Testimony of Walter P. Palmer, III
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Presented to
The House Labor Relations Committee
April 23, 2008

Chairman Belfanti, Chairman DiGirolamo and Members of the House Labor Relations Committee:

On behalf of the General Contractors Association of Pennsylvania (GCAP) I would like to thank you for inviting me to appear before you to share GCAP's position on HB 2400, P.N. 3545. I appreciate the opportunity to discuss how the problem of employee misclassification has a severely negative impact on our members and the entire construction industry.

GCAP represents the member interests of the Master Builders Association of Western PA (MBA), the Keystone Contractors Association (KCA) and the General Building Contractors Association (GBCA). As such, we are the statewide voice for more than 500 union-affiliated general and specialty contractors and their affiliates throughout the Commonwealth.

Member companies include large general contractors such as PJ Dick Incorporated which is engaged in a nearly $200 million expansion of the Children's Hospital of Pittsburgh. GCAP also represents respected specialty contractors, including Caretti, Inc., which did the stone work for the Cabela's store in Berks County. Regardless of what they do in the commercial building process, GCAP members are dedicated to skill, integrity and responsibility.

Unfortunately, the construction industry is plagued by companies who intentionally misclassify workers as independent contractors to avoid paying taxes, insurance costs and payroll deductions. This practice results in lost tax revenue, higher workers' compensation premiums, illegal profits and a grossly uneven playing field when it comes to cheaters entering into competitive bids. Finally, while not the immediate focus of this hearing, the misuse of the independent contractor classification is often a means to hire illegal aliens. That is why GCAP supports the overall intent of HB 2400.

However, we do believe that several changes will further strengthen this legislation and make it an effective tool to combat the problem of employee misclassification.

A convenient loophole for unscrupulous employers and a legitimate challenge for honest businesses is that there is no clear definition of what constitutes an employee and who qualifies as an independent contractor. While HB 2400 does provides broad criteria to identify an employer/employee relationship, GCAP believes that the bill should be amended to include a set of specific requirements for an individual to be deemed an independent contractor.

For instance, Mertens Law of Federal Income Taxation provides 20 Common Law factors to help a filer determine if an employer/employee relationship exists. And, other states provide examples as well. GCAP is not suggesting that the Commonwealth adopt a 20-point test. Rather, we believe Section 4 of HB 2400 should include practical identifiers such as whether or not an individual provides his or her own tools or whether or not an individual providing services realizes profits or loss. On this point, GCAP looks forward to working with the Committee to determine what these specific requirements will be. I would like to note that GCAP does believes that what ever definition of independent contractor is ultimately included in HB 2400, it should be consistent with the Workers Compensation and Unemployment Compensation laws and Pennsylvania case law on this matter.

Perhaps our greatest concerns lie with the penalties and enforcement provisions of the legislation. To be clear, by voicing these concerns, GCAP does not mean to diminish the severity of the criminal behavior being perpetrated by some in the construction industry. Defrauding the state of millions of dollars in tax revenues and cheating the system has major consequences that require appropriate penalties and strong enforcement.

In fact, a DVD produced by the United Brotherhood of Carpenters and Joiners correctly recognizes that the problem of misclassification is rampant across the country. Their national report is reflective of what is happening in Pennsylvania as well. While not on the DVD, one example is a recent investigation into a project at Slippery Rock University which found that one subcontractor paid all of the workers on the jobsite as independent contractors. Not surprisingly, some of these "independent contractors" were not U.S. citizens. It also came as no surprise that the contractor on the project was from out of state. This is not an isolated case.

However, GCAP believes the penalties currently outlined in HB 2400 – especially those for "unintentional violations" are excessive. While better defining the requirements of an independent contractor will help clarify matters, there will always be some uncertainty depending on the specific circumstances of a specific project, a specific employee, etc. Therefore, an otherwise law-abiding business should not face the possibility of imprisonment for an honest error in classifying an employee.

In addition, empowering the Secretary of Labor and Industry to enforce the statute and to assess administrative penalties with no oversight and limited statutory direction on the amount of the penalty is problematic. An alternative would be to make enforcement the sole purview of the Attorney General and to allow the Secretary to collect administrative penalties only if an employer is found guilty of violating the law. Doing so will help ensure a greater level of consistency in enforcement.

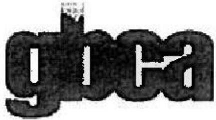
We do agree with the Carpenters that the state must have the necessary tools to effectively enforce either the current laws or this proposed statute. As such, GCAP would support giving the Attorney General what he or she needs to ensure they have enough agents and the supporting resources to address this problem.

Finally, GCAP is concerned that, as drafted, HB 2400 may not protect a general contractor from the illegal business practices of a subcontractor. In other words, if a general contractor properly classifies its employees but a subcontractor with whom the general is engaged on a project does not, can a misclassified employee or his/her representative also bring suit against the general? In the commercial construction industry, a general contractor could involve as many as 40-50 different subcontractors on one project so any legislation needs to clearly state that only the direct employer should be held liable for any illegal hiring practices. This concern holds true for subcontractors and their sub-subcontractors also. Therefore, we believe HB 2400 should provide a clear safe harbor for general contractors and subcontractors who operate in full compliance with the law.

In closing, GCAP applauds the efforts of the House Labor Relations Committee to find an appropriate remedy to the serious problem of employee misclassification. While still a work in progress, HB 2400 is clearly a step in the right direction.

Thank you again for the opportunity to be here today. I would be pleased to answer any questions you may have.

Walter Palmer Contact information



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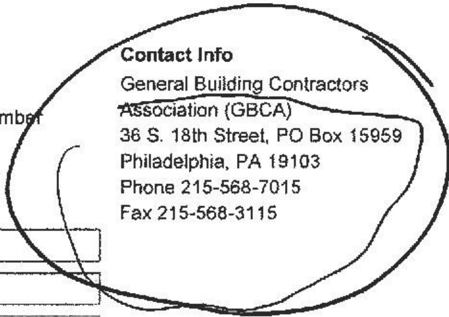

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