



**Written Testimony of Basil Merenda
Deputy Secretary for Safety and Labor-Management Relations
Department of Labor & Industry
Senate Democratic Policy Committee Hearing
Worker Misclassification and the Future of Work
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Thank you for the opportunity to present testimony to the Committee on the Misclassification of Workers. My name is Basil L. Merenda and I serve as the Deputy Secretary for Safety and Labor Management Relations (SLMR) in the Department of Labor and Industry (L&I). I am responsible for administering four (4) bureaus in L&I, including the Bureau of Labor Law Compliance (BLLC).¹

Through its twenty-four (24) investigators, BLLC is charged with statewide enforcement of the Commonwealth's thirteen (13) labor statutes covering wage, hour, child labor, and other workplace conditions including enforcement of the Construction Workplace Misclassification Act (Act 72 of 2011).²

As you know, Act 72 is limited to the construction trades sector of the Commonwealth's economy. But, without a doubt, worker misclassification poses

¹ The other three bureaus that I administer include the Bureau of Occupational and Industrial Safety (BOIS), Mediation Bureau, and Bureau of Disability Determination (BDD).

² By comparison, New Jersey's Labor department has sixty-five (65) Investigators to investigate and enforce its laws which has enabled each New Jersey investigator to specialize on construction related issues or wage payment matters or child labor violations. In contrast, L&I statewide staff of 24 Investigators means that a Pennsylvania labor investigator must be a so called, "jack of all trades" be able to investigate and enforce all the Commonwealth's 13 labor laws.

a vexing problem for workers and businesses across many sectors in the Commonwealth.

For the benefit of the Committee, I would like to first explain how BLLC is presently confronting worker misclassification despite certain obstacles. Second, I would like to discuss the huge potential for more effectively tackling it across all business sectors through the work of the Pennsylvania Joint Task Force on Misclassification of Employees. Third, I will end by highlighting issues and concerns that L&I has identified over the past few years on the worker misclassification front.

First and foremost, since 2015, BLLC has levied fines on over 790 construction contractors for misclassifying more than 3,440 workers which has resulted in over \$2.65 million in penalties under Act 72. Since 2018, BLLC has conducted over 600 on-site investigations of construction projects for worker misclassification.³ Many of these projects included state-funded Prevailing Wage Projects.⁴

I would like to highlight one recent example from May of 2021 that exemplifies BLLC's efforts on the misclassification front. It involved a drywall subcontractor working on a private high-rise project in the State College area. Our investigators did a commendable job combining both extensive document review and job-site visits to interview workers.

In this case, BLLC found that 150 workers were misclassified as independent contractors and issued a \$144,000.00 fine for violating Act 72, which has been

³ During these on-site investigations, BLLC investigators interview workers on the construction site, review payroll information as appropriate, and distribute educational materials on labor laws to construction workers.

⁴ It should be noted that when conducting these on-site investigations, BLLC also seeks to determine whether there are also prevailing wage, child labor, and wage and hour violations occurring on these projects.

paid. To make matters worse, it was also determined that the workers were owed \$155,000.00 in overtime wages which is being paid as back wages pursuant to a monthly payment schedule.

BLLC is successfully pursuing construction misclassification actions despite having no authority to enter worksites to review documents, limited staffing, no debarment authority, a cumbersome stop-work order process, and no forensic accounting capability.

I can also report on one additional L&I approach to Act 72 worker misclassification enforcement which also has been yielding good results. That is, L&I's internal misclassification work group. It includes BLLC, L&I's Office of Unemployment Compensation (UC) Tax Services, as well as its Bureau of Worker's Compensation, working together, sharing information, and strategizing as a collaborative team.

By coordinating efforts, conducting tax and wage audits, and making referrals to each other, L&I's misclassification internal work group seeks to determine whether these bad actors are failing to meet their obligations under Act 72, and whether they are also violating their responsibilities under the unemployment compensation and workers' compensation laws of the Commonwealth. Thus, the internal work group within L&I is directly taking on these businesses that are improperly and illegally gaining an unfair advantage over law-abiding competitors who are honorably doing the right thing by appropriately and accurately classifying their workers.

For example, BLLC recently investigated a construction misclassification matter and then referred it to both the unemployment tax and workers' compensation offices. In addition to a fine of \$30,000.00 that BLLC imposed for violating Act 72, L&I's Office of UC Tax Services was also able to collect an additional \$25,000.00 from the contractor for failing to pay unemployment taxes.

Although Act 72 limits BLLC's worker misclassification enforcement to construction trades, the Office of UC Tax Services conducts audits ***across all industries***, identifying unreported employees because of error and omission as well as misclassification. In fact, between 2017 and 2020, UC Tax Services discovered more than \$1.1 Billion in unreported wages for 72,000 employees amounting to UC taxes owed to the Trust Fund of \$29.9 Million.

Simply put, as the Committee now can see, L&I is vigorously making the most of its authority on the worker misclassification front. However, it is clear that much more can and must be done to ensure that working Pennsylvanians receive the wages and benefits they have earned; that the State and municipalities receive the tax revenues they desperately need to provide necessary services; and those law-abiding businesses are no longer cheated and can compete on a level playing field.

Accordingly, I would submit that the future of worker misclassification lies in the PA Joint Task Force on Misclassification of Employees and the legislative, regulatory, and policy initiatives it can recommend to the General Assembly to address worker misclassification. The General Assembly established the Task Force in Act 85 of 2020 to inform a more comprehensive understanding of the worker misclassification issue in all regions and business sectors of the Commonwealth.

Because of my responsibility as Deputy Secretary of Safety and Labor-Management Relations, L&I Secretary Jennifer Berrier designated me to chair the Task Force. It consists of seven members including designees of the Secretaries of Labor and Industry and of Revenue, along with the Attorney General, as well as appointees of the President Pro Tempore of the Senate, Minority Leader of the Senate, Speaker of the House of Representatives, and Minority Leader of the

House of Representatives. The Task Force began conducting meetings on January 22, 2021 and has held sessions every month thereafter.⁵

Pursuant to Act 85, the Task Force is statutorily charged with providing to the General Assembly a preliminary report in March 2022 and then a final report in December 2022. Among other directives, the report shall include recommendations on what is legislatively needed to effectively address worker misclassification in the Commonwealth of Pennsylvania in all sectors of our economy and how best to educate employees, employers, and the public about worker misclassification.

During these monthly meetings, the Task Force has heard from several individuals and a variety of groups who have explained with evidence, anecdote, and experience just how vexing worker misclassification has been throughout the Commonwealth. These presenters have shown how misclassification has touched every region and almost every sector of the state's economy, as well as how governmental agencies, such as L&I, Revenue, and the Attorney General's Office, are presently policing the misclassification issue.

After its organizing meeting in January, the Task Force first heard in February from L&I--- BLLC, the Bureau of Workers' Compensation, and the Office of UC Tax Services, and then, in March, it heard from the Revenue Department and prosecutors from the Pennsylvania Attorney General's Office.

All these governmental agencies identified the obstacles each faces and what it would need to address worker misclassification more effectively under their respective authorities and prerogatives. Despite those drawbacks, all these

⁵ The Task Force has invited both the Republican and Democratic executive directors of the senate labor committee to call-in and observe its monthly meetings. In fact, the Democratic Executive Director of the Senate Labor Committee, Noah Erwin, has participated in several of the Task Force's monthly meetings.

agencies have explained that they are presently doing their best to bring bad actors, who are misclassifying workers, into compliance.

For instance, as I previously referenced in my testimony, L&I's three bureaus explained to the Task Force how they coordinate their efforts to investigate businesses that are allegedly misclassifying workers, not complying with the labor laws of the Commonwealth, failing to maintain the required workers compensation insurance, and disregarding their unemployment compensation obligations.

The Commonwealth's Revenue Department explained how it tackles tax issues related to misclassification, how it uses its tax enforcement authority to address bad actors, and what specific changes in the law and regulations it would need to improve its efforts, including some interesting tax withholding and reporting recommendations.

The Pennsylvania Attorney General's Office explained that it created a Fair Labor section to initiate criminal actions, where appropriate, on a variety of workplace issues. It has pursued criminal prosecutions on Act 72 violations, pursuant to its concurrent authority and it recommended to the Task Force changes in liability standards, criminal penalties, and debarment authority.

In April, the Task Force heard from Steve Mazza and Joel Niecgorski from the Pittsburgh Construction Misclassification Task Force, which has been on the frontlines on the misclassification issue in the City of Pittsburgh for the last three years. They explained to the Task Force how they have identified persistent issues, such as fraud schemes, what can be done to take on these bad actors and how the misclassification problem is occurring in residential construction as well as commercial construction.

In May, the Task Force heard from the New Jersey Labor Commissioner, Rob Asaro-Angelo. He explained how his state used a similar task force approach to identify issues on the worker misclassification front and then he explained what the New Jersey legislature enacted to provide his department with the necessary tools to come to the aid of workers impacted by misclassification. It was truly impressive.

My fellow Task Force members and I view New Jersey's approach to worker misclassification as the gold standard. I often say that if Pennsylvania could enact just a portion of the reforms that are currently on the books in New Jersey, we here in the Commonwealth will be in good position to take on misclassification in a very effective manner.

To that end, the Committee's consideration of New Jersey's final report of its Misclassification Task Force would be very worthwhile and could provide guidance on how to effectively address worker misclassification. I have provided a copy of the New Jersey report to each of our Task Force members to use as a point of reference as part of our report drafting process. For the convenience of the Committee, here is a link to the New Jersey report:

<https://www.nj.gov/labor/assets/PDFs/Misclassification%20Report%202019.pdf>

In both June and July, our Task Force devoted time to hear from individual workers and their perspective on how misclassification is impacting their daily lives. This was done through presentations by Community Legal Services of Philadelphia, and Philadelphia Legal Assistance. For example, the Task Force heard from misclassified workers in therapeutic health care, home health care, retail sales routes, and nanny-child care about their situations and the severe tax consequences they face.

In one case, the Task Force heard from a registered behavior technician who explained that she was classified as an independent contractor even though her

employer chose her clients, designated her work hours, directly supervised her services, and decided the treatment plan for her clients. In fact, her employer failed to fully compensate her even though the employer received full payment for services rendered from her client's insurance policy.

In another case, a childcare worker had an agreement with the family that they would treat her as an employee and deduct taxes from her pay and issue her a W-2. They never made the appropriate payroll deductions and instead sent her a 1099 after she had moved on to another position. This resulted in an IRS tax liability which she has had a difficult time paying.

In still another case, a gentleman, who worked as snack delivery driver, explained how he was forced to purchase a retail snack distribution route from his employer at exorbitant financing rates and how the employer dictated terms and conditions of the business relationship, and what could be sold on the route, as well as the route itself.

In August, Robert Wolper and his group "Rebuilding American Values" made a very thorough and comprehensive presentation to the Task Force that included the need for tracking misclassification violators and the types of violations. He even identified how misclassification distorted the public bidding process. The Task Force expressed an interest in considering the impact of misclassification on public bidding in its final report.

At the September meeting, the Task Force began its report drafting process. It kicked off this process by discussing background information on the worker misclassification issue, as well as a preliminary list of recommendations for addressing it. Its goal is to recommend how to strengthen enforcement, and how to educate employees, employers, and the public about misclassification and how to hold bad actors accountable most effectively.

Most recently, at the October meeting of the Task Force, Matt Capece from the International Carpenters Union and Delaware County District Attorney Jack Stollsteimer drilled down on the impact labor brokers are having on the worker misclassification issue. They explained how best to hold these labor brokers accountable across the board, even to the point of initiating criminal prosecutions where appropriate.

That brings me to what can be done to better tackle the worker misclassification issue. Understandably, I would not like to get ahead of the Task Force since it is in the process of initially considering and reviewing what to include in its report to the General Assembly. However, I have no difficulty highlighting a few concerns and issues on the worker misclassification front that L&I has identified over the past few years.

Perhaps most perplexing for BLLC is that its authority to investigate worker misclassification issues is confined to construction trades despite receiving complaints from workers in other business sectors who have deliberately been misclassified by their employers. BLLC can only forward these complaints to L&I's unemployment and workers' compensation bureaus for investigation and action.

In addition, unlike other states, BLLC does not have the power to enter worksites and review documents, which is needed to investigate worker misclassification complaints. Upon receiving a complaint, BLLC can only issue a letter to the business requesting relevant documentation and records. Of course, the business is not under any legal or judicial compunction to provide BLLC with the documents and records it needs to determine if there is a misclassification violation. This should change.

Further, BLLC could more effectively address worker misclassification against defiant and repeat offenders if it had less cumbersome stop work authority. BLLC's current stop work authority involves a tedious judicial process

and notification period of 20 days, which can and does mean that the offending business may have completed the project and be long gone by the time the stop work order is issued.

Also, BLLC could make effective use of debarment authority to hold businesses accountable for repeat misclassification violations. It has made effective use of debarment authority in pursuing defiant violators of the Prevailing Wage Act. L&I's authority to debar for prevailing wage violations provides the General Assembly with strong precedent to extend debarment authority to the worker misclassification front.

In the end, I would just like to note that worker misclassification is a widespread and vexing problem in the Commonwealth. It is not a partisan issue that breaks down along political lines. In fact, it is not exclusively an organized labor or non-union matter.

Rather, it boils down to a question of fairness to workers, fairness to taxpayers and fairness to law-abiding businesses that are forced to compete on an uneven playing field against competitors who cut corners and violate the law. It is that simple and straightforward.

Thank you for your attention. I would be happy to answer any questions that you may have.