

Interagency Task Force on Employee Misclassification

Tuesday, March 24, 2009
General Office Building
State Secondary Complex
Conference Room A
7150 Harris Drive
Dimondale, MI 48821

MINUTES:

Susan Corbin called the meeting to order and asked Joyce Surprenant to take roll call of members present.

Task Force Members – present: Jack Nolish, Susan Corbin, Susan Agee, Chris Mitchell

Task Force Members – not present: Craig Orr (represented by Chris Mitchell), Steve Geskey, Jack Finn

Susan Corbin introduced Susan Agee and indicated the Governor recently appointed Ms. Agee to the Task Force as the member representing Treasury.

Susan Corbin – It looks like for purposes of today’s meeting we don’t have a quorum so we won’t be voting on anything but we will go ahead and take public comments and we will also hear the report outs from the sub-committees but we won’t be able to take a vote to take any action on those reports today.

Public Comments

- **Tom Thornburg**, “Managing Attorney for the nonprofit organization called Farmworker Legal Services. Farmworker Legal Services serves the legal needs of vulnerable migrant and seasonal farmworkers throughout Michigan. We have a permanent staff of five (5) bilingual attorneys assisted by seasonal interns located near Bangor and through our proven program of outreach and community education and direct legal representation we strive to be the law office of first resort for farmworkers in Michigan. We, as I said are nonprofit, all of our services are free via a grant through the Federal Legal Services Corporation. You may or may not know and I provided you with my testimony and on page 4 there is a profile of migrant and seasonal farmworkers in Michigan that we have put together. In summary, Michigan is a top destination for migrant farmworkers in the U.S. with an annual population estimated at over 90,000 migrant and seasonal farmworkers and their dependents. Almost all of Michigan migrants are of Mexican national origin; many have primary homes in Texas and Florida. Over 70% are U.S. citizens, lawful permanent residents of the United States, or have other legal work authorization in the United States. The average family size is five (5) persons and the average family income ranges from 17,000 down to 12,000 dollars annually. The highest grade completed by adult farmworkers is on average sixth grade and over half speak primarily Spanish. Our attorneys represented a migrant pickle harvesting crew in 1999 in the landmark independent contracting case *Elizondo v. Podgorniak* in the Eastern District

of Michigan. In its decisive order the federal court declared that pickle harvesters are employees, not sharecroppers or independent contractors, as alleged by the grower in that case. In that case the court held that the grower exercised significant control over the harvester's work which was an integral part of the farming operation. The court recognized that produce growers have invested a great deal more in the harvest operation than the harvesters and therefore farm owners bear much larger risk and have greater opportunity for profit than do the harvesters. Therefore, under the economic reality test the court scrutinized purported contract that had been drafted and used by the grower in an attempt to create an independent contracting relationship it ruled that the documents had no basis in reality, were phony, and sham contract. In rejecting Podgorniak Farm's argument that the court should follow an earlier case of *Donovan v. Brandel* in the Sixth Circuit the judge cited a host of cases from other jurisdictions where courts have found harvesters to be employees rather than independent contractors eliminating any remaining controversy over the legitimacy or lack thereof of independent contracting schemes applied to field workers in Michigan. Nonetheless, I read with concern the minutes of the Task Force November 6th, 2008 meeting in which Craig Anderson of the Michigan Farm Bureau asserted that "independent contracting is a longstanding tradition" in Michigan agriculture. If it is truly such a tradition then it is a tradition that falls well outside of legal norms as recognized by modern courts and I commend the Task Force particularly to a more recent 2007 opinion of the United States Court of Appeals for the Seventh Circuit in the case of *Reyes v. Remington Hybrid Seed Company* which is also in your documents. Chief Judge Easterbrook wrote: "a reference to economic reality tells the court to disregard economic fantasies". Such as the idea that corn detasseling in the Midwest might be legitimately characterized as independent contracting. In this enlightening twelve page opinion in the *Remington Hybrid Seed Case*, this renowned federal jurist answers the questions posited by Mr. Anderson in his testimony to this Task Force. Mr. Anderson asks "Is it a contracting activity where the person does the same work in Indiana, Arkansas and Texas or is that an employee in Michigan"? There is no doubt for traditional hand harvesting in Michigan and throughout the Midwest the answer is not unclear. Hand harvest workers are employees entitled to all labor protections the law affords. Respectfully I would also like to debunk a few of the other examples of economic fantasies contained in Mr. Anderson's testimony. 1) We know of no instances of Michigan farmworkers demanding that growers treat them as contractors in order to avoid immigration issues or any other reasons, especially not on a regular basis as Mr. Anderson asserted. 2) We are not aware of any farm operations that have successfully avoided joint employer liability under employment laws by splitting up into separate companies while doing the same work with the same people. The Agriculture Worker Protection Act enforced by the United States Department of Labor and private attorneys such as ourselves in nonprofit practice simply does not allow that kind of split up to evade the requirements of joint employment. 3) We have heard of no instances of farmworkers in Michigan presenting themselves to growers as contractors who carry their own Workers' Compensation coverage and pay their own payroll taxes. We contact a minimum of a thousand migrant farmworkers every year in this state, I have never heard of one of them that said that anyone he works for whether it be a person on his crew or crew leader said that they covered Workers' Compensation. So we disagree with the assertion that for agriculture "if the employer has done nothing wrong it can't cover lost wages for the individual who files a Workers' Compensation claim". Sure they can, they do all the time. They do carry Workers' Compensation and the employer does and covers the worker. So to complete the record of the Task Force proceedings I am leaving you with the copies of the two federal court decisions discussed as well as a few more documents that shed some more light on some of the accuracy of Mr. Anderson's testimony specifically there is a fact sheet from the United States Department of Labor that accurately depicts the U.S. Department of Labor's interpretation of joint employment and independent

contractors under the Michigan and Seasonal Agricultural Worker Protection Act. There is a Q & A from the U.S. Citizenship and Immigration Services regarding employment eligibility verification the I-9 Form which is being revised the new one to be out on April 3rd. There is two documents from the National Immigration Law Center relating to the basic pilot e-verify reality check; businesses challenge Department of Homeland Security's claims as to accuracy, and facts about the Social Security no match letter. These articles imply they accurately explain the present status of the various employment related issues referred to by Mr. Anderson in his comments to the Task Force a review will reveal agricultural employers are not somehow forced to characterize their farmworkers as independent contractors in order to somehow comply with these governmental processes and regulations as Mr. Anderson's testimony seems to imply rather these requirements are simply parts of a comprehensive federal system which regulates employment relationships and which unfortunately some Michigan employers seek to avoid by tempting to treat their workers as independent contractors. In the experience of Farmworker Legal Services some real employment issues constantly faced by migrant and seasonal workers are: 1) Nonpayment of the minimum wage by imposing compensation based upon piece rates and failing to track actual hours worked as required by the law; 2) Taking unauthorized deductions from employees wages for unmetered "utility charges" or other charges for unsafe and licensed migrant housing; 3) Failing or refusing to pay wages at all to some workers; and 4) Retaliating against workers who speak English or who otherwise assert agreements. Thank you for this opportunity, I'm sorry we didn't make it to a regular public hearing but we appreciate this opportunity for public comments and I can always be reached for questions".

- **Susan Corbin** – "We appreciate you coming today and providing us with this information, we'll certainly keep it for our next report. Is there anybody else that would like to make a public comment at this time? Okay, we will move on then to reports from the sub-committees. Susan Agee also has attended a recent conference, maybe she would like to share some information about it".
- **Susan Agee** – "I attended the federal Tax Administrator's Conference in Atlanta, Georgia and one of the speakers was talking about the integrated tax agencies and misclassified employment classification and Wisconsin is coming on board, they are very enthusiastic about it. We had speakers from the Internal Revenue Service where they are going and engaging other states to practice in this and working within your other agencies to be able to cooperate and come up with a way of being able to identify these employees that are misclassified and then to follow-up and to be able to respond to that. A lot of states were very enthusiastic about it and I think we are going to hear more and more as more complete things happen".

Report out from Sub-Committees

- **Legal Sub-Committee**

Jack Nolish – "The Legal Sub-Committee consists of those of us amongst the Task Force that are in fact attorneys and we were looking into two different areas. First, what existing enforcement statutes may each individual agency have, each does have one form of enforcement or another. There is however no uniform definition of employee or independent contractor throughout our various statutes and unfortunately the historical research suggests to us that may simply not be workable or easy to do or even recommended. Prosecutions have been done over these matters, civil suits have been filed in the Workers' Compensation

Agency does make determinations about somebody's employment status on a case-by-case basis. We have come up with a couple of things that probably do need to be done and are recommending these. 1) Some legislation should be introduced to expand the Workers' Compensation Act to include such things as defining contractor/independent contractor indicating that contractors in the trucking construction industry should be considered employees unless a series of criteria are met establishing that they are not and that there should be criminal and civil sanctions available for that issue. A Workers' Compensation Agency director, who in this case at the present time anyway is me, should have the authority to issue stop work orders and impose administrative fines on those employers found in violation on these issues and provisions for enforcement actions to be brought by an improperly classified contractor, union, or other organization in a civil action on behalf of the misclassified individuals. Legislation needs to be introduced to protect the individuals making complaints regarding misclassification which is generically referred to as whistleblower type protection. We are also calling for legislation to be introduced requiring that all employment oriented training programs at the high school and post high school levels require mandatory training on employee rights and responsibilities. We raise that because what we discovered through the course of various testimonies that we heard is that there is a growing culture out there that has the expectation that that's the way this work is done, that is by independent contractors. Essentially thinking that there are no specific employee rights, much likely a high school civics class in employee rights needs to be taught on a broad scale basis. There also should be some legislation introduced that would overcome a problem that the various agencies have with our ability to communicate information one to another. There are certain privacy restrictions in the various acts that have to be overcome so this will have to be done by legislative changes and then a series of memoranda of understanding as they are called facilitating the exchange of information; and lastly it appears that we need to create in either one of the agencies or in some separate category a clearinghouse operation that can take in complaints, do initial investigations, refer the matters out to the appropriate agencies, and maintain a reciprocal information exchange so we can actually get things done. So that's the report of the Legal Sub-Committee at this time. If you have any questions I'll be happy to entertain them".

Richard Stringer – “Can you address the issue of the trucking and construction industries, is this document limited to those industries or can other industries be included in this”?

Jack Nolish – “I would think that's just the starting point and yes other industries. Most of the studies that we came across seem to point to those two as the most prevalent, however, there are clearly more out there”.

Richard Stringer – “Thank you. I should have introduced myself I am Mr. Stringer with MATSIF which stands for Michigan Association of Timbermen Self-Insurers' Fund and the issue of independent contractor's misclassification plagues this industry and I make note of that because our concern is who do we actually insure on these jobs”?

Jack Nolish – “Certainly another industry where indeed there are some examples of this problem”.

Pete Accica – Bricklayers Local 1 – “Which agency should they complain to now when they have a problem, Workmen's Comp.”?

Jack Nolish – “Right now we have a central 800 number which is the link we have posted and certainly make sure you have it before you leave. That's the number. We can channel it

from there. That's already in place. I'm talking about a little more formalized structure. Anybody else? Great, thank you".

- **Education Sub-Committee**

Ann Marie Cardenas – "I am with the Unemployment Insurance Agency and I am one of the members of the Education Sub-Committee. Some of the items the Sub-Committee recognizes and it ties into what Jack was talking about, a lot of the younger workers who are just entering the workforce, a lot of them are currently being misclassified and entering the workforce by believing that this is the norm so it is our responsibility to do some educating and provide some training programs for not only employees but also a lot of employers as well. Educating them about what their rights are. I know we discussed about creating some training courses, some materials and doing our part in marketing those training courses to the different employer groups through different school programs and there's been discussion about legislation about making it a requirement in high school programs as well about employee rights. These are the key items that we believe are definitely needed".

Norm Isotalo – "I am with the Department of Energy, Labor & Economic Growth and I am just going to tag onto what Ann Marie said. You may have noticed if you were looking for the Task Force website that it hasn't been up and it is up now. It is linked off of the department's website and apparently what happened was that the department website was going through a reorganization, a redesign and during that process somehow our link to the Task Force information was dropped but it's now back up and we are actually in the process of reorganizing that site a little bit now, we're going to delete some of the old material and organize the remaining material so that it is a little easier to access it so that information should be going up and there is going to be permanent navigation bar on the UI website and that will be going live tomorrow and then we're going to start to reorganize it a little bit tomorrow as well although that may not show up until later in the week. Thank you".

Susan Corbin – "Does anybody have any questions for the Education Sub-Committee"?

Pete Harvatin – "I'm with the Carpenters in West Michigan and I think it should also be responsibility. You know you are going to educate these young people on their rights, on their rights, on their rights, I think a lot of it is responsibility and again you know it's our responsibility to pay our fair share of the taxes. It's our responsibility to make sure that the businesses we work for are sharing in the cost of the services that our tax base provides. The roles that public service provides and everything, I think it's awesome, but it's not just rights, it's responsibilities as well. Obviously a lot but I think and I know rights are important but it's their responsibility".

Jack Nolish – "Will tell you in the draft process of the power point that goes with this preliminary education stuff it does talk about rights and responsibility".

Pete Harvatin – "Okay, I think it's important and again you know a young society that just takes things for granted, I got three of them that do personally, so you know you got to be responsible not only for yourself but for your actions".

Susan Corbin – "Any other questions for members of the Education Sub-Committee"? We will go ahead and have a report from the Resource Sub-Committee".

- **Resource Sub-Committee**

Joyce Surprenant – “The whole partner of the Resource Sub-Committee, Mr. Rodger Palm is my other half. In our research of several, several hundreds of documents, there’s a lot of information on misclassification out on the website. It’s enormous. It was very hard going through that to distinguish what was good information, what may not be so good information but it doesn’t matter what you were looking at, all of the information talked to the same subject of a problem. There are several papers that were produced. Planmatics introduced an Independent Contractor’s Prevalence and Implications for Unemployment Insurance Programs. That was done for the U.S. Department of Labor. Matthew Capece from the United Brotherhood of Carpenters and Joiners of America wrote a report on the Size and Cost of Misclassification Fraud and Unreported Pay a Survey of National and State Studies. He has a very well put together summary of all the reports out there and again the reports are all pointing to one thing. It is a growing problem. Richard Cordray of Ohio, he is an Attorney General, recently has released a report of the Ohio Attorney General on the Economic Impact of Misclassified Workers in State and Local Government in Ohio. That just came out the beginning of this year. In Maine and Illinois there were several studies on the Cost of Misclassification in both of those states. We ourselves also had a report issued by Dr. Dale Belman and Richard Block from Michigan State School of Labor and Industrial Relations that was released out on the MSU website in December of 2008, and in that they did random sample audits of employers, and found on average 30% of Michigan employers misclassify employees as self employed workers. The IRS also had a report issued by the Treasury Inspector General for Tax Administration titled While Actions Have Been Taken to Address Worker Misclassification an Agency Wide Employment Tax Program and Better Data are Needed. So it’s a growing concern of all states, of the federal government, and our recommendation to the Task Force is contained in our report out as a draft so please consider”.

Jack Nolish – “The material that Joyce was referring to is labeled review of available information. I believe you have that and I direct your attention to the first paragraph on top of page 2 which is some interesting information from a group calling itself the Freelancers Union. It dovetails with what we’ve just heard about with the farmworkers experience, and that is they surveyed some 2,000 independent workers to find out that 85% of them were paid late and 42% were never paid at all, so this is a huge problem out there. You know we hear the virtues of folks being out there working on their own and whatever, apparently it doesn’t pay very well and this is the data to back it up”.

Susan Corbin – “Does anybody have any questions for members of the Resource Sub-Committee? We will have a report of the Enforcement Sub-Committee”.

- **Enforcement Sub-Committee**

Tina Alagna – “Good afternoon everyone, I’m Tina Alagna, Unemployment Insurance Agency, Tax Enforcement Unit. As Jack was explaining to you, all the agencies involved in the Task Force are granted authority under their respective laws to exercise enforcement when the circumstances apply. I’ll give you a briefing on each of the agencies”.

“The Department of Management and Budget – First of all a link to let everyone know to the misclassification URL has been added off the DMB Purchasing homepage for contractors and purchasing agents. Also the Prevailing Wage Act violator’s list has been incorporated into the process of evaluation of prior performance for vendors responding to bids in the construction area. The terms and conditions language incorporated into state contracts requires prime contractors to provide insurance certificates to demonstrate compliance with

Workers' Compensation, Social Security and liability insurance requirements prior to beginning work. The insurance terms and conditions which are included in both the solicitation documents and the final contracts also require vendors to certify that each of their proposed sub-contractors have documentation of their compliance with the labor and insurance laws".

"The Department of Treasury – discretionary penalties of negligence, intentional disregard and fraud are found under the Michigan Compiled Laws 205.23, 3, 4 and 5. An example could be that a taxpayer has knowledge of a tax obligation and woefully decides not to comply with that obligation. Under the Unemployment Insurance Agency, if it can be shown that the employer's failure to consider workers to be employees was due to a willful violation, intentional failure to comply or any of the provisions of the Act, the penalties of 54A will apply. If it can be shown that the employer's failure to pay taxes on workers involved in making a false statement or presentation knowing it to be false or intentionally failing to disclose information, the quadruple penalties of 54B will apply".

"Workers' Compensation Agency – this agency has a Compliance Division which determines if the employer is properly insured. If coverage is not on record action can be taken to impose fines and/or obtain court ordered cessation of work. Questions of individual employees or independent contractors can be adjudicated individually if a contested claim is filed for Workers' Compensation benefits. The agency director can conduct administrative hearings on questions of coverage".

"The Wage & Hour Division – Both the Michigan Payment of Wages and Fringe Benefits Act which is Michigan Compiled Laws 408.471, and the Michigan Wage and Overtime Law which is Michigan Compiled Laws 408.381, provide for penalties if the employer is found to have violated sections of either law. The penalties if any are assessed during the investigatory process".

Susan Corbin – "Thank you. Are there any questions or does anybody else on the Enforcement Committee have anything to add to that information"?

Pete Accica – Bricklayers Local 1 – "How do you insure that, say they are from the out of the country working here under student visas, you know they are not paying taxes here, or maybe they are from Georgia. If the company is based in Georgia they are doing a small job here, would they pay Michigan taxes? If they decided not to claim them or would they pay them here or would they pay them in Georgia"?

Tina Alagna – "If people are working here in Michigan they should be paying Michigan taxes".

Pete Accica – Bricklayers Local 1 – "Is there any way to investigate to see if they pay the taxes"?

Susan Agee – "We would look to see if there is nexus involved. If there is nexus, meaning a connection between that company in Georgia and working here in Michigan then yes, we would pick them out and look at any liable taxes that we administer".

Pete Accica – Bricklayers Local 1 – "If we could give you the name of the general contractors that were working here and they subbed it out to subs who are either some are from Peru, some are from Georgia, some are from Texas, from all over the country, and

everybody here is a 1099, that's what they tell us, those are 1099 reporters, but they are here maybe for three or four weeks, they go away. Could a general contractor be made liable or is it got to go to that individual"?

Susan Agee – “Again, if there is nexus involved, meaning a connection, then yes they could become liable and in instances of the situation that you are describing it could very well be liability on their part in which there would be a (inaudible) if they meet the voluntary requirements of the treasury taxes and then we would pick up their liability”.

Pete Accica – Bricklayers Local 1 – “So I could give you this information”?

Susan Agee – “Yes you can”.

Pete Accica – Bricklayers Local 1 – “Thank you”.

Susan Corbin – “Are there any other questions or comments on that report? Okay. We can talk a little bit about recommendations on next step. From my perspective I think what I would suggest that we do is that we schedule another meeting as quickly as possible when we know we will have a quorum when we think that we will get all our members here and I would make a recommendation that we compile all this information and put it in the report to the Governor and get it to her as quickly as possible. I don't know if anybody has additional thoughts on that? Joyce, if you could work with the members of the Task Force and comply with the Open Meetings Act and get a meeting scheduled as quickly as we can so that we can vote on taking some of kind of action on all of these reports”.

Susan Corbin – “Does anybody here have any other comments or anything else”?

“We did want to talk a little bit about the stimulus money that is coming into Michigan and something that we are doing in this department as it relates to employee misclassification. We don't know yet the full story of everything that is going to be coming to Michigan under the stimulus package but we are seeing some of the first dollars on their way to Michigan. We are seeing the necessary legislative action that needs to happen. What we are doing at DELEG in terms of employee misclassification is taking every opportunity that we can to educate people who are going to be involved in distributing any of those dollars on the issue of employee misclassification. We have a conference call later this week with many of the community action agencies around the state. We know that in working with these federal dollars there are a lot of new issues that they are going to have to be looking at as they distribute the money. One thing the community action agencies are going to be involved in is weatherization efforts, energy and weatherization efforts. So, on that conference call we are going to give them a mini tutorial on the issue of employee misclassification among other issues that we know they are going to have to be conscious of. As part of the stimulus we expect that there will be a lot of job training going on through the Bureau of Workforce Transformation and we are working on a one hour CD tutorial talking about employees, as those people are being trained, talk with them about employee's rights and responsibilities so any training that goes on with people who may be eventually employed with those stimulus dollars they will receive some information and part of that will be educating them on the issue of employee misclassification. Is there anything that I've left out that we are involved in so far as it relates to stimulus”?

“We can move on then to the second Public Comments period so if there is anybody who would like to take an opportunity to comment on anything related to classification and misclassification we would appreciate that”.

Public Comments

- **Rich Newell** – “I have a question for Jack, I’m Rich Newell with MATSIF, a Workers’ Comp provider to the wood products industry. Are you saying that there can’t be a definition really written defining who is an independent contractor and who is an employee, it has to be decided by an agency in every case or are you going to be able to come up with a definition that clarifies that across the board”?

Jack Nolish – “The Workers’ Compensation Agency view is we try to make it as broad as possible. Who is an employee, we want to make sure they are appropriately covered with insurance. On the employer side we want to make sure there is a level playing field that everybody that should be in compliance with our mandatory insurance requirements is so there is an equal competitive game. Having said that however the other agencies use the word standardized economic realities test which looks a lot like the IRS test so getting those things transferred over one or the other is not simply done. So the short answer is the scope is different. We want to make it as broad as possible for Workers’ Compers. That’s part of the problem. So rather than come up with a unified definition which could probably take us forever to come up with, some of the materials that are quoted in there address the problem of how difficult that is to do. We just want to make it as broad as possible for our purposes. Anyone under a contract hired express or implied it’s pretty broad. We don’t have an independent contractor definition in Workers’ Comp. It’s either someone is an employee or they’re not and we can adjudicate that case-by-case. If somebody calls our agency we advise them to get coverage”.

- **Rich Newell** – “Once this all settles down how are we going to get the information to the employers and how long will that take so that employers better understand that we’re really serious now and there’s some action got to be taken, is that any mechanism that’s going to get it out there and let them know this”?

Jack Nolish – “Well, Norm Isotalo who you met a few minutes ago is our press release writer and is really good at it. We’ll get the information out there as quickly as we can, it will be on our website of course and my guess is as soon as we start to take some action against some folks the word will get out pretty quickly”.

- **Rich Newell** – “By that I would agree.”
- **Bill Black** with the Teamsters, just a couple brief comments that we’d like to make. First of all, we want to thank Governor Granholm for her leadership for assembling this Task Force and addressing this very difficult issue. We believe not only from a labor perspective but from all the citizens in the State of Michigan that this is a very, very serious issue, especially nowadays when we’re all hurting for money and the state’s hurting for money. Misclassification punishes the good employers that are playing by the rules and helps the bad employers and it’s time to fix this. As we’ve been spending time up at the capitol talking to legislators on both sides of the aisle and educating them on this issue and they see what it’s doing, I think now is the right time to fix this problem once and for all for the citizens of

Michigan and we want to thank this Task Force and thank Governor Granholm for all your hard work on this.

Susan Corbin – “Thank you. Are there any other comments”?

- **Tyler McCastle** – “I’m with the Michigan Regional Council of Carpenters, and just would like to thank you for expediting this and maybe to let you know what a critical nature it is out there. Economically speaking we’ve got companies, legitimate good companies hanging in the balance if this is not addressed hopefully sooner than later. Legislatively if there is anyone at that level that isn’t on board that this is an issue or a problem that needs to be fixed that maybe they can join an economic reality in embracing (inaudible) them in the rat race. Thank you”.

Adjournment

- **Susan Corbin** – Are there any other public comments at this point? The meeting is adjourned and as soon as the next meeting is scheduled we will post something on the website and we will communicate with everybody who has given us their e-mail about when that next meeting will be. Thank you very much for your attendance today.