

NELP

**Immigrant & Nonstandard Worker Project
Policy Update**
Advocating for the Working Poor and the Unemployed

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**Combating Independent Contractor Misclassification in the States
Models for Legislative Reform**

Employer misclassification of employees as “independent contractors” in many sectors has arisen as a top priority in several states in 2005. Several states recently enacted provisions aimed at employer misclassification of employees as independent contractors in the 2004-2005 legislative sessions. The new laws vary from establishing a commission to study the impact of misclassification and to recommend remedies, to creating uniform definitions of “employee” that apply across several labor and employment laws, to crafting sector-specific “fixes” to rampant misclassification that occurs in construction and day labor, to name two categories.

The state’s interest in stemming these abuses is primarily in upholding the benefits and protections afforded by its minimum wage and overtime, workers compensation, unemployment insurance, and discrimination laws for the workers in IL. It also stands to lose the tax withholding revenues that otherwise would have been paid had the workers been on the payroll. These unpaid taxes and premiums for state benefits can run into the billions per year. See NELP Fact Sheet: [1099'd: Misclassification of Employees as Independent Contractors](#), and studies cited therein.

This Policy Update is a summary compilation of some of the “best practices” for combating independent contractor abuses in existing state law, with some proposed legislative provisions and supporting language, where available.

A. Good Models:

1. Free-standing laws creating a presumption of “employee” status for those performing labor or services for a fee.

Past practice shows that the most effective laws combating independent contractor misclassification are those that are the simplest to administer. Creating a presumption of employee status is one example of a simple “fix.”

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Existing Laws:

- NM creates a presumption of employee status for workers in the construction industry, and provides penalties for improperly reporting an employee as an independent contractor. Requires state Labor Department to administer and enforce the standards. [Full Text of NM SB 657](#)
- MA's weekly wage payment law creates a presumption of employee status for "individuals performing any service," with some exceptions. <http://www.mass.gov/legis/laws/mgl/149-148b.htm>
- IL UI code, like many state UI laws, puts the burden on the employer to prove that the worker is not an "employee." See 820 ILCS 405/212

Pending bills:

- NM bill provides for a presumption of employee and not independent contractor status *for anyone* performing labor or services for a fee, regardless of the sector or job. [Full Text of NM HB 653](#)

2. Sector-specific laws that get at the worst abuses in the industries with rampant independent contractor misclassification, like construction and day labor.

Existing Laws:

- IL day labor law, HB 3471, requires labor providers and worksite employers to keep records of hours and pay, and provide written disclosures. These provisions should apply to any worker, regardless of whether they're called "independent contractors." <http://www.ilga.gov/legislation/publicacts/94/PDF/094-0511.pdf>

See also, New Mexico [Full Text of NM SB 657](#) (listed above, pertaining to construction workers only.)

3. Enhanced data collection and audit capabilities at the state workers' comp, unemployment insurance, wage and hour and tax agencies with funds for agency enforcement against independent contractor misclassification from penalties in the law and an inter-agency collaboration or task force.

Existing law:

- CA unemployment insurance law creates inter-agency task force to collect data on independent contractor misclassification and provides for collaborative enforcement among agencies, including Employment Development Department, Department of Consumer Affairs, Department of Industrial Relations, Department of Insurance, and Department of Criminal Justice Planning. CA Unemployment Ins. Code section 329. <http://caselaw.lp.findlaw.com/cacodes/uic/301%2D335.html>

Pending:

- KS bill provides for penalties for knowingly misclassifying an employee as an independent contractor for purposes of evading taxes. Specifies that departments of revenue, labor and the state attorney general are charged with enforcement. [Full Text of KS HB 2372](#)
- NY bill passed by legislature but vetoed by governor would have required any person, corporation or other business entity contracting with the State to submit to the Commissioner of Labor a list of independent contractors hired by such person, corporation or other business entity; requires that a fee of \$10 per independent contractor be paid upon the submission of such list; provides that monies from such fees shall be used to fund the prevailing wage enforcement fund to prosecute violations of law. [Full Text of NY SB 3282](#)

4. Specific changes to individual laws, like workers' compensation statutes, to target independent contractor abuses.

Existing law:

- FL law redefines "employee" under state workers' compensation act to include owner-operators of motor vehicles, previously exempted as independent contractors. [Full Text of FL HB 423](#)

- CO law requires construction contractors to provide workers comp coverage to all workers onsite; gives state department of revenue access to workers compensation records for enforcement.
http://www.leg.state.co.us/CLICS2004A/csl.nsf/fsbillcont3/7F2516C7B4E9B70087256D790073B01D?Open&file=1090_enr.pdf
- AZ and other states codify “relative nature of the work test,” which helps workers claiming to be “employees” and not independent contractors. To be true independent contractors, this test requires a showing that worker is independent of employer’s business, and is engaged only in performance of definite job or piece of work. [§Ariz. Rev. Stat. §23-902\(B\),\(C\)](#)

5. State Unemployment Tax (SUTA) Evasion Protections that Combat Employers’ Practices of Creating New Entities to Dodge Their UI Experience Ratings. For more on SUTA Dumping, *see*
http://www.nelp.org/ui/state/funding/statesutadumping_.cfm

Existing Law:

- 13 states prohibit employer SUTA Dumping; Pennsylvania’s is a good model.
<http://www.legis.state.pa.us/WU01/LI/BI/BT/2005/0/SB0464P0765.HTM>

6. Study bills (a place to start, if support for legislation is needed).

Existing Laws:

- NH established a committee to study the classification of employees as independent contractors. [Full Text of NH HB 246](#)

Pending:

- MA bill proposed developing information on labor markets, including nonstandard and unregulated workers via household survey. Information produced would be used to formulate a wide range of employment programs.
[Full Text of MA HB 3942](#)

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B. Things to Include as a Priority in Independent Contractor laws (whatever the specifics):

1. **Provide for a private right of action** for the aggrieved worker(s) and the worker's representative, including unions or community groups. This is key to supplement public sector enforcement by agencies that are strapped for resources and cannot bring enforcement actions for all claims brought. The laws should also provide for attorneys fees for the prevailing plaintiffs, to enable low-wage workers to get attorneys to bring their claims.
 - IL day labor act provides for private right of action, 820 ILCS 175/95, and permits "any party" to seek penalties under the act. IL minimum wage act also has private right of action, at 820 ILCS 105/12, [Full text of the law](#), as do many other state and federal laws.
 - Because workers are often afraid to come forward themselves, it is helpful to provide for representative cause of action, like the San Francisco living wage law, which permits individual workers, unions and community groups that represent workers at the worksite to file claims. [Full text of SF law](#)
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 - Note: the landmark CA law on garment contractors that was passed with much fanfare as the strictest against garment subcontracting in the country has recently resulted in a report showing little if any impact, six years later, in part due to lack of enforcement by the state agency.¹ The bill: http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0601-0650/ab_633_bill_19990929_chaptered.pdf

¹ Recently, five California-based organizations, the Asian Pacific American Legal Center and Sweatshop Watch, in conjunction with the Asian Law Caucus, Women's Employment Rights Clinic (WERC) at Golden Gate University School of Law, and the Garment Worker Center, released a study evaluating California's implementation of its landmark anti-sweatshop law seeking corporate accountability for sweatshop abuses in the garment industry, by enabling the state's garment workers to recover their unpaid wages from powerful apparel companies. The evaluation, "Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law, An Evaluation of Assembly Bill 633 Six Years Later," and its Executive Summary are available at www.apalc.org, www.sweatshopwatch.org, and www.asianlawcaucus.org. The study revealed lackluster state enforcement and widespread corporate disregard of what has been lauded as the strongest anti-sweatshop legislation in the nation, and includes various recommendations to realize the law's full potential.

2. Provide for strong anti-retaliation protections for workers who complain under the new law.

- *See* SF Minimum Wage Ordinance, with the strongest anti-retaliation provision in the country, creating a rebuttable presumption that any adverse action taken against a complaining worker is retaliatory if it occurs within 90 days of worker’s complaint. SF Administrative Code CH. 12R.
http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sf_admin

3. Provide for “hot goods” enforcement ability by agency and possibly individuals to seize goods produced under violation of these laws. Laws should also provide for injunctive relief.

- *See* CA garment bill, noted above, AB 633.
- *See* Fair Labor Standards Act hot goods provision, which only provides the federal DOL with power to enjoin shipment of goods produced under substandard conditions. http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=29&sec=215

4. Provide for monetary damages per worker misclassified in an amount likely to deter future violations.

- *See* IL Day Labor law, [820 ILCS 175/70 \(a\)](#).

C. Things to watch out for (they sound good but can be bad):

- 1. Laws that pertain to “simplify” the myriad definitions of “employee” or “independent contractor” under state labor and employment laws.** Employer groups often push “clarification” bills, purportedly to clear up confusion and multiplicity of disputes over employee status. Many of these proposals end up watering down the more expansive laws that make it easier for workers to claim they are “employees” and use the stricter common-law test for employee status, that is easier for employers to manipulate (like the IRS test).

Existing law, for example:

- OR enacted SB 323 ostensibly to simplify the myriad definitions of “employee” under its various labor and employment laws. The final version did not alter the minimum wage act’s definition (the best for workers), thanks to a late intervention by worker advocates. But, it’s not a “simple” definition, and the factors determining whether a worker is an “employee” are manipulable by employers,

<http://landru.leg.state.or.us/05reg/measures/sb0300.dir/sb0323.en.html>

- 2. Laws that only create criminal penalties or criminal violations** (misdemeanors or felonies) for independent contractor misclassification, and do not provide for private right of action for workers to bring civil claims. Because criminal violations must be brought by prosecutorial arms of state agencies, resources are limited and the burden is on the prosecutor to prove the violation. As a result, few criminal actions are brought and the law doesn’t have much of a practical impact. Eg, unfair wages prohibition act in NY, Art. 19, section 662.

<http://caselaw.lp.findlaw.com/nycodes/c54/a45.html>. This law *has not been used once* by the state DOL since its enactment in 1997.