

EMPLOYEE MISCLASSIFICATION ADVISORY TASK FORCE

FINAL RESPONSES TO QUESTIONS POSED BY THE COMMITTEE CHAIR

(1) “Whether civil matters involving unlawful employment practices should be referred to the Attorney General’s Office. If so, which cases should be referred?”

Response: The Attorney General’s Office has authority to take action in three instances involving unlawful employment practices. The first involves cases where an employer petitions the Davidson County Chancery Court for judicial review of a civil penalty assessed against it by the Department of Labor pursuant to Tenn. Code Ann. §§ 50-6-118(a)(1), 50-6-405(d)(3)(a), and 50-6-412(d),(e),(f) and (h). Judicial review petitions should be referred to the Attorney General’s Office whenever a petition is served upon the Department.

The Attorney General’s Office can also take action in cases falling under the False Claims Act. These cases involve an employer who files a false claim in order to minimize unemployment tax liability. In cases where the offending employer is working on a project funded with State dollars or political subdivision funds, the employer can be assessed civil penalties between \$2,500 and \$10,000 for each false claim filed. The employer could also be assessed treble damages.

Finally, any case in which the Commissioner of the Department of Labor wishes to enjoin an employer from operating a business due to violations of the workers’ compensation law should be referred to the Attorney General’s Office. Pursuant to Tenn. Code Ann. § 50-6-412(i), the Commissioner has authority to seek an injunction against any employer who disobeys an order from the Commissioner or the Commissioner’s Designee to obtain workers’ compensation insurance coverage, and against any employer who fails to secure payment of compensation on a subsequent occasion.

(2) “Whether agencies including EMEEF will work closely with the AG’s Office to ensure that employers have ceased violating the law.”

Response: Every agency that regulates state labor and employment practices has shown a willingness to assist the Attorney General in policing employers to prevent legal violations and punish malfeasance. However, a lack of available resources diminishes enforcement efforts.

For example, in situations where an employer has been enjoined from operating a business for failing to obtain workers’ compensation insurance, the Attorney General’s office would be responsible for bringing contempt actions against an employer who violates the terms of the injunction. The Tennessee Department of Labor assists in enforcement by reporting activity that violates the injunction. The Department of Labor, however, has too few investigators to closely

watch each enjoined employer. Oftentimes, an employer who has been ordered closed will simply start a new operation under a different name within a matter of days.

To make headway in policing employers, the number of investigators should be increased. Further, the EMEEF and the Department should tap local resources, such as the local police department or codes inspectors in construction cases, to ensure that injunctions are being honored. Some local codes offices have already expressed a willingness to assist in this area.

(3) “Whether criminal matters involving employee misclassification and related unlawful employment practices should be referred to the District Attorney’s Office and/or TBI.”

Response: Criminal prosecution should not be the preferred method for combating employee misclassification and unlawful employment practices. The criminal process requires a higher burden of proof and is not sufficiently nimble or expeditious to provide punitive measures likely to curb this illegal activity. Civil measures including injunctions and stop work orders can be more easily obtained and, therefore, will better serve to stop illegal activity.

Criminal prosecution, however, can be a useful tool for reprimanding employers who continuously circumvent the law or misclassify workers on a large scale over an extended period of time. Accordingly, only egregious cases should be referred to the District Attorney’s Office and/or the TBI for prosecution.

(4) “Whether Employee Misclassification Education & Enforcement Fund (EMEEF) and other agencies should work closely with the DA’s office and/or TBI to ensure the quality and extent of proof is sufficient and helpful to obtaining criminal prosecutions.”

Response: The EMEEF and other agencies should work closely with the DA and/or TBI to ensure that the quality and quantity of proof is sufficient to satisfy a beyond a reasonable doubt standard. To achieve this goal, professional, educational and certified training for agencies and/or investigators is necessary. Specific areas of training could include: evidentiary standards of proof, explanations of the common law test and the ABC test, and workshops on writing subpoenas and obtaining affidavits.

The enforcement committee understands that Kim Jefferson has researched and requested training for UEF & EMEEF workers’ compensation specialist/investigators. This training should assist investigators in recognizing the difference between criminal and civil consequences so the investigators understand the quality of proof necessary for each type of prosecution. The training should also provide guidance on the weight to be given an employer’s history of noncompliance when deciding whether to refer the case for criminal prosecution. Specific criteria from the DAs’ office establishing a threshold for criminal prosecution would be invaluable. Once the agency or investigator determines a criminal statute has been breached, then a specific path with guidance from the DA’s office to investigate and develop useful proof should be available.

Statutes governing investigative procedures would also be helpful. UEF investigations are governed by specific procedure and the EMEEF would benefit from similar regulations. Developing a plan and a commitment for the Tennessee Department of Labor and Workforce Development to collaborate and identify areas of potential cooperative methods and processes for the purpose of administering civil penalties or referring criminal activities that cross inter-agency departments would assist in the timely sharing of information and provide for employee growth, efficiency and productivity.

However, the importance of civil penalties to combat unlawful employment practices cannot be minimized. Civil penalties need to be established for EMEEF cases because there are presently no civil penalties for unlawful deductions or Workers' Compensation premium avoidance. The absence of a civil penalty reduces enforcement options necessary to ensure a fair market.

(5) “Propose legislation granting the Department and EMEEF the ability to monitor, regulate and penalize (if necessary) for employee misclassification and unlawful employment practices and the amount of such penalties.”

Response: Preliminarily, new legislation should clearly define the actions that constitute misclassification of employees. Actions including erroneously or willfully classifying employees as independent contractors, concealing or misrepresenting employee duties to avoid proper classification, concealing or understating payroll, and negligently or willfully failing to ensure that subcontractors have insurance coverage should be included in the definition of employee misclassification.

The Enforcement Committee suggests that the legislation governing this area be primarily complaint driven to keep costs down. However, the legislation should also provide investigators with broad authority to enter worksites and places of business and access employer records to determine whether misclassification is occurring. Once misclassification is identified, legislation should provide enforcement measures such as the authority to enter targeted stop work orders that can be swiftly deployed.

Any employer who violates a stop work order should be assessed a penalty of \$1,000 per day to be assessed by the Department. Legislation should also provide courts with authority to enjoin employers who violate stop work orders. This added level of enforcement would be beneficial as a violation could result in a finding of contempt.

In addition to stop work orders, the Enforcement Committee also suggests that the legislation include civil penalties for misclassification. The civil penalty amounts should be commensurate with the level of culpability of the offending party. Accordingly, negligent violations of the law would carry smaller civil penalties. The Enforcement suggests a maximum penalty of up to \$1,000 per day for each worker that was negligently misclassified.

Willful violations would carry more severe civil penalties. The Enforcement Committee suggests a civil penalty of \$2,500 per misclassified employee per day for willful misclassification. Repeated willful misclassification should result in disgorgement of all profits earned on a project and loss of the employers business and/or contracting license. The employer should be given the opportunity to have a contested case hearing to challenge any penalty assessment or license revocation in the manner provided by Tenn. Code Ann. § 4-5-301, *et seq.*

Concurrent with civil penalties, employee misclassification legislation should include criminal penalties for egregious violations of the law. However, criminal penalties should be used as a “weapon of last resort” for employers who repeatedly and willfully violate the statute.

(6) “Whether existing laws aimed at preventing, investigating, and taking enforcement action against the failure of employers to properly classify individuals as employees are effective.”

Response: Existing laws are somewhat effective. However, the intermingling of criminal sanctions and civil penalties creates some difficulty in enforcing civil penalties because the employer may invoke Fifth Amendment protections during the administrative penalty phase.

(7) “Other Enforcement Issues: Labor Brokers”

What are Labor Brokers?

Labor brokers are companies or individuals that provide construction companies with temporary workers. They often work for a subcontractor as second or third tier subs. Labor brokers often come to Tennessee from other states making their activities difficult to track.

Many labor brokers use migrant workers that do not understand English or Tennessee laws. Labor brokers often house the workers in a single apartment in groups of six to eight. The labor brokers deduct the cost of rent from their employees’ paychecks.

The employees often work more than forty hours per week but receive no overtime pay. Further, the employees typically experience trouble getting their pay and are sometimes charged a fee to perform the work. Most employees are paid cash or by check.

How is the State Affected?

Workers Compensation is affected because most labor broker companies obtain only a minimum workers’ compensation insurance policy despite their staffing levels. Further, the companies never report their true payroll and often leave the state upon completing work.

Many labor brokers misclassify their workers as independent contractors and pay their workers off the books. The Employment Security Division loses money on labor brokers because they never open an unemployment account or they underreport their payroll. The labor brokers can do this with impunity with the knowledge that their employees will be reluctant to file a claim for unemployment.

How to correct the labor brokers in the State of Tennessee

1. Require all companies operating as labor brokers to register with the Secretary of State and with the board of licensing.
2. Require the owner of any company providing labor broker services to have a contractor's license.
3. Require all companies providing labor broker services to open an unemployment account in Tennessee prior to offering services. Further, require the labor broker company to provide a list of all the companies with which they subcontract on a quarterly basis. General contractors or contractors should also be required to report to the Tennessee Department of Labor the names and addresses of the labor brokers and other subcontractors on their job sites. If a general contractor fails to identify the labor broker services used and subcontractors operating on the site, the general contractor will be liable for any unpaid unemployment taxes.
4. Require all companies providing labor broker services to be approved by the Department of Labor before they can offer services in Tennessee and further require those companies to provide an accounting of the number of workers they employ to the Department of Labor. The Department of Labor can then maintain a registry of all approved labor broker companies and the number of employees disclosed by that company. Contractors could access the registry to determine if they are dealing with an approved labor broker company.
5. Fine any general contractor or contractor who uses the services of an unregistered/unapproved labor broker.
6. Give the Tennessee Department of Labor authority to fine a contractor or labor broker who hides payroll to reduced workers' compensation premiums
7. Promulgate legislation allowing the issuance of stop work orders for sites utilizing the services of unapproved labor brokers.