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Attorney General's Advisory Task Force on Worker Misclassification
Government Investigation & Enforcement Recommendations – Adopted Feb. 7, 2024

- To ensure an effective and efficient whole of government approach to misclassification enforcement, the state should create an interagency misclassification enforcement and education partnership made up of Department of Labor and Industry, Department of Revenue, Department of Employment and Economic Development, Department of Commerce and the Attorney General's Office.

- With the goal of strengthening the communication and collaboration amongst the government partner entities, the partnership should:
    - set goals to maximize Minnesota's efforts to detect, investigate, and deter employee misclassification;
    - adopt a statement that the policy of the State of Minnesota is to prevent employers from misclassifying their workers;
    - share data and make referrals amongst the partner entities;
    - serve as the primary point of contact for workers, businesses and the public impacted by misclassification;
    - engage in public outreach and education; and
    - coordinate with other relevant government entities.

- Modify Minnesota's construction independent contractor statute (Minn. Stat. § 181.723) to promote enforcement efficiency, strengthen enforcement authority for Dept. of Labor and Industry, and enhance available remedies and penalties to disincentivize misclassification and systemic noncompliance.

- Update Minnesota's construction misclassification law to provide for individual and successor liability to address the issue of individuals or successor entities avoiding legal liability for violating the law.

- Modify the penalties and enforcement provisions in the misclassification statute (Minn. Stat. § 181.722) to promote enforcement efficiency, strengthen enforcement authority for Dept. of Labor and Industry and enhance available remedies and penalties to disincentivize misclassification and systemic noncompliance.

- Provide a private right of action by employees who have been misclassified.
- Explore strengthening incentives and protections for whistleblowers from misclassification.
- Modify the contractor registration system (326B.701) to:
    - simplify the registration application process by streamlining requirements and making them applicable to all persons required to register;
    - prohibit employers from requiring an individual, who is the person's employee, to register in the contractor registration system; and
    - change the connection between the contractor registration system and the Independent Contractor multi-factor analysis in Minn. Stat. § 181.723, to clarify the relationship and documentation required for an independent contractor relationship in the construction industry to exist.

Task Force Members:

Rod Adams, Executive Director, The New Justice Project*, Co-Chair*
Commissioner Nicole Blissenbach, Commissioner, Department of Labor and Industry
Octavio Chung Bustamante, Marketing Representative, LIUNA Minnesota and North Dakota
Representative Emma Greenman, Member of the Minnesota House of Representatives, *Co-Chair*
Melissa Hysing, Legislative Director, MN AFL-CIO
Burt Johnson, General Counsel, North Central States Regional Council of Carpenters
Briana Kemp, Policy Lead, Centro de Trabajadores Unidos en la Lucha (CTUL)
Amir Malik, Compliance Manager, City of Bloomington City Attorney's Office
Commissioner Paul Marquart, Commissioner, Department of Revenue
Senator Clare Oumou Verbeten, Member of the Minnesota Senate
Evan Rowe, Deputy Commissioner, Workforce Services and Operations, Department of Employment and Economic Development (DEED)
Aaron Sojourner, Senior Researcher, W. E. Upjohn Institute for Employment Research
Brittany VanDerBill, Owner, B. VanDerBill Consulting LLC
Kim Vu-Dinh, Associate Professor, Mitchell Hamline School of Law
Jonathan Weinhagen, President & CEO, Minneapolis Regional Chamber of Commerce

Summary

March 2024

Worker Misclassification

Minnesota has neither an adequate nor coordinated approach for ensuring that Minnesota workers are properly classified.

Report Summary

Misclassification Rates in Minnesota

Although several state agencies undertake efforts related to addressing worker misclassification, no state agency calculates a rate at which workers are misclassified in Minnesota. We estimated worker misclassification rates using data from DEED's unemployment insurance audits of employers.

- The overall rate of worker misclassification in Minnesota is unknown. However, according to DEED audit data, estimated rates of worker misclassification were higher in 2018 than when OLA last issued a report on worker misclassification in 2007. (pp. 11, 17)

- Misclassification occurred in many industries. According to DEED audit data, we estimated that 22 percent of employers subject to a random unemployment insurance audit misclassified at least one worker in 2018. (pp. 14-15)

  Recommendation ► The Legislature should direct a state agency (or agencies) to calculate worker misclassification rates in Minnesota on an ongoing basis. (p. 19)

State Agency Efforts to Address Misclassification

State agencies may conduct investigations or audits related to worker misclassification, but the extent of these efforts and their impacts on the entities involved are limited.

- State law assigns DLI, DEED, and DOR limited duties to ensure workers are correctly classified. Generally, the efforts of these agencies to identify and correct worker misclassification result from administering or enforcing other state laws or programs. (pp. 27-28)

  Recommendation ► If the Legislature would like agencies to take a more active role in addressing worker misclassification, the Legislature should direct agencies to do so in law. (p. 29)

Background

A worker's classification, such as being an employee or an independent contractor, is important because it affects the legal rights and obligations of the worker and their employer.

Worker misclassification—which is prohibited by state law—occurs when an employer incorrectly classifies a worker. When worker misclassification occurs, a worker may lose rights that they are afforded in law, employers who properly classify their workers may be forced to compete with misclassifying employers who have an unfair competitive advantage due to lowered labor costs, and the government may lose program and tax revenues.

Several state agencies undertake activities that involve identifying and correcting worker misclassification. We focused on the efforts of the following agencies to address worker misclassification:

- Department of Labor and Industry (DLI)
- Department of Employment and Economic Development (DEED)
- Department of Revenue (DOR)

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- The authority in state law to address issues involving worker misclassification is fragmented across state agencies, and agencies generally do not coordinate investigative efforts or share information about employers that misclassify workers. (pp. 29-30)

  Recommendation ► The Legislature should require state agencies to take a coordinated and collaborative approach to addressing worker misclassification. (p. 39)

- Minnesota law outlines several different tests to determine a worker's classification, which creates challenges to addressing misclassification. (p. 22)

  Recommendation ► To the extent possible, the Legislature should enact common tests for determining worker classification and reduce the number of different classification tests currently in law. (p. 26)

- State agency efforts to identify and address instances of worker misclassification sometimes take years. (p. 31)

  Recommendation ► The Legislature should consider establishing timeliness standards for worker misclassification investigations. (p. 32)

- When state agencies find worker misclassification, employers face limited consequences for misclassifying workers. (p. 32)

  Recommendation ► The Legislature should amend statutes to ensure that agencies are required to penalize employers that repeatedly misclassify workers. (p. 35)

- Workers may be compensated for only a fraction, if any, of the benefits they were denied as a result of being misclassified, and only certain workers can pursue civil action to directly rectify their misclassification. (p. 36)

  Recommendation ► The Legislature should amend statutes to allow civil action by misclassified workers in all industries. (p. 37)

Summary of Agencies' Responses

In a letter dated March 8, 2024, DLI Commissioner Blissenbach said that "DLI considers worker misclassification a significant problem in Minnesota" and the "OLA report highlights some of the challenges inherent in DLI's efforts to enforce statutes specific to worker misclassification." She further stated that "DLI is committed to tackling this issue head-on and always strives to improve its efforts in this area." She explained that DLI is currently working on legislative changes to address misclassification, in addition to taking steps to improve the agency's misclassification enforcement efforts.

DEED Commissioner Varilek stated in a letter dated March 6, 2024, that "addressing misclassification is critical to helping DEED achieve its mission, and we appreciated [OLA's] recommendations for improving education, prevention, detection, and correction of worker misclassification. We look forward to working with our agency partners and stakeholders across the state to ensure that Minnesota employers and workers have access to a level playing field...."

In a letter dated March 8, 2024, DOR Commissioner Marquart commented that the agency appreciated the evaluation's "identification of the challenges and the impacts of employee misclassification to our state…and agree with the value of coordinating this work to effectively administer worker classification laws." The Commissioner continued, "we have taken this opportunity to continue to look for ways to improve and refine our processes."

The full evaluation report, *Worker Misclassification*, is available at 651-296-4708 or:
www.auditor.leg.state.mn.us/ped/2024/worker-misclassification.htm

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March 15, 2024

House File 4444 (Greenman)

Dear Chair Becker-Finn and House Judiciary and Civil Law Committee Members,

The National Federation of Independent Business (NFIB) represents over 10,000 small businesses across Minnesota. Our mission is to promote and protect the right of our members to own, operate, and grow their businesses.

NFIB Minnesota appreciates the opportunity to outline a few of our concerns with HF 4444. Our members want a fair and level playing field and support more consistent, tougher enforcement against those who deliberately misclassify workers to avoid paying taxes and other obligations. However, small business owners oppose new restrictions and additional complexity when it comes to working as or with an independent contractor.

Effective Dates: The proposal contains no means to inform and educate affected entities about these changes. To allow time for all industries to understand the implications and expectations in this proposal, the effective date should be no earlier than 1/1/2025.

Section 7: The A8 amendment narrows the scope of individual liability but individual liability should be reserved for severe violations, such as willful and repeat offenses, especially given this section also allows for a long-term ban on working in a person's field.

Further clarity is needed about what it means to have "engaged" in prohibited conduct under this section. It remains unclear whether the individual(s) would have had to directly participate in the prohibited behavior to be held liable, or if the conduct of others could be held against any owner, member, principal, or officer of an entity alleged to have violated this section.

Sections 9-10: NFIB members want better coordination of independent contractor regulations and more consistent enforcement across state agencies. We recommend clearly requiring the partnership agencies to improve the education and training of enforcement personnel before unleashing these proposal's broad new enforcement powers.

Sincerely,

John L. Reynolds
Minnesota State Director
National Federation of Independent Business
john.reynolds@nfib.org

March 14, 2024

Dear Members of the House Judiciary Finance and Civil Law Committee:

Our organizations collectively represent tens of thousands of Minnesota businesses and hundreds of thousands of Minnesota employees and workers. We appreciate the opportunity to provide feedback relative to this Committee's consideration of HF 4444 (Rep. Greenman), legislation seeking to address the issue of worker misclassification.

We share many of the same goals in preventing the practice of illegally classifying workers as independent contractors instead of employees – in fact, many of our members identified interagency collaboration and knowledge sharing as a defect in state enforcement of worker classification rules. Unfortunately, the proposed Intergovernmental Misclassification Enforcement and Education Partnership fails to focus on a core concern of our members: consistent and uniform application of independent contractor regulations across state agencies.

We believe that progress can be made this session on creating a fair and level playing field. That said, we want to make sure that efforts to hold bad actors accountable are done so while protecting all of the employers and independent contractors that play by the rules and follow the laws. Those willfully engaging in labor trafficking or other such practices should not protected by ineffective laws, but employers and workers already complying with the laws shouldn't be subjected to an overreaching regulatory regime, complicated processes, and restrictions on how to legally participate in our economy.

We are also concerned by the rushed nature of this legislation. Following the 2023 legislative session, two state efforts commenced to study the issue of worker misclassification and its impacts. The Attorney General's Office established a Task Force on Worker Misclassification and the Office of the Legislative Auditor (OLA) was tasked with conducting an evaluation on Worker Misclassification. Both of these efforts are still ongoing.

The AG's Task Force was populated with 15 members that include advocates, researchers, Minnesotans with an interest in the topic, a member of each body of the Minnesota Legislature, and representatives from the

Minnesota Departments of Labor and Industry (DLI), Department of Revenue (DOR), and Department of Employment and Economic Development (DEED). On February 7, 2024, the Task Force released a series of interim recommendations focused on "Government Investigation & Enforcement," which we understand serves as the basis for HF 4444. This legislation was introduced on February 29, 2024 and was scheduled to be before its first committee just a few days later.

At the same time, the OLA evaluation is set to be released on March 14, 2024, one day before this hearing. This evaluation will focus specifically on the misclassification of employees as independent contractors and to better understand Minnesota's approach to addressing misclassification. In doing so, the OLA will:

- review state and federal laws and court determinations to understand worker classification requirements, including those for gig workers;
- evaluate the relevant policies and practices of DEED, DLI, and DOR that help ensure correct worker classification;
- review the efforts of other states to address misclassification;
- review Minnesota's approach to enforcing certain other employment-related laws;
- interview select stakeholder organizations; and
- estimate how frequently employers in the state's unemployment insurance program misclassify employees.

Overall, this evaluation will focus on questions pertaining to Minnesota's laws and practices regarding the classification of workers. It is therefore unclear whether the work of the OLA and AG's Task Force will be in alignment or not and whether HF 4444 is the appropriate legislative response.

As Minnesota's workforce and workplaces rapidly change and more workers are choosing to participate as independent contractors, policymakers should commit to thoughtful, deliberative analysis and seek to understand emerging policy within the current the regulatory landscape before prematurely seeking to impose rigid regulations or restrictions or adopt model legislation from other jurisdictions. Employers must be able to efficiently manage operational challenges the same way that individual workers should be able to choose how they participate in the workforce. Balanced employment-related policy benefits both employers and workers as well as taxpayers while enabling our economy to grow.

Furthermore, in speaking with many of our members over the past several months, Minnesota businesses of all sizes are experiencing significant administrative, implementation, and compliance challenges with the state's suite of new labor laws – laws that in and of themselves seek to address some of issues being discussed within the context of this bill.

With that in mind, and given the jurisdiction of this Committee, we respectfully request that the Committee wait until the results of the OLA's evaluation on Worker Misclassification are disseminated and analyzed before prematurely considering HF 4444.

Minnesota
Employment
Law Council

MEMORANDUM

TO: House Committee on Judiciary Finance & Civil Law

FROM: Minnesota Employment Law Council

DATE: March 14, 2024

RE: H.F. 4444, 1st Engrossment

We write to express concerns regarding H.F. 4444, which expands potential remedies for worker misclassification. The Minnesota Employment Law Council ("MELC") agrees that misclassified workers should have appropriate remedies, many of which are provided under existing law. However, MELC respectfully recommends adjustments to H.F. 4444 in order to avoid unintended consequences, particularly on employers and others who have no intention of violating the law. We appreciate the opportunity to discuss these concerns and to work with the bill author as this issue proceeds.

Expanded Violations (Lines 4.27-5.10) + Expanded Civil Penalties (Lines 6.29-6.31)

Lines 6.29-6.31 provide for civil penalties of up to $10,000 per misclassification violation, with a floor of $5,000 for each misclassified worker. Given the expanded range of violations set forth at Lines 4.27-5.10, that may mean multiple civil penalties for a single misclassified worker (misclassification itself, plus inaccurate reporting of employee status, plus execution of an inaccurate independent contractor agreement). These civil penalties are not remedies needed to make an individual worker whole; those remedies (*i.e.*, compensation for lost wages, lost benefits, etc.) are provided elsewhere in this bill and under existing law.

These stacked civil penalties are not limited to deliberate wrongdoers. While obvious instances of misclassification grab headlines, in most instances, a worker is determined to be misclassified (if at all) as the result of a fact-intensive, multi-factor analysis. In those instances, the employer typically did not intend to violate the law, and often has a good-faith basis to believe that independent contractor status is appropriate, even if the employer is mistaken.

In those instances, MELC respectfully submits that public policy is not served by imposing tens of thousands of dollars in stacked civil penalties on an employer that did not deliberately break the law. That may be easily avoided by limiting the listed civil penalties to "willful" violations.

Expansion of "Consequential Damages" (Lines 6.21-6.28)

In this section, damages that may be awarded to a misclassified worker are expanded in two troublesome respects. First, "consequential damages" payable to an aggrieved employee are expanded to include "employer contributions to unemployment insurance; Social Security and Medicare." Those amounts are appropriately directed to the proper government agency on the employee's behalf, pursuant to applicable law, not payable directly to the employee.

Further, consequential damages are expanded to include "any costs and expenses incurred by the individual resulting from the person's failure to classify, represent or treat the individual as an employee." That provision is extraordinarily overbroad (and similarly overbroad provisions have been appropriately

removed from other bills in recent years). The "resulting from" standard provides no meaningful limit on what might be claimed as damages in a misclassification case. By way of illustration, if a worker did not purchase health insurance, but would have been covered by the employer's plan if they were classified as an employee, would the worker's potential unpaid medical bills "result from" misclassification? Courts have consistently rejected such a broad understanding of "consequential damages," but the language of this bill raises serious due process questions as to whether an employer could face effectively limitless exposure.

Adjustments to the independent contractor standard in the construction industry (Lines 8.16-11.26)

MELC respectfully submits that certain elements of the proposed new test for independent contractor status in the construction industry also may create unintended consequences. By way of example only, a business may only be treated as an independent contractor if it has previously received and retained 1099 forms, and filed business or self-employment taxes for the previous 24 months. However, a new business may never have received 1099 forms and will not pay those taxes if it is not already an independent contractor, effectively precluding new independent contractors. (Lines 10.4-10.9). Further, while various tests for independent contractor status consider the extent of the worker's control over the means and manner of performing services, the bill precludes independent contractor status unless the worker has *"sole* direction and control over the means of providing or performing the specific services." (Lines 11.4-11.6) Requiring only one party to have complete and exclusive control over the performance of services is impractical in any business relationship.

Thank you for your consideration.

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To: Minnesota House Judiciary Finance and Civil Law Committee
From: Rich Neumeister
Re: HF 4444 (Greenman) First Engrossment

Minnesota's robust approach for accountability and transparency of their government actions is through the Minnesota Government Data Practices Act (MGDPA). But this bill is missing that sunshine with the creation of what is called the Intergovernmental Misclassification Enforcement and Education Act. On pages 17, lines 18 and 19., the proposal says this scheme/project is not under the MGDPA.

I have not seen in my nearly half century advocating for open government and privacy at the Legislature such a brazen attempt to avoid public scrutiny for a large part of government actions. With the proposal as so stated there would be no way to see how the efforts which the partnership is designed to do is being fulfilled by the public or media.

The duties of the partnership are to share information, to educate the public and other duties of it as outlined on pages 17, line 20 through page 18, line 9.

Being an experienced requester of government data, I see where the agency partners will use the partnership scheme to hide behind to avoid even data requests under their own agency on the subject of misclassification.

Joint enforcement efforts between agencies is not new, what they do is inter-agency agreements, joint powers agreements, not discharging itself from the responsibility of being under the rule of MGDPA. This partnership arrangement allows for wholesale sharing of information on individuals and private entities with it not being under the MGDPA.

In summary, the current bill gives an unduly generous and easily exploitable loophole that enables government entities in this effort to keep public data from public view and accountability with what they do.

I encourage the removal of the language on page 17, lines 18 and 19.

As we celebrate Sunshine Week, (annual observance of open government) the Legislature should make efforts to breed confidence in democratic institutions, to do all out to earn and keep the public's trust, not to show disdain for public right to know.

March 14, 2024

Chair Becker-Finn and Members of the House Judiciary Committee:

The Minnesota Trucking Association submits this letter to register its serious concerns regarding the stop work provisions contained in HF4444.

Under current law, the Commissioner of the Department of Labor and Industry may issue a stop work order based on an inspection or investigation that a person has violated or is about to violate applicable law.

HF4444 dramatically expands the authority to issue stop work orders, both in scope and expanding the potential violations. It eliminates the requirement of an inspection or investigation, meaning such an order could be issued at any time. It appears that HF4444 could allow even a complaint of misclassification to trigger a stop work order. Only one potential violation could empower the commissioner to shut down an entire business in all its locations.

Trucking is the backbone of the supply chain, and truck drivers are the lifeblood. Independent contractor truck drivers play a critical role in delivering essential goods and materials, including baby formula, life-sustaining biologics, blood, vaccines, air and fluid filters, fuel, and components for generation of electricity.

An unfounded stop work order could prevent the delivery of time-sensitive or perishable goods.

It should also be noted, since the application of HF4444 would apply to all industries, all services, and all businesses, its impact would extend to **ALL** public or private sector commercial or residential building or construction improvement services. Stop work orders could halt the transportation of materials destined for ANY building project. These would include projects funded by local, state, or federal dollars such MnDOT, Met Council, county or city transportation buildings (e.g. maintenance and storage facilities, terminals, public rest area buildings, and weigh stations). Stop orders could dramatically impact the time-sensitive delivery of publicly funded projects.

We believe that the current language in Minnesota Statutes 2022, Section 326B.082, subdivision 10 is adequate authority for stop work orders and should not be amended. However, if it is amended it should: a) only take place following an inspection or investigation, and b) apply to entities involved in freight transportation (per North American Industry Standard Codes) only with due process, advance warning, and opportunity to correct any potential violations to ensure that critical supply chain deliveries are not delayed or prevented.

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At a minimum, critical questions raised regarding how HF4444 impacts the supply must be addressed before any enactment:

- How would DOLI determine whether to issue a stop work order?
- Would exceptions be made for critical services?
- If so, what services would be deemed critical?
    - Insulin deliveries?
    - Organ transplant deliveries?
    - Building new nursing homes?
    - Transporting patients to doctor appointments?
    - Delivering diapers to homeless shelters?
    - Delivering food to schools and food shelves?
    - Delivering gravel to highway improvement projects?
    - Delivering fuel?
    - Delivering livestock to the market, or grain to COOPs?
- What backstops will be implemented to prevent failures in the supply chain for our economy?

We look forward to working to modify the bill to address these supply chain concerns, as well as other concerning provisions of HF4444.

Sincerely,

John Hausladen
President
Minnesota Trucking Association