

February 22, 2013

Division of Regulations, Legislation and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Ave., NW Room S-3502

Re: Comments of the United Brotherhood of Carpenters and Joiners of America (“UBC”) on  
Department of Labor Wage and Hour Division, Public Information Collection Request, Worker  
Classification Survey  
Doc. No. 2013-00389

Dear Desk Officer for the USDOL:

## **I. Introduction**

The United Brotherhood of Carpenters and Joiners of America (“UBC”) has reviewed the proposed request and has concluded that it is not burdensome and that the information to be collected is necessary for the proper performance of the U.S. Department of Labor (“DOL”). Moreover, the UBC has identified some additional suggestions to improve the utility of the information collected.

## **II. Intentional misclassification is widespread and harmful**

Employee misclassification is a continuing and serious problem within the construction industry. A 1984 IRS study estimated that 19.8 percent of construction employers misclassify employees compared to 15 percent for employers in all industries.<sup>1</sup> In numerous recent studies, construction employers continue to top the misclassification list generally, providing members of the construction industry with the dubious honor of expertise on this issue.

Misclassification causes significant problems. The construction industry is fiercely competitive with work frequently awarded to the lowest bidder. Misclassification allows corrupt construction firms to illegally lower their bids in order to steal work away from law-abiding employers. The common practice is to intentionally mislabel employees as contractors and send them IRS 1099 MISC forms. In other instances, employees are paid off-the-books and income is not reported at

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<sup>1</sup> Natwar Gandhi, *Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors*, GAO/T-GGD-196-130 June 20, 1996 at 1 and 13.

all to state and federal taxing authorities or workers' compensation insurance carriers.<sup>2</sup> These issues do not stop at non-payment of taxes or workers' compensation premiums, however. Employers engaged in these practices frequently do not pay overtime and sometimes do not pay the minimum wage.<sup>3</sup> Cases have also revealed that perpetrators have laundered money, committed mail, tax, and insurance fraud and have engaged in racketeering.<sup>4</sup>

Because of the intentional nature of schemes used by irresponsible construction businesses, the practice of misclassifying workers is often simply payroll fraud. While misclassification has been observed in sectors such as concrete construction and wood framing, UBC research has focused on the interior-systems sector of the construction industry, which includes metal stud framing, drywall application and acoustical ceiling installation. In this regard, interior-systems companies employ and pay on the books superintendents, foremen, and (potentially) lead carpenters but use so-called "labor subcontractors" for the bulk of their work force.<sup>5</sup> The labor subcontractors will improperly classify their employees as 1099 independent contractors, or pay them off-the-books.<sup>6</sup> By cheating, the labor subcontractors can save as much as 30 percent on labor costs which in turn allows the interior-systems contractors who use them to underbid law-abiding competitors while using the subcontract relationship with the labor provider as a shield against liability.<sup>7</sup>

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<sup>2</sup> See, Dale L. Belman and Richard Block, *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, School of Labor and Industrial Relations, Michigan State University, 2008, at 9. Of those construction employers who ran afoul of the law, 38% misclassified and 62% didn't report payroll at all.

<sup>3</sup> See, Press Release, James D. "Buddy" Caldwell, Office of the Attorney General State of Louisiana, *Attorney General's Office Accepts Guilty Plea in Lafayette Businessman Fraud Case* (May 4, 2011) and Press Release, US Dept. of Labor Wage & Hour Division, *US Department of Labor Recovers More Than \$203,000 in Overtime Back Wages for 224 Drywall Installers in Lafayette, La.* (June 7, 2011), available at: <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20110607.xml>.

The author has been studying misclassification and payroll fraud in the construction industry since 1989. His work has included interviewing construction contractors and workers. In addition to the above reports he is also relying on his interviews of construction workers who improperly received 1099s or were paid off-the-books, and who were not paid the minimum wage or overtime.

<sup>4</sup> See, *Cal. v Petronella*, No. 09CF1067 (Super. Ct., Orange County 2009), Press Release, U.S. Attorney's Office, Southern District of Florida, *Pompano Construction Company Owners Sentenced in Workers' Compensation, Tax and Mail Fraud Conspiracy* (March 25, 2009), Press Release, U.S. Attorney's Office, Southern District of Florida, *Guilty Verdict Announced Against La Bamba Check Cashing in Connection with \$132,000,000 in Financial Transactions* (February 9, 2009), Press Release, Attorney General Bill McCollum, Office of the Attorney General State of Florida, *South Florida Men Sentenced in \$15 Million Check Cashing Fraud: Criminal Charges Include Racketeering, Grand Theft, Workers Compensation Fraud, Money Laundering* (October 30, 2008), *Construction Company Pleads Guilty to Premium Evasion, Payroll Fraud*, WorkCompCentral, March 24, 2008, Press Release, U.S. Attorney Southern District of New York, *Construction Company Owner Pleads Guilty for Paying Millions in Off-the-Books Wages to Evade Payroll Taxes*, (April 8, 2009) and *Or. v Vega*, No. 08C51095 (Cir. Ct. Marion County 2008). Information on many of these cases and others are available at [payrollfraud.net](http://payrollfraud.net).

<sup>5</sup> Again, the author is relying upon his interviews of interior systems construction workers. Also, see, e.g., Michael Riley, *Labor Brokers Cut Costs, Corners*, Denver Post, February 6, 2003.

<sup>6</sup> *Ibid.*, see, e.g., Demetria Kalodimos, *Is Music City Center Construction Funding "Underground Economy,"* WSMV-TV Nashville, July 18, 2011, *Labor Broker Guilty in Workers' Compensation Fraud*, The Commercial Appeal, December 6, 2012, *C & F Drywall*, No. 1625635 U.S. Dep't of Labor Wage & Hour Div. (2011) (investigator's report, hereinafter Ft. Knox Case), Indictment at 6-8 *US v Guevara*, No. 07-20043CR (S.D. Fla. 2007) and Press Release U.S. Attorney Southern District of Florida, *Broward County Tax Preparer Sentenced for Tax Fraud Related to Workers' Compensation Insurance Scheme* (February 7, 2008).

<sup>7</sup> See, e.g., Riley, *supra* note 5.

These fraudulent misclassification schemes are an all-too common practice. Florida is one of the most beleaguered states, but it has also become one the most aggressive, on the state and federal levels, in investigating and prosecuting scofflaws.<sup>8</sup> Florida cases have also involved the use of shell companies and money service businesses that launder un-taxed cash pay to construction workers.<sup>9</sup> A grand jury reported that in less than three years \$1 billion dollars in cash was moved through money service businesses by only ten construction companies.<sup>10</sup>

Beyond Florida, cases and reports have disclosed misclassification at the \$600 million convention center project in Nashville, Tennessee.<sup>11</sup> In Louisiana, as well, a labor provider to one of the largest interior systems companies in the state was found to be reporting only 35 out of approximately 300 workers as employees.<sup>12</sup> Not even construction projects on military bases, like the Warrior in Transition building at Ft. Knox, are immune.<sup>13</sup>

From a financial standpoint, the proposal summary states that the estimated federal tax loss due to employee misclassification is \$2.7 billion per year. The UBC maintains that is a low estimate given that the \$2.7 billion figure is a calculation in 2006 dollars of the annual tax loss from a 1984 IRS misclassification study.<sup>14</sup> Taken alone, the one Florida grand jury noted above implicated the laundering of approximately \$1 billion, and a recent study estimated the federal tax loss due to misclassification of construction workers in Texas at \$1.6 billion.<sup>15</sup> The situation has only deteriorated since 1984, and the expanded scope and cost of misclassification has been documented in recent studies. For example:

- A study released in 2000 for DOL's Employment and Training Administration found an unemployment tax loss of \$198 million annually due to misclassification of employees as independent contractors.<sup>16</sup> According to this study, statewide misclassification rates ranged from 9.15 percent in New Jersey to 42 percent in Connecticut and the construction industry was cited by sources as the most likely to offend.<sup>17</sup>
- A 2001 study of workers' compensation premiums paid by Florida construction businesses found that \$912 million in premiums were paid in 1997 and that an additional

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<sup>8</sup> See, e.g., Fla cases, *supra*. note 4.

<sup>9</sup> *Id.*

<sup>10</sup> Eighteenth Statewide Grand Jury, *Second Interim Report of the Statewide Grand Jury, Check Cashers: A Call for Enforcement*, No. SC 07-1128, West Palm Beach, Fla., March 2008, at 13.

<sup>11</sup> Kalodimos, *supra* note 6.

<sup>12</sup> See , *Attorney General's Office Accepts Guilty Plea and US Department of Labor Recovers more than \$203,000*, *supra*. note 3.

<sup>13</sup> Ft.Knox case, *supra* note 6.

<sup>14</sup> See, *Employment Arrangements: Improved Outreach could Help Ensure Proper Worker Classification*, GAO-06-565, July 2006 at 2.

<sup>15</sup> *Build a Better Texas: Construction Working Conditions in the Lone Star State*, Workers Defense Project and Community Engagement at University of Texas at Austin, 2013 at 46.

<sup>16</sup> *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmantics, Inc., 2000, at iv, 69 and 93.

<sup>17</sup> *Ibid.*, at 41-44. 57.

\$1.3 billion was lost due to employer premium fraud and abuse of the state's exemption policies that are common in misclassification schemes.<sup>18</sup>

- A 2010 study estimated the annual cost shifting of unemployment insurance to law-abiding employers at \$831.4 million and \$2.54 billion in workers' compensation premiums as a result of rampant payroll fraud resulting from misclassification.<sup>19</sup>
- In 2004 researchers in Massachusetts found that up to 19 percent of all employers misclassified employees as independent contractors for a loss of as much as \$278 million in unemployment insurance taxes, state income taxes, and workers' compensation premiums.<sup>20</sup> In the construction industry, up to 24 percent of employers were determined to have misclassified workers for a loss of \$17.8 million.<sup>21</sup>
- A 2006 Illinois study concluded that 17.8 percent of employers in all industries in the state misclassified employees as independent contractors.<sup>22</sup> This resulted in a loss of up to \$400 million in unemployment taxes, state income taxes, and workers' compensation premiums across all industries and an estimated loss of \$54.6 million in the construction industry alone.<sup>23</sup> In addition, the study estimated that 418,870 employees were generally misclassified across all industries and that 22,371 employees were similarly misclassified in construction.<sup>24</sup>
- Researchers analyzing Minnesota in 2007 concluded that up to 14 percent of all employers in the state and 15 percent of construction employers misclassified employees as independent contractors.<sup>25</sup> Among construction employers specifically, the study found that 31 percent of drywall employers misclassified their employees.<sup>26</sup>

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<sup>18</sup> Coble Ph.D, Hinze Ph.D. P.E., *A Study on the Magnitude of Loss of Workers' Compensation Premiums in 1997 due to Employer Fraud and Exemptions in the Florida Construction Industry*, Construction Concepts, March 2001, at 27-28.

<sup>19</sup> Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, September 12, 2010, at 5-6. For further discussion of cost shifting due to workers compensation premium fraud, read Frank Neuhauser and Colleen Donovan, *Fraud in Workers' Compensation Payroll Reporting: How Much Employer Fraud Exists and How are Honest Employers Impacted: Report for the Commission on Health and Safety and Workers' Compensation*, University of Cal., Berkeley, August 2007, at 1-3 and 7.

<sup>20</sup> Bernhard and Herrick, *The Social & Economic Cost of Employee Misclassification in Construction*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, December, 2004, at 1.

<sup>21</sup> *Ibid.*

<sup>22</sup> Kelsay, Sturgeon and Pinkham, *Economic Costs of Employee Misclassification in the State of Illinois*, Dept. Of Economics, Univ. Missouri-Kansas City, December 2006, at 4-8 and 15.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at 17.

<sup>25</sup> *Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor, State of Minn., November, 2007 at 15 and 18.

<sup>26</sup> *Ibid.*, p. 20.

- A 2008 study found that up to 30 percent of Michigan employers underreported \$1.5 billion of payroll.<sup>27</sup> Twenty-six percent of construction employers misclassified employees or paid them off the books, compared to 24 percent of trucking employers and 56 percent of security-guard firms.<sup>28</sup> The accumulated losses from these practices were estimated at \$129 to \$203 million in state and federal taxes.<sup>29</sup>
- A 2010 study of Indiana employers found that up to 47.5 percent of all employers were estimated to have misclassified workers, amounting to a loss of as much as \$406.4 million in unemployment taxes, state and local income taxes, and workers' compensation premiums.<sup>30</sup> Of that figure, \$35.5 million in losses were attributed to the construction industry.<sup>31</sup>
- A 2010 Tennessee study found that up to 38,680 construction workers, or 21 percent of the construction workforce, were misclassified as independent contractors or paid unreported compensation in 2006.<sup>32</sup> The losses incurred were as much as \$14 million to the state unemployment trust fund, \$91.6 million in workers' compensation premiums, and \$115.4 million in federal income and employment taxes.<sup>33</sup> In addition to tax and insurance losses, the study determined that the underground economy in Tennessee facilitated low wages and dangerous and deadly working conditions. Thirty-three construction workers died in 2008 and median wages were near poverty levels.<sup>34</sup> The study also discussed the high level of immigrant workers employed and exploited in the industry.<sup>35</sup>
- In 2009 the U.S. Treasury Inspector General for Tax Administration wrote that employee misclassification is a growing nationwide issue that contributes significantly to the \$345 billion federal tax gap.<sup>36</sup>
- A survey published in 2013 of construction companies and workers in Texas cities including Austin, Dallas, Houston, San Antonio, and El Paso revealed that 41 percent of the construction workforce in Texas (approximately 300,000 construction workers) are either paid unreported compensation or wrongly classified as independent contractors,<sup>37</sup>

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<sup>27</sup> *The Social and Economic Costs of Employee Misclassification*, *supra* note 2, at 5.

<sup>28</sup> *Ibid.*, at 7.

<sup>29</sup> *Ibid.*, at 5 and 10.

<sup>30</sup> Sturgeon and Kelsay, *The Economic Costs of Employee Misclassification in the State of Indiana*, Dept. of Economics, University of Missouri-Kansas City, 2010, at 3-5.

<sup>31</sup> *Ibid.*

<sup>32</sup> Dr. William Canak and Dr. Randal Adams, *Misclassified Construction Employees in Tennessee*, January 15, 2010 at iv and vi.

<sup>33</sup> *Ibid.*, at v.

<sup>34</sup> *Ibid.* at v-vi and 11-15.

<sup>35</sup> *Ibid.*, at 22-23.

<sup>36</sup> *Final Audit Report; While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed* (Audit # 200730001), US Treasury Inspector General For Tax Administration, Ref. # 2009-30-035, February 4, 2009, at 1 and 2.

<sup>37</sup> *Build a Better Texas*, *supra* note 15, at i, ii and 13.

costing the state an estimated \$54.5 million in lost unemployment contributions.<sup>38</sup> The resulting federal income tax loss was estimated at \$1.06 billion.<sup>39</sup>

Taken together, these studies demonstrate the seriousness of employee misclassification on both a state and national scale. Systemic, widespread fraud of this variety reduces government revenue, improperly shifts tax and workers-compensation insurance costs away from unethical employers to the community of honest employers and the states, harms working conditions, and steals jobs from law-abiding employers and their employees. The DOL proposal offers a necessary and overdue examination of this problem.

### **III. The proposed study will not be burdensome**

Neither the five to fifteen minute interviews of workers and business people nor the 60 minute in-depth interviews of employers will be burdensome. Such interviews of business people will be less disruptive if they are given the ability to answer through an electronic format that will allow them to choose the most convenient time to respond, especially if the form can be copied and saved to other electronic equipment without losing any data that has already been entered.

Moreover, the proposal summary estimates that the total annualized cost to survey respondents will be \$93,670 and that the total annualized cost to in-depth interview respondents will be \$3,820. Even considered alongside the estimated cost of the proposed collection to the federal government at \$1.8 million, these figures pale in comparison to the conservatively estimated annual tax loss of \$2.7 billion attributed to employee misclassification. If the fruits of this information collection are able to offset even a fraction of this staggering loss, the benefits far outweigh the costs of carrying out the proposal.

Moreover, it is well worth a one hour interview if it leads to compliant businesses winning work rather than systematic violators of the law. Many businesses are fed up with illegal competition and want a level competitive playing field.<sup>40</sup>

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<sup>38</sup> *Ibid.*, at iii. 40, 45, 46 and 56.

<sup>39</sup> *Ibid.*, at 46.

<sup>40</sup> See, e.g., *Testimony of Scott Morrisey, Owner Red Line Wall Systems, Inc., Commercial Drywall and Metal Stud Installation Company* before the US Senate Committee on Small Business & Entrepreneurship (August 28, 2008), Ashley Smith, *Contractors Speak Up on Workers Comp.*, Nashua Telegraph, August 19, 2008, Press Release, *Professional Contractors Support "Cracking Down" on Misconduct Within the Industry*, PRNewswire (December 1, 2010), available at: <http://www.prnewswire.com/news-releases/professional-contractors-support-cracking-down-on-misconduct-within-the-industry-111147169.html>. and David Schechter, *Contractors slash bids by avoiding taxes, state lacks enforcement*, WFAA Dallas/Ft. Worth, July 12, 2011, available at: <http://www.wfaa.com/news/investigates/Contractors-Cut-Cost-By-Avoiding-Payroll-Tax-State-Lacks-Enforcement-125451023.html>.

#### **IV. The information collected is necessary for the proper performance of DOL**

Reducing instances of misclassification that lead to violations of the Fair Labor Standards Act and other laws under its jurisdiction has been a DOL priority. DOL efforts in this regard have included signing memorandums of understanding (MOU) with fourteen states and with the Internal Revenue Service.<sup>41</sup> The MOUs with states provide for improved outreach to employers and workers as well as coordinated investigation and information sharing with state law enforcement authorities. The proposed collection will only aid in maximizing the utility of these cooperative efforts.

Enhanced knowledge about what workers and employers understand about the impact of misclassification will no doubt improve DOL's outreach and messaging for its education efforts. Improved messaging will result in fewer negligent violations by employers. More educated workers, employers, and stakeholder communities will deter intentional violators from perpetuating their schemes. Furthermore, a more vigilant public will be better able to defend its own rights and will more likely provide useful information in aid of future investigations of improper misclassification.

The information gathered will also improve DOL enforcement by streamlining its investigatory method. Better understanding of the means and circumstances through which workers and employers deal with misclassification issues will assist future investigations by illuminating which questions to ask and what additional materials are relevant to the process.

#### **V. Suggestions to improve the utility of the information**

To improve the utility of the information, the UBC offers a number of suggestions for survey inquiries:

- Do employers rely upon advisors for employment classification issues? If so, what type(s) of advisors? Lawyers, accountants, associations?
- How do employers and workers receive information on employment classification and its impact? Through newsletters, consultation meetings, web-sites, electronic media? What would be the most efficient means for employers and workers to receive this information?
- Do employers know or strongly suspect that they have lost business to competitors who misclassify or underreport their employees? In which industries do these employers operate?

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<sup>41</sup> U.S. Dep't of Labor, misclassification web site at:  
<http://www.dol.gov/whd/workers/Misclassification/index.htm#stateDetails> .

- What enforcement efforts regarding misclassification or under-reporting by state and federal authorities have employers (or colleagues in other businesses) experienced? What have employers heard about and what are their opinions of enforcement efforts? Have employers ever experienced an on-site audit from their workers' compensation carrier?
- Were workers paid by check or in cash with no tax deductions? Were the workers directed to use, or did the employer use, a money service business such as a check cashing or convenience store?
- Did the workers receive a 1099 MISC form?
- When do workers discover that they should have been classified as an employee? When injured? When filing for unemployment? When paying their income taxes?
- Did the workers provide their services through a labor-provider?
- Have workers filed complaints with state or federal regulators or through attorneys? If regulators, which ones? Were the results satisfactory? If workers have not filed complaints, why not?

## **VI. Conclusion**

The UBC believes the proposed DOL study is long overdue given how harmful misclassification is widespread and how widespread it has become. The survey will not be burdensome and the information will improve compliance through the DOL's education and enforcement work. A number of suggestions have been made in our comments that will improve the utility of the information and we trust that they will be seriously considered.

Very respectfully,  
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