

Interagency Task Force on Employee Misclassification

Tuesday, September 16, 2008
Problem Resolution Office
Lake Superior Room
5015 S. Cedar St.
Lansing, MI 48910

MINUTES:

Task Force Attendees: Keith W. Cooley (Chair), Stephen Geskey, Jack Finn, Craig Orr, Doug Schafer, Jack Nolish

The meeting was called to order at 2:00 p.m.

Approve Minutes from the June 17, 2008 Meeting

The minutes from June 17th were approved by the committee.

Task Force Hearings

We have had five meetings around the state. We had a number of students who came to see what we do. We also had testimony that many of the college students tend to be contract employees as opposed to full employees in that part of the state. It's going to be one of the things we have to deal with pretty carefully. Suggestions will go into our January notes to the Governor. Another piece of business that came out of Marquette is, a gentleman offered that many of the workers who are signed on as temporary contract workers would want to come forward and expose some of the contractors that do that except there are some concerns for their liability with taxes and FICA. It was suggested the state come up with some kind of amnesty. In other words, if you come forward and talk with us, we would hold you to fines. We may be able to get around fines, but back taxes are still part of the issue. We will be looking for comments from you on that, and we will also be trying to figure out what kinds of recommendations to make to the Governor.

The second item is, the Department of Civil Rights Director, Linda Parker and DLEG Deputy Director Susan Corbin spoke to determine the volume of calls Civil Rights is getting relative to the loss of worker rights and civil rights due to being classified as a contract employee or 1099er. When you're classified as a 1099, certain acts under the state and federal government are no longer valid. We will talk carefully about that. They are going to prepare a presentation for a future meeting.

The last item is, the Division Director for the State Court Administrative Office has put together a task force on something called the Underground Economy. Their charge is to study and recommend strategies for combating the underground economy practice of earning wages or selling products through unreported cash transactions. We have committed to have someone from our area attend the meetings in December to talk about misclassification of wages and how we can get together a real system inside the state to work on combating the problem.

Report out from

- **Jack Nolish**

Cheryl Cornellier, Manager of the Compliance Division was introduced. In terms of the Workers' Compensation agency, the question of misclassification is whether or not the employer is appropriately insured under the Workers' Comp Act. Cheryl is in charge over that division. We do have statutory authority already in place in that regard, and it's through her office that we initiate going after employers when we find they are inappropriately insuring people. Beyond that, we deal

with the question of misclassification on a case by case basis. If somebody is injured, if the question is raised as to whether they are an independent contractor or employee, that becomes litigated in the course of the case. We do get reports from MIOSHA when they do their inspections. We get reports from UIA when they do audits, and we follow it up.

- **Jack Finn**

Jack introduced George Pierce. The collections we obtained through working with the Attorney General's office have increased 30% from the last fiscal year through 11 months of this fiscal year. It's been a special effort by us to make sure all the claims and payment of wages have been done timely and they have done an excellent job enforcing orders. We've had a number of meetings with, both sides on the issue of misclassification of workers. It's not only impacting us at Wage and Hour and the Prevailing Wage Act area, but the Payment of Wages Act where workers feel they have not received the full wages from the employer. Many times the employer will say well they aren't really an employee, they're independent contractors, and then we do the economic reality test and find out they are really an employee. So we have a couple of the acts impacting the misclassification area. Troy Smith was instrumental in helping with the PowerPoint we used this summer and we try to use that as an educational tool.

- **Craig Orr, DMB**

We are impacted by employee misclassification in the area of the purchase of goods and services. This impacts our purchasing organization as well as our facilities administration group and design and construction group. We addressed it in a preventative measure by requiring insurance before we issue them a contract. The last month or so, within DMB we have been educating our employees with PowerPoint presentations that many of you have seen and we found that to be an excellent tool and we have been cascading that out within DMB and have been focusing on the administrative piece.

- **Stephen Geskey, UIA**

The Unemployment Insurance Agency will be conducting four employer related seminars around the state in the month of October. The subject matter is a variety of Unemployment tax issues and other issues in the employer community. One segment will be dedicated to misclassification of worker issues. Also, the agency issues an Employer Advisor newsletter which goes out on a quarterly basis in the employer community. One issue has already gone out about the issue of employee misclassification and another issue will go out with a little bit more information now that the Task Force has done a little bit more work and has received a lot of public testimony on the Task Force issues. Regarding the amnesty program, I have had several folks in the employer community inquiry about amnesty programs. They say, I have a client who may have misclassified workers... If I was to report them to your agency, what would you do? I think the Director and I are on the same page that UIA would have to recognize that there is a class of people out there who for whatever reason may have received bad advice or may now realize, maybe we should not have done that and may be willing to voluntarily come forward if we tell them this is what will happen if you come forth. The UIA is in the process of developing its standards and to figure out exactly how we are going to address those situations. We are in the process of compiling various types of statistics because we received a number of complaints from unemployed workers who ask, "why am I an independent contractor or why am I not an employee?" We are compiling statistics to identify the number of complaints we received, the number of investigations and that type of data.

- **Doug Shaffer, Department of Treasury**

One of the things I have heard here today is the idea of having amnesty programs for individuals who expose employers, but it's also an opportunity for employers who realize they have done something wrong to come forward and make it right with the state as well. Treasury has a program, called Tax Payer Initiated Disclosure, where if an individual or business comes forward and they have not paid a particular tax and they pay the tax with interest, they won't owe any additional penalties. So we do have sort of a program in place to address some of the issues where people

may be reluctant to come forward, more in terms of employers who may realize they made a mistake and have an opportunity to come forward under this program to minimize their tax liability.

Dir. Cooley – We will make sure those things are included in our report to the Governor.

■ **Legal Subcommittee**

We have compiled a set of definitions of employees. It turns out Treasury, Unemployment Insurance and our office has slightly different definitions of employees. The next thing we are working on is the assessment of the reports and existing tools that the various agencies have. Compilations are in place for Wage and Hour, Workers' Comp and from Treasury. We have just added to the subcommittee, Chris Mitchell from MISHDA. MISHDA does a fair amount of contracting on various maintenance repair and construction projects and we are in the process of having them review the contracting to see if any of these things show up either in their prime contractors or in some level of subcontractors.

■ **Education Subcommittee**

Some of the things we have done is try to publicize some of the hearings prior to them taking place and that's been done largely due to the efforts of Norm Isotalo with the UIA. We have also been making calls to the locals in the area where we have had hearings to make people more aware so they can come out. In Marquette, we had our largest turn out. The other thing is we have been setting up communications with other states who have Task Force hearings. Joyce Surprenant has set up a call with the New York Task Force. We will obtain a report that is about 10 pages from the state of Illinois, and that will be very helpful. One witness at one of the hearings in Benton Harbor mentioned there is federal legislation that would address the issue of misclassification. It is sponsored by Senator Barak Obama of Illinois. We are trying to go to different organizations to advise them about the Task Force. At the State Bar Annual Meeting in Dearborn, we will be advising them on the labor law section of our efforts.

■ **Research Subcommittee**

We are going to have a conference call with New York. All of the departments on the Task Force have sent questions to forward to New York. Along with that, we have done lookups of different studies however the studies are relatively old. They go back to 2002, 3, 4, so one of the major things is there are no current studies out there. I'm sure since 2002, a lot of things have happened. We do have a lot of enthusiasm to have our problem solved. As the calls get started they go longer than we expected. Sometimes it seems like we are overlapping with the other committees, because you start getting into surveys.

Dir. Cooley – These meetings and hearings are providing us with a lot of information that confirms things we knew or helps to bring items we need to get to.

■ **Public Comments**

Bart Carrigan, Associated General Contractors of Michigan – I heard that MDOT is getting more involved in prevailing wage. MDOT is going after contractors who do not pay prevailing wages in an aggressive fashion.

A – In the last two years, we have been in meetings with MDOT. Up to 90% of the contracts are federally funded. We didn't want to ignore the 10% that are state funded. Some of the employers have not been pleased because the Michigan Prevailing Wage Act is stricter than the federal. We had some initial difficulty, but now we are comparing notes.

Q – Is there a number people can call to report would be violators?

A – 1 (800) 822-1122.

Peter Accica, BAC Local 1

In Chicago, they finished a survey on employee misclassification last year. They ran television ads to get people to call in.

Dir. Cooley - One of the things the Education Committee has been charged to do is to get word out. We talked about running a public service announcement. It's good to hear what's going on in other states.

Jim Dotson, IBEW L.U. 948

Q – My question to Mr. Finn is how long is it going to take for the enforcement to take place on any job where they don't have the one to one ratio on prevailing wage jobs?

A – The problem is that Act 217 and the minimum wage act don't have any sister enforcement power together. It's a situation where the electrical codes division enforces the prevailing wage act, but we have no true enforcement power to tell them you have this many bricklayers and this many electricians or whatever. That is up to the individual employer, but we do investigate whether they are misusing the number of people and whether they should be using an electrician instead of a laborer.

Q – Would you get the violation at wage and hour if they don't have enough journeymen on the job?

A – When we get the complaint, we investigate if they are misusing the classification, but we can't say ahead of time you have to have, say, "x" number of journeymen.

Paul Sheckler

The amnesty thing, I don't think employers are going to come forward.

Steve Geskey – There are two sides to the amnesty thing. I have had lawyers who have employers say, "my bad." What's going to happen if they do so? I don't know. On the other side of the coin are the workers out there who want to report wrong doing about the employers. Well they're not the employee because they are independent contractors. But the Whistle Blower Protection Act only protects employees so it's a vicious circle. I think both sides of the equation need to be addressed.

Dir. Cooley – You will see us putting together some recommendations to try to get at the heart of this.

Q – Did I understand there are two problems with workers coming forward? They don't have the protection of the Whistle Blowers Act and there's also the problem that some workers are not paying their taxes? Mr Sheckler, do you have a sense of how big this problem is among workers?

A – In our trade, probably not as bad as other trades. I'm thinking of one contractor.

■ **Jim, Central Michigan**

Paul's correct. We don't have many but there are some pure licensing problems. We get a lot of people paid in cash. Some of the independent contractors honestly don't know they are supposed to pay. They have no idea. All they know is at the end they get a little slip. They don't know it's any different from being an employee. The ones working for cash clearly know.

■ **Pete Harvatin, MRCC Local 100**

The amnesty program has helped level the playing field for all contractors. A couple of years ago, I went into the IRS office in Grand Rapids. The question is if I was an illegally classified contractor, what repercussions do I have walking in this office and they say you are going to be responsible for 100% of the taxes and if we do a questionnaire for you we will contact the individual and if they answer accordingly, when they pay we will reimburse the ½ that you are covering of the employers burden. That's not much of an incentive to come and turn myself in because if he doesn't want to answer the questionnaire, I'm done. So with your amnesty program, please make it fair for not only the employer.

Joyce Surprenant – I believe what he's talking about is now you can file with an 8919. You can file with the IRS as though you were an employer. If they do get the money back from the employer, that's the part you would be reimbursed. There's a lot of people out there that are filing with 8919s because their employer has classified them as independent contractors and the person strongly

objects to that saying they are not an independent contractor, I am an employee. They went through the check list and said I fit the criteria and I want my taxes paid.

Pete Harvatin

A form is sent and the potential employer is requested to fill it out, but if they choose to fill it out will they make a judgment. That's not fair to the worker.

Dir. Cooley – We now seem to have an opportunity for a discussion with the IRS. We will take that forward.

■ **Kevin Klingler, UBC L.U. 1004**

Question for Craig and Jack Finn: In the competitive bidding process with DMB, does the State of Michigan's prevailing wage law apply to all these projects? The other being the DMB, in the process of FOIAing the certified payroll, the response was we only require the contractor that has a direct contract with us to provide that. They are not performing the work. We have 10 or 12 sub contractors that are misclassifying their employees. That's where the problem lies. No requirement for certified payroll. Therefore, you have no checks and balances with Jack Finn's department in Wage and Hour. Ninety five percent of the work is performed by subcontractors and not the contractor who has the contract. Is Wage and Hour watching the contracts that are awarded by the DMB? Within those contracts, every contractor should, in my opinion, provide a list of the subcontractors and they should have to provide certified payroll to Wage and Hour so there are checks and balances. Unless there is a Workers' Comp case, how would you know there is a violation?

Craig Orr – As of this point in time, I don't think we have found a way to prevent that.

Kevin Klinger

That would be a start. On that particular job, they were awarded the bid and shopped the prices for several weeks. I don't know if that's a violation of the contract with Wage and Hour or DMB, but it's very unethical. Obviously the subcontractor is giving the best price to get that job, and DMB awards them multi million dollar contracts and the subs are not even established yet.

Q – Jack, is there an procedure to track DMB when they award contracts?

Jack Finn – We have had meetings with DMB to work on the issue of certified payroll. The Attorney Generals office advises us. We have talked to colleges and universities regarding state contracts. The issue of tracking contracts supported by DMB, we are looking at that as well and also through the joint committees administrative rules, the legislative body that basically blesses these contracts. We are working on being able to monitor that, but historically we have not.

Craig Orr – Jack, what I would like to do is get some contract information. Either myself or someone from my team will be contacting you to get some more information to see what we can do.

■ **Tyler McCastle, Michigan Regional Council of Carpenters**

This is probably one of the biggest focuses we have around the state is this 1099 misclassification. In regards to the Whistle Blower protection, I don't think there should be any doubt that these people should be employees and covered by the Whistle Blowers Act. One hundred percent of the guys say, the company told me I'm going to work under the 1099 or I'm not going to work here. So there may be 1% of the companies out there that would say they were either forced into this or they didn't know.

■ **Dan Argentati, Michigan Fair Contracting Center**

My question is for Craig...does DMB have a pre-qualifying process similar to MDOT to pre-qualify these contractors and subcontractors?

A – In most cases no.

Dan Argentati – That's one way MDOT gets around this issue of certifying payroll. They have a

master list and they cross reference that master list with who's working on the project and requires certified payroll for each of those contractors. It's all tied in to the pre-qualification process. If a sub contractor is not pre-qualified, he cannot work on that project or any MDOT project.

Craig Orr – That's a good model for us to look at.

■ **Tom Eastwood, IBEW 665**

When we are dealing with contractors who may or may not be paying their fair share, is there something that can tie into unfair competition? What we are coming up against is employee sharing amongst companies. I see the form 1700 on the UIA website. I think it's like where an employer can lend an employee to another company. We will see electrical contractors, plumbers, where they are not really employees but they are lending them. This is happening big-time here in Lansing. Legitimate employers will have a hard time competing.

Steve Geskey – We received testimony from an organization who is suffering the consequences because these organizations are avoiding employment laws and avoiding compliance with Title 7 and FMLA. They have an unfair competitive advantage and we are trying to get the message out.

Dir. Cooley – We have to figure out a way to do the enforcement by going after the big guy first and figure out a way to get people to come forward.

Tom Eastwood – You have competing employers who are cutting out the middle man sharing employees among themselves.

Dir. Cooley – That needs to be looked at.

Neil Zechman – This is closer to a SUTA dumping question than it is to an independent contractor. You have two unrelated employers but only one is paying the unemployment tax up to that employer \$9,000 annual maximum. The other employer is not paying any tax. The worker is getting all the work. I don't see any harm to the worker but I can see harm to UIA because of loss in taxes on the \$9,500 taxable wages.

Steve Geskey – In some ways it's an employee misclassification issue and a SUTA dumping issue.

Tom Eastwood – What might these gentlemen do?

Steve Geskey – The agency should be alerted and if it fits as a SUTA dumping issue, it would be investigated.

Cheryl Cornellier - It falls under Workers Comp. The problem is who is this person's employer when this person gets injured? One person is paying them but someone else is giving them instructions.

Q – Does the 1099 have anywhere on there for a contractor number?

A – It looks like a W2 or W4. It just has the persons name and social security number on it.

Q – If it's a legitimate contractor, wouldn't there be an employer number?

A – It has a federal employer ID number. It used to be called a 38 number.

Q – At the first meeting, I addressed the rewards program. Was there any talk about that?

A – It again is cataloged in the minutes to get ready for our report to the Governor.

The meeting was adjourned.