

AG's Advisory Task Force on Worker Misclassification

Revised Recommendations

Education, Outreach and Notice

Recommendations:

1. The state should provide information on the requirements of Minnesota's classification requirements and misclassification fraud enforcement and penalties as part of other information materials provided by state and local government.
2. The state should provide plain language guidance and education to hiring entities including outreach to Human Resources departments and classes for small businesses, nonprofits and other entities that hire and contract with independent contractors. Intergovernmental Misclassification Enforcement and Education Partnership ("The Partnership") should coordinate with the Secretary of State to provide information on how to correctly classify workers and the consequences of misclassification fraud to any entity that applies for a business license with the state.
3. The legislature should enact and fund, or support local jurisdictions to provide, a program to provide, limited engagement legal counseling and support for small businesses and free legal counsel to workers facing employment classification and employment law issues.
 - a. Example: Programs like Hennepin County's Elevate Hennepin provide free legal counseling and support to small businesses, explore how to partner with additional counties to share information.
4. The legislature should ensure that adequate resources are provided to entities developing and providing guidance and education.
5. The Partnership should develop broadly-accessible notices informing hiring/contracting entities, workers, and those treated as independent contractors of their rights and responsibilities under worker classification laws. The notices must be written with the intended audience in mind, including plain language and available in the languages most commonly spoken in Minnesota. The notice must include at a minimum:
 - a. What worker misclassification is, that misclassifying a worker is it against the law, and detail the requirements under Minnesota law when hiring and contracting labor;
 - b. Information on the differences between an employee and an independent contractor, including:

- i. factors and legal criteria used to determine classification under MN law;
 - ii. that worker classification is a legal decision determined by legal criteria and rules regarding the nature and facts of the relationship; and
 - iii. that an agreement or choice by either worker or hiring entity cannot determine classification if the legal criteria and rules are not met.
 - c. The consequences to employers of misclassifying workers as an independent contractor, including penalties and legal liability;
 - d. The legal and economic consequences to workers of being misclassified, including, but not limited to:
 - i. The lack of protections under state and federal labor and employment laws, including, but not limited to, those governing minimum wage, overtime, payment of wages, earned sick and safe time, and collective bargaining rights;
 - ii. the lack of protections under anti-discrimination laws;
 - iii. Exclusion or ineligibility from social insurance programs, including, but not limited to, unemployment insurance, paid family and medical leave, workers' compensation, and temporary disability insurance; and
 - iv. Payroll tax liability.
 - e. Redress and remedies available to workers who believe they are misclassified, including the right to file a civil action;
 - f. How to learn more; and
 - g. How and where to file complaints for misclassification and wage theft.
- 6. Require the notice(s) to be provided by:
 - a. The Secretary of State to new business owners upon registering their business, provided that:
 - i. Registrants be required to sign an acknowledgement they have read the notice as a condition of a new business registration and annually or at any renewal thereafter; and
 - ii. Failure to sign by a business owner can result in their business status being placed on hold.
 - b. Hiring entities to independent contractors immediately upon hire, provided that:

- i. The notice cannot be used by the hiring entity as a defense for misclassification violations; and
 - ii. Where a business fails to provide such notice, that shall be the basis of additional penalties or damages for misclassification.
- c. the Department of Revenue to 1099 filers

Measuring the Problem and Impact (Data & Research)

Recommendations:

1. Minnesota should calculate an annual estimate of worker misclassification fraud rates for the purposes of:
 - a. Tracking the estimated scale and cost of Minnesota’s misclassification fraud problem to workers, state programs and the budget, and law-abiding employers placed at a competitive disadvantage
 - b. Measuring the effectiveness of new enforcement reforms; and
 - c. Informing the public, lawmakers, and taxpayers of the budget impact of misclassification fraud.
2. Direct The Partnership to develop a randomized audit that would allow for a generalizable and comprehensive estimate of misclassification rates in Minnesota.
 - a. *From the OLA Report:* For example, the Legislature could direct DOR to randomly audit tax filings on a regular basis to identify misclassification and calculate a misclassification rate. DOR is likely best suited to conduct such an analysis because of its access to tax data about compensation that may have been paid to independent contractors. The agency’s tax data likely includes more employers and workers than the unemployment insurance program. And, in contrast to DOR’s current approach, random audits would generate more generalizable misclassification rates.
3. The legislature should direct and resource Partnership entities to calculate and report worker misclassification rates on an annual basis. This calculation should be:
 - a. generalizable to the whole state,
 - b. carried out annually,
 - c. publicly reported,
 - d. provide an estimate of the number of workers experiencing misclassification,

- e. provide an estimate of the cost of misclassification to impacted workers,
 - f. provide an estimate of impact on law-abiding competitor,
 - g. provide an estimate of the cost of misclassification to the state; and
 - h. provide an estimate by sector, to help guide Partnership enforcement priorities.
4. Develop an Misclassification Fraud Impact Report to estimate the budget impact on the Unemployment Trust Fund, DOR tax collection, workers compensation insurance rates, other government programs and activities impacted by the classification of workers.

Co-Enforcement & Government Enforcement Reforms

Recommendations:

1. State and local government should make an ongoing commitment to co-enforcement strategies that partner with community-based organizations with a history of workplace organizing and a membership base that reflects workers in industries with a higher volume of misclassification and wage theft and industries where misclassification is often under-reported, including residential construction, service sector, cleaning, and janitorial.
2. Partnership entities should expand state level co-enforcement efforts by developing and strengthening strategic relationships and coordination with community-based organizations.
3. Co-enforcement efforts at the state and local level should prioritize education to help workers and communities prevent and report misclassification, by training them to identify when they or other workers are being misclassified, documenting evidence of the violation, and providing workers with information, resources and clear channels for reporting potential violations early.
4. State and/or local jurisdictions should appropriate resources to community organizations to provide technical assistance to workers and assist with filing misclassification and related complaints and claims, including support in acquiring the required documentation.
5. Minnesota should explore ways to incentivize workers, community-organizations, and law-abiding business competitors to identify and compile the necessary evidence for a misclassification complaint. Strengthen the penalties and enforcement tools available to DEED to align with 2024 changes to misclassification statutes in other areas.
6. Update Minnesota tax provisions to exclude Internal Revenue Code Section 530 of Public Law 95-600's permanent safe harbor rule.

7. Provide funding to Partnership entities to support education and enforcement efforts.
8. Direct state agencies to allocate more resources to raising awareness of and to the enforcement of existing misclassification laws.

Classification Tests

Recommendations:

1. To align with Minnesota's policy of attaching worker protections, benefits, and the funding of broad-based economic safety net programs to the employment relationship, the state should expand a rebuttable presumption of employment to all classification tests.
2. To the extent possible, Minnesota should streamline its classification analysis and align the factors into a single test applied across all government agencies.
3. Minnesota should revise the evaluation criteria in the classification tests to achieve the following goals:
 - a. Create a user-friendly classification test that provides clear, consistent, and functional direction that workers and the organization or individuals purchasing the labor can use to determine proper classification and compliance with state laws;
 - b. Test factors should be easy to understand, apply and not easily manipulated to evade requirements of the law;
 - c. Incentivize effective, efficient, consistent and predictable enforcement decisions by state and local regulators;
 - d. Identify and differentiate between an individual operating as a legitimate sole proprietor running their own independent business free from the direction and control of another business, as disguised from workers that should be classified as employees;
 - e. Recognize and distinguish legitimate business to business transactions and contracts;
 - f. Disincentivize and deter efforts to evade, delay, or avoid complying with the law.
4. To support the goal of predictability and to eliminate the confusion and lack of understanding voiced by workers, businesses, local regulators, and community members, Minnesota should replace its judicial-style balancing test decision-rule with a threshold decision-rule approach, i.e. a test with a determined number of threshold factors that must be met in order to rebut a presumption of employment.

Additional Recommendations

Recommendations:

1. The legislature should pass policies requiring disclosure and transparency to workers about how their data is collected and used by entities that hire or contract for their labor.
2. Lawmakers should explore policy initiatives related to emerging use of technology and surveillance, and its use to manage and control work and workers.
3. State law should require transparency about how employers are using technology to set the terms and conditions of work including assignments, compensation, take-rate, expenses, etc.
4. State law should require hiring entities to provide regular confidential disclosure to state regulators on what data they track, compile, or collect on individual workers and consumers to set compensation and conditions of employment, and how they use that data to set competition and conditions of employment.

Newly Proposed:

- State law should require fully-executed written contracts between buyers of sellers of labor for all independent contractors that are required to file a 1099 form.