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Select Summary of State Legislation Aimed at Independent Contractor Abuses

The following is a select summary of recent state legislative activity aimed at misclassification of employees as independent contractors.¹ A growing problem, misclassification is a top choice of employers seeking to evade responsibility for workers under labor and employment laws, including fair pay, health and safety, and collective bargaining rules. By calling employees independent contractors (“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 paid for “employees.” For background on these practices and their impacts on workers and on the economy, see NELP’s recent Congressional testimony.²

NELP welcomes news from advocates on pending legislation; we will circulate it if you forward it to cruckelshaus@nelp.org. This summary is beginning with new legislation and leading pending bills introduced in the 2007 legislative sessions. For earlier cumulative summaries, see NELP, *Combating Independent Contractor Misclassification in the States: Models for Successful Reform*.³

1. **A growing number of research studies and state commissions showing 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. Several states have recently collected data on the costs of misclassifying employees as independent contractors, and the numbers of lost payroll and other taxes are staggering.

- NY: Fiscal Policy Institute, “New York State Workers Compensation: How Big is the Shortfall?” (January 2007);

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>

² Available at <http://www.nelp.org/docUploads/IndependentContractorTestimony2007.pdf>

³ Available at <http://www.nelp.org/docUploads/COMBATING%20INDEPENDENT%20CONTRACTOR%20MISCLASSIFICATION%2Epdf>.

- IL: Michael Kelsay, James Sturgeon, Kelly Pinkham, "The Economic Costs of Employee Misclassification in the State of Illinois" (Dept of Economics: University of Missouri-Kansas City: December 2006);
- NJ: Dept. of Labor & Workforces's audit in 2005 found \$5 million in lost income taxes and \$15 million in underpayments to UI and disability funds;
- IA: Peter Fisher *et al*, "Nonstandard Jobs, Substandard Benefits", Iowa Policy Project (July 2005);
- ME: State of Maine, "Annual Report on the Status of the Maine Workers' Compensation System," Submitted to the Legislature, February 2005);
- MA: Francois Carre, J.W. McCormack, "The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004)⁴.
- NH and other states have established a **commission to study** the classification of employees as independent contractors. For a recent example, see [Full Text of NH HB 246](#)

2. 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. (See cautionary note below, at number 7).

Existing Laws:

- MA's weekly wage payment law creates a presumption of employee status for "individuals performing any service," with some exceptions. [MA Gen. Laws Ch. 149, section 148B](#)
- CO's Workers Compensation Act states that any company contracting-out any work is an "employer" under the Act. [C.R.S. 8-41-401](#).
- NH and at least 9 other states have a general presumption of "employee" status in their workers' compensation acts, regardless of the job. For an example of such a law, see [NH Rev. Stat. 281-A:2](#).

⁴ These studies are available on the web for the most part. See, e.g., "The Social and Economic Costs of Employee Misclassification in Illinois," http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Illinois_Misclassification_Study.pdf. Contact NELP for a copy of any of these studies you are unable to find.

- IL UI code, like many state UI laws, puts the burden on the employer to prove that the worker is not an “employee.” See [820 ILCS 405/212](#).
- [CA’s Labor Code 2819](#) creates a presumption of employer status for construction, farm labor, garment, janitorial or security guard contractors, requiring them to comply with labor and employment laws.
- MT’s Independent Contractor Unit issues required Independent Contractor Exemption Certificates for true independent contractor status, and is a collaboration of the state UI, workers’ compensation, wage and hour, human rights and department of revenue agencies. See, <http://erd.dli.nt.gov/wcregs/iccu.asp>.

Pending bills:

- NM bill provides for a presumption of employee and not independent contractor status *for anyone* performing labor or services for a fee, regardless of the sector or job. [Full Text of NM HB 653](#)
- IL HB 1795 creates a presumption that a construction contractor is an “employer” responsible for compliance with the state workers’ compensation act. [Full Text of IL HB 1795](#).
- MN HF 1283 states that an individual is an employee unless it has an independent contractor exemption certificate, requiring a showing of independent business entity, and calls for collaboration between state agencies. [Full Text of MN HF 1283](#).

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

Existing Laws:

- IL day labor law, HB 3471, requires labor providers and worksite employers to keep records of hours and pay, and provide written disclosures. These provisions should apply to any worker, regardless of whether they’re called “independent contractors.” See <http://www.ilga.gov/legislation/publicacts/94/PDF/094-0511.pdf>
- NM creates a presumption of employee status for workers in the construction industry, and provides penalties for improperly reporting an employee as an independent contractor. It requires state Labor Department to administer and enforce the standards. [New Mexico Stat. 60-13-3.1](#)
- WA prohibits public employers from misclassifying workers in order to get out of providing employment benefits. [Full Text of RCW 49.44.170](#).
- FL law creates a statutory “employee”, defining “employee” under its state workers’ compensation act to include owner-operators of motor vehicles, previously exempted as independent contractors. [Full Text of FL HB 423](#)

- CO law creates a statutory “employer,” requiring construction contractors to provide workers comp coverage to all workers onsite; and gives state department of revenue access to workers compensation records for enforcement. CO Rev. Statutes 8-43-409 (8).

Pending Laws:

- IL bill has extensive independent contractor misclassification rules for construction contractors (defined broadly) under workers compensation act, including creating a presumption of employee status and requiring inter-agency cooperation to stem abuses. [Full Text of IL HB 1795](#).
- DE bill regulates contractors and requires them to have workers compensation insurance, and requires data collection on workers comp abuses, including independent contractor misclassification. [Full Text of DE SB 1](#).

4. Specific changes to workers’ compensation and unemployment insurance statutes to target independent contractor abuses.

Existing law:

- AZ and 13 other states (including the District of Columbia) have the “**relative nature of the work test**,” which helps workers claiming to be “employees” and not independent contractors, even where the state workers’ compensation act uses the more restrictive common law test for employee status. To be true independent contractors, this test requires a showing that worker is independent of employer’s business, and is engaged only in performance of definite job or piece of work. For an example, see [§Ariz. Rev. Stat. §23-902\(B\),\(C\)](#)
- PA and 13 other states prohibit “SUTA” (state unemployment insurance tax) dumping by prohibiting employers from creating new entities to dodge UI experience ratings and higher premiums.⁵ For the PA law, see <http://www.legis.state.pa.us/MU01/LI/BI/BT/2005/0/SB0464P0765.HTM>

5. State agency collaboration and data sharing.

Existing law:

- CA unemployment insurance law creates an inter-agency task force to collect data on independent contractor misclassification and provides for collaborative enforcement among agencies, including Employment Development Department, Department of Consumer Affairs, Department of Industrial Relations, Department of Insurance, and Department of Criminal Justice Planning. CA Unemployment Ins. Code section 329. <http://caselaw.lp.findlaw.com/cacodes/uic/301%2D335.html> . See also CA’s Economic

⁵ For more on SUTA Dumping, see http://www.nelp.org/ui/state/funding/statesutadumping_.cfm

and Employment Enforcement Coalition (EEEC). The EEEEC's mission is "to root out California's underground economy," according to its website. For recent enforcement activity by the CA EEEEC, see <http://www.dir.ca.gov>

- NJ's Governor created a Misclassification Initiative in 2006, directing the state's Department of Labor and Workforce Development and its Department of Treasury to work together to combat independent contractor misclassification. For more, see <http://www.state.nj.us/labor/press/2006/Corzine.htm>
- CA and other states require employers to report all IRS 1099 filings in order to collect child support payments under a federal Health & Human Services program. This information can be used by state agencies to combat independent contractor abuses. For more information, see [Employer Services - Employer Responsibilities](#).

Pending:

- IL Bill requires inter-agency cooperation between the state Department of Labor, Department of Employment Security, Department of Revenue, and the IL Workers Compensation Commission. [Full Text of IL HB 1795](#).

6. 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,⁶ and to protect workers who fear retaliation if they complain. The laws should also provide for attorneys fees for the prevailing plaintiffs, to enable low-wage workers to get attorneys to bring their claims.

⁶ Recently, five California-based organizations, the Asian Pacific American Legal Center and Sweatshop Watch, in conjunction with the Asian Law Caucus, Women's Employment Rights Clinic (WERC) at Golden Gate University School of Law, and the Garment Worker Center, released a study evaluating California's implementation of its landmark anti-sweatshop law seeking corporate accountability for sweatshop abuses in the garment industry, by enabling the state's garment workers to recover their unpaid wages from powerful apparel companies. The evaluation, "Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law, An Evaluation of Assembly Bill 633 Six Years Later," and its Executive Summary are available at www.apalc.org, www.sweatshopwatch.org, and www.asianlawcaucus.org. The study revealed lackluster state enforcement and widespread corporate disregard of what has been lauded as the strongest anti-sweatshop legislation in the nation, and includes various recommendations to realize the law's full potential, including affording a private right of action.

- The IL day labor act provides for private right of action, 820 ILCS 175/95, and permits “any party” to seek penalties under the act. IL minimum wage act also has private right of action, at 820 ILCS 105/12, [Full text of the law](#), as do many other state and federal laws. Several of the recently-passed state minimum wage ballot initiatives also contain these provisions. See, e.g., AZ Minimum Wage law, [Proposition 202 - 2006 Ballot Propositions and Judicial Performance Review](#).
- Because workers are often afraid to come forward themselves, it is helpful to provide for a representative cause of action, like the Arizona and Ohio Minimum Wage ballot initiatives and the San Francisco living wage law, which permit individual workers, unions and community groups that represent workers at the worksite to file claims. See http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/prop202.htm
- **Provide for strong anti-retaliation protections for workers who complain.**
 - See AZ Minimum Wage Act (above); SF Minimum Wage Ordinance, with the strongest anti-retaliation provision in the country, creating a rebuttable presumption that any adverse action taken against a complaining worker is retaliatory if it occurs within 90 days of worker’s complaint. SF Administrative Code CH. 12R. http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sf_ad_min
- **Provide for monetary damages per worker misclassified in an amount likely to deter future violations.**
 - See IL Day Labor law, [820 ILCS 175/70 \(a\)](#).
 - MA Wage Payment Collection Law provides for individual liability and treble the amount of unpaid wages as damages. [MA Gen. Law Ch. 149 Section 150](#).
- **Provide for debarment remedies if the violating employers are state public contractors.**
 - See [MA Gen. Laws Ch. 149, section 148B \(d\)](#).

7. 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:

- 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, <http://landru.leg.state.or.us/05reg/measures/sb0300.dir/sb0323.en.html>

- **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 doesn’t have much of a practical impact. Eg, unfair wages prohibition act in NY, Art. 19, section 662. <http://caselaw.lp.findlaw.com/nycodes/c54/a45.html>. This law *has not been used once* by the state DOL since its enactment in 1997.

Bills providing for criminal penalties for independent contractor misclassification are pending in NJ (S-2248 and S-2579) and KS (HB 2772) this year, among other states.