



**Pennsylvania Attorney General Josh Shapiro**  
Testimony submitted to the Senate Democratic Policy Committee  
For the hearing entitled  
**“Worker Misclassification and the Future of Work”**  
November 15, 2021  
Presented by

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Chairwoman Muth, Senator Kane, and all members of the Committee, thank you for inviting me to testify today. My name is Nancy A. Walker, and I am the Chief Deputy Attorney General of the Fair Labor Section at the Office of Attorney General.

In 2017, Office of Attorney General established the first ever Fair Labor Section. The Section is tasked with protecting working Pennsylvanians and law-abiding employers. Since our inception, I have met with hundreds of workers, employers, stakeholders, and companies across the Commonwealth to hear about the challenges they are encountering. Those interactions have made clear that employee misclassification is one of the most widespread, pressing problems facing Pennsylvania's workforce. In fact, worker misclassification is a problem the entire country is experiencing. Misclassification robs workers of the wages they earned and precludes them from essential protections that laws confer on employees. In addition, it unfairly benefits cheating employers and drains state and local coffers of owed revenue.

Workers that are classified as independent contractors are not covered by the standard protections of the modern workplace. A misclassified worker is not entitled to minimum wage or overtime, protection from discrimination, family and medical leave, the right to organize, workers' compensation, and unemployment

compensation. They also are not entitled to employment benefits like medical insurance or retirement contributions. They are responsible for paying the full payroll tax contribution to federal Social Security and Medicare programs. Those legitimately operating an independent business can negotiate contracts and secure insurance and other benefits. Misclassified workers, however, are left with the worst of both worlds—all of the precarity of the independent contractor, but none of the control.

Misclassification transcends industries. A survey of state and federal studies by the National Employment Law Project found high rates of misclassification among workers in the janitorial, home care, real estate, tech, local delivery, and trucking industries.<sup>1</sup> It is a well-known problem in the construction industry, and led to Pennsylvania enacting Act 72—the Construction Workplace Misclassification Act—in 2011. With the emergence of the gig economy, the problem is expanding exponentially. This is particularly concerning given the projections for the number of people expected to work in this sector in the future.<sup>2</sup> It is becoming all too common for gig companies to take advantage of their position and impose one-sided and constantly changing terms of service under the guise of an independent

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<sup>1</sup> National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Cost on Workers and Federal and State Treasuries*, 2 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

<sup>2</sup> Sacha Mehlhase, *Making the Most of the Gig Economy*, Law Technology Today (Sept. 24, 2020) <https://www.lawtechnologytoday.org/2020/09/making-the-most-of-the-gig-economy/>.

contractor relationship. This dynamic allows companies to evade the legal obligations of a traditional employer while retaining all the advantages. One recent study found drivers for Uber and Lyft take home as little as \$4.82/hr. in Boston after factoring in expenses and time between customers, far less than minimum wage.<sup>3</sup>

The effects of misclassification are felt beyond the homes of individual working Pennsylvanians. The Keystone Research Center estimated that the Commonwealth lost between \$37.5 and \$136.7 million in unemployment compensation tax, income tax, and workers' compensation premiums in 2016 as a result of misclassification in the construction industry alone.<sup>4</sup> As early as 2000, long before the rise of the gig economy, a U.S.-Department-of-Labor-commissioned study found that between ten and thirty percent of the employers they audited misclassified workers—likely an underestimate.<sup>5</sup> The Pennsylvania Department of Labor & Industry's Center for Workforce Information and Analysis

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<sup>3</sup> Ken Jacobs and Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour*, 2 Univ. of Cal. Berkeley, Institute for Research on Labor and Employment (Sept. 29, 2021), <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/>.

<sup>4</sup> Stephen Herzenberg and Russell Ormiston, *Illegal Labor Practices in the Philadelphia Construction Industry: an Assessment and Action Plan*, 4 (Keystone Research Center, Dec. 2018), [https://www.keystoneresearch.org/sites/default/files/KRC\\_Illegal\\_Labor\\_in\\_Construction\\_Final.pdf](https://www.keystoneresearch.org/sites/default/files/KRC_Illegal_Labor_in_Construction_Final.pdf).

<sup>5</sup> Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

recently estimated that 15% of Pennsylvania employers misclassify their employees.<sup>6</sup> Finding a solution to the problem of worker misclassification is an important focus.

Not all employers that misclassify employees do so intentionally. In our Commonwealth, there is no uniform definition of employee or independent contractor. The Workers' Compensation Act applies one standard, Act 72 another, and the Unemployment Compensation Act, another still.<sup>7</sup> In addition, a body of common law has developed its own criteria for determining employee status for wage and hour purposes.<sup>8</sup> The result is a patchwork of standards that workers and employers may have difficulty understanding and applying.

There are potential solutions to the problem of misclassification, however. First, a uniform definition of "employee" could be applied across all of Pennsylvania's labor and employment laws. Pennsylvania adopting what is known as the ABC test for distinguishing employees from independent contractors across all employment-related statutes and regulations could remove a lot of the uncertainty created by different standards. The ABC test is used to distinguish employees from independent contractors by a number states, including

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<sup>6</sup> *Hearing on H. 716 Before the H. Comm. On Labor & Indus.*, 203d General Assembly (2019) (statement of Deputy Sec. of Labor & Indus. Jennifer Berrier) [https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2019\\_0064\\_0005\\_TSTMNY.pdf](https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2019_0064_0005_TSTMNY.pdf).

<sup>7</sup> 77 P.S. § 22; 43 P.S. § 933.4; 43 P.S. § 753.

<sup>8</sup> See, e.g., *Com. Dept. of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873-74 (Pa. Commw. Ct. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004) (applying the economic realities test).

Connecticut, Massachusetts, Nebraska, and New Jersey.<sup>9</sup> As with Act 72, the starting premise is that a worker is an employee. Only workers that meet all three conditions of the ABC test may be classified as independent contractors. The three prongs of the ABC test are:

- A) The individual is free from control or direction over their work, both under the contract of service and in fact;
- B) The individual's work is outside the usual course of business of the employer; and
- C) The individual is customarily engaged in an independently established trade, occupation, profession or business.

Act 72 essentially is an ABC test, but with additional requirements for the last prong, describing the factors necessary to establish an independent trade, occupation, profession or business in the construction industry. It may make sense for those requirements to remain in place for the construction industry—with the remainder of the test applicable for all other types of industries.

The ABC test's ease of application—in contrast to the current mosaic of tests of varying stringency—could simplify compliance for employers, and may help them to avoid the scenario in which it may be possible for a worker to be

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<sup>9</sup> Rhinehart et al., *Misclassification, the ABC test, and employee status: The California experience and its relevance to current policy debates*, 8 Economic Policy Institute (Jun. 16, 2021), <https://files.epi.org/uploads/229045.pdf>.

considered an employee for the purposes of one statute and an independent contractor for another. At the same time, it could provide workers with better protection from misclassification, helping to ensure that only those truly in business for themselves are classified as independent contractors. It may also help to level the playing field for law-abiding businesses, and could increase the Commonwealth's tax receipts, depleted from the strain of the pandemic.

Second, the Department of Labor & Industry ("DLI") could be empowered with a broader range of enforcement tools. Although Act 72 currently provides for stop-work orders, it may be more effective if streamlined. Perhaps, stop-work orders could evolve into cease-operations orders, applicable across all industries. Additionally, DLI could be granted the authority to debar employers that misclassify employees from bidding on or participating in state-funded or supervised construction or procurement contracts. Debarring employers that misclassify employees would also underscore the Commonwealth's commitment to working only with contractors that operate within the parameters of the law. To assist with the costs of this increased civil enforcement, DLI could be permitted to assess investigative costs and counsel fees against employers found in violation of the Act, and a portion of the penalties assessed could be allocated to support the administrative and enforcement costs of the Bureau of Labor Law Compliance.

Third, the General Assembly could enhance criminal penalties for employers that misclassify employees. The maximum penalty an employer currently faces, even if they have previously been convicted of misclassifying employees, is conviction for a second-degree misdemeanor, resulting in a maximum \$5,000 fine and up to two years in prison. Enhancing penalties so that an employer is guilty of a first-degree misdemeanor for knowingly misclassifying employees,<sup>10</sup> and escalating to a third-degree felony<sup>11</sup> for second and subsequent offenses could have a greater deterrent effect. Additionally, making it easier to impute culpability for misclassification by supplier employers onto end-user employers,<sup>12</sup> when appropriate, may be a useful tool. Because these cases are resource intensive, criminal enforcers could be authorized to recover counsel fees and investigative costs from those who are convicted of or plead guilty or *nolo contendere* to criminal charges of misclassification.

Fourth, legislation could address the need for streamlining communications and sharing information between and among agencies. If the agencies were able to more freely share information, it would increase efficiency in our enforcement efforts.

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<sup>10</sup> Punishable by a maximum \$10,000 fine and up to five years in prison. 18 Pa.C.S. §§ 1101(4) & 1104(1).

<sup>11</sup> Punishable by a maximum \$15,000 fine and up to seven years in prison. 18 Pa.C.S. §§ 1101(3) & 1103(3).

<sup>12</sup> In the construction context, they are generally referred to as labor brokers and prime contractors, respectively.



Fifth, the posting requirement currently in effect under Act 72 could be expanded. If employers posted information regarding misclassification at all places of business with other legally required notices it could better educate works about their rights.

And finally, if misclassified employees had a private right of action, such as exists under the Wage Payment and Collection Law, it could encourage broader enforcement. Empowering victims of misclassification would have the added benefit of relieving DLI of some of the burden of civil enforcement and act as a reasonable deterrent similar to existing laws.

Employee misclassification is having a profound effect on Pennsylvania. It robs employees of the wages, benefits, and protections they are entitled to, forces law-abiding employers to compete on an uneven playing field and deprives state and local governments of owed revenue.

On behalf of Attorney General Shapiro, thank you for the opportunity to offer testimony.