THE BIG RIG OVERHAUL

RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT

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LOS ANGELES ALLIANCE FOR A NEW ECONOMY

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| FOREWORD |

What you're about to read is a microcosm of one of the foremost challenges facing the American economy and the workers who keep it running: the fight for a decent pay in return for hard work. In this case, that critical American story is told through the experience of truck drivers in our ports as they fight for fair pay through proper classification.

Why, you might well ask, should an American worker who is providing a vital service transporting goods from ports to their next stage of delivery have to "fight for fair pay?" Why don't they just get it in their paychecks the way they should? **Is someone really blocking that simple, just outcome, and if so, who, why, and how?**

forming a new business, seeking the independence of self-employment as opposed to working for a company. What you'll learn in these pages is that these truckers do, quite clearly, work for a company, with employers who set their hours and working conditions. Yet in order to cut their labor costs, their employers classify them as non-employees, or self-employed workers.

The implications of this are far reaching: Mislabeling workers as independent businesses deprives them of bedrock labor protections such as the rights to minimum wage, overtime pay, and a safe and healthful workplace. Workers who are illegally called independents are cheated of such rudimentary workplace benefits as unemployment compensation when they are laid

With this update of the Big Rig report, we begin to see something you don't see nearly enough of these days: a beginning of a story about economic justice, as cases against misclassifying employers are being brought and being won. This emerging justice did not materialize out of nowhere. It is coming from working people teaming up with labor advocates to fight for a basic right provided them by US labor law: the right to proper classification as an employee of a company, not an 'independent contractor.'

The "how" has already been mentioned: by misclassifying workers—truck drivers, in this case—as independent contractors instead of regular employees. This arcane-sounding designation may not seem significant enough to be connected to national challenges of stagnant pay for many groups of workers, inequality, and the middle-class squeeze. That's another reason to delve into this report. It turns out that **for these truck drivers and many others in related blue-collar occupations, classification can mean the difference between a decent, family-supporting job, and working in poverty.**

First, do not confuse these workers with entrepreneurs setting out on their own,

off; workers' compensation when they are injured; and the right to join together to bargain for better wages and working conditions. In the case of port drayage drivers, companies have deducted millions of dollars of charges from workers' paychecks to pay for trucks that often remain in the company's name.

Those are the costs to the workers themselves, but the damage done by misclassification goes beyond that. It results in at least two other big problems: First, it robs state and federal coffers of taxes that employers should be paying to cover their employees. The report estimates that in the ten most important port states, $485 million in workers' compensation premiums alone are going unpaid each year. This links

misclassification to another national challenge: the fiscal shortfalls experienced by the federal and many state governments. The federal government loses some $60 million per year in unpaid taxes in the drayage industry.

Second, by illegally lowering labor costs for the misclassifying employers, it gives them a competitive advantage over other employers playing by the rules. In this regard, misclassification paves the way to the low road in terms of job quality.

Earlier editions of this study largely stopped there. The authors did us a service by shining a light on a nefarious practice that was little known. But with this update, we begin to see something you don't see nearly enough of these days: **a beginning of a story about economic justice, as cases against misclassifying employers are being brought and being won.**

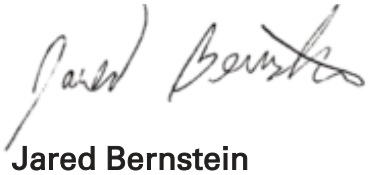
This emerging justice did not materialize out of nowhere. It is coming from working people teaming up with labor advocates to fight for a basic right provided them by US labor law: the right to proper classification as an employee of a company, not an 'independent contractor.' This report tells of numerous legal actions that are starting to generate monetary penalties for the misclassifying employers, to the tune of some $850 million per year in potential liability in California alone. In many cases, simply allowing in the sunlight of exposure into these labor practices is turning out to provide the necessary antiseptic.

Our economy depends on moving goods. Much like the human body depends on the circulation of vital fluids, our households, businesses, and governments could not function if the goods we want and need did not efficiently reach us. But whether it's the garment or new iPad we've been waiting for at home, the new parts for a motor at the factory, or the food at the grocery, most of us don't give a lot of thought to the process by which things move around America.

Unfortunately, as the economy and the labor market have grown more unequal, as globalization and deunionization have zapped the bargaining power of workers—a power that has historically been critically important for maintaining economic balance in America—new roads have opened up, both low ones and higher ones. In the economists' jargon, we now live in a "dual equilibrium" world, where we can produce our output in ways consistent with what many would view as socially and economically fair, or not.

> This report tells the story: the benefits of "getting this right," the costs of getting it wrong, and the workers, advocates, judges, and others who are moving us closer to justice.

Worker's classification is a fork where those two roads meet. By getting this right—by properly classifying workers as regular employees when that's what they are—we take the correct turn at that fork. In doing so, we lift both the paychecks of workers performing an essential economic function, provide public coffers with the resources they're owed, and reverse a dangerous tilt in the economic playing field. **This report tells that story: the benefits of "getting this right," the costs of getting it wrong, and the workers, advocates, judges, and others who are moving us closer to justice.**



Jared Bernstein
Senior Fellow, Center on Budget and Policy Priorities &
former Chief Economic Advisor to Vice President Joe Biden

| EXECUTIVE SUMMARY |

In *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports*, we examined changes in labor practices in the port trucking industry. These changes, originating in the 1970s, have led to the development of an industry characterized by "fierce competition, ever-increasing service requirements, a contingent workforce, poverty level wages, no health care coverage, rampant safety violations, [and] ineffective or illusory enforcement." **Such conditions are now increasingly common among American workers and feature prominently in debates about burgeoning inequality in the country.**

Our research found the dire working conditions of port truck drivers to have flowed from the practice of treating employees as if they were 'independent contractors,' an illegal practice called misclassification. At the time, there were practically no official government investigations to verify our findings despite a host of enforcement agencies being responsible for preventing misclassification.

That has now changed. **Our findings match those coming from recent investigations of employment practices common in the industry by the United States Department of Labor, the Internal Revenue Service, the National Labor Relations Board, and various state agencies.** More importantly, these investigations signal a new dynamic, one with practical ramifications for the organization of work in the industry as well as for broader discussions of inequality in this country.

In recent years, port truck drivers, like workers in several industries, have actively fought declining working conditions. There have been strikes, legislative campaigns, community-based activism, and the first unionization vote since deregulation thirty years ago. In addition to those well worn paths, a great many port drivers have also started filing complaints with state and federal enforcement agencies, as a way to improve their lives.

Given the positive findings from already – adjudicated complaints and the growing number of pending driver complaints, these filings have the potential to be transformative. The industry's potential liability for the labor and tax law violations these complaints address runs in the billions of dollars.

A close examination of the port trucking industry illustrates just how inadequate enforcement of labor and tax laws in this country has resulted in **diminished earnings for drayage drivers. Vigorous application of these laws has the potential to stem rising inequality and the shrinking of our prosperous middle class.**

Major Research Findings

- State and federal courts and agencies reviewing employment arrangements in port trucking overwhelmingly conclude that the drivers before them are employees and that **the label 'independent contractor' has little connection with the reality of these drivers' work.**
- By treating employee drivers as independent contractors, **port trucking companies are violating a host of state and federal labor and tax laws,** including provisions related to wage and hour standards, income taxes, unemployment insurance, organizing, collective bargaining, and workers' compensation.
- Approximately **49,000 of the nation's 75,000 port truck drivers are misclassified as independent contractors.**
- Port drivers have filed some 400 complaints with the California Division of Labor Standards Enforcement (DLSE) for wage theft violations related to misclassification.
- Penalties in 19 cases already adjudicated by the DLSE have averaged $66,240 per driver, amounting to $4,266 per driver per month covered by the claim. Claims in pending complaints we have reviewed average a little over $127,000 per driver, amounting to **$5,072 per driver per month.**
- Extrapolating from existing claims made under California state law, **we conservatively estimate that port trucking companies operating in California are annually liable for wage and hour violations of $787 to $998 million each year.** The true figure probably lies in the middle of this range at around $850 million per year.
- We estimate the industry's total federal and state **liability for unemployment insurance fund contributions, workers' compensation premiums, and income tax payments at approximately $563 million annually**
- Total quantifiable costs of misclassification nationally – tax losses plus wage and hour violations – run to **$1.4 billion annually** with non-quantified costs likely exceeding the figure significantly.

Recommendations

- State and federal labor and tax law enforcement agencies should **prioritize investigations** in those industries, like port trucking, in which widespread violations have the greatest impact on workers and law-abiding employers.
- Enforcement agencies should coordinate their efforts to fight misclassification in the trucking industry, with each taking the most advantage of their particular capacities.
- Enforcement agencies should be adequately funded and field enough well-trained staff to ensure investigations are accurate, consistent, and sufficient in scope.
- **States should use legal tests of employee status** that account for the lack of independence among port drivers. State laws should ensure that employer-mandated deductions for truck and other business-related expenses are illegal.
- Anti-retaliation measures for workers reporting violations of employment, tax, and safety **laws should be strengthened.**
- The U.S. Department of Labor should expedite its recently-announced study on the incidence of worker employment classification as federal studies are now outdated. Further study should also be made of the costs of misclassification to particular states and federal programs.
- Congress should pass the Payroll Fraud Prevention Act (S. 770), the Clean Ports Act of 2013 (S. 1435), and the Fair Playing Field Act of 2012 (S. 2145). These bills would each help address some of the causes and consequences of misclassification among port drivers.

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| ACKNOWLEDGEMENTS |

This report was made possible because of the time and talent of dozens of researchers, advocates, and lawyers across the country, and the dedication of public servants at the state and national levels.

We wish to thank NELP policy analyst Michael Evangelist, NELP staff attorney Diego Rondón Ichikawa, and NELP intern Michelle Gonzalez for their contributions to this report. LAANE research and policy analyst Paula Winicki gave generously of her time and energy, making the report much richer for it. Nick Weiner, Barbara Maynard, and Adan Alvarez were essential to making sure the stories, data, and details contained in this report saw the light of day.

We would also like to thank John Schmitt of the Center for Economic and Policy Research for reviewing the report, including particularly our foray into estimating the costs of misclassification. We are indebted to Jared Bernstein, Senior Fellow at the Center on Budget and Policy Priorities, for his generosity in writing the foreword for our report.

And, above all, we thank Jose Galindo, Dennis Martinez, Carol Cauley, John Jackson, and all those courageous port truck drivers who have stood up for themselves and their co-workers to demand an end to illegal practices in their industry.

| A NOTE ON OUR CONTINUING COLLABORATION |

Three years ago, Rebecca Smith of the National Employment Law Project and Paul Alexander Marvy of the Change to Win Strategic Organizing Center, along with Professor David Bensman of Rutgers University, co-authored *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports.* That report grew out of our commitment to extending the shared prosperity and upward mobility known as the American Dream into the 21st century. Challenges to that ethos, for workers in port trucking and the nation as a whole, have become starker in the last three years, prompting in part our return to this subject.

The **National Employment Law Project (NELP)** is an advocacy organization devoted to improving economic opportunities and security for working families. The **Change to Win Strategic Organizing Center** works to secure family wage jobs, affordable health care, a secure retirement, and dignity for all workers. The **Los Angeles Alliance for a New Economy (LAANE)** is an advocacy organization dedicated to building an economy that works for everyone, through creating good jobs, a healthy environment, and thriving communities. All three organizations promote policies that create good jobs, reduce inequality, and expand workplace protections.

Rebecca Smith is the Deputy Director of NELP. She has been an attorney and worker advocate for over 30 years. In the course of her career, she has litigated issues of misclassification of workers, testified in Congress on this issue and counseled policy-makers, organizing groups, and agency personnel on the best policies and practices to address misclassification of workers. Smith oversaw the analysis of legal and administrative enforcement actions.

Paul Alexander Marvy is an attorney and researcher whose career has spanned the fields of public health, civil and criminal justice system reform work, and workers' rights. Over the last six years, he has collaborated with truck drivers, community groups, labor unions, and environmental advocates to encourage comprehensive reform of the port trucking industry in Washington state. Marvy had lead responsibility for detailing industry developments, analyzing the costs of misclassification, and drafting the overall report.

Jon Zerolnick is the campaign director for LAANE's Clean and Safe Ports project, which was instrumental in the creation and passage of the award-winning Clean Truck Program at the Port of Los Angeles. Over the past seven years, he has worked with a coalition of port drivers, labor unions, environmental, community, public health, and faith-based groups to address the systematic failures of the port trucking system. He is the author of several reports on port trucking, including *The Road to Shared Prosperity, and Foreclosure on Wheels.* Zerolnick collected and reviewed the bulk of the enforcement actions.

NELP
National Employment Law Project

CHANGE to WIN
STRATEGIC ORGANIZING CENTER

laane
20 YEARS OF
CHANGING LIVES

Changing An Industry?

Three years ago, we co-authored *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports*, a comprehensive overview of the port trucking industry. We concluded that the industry's dominant business model was based on the illegal misclassification of employee drivers as independent contractors. We found that this resulted in an industry characterized by "fierce competition, ever-increasing service requirements, a contingent workforce, poverty-level wages, no health care coverage, rampant safety violations, (and) ineffective or illusory enforcement."

Since we released that report, numerous state and federal agencies have officially examined the employment classification of port drivers, allowing us to now compare our analysis with their official findings. Trucking industry advocates have also responded to charges of misclassification in illuminating ways. And we now have data that permits us to quantify some of the costs of misclassification in the industry. These developments, and the deepened knowledge they afford, merit an extended return to this subject, a return which provides a valuable perspective on growing national discussions around low-wage work and its consequences.

Port Trucking and Challenges to Low-Wage Economics

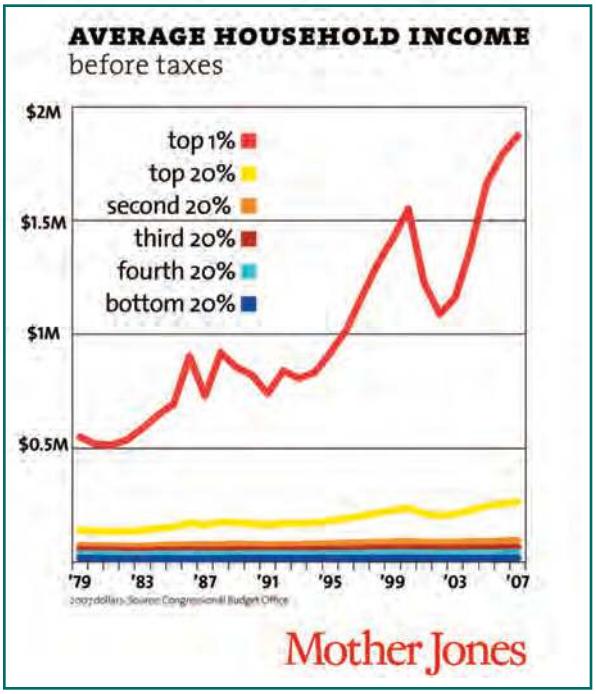
Roughly a year after we published *The Big Rig,* CBS Morning News examined worker misclassification, prefacing its investigation with the question, "When is an employee not an employee?" The show's anchors explained that the U.S. Department of Labor was cracking down on businesses that call their employees 'independent contractors' as a way of denying them wages and benefits. The hosts went on to note that "The issue had been historically linked to low-paying jobs but now it is really hitting the middle class."[1]

The main subject of their report, Dutch Prior, had been working at the Port of Oakland for seven years. He drove a truck owned by Shippers Transport Express but still, he noted, "I am not classified as an employee. I am classified as an 'independent contractor.' I have very, very little control over the success or failure of my company."

Dutch Prior worked exclusively for Shippers, which assigned his routes and determined the dwindling amounts he was being paid for them. He explained the economics this way: "As long as we're independent contractors, they don't have to cover benefits. They don't have to cover sick time, bereavement, leave time, holiday pay. It just saves the company money."[2]

Prior's predicament is typical of port drivers around the country. It also reflects defining trends in our country's economy.

Since the mid-1970s, American workers have increasingly found themselves in uncertain, contingent employment relationships. Whole industries, such as warehousing, have been reconfigured to shift business costs onto individual workers, taxpayers, and local **communities. Powerful companies have moved core operations into nebulous networks of undercapitalized subcontractors, both domestic and overseas. And large numbers of workers find themselves beyond the reach of such core labor protections as a minimum wage, unemployment insurance, and Social Security.** These trends are at least partially responsible for the absolute stagnation of workers' real income and burgeoning wealth gap in this country over the last four decades.



These trends and the corporations driving them have been the targets of increasing amounts of direct action in recent years. At warehouses in California and Illinois, car washes in New York, fast food restaurants in 60 cities, Philadelphia's airport, museums in the District of Columbia, and farms in Florida, workers have taken collective action to improve their working conditions. These actions have reached such a point that even the

CEO of Walmart, a company that has been among the principal drivers of declining working conditions across the entire economy, acknowledges the need for both public discussion of, and measures to address, growing inequality in the country.[4]

Like the workers involved in these actions, Dutch Prior saw his act of speaking out as reflecting the values of fairness and justice. When a reporter asked him, "Could you be fired for talking to me about this?" Prior responded, "I don't know. I honestly don't know and I'll find out when this airs. My grandfather told me you stand for something or you'll fall for anything. This is me standing up for what I believe in."[5]

Over the last few years, port truck drivers like Dutch have engaged in many of the tactics that have marked the surge in worker activism in other industries. There have been strikes in Seattle, Oakland, and Los Angeles.[6] Drivers have engaged activists and community members, including those involved in the Occupy movement.[7] They have pressed to reform outdated processes for determining employee status in New Jersey, New York, Washington State, and elsewhere.[8] New York Governor Andrew Cuomo has just signed the New York State Commercial Goods Industry Fair Play Act, a comprehensive measure to address misclassification of commercial truck drivers.[9] And the industry has seen the first successful unionization vote since deregulation thirty years ago.[10]

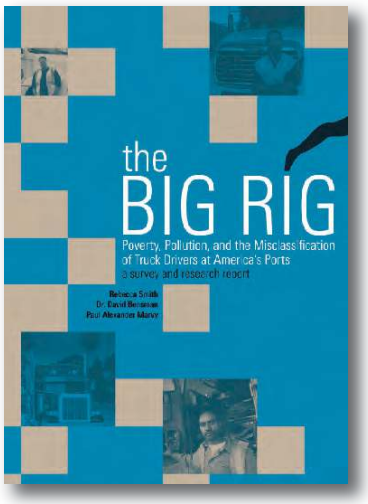
Port truck drivers are also engaging in a promising and novel tactic: large-scale, collective use of existing legal remedies. In *The Big Rig,* we pointed out the considerable array of legal norms violated by the misclassification of port drivers. Now, drivers are filing legal actions to enforce these norms, including those related to wage and hour rules, wage theft, working hours, retaliation, and discrimination.

In the following sections of this report, we look in detail at specific examples of these legal actions. Because many rely on state and federal officials to determine drivers' employment status, they allow us to compare our analysis in *The Big Rig* with official findings. They also open up a discussion of the costs of misclassification and the role such legal actions might have in bringing this industry and others closer in line to commonly-held norms about working and equality. But before turning to these legal actions, we will briefly review our findings from *The Big Rig*, since they form a base to which we can compare this new information.

Dutch Prior's predicament is typical of port drivers around the country. It also reflects defining trends in our country's economy.

| THE BIG RIG: HOW PORT TRUCK DRIVERS WORK |

In 2010, we wrote *The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports* in response to a then-swirling debate over the role of independent contracting in the linked environmental, com-munity, and worker crises surrounding our nations' container ports. We aimed to answer the central, ultimately empirical, question of that debate: Were port drivers misclassified as independent contractors?



To approach that question, we used a multi-method research design consisting of three prongs:

a) An in-depth literature review covering the industry's structure and economics;

b) A re-analysis and aggregation of 10 surveys of 2,183 workers at seven major ports; and

c) An analysis of the work arrangements of a diverse group of drivers and the firms they work for, drawing on exhaustive, original interviews and hundreds of the workers' employment documents, including truck leases, pay stubs, insurance provisions, and log books.

We analyzed the data from these sources, especially the interviews and collected documents, according to the most stringent test of employment status in American statutes, that used by the Internal Revenue Service (IRS). We reasoned that if port truck drivers are considered "employees" under the IRS code, then they would also be employees under statutes that use other, more generous tests.

Applying the IRS test, we found that the typical port driver is misclassified as an 'independent contractor':

- **Trucking companies imposed strict controls on port drivers.** Trucking companies determined how, when, where, and in what sequence drivers worked. They imposed truck inspections, drug tests, and stringent reporting requirements. Drivers' behavior was regularly monitored, evaluated, and disciplined. Drivers feared retaliation should they refuse a job assignment, and believed that they could be fired at any time.
- **Port drivers were financially dependent on trucking companies.** The companies unilaterally controlled the rates that drivers were paid. Drivers worked for one trucking company at a time, did not offer services to the general public, and were entirely dependent on that company for work and access to the ports. Like other low-wage employees, drivers' only means for increasing their earnings was to work longer hours.
- **Port drivers and their companies were tightly tied to each other.** Drivers not only performed a function integral to the companies they served – the drivers' function **was** the business of the companies. Drivers worked for years for the same company, used company signs and permits, represented themselves to others as being from the company, and rarely offered their work independently of the company.

Like other low-wage employees, drivers' only means for increasing their earnings was to work longer hours.

JOSE GALINDO, PACIFIC 9 TRANSPORTATION

Jose Galindo has been a port truck driver serving the twin ports of Los Angeles/Long Beach for the past 12 years. Jose drives exclusively for Pac 9 Transportation, a major drayage company with some of the highest gate moves in the Ports of L.A./Long Beach. Pac 9 classifies its drivers as "independent contractors" and pays them by the load.

In December 2012, Jose suffered a serious accident at work. "I was engaging the landing gear crank on a chassis that I had hauled to the ports when all of a sudden the crank sped out of control and yanked my arm and shoulder forward, damaging the tendons," said Jose. Initially, Pac 9 and the California State Disability Insurance office (SDI) treated Jose as an employee. The company provided him access to medical care through an insurance policy for work related injuries, and the California SDI provided disability benefits.

However, after four months of receiving state disability benefits, the SDI informed Jose that his benefits were being terminated even though he remained disabled. "The state told me that Pac 9 had notified them that I was never an employee; rather, that I was an 'independent contractor.' I asked why I had initially received disability benefits and they told me that Pac 9 had classified me as an employee until March 2012. The companies we work for classify us as they wish depending on what is most convenient for them."

Jose is currently unable to work because of his disability, but he continues to fight for justice at Pac 9 with his coworkers and is appealing the termination of his disability insurance.

Based on driver surveys and industry analyses, we also determined that:

- Port truck drivers worked long hours for poverty-level wages. Among surveyed **drivers, the average work week was 59 hours.** Median net earnings before taxes were $28,783 per year for contractors and $35,000 per year for employees.

> Most of the companies in a vital economic sector were, and continue to be, operating illegally.

- In driver surveys, **independent contractors reported average net income 18 percent lower than employee drivers reported.** Independent contractors were two-and-a-half times less likely than employee drivers to have health insurance and almost three times less likely to have retirement benefits. Trucking companies made drivers responsible for all truck-related expenses including purchase, fuel, taxes, insurance, maintenance, and repair costs.

Put another way, our analysis showed that most of the companies in a vital economic sector were, and continue to be, operating illegally. We noted in the report that misclassification of employees as independent contractors allows companies to avoid various state and federal taxes, including contributions to workers' compensation and unemployment insurance funds. We also pointed out that this practice allows companies to shed responsibility for compliance with core labor standards, such as minimum wage, anti-discrimination protections, and safety requirements. We recommended that, in response to this state of affairs, "The U.S. Department of Labor, the IRS, and state enforcement agencies should take substantial, coordinated action to end the practice of misclassification in the port trucking industry."

In the intervening three years, some coordinated enforcement action has begun, albeit on a too-limited scale. There has also been a large scale and growing effort by drivers to assert their employment rights through the courts. It is to these actions that we now turn.

THE LIFE OF A PORT TRUCK DRIVER

- Average work week: 59 hours
- Median net earnings before taxes:
  Independent Contractors: $28,783
  Employee Drivers: $35,000
- Independent contractors pay all truck-related expenses, like fuel, maintenance, and repair costs

LABOR LAW ENFORCEMENT AND TAX COLLECTION IN PORT TRUCKING SINCE THE BIG RIG

Since the publication of *The Big Rig,* state agencies that administer workers' compensation and unemployment insurance funds, as well as the U.S. Department of Labor and the Internal Revenue Service, have issued decisions finding that these workers are employees, not independent contractors. This has been true under state and federal statutes that define "employee" in a variety of ways.

There are also a great number of pending complaints, including **nearly 400 claims** stemming from misclassification submitted to the California Division of Labor Standards Enforcement (DLSE). Nationwide, there are at least **nine pending private lawsuits** that concern the issue of misclassification. One related case is awaiting decision in the California Supreme Court.

In addition, legislatures in states handling 60 percent of all container port traffic – New York, New Jersey, California, and Washington – have considered proposals that would strengthen worker protections against misclassification. In 2013, the New Jersey and New York legislatures passed bills that would establish better methods for classifying drivers' employment status. (The New Jersey bill was vetoed by Governor Christie. **New York's Governor Cuomo signed the New York State Commercial Goods Transportation Industry Fair Play Act in early January 2014**).

These decisions, as well as evidence coming out of these legislative initiatives, confirm our assessment of the drivers' employment status in *The Big Rig.* **Courts and agencies have overwhelmingly agreed with our initial conclusion that the typical port truck driver is an employee, and that the label 'independent contractor' has little connection with the reality of these drivers' work.** Below, we consider these cases in detail.

Methodology

We analyzed official government decisions that rule on the employment status of port truck drivers. These cases arose in a variety of state and federal contexts. One is an IRS status determination issued in response to a standard request called an SS-8 determination. Another is a state court decision resulting from an appeal by a port trucking company of a successful claim by one of its drivers for unemployment insurance benefits. There are decisions by administrative hearing officers from California who ruled on drivers' claims that companies had violated wage and hour laws. And there are many other rulings. What unites these decisions is that they all required a government fact finder to determine whether the port driver in the case was an employee or an 'independent contractor' according to applicable state or federal law.

We present here all such decisions issued since January 1, 2011, just after we released *The Big Rig*, that we have been able to identify, as well as a few particularly significant decisions from before 2011. We gathered these decisions through public disclosure requests to relevant state and federal agencies; through standard legal research methods; and through networks of attorneys and policy advocates involved in monitoring and bringing cases on these issues. We have also included a catalog of the pending civil cases of which we are aware. There will inevitably be cases that we have missed, although we are confident, given the number of decisions we have reviewed and our background knowledge of the industry, that the conclusions we present here reflect predominant conditions in the industry.

California Wage and Hour Decisions Establish the Employee Status of Port Drivers

Some 400 port drivers have filed labor law complaints with the California Division of Labor Standards Enforcement (DLSE), the most in any state. DLSE hearing officers have issued at least 19 decisions finding that drivers are employees, not independent contractors, ruling that deductions from their wages for lease payments are illegal. **These orders have assessed more than a million dollars in wages, unlawful deductions, and penalties on behalf of at least 19 drivers against at least five companies**: Green Fleet Systems, Seacon Logix, Western Freight Carrier, Total Transportation Services, and Mayor Logistics. When Seacon Logix appealed its case, a California Superior Court made nearly identical findings as had the DLSE.

CALIFORNIA WAGE AND HOUR LAW DEFINING "EMPLOYEE"

Like many state laws, the California Labor Code states that an "employee" is a person "rendering actual service in any business for an employer." In the port truck driver cases, DLSE follows a California court decision that establishes an eight-part test to determine whether a worker fits this definition of employee. In addition to the element of control, the factors are:

a) Whether the one performing services is engaged in a distinct occupation or business;

b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

c) The skill required in the particular occupation;

d) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

e) The length of time for which the services are to be performed;

f) The method of payment, whether by the time or by the job;

g) Whether or not the work is a part of the regular business of the principal; and

h) Whether or not the parties believe they are creating the relationship of employer-employee.[11]

Courts also look at the alleged employee's opportunity for profit and loss and investment in tools and materials.[12] Further, the right to discharge a worker at will is considered strong evidence of employee status.[13]

California Labor Code requires an employer to reimburse employees for any necessary expenditures incurred on the job.[14] Further, it provides that **employers may not coerce employees to buy things from the employer.**[15] If drivers are considered employees under California law, the requirement that they lease or purchase trucks is invalid and related automatic paycheck deductions are illegal. In the time since *The Big Rig* was published, such arrangements have become ubiquitous at California's ports, which include the first (Los Angeles), second (Long Beach), and fifth (Oakland) largest container ports in the United States.

CALIFORNIA WAGE AND HOUR ACTIONS

Romeo Garcia v. Seacon Logix, Inc.
(Los Angeles County Superior Court)[16]

✓ **Four drivers awarded a total of $107,803**

These cases were initially filed and handled separately by DLSE. Like many California port drivers, the four involved in this case, all monolingual in Spanish, had to lease company-provided trucks and pay for company-provided insurance through paycheck deductions as a condition of working for Seacon.[17] Their English language contracts also obliged the drivers to pay for all their gas, repairs, and registration fees.[18] However, the trucks that the drivers were "purchasing" were in Seacon's name and had Seacon's logo on the side.[19] The driver-paid insurance policies were also in Seacon's name.

hearing officer said, "The driver's work is an integral part, if not the essential core of the principal's business."

The DLSE hearing officer also noted that independent contractor agreements, offered as take-it-or-leave-it propositions to workers, are often shams: **"The formation of independent contractor agreements signed by its drivers can be and is often a subterfuge to avoid paying payroll and income taxes."**

DLSE issued similar decisions on three other driver complaints. After the company appealed all four cases, a consolidated hearing was held in Los Angeles Superior Court in early 2013. The judge affirmed the DLSE. The judge's order cited testimony of a worker called by the company. This witness told the court that the

"I am a believer in free markets. This was not a free and open market."
-- Judge Michael P. Vicencia, Los Angeles Superior Court

When one of the drivers, Eddy Gonzalez, missed four days of work in order to bury his mother in Guatemala, he was fired. Gonzalez had made payments through paycheck deductions, of $650 per week, to the company. Although Gonzalez was ostensibly leasing his truck to own it, on termination he was required to turn over the truck keys.

The drivers claimed that Seacon Logix had misclassified them, and that, therefore, deductions from their wages were illegal under California law. A DLSE hearing decision, issued in January 2012 in Eddy Gonzalez' case, found that Gonzalez had been misclassified. The hearing office said that **the overriding factor influencing his decision was that the worker was not engaged in an occupation or business distinct from that of Seacon Logix.** With respect to the issue of the driver's work being integrated into the work of the company, the company's dispatcher had control over all of his movements, that he wasn't allowed to work for other companies, that drivers were punished for rejecting assignments, and that he didn't realize his truck was leased (as opposed to purchased) until two weeks after he got it.

The court's primary reasoning was that the truck lease and the employment agreements were not separate contracts. Workers were not free to contract with the company for driving jobs unless they also agreed to purchase a truck from the company. Nor could they use the truck purchased from Seacon to drive for other companies. This "hand in glove" arrangement, the court said, gave Seacon tremendous control over the workers. The judge said, "I am a believer in free markets. This was not a free and open market."[20]

Seacon Logix, Inc. **(Five cases, California Division of Labor Standards Enforcement)**[21]

✓ **Five drivers awarded a total of $537,527**

Since the Los Angeles Superior Court ruling, the DLSE has issued five additional decisions on behalf of Seacon drivers, after joint hearings were conducted in December and February 2013. The DLSE hearing officer found in these cases, too, that Seacon drivers were in reality employees of the company.

Green Fleet Systems, LLC **(California Division of Labor Standards Enforcement)**[22]

✓ **Four drivers awarded a total of $281,000**

Like the drivers we interviewed for *The Big Rig,* Jenner Monge signed a purported 'independent contractor' agreement with Green Fleet Systems (GFS). He put a down payment of $6,000 and a security deposit of $1,400 on his truck. Deductions from his paychecks included fees for truck washes, repairs, insurance, parking, physical damage, and trip permits. Monge's arrangement with GFS had little in common with general notions of ownership; he was not allowed to take the truck home, the company manager referred to the truck as "my" truck, and sometimes Monge would arrive in the yard to find the truck gone. Monge's movements and assignments were tightly controlled by the company.

The hearing officer examined whether Monge and three other drivers who filed complaints were in a business or occupation distinct from **that of the company and found, "Without the workforce of drivers, the Defendant would not have a business. In this case, the Defendant's business is transporting services or goods. Defendant would be unable to provide this service or good if he did not have drivers to deliver the service or good."**

Like the hearing officer in Seacon Logix, **the adjudicator said that not only was the drivers' work integrated into the defendant's business, but that transportation is the defendant's sole business.** Further, the hearing officer noted that there was no real opportunity for profit or loss such a would exist in a bona fide business, since the company had the only direct contact with clients and set the contracts with them.[23]

There was no real opportunity for profit or loss such as would exist in a bona fide business, since the company had the only direct contact with clients and set the contracts with them.

With respect to driver investment and provision **of equipment, the officer found that the company provided all the supplies, equipment, and tools required to operate a transportation business and then charged the worker for them.**[24] The drivers had no up-front financial investment other than signing a lease.[25]

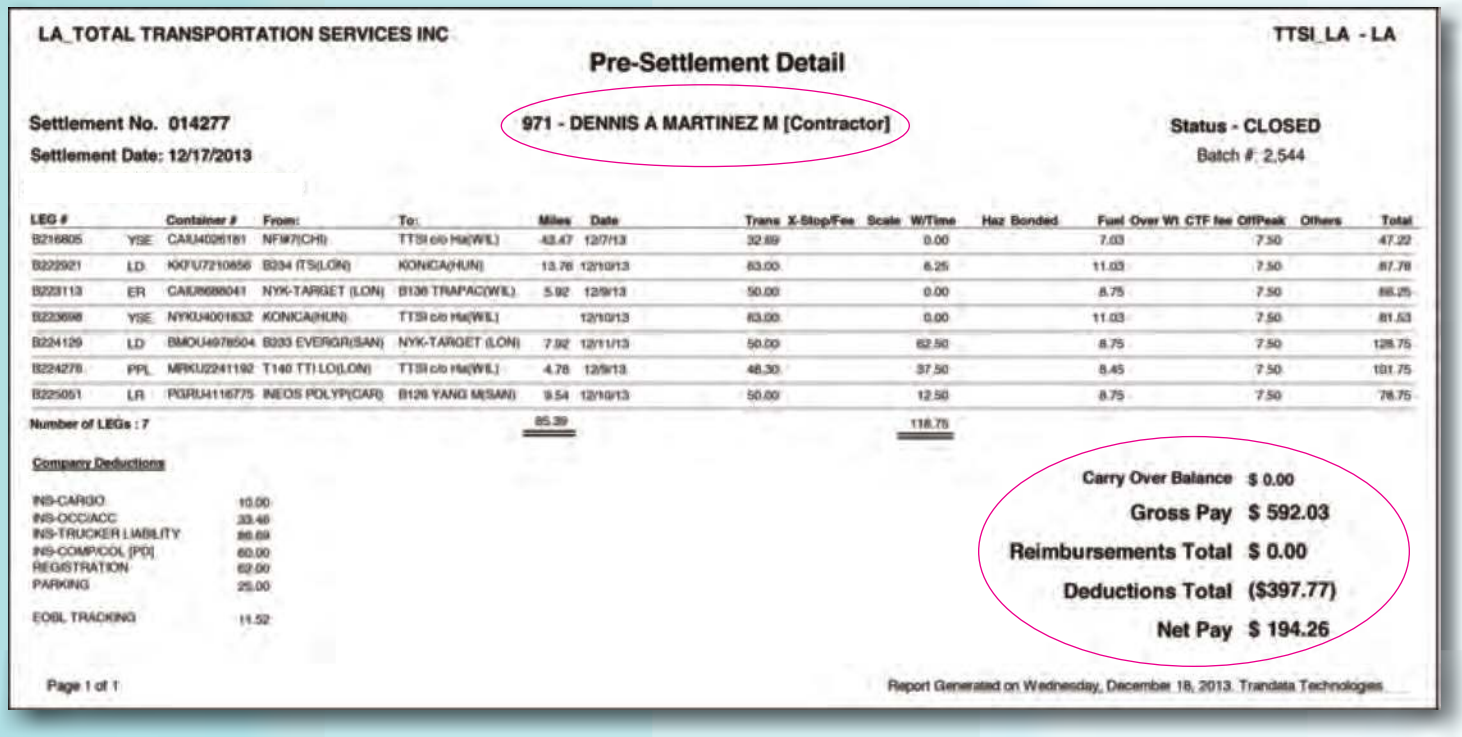
The hearing officer gave little weight to the fact that the workers and the company had signed an agreement calling the driver an 'independent contractor,' saying, "The employer cannot change the status from that of an employee to one of an independent contractor by illegally requiring the employee to assume a burden that the law imposes directly on the employer, that being, withholding payroll taxes and reporting such withholdings to the taxing authorities."[26]

DENNIS MARTINEZ, TOTAL TRANSPORTATION SERVICES, INC.

Dennis Martinez, age 28, has been a port truck driver serving the Ports of LA/Long Beach for three years, working hard every day to provide for his wife and four young children. Dennis is employed full time by Total Transportation Services Incorporated (TTSI). Though the company calls him an 'independent contractor,' he works under the same conditions as two TTSI drivers that DLSE found to be misclassified.

Every week, regardless of how much or how little he makes, TTSI's business expenses are deducted from Dennis' paycheck. If Dennis earns less than the total of the deductions, he falls into debt with the company. "There are times when I work 6 days a week, 8-14 hours a day and bring home less than $200 for the week. It's tough when you earn that little and have to provide for the family." Although TTSI claims that its drivers are "independent," their relationship is dependent on the company. Drivers do not have a say in how much they are paid per load, or where the load must be delivered.

Dennis is one of 20 drivers at TTSI who have filed Wage and Hour Claims with the California Labor Commissioners Division of Labor Standards Enforcement (DLSE). In November 2013, Dennis led a delegation of drivers to demand that TTSI recognize them as employees. Since that day, TTSI has retaliated against Dennis and his co-workers for their demands.



LA_TOTAL TRANSPORTATION SERVICES INC — TTSI_LA - LA

Pre-Settlement Detail

Settlement No. 014277
Settlement Date: 12/17/2013

971 - DENNIS A MARTINEZ M [Contractor]

Status - CLOSED
Batch #: 2,544

LEG #		Container #	From:	To:	Miles	Date	Trans	X-Stop/Fee	Scale	W/Time	Haz	Bonded	Fuel	Over Wt	CTF fee	OffPeak	Others	Total
B216805	YSE	CAIU4026181	NFI#7(CHI)	TTSI c/o Ha(WIL)	43.47	12/7/13	32.89			0.00			7.03		7.50			47.22
B222921	LD	KKFU7210856	B234 ITS(LGN)	KONICA(HUN)	13.76	12/10/13	83.00			6.25			11.03		7.50			87.78
B223113	ER	CAIU8688041	NYK-TARGET (LGN)	B136 TRAPAC(WIL)	5.92	12/9/13	50.00			0.00			8.75		7.50			66.25
B223698	YSE	NYKU4001832	KONICA(HUN)	TTSI c/o Ha(WIL)		12/10/13	83.00			0.00			11.03		7.50			81.53
B224129	LD	BMOU4978504	B233 EVERGR(SAN)	NYK-TARGET (LGN)	7.92	12/11/13	50.00			62.50			8.75		7.50			128.75
B224278	PPL	MRKU2241192	T140 TTI LO(LGN)	TTSI c/o Ha(WIL)	4.78	12/9/13	48.30			37.50			8.45		7.50			101.75
B225051	LR	PGRU4116775	INEOS POLYP(CAR)	B126 YANG M(SAN)	9.54	12/10/13	50.00			12.50			8.75		7.50			76.75
Number of LEGs : 7					85.39					118.75								

Company Deductions

INS-CARGO	10.00
INS-OCC/ACC	33.48
INS-TRUCKER LIABILITY	86.69
INS-COMP/COL [PD]	60.00
REGISTRATION	62.00
PARKING	25.00
EOBL TRACKING	11.52

Carry Over Balance	$ 0.00
Gross Pay	$ 592.03
Reimbursements Total	$ 0.00
Deductions Total	($397.77)
Net Pay	$ 194.26

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While the hearing officer found some evidence that indicated independent contractor status, he ultimately concluded that the 'independent contractor' label was a sham.

> The California hearing officer found that the 'independent contractor' label was used "to unlawfully reap financial rewards for themselves at the expense of their workforce and to secure an unfair competitive advantage over their competitors by lowering their labor costs and shifting the risks and operating expenses while retaining the right to control their workforce that an employer exercises over employees."[27]

Western Freight Carrier, Inc. **(California Division of Labor Standards Enforcement)[28]**

✓ **One driver awarded $18,058, employer appealed, then settled**

Driver Richard Hernandez testified in a hearing on his complaint that he was allowed to work for the company only on the condition that he lease a truck through the assistance of the company and pay costs of operating and maintaining the truck. Hernandez testified that he did not know what the deductions from his checks stood for.

In finding for Hernandez, the hearing officer noted, "I find it interesting that the Defendant purchases the truck; however, the costs that go into purchasing and operating the truck, that burden is assumed by the Plaintiff…**the Defendant operates a trucking business on the expense of the Plaintiff."**

Total Transportation Services, Inc. (California Division of Labor Standards Enforcement)[29]

✓ **Two drivers awarded a total of $179,000, on appeal to Los Angeles Superior Court**

Jose Montero's company classified him as an "owner-operator" when the Clean Truck Programs were implemented at the Ports of Los Angeles and Long Beach. He signed a lease agreement in order to have a truck that complied with program requirements and to continue working. Montero ultimately had more than $84,000 deducted from his paychecks for a truck that was not in his name, that he was not allowed to park off of company property, and that he could not drive for companies other than Total Transportation Services (TTSI). **TTSI has some 150 lease agreements with drivers at the port, and drivers are subject to roughly the same controls as in the other cases.** DLSE ruled in favor of Montero and another TTSI driver, Cristobal Cardona Barrera.

Mayor Logistics, Inc. **(California Division of Labor Standards Enforcement)[30]**

✓ **Three drivers awarded a total of $122,000 on appeal to Los Angeles Superior Court**

The three drivers in this case were found to be misclassified employees. They were employed by Mayor Logistics starting in 2007 and 2008, using their own trucks.

In 2009, Mayor instructed them to drive trucks purchased by the company and began making deductions from their wages. None of them was given the option to own the vehicle, but Mayor took deductions of five percent, and later ten percent, from their paychecks for insurance, registration, maintenance, road taxes, and lease payments. Each was instructed when to report to work, "counseled" if he was late, required to check in with the company while carrying out assignments, told to have **no interactions with client companies, and permitted no input on the prices charged by the company. Each testified that he faced retaliation if he refused loads.**

When one driver, Pablo Argueta, padlocked his truck one day after leaving work because there were no loads, he testified that the company owner became angry, asking him, "Why was he putting a lock on my (Mayor's) truck?" Argueta was ultimately fired (and asked to turn in his keys) because he ostensibly wasn't producing enough."

New Jersey Trucking Companies Cited for Payroll Fraud

NEW JERSEY LAW DEFINING "EMPLOYEE"

New Jersey unemployment insurance and temporary disability laws define "employee" using a legal standard frequently referred to as the "ABC Test." This test provides that services performed by a person for money makes that person an employee unless it is established that:

A. Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

B. Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

C. Such individual is customarily engaged in an independently established trade, occupation, profession or business.[31]

This test is used by many states around the country to determine whether workers are covered by unemployment insurance.

NEW JERSEY CASES

Proud 2 Haul, Inc. **(New Jersey Department of Labor and Workforce Development)[32]**

✓ **$127,723.49 assessed in Unemployment Insurance and Temporary Disability contributions for 2007-2009**

A worker filed a disability claim naming Proud 2 Haul (P2H) as the employer, prompting an audit of the company. The state agency's review found that P2H had unlawfully paid drivers on 1099s (a tax form used to report payments to independent contractors), thereby **underreporting gross wages and under-paying employment tax contributions.**

Applying the ABC test for "employee" status under New Jersey law, the department's audit concluded that **drivers were not free from P2H's control or direction.** The auditors first noted that drivers who drove trailers leased by the company paid 70 percent in reimbursement for leasing of the trucks, which the auditors found, along with other factors, indicated control by the company.

Further, like the DLSE in California, **New Jersey auditors found that drivers' services were not outside the usual course of P2H's business because transporting goods is P2H's primary business.** Auditors also determined that the drivers' services were not performed outside of P2H's places of business, finding that the drivers drove from P2H's place of business to P2H's clients' places of business.

Finally, drivers were not customarily engaged in an independent trade or business. Drivers did not advertise as a business. They "just walked in" to P2H's site to apply for their jobs. Drivers did not have the usual markers of an independent business including such items as stationery, a business address, or a business telephone. In fact, drivers' **tax returns did not show multiple employment or multiple revenues.**

Diamond Freight Distribution **(New Jersey Department of Labor and Workforce Development)[33]**

✓ **One driver awarded disability benefits, appeal dismissed**

Diamond Freight driver Eduardo Rivera was in an automobile accident in December 2011. In August 2012, he had back surgery, which prevented him from working for some months.[34]

In a cover letter accompanying his claim for state disability benefits, Rivera said that he had worked full time for Diamond since 2006 and that Diamond did not allow him to work for other companies.[35] Rivera wrote that he had to keep a Diamond sign on his truck and that Diamond "tells me where to go and what to do" while on the job. Rivera maintained that services he provides for Diamond are not outside Diamond's usual course of business. **Diamond refused to fill out Rivera's disability application, claiming "We are not his employer and cannot fill out a disability form not being his employer."**[36]

In December 2012, the department determined that Rivera was eligible for disability benefits. Diamond Freight's appeal of this determination was dismissed and has not been reinstated.

Washington State Cases Disclose Misclassification of Drivers

WASHINGTON STATE INDUSTRIAL INSURANCE LAW DEFINING "EMPLOYEE"

Washington state law covering workers' compensation defines "employee" using a modified "ABC" test. In addition to showing that a worker is free from the control of an employer, 'independent contractor' status can be shown if the worker is responsible for her own costs, has a place of business eligible for an IRS deduction, is responsible for filing with the IRS, has accounts with state agencies, and maintains a separate set of books.[37]

Since 2011, the Washington State Department of Labor and Industries has completed at least six audits of trucking companies operating out of the Ports of Seattle and Tacoma. In four of these, the department found that the companies had misclassified drivers as independent contractors. The cases and findings are reviewed below:

WASHINGTON STATE LABOR AND INDUSTRIES CASES

Blue Star Transportation **(Washington State Department of Labor and Industries)[38]**

Office clerical workers were found to be employees, but no finding was made with respect to its owner-operators. The firm had no industrial insurance account. Washington State Labor and Industries (L&I) assessed premiums.

Sea Port Logistics **(Washington State Department of Labor and Industries)[39]**

After a worker injury, an audit found that the company had "a large amount of control over both driver and truck." L&I assessed premiums and penalties against it for this driver and the others that the firm employed.

RoadLink Services **(Washington State Department of Labor and Industries)[40]**

After a worker injury, an audit found that an employer-employee relationship existed between the company and the driver.

Island Transport Logistics **(Washington State Department of Labor and Industries)[41]**

An audit discovered four worker-drivers who had been misclassified as independent contractors; L&I assessed premiums.

***Liberty Freight* (Washington State Department of Labor and Industries)[42]**

An audit found a driver to be an independent contractor, but assessed premiums and penalties for office staff. This is the only case we have reviewed in which an enforcement agency determined the port driver to be properly classified as an independent contractor. However, nothing about the facts suggests meaningful distinctions from the other cases presented here.

***Red Sea Express* (Washington State Department of Labor and Industries)[43]**

An audit found workers to be misclassified and that the company had no account with Labor and Industries.

***Western Ports Transportation, Inc.* v. Employment Security Department (WA State Court of Appeals)[45]**

Driver Rick Marshall signed a standard Independent Contractor Agreement in January 1998. At that time, Western Ports had approximately 170 such agreements in place.

Like many other drivers, Marshall drove his truck exclusively for Western Ports, had Western Ports' insignia on his truck, purchased his insurance through Western Ports' fleet insurance coverage, and participated in the company's drug and alcohol testing programs. The agreement required that he notify Western Ports of accidents, roadside inspections, and citations; keep his truck clean and in good repair and operating condition in accordance with all governmental regulations; and submit monthly vehicle maintenance reports to Western Ports. Marshall's work was dispatched by Western Ports. Western Ports had the right to terminate Marshall, and did so in August 1999.

The Washington State Court of Appeals found that Marshall was Western Ports' employee and entitled to unemployment compensation benefits after his termination. The court addressed what has been a common claim of drayage companies when independent contractor agreements have been challenged: Western Ports argued that the control it exerts over owner/drivers is unimportant because it is dictated by state and federal motor vehicle regulations. The Court of Appeals disagreed, for two reasons. First, it said that "it would make little sense" for state law to cover employees engaged in interstate commerce and then exempt them, based on federal regulations that require control over commercial drivers operating motor vehicles in interstate commerce. Second, the court reasoned that the same degree of control is required regardless of whether such drivers are designated as employees or independent contractors under state law. Finally, the court found that Western Ports exercised control beyond that covered in federal regulations.[46]

The Washington State Court of Appeals found that port driver Rick Marshall was Western Ports' employee and entitled to unemployment compensation benefits after his termination.

DEFINITION OF "EMPLOYEE" UNDER WASHINGTON UNEMPLOYMENT INSURANCE LAW

Like New Jersey, Washington State's Employment Security Act uses an ABC test to determine employee status for the purposes of determining worker eligibility for unemployment insurance funds. Under this test, a worker is covered by the law unless:

A. The worker has been and will continue to be free from control or direction over the performance of services, both under the contract of service and in fact;

B. The worker's service is either outside the usual course of business for which such service is performed or the service is performed outside of all the places of business of the enterprise for which such service is performed; and

C. The worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.[44]

United States Department of Labor Determines Port Drivers are "Employees" Under Fair Labor Standards Act

FAIR LABOR STANDARDS ACT DEFINITION OF "EMPLOYEE"

The federal law that regulates minimum wages and overtime pay, the Fair Labor Standards Act (FLSA), uses a broad definition of "employee," including all those "suffered" or "permitted" to work. Most courts and the United States Department of Labor (USDOL) interpret these words to cover workers who, as a matter of economic reality, are dependent on an employer, and they apply a multiple-part test to determine employee status, with factors similar to those used in California.[47]

USDOL CASES

***Proud 2 Haul* (US Department of Labor, Wage and Hour Division)[48]**

USDOL launched an investigation after a complaint was filed alleging that Proud to Haul (P2H) failed to pay the minimum wage to drivers classified as independent contractors. While the Wage and Hour Division found limited instances of payments below federal minimum wage, it determined that an employment relationship existed between the company and its drivers.

Like the California DLSE, USDOL found that the drivers' services were long-term, integrated into the primary business of the company, and that the drivers had no opportunity to offer their services to others on the free market. In fact, the drivers were required to wear the P2H logo when working, and to place it on their trucks. Drivers were not allowed to display any markers of their own independent business.

With respect to control, USDOL found that P2H required drivers to enter into lease agreements, regardless of whether drivers owned their own vehicle. The leases established that P2H would maintain exclusive control and possession of the trucks and prohibited drivers from using the trucks in services unrelated to P2H. P2H and its managers controlled drivers' work, contract terms, conditions of employment, and pay practices. Lease agreements were offered on a take-it-or-leave-it basis. P2H set wages and determined what percentage of gross revenue it would compensate drivers for each trip. **Drivers who turned down jobs for not being profitable were punished by getting no other assignments that day or assigned an even less profitable job.**

Finally, USDOL found that **drivers had no opportunity for profit or loss given that P2H unilaterally determined the percentage of gross revenue drivers would receive for trips.** P2H made deductions from drivers' pay for workers' compensation, fuel, and any container damages. Drivers suspected insurance already had reimbursed P2H for container damages in many instances. Drivers also covered tolls, insurance, truck maintenance, and the loan on their truck. **Drivers were not allowed to drive for others in order to increase their income.**

Ultimately, the Department of Labor found that the "totality of the circumstances demonstrates that owner–operators are employees, not independent contractors."[50]

CAROL CAULEY, C&K TRUCKING

Carol Cauley has been a Savannah port truck driver for 9 years to provide for her two children, ages 11 and 17. She is employed by C&K Trucking, but is classified as an 'independent contractor.'

Carol is paid for every load that she moves and not for every hour she works. Her income is very volatile. "There was one week when I worked full time but I only made $219 dollars, well below the minimum wage. Even during a week when I make more money, I need to save that money in order to pay for repairs and truck maintenance. It never ends."

Carol explains how driver misclassification negatively affects the entire industry. "Because of the way the industry works, port drivers get no respect. Trucking companies can treat us any way they want to treat us. Trucking companies say that we are independent business owners, but I don't know anyone who owns their own business and makes less than minimum wage."

Health coverage is another issue that concerns Carol, particularly as the mother of two children. She must pay for any medical care for her family out of pocket because the company she works for does not provide health benefits. "It's sad when you have to tell your child that we can't go to the doctor yet. It's for this reason that I am fighting for justice at the ports, to be able to earn a living wage and provide for my family."

Carol has fought for change by organizing with other port truck drivers that serve the Port of Savannah. Just recently, Carol testified before the Savannah City Council to bring attention to the challenges that port truck drivers face on a daily basis because of misclassification.

Pay			
Gross Amount		325020-	1,005.50
Standby Amount		0000-	0.00
CTF Amount		322107-	0.00
Fuel Surcharge @ 23.00%		325040-	231.27
Total Gross Pay			**1,236.77**
Additional Deductions			
O/O Reimb – Bobtail	wk 31-32	3217-	-14.92
O/O Reimb – Physical Damage		3213-	-44.94
FUEL CARD		3502-	-658.00
Miscellaneous Deduction		3219-	-299.87
Total			**-1,017.73**
Total Due To Carol Cauley			**219.04**

ADDITIONAL DOL CASES

Fox Transportation, Inc., Container Connection, and Intermodal Container Services, Inc., (dba Harbor Rail Transport) **(US Department of Labor, Wage and Hour Division)**[51]

Using the Fair Labor Standards Act analysis for determining employee status, investigations by the Wage and Hour Division of the United States Department of Labor found that Southern California drayage companies Fox Transportation, Container Connection, and Intermodal Container Services had also misclassified drivers working for them.

In the Intermodal Container Services case, the investigator described the lease agreement that drivers signed in order to get a job: the agreement required that the workers lease their trucks from a company called CTP Leasing, located at the same address as Pacer Cartage, Inc. The Regional Vice President of Pacer Cartage also identified himself as a representative of CTP Leasing, Inc. The trucks were registered to CTP Leasing, Inc., and drivers who terminated their employment were also required to turn over the key to the trucks that they ostensibly owned.

The investigator found that these arrangements led to control of the driver by the company. That, along with other factors, established an employer-employee relationship.[52]

Internal Revenue Service Finds Driver is an Employee Under Most Stringent Legal Standard

Total Transportation Services, Inc. **(Internal Revenue Service)**[53]

A driver petitioned the Internal Revenue Service for a ruling on whether he should properly be classified as an employee of trucking firm TTSI for services performed in 2009. As noted at the beginning of this report, the IRS test for "employee" status is the most stringent statutory test in the country. Nonetheless, **the IRS found the worker was misclassified as an 'independent contractor.'**

Two of the factors motivating that decision are of particular interest because they address arguments frequently made by trucking companies:

- That TTSI exercised insufficient "control" over drivers to be considered their employers.

  The IRS responded, "Often because of the nature of an occupation it is not necessary that the worker receive extensive training, instructions or close supervision." The compliance officer found (as have many courts that have examined this issue) that the control factor is present as long as there is a right to control, and said, **"We believe the firm retained the right, if necessary, to protect their business interest, to determine or change the methods used by the worker in the performance of his services."**

- That the contracts that TTSI drivers were required to sign automatically made the drivers "independent contractors."

  The IRS said, "Federal guidelines stipulate that this agreement in and of itself cannot be considered." In fact, IRS rules provide that if the relationship of an employer and employee exists, the **"designation or description of the parties as anything other than that of employer and employee is immaterial."**[54]

In addition to the state and federal agency decisions outlined here, public and private litigation is pending against at least thirteen trucking companies. Each case involves the misclassification of workers as independent contractors.

USDOL LITIGATION

Solis v. Shippers Transport Express, Inc. **(Federal District Court)**[55]

The United States Department of Labor has initiated litigation on behalf of drivers working for Shippers Transport Express, Inc. The United States Secretary of Labor alleges that the company misclassified the Oakland truck drivers as independent contractors, and in doing so, violated the Fair Labor Standard Act (FLSA).

STATE OF CALIFORNIA LITIGATION

People of the State of CA v. Pac Anchor **(Supreme Court of California)**[56]

The state of California filed litigation in 2008 against Pac Anchor, alleging that its misclassification of workers as independent contractors violated the California Unfair Competition Act and several provisions of wage and hour, workers' compensation, and other laws. While a Superior Court initially found that the state's action was preempted by the Federal Aviation Administration Authorization Act, that decision was overturned in the California Court of Appeals. Review is pending by the California Supreme Court.

The People of the State Of California v. Moreno **(filed 10/27/2008);** ***The People of the State Of California v. J. Lira*** **(filed 09/05/2008);** ***The People of the State Of California v. E. Lira*** **(filed 10/27/2008);** ***The People of the State of California v. Pacifica Trucks*** **(filed 12/29/2009);** ***The People of the State Of California v. Guasimal Trucking*** **(12/29/2009)**[57]

These cases were brought in Los Angeles County Superior Court before release of *The Big Rig* by California's then-Attorney General, Jerry Brown, against five port trucking companies operating at the Ports of Los Angeles and Long Beach. The judgment in each case required the trucking company to permanently refrain from misclassifying truck drivers as independent contractors and to pay a penalty and for the state's attorney fees.

PRIVATE LITIGATION

Hernandez v. Gold Point Transportation, **Superior Court of the State of California, Los Angeles County (Transferred March 9, 2012)**[58]

Class-action lawsuit on behalf of plaintiff Nazario Hernandez and all employees misclassified as "Exempt" who occupied positions of "truck drivers." The case was originally filed in Orange County and later transferred to Los Angeles County.

Arellano v. Container Connection, **Superior Court of the State of California, Los Angeles County (Filed February 7, 2013).**[59] **Class-action lawsuit on behalf of current and former drivers of Container Connection of Southern California, Inc.**

The plaintiff argues that Container Connection willfully misclassified the truck drivers as independent contractors. During 2012 and January 2013, the United States Department of Labor investigated and corroborated the misclassification, but the complaint alleges that the violation continues.

Talavera v. QTS, Laca Express, Winwin Logistics, Imex Logistics, Calinex, B & G Transport, and Eric and Susan Yoo, **Superior Court of the State of California, Los Angeles County (Filed February 22, 2013)**[60]

Class-action lawsuit alleges that the defendants systematically misclassified their truck driver employees as "independent contractors," imposing on them unilateral, unlawful contracts. **Through these contracts, the defendants extracted from the drivers onerous weekly payments for truck lease, insurance, and other business expenses, with the specific intent of depriving them of all employees' rights and protections guaranteed to them by law, and of maximizing their own profits.**

***Taylor et al v. Shippers Transport Express,* United States District Court Central District of CA (Transferred from state court March 22, 2013)**[61]

This is a class-action lawsuit against Shippers Transport Express, Inc., for misclassifying its truck drivers as independent contractors and denying them wage and hour rights and protection. The lawsuit includes all Shippers drivers in California. On February 15, 2013, SSA Marine was added as an additional defendant, based on allegations that SSA and Shippers are joint employers.

***Estrada v. Harbor Express Superior Court of the State of California,* Los Angeles County (Filed May 13, 2013)**[62]

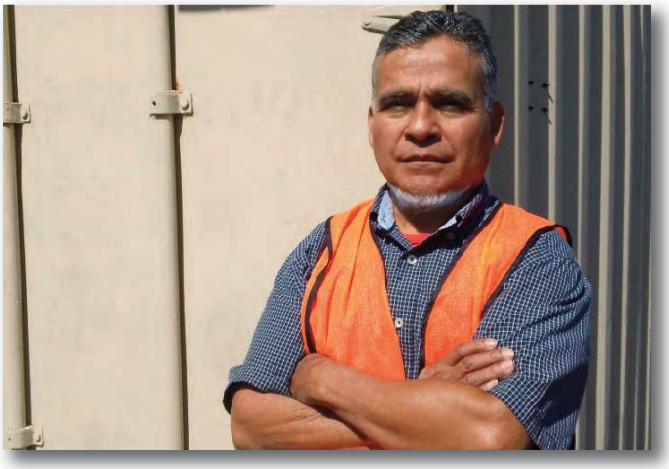
Class-action suit for wage and labor violations, claiming that Harbor Express intentionally misclassified employees, failed to pay wages and overtime pay, and failed to provide meal and rest breaks to its employee drivers.

***Hall v. Gold Point Transportation Superior Court of the State of California,* Los Angeles County (Filed July 25, 2013)**[63]

Class-action lawsuit claiming wage and labor violations arising out of Gold Point's intentional misclassification of drivers.

***Mendoza v. Pacer Cartage U.S. District Court,* Southern District of California (Transferred from state court September 30, 2013)**[64]

Class-action suit for intentional misclassification of employees, failure to pay wages, failure to pay overtime, and failure to provide meal and rest breaks to its employee drivers.



***Robles v. Comtrak Logistics United States District Court,* Eastern District of CA (Filed January 25, 2013)**[65]

Class-action complaint for misclassification of workers as independent contractors, unreimbursed expenses, unpaid driving time, minimum wage, failure to afford workers meal and rest breaks, failure to provide wage statements, and violation of California Business and Professional Code.

***Martinez v. Southern Counties Express Transportation Superior Court of the State of California,* Los Angeles County (Filed November 12, 2013)**[66]

Class-action complaint for misclassification of workers as independent contractors, failure to provide meal and rest breaks, failure to pay minimum wage and overtime, failure to pay all wages every pay period and on termination, and violation of California Unfair Competition Act.

Official Examinations Support *Big Rig* Finding That Typical Port Driver Is Misclassified

The cases we review above originate in a variety of jurisdictions. They rely on multiple legal standards to define employee status. And the consequences for workers and their employers vary. But several commonalities emerge, commonalities that confirm our analysis in *The Big Rig* and suggest the need for further action.

The decisions conclude that port trucking companies exercise extensive control over the daily activities of drivers they call "independent." The decisions, with one exception, recognize that this control is enough to determine the drivers are, in fact, employees. And each decision highlights significant responsibilities to the public and workers that the companies avoid by their fraud.

JOHN JACKSON, CALIFORNIA CARTAGE

John Jackson has been a port truck driver at the Port of Savannah for 23 years. He currently works exclusively for California Cartage yet, like the majority of port truck drivers, John is classified as an 'independent contractor.'

"We don't have a future in this industry. It doesn't give us a way to live a basic life. Sometimes after working 5 days a week, 8 hours a day, I've made as little at $450. It's hard to live off of that, much less maintain my truck. We want to live a good life just like the longshoremen who work on the inside of the port loading and unloading from the cargo ships. They have health and retirement benefits, which allow them to have a better future."

John has joined thousands of other port truck drivers in the U.S. who are fighting to end the scam of misclassification. "I want to have a voice and a place in the industry. I want to change the situation we currently work in, being destitute and living from paycheck to paycheck."

Earning as little as what amounts to $11.25 an hour, Jackson needs to keep his truck safe and compliant with clean air standards, yet still support his family.

| THE COSTS OF MISCLASSIFICATION |

The California Division of Labor Standards Enforcement (DLSE) cases that we reviewed above involved just 19 drivers at five companies. **DLSE assessed those companies $1,258,574, for an average penalty of $66,240 per driver.**

Thousands of port truck drivers in California work under conditions similar to these nineteen drivers, and a great many more are spread across the country. While the labor law abuses in these cases – chief among them, **illegal paycheck deductions and wage and hour violations** – can impose substantial financial liabilities in favor of workers, there are many other laws that impose penalties for misclassifying drivers, including **unpaid taxes and penalties for tax evasion**.

Employee drivers are automatically protected by unemployment insurance, workers' compensation, and Social Security, among other laws. Like other employers, trucking companies are responsible for paying into these systems. And like the cases reviewed above, **companies face significant liabilities for their refusal to comply with the related financial responsibilities.**

In this section, we estimate the direct costs of misclassification stemming from companies' failure to pay their taxes and comply with these labor laws. Specifically, we examine **losses in unemployment insurance funds, workers' compensation premiums, income taxes, and drivers' wages.** As many of the factors determining these costs are state specific, our first task is to estimate the number of drivers working in the major port states.

Port Drivers State-By-State

We have estimated the number of port truck drivers in each state based on data from multiple sources. These sources include Department of Homeland Security survey data,[67] port-specific container cargo volumes,[68] port authority driver estimates,[69] and port-maintained drayage truck registries.[70]

In developing our estimates, we weighted these sources according to their reliability. For example, we give more weight to electronic identification-based truck counts than to consultant estimates. We value estimates generated for long-term port uses above those made to justify project expenditures. And we rely more heavily on port-maintained registry data than on volume-based estimates.

In weighing the sources, we also have considered how drayage patterns differ between ports. For example, the operation of night gates and mandated use of more expensive trucks at the Ports of Los Angeles and Long Beach means that there are more drivers per truck than at ports without these features, such as the Port of Savannah. Similarly, ports like Tacoma, from which most containers make only a short trip onto rail for transport to the Midwest, use fewer drivers per container than ports like the Port of New York and New Jersey, which is the major port for all points north of Virginia.

PORT OF LOS ANGELES' CLEAN TRUCK PROGRAM

In an effort to significantly reduce air pollution within five years, in 2008 the Port of Los Angeles adopted a Clean Truck Programs that established a progressive ban on polluting trucks. By 2012, all trucks that did not meet the 2007 Federal Clean Truck Emissions Standards were banned from the Port of L.A. According to the Port, "When the program was fully implemented in 2012, port truck emissions were reduced by more than 80 percent."

From the resulting driver population figures, we have estimated the number of port drivers misclassified as independent contractors in each state. From our aggregation analysis of 10 surveys of 2,183 drivers in *The Big Rig,* we know that approximately **82 percent of drivers are independent contractors.**[71] We also estimate that **80 percent of these independent contractors are misclassified.** As more audits, like those discussed in the chapter above are completed, we will have firmer figures for misclassification rates. Our research for *The Big Rig* and review of current audits suggest that the 80 percent figure is conservative.

Our estimates of the total number of drivers per state and misclassified drivers per state can be seen in the table below. It is from these numbers that we estimate tax losses due to misclassification.

Estimated Number of Port Drivers per State

State	Port Drivers	Misclassified Drivers
California	25,000	16,400
New Jersey	7,000	4,592
Washington	6,500	4,264
Georgia	6,000	3,936
Florida	6,000	3,936
Texas	4,500	2,952
Virginia	4,000	2,624
Puerto Rico	3,000	1,968
South Carolina	3,000	1,968
New York	1,200	787
Others	9,000	5,904
Total	**75,200**	**49,331**

The Cost of Wage Theft in California

In the preceding section, we reviewed nineteen final decision letters issued by California's Division of Labor Standards Enforcement on wage and hour complaints recently filed by port truck drivers. These cases illustrate that port trucking companies are misclassifying their drivers. They also give a concrete amount companies took from the drivers by doing so; **each decision contains an award amount the company is required to pay the filing driver.**

Based on case tracking, communications with plaintiffs' attorneys, and public disclosure requests, we estimate that there are approximately 400 port driver-related wage and hour complaints currently pending with DLSE. (That number has been steadily growing over the last year and we expect that trend to continue.) We have been able to systematically document the details of 128 of these pending claims as well as the details for the 19 adjudicated claims reviewed above. Our database of these cases includes details such as the basis of the claims, the employer, filing date, amounts claimed, claim period, and current case status among other categories. The charts on page 30 summarize important features of the pending and adjudicated claims.

To allow for more meaningful comparison between claims, we computed per month figures for the claims for which we could ascertain the covered time period. The claims' periods varied from as short as five months to as long as forty-one months. Per-month figures smooth out those variations and so allow time-based measurement and projection of the amounts being taken from drivers through misclassification and related practices. Because the averages across the data for other variables were calculated from a slightly different set of claims (for instance, we have pending claims totals in 122 cases but know the claim period for only 113 claims), the monthly averages for each category will not equal the category average divided by the average number of months.

The adjudicated claims covered on average seventeen months, or just under a year and a half. **About 70 percent of the claimed amounts were for unlawful business deductions,** which were largely for company-mandated payments on truck leases. The rest were unreimbursed expenses, principally fuel and insurance payments. None of these claims included amounts for meal and rest breaks or minimum wage violations.

The pending claims cover two years and two months of work on average. Sixty-eight percent of claim totals are attributable to unlawful business deductions. Meal and rest breaks account for 19 percent of claims, while unreimbursed expenses, principally fuel and insurance payments, account for 12 percent. These claims demonstrate the enormous liability the industry faces in California for wage and hour violations stemming from misclassification. A liability, according to standard

Wage and Hour Claim Awards in California

	Claim Period in Months	Unlawful Deductions	Unreimbursed Expenses	Meal & Rest Breaks	Minimum Wage	Total Claimed
Average	18	$ 43,492	$ 13,610	$ 0	$ 0	$ 65,416
Max	34	$ 84,374	$ 63,865	$ 0	$ 0	$ 143,313
Total	319	$ 742,455	$ 272,975	$ 0	$ 0	$ 1,242,900
Monthly Average		$ 2,442	$ 939	$ 0	$ 0	$ 4,236
Number of Individual Driver Claims		17	17	19	19	19

Pending Wage and Hour Claims in California

	Claim Period in Months	Unlawful Deductions	Unreimbursed Expenses	Meal & Rest Breaks	Minimum Wage	Total Claimed
Average	26	$ 88,386	$ 17,496	$ 26,611	$ 704	$ 129,174
Max	41	$ 209,777	$ 123,189	$ 80,094	$ 40,273	$ 293,668
Total	2,934	$ 10,341,148	$ 2,029,560	$ 3,060,245	$ 83,817	$ 15,759,186
Monthly Average		$ 3,474	$ 615	$ 954	$ 29	$ 5,072
Number of Individual Driver Claims	113	117	116	115	119	122

legal definitions, is a legal responsibility to another enforceable by civil remedy or criminal punishment.[72] The awards in the adjudicated cases we reviewed are such enforceable obligations, that is liabilities of the companies toward their drivers. The claims in pending cases are potential liabilities that, based on our analyses, are very likely to become actual liabilities.

The **adjudicated claims averaged $4,236** per driver per month. The **pending claims average $5,072 per driver per month**, with a large part of the difference due to increases in the amount drivers claimed for denial of mandatory meal and rest break periods.

We estimate that there are approximately 16,400 misclassified port drivers in California alone. Based on the case documents, our own research, and the studies[73] we reviewed for *The Big Rig,* we expect most drivers would achieve results from enforcement actions similar to those in the already adjudicated cases; **there appears to be little that differentiates the vast majority of California's port drivers from those that have already filed claims**. Indeed, a coalition of leading industry trucking companies has admitted as much in legal pleadings.[74]

Based on the total number of port drivers in California and the likelihood of consistent rulings by the California Labor Commission finding misclassification, we can extrapolate from the monthly claims average to the industry's overall financial liability for wage and hour violations in California.

Analysis of claims documents suggests that the increase in total claim amounts in pending claims over previously adjudicated claims are due to plaintiffs' attorneys learning to identify where drivers' rights are being violated and that the $5,072 figure from pending claims is closer to actual liabilities for each driver. The later claims reflect a growing knowledge among drivers of their rights due in part to increasing legal assistance. At a minimum, that figure for adjudicated claims provides a reasonable upper bound on industry liability.

Still, there are some factors that may ultimately make average liability figures lower. These include variability in the adjudication process, operation of non-leased company-owned trucks and equipment by some drivers, reductions in the number of drivers working in California, and the ability of some companies to avoid legal **obligations. To account for all of these factors, we will use a conservative estimate of $4,000 per driver per month,** lower than the average for completed cases, to calculate the total financial liability port trucking companies will likely be found to owe drivers for wage and hour violations in California.

These claims demonstrate the enormous liability the industry faces in California for wage and hour violations stemming from misclassification.

Accordingly, we estimate that California's port trucking companies are liable to drivers for violations of wage and hour laws for $65 to $83 million each month, or $787 to $998 million each year. **The true figure probably lies in the middle of this range at around $850 million per year.**

These liabilities reflect the current operational paradigm in California. Upgrading truck fleets to meet new requirements has been expensive. **The state's port trucking companies have largely chosen to force drivers to pay for these trucks through leasing programs, and it is the related paycheck deductions and business expenses that underlie most of the liability we have seen in adjudicated and pending claims.** The per-month liability figures could reduce from what we have seen as the new trucks become paid for, or companies move to a model of company-owned equipment.

However, the practices underlying our liability calculations have been consistent at least since the new truck programs went into place in California four years ago. The industry shows few signs of proactively changing its practices. And leasing arrangements mean few drivers will ultimately own their trucks free and clear of obligations to the companies they work for.[75]

Liability levels in the industry are higher in California than elsewhere because so much liability stems from charges to drivers for the costs of port- and state-mandated truck fleet upgrades. Nonetheless, there remains substantial liability in other states. Other states have adopted truck replacement programs that mandate expensive fleet replacement, with leasing programs like those in California likely to spread nationwide. Drivers around the country are routinely forced to attend company meetings, wait for loads, and even haul containers without pay. And **the practice of illegally charging drivers for business expenses, in particular insurance, is widespread.**

Federal Tax Losses

Under standard employment models, businesses and workers each pay half of Social Security and Medicare assessments. **Businesses that misclas-sify their workers avoid paying their share of Social Security and Medicare taxes entirely. This shifts the entire federal FICA and FUTA tax burden to the worker.** In theory, independent contractors pay both the employer and employee share of the taxes, resulting in zero net loss to the program funds and workers who rely on them. However, misclassification abets income underreporting, which leads to significant tax loses.

The Internal Revenue Service requires employers to report income on W-2 forms. **The IRS has found that when employers pay workers as independent contractors, that income is ultimately underreported by 23 percent.**[76] Subsequent studies of misclassification by the General Accounting Office and the IRS Inspector General have considered the figure to be conservative and in need of further study.[77] Recent independent studies of the costs of misclassification tend to estimate a higher figure, usually around 30 percent.[78] For the sake of being conservative, we use the 23 percent figure.

We can calculate federal tax losses from this by multiplying the IRS estimate of underreported income with figures for total driver earnings. In *The Big Rig,* we determined that drivers' annual average wages were $33,081. Accordingly, the approximately 49,331 **misclassified drivers earn on the order of $1.6 billion annually**. But, based on the 23 percent underreporting estimate, they likely **report only around $1.1 billion in earnings to the Internal Revenue Service.**

Federal Tax Losses Due to Misclassification of Port Drivers

Misclassified Drivers	Avg. Wages[79]	Earned Wages	Reported Wages
49,331	$33,081	$1,631,925,427	$1,256,582,579

Tax	Rates	Tax Liability	Reported Liability	Tax Loss
Social Security	12.40%	$202,358,753	$155,816,240	$46,542,513
Medicare	2.90%	$47,325,837	$36,440,895	$10,884,943
			Total Loss	$57,427,456

Since independent contractors are responsible for both the employee and employer shares of Social Security (12.4 percent) and Medicare (2.9 percent) taxes, this reporting gap leads to a total loss in tax collections of almost $60 million each year.

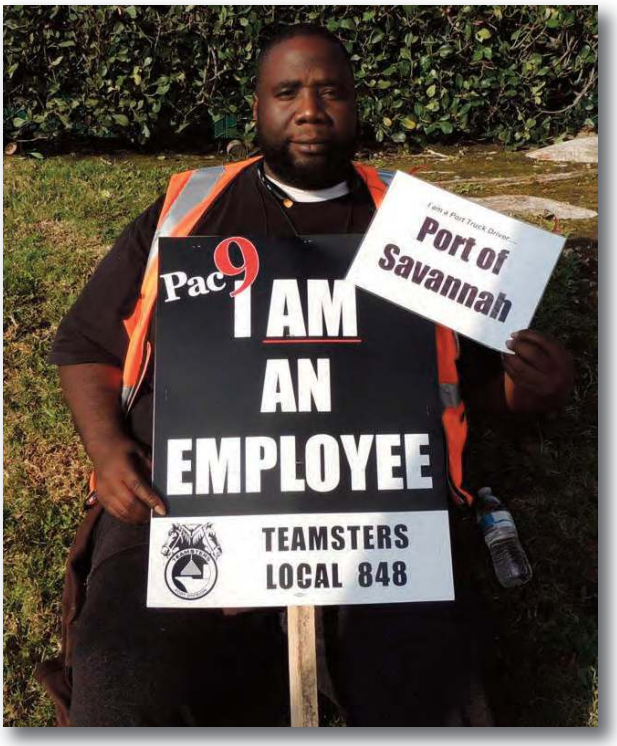
Depleting Unemployment Insurance Funds

Employers generally pay state and federal Unemployment Insurance (UI) taxes for their employees, although some states also allow cost-shifting onto employees. **Independent contractors and the businesses that rely on them do not contribute to Unemployment Insurance funds at all.** As a result, misclassification of drivers entirely deprives UI systems of contributions for those drivers.

Also, **when companies misclassify their employees, it becomes very difficult for drivers to qualify for benefits and access this important social safety net**. Many misclassified drivers are unaware that they are eligible for benefits. Those that are aware can face great difficulty navigating the claims process, often needing to appeal initial denials. And misclassified drivers have avoided filing for **fear of being blacklisted.**

Unemployment Insurance fund contributions are calculated for each worker by multiplying a government-determined base wage and tax rate. The base wage is typically the lower of an employee's actual earnings and the state-set maximum base, which varies among states with major ports from the federally-mandated minimum of $7,000 per year to $38,200 per year.[80] Rates are then adjusted according to a company-specific experience rating, which raises or lowers a company's tax liability based on how often its employees have relied on unemployment insurance.

The varying wage bases and rates are shown in the table on page 34. For the purposes of this exer-cise, we have used the new employer rates for each state. More specific industry-specific experience rating were unavailable and, anyways, are likely inaccurate given that companies classify 82 percent of drivers as independent contractors.



The federal government levies a six percent Unemployment Insurance tax on wages but then gives a 5.4 percent credit to employers paying state taxes. That credit is incrementally reduced in those states that have relied on federal funds to make state insurance fund payments. The table on page 34 reflects the effective federal rates in 2012.

The total lost insurance premiums are $3 million for the federal government and a little under $18 million for the states. **These premiums would provide a meaningful safety net for workers; assuming reasonably efficient administration, the missing premiums minus overhead costs equal direct losses to drivers at moments when they are particularly financially vulnerable.**

Unemployment Insurance System Losses Due to Misclassification of Port Drivers

State	Misclassified Drivers	Federal Wage Base	Federal Rate	Federal Losses	State Wage Base	State Rate	State Loss
California	16,400	$7,000	1.2%	$1,377,600	$7,000	3.40%	$3,903,200
New Jersey	4,592	$7,000	1.2%	$385,728	$30,900	2.98%	$4,231,953
Washington	4,264	$7,000	0.6%	$179,088	$33,081	1.97%	$2,780,241
Georgia	3,936	$7,000	1.2%	$330,624	$9,500	2.78%	$1,039,498
Florida	3,936	$7,000	1.2%	$330,624	$8,000	2.70%	$850,176
Texas	2,952	$7,000	0.6%	$123,984	$9,000	2.70%	$717,336
Virginia	2,624	$7,000	0.6%	$110,208	$8,000	2.50%	$524,800
Puerto Rico	1,968	$7,000	0.6%	$82,656	$7,000	4.30%	$592,368
South Carolina	1,968	$7,000	0.6%	$82,656	$12,000	3.40%	$474,918
New York	787	$7,000	1.2%	$66,125	$10,300	4.10%	$332,435
Others	5,904	$7,000	0.9%	$371,952	$13,478	2.94%	$2,343,037
		Total Federal Losses		**$3,069,293**	**Total State Losses**		**$17,789,961**
						Total Losses	**$20,859,254**

Workers' Compensation Premium Losses

The Federal Unemployment Tax Act compels states to adopt relatively uniform systems for unemployment insurance. The same is not true for state workers' compensation systems; lacking similar federal standards, the statutory schemes vary widely from state to state.

Most states require workers' compensation coverage to be obtained through private carriers. Some states allow industries, such as agriculture, and small businesses, to avoid insuring against worker injuries altogether. Benefit levels, waiting periods, and injury certification procedures vary widely as well. Some states require employers to bear this cost. A few states allow companies to pass some of the costs along to their employees. Some states mandate that coverage be provided on specific terms, such as coverage rates per $100 of employee payroll; other states do not.

We do not have access to private carrier rates and therefore cannot generate an estimate of missing workers' compensation payments based on state-by-state rates. However, Washington state operates a public system from which we can make an estimate of workers' compensation premiums for port truck drivers nationwide.

Washington's Department of Labor and Industries sets a base hourly rate for each industry as defined by the Census Bureau's North American Industrial Classification System (generally referred to as NAICS codes). This rate, like private insurance rates, is based on the patterns of payments to injured workers in the industry. Bakers ($0.44 per hour) have, for instance, much lower rates than loggers ($18.56 per hour). Washington's rate for general trucking employees is $3.33 per hour.[81]

This rate is a good proxy for a national average for port drivers. Every two years, the state of Oregon ranks states according to the cost of workers' compensation coverage.[82] The most recent study, done in 2012, put Washington premiums at 112 percent of the national average and well below the states with the most port drivers: California (155 percent) and New Jersey (146 percent). Oregon's 2010 study placed Washington at exactly the national average.

Based on our aggregation analysis of independent driver surveys, we know port drivers nationally average 59 hours of work per week.[83] At 50 work weeks per year, drivers work on average 2,950 hours per year. A rate of $3.3315 per hour means approximately **$485 million in premiums are going unpaid each year.**

These missing premiums are an indirect measure of the losses for drivers and the states. The premiums would go to insure drivers against losses due to injury and to defray medical and support costs that otherwise end up being absorbed in part by taxpayers and our private and Medicaid health care systems.

Industrial accidents, of course, occur at a regular pace for port truck drivers; **truck driving is the eighth most dangerous major job**

category in America according to the Federal Bureau of Labor Statistics.[84] In cases where putative "independent contractors" apply for workers' compensation, funds for coverage will typically come out of state funds meant to cover eligible but uninsured workers. In most circumstances, however, **injured drivers are left to cover what they can and the seriously injured are left without disability payments or a way to earn a living.** American taxpayers, health care providers and hospitals absorb the medical care and other costs associated with job loss that drivers cannot cover, pushing up the cost of health care for all Americans.

Workers' Compensation Premium Losses Due to Misclassification of Port Drivers

Misclassified Drivers	Hourly Workers' Compensation Rate	Avg. Hours per Week	Est. Weeks per Year	Estimated Premium Loss
49,331	3.3315	59	50	$484,823,334

Tallying the Costs

Advocates for drivers, port-adjacent communities, and the environment have long pointed out that misclassification has significant, costly impacts. These impacts include:

- **Diesel pollution** from old, poorly maintained trucks and resulting respiratory diseases are heavily concentrated in port-adjacent communities.[85]
- Operating margins and capital expenditures of responsible employers are reduced in order to compete with misclassifying businesses.
- Hospitals and public agencies/taxpayers absorb substantial costs when drivers cannot pay for medical care or provide for their families due to work injuries.
- Denial of health and safety protections, unemployment insurance, worker's compensation, organizing rights and other rights of employment can have long term physical, financial and mental consequences for drivers, their families and communities. **Transfer to an employee-based clean-truck system was, for instance, projected to have $4.2 billion in financial benefits for Southern California communities over a five-year period.**[86]

Raising these kinds of impacts underlines the fact that the quantifiable costs we have examined here are just a portion of the overall costs of misclassification. Ultimately, they may not even be the most significant or costly of the impacts. Still, the costs we have quantified are substantial and suggest the scope of impacts of non-enforcement of labor and tax laws in the port trucking industry.

Transfer to an employee-based clean-truck system was, for instance, projected to have $4.2 billion in financial benefits for Southern California communities over a five-year period.

Our tallies show that missing Social Security and Medicare taxes, Unemployment Insurance taxes and Workers' Compensation premium contributions total around **$563 million annually**, while wage theft resulting from labor law violations amounts to **$850 million in California** and hundreds of millions more in other states. The magnitude of these losses suggest that federal, state, and private enforcement of exist-ing laws can be an efficient and cost-effective way of reestablishing legal norms in the industry and ending widespread misclassification.

Quantifiable Annual Costs Due to Misclassification of Port Drivers

Social Security and Medicare	$57,427,456
Unemployment Insurance	$20,859,254
Workers' Compensation	$484,823,334
Total	**$563,110,043**
Wage and Hour (California)	$850,000,000
Total	**$1,413,110,043**

PORT TRUCKING COMPANIES FIGHT TO CONTINUE MISCLASSIFYING DRIVERS

Evidence of the existence and costs of misclassification in port truck driving has typically drawn strong denials from the industry's advocates.[87] Robert Digges, chief counsel to the American Trucking Associations (ATA), offered a characteristic – though particularly telling – example when he told a reporter, "Trucking companies are not misclassifying workers…they believe they get a more productive employee, a more, excuse me, a more productive worker, a worker who is efficient, who has some skin in the game."[88]

But now, at least some port trucking companies **are recognizing that there is a substantial chance that enforcement agencies will find that their drivers are, in fact, employees.**

For example, in recent legal pleadings, four major Southern California port trucking firms admit that the DLSE will find that their drivers are employees as it applies state legal principles.[89] A partner company of the California Trucking Association (CTA) likewise warned that common leasing programs are "risky practices that will trigger misclassification investigations."[90]

The attorney for the Washington Trucking Association (WTA) similarly advised members, "Various state agencies (and the IRS) have concerns about the use of owner/operators. Some WTA members assume that merely by calling someone an owner/operator, it is enough. That is not true. To the extent that a company treats an owner/operator more as an employee than a separate business … the company is asking for trouble."[91]

Growing recognition of the likelihood of enforcement agencies finding drivers are employees has not as yet prompted business reorganizations on even modest scales. Instead, **many in the industry are exploring strategies for maintaining the status quo in the face of growing pressure to conform to legal norms.**

Below, we examine some of these strategies. We do so to illustrate the broad point that many port trucking companies are *intentionally* trying to maintain a system that is illegal, that hurts workers, and that harms the public. To underline this point – and show there is another path – we conclude this section by briefly looking at some port trucking companies that have instead adopted high-road employment policies.

Defending Misclassification

Port trucking companies have sought to maintain their drivers as independent contractors through means ranging from contract alteration, to revised leasing arrangements, to raw intimidation. Viewed as isolated examples, these efforts could be seen as reactions to individual company circumstances. Viewed together, they reveal **an industry seeking to preserve a business model without altering the fundamental controls over workers that make that model illegal.**

One relatively direct method companies have been using to maintain the status quo is changing driver employment contracts, particularly in the parts that purport to define worker status. In one recent example, one company introduced new contract language that explained that, "Independent Contractor represents that Independent Contractor is an independent contractor." Another went farther, requiring that drivers defend the company against claims that they are employees, that drivers arbitrate all claims against the company, and that drivers waive use of any governmental enforcement procedures.[92]

Another experiment in contractual adjustment focuses on truck leasing. In one example, a financing firm offers, for a fee, to take lease payments from the driver instead of having the trucking company do so, asserting that this program would "insulate from misclassification" and help in "maintaining IC status."[93]

On a broader scale, trucking companies have sought to change or challenge the legal norms that define employment status. In one arena, **trucking companies in Washington and California have sued enforcement agencies to stop them from applying state law.**[94] In another, trucking companies have sought legislation to change the definition of independent contractors for their industry.[95]

Some port trucking companies have gone further, seeking to maintain the current employment regime through direct intimidation. The following are just a few examples:

- A New Jersey-based port trucking company fired "independent contract" drivers who had organized a meeting with an attorney, **a firing the National Labor Relations Board later overturned, finding the drivers to be employees for the purposes of the National Labor Relations Act.**[96]
- A Southern California-based company sued its own drivers in response to a DLSE finding that the company had misclassified them.[97]
- A Washington State company severely disciplined a driver after he had testified before the state legislature about misclassification and safety concerns.[98]

It is not terribly surprising that many port trucking companies hope to maintain their business model in the face of mounting legal pressures. **Misclassification saves companies as much as 30 percent** according to U.S. Department of Labor estimates.[99] That should not, however, cloud the fact that **large portions of an industry are taking multiple, intentional steps to perpetuate a business model that is illegal under current law.**

Working With Employee Drivers

There is an existing, alternative business model in the port trucking industry. At present, roughly **18 percent of port truck drivers are treated by their companies as employees.**

There is no indication that firms use such employees because they are compelled to do so by state or federal law. **The clear majority of port trucking companies simply flout prevailing laws.** Instead, firms use employees because of the operational advantages they provide.

These operational advantages allow companies to offset the additional costs that come through an employee model by **increasing worker productivity** and providing **more reliable service.** In some cases, these advantages allow employee firms to work in more profitable niche markets like Jones Act shipping or time-sensitive fashion-industry shipments.

While working standards vary among these employee-based firms, a handful can rightly be characterized as high-road employment practices. **A pair of such companies, Toll and Horizon Lines, employ unionized port drivers** who enjoy workplace benefits like retirement plans and health benefits in addition to higher wages, paid time off, regular work schedules and sick leave. Toll, which signed a union contract a little over a year ago, has since added full time drivers demonstrating its competitiveness under a high-road model. Of this model, a Toll executive said:

> "Toll welcomes its improving relationship with its drivers and the Teamsters since settling its first contract in San Pedro earlier this year. We support the Teamster's goal of improving the working conditions in the industry for all drivers, including raising safety standards to the industry leading level Toll applies at all of its facilities."
>
> – JOSEPH DESAYE
> *President of Operations*
> *Toll Global Forwarding, New Jersey*

Wages and benefits like those at Toll and Horizon disappeared from most of the industry decades ago. But the existence of such companies alongside the nearly one-fifth of the industry workers who are already employees, strongly suggests that the industry remains capable of supporting legal and high-road business models.

LEGAL ENFORCEMENT AND THE CREATION OF GOOD JOBS IN PORT TRUCKING

The failure of labor and tax law enforcement to keep pace with modern employment practices has significantly contributed to the **growing inequality in America.** Employment and labor laws regarding misclassification have largely not kept pace with contemporary labor management practices, highlighted by the port trucking industry's widespread use of misclassification. Yet, this report shows that when robust enforcement tools are used, such as appears to be happening in California, there is the **potential to move an industry now functioning like an underground economy towards one that provides stable, family wage jobs.**

Many obstacles to a functioning enforcement regime have stood out in the course of our research for this report. They include:

- Enforcement agencies are **under-resourced.** Huge backlogs prevent them from prioritizing resources.
- **Collaboration** between agencies is surprisingly rare, creating a further drain on resources (although there are notable exceptions such as the agreement between the U.S. Department of Labor and California's Labor Commission).[100]
- Some enforcement officers are inadequately trained.
- Misclassified drivers so fear **retaliation** that they will not file complaints.
- Industry advocates have used **political pressure** to slow and derail enforcement.

Each of these obstacles implies recommendations for improving enforcement. It must also be said that the good work of some in enforcement agencies, particularly in California's Division of Labor Standards Enforcement, suggests just how effective enforcement agencies can be with **confident, consistent leadership**. We offer here a handful of recommendations that our research suggests would be most effective at expanding these efforts, in order to make work in this industry dignified, stable, and family-sustaining.

Many of these recommendations mirror those found in USDOL's Strategic Plan. That plan includes:

- Wage and Hour Division investigations targeted in industries with the most substantial independent contractor abuses, and training for investigators on the detection of misclassified workers;
- Targeted efforts to recoup unpaid payroll taxes due to misclassification, including a pilot program to reward states with the most success at detecting and prosecuting employers that misclassify;
- Coordination with the states on enforcement litigation against multi-state employers that routinely abuse independent contractor status; and
- Training for Occupational Safety and Health inspectors on misclassification issues.

The challenge is putting such plans in place and replicating them among state and other federal agencies.

| RECOMMENDATIONS |

1. Improve the Effectiveness of State and Federal Enforcement Agencies

- **Prioritize High-Impact Investigations:** State and federal tax and labor law enforcement agencies should prioritize investigations in those industries, like port trucking, in which violations have the greatest impact on workers and law-abiding employers.

- **Increase Coordination:** In states that have significant ports, enforcement agencies should coordinate their efforts to fight misclassification in the trucking industry, with each taking the most advantage of their particular capacities. For example, where state law affords greater protection to workers, emphasis should be on state agency enforcement. Conversely, where state labor law is weak or non-existent, the U.S. Department of Labor should concentrate its enforcement.

  The United States Department of Labor Employee Misclassification Initiative is a model for such coordination of state and federal actions. The Department of Labor's multi-agency initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification was launched in 2010.[101] The port states of California and Washington are among fifteen states that have already signed Memoranda of Understanding with the USDOL.

- **Adequately Fund Enforcement Agencies:** Enforcement agencies should be adequately funded and field enough well-trained staff to ensure investigations are accurate, consistent, and sufficient in scope. Agencies investigating misclassification should develop educational materials for staff, workers, trucking companies, and seaports. Materials should include enforcement guidelines and simple misclassification checklists for the use of investigators and adjudicators to ensure accurate and consistent decision-making.
- **Increase Protections against Retaliation:** Anti-retaliation measures for workers reporting violations of employment, tax, and safety laws should be strengthened. Many workers, including port truck drivers, are reluctant to report legal violations or assert their rights as employees for fear of being fired, starved of work, or blacklisted.

FACTS AT A GLANCE

49,000 American port truck drivers are misclassified as 'independent contractors.' In California alone . . .

- About 400 complaints have been filed with the CA Division of Labor Standards Enforcement for wage theft.
- Penalties in 19 adjudicated cases average more than $66,000 per driver.
- New claims filed average more than $127,000 per driver.
- California port trucking companies are liable for about $850 million per year in stolen wages.

2. Increase Understanding of the Scope, Costs, and Consequences of Employee Misclassification

- **Study the Incidence of Misclassification:** Federal studies of the incidence of misclassification have not been updated in nearly a decade. In January 2013, the U.S. Department of Labor sought comments on a planned classification survey of workers. This study, and others, should be undertaken immediately, and should target industries with known high levels of misclassification.[102]
- **Refine Estimates of the Costs of Misclassification:** Many state studies exist on the costs of tax evasion due to employer misuse of the 'independent contractor' label.[103] To further refine the estimates of costs that we have attempted here, and fill in the data that was not available to us, further research should undertake a more detailed review of the costs of misclassification at the state and federal levels, in all major port cities of the country.

3. Update Labor and Tax Laws to Reflect Current Employment Practices

AN APPROACH FOR EMPLOYERS

The Internal Revenue Service has launched its Voluntary Worker Classification Settlement Program, which enables employers to resolve past worker misclassification problems by voluntarily reclassifying their workers prospectively and making a minimal payment covering past payroll tax obligations.

To be eligible, the employer must:

(1) Have consistently treated the workers in the past as nonemployees;

(2) Have filed all required Forms 1099 for the workers for the previous 3 years; and

(3) Not currently be under audit by the IRS, the Department of Labor or a state agency concerning the classification of these workers. Employers accepted into the program will pay federal taxes in an amount equaling just over one percent of the wages paid to the reclassified workers for the past year.

- **Adopt Improved, More Consistent Tests of Employee Status Under State Law:** State employment laws should be designed to account for the lack of independence among port drivers, enable government enforcement officials to swiftly determine employment status, and also ensure that employer mandated deductions for truck- and other business-related expenses are illegal.
- **Pass the Payroll Fraud Prevention Act (S. 770):** The Payroll Fraud Prevention Act was first introduced in April 2011 by United States Senator Brown and reintroduced in Nov. 2013 by Senators Brown, Franken, Harkin, and Casey. It would specifically target employers that shift unemployment and workers' compensation tax burdens to their employees. The bill would amend the recordkeeping requirements of the Fair Labor Standards Act (FLSA) to require employers to notify all employees and non-employees who perform services for remuneration of their employment status; would establish a presumption that an individual is an employee under the FLSA if the employer violates the notice requirements; and would provide for the imposition of civil penalties.

- **Pass the Clean Ports Act of 2013 (S. 1435):** The Clean Ports Act of 2013 would give local governments the ability to address many of the environmental, safety, and labor issues connected to port trucking that we have described in this report and *The Big Rig*. The Supreme Court recently interpreted a 40-year-old Congressional law to prohibit such local options and this bill would reestablish such local flexibility.

- **Pass the Fair Playing Field Act of 2012 (S. 2145):** This bill would amend the Internal Revenue Code to modify the rules giving employers a "safe harbor" when they misclassify employees, and would permit the IRS to issue guidance on the subject. This change is vital to serious reform seeking to combat independent contractor abuses. Such a change would prevent keeping the IRS largely on the sidelines of misclassification enforcement and provide a powerful tool to combat employer abuses.

| ENDNOTES |

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