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FALL 2008

10TH ANNUAL NAFC CONFERENCE

Washington, DC, October 1-3, 2008



COURTS GIVE OK TO SUE • HOUSTON ADDRESSES IC ISSUE • SEC. PEREZ of MARYLAND

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ON THE COVER: US Capitol visitor center under construction. The official opening date is December 8, 2008 which is the 145th anniversary of the placing of the Statue of Freedom atop the Capitol Building..

Since 1990, the National Alliance for Fair Contracting (NAFC) has been providing a forum in the construction industry for those interested in fair, competitive contracting.

NAFC is a labor-management organization that promotes a “level playing field” through compliance with all applicable laws in public construction.

When responsible contractors bid and perform public construction projects, the taxpayer gets a high quality project performed by contractors who comply with the laws of the land.

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Community Based Wage Laws Benefit Local Communities

This year marks an historic occasion for the National Alliance for Fair Contracting (NAFC) for it is our official 10th anniversary as an incorporated national non-profit labor-management trust.

For all these years NAFC has been professionally promoting fair contracting principles and supporting responsible contractors and their employees within the publicly funded construction industry.

Our efforts have not only benefited these employers and their employees but the communities in which they reside and do business as well. For when the government procurement process is fair and compliance with existing laws such as the Davis-Bacon Act is the rule rather than the exception, then it is our local communities and their economies that benefit.

A primary example is the Davis-Bacon Act which was passed in 1931 (over 77 years ago) by Republicans concerned about federal tax dollars and their effect on local communities. This very important economic measure has served our nation well for almost eight decades and with proper oversight by the government will continue to serve our local communities for many decades to come.

It is one law that has indeed survived the test of time through several administrations and numerous Congresses from both sides of the aisle. Even in 1994 when a repeal attempt was made, it was defeated because saner heads finally realized the disastrous economic effects repeal would have meant for the country's economy and the construction industry as a whole. So the Republicans many years ago knew what they were doing when

they passed this long standing positive economic law.

And with ever diminishing resources government employees working for the United States Department of Labor's Wage and Hour Division have been doing all they can to keep the Act alive and well by their dedicated service to fair and responsible contractors and their hard working employees. For them ideology does not enter into the process. They know first hand the positive effects of the law on the communities in which they live with their friends and neighbors who may be either employers or employees in the construction industry.

When one looks past the words in the Act and into the faces of the workers that it protects, who are just trying to raise their families and get their piece of the American dream, one begins to fully appreciate the value and importance of this legislation.

Those public servants in the 1930's saw a need for a government procurement process that would give back to the communities from which the revenue for public projects originated in the first place. And so it is to their vision for hard working American citizens that the National Alliance for Fair Contracting has rededicated its efforts in 2008.

NAFC fully realizes that the America of the future will face many serious challenges and it is ready to do what it can to work professionally and cooperatively with the federal government in order to ensure that the process of publicly fund-



Rocco Davis, Chairman

ed construction is fair and equitable for all that are involved.

A level playing field creates a process where the entire tax paying public benefits from projects that are built on time and within budget. And the American public believes the men and women that build these projects should be fairly compensated for all the hard and dangerous work they perform on a daily basis.

The many years that NAFC has been involved in promoting fair contracting principles throughout this great country of ours has indeed been an honorable mission. And so our 10th annual conference will be a celebration of those efforts. NAFC and its members can indeed be proud of the professional reputation it currently enjoys with the public sector of the construction industry and the federal agencies that oversee the projects.

And while this past can be viewed with pride, NAFC is fully aware of the challenges our responsible contractors, their employees, and government agencies face in the future.

With the professional dedication of this organization and its members, we will prove to all that we are up to the task and will deal effectively with any and all challenges to the fair contracting process in the future. We serve because we care.

Enjoy the conference.

Workers Given Green Light

The 10th Annual NAFC Conference will kick off on October 1, 2008 in Washington DC with a Legal Roundtable. Topics include “Using Private Litigation to Enforce Prevailing Wage Laws.” Conference participants will hear from attorneys and fair contracting groups about new litigation strategies to enforce prevailing wage laws which they can add to their organization’s fair contracting “tool-box”. Some of those cases include:

Araujo and Cox (New York)

The highest Court in New York (the Court of Appeals of New York) has ruled that workers have a right to sue in state court for breach of contract to recover prevailing wages on federally-assisted housing projects. (Cox v. NAP Construction Co. and Araujo v. Tiano’s Construction Co.). The workers sued the contractors and their sureties in New York state court on claims for breach of contract, unjust enrichment and violations of New York wage and hour law.

Both cases involved projects entered into by the New York City Housing Authority under the 1937 federal Housing Act. The New York high court ruled in favor of allowing workers employed on a federally-funded project which contains a Davis-Bacon Act “Related” provision to sue under state law for recovery arising from prevailing wage violations. The court held that workers become

“third party beneficiaries of the contractors’ contract with the housing authority to pay the prevailing wage and benefits.”

The contractors raised three main objections to the right of workers to bring a state court action:

1. That there is no private right of action under the Davis-Bacon Act;
2. That federal law pre-empts all state court actions to enforce prevailing wage violations;
3. That workers must rely solely on US Department of Labor administrative remedies.

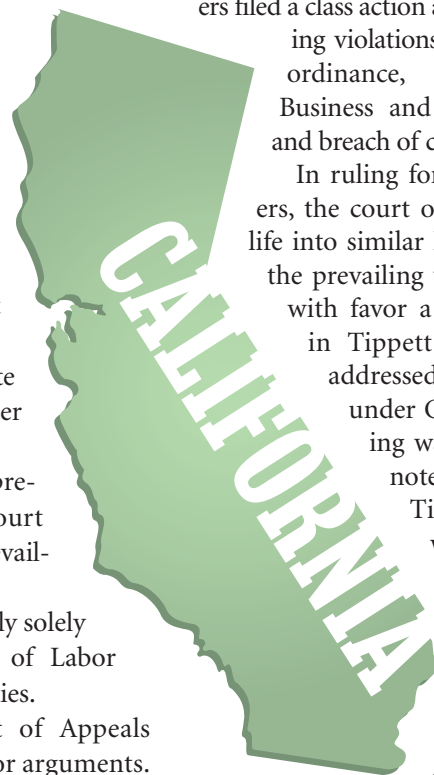
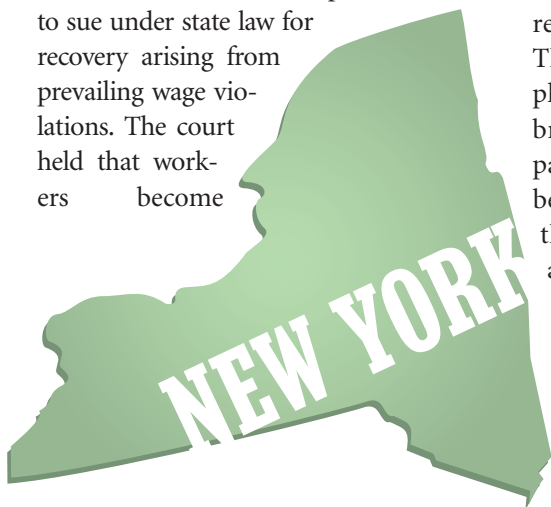
The New York Court of Appeals rejected all three contractor arguments. The court stated: “We ... conclude that plaintiffs in both these cases have valid breach of contract claims as third-party beneficiaries of the agreements between NYC Housing Authority and the contractors” and, therefore, allowed the workers to proceed to recover unpaid prevailing wages and benefits in New York state court under both a breach of contract claim and under New York state labor law.

Amaral v. Cintas Corporation and Tippet v. Terich (California)

A recent decision from the California court of appeals ruled favorably on the legality of a municipal living wage ordinance. The City of Hayward and Cintas Corporation had entered into contracts for laundry services requiring payment of the living wage. When Cintas failed to pay the required wages and benefits, its workers filed a class action against Cintas alleging violations of the living wage ordinance, the California Business and Professions Code and breach of contract.

In ruling for the Cintas workers, the court of appeals breathed life into similar lawsuits to enforce the prevailing wage law by citing with favor a previous decision in Tippet v. Terich, which addressed the same question under California’s prevailing wage law. The court noted that the court in Tippet held that workers are third party beneficiaries who may sue to enforce a contractor’s promise to pay prevailing wages and concluded that the state statutory remedies for violations of the prevailing wage law are not exclusive.

The court in Tippet held that “contractors’ employees who are not paid a prevailing wage can sue as third party beneficiaries for their employer’s breach of the public works contract...If the contractor and the public agency agree in their contract that employees of contractors will be paid the prevailing wage ...a breach of contract action based on third party ben-



to Sue to Recover Wages

eficiary principles is available to the employee. ... Since employees working on the public works projects are the intended beneficiaries of this provision, they are third party beneficiaries of the contract between the public agency and the contractor. We therefore find no obstacle to the employee's common-law suit against the contractor on a third party beneficiary theory."

Favel (Montana)

Workers employed by subcontractors on a federal contract between the American Renovation & Construction Co. (ARC) and the U.S. Air Force (USAF) to construct military housing at Malmstrom Air Force Base sued in state court, alleging that they were not paid prevailing wages under the Davis-Bacon Act. The workers

sought relief in state court on various common law grounds including breach of contract, negligence and wrongful discharge. The workers in this case were assisted by the Montana fair contracting group (Montana Labor Management Alliance).

The Montana Supreme Court ruled that its state courts had jurisdiction to hear the workers' common law claims for breach of contract which guaranteed them wages established by the federal Davis-Bacon Act.

Just as in the New York cases discussed above, the contractors raised three main arguments to try to defeat the workers' case and, again, the court ruled for the workers.

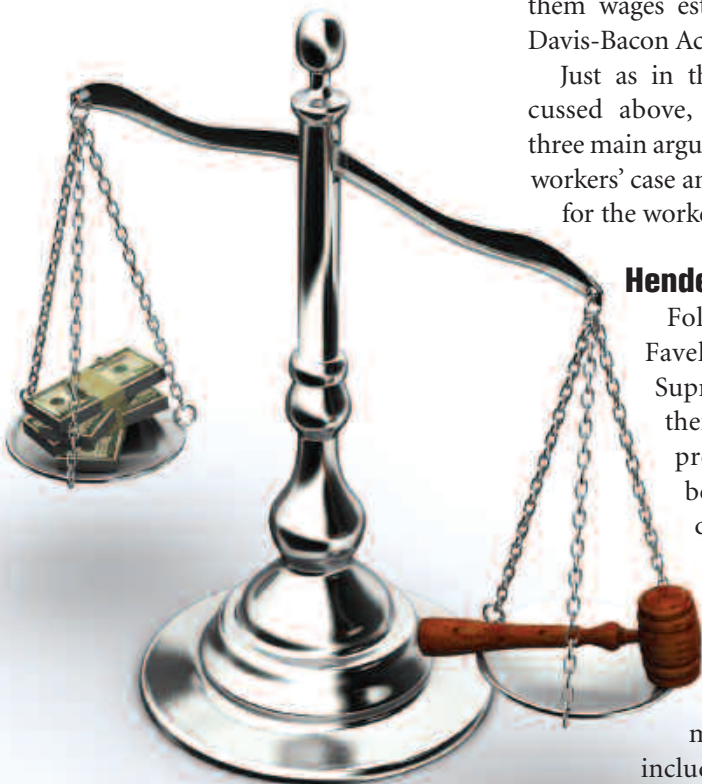
Henderson (Montana)

Following the victory in Favel in the Montana Supreme Court, the workers then successfully sued the provider of the surety bond for the project in question in the Favel case after the contractor became insolvent. The workers sought to recover the amount of the judgment in Favel which included back wages.

The surety company argued, among other things, that it was not liable for the judgment on the basis that the workers are limited to a claim under the Miller Act. The court rejected this argument, stating that: "There is no requirement ... that parties must first pursue their claims under the Miller Act or through administrative pathways before being allowed to bring common law claims in state court."

The court further agreed that the surety company was "jointly and severally" liable for the entire amount of the judgment awarding back wages to the workers and, like the court in Favel, found that the workers were the "contemplated beneficiaries of the original surety bond" in which the surety company had agreed to indemnify the contractor in its performance of the construction contract in question. The court refused to accept the argument that the only recourse for the workers was to sue in federal court under the Miller Act which has a very short statute of limitations and often makes it difficult for workers to sue.

Important to the Montana District Court in Henderson was the decision of the US Court of Appeals in the Ninth Circuit in *K-W Industries v. National Surety Corp.* in which the federal court of appeals decided that the "...National has pointed to nothing in the Miller Act or in its legislative history to suggest that Congress intended the [Miller] act to protect sureties from ... violations of state law ...". The Ninth Circuit concluded that a lawsuit on the Miller Act bond is, therefore, not the exclusive route for a party that claims it is owed payment by a contractor on a federal construction project.



Affiliated Construction Trades Foundation v. West Virginia DOT (West Virginia)

In a case brought by the Affiliated Construction Trades Foundation (ACT) /West Virginia BCTD against the West Virginia Department of Transportation and the Federal Highway Administration, a federal court judge ruled that State and federal officials illegally exempted a federal-aid highway project from the Davis-Bacon Act (the King Coal Highway). The federal district court concluded that the contractor (Nice-wonder Contracting Inc.) should have been required to pay prevailing wages under the Davis-Bacon “related” section of the Federal Aid Highway Act (section 113) on a project funded by the West Virginia Department of Transportation and the Federal Highway Administration (FHWA).

The ACT Foundation sued to challenge some 13 miles of the project being built by Nicewonder in Mingo County, West Virginia. The judge ruled that ACT was correct in arguing that workers on the project should have been paid according to the Davis-Bacon Act’s requirement.

The court ruled that the FHWA decision that the contract was not subject to the Davis Bacon Act was flatly wrong and that there are no administrative procedures “that expressly provide review of a coverage determination” by the FHWA. It summarily rejected the argument that plaintiffs had failed to exhaust its administrative remedies.

Reviewing the merits of the coverage denial by FHWA, the court rejected FHWA’s excuse that because the contract had been let through a negotiated procurement rather than through competitive bidding that it was not subject to the Davis-Bacon Act. Citing the FHWA

Emergency Relief Manual which states that the Davis-Bacon Act can only be waived in an emergency and upon the issuance of an executive order by the President. The court found nothing in the Manual or statute which exempted negotiated procurements from Davis-Bacon coverage.

Following the initial decision, the court asked the parties to provide additional legal briefs spelling out what kind of remedies should be required. The ACT Foundation is seeking back pay for the workers who were not properly compensated.

Cincinnati ex rel. Zimmer (Ohio)

Cincinnati ex rel. Zimmer was brought by two Ohio taxpayers, who are also officers of the Cincinnati Building and Construction Trades Council and Laborers’ International Union Local 265, against the owner/developer of a downtown Cincinnati housing development built on top of a parking garage. Only one story of the parking garage was to be open to the public. The funding agreement between the city and the developer required that the construction of the parking garage was subject to Ohio’s prevailing wage law, but the housing development project was exempted.

The two taxpayers had sent letters to the City Solicitor and the Ohio Attorney General requesting them to compel the city and the developer to comply with the prevailing wage law for the housing part of the development. When that

failed, the two taxpayers filed a “taxpayer suit” under Ohio Law R.C. 733.59. They contended that the construction of the parking garage and the housing development was a single project subject to the prevailing wage law.

Ohio law allows taxpayer suits “to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract ... which was procured by fraud or corruption.” To maintain a taxpayer suit, the taxpayer’s aim must be to enforce a public right.

The court concluded that “this court has previously determined that a taxpayer has the requisite standing to bring suit ... to challenge a public authority’s failure to comply with the prevailing wage law.” It, therefore, allowed Zimmer and Brice to continue with their taxpayer suit against the City of Cincinnati.

- *Cox v. NAP Construction Co; Araujo v. Tiano’s Construction Co., New York Slip Opinion 04949 (June 5, 2008).*
- *Amaral v. Cintas Corporation, 78 Cal. Rptr. 3d 572 (Cal. App. 2008).*
- *Tippett v. Terich, 37 Cal. App.4th 1517 (1995).*
- *Favel v. ARC, 312 Mont. 285, 59 P.3d. 412 (2002).*
- *Henderson v. St. Paul Fire and Marine Insurance Co., Montana Judicial District Court, No. CDV-05-192 (2007).*
- *Affiliated Construction Trades Foundation v. West Virginia DOT, S.D. W.Va. No. 2:04-1344 (September 5, 2007)*
- *Cincinnati ex rel. Zimmer, Ohio Court of Appeals 3156 (2008).*



Back Wages Paid to Michigan Workers

“From time to time unscrupulous contractors ignore the requirements of prevailing wage and are forced to pay back wages when discovered”.

The Michigan Fair Contracting Center (MFCC), a member of NAFC, has assisted in the effort to get eight equipment operators and four laborers employed by C&H Site Development more than \$130,000 in back wages.

History

Several claims were filed by MFCC for the workers of C&H in early 2006 for school construction projects located throughout Oakland County. The Michigan Department of Labor and Economic Growth, Wage and Hour Division found all the claims had merit and sited C&H to be in violation. The contractor was immediately placed on the State’s violators website list a total of 13 times.

Beyond that, Michigan’s law has no other penalties or fines, nor can it than force a contractor to pay the back wages. Although Michigan’s law is weak, many contactors comply when found in non-compliance, if for no other reason to avoid being placed on the State’s violators list. The violator’s

list appears on the State’s website and is often referred to by project owners and construction managers as a guide when awarding bids.

At this point all administrative remedies were exhausted, and it was necessary to pursue other avenues in collecting the worker’s back wages. To begin the process, MFCC representatives reached out to the construction managers for the projects in question to tie up C & H’s progress payments, and then secured legal assistance through David Selwocki, an attorney with Sullivan, Ward, Asher & Patton in Southfield, Michigan to file a lawsuit on behalf of the workers, covering all projects, for breach of contract and breach of implied contract. During the discovery process the factual basis of the workers’ claims was not disputed by C & H. C & H did not contest these charges during the discovery process, which then allowed for pursuing claims on the bond that ultimately resulted in the recovery of the back wages.

This represents the largest claim ever handled by MFCC.



Editor’s Note: Submitted by MFCC which is a Michigan non-profit organization that provides educational services on public projects to ensure compliance with all applicable prevailing wage rate regulations and related standards (Federal Davis-Bacon, Michigan Prevailing Wage Law, and local ordinances and resolutions). For additional information please contact: P.O. Box 530492, Livonia, MI 48153-0492 or visit: www.mifcc.org

AGC of New Jersey Executive Director Brian N. Tobin Wins Forty Under 40 Award

Brian N. Tobin, Executive Director of the Associated General Contractors of New Jersey (AGC of NJ) and the New Jersey Asphalt Pavement Association (NJAPA) and a Member of the Board of Directors of the National Alliance for Fair Contracting was recently named a 2008 Forty Under 40 recipient. The awards program is produced by NJBIZ, New Jersey’s premiere business news publication.

The Forty Under 40 awards program honors men and women who have been making headlines in their field and who share a commitment to business growth, professional

excellence and the community. Tobin was nominated for the award by the Presidents of the AGC of NJ and NJAPA, Jeff Cruz and Steve Kurtz, respectively.

NJBIZ and the program sponsors will honor this year’s 40 winners during an awards ceremony on Monday, September 22, 2008 at the Palace at Somerset Park in Somerset, N.J. Winners will be highlighted in a special supplement to NJBIZ on September 29, 2008.

For more information, contact Wendy Berg at wberg@njbiz.com.

Houston Addresses Independence

By Michael Bologna
Houston Chronicle, July 24, 2008

The Houston City Council passed an ordinance recently requiring better record keeping from contractors working for the city.

The new rules are aimed at making it harder for companies to misclassify their workers as “independent contractors,” to avoid paying Social Security, Medicare, workers’ compensation or unemployment insurance. Union officials say the practice is widespread in construction, allowing companies to underbid their competitors.

The ordinance requires all contractors, except professional service providers, to keep a list of every employee or independent contractor working on a city project, including descriptions of his or her duties and any benefits provided. If the contractor does employ an independent subcontractor, the city may ask the prime contractor to produce a copy of the Internal Revenue service Form 1099-Misc. for that subcontractor.

Violations could result in a \$500 fine per misclassified employee or debarment

from future city work.

“We want to make sure people do good business in town, we want to make sure we keep them on their toes,” said Councilman Adrian Garcia, chair of the council committee that monitors contract compliance.

But Sullivan said it is not the city’s job to check whether companies are properly withholding federal income taxes. If the city goes down that path, he added, “We should do it with all federal issues, not just one or two.”

Contractors already have complained that the city’s paperwork burden is too much, he added.

Others questioned the necessity of the ordinance, saying that misclassification plagues smaller-scale home and commercial construction, not the huge infrastructure projects that cities usually undertake.

“I just don’t really see it affecting us,” Jeff Nielsen said Tuesday. Nielsen is executive vice president for the Houston Contractors Association. The group’s membership focuses on civil construction for government agencies.

The city’s Department of Affirmative

Action and Contract Compliance oversees about 350 construction contracts at any one time. An investigation turned up only three companies that appeared to be using independent contractors, said Director Velma Laws.

“Why are we charged with enforcing a law that the department says is not high priority?” Councilman Green asked.

That department already has a tough time enforcing contract goals for the participation of woman and minority owned businesses, he said.

Loophole Lets Contractors Have It Both Ways

Commentary by Rick Casey
Houston Chronicle, July 26, 2008

There are two kinds of illegal immigrants here in Houston and across America.

Those who pay less than their fair share of taxes and those who pay more.



nt Contractor Status, Abuses

We have names for both types.

The ones who pay more than their fair share are called employees.

The ones who pay less than their fair share: independent contractors.

Ever since 1986, when the Immigration Reform and Control Act penalized employers for knowingly hiring illegal immigrants, most workers who fall into that category have bought fake Social Security cards in order to apply for work.

Many work for food processing plants, janitorial services, restaurants and other low-paying industries.

Their employers, like mine, deduct money from their paychecks for Social Security and Medicare.

Week after week, these workers pay these taxes, yet few of them are likely to ever receive Social Security or Medicare benefits.

In 2002, the Social Security Administration received about \$56 billion in payments with numbers for accounts that don't exist, according to the New York Times. Officials said the vast majority of that is from illegal workers.

It accounted for about \$1.50 of every \$100 of Social Security revenues that year, and it was expected to grow.

It would be great if all illegal immi-

grants were employees. According to the New York Times article, officials figure if we removed the contributions of illegal immigrants, Social Security's "long-term funding hole over 75 years would be 10 percent deeper."

That's a healthy contribution to our senior citizens and it would be more if all workers paid.

But many illegal immigrants are "independent contractors." Most of them don't pay Social Security or Medicare taxes. Or income taxes, for that matter.

Is that because they are less moral than employees? No. It's because their employers hire them as "independent contractors," not as employees.

The practice is rampant among home builders.

The company, whether large or small, hires subcontractors to do the foundation, framing, plumbing, electrical wiring, roofing, painting, etc.

The subcontractors then hire the laborers as sub-subcontractors. The notion that they are independent contractors, rather than employees, is an arguably legal fiction that benefits the workers a little and the employers a lot.

It also gives the company a couple of layers of protection from that law passed in 1986.

The workers often get paid in cash. Few file income tax returns, not only because they don't want to pay taxes but because they don't want to draw attention to themselves.

Most are transient and will never be found by the IRS for prosecution over unpaid taxes.

Because the workers are contract labor, the owners of the construction companies don't have to pay their half of Social Security taxes.

Nor must they pay unemployment taxes or buy workers' compensation.

What if a worker is hurt? That, in this rugged sector of free-enterprise, is what county hospitals are for. That independent contractor should have bought himself health insurance.

City Council this week passed a modest ordinance attempting to cut down on the inappropriate classification of workers by companies that do work for the city.

I suspect the effort will be more symbolic than real. For one thing, the city has limited resources to police the rule.

For another, people in the construction industry tell me the problem is most widespread among home builders, not among companies who build anything larger than houses or strip malls.

It would be far better for Congress, in addition to trying to pass immigration reform that makes sense, to close loopholes that allow employers to wink, nod and treat low-skilled laborers as if they were entrepreneurs so as to avoid paying taxes and other costs.

But don't hold your breath. According to the Center for Responsive Politics, the National Association of Home Builders has the seventh largest political action committee in Washington, and that doesn't count what individual home builders give.

So if you can get a mortgage, enjoy the pittance that will be passed on to you from the underground economy.

Meanwhile, we're all more than making up for it in what the employers and their illegal "independent contractors" are allowed to escape.

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Massachusetts Establishes a Task Force on the Underground Economy and Employee Misclassification

WHEREAS, the health of the Commonwealth's economy, its workers and its businesses is harmed by the existence of an illegal underground economy in which individuals and businesses conceal their activities from government licensing, regulatory and taxing authorities;

WHEREAS, individuals and businesses that operate in the underground economy do so in violation of labor, employment, tax, insurance and occupational safety laws, by failing to pay required wages, carry workers' compensation insurance, comply with health, safety and licensing requirements, or pay income taxes and payroll taxes that fund unemployment insurance, disability insurance, and Medicare and Social Security benefits;

WHEREAS, certain businesses also improperly classify their employees as "independent contractors" (referred to as "employee misclassification") and hire undocumented workers to avoid compliance with labor, employment, tax, insurance and regulatory requirements;

WHEREAS, the underground economy and, in particular, the practice of employee misclassification: (1) exploits vulnerable workers and deprives them of legal benefits and protections; (2) gives unlawful businesses an unfair competitive advantage over lawful businesses by illegally driving down violators' taxes, wages, and other overhead costs; (3) defrauds the government of substantial tax revenues; and (4) harms consumers who suffer at the hands of unlicensed businesses that fail to maintain minimum levels of skills and knowledge;

WHEREAS, a recent study based on audits of Massachusetts unemployment records for construction employers between 2002 and 2005 found that up to 14% of the employees covered by the audits were estimated to have been misclassified by employers;

WHEREAS, efforts to combat the underground economy and employee misclassification historically have been divided among various agencies, diminishing the timeliness, efficiency and effectiveness of such efforts; and

WHEREAS, the creation of joint task forces has proven to be an effective mechanism for enhancing interagency cooperation, information sharing, and the prosecution of violators;

NOW, THEREFORE, I, Deval L. Patrick, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me by the Constitution, Part 2, c. 2, § 1, Art. I, do hereby order as follows:

Section 1. There is hereby established the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification (the "Task Force").

Section 2. The Task Force shall consist of the following members or their designees: the Director of Labor, the Commissioner of Revenue, the Commissioner of the Department of Industrial Accidents, the Chief of the Attorney General's Fair Labor Division, the Commissioner of the Division of Occupational Safety, the

Commissioner of the Department of Public Safety, the Director of the Division of Professional Licensure, the Director of Apprenticeship Training and the Director of the Division of Unemployment Assistance. The Director of Labor shall chair the Task Force.

Section 3. The Task Force shall coordinate joint efforts to combat the underground economy and employee misclassification, including efforts to: (a) foster compliance with the law by educating business owners and employees about applicable requirements; (b) conduct joint, targeted investigations and enforcement actions against violators; (c) protect the health, safety and benefit rights of workers; and (d) restore competitive equality for law-abiding businesses.

In fulfilling its mission, the Task Force shall:

a. Facilitate timely information sharing between and among Task Force members, including through the establishment of protocols by which participating agencies will advise or refer to other agencies matters of potential investigative interest;

b. Identify those industries and sectors where the underground economy and employee misclassification are most prevalent and target Task Force members' investigative and enforcement resources against those sectors, including through the formation of joint investigative and enforcement teams;

c. Assess existing investigative and enforcement methods, both in Massachusetts and in other jurisdictions, and develop and recommend strategies to improve those methods;

d. Encourage businesses and individuals to identify violators by soliciting information from the public, facilitating the filing of complaints, and enhancing the available mechanisms by which workers can report suspected violations;

e. Solicit the cooperation and participation of district attorneys and other relevant enforcement agencies, including the Insurance Fraud Bureau, and establish procedures for referring cases to prosecuting authorities as appropriate;

f. Work cooperatively with employers, labor, and community groups to diminish the size of the underground economy and reduce the number of employee misclassifications by, among other means, disseminating educational materials regarding the applicable laws, including the legal distinctions between independent contractors and employees, and increasing public awareness of the harm caused by the underground economy and employee misclassification;

g. Work cooperatively with federal, commonwealth, and local social services agencies to provide assistance to vulnerable populations that have been exploited by the underground economy and employee misclassification, including but not limited to immigrant workers;

h. Identify potential regulatory or statutory changes that would strengthen enforcement efforts, including any changes needed to

resolve existing legal ambiguities or inconsistencies, as well as potential legal procedures for facilitating individual enforcement efforts; and

i. Consult with representatives of business and organized labor, members of the General Court, community groups and other agencies concerning the activities of the Task Force and its members and ways of improving its effectiveness, including consideration of whether to establish an advisory panel under the secretary of labor and workforce development.

Section 4. The Task Force shall transmit an annual report to the Governor summarizing the Task Force's activities during the preceding year. The report shall, without limitation: (a) describe the Task Force's efforts and accomplishments during the year; (b) identify any administrative or legal barriers impeding the more effective operation of the Task Force, including any barriers to information sharing or joint action; (c) propose, after consultation with representatives of business and organized labor, members of the legislature and other agencies, appropriate administrative, legislative, or regulatory changes to strengthen the Task Force's

operations and enforcement efforts and reduce or eliminate any barriers to those efforts; and (d) identify successful preventative mechanisms for reducing the extent of the underground economy and employee misclassification, thereby reducing the need for greater enforcement. The Task Force also shall take appropriate steps to publicize its activities.

Section 5. To the extent permitted by law, every agency within the Executive Branch shall make all reasonable efforts to cooperate with the Task Force and to furnish such information and assistance as the Task Force reasonably deems necessary to accomplish its purposes.

Section 6. Nothing in this Executive Order shall be construed to require action inconsistent with any applicable state or federal law.

Section 7. This Executive Order shall continue in effect until amended, superseded, or revoked by subsequent Executive Order.

Given at the Executive Chamber in Boston this 12th day of March in the year of our Lord two thousand and eight and of the Independence of the United States, two hundred and thirty-two.

Attorney General Brown of California Cracks Down on Worker Abuses at Long Beach and Los Angeles Ports

Sept. 5th, 2008—California Attorney General Edmund G. Brown Jr. today announced a crackdown on trucking companies operating at the Ports of Long Beach and Los Angeles that abuse their workers by denying them protections under state workers' compensation, disability and minimum wage laws. These companies engage in cost-cutting schemes that take advantage of their workers and avoid California taxes. They unlawfully classify their workers as "independent contractors," circumventing state employment taxes and labor laws that guarantee workers compensation and disability benefit and the right to a minimum wage.

"We are cracking down on these two companies and investigating several others that are taking advantage of their workers and cheating the state out of payroll taxes," Attorney General Brown said. "These are low-paid truck drivers working long hours under onerous conditions who are not getting the benefits they deserve."

Beginning in February 2008, the Attorney General's office authorized a task force to investigate trucking companies at Long Beach and Los Angeles Ports. The investigation uncovered numerous state labor law violations committed by several trucking companies operating at the ports. Two of the lawsuits were filed in Los Angeles Superior Court today and several more will be filed in the coming weeks.

The lawsuits allege that the trucking companies named in the suits have an unfair advantage over their competitors in violation of California Business and Professions Code 17200 by depriving employees of benefits and protections entitled to them under California law. These companies are also cheating the State of California out of thousands of dollars in state payroll taxes.

Jose Maria Lira, a fleet operator responsible for transporting cargo from the Ports of Los Angeles and Long Beach, controlled all aspects of his drivers' work, yet classified his employees as independent contractors and made them sign documents stating that they were independent. Lira leased his trucks to drivers, requiring them to sign a lease agreement stating that the driver would pay Lira 50% of his gross earnings each month in return for use of the truck, plus an additional 10% for management fees.

In fact, Lira required them to claim independent contractor status contrary to their true status as employees. The drivers worked exclusively for Lira, working 60 hours or more per week, delivering cargo in Lira company trucks. Under these conditions, the drivers should have employee status with its legal protections and benefits under the law.

The second lawsuit filed today is against the Pac Anchor Transportation Inc. ("Pac Anchor") and Alfredo Barajas. Brown asserted that Pac Anchor and Barajas engaged in a shell game in which Alfredo Barajas supplied Pac Anchor with 38 trucks and drivers. Pac Anchor directly paid Barajas' truck drivers, providing them with 1099 tax forms at the end of the year. Barajas and Pac Anchor misclassified the drivers as independent contractors in order to keep operating costs down and to avoid paying the mandated taxes and benefits.

The investigation found that the drivers should be classified as employees because they do not own the trucks they drive, do not have a business independent of Pac Anchor or Barajas, have no real opportunity for "profit" other than compensation on a piecework basis delivering loads and can be terminated at will.

McGarvey Replaces Riley on NAFC Board

On Sept. 10, 2008, at a regularly scheduled Board Meeting the Board of Directors regrettably accepted the resignation of Board Member Patrick Riley, Legal Counsel to the Sheet Metal Workers International Association.

Mr. Riley cited additional work responsibilities and his wish to bring additional new fresh ideas to the Board as his reason for resigning; stating that it was his intention to remain engaged with NAFC activities in the future, only not in the capacity as a Board Member. The



Sean McGarvey, NAFC Board member

Board unanimously thanked Mr. Riley for his many professional contributions to NAFC since its inception and wished him much success in any of his future endeavors.

The Board then nominated, seconded and unanimously elected Sean McGarvey, Secretary-Treasurer of the Building and Construction Trades Department, AFL-CIO as a member of the Board of Directors to replace Mr. Riley.

Sean McGarvey started his career with

the International Union of Painters and Allied Trades (IUPAT) in 1981 as an apprentice glazier with Glazier's Local 252 in Philadelphia, Pennsylvania. He graduated to journeyman status in 1984. He was later elected recording secretary of his local after 14 years in the field as an apprentice, journeyman, shop steward, foreman and general foreman. Sean served as an elected business representative for Local 252, and later he was appointed a general president's representative for the Painter's International, and then Assistant to the General President where he concentrated on internal reorganizing of IUPAT local unions and district councils.

In 2000, Sean was elected General Vice President-at-large. In May 2002, he was appointed political director for the IUPAT where he directed IUPAT's governmental affairs department.

In 2004, Sean was re-elected as IUPAT General Vice President At-Large. And in October 2005, he was elected as Secretary-Treasurer of the Building and Construction Trades Department.

Mr. McGarvey graduated from Cardinal Dougherty High School in Philadelphia, PA; attended the St. Joseph's University of Philadelphia Labor Relations program; attended Harvard University's Trade Union Program and earned his Bachelor of Arts in Union Leadership and Administration and Labor Studies from the National Labor College. He was born and raised in Philadelphia but currently resides in Oak Hill, Virginia. He has been married to his wife Tina for 22 years and has two lovely daughters; Kerri Ann who is 20 and 17 year old Kelsey Marie.

Mr. McGarvey is a welcomed addition to the NAFC Board of Directors.



Patrick Riley
Board Member, 1998-2008
National Alliance for
Fair Contracting

Go n-eírí an bóthar leat
(Gaelic)

May the road rise up with you.

May love and laughter light your days, and warm your heart and home.

May good and faithful friends be yours, wherever you may roam.

May peace and plenty bless your world with joy that long endures.

May all life's passing seasons bring the best to you and yours!

*Good Luck & God Bless,
The NAFC Board of
Directors & Staff*

Iowa Executive Order Eight

WHEREAS, it is a goal of this Administration to achieve and maintain a fair and equitable work force environment in the State of Iowa; and

WHEREAS, certain employers in Iowa and elsewhere may also improperly classify individuals they hire as “independent contractors,” even when those workers legally should be classified as “employees” (hereinafter referred to as “employee misclassification”); and

WHEREAS, the practice of employee misclassification is often an attempt by employers to avoid the employers’ legal obligations under federal and state labor, employment and tax laws, including laws governing minimum wage, overtime, unemployment insurance, workers’ compensation insurance, temporary disability insurance, wage payment and income tax; and

WHEREAS, the practice of employee misclassification has serious adverse effects on the residents, businesses and economy of Iowa, because this practice: (1) increases uncertainty of collecting unemployment taxes; (2) unfairly shifts the tax burden to the overwhelming majority of Iowa employers who adhere to federal and state labor laws; (3) allows employers who misclassify their employees an improper competitive advantage over law-abiding businesses; and (4) undermines fundamental laws intended to ensure employees receive legally-required employment insurance and workers’ compensation; and

WHEREAS, enforcement efforts to address the problem of employee misclassification should be studied and enhanced, to improve the efficient coordination and cooperation between state agencies to address the problem of employee misclassification; and

WHEREAS, the creation of a Task Force to examine and report on the issue of employee misclassification is an effective method to better understand the magnitude of these employment practices and come up with cooperative solutions to enforcement of applicable laws.

NOW, THEREFORE, I, Chester J. Culver, Governor of the State of Iowa, by the power vested in me by the laws and constitution of the State of Iowa, do hereby order as follows:

An Independent Contractor Reform Task Force shall be created.

A. Membership. Membership on the Task Force shall include:

- The Governor, or the Governor’s designee;
- The Director of Iowa Workforce Development, or the director’s designee;

- The Director of the Iowa Department of Revenue, or the director’s designee;
- The Director of the Department of Economic Development, or the Director’s designee; and
- The Labor Commissioner, or the Commissioner’s designee;

The Director of Iowa Workforce Development or the director’s designee shall serve as Chairperson of the Task Force.

B. Duties. The Task Force shall:

1. Review Iowa laws, regulations, policies and procedures related to employee misclassification.
2. Assess existing methods, both within Iowa and in other jurisdictions, of preventing, investigating and taking enforcement action against employee misclassification violations.
3. Identify and recommend potential regulatory or statutory changes that would improve prevention and enforcement efforts and systematically address the problem of employee misclassification in Iowa.
4. Develop a plan and a timeline, with input from appropriate stakeholder groups, to redress the problems caused by and prevent the practice of employee misclassification through coordinated legal and regulatory changes.
5. Identify and recommend ways to prevent employee misclassification, such as through the dissemination of educational materials regarding the legal differences between independent contractors and employees, thereby reducing the need for corrective action.

C. Final Report. The Task Force shall submit a written report outlining its activities and making recommendations for corrective action to the Governor’s Office no later than December 17, 2008.

D. Administrative Support. Iowa Workforce Development shall provide the administrative support necessary to facilitate the work of the Task Force.

E. Dissolution. The Task Force shall be dissolved upon submission of its report to the Governor’s Office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Great Seal of Iowa to be affixed. Done at Des Moines this 16th day of July, in the year 2008

Governor Attest: Michael A. Mauro
Secretary Of State

Contractor or Employee? Ask the IRS to Decide

By L.M. Sixel Staff
Houston Chronicle, July 26, 2008

The boss says you're an independent contractor. You think you're an employee. What do you do?

You can ask the Internal Revenue Service to decide.

Workers can fill out a "determination of worker status" form, known as an SS-8. It doesn't cost anything, and you get the definitive word on who is responsible for federal, state and local taxes, eligibility of overtime pay as well as benefits such as health insurance. And did I mention unemployment insurance benefits and workers' compensation?

If you're misclassified as an independent contractor, filling out a simple form to find out whether you're really an employee could translate into thousands of extra dollars in your pocket and save you from hours of irritation.

That's because when the boss classifies a worker as an independent contractor, the worker doesn't receive unemployment insurance benefits or workers' compensation coverage and is responsible for paying the entire tab for Social Security and Medicare taxes - that means paying 15.3 percent rather than 7.65 percent. If you earn \$100,000 a year, that's an extra \$7,650 in taxes. Ouch.

Most workers probably aren't thinking about the tax liability though, said Martin Shellist, an employment lawyer with Shellist Lazarz in Houston. They're thinking more about overtime eligibility and benefits such as health insurance, their 401(k) plans and other perks that go to employees but not independent contractors.

What makes a worker an employee is complicated, determined by several tests used by courts and the government. Generally, employees are supervised, and they're told when and where to work and which tools to use, according to rules published by the IRS.

Independent contractors are typically given a project to do but not much in the way of direction or rules for how it's done. They often bear financial responsibility, and they're free to work for others and cover their own expenses.

Michael Cunningham, executive director of the Texas Building & Construction Trades Council for AFL-CIO in

Austin, urges construction workers who have been told by the boss that they're independent contractors to ask for the IRS interpretation by filing Form SS-8. Misclassification of construction workers is common, said Cunningham, who recalled one work site where all 150 plumbers, insulators and sheet metal workers were classified as independent contractors. But that doesn't mean all workers are unhappy about their status. "Initially a lot of workers don't think about it," said Cunningham. "All that money. No taxes taken out." But at the end of the year, they see the tax liability and that they have to pay the whole amount for Social Security and Medicare.

"It's not a union or a nonunion issue," said Michael McNelly, director of governmental affairs/head administrator for the National Alliance of Fair Contracting in Washington. "It's a fairness issue." It's hard to compete with a company that is misclassifying its employees, said McNelly, who estimates the technique can save an employer up to 30 percent of payroll costs. It's impossible to know how much the misclassification is costing governments in terms of tax revenue. There was 2001 data from the IRS that shows an income tax gap of as much as \$353 billion - the difference between what's owed and what's collected. A good portion of that stems from misclassifying workers as independent contractors who don't pay their taxes, McNelly said.

Attorney Shellist argues that filling out an SS-8 request doesn't necessarily solve matters.

Sometimes the worker doesn't answer questions completely or the information is wrong, Shellist said. He prefers to let a court handle the issue as part of a lawsuit involving the nonpayment of overtime, minimum wage or employee benefits.

There's another benefit to incorporating the request as part of a lawsuit: Under those federal wage and benefit laws, employers can't retaliate against you for asserting your rights, he said. The IRS form doesn't carry that anti-retaliation provision.

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“Honest Working Men and Women Deserve Respect”

By Secretary Thomas E. Perez
Maryland Department of Labor, Licensing & Regulation

Each day I and my counterparts in other states around the nation go to work with a simple principle to uphold: that hard working men and women deserve no less than absolute respect in exchange for their contribution to our economy and our society, and that law-abiding employers deserve a level playing field. And yet across the country, the misclassification of employees as independent contractors is robbing workers of the basic rights guaranteed them by law, creating an unfair advantage for unscrupulous employers and denying taxpayers critical tax dollars.

Misclassified workers are deprived of the protections of so many labor laws, including minimum hourly wage requirements, overtime pay, safety and health standards, medical leave, antidiscrimination laws and access to unemployment insurance and workers' compensation. This pervasive practice exploits workers and cheats taxpayers of revenue we can ill afford to do without. It is a practice too often used intentionally by employers to reduce their tax burden and avoid those laws designed decades ago to create protections for people who work hard and play by the rules.

In Maryland, audits have found that as many as 20 percent of employers misclassify employees as independent contractors, and that we lose as much as \$22 million a year – and that's just from our Unemployment Insurance Trust Fund. Millions more never make it to our general fund, which pays for schools and roads and all the services our taxpayers rightfully expect from their government. Responsible employers pay higher Workers' Compensation rates because of the failure to pay at all by those who misclassify. Those employers who cheat the system, meanwhile, stand to cut their payroll costs by up to 30 percent, undercutting their law-abiding competitors.

Yet despite efforts by some members of Congress to pass legislation to crack down on this unfair practice – including Democratic Presidential nominee Sen. Barack Obama – the federal government under the current administration has done little to protect workers and responsible employers by curbing employee misclassification.

So in Maryland, we have taken steps to crack down on employers who misclassify workers. My Department has entered into information sharing agreements with the IRS and with sister state agencies that also have the capacity to detect misclassification in the workplace. We've convened a work group of stakeholders from labor and industry to come to the table together to find common ground. Our goal is to come to consensus on legislation that will provide us with the tools and leverage we need to eradicate misclassification from our workplaces. We plan to introduce that legislation in the upcoming legislative session, which begins in January.

We want to send a strong message that Maryland will not tolerate cheating. We will not allow employers to evade their responsibilities to their employees, their government and their communities just to save a few bucks. We will not allow practices that put our law-abiding employers at a distinct competitive disadvantage while letting cheaters get ahead.

This comes down to the fundamental purpose of a government – to protect its people and do what's in their best interest. It is in the best interest of all workers and responsible, hard-working employers to ensure they are afforded the basic protections they deserve, and that they are guaranteed by law. Our nation was built upon the backs of working men and women, and we owe it to them to give them the respect they deserve.



Secretary Thomas E. Perez

National Alliance for Fair Contracting

Membership Application

Organization _____

Phone _____

Fax _____

E-Mail _____

**PLEASE MAKE CHECKS
PAYABLE TO:**

National Alliance for Fair Contracting, Inc.

905 16th Street, NW – 4th Floor

Washington, DC 20006

Toll Free: (866) 523-6232

Fax: (202) 942-2228

The National Alliance for Fair Contracting (NAFC) is a well known professional nationwide labor-management trust founded in 1990 to encourage fair contracting in the field of publicly funded construction. An annual membership fee of only \$600 entitles your organization to unrestricted access to the NAFC website at www.faircontracting.org, a subscription to the NAFC Fax Alert and the Prevailing Times Magazine, national legislative updates, consultation on the Davis-Bacon Act & Freedom of Information Act, as well as educational/training opportunities.

Signature of Authorized Representative

Name of Authorized Representative

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