

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
LABOR RELATIONS COMMITTEE

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PUBLIC HEARING

IN RE: HOUSE BILL 2400 - MISCLASSIFICATION OF
EMPLOYEES AS INDEPENDENT CONTRACTORS

* * * * *

BEFORE: Gene DiGirolamo, Chair
Scott Boyd, Thomas R. Caltagirone, Jim Cox,
Thomas Killion, Bryan Lentz, Mark Mustio,
Dante Santoni, Jr., Tim Seip and Ronald
Walters, Members

HEARING: Wednesday, April 23, 2008
1:01 p.m.

LOCATION: Ridley High School
901 Morton Avenue
Folsom, PA 19033

WITNESSES: Patrick T. Beaty, Bruce Decker, Tim
Wisecarver, Troy Singleton, Matthew Capece,
Rob Naughton, Louis J. Biacchi, David M.
Dvorchak, Stephen M. Swarney, William
George, Russ Keating, Gene Barr, Kevin
Shivers, Danny Kubik, Frank Sirianni, Dean
A. Heyl and Walter P. Palmer

Reporter: Ben Hunter Mengel

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CHAIRMAN DIGIROLAMO:

Good afternoon, everyone. I'd like to call this meeting of the Labor Relations Committee to order. And I think our first order of business, I'd like to ask everyone to rise and we can say the Pledge of Allegiance to the Flag.

ALL RECITE PLEDGE OF ALLEGIANCE

CHAIRMAN DIGIROLAMO:

Okay. At this time I'd like to give the members of the Committee an opportunity to introduce themselves. I am Gene DiGirolamo from Bucks County in the 18th Legislative District. I am the Minority Chairman of the House Labor Relations Committee.

REPRESENTATIVE CALTAGIRONE:

State Representative Tom Caltagirone, from the 27th Legislative District, Reading, Berks County. Chairman of the House Judiciary Committee

REPRESENTATIVE KILLION:

Tom Killion, 168th District representing parts of Delaware and Chester Counties.

REPRESENTATIVE MUSTIO:

Mark Mustio, 24th District, Allegheny County.

1 REPRESENTATIVE LENTZ:

2 Bryon Lentz, Delaware County.

3 REPRESENTATIVE SANTONI:

4 I'm Dante Santoni, I'm from Berks County.

5 CHAIRMAN DIGIROLAMO:

6 And also our two executive directors for
7 the Committee are here, and if you'd let them know who
8 you are.

9 MR. HANSON:

10 I'm Bruce Hanson, Minority Executive
11 Director.

12 MS. DILEO:

13 Vicki DiLeo, Majority Executive Director.

14 CHAIRMAN DIGIROLAMO:

15 We'd like to acknowledge the Majority
16 Chairman, Representative Belfanti, who is not able to
17 be here today. And as the first order of business,
18 I'm going to give Representative Bryon Lentz, whose
19 district we're in, an opportunity to give us a
20 welcome, and if he has a few comments.

21 REPRESENTATIVE LENTZ:

22 Thank you, Mr. Chairman and thank you,
23 members of the Committee. I want to welcome everyone
24 here to Ridley Township. And I want to start by
25 thanking the Ridley School District, whose facility

1 we're using today for hosting us. I want to thank the
2 committee, and those in attendance, and those in the
3 audience for being here today for a hearing on this
4 very important issue for our state and our country.
5 Worker misclassification is a huge problem which needs
6 to be addressed by a clear-cut, understandable
7 legislation like House Bill 2400. This is an issue of
8 fairness to employers, taxpayers and workers.

9 The principles undermined by the practice
10 of misclassification are well established in our
11 Commonwealth. The legislature enacted the Workers'
12 Compensation Act in June of 1915, to protect injured
13 workers and spare employers from protracted lawsuits
14 arising out of on-the-job injuries. In December of
15 1936, at the height of the Great Depression, this same
16 body enacted the Unemployment Compensation Act to
17 assist those who lose their jobs. Misclassification
18 essentially guts both of these basic benefits of
19 employment.

20 Employers who list their workers as
21 employees share in paying the state and local taxes,
22 health care, pensions, unemployment insurance and
23 other basic employee benefits. Employers who
24 misclassify employees avoid these expenses. These
25 employers are then, when they avoid these expenses are

1 able to underbid honest employers who comply with the
2 employment and tax requirements.

3 Some estimates, which we'll hear about
4 today in testimony, estimate that noncompliance with
5 tax and unemployment laws decrease an employer's
6 payroll costs between 15 and 30 percent. This damages
7 the statewide system even further when they are used
8 as a method to hire and use illegal workers on
9 projects. This is particularly true in the
10 construction industry. The cost of misclassification
11 should get all of our attention.

12 Other states like Massachusetts and New
13 York estimate that they're losing millions of dollars
14 each year in unemployment insurance, and being cheated
15 out of additional millions in income taxes. Based
16 upon recent studies of misclassification in the states
17 of Illinois and Massachusetts, Pennsylvania could be
18 losing more than a hundred million dollars annually in
19 unemployment compensation taxes that should be paid on
20 the wages of employees who are misclassified.

21 These costs are passed on to the
22 taxpayer. Misclassification of employees results in a
23 loss of revenue by local, state and federal
24 governments. The losses mean less revenue for the
25 state, which means less money for our school systems,

1 less money for roads and less money for many other
2 critical programs. Misclassified workers don't
3 typically get health insurance. More of them rely on
4 emergency rooms to obtain medical treatment, and go to
5 hospitals without being able to pay, which in turn
6 jacks up the cost of health care and insurance rates.

7 In Pennsylvania, we need to follow the
8 lead of other states that have provided clear notice
9 to employers of the rules and the penalties for
10 misclassifying employees. This legislation
11 establishes the Employee Misclassification Prevention
12 Act. It would presume a person who is paid to perform
13 services to be an employee of that employer that pays
14 their wages. This presumption is similar to the
15 Unemployment Compensation Act, and can be similarly
16 rebutted by three basic criteria.

17 Employers would be required to prove to
18 the Department of Labor and Industry that the
19 individual is independent from their direction and
20 control, provides a service is outside the usual
21 course of the business of the contractor, and lastly,
22 the individual is regularly engaged in an
23 independently-established trade, occupation,
24 profession or business. The legislation proposes both
25 criminal and civil penalties, and debarment from

1 public work, if an employer is found to be in
2 violation of the act.

3 This legislation is patterned after a
4 recently enacted legislation in New Jersey. It was
5 undertaken with the assistance and leadership of
6 Representative Bob Belfanti, who has worked on this
7 issue for many years. I ask the members of the
8 Committee that are present today, and those who can to
9 support this legislation. I think it's an issue we
10 can all agree is wrong and must be fixed. The
11 exploitation of American workers is a systemic
12 problem, which is eroding the middle class.

13 There are many accounts in the press of
14 the impact that this has on individuals that have been
15 misclassified, and they lose their job or become ill
16 or injured. Let's act today to stop what is really an
17 obvious bad practice hurting both workers and
18 taxpayers, as well employers.

19 Thank you, Mr. Chairman.

20 CHAIRMAN DIGIROLAMO:

21 Thank you, Representative Lentz. And I
22 would like to give the opportunity to Representative
23 Cox to introduce himself.

24 REPRESENTATIVE COX:

25 I am Representative Jim Cox. I represent

1 western Berks County, and that is the 129th District.

2 CHAIRMAN DIGIROLAMO:

3 At this time I'd like to recognize Vicki
4 DiLeo, the Executive Director.

5 MS. DILEO:

6 Thank you, Mr. Chairman. I just want to
7 make a couple announcements. First of all, turn of
8 your cell phones off or put them on vibrate. We
9 appreciate having them turned off. As you can see,
10 there are two cameras in the room. The carpenters
11 requested, or asked if they could tape the meet. It's
12 a public meeting, so they are permitted to do so. And
13 we're going to ask the testifiers to try to stay close
14 to their time allotted. And as sort of a little bit
15 of background for some of you, this hearing is being
16 held at the request of the Republican --- primarily
17 the Republican members of the committee.

18 We were going to move this bill out of
19 committee about two weeks ago. They indicated they
20 wanted more time. Representative Belfanti reluctantly
21 agreed to do so, and agreed to hold a hearing. And it
22 would be --- and it made sense to hold it here in
23 Representative Lentz' district. So that's the
24 background. We have a meeting scheduled for May 6th
25 at ten o'clock in Room 60, East Wing of the Capitol,

1 where we will hopefully have a compromise amendment,
2 and we'll take up the bill and move it out of
3 committee. Thank you.

4 CHAIRMAN DIGIROLAMO:

5 Okay. Thank you. And again, just for
6 the information of everybody that's here today, I am
7 also a co-sponsor of this bill. And I appreciate
8 Representative Belfanti giving the opportunity for all
9 the groups that are involved to have this opportunity
10 to come here today and testify. So maybe some of the
11 concerns of some of the groups we'll be able to
12 address in that amendment.

13 With that, I'd like to call up our first
14 set of testifiers, Patrick Beaty, Deputy Secretary of
15 Unemployment Compensation Programs, Department of
16 Labor and Industry. Bruce Decker, Senior Vice
17 President, Pennsylvania Compensation Rating Bureau.
18 And Tim Wisecarver, who is the President of the
19 Pennsylvania Compensation Rating Bureau.

20 If you three gentlemen want to come up.
21 If I might ask, before you begin testifying, to
22 identify yourselves so we know who each of you are.
23 Thank you.

24 MR. DECKER:

25 I'm Bruce Decker with the Pennsylvania

1 Compensation Rating Bureau.

2 MR. WISECARVER:

3 I'm Tim Wisecarver, also with the
4 Pennsylvania Compensation Rating Bureau.

5 DEPUTY SECRETARY BEATY:

6 Patrick Beaty, Deputy Secretary for
7 Unemployment Compensation Programs, Department of
8 Labor and Industry.

9 CHAIRMAN DIGIROLAMO:

10 Okay, gentlemen, you can begin at any
11 time.

12 DEPUTY SECRETARY BEATY:

13 I believe I'm scheduled to go first.
14 Thank you, Mr. Chairman and members of the Committee.
15 I will attempt to stay within the time constraints. I
16 didn't actually time my testimony, so I'm not sure how
17 long it will take me, but we'll try to move it right
18 along.

19 Again, my name is Patrick Beaty. I am
20 Deputy Secretary for Unemployment Compensation
21 Programs in the Pennsylvania Department of Labor and
22 Industry. On behalf of Acting Secretary Sandi Vito, I
23 want to thank you for this opportunity to appear
24 before you today to give the Department's perspective
25 on the growing problem of misclassified workers.

1 My testimony today will attempt to
2 describe this problem and its effects on various
3 parties and on the programs that we administer in the
4 Department.

5 At the outset, I think it is important to
6 state the problem clearly, so that we all know what
7 we're talking about and what the issue is that we're
8 trying to --- what the objective is of any proposed
9 legislative solution, whether it be House Bill 2400 or
10 any of the other numerous bills that have been debated
11 over the past few years.

12 The first thing I believe we need to
13 acknowledge is that there are many individuals in
14 Pennsylvania and across the country who are in the
15 business of doing jobs or projects for others on a
16 contract basis. Their livelihood depends upon the
17 ability to continually find new clients who are
18 willing to pay them by the job and not as an employee.
19 They have invested in their own business with all the
20 overhead costs that go along with that. And they have
21 taken a substantial risk that the business might
22 succeed or fail. These independent contractors are
23 entrepreneurs in the truest sense in many cases. And
24 they play a very important role in Pennsylvania's
25 economy.

1 Likewise, businesses that choose to
2 contract for the services of an independent
3 contractor, rather than to hire an employee for that
4 person usually have very legitimate reasons for doing
5 so. Those reasons might even include the fact that
6 the business does not want to take on the additional
7 cost of paying unemployment compensation tax, or
8 Workers' Compensation premiums for an employee to do
9 that same work.

10 So long as those arrangements are entered
11 into willingly by both parties, and the party doing
12 the work is truly an independent contractor, the
13 Department of Labor and Industry has no desire to
14 second guess legitimate business decisions or to
15 express a preference for hiring employees rather than
16 contractors.

17 The problem arises when the person doing
18 the work is in reality an employee, but has been
19 misclassified by his employer as an independent
20 contractor. All kinds of consequences flow from
21 misclassification, particularly for the worker
22 himself, if he is underpaid, or injured on the job, or
23 let go.

24 Even if he is eventually successful in
25 establishing his true status as an employee, a

1 misclassified worker can find it much harder to
2 qualify for Workers' Compensation and Unemployment
3 Compensation since the business that he worked for has
4 not been listing him as an employee, in the reports
5 they provide to their insurance carrier or in the
6 quarterly wage reports that they file with the
7 Department of Labor and Industry. There can also be
8 significant consequences for the competitors of
9 businesses that misclassify their workers in order to
10 reduce their costs of doing business.

11 Misclassification creates an unfair advantage for
12 those who engage in the practice, allowing them to
13 underbid their competitors who play by the rules.

14 Now, the balance of my comments today
15 will relate to the area for which I am responsible,
16 which is the Unemployment Compensation system.
17 However, many of the problems that misclassification
18 creates for the UC system exists as well in the
19 context of Workers' Compensation. When workers are
20 misclassified, that means Workers' Comp premiums are
21 not being paid for that worker, even though the
22 insurer may still be at risk in the event that the
23 worker is injured on the job.

24 And like UC, the WC system currently
25 relies upon an audit system to find misclassified

1 workers and to recover premiums that should have been
2 paid. Other programs in L&I and other labor laws are
3 also affected by misclassification. Including, for
4 example, the minimum wage law, the wage payment and
5 collection law and personal income tax withholding.
6 As I said, the balance of my comments will be
7 primarily related to the Unemployment Comp system, and
8 the effects on that system.

9 In Pennsylvania, as in all other states,
10 employers pay Unemployment Compensation taxes based on
11 the wages they pay to their employees, up to a certain
12 amount. And in Pennsylvania, that amount is \$8,000
13 per employee. Businesses do not pay Unemployment
14 Compensation on any payments they may make to workers
15 who perform services as independent contractors, even
16 if those services are indistinguishable from services
17 provided by employees.

18 The UC law presumes, just as HB 2400
19 would do, presumes that an individual who is
20 compensated for work is an employee who is potentially
21 eligible for UC benefits, and whose wages are subject
22 to tax, unless the worker qualifies as an independent
23 contractor.

24 Now, the lack of any requirement in law
25 that employers identify contracted labor in their UC

1 filings makes it difficult to accurately estimate the
2 number of workers who are not being reported as
3 employees, and the extent to which those workers may
4 be misclassified as independent contractors.

5 However, every misclassified worker
6 represents a loss of revenue to the UC trust fund, an
7 average of \$400 per worker last year, and an unfair
8 competitive advantage, as I said, compared to other
9 employers who do not misclassify workers. There are
10 indications that misclassification of workers is
11 becoming more prevalent, particularly in certain
12 industries. This is occurring at a time when
13 employers in Pennsylvania have been paying higher UC
14 tax rates, including additional solvency taxes, needed
15 to replenish the trust fund following the 2001
16 economic recession. Even though it's now 2008, our
17 employers in Pennsylvania are still paying additional
18 solvency taxes that kicked in a few years ago. And
19 they will continue to pay them for the foreseeable
20 future.

21 A recent study, which has been alluded to
22 by Representative Lentz, of misclassification in
23 Massachusetts, estimated that between 13 and 19
24 percent of all employers in that state engage in
25 misclassification. The 2004 Massachusetts study

1 focused on the construction industry, in which the
2 study found misclassification was only slightly more
3 prevalent than in other industries, ranging between 14
4 and 24 percent of all construction employers.

5 However, the study also found that among
6 construction employers who engage in misclassification
7 between 40 and 48 percent of their workers are
8 misclassified. Moreover, the study concluded that
9 worker misclassification is a growing phenomenon, as
10 employers look for ways to cut costs and gain a
11 competitive advantage. Estimates of misclassification
12 in Massachusetts grew from 8 percent of employers in
13 the 1995-'97 period, to 11 percent in 1998 to 2000 and
14 to 13 percent in 2001-2003. The Massachusetts study
15 estimated that between four and a half and 8.9 percent
16 of all employees in the state are misclassified as
17 independent contractors.

18 Studies in other states have reached
19 similar results, including one that was done for the
20 State of Illinois that was also mentioned previously
21 that we measured misclassification during the 2001 to
22 2005 period, and estimated that 7.5 percent of
23 employees in that state were misclassified during that
24 period. And again, it was seen to be a growing
25 problem, going from 5.5 percent to 8.5 in 2005, a 55

1 percent increase in four years.

2 Tim Wisecarver, who's here with me and
3 Bruce Decker, from the Pennsylvania Compensation
4 Rating Bureau have recently completed an analysis
5 using our Pennsylvania UC data, and applying a similar
6 methodology to the one that was used in Massachusetts.
7 The PCRB analysis concludes that nine percent of
8 Pennsylvania workers are misclassified for UC purposes
9 on an annual basis. And that represents over half a
10 million Pennsylvania workers.

11 There was a reference earlier to an
12 estimated loss in Pennsylvania UC taxes of above \$100
13 millions. That's a figure I believe that we may have
14 provided. We now believe that that is actually
15 double, that we are losing, and we lost over \$200
16 million last year due to misclassification.

17 We also believe this is a conservative
18 estimate, because it's based primarily upon audits of
19 employers who are already in our system. That is,
20 employers who typically do file reports that contain
21 wages for some employees, workers that they consider
22 to be employees. In most cases, or in many cases I
23 should say, the audits will discover additional
24 workers who are not being reported, and who we believe
25 should have been reported by employees.

1 However, because the estimate of
2 misclassified workers is based on the universe of
3 known employers, it does not take into account much of
4 the so-called underground economy, which includes
5 employers who act as if they have no employees at all,
6 who pay everybody under the table and off the books.

7 The majority of Pennsylvania businesses
8 who properly report employee wages are losing out
9 twice as a result of this practice. First, as I
10 mentioned previously, they're finding it increasingly
11 more difficult to compete against businesses that
12 wrongfully avoid paying their fair share of Workers'
13 Compensation premiums and UC taxes. And in the case
14 of UC taxes, they are paying more into the trust fund,
15 in the form of solvency taxes, that kick in when the
16 trust fund balance is low.

17 As our national economy continues to
18 weaken, the temptation for employers to engage in
19 misclassification will only increase, as they look for
20 ways to cut costs and gain a competitive advantage.
21 This will mean fewer UC tax dollars, and an increased
22 tax burden on the majority of employers who continue
23 to play by the rules. As I stated before, the UC law
24 presumes that a worker who performs services for
25 another is an employee. However, the decision to

1 report the money paid to that worker as wages paid to
2 an employee is up to the employer in the first
3 instance.

4 Often the Department of Labor and
5 Industry will only discover the existence of
6 misclassified workers either as the result of an
7 audit, when the worker files for Unemployment
8 Compensation, or when we receive a complaint from a
9 competitor. Even when we do discover
10 misclassification, the penalties are not substantial
11 and are obviously not sufficient to deter this
12 practice, or prevent it from becoming more prevalent.
13 Proving misclassification has also become more
14 difficult, as the courts have gradually weakened the
15 two-part test to qualify as a independent contractor
16 under the UC law.

17 And here I will just diverge for a minute
18 from my testimony. HB 2400 has a three-part test.
19 The current UC law has a two-part test, which would be
20 I believe the first and the third of the factors that
21 are in HB 2400.

22 Current law requires proof that the
23 worker is free from direction and control by the
24 employer. And that the worker is engaged in an
25 independently established trade, occupation,

1 profession or business. Unfortunately, the courts
2 have interpreted the second part of this test, to
3 require only that the worker have the ability to
4 perform services for other customers or clients, even
5 if in reality he's only working for one, and even if
6 that one client provides all the tools needed to do
7 the job.

8 The Department of Labor and Industry
9 believes that tightening up the definition of who can
10 qualify as an independent contractor is the single
11 most important change that you can make in the law on
12 this subject. A stronger definition will not only be
13 a big help to our enforcement efforts, it will also
14 provide some much needed clarity for the business
15 community and for the vast majority of employers who
16 strive to play according to the rules.

17 In conclusion, I want to thank the
18 committee for focusing on this issue. And I look
19 forward to working with you to find workable solutions
20 to the problem.

21 CHAIRMAN DIGIROLAMO:

22 Thank you very much. Vicki, do you want
23 to have the full panel ask questions? Thank you.

24 MR. WISECARVER:

25 Thank you, my name is Tim Wisecarver.

1 I'm with the Pennsylvania Compensation Rating Bureau.
2 We've provided some written materials to the Committee
3 in advance of this hearing. My invitation to speak
4 here included an admonition that I not try and say all
5 that before you this afternoon, so I'm not going to do
6 that. There was also some guidance about things I
7 might talk about that perhaps would be most helpful to
8 you. And those included our view of the scope of this
9 issue, and some comments towards possible solutions to
10 it. So those are the two areas I'm going to address.

11 As Pat mentioned, we became aware of,
12 actually in part through the efforts of the Department
13 of Labor and Industry, this Massachusetts study of
14 misclassification of workers. And we read that
15 report, and went back to the Department of Labor and
16 Industry and got information from them about the
17 unemployment tax audits which they performed in 2006,
18 2007 and the first part of 2008. There were 11,000
19 such audits that we were given data on. And when we
20 worked through those, we did find, as Pat told you,
21 about nine percent of the workers who were ultimately
22 identified in that set of 11,000 audits, that weren't
23 there before the audit was done.

24 There were new workers that were
25 basically found by virtue of the audit enterprise.

1 And presumably, at least in the Massachusetts study,
2 those were folks who had been considered independent
3 contractors beforehand, and were found to be employees
4 when the auditors came through. We also found that
5 about three percent of the total payrolls for the
6 entities that were subject to those 11,000 audits,
7 were attributable to the new employees. That's an
8 important number for us, because payroll is generally
9 the driving exposure base for Workers' Compensation.

10 Now, for that group of new employees to
11 represent nine percent of the workers, and three
12 percent of the payroll, they are typically getting
13 less than remuneration in an audit period, typically a
14 calendar year, than are the --- if you want to use the
15 term regular employees, the ones who were on the
16 report initially, we believe it is more likely that
17 that's because the independent contractors were of a
18 mobile nature where they came in, did work for an
19 entity for a limited period of time and then left, as
20 opposed to working side-by-side with the regular
21 employees throughout the course of the year, and
22 simply getting lower payment for the services that
23 they were providing.

24 Using that three percent number, which
25 would be the catalyst for an effective Workers' Comp

1 system, which in Pennsylvania, the commercial
2 insurance market is about a \$2.7 billion premium
3 market each year. We would estimate about an \$81
4 million difference attributable to this population of
5 new employees that is translated across the entire
6 population of insured employers.

7 In terms of a potential solution, we
8 certainly read House Bill 2400. We've heard and
9 understand there are some ongoing dialogues that we
10 are not party to, and that's fine, in terms of these
11 definitions. Our most pertinent observation would be
12 that at least in terms of the existing standards, we
13 do not perceive the characteristic of being an
14 employee or an independent contractor to be an
15 immutable and constant characteristic of each of us as
16 an individual.

17 And we don't think it's determined by
18 what we're doing. It's determined, in substantial
19 part, by how we're doing it. The right of direction
20 and control can come and go as people perform
21 services, are asked to do things, adapt to the
22 environment in which they are operating. We've seen
23 case decisions which specifically take note of the
24 fact that someone typically would clearly have been an
25 independent contractor, but for a period of time right

1 around the event of their injury, they were engaged in
2 something at the behest of the entity they were
3 providing services to, and got specific direction or
4 requests on how to do that, and their accommodation to
5 that made them employees in the light of the law for
6 that limited period of time during which they were
7 actually hurt.

8 So as you think about this and craft
9 definitions, and think about applying those kinds of
10 constructs, it simply occurs to us that you should be
11 mindful of that vagary of the circumstances. And that
12 you can consider either making definitions that you
13 are comfortable with, or you could consider an
14 approach that says if independent contractors were
15 covered under the Workers' Compensation Act, now it
16 wouldn't matter whether I was moving back and forth
17 between the standard of being an employee or an
18 independent contractor, I would always be covered, and
19 we wouldn't have this debate about am I or am I not,
20 because of how I'm doing the work.

21 We don't advocate it, as much as we just
22 want to open it up for intellectual purposes to say,
23 thinking about a problem and when you understand how
24 the system works today and how it might work under
25 these alternatives, either that approach or some

1 adaptation within your approach to the definitions
2 might be useful. And we would rather use additional
3 time, if we have it, for some of these questions than
4 further comments from us.

5 CHAIRMAN DIGIROLAMO:

6 Does anybody have any questions for these
7 witnesses? Representative Mustio?

8 REPRESENTATIVE MUSTIO:

9 Thank you. And before I do that, just to
10 give you a little bit of background on myself so you
11 understand the nature of my questions and where
12 they're coming from. Prior to running for office, and
13 currently, I was in the insurance business and
14 currently am, in prior to deciding to run, I actually
15 met with the Pittsburgh Council of Carpenters to
16 address an issue that I tried to address in the last
17 session. But my philosophy was, I didn't want to
18 create a piece of legislation that was going to cause
19 more problems than what I was trying to solve.

20 And Mr. Decker and I had spoken in the
21 past regarding insurance companies that would audit
22 sole proprietors --- or audit contractors and include
23 sole proprietor independent contractors. And I think
24 that's really what we're talking about in these
25 situations, are really the sole proprietor as opposed

1 to the independent contracting situation that is being
2 used to kind of scam the system. And that's something
3 that we all, I think, are in agreement that we want to
4 stop, because it's costing not only benefits, it's
5 costing jobs. But it's also costing our employers
6 that are paying legally into the system, a lot of
7 money.

8 Yesterday, Mr. Decker, we spoke about
9 some of the classifications under the current Workers'
10 Compensation law, that are exempt from coverage. For
11 example, real estate agents or some insurance agents
12 that are paid solely on commission. Some of the
13 feedback that we've received are those direct sellers,
14 like Mary Kay cosmetics, or Avon, those type of people
15 that are truly out there on their own. Do you see a
16 need or possibly a necessity to exempt some other
17 classifications? My fear is that enacting this
18 legislation creates some additional problems that will
19 need to be addressed.

20 MR. DECKER:

21 Well, in other systems, and currently in
22 the Pennsylvania system, if you incorporate your
23 business, and become a corporation, there is a
24 corporate officer exemption. You can exempt the
25 corporate officers from Workers' Comp. And that's one

1 avenue to exempt any type of business. Again, there
2 are businesses out there that clearly are different
3 than the rank and file that deal with individuals more
4 than others. You mentioned a couple. It's obvious
5 that there's others that we probably wouldn't think of
6 that will surface as this thing gets discussed more.

7 REPRESENTATIVE MUSTIO:

8 But if they don't incorporate, they're
9 still a sole proprietor. For example, my daughter
10 sells Mary Kay cosmetics to help put herself through
11 school. Is she an employee of Mary Kay?

12 MR. DECKER:

13 Well, again as we pointed out, the
14 question isn't necessarily whether or not you're an
15 independent contractor, because for a period of time,
16 absolutely. I don't think anybody would argue that
17 you would be an employee. But if there's a
18 circumstance that takes place, and it's hard to think
19 of every situation, but there have been examples in
20 the past, court cases, where an accident occurs,
21 there's an injury, who's going to pay for that.
22 Sometimes it's clear, if it's not work-related. But
23 if it is work related, and the claim is significant,
24 usually you're looking towards an entity such as an
25 insurance company to pay that claim. And that's where

1 I think the question is suggested that whether or not
2 you now are an employee.

3 REPRESENTATIVE MUSTIO:

4 Right. And previously, if you look, as
5 you know, in the Workers' Compensation manual, sole
6 proprietors were not covered under the Act. Now it's
7 my understanding that SWIF is selling insurance
8 policies or making them available for sole
9 proprietors.

10 MR. WISECARVER:

11 Voluntary policies. We understand that
12 to be true as well.

13 REPRESENTATIVE MUSTIO:

14 So I think from a risk management type
15 perspective, that that addresses the problem that I
16 tried to address in the last session. So that issue I
17 think is pretty much off the table. And we can say to
18 employers, look, those that are hiring and calling
19 people independent contractors, and we're picking you
20 up on audit because those people didn't have coverage,
21 you've had the opportunity to make them buy it as
22 individuals; correct?

23 MR. DECKER:

24 That's our understanding.

25 REPRESENTATIVE MUSTIO:

1 And if not, then we're going to pick them
2 up on ours. So my issue, I think, that I tried to
3 fix, has been fixed from a risk management
4 perspective. And now we can just go after it and
5 attack ---.

6 MR. DECKER:

7 One point of clarification. When you
8 indicate sole proprietor, I think within our shop we
9 like to say sole proprietor without employees.
10 Because if you're a sole proprietor with employees ---

11 REPRESENTATIVE MUSTIO:

12 Correct, you have to have coverage.

13 MR. DECKER:

14 --- you have to buy a policy.

15 REPRESENTATIVE MUSTIO:

16 Correct. That's what I was alluding to.

17 MR. DECKER:

18 Right, I understand. I just wanted to
19 make it clear.

20 REPRESENTATIVE MUSTIO:

21 Now, one last quick question, when we
22 spoke yesterday on the phone, you thought possibly
23 that we might want to re-term how we're stating the
24 employee classification, or misclassification, because
25 it might generate some other problems.

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MR. DECKER:

Within the Workers' Compensation system within Pennsylvania and most other jurisdictions that we're aware of, the employee misclassification term is also used for the classification system within all the businesses. So if you were a clerical office person, and your policy was also a carpenter, if you were ---.

REPRESENTATIVE MUSTIO:

In fact, I brought an example, so that you can --- so the members can see it as you explain it. The classification on there is carpentry, sales and clerical. So if you want to speak to that for the members, they'll see it in black and white.

MR. DECKER:

Okay. Again, each of these examples of classifications are really not a question of whether or not a person is an independent contractor or not. They are bona fide employees, and I don't think there's any kind of dispute. The dispute may come because of the activities or the duties that the person has. And that's how an insurance carrier would classify the person. And the term that's used if they're not classified properly is misclassification, employee misclassification. What we talked about was --- really what we're addressing today is employment

1 status misclassification, or employee status
2 misclassification. It's a subtle term, but again, I
3 think it addresses what we're actually talking about
4 as opposed to the example that you have in front of
5 you.

6 REPRESENTATIVE MUSTIO:

7 And just one last follow-up, and then
8 I'll be quiet. Two reasons that this legislation is
9 important. One, if you look at the sheet that I
10 handed you, you can see that the carpentry
11 classification rate is \$14.73 per hundred of payroll.
12 What happens in the instance what Mr. Decker is
13 talking about is that some employers will on their
14 books, say that person is really a salesman, and you
15 can see they pay a lot less for Workers' Comp, but
16 they still have the coverage.

17 But what the legislation is trying to do,
18 and I think rightfully so, is for those employers that
19 are calling them independent contractors, they're not
20 even paying the 75 cent rate, let alone the \$14 rate.
21 So the rest of the businesses out there that are
22 actually paying premiums are paying a higher rate than
23 they really should be, because these other employers
24 aren't paying into the system. And that's what your
25 legislation is trying to address. And that's what's

1 very good about it. Thank you.

2 CHAIRMAN DIGIROLAMO:

3 I want to give Representative Boyd a
4 chance to introduce himself.

5 MR. BOYD:

6 Scott Boyd, from the 43rd District in
7 Lancaster County.

8 CHAIRMAN DIGIROLAMO:

9 Are there any more questions for this
10 panel? Okay, thank you, gentlemen for your time and
11 your testimony. Next up we have --- I ask Troy
12 Singleton to come forward. Is Troy here? Troy is the
13 Director of Policy and Planning for the Eastern
14 District Council of Carpenters. Matthew Capece,
15 representative of the General President of the United
16 Brotherhood of Carpenters. And Rob Naughton, from the
17 Philadelphia Carpenters' Union.

18 Mr. Singleton, we'll start with you when
19 you're ready.

20 MR. SINGLETON:

21 Sure. Good afternoon, gentlemen. My
22 testimony I believe is in the package you all
23 received. But I really wanted to highlight a few
24 points of it if I might. Again, my name is Troy
25 Singleton. I'm the Director of Policy and Planning

1 for the Eastern Region of the United Brotherhood of
2 Carpenters. It is indeed a privilege to speak before
3 you today.

4 First question is, why is this issue of
5 employee misclassification reform so important. And
6 quite honestly, it's important because it affects
7 every corner and every aspect of our society in a
8 tangible way. And if I might, I'll give one example
9 of hospitals. As we all know, hospitals are obligated
10 to provide care for those who come through their
11 doors. I'm from New Jersey, and in New Jersey, that's
12 called our Charity Care Program. In different places
13 it's called uncompensated care pools, et cetera.
14 Workers without health insurance coverage, that they
15 would otherwise enjoy if they were classified
16 correctly, are subsidized by emergency medical care.
17 And the cost of these uncompensated care pools make
18 their way into the cost of health and Workers'
19 Compensation insurance, raising premiums and having
20 all of us have to pick up the tab.

21 The issue of employee misclassification
22 is a critical challenge facing both our region and
23 nation. I believe Representative Lentz stated it
24 quite succinctly earlier that entities that
25 misclassify workers as independent contractors have

1 been shown to lower their labor costs in some
2 instances by 15 to 30 percent.

3 This practice obviously hurts their
4 workers and the public, and they gain an unfair
5 advantage in the marketplace.

6 In New Jersey, the United Brotherhood of
7 Carpenters were proud to stand with Governor Corzine
8 as we crafted a similar proposal that sought to
9 protect workers and root out the abuses of this
10 underground economy. That proposal, signed into law
11 in July of 2007, was instrumental in a March class
12 action lawsuit filed by the New Jersey Regional
13 Council of Carpenters against D.R. Horton.

14 One of the five main points of that class
15 action suit is that D.R. Horton is alleged to have
16 violated the provisions of the New Jersey Construction
17 Industry Independent Contractor Act, by employing and
18 harboring undocumented workers. The case goes into
19 great detail of the talk about how this illegal hiring
20 scheme was done not only to suppress wages, but also
21 to knowingly hire a large contingent of undocumented
22 workers, and deny those individuals the proper wages
23 and benefits that they would deserve for their work.

24 In 2005, the New Jersey Department of
25 Labor conducted an audit of 2.5 percent, merely two

1 and a half percent of the New Jersey employers, and
2 revealed 26,000 employees were misclassified. This
3 resulted in \$15 million in underpayments to the
4 unemployment insurance and disability insurance funds.

5 Furthermore, in 2006, the United States
6 Government Accountability Office estimated that the
7 federal government lost \$4.7 billion in income taxes
8 alone in the previous year, due to employers
9 classifying employees as independent contractors. And
10 if I might give an example of what happened in the
11 Commonwealth here, no clearer example of this practice
12 can be seen in what happened at Slippery Rock
13 University in 2006.

14 I know the Channel 4 Action News in that
15 area, as well as the Pittsburgh Tribune News (sic),
16 had ran articles on this. And they talked about how
17 workers were being paid as independent contractors on
18 a new dormitory project. The story, almost too
19 comical to be believed, depicted how workers on the
20 site, though not fluent in the ability to read or
21 write the English language were listed as construction
22 company owners, and working as independent contractors
23 on those projects.

24 We've come to realize that this is such a
25 common practice that in 2000 the United States

1 Department of Labor commissioned a report that found
2 employee misclassification in the construction
3 industry to be critical nationally. And I'll quote
4 that report if I might.

5 The construction industry was the
6 industry frequently cited by the interviewees as most
7 likely to use independent contractors, contain the
8 highest incidence of misclassification, or as one that
9 lures employees into becoming independent contractors.
10 That report, again, found that 30 percent of firms
11 misclassified their employees as independent
12 contractors. Quite honestly, that is one of the main
13 reasons why the State of Pennsylvania needs this
14 legislation.

15 The legislation you have before you is an
16 aggressive attempt to combat this problem, it seeks to
17 level the playing field, and ensure that all employers
18 are playing by the same rules. One of the sort of
19 monikers that we used in New Jersey when we did this,
20 was that we were looking to say that we were breaking
21 the HUB. And for us, the HUB meant --- as an acronym,
22 that means higher taxes and insurance costs on honest
23 citizens unfair to honest businesses and billions of
24 lost revenue.

25 Gentlemen, I thank you for your time.

1 CHAIRMAN DIGIROLAMO:

2 Thank you. Mr. Capece?

3 MR. CAPECE:

4 Thank you. My name is Matthew Capece. I
5 work for the United Brotherhood of Carpenters. It's a
6 pleasure to be here today to lend our voice in support
7 of this important piece of legislation. I was hired
8 by the United Brotherhood of Carpenters to work
9 specifically on this issue. And it's an issue that in
10 one capacity or another, either for the international
11 union or for my local union and council in
12 Connecticut, that I've been working on since 1989,
13 both as doing field investigations and presenting
14 information to law enforcement on violation of a law,
15 and also on a policy basis, helping to draft testimony
16 and speaking before committees like this on these
17 issues.

18 So it's a pleasure to be here with you
19 today. I'm not going to try to --- hopefully I'm not
20 going to cover a lot of ground that's already been
21 covered by Troy Singleton, and by the Department, and
22 folks that testified in the previous panel. Their
23 comments were concise and ably reflected the
24 situation. I'm going to try to focus a bit more on
25 the construction industry, to tell you about how this

1 is specifically --- how we see this impacting the
2 construction industry nationally. And also discuss
3 about --- discuss with you some other actions we've
4 seen around the country by other states on the issue.

5 First of all, what we see as
6 misclassification comes in two forms. First, it's the
7 payment of the worker who by law should be treated as
8 an employee. And they're paid as an independent
9 contractor with a check, and without deductions. And
10 at the close of the tax year, they get a 1099 form.
11 But we also see another form of this, which is paying
12 people unreported compensation. A check without
13 deductions and cash, straight on the barrel head cash
14 without deductions.

15 And a common thought I frequently hear is
16 folks seem to think this sort of thing is happening on
17 small construction projects, a kitchen renovation or a
18 porch being built on someone's house. And certainly
19 it does happen in those situations. But unfortunately
20 we see it --- we see it around the country on much
21 larger projects. We've seen it on construction of
22 hundred million dollar condos, skyscrapers. We've
23 seen it on unemployment offices. We've seen it on
24 federal courthouses. So it covers a spectrum. We see
25 it in residential; we see it in drywall; we see it in

1 floor covering; we see it in the concrete part of our
2 industry.

3 We did a survey a number of years ago of
4 our councils to see how much of a problem this was
5 before we launched into our efforts. And 88 percent
6 of the councils came back from around the country, and
7 told us that they found this was a significant
8 problem. And it's not hard to understand why this is
9 a significant problem in the construction industry,
10 where jobs are frequently awarded on the basis of a
11 competitive bid. And as you've heard, folks can lower
12 their labor costs unlawfully and underbid legitimate
13 businessmen.

14 So there's the competitive nature of the
15 business. There's the mobile nature of the business,
16 where contractors and workers jump from job to job, so
17 it can be difficult to keep track of people. And in
18 addition, you have the multiple layers of contracting
19 what are involved. So all this activity, illegal
20 activity that we are seeing, skews the competitive
21 marketplace in favor of the cheaters and victimizes
22 law abiding employers, their employees and taxpayers.

23 Some numbers. In addition to my
24 testimony, I have a summary of some studies. And I
25 want to bring your attention to some of those.

1 There's some discussion about cross shifting on
2 Workers' Comp. In the State of California, UC Berkley
3 took a look at this issue. And they found in the
4 State of California, \$100 billion, not million,
5 billion dollars in underreporting. That included
6 misclassification of class codes, misclassification of
7 workers as independent contractors and underground
8 cash, unreported pay, a hundred billion dollars a
9 year.

10 And they found that for the high class
11 codes --- now, who are the high class codes in
12 Workers' Comp? Construction. That those contractors
13 were paying up to eight times more for their Workers'
14 Compensation premiums than they should have been
15 because of the fraud in the industry.

16 I am a little nervous about mentioning
17 this number, because I just read a press report about
18 it this morning, so it deserves some looking into,
19 because it was a press report and I haven't read the
20 study, but at Cornell University, who did the New York
21 study that's cited in the papers I gave you, they did
22 something --- well, the press report described it is a
23 poll.

24 What it means, I don't know. But
25 according to the Cornell poll, between 2002 and 2005,

1 four billion dollars in tax revenues were lost, state
2 tax revenues were lost, because of misclassification
3 in the construction industry. I thought you should
4 know about it. There's another number out there that
5 seems pretty big, but we should take a look at that
6 report also, and not dismiss it.

7 Also, the reports --- a lot of these
8 studies that have been coming out, a problem with the
9 studies, for instance the Massachusetts study, which
10 is a great study, and the Illinois study, is that they
11 take a look at the misclassification, and the workers
12 getting the 1099s.

13 But they don't really take --- because of
14 how the studies were done, they don't encompass the
15 breath of the underground economy, the off the books
16 stuff. The Fiscal Policy Institute took a stab at it.
17 And in New York City alone, in the construction
18 industry, they found that 25 percent of the
19 construction workers in New York City were paid either
20 off the books or misclassified. And they estimate
21 that in 2008, that is going to cost, in lost federal
22 taxes, lost state taxes and health care cost shifting,
23 and lost premiums for Workers' Comp, just from the
24 activity in New York City alone is going to cost \$557
25 million.

1 So clearly we're not talking about
2 something small here. We're talking about something
3 much larger.

4 And we're not talking about confusion. I
5 frequently hear that part --- that the problem is,
6 people don't know where the boundaries are. So they
7 get confused and they just do what they do, and they
8 make a mistake. We're not seeing a whole heck of a
9 lot of confusion out there in the construction
10 industry. We're seeing a lot of willful intentional
11 conduct.

12 For instance, in the State of Florida,
13 and in Massachusetts there have been cases cited like
14 this also, you would have a contractor, who
15 subcontracts to a worker on the site who has a crew of
16 friends. And that worker uses a shell company name,
17 not a real corp. It exists in the Secretary of
18 State's office, and that's about it. That worker gets
19 a check. That worker cashes a check at a check
20 cashing establishment that files false currency
21 transaction reports, or doesn't file any of them at
22 all, and that cash is distributed to the workers.

23 And to cover the contractor for Workers'
24 Compensation purposes, so they don't get in trouble
25 with their carrier, they get a minimum Workers'

1 Compensation policy from a crooked insurance broker,
2 who for instance will have four or five people that
3 premiums are paid on, when there are actually a lot
4 more that are being paid cash. So this is the ---
5 we're seeing this type of conduct out there. It's not
6 confusion. What we're seeing out there is fraud as a
7 business plan.

8 Now, other states have recognized this
9 problem, as well as the federal government. In the
10 federal government, we have two bills. One in the
11 senate and one in the house was issued in the past
12 couple of weeks to address the issue on the federal
13 side.

14 And we've also seen a lot of activity on
15 the state side in the past couple of years. For
16 instance, California --- misclassification fraud task
17 forces that have studied the issue, and investigated
18 have been established. They exist in California, New
19 York, New Jersey now, Michigan, Massachusetts, and
20 Utah is actually taking a crack at this also. And in
21 the first four months of work by the New York task
22 force, they found \$19.4 million in unreported wages.
23 Assessed \$1.4 million in UI taxes. And they found 646
24 workers owed three million dollars in wages.

25 This is fraud as a business plan. We do

1 not see this as people being confused or mistaken.
2 Now comprehensive laws similar to the one that you're
3 considering, as you heard has been passed in New
4 Jersey, also a similar comprehensive appeared in
5 Illinois. Misclassification, in and of itself is not
6 a violation of law. It's the things around it that
7 are the violations. And what you're doing, looking to
8 do is make this classification in and of itself a
9 violation.

10 That exists also in Florida, New Jersey,
11 Massachusetts, Illinois, Kansas and New Mexico. This
12 bill also has a stop-work order provision. Florida
13 has had a stop-work order provision for years, and so
14 has Massachusetts. And Connecticut adopted a stop-
15 work order provision last year. And something to note
16 about the Connecticut stop-work order, it was for
17 violations of Workers' Comp. coverage, and Workers'
18 Comp premium fraud. That bill passed unanimously.

19 It passed the state senate unanimously.
20 It passed the state house unanimously. It was signed
21 by a Republican governor. And it was supported by the
22 Republican commissioner of Workers' Compensation. And
23 it was supported by construction employers and other
24 employer groups in the State of Connecticut.

25 We think that is important, because we

1 don't see this as a union issue. We see this as a law
2 issue, following the law, not following the law, in
3 fairness to law-abiding employers.

4 In conclusion, there's a lot of people in
5 this room who have either --- they or their families
6 have benefited from unemployment, overtime, Workers'
7 Compensation, Social Security. And what we're seeing
8 in the marketplace is the beginning of the abolishment
9 of those types of laws. Those are very good laws.
10 And it's you all who make the laws. If you think that
11 people should not be --- that these things are bad,
12 you should repeal them, not the marketplace. So we
13 are looking for your assistance to bring some order
14 back to the marketplace.

15 And in the construction industry, again,
16 what's happening is not a secret. I think most, if
17 not all people will tell you who are in the industry
18 that this is a problem that needs to be addressed.
19 And we are hoping to see more leadership within the
20 construction industry to address this problem. And
21 we're also looking for your assistance. We support HB
22 2400 and we hope you will, too. And thank you very
23 much.

24 CHAIRMAN DIGIROLAMO:

25 Thank you. Mr. Naughton, before you

1 begin, I want to recognize Representative Seip. Want
2 to introduce yourself for the record?

3 REPRESENTATIVE SEIP:

4 Representative Tim Seip. I represent
5 District 125 covering parts of Schuylkill and Berks
6 Counties.

7 CHAIRMAN DIGIROLAMO:

8 Thank you. Mr. Naughton?

9 MR. NAUGHTON:

10 Mr. Chairman, I don't have a lot of
11 testimony to add. I'm here to help answer some
12 questions. But I do represent the Metropolitan
13 Regional Council of Carpenters here locally. And if
14 you have any questions I'd be happy to help answer
15 them.

16 CHAIRMAN DIGIROLAMO:

17 Are there questions for this panel?
18 Okay. That keeps us on schedule. Thank you very much
19 gentlemen. Thanks for being here. Next panel is Mr.
20 Biacchi, David Dvorchak from Murray Risk Management
21 and Insurance, and Stephen Swarney. Good afternoon.

22 We'll start with you, Mr. Biacchi.

23 MR. BIACCHI:

24 Good afternoon, representatives, and I
25 appreciate the opportunity to be here. I'll just

1 paraphrase my testimony. I am Lou Biacchi, Director
2 of Governmental Affairs, Pennsylvania Builders
3 Association, a trade association representing over
4 10,000 member companies, with approximately 528,000
5 employees. Most of our members are small builders who
6 build six to ten homes a year. Although the chairman
7 is not here, I'd like to extend an official thank you
8 to Chairman Belfanti for scheduling the hearing.

9 The Pennsylvania Builders Association
10 clearly got the message a couple of weeks ago that the
11 chairman wants the bill to move. And I can assure the
12 chairman through his executive director that we will
13 cooperate in trying to achieve a bill that can move
14 through the General Assembly.

15 Let me start by saying that when this
16 bill was introduced and scheduled for the vote in
17 committee, in our haste to voice our opinion on the
18 bill, I sent out a letter saying that we know of no
19 violations in the housing industry. Well, that was a
20 major mistake, because when I scheduled the bill for
21 conversation with our leadership, I was informed that
22 there are issues out there.

23 A number of our members believe that
24 their competition is unfairly competing with them.
25 And so they would like some resolution to the problem.

1 Now, of course, I would have gotten that information
2 and put out a correct letter if I had done what Vicki
3 DiLeo asked me to, which was circulate a draft of the
4 bill, which she sent me in January. So my official
5 apologies to the Executive Director of the Committee.

6 We do have strong concerns over the
7 impact of the bill, in its current printers number,
8 and how it will affect small employers. The proposed
9 standards to define contractor/subcontractor
10 relationship are vague and unclear in an already tough
11 economic time. And with the housing industry being at
12 a 13-year low, adding more burdensome requirements
13 would be very detrimental. The penalty section is a
14 particular concern.

15 Having said that, again, the PBA believes
16 that the bill does seek to address a serious issue.
17 And we do appreciate the opportunity to work towards a
18 solution. One of the things we are very concerned
19 about is clear definitions. I would like to say that
20 in the first two working sessions that the staff have
21 put together, the draft definition of independent
22 contractor are clearly moving in a direction that we
23 think is very positive. And we are pleased about
24 that.

25 I believe we're going to be moving into

1 the issue of the penalty section in future negotiating
2 sessions. And we're hoping that, with all due respect
3 to the previous speakers, certainly with small
4 employers we do believe there is issues of mistakes.
5 And it's not all intentional. And certainly when it
6 comes to first offenses, there ought to be some
7 discrimination in the level of penalty as it relates
8 to those repeat offenders.

9 One of the things I would like to
10 address, and I see Representative Mark Mustio in the
11 room. Representative Mustio in the previous session
12 sought, in a different way, to address this issue.
13 While House Bill 1215 did not move forward due to
14 opposition from the construction trade unions, we are
15 hopeful that the compromise for this bill will address
16 the concern that contractor employers have when it
17 comes to audits of their employees and their payments
18 in the Workers' Comp program as it relates to --- I
19 think they're described as post audits.

20 We have members who are, we believe,
21 unfairly being --- not unfairly being audited, but
22 unfairly being charged. And while again, the solution
23 in 1215 seemed to be unsuccessful, or unacceptable,
24 we'd like to bring our concerns to the table.

25 Again, I want to thank the staff for the

1 initial negotiating sessions. They have been very
2 positive. There's certainly a cooperative approach
3 that Bruce and Vicki have. And I think that will move
4 this issue forward.

5 Again, PBA will continue to work with the
6 prime sponsor, and the committee, and the other
7 interested parties to create a compromise bill that
8 protects the good honest contractors, but at the same
9 time penalizes the number of bad ones.

10 I thank you for the opportunity to
11 testify, and I'd be pleased to answer any questions.

12 CHAIRMAN DIGIROLAMO:

13 We'll finish the other speakers, and then
14 we'll come back to questions if that's okay. Mr.
15 Dvorchak?

16 MR. DVORCHAK:

17 Thank you. Thank you, Mr. Chairman,
18 members of the House Labor Relations Committee, and
19 Representative Lentz for hosting this hearing, and for
20 allowing us the opportunity to testify before you
21 today. My name is David Dvorchak. I am Vice
22 President of Construction Services at Murray Risk
23 Management Insurance in Lancaster, Pennsylvania. I am
24 also the current Chairman of the Board of the Keystone
25 Chapter of Associated Builders and Contractors. I'm

1 here today not only representing the Keystone Chapter,
2 but I speak on behalf of the Central and Western
3 Pennsylvania Chapters. The Southeast Pennsylvania
4 Chapter also concurs with our testimony.

5 There is no doubt that an issue of
6 employee misclassification exists. We acknowledge
7 that something should be done to curtail intentional
8 and illegal practices surrounding the improper
9 classification for employees for the purposes of
10 Workers' Compensation, Unemployment Compensation and
11 taxation.

12 We in no way condone the intentional
13 employee misclassification by those seeking to
14 circumvent the law to the detriment of workers and to
15 the Revenue Department. Abuses of this nature create
16 an unfair advantage for those dishonest businesses
17 intentionally choosing to skirt the law for the bottom
18 line. Workers and honest employers must be protected.
19 However, HB 2400 in its current form is not the
20 answer.

21 Let me elaborate. The legislative intent
22 of HB 2400 states that the General Assembly wishes to
23 target employers who improperly classify employees,
24 because it puts businesses who comply with applicable
25 law at a competitive disadvantage with those who do

1 not.

2 Even Representative Lentz' media advisory
3 announcing this hearing, stated that HB 2400 would
4 quote, crackdown on employers that intentionally
5 misclassify workers to avoid paying state and federal
6 taxes, and Workers' Compensation premiums. We believe
7 that a distinction must be made between those
8 intentionally and unintentionally violating the law.
9 Let me give you an example. Unintentional violations
10 of this act result in criminal penalties ranging from
11 a fine of \$2,500 a year, and 180 days imprisonment for
12 a first offense, to fines of \$5,000 and not more than
13 one year in prison for subsequent unintentional
14 violations. It is inherently unfair to punish
15 unintentional actions in this manner.

16 Additionally, the act allows for civil
17 actions and remedies. The civil actions and remedies
18 make no distinction between intentional and
19 unintentional violations. If the purpose of the act
20 is to stop unscrupulous and dishonest employers from
21 gaining unfair advantages over those making every good
22 faith effort to comply with the law, a distinction
23 should be made with the penalties imposed for
24 intentional and unintentional violations.

25 Why, for example, should a company with

1 an honest and solid track record face debarment for
2 unintentional violations? An employer who has
3 consistently followed the law should not face the loss
4 of reputation, debarment and jail time for
5 unintentional violations. Following along the same
6 line of thought, HB 2400 fails to provide any safe
7 harbors for honest companies similar to those found in
8 section 530 of the Federal Reserve Act of 1978.
9 Section 530 of the Revenue Act provides safe harbor
10 protection for employers that have a reasonable basis
11 for classifying as a worker as an independent
12 contractor.

13 Under Section 530, a reasonable basis for
14 treating a worker as an independent contractor exists
15 if the taxpayer or entity relied on past IRS audits,
16 published rulings, established past practices or any
17 other reasonable basis. HB 2400 should not serve as a
18 means for disrupting a legitimate business. A
19 company, for whatever reason or purpose, should not be
20 made to answer and defend multiple and frivolous
21 claims. Clear remedies exist within HB 2400 to ensure
22 that complaints can be made against an employer, or by
23 an individual or by a representative, including a
24 labor organization. The bill allows for an award of
25 attorney fees, court costs and damages.

1 Similar protection should be afforded to
2 an employer, should a claim be filed against that
3 employer that is found to be without merit. A
4 legitimate employer should have the same protections
5 against any person, or group representing that person,
6 who makes unsubstantiated claims. HB 2400 is very
7 clear that retaliation for action is prohibited. No
8 employee or group who acts in good faith, even upon
9 failure to prevail on the merit, suffers any
10 consequence for using this act as ammunition against
11 an employer.

12 This is the not the type of one-sidedness
13 that creates a level playing field. As I stated
14 earlier, we do not condone dishonest employers'
15 actions. They hurt our members, as much as they hurt
16 anyone. However, we must protect honest employers
17 from repeated claims and attacks that could
18 potentially put someone out of work for acts either
19 nonexistent or unintentional. Stop-work orders are
20 another remedy afforded from misclassification. Once
21 again, no distinction is made between intentional and
22 unintentional violations.

23 Furthermore, a stop-work order can remain
24 in effect until the Secretary issues an order
25 releasing the stop-work order, or upon finding that

1 the employer has properly classified the individual as
2 an employee. The discretion granted to the Secretary
3 is too broad, and should contain a provision for
4 making decisions in a specified period of time. If an
5 employer is found to have committed an unintentional
6 and minor violation, a stop-work order not handled in
7 an expedited manner, will result in a penalty far
8 exceeding the violation.

9 There are other parts of HB 2400 that are
10 troubling. For example, the definition outlined in
11 Section 4 lacks the clarity needed by employers to
12 follow the law. It appears that, based on the
13 definition listed, that one contractor could not sub
14 work to another contractor in the same trade.
15 Moreover, the three-part test in Section 4 is vague.
16 It includes undefined terms and phrases such as,
17 quote, free from direction and control, unquote.
18 Service that is, quote, outside the usual course of
19 business, unquote. And independently established
20 trade, occupation, profession or business, without
21 defining what that means.

22 We would like to propose several
23 solutions and alternatives. First, we can increase
24 outreach, education and enforcement of current laws.
25 A study performed in July, 2006 by the U.S. Government

1 Accountability Office on the misclassification of
2 workers showed that every dollar spent on increased
3 enforcement by the IRS, resulted in a four dollar
4 increase in previously unpaid tax revenue. Simple yet
5 effective tools can be put in place to educate
6 employers and employees alike.

7 Job site informational posters and a
8 state-run hotline to report wrongful
9 misclassifications would be a start. Next, any state
10 laws established need to be consistent with federal
11 laws. There is no need to subject honest employers to
12 multiple tests to determine whether an employee is an
13 independent contractor. Clear and consistent
14 standards are vital to help law-abiding employers
15 properly classify their employees.

16 These are not the only solutions, rather
17 they are a starting point for good faith discussions.
18 Companies not following the law hurt us all. However,
19 HB 2400 should not serve as a weapon to harass,
20 intimidate or provoke. Clear and consistent
21 definitions and fair remedies will go a long way in
22 proving that this problem will be dealt with in a
23 reasonable manner.

24 In summary, while a need to properly
25 classify employees exists, HB 2400 in its current form

1 is not the solution. HB 2400 contains too many
2 inconsistencies, too many inequitable and unclear
3 definitions, too many unfair and over-burdensome
4 requirements for honest employers and too many
5 opportunities for abuses and harsh penalties that will
6 potentially rob law-abiding employers of work,
7 reputation and possibly freedoms.

8 Thank you for allowing me the opportunity
9 to speak today. We look forward to participating in
10 this process.

11 REPRESENTATIVE LENTZ:

12 Next we have Mr. Stephen Swarney from the
13 Keystone Chapter of the Associated Builders and
14 Contractors, Inc.

15 MR. SWARNEY:

16 Thank you. I don't have any additional
17 testimony. I share this testimony. I'd also like to
18 say that we're actively involved in this process to
19 tighten up and clarify some of the definitions that
20 have been put forth.

21 REPRESENTATIVE LENTZ:

22 Any questions?

23 REPRESENTATIVE CALTAGIRONE:

24 Thank you, Mr. Chairman. Mr. Dvorchak,
25 I was just curious about your testimony. How many

1 unintentional violations should occur before we do
2 something?

3 MR. DVORCHAK:

4 I don't know, Representative. I only
5 know that there's no set number that we have. And I
6 think clearly when a pattern exists --- after more
7 than a few, I think it's clearly not unintentional. I
8 think in that case we have to look at it on a case-by-
9 case basis, and look at all the facts. But I think
10 there are clear instances where an act is intentional,
11 but to put a number on how many are unintentional, I
12 can't do that.

13 REPRESENTATIVE CALTAGIRONE:

14 As Chairman of the Judiciary Committee, I
15 take umbrage at that, because I think if you know the
16 law and it's spelled out very, very clearly and you
17 know that these are the parameters, and if you go
18 beyond that, you know, these are offenses. I know
19 you're saying there are these kinds of situations
20 where honest employers are doing the right thing, why
21 should that in fact be penalized by dishonest
22 employers who continue to go over the line and maybe
23 once, okay, but if it starts to be a situation where
24 there's a second time, third time, fourth time, now
25 they're making a fool out of us and taking advantage

1 of a policy, that just doesn't seem fair. I can
2 understand what you're saying. I think there are
3 honest mistakes. But if there's a pattern of that
4 type of activity, then I think you come down on them
5 like a ton of bricks. These are the rules which
6 you're supposed to be playing by. These are the laws
7 that we make here. And if you're going to continue to
8 go above and beyond, just because they're
9 unintentional, that concerns me.

10 MR. BIACCHI:

11 If I could comment on that,
12 Representative. I think the clearer the definitions
13 of the distinction between a subcontractor and
14 employee, the less unintentional errors there will be.
15 Certainly, with the committee that you chair, when
16 it's criminal law, I think we understand what
17 shoplifting is, even a four or five-year-old is clear
18 what shoplifting is. We don't believe that the law is
19 clear enough on the definition between a subcontractor
20 and employee, and it clearly impacts the issue.

21 REPRESENTATIVE CALTAGIRONE:

22 Well, you know as well as I do, that
23 people can understand what unintentional was but when
24 it starts to become a pattern, when you start to see
25 this continues over and over again, then I've got to

1 say it's a little bit of a stretch, and makes a
2 mockery out of what we need to do as a matter of law.

3 MR. SWARNEY:

4 We totally agree with what you said.
5 We're not looking for a string of free passes. That's
6 not our intention. I think as Mr. Biacchi said, we're
7 just looking for a clarification, so we're not looking
8 for seven, eight, nine times and it's still
9 unintentional. It clearly is not in the scope of the
10 law or the spirit of what this bill is trying to do.
11 We're not looking to jump over that in any way.

12 MR. DVORCHAK:

13 I was just going to add that we're not
14 looking for a three strikes and you're out situation
15 here. Every time somebody misclassifies and does it a
16 second time he should be dealt with much harsher.

17 REPRESENTATIVE CALTAGIRONE:

18 Get back to the good employers. There
19 are many good employers out there. And they pay the
20 price, too. And they pay it doubly because they're
21 not skirting the law by going around it and trying to
22 find these loopholes. But the problem that has been
23 pointed out here that they shouldn't be paying for
24 somebody who is. It's that simple. Thank you.

25 REPRESENTATIVE LENTZ:

1 Just to make an observation before we go
2 on to the next questioner, there is in the current
3 draft a distinction between unintentional and
4 intentional. Intentional is a felony. An
5 unintentional act is a misdemeanor. So we did make a
6 distinction in the act. As far as having to respond
7 to multiple definitions, under the current state of
8 the law, employers are responding to multiple
9 definitions. There's the IRS definition; there's the
10 Common Pleas Judges' definitions if they go to court.
11 This law would create a uniform definition.

12 CHAIRMAN DIGIROLAMO:

13 We'll go to Representative Boyd first,
14 because he has to leave.

15 REPRESENTATIVE BOYD:

16 Thank you, Representative. Actually, I
17 really appreciate it, because my question follows up
18 with that unintentional versus intentional on the
19 penalty side. I think two observations. One is that
20 there are legitimate --- and we've been focusing
21 primarily our discussion on the construction trades,
22 but the scope of this legislation would apply to all
23 employers. And there are --- as a former employer who
24 owned a company, sometimes it is a little difficult in
25 all honestly to legitimately classify an employee.

1 As an example, I have --- in my former
2 company I had designers whose primary function was
3 sitting at a computer designing, doing CAD designs,
4 but occasionally they would make handmade models. How
5 do I classify them? Are they model makers? Are they
6 technicians working on a computer? And if, while
7 they're making a model, they happen to use a utility
8 knife and slice a finger and have to get stitches ---
9 I don't think that's ever happened --- what
10 classification --- do you see what I'm trying to get
11 at?

12 So clearly the intention is that they are
13 --- they're not full-time shop workers. Ninety (90)
14 percent of the time is spent sitting at a computer.
15 And when you talk to someone in the insurance industry
16 and you say how do I classify them? And you even get
17 --- with the brokers that I dealt with in the
18 insurance industry there was some confusion. What I
19 think what I'm basically trying to say is having a
20 Work Comp law in a situation like that, or somebody
21 has misclassified somebody, to make that person a
22 criminal. Right now if that happens we're assessed
23 basically with back comp rates that we should --- if
24 we misclassified somebody by accident, we have to pay
25 for those misclassifications. It's similar with the

1 sales and use tax. I don't know if anybody's familiar
2 with that. But as an employer, or if you as an
3 individual, you would happen, if you buy a computer
4 through the internet, you're required by state statute
5 to pay sales and use tax on that computer. And I'm
6 sure if anybody in this room has ever bought a
7 computer over the internet has paid that sales and use
8 tax. But if they hadn't, the way the statute is
9 constructed right now, you would be assessed a back
10 tax. You would owe that tax, and you might end up
11 paying a summary fine. But some of us felt that the
12 penalty at the kind of first offense level was a bit
13 strong, and again, I'm reacting to the Chairman of
14 Judiciary.

15 So looking at those penalties, you know,
16 clearly trying to define first offense, if it is
17 intentional and done from a criminal basis, clearly
18 when somebody intentionally --- I don't have a problem
19 with any of the intentional stuff. If somebody
20 clearly intentionally --- though I would suggest that
21 some people with sales and use tax do actually
22 intentionally violate the law. But if somebody, if an
23 employer is clearly intentionally violating the law, I
24 don't have any problem with the way it's drafted. I
25 just would encourage you to take a look at this. I

1 think there are cases outside of the purview of the
2 construction trade where it is possible that somebody
3 does unintentionally misclassify, really not knowing
4 that they did it.

5 And the other important thing to remember
6 is every employer goes through the Workers' Comp audit
7 every year because their payroll numbers are aligned
8 with what their estimated Workers' Comp payments were.
9 So I don't know that there's any employer that has
10 ever in the history of their company has a clean
11 Workers' Comp Audit every time. Maybe you do. So I'm
12 just asking the prime sponsor to work through this
13 process and I'm grateful for this hearing, that the
14 unintentional consequences don't become so egregious,
15 that we end up putting the seriously legitimate
16 employers out of business simply because they made a
17 misclassification of an employee. It does happen on
18 occasion. Thank you, Mr. Chairman.

19 CHAIRMAN DIGIROLAMO:

20 Representative Mustio?

21 REPRESENTATIVE MUSTIO:

22 Representative Boyd, that was one of the
23 reasons I asked the question of Mr. Decker earlier on.
24 It's a definite change which I don't want to see
25 because it leads into the misclassification.

1 The intent of this bill is to address
2 those that are classifying individuals as
3 subcontractors to avoid providing benefits.

4 And I'd like to follow up on Chairman's
5 question of unintentional. Can you give you an
6 example of how somebody would unintentionally
7 misclassify somebody as an independent contractor?

8 MR. SWARNEY:

9 I don't think I came prepared to give an
10 example of unintentional violation. I'd only say that
11 it does exist, and it could happen. I don't have an
12 example; I can only say that if a company wants to
13 classify an employee for a certain period of time have
14 the results of an IRS audit and there was no problem
15 with Workers' Comp or whatever, no violation or a
16 pattern, and then all of a sudden you discover this
17 and that had existed also in the past and was not
18 considered a violation this would now amount to
19 criminal penalties even in this kind of case.

20 MR. DVORCHAK:

21 If I could just jump in on that. I'll
22 give you an example of something I'm involved with
23 right now, cleaning people. I'm involved with a
24 situation where cleaning people come in and these
25 people are deemed to be employees not subcontractors.

1 In that case, if the employer classifies them as
2 subcontractors he could be penalized, and that is an
3 unintentional misclassification of employees. I mean
4 in that situation where a few people are classified as
5 employees, that would be an unintentional
6 misclassification.

7 REPRESENTATIVE MUSTIO:

8 I made a suggestion at our last meeting
9 that we consider using some of the penalties that are
10 already existing in the Workers' Compensation law.
11 Because I believe there is an ARD program for
12 unintentional acts. And I think I gave that
13 description to you and I'd like to know if we could
14 possibly consider that as we move forward because I
15 think that will help alleviate a lot of concerns, and
16 maybe we do give benefit of the doubt to the first-
17 timer, even though it's tough to come up with examples
18 of where you would unintentionally pay somebody cash
19 under the table. But I think we might want to look at
20 that a little closer.

21 REPRESENTATIVE LENTZ:

22 Thank you. I would just follow up on
23 that. The criminal statute no matter what the burden
24 of proof is, knowing that it's the highest standard of
25 all to prove that someone did something knowingly,

1 that they knowingly misclassified employees, that's a
2 very tough burden. You can imagine that if we're not
3 allowed to punish non-knowing offenses, every
4 contractor could say, oh, sorry, it was an accident.
5 So there are many things in the law, particularly with
6 taxes, where a personal does something unintentionally
7 which results in not paying a fair share, as was
8 discussed here, but as I said, we have made a
9 distinction, and maybe that's --- but the bill really
10 would lose its meaning if people could simply say, oh,
11 I didn't mean it. Thank you, Mr. Chairman.

12 CHAIRMAN DIGIROLAMO:

13 Representative Seip?

14 REPRESENTATIVE SEIP:

15 Thank you, Mr. Chairman. I certainly
16 don't want to blindly make it more difficult for any
17 of you folks in business, but when misclassifications
18 occur, it does hurt those businesses who are doing
19 things the right way and classifying people the way
20 they should be. And certainly it comes back to haunt
21 those businesses who do discover a misclassification
22 down the road because then they're asked to make a
23 tremendous contribution to catch up and get those
24 workers back into line. One of the things that I want
25 to emphasize, and my colleague, Bill Goodman from

1 Schuylkill County as well, and apologized for not
2 being able to be here today, but he and I share a
3 major concern with misclassified workers. One of the
4 things that happened in Schuylkill County on November
5 17th of 2005, there were 120 individuals that were
6 discovered to be not only in the country illegally,
7 but working on that job site illegally. We worked
8 with the Schuylkill County Sheriff, Frances McAndrew
9 at the time and Congressman Holden's office and that
10 that situation was remedied.

11 But there was a terrible injustice to
12 have people, not only in the country illegally but
13 taking jobs from other citizens, our citizens, because
14 those folks were in there working illegally. And a
15 lot of my constituents said, well, how could that
16 happen? How did these people end up being here? And
17 it's when people are working here illegally. So I
18 think that one of the things that I want to commend
19 Representative Lentz for in this legislation, is
20 trying to remedy this problem of having people here
21 illegally, and encouraging people to come to our
22 country illegally to work here.

23 So I'm certainly open to trying to work
24 with you guys to come up with a solution to this
25 problem that I face, and Representative Goodman faces

1 as well.

2 And I just have a very quick question of
3 Mr. Biacchi. I'd like to ask you, what are you doing
4 now within your membership to try and encourage them
5 or make sure that you're policing your membership to
6 have all the workers classified the right way?

7 MR. BIACCHI:

8 The current standard that most everyone
9 in Pennsylvania, and employers across the country use
10 is the IRS seven-point definition to determining the
11 distinction between an employee and a subcontractor.
12 So we try to get that message out and encourage all
13 our members to follow those seven points. If you do,
14 for purposes of federal law, then you are protected,
15 but even those seven points --- and I'm not a lawyer,
16 but they're not the most precise, and generally it
17 relates to the phrase direction and control. It goes
18 back to the conversation we're having about
19 unintentional, employer's direction and control.
20 Candidly, it is not an issue that we have taken great
21 efforts on, but once this bill passes, we will
22 certainly have to do more on that, because the
23 penalties will be so severe that we'll hear about it.

24 REPRESENTATIVE SEIP:

25 Thank you, gentlemen, for your testimony.

1 CHAIRMAN DIGIROLAMO:

2 Representative Cox?

3 REPRESENTATIVE COX:

4 Thank you, Mr. Chairman. I don't know
5 that my question is for anyone in particular, but I
6 think the ABC is the one that spells it out more
7 clearly. I'm looking at the Section 4 of the
8 legislation, where it talks about applicability and it
9 has what they call an ABC test. And Louis mentioned
10 the direction and control seven point test that the
11 IRS has been using. I remember referring to that back
12 in law school back in the mid-'90s and did some study
13 on it and I worked with an attorney on some situations
14 with it. I don't think the direction control test and
15 the seven point test I don't think it's as fluid or as
16 uncertain as some people would like us to believe. As
17 an attorney I look at that and I can clearly walk
18 through and determine, based on a number of factors,
19 those seven point tests. The IRS has a form, the SSE
20 form that you can request a determination letter,
21 essentially, for determination of worker status.

22 So there are elements in place already at
23 the federal level for purposes of the federal
24 withholdings and what not, that I would like to see
25 this legislation adopt. Too often we try to reinvent

1 the wheel and say we have a new classification system,
2 when we've got decades of law, decades of IRS rulings
3 and court opinions and so forth that surround
4 direction and control type tests.

5 I'd like to get your opinion, whatever it
6 may be, on something like the existing points as part
7 of this approach. And clearly, we have a problem that
8 need to be addressed, but I'm concerned that we're
9 trying to reinvent the wheel and confusing things even
10 further. And rather than saying let's utilize a
11 federal standard that is arguably hashed out pretty
12 well, let's not reinvent the wheel, let's utilize
13 that. Or simply saying if you have any determination
14 letter from the IRS regarding the worker's status,
15 right there you are not intentionally breaking this
16 law. I think we can do some things like that, but I
17 want your opinion on some of those thoughts, if I
18 could.

19 MR. SWARNEY:

20 I think we would agree with everything
21 you say, Representative. I know during one of the
22 last meetings we had, when we were talking about
23 clearer definitions I happened to mention two parts of
24 the test, being the direction control and the
25 independently-established trade or occupation, and I

1 think that's a good starting point. I think obviously
2 that's not maybe my preference, but I agree that the
3 definitions should be clear, and I think there are, in
4 a minority of those cases the violation would be
5 intentional, and if we have a clear definition,
6 everybody knows exactly what they need to do.

7 REPRESENTATIVE COX:

8 And the onus of that test, don't they
9 call it --- they don't call it an employer/employee
10 relationship. Phrases like, were tools provided to
11 you? Was it a situation where they provided cleaning
12 supplies? Did they control when you did your work,
13 where you did your work, how you did your work, if you
14 hired anybody else, things like that. I think the
15 questions from my recollection of the IRS test, I
16 think they pretty much cover almost every situation
17 out there. Is that a fair statement?

18 MR. BIACCHI:

19 Some of my members would say yes. But
20 some of them will say that maybe it is, and it's an
21 issue of enforcement. But their issue is it wasn't
22 sufficient to give them what they need to address the
23 situation. One of the questions that you also have to
24 decide is, is the law clear enough or where does it
25 need to be made clearer? It doesn't matter what you

1 pass, if it's not enforceable. And so the resources
2 to unemployment comp and Workers' Comp has to be
3 sufficient so they can do their job.

4 It's a long answer to the question. It
5 may be an issue of enforcement, not a hundred percent,
6 but there may be an issue of resources for
7 enforcement.

8 REPRESENTATIVE COX:

9 Thank you.

10 REPRESENTATIVE LENTZ:

11 I'm just curious how you would
12 characterize the current state of knowledge of people
13 in the industry that you represent? In other words,
14 you mentioned as an alternative to this kind of
15 enforcement, having an educational program. Do you
16 have any kind of program like that now to deal with
17 the issue of the IRS? And I would think your average
18 person in this business knows a duck when they see
19 one, right? If it walks like a duck, quacks like a
20 duck, it's a duck. So I'm curious, do we need an
21 education on the issue of whether someone's an
22 employee? I mean, do we need an educational program?

23 MR. DVORCHAK:

24 If I could respond, this isn't just for
25 employers, it's also for employees. They're confused

1 also, and they guess they're coming on as a
2 subcontractor, and that's not always the case. But
3 sometimes they're confused, if there's something else,
4 like the minimum wage laws, and if they could say,
5 hey, I am an employee or a subcontractor, that would
6 help.

7 REPRESENTATIVE LENTZ:

8 But you don't currently have an
9 educational program?

10 MR. DVORCHAK:

11 That's right.

12 MR. SWARNEY:

13 We tried with the issue, but there are so
14 many issues that we can't possibly deal with every
15 one. We're putting together a program now saying,
16 hey, this is a big issue and we need to make sure
17 you're doing the right thing. So currently we don't
18 have a program right now, but certainly we will.

19 MR. BIACCHI:

20 The last time this came up in my
21 organization --- certainly when our members get
22 audited for comp purposes, and they think unfairly
23 cited or charged, they see it as a problem. They
24 learn a lesson perhaps. Or they think the world is
25 unfair, there should be a way of protecting them. But

1 there is nothing that we've done to this time in terms
2 of a systematic approach.

3 CHAIRMAN DIGIROLAMO:

4 Thank you, gentlemen. The next panel is
5 Mr. William George, of the Pennsylvania AFL-CIO, along
6 with Mr. Russ Keating.

7 MR. GEORGE:

8 Good afternoon. I want to congratulate
9 all of you on your great successes as of last night.
10 To those who are retiring, I wish you all the best in
11 your endeavors, hopefully in a position that's a lot
12 more productive and lot more satisfying.

13 I thank you for this opportunity today.
14 The subject is important to all of us. My name is
15 William George. I'm the President of Pennsylvania
16 AFL-CIO. This is Russ Keating on our staff, and a
17 brand new staff person that just started at nine
18 o'clock this morning. We figured we'd throw him in
19 right away. He's an individual who's done some work
20 in the House in the past and over at the Department of
21 Labor. He joined the AFL-CIO staff starting today.

22 This is an interesting subject, in
23 reference to misclassification of employees as
24 independent contractors.

25 And it's bad, because of those who really

1 cheat on a number of categories that have been
2 previously mentioned, but I'd like to mention a couple
3 of others that they've been cheating on. Sometimes
4 its overtime, sometimes it's discrimination laws that
5 they're entitled to. And a number of other issues
6 dealing with pension contributions, and so there's a
7 whole long list of things other than some of the
8 things that's have been mentioned previously here. It
9 really boils down to being an issue dealing
10 humanitarian rights and workers' rights and rights
11 that belong to people as citizens.

12 I have to say that I compliment House
13 Bill 2400. I think it addresses these in a correct
14 manner. But I do want to mention the fact that the
15 Pennsylvania AFL-CIO supports legislation that
16 promotes workers' human rights and enforces employers'
17 statutory responsibility and obligations to their
18 employees. Thus the Pennsylvania AFL-CIO adamantly
19 opposes the mere vulnerability of, let alone tolerance
20 of, misclassifying employees as independent
21 contractors.

22 The Pennsylvania AFL-CIO opposes as
23 forcefully as we can and with all our resource, all
24 legislation that allows dishonorable employers to
25 wrongfully deprive workers of their equitable

1 compensation and lawful protection they rightfully
2 deserve in exchange for their labor. This is
3 precisely what misclassifying employees as independent
4 contractors does to workers, and not only to the
5 workers, but it's an embarrassment to the community.
6 It's an embarrassment to the state. It's an
7 embarrassment to the union. Because when these
8 embezzlements that take place --- that's what we call
9 then, embezzlements, because when you do these things,
10 you know what it's all about, that you're cheating,
11 regardless of what human rights are.

12 My testimony before you today is very
13 simple and so I'm not going to go into a lot of detail
14 in reference to where we stand. I think that House
15 Bill 2400 addresses the problem but I don't think you
16 went far enough. I think a \$5,000 fine should be a
17 \$10,000 fine, and the imprisonment and penalties is
18 correct. I really think the tax issue makes people
19 stop. Because getting caught and being fined only a
20 few dollars is, depending on the job, it's worth it.
21 I think something is wrong on a \$100,000 job and you
22 slap me with a \$2,400 fine or \$5,000 fine. What's
23 that to me compared to what I saved? Here, it's
24 money, no big problem.

25 And I think that's one of the problems we

1 have with a number of issues in the State of
2 Pennsylvania. The penalty clauses in the wage and
3 hours division, the minority laws are there, you would
4 hope, to act as a deterrent against the employers.
5 But obviously with the last few years, I think in this
6 state and across the country in the Department of
7 Labor, all of these violations have increased.

8 I do think that in addition to this it
9 might be worthwhile to have the Department of Labor,
10 our Human Rights Division of the state to take a look
11 and really look at the cases that we have. Have they
12 increased? Are they being lowered? Is the deterrent
13 acting good enough or should we increase these fines?
14 You've heard testimony today from the Department of
15 Labor and Industry that in Massachusetts there's a
16 tremendous percentage increase that's taken place.

17 The fact of the matter is, we can't
18 maintain the equities that workers are entitled to,
19 and families are entitled to in this country, and I
20 think that the time has come to ensure workers the
21 equitable compensation and due protection they deserve
22 in exchange for their labor. And I compliment you,
23 Representative Lentz, for sponsoring this bill. I'd
24 be glad to answer any questions.

25 REPRESENTATIVE LENTZ:

1 Thank you for your support. Since the
2 election yesterday, and as an undecided superdelegate,
3 are you prepared today to announce who you're
4 supporting?

5 MR. GEORGE:

6 You're the 20th person that's asked me.
7 I had this dream last night, I had this dream that I
8 was at the convention, and it was all tied up, and
9 they called the roll call three times across the
10 states and there was one delegate left and it was a
11 Pennsylvania, and it was me. Okay? And so I asked
12 the special privilege of the chair and I went up to
13 the podium and I said you're looking at people that
14 spent almost \$500 million, did over 800,000 miles, 20
15 million phone calls, and all these numbers I threw
16 out, and now to make a final decision, this guy from
17 Pennsylvania is about to tell you who the next
18 President is.

19 REPRESENTATIVE LENTZ:

20 And ---?

21 MR. GEORGE:

22 I woke up. It's very interesting and
23 very exciting for all of us.

24 But this issue is exactly what this
25 election is about. I mean, if you really look at some

1 of the things that have happened in this country in
2 terms of inequity and inequality that's taking place,
3 I think you can see the intensity building in the
4 campaigns. Look at your community level people.
5 We're looking at people out of work. It's not anti-
6 business. AFL-CIO does not advocate eliminating
7 businesses. If you look at our track record
8 historically, corporations and companies that have
9 been in trouble, it's been the union side that's
10 stepped forward and has done everything possible to
11 save those particular companies. Out in Western
12 Pennsylvania, the old steel industry, the workers gave
13 up a lot in order to keep them going.

14 We understand the capitalist system, and
15 the last thing we want to do is lose thriving
16 businesses and fair businesses --- of course, if
17 they're union that makes it even better, but the fact
18 of the matter is that we support this economy. I do
19 not think this bill hurts anybody that's in industry.
20 I think it makes them pay a lot more attention, and I
21 think it makes them --- it's like anything else, you
22 have a place where the speed limit's 65, somebody's
23 going to go 80. We can reduce that speed limit to 55
24 and maybe we can save some mileage.

25 CHAIRMAN DIGIROLAMO:

1 Thank you very much. Any other
2 questions?

3 MR. KEATING:

4 If it please, President George had
5 prepared testimony and there's one paragraph in there
6 that I must read. "First and foremost, misclassifying
7 employees as independent contractors robs workers of
8 the equitable level of pay, benefits and dignity they
9 rightfully deserve in exchange for their labor. Most
10 unconscionably, employee misclassification precludes
11 prevailing wage opportunities and denies Workers'
12 Compensation for injured workers, unemployment
13 compensation for jobless workers, and correct Social
14 Security benefits for retired workers." It goes on to
15 say, "Employee misclassification also victimizes
16 workers as taxpayers and consumers."

17 And the conclusion of President George's
18 testimony was that the AFL-CIO was supportive of this
19 bill as a mechanism to get us to the right definitions
20 and the way we think things should operate for the
21 benefit of all parties. I was noticing in the law
22 that the definition in Section 4, Performance of
23 Services, if you go down to paragraph (b), it says
24 factor not to be considered: the failure to withhold
25 federal or state income taxes or to pay unemployment

1 compensation contributions or workers' compensation
2 premiums with respect to an individual's wages shall
3 not be considered in making a determination under this
4 section.

5 Maybe I just don't understand it right
6 now. I'm not going to hold up the proceeding, but I
7 think we would be supporting House Bill 2400 for the
8 purpose of resolving the issue of employee
9 misclassification, just with the reservation that we
10 still would like this paragraph clarified. It seems
11 to contradict the purpose of our testimony in support.

12 REPRESENTATIVE LENTZ:

13 Actually that is a little unclear. That
14 only refers to finding someone to be an independent
15 contractor, that shall not be a factor. Not paying
16 those doesn't automatically ---.

17 MR. GEORGE:

18 I notice it more with your subcontractors
19 in construction stuff, that somebody --- because this
20 misclassification category, many, many times in
21 Workers' Comp cases or in unemployment cases, we would
22 find the person being cheated on their rightful amount
23 of money simply because a big company, oh, we just
24 forgot to move the guy from a \$10 an hour job to a \$20
25 an hour job, and we didn't --- oh, yeah, okay, we'll

1 make it up. You know, they do that purposely, the way
2 they structure it for bids, and then the lower they
3 keep you classified, the less they pay in premiums.
4 It's an argument I have constantly with the Workers'
5 Comp insurance industry, regarding the insurance on
6 the job categories, and this is another
7 misclassification for insurance purposes. It's a
8 little bit similar, but it's not as prevalent as the
9 other category.

10 CHAIRMAN DIGIROLAMO:

11 Thank you, very much. Representative
12 Cox?

13 REPRESENTATIVE COX:

14 Just a quick follow-up question. I'd
15 asked the previous panel the same question regarding
16 the specificity of the factors that are labeled
17 regarding classification and what not. Based on your
18 reading of it, is there room for improvement? Should
19 we go toward a more uniform, national approach to what
20 determines if I'm a regular employee, or --- what are
21 your recommendations on that?

22 MR. GEORGE:

23 I have some hesitation about a national
24 application, because I think if you look at certain
25 states with reference to their hours and wages

1 positions and state labor laws, state safety laws,
2 they vary a tremendous amount. For instance, we have
3 some states that are non-OSHA states in reference to
4 safety applications. So when you look at this in the
5 category of being universal, if in fact all those
6 other factors I listed, prevailing wage issues, et
7 cetera, et cetera, were exactly the same, then it
8 would be maybe viable to take a look at a more
9 universal and a more federal standard. The variations
10 in categories of work classes and wages and hours from
11 state to state is tremendous. South Carolina has
12 very, very little of anything. You're an at-will
13 employee.

14 REPRESENTATIVE COX:

15 Thank you very much.

16 CHAIRMAN DIGIROLAMO:

17 Thank you very much. The next panel is
18 Gene Barr from the PA Chamber and Kevin Shivers. Mr.
19 Barr, we'll start with you.

20 MR. BARR:

21 Good afternoon, Mr. Chairman, and members
22 of the committee. Thank you for the opportunity to be
23 here. We really appreciate the chance to talk about
24 House Bill 2400. My name is Gene Barr. I'm Vice
25 President for Government and Public Affairs for the

1 Pennsylvania Chamber of Business and Industry. The
2 Chamber is the largest broad-based state-wide business
3 advocacy group, with 24,000 members. Our members
4 include everything from the largest companies you can
5 think of in Pennsylvania down to some of the smallest,
6 and pretty much everything in between. It's a broad
7 cross section.

8 Again, thanks for the opportunity to be
9 here. The Chamber has been part of the discussion on
10 this, and as was already referenced, we are making
11 some progress on the bill. I'd like to thank the
12 committee members and the executive directors for
13 including everyone in trying to get this worked out.
14 We are serious about trying to get something worked
15 out here. I think that what we heard today helped us
16 further define problems and helped us try to figure
17 out exactly where we need to go with this. And then
18 we are going to try to find a solution. As was
19 referenced, clearly a lot of these activities have an
20 impact on businesses that operate in Pennsylvania.
21 They've got problems with House Bill 2400 as is. The
22 fact is it's overly-broad, and I think that the issue
23 of concern from our members is that we know people who
24 are skirting their legal responsibilities and that is
25 a concern. AAA, the automobile association, says that

1 bill in its current form, and I reiterate that, in
2 their view they believe that they companies with whom
3 they contract to provide those services under the
4 definitions that exist in 2400 would be employees, and
5 that's a concern. I don't believe that that is the
6 intent of the act, but again, it points to the fact
7 that we have to be very concerned about how wide a net
8 we cast, how we define these definitions of who is an
9 independent contractor and who is an employee. We
10 have to be cautious about that. We referenced the
11 penalty section and we would agree that unintentional
12 violation could result in incarceration and shut down
13 businesses. It is clearly overly harsh. And I think
14 we have to sit down and figure out where we're going
15 in terms of this penalty section. And I think we've
16 already heard today how this could also be much
17 clearer, and again, I think the concern is crafting
18 too wide a definition and bringing in those whom we do
19 not believe ought to be there. There is clearly an
20 important consideration in terms of continuing to
21 provide the vital function that independent
22 contractors serve in the marketplace. And one of the
23 things that clearly came to us is our concern is in
24 keeping Pennsylvania competitive. We have a lot of
25 work to do, but one of the concerns we have is working

1 on our business structure, and many of you have worked
2 with us on that, and we appreciate that, our business
3 tax structure, but one of the things we don't want to
4 do is, again, create a new definition such that it
5 works against a company coming in or a company
6 expanding who legitimately and properly utilizes
7 independent contractors as a way to manage labor
8 costs. That's a huge concern of ours, and hopefully
9 you'll share it as we move forward. We know we need
10 to uniformly enforce the laws, WC and UC, and clearly
11 again, we do not want to position Pennsylvania in a
12 non-competitive position. Much of what I have here
13 has been noted already, and we'd be willing to answer
14 questions as we go through this.

15 Thank you.

16 MR. SHIVERS:

17 Thank you, Representative. My name is
18 Kevin Shivers. I'm the State Director for the
19 National Federation of Independent Business, also
20 known as NFIB. We represent the smallest of small
21 businesses in Pennsylvania. Our typical member has
22 five or fewer workers with sales of about \$400,000 a
23 year. The average take-home salary of one of our
24 small-business members is about \$50,000 a year. So
25 you can imagine that legislation like this is of

1 particular interest to our type of members. Many of
2 them are micro-businesses. Many of them are
3 subcontractors. Many of them are growing and then
4 become general contractors or provide a greater
5 service.

6 I've already provided written testimony
7 and I don't want to go through and repeat that. I
8 just really want to hit, you know, the key points that
9 are our concerns.

10 The first concern that we have is, you
11 know, let's not enact a law that impedes the ability
12 of an individual to start and run a business.
13 Pennsylvanians have a fundamental right to achieve the
14 American dream without having to work for somebody
15 else just to earn it. You know, most small business
16 people, if you ask them, the reason they're in
17 business by themselves is because they don't want to
18 work for anybody else. And we did some research a
19 couple of years ago and we found that one in four
20 business people who had started a company, previously
21 were unemployed. We also found that about 37 percent
22 of the small businessmen just wanted to make a decent
23 living. About 28 percent of them wanted to supplement
24 their family income. And less than five percent of
25 them said they started their business while waiting to

1 find a better job. So you can tell that most of these
2 people want to be out on their own, accomplish things
3 with their own skills and their own abilities, and
4 really just wanted to be able to do something where
5 they were proud of the work that they provided and the
6 services that they gave. But they didn't want to work
7 for somebody else. So we needed to make sure that in
8 drafting this legislation that we don't run into
9 anything unnecessarily harsh, because those micro-
10 businesses and small businesses, we'll push them out
11 of business and make it impossible for them to operate
12 under these parameters.

13 Our immediate concern with House Bill
14 2400 is that it starts with the premise that everyone
15 is an employee unless the employer can prove
16 otherwise. And the three level test that's included
17 in the legislation, also known as the A-B-C test, as
18 we've heard from other witnesses here today and we've
19 seen from research from other states, it's virtually
20 impossible to meet that test. As an example, there
21 are a myriad of small business owners in Pennsylvania
22 whose only commodity is their skill or their labor.
23 They hammer and nail, or they might even teach us, for
24 example. We have a small business that's a member of
25 our organization who contacted us and said that, you

1 know what, in my company we treat children with
2 autism. We have a contract with local school
3 districts, with local learning centers, with private
4 and parochial schools, to provide treatment services
5 in the classroom. They use the facilities' materials,
6 the clay, the chalk and audiovisual equipment, their
7 toys, et cetera, to treat these children with autism
8 disorders. Under this definition in the legislation,
9 they are concerned that they might be forced out of
10 business the school district would be forced to treat
11 these independent contractors as employees, and
12 subject to wages and benefits, et cetera.

13 And under the legislation, they are
14 estimating that the additional costs to the schools
15 for these treatments and services would jump 25
16 percent. There are a host of other types of
17 relationships like that. Many doctors use
18 transcriptionists to take down their dictations and
19 transcribe medical records. We have hospitals who
20 contract regularly with skilled nursing facilities as
21 an example, organization, to provide skilled nursing.
22 Under the current definition in the legislation, they
23 would be subject to being treated as employees. We
24 have drapery installers who, you know, actually will
25 go out there --- you want to refurbish your home, and

1 you're tired of the way the drapes look, or your
2 spouse is tired of the way the drapes look. And you
3 call a drapery installer, and they come in and pull
4 out the big book and you flip through and you find the
5 color and the type of drapes you want, and then they
6 come back in a couple weeks and install them. Well,
7 the backdrop of this operation that occurred was that
8 drapery installer went to a manufacturer and he got
9 those drapes ordered, but he's a sole proprietor.
10 He's operating by himself and he's not a very good
11 sewer, so he contracted with a seamstress, who then
12 hems and sews the drapes to the size to fit your
13 custom windows, and then he comes back and he
14 installs. Technically, under this legislation, that
15 person could be in violation.

16 And I point out, and Gene did a nice job
17 of explaining this --- and again, we're talking about
18 the current definition, and the current language as
19 being too broad. I applaud the Chairman of the
20 committee, and Vicki DiLeo, and Representative Boyd
21 for putting together a stakeholders' group on this
22 issue.

23 I think one of the biggest problems is
24 that we need clear and more concise definitions that
25 are consistent with federal law. One of the

1 challenges a small employer has to face in
2 Pennsylvania, and this was one of Representative
3 Caltagirone's points before, most small businesses in
4 Pennsylvania don't have big staffs. They don't have
5 somebody that's working on the regulatory floor. They
6 don't have people in an enforcement section. In fact,
7 most small business people find out they violated the
8 law when an enforcement agent comes and tells them
9 that they broke it.

10 So one of the challenges that we have
11 with small employers is the whole issue of education.
12 Most of these employers just want to do a good job and
13 provide a good living for their families. And you're
14 absolutely right. There are competitors out there
15 that are unscrupulous, that are hiring people that
16 should be treated as employees, but they're using
17 1099s to work with them. And it gets them frustrated,
18 these small businesses that are trying to do the right
19 thing. They're being frustrated. But you know what,
20 they're also frustrated by the fact that they can't
21 deduct their health care costs like large corporations
22 can on their taxes. They also get frustrated when a
23 state government changes contracting rules and makes
24 it impossible for them to compete. There are a lot of
25 frustrations that small business owners face in

1 competing, but we don't want to make it so we change
2 the rules of the game, and make it harder for them to
3 even be in business.

4 We had mentioned in our testimony to you
5 that we're concerned that this legislation, without
6 any real clear definitions about what an employer is,
7 what an employee is, what an independent contractor
8 is, and what a contractor is, you're going to wind up
9 forcing many small businesses in Pennsylvania into
10 court.

11 The three-point A-B-C test is impossible
12 to meet. We have noted that the IRS --- it's been
13 noted in previous testimony --- includes a 20-point
14 definition and a 7-point definition. The interesting
15 thing about that legislation --- about those tests, is
16 that you're not required to meet all of the components
17 of each of those. You can meet some of them or a
18 majority of them, to qualify as an independent
19 contractor.

20 We need to worry about defining words
21 like control. The definitions of direction and
22 control are key to the entire thing we're debating,
23 and without that definition, it'll be determined by a
24 bureaucrat on a case-by-case basis, and ultimately
25 it's going to force a lot of small business owners

1 into court to further determine, all right, is the
2 person actually an employee or a contractor. One of
3 the things that we need to do is we need to make sure
4 that there's a clear and consistent black and white
5 line that determines whether or not you are an
6 employee, whether or not you're an independent
7 contractor. That's the kind of clarity we need and
8 want and are looking for you to provide in this type
9 of legislation.

10 We need to make sure again, that there
11 are business-to-business relationships that occur
12 every day and we need to make sure we don't impede
13 those. One of the concerns is that many times people
14 work in a company and they want to retire, but they
15 want to stay on on a consultant basis. Well, there's
16 a concern. Are those people able to set up and
17 operate as an independent contractor under the
18 parameters within this legislation. That would be a
19 real concern for me if I'd worked a lifetime in a
20 company and I had a wealth of knowledge and I may want
21 to still play a role in that field, but I don't
22 necessarily want to have to work a 9:00 to 5:00 day,
23 day in and day out.

24 In closing, you know, again, we talked
25 about the concerns about the harsh penalties that are

1 included in this legislation. We were talking a
2 minute ago with Representative Caltagirone, and
3 pointed out to him again that most employers,
4 particularly in small businesses, find out about these
5 things when they're being enforced, or when they find
6 out they violated the law. An unintentional violation
7 that includes six months in jail is extreme. And
8 certainly we're not saying that --- everybody can
9 claim it's an unintentional violation, but there are
10 degrees, and we would encourage you to work with us in
11 coming up with something that's reasonable. We also
12 need to make sure that we don't create a cause of
13 action where we create unnecessary harassment of small
14 employers by their competitors, by subcontractors that
15 are angry over a business decision, or by anybody else
16 who just simply feels that they're going to file a
17 lawsuit just to continually harass this company.

18 So with that, I'll wrap up my remarks,
19 and say that we're happy to work with the committee.

20 CHAIRMAN DIGIROLAMO:

21 Thank you both for your testimony. I
22 appreciate it very much and it will be helpful in
23 coming up with a bill that I'll support. I would say
24 that I think the only way to have a sense of clarity
25 is to have the presumption. You're not going to come

1 up with a one-two-three definition. There's always
2 going to be ways of looking at it, always going to be
3 facts to consider. That's the experience we've had in
4 the law. So you start with a presumption that
5 everybody's an employee, and then you get to the
6 facts. And I think even the examples you gave, in
7 most cases, the facts are pretty easily discovered.
8 The example of the person who comes to your house to
9 do curtains, they come and they measure and they leave
10 when they're done, so that's a different threshold.
11 But my point is, you start with the presumption he's
12 an employee and then deal with the facts that rebut
13 that. And that's the way the unemployment law is and
14 it's worked for many, many years. So I do think that
15 is the model we have to start with, the presumption
16 that needs to be rebutted.

17 MR. BARR:

18 We've expressed our strong reservations
19 about the test, and as we said, it's one of the next
20 things the group is going to be undertaking and even
21 when you have a test, and the IRS tests may or may
22 not, but it can be difficult to do this, and you can
23 have unintentional misclassifications. If someone's
24 misclassifying every single day, then you get another
25 issue, but it can happen, and as Kevin said, we don't

1 want to penalize those people who are making a good
2 faith effort to employ people and make their best
3 determination in terms of whether that person is an
4 independent contractor or an employee. And again, we
5 will absolutely work with you on that.

6 CHAIRMAN DIGIROLAMO:

7 I actually was making the opposite
8 remark. I don't think it's that hard to know, if you
9 start with the presumption of employee I don't think
10 it's that hard to get to where it's clear whether he's
11 an independent contractor or not. Representative
12 Seip?

13 REPRESENTATIVE SEIP:

14 Thank you, Mr. Chairman. I appreciate
15 the remarks about the delivery of autism treatment.
16 My son was a private contractor, a licensed social
17 worker who delivers therapeutic services in that
18 capacity. But again, getting back to what I said
19 earlier about that situation up in Schuylkill County,
20 we had a situation where millions of dollars of
21 projects were going on in a KOZ zone, and we're losing
22 out on tax revenue and encourage economic development,
23 and that's all thwarted because we have illegal
24 individuals there working, taking those jobs away from
25 citizens in my district. That is a huge, tremendous

1 problem that we're trying to address, and I would be
2 happy to try and work with you and others on the
3 committee to try and clarify the situations where
4 autism services are being delivered or things like
5 that, where we clearly have an independent contractor
6 involved.

7 Thank you, Mr. Chairman.

8 CHAIRMAN DIGIROLAMO:

9 Before you go, I want to recognize
10 Representative Ron Waters, who came in during the last
11 testimony.

12 REPRESENTATIVE WATERS:

13 You do raise an important point, but in
14 some ways it extends beyond the classification of
15 employees to classification of Americans. Because
16 we're talking about using illegal aliens, people that
17 shouldn't be here in the work force and don't have
18 proper paperwork, versus am I an employee or not
19 because I'm using somebody else's tools. I don't want
20 to go beyond the point, but those are some of our
21 questions. I mean, if I have a contractor, somebody
22 who's working on a project for me, and they set up
23 scaffolding, and I have another contractor who is
24 doing some other work and uses that scaffolding that
25 was set up by the other contractor, is he now an

1 employee? Is there a new relationship being set up.
2 Again, I think Representative Lentz, this is a good
3 point, that there are a lot of shades of grey here,
4 and it all depends fact pattern. And that's why, with
5 the penalties that we're talking about, from a small
6 business person's perspective, if we're going to be
7 talking about literally killing the company, because
8 that's what we're doing. We're talking about stop-
9 work orders. We're talking about three years in jail,
10 or six months in jail. For a small business person,
11 that's deadly. If we're going to do that, let's try
12 to make it for shades of grey instead of black and
13 white.

14 MR. BARR:

15 The other thing I wanted to add, and
16 that's a very good point, but one of the things that
17 has concerned us in here, is when we look at these
18 allegations, being paid under the table, safety
19 violations, all those are serious, and your concern is
20 illegal labor, there are already federal interstate
21 statutes relative to that. So one of the things we
22 want to be cautious about is to make sure that we're
23 enforcing those things that are already on the book
24 before we crank out something that says, let's do this
25 as well. But let's define what's proper and what may

1 be falling through the cracks.

2 CHAIRMAN DIGIROLAMO:

3 I'd like to recognize Representative
4 Mustio, but I just want to clarify that we need a
5 broad criterion. So there's a broad presumption when
6 you go to these three criteria, and apply the fact
7 pattern, it's not that hard to figure out who the
8 independent contractors are.

9 REPRESENTATIVE MUSTIO:

10 Thank you for your testimony. Many of
11 the arguments that you gave about this bill were very
12 similar to the arguments made to my bill. My
13 frustration is as we go through all these arguments,
14 that we're ultimately not getting to the thousand-
15 pound gorilla that's in the room, which is, quite
16 honestly, the construction trade problem. And my
17 thought was that at some point down the road, was
18 really to make this bill similar to what was done in
19 New Mexico, and really just addressing the
20 construction trade issue. Currently under the
21 Workers' Compensation law there already are stop-work
22 orders. I was just reading this last night.
23 Technically, a contractor must to the local
24 municipality, show evidence of Workers' Compensation
25 insurance before they get their building permit, and

1 when they do that, if they have subcontractors, they
2 have to show that they're covered, and if they're not,
3 they have to have affidavits signed for the local
4 municipality. But I think it gets to your point of
5 current enforcement. I did request a copy of the
6 building permit application from a local municipality,
7 and nowhere on there was there a request to show
8 evidence of Workers' Compensation insurance. So I
9 think we have to do some other things. But I'll stop
10 talking for today, but I wanted to make the point that
11 we need to get legislation to address these building
12 trades concerns passed, and I think these other issues
13 are very rare.

14 MR. BARR:

15 It is certainly pertinent that, from our
16 perspective, and we discussed this within our
17 organization, every person should know whether they're
18 working as an employee or as an independent
19 contractor, and must present that information under
20 Workers' Comp, whether they're covered or not.

21 REPRESENTATIVE MUSTIO:

22 It's not fair to the employee or the
23 family.

24 MR. BARR:

25 Correct. Absolutely.

1 CHAIRMAN DIGIROLAMO:

2 Thank you both very much. Next we have
3 Frank Sirianni and Danny Kubik.

4 MR. KUBIK:

5 Good afternoon, ladies and gentlemen.
6 Good afternoon, Mr. Chairman. My name is Daniel
7 Kubik. I'd like to thank you for the opportunity to
8 testify in front of you today. I've been a member of
9 the Operating Engineers Local 542, since 1976 and I've
10 been the business representative since 1992. I'm also
11 chairman of the Chester and Delaware County committees
12 of the Philadelphia Building Trades.

13 I am here today to support House Bill
14 2400 on behalf of the working men and women of
15 Delaware County and the rest of Pennsylvania. The
16 practice of misclassifying employees as independent
17 contractors affects all the citizens of the state.

18 Today I'd like to focus specifically on
19 the negative impact that misclassification has on
20 workers. Misclassification denies workers the
21 protections and benefits they are entitled to as
22 employees. Employees have income taxes withheld and
23 also pay their fair share into Social Security and
24 Medicare. Employees also contribute to unemployment
25 taxes and Workmen's Compensation and are entitled to

1 receive these benefits. They receive minimum wage,
2 and over time in many cases, health care.

3 Employers are not obligated to provide
4 these same benefits to independent contractors. Many
5 times, contractors are not protected by state and
6 federal anti-discrimination laws. Some workers are
7 forced to accept independent contractor status because
8 they lack the certificates and skills necessary to be
9 an employee, or because of their citizenship status.
10 Because they are classified as independent
11 contractors, these workers are placed in the position
12 of receiving low pay with no health benefits,
13 pensions, or other protections from the laws covering
14 employees, such as hour and wage standards.

15 The impact of misclassifying workers is
16 most severe when they lose their jobs, or worse yet,
17 when they are injured on the job. They will be denied
18 unemployment benefits, since there is no record of
19 them as an employee. If they are injured, they are
20 not eligible for Workers' Comp. Between medical bills
21 and being out of work, this can devastate a worker and
22 his or her family. And we all share this cost. The
23 only way to stop misclassification is effective
24 enforcement. Current laws prohibiting Workers' Comp
25 fraud are rarely enforced and lack teeth. House Bill

1 2400 will get the attention of employers who are
2 misclassifying their workers. This act has clear
3 definitions. I urge you to support the bill in its
4 entirety.

5 Thank you.

6 CHAIRMAN DIGIROLAMO:

7 Thank you very much. Mr. Sirianni?

8 MR. SIRIANNI:

9 Thank you for allowing me to make
10 comments on House Bill 2400. My name is Frank
11 Sirianni. I'm the president of the Pennsylvania State
12 Building Trades Council, and our council is made up of
13 121 locals and 15 regional councils, which
14 collectively represent 96,000 construction workers in
15 the State of Pennsylvania. Along with that, we have
16 approximately 3,100 signatory contractors in the State
17 of Pennsylvania, businesses that do the right thing,
18 pay the taxes, create jobs for employees, pay health
19 care benefits and provide pensions and good jobs for
20 the workers and their families.

21 I commend Representative Lentz and the
22 co-sponsors of House Bill 2400, which is very
23 complicated and very controversial. I also commend
24 the members of this committee for working on this.
25 I've attended several working group meetings on this

1 piece of legislation and there's been several
2 definitions of what employee and independent
3 contractor are. As Representative Mustio said, we've
4 addressed this issue at the last session. We've had
5 hours and hours of debate and conversation over this,
6 and as a matter of fact my lawyer filibustered for
7 three weeks, but we did come up with a solution to his
8 problem, and I think all problems can be resolved
9 through open dialogue and conversation between all
10 parties involved. I will say in one aspect, our
11 contractors do not misclassify employees. Also
12 earlier in some of the other testimony, there was
13 mention of that as one of the tools of the trade, and
14 I want to say that we do not consider that a tool of
15 the trade.

16 We have rampant misclassification of
17 workers as independent contractors in the construction
18 industry across the state. It's unbelievable the
19 amount we actually see. It actually originated in the
20 residential part of the industry and has now spread
21 into multi-million dollar projects. It's a guise or a
22 scam to avoid all the things that everyone's talking
23 about here today. That is, paying taxes, paying
24 Workers' Comp, paying unemployment comp, and being the
25 low-ball bidder on bid day to achieve a contract for a

1 client. The way the scam happens is, the contract
2 comes in and he's bid \$8,000 low already. And he
3 might be \$8,000 low on another project. So he already
4 has an \$8,000 advantage because he doesn't have
5 employees. What he'll do is take these people and
6 say, okay, you're all subcontractors now, you're
7 independent contractors, when in fact they are
8 employees. They're all working together. They're all
9 working on the same project. It's devastating in the
10 industry.

11 We will not be competitive in this state;
12 we will no longer survive in this state if we continue
13 to allow this to happen in the construction industry.

14 Classifying people as independent
15 contractors is the main way to bring in illegal
16 workers. That's one of the big cover-ups. He writes
17 up 1099s. A company comes in from Ohio with illegals
18 as independent contractors, takes Pennsylvania tax
19 dollars, takes Pennsylvania jobs away from workers in
20 Pennsylvania, didn't pay the Workers' Comp. Someone
21 had to pay for all that. And it was you and I as
22 citizens of Pennsylvania. And they took our tax
23 dollars and took it to other states. When they're
24 hurt, they go to the emergency room. The example that
25 Representative Seip gave, 150 employees and they were

1 listed as independent contractors on the job. Our
2 contractors didn't get their fair shake to bid that.
3 Honest local contractors lose out and that hurts the
4 local economy. It costs everyone.

5 It's a travesty what's happening in our
6 economy. I think this committee can and will and
7 should, by the obligation of their office, address
8 this issue to their utmost ability.

9 There are some definitions of employee
10 and independent contractor from the working group.

11 Thank you.

12 CHAIRMAN DIGIROLAMO:

13 Any questions? Thank you both very much.
14 We're going to take a brief break.

15 SHORT BREAK TAKEN

16 MR. HEYL:

17 Hi. My name is Dean Heyl from the Direct
18 Selling Association. I'm the Director of Government
19 Relations. I have just a few brief comments. As was
20 mentioned earlier, our sole concern with the bill is
21 that direct sellers are specifically as not employees
22 under Pennsylvania's unemployment compensation
23 statutes, and if House Bill 2400 were to apply to us,
24 that could have a chilling effect on those individuals
25 wanting to become direct sellers. These direct

1 salespeople enjoy their independent contractor status,
2 which provides the flexibility of setting their own
3 hours, in addition to the sense of pride they have
4 owning their own businesses.

5 DSA supports the proper classification of
6 employees and independent contractors. However, DSA
7 believes that the independent contractor status
8 established under the previously mentioned
9 Pennsylvania unemployment compensation statute and
10 also in the Internal Revenue Code Section 3508,
11 combined with written sales consultant agreements
12 provide adequate safeguards for direct sellers. For
13 these reasons, DSA respects that House Bill 2400 be
14 amended to clarify that direct salespeople are
15 exempted from coverage. This will provide consistency
16 with Pennsylvania's existing unemployment compensation
17 law.

18 Thank you.

19 MS. DILEO:

20 Any questions? Our last testifier is
21 Walter Palmer.

22 MR. PALMER:

23 Good afternoon. My name is Walter
24 Palmer, and I represent the General Contractors
25 Association of Pennsylvania, GCAP, which is comprised

1 primarily of union contractors from across the state,
2 including representatives from the Master Builders
3 Association in Pittsburgh, Keystone Contractors
4 Association in Harrisburg, and the General Building
5 Contractors Association in Philadelphia. All three
6 associations are the collective bargaining agents for
7 the entire Commonwealth of Pennsylvania for
8 predominately commercialized union contractors.

9 Because of the hour of the day and
10 because of most of the testimony that's been given,
11 GCAP does support House Bill 2400 with a few
12 exceptions. I do have some written testimony and I'm
13 sure the committee will have that.

14 I do want to call your attention to
15 several issues. One of tremendous concern to the
16 association obvious is the classification of workers.
17 Misclassification of workers, to our members, they
18 compete with this issue on a regular basis, time in
19 and time out. A lot of our members do do prevailing
20 wage work and they constantly call my offices and call
21 other contractors associations' office and try to
22 explain to me how they do compete with people on a
23 prevailing wage job, and they find themselves a
24 million dollars off on their number to the next lowest
25 bidder. It's a severe problem. Our people lose

1 projects that taxpayers are paying all the time, on
2 courthouses, on schools. Our people do complete. We
3 have a good auditing system in place through our
4 collective bargaining agreements, and we are certainly
5 contractors that do provide benefits and have very
6 good classification of our workers. Unfortunately, we
7 are competing against people that are not classifying
8 their workers properly, and unfortunately, the
9 taxpayers are paying for that.

10 Many of our schools that are being
11 reconstructed today are in the situation. Our
12 contractors are losing these contracts to what we
13 believe are employees that are frankly misclassified.
14 It is, we believe, a crime really for our people to
15 lose these projects to these contractors and it's cost
16 us a tremendous amount of business.

17 We have another issue that we are
18 concerned about House Bill 2400, is the penalties. We
19 do believe that a misclassification is a
20 misclassification and that those people should suffer
21 some penalty for misclassification of employees. We
22 do, however, have concerns about the ramifications of
23 a prime contractor being responsible for
24 misclassification by a subcontractor or a material
25 supplier, or a sub-sub-contractor or a third, fourth

1 or fifth tier subcontractor. We do believe that there
2 does need to be some penalties in place, but making a
3 prime contract, who sometimes has as many as 40 or 50
4 subcontractors and material supplies coming in and out
5 of the job site, making him responsible and suffer
6 consequences for someone who's delivering material or
7 unloading material, we believe is slightly excessive.
8 But I do agree that a misclassification is a
9 misclassification and that there should be fines or
10 penalties in place. I would say we do not agree with
11 sending a contractor to jail or suffering some penalty
12 such as that if a material supplier or a sub-sub
13 contractor does make those kinds of errors.

14 With that, I'm just going to stop, and
15 I'll answer any questions, but I will say that our
16 contractors are --- we are 500 contractors strong and
17 we do employ good unionized labor throughout the State
18 of Pennsylvania. So with that, I'll conclude. I'll
19 answer any questions, and we do have formal testimony.

20 Thank you.

21 REPRESENTATIVE WATERS:

22 I agree with your comments. It makes
23 sense to me.

24 MR. PALMER:

25 Thank you very much.

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CHAIRMAN DIGIROLAMO:

And that concludes the hearing this
afternoon. I want to thank all of you for being here.
And thank you to the testifiers for your testimony.
This meeting is adjourned.

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PUBLIC HEARING CONCLUDED AT 3:34 P.M.

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