 142:** The act increases the civil penalty for failure to insure under the workers' compensation law. The act authorizes the issuance of a stop work order until an employer secures insurance, provides for the imposition of administrative penalties for continued failure to secure coverage and of civil and criminal penalties for violating a stop work order, and debars violating employers from contracting with the state or its subdivisions. The act also imposes civil penalties for misclassification under the unemployment insurance law.<sup>36</sup>
- **Wisconsin, Act 288:** The act provides for a \$25,000 fine on painting or drywalling employers for willful misclassification relating to tax withholding, workers' compensation, unemployment insurance, or employment discrimination.<sup>37</sup>

#### **Sample Bills Introduced:**

- **Massachusetts, H 17:** The bill authorizes the imposition of a stop work order against an employer who fails to make proper provision for workers' compensation for his employees, which can only be removed by obtaining the necessary insurance and paying a civil penalty.<sup>38</sup>
- **Vermont, S.257:** The bill makes coercing a statement of independent contractor status subject to penalties under both the workers' compensation and unemployment compensation laws. The bill authorizes closure orders, fines, and criminal penalties against employers that fail to secure workers' compensation coverage.<sup>39</sup>

#### **5. Laws that require the licensing or registration of independent contractors.**

Some states have proposed imposing a requirement that the identity of all individuals classified as independent contractors be brought to the attention of the state. This can help deter some employers from falsely requiring workers to attest that they are independent contractors, and can provide data for state enforcement agencies. However, these laws should be viewed with caution so that they are not used to penalize employees who just seek a license or registration in order to get a job.

#### **Sample Bills Introduced:**

- **New York, A 403:** This bill requires all construction, renovation, repair or other improvement contractors and subcontractors on a public works project to submit under penalty of perjury a list identifying all individuals classified as independent contractors to the Commissioner of Labor. The list shall be submitted with a fee of ten dollars per independent

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<sup>35</sup> Available at [http://mainelegislature.org/legis/bills/bills\\_124th/chapters/PUBLIC649.asp](http://mainelegislature.org/legis/bills/bills_124th/chapters/PUBLIC649.asp).

<sup>36</sup> Available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT142.pdf>.

<sup>37</sup> Available at <http://www.legis.state.wi.us/2009/data/acts/09Act288.pdf>.

<sup>38</sup> Available at <http://www.mass.gov/legis/bills/house/186/ht00pdf/ht00017.pdf>.

<sup>39</sup> Available at <http://www.leg.state.vt.us/docs/2010/bills/Intro/S-257.pdf>.

contractor, which will be deposited in a fund for investigating and prosecuting misclassification.<sup>40</sup>

- **Rhode Island, S 2374:** The bill requires registration of all independent contractors or those who hire an independent contractor with the Division of Taxation, and imposes civil and criminal penalties for failure to register. Employers of independent contractors must withhold a percentage of the contract proceeds and pay it as an estimated tax payment.<sup>41</sup>

### **Federal Action Addressing Independent Contractor Misclassification**

Also of note this year was the attention given to the issue of misclassification at the federal level, both legislative and administrative.

- **Employee Misclassification Prevention Act:**<sup>42</sup> This bill, which was introduced in both the House and Senate in April 2010, amends the recordkeeping requirements of the Fair Labor Standards Act to require employers to keep records relating to non-employees who perform services for remuneration. The bill also requires an employer to provide notice in writing of a worker's classification, and information about rights and Department of Labor resources. The bill establishes a presumption that an individual is an employee under the FLSA if the employer violates these recordkeeping and notice requirements, and imposes civil penalties.

The bill also amends the Social Security Act to require state unemployment insurance programs to implement investigative procedures and establish penalties for misclassification, and requires the Department of Labor to measure state performance in this misclassification enforcement when conducting unemployment compensation tax audits.

The bill requires information sharing within the Department of Labor regarding possible misclassification under the FLSA, and authorizes the sharing of such information with the IRS. The bill also requires that targeted audits conducted by the Wage & Hour Division shall include industries with frequent incidence of employee misclassification.

The Senate's Committee on Health, Education, Labor and Pensions held a hearing on this legislation in June of 2010.<sup>43</sup>

- **Taxpayer Responsibility, Accountability and Consistency Act:**<sup>44</sup> This bill, introduced in the House and Senate in late 2009, tightens the safe harbor provision in the Internal Revenue Code that allows employers to avoid employment tax liability by classifying a worker as an independent contractor. The bill provides that an employer's classification of a worker is reasonable only if based on an agency's written determination or concluded employment tax

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<sup>40</sup> Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A00403&Summary=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A00403&Summary=Y).

<sup>41</sup> Available at <http://www.rilin.state.ri.us/BillText10/SenateText10/S2374.pdf>.

<sup>42</sup> Available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5107>; and <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3254>.

<sup>43</sup> All testimony from the hearing is available from the HELP Committee website at <http://help.senate.gov/hearings/hearing/?id=225aa689-5056-9502-5d83-96cd13339413>.

<sup>44</sup> Available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3408>; and <http://thomas.loc.gov/cgi-bin/query/z?c111:S.2882>.

examination, and if the employer has not treated workers in this position as employees at any point since 1978. The bill also increases the penalties for filing incorrect tax returns due to misclassification.

This bill also requires the Secretary to issue an annual report on worker misclassification that includes information regarding: the number, type, and results of enforcement actions against employers who have misclassified workers; overall estimate of the number of employers misclassifying workers, the number of workers affected, and the industries involved; and the impact of such misclassification on the federal tax system.

- **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 Department plans: targeted Wage & Hour Division investigations in industries with the most substantial misclassification problems, 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.<sup>45</sup>

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

**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 end up watering down more expansive laws that make it easier for workers to claim that they are employees by instead using the convoluted common-law tests for employee status that are easy for employers to manipulate (such as the IRS “20-factor” test).

#### **Sample Laws Passed:**

- **Indiana, Act No. 23:** The act requires the Department of Labor to develop guidelines and procedures for investigating complaints concerning independent contractor misclassification in the construction industry. The act requires that the Department use the twenty factors developed by the IRS to determine whether a worker is an independent contractor in implementing these investigative procedures. This enacts a highly manipulable test as the standard by which employer misclassification is judged.<sup>46</sup>

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<sup>45</sup> See [http://www.dol.gov/sec/media/congress/20100310\\_appropriations.htm](http://www.dol.gov/sec/media/congress/20100310_appropriations.htm).

<sup>46</sup> Available at <http://www.in.gov/legislative/bills/2010/SE/SE0023.1.html>.

**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.

**Sample Bills Introduced:**

- **Maryland, HB 714:** The bill specifies the conditions under which home care work is not covered employment for unemployment insurance purposes, placing emphasis on whether a worker has entered into a written agreement explicitly labeling her an independent contractor. Many workers who are not independent contractors will sign such agreements in order to obtain needed work.<sup>47</sup>
- **Vermont, S.251:** The bill specifies the conditions under which an individual providing private delivery or messenger services is not an employee for purposes of workers' compensation and unemployment compensation.<sup>48</sup>

**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 work authorization program, E-Verify, 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.

**Sample Bill Introduced:**

- **Idaho, S 1303:** This law requires employers to verify the employment eligibility of all employees using E-Verify, and prohibits the knowing employment of an unauthorized worker. The law also makes knowing failure to claim a worker as an employee a violation, and imposes penalties.<sup>49</sup>
- **New York, A 6793:** In addition to providing for a standardized definition of “employee” in the tax, workers’ compensation and labor laws, this bill also requires undocumented workers to pay state income tax and provides 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.<sup>50</sup>

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<sup>47</sup> Available at <http://mlis.state.md.us/2010rs/bills/hb/hb0714f.pdf>.

<sup>48</sup> Available at <http://www.leg.state.vt.us/docs/2010/bills/Intro/S-251.pdf>.

<sup>49</sup> Available at <http://www.legislature.idaho.gov/legislation/2010/S1303.pdf>. This legislation seems to conflate the concepts of knowing employment of an unauthorized worker and knowing misclassification of an employee, and it is not clear whether the law is actually intended to address the problem of independent contractor misclassification.

<sup>50</sup> Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A06793&Summary=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A06793&Summary=Y).