

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

LABOR AND INDUSTRY COMMITTEE

STATE CAPITOL
HARRISBURG, PA

IRVIS OFFICE BUILDING
ROOM G-50

MONDAY, APRIL 16, 2018
11:32 A.M.

PRESENTATION ON HOUSE BILL 1781
REGISTRATION OF INDEPENDENT CONTRACTORS IN
WORKERS' COMPENSATION

BEFORE :

HONORABLE ROB KAUFFMAN, MAJORITY CHAIRMAN
HONORABLE JIM COX
HONORABLE SHERYL DELOZIER
HONORABLE CRIS DUSH
HONORABLE MARK GILLEN
HONORABLE DAWN KEEFER
HONORABLE FRED KELLER
HONORABLE RYAN MACKENZIE
HONORABLE JOHN McGINNIS
HONORABLE STEVEN MENTZER
HONORABLE ERIC NELSON
HONORABLE JACK RADER
HONORABLE JESSE TOPPER
HONORABLE JOHN GALLOWAY, MINORITY CHAIRMAN
HONORABLE MORGAN CEPHAS
HONORABLE LEANNE KRUEGER-BRANEKY
HONORABLE JEANNE McNEILL
HONORABLE DAN MILLER
HONORABLE ED NEILSON
HONORABLE ADAM RAVENSTAHL
HONORABLE PAM SNYDER

1 COMMITTEE STAFF PRESENT:

2 JOHN SCARPATO, MAJORITY EXECUTIVE DIRECTOR
3 SHANNON WALKER, MAJORITY RESEARCH ANALYST
4 ELANA MAYNARD, MAJORITY LEGISLATIVE
5 ADMINISTRATIVE ASSISTANT II
6 VICKI DiLEO, MINORITY EXECUTIVE DIRECTOR
7 HALEY SALERA, MINORITY RESEARCH ANALYST

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Pennsylvania House of Representatives
Commonwealth of Pennsylvania

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SUBMITTED WRITTEN TESTIMONY

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P R O C E E D I N G S

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MAJORITY CHAIRMAN KAUFFMAN: To get things off in a timely fashion, and it is 11:30, so I'd like to call this meeting to order of the House Labor and Industry Committee.

Would you please rise for the Pledge of Allegiance?

(Pledge of Allegiance recited.)

MAJORITY CHAIRMAN KAUFFMAN: Thank you.

I appreciate everyone being here today, and of course, the meeting is being recorded, as usual. Members and guests, please do your best to silence your electronic devices to reduce the interruptions.

And will the secretary please call the roll?

(Roll call vote taken.)

MAJORITY CHAIRMAN KAUFFMAN: All right. Thank you.

Today we will be discussing Representative Keller's legislation, House Bill 1781, to provide registration of independent contractors for the purposes of workers' compensation. This is in circumstances where the business and the independent contractor agree about the nature of the business relationship.

And so at this time, I would like to

1 recognize Representative Keller for some brief remarks
2 surrounding his legislation.

3 Go ahead, Representative Keller.

4 REPRESENTATIVE KELLER: Thank you, Mr.
5 Chairman.

6 Again, I think you hit the nail on the head
7 with the introduction here. This is about a business
8 relationship where it meets the definition of "independent
9 contractor" by federal guidelines, and also, both parties
10 agree that they are independent contractors.

11 And the need for this is, you know, it comes
12 into play so insurance companies can be sure that they're
13 capturing the appropriate employees when they go in and do
14 audits for businesses that hire independent contractors.
15 So I think it adds an important point of clarity to a
16 relationship between a business and an independent
17 contractor that's hiring them to do work.

18 So I appreciate the committee taking up the
19 bill. I appreciate the people that came here today to
20 testify. Thank you.

21 MAJORITY CHAIRMAN KAUFFMAN: All right.
22 Thank you, Representative Keller.

23 Now I'd like to invite the first panel to
24 come forward to the table in front of me. First, I know,
25 is Lynn Sholley of the Sholley Agency, Incorporated, I

1 believe a constituent of Representative Keller's, Kevin
2 Shivers is executive state director of the National
3 Federation for Independent Business, and Sam Marshall,
4 president of the Insurance Federation of Pennsylvania.
5 Please come forward.

6 I would like to ask all of our witnesses
7 today to please summarize your testimony in about five
8 minutes. We have limited time today. Of course, session
9 begins at 1 p.m., and we want to make sure we get
10 everything on the agenda done.

11 Shannon Walker, our assistant on the
12 committee, is sitting to my right, to your left. And she
13 will signal you when you have approximately 30 seconds
14 remaining to begin concluding your remarks.

15 And so I will open it up and, Mr. Sholley,
16 maybe you would be the first to start.

17 MR. SHOLLEY: I appreciate the opportunity
18 to provide testimony in front of the committee. I
19 apologize if some of your copies are a little
20 water-stained. It was not a good day to forget an
21 umbrella.

22 But just again, as my experience of working
23 in the insurance business for over 40 years, most
24 independent contractors are typically sole proprietors,
25 partners, members of an LLC, which under workers'

1 compensation, if they have no employees, they are not
2 obligated to carry workers' compensation. Most independent
3 contractors either typically are owner operators or other
4 businesses that work with trucking companies and also we
5 see it with contractors where they're hiring independent
6 contractors to maybe do specific jobs for them.

7 The one situation that I put into my written
8 testimony is actually a smaller trucking company, who for
9 several years had been insured with the State Workers'
10 Insurance Fund, and had went through the process of the
11 legal department of the State Workers' Insurance Fund, has
12 documents, questionnaires that are needing to be completed,
13 and other information they require to determine "is the
14 independent contractor that this person is hiring truly an
15 independent contractor or are they really just acting as an
16 employee, but we're calling them an independent contractor
17 so we don't have to provide workers' compensation for
18 them?"

19 In this particular situation, this was
20 determined by the legal department of the State Workers'
21 Insurance Fund that they were truly independent contractors
22 and were excluded from any premium under the trucking
23 company's workers' comp premium.

24 In September of 2016, the trucking company
25 actually had an opportunity to go in with a standard

1 workers' comp carrier. Of course, the advantage of that is
2 the rates through a standard company are significantly less
3 than what you're going to find in the State Workers'
4 Insurance Fund. And after being in that standard company
5 for three months, the insurance company decided to do an
6 audit, came back and said, "Well, based on our audit, we
7 are going to include premium for these independent
8 contractors and we're sending out an additional bill of
9 \$25,000 for the first quarter."

10 We approached the current, that particular
11 insurance company and explained to them and provided the
12 documents that Swift had used to determine that they should
13 not be covered. And at that point, the insurance
14 company -- which is what we're hearing from most insurance
15 companies now is, "We don't know if that independent
16 contractor, if he's involved in a serious accident, whether
17 he's going to file a claim against the trucking company,
18 and then all of a sudden, we're paying a workers' comp
19 claim on that."

20 So I understand the concern that they had.
21 And from that, their response was, "Because of that
22 possibility, we are going to charge a premium if that
23 independent contractor cannot show proof that they have
24 their own workers' compensation policy."

25 So under that situation, it would have cost

1 this small trucking company over \$100,000 additional
2 premium in workers' comp, so he really had no choice but to
3 go back to the State Workers' Insurance Fund, where
4 although he was paying a higher premium, he was not near
5 the cost because they were not charging for the independent
6 contractors.

7 So we kind of have, in my opinion, a
8 situation where I understand the insurance companies. They
9 need to be protected. If a claim is presented against them
10 and they're found to be liable to provide workers' comp, it
11 puts a tough situation for them. But we're also requiring
12 individual, sole proprietors, partnerships, and LLCs --
13 basically saying, "You either have to purchase workers'
14 comp, even though you're not obligated to, or the trucking
15 company you haul for has to pay workers' comp for you, and
16 that's the only scenarios where you're really able to work
17 for us because of the situation of each party trying to
18 protect themselves."

19 I think workers' compensation and the
20 Department of Labor and Industry has done a great job with
21 executive officers of corporations where they can waive
22 off. There is a form that they sign basically stating that
23 they're waiving off of any rights to workers' compensation.
24 If we could come up with a similar type of form, which I
25 think this bill is somewhat addressing, where sole

1 proprietors, partners, and members of LLCs can file with
2 Labor and Industry that they are waiving off of all rights.
3 Then it does protect the insurance companies similar to how
4 it protects them for officers of corporations where if they
5 would try to make a claim against the insurance company,
6 it's on file showing that this individual has waived off of
7 any rights to workers' comp. So the insurance company then
8 could deny that and should be able to be successful in that
9 because it was the individual who chose to waive off of
10 those rights.

11 So that's kind of, in a nutshell, my
12 testimony. And again, thank you for your time.

13 MAJORITY CHAIRMAN KAUFFMAN: Thank you very
14 much.

15 Just to note, Representative Cephas,
16 Representative Delozier, and Representative Cox have
17 entered the room since the roll call.

18 Whoever would like to go next, you can have
19 an arm wrestling match over it, whatever you'd like.

20 MR. SHIVERS: Mr. Chairman, thank you so
21 much for the invitation to appear before the committee this
22 morning.

23 My name is Kevin Shivers. I'm the executive
24 state director of the National Federation of Independent
25 Business. Our members are exclusively small independent

1 businesses, so the common denominator for our members is
2 that there are no publicly traded companies within our
3 membership. We also don't allow nonprofits or charitable
4 organizations in our membership, so they are exclusively
5 family-owned or closely held businesses. And we have about
6 15,000 members across Pennsylvania.

7 And just a couple of interesting statistics
8 I thought you would appreciate in the committee in dealing
9 with the bill, that one in four individuals who start a
10 small business were previously unemployed or not in the
11 workforce.

12 For some of those, this is a
13 family-sustaining living. For others, this is something to
14 supplement the family income. But it's really important
15 that we have the ability to be able to go out and hang a
16 shingle and to be able to provide a service or to sell a
17 good in Pennsylvania. And that is our mission at NFIB, to
18 preserve and protect the ability of entrepreneurs and
19 individuals to be able to start, run, and grow a business
20 here in the Commonwealth.

21 It's the American dream. And we support the
22 spirit of House Bill 1781 for preserving and protecting the
23 American dream.

24 When Representative Keller spoke a moment
25 ago, he talked about how, you know, what we're trying to do

1 is just clarify the law for businesses that have an
2 agreement. You know, a contractor and a business who want
3 to perform a service and to do that, should be able to
4 conduct that business without any fear of any additional
5 bureaucracy. But I had one labor lawyer once say to me
6 that everybody is an independent contractor until they hit
7 the ground, you know, that the best laid intentions often
8 are skewed when there is somebody who got injured.

9 And the challenge that we face is that you
10 have workers' comp judges who are often taking a look at a
11 lot of factors in determining who, in fact, really is an
12 independent contractor and who is an employee.

13 There was an example with an NFIB member
14 business where they contracted with an individual who had
15 their own tools, set their own hours, carried their own
16 liability insurance, but the judge found that because that
17 individual showed up to perform that contracted job at the
18 company's place of business, they, in fact, were an
19 employee of that company when they got hurt. So while we
20 have a balance test in Pennsylvania, judges often are
21 giving greater weight to one of the factors over other
22 factors and it really brings imbalance to the balance test
23 that we have.

24 Now, the issue of independent contractors
25 and preserving their rights to run and grow their business

1 has been a significant issue. We've been battling this
2 here in Pennsylvania for 10, 15 years. I remember the last
3 big push was back in 2007, 8, 9, and we were talking about
4 these businesses. And one of the issues it always comes
5 back to is a rebuttable presumption. You know, having this
6 declaration is really important, but without a rebuttable
7 presumption that an employer can bring or a contracted
8 business can bring to the court that says that at the time
9 this was signed, both parties knew exactly that this was
10 going to be an agreement of services and compensation for
11 that service that was provided -- that, you know, there
12 really is without -- that individual company is without any
13 other basis to fight this and we wind up in a circumstance
14 where the judges can pick and choose factors.

15 We would point out to you and recommend
16 taking a look at the Arizona law, because Arizona law did
17 two things. Not only do they have this declaration for
18 workers' comp purposes, but they also have a declaration
19 for independent businesses. And one of the things that
20 this declaration has, which could be amended into this, is
21 an acknowledgment in the declaration that the individual
22 who's signing that form is not an employee. I mean, how
23 often have we heard that circumstance where that injured
24 person says, "I thought I was an employee. I was told I
25 was an employee. And now, all of a sudden, I'm an

1 independent contractor."

2 Well, if it is clearly listed that that
3 individual is not an employee, that they are being
4 contracted with to perform a service, that they don't have
5 to perform that service within a given period of time, they
6 don't have to show up at a certain period of time, you
7 know, that they have their own tools to perform the
8 service, you know, we can do our level best to honor the
9 spirit of that relationship that existed in that
10 contracted -- providing that contracted service. Because
11 in the absence of it, I think, you know, we're still going
12 to be beholden to decisions by the courts.

13 And the last thing I would suggest is that,
14 again, without rebuttable presumption, a registration
15 requirement, again, still would not reach that level, I
16 think, that the courts would look at to establish
17 independence. And so for some of these smaller companies,
18 you really could just be creating an extra regulatory
19 hurdle for them to jump, which I think they would do if
20 there was an actual confidence in knowing that a rebuttable
21 presumption could help protect, you know, both parties.

22 So with that, I'll be available for
23 questions. And I'm sure after Sam finishes, you'll have
24 many for all of us.

25 MR. MARSHALL: Thank you. Sam Marshall with

1 the Insurance Federation.

2 Deja vu all over again. We have a
3 well-chronicled, persistent problem in the workers'
4 compensation system. It's been around for a number of
5 years. It gets sporadic legislative and regulatory
6 attention, not the final action that we feel needs to be
7 done. And meanwhile, the problem grows.

8 We have a bill that directly addresses the
9 problem. It doesn't do it by allowing unilateral action by
10 any party, not us, not the worker. I mean, it does it by
11 implementing, establishing a process that's run by the
12 Department of Labor and Industry.

13 Now, I bet you all thought that was going to
14 be a little prelude to a different bill, but today the bill
15 is independent contractors. And that's the uncertainty
16 that we have all struggled with, on both sides, everybody,
17 you know, whether an individual is an employee or an
18 independent contractor, for purposes of determining whether
19 he should or should not get coverage under the Workers'
20 Comp Act.

21 Kevin mentioned it. He used the phrase a
22 little differently than we use it, but it's the same thing.
23 I mean, everybody is an independent contractor until they
24 get hurt, and then they're an employee. Just the way the
25 system tends to work, you know, good, bad, indifferent.

1 And when that happens, you either file a
2 claim against the employer and the employer is on the
3 hook -- and I think Lynn talked about that -- or you go to
4 the Uninsured Employer Guarantee Fund. And that's one
5 reason why the fund continually is operating on a deficit.
6 And everybody in both chambers and -- you know, I mean, in
7 government, you're all struggling with how to adequately
8 fund that. You know, it's because you look at the claims
9 there, there's a number of them that involve people who the
10 employer initially thought the person was an independent
11 contractor and then it's found, no, he was an employee and
12 the employer didn't have insurance. Then it goes to the
13 UEGF.

14 So that uncertainty -- and then frankly,
15 that uncertainty isn't fair to anybody. It's not fair to
16 us as insurers because we're trying to charge a fair
17 premium for the employer. It's not fair to the employer,
18 who says, "I thought this, I thought that." And it's not
19 fair to the injured worker, because the injured worker
20 ought to know his status before he gets hurt, not after he
21 gets hurt, because then it's really the roll of the dice.
22 Is he going to get picked up by the system or isn't he?
23 And therefore, if that's the roll of the dice he's making,
24 he's not able to plan for the contingency of a possible
25 injury.

1 We think Representative Keller's bill is a
2 solid step to address that uncertainty. It has the
3 employer and the individual agree up front on what the
4 relation is. And it has an affidavit for the employer and
5 the employee, where the employee expressly acknowledges
6 what is going on. He is given all of the disclosures. He
7 acknowledges that he isn't an employee. You know, he is
8 told that he has the ability to go purchase on his own
9 workers' compensation coverage.

10 You tinker around with what those terms are
11 and that disclosure, how that affidavit works, but those
12 are the kinds of disclosures, those are the kinds of
13 attestation that you want up front, not after the fact.

14 You know, that's -- I mean, what you look
15 for is to have a knowledgeable, informed, and arm's length
16 agreement between the employer and the independent
17 contractor, and the individual who's doing the work.
18 That's what the bill does. If somebody has a way to make
19 it stronger -- you know, Kevin talked about the Arizona
20 approach -- by all means, do so. But we think the bill
21 does a great deal on that.

22 The one thing I'd say, I understand the
23 challenge. You know, I mean, you have this, and are
24 workers' comp judges going to adhere to this? Are they
25 going to try to find some way to circumvent it? And I get

1 it. I mean, you're a workers' comp judge. You say, "Here,
2 you know, I have an injured worker, he has medical bills
3 and he has no coverage. I want to do what I can to try to
4 cover for him."

5 You know, that's compassionate, but it's not
6 free. The problem we have now is that that cost is being
7 borne after the fact when nobody has a chance to absorb it
8 and it is a risk.

9 I think that the way the bill is drafted,
10 it's clear on that, that that will -- I mean, it sort of
11 locks in a judge no matter -- you know, it says here,
12 "Look, whatever else can happen, it's not going to be
13 coverage under the Workers' Comp Act."

14 You can tinker around with that language,
15 and I've made some suggestions on that, to say that the
16 individual isn't entitled to coverage under the UEGF, isn't
17 entitled to any coverage under the act. That's
18 wordsmithing. That's why we lawyers, you know, they crank
19 us out by the bushels and we will all come around with
20 that. But, you know, I think -- some would say, "Well, so
21 what you want is stronger language." What we want is
22 clearer language up front, just so that everybody knows.

23 You know, I would -- and you've heard me say
24 it before on that other issue that I've referenced, if you
25 don't like this, what do you recommend? You know, that's a

1 question we -- and whether you're an injured worker or
2 whether you're a small employer, whether you're an agent,
3 or whether you're an insurance company, or frankly, whether
4 you're the provider that provided health care to an injured
5 individual and is wondering how he's going to get paid and
6 at what rate, we come to you, as government officials, when
7 we face uncertainty, when we look at the law and we say,
8 "It's not clear, going into it, what we're supposed to do."

9 This is a solution. We think that this is a
10 solution that addresses the uncertainty that plagues
11 everybody involved now. If you don't like it, come up with
12 something different. But please, whatever you do, address
13 that uncertainty because that uncertainty isn't fair to
14 anybody.

15 I mean, I represent the insurance industry
16 and, you know, so be it, but whether it's us, whether it's
17 the employer, or in particular the injured worker, you're
18 doing a disservice to everybody to have an uncertainty
19 exist in the law.

20 Thank you.

21 MAJORITY CHAIRMAN KAUFFMAN: Thank you, Sam.

22 Since roll call, Chairman Galloway has come,
23 and Representative Krueger-Braneky, Representative
24 Mackenzie, and Representative Keefer. I don't think I've
25 missed anyone.

1 And we are going to open it up for
2 questions. And first, we are going to go with
3 Representative Eric Nelson.

4 REPRESENTATIVE NELSON: Thank you, Mr.
5 Chairman.

6 And thank you for your testimony.

7 You know, the idea romantically sounds good,
8 but pragmatically, you know, just a month or two ago, we
9 heard of the dire straits that the Underinsured Workers'
10 Compensation Fund is as a result, and that was trucking,
11 construction, food service.

12 In your trucking example, if that individual
13 had signed a clarification that he wouldn't go on the much
14 larger trucking company, who is now establishing a series
15 of independents, then potentially, he would fall onto the
16 state. Is that correct?

17 MR. MARSHALL: No. You know what, I think
18 the fund that you're referring to is the Uninsured Employer
19 Guarantee Fund.

20 REPRESENTATIVE NELSON: Yes.

21 MR. MARSHALL: And what is to file a claim
22 under that, you first have to establish that you are an
23 employee of an uninsured employer. And that's actually,
24 that's why I referenced in my remarks that one of the
25 problems you're seeing is -- we call it the UEGF, because

1 we all speak in acronyms -- but what you're seeing is a
2 growing insolvency, perpetual insolvency, in underfunding
3 of the UEGF precisely for the problem that this bill
4 attempts to address.

5 With the uncertainty --

6 REPRESENTATIVE NELSON: So in the situation
7 when you have the trucker who gets injured with the
8 \$500,000 claim, who pays for that?

9 MR. MARSHALL: Right now, it happens one of
10 two ways, but what you're referring to is when the claim
11 goes to the UEGF -- because the parent company in that
12 instance says, "I didn't have insurance." Therefore, it's
13 an uninsured employer. Therefore, it goes over to the
14 Uninsured Employer Guarantee Fund because what happens is
15 somebody says, "You know, that individual with the claim,
16 we now, after the fact, determined that he wasn't an
17 independent contractor, he was an employee. And his
18 employer didn't have insurance, and therefore, it's a UEGF
19 claim."

20 What the bill does is say right up front,
21 "It's not going to be a UEGF claim." If somebody filed
22 that was given all the right disclosures and the
23 registration statement, the registration was filed with the
24 department and was properly maintained and there was no
25 revocation, that individual has already affirmed up front

1 that he is an independent, not an employee.

2 REPRESENTATIVE NELSON: Back to my question,
3 who pays the \$500,000 claim?

4 MR. SHOLLEY: If I can kind of address, the
5 situation that I referred to, in that particular case, if
6 the independent contractor now is injured and all of a
7 sudden says, "Hey, I'm really an employee, and I filed a
8 claim," and it goes in front of a workers' compensation
9 judge, that judge will determine if, "yes, we agree, you're
10 an employee." Under that scenario, our trucking company
11 was insured with the State Workers' Insurance Fund. So the
12 State Workers' Insurance Fund would have been obligated to
13 pay that claim. If they would have ruled "no, you know,
14 you are truly an independent contractor and you're
15 responsible for your own coverages for that," then that
16 would have been on that particular individual.

17 REPRESENTATIVE NELSON: So, again, back to
18 the question, the \$500,000 claim that would need to be made
19 to make this worker whole -- because maybe he was backed
20 over by his truck. So he signed the clarification that
21 he's not on your insurance policy and his claim is denied.
22 So what happens to that individual and who pays that
23 \$500,000?

24 MR. SHOLLEY: And again, there would be a
25 couple of situations there.

1 If that individual had hospitalization
2 insurance, because they are not required to carry workers'
3 comp, their hospitalization insurance would actually step
4 in and pay for the claim, plus there's also some first
5 party benefit coverages --

6 REPRESENTATIVE NELSON: Thank you. That's
7 what I was trying to get to.

8 In the world of suggestions, I think, that
9 would be potentially just similar if you're an employer and
10 you're declining medical benefits and you show that, "hey,
11 I have insurance over here," maybe some alternate. My
12 concern is, ultimately, if there isn't personal medical
13 benefits or there aren't personal medical benefits
14 available, they're going to end up falling onto the state
15 in some other manner or program.

16 MR. SHOLLEY: In that scenario, that
17 independent contractor, if he chooses to not carry personal
18 health insurance, he can purchase under their insurance
19 policy, under the auto policy, first party benefits
20 coverage, and they can purchase significant amounts of
21 medical insurance to pay for the situation that you're
22 referring to.

23 REPRESENTATIVE NELSON: So that may be --
24 yeah.

25 MR. MARSHALL: That person can also -- that

1 person can purchase workers' comp coverage, too.

2 REPRESENTATIVE NELSON: Well, they can, but
3 in reality, they don't.

4 MR. MARSHALL: But that's because -- but
5 again, if you address the uncertainty up front, and you
6 say, "Hey, you know what, you're going to be an independent
7 contractor, period. You've attested to this, you've signed
8 an affidavit, you have verified that that's your status."
9 Then you're going to say, "Okay, now I know. I'm going to
10 purchase" -- whether I'm going -- as Lynn mentioned, "I'm
11 either going to, you know, rely on my personal health
12 insurance for it, and that will cover it, or I'm going to
13 have my own workers' comp policy."

14 REPRESENTATIVE NELSON: Under this bill, do
15 you need to show that you have an alternative form of
16 insurance?

17 MR. MARSHALL: No.

18 REPRESENTATIVE NELSON: Of any kind?

19 (No response.)

20 REPRESENTATIVE NELSON: Okay.

21 Thank you, Mr. Chair.

22 MR. MARSHALL: That's something you can
23 consider. You all bounce back and forth on, you know, the
24 zeal for certain mandates.

25 MAJORITY CHAIRMAN KAUFFMAN: Okay. And

1 next, we go to Representative Neilson.

2 REPRESENTATIVE NEILSON: Thank you.

3 I'm going pick up right where Eric,
4 Representative Nelson, left off.

5 Kevin, my previous life, I call it, I was at
6 Labor and Industry. And I was there at 2/7 -- 7/09 when we
7 changed all these policies because there was unemployment
8 then. And it's just like you say, you try to provide
9 opportunities for people to grow a business.

10 So these people were unemployed, and they
11 were going to -- it happened a lot in construction, as
12 you're aware of, where they pick up their tool bag, like I
13 do as an electrician, and go to a jobsite. And that guy,
14 goes to me and says, "Hey, look, I want you to sign this
15 paper saying you're an independent contractor." Even
16 though I'm there just for a job, I'm actually working for a
17 contractor.

18 And we found that happened across the
19 Commonwealth, some jobs as big as 85 employees on that job.
20 And they all said, "Well, we're independent contractors."
21 And that's why we started following this, and that's why
22 the department really stepped up on this because that
23 wasn't true, okay, we knew that wasn't true. And all that
24 was doing -- that killed the UEGF Fund, as Sam pointed out.
25 It clobbered it, bankrupt. We were borrowing money just to

1 pay for claims. So that was the importance of that.

2 What does this do to it? As Eric said, at
3 the end of the day, somehow this will fall upon us, the
4 Commonwealth, to pay these bills, whether it be, "hey, I
5 don't have health insurance, okay, so where am I going to
6 go, to medicaid, welfare? I'm going somewhere." Okay? So
7 somehow, somewhere along the line, it's going to come.

8 Our employers -- do you gentlemen feel that
9 as a contractor -- I'll put my contractor hat on, I'm a
10 contractor. How much money do you think I'd save if I
11 hired 200 employees and made them sign this document to say
12 they're independent contractors? I mean, wouldn't that be
13 its own business? What do you guys think?

14 I mean, I saw it happen. I know you had to
15 see this happen. People were getting hurt like crazy in
16 the early 2000s, because there was unemployment, probably
17 two and a half times what it is today.

18 MR. SHIVERS: Sure.

19 You know, and again, going back to the '08,
20 '09, I mean, one of the issues that, you know, we had
21 debated back then was, you know, being able to guarantee
22 somebody was free from direction and control, not only in
23 the present moment, but also into the future, which you
24 wouldn't be able to price that.

25 I think one of the challenges, you know --

1 and also, I think the legislature actually passed a law --
2 actually, I think they did -- to allow sole proprietors to
3 be able to purchase workers' comp. And so there's a part
4 of responsibility on both the contractor and the person
5 they're contracting with.

6 And just as a clarification, we're not
7 talking about workers or injured workers, because when you
8 say that somebody is an injured worker, by default you're
9 saying that that person is an employee, and we're not
10 talking about that. We're talking about two individuals,
11 two business people, contracting to provide a service for
12 compensation.

13 And so there needs to be a level of
14 education on the part of the businesses that are doing
15 contracting work, that are, you know, contracting with a
16 vendor to provide that service.

17 Look, there are --

18 REPRESENTATIVE NEILSON: Do you think that's
19 something we should fix here?

20 I don't want to cut you off, but I know the
21 chairman likes to keep things moving.

22 Do you think that's something we should fix
23 prior to doing something like this, requiring all them,
24 independents, to require workers' comp?

25 MR. SHIVERS: I don't think you need to go

1 that far. I mean, I think somebody who is contracting with
2 a vendor can certainly ask that sole proprietor, "Do you
3 carry a policy?" And it's up to that individual, you know,
4 company, to say, "I have one" or "I don't, I might lose the
5 business because I don't have that policy." There could be
6 insurance requirements that go along with that contract.
7 That certainly can be worked on between those individual
8 parties.

9 But, again, all of that happening, this is
10 still up to the individual judge to decide whether or not
11 that individual is free from direction and control. You
12 could have -- and that's why, you know, Representative
13 Keller's language is a good first step, but it's not a
14 complete step. There needs to be something there that
15 fully protects that person, that business, that is using
16 that contracted individual.

17 And I'll give you an example of that --

18 REPRESENTATIVE NEILSON: And we also want to
19 protect that individual, as well.

20 MR. SHIVERS: Sure.

21 REPRESENTATIVE NEILSON: I mean, because
22 that's what our duty here is and that's why we're trying to
23 create this. And I appreciate Representative Keller
24 bringing it up because this is one step of many.

25 So maybe -- I'm not going to say it's not

1 ready, but maybe we want to do a more comprehensive piece
2 of legislation that covers all of these questions we have
3 because -- I mean, we can support the spirit, as you said.
4 We support the spirit of the bill, but until we get all of
5 the pieces in place, having one could just jeopardize the
6 other.

7 MR. SHIVERS: The Arizona law actually, I
8 think, handles this quite nicely. And within this
9 declaration, there is a paren F that says that this written
10 agreement shall be null and void and create no presumption
11 of independent contractor status if, one, it was obtained
12 through misrepresentation, false statements, or fraud or
13 intimidation; two, obtained through coercion or duress; or
14 three, if any of the agreements are found that are subject
15 that are null and void, the carrier is entitled to collect
16 a full premium.

17 So I think what you can do is you can get at
18 this in that full declaration and I think if the individual
19 who's signing that actually sees in plain language all
20 that's at stake, that may force that individual, or
21 encourage that individual to think twice.

22 REPRESENTATIVE NEILSON: And that will bring
23 me up to the next question, and my final question,
24 Chairman, if I may?

25 The registration, the department revokes the

1 registration. How are you supposed to know? How does that
2 company know that you're not even registered? I mean, do
3 they have to show a card? Do they have to say, "Hey, look,
4 this is my" -- if they're not playing by the rules and
5 they're not doing it correctly, the staff, the manpower,
6 the money that the department -- all the resources, they're
7 going to send out a letter. They don't know who they're
8 working for. So no employer or anybody who hires them will
9 even know their registration has been revoked. It's not
10 something you'll put in the paper. You're not going to
11 look in the newspaper.

12 How do you think we fix that problem within
13 the legislation?

14 MR. MARSHALL: The bill -- in the example
15 we're talking about, the employer would be filing a
16 registration. In that registration, the employee -- the
17 registration lists all of the individuals who have signed
18 the attestation, maybe one, maybe five, maybe ten.

19 So the department would have on record the
20 address of every individual who signed an attestation
21 saying, "As it goes to my relation with employer X, I am an
22 independent contractor, not an employee." So if the
23 department were to revoke that registration, the department
24 could very easily simultaneously notify every one of the
25 individuals who signed the attestation.

1 REPRESENTATIVE NEILSON: Understood, Sam.
2 But I understand if I'm hiring you tomorrow, I'm having you
3 sign that paper. And then, you know, three months later,
4 I'm sending it to the department and it's too late, I
5 already had you. Your job is done. You dug a hole. You
6 dug -- a lot of this happens with bigger equipment and
7 stuff like that. You bring a backhoe, dig a hole. It's a
8 three-day, four-day job -- or I take this tractor, drive it
9 across country, and I'm back already.

10 So the violation is already there. So how
11 do you -- do you know what I mean? There's no teeth. I
12 had -- the violation is already there.

13 MR. MARSHALL: I guess, I guess the only --
14 maybe what you're talking about is if the individual had
15 purchased his own workers' comp policy --

16 REPRESENTATIVE NEILSON: And that was the
17 requirement that I talked about.

18 MR. MARSHALL: -- (inaudible) be entitled to
19 a refund from the employer.

20 REPRESENTATIVE NEILSON: And that's the part
21 I was thinking -- if we require them all to have it, then
22 that was the --

23 MR. SHOLLEY: Could I address your first
24 question real quick?

25 REPRESENTATIVE NEILSON: Please.

1 MR. SHOLLEY: I think --

2 REPRESENTATIVE NEILSON: And I'm done, Mr.
3 Chairman. So I'm going to turn my microphone off for you.
4 I see you're getting itchy.

5 MAJORITY CHAIRMAN KAUFFMAN: I've given you
6 lots of leeway, yes.

7 REPRESENTATIVE NEILSON: You're right in
8 front of me here.

9 MAJORITY CHAIRMAN KAUFFMAN: I've given you
10 lots of leeway. I'm glad you recognize that.

11 MR. SHOLLEY: I'll make it quick, but I
12 think you bring up some valid points.

13 On the first question about requiring them
14 to carry workers' comp, I think we're actually doing them a
15 disservice. Because what you have to look at is, for
16 these, the jobs they're doing, the workers' compensation
17 rate is very expensive. So what's happening is we're going
18 to force these individuals to purchase workers' comp at a
19 high premium that's only going to cover them while they're
20 on the job. It is much better for those people who don't
21 have to purchase workers' comp to save those dollars and
22 allow them to purchase health insurance, disability, other
23 items that covers them 24/7. So we're really going to make
24 their situation even worse if we force them to purchase
25 workers' comp at the high rate that it is, because then it

1 takes away those dollars that are now available to them to
2 get 24/7 coverage.

3 REPRESENTATIVE NEILSON: And I agree. So
4 maybe in lieu of workers' comp, maybe we require those
5 types of insurance, something like that. Just throwing it
6 out as we discuss this.

7 Thank you, Chairman.

8 MAJORITY CHAIRMAN KAUFFMAN: All right.
9 Thank you.

10 And moving on to Representative Keller.

11 REPRESENTATIVE KELLER: Thank you, Mr.
12 Chairman.

13 I just would like to point out that on page
14 2 of the bill, line 27, "The department shall confirm
15 receipt of the request for revocation with the individual
16 and the person," the person being the person that hired
17 them.

18 Again, the intent of this legislation is to
19 make sure that there's no gray areas. It's to shine some
20 light upon it and make it either black or white, so that
21 everyone understands the nature of the agreement.

22 Are there going to be people that, you know,
23 later on want to claim something different? That's going
24 to happen no matter what we do, but we're just trying to
25 clear that up so it's better for the person performing the

1 work as an independent contractor and the person having the
2 work done.

3 As far as the general contractor, having
4 been a general contractor, you generally require a
5 certificate of insurance for everybody who's coming on your
6 place to work. I've done that, okay? They have to provide
7 it and they have to show how much coverage they have, or
8 they don't come on my jobsite.

9 I mean, we're not going to be able to fix
10 everybody that's a bad actor out there. But the people
11 that are playing by the rules, that are by definition,
12 according to the government, independent contractors and
13 want to agree with the person that's hiring them that
14 they're an independent contractor, we want to clear that up
15 for them. That's the intent of this.

16 The question I have is for Kevin Shivers
17 from the FIB.

18 You mentioned the Arizona bill. We did have
19 a couple of things on here -- and I'm thinking maybe we
20 didn't go far enough. It actually states in ours that it
21 is not an employee of the person or the company. So you
22 think we need to go farther with the presumption language?

23 MR. SHIVERS: I would. And my concern,
24 again, is over the workers' comp judges and their broad
25 interpretation of all of the factors that are used in the

1 existing balance test that I think would just create --
2 it's belts and suspenders that I think would clarify
3 specifically what you're looking at doing.

4 REPRESENTATIVE KELLER: Okay. It's good for
5 the hearing -- thank you, Mr. Chairman -- because then we
6 can have these things included. I appreciate it.

7 MAJORITY CHAIRMAN KAUFFMAN: Thank you.
8 Chairman Galloway.

9 MINORITY CHAIRMAN GALLOWAY: Thank you, Mr.
10 Chairman.

11 Good afternoon, everybody. I apologize for
12 being late. The weather was terrible. Turnpike was rough.

13 First of all, thank you for being here. I
14 appreciate Representative Keller for introducing this,
15 explaining it. I just have one question.

16 The existing law, we have the Construction
17 Workers Misclassification Act, which already has specific
18 criteria for independent -- to determine an independent
19 contractor. Does this supersede that? Does it replace it?
20 How does it mesh with this classification?

21 MR. MARSHALL: Where you file this, yes, it
22 would supersede it.

23 MINORITY CHAIRMAN GALLOWAY: This supercedes
24 it?

25 MR. MARSHALL: No, no, I mean, if you file

1 an attestation that you are not an employee, that -- you
2 know, I mean, at some point, when you file an attestation,
3 an affidavit, your word is your bond.

4 MINORITY CHAIRMAN GALLOWAY: So does the...

5 MR. MARSHALL: You know, what you then -- I
6 mean, if you're going to file that, then you can't come
7 back and say, "Hey, actually I was operating -- I was using
8 his tools; so therefore, even though I signed off on saying
9 'I'm not an employee,' ha, I actually am."

10 So you have to have the affidavit. It means
11 something.

12 MINORITY CHAIRMAN GALLOWAY: So does the
13 criteria in existing law have to be repealed?

14 MR. MARSHALL: No.

15 MINORITY CHAIRMAN GALLOWAY: No?

16 MR. MARSHALL: No, because you know what,
17 because you're going -- you know, first, this isn't going
18 to be every employer and every individual. This is an
19 option. Some will use it, some will not.

20 MINORITY CHAIRMAN GALLOWAY: Does the maker
21 of the bill agree with that, that this does not have to be
22 repealed, that this supersedes existing law in the
23 misclassification act, specifically?

24 MR. MARSHALL: Where you have -- it
25 doesn't -- it supercedes it to the extent that the

1 individual and the employer have filed a registration and
2 an affidavit.

3 MAJORITY CHAIRMAN KAUFFMAN: Representative
4 Keller, you're welcome to address it, if you'd like.

5 REPRESENTATIVE KELLER: Well, again, I think
6 the point was very well made here just a second ago. This
7 is just to make sure that there are no gray areas. If
8 everybody is okay with the way the law is now, that's okay.
9 That can be -- but we're talking about when there's an
10 instance, just that everybody wants to be clear on what's
11 happening, then they can make the agreement to this.

12 And again, it is helpful to the person
13 performing the work as an independent contractor because
14 then they know what coverage they need to have. It clears
15 it up.

16 MR. SHIVERS: Chairman Galloway, I would
17 suggest -- and I'm not a practicing attorney -- that, if
18 anything, this legislation would actually strengthen that
19 misclassification act because it's one further thing that
20 clarifies the relationship between that company and the
21 individual, or the employer and the employee.

22 You know, you set up, you set out in the
23 misclassification act a variety of requirements that were
24 needed, you know, contracts and other things, to establish
25 that the individual was indeed an independent contractor.

1 So I would see this Keller bill actually would supplement
2 that because not only do you have all of those things that
3 you still need to be a contractor, but now you've got this
4 attestation that says that you are indeed an independent
5 contractor.

6 So I don't think it would unwind anything in
7 the misclassification act. I think it would actually
8 support it.

9 MINORITY CHAIRMAN GALLOWAY: Thank you, Mr.
10 Chairman.

11 Thank you for your answer. I appreciate it.

12 MAJORITY CHAIRMAN KAUFFMAN: Representative
13 Dush.

14 REPRESENTATIVE DUSH: Thank you, Mr.
15 Chairman.

16 And actually, pretty much all of my
17 questions have been addressed by Sam.

18 And I believe the Arizona requirements --
19 I'm glad Representative Keller is amenable to that. I
20 think they'd be some good measures to help tighten it up.
21 I'm grateful that we're trying to prevent the workers'
22 compensation judges from driving a truck through what the
23 actual intent of the law is.

24 Thank you.

25 MAJORITY CHAIRMAN KAUFFMAN: Representative

1 Miller.

2 REPRESENTATIVE MILLER: Thank you, Mr.
3 Chairman.

4 Hey, guys, I'm sorry. Were you guys talking
5 about one form, like creating one form that would be used
6 in all -- for these types of arrangements, one form?

7 MR. MARSHALL: And that would be the
8 department's call. I mean, it's done by the Department of
9 Labor and Industry.

10 REPRESENTATIVE MILLER: Okay. So does the
11 bill itself -- I apologize, I missed it, but maybe -- does
12 the bill itself require the Department of Labor and
13 Industry to create a form that would be used in all of
14 these circumstances?

15 MR. MARSHALL: I believe it does. Yeah.

16 REPRESENTATIVE KELLER: (Inaudible.)

17 MR. MARSHALL: Yes, thank you. Page --

18 REPRESENTATIVE KELLER: Go ahead.

19 MR. MARSHALL: Page 2, line 9. The author
20 of the bill can speak to it.

21 REPRESENTATIVE MILLER: I'm sorry. Page 2,
22 go ahead.

23 REPRESENTATIVE KELLER: (Inaudible.)

24 REPRESENTATIVE MILLER: Okay. Thank you.

25 So assuming that -- I was confused when you

1 guys were saying that -- so let's assume, then, that the
2 intent -- I appreciate it -- is to create one form. Were
3 you guys saying that somebody may not -- I thought you were
4 saying that somebody may decide not to use it in this
5 relationship.

6 Is the intent -- not to say the
7 Representative's intent -- is it you guys' understanding
8 that when the form is -- assuming this becomes law -- that
9 the form is created by L&I, that it would have to be the
10 form that would be used in every one of these
11 circumstances?

12 MR. MARSHALL: Yeah. In these -- but
13 remember, I mean, what the bill says on page 1, line 15, "A
14 person may file a registration." So, you know, if somebody
15 doesn't file it, you're going to have -- in that instance,
16 you're still going to have the problem that you have now.
17 But this is an option to provide that service.

18 REPRESENTATIVE MILLER: Is that what you
19 guys think? You think it should be "may"? Is that your
20 recommendation?

21 MR. MARSHALL: Yeah.

22 REPRESENTATIVE MILLER: Yes, it should not
23 be required?

24 MR. MARSHALL: I don't think you can require
25 that somebody file that registration.

1 REPRESENTATIVE MILLER: I mean --

2 MR. MARSHALL: But one would think that, you
3 know, one would think that a forward-thinking employer and
4 forward-thinking individual would say, "Here, we want to
5 clarify this up front." We would hope that that would
6 become the standard of those relations.

7 REPRESENTATIVE MILLER: Okay.

8 And envisioning the form that is prescribed
9 here, it would include like -- I know there's wording in
10 here regarding revocation rights and so forth. So the idea
11 is the form itself would have everything on it regarding
12 the employee's rights, right?

13 MR. MARSHALL: Yeah.

14 REPRESENTATIVE MILLER: Yeah. Okay.

15 Thank you.

16 MAJORITY CHAIRMAN KAUFFMAN: Representative
17 Keller, did you want to address something that was being
18 discussed, to clarify?

19 REPRESENTATIVE KELLER: Yeah. I'd just like
20 to clarify that if you're a general contractor and you have
21 several subs acting as independent contractors for you,
22 normally, if they have a certificate of insurance of their
23 own that you ask for and they provide it, there's no need
24 for this. So I guess that's what we're looking at here.

25 So thanks for allowing me to clarify that.

1 MAJORITY CHAIRMAN KAUFFMAN: Representative
2 Krueger-Braneky.

3 REPRESENTATIVE KRUEGER-BRANEKY: Thank you,
4 Mr. Chairman.

5 One question for this panel, and help me
6 understand the process.

7 So if we have an individual who files for
8 revocation, but they get injured on the job within that
9 10-day period that it takes for the revocation to go into
10 effect, does it mean that they would no longer be able to
11 get workers' comp benefits or what would happen if somebody
12 was injured in that in-between period?

13 MR. SHIVERS: So you're suggesting -- so I
14 have a contract with this general contractor, with this
15 business. As I'm explaining, I see this relationship as
16 way more than the contracted services, so --

17 REPRESENTATIVE KRUEGER-BRANEKY: Right.

18 MR. SHIVERS: -- now, all of a sudden,
19 they're telling me, "You need to be here on the jobsite at
20 8, you're working until 3. You know, you've got to start
21 on this side of the building and not on that side."

22 I mean --

23 REPRESENTATIVE KRUEGER-BRANEKY: Or
24 furthermore, it's someone who signed a piece a paper when
25 they were hired, because they needed a job, and then as

1 they're educated in the process realize that they do not
2 fall under the independent contractor rules.

3 MR. SHIVERS: Sure. And I mean, that's what
4 we suggested --

5 REPRESENTATIVE KRUEGER-BRANEKY: So they
6 file their revocation and then they get injured. What
7 happens?

8 MR. SHIVERS: Yeah. It would seem to me --
9 I mean, what currently happens now, that you have two
10 individuals who have a contract. They believe there was a
11 violation, they can make a claim with the, you know, the
12 Bureau of Workers' Compensation. They can file a complaint
13 and say that I was an employee, that I was misclassified as
14 an employee, and that whole process would take place, or,
15 you know, again, if this went -- when I filed for workers'
16 comp benefits and it goes to a judge, and a judge is taking
17 a look at the fact pattern, they would decide, as well.

18 So I mean, I think what Representative
19 Keller is really trying to get at are those circumstances
20 where you've got two people that really need a service
21 accomplished and this one business is contracting with
22 another business to get that service done. And those are,
23 by and large, the vast majority of the transactions.

24 What we're looking for is a little bit of
25 clarity when somebody does get injured and we can put into

1 that fact pattern that, no, this was a time, this person
2 really legitimately was an independent contractor. And
3 there's an attestation to that.

4 We had recommended, again, the Arizona
5 language, which plainly states out, "You are not an
6 employee," that really addresses all of those factors. But
7 again, to your comments, Representative, that relationship
8 can change at any time.

9 I had a circumstance. We were having work
10 done on our house. We were having siding and windows. And
11 I hired a contractor to come in to put the siding and the
12 windows up. And he started on the back of the house. And
13 I said to the contractor, I said, "Man, couldn't you just
14 start on the front of the house? I mean, I'd like to come
15 home and see the new siding and the windows starting. I'd
16 really get excited."

17 Well, then, all of a sudden, I kind of --
18 because we were right in the midst of the misclassification
19 debate several years back. And all of a sudden, I thought
20 to myself, "Oh, my God. Just that statement is direction
21 and control." Like, God forbid, that contractor had fallen
22 off of my house and injured himself. He could make a claim
23 and say, "You know what, I was that fellow's employee. I
24 was the homeowner's employee because he told me to start on
25 the front of the house and not the back."

1 And now, all of a sudden, you start getting
2 into that really gray area and that creates a lot of
3 problems. And that's ultimately what the legislation is
4 just trying to address. It's not, I think, trying to pull
5 the wool over anybody's eyes. I think the intent of it is
6 to really establish a bright line where there truly is a
7 bright line.

8 MR. MARSHALL: And the other thing, you
9 know, Representative Krueger-Braneky mentioned, you know,
10 the individual may become more educated as time goes on. I
11 think one of the great virtues of the bill -- because we
12 face that problem, you know, the problem you referenced --
13 one of the great virtues of the bill is that it educates
14 both sides up front. You don't want that, "Gee, you know
15 what, I didn't understand it initially, but now, later on,
16 I do."

17 I mean, what the bill tries to do, and I
18 mean -- I think it does a good job. If somebody wants to
19 make the education up front better, you know, I don't think
20 you want to make it like a Google privacy arrangement that
21 nobody can understand. You want to make it fairly clear
22 and concise.

23 But you need the education up front on both
24 sides, because, you know -- and there's been sort of a,
25 seems to be sort of this underlying presumption that right

1 now, if a person gets hurt, he somehow is going to get
2 coverage. That's not the case.

3 Right now there are people who get hurt and
4 they didn't prepare, you know, they didn't have major
5 medical health insurance, they didn't have disability
6 coverage. And you know what, they don't qualify as a an
7 employee. And they're going without.

8 That's why I, you know -- what the bill does
9 is say, you know, right up front, you're not going to have
10 that uncertainty, you're not going to have to roll the dice
11 as to whether you're going to get a claim with your
12 employer or with the UEGF. You're going to be able to
13 prepare right up front, so that you can get disability, so
14 that you can have major medical.

15 You know, in theory, under ObamaCare,
16 everybody has major medical. You know, that's going to be
17 an educated decision. What you have right now is at the
18 initial issuance of the relation, you don't have an
19 educated decision. It's just not there.

20 I mean, you do in the instance that
21 Representative Keller talked about, where, as the general
22 contractor, you're asking your sub, "Show me the
23 insurance." But in the scenario that we're all worried
24 about, of the employer who's not really educating the
25 people who come to work and not really disclosing

1 everything, you don't have it. You will under this.

2 MAJORITY CHAIRMAN KAUFFMAN: Thank you very
3 much.

4 Thank you, gentlemen, for your testimony
5 today. We are going to move on.

6 As some have noted, I've been rather relaxed
7 with the discourse and the timing. And part of that is
8 because our second panel hasn't all materialized. We can
9 always count on Secretary Vovakes to be here. And so we
10 want to recognize Secretary Vovakes.

11 And I understand one of the other members of
12 the panel may be on his way. If he shows up during the
13 course of the meeting, I'll recognize him.

14 But, Mr. Secretary, I'll let you go and I
15 know you've had some family emergency today, so if you need
16 to depart as soon as your testimony is done, we will submit
17 any questions we have in writing.

18 Secretary, thank you for being here.

19 SECRETARY VOVAKES: Thank you, Chairman
20 Kauffman. And thank you to the committee for being here
21 and for bringing this very important topic to light.

22 The department certainly values the
23 committee's efforts, Representative Keller's efforts, to
24 provide some clarification to independent contractor
25 status. But we do have some concerns about this

1 legislation.

2 First concern -- and a lot of this is legal
3 stuff. I'm not a lawyer. I've watched Boston Legal on
4 television, but that's as far as I go. But I do have some
5 information I do want to share with you. We could
6 obviously discuss that with lawyers that are in the room at
7 another time, if that's more appropriate.

8 First concern is that we do see a conflict
9 with current laws, including case law that's developed
10 under the Workers' Compensation Act, as well as the
11 Construction Workplace Misclassification Act, Act 72 of
12 2010. And secondly, the bill would create confusion,
13 unintended albeit, and litigation for all stakeholders in
14 the workers' compensation system, as well as -- we would
15 look at additional claim exposure to the Uninsured
16 Employer's Guarantee Fund, which has been addressed a
17 little earlier. I think everybody knows the state of that
18 fund.

19 Right now, apart from the construction
20 industry, the question of whether somebody is an
21 independent contractor for workers' compensation purposes
22 is based on longstanding case law that has run through
23 Pennsylvania's courts all the way up to the Supreme Court.
24 And the criteria to ascertain that is whether the employer
25 had a right to control the work to be done, the manner in

1 which the work was performed. The criteria are listed in
2 many written testimony and it should be noted that the
3 courts may determine employment relation based on some or
4 all of these factors. They are not compelled to look at
5 all of the factors.

6 In 2010, the general assembly enacted the
7 Construction Workplace Misclassification Act. It defined
8 in pretty clear and concise terms what an independent
9 contractor is. And like established case law, it also
10 created a set of criteria to use to bounce off situations
11 as to whether an individual is an independent contractor.

12 Act 72 is enforced by the department's
13 Bureau of Labor Law Compliance, not the Bureau of Workers'
14 Compensation. And we are concerned that there would be an
15 inconsistency created in applying the standards of this
16 bill against Act 72, contrary to what, I think, Kevin
17 believes would be the case.

18 It was -- you know, Act 72 was passed with
19 the intent of reducing misclassification and providing the
20 department with some enforcement tools. And to compare
21 that to 1781, it's inconsistent with the department's
22 enforcement efforts, as well as broader goals for
23 preventing misclassification. We do think that it would
24 create a situation where Act 72 is superseded and doesn't
25 really need to exist. So we do have some concerns about

1 that, and Representative, or Chairman Galloway mentioned or
2 alluded to that in his questions.

3 If the new test for determining independent
4 contractor status in all occupations now is proposed to be
5 the registration process set forth in the bill, failure to
6 properly follow the procedure could result in an inability
7 to argue that an individual was an independent contractor.
8 If so, this litigation -- or this legislation would
9 significantly increase claims against UEGF, which has no
10 preexisting relationship with the parties and could be
11 conflicted with the registration process.

12 House Bill 1781 seems to oversimplify the
13 process by which workers may be classified as independent
14 contractors based solely on the filing of a registration
15 tied to federal income tax status. And we believe that
16 this may lead to errors by businesses and individuals,
17 which will also, again, further expose UEGF.

18 We anticipate that this will be litigated
19 heavily both in the workers' compensation adjudicative
20 bodies, as well as the Commonwealth and the Supreme Court.
21 I do want to point out some information --

22 You know what, let me finish this summary,
23 then I'll talk to you about some of the thinking that was
24 captured in case law that the court, the workers' comp
25 judges have to consider.

1 In terms of implementation, we've got some
2 obligations as a department to fulfill. We'll need to
3 develop new forms and a process for registration and
4 revocation and confirmation of receipt. There's -- you
5 know, that causes me some operational angst, because we had
6 a mail room of 15 people, that now we're down to 2. And
7 we've been able to give the other folks in that mail room
8 opportunities to increase their level of responsibility in
9 the bureau, so that's a concern of ours.

10 So we'll probably have to do some hiring. I
11 don't know how we can't. And we'll also have to -- you
12 know, for me, the cleanest way to accomplish something like
13 this would be to do it electronically and to enhance the
14 Workers' Compensation Automation and Integration System.
15 That's going to take longer than the 60 days allowed, so
16 we'd be working in a paper system for a while until we
17 could gain the efficiencies of technology.

18 Listen, we're happy to engage in this
19 discussion. We are happy to increase oversight and
20 enforcement of misclassification, if that's the goal of
21 this legislation. We're happy to have broader
22 conversations with the committee and all stakeholders to
23 ensure consistency with existing law and to identify
24 resources and enforcement tools.

25 And, you know, I just want to talk to you

1 before I end on a couple of matters that the workers'
2 compensation judges consider when they're adjudicating
3 these cases and coming up with reasons and decisions. And
4 again, I'm not a lawyer.

5 "The Workers' Compensation Act must be
6 liberally construed in order to effectuate its humanitarian
7 objectives." That was determined in a Commonwealth Court
8 case, Lehigh County Vo-Tech was the plaintiff.

9 "The object of all interpretation in
10 construction of statutes is to ascertain and effectuate the
11 intention of the general assembly, and the ultimate goal of
12 the Workers' Compensation Program is to make an injured
13 employee whole; thus, the act must be liberally construed
14 to effectuate its humanitarian purpose with borderline
15 interpretations resolved in favor of the injured employee.

16 "And finally, in making determinations, the
17 humanitarian purpose of the act must be kept in mind, and
18 evidence is to be liberally construed in a light most
19 favorable to the injured worker, even in close cases."

20 So, Kevin, I think some of the other folks,
21 and maybe the other gentleman on the earlier panel,
22 mentioned some arbitrariness to the system. Well, these
23 are parts, these are part of the, or some of the
24 considerations that our judges have to take when they're
25 making their decisions. And clearly the case law tips it

1 towards the claimant because of the nature of the Workers'
2 Compensation Act.

3 I'm okay to take some questions if...

4 MAJORITY CHAIRMAN KAUFFMAN: All right.

5 Okay, then.

6 Then we will start out with Representative
7 Neilson.

8 REPRESENTATIVE NEILSON: Thank you, Mr.
9 Chairman.

10 Thanks to --

11 MAJORITY CHAIRMAN KAUFFMAN: And we do have
12 others on the list, so I'm not going to be as liberal at
13 this point with my time.

14 REPRESENTATIVE NEILSON: Wow. Never mind,
15 I'll get mine to you in writing -- no.

16 Do we have any idea of the burden that this
17 will put on -- I know we talked about employees and
18 financial woes and how the department has, their budget has
19 been cut significantly last year and the year before. Do
20 we have any idea of the financial burden with your computer
21 systems, your employees, to implement such a program?

22 SECRETARY VOVAKES: I can --

23 REPRESENTATIVE NEILSON: An estimate or
24 something?

25 SECRETARY VOVAKES: I can take a guess. I

1 would think that we would need to add -- I mean, you know,
2 it's a "may," not a "shall," so, you know, I don't know
3 what the universe is.

4 REPRESENTATIVE NEILSON: Yeah.

5 SECRETARY VOVAKES: I mean, I would guess
6 we'd need a couple more people in the mail room, so 60 --
7 I'd say, you know, ballpark, \$140,000 all in, salaries and
8 benefits.

9 To automate it, we'd have to make a
10 decision -- I mean, my instinct is to automate it, but I
11 don't want to overautomate. There's a tipping point in
12 which, you know, it's not worth it to automate. My guess
13 would be it would take maybe eight months and \$400,000 to
14 automate it, maybe five.

15 REPRESENTATIVE NEILSON: The legislation --
16 thank you -- was introduced in September, and I'm sure the
17 department had time to review it. Do you have any numbers
18 on how many cases this legislation, if enacted, would have
19 affected, by chance?

20 SECRETARY VOVAKES: I don't, sorry, no.

21 REPRESENTATIVE NEILSON: All right. Thank
22 you.

23 Nothing further, Chairman.

24 MAJORITY CHAIRMAN KAUFFMAN: Okay. Thank
25 you, Representative.

1 Moving on to Representative Dush.

2 REPRESENTATIVE DUSH: Thank you, Chairman.

3 And thank you, Deputy Secretary. I
4 appreciate you being here.

5 Just a quick question. You had mentioned
6 about this oversimplifying it. Most of our businesses
7 definitely want simplification. Our rules and regulations
8 are already extremely hard to decipher and it also has left
9 the courts with a lot of wiggle room. And you had
10 mentioned the case laws.

11 If we are clarifying the law, the courts are
12 going to -- the workers' compensation judges are going to
13 have to rule based on the legislative intent and the law as
14 we establish it, unless there's a constitutional issue. So
15 we are, we will be altering case law if we do this.

16 And I think to good effect, when people make
17 a decision to go down a certain path as an independent
18 contractor, they're making a decision. And then to come
19 along later and petition the court to say, "All of a sudden
20 now, I'm an employee," and have a court decide that that
21 contractual obligation in which the person who's getting
22 the contracted services and that independent provider, to
23 turn around and say that just because of some sort of a
24 compassion on the part of the judge, whenever that
25 individual has made a conscious decision to do the work

1 just because it's a benefit to him in one context, to be an
2 independent contractors, and then to turn around afterward,
3 and say, "Oh, no. I'm not an independent contractor and
4 the person with the deep pockets is going to have to pay."
5 I have a problem with that. And I believe that this
6 language in this bill is going to address that.

7 I do take some of your concerns and will be
8 considering them. But I just wanted to clarify that those
9 judges are going to have to rule on the change to the law
10 as we make it. And that's the way it's supposed to be.

11 SECRETARY VOVAKES: Yeah, which leads me
12 to -- you know, if we're talking about changing the
13 workers' compensation law, something to contemplate is
14 Sections 103 and 104 of the Workers' Compensation Act. It
15 defines what an employee is, what an employer is. I think
16 those would be -- I just think you would need to look at
17 that, if you're going to look at this.

18 REPRESENTATIVE DUSH: I appreciate that.

19 SECRETARY VOVAKES: Certainly.

20 MAJORITY CHAIRMAN KAUFFMAN: All right.

21 Thank you very much.

22 Moving on to Representative Cephas.

23 REPRESENTATIVE CEPHAS: Thank you, Chairman.

24 So quick question -- throughout the
25 testimony today, there has been reference to an Arizona

1 model. Has your department examined that at all, and what
2 do you feel like, as it relates to what they're doing,
3 works for the state of Pennsylvania, but what also doesn't
4 work?

5 SECRETARY VOVAKES: Well, Representative, I
6 was hoping that Bill Taylor from the PCRB would make it
7 today.

8 REPRESENTATIVE CEPHAS: Okay.

9 SECRETARY VOVAKES: But apparently, he is
10 not. He's probably stuck on the Turnpike, is what I'm
11 guessing from what I understand is going on.

12 I don't know what the Arizona model is. I
13 do know that in Delaware -- and the state of Delaware, I
14 believe what they did was create their law so that
15 everybody is assumed to be an employee of -- and that from
16 an administrative perspective, from what I do every day and
17 think about every day, that's the easiest solution. But
18 I'll also tell you that I'm not the only stakeholder in the
19 room. But that, administratively, would be the easiest,
20 and I think Delaware is happy with that solution.

21 REPRESENTATIVE CEPHAS: What does that do to
22 their compensation system? I can imagine it comes out
23 of --

24 SECRETARY VOVAKES: What's it do to their
25 system? I think it simplifies their system. There aren't

1 any debates as to whether somebody is an employee or not.
2 They are just an employee. So I think that that's fair to
3 say, that it would simplify it.

4 REPRESENTATIVE CEPHAS: Thank you.

5 MAJORITY CHAIRMAN KAUFFMAN: And last I
6 think I have Representative Keller.

7 REPRESENTATIVE KELLER: Thank you, Deputy
8 Secretary, always a pleasure to see you.

9 The question I have -- I know we were
10 talking a little bit about the implementation and the cost.
11 Do we see that we would save anything on the back end as
12 far as making sure people are going into this
13 understanding? So would it help us hearing cases with our
14 judges? Would there be any savings there, that there
15 wouldn't be as much of a burden on the people out in the
16 field trying to determine after the fact whether somebody
17 was an employee or not?

18 SECRETARY VOVAKES: You know, I don't know,
19 because what I think they're going to do is look at each --
20 do what they do now, which is -- you know, that's a
21 different piece of law in here. I think they're going to
22 look at each case on its own merits.

23 And I don't -- I mean, theoretically, you
24 think, you might say that it would, but -- you know, here's
25 a Supreme Court case that counsel pulled up for me. In

1 relationship, it talks about workers' compensation
2 relationship of master, servant, and in general. And it's
3 the claimant's burden to establish an employer-employee
4 relationship in order to receive workers' compensation
5 benefits. And then it talks about a determination
6 regarding the existence of an employer-employee
7 relationship, is a question of law that is determined on
8 the unique facts of each workers' compensation case. So --

9 Did somebody just walk in?

10 MAJORITY CHAIRMAN KAUFFMAN: Bill Taylor
11 just walked in the room to save you.

12 Bill, why don't you come forward a while?
13 We were having a conversation here. And we're glad you're
14 here. No matter what happened on your route to getting
15 here, we're just glad you're here.

16 SECRETARY VOVAKES: We're done talking about
17 you.

18 MR. TAYLOR: Apologies.

19 MAJORITY CHAIRMAN KAUFFMAN: We have, you
20 know, about 10 --

21 MR. TAYLOR: Too early, actually.

22 MAJORITY CHAIRMAN KAUFFMAN: Oh, no. All
23 right. We have about 10 minutes give or take a little, but
24 we would be happy --

25 And I didn't mean to interpret you,

1 Secretary.

2 SECRETARY VOVAKES: You were just happy to
3 see him. I know.

4 MAJORITY CHAIRMAN KAUFFMAN: Yeah. Well,
5 because he actually, to one of the questions, he said,
6 "Well, I was hoping Bill would be here because he would be
7 able to answer this."

8 So just a few minutes, I'll give you, if
9 you'd like to summarize what you have to say. And then
10 we'll open it up to a little more conversation.

11 So go ahead, Bill.

12 MR. TAYLOR: So in the interest of time, I
13 once again apologize, but I thank the committee for the
14 opportunity.

15 And this is a -- I'm not going to go over
16 probably a lot of what's already been talked about as far
17 as an independent contractor, who and what they are. I
18 think we all know that pretty well.

19 But the PCRB deals with this on a daily
20 basis as we try to police the environment as best we can as
21 far as who's really an independent contractor and not,
22 especially as we are evaluating policies upon expiration,
23 experience rating issues, things of that nature, very
24 important when it comes to audits. So bills of this
25 nature, I think, are really actually great, that this is in

1 the forefront of our discussion.

2 I have some testimony that I think will be
3 helpful to you, which provides some insights at least on
4 what we think. By and large, we're neutral on this, from
5 the standpoint of it's really important to the business
6 community and the insurance community to get it right. We
7 just then oversee it once it's in place to deal with any
8 disputes.

9 What's good about registration is it would
10 help to be on the same page as far as those businesses that
11 agree and are transparent about who and what they are as an
12 independent contractor.

13 One thing I would point out, though, is,
14 it's not a be-all and end-all. We don't really view it
15 that way because there's many that aren't transparent and
16 there's many that -- that's really not what this bill is
17 addressing. So they still get lost in the shuffle, so to
18 speak.

19 And so I have some concerns personally
20 because this has been, really, the bane of the industry for
21 the longest time. So some of my thoughts are, there's a
22 bigger picture and a bigger picture is emerging countrywide
23 right now as it relates to the gig economy. And the fact
24 that there's other states -- I think there's up to seven
25 now -- that have enacted recent legislation to pretty much

1 uncuff independent contractors. I think it's actually in
2 the wrong direction, some of what's being done there.
3 There's estimates now, official estimates, that, with the
4 gig economy -- and I think everyone knows what that is, I'm
5 not going to try to define it for you -- but basically,
6 there's estimates that the independent contractor
7 marketplace will be in upwards of 40 percent of our
8 business community by 2020. And that's going to further
9 erode insurance premiums, as well as erode the exclusive
10 remedy provision. Less will have that safety net as far as
11 injury protection and the like.

12 So in our minds, this bill does a lot of
13 great things, but on the other hand, it maybe doesn't go
14 far enough. And by and large, I think that's the message
15 in the testimony we have before you. We have some articles
16 within the testimony, as well as some other research papers
17 that may be helpful to the committee.

18 MAJORITY CHAIRMAN KAUFFMAN: Thank you very
19 much, Mr. Taylor. I appreciate it.

20 And I'm going to start out because there was
21 a conversation going on between Representative Cephas and
22 Secretary Vovakes. And so I'm going to let Representative
23 Cephas address the question that was lying out there.

24 REPRESENTATIVE CEPHAS: Thank you.

25 But you spoke exactly to what I was

1 thinking, is that as our economy continues to go towards
2 independent contracting, it's, you know, what systems, what
3 policies are put in place to, you know, keep everybody
4 protected.

5 So just to that point, and earlier
6 conversations, a lot of the speakers spoke of an Arizona
7 model that this legislation is modeled after. So I just
8 wanted to get your perspective on the Arizona model, but
9 then the gentleman also brought up the Delaware model, that
10 could be something interesting that we do.

11 So based on your experience and your
12 expertise, which direction, given the state of
13 Pennsylvania's economy, should we be going into?

14 MR. TAYLOR: I'm not real familiar with
15 Arizona's model, but I will say that I believe there's in
16 the range of nine states that have had certification or
17 registration-type processes. And some go back many years,
18 but even in all cases, typically, there's disputes that
19 arise that ultimately are challenged. Low and behold,
20 often it's upheld in the interest of that injured worker,
21 so they're not usually all that ironclad. So right there,
22 there's an issue. And then, usually, as I mentioned
23 already, they're not a broad -- it's usually not a broad
24 enough safety net.

25 Delaware is a little unique and different in

1 that they're what you would call all in -- in a sense that
2 everyone in the marketplace must have coverage, whether
3 it's even an agreed upon independent contractor or not.
4 The independent contractor would have to demonstrate
5 coverage and secured coverage. So unlike, say, the model
6 we have here where they could choose not to secure
7 coverage, in Delaware, they must secure coverage, even if
8 it's understood that they would be viewed as an independent
9 contractor. So if there is a legitimate employment
10 situation, they must -- there's proof that they're covered
11 under that employment situation, and if not, they're
12 covered under an independent contractor, single
13 proprietor-type of workers' comp policy.

14 So the bottom line is no one goes bare.
15 There's coverage across the board. So that's where there's
16 quite a difference here in what we're speaking about with
17 this bill.

18 REPRESENTATIVE CEPHAS: So with the nine
19 states that you're referencing, who do you think, given
20 again Pennsylvania's economy, should we be modeled after?

21 MR. TAYLOR: I would probably need to go
22 back and assess that. One of my statements that I had in
23 my notes was, no jurisdiction has really ever addressed
24 this with enough broad satisfaction. There's always -- I
25 think my statement says, "No jurisdiction has applied a

1 construct or solution embraced without controversy or
2 exception as having fully and fairly resolved the disputes
3 and ambiguities which abound in this area."

4 So this has been tried. Solutions have been
5 tried virtually in every state, and even by the federal
6 government. And it's always been a challenge. And it
7 still remains that way.

8 I would almost say that Delaware is the most
9 successful, in my mind --

10 REPRESENTATIVE CEPHAS: Okay.

11 MR. TAYLOR: -- from what we've experienced,
12 what I've seen.

13 And my prior experience, before where I sit
14 now in Pennsylvania, was with the New York Rating Bureau.
15 And they -- we had similar, very challenging issues,
16 especially with New York City, in particular. The district
17 attorney's office in Manhattan enacted somewhat of a
18 registration process like this for the construction trades,
19 and that was fraught with all kinds of controversy and
20 challenges. So there's usually not a silver bullet, unless
21 it's a broader type of legislation.

22 REPRESENTATIVE CEPHAS: Last question, would
23 you be able to name the nine states that you're
24 referencing?

25 MR. TAYLOR: I can --

1 REPRESENTATIVE CEPHAS: (Inaudible.)

2 MR. TAYLOR: I don't have that in my
3 testimony, but I can provide that with you and I do have it
4 in my materials, actually, here.

5 REPRESENTATIVE CEPHAS: Okay.

6 Thank you, Chairman.

7 MAJORITY CHAIRMAN KAUFFMAN: Thank you very
8 much.

9 I appreciate everybody's attention and those
10 who have made it a point to come and attend the hearing
11 today. And we look forward to the continued discourse as
12 Representative Keller's concept and other concepts are
13 flushed out and we attempt to, you know, see if we can
14 improve the system here in Pennsylvania.

15 Thank you all very much.

16 (The hearing concluded at 12:52 p.m.)

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C E R T I F I C A T I O N

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.



Summer A. Miller, Court Reporter
Notary Public

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NOTARIAL SEAL
Summer A. Miller, Notary Public
Springettsbury Twp, York County
My commission expires November 13, 2018