

EXAMPLES OF RECENT REPORTS AND LEGISLATION ON THE UNDERGROUND ECONOMY IN SELECTED STATES

Selected States: Arizona
California
Illinois
Kansas
Maine
Massachusetts
Michigan
Minnesota
Nevada
New Hampshire
New Jersey
New Mexico
New York
Oregon
Pennsylvania

Note: The following are examples of recent reports and legislation in selected states that address various aspects of the underground economy. This is not intended to be a comprehensive list of all provisions in these states.

Prepared For: Joint Legislative Task Force on the
Underground Economy in the Construction Industry

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ARIZONA

Relevant Laws

Arizona statutes describe when a worker is an employee and when the worker is an independent contractor.

- A worker is an independent contractor when he or she is engaged in work for a business and acts independently of that business in the execution of that work and is not subject to the rule or control of the business for which the work is done.
- The worker must be engaged only in the performance of a definite job or piece of work and is subordinate to the business only in effecting a result in accordance with that business design.
- Existence of an independent contractor can be proved through a written agreement that states that the business does not have the authority to supervise or control the actual work of the independent contractor. The written agreement must state that the independent contractor is not entitled to workers' compensation benefits. It must also state that the business:
 - Does not require the independent contractor to only perform work for the business.
 - Does not provide the independent contractor with business registrations or licenses.
 - Pays the independent contractor an amount fixed by contract.
 - Will not terminate the independent contractor before the expiration of the contract period.
 - Does not provide tools to the independent contractor.
 - Does not dictate time of performance.
 - Pays the independent contractor in the name appearing on the written agreement.
 - Will not combine business operations with the person performing the services rather than maintaining these operations separately.

Recent Legislation

- **HB 2779 (2007) – PASSED.** In 2007, the Arizona Legislature passed HB 2779, the Legal Arizona Workers Act. HB 2779 requires employers to verify that the people they employ are present in the county legally and failure to do so will cause the employer's business licenses to be suspended. A second offense may result in a permanent revocation of the employer's business license. The bill also makes it a violation of the identity theft statutes to use another's identification to obtain employment.

CALIFORNIA

Recent Executive Order and Legislation

In October 1993, the Governor issued an Executive Order (EO) establishing the Joint Enforcement Strike Force on the Underground Economy to combat the underground economy by pooling resources and sharing data among the state agencies charged with enforcing licensing, labor and tax laws. On January 1, 1995, legislation placing the EO into law was added to the California Unemployment Insurance Code. A variety of state agencies make up the Strike Force.

Goals

- Eliminate unfair business competition.
- Protect workers by ensuring they receive all benefits to which they are entitled.
- Protect consumers by ensuring all businesses are properly licensed and adhere to the state's consumer protection regulations.
- Reduce the burden on law-abiding citizens and businesses by ensuring that all businesses and individuals comply with the State's licensing, regulatory and tax laws
- Increase compliance with the state's tax laws to maximize the state's revenues.

Activities

- Employment Enforcement Task Force – The goal of this task force is to identify and bring into compliance those persons and businesses participating in the underground economy that are in violation of payroll tax, labor and licensing laws. Since its inception, EETF has focused on construction, automotive repair, garment industry, bars, restaurants, nightclubs, furniture manufacturers and adult entertainment establishments.
- Construction Enforcement Project – targets underground fraud in the construction industry.
- Janitorial Enforcement Project was formed to address underground economy activities in the janitorial industry.
- Targeted Industries Partnership Program was created in 1992 as a multi-agency enforcement and educational program targeting the garment manufacturing and agricultural industries.
- Contractors State Licensing Board protects consumers by regulating the construction industry through policies that promote the health, safety and general welfare of the public in matters relating to construction.

Identifying Businesses Participating in Underground Economy

- Hotline numbers (one for construction and auto repair industries & another for all other industries) – allow people to report suspected violators.
- Other governmental agencies – all agencies involved in SF share information.
- Industry sources.
- Other Employment Enforcement Task Force staff.

ILLINOIS

Relevant Laws

- 820 ILCS 405/212 puts the burden on the employer to prove that the worker is not an employee. The contractor can prove this by demonstrating that:
 - The individual acts free from control or direction over his or her services.
 - The service is outside the usual course of business for which such service is performed.
 - The individual is engaged in an independently established trade, occupation, profession or business.

- 820 ILCS 175 is the Day and Temporary Labor Services Act. Day and temporary labor service agencies are defined as entities that employ day or temporary laborers to provide services for a fee to or for a third-party client. This does not include professional or clerical employment. Day and temporary labor agencies must:
 - Register with the Illinois Department of Labor (IDOL).
 - Provide proof of required unemployment insurance contributions and valid workers' compensation insurance, and must report any lapse in workers' compensation coverage to IDOL.
 - Provide workers with detailed employment and wage notices, which can be inspected by IDOL.
 - Not make unreasonable deductions from paychecks for meals and equipment.

Recent Legislation

- HB 2137 (2005) – PASSED WITHOUT MISCLASSIFICATION PROVISIONS. HB 2137 addresses the practice of misclassifying employees as independent contractors. It requires contractors working in construction to file statements about independent contractors performing work for them with the Department of Revenue. The Department may investigate if it suspects employee misclassification. Penalties for misclassification include requiring the employer to cease operations; a fine of \$200 for each day of the violation; a fine of \$400 a day for each subsequent violation involving another misclassified worker; and misdemeanor charges. (The language in HB 2137 relating to employee misclassification was removed in the Senate and HB 2137 passed the Illinois Legislature without the misclassification language.)

KANSAS

Recent Legislation

- HB 2772 (2006) – PASSED. Addresses misclassification for unemployment insurance and income tax purposes. Makes a person who knowingly and intentionally misclassifies an employee as an independent contractor for the sole or primary purposes of avoiding unemployment contribution reporting requirements subject to penalties. See KS 44-766 (2006).

Recent Legislation

- LD 1345 (2007) – Amends the definition of "independent contractor" under state unemployment compensation laws to make it consistent with the term used under state workers' compensation laws. Also authorizes the Bureau of Unemployment Compensation to issue a predetermination of independent contractor status. CARRIED OVER TO NEXT LEGISLATIVE SESSION.

- LD 1274 (2007) – Requires the Workers' Compensation Board to issue a construction contractor certificate to a person working in the construction industry upon proof that: (1) the person functions in a particular trade or occupation as an independent contractor rather than an employee; or (2) the person has secured the payment of compensation by obtaining insurance coverage. Specifies that the certificate creates a binding presumption that the person is an independent contractor so long as the person works in the trade, business, occupation or profession identified in the certificate. Also specifies that a person who engages in construction work without a certificate is deemed an employee of the person's hiring agent. CARRIED OVER TO NEXT LEGISLATIVE SESSION.

MASSACHUSETTS

Recent Legislation

- Senate, No. 2358 (2004) – PASSED. Amends the Massachusetts Independent Contractor Act at G.L. c 149, § 148B.

Creates a presumption that workers are employees, and not independent contractors.

Requires employers to meet all three parts of the following test to overcome this presumption:

- The worker must be free from the presumed employer's control and direction in performing the service; and
- The service provided by the worker must be outside the employer's usual course of business; and
- The worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

Makes the presumption applicable under unemployment compensation, workers' compensation, and wage and hour laws. Provides for civil and criminal penalties. Also permits the Attorney General to debar from public works certain employers that violate the Independent Contractor Law.

- House, No. 3942 (2005) – DID NOT PASS. Requires that information on labor markets be developed, including nonstandard and unregulated workers, via a household survey. Also requires that information be used to formulate employment programs.

MICHIGAN

Relevant Laws

- MCL § 418.171. Makes an employer who willfully circumvents the requirement to obtain industrial insurance by encouraging persons who are employees to pose as contractors subject to both civil and criminal penalties.

Recent Legislation

- HF No. 3819 (2005-06) – DID NOT PASS. Requires a written agreement that proves the person is an independent contractor and not an employee. In the construction of commercial or residential building agreement must indicate that the worker meets the following conditions:
 - Maintains a separate business with worker's own office, equipment and other facilities;
 - Holds or has applied for a federal employer identification number;
 - Operates under contracts to perform specific services or work for specific money under which the worker controls the means of performing the work;
 - Incurs the main expenses related to the service or work;
 - Is responsible for the satisfactory completion of work or services that worker contracts to perform and is liable for failure to perform the work;
 - Receives compensation for work or service performed under a contract or commission or per-job or competitive bid basis only;
 - May realize a profit or suffer a loss under contracts to perform work;
 - Has continuing or recurring business liabilities or obligations; and
 - The success or failure of the worker's business depends on the relationship of business receipts to expenditures.

- SF 0408 (2005-06) – DID NOT PASS. In workers' compensation matters, prohibiting employers from misrepresenting the nature of the employment relationships with independent contractors; requiring copies of court findings of violations to be transmitted to the commissioner of labor and industry for reporting to relevant state and federal agencies.

- HF 1283 (2007-08) – DID NOT PASS. To be considered an independent contractor, must hold a current independent contractor exemption certificate, created by this legislation.

NEVADA

Relevant Laws

- NRS 624.256. Proof of industrial insurance is required to obtain a contractor's license.
- NRS 616B.630. The State Contractors' Board must notify Administrator of Industrial Relations if a contractor's coverage has lapsed.
- NRS 624.720. If the State Contractors' Board determines that a contractor has engaged in prohibited advertising, the Board may cause a telephone number to be disconnected and request the provider of paging services to change the number of any beeper or disconnect the paging services.
- NRS 338.010 (12). Industrial insurance, unemployment insurance, and ability to bid on public works contracts. Failure to pay contributions for unemployment insurance and secure workers' compensation is an "offense" under public works provisions.
- NRS 338.015. The Labor Commissioner may impose administrative penalties (fines) for offenses.
- NRS 338.017. If an administrative penalty is imposed, the person is debarred for specified periods (depending on number of offenses.)

NEW HAMPSHIRE

Recent Reports

House Bill 246 (2005) established the Committee to Study the Classification of Employees as Independent Contractors. The Committee was comprised of three House and three Senate members.

Committee Focus

The committee is to study the issues relating to the misclassification of employees including potential problems with employers labeling their employees as “independent contractors.”

Committee Recommendations

- Add seven additional criteria to the list of items distinguishing an employee from an independent contractor. Therefore, a person is not considered an employee if: a) he or she has continuing or recurring business liabilities or obligations; b) the success or failure of the person’s business depends on the relationship of business receipts to expenditures; c) the person receives compensation for work or services performed and remuneration is not determined unilaterally by the employer; d) the person incurs the main expenses related to the service or work performed; e) the person is responsible for satisfactory completion of work and may be held legally liable for failure to complete the work; f) the person supplies tools and instrumentalities used in the work; and the person is not required to work exclusively for the employer.
- Require all employees working in New Hampshire to have workers’ compensation coverage in New Hampshire.
- Authorize Labor Department to levy fines against employers when their workers’ compensation coverage lapses and not when it is discovered by the Department.
- Require that applicable independent contractor and employee laws be posted at all job sites.

Recent Legislation

- SB 92 – PASSED. Adds seven criteria for determining whether someone is an independent contractor.
- SB 265 – PASSED. Requires nonresident employees and employers to be subject to New Hampshire workers’ compensation laws.
- HB 336– PASSED. Requires that information about classification of workers as employees or independent contractors be posted in the workplace.

- HB 337 – PASSED. Increases penalty for employer not in compliance with workers' compensation laws.
- HB 426 – PASSED. Allows Insurance Commissioner to investigate and assess employers additional premiums for failure to properly categorize employees.
- HB 471 – PASSED. Requires all contractors to certify that they have workers' compensation coverage and meet safety requirements before beginning a public works project.

Recent Legislation

- A4009 (2007) – PASSED. The Construction Industry Independent Contractor Act addresses classification of construction workers for industrial insurance, unemployment compensation, wage and hour, income tax, and other purposes. See Laws of 2007, Chapter 114.

Deems services performed in the making of improvements to real property as employment unless it is shown to the satisfaction of the Department of Labor and Workforce Development that:

- The individual is free from control or direction over the performance of the service,
- The service is outside the usual course of business for which the service is performed, and
- The individual is customarily engaged in an independently established trade, occupation, profession or business.

Establishes the following penalties for misclassification of construction workers:

- Criminal penalties.
- Civil monetary penalties.
- Contractor registration penalties (e.g., summary suspension, stop-work order at site of violation, and cessation of all business operations).
- Cause of action for construction worker who has been misclassified for damages, attorneys fees, and costs. Class actions allowed and representatives, including labor organizations, may sue.

Relevant Laws

This statute establishes what constitutes an employer and employee relationship in the construction industry. A contractor who is an employer must consider workers providing labor or services to be employees unless the following standards indicative of an independent contractor are met:

- The worker is free from direction and control over the means and manner of providing the labor or services.
- The worker must obtain necessary business registrations or licenses.
- The worker furnishes the tools or equipment necessary to provide labor or services.
- The worker has the authority to hire and fire employees.
- Payment is made upon completion of the performance of specific portions of a project or when the project is completed.
- The worker establishes that he or she is engaged in an independently established business. An independently established business is demonstrated when four of the following conditions are met:
 - The labor or services are primarily performed at a location separate from the person's residence.
 - Advertising or business cards are purchased by the worker, or the worker is a member of a trade or professional organization.
 - Telephone or e-mail listings for the labor or services are different from the worker's personal listings.
 - Work is performed under contract.
 - The worker performs services for two or more people a year.
 - The worker assumes financial responsibility for errors and omissions on the work.

Recent Legislation

- HB 653 (2005) – DID NOT PASS. HB 653 provided that a person providing labor or services for compensation is to be considered an employee and will not be considered an independent contractor unless the worker establishes the same factors under 60-13-3.1.

Recent Legislation

- S 3282 (2005) – VETOED. Requires any person contracting with the state to submit to the Commissioner of Labor a list of independent contractors hired by that person. Requires that a fee of \$10 per independent contractor be paid, and that such fees be used to prosecute violations of the law.
- A 3816 (2005) – DIED IN COMMITTEE. Creates a right of action in favor of a contractor whose bid is denied against a winning bidder who knowingly classified employees as independent contractors to avoid paying workers' compensation premiums.
- A 3280 (2007) – REFERRED TO COMMITTEE. Similar to A 3816 (2005).
- A 4860 (2007) – REFERRED TO COMMITTEE. Similar to S 3282 (2005).
- S 6212 (2007) – REFERRED TO COMMITTEE. Establishes a task force within the Department of Labor to study employment classification and misclassification with respect to a worker being an employee or an independent contractor and report thereon.
- A 6643 (2007) AND S 4925 (2007) – REFERRED TO COMMITTEES. Creates a “presumption” that workers are employees, and not independent contractors. Requires employers to meet all three parts of the following test to overcome this presumption:
 - The worker must be free from the presumed employer's control and direction in performing the service; and
 - The service provided by the worker must be outside the employer's usual course of business; and
 - The worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

Makes the presumption applicable under unemployment compensation, workers' compensation, and wage and hour laws. Increases sanctions for misclassification of workers.

Recent Legislation

- HB 3302 (2007) – DIED IN COMMITTEE. Creates a five-member Task Force on the Underground Economy to: (1) investigate ways to identify employers who pay employees in cash to avoid complying with employment laws; (2) provide the Commissioner of the Bureau of Labor and Industries with information about such employers; (3) focus on identifying such employers who are not experiencing labor shortages and who are paying above average wages including, but not limited to, employers in the construction industry; and (4) consider a recommendation that the Commissioner hire 3 persons to investigate and initiate proceedings against such employers.

Recent Legislation

- HB No. 1215 (2005-06) – DID NOT PASS. Addresses registration of independent contractors for industrial insurance purposes. Revises definition of independent contractor. Requires independent contractors to register with the agency indicating independent contractor status. Requires registration form to have a statement that the individual is not eligible for industrial insurance benefits. Specifies that benefits may be awarded if it is determined that an injured person was coerced to register as an independent contractor by a party that is, in fact, the employer. Makes an employer who knowingly and with intent to defraud forces an employee to register as an independent contractor to misrepresent their true relationship subject to penalty.