

Employee Misclassification Advisory Task Force (EMATF)

2012 Annual Report



Commissioner Karla Davis
Kim Jefferson, Designee
Tennessee Department of Labor and Workforce Development

Commissioner Julie Mix McPeak
Mike Shinnick, Designee
Tennessee Department of Commerce and Insurance

Carolyn Lazenby, Executive Director
Board of Licensing Contractors

**Employee Misclassification Advisory Task Force
Annual Report 2012**



STATE OF TENNESSEE
Employee Misclassification Advisory Task Force

January 30, 2012

The Honorable Jack Johnson
Chair, Senate Commerce, Labor and Agriculture Committee
11 Legislative Plaza
Nashville, TN 37243

The Honorable Jimmy Eldridge
Chair, House Consumer and Employee Affairs Committee
208 War Memorial Building
Nashville, TN 37243

Dear Chairman Johnson and Chairman Eldridge:

The Employee Misclassification Advisory Task Force is pleased to present its First Annual Report. The Task Force was created to study and make recommendations as to employee misclassification in the construction industry. We are grateful for your leadership and vision in providing an opportunity for state agencies, business entities, and the general public to collaborate to ensure stronger compliance with Tennessee's employment, tax, licensing, and insurance laws. Collaborative efforts will enable us to treat responsible employers fairly, impede the spread of the underground economy, and curb unlawful practices.

The Task Force is committed to bringing member agencies together, identifying issues related to employee misclassification in the construction industry and enlisting assistance from the public on ways to encourage fair competition, prevent fraudulent practices, ensure unemployment security trust fund solvency, and protect law abiding employers.

In the future, the Task Force hopes to receive public complaints, make referrals to proper agencies, increase enforcement efforts, undertake additional research, educate employers and employees, improve execution of Tennessee's employment, tax, and licensing laws and to enhance proper assignment of workers' compensation premiums.

While we have only begun to scratch the surface of the problem, we know that there is a great deal of work ahead. Our agencies are committed to building on our current efforts, standing for law abiding employers, and continuing to combat illegal practices in the construction industry.

Sincerely,

Karla Davis

Commissioner, Department of Labor and Workforce Development
Chairman, Employee Misclassification Advisory Task Force

220 French Landing Drive, 1B • Nashville, TN 37243 • Attn: EMATF
TEL. 615.253.2741

**Letter to Commerce, Labor and Agriculture Committee of the Senate and
Consumer and Employee Affairs Committee of the House of Representatives**



Commissioner Karla Davis, Chair
Tennessee Department of Labor and
Workforce Development
Kim Jefferson, Designee

Commissioner Julie Mix McPeak
Tennessee Department of
Commerce and Insurance
Mike Shinnick, Designee

Carolyn Lazenby, Director
Board for Licensing Contractors

The Honorable Tre Hargett
Secretary of State
Nathan Burton, Designee

The Honorable Robert Cooper, Jr.
Attorney General and Reporter
Martha Campbell, Designee

The Honorable David H. Lillard, Jr.
State Treasurer
Chairman of the Advisory Council on
Workers' Compensation
Lynn Ivanick, Designee

The Honorable J. Wally Kirby
Executive Director of the
District Attorneys General Conference
James Milam, Designee

Mark Gwyn
Executive Director of the
Tennessee Bureau of Investigation
Jason Locke, Designee

Abigail Hudgens
Administrator for the Workers'
Compensation Division
Tennessee Department of Labor and
Workforce Development

Dan Bailey
Attorney for the Tennessee Department of
Labor and Workforce Development

Randall Thomas
The Travelers Companies, Inc.

Table of Contents

Section 1:	Executive Summary Page 1
Section 2:	Legislative History Page 3
Section 3:	Efforts and Progress Page 4
Section 4:	Administrative and Legal Impediments Page 5
Section 5:	Reducing Employee Misclassification Page 6
Section 6:	Exposing the Underground Economy Page 7
Section 7:	Impact on the Insurance Industry Page 8
Section 8:	Impact on State and Local Governments Page 10
Section 9:	Proposed Legislative Initiatives and Recommendations Page 12
Section 10:	Revenue and Expenditures Page 14
Section 11:	Task Force Committees Page 16
Appendix A:	Tenn. Code Ann. § 50-6-913 Page 17
Appendix B:	Tenn. Code Ann. § 50-6-919 Page 18

Committee Reports and Supplemental Reports can be found at:
<http://www.tn.gov/labor-wfd/EMEEF/>

Executive Summary

The General Assembly passed Public Chapter No. 1149 creating the Employee Misclassification Advisory Task Force (“EMATF” or “Task Force”) within the Workers’ Compensation Division of the Department of Labor and Workforce Development (“TDLWD”). The purpose of the Task Force is to study and make recommendations regarding employee misclassification in the construction industry by seeking public input, holding public hearings, and creating committees to study and make recommendations relative to statutory issues. This report addresses items (1) through (6) of the statutory issues identified in Tenn. Code Ann. § 50-6-919(b).

Problems in Tennessee:

“Employee misclassification” occurs when an employer classifies employees as independent contractors or pays the employees “off the books” or in cash. This practice is prevalent in the construction industry. In some instances, the behavior is deliberate and constitutes insurance and tax fraud.

Employers who misclassify their employees do not pay unemployment insurance premiums. Furthermore, they either do not have workers’ compensation coverage or they pay substantially lower premiums because of fraudulent underreporting of payroll, number of employees, and/or the type of work performed (“premium avoidance”).

These noncompliant employers do not pay and deduct federal taxes (income, Social Security, Medicare) from their employees’ pay. Furthermore, they do not pay overtime as required by the federal Fair Labor Standards Act. These practices create an unfair competitive advantage over employers who comply with federal and state employment and tax laws.

Over 35 states have enacted legislation in attempts to locate noncompliant employers and deter this unlawful behavior. Such conduct harms honest employers, mistreats workers, and costs the treasury uncollected revenue. In some cases these dishonest employers have been found working on state-funded projects.

Financial Impact:

Based on estimates using 2006 data, Tennessee lost between \$2.1 million and \$3.7 million in uncollected workers’ compensation premium taxes.¹ Tennessee’s estimated losses from unpaid unemployment insurance premiums range from \$8.4 million to \$14.9 million.²

Workers’ compensation insurers lost an estimated \$52.1 million to \$91.6 million in unpaid workers’ compensation premiums.³

¹ There is a 4% tax imposed on workers’ compensation insurance premiums.

² Based on current rates of 1.1% to 10.6% on first \$9,000.00 in wages. Tenn. Code Ann. § 50-7-403(g).

³ *Misclassified Construction Employees in Tennessee*. Dr. William Canak and Dr. Randall Adams, 2010.

Initial Recommendations:

(1) Enhanced Enforcement

There are currently only seven (7) investigators. Three (3) investigators are funded through the Employee Misclassification Enforcement and Education Fund (“EMEEF”). The remaining four (4) investigators are funded through the Workers’ Compensation Division’s Uninsured Employers Fund (“UEF”). There is a need for at least four (4) additional investigators in each grand division of Tennessee, with at least one (1) per grand division having interpretation/translation skills.

(2) Authorize Administrative Penalties

Current law does not grant authority to issue administrative penalties for employers who have committed workers’ compensation insurance premium avoidance. Such penalties would be consistent with the practices of other states.

(3) Authorize Stop Work Orders Directed at Noncompliant Employers

Current law does not grant authority to issue stop work orders as part of enforcement capabilities. The authority to issue orders that stop the offending employer(s) would significantly improve enforcement capabilities and are not intended to shut down an entire jobsite. Such measures would be consistent with the practices of other states.

Future Action Items:

In addition to these Recommendations, the Task Force intends to implement the following:

(1) Educate Employers and Employees

Establish a website including a fraud tip line and tip form. The website is operational and should be fully completed by the middle of 2012.

(2) Train Investigators

Provide certified training on both civil and criminal investigative techniques to ensure that investigators perform thorough and complete investigations that meet industry recognized standards.

(3) Collaborative Investigations

Conduct joint investigations and encourage member agencies and other entities to work together to make referrals, contact insurance carriers, report fraud, and coordinate efforts with the Tennessee Department of Commerce and Insurance.

(4) Level the Playing Field

Develop reliable methods to encourage fair competition to assist Tennessee in restoring competitive equality for law abiding employers, particularly on publicly-funded projects.

(5) Fraud Detection Software

Research the feasibility of obtaining fraud detection software and related databases.

Legislative History

- Public Chapter 1149 (2010) was the result of a compromise between the implementation of Public Chapter 1041 (2008) on December 31, 2009 (suspended after three weeks) and the need to account for every construction owner and executive on the jobsite.
- Legislators from across the state heard complaints that the requirement to purchase workers' compensation coverage would put many construction industry employers out of business in a time when the industry was facing enormous economic challenges.
- In the commercial construction industry there was consensus among the trades that only three direct laborer exemptions should be permitted, while under Public Chapter 1041 all laborers on a jobsite were required to be covered. Business owners and executives wishing to be exempt from Workers' Compensation laws were given the option to apply for an exemption through the Secretary of State's office for a fee.
- For non-commercial (i.e. small commercial and residential) contractors, there is no such jobsite exemption limitation for owners and executives.
- The decision to include business owners and executives in the definition of employee was a significant change of direction by the legislature. Provisions of Public Chapter 1149, which went into effect March 1, 2011, cleared up what had been contentious debate between policyholders and insurance carriers as to who was legally required to be covered. Historically, the seven factors or common law test was used in determining work relationships to classify individuals either as employees or independent contractors.
- Business and employee groups made efforts to draw the legislature's attention to an ever growing problem of employee misclassification and its potentially devastating impact on uninsured employees. These effects apply especially to non-English speaking workers and law-abiding contractors who find themselves at a distinct competitive disadvantage.
- Pursuant to their study, Dr. William Canak and Dr. Randall Adams supplied several questions that the legislature deemed worthy of study. The legislature created the EMATF to study these questions and make recommendations.

Efforts and Progress

The first Task Force meeting was held on July 14, 2011. At the meeting, Karla Davis, Commissioner of the TDLWD, welcomed Task Force member agencies. Department and agency designees were introduced and the mission was explained pursuant to Tenn. Code Ann. § 50-6-919. A brief overview of employee misclassification was given and public comments were accepted. Finally, Kim Jefferson and Mike Shinnick were elected Chair and Co-Chair and Dan Bailey and Abigail Hudgens were appointed to serve on the Task Force.

On September 22, 2011, Matthew Capece, Representative for the United Brotherhood of Carpenters and Joiners of America, gave a national perspective of employee misclassification and discussed the underground economy. Members described agency authority, discussed issues affecting their agency, spoke about needed legislation and briefly discussed possible recommendations that could assist agencies to better handle employee misclassification issues. Randall Thomas was appointed to serve on the Task Force.

Five committees were created and chairs were assigned (Dan Bailey: Legal Committee; Lynn Ivanick: Education Committee; Carolyn Lazenby: Research and Resource Committee; Martha Campbell: Enforcement Committee; and Mike Shinnick: Insurance Committee). Committees were given issues for consideration, asked to review Tenn. Code Ann. § 50-6-919, and asked to develop committee reports.

The Task Force Chair provided an overview of the Task Force's progress on October 27, 2011. In addition, Bob Pitts, Senior Policy Advisor for the Associated Building Contractors, Inc., provided legislative history on employee misclassification. Committee chairs presented initial reports and were asked to finalize committee reports and issues for consideration. In addition, committee chairs were asked to make recommendations and to provide an itemized list of committee expenditures pursuant to Tenn. Code Ann. § 50-6-913.

On December 1, 2011, Kevin Hale, Hale Insurance, LLC, provided an insurance industry perspective. Committee chairs presented final reports, and various representatives of employer and employee groups, business associations and the general public provided comments.

In December, 2011 and January, 2012, the Review Committee held several meetings to review and finalize the annual report.

Administrative and Legal Impediments to the Effective Operation of the Task Force

- The lack of administrative monetary penalties makes curbing employee misclassification difficult. Existing Tennessee law does not authorize the TDLWD to assess administrative monetary penalties against employers for workers' compensation premium avoidance.
- Existing law does not authorize TDLWD to issue stop work orders to offending employers.
- Lack of Integrated Data Between Agencies and External Sources: Access to and integration of data from various agency and entity sources will greatly assist investigation and enforcement. Investigation will be assisted when investigators gain access to certain information reported to the National Council on Compensation Insurance ("NCCI") regarding details of the coverage in place for employers. Fraud detection software would integrate and cull data from various sources to help identify noncompliant employers.
- Insufficiency of Reported Information on State Projects: Enforcement capabilities on state-funded projects will be enhanced if the general contractor is required to report the names of all subcontractors and the subcontractors' workers' compensation insurance carriers to TDLWD prior to or at the beginning of work by the subcontractor. Investigations would be aided if the State Board for Licensing Contractors had the authority to share financial statements of applicants and licensees with other state agencies.
- Inadequate Criminal Penalties for Unemployment Insurance Fraud: Tying the monetary value of unemployment insurance fraud to the criminal theft statutes, where greater value thefts result in a higher criminal classification, would provide stiffer criminal sanctions which may present a more effective deterrent. This would imitate the existing scheme for workers' compensation fraud.

Reducing Employee Misclassification

An effective enforcement program is essential to combating the problem of employee misclassification. An effective enforcement program will combine civil penalties, injunctions, stop work orders, and criminal prosecution for egregious repeat offenders.

The TDLWD through the UEF currently has authority to assess civil penalties for employers who fail to provide workers' compensation insurance coverage. While this program is effective in addressing employers who fail to secure workers' compensation insurance policies, current law does not adequately address the issue of premium avoidance. Employers who engage in premium avoidance misclassify workers, underreport payroll and the number of employees, and misrepresent the type of work performed. Accordingly, an effective enforcement program should assess civil penalties against employers who engage in premium avoidance.

In most instances, civil penalties will curb employee misclassification. However, the Task Force recognizes that some employers may merely view the penalties as a cost of doing business. In these cases, the appropriate use of stop work orders would provide an effective means of enforcing the law. The Commissioner of TDLWD should be given authority to issue stop work orders to offending employers. The authority to issue stop work orders would complement the Commissioner's existing authority to seek judicial injunctions against employers who fail to abide by an order of the Commissioner.

Some authority to pursue criminal sanctions currently exists, although not directly aimed at employee misclassification. Criminal prosecution is available as an option for enforcement against employers who have demonstrated an egregious, willful pattern and practice of fraudulent insurance acts over a period of time. Criminal prosecution has been used sparingly because of the difficulty of prosecuting criminal claims due to the higher burden of proof, stricter evidentiary standards, stricter constitutional protections, and competition for limited investigative and prosecutorial resources. If criminal prosecution is to be used more frequently, additional resources would be required for the investigating and prosecuting agencies.

Before there can be effective enforcement, investigators must be properly trained to both identify misclassification and collect relevant evidence. Because enforcement will involve the collaboration between multiple agencies, the Task Force recommends the integration of data from relevant governmental agencies and outside entities. The Task Force also recommends obtaining and implementing fraud detection software.

In the near future, the Task Force contemplates the formation of an "Investigator Round Table" to discuss and recommend methods and resources for identifying, investigating and distributing information useful in the enforcement efforts of the TDLWD and other participating agencies.

Exposing the Underground Economy

To raise awareness of employee misclassification, some resources should be targeted toward educating employees and employers about their rights and responsibilities regarding misclassification.

Priorities:

- An informational website and fact sheet has been created and can be viewed at <http://www.tn.gov/labor-wfd/EMEEF>. The Task Force is developing a Clearing House Operation to take in complaints and refer matters to proper member agencies.
- A method to receive complaints from the public has been established in the form of a toll-free “1-800 tip-line” and will be published by mid-2012.
- Currently, the TDLWD provides education and training in other areas. Task Force information regarding employee misclassification should be added to the existing curriculum. The use of informational webinars and PowerPoint presentations are available educational tools.
- Public Service Announcements (PSAs) rarely achieve effective television airtime without “star power” or money for better time slot placement. However, some radio stations may be willing to broadcast public service announcements if they are beneficial to their listeners.

Employee Misclassification and Its Impact on the Insurance Industry

Employee misclassification has a significant financial impact on agencies and carriers who service and provide workers' compensation coverage to Tennessee employers.

According to the research and report of Dr. William Canak and Dr. Randall Adams entitled *Misclassified Construction Employees in Tennessee*, dated January 15, 2010, employee misclassification is a serious problem for the insurance industry. This research focused on 2006 Census (American Community Survey) and IRS non-employer tax filings data. Based upon a 2008 audit of Tennessee's unemployment insurance performed by the TDLWD, Employment Security Division, the study projected the number of misclassified self-employed construction workers in 2006. Potential insurance industry losses were estimated to be between \$52.1 million and \$91.6 million.

It should be noted that considerable time has elapsed since the audit and socioeconomic conditions have changed. Thus, the Task Force uses the findings of the report cautiously as a basis for estimating lost earnings of the insurance industry in the 2012 Annual Report.

Three law changes have occurred since the report was prepared which substantially changed the playing field with respect to the definition of an *employee*:

- 2008 Public Chapter 1041 (suspended after three weeks in effect)
- 2010 Public Chapter 1149 (replaced Public Chapter 1041)
- 2011 Public Chapter 422 (amended certain aspects of Public Chapter 1149)

Prior to December 31, 2009, the determination of the work relationship as to whether an individual was considered an employee or a "subcontractor" or "independent contractor" was based upon the seven factors described in Tenn. Code Ann. § 50-6-102(10)(D) or the common law test. This method for determining work relationships tended to be very subjective and open to interpretation. "Independent contractors" were not covered under the workers' compensation laws. Workforces using "independent contractors" were at a competitive advantage compared to contractors utilizing their own employee-based workforce because they incurred much higher workers' compensation costs. Thus, the system itself was vulnerable to unscrupulous contractors misclassifying "statutory employees" as "independent contractors" to gain a competitive advantage.

Public Chapter 1149 essentially defined who *is not* an employee instead of who *is* an employee. Beginning March 1, 2011, as a general rule, every owner or executive officer of a construction company is required to obtain an exemption through the Secretary of State's office or be covered under a workers' compensation policy. What was once very "grey" became very "black and white" from a coverage standpoint. If a subcontractor failed to obtain an exemption or policy, NCCI Basic Manual Rule 2.H, requires that for each subcontractor not providing evidence of workers' compensation insurance, an additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees. This went a long way toward reducing the

exposure to misclassifying employees as independent contractors, at least from a workers' compensation perspective.

There was unified agreement that the loss of earnings to the insurance industry is a very significant problem in Tennessee, despite not having current data to analyze. The Task Force was made aware of a "shell scheme" prevalent in Florida which allows uninsured contractors to operate under a fictitious company name, while insured under a minimum deposit policy. Employees are paid cash, keeping their exposure "off the books." Given the very limited resources available for investigation and enforcement of workers' compensation fraud, Tennessee is at risk from such premium avoidance schemes. The ability of Tennessee regulators to identify unscrupulous contractors will determine the availability of data in the future to estimate premium loss to the carriers.

Finally, while acknowledging the severity of the loss of earnings to the insurance industry due to misclassification, the Task Force believes the new workers' compensation construction laws need to season before an attempt is made to reevaluate leakage in the system. After the new construction laws have seasoned for a year or two, we will attempt to gather available data to reassess the current financial impact of misclassification upon the insurance industry. This new study would take into consideration new methodologies for projecting the loss of earnings to the insurance industry.

Impact on State and Local Governments

The misclassification of workers in the construction industry deprives honest individuals of benefits while irresponsible employers gain a competitive advantage. Most states recognize this problem and have made combating it a priority. Accordingly, Tennessee's efforts are likely to be consistent with those of other states.

The practice of misclassifying employees as independent contractors is responsible for the significant loss of revenue by state government. To determine the financial impact of misclassification on state government, the most recent data available for Tennessee was derived from a 2006 report, *Misclassified Construction Employees in Tennessee*.¹ Findings in this report reveal the loss of tax revenue and premiums, increased costs incurred by taxpayers, and the resulting competitive disadvantage of legally compliant employers.

The problems identified in the *Tennessee* report are similar to the concerns of other states, as indicated in the State of Florida's annual report, *Joint Report to the President and Senate*.² Florida has conducted studies to develop solutions to prevent the problems associated with misclassification, including payroll fraud, and is actively prosecuting these violations as indicated by the *Maj. Geoff Branch of the Florida Division of Insurance Fraud* report (see study resources on page one of the Supplemental Report).

The *Tennessee* report identified the construction industry as one of the leading violators of employee misclassification. In some instances, deliberate fraud (insurance and tax) is a means to illegal cost-cutting measures. The study revealed that an estimated 17% of workers in the construction industry were misclassified or underreported resulting in an approximate loss of \$3 million in uncollected workers' compensation premium taxes. More information for a future study will be available after the first cycle of the workers' compensation exemption registrations expire.

Statistics cited in the *Tennessee* report do not show the amount of revenue lost by local governments. No studies on the impact of employee misclassification on local governments and municipalities were identified. Local effects include the costs of social and medical services in any given community. Costs incurred by those injured on construction jobsites, where they are unprotected by workers' compensation insurance or health insurance, are borne by local social service agencies, hospitals, clinics, etc.³ Families are impacted by the loss of income resulting from a family member's workplace injury and the lack of appropriate insurance coverage. These costs are passed on to the taxpayer through higher property taxes, and to law-abiding employers who end up paying 15-20% higher insurance premiums. The Task Force believes this issue should be addressed in the future if pertinent data is available.

¹ *Misclassified Construction Employees in Tennessee*. Dr. William Canak and Dr. Randall Adams, 2010.

² State of Florida's Annual Report, January 1, 2011.

³ *Construction Emergency: The Hidden Cost of Workplace Injuries*. University of Texas at Austin, 2011.

Workers classified as employees are covered by federal and state laws that provide protections and rights. These laws require employers to pay unemployment insurance and Social Security tax, withhold federal income tax, and secure workers' compensation insurance.

The *Tennessee* report references Tennessee unemployment data which estimates between 21,990 and 36,680 misclassified and unreported construction industry workers. In Tennessee, misclassified and unreported workers are estimated to range from 11-22% of all workers in the construction industry.⁴

ESTIMATED LOSSES⁵

- Unpaid Unemployment Insurance Premiums: \$8.4 million - \$14.9 million
- Unpaid Workers' Comp Premiums: \$52.1 million - \$91.6 million
- Uncollected Workers' Comp Premium Tax: \$2.1 million - \$3.7 million
- Uncollected Federal Income Tax: \$15.2 million - \$73.4 million
- Uncollected Social Security/Medicaid: \$7.5 million - \$42.1 million

A separate report claims that over 35 states have proposed legislation in the last five years to combat the underground economy.⁶ These efforts attempt to deter the underground economy that burdens the honest, responsible employer with unnecessary costs and harms hardworking families.

⁴ *Misclassified Construction Employees in Tennessee*. Dr. William Canak and Dr. Randall Adams, 2010.

⁵ Research and Resource Committee Supplemental Report.

⁶ *Survey of National and State Studies*. Matthew Capece, 2010.

Proposed Legislative Initiatives & Recommendations

(1) Enhanced Enforcement

There is a need for more investigators, especially with fluency in other languages. The Task Force believes that the TDLWD and its EMEEF unit are best suited to investigate employee misclassification issues and should take the lead in such investigations. There are currently only seven (7) investigators. Three (3) investigators are funded through the EMEEF. The remaining four (4) investigators are funded through the Workers' Compensation Division's UEF. The Task Force recommends hiring at least four (4) additional investigators in each grand division of Tennessee, with at least one (1) per grand division having interpretation/translation skills.

(2) Authorize Administrative Penalties

The Task Force recommends enacting legislation that allows the Commissioner of the TDLWD to assess administrative penalties. The Commissioner of the TDLWD currently has the authority to assess back unemployment premiums plus interest to employers who fail to report their complete payroll because they have misclassified workers as independent contractors or have paid them "off the books." The Commissioner currently has the authority to penalize employers who fail to obtain workers' compensation insurance coverage because they have misclassified employees as independent contractors or paid them in cash or "off the books." Current law does not grant authority to issue administrative penalties for employers who have committed workers' compensation insurance premium avoidance. Such penalties would be consistent with the practices of other states. The authority to seek criminal sanctions remains within the sole discretion of the District Attorneys General.

(3) Authorize Stop Work Orders

The Task Force recommends that the Commissioner of the TDLWD be granted authority to issue stop work orders against noncompliant employers as part of the TDLWD's enforcement capabilities. It is the Task Force's goal to stop only offending employers. It is not the Task Force's goal to prevent legitimate employers from conducting business and making an honest living. The Task Force's aim is to strike a balance by leveling the playing field among employers and enforcing compliance. *Legislative proposals* providing stop work orders will significantly improve enforcement efforts. Such measures would be consistent with the practices of other states.

(4) Lack of a Uniform Definition of "Employee"

While different definitions can be problematic in certain situations, the Task Force does not recommend adopting a uniform definition at this time. Consideration was given to standardization of the definition of "employee." Currently, there are two tests for such a definition: the "ABC" test used by Employment Security and the common law "Seven Factors" test as codified in Tenn. Code Ann. § 50-6-102 used by others.

(5) Misclassification in Other Industries

Although misclassification occurs in other industries, the problem is significantly more severe in the construction industry. The Task Force recommends that its focus should remain there at this time.

Revenue & Expenditures

Tennessee Code Annotated § 50-6-913 created the EMEEF which directs the fiscal policy on spending.

Any fees collected pursuant to the fee schedule for Workers' Compensation Exemption Registrations outlined in Tenn. Code Ann. § 50-6-912 must be deposited into the fund. Moneys in the fund must also be invested by the State Treasurer in accordance with provisions of Tenn. Code Ann. § 9-4-603. Pursuant to statute, the fund must be administered by the Commissioner of the TDLWD. Tenn. Code Ann. § 50-6-913.

The statute further stipulates that all costs of the Secretary of State associated with the administration of the Workers' Compensation Exemption Registry shall be paid from the fund by the Commissioner of the TDLWD. Moneys remaining in the fund after such payment may be expended, subject to appropriation by the General Assembly, at the direction of the Commissioner for education of employers and employees regarding the requirements of this part, and in support of the ongoing investigation and prosecution of employee misclassification. Any amount in the fund at the end of any fiscal year shall not revert to the general fund but shall remain available for payment of the costs of administering the registry or for education or enforcement.

The total amount of revenue collected in FY2010-11 was \$2,177,741.50. This revenue was generated from Workers' Compensation Exemption applicant registration and change fees. Applicant registrations are valid for a period of two (2) years. The first exemptions will be eligible for renewal in March 2013.

The total expenditures from the fund in FY2010-11 were \$416,443.32.

Revenue collections in FY2011-12, through December 31, 2011, are estimated to be \$784,532.50.

Expenditures in FY2011-12, through December 31, 2011, are estimated to be \$209,090.91.

Current and On-going Expenditures:

- Secretary of State administrative costs
- EMEEF administrative costs (includes employee salaries, investigator training, and court reporter and incidental expenses for public hearings)

Future Expenditures:

- Hire additional investigators, including some who are bilingual.
- Educate and train the public, employees, and employers through education awareness campaigns in conjunction with the TDLWD.
 - Production costs of a public education campaign range from \$91,000 to \$351,000.
 - Design costs of interpretation/translation service brochures range from \$300.00 to \$500.00 per document.
- Obtain fraud detection software and related databases.

Task Force Committees:

Dan Bailey, Chair
Legal Committee

Lynn Ivanick, Chair
Education Committee

Martha Campbell, Chair
Enforcement Committee

Carolyn Lazenby, Chair
Research and Resource Committee

Mike Shinnick, Chair
Insurance Committee

The entire Task Force extends special thanks to everyone who participated and contributed their time and efforts toward encouraging fair competition among employers and eliminating employee misclassification in the construction industry. The Task Force could not have prepared the 2012 Annual Report without your assistance.

Tenn. Code Ann. § 50-6-913

TENNESSEE CODE ANNOTATED
© 2011 by The State of Tennessee
All rights reserved

*** CURRENT THROUGH THE 2011 REGULAR SESSION ***

Title 50 Employer and Employee
Chapter 6 Workers' Compensation Law
Part 9 Construction Services Providers

Tenn. Code Ann. § 50-6-913 (2011)

50-6-913. Creation of employee misclassification education and enforcement fund -- Costs of administration.

(a) There is created a fund to be known as the “employee misclassification education and enforcement fund.” Any fee collected pursuant to § 50-6-912(a) shall be deposited in the employee misclassification education and enforcement fund. Moneys in the fund shall be invested by the state treasurer in accordance with the provisions of § 9-4-603. The fund shall be administered by the commissioner of labor and workforce development.

(b) All costs of the secretary of state associated with the administration of this part shall be paid by the commissioner of labor and workforce development from the employee misclassification education and enforcement fund. Moneys remaining in the fund after such payment may be expended, subject to appropriation by the general assembly, at the direction of the commissioner of labor and workforce development for education of employers and employees regarding the requirements of this part and in support of the ongoing investigation and prosecution of employee misclassification.

(c) Any amount in the employee misclassification education and enforcement fund at the end of any fiscal year shall not revert to the general fund, but shall remain available for the purposes set forth in subsection (b). Interest accruing on investments and deposits of the employee misclassification education and enforcement fund shall be credited to such account, shall not revert to the general fund, and shall be carried forward into each subsequent fiscal year.

HISTORY: Acts 2010, ch. 1149, § 13.

Tenn. Code Ann. § 50-6-919

TENNESSEE CODE ANNOTATED
© 2011 by The State of Tennessee
All rights reserved

*** CURRENT THROUGH THE 2011 REGULAR SESSION ***

Title 50 Employer and Employee
Chapter 6 Workers' Compensation Law
Part 9 Construction Services Providers

Tenn. Code Ann. § 50-6-919 (2011)

50-6-919. Employee misclassification advisory task force.

(a) There is created the employee misclassification advisory task force to study and make recommendations regarding issues relative to employee misclassification in the construction industry.

(b) The task force shall study issues relative to employee misclassification in the construction industry, including, but not limited to:

(1) The impact of employee misclassification on state and local governments of this state and the amount of state revenue, if any, that is lost or not collected due to employee misclassification;

(2) The lost earnings of the insurance industry due to employee misclassification;

(3) The estimates of the frequency of occurrence and economic impact of employee misclassification and whether particular industries are more likely to engage in the misclassification of employees;

(4) Whether state law should specify a uniform definition of the employment relationship and, if so, how it should be defined;

(5) Whether existing Tennessee laws aimed at preventing, investigating and taking enforcement action against the failure of employers to properly classify individuals as employees are effective;

(6) Whether there are ways to facilitate the sharing of information among agencies represented by task force members relative to violations of laws by employers who fail to classify individuals as employees;

(7) Whether there are new ways to pool, focus and target investigative and enforcement resources relative to employee misclassification;

(8) New strategies for systematically investigating the failure of employers to properly classify individuals as employees;

(9) Whether improvements are needed to facilitate the filing of complaints and identify potential violators, including, but not limited to, soliciting referrals and other relevant information from the public;

(10) Changes in the law, if any, that need to be made in order to ensure that agencies represented by task force members investigating the failure of employers to properly classify individuals as employees under their own statutory or administrative enforcement mechanism have the authority to refer a matter to other participating agencies for assessment of potential liability under the other agencies' relevant statutory or administrative enforcement mechanisms;

(11) Innovative ways to prevent misclassification of employees by employers, such as through disseminating educational materials regarding the legal differences between independent contractors and employees;

(12) Methods by which public awareness of the illegal nature and harms inflicted by the failure of employers to properly classify individuals as employees can be increased; and

(13) Any other issues relative to employee misclassification in the construction industry.

(c) The task force shall seek public input and may conduct public hearings or appoint study groups as necessary to obtain information necessary to conduct its study.

(d) Membership on the task force shall be as follows:

(1) The commissioner of labor and workforce development or the commissioner's designee;

(2) The commissioner of commerce and insurance or the commissioner's designee; and

(3) The executive director of the board for licensing contractors or the director's designee.

(e) The secretary of state or the secretary of state's designee, the attorney general and reporter or the attorney general's designee, the chairman of the advisory council on workers' compensation or the chairman's designee, the executive director of the district attorneys general conference or the director's designee, and the director of the Tennessee bureau of investigation or the director's designee shall all serve as ex officio nonvoting members of the task force. The task force may appoint additional ex officio nonvoting members as it deems appropriate.

(f) The commissioner of labor and workforce development shall convene the first meeting of the task force on or after February 1, 2011, at which meeting the task force shall elect its officers from the voting members and otherwise organize itself as it deems appropriate.

(g) On or before February 1, 2012, and on or before February 1 annually thereafter, the task force shall submit a report on its findings and progress to the commerce, labor and agriculture

committee of the senate, and the consumer and employee affairs committee of the house of representatives.

(h) To the extent permitted by law, every agency, department, office, division or public authority of this state shall cooperate with the task force and furnish such information that the task force determines is reasonably necessary to accomplish its purposes.

(i) In accordance with procedures set forth in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 2, the department of labor and workforce development, the department of commerce and insurance, and the board for licensing contractors may individually implement recommendations of the task force; provided, that such implementation is authorized under the existing statutory authority of the respective departments or board.

HISTORY: Acts 2010, ch. 1149, § 13.