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## **THE FINAL REPORT OF THE SENATE SUBCOMMITTEE ON EMPLOYEE MISCLASSIFICATION**

### **SUBCOMMITTEE MEMBERS**

Senator Josh McKoon – Chair  
District 29

Senator Ed Harbison  
District 15

Senator Burt Jones  
District 25

Senator P.K. Martin  
District 9

Senator Charlie Bethel (*ex officio*)  
District 54

## SUBCOMMITTEE FOCUS, CREATION, AND DUTIES

The Senate Subcommittee on Employee Misclassification was created by Senator Charlie Bethel, Chairman of the Senate Insurance and Labor Committee, to review the topic of employee misclassification in Georgia generally and any other matters related to the subject.

Senator Josh McKoon of the 29<sup>th</sup> was appointed as the Subcommittee's Chair. Senator Ed Harbison of the 15<sup>th</sup>, Senator Burt Jones of the 25<sup>th</sup>, and Senator P.K. Martin of 9<sup>th</sup> also served on the Subcommittee, while Senator Charlie Bethel of the 54<sup>th</sup> served as *ex officio*.

The Subcommittee held three meetings and met on July 21, 2015 at the Chatham County Commission Chambers in Savannah; and on September 29, 2015 and October 27, 2015 at the Coverdell Legislative Office Building in Atlanta. The Subcommittee also toured the Garden City Terminal of the Port of Savannah on July 21, 2015.

The Committee heard testimony from: Ms. Rebecca Smith, Deputy Director of the National Employment Law Project (NELP); Mr. John Jackson and Ms. Carol Cauley of Stand Up for Savannah; Mr. Ed Crowell, President of the Georgia Motor Trucking Association; Mr. Jim Boykin, President of the South Georgia Mechanical & Erectors Association; Mr. Alston Correll of Dentons; Mr. Tim Mitchell of the Georgia Department of Labor; Mr. Darrell L. Sutton of the Sutton Law Group, LLC; Mr. Jerry Hayes, member of the Georgia Construction Industry Licensing Board's Division of Electrical Contractors; Mr. Tom LeMay, owner of LeMay Electric, Inc.; Mr. Jimmy Gibbs of the Southeastern Carpenters Regional Council; Mr. Will Garrett, former employee of Carey Limo; Mr. David A. Cole of Freeman Mathis & Gary, LLC; Mr. Mark Woodall, Director of Government Affairs for Associated General Contractors of Georgia, Inc.; Mr. Steve Weizenecker of Barnes and Thornburg, LLP and member of the Georgia Film, Music, and Digital Entertainment Advisory Board; Mr. Jonathon Martin and Mr. John Weltin of Constangy, Brooks, Smith & Prophete, LLP; Mr. Kyle Jackson, Vice President of State and Political Affairs for the Georgia Chamber of Commerce; Mr. Matt Patterson of Roof Solutions; Mr. Neil Gluckman and Ms. Katherine Walding of Crew One; Mr. Frank Young, President of B-H Transfer Company; and Mr. Wade H. Parr, owner of Wade H. Parr Trucking.

## COMMITTEE FINDINGS

### BACKGROUND

Sometimes referred to as the "underground economy," employee misclassification is the practice of designating workers as independent contractors when they should be treated as employees and afforded all the rights and benefits of an employee. The practice allows employers to avoid providing workers' compensation coverage, paying unemployment taxes and other payroll taxes, adhering to minimum wage and overtime laws, and providing healthcare benefits, all resulting in workers being cheated out of vital benefits and protections.<sup>1</sup> Misclassification also results in federal and state governments missing out on millions of dollars in needed revenue.<sup>2</sup> Additionally, by reducing labor costs, companies that misclassify gain unfair advantages when businesses are involved in competitive bidding on projects.<sup>3</sup> Employers who misclassify can also circumvent federal and state immigration employment laws more easily.

Although the abuse is particularly prevalent in the construction and trucking industries due to the inherent danger of the work and the high costs of providing workers' compensation coverage, the overall numbers of

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<sup>1</sup> Testimony presented by Mr. John Jackson and Ms. Carol Cauley of Stand Up for Savannah; July 21, 2015.

<sup>2</sup> Testimony presented by Mr. Tim Mitchell, of the Georgia Department of Labor; July 21, 2015.

<sup>3</sup> Testimony presented by Ms. Rebecca Smith, Deputy Director of the National Employment Law Project (NELP); July 21, 2015; Mr. Jim Boykin, President of the South Georgia Mechanical & Erectors Association; July 21, 2015; and Mr. Jerry Hayes, member of the Georgia Construction Industry Licensing Board's Division of Electrical Contractors; October 27, 2015.

misclassified employees have likely increased in recent years as workers in traditional industries have been joined by a growing number of “on-demand workers,” who often get their assignments via a phone app or online. Because employee misclassification affects a wide range of businesses and workers, the Subcommittee heard concerns from representatives of the following industries:

- Trucking;
- Insurance agencies;
- Electrical contractors;
- General construction contractors;
- Limousine drivers;
- Roofers;
- Film industry; and
- Entertainment stagehands.

## **DETERMINING THE WORKING RELATIONSHIP**

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Georgia law generally recognizes two primary worker classifications:

- Employee (part-time or full-time); and
- Independent Contractor.

The implications of these statuses are primarily related to federal and state taxation, workers’ compensation, and how businesses and their workers interact with one another. Because of the tax and revenue implications, the Internal Revenue Service (IRS) and Georgia Department of Labor (GDOL) try to prevent the misclassification of employees and independent contractors.

Three factors are used to determine the relationship between businesses and workers:

- Behavior control;
- Financial control; and
- Relationship of the parties.

Generally, no single factor provides the answer to proper classification.

### **1. Behavioral Control**

Behavioral control shows whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. For example, if a worker receives extensive instructions on how work is to be done, this suggests that the worker is an employee. If the worker receives less extensive instructions about what should be done, but not how it should be done, then that worker may be an independent contractor. Another test of behavioral control is training. If the business provides the worker with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that the worker is an employee.

### **2. Financial Control**

This factor shows whether there is a right to direct or control the business part of the work. For instance, if a worker has a significant investment in the work, then they may be an independent contractor. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an independent contractor. Additionally, if the worker is not reimbursed for some or all business expenses, then they may be an independent contractor, especially if the unreimbursed business expenses are high. Finally, the opportunity for profit or loss strongly suggests that the worker is in business for themselves and that they are most likely an independent contractor.

### 3. Relationship of the Parties

This factor illustrates how the business and the worker perceive their relationship. For example, if the worker receives benefits, such as insurance, pension, or paid leave, this is an indication that worker is an employee. However, a lack of benefits alone is not a clear enough factor in determining a classification.

A written contract may show the intentions of both the worker and the business. This is a very significant factor when it is difficult to determine status based on other facts.

### ESTABLISHING INDEPENDENT CONTRACTOR STATUS IN GEORGIA

Within Georgia's employment security statutes,<sup>4</sup> there are typically two ways<sup>5</sup> for an employer to establish that a worker is an independent contractor in Georgia:

1. Demonstrate that the worker has been, and will continue to be, free from control or direction over the performance of the work, and is customarily engaged in an independently established trade, occupation, profession, or business; or
2. Show that the IRS found that the worker is not an employee through an SS-8 determination.<sup>6</sup>

Another method that can establish a worker's status is through the state's workers' compensation statute which defines an independent contractor<sup>7</sup> as a person who:

1. Is working under a contract that creates an independent contractor relationship;
2. Has the right to exercise control over the time, manner, and method of the work; and
3. Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.<sup>8</sup>

### Common Law Tests

The Subcommittee repeatedly heard references to the "Sky King" test or court case. This is in reference to the 2012 *Sky King 101, LLC v. Thurmond* court case which most recently reaffirmed that common law determines independent contractor status.<sup>9</sup> Under this test, Georgia courts have traditionally found that the following factors demonstrate that an individual is free from significant control or direction, and is, therefore, an independent contractor:

1. There are no territorial or geographic restrictions placed on the worker;
2. The worker is allowed to work for other companies or to hold other employment contemporaneously;
3. The worker has no prescribed minimum hours to work or orders to obtain;
4. The worker is free to accept or reject work without consequence; and
5. The worker has the discretion to set his own schedule.<sup>10</sup>

In general, it must also be demonstrated that the worker is customarily engaged in an independently established trade.

### Introduced Legislation

Introduced during the 2015 Legislative Session, Senate Bill 19 and House Bill 500 attempt to codify the *Sky King* language mentioned above in an effort to curtail the abuse of misclassifying workers. These bills maintain that services performed by an individual for wages is considered employment unless GDOL makes a contrary

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<sup>4</sup> Chapter 8 of Title 34

<sup>5</sup> O.C.G.A. § 34-8-35(f)

<sup>6</sup> Testimony presented by Mr. David A. Cole, JD, of Freeman Mathis & Gary, LLC; October 27, 2015. Firms and workers file this form to request a determination of the status of a worker for purposes of federal employment taxes and income tax withholding. Mr. Cole testified this method is almost never carried out for the simple reason that a business would never voluntarily allow the IRS access to its financial records.

<sup>7</sup> O.C.G.A. § 34-9-2(e)

<sup>8</sup> Testimony presented by Mr. Darrell L. Sutton, JD, of the Sutton Law Group, LLC; September 29, 2015; and Mr. David A. Cole, JD, of Freeman Mathis & Gary, LLC; October 27, 2015.

<sup>9</sup> *Sky King 101, LLC v. Thurmond* 12 FCDR 794, 314 Ga. App. 377, 724 S.E. 2d 412 (2012).

<sup>10</sup> See *Sarah Coventry, Inc. v. Caldwell*, 243 Ga. at 433-434(2)(a) (1979); *Vocational Placement Svcs., Inc. v. Caldwell*, 168 Ga. App. 198, 200(1)(a) (308 S.E.2d 618) (1983); and *Sky King 101, LLC v. Thurmond* 12 FCDR 794, 314 Ga. App. 377, 724 S.E. 2d 412 (2012).

determination based upon submitted evidence of certain factors demonstrating that the individual has been, and will continue to be, free from control or direction over the performance of those services. Similar to the Sky King factors, the submitted evidence must demonstrate that the individual:

1. Is not prohibited from working for other companies or holding other employment contemporaneously;
2. Is free to accept or reject work assignments without consequence;
3. Is not prescribed minimum hours to work or, in the case of sales, does not have a minimum number of orders to be obtained;
4. Has the discretion to set his or her own work schedule; and
5. When applicable, has no territorial or geographic restrictions.

These bills also add two additional factors that must be considered beyond the Sky King criteria:

1. The worker receives only minimal instructions and no direct oversight or supervision regarding the services to be performed, such as the location where the services are to be performed and any requested deadlines; and
2. The worker is not required or compelled to perform, behave, or act in a manner related to the performance of services for wages which is determined by the Commissioner to demonstrate employment.

House Bill 500 was adopted by the House Industry and Labor Committee, while Senate Bill 19 was never addressed by the Senate Insurance and Labor Committee.

### **U.S. DOL's Updated Guidelines on Employee Misclassification**

The U.S. Department of Labor (DOL) issued updated guidelines on the misclassification of employees as independent contractors on July 15, 2015.<sup>11</sup> Although nonbinding, the DOL guidance could motivate businesses to focus more closely on contract language that governs their behavior toward contractors. DOL's key points in its guidance are that: (1) most workers are employees under the broad definitions of the Fair Labor Standards Act (FLSA); (2) no single factor is determinative and employers should be wary of classifying workers as independent contractors merely because the workers control some aspects of their work; and (3) the ultimate question is whether a worker is really in business for him or herself or is economically dependent on the employer. DOL lists six factors that should be used in determining employment status:

#### **1. Is the Work an Integral Part of the Employer's Business?**

If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and is an employee. However, a true independent contractor's work is unlikely to be integral to the employer's business. Work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers. To illustrate this, the guidance document contends that a worker answering calls at a call center along with hundreds of others is performing work that is integral to the call center's business, even if that worker's work is the same as and interchangeable with many others' work. Furthermore, work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home, or on the premises of the employer's customers.

#### **2. Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?**

An independent contractor faces the possibility to not only make a profit, but also to experience a loss. Its managerial skill will often affect opportunity for profit or loss beyond the current job, such as by leading to additional business from other parties or by reducing the opportunity for future work.

#### **3. How Does the Worker's Relative Investment Compare to the Employer's Investment?**

The worker should make some investment and undertake at least some risk for a loss in order for there to be an indication that he or she is an independent contractor. An independent contractor typically makes investments

<sup>11</sup> The document can be accessed at: [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf)

that support its business beyond any particular job. If the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on the employer. DOL's interpretation contends that even if the investment is possibly a business investment, the worker's investment must be significant in nature and magnitude relative to the employer's investment in its overall business to indicate that the worker is an independent businessperson. The Tenth Circuit determined, for example, that rig welders' investments in equipped trucks costing between \$35,000 and \$40,000 did not indicate that the rig welders were independent contractors when compared to the employer's investment in its business.<sup>12</sup>

#### **4. Does the Work Performed Require Special Skill and Initiative?**

A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. DOL asserts that the technical skills of cable installers, carpenters, construction workers, and electricians, for example, even assuming that they are special skills, are not themselves indicative of any independence or business initiative.

#### **5. Is the Relationship between the Worker and the Employer Permanent or Indefinite?**

Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. An independent contractor will generally avoid a permanent or indefinite relationship with an employer and the dependence that comes with such an arrangement. Even if the working relationship lasts weeks or months instead of years, there is likely some permanence or indefiniteness to it as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for that employer. DOL further cautions that a worker's lack of a permanent or indefinite relationship with an employer is indicative of independent contractor status if it results from the worker's own independent business initiative.

#### **6. What is the Nature and Degree of the Employer's Control?**

As with the other economic realities factors, the employer's control should be analyzed in light of the ultimate determination whether the worker is economically dependent on the employer or truly an independent contractor. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. However, DOL warns that the "control" factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor. All possible relevant factors should be considered, and cases must not be evaluated based on the control factor alone.

As noted previously, the DOL interpretation only provides guidance and does not have the force of law. Instead, it attempts to provide a more detailed interpretation of how the DOL assesses employer compliance with existing law and the "economic realities" test under the FLSA.

### **EMPLOYEE MISCLASSIFICATION: FINANCIAL COSTS TO THE STATE**

It is difficult estimate just how much misclassifying employees is costing Georgia financially; in part, because Georgia has not conducted any far-reaching studies to examine the practice as other states have done. Another problem is that GDOL currently lacks the resources and manpower to effectively audit and investigate potential violators. Despite this, GDOL did testify that it has about 50 auditors who carry out routine audits and wage investigations. This has resulted in over 1,700 businesses being investigated and uncovering over 4,000 misclassified employees. GDOL also demonstrated how a concerned individual can submit an anonymous complaint regarding fraud or misclassification through its website.<sup>13</sup>

<sup>12</sup> *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998)

<sup>13</sup> Testimony presented by Mr. Tim Mitchell, JD, of the Georgia Department of Labor; July 21, 2015.

Despite the lack of available and reliable information specific to Georgia, several states have conducted exhaustive studies on employee misclassification in recent years. The National Employment Law Project (NELP) recently reviewed various state commissions, task forces, and agencies that have studied employee misclassification in their respective states. The following is a summary of NELP's findings.<sup>14</sup>

### California

Tax audits conducted by California's Employment Development Department (EDD) from 2005 to 2008 identified a total of 49,738 previously unreported employees. During that four-year period, the EDD recovered a total of \$173,516,334 in payroll tax assessments, \$28,950,656 in labor code citations, and \$64,229,829 in assessments on employment tax fraud cases.<sup>15</sup>

In 2012, the EDD's Tax Branch conducted 4,290 audits and investigations, resulting in assessments totaling \$230.6 million, and identified 89,063 unreported employees. The Compliance Development Operations within the EDD Tax Branch, which includes several programs that concentrate on the "underground economy," conducted 2,600 joint inspections, identified 13,226 previously unreported employees, assessed \$36 million in payroll tax assessments, and assessed over \$9 million on fraud cases in 2012.<sup>16</sup>

### Iowa

The 2010 Iowa Misclassification Task Force's 2<sup>nd</sup> Report noted that 230 employers were found to have misclassified workers. Through audits and missing wage investigations completed by Unemployment Insurance Tax Bureau field auditors from July 1, 2009 through December 30, 2010, 134 employers were found to have misclassified a total of 544 workers. These employers failed to report \$5,692,181 in employee wages for unemployment insurance tax purposes and owed a total of \$130,511 in unpaid unemployment insurance taxes, penalties, and interest.<sup>17</sup>

### Maryland

Audits conducted by Maryland's Unemployment Insurance Division found that an average of 20 percent of employers misclassify workers. The Division's report estimated that misclassification accounts for an annual loss of between \$15 million and \$25 million to the Unemployment Trust Fund. The Secretary of the Department of Labor noted that the estimate is likely conservative because audits are random, do not target industries where misclassification is most prevalent, and do not capture the underground economy.<sup>18</sup>

Maryland created the Joint Enforcement Task Force on Workplace Fraud in 2009. In its 2011 report, the Task Force noted that misclassification costs the Unemployment Insurance Trust Fund up to \$22 million every year. In 2011, the Department of Labor and Industry opened 660 investigations and issued citations to 12 companies; the Division of Unemployment Insurance completed 76 UI Workplace Fraud Audits and identified 3,178 misclassified workers and over \$17 million in unreported wages paid to employees, while UI Workplace Fraud Audits resulted in \$618,752 paid into the UI trust fund; while the Comptroller completed seven joint audits with the Task Force, which resulted in \$364,400 assessed for withholding taxes.<sup>19</sup>

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<sup>14</sup> The full report can be found at <http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf>

<sup>15</sup> California Employment Development Department, Annual Report: Fraud Deterrence and Detection Activities, report to the California Legislature (June 2009), available at [http://www.edd.ca.gov/pdf\\_pub\\_ctr/report2009.pdf](http://www.edd.ca.gov/pdf_pub_ctr/report2009.pdf)

<sup>16</sup> California Employment Development Department, Annual Report: Fraud Deterrence and Detection Activities, report to the California Legislature (June 2013), available at [http://www.edd.ca.gov/about\\_edd/pdf/Fraud\\_Deterrence\\_and\\_Detection\\_Report13.pdf](http://www.edd.ca.gov/about_edd/pdf/Fraud_Deterrence_and_Detection_Report13.pdf)

<sup>17</sup> Iowa Misclassification Task Force 2<sup>nd</sup> Report, Iowa Workforce Development (December 30, 2010), available at <https://www.iowaworkforcedevelopment.gov/sites/search.iowaworkforcedevelopment.gov/files/Iowa%20Misclassification%20Task%20Force%202nd%20Report.pdf>

<sup>18</sup> Testimony of Thomas E. Perez, Secretary of the Department of Labor, Licensing and Regulation, on HB 1590, before the House Economic Matters Committee (March 20, 2008), available at <http://www.dlir.state.md.us/whatsnews/testimonyclass.shtml>

<sup>19</sup> Department of Labor, Licensing and Regulation, Annual Report of the Joint Enforcement Task Force on Workplace Fraud (December 2011), available at <http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000113/014000/014584/unrestricted/20120420e.pdf>

## **Massachusetts**

In 2012, Massachusetts' Joint Task Force on the Underground Economy and Employee Misclassification recovered over \$15.4 million through its enforcement efforts: the Department of Unemployment Assistance recovered \$13 million in unpaid employer contributions to the UI Trust Fund and Fair Share Contribution; the Department of Revenue recovered \$328,000 in unpaid taxes; and the Attorney General's Office brought in \$593,400 in restitution, penalties, and fines related to violations of the state's wage and hour and independent contractor laws. The Department of Industrial Accidents (DIA) issued 15 stop-work orders for lack of workers' compensation coverage, brought 81 workers under coverage, and recovered \$10,500 in fines from employers. In its complementary enforcement process, the DIA brought coverage to 7,016 workers, issued 2,707 stop work orders, and assessed \$1.4 million in fines from employers.<sup>20</sup>

## **Michigan**

Michigan established its Underground Economy Task Force in June 2008, which found that more than 8 percent of Michigan employees are misclassified, \$16.8 million in UI payments went uncollected, and \$30 million in wages were not reported.<sup>21</sup>

## **Minnesota**

The Minnesota Office of the Legislative Auditor used UI audit data to estimate that 14 percent of employers misclassified workers in 2005 – about 17,500 employers. Misclassification rates in the construction industry were higher: 15 percent of construction employers and 31 percent of drywall employers misclassify their employees. The Auditor claims that the estimates are conservative because they exclude employers that operate in the “cash” economy or fail to register in the unemployment program.<sup>22</sup>

## **Nebraska**

From July 1, 2010 - June 30, 2011, Nebraska UI Tax field representatives conducted 938 audits and investigations; 669 of these audits targeted high violation industries. Of these 669 audits, 1,039 misclassified workers were discovered while additional tax collections of \$42,559 were uncovered.<sup>23</sup>

From July 1, 2011 – June 30, 2012, UI Tax field representatives completed 766 audits and missing wage investigations. Of those, 727 field audits targeted high violation industries resulting in 947 misclassified workers and additional tax collections of \$44,826.08.<sup>24</sup>

## **Nevada**

Nevada Employment Security Division records indicate that 12.4 percent of benefit claims investigations involved a claim of independent contractor misclassification and 2.7 percent of audited employment was misclassified. This led to a conservative estimate of approximately 31,000 employees in the state that may be misclassified. The estimated annual revenue loss to the Unemployment Trust Fund is \$8.2 million.<sup>25</sup>

## **New York**

A 2007 study issued by the Cornell University School of Industrial and Labor Relations, and based on audits by the New York DOL UI Division of select industries from 2002-05, estimated annual misclassification rates of

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<sup>20</sup> Massachusetts Department of Labor, Joint Task Force on the Underground Economy and Employee Misclassification 2012 Annual Report (August 2013), available at <http://www.mass.gov/lwd/eolwd/jtf/annual-report-2012.pdf>

<sup>21</sup> Michigan Supreme Court, Underground Economy (June 2010), available at: <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/UETF-2010.pdf>

<sup>22</sup> Misclassification of Employees as Independent Contractors, Program Evaluation Division, Minnesota Office of the Legislative Auditor (2007), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/missclass.pdf>

<sup>23</sup> Nebraska Employee Misclassification Act, Annual Report 2010-11. Nebraska Department of Labor (2011), available at <http://dol.nebraska.gov/employers/safety/EmpClassAct/2011%20Employee%20Classification%20Act%20Annual%20Report.pdf>

<sup>24</sup> <http://dol.nebraska.gov/employers/safety/EmpClassAct/2012EmployeeClassificationActReport.pdf>

<sup>25</sup> Employee Misclassification- Bulletin No. 11-07. Nevada Legislative Counsel Bureau (January 2011), available at <http://leg.state.nv.us/Division/Research/Publications/InterimReports/2011/Bulletin11-07.pdf>



about 10.3 percent in the state's private sector and approximately 14.9 percent in the construction industry. Each year, an estimated 39,587 employers within those audited industries misclassified workers. Approximately 704,785 workers were misclassified. Average UI taxable wages underreported due to misclassification each year was \$4,238,663, and UI tax underreported was \$175,674,161.<sup>26</sup>

According to a February 2014 report by the Joint Enforcement Task Force on Employee Misclassification, the Task Force has identified over 114,000 instances of employee misclassification and discovered over \$1.8 billion in unreported wages, between 2007 and 2013. The sweeps were conducted at construction sites, bars/restaurants, adult entertainment venues, automotive tire and repair centers, grocery stores, and retail establishments. In 2013 alone, completed audits and investigations of businesses found through the Task Force sweeps: uncovered nearly \$62.2 million in unreported wages; resulted in the assessment of over \$2.2 million in additional unemployment insurance contributions; and revealed over 4,700 misclassified workers.<sup>27</sup>

### **Pennsylvania**

A 2008 study found that 9 percent of Pennsylvania's workforce, or 580,000 workers, were misclassified as independent contractors. Misclassification resulted in a loss of over \$200 million to the unemployment compensation trust fund and \$81 million to the workers' compensation system.<sup>28</sup>

### **Tennessee**

Tennessee's 2013 Employee Misclassification Task Force Annual Report concluded that if a business has workers and has obtained a workers' compensation insurance policy to provide coverage to those workers, the same workers should be eligible for unemployment insurance, and the business should pay unemployment taxes in addition to workers' compensation insurance premiums. In addition, the report indicated that the majority of businesses misclassifying workers are smaller businesses and that it is at this "grass roots" level that the misclassification begins and finds its way to the other business sectors such as commercial construction. Only 50 percent of trucking businesses and 12 percent of residential construction businesses consistently classified workers as employees for both workers compensation and unemployment insurance. The Task Force recommends sharing information among existing agencies and appointing additional investigators to identify noncompliant employers, but small scale investigations support the assertion that employee misclassification is prevalent in some industries. Investigations of 32 companies in the drywall, painting, framing, general construction, and roofing industry identified 1,035 misclassified workers and half a million dollars in money owed to the state. Investigations of 23 drywall employers identified 884 misclassified workers and \$374,652 in money owed to the state.<sup>29</sup>

### **Utah**

The Unemployment Insurance Division of the Department of Workforce Services routinely conducts both "random" and "targeted" audits of Utah employers. In the four and one-half year period between January 1, 2008 and June 30, 2012, the division completed 5,233 "random" audits, covering \$1.4 billion in total reported wages. The random audits identified \$42 million in total unreported wages to 6,949 workers who were misclassified as "independent contractors." The random audits revealed a variance of 2.9 percent. During the same time period, the division completed 913 "targeted" audits of Utah employers, covering \$970 million in total reported wages. Targeted audits, which primarily use IRS Form 1099 information to identify potential unreported workers, yield different results, and identified \$138 million in total unreported wages to 18,114

<sup>26</sup> The Cost of Worker Misclassification in New York State, Cornell University School of Industrial Labor Relations (February 2007), available at <http://digitalcommons.ilr.cornell.edu/reports/9/>

<sup>27</sup> <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2014.pdf>

<sup>28</sup> Testimony of Patrick T. Beaty, Deputy Secretary for Unemployment Compensation Programs, Pennsylvania Department of Labor and Industry, before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act (April 23, 2008), available at [http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2008\\_0091\\_0001\\_TSTMNY.pdf](http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2008_0091_0001_TSTMNY.pdf)

<sup>29</sup> Employee Misclassification Task Force, 2013 Annual Report 20 (2013), available at <http://www.state.tn.us/regboards/contractors/documents/2013EMATFAnnualReport.pdf>

workers who were misclassified as “independent contractors.” The targeted audits revealed a variance of almost 14 percent.<sup>30</sup>

### **Vermont**

The Vermont Workers’ Compensation Task Force issued a report in April 2009 finding that 10 to 14 percent of Vermont employers misclassify their workers.<sup>31</sup>

### **Virginia**

The Virginia Joint Legislative Audit and Review Commission (JLARC) relied on data compiled by the Virginia Employment Commission (VEC) in 2010, finding that of the one percent of employers audited by the VEC, 27 percent of them had misclassified at least one employee. The study acknowledged that the targeted nature of the audits may have resulted in an inflated estimate of the proportion of employees misclassified in all sectors. The JLARC’s study also found that roughly \$28 million was lost in unpaid state income taxes.<sup>32</sup>

### **Washington**

The 2010 Washington State Underground Economy Benchmark Report indicated that, in FY 2010, the Department of Labor & Industries, the Employment Security Division, and the Department of Revenue collaborated to uncover a combined 1,677 unregistered businesses that were assessed nearly \$39 million in unpaid taxes, premiums, penalties, and interest. The three agencies exchanged over 100,000 tips and leads through electronic data matches, up from about 25,000 in FY 2009.<sup>33</sup>

An earlier report by the Washington Department of Revenue studied discrepancies in the number of businesses that had registered with the IRS, but not with the state, finding that in-state and out-of-state businesses registered with the IRS in 2004 failed to pay: \$225 million in state income taxes; \$14.8 million in unemployment insurance taxes; and \$34.5 in workers’ compensation premiums. In-state construction employers failed to pay: \$1 million in state income tax; \$3.4 in unemployment insurance taxes; and \$8.7 million in workers’ compensation. In 2001, the state lost \$183 million in taxes from employers registered with neither the IRS nor the state.<sup>34</sup>

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<sup>30</sup> Jody McMillan, Chief of Contributions, Utah Department of Workforce Services, *Effective Methods to Detect and Deter Worker Misclassification* (Oct. 24, 2012).

<sup>31</sup> Vermont Workers’ Compensation Task Force 2008-2009 Progress Report, available at [http://www.nh.gov/nhworkers/documents/vt\\_08-09\\_rpt.pdf](http://www.nh.gov/nhworkers/documents/vt_08-09_rpt.pdf)

<sup>32</sup> Joint Legislative Audit and Review Commission, Review of Employee Misclassification in Virginia, Report to the Governor and the General Assembly of Virginia (June 11, 2012), available at <http://jlarc.virginia.gov/pdfs/reports/Rpt427.pdf>

<sup>33</sup> Underground Economy Benchmark Report: 2010 Report to the Legislature, Joint Report of the Washington State Department of Labor and Industries, Washington State Department of Revenue, and the Washington State Employment Security Division (November 2010), available at <http://lni.wa.gov/Main/Docs/UEBenchmarkFY2010.pdf>

<sup>34</sup> Washington State Dept. of Labor and Industries and the Washington State Employment Security Dept., Unregistered Business Study: Joint Report of the Washington State Dept. of Revenue (November 2007), available at [http://dor.wa.gov/docs/reports/Unregistered\\_Business\\_Study\\_finalfinal.pdf](http://dor.wa.gov/docs/reports/Unregistered_Business_Study_finalfinal.pdf)

## SUBCOMMITTEE RECOMMENDATIONS

### **1. Codify the Sky King factors showing that an individual is free from significant control or direction.**

As mentioned previously, the 2012 *Sky King 101, LLC v. Thurmond* case most recently reaffirmed common law that determines independent contractor status. Under this test, Georgia courts have traditionally found that the following factors demonstrate that an individual is free from significant control or direction:

1. There are no territorial or geographic restrictions placed on the worker;
2. The worker is allowed to work for other companies or to hold other employment contemporaneously;
3. The worker has no prescribed minimum hours to work or orders to obtain;
4. The worker is free to accept or reject work without consequence; and
5. The worker has the discretion to set his own schedule.

The Subcommittee recommends that the Sky King language showing when an individual is free from significant control or direction and thus an independent contractor should be codified through legislation.

### **2. Increase funding for GDOL to allow the agency to conduct more thorough annual audits.**

As testimony revealed, it is nearly impossible to estimate just how much misclassifying employees is costing Georgia financially. In part, because GDOL currently lacks the resources and manpower to effectively audit and investigate potential violators. The Subcommittee believes that the estimated 50 GDOL auditors currently charged with carrying out routine audits and wage investigations is totally insufficient for a state whose economy is as large and diverse as Georgia's. The Subcommittee, therefore, recommends that more funding be allocated to GDOL so it can hire more investigators and auditors to conduct more annual audits, at least 5 percent of which should target the construction and motor carrier industry.

### **3. Establish a Commission to Investigate Employee Misclassification Statewide**

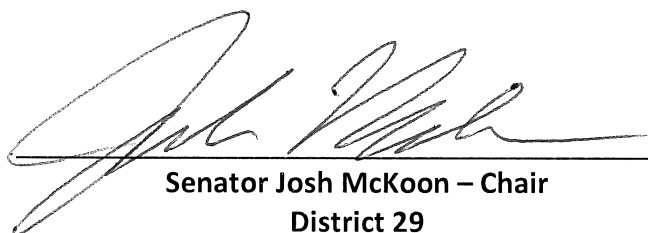
The Subcommittee learned that many states have established state-level task forces, commissions, or research teams that conduct agency audits or examine unemployment insurance and workers' compensation data to document the scope of employee misclassification and the effect it has on the state's finances. The Subcommittee recommends that a commission or task force, either temporary or permanent, be created in Georgia to formally determine the true impact employee misclassification has on the state's revenue, economy, and its workforce. This commission or task force should be charged with issuing a formal report of its findings.

### **4. The Secretary of State should allocate more resources to investigate unlicensed contractors.**

Although not the primary focus of the Subcommittee, the Subcommittee heard disturbing testimony of businesses, particularly in the construction industry, hiring independent contractors who are not licensed to complete particular projects. In light of this, the Subcommittee recommends that the Secretary of State should allocate additional resources to investigate the extent of unlicensed contractors operating on worksites statewide.

Respectfully Submitted,

**THE SENATE SUBCOMMITTEE ON EMPLOYEE MISCLASSIFICATION**



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Senator Josh McKoon – Chair  
District 29