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Meeting Minutes: Attorney General's Advisory Task Force on Worker Misclassification

Meeting Date and Time: October 21st, 2024, 1:00 pm – 4:00 pm
Minutes Prepared By: Abdulaziz Mohamed
Location: Bloomington City Hall, and Microsoft Teams

Attendance

Members Present
Representative Emma Greenman
Rod Adams
Senator Clare Oumou Verbaten
Commissioner Nicole Blissenbach
Octavio Chung Bustamante
Daniel Getschel
Burt Johnson
Melissa Hysing
Briana Kemp
Amir Malik
Deputy Commissioner Evan Rowe
Aaron Sojourner
Brittany VanDerBill
Kim Vu-Dinh
Mike Logan
Brian Elliot (Ex-Officio)
Lee Atakpu (Ex-Officio)

Members Absent
Commissioner Paul Marquart

Attorney General's Office (AGO) Staff Members Present
Carin Mrotz
Abdulaziz Mohamed

Agenda Items

1. **Call to order and roll call**

   Emma Greenman calls the meeting to order at 1:10 pm. A quorum was present.

2. **Approval of meeting agenda**

   A motion was made and seconded to approve the agenda as amended. A vote was taken, and the motion passed unanimously.

3. **Approval of October 8th minutes**

   A motion was made and seconded to approve the October 8th minutes. A vote was taken, and the motion passed unanimously.

4. **Presentation: Worker Classification Tests Utilized by Minnesota Agencies**

   A presentation on worker classification tests utilized by Minnesota agencies was given by Commissioner Nicole Blissenbach, Deputy Commissioner Evan Rowe, and Daniel Getschel, respectively. The presentation featured the following:
   - Commissioner Nicole Blissenbach explained that the Department of Labor and Industry uses a combination of tests to address worker misclassification, including the workers' compensation test and the unemployment insurance test. For wage and hour issues, the workers' compensation test is applied, especially for occupations not covered by specific rules. In determining the need for workers' compensation insurance, more than 30 specific occupations and general criteria for nonspecified occupations are considered. The primary focus is on whether a worker is economically dependent on the business, balancing various factors.
   - Deputy Commissioner Evan Rowe explained that the Department of Employment and Economic Development uses a five-factor test to determine whether an individual is an employee or an independent contractor. The factors under considerations are the right or the lack of the right to control the means and manner of performance, the right to discharge the worker without incurring liability for damages, the mode of payment, furnishing of materials and tools, and control over the premises where the services are performed. The first two factors are most important and, while these five factors are key, additional factors may be considered if the results are inconclusive.
   - Daniel Getschel explained that the Department of Revenue follows the IRS common law rules to determine a worker's classification, focusing on three key factors: behavioral control, financial control, and the nature of the relationship between the employer and the worker. He noted that a tool was created to help

agencies evaluate worker classification by comparing different questions across agencies. The tool identifies which factors are relevant to each agency, and while there is overall consistency, some agencies may consider additional questions or industry-specific tests.

- The presenters discussed a comparison between the tests used in the construction industry and those used in unemployment insurance, highlighting the differences between them.

5. **Discussion: Worker Classification Tests Utilized by Minnesota Agencies**

Based on the presentations given, the task force members asked questions and engaged in a discussion as follows:

- Represented Emma Greenman asked if the presenters could identify commonalities across the different tests, specifically focusing on behavioral control, financial control, and the relationship between the worker and employer. Commissioner Nicole Blissenbach clarified that the workers' compensation doesn't explicitly categorize factors into behavioral control, financial control, and the relationship, rather, the questions in the rules naturally align with these categories, but the test itself isn't structured in the same way. Representative Emma Greenman followed up by asking if the presenters could identify the core questions or criteria that are consistent across all agencies, and what key elements are central to the focus of the tests. Daniel Getschel explained that while the agencies are consistent overall, differences arise based on their specific authority. For example, the Department of Labor and Industry considers whether a worker holds a business license when determining classification, but the Department of Revenue doesn't, as a license doesn't necessarily indicate whether someone is an employee or contractor.

- Kim Vu-Dinh asked if the chart is intended to show where the tests converge. She pointed out that where a question isn't marked NA by an agency, it indicates overlap between the agencies in terms of what they consider in their tests. Commissioner Nicole Blissenbach agreed, noting that some questions may not apply to certain scenarios. She stressed that the process is a balancing test, where all questions must be considered in context to determine if the situation leans more toward an independent contractor or employee. Kim Vu-Din asked if, except for the construction test, all the other agencies use a balancing test to determine worker classification. Commissioner Nicole Blissenbach clarified that the construction test is used by other agencies for unemployment insurance in the construction industry.

- Daniel Getschel explained that the purpose of the tool is to provide a deeper comparison of the questions each agency asks to determine worker classification. It consolidates the relevant statutes, rules, and fact-finding questions from all agencies into one place to simplify the process of assessing whether someone should be classified as an independent contractor or employee.

- Representative Emma Greenman asked the task force to consider which factors in the current test are most useful for determining worker classification and which are less useful or incomplete. She suggested that this analysis could help identify areas for reform, benefiting both the agencies and those affected by the classifications.
- Melissa Hysing asked whether there are specific rules or formulas for weighting the factors in the different tests, as she had heard that some factors are given more weight, like in the UI 5-factor test. She was curious how the factors are applied in practice, whether there are clear guidelines for weighing them, or if it is more of a judgment call. Commissioner Nicole Blissenbach explained that for workers' compensation, control is the most important factor, while for wage and hour laws, all factors are weighted equally. The weighting differs depending on the type of classification being determined. Representative Emma Greenman clarified that, based on the discussion, the workers' comp test has weighting, the UI test also has weighting, but the DOR test doesn't. She asked if this impacts the assessment of the factors discussed. Daniel Getschel and Evan Rowe stated that, yes, that's a factual assessment for DOR and DEED, respectively. Representative Emma Greenman suggested that when discussing the decision rule, it would be helpful to include this in the conversation and possibly add it to the chart.
- Representative Emma Greenman wrapped up by highlighting three key aspects to consider when evaluating worker classification tests: the default presumption, the evaluation criteria, and the decision rule. She emphasized that Minnesota's tests are generally balancing tests, and these components should be considered separately to understand how each test works.

6. Public Testimony

Public testimony took place as follows:
- Marc Freedman, vice president for workplace policy at the U.S. Chamber of Commerce, discussed the challenges of worker classification, stressing the importance of preserving the independent contractor model while targeting misclassification. He acknowledged the problem of misclassification but argued against overly restrictive definitions that would reclassify legitimate independent contractors as employees. Freedman emphasized that Minnesota's current laws, including the workers' compensation test, provide a clear framework for identifying misclassification without unnecessarily limiting the use of independent contractors. H urged the task force to focus on solutions that target bad actor rather than making broad changes tat could harm the independent contractor model.
- Jim Peretti, a shareholder at Littler Mendelssohn, opposed the adoption of the strict ABC test in Minnesota, arguing it would limit legitimate independent contractor relationships. He cited challenges faced by California and Massachusetts after adopting the ABC test, including the need for numerous

exceptions. Peretti recommended using a multi-factor control test, which he believes better balances the needs of employers, employees, and independent contractors while preserving worker flexibility and independence.

- Luke Wake, an attorney at the Pacific Legal Foundation in Sacramento, cautioned against adopting California's ABC test, which he believes restrict entrepreneurial opportunities, especially for women and minorities. He recommended Minnesota create clear guidelines that support independent contractors, preserving their flexibility while encouraging innovation. He suggested a presumption of independent contractor status if certain steps are taken.

- Kimberly Kavin, a freelance writer, opposed the ABC test, citing its harmful impact on independent contractors, especially women and minorities. Drawing from experiences in New Jersey and California, she warned that such a test limits entrepreneurial opportunities and leads to public backlash. Kimberly Kavin urged the task force to consider more reasonable alternatives, warning that the ABC test would hurt Minnesota's independent contractors and damage the state's reputation.

- Jan Hower, President of the Long Beach Singers, testified that California's AB5 law forced her nonprofit to classify its 24 professional singers as employees, adding $75,000 in payroll taxes and overhead. This increased administrative burden diverted funds away from producing concerts and negatively impacted both the organization and its musicians.

- Robert Lopez, a legislative representative for UFCW, highlighted the negative impact of the ABC test on workers in California and Massachusetts. He shared how grocery delivery drivers in California lost their jobs when their employer switched to independent contractors, benefiting unionized workers while non-union workers were fired. He also mentioned a misclassification case in Massachusetts, where GoPuff was fined foe denying workers benefits like paid sick leave. Robert Lopez concluded that the ABC test undermines workers' rights and protections.

- Jason Salgado, a staff attorney at Greater Boston Legal Services, highlighted the harm caused by misclassifying workers as independent contractors, which leads to lost wages, benefits, and retaliation. He supported the ABC test, noting it simplifies enforcement and helps workers access protections. Jason Salgado emphasized that the ABC test doesn't limit worker flexibility or require business model changes, but ensures workers are paid fairly and receive benefits.

- Karen Anderson, founder of Freelancers against AB5, testified about the severe negative impact of California's ABC test, which she says devastated freelancers and small businesses. She described how the law caused widespread job losses and business closures, especially in industries like music and education. Karen Anderson urged lawmakers to avoid the mistaken approach of the ABC test and find more balanced solutions to worker misclassification.

- Frank Callahan, President of the Massachusetts Building Trades Unions, spoke in support of the three-part ABC test, which helps prevent worker misclassification,

He explained that before its implementation in 2004, employers exploited loopholes to misclassify workers. The ABC test has made enforcement easier, ensuring workers receive protections like workers' compensation and unemployment benefits, and argued the law is effective and has been beneficial for workers in industries like construction.

- Caitlin Vega, General Counsel for the California Federation of Labor Unions, discussed California's adoption of the ABC test to address worker misclassification. She explained that the test, supported by the state Supreme Court, helps enforce labor laws and prevent unfair competition. AB5 standardized the test across agencies, improving accountability for misclassification without changing who is covered. Caitlin Vega emphasized that the policy benefits both workers and employers by ensuring fair competition and effective enforcement.

- Karen Kroll discussed research on the use of public benefits by independent contractors. She referenced a 2021 GAO study that showed most people on Medicaid or SNAP are working for employers, not as independent contractors. However, independent contractors make up a larger share of the ACA health insurance marketplace users. She also shared a story about a machinist union, suggesting that both W2 employees and independent contractors can thrive in the economy.

7. Discussion: Public Testimony

Based on the public testimony, the task force members asked questions and engaged in a discussion as follows:

- Kim Vu-Dinh asked about the shift from employee roles to independent contractors in certain industries and how it is changing the market. Robert Lopez acknowledged that he doesn't have a direct answer but can gather relevant data from sources like the Economic Policy Institute. He explained that during the pandemic, W2 workers were replaced by independent contractors through platforms like Instacart and DoorDash, particularly after California's Prop 22. Kim Vu-Dinh mentioned that industries like journalism have shifted to more independent contractor roles, replacing traditional jobs, and that data could show this trend. Robert Lopez deferred to Caitlin Vega for more insight on the broader industry trends. He agreed that local news stations, which were once unionized, have increasingly shifted to using independent contractors, leading to a decline in traditional employment in these sectors.

8. Task Force Discussion

The task force members asked questions and engaged in a discussion as follows:

- Representative Emma Greenman opened the discussion by reflecting on the progress made by the task force, especially regarding the different tests for worker classification. She summarized past conversations about presumption, default

rules, and evaluation criteria, noting that the tests are complex and involve policy choices. Representative Emma Greenman emphasized that today's focus would be on discussing these components, particularly the evaluation criteria, which are the most complicated. She also highlighted the trade-offs between clarity and unpredictability in these tests and asked for thoughts on the pros and cons of having a default or presumption in Minnesota's classification tests.

- Burt Johnson argued that Minnesota's presumption of employment in the construction industry has been helpful, especially in educating workers and employers. He explained that a presumption is easier to communicate than a complex set of factors. Burt Johnson emphasized that having a presumption of employment supports workers' rights to protections like minimum wage, overtime, and anti-discrimination laws. He also cautioned against a presumption for independent contractors, which he thinks is not advisable, but supports the presumption for employment status.

- Kim Vu-Dinh supported Burt's point, arguing that a presumption of employment makes statutes easier to understand, especially for workers with fewer resources. She stressed that while the presumption should favor workers, businesses should be able to rebut it if they have the resources.

- Amir Malik emphasized the importance of making statutes enforceable, noting that presumption-based laws are easier to enforce. He cited past challenges with vague criteria, like revenue thresholds, that made enforcement difficult. Amir Malik stressed that any law passed must provide a clear and practical path for investigators to follow, ensuring that enforcement is realistic rather than symbolic. He recommended consulting enforcement officials to ensure laws can be effectively enforced.

- Brian Elliot emphasized the importance of workers understanding their rights and being able to recognize when they are misclassified as independent contractors. He pointed out the power imbalance between workers and employers, noting that legitimate independent contractors should not be confused with those misclassified to bypass legal obligations. The focus should be on protecting workers from forced misclassification.

- Brittany VanDerBill expressed concern about the presumption of employment potentially having unintended consequences for legitimate independent contractors and businesses. While agreeing on the need to protect workers. She emphasized that assuming everyone is an employee could negatively impact those who are legitimate independent contractors. Brian Elliot clarified that the goal is not to assume everyone is an employee, but to start with the presumption of employment unless certain criteria indicate otherwise.

- Representative Emma Greenman clarified usage of the term "default" and emphasized having a clear starting point in classification, likening it to Minnesota's construction test. She also questioned whether the state is already making a presumption about employment status through existing protections, even without a formal default.

- Carin Mrotz shared an anecdote about a small business owner who faced confusion about worker classification and feared an audit. The business owner, lacking a traditional business background, struggled with knowing how to classify workers. Carin Mrotz emphasized that a presumption of employment would provide clearer guidelines, helping business owners make informed decisions about whether to hire workers as employees or independent contractors. The presumption would serve as both an enforcement and education tool for businesses.

- Senator Clare Oumou Verbeten expressed concern about the unfair burden on workers to prove their employment status, especially when they lack proper documentation, like cash payments and text messages, and over the imbalance of power between employers and employees.

- Representative Emma Greenman emphasized considering who controls the contracting process and has access to the relevant information, both at the start and during enforcement. She suggested that this should be a key factor in developing evaluation criteria and highlighted the need for a holistic approach to how these elements fit together in the conversation.

- Commissioner Nicole Blissenbach highlighted the challenges of applying a balancing test to determine whether workers are employees or independent contractors. She noted that the usefulness of each factor depends on the specifics of the case, which complicates guidance for businesses. This complexity makes it hard to provide clear answers when people seek help from the government. She also mentioned that while identifiable factors, like a contract, can make the determination easier, they can be manipulated, leading to potential abuse.

- Daniel Getschel passed the microphone to Jack Schultz, who highlighted that applying different classification factors depends on the specific situation or industry. He noted that behavioral factors, such as training and instructions, are often strong indicators of whether a worker is an employee or contractor. These factors are especially helpful in many cases. Evan Rowe discussed the tension between the need for simplicity and clarity in classification tests and the complexity of real-world situations. He noted that while the unemployment insurance test is straightforward and flexible, policymakers must determine the best balance between clarity and the complexity of real-world situations.

- Burt Johnson asked whether there is a valid policy reason for different classification tests across various agencies, questioning if it's logical for these tests to vary in different contexts. Daniel Getschel explained that differences in classification tests arise because agencies are governed by different statutes. The Department of Revenue aligns with the Internal Revenue Code to avoid complications for employers who would otherwise face conflicting requirements at the federal and state levels.

- Representative Emma Greenman questioned whether there's a reason for different classification tests across agencies, beyond administrative challenges, and suggested a unified approach might be better. Commissioner Nicole Blissenbach

responded that she doesn't know the specific reasons for the different industry-specific carve-outs in worker's compensation tests but acknowledged that they add complexity to enforcement and messaging. Kim Vu-Dinh pointed out that there are already situations where a worker's classification can differ between federal and state levels, which make administration challenging. She also noted the helpfulness of the chart that illustrates overlapping and differing factors used by various agencies. Commissioner Nicole Blissenbach clarified that while the chart shows common questions, the unemployment judges ask hundreds of questions, not just those listed, to assess control factors. The process is more complex, and some questions on the chart may be irrelevant to specific cases.

- Representative Emma Greenman questioned how the test could be used by a business owner or worker. She expressed concern that the test seems designed for a judge, not for someone trying to structure their business or economic relationship in a practical way. Evan Rowe highlighted that the key factors in the UI test are control, the right to discharge, and avoiding additional liability. While these are the most important, other factors may also be relevant. He noted that plain language guidance is provided to help employers navigate the test.

- Melissa Hysing asked how the different factors in the five-factor UI test are weighted when making decisions, wondering if there are clear guidelines or practices on how to prioritize certain factors over other, and whether there are specific metrics used to determine the weight of each factor. Evan Rowe explained that the weight of factors in the UI test depends on the specific case and is reviewed on appeal. While factors are ranked, the process is complex and may require input from an ALJ for more clarity.

- Representative Emma Greenman pointed out that the rules are designed with enforcers, ALJs, and judges, not businesses or workers, as the decision-makers who apply the tests. Daniel Getschel noted that discretion is built into the process. With factors weighted based on the industry and case specifics. The Department of Revenue must present strong evidence, and the taxpayer has the burden of proof in disputes.

- Representative Emma Greenman asked Amir Malik about the challenges of balancing discretion with enforcement, particularly in terms of ensuring clarity and consistency in decisions. Amir Malik argued for a presumption that workers are employees to simplify enforcement, reduce the burden of employees, and make investigations more efficient. He believes complex tests increase the risk of under-enforcement and that clearer guidelines would improve the process.

- Octavio Chung Bustamante highlighted examples where workers, such as those in framing or concrete, may appear as independent contractors but are effectively doing the same work under similar conditions, prompting the question of how to accurately classify them.

- Representative Emma Greenman discussed the importance of a clear decision rule in worker classification, noting that different tests weigh factors differently. She suggested that incorporating decision rules would help provide consistency in the

process. Aaron Sojourner advocated for a standardized, transparent, and predictable worker classification process across agencies to reduce uncertainty and complexity, emphasized the need for harmonization and simplicity to avoid unnecessary appeals.

- Amir Malik argued that clear, threshold-based tests and policies like pay stubs with detailed information make labor law enforcement more practical and effective, making it easier to address worker and employer issues.
- Daniel Getchel highlighted the need for balance between clear rules and discretion to avoid loopholes. He notes that most misclassification cases are resolved without going to court and advocates for continued education and outreach to help new businesses comply with the law.

9. **Adjournment**

Representative Emma Greenman adjourned the meeting at 4:13 pm.