

A PUBLICATION OF THE NATIONAL ALLIANCE FOR FAIR CONTRACTING, INC.

Prevailing Times

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SUMMER 2010



CONGRESS & STATES ATTACK MISCLASSIFICATION • MEET SENATOR SHERROD BROWN

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Cover Photo: Barrier machine in operation on the rehabilitation of the Jane Adams Memorial Highway in Illinois. Photo Courtesy of Illinois Tollway.

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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“When a Tradesman or Tradeswoman is unemployed, willing to work and looking hard for a job but is unable to find one; it creates a situation that is contrary to the American dream and our national culture.”



Rocco Davis, Chairman

Unemployment in the construction industry in April of this year was approximately 21.8%, the greatest it has been since the great depression of the 1930's. And while the President's stimulus package has helped somewhat, it has not been enough to stem the increase of unemployed construction workers. Yet it has always been the construction industry that has been the leading factor in any of this country's history of economic recovery. One of the problems is perception.

For some in government the unemployment rate is just a number that has to be dealt with like the numbers that Wall Street bankers banter around every day in the course of doing business. That thought process desensitizes the human condition of the millions of men and women in this country currently looking for work.

Remember the recent argument of some Republicans in Congress who were doing their best to delay the extension of unemployment benefits to millions of unemployed Americans? What are they thinking? These workers are not numbers; they are decent, hard working people who only want to remain in the race to pursue the American dream.

The employed are the lucky ones, who may escape the emotional and financial scars that are left behind after being laid off and unable to find work in their chosen profession or any work at all. The unemployed worker will carry those burdens for years if not a lifetime.

Construction workers are not afraid of hard or dangerous work. What is dif-

ficult for them to comprehend is why they haven't been treated as well as the bankers on Wall Street, who they have observed rebounding from the recession with the help of their government and have been able to pay themselves millions of dollars in unearned bonuses.

Where is the equity they deserve? Where is the fairness in the system? Where are the jobs?

According to economist Ross Eisenbrey, twenty seven million Americans are either unemployed or underemployed, while Washington and Treasury Secretary Geithner focus on the budget deficit. The deficit has to be addressed but it will only get worse with the unemployment rate at such a high level. Giving the deficit priority over unemployment is putting the cart before the horse.

Those government officials need to visit a union hall anywhere in this country and ask those idle construction workers what they think the nation's priorities should be. The government will eventually get the message, but it may not be what they want to hear.

If they wait until November to address the unemployment issue, construction workers and the rest of the nation's jobless should take their valid concerns to the polls and the ballot box. It is the only legitimate tool they have in a democracy to get their government to listen to their concerns.

Another hard cold fact is that this recession has forced many responsible construction contractors out of busi-

ness which has added to the increasing unemployment rate for construction workers around the country.

Problems like the abuse of the independent contractor status has also added to the problem while depleting unemployment funds and workman compensation funds throughout the nation. Responsible contractors that go out of business now may never recover and return to the industry for they have had to face the most serious recession in this nation's history while competing with dishonest contractors that were cheating on their payroll taxes sometimes to the tune of 30%.

The construction industry is highly competitive in normal economic times so how do these legitimate contractors compete with someone who is willing to cheat to the tune of 30% while the government appears to turn its back on honest and fair competition?

That is why the National Alliance for Fair Contracting and its current efforts are so important to the honest and responsible construction contractor community. If NAFC and others can remove the unfair and illegal competition that exists in the industry, then more honest and responsible contractors will survive to compete another day.

And more of their construction workers will be put back to work doing what they do best, rebuilding America and America's future.

U.S. Department of Labor: Serious about Prevailing Wage Enforcement

Spotlight on the DOL
By Christopher Burger
Wage Compliance Administrator,
Ironworkers International / IMPACT



Christopher Burger

What a difference a change in leadership has made at the U.S. Department of Labor. For years, it was easy to be discouraged that nothing could or would be done to ensure compliance on federal construction

projects. Since last year, we have seen the Wage and Hour Division (WHD), as well as OSHA and other key divisions, re-commit to the mission of serving workers. A running not-so-funny joke in recent years was that it had become the Department of Commerce. But it is plain now that on Davis-Bacon alone, the DOL has stepped up prevailing wage enforcement in a welcome and long-overdue way.

Under the leadership of Secretary of Labor Hilda Solis, the DOL has made investigations of contractor wage and hour violations a priority again. Common problems on federal projects are too familiar: a failure to pay the prevailing wage according to the particular trade; a failure to submit true and accurate certified payroll records; the non-payment of time-and-half overtime; and intentionally misclassifying workers as “independent contractors” instead of employees.

Shortly before the new Administration took office, a U.S. Government Accountability Office report presented to Congress said it all in its title: “Department of Labor: Wage and Hour Division’s Complaint Intake and Investigative

Processes Leave Low Wage Workers Vulnerable to Wage Theft.” Since that time, the public has benefited from the now-trademark words of Secretary Solis: “You’d better believe there is a new sheriff in town.” As she remarked last year at the annual building trades conference in Washington: “I am committed to supporting Davis-Bacon and will strongly enforce our laws, including prevailing wages.”

immigrant workers. This sort of education will serve all levels of industry, including construction. With media outreach and strategic enforcement using multi-lingual billboards, radio and community groups, and the intent is to breathe new life into the Fair Labor Standards Act and encourage all workers to be aware of rules on overtime, payment of wages, etc. A strategic focus

“You’d better believe there is a new sheriff in town”

–Secretary of Labor Hilda Solis

Under the American Recovery and Reinvestment Act (ARRA), the revitalized DOL has already conducted five major regional prevailing wage conferences nationally in the last year. The Weatherization Assistance Program was rolled out with Davis-Bacon applied in an effort to combine green / labor goals, while Davis-Bacon is being newly-applied at Guam for a major military base re-location. After many years of neglect, the DOL is ramping up its wage survey process for Davis-Bacon, with an eye towards getting back to the 3-year standard. This will go a long way to prevent outdated data from being published years after it was first collected.

And in a cause long-championed by NAFC, the DOL also is spearheading a joint Labor- Treasury Department initiative to combat misclassification of employees as independent contractors.

Meanwhile, Secretary Solis has begun a new public awareness campaign to promote the nation’s wage and hour laws on behalf of low-wage and

is on specific cities known to have low compliance rates.

All told, next year, the Wage & Hour Division’s proposed budget (just part of the total DOL outlay) is \$244 million, an increase of almost \$20 million from this year. As a result, some 90 new investigators will be added, according to BNA. This investment in compliance will go a long-way towards leveling the playing field for fair contractors in the public sector.

The DOL’s Office of the Inspector General is conducting an audit on several programs, including Davis-Bacon Act enforcement. It will involve an independent public accounting firm to review enforcement of Davis-Bacon prevailing wage determinations.

Likewise, the partnership of the building trades, their signatory contractors, along with labor-management fair contracting compliance groups (mostly under the umbrella of NAFC) will continue to hold the DOL to live up to its historic mission.

Employment Tax Compliance Could Be Improved With Better Coordination and Information Sharing

Highlights of Report Number: 2010-30-025 to the Internal Revenue Service Commissioners for the Small Business/Self-Employed Division and the Wage and Investment Division.

IMPACT ON TAXPAYERS

The misclassification of employees as independent contractors is a nationwide issue affecting millions of employees that continues to grow and contribute to the tax gap. According to program documents, closing the tax gap remains one of the biggest challenges for the Small Business/Self-Employed Division.

The Internal Revenue Service (IRS) has several opportunities to enhance compliance in its Employment Tax Program by taking measures to ensure that employment tax forms are not misused to avoid paying proper tax and by regularly sharing results of examinations from worker classification leads to ensure it is maximizing its resources efficiently when addressing the underreporting tax gap. Implementing these enhancements will help ensure that the burden of uncollected taxes is not shifted to compliant taxpayers.



WHY TIGTA DID THE AUDIT

The objective of this audit was to evaluate the effectiveness of the IRS' controls and procedures for ensuring taxpayer compliance with the determinations of worker status. This audit is part of TIGTA's risk-based audit coverage included in the Fiscal Year 2009 Annual Audit Plan under the major management challenge of Tax Compliance Initiatives.

WHAT TIGTA FOUND

The IRS created the Uncollected Social Security and Medicare Tax on Wages (Form 8919) for taxpayers to use when reporting only the worker's share of Social Security and Medicare wages. TIGTA identified 74,068 taxpayers who may have avoided paying \$26.2 million in Social Security and Medicare taxes because they improperly used the Form 8919.

TIGTA believes the improper use of Forms 8919 occurred because the IRS did not ensure that only qualifying taxpayers used it to report their wages. If IRS management does not take steps to correct the weaknesses and ensure taxpayers do

not continue to improperly claim to be employees, TIGTA believes \$131 million in taxes could be avoided over the next 5 years.

The IRS has the opportunity to enhance its referral process to address compliance with worker status determinations. Almost all of the referred cases were accepted by the Examination function, but results from examinations were not always provided to the SS-8 program. TIGTA believes it is important that results are shared to ensure that the IRS, as part of its Employment Tax Strategy, maximizes efficiency

when addressing the underreporting portion of the tax gap.

WHAT TIGTA RECOMMENDED

TIGTA made three recommendations for the IRS to take measures that will ensure that employment tax forms are not misused. In addition, TIGTA recommended that the operating divisions take steps to ensure that feedback is provided to the SS-8 program regarding its referrals.

IRS management agreed with two recommendations, disagreed with one, and partially agreed with the remaining recommendation. The IRS cited costs as the basis for its disagreement with one of TIGTA's recommendations, and offered an alternative corrective action to conduct a pilot study.

Although TIGTA is encouraged by this, it is also concerned about the overall effectiveness of the alternative corrective action and the Calendar Year 2012 completion date because the IRS previously agreed to perform a similar pilot study in response to a prior report and only recently began to take action to address these concerns. Furthermore, the IRS stated it plans to consider the results of the pilot study, workload, staffing, and budget before committing to any expansion.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full IRS response, go to: <http://www.treas.gov/tigta/auditreports/2010reports/201030025fr.pdf>.

Final Rules Issued on Use of Project Labor Agreements for Federal Construction Projects

On April 13, 2010, the final rules to implement Executive Order 13502 (Use of Project Labor Agreements for Federal Construction Projects) were issued. The rules reaffirm that federal agencies are encouraged to use Project Labor Agreements in connection with large-scale federal projects over \$25 million, and to consider use of PLAs early in the acquisition process.

The rules include alternative approaches regarding when a federal agency may require an executed PLA on a particular project, including submission with the initial offer, after offers are submitted but before award, or after award. The rules provide that an agency may specify in the solicitation the terms and conditions of the PLA and require the successful bidder to sign the PLA as a condition of being awarded the contract.

The final rules give flexibility to agencies to evaluate whether a PLA is appropriate for a given construction project. An agency may seek the views, confer with, and exchange information with the prospective bidders and union representatives as part of the agency's effort to identify appropriate terms and conditions of a PLA for a particular construction project.

Federal agencies may consider the following factors in deciding whether the use of a Project Labor Agreement is appropriate for a large-scale federal construction project:

- (1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.
- (2) There is a shortage of skilled labor in the region in which the construction project will be situated.
- (3) Completion of the project will require an extended period of time.
- (4) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.
- (5) A project labor agreement will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.
- (6) Any other factors that the agency decides are appropriate.

The final rules also state the terms which shall be included in a PLA on a federal project:

- Bind all contractors and subcontractors engaged in construction on the construction project to comply with the PLA.

- Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements.
- Contain guarantees against strikes, lockouts, and similar job disruptions.
- Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the PLA.
- Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety and health.
- Include any additional requirement the agency deems necessary to satisfy its needs such as targeted hiring and outreach policies.

Finally, the new rules clarify that the Executive Order is applicable to large-scale Federal construction projects where the total cost is over \$25 million. While the PLA Executive Order and the final rules only provide new contract clauses and procedures for direct federal contracts, both also state that PLAs are no longer prohibited on federally assisted projects. The Executive Order states:

■ *This order does not* require an executive agency to use a project labor agreement on any construction project, nor does it *preclude the use of a project labor agreement in circumstances not covered by this order, including* leasehold arrangements and projects receiving Federal financial assistance. (Section 5 of EO 13502).

By its terms, the Obama Executive Order revoked two Bush Executive Orders (EO 13202 and EO 13208) which specifically required executive agencies to prohibit PLA's in federally assisted contracts. Accordingly, the final regulations state:

■ While the E.O.'s explicit policy focuses on large-scale construction contracts, section 5 states that the *E.O. does not preclude use of a project labor agreement in circumstances not covered by the order, including leasehold arrangements and projects receiving Federal financial assistance.*

The new PLA rules become effective May 13, 2010, and will apply to solicitations for construction projects issued on or after that date.

Additional information regarding the role of PLAs in promoting labor-management cooperation, protecting labor standards, encouraging training and ensuring quality construction can be found at www.PLAsWork.org.

The full text of the final rules implementing the PLA Executive Order can be found at <http://edocket.access.gpo.gov/2010/pdf/2010-8118.pdf>.

US DOL Issues Guidance on Davis-Bacon Coverage of Recovery Act Bonds

The Wage and Hour Division of the US Department of Labor has issued long-awaited guidance concerning Davis-Bacon requirements on projects financed with the proceeds of the five categories of bonds listed in section 1601 of ARRA. See *All Agency Memorandum No. 208, Applicability Of Davis-Bacon Labor Standards To Construction Financed With The Proceeds Of Certain Tax-Favored Bonds Under Section 1601 Of Division B Of The American Recovery And Reinvestment Act Of 2009*. <http://www.dol.gov/whd/recovery/AAM208.pdf>.

SEC. 1601. APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS.

[The Davis-Bacon Act] shall apply to projects financed with the proceeds of-

- (1) Any new **clean renewable energy bond** (as defined in section 54C of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,
- (2) Any **qualified energy conservation bond** (as defined in section 54D of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,
- (3) Any **qualified zone academy bond** (as defined in section 54E of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,
- (4) Any **qualified school construction bond** (as defined in section 54F of the Internal Revenue Code of 1986),
- (5) Any recovery zone economic development bond (as defined in section 1400U-2 of the Internal Revenue Code of 1986). (Section 1601, Division B, Pub. L. No. 111-5, 123 Stat. 362)

All Agency Memorandum No. 208 (“AAM No. 208”) details the responsibilities of state and local government entities, contractors, and others for implementation and compliance with the Davis-Bacon Act (“DBA”) in connection with projects financed with the proceeds of ARRA’s tax-favored bonds. US DOL states that the provisions of the Davis-Bacon Act “shall apply” to projects financed with the proceeds of the five specified types of bonds and that the prevailing wage coverage with respect to such projects must be determined in the same manner as under the DBA, and such projects must follow applicable requirements in the Department’s DBA regulations at 29 CFR Parts 1, 3 and 5.

An entity (most frequently a state or local government agency) with contracting responsibility for a new or ongoing project being financed with the proceeds of one of the ARRA bonds must cause



or require the contracting officer for the project, upon notice of ARRA assistance with respect to the project, to insert in full the Davis-Bacon contract clauses and the applicable wage determination in bid solicitations and covered construction contracts.

The requirement to insert the Davis-Bacon contract clauses and attach the applicable wage determination applies regardless of the amount or form of ARRA funding or assistance. Thus, coverage under section 1601 of Division B of ARRA can exist even if a project is financed only in part by proceeds of one of the bonds listed in section 1601. If bond proceeds are pooled in a general fund or otherwise, then every project financed in whole or in part by the pooled proceeds is subject to Davis-Bacon labor standards provided that other applicable coverage criteria are satisfied.

The \$2,000 threshold for Davis-Bacon and related Act coverage pertains to the amount of the prime construction contract, not to the amount of individual subcontracts. If the prime construction contract exceeds \$2,000, all construction work on the project is covered and a standard Davis-Bacon contract clause requires that the Davis-Bacon labor standards be applied to all subcontractors.

WHD has established a special ARRA website at www.dol.gov/whd/recovery where important information that may be particularly valuable to Federal and other government agencies, recipients of ARRA assistance, contracting entities, contractors, employees, and others who have an interest in the application of Davis-Bacon labor standards under ARRA are posted. Questions regarding the applicability of the Davis-Bacon Act to a specific project also may be directed to the Department of Labor via email to WHDARRA@dol.gov

Taskforce Prompts Wisc

This bill signed into law by the Governor on May 12, 2010, is the product of a Task Force on worker classification compliance appointed by the Secretary of the Department of Workforce Development (DWD). The Task Force heard from employers in the construction industry, contractors associations, employees and labor groups about misclassification of workers. Misclassification has become a serious problem in the construction industry.

When employers unlawfully treat workers as though they were independent contractors rather than employees and evade the laws by paying wages in cash without legally required records, workers lose the protections afforded by the laws on workers compensation, minimum wage, overtime compensation, unemployment insurance and social security.

Authority of Department to Investigate and Promote Compliance

This bill requires DWD to promote and achieve compliance by employers with certain employment laws by educating employers and the public about the proper classification of workers as employees and to coordinate enforcement with other agencies.

This bill authorizes DWD to investigate the practices of employers in the construction industry (construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects) to determine whether the employers:

1. maintain records identifying *all persons performing work* for the employer, including the name, address, and social security number of each of those persons.
2. maintain worker's compensation coverage for its *employees* as required under the worker's compensation law.
3. provide to DWD the information that employers are required to provide with respect to newly hired *employees*.

Misclassification has become a serious problem in the construction industry.

4. maintain records of the hours worked by its *employees*, the wages paid to those employees, any deductions from those wages, and any other information that the employer is required to keep under rules promulgated by DWD relating to hours of labor and the minimum wage, and is listing deductions from wages as required by law.
5. comply with the unemployment insurance laws for the benefit of their *employees*.

The department will investigate compliance with these 5 requirements by questioning the employer, employees and others on site where the employer is engaged in construction; and by inspecting the employer's records related to compliance.

Notice to the Employer and Stop Work Order

In the event the department finds that an employer has failed the requirements (1 – 5 above), the department will seek to obtain compliance by a step-by-step process:

1. Department serves the employer a notice of intent to issue a stop work order.
2. Employer shows compliance within 3 days, no action adverse to employer.
3. Employer fails to show compliance within 3 days:
 - Department issues a *stop work order* requiring the employer to stop work at the locations specified in the prior notice to the employer.
 - *Forfeiture of \$250 per day* begins to accrue and continues until the employer has either stopped work or complied with the requirements.

Employer Appeal of the Stop Work Order

- The employer may appeal (immediately on site) the stop work / forfeiture order.
- Employer's appeal hearing before administrative law judge occurs within 14 days.

onsin Legislation

- Decision by ALJ within 7 days after hearing.
- Employer is protected: stop work order is stayed from appeal until decision by ALJ.
- Forfeiture continues while work continues and employer has not complied.

Post-appeal Process

After appeal decision, the employer or the department may obtain:

1. Review of decision by Labor and Industry Review Commission;

2. Review of LIRC decision by circuit court and court of appeals.

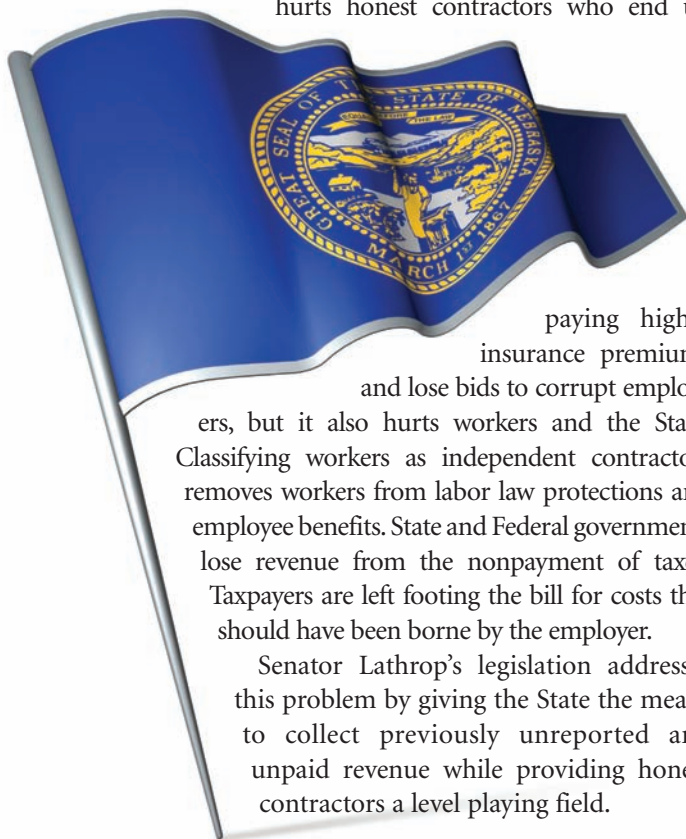
Stop work order remains in effect during the pendency of review. Violation of a final stop work order or final decision affirming stop work order is assessed a forfeiture of \$1,000. Review of \$1,000 forfeiture is the same as for stop work order.

Limited Effect of this Bill

Stop work order and appeal decisions do not impair any other action that is required or permitted under the employment laws of this state to enforce a requirement under any of those laws.

Nebraska Passes Legislation Targeting Misclassification in the Construction and Delivery Service Industries

Nebraska Senator, Steve Lathrop, introduced and successfully passed LB 563; legislation targeting misclassification in the construction and delivery service industries. Misclassification not only hurts honest contractors who end up



paying higher insurance premiums and lose bids to corrupt employers, but it also hurts workers and the State. Classifying workers as independent contractors removes workers from labor law protections and employee benefits. State and Federal governments lose revenue from the nonpayment of taxes. Taxpayers are left footing the bill for costs that should have been borne by the employer.

Senator Lathrop's legislation addresses this problem by giving the State the means to collect previously unreported and unpaid revenue while providing honest contractors a level playing field.

The Employee Classification Act provides the Nebraska Department of Labor with the tools necessary to enforce existing law. Employers must post, at job sites, the Act's requirements including the right to be properly classified and report suspected violations to the Department of Labor. The Department of Labor will investigate all credible complaints and issue yearly dispositional reports to the Legislature. The department employs the existing statutory independent contractor standard (commonly known as the "ABC" test) to determine a worker's proper classification.

The Commissioner of Labor shall fine an employer \$500 per each misclassified employee for a first offense and for second and subsequent offenses shall issue a \$5,000 fine for each misclassified employee. After a violation is found, the Commissioner will instigate proceedings to recoup unpaid unemployment taxes and interest.

Inter-agency information sharing is also addressed. Before LB 563, Nebraska law prevented agencies, including the Departments of Labor and Revenue, and the Nebraska Workers' Compensation Court, from sharing violations of employment security, workers' compensation, and the Nebraska Revenue code.

The Employee Classification Act corrects this agency inefficiency by directing these agencies to share information and forward potential criminal violations to the appropriate prosecuting authority.

Michigan Study of the Social & Econom

Another important study on the impact of independent contractor abuse has been published by several of the nation's leading economists. Professors Dale L. Belman and Richard Block from the School of Labor and Industrial Relations, Michigan State University, are authors of *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*.

The economists summarize the devastating impact which misclassification has upon workers, particularly in the construction industry, finding that "the misclassification of employees as self-employed, and the under reporting of payroll of employees, imposes a burden on employees, honest employers and the state of Michigan":

Employees lose because they do not receive the benefits of unemployment insurance coverage and likely of workers compensation payments. They are almost certainly excluded from pension and medical benefits by their employer. They are also likely placed in the situation of either having to pay both the employers and employee share of social security on their full income, or of under reporting their income and later not receiving full social security pensions.

With respect to responsible employers, the study finds that they are placed at a strong competitive disadvantage when other employers fail to properly classify workers:

An employer who avoids unemployment insurance payments reduces its labor costs by at least two percent. If, as is likely, they are also not paying workers compensation, the employer share of social security, and pension or medical insurance, they are reducing their labor costs by at least 20 percent and possibly as much as 40 percent. Just as bad money drives out good money, misclassifying employers make it more difficult than otherwise for non-misclassifying employers to operate profitably. Non-misclassifying employers are faced with a situation in which they either need to leave a market, or emulate the practices of employers who engage in misclassification and under reporting.

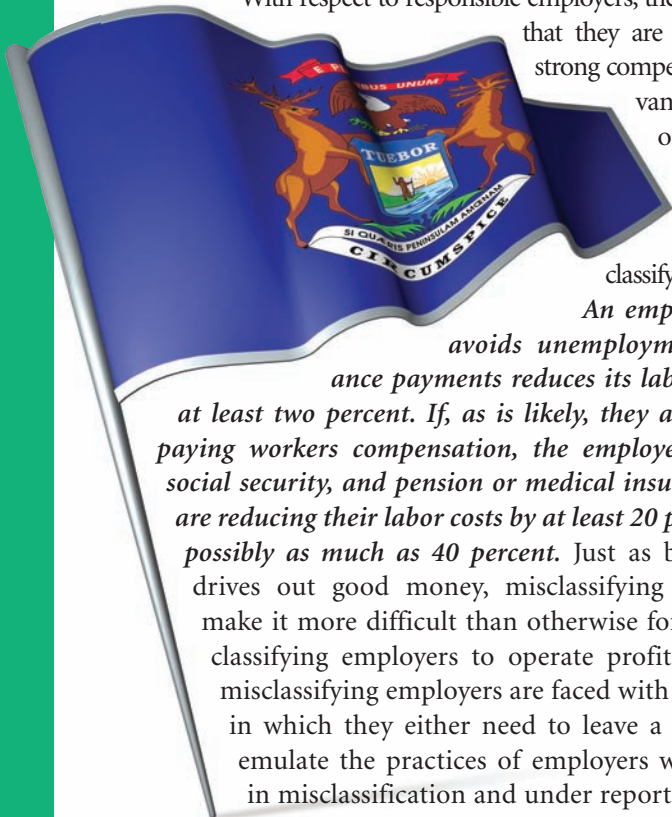
Employees lose because they do not receive the benefits of unemployment insurance coverage and likely of workers compensation payments. They are almost certainly excluded from pension and medical benefits by their employer.

Belman and Block also document the impact upon taxpayers by the loss of state revenue which flows from the widespread practice of failing to properly classify workers with the resulting failure to pay required payroll and other taxes to the government:

The state of Michigan suffers because of the substantial loss of revenue to support its unemployment system and other tax revenues. *The state forgoes significant amounts of revenue, between \$36.3 and \$49.3 million, each year because of misclassification of employees and under reporting of payroll.* Given Michigan's striated economic circumstances, this is a significant loss of revenue to the state treasury. But misclassification imposes other costs on the state and its citizens. Employees who are classified as self-employed are less likely than regular employees to have health insurance and retirement savings plans. As a result, the self-employed are more likely to use public medical services, imposing costs on medical providers and the state. Similarly, the limited retirement savings are likely to create costs for public programs for the elderly when these workers retire.

Belman and Block make strong findings regarding the proportion of the Michigan labor force that is improperly classified, concluding that almost "30.1 percent of Michigan employers covered by the unemployment insurance system misclassified employees or failed to report payments to employees covered by the unemployment insurance system":

The proportion of employers with misclassified employees



ic Costs of Employee Misclassification

varied considerably by sector. *In construction, 26.4 percent of employers misclassified employees or employee payments; in trucking, 24.4 percent of employers misclassified employees or employee payments.*

Belman and Block also document that misclassification can come in several forms, including improperly classifying a worker as a self-employed independent contractor and the failure of wages to be reported:

Distinguishing these forms of misclassification is burdensome as it requires detailed review of each audit in which it was determined there was misclassification. ... For all Michigan industries, 66 percent of employees who were misclassified were treated as self-employed, the balance, 34 percent, received unreported payments....

In construction, 79 percent of taxable income, and percent of gross income, goes to employees improperly classified as self-employed; in trucking 100 percent goes to those improperly classified as self-employed....

Under reporting affects programs beyond the unemployment insurance fund. A number of studies have established that the self-employed are less likely to pay income taxes on all of their income. The amount underpaid varies considerably between studies, but it is reasonable to believe that the self-employed fail to pay taxes on between 30 and 50 percent of their income. ... *The state of Michigan loses between \$19.5 and \$32.5 million dollars in state tax revenue to underreporting and misclassification ...*

The construction industry underreported \$168 million in income annually in 2003 and 2004. Under the assumption of 30% under reporting of self-employment income, the state of Michigan lost \$2.2 in income tax revenue, under the assumption of 50% under reporting, the state of Michigan lost 3.7 million in income taxes (in addition to the \$2.5 million in unemployment insurance payments). In trucking, the state lost between \$503 and \$840,000 in income tax revenue due to under reporting in addition to the \$48,000 in lost unemployment insurance revenue.

Professors Belman and Block conclude with several important recommendations to prevent misclassification and improve the Unemployment System:

First:

A first suggestion would be to *increase the number of firms subject to random audits by the unemployment insurance*

administration. Currently, an employer can reasonably count on being audited once every one hundred years. It is in part because of the low likelihood of being audited that almost one third of all audited employers are found to be misclassifying employees. Although the return to audits is currently unlikely to be very large, *substantial efficiencies can be realized by coordination of audits across Michigan agencies.* As indicated by our work, firms that misclassify employees not only underreport taxable income, but also gross income. There are, as a result, likely substantial losses of state income tax revenues in cases in which firms misclassify employees for unemployment insurance purposes. *If the Unemployment Insurance Agency were able to communicate the results of its audits to the Department of Revenue, this might improve the targeting of that Department's audits.*

Second:

Similarly, *if the Department of Revenue could share information with the Unemployment Insurance Agency, the agency could better target its audit resources.* This should produce greater revenue per audit. The UIA does routinely share its audit results with both the Internal Revenue Service and the Michigan Workers' Compensation Agency.

Third:

Although the Unemployment Insurance Agency already has a very good employer information program, this program is likely to come under stress if there is an increase in the number of audits. *Increased resources for employers, and aid in helping employers classify employees properly, will be needed to meet employers who are trying to adhere to the requirements of the Unemployment Insurance law.*

Fourth:

A challenge for the Unemployment Insurance system is the disjuncture in the definitions of employee and self-employed between the federal and state systems. Such differences increase the probability of good faith, inadvertent misclassification. If such intentional misclassification imposes a cost on the state, the state may wish to consider changing its definitions of employee and independent contractor to conform to the federal system.

(The full text of *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry* may be found on www.faircontracting.org.)

Iowa Attacks Misclassification

Indiana, Illinois & Iowa Foundation for Fair Contracting

Illegal worker misclassification occurs when a contractor misclassifies an employee as an independent contractor to avoid payment of payroll taxes, workers' compensation costs, labor law compliance and other laws. In response to the problem of illegal worker misclassification, Iowa Governor Chet Culver issued Executive Order Eight in the summer of 2008, establishing an interagency Task Force comprised of leadership from the Governor's office and various Iowa Administrative Departments. The Task Force was charged with studying and identifying potential legislative, regulatory, communication, and enforcement changes and approaches to prevent misclassification.

Over a six-month period, the Task Force held several public meetings and one public hearing, and established three subcommittees. Each subcommittee met several times to gather information and discuss methods to define the scope of, and suggest possible remedies for. The Task Force heard testimony from various stakeholders and also reviewed numerous reports, studies and information from other states.

After assessing the information, on December 17, 2008 the Task Force proposed six recommendations regarding misclassification. Most notably, the need for budgetary commitments needed to enhance enforcement of existing laws including the creation

of a Misclassification Task Force Unit. Soon, after the report issued,

approximately \$500,000 was then appropriated to the Misclassification Task Force. Over the course

of the next year, the Task Force held various meetings to discuss its progress. The

last meeting held was in November 2009, where the Task Force discussed the Unit's progress in preventing, identifying, and penalizing employee misclassification. At the meeting, Iowa Workforce Development ("IWD") Director Elisabeth Buck welcomed one Senator, 26 guests, 15 IWD staff members, and introduced IWD Deputy Joe Walsh.

Deputy Walsh announced that a Coordinating Committee was established to provide direction to the unit and maintain a high degree of collaboration between IWD Divisions and other agencies. The Committee will be led by IWD Attorney Barbara Tapscott and will include leadership from the Divisions of Labor, Workers' Compensation, and

Unemployment Insurance ("UI") Services Division. Tax expertise will also be provided by the Department of Revenue. The goal is to ensure efficient sharing of information, cross-training, proper referrals, reporting standards, identification of weaknesses and potential improvements, to ensure maximum efficiency and effectiveness.

Director Buck next introduced the new Misclassification Unit Manager Jason Tryon. Mr. Tryon noted that the Unit is fully staffed with two investigators, three field auditors, one administrative assistant and one attorney. Mr. Tryon explained that since July 1, 2009, there have been 45 employers identified who misclassified 178 workers with unreported wages totaling \$2,621,115. The total unemployment taxes due was \$112,253, penalties/interest due was \$24,246, and the average unreported wages per worker was \$14,725.

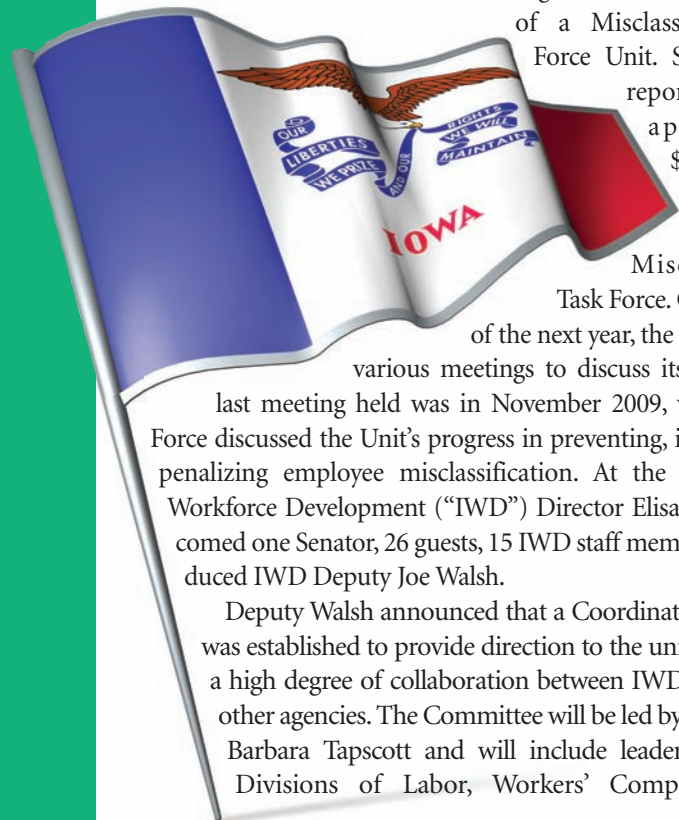
Complaints can be made by email, telephone call or fax, and the agency has initiated 51 internal leads where Unit staff stopped at a worksite to make inquiries. Leads are also received through OSHA, Workers' Comp, and Contractor Registration. Mr. Tyron continued to explain that the unit currently has 131 files open where misclassification is suspected.

Dave Neil, Labor Commissioner, also noted that it is difficult to know how many new contractor registrations are received as a result of Misclassification Unit investigations. However, in 2005, when the contractor registration process was brought out of dormancy, there were 8,000 registered contractors and today there are 23,892 registrations. Since August there have been 143 investigations conducted by contractor registration staff that have resulted in: 47 contractors registering immediately, 42 citations, 12 Unemployment Insurance referrals, and 5 OSHA referrals with eminent danger noted. Since July 2006, there have been 337 registered contractors noted with delinquent UI taxes; to date 258 of these have paid a total of \$856,030. It was also noted that there is great support from the city/town administrators and many towns are now making contractor registration a part of their permitting process.

The Misclassification Unit is also holding regular educational seminars, with 26 seminars completed or scheduled and a total of 400 people attending to date. The main goal of the seminars is to educate employers about misclassification; there is a strong sense that many people simply do not understand misclassification issues.

Jim Larew, from the Governor's Office, noted that this effort has been a singular success. He stated that the numbers indicate that this effort is an investment for the State of Iowa and that there must be continued focus on compliance with the law. Priorities for the Administration in the coming year will be to keep this Unit on track and support funding for this program. Mr. Larew offered the Governor's congratulations for all the hard work on a job well done.

For more information about the Misclassification Unit in Iowa, visit the IWD website at <http://www.iowaworkforce.org/misclassification/>.



Employee Misclassification Protection Act

Companion Bills Introduced in Congress

On April 22, 2010, Sen. Sherrod Brown (D-Ohio) introduced legislation to amend the Fair Labor Standards Act (FLSA) to prevent employers from misclassifying workers as independent contractors. The bill, entitled the Employee Misclassification Protection Act (S. 3254) is co-sponsored by Sen. Tom Harkin (D-Iowa), Sen. Patty Murray (D-Wash.), Sen. Richard Durbin (D-Ill.), Sen. Robert Casey (D-Pa.), and Sen. Jeff Merkley (D-Ore.). In the House of Representatives, Rep. Lynn Woolsey (D-Calif.) has introduced an identical bill (H.R. 5107) with co-sponsors Rep. Robert E. Andrews (D-NJ), Rep. Elijah E. Cummings (D-MD.), Rep. Luis V. Gutierrez (D-IL.), Rep. Carolyn B. Maloney (D-NY), Rep. George Miller (D-CA.), Rep. Laura Richardson (D-CA.) and Rep. Betty Sutton, (D-OH).

Senator Brown emphasized the importance of the bill in leveling the playing field for responsible employers in industries such as construction:

A crackdown on this could bring in billions of dollars nationally into federal, state and local government coffers and help businesses that operate honestly compete on a level playing field, Brown said during a conference ... to announce the legislation. "This is a win for the workers and it is a win for good employers and the overwhelming number of employers who are good employers," ... If you are a landscaping company and you go by the book and one of your competitors doesn't, they win a lot of contracts because they can charge lower rates...because they are not playing it straight." <http://blog.dispatch.com/mte/mt-tb.cgi/62398>

According to Senator Brown's office, the key elements of the legislation include:

Prohibitions and Penalties

- Makes it a violation of the Fair Labor Standards Act to misclassify an employee.
- Extends a private right of action to misclassified employees to recover lost wages.
- When an employer also violates minimum wage or maximum hour standards, provides double liquidated damages.
- Subjects employers to a civil penalty up to \$1,100 for misclassification violations.
- Subjects employers to a civil penalty up to \$5,000 when such violations are repeated or willful.
- Makes it a violation of the Fair Labor Standards Act to discharge or discriminate against a worker because he or she has opposed any practice concerning his or her classification.

Recordkeeping and Notice Requirements

- Requires employers to keep wage and hour records of workers who are not employees and 1) are engaged in the course of the employer's trade or business and 2) for whom the employer is required to file an IRS 1099.
- Creates a rebuttable presumption that, when an employer fails to keep wage and hour records or provide a worker with notice of classification, the worker will be considered an employee.
- Requires that records kept pursuant to the Act include an accurate classification of the worker as either an employee or a non-employee.

- Requires that all employees and non-employees be given written notice of their classification and that they be directed to DOL employee rights resources.

Employee Rights Website

Directs DOL to establish a website summarizing the rights of workers under the Act.

State Directives

Makes unemployment compensation grants contingent on a state:

- Having auditing and investigative procedures in place to identify employers that exclude employees from unemployment compensation;
- Filing quarterly reports describing the findings of such procedures; and
- Establishing administrative penalties for misclassifying employees or paying unreported compensation. DOL is also required to audit states' performance in conducting unemployment compensation tax audits.

Departmental Coordination

Directs all divisions of DOL to report information obtained concerning misclassification to DOL's Wage and Hour Division, which may report such information to the IRS, as appropriate.

Directed Audits

Directs the DOL's Wage and Hour Division to conduct audits of industries with frequent incidence of misclassification.

The full text of the **Employee Misclassification Protection Act** (S. 3254) may be found at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3254>

Senator Sherrod Brown —

Since January of 2007, Senator Sherrod Brown has held more than 130 community roundtables across Ohio, visiting each of Ohio's 88 counties at least once to talk with local leaders and business owners, farmers and veterans, workers and families, and educators and students to find ways to rebuild our nation's middle class.

Senator Brown worked with his colleagues on the Health, Education, Labor and Pension Committee (H.E.L.P.) to pass an historic health insurance reform bill. This legislation will increase competition to reduce private insurance premiums, provide more insurance options so that every American can gain access to coverage, and prevent insurers from discriminating against consumers based on age or pre-existing health conditions.

In 2008, Senator Brown worked to re-authorize *Healthy Start*, a program that reduces infant mortality and low birth weight. In 2009, Senator Brown helped to strengthen the *Children's Health*

Insurance Program, which expands access to health insurance for 11 million children nationwide.

In Ohio and in Washington, Senator Brown has earned a reputation as a public official who looks to the future. His commitment to making Ohio the Silicon Valley of Clean Energy began when he wrote Ohio's first solar energy law in 1977 as a member of the Ohio General Assembly. As a

U.S. Senator, Brown is working with Ohio's universities, entrepreneurs, labor unions, and community leaders to help utilize Ohio's natural resources — wind, solar, and biofuels — and to develop a clean energy industry in the state.

As a result of this collaborative work, Senator Brown introduced the *Green Energy Production Act of 2009* — which he first introduced in 2008. *The Green Energy Production Act* would encourage production of clean energy manufacturing technologies and domestic sources of clean energy. Senator Brown recognizes that creating clean energy jobs is both an economic and environmental strategy. Most recently in April 2009, he convened a ground-breaking Clean Energy Summit that connected Ohio clean energy businesses, workers, and municipalities with federal resources available through the American Recovery and Reinvestment Act of 2009. He is also building a coalition to revamp our trade policies. In 2008, he introduced the TRADE Act, forward-looking and pro-trade legislation which would review and renegotiate existing trade agreements while strengthening the role of Congress in trade policy making. By using trade policies to expand economic opportunity for the middle class, Senator Brown is working to expand opportunities for American manufacturing, to protect workers' rights and the environment, and to strengthen product and food safety.

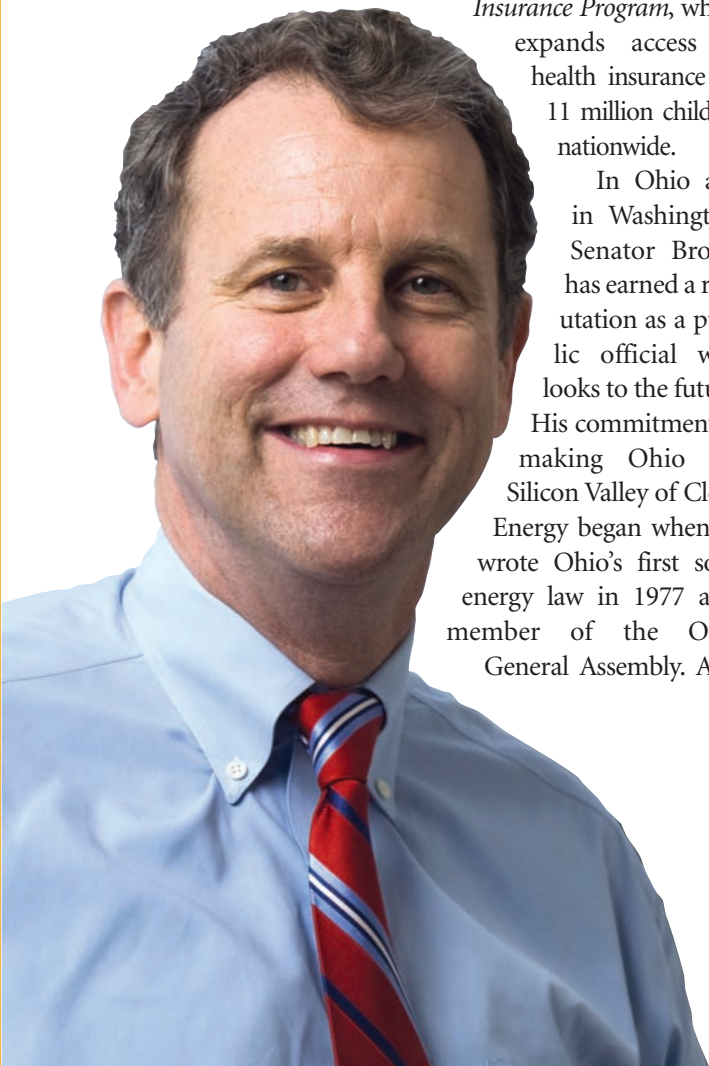
An early and outspoken opponent of the Iraq war, Senator Brown is fighting for comprehensive benefits for our nation's veterans. As a member of the Veterans Affairs Committee, Senator Brown takes this privilege seriously and works to ensure our nation's veterans are guaranteed the benefits they have earned.

Brown is a leading congressional voice on trade issues, and has introduced legislation that provides for a thorough review of our trade agreements and their impact on American wages and jobs.

House

He made his mark during his 14-year tenure in the House with his vigorous opposition to treaties such as the North American and Central American free-trade agreements, which have harmed the manufacturing industry in Ohio and across the nation and exacerbated the nation's trade deficit.

Brown has led the fight in Congress to reform American international trade agreements including CAFTA and NAFTA. In July 2005, while serving in the House of Representatives, Brown led the largest-ever bipartisan, bicameral coalition in opposition to CAFTA. Brown has sought to revamp trade pacts with incentives for corporations to create jobs in this country rather than outsource them. In 2004, Brown wrote the "Myths of Free Trade," a critique of free-trade dogma that spans Central America to Asia to Congress.



Looking Towards the Future

Senate

In March 2010, Brown was appointed to the President's Export Council, the principal national advisory committee on international trade. As Chair of the Senate Banking Subcommittee on Economic Policy, Brown is a vocal advocate for trade deficit reduction. In January 2010, he convened more than 100 Ohio business leaders, including Export-Import Bank Chairman Fred Hochberg, to discuss how an aggressive export strategy can grow new jobs and accelerate economic development.

ITC

Brown has testified repeatedly before the International Trade Commission (ITC). In January 2010, Brown joined U.S. Rep. Tim Ryan (D-OH) to outline how trade enforcement will help domestic producers and workers in the Mahoning Valley before the ITC.

He previously testified before the ITC on behalf of Ohio workers affected by oil tubular imports from China in December 2009. Brown petitioned the ITC for relief from excessive imports of oil tubular goods from China that have had an adverse impact on Ohio companies and workers at U.S. Steel in Lorain, V & M STAR in Youngstown, and Wheatland Tube Co. in Warren.

In October 2008, he testified before the ITC on the effect of subsidized imports on Appleton Papers of West Carrollton, Ohio. Later that month, following his testimony, the ITC ruled that imports of lightweight thermal paper (LWTP) from China and

Germany have injured the U.S. industry. The ruling opened the door for duties to be imposed on imports for three years, which will help domestic paper producers like Appleton Papers.

Recent Legislative Efforts

■ In November 2009, he introduced the *Trade Reform, Accountability, Development, and Employment (TRADE) Act* with Senator Byron Dorgan (D-ND). The TRADE Act would require a review of our trade agreements, provide for policy changes to address any weaknesses in those agreements, and set forth principles on labor, climate and the environment, and food and product safety.

■ The *Trade Enforcement Priorities Act of 2009*, cosponsored by Senator Debbie Stabenow (D-MI), would require the USTR, in consultation with relevant agencies and Congress, to prioritize U.S. trade enforcement strategy to work with those countries with that have a pattern of unfair trade practices.

■ The *Reciprocal Market Access Act of 2009*, cosponsored by Senator Kay Hagan (D-NC), would help the USTR ensure trade agreements result in better market access for U.S. producers and products. Under this legislation, if negotiations do not provide new market access for U.S. goods, then the U.S. cannot reduce or eliminate tariffs on similar products in any trade agreement.

■ In April 2010, Sen. Brown introduced legislation that would prevent workers from being misclassified as independent contractors and would provide for the protection and benefits which they have earned. *The Employee Misclassification Prevention Act* would ensure access to safeguards like fair labor standards, health and safety protections, and unemployment and workers' compensation benefits. "For too long, workers have been denied vital worker safeguards - like fair labor standards, health and safety protections, and UI or workers' compensation benefits," Brown said. "With still fragile economic recovery with significant job loss - workers are too often taken advantage of and lose out on the benefits they rightfully earned. Meanwhile, employers who do right by their employees are placed at a disadvantage when competitors are cutting corners."

As a Congressman representing the 13th District from 1993 - 2006, Senator Brown represented an independent voice for ordinary Ohioans and middle-class families - a man of principle who has made a career of standing up to special interests that have too much influence in Washington.

A native of Mansfield, Ohio, Senator Brown is married to Pulitzer-prize winning columnist Connie Schultz. They reside in Avon, Ohio, and have three daughters, a son, and a grandson all of whom make Ohio their home.

COMMITTEE ASSIGNMENTS

Agriculture, Nutrition & Forestry »

- Subcommittee on Energy, Science & Technology
- Subcommittee on Production, Income Protection & Price Support
- Subcommittee on Hunger, Nutrition and Family Farms

Banking, Housing & Urban Affairs »

- Subcommittee on Economic Policy
- Subcommittee on Housing, Transportation and Community Development
- Subcommittee on Securities, Insurance, and Investment

Select Committee on Ethics »

- Health, Education, Labor & Pensions (H.E.L.P.) »
- Subcommittee on Children and Families
- Subcommittee on Employment & Workplace Safety

Veterans' Affairs »



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Signature of Authorized Representative

Name of Authorized Representative