



NEBRASKA

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DEPARTMENT OF LABOR

EMPLOYEE  
**Classification Act**  
ANNUAL REPORT 2016

**em · ploy · ee** – *noun*  
/ em' ploiē, em, ploi' ē/

A person employed for wages or salary, especially at non-executive level.

**con · trac · tor** – *noun*  
/ 'kən trakər, kən' traktər/

A person or company that undertakes a contract to provide materials or labor to perform a service or do a job.



# Table of Contents

Background & Purpose	<b>3</b>
Accomplishments	<b>5</b>
Audit Activity	<b>10</b>
Collaboration with State & Federal Agencies	<b>11</b>
Addendum 1: Nebraska Workers' Compensation Court	<b>12</b>
Addendum 2: Nebraska Department of Revenue	<b>14</b>

# Background Purpose &

## Terms, defined.

### 48-2902.

For purposes of the **Employee Classification Act**:

1. Commissioner means the Commissioner of Labor;
2. Construction has the same meaning as in section 48-2103;
3. Contractor means an individual, partnership, limited liability company, corporation, or other business entity engaged in a delivery service or a construction contractor business, as contractor is defined in section 48-2103, and includes any subcontractor performing services for a contractor

### 48-2103.

For purposes of the **Contractor Registration Act**:

1. Commissioner means the Commissioner of Labor;
2. Construction means work on real property and annexations, including new work, additions, alterations, reconstruction, installations, and repairs performed at one or more different sites which may be dispersed geographically;
3. Contractor means an individual, firm, partnership, limited liability company, corporation, or other association of persons engaged in the business of the construction, alteration, repairing, dismantling, or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks and towers, airports, dams, levees and canals, water wells, pipelines, transmission and power lines, and every other type of structure, project, development, or improvement within the definition of real property and personal property, including such construction, repairing, or alteration of such property to be held either for sale or rental. Contractor also includes any subcontractor engaged in the business of such activities and any person who is providing or arranging for labor for such activities, either as an employee or as an independent contractor, for any contractor or person

The Nebraska Department of Labor (NDOL) educates employers and workers about the differences between “employees” and “independent contractors” and proper classification of workers. NDOL makes referrals and collaborates with the Nebraska Department of Revenue (NDOR) and Workers Compensation Court (WCC) to ensure the collection of required taxes, interest and penalties, and affords employees the protections of law under the Employee Classification Act (ECA). Other enforcement actions may be taken to protect Nebraska workers and help businesses properly classify workers.

## Misclassification investigations are conducted within two program areas in NDOL:

1. The Employee Classification Unit within the Contractor Registration (CR) program conducts investigations on reported violations derived from the hotline, website, random work site visits, and tips received as a result of investigative inquiries.
2. The UI Tax program field representatives conduct employer wage verification audits. Data from the 1099 extract files for targeted industries identifies potential employers for misclassification audit purposes.

NDOL works to improve proper classification of workers through continual review of its programs. The federal government's emphasis on employee misclassification prevention is underscored by audit measures outlined in the Unemployment Insurance Program Letter (UIPL) 30-10 from the United States Department of Labor (USDOL), requiring state unemployment insurance agencies to align federal and state practices by conducting audit and investigative programs to detect employers that misclassify or fail to properly report compensation to workers with the effect of excluding employees from protections of law. NDOL efforts enforce and deter labor violations that result in the misclassification of employees as "independent contractors." Investigations are particularly directed at industries that have higher rates of violations, such as construction, transportation, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.

To determine proper classification of workers as an employee or independent contractor, the Internal Revenue Service (IRS) and state tax agencies apply common law criteria and controlling state statutes to examine the degree of control a company has over that worker. Proper classification entitles "employees" to the protections of wage and hour laws, employment discrimination laws, and unemployment and workers' compensation insurance. The focus on proper classification is also recognized as a revenue-generating measure for federal and state governments. Employers who abide by the law, report quarterly wages, and pay unemployment insurance and other taxes owed are put at a competitive tax disadvantage by employers who misclassify workers as "independent contractors."

## Misclassification Investigative Programs

The purpose of misclassification investigative programs is to determine if workers are being appropriately classified as "employees" or "independent contractors," and if there are related tax obligations. Proper classification also affords employees the protections of law. NDOL investigates misclassification in two program areas: **Contractor Registration/Employee Classification** and **Unemployment Insurance Tax**.

1. The Employee Classification Unit in the CR program investigates possible ECA violations. A misclassification investigation is initiated when workers, businesses, or government agencies provide tips, referrals, or leads. The Employee Classification Unit creates and assigns a file for every valid tip, referral, and lead received. Assigned files are prioritized and their completion depends upon the complexity of the issues, the level of evidence gathered, and the cooperation of the workers and employer. The investigative determination is based on all available evidence. The employer ultimately receives a determination letter in the mail advising them if workers have been misclassified and if any unemployment insurance taxes, related penalties and interest are owed. The UI Tax division also investigates UI benefit claims that lack wage credits as a means of identifying misclassified workers.
2. Nineteen UI Tax field representatives conduct employer audits utilizing a web-based audit process that loads 1099 extract information into an audit application. The 1099 data identifies employers who issued between one and 50 1099s. Data can be refined to identify specific trades within North American Industry Classification System (NAICS) codes. Particular emphasis is placed on industries that have high employee misclassification violation rates, such as transportation and construction trades.

NDOL receives tips, referrals, and leads through the online application on the website, the hotline, and as a result of general telephone or walk-in inquiries regarding the law. The agency also conducts employer and worker interviews during random work site visits.

The success of proper employee classification is grounded in the careful, detailed investigation and audit process of the Contractor Registration/Classification Unit and UI Tax field representative staff. The investigators are thorough in their observations at the work site, including their interviews with workers and management. Field representatives are diligent in their review of often voluminous and complex financial records. The goal is to gather evidence from all interested parties to ensure a complete picture of the business operation and relationships between the employer and workers.

# Accomplishments

## Outreach and Education

Through the ECA, CR and UI Tax programs, NDOL staff conduct field audits, random work site visits and interviews, and provide educational information on ECA and the penalty for violation to employers and workers. Informational materials have been developed and distributed statewide.

## Website

The ECA requires NDOL to maintain a website providing general information regarding ECA, narrative of the law, links to required postings (English and Spanish versions), and the ECA Report Form, allowing for the confidential reporting of suspected violations of employee classification. The site allows employers and workers to contact Contractor Registration and Classification Unit program staff.

The website is located at <http://dol.nebraska.gov/LaborStandards/EmployeeClassificationAct>

## Hotline

A 1-800 Hotline was established to allow for reporting suspected violations of the ECA. The website features links to sources of information regarding worker misclassification, including contractor registration, the WCC, NDOR, and the IRS (SS-8 Determination of Status Form).

## Brochures and Notices

More than 4,000 Contractor Registration/Employee Classification Act brochures were distributed statewide. The brochures include:

- Basic information on contractor registration
- Instructions for reporting suspected violations of the ECA
- UI and IRS contact information

The Employee Classification Act Notice is required to be posted at all job sites. More than 12,500 notices, in English and Spanish, have been distributed to date. All brochures and notices are available online and have been provided to employers and workers at six presentations and 242 on-site inspections and 236 business visits this past year.

## The Employee Classification Act Report Form

The ECA Report Form allows individuals to report suspected misclassification violations. The individual or entity completing the form may remain anonymous. The form requires the reporting individual to provide contact information, a description of the suspected violation, the name of the business and job site location. The form is located at <http://dol.nebraska.gov/LaborStandards>.



## Employee Classification/Contractor Registration Unit

Each Contractor Registration/Employee Classification investigator is required to perform a minimum of 100 on-site inspections annually. Contractor registration investigators conducted 242 on-site construction inspections and 501 business visits in FY 2015-2016. They also conducted interviews with 735 walk-in customers regarding the law. Each work site was checked and employers and workers were interviewed for possible misclassification violations. Many times employers found to be misclassifying workers provide the names of other employers who are engaged in the same illegal practice. Tips also come from businesses that are underbid by competitors whom they suspect of being engaged in misclassification.

For the reporting period of July 1, 2015 through June 30, 2016, the Employee Classification/Contractor Registration Units yielded 20 misclassification inquiries through the online ECA application process and another 54 from the Minimum Wage Complaint Form. Nebraska's CRA requires that eligible contractors provide proof of workers' compensation insurance and provide a valid unemployment insurance tax ID number if reporting employees when they register or renew.

Staff received more than 1,000 telephone inquiries regarding the law. Investigators within the Contractor Registration/Employee Classification Unit created 60 leads from random work site visits resulting in an additional 33 inquiries. There are currently 58 open investigations. Eight cases pending payment of citations involved 324 total individuals and \$105,250 in penalties, of which, \$33,141 has already been collected.

Approximately 52 reports of possible misclassification were received in 2016 that did not fall under the legal requirements of the ECA. These individuals were forwarded to the Internal Revenue Service, Department of Revenue and the U.S. Department of Labor for assistance.

During the reporting period, 38 cases were closed. Two cases were set for hearings. Six contractors, involving 35 violations and \$16,101 in penalties, have settled and paid their citations with no hearing. Thirty-two additional cases were resolved without hearings or penalties. Five cases involving 99 violations have \$48,500 in citations pending collections. Thirty-two cases were closed with no determination due to inability to locate the employer, lack of employer cooperation, or lack of evidence.

During the reporting period, 45 (\$500) and one (\$5,000) Contractor Registration citations were issued. Twenty were paid in full, five were withdrawn, and 22 from 2015-2016 and 220 citations from previous years are pending further collection action.

A \$40 fee must be submitted with the contractor registration application, unless the contractor meets fee exemption requirements. There are 17,962 registered contractors in our database, 3,000 of which are claiming to be fee exempt with "zero" employees.

All misclassification reports were forwarded to the NDOL UI Tax Division and the NDOR, and all closed files to the WCC.

Year/	Number of Contractors	Employees Reported to CRA	Employees Reported to U.I.	U.I. Tax Paid
2011	44	270	125	\$149,910.32
2012	94	954	273	\$123,400.00
2013	195	2,091	541	\$142,953.86
2014	91	1,966	894	\$57,827.43
2015	372	26,072	760	\$98,287.35
<b>2016</b>	<b>542</b>	<b>12,329</b>	<b>2,663</b>	<b>\$311,441.86</b>
<b>Total:</b>	<b>1,338</b>	<b>43,682</b>	<b>5,256</b>	<b>\$883,820.82</b>

The Contractor Registration/Employee Classification Unit received 16 referrals from the NDOL UI Tax field representatives and six referrals from the Department of Revenue.

Each registration or renewal is checked for compliance with unemployment insurance tax law. Staff work with new employers to educate them about correct wage reporting, payment of unemployment insurance taxes, and proper employee classification. This activity puts the employer on the right path from the start and discourages improper classification of employees.

Since January 1, 2010 ECA/CRA staff worked with contractors to bring them into compliance with the Nebraska Employee Classification and Contractor Registration Acts, unemployment insurance and workers' compensation. These contractors were found to have employees through their contractor registrations, while not reporting any employees to unemployment insurance. These contractors are now reporting more than 1,000 employees and paying unemployment taxes not being paid previously. These contractors all now have valid workers' compensation coverage on their workers, which was not provided before. In addition, \$1,107 in interest and \$1,441.44 in penalties was assessed and collected from these contractors.

A total of six presentations have been given during FY 2015-2016, with up to 50 participants at each event. Participants included construction contractors, Hispanic Community Centers and Heartland Community Center, construction management students, accountants, payroll processors, human resource professionals, attorneys, agency staff, and employers and workers in various industries and organizations.

Outreach is a shared venture with the NDOR. Presentations provided upon request focus on compliance with Nebraska's labor laws and emphasize the fact that it is a violation of the ECA to designate an individual as an independent contractor who would be properly classified as an employee. Fines and penalties for violations are reviewed. Each presentation encourages questions and includes how to confidentially report suspected misclassification.

In August of 2016 an agreement was finalized between The United States Department of Labor's Wage and Hour Division (WHD) and the Nebraska Department of Labor, which recognizes the value of establishing a collaborative relationship to promote compliance with laws of common concern between WHD and Nebraska. The partnership will allow for more effective and efficient communication and cooperation on areas of common interest, including shared training materials, providing employers and employees with compliance assistance information, conducting coordinated investigations, and sharing information as appropriate.



## Unemployment Tax Field Representative Audit Program:

The field tax representatives in NDOL's UI Tax division provide education and services to more than 59,600 employers who report wages quarterly and pay related unemployment insurance taxes. Field representatives also work with new employers to ensure they get unemployment insurance accounts set up correctly when they start a business and understand their quarterly reporting and unemployment insurance tax payment obligations.

The correct classification of workers is discussed with employers when the new unemployment accounts are set up. Similarly, if an employer attempts to inactivate their unemployment account, field representatives ask the necessary questions to determine if the employer downsized their business or is attempting to misclassify workers as independent contractors.

In addition, field representatives also assist contractors who are registering for a contractor registration certificate, taking the time during the application process to educate employers on the differences between an independent contractor and an employee.

From July 1, 2015 – June 30, 2016, UI Tax field representatives completed 805 audits and missing wage investigations. Of those, field audits targeted high violation industries identified in the 1099 data extract file, resulting in 1,397 misclassified workers and additional tax collections of \$82,899.83.

Regarding obstructed claim investigations (UI benefit claims that have no wage credits), UI Tax field representatives identified 159 misclassified workers, resulting in \$21,370 in tax collections.

The UI Tax collections unit works with employers to collect the unpaid taxes and sets up payment plans as appropriate.

The UI Tax field representatives conduct two kinds of audits that may lead to discovery of misclassification: **1099 extract audits** and **obstructed claim investigations**.

**The 1099 extract audits** target employers who are registered in the unemployment insurance system but also issue 1099s.

**Obstructed claim investigations** occur when a worker files for unemployment benefits and it is discovered the worker's alleged employer did not report wages and pay corresponding unemployment taxes related to the worker, and other workers in the same classification, because the worker was an alleged "independent contractor."

# Audit Activity

<b>Fiscal Year</b>	<b>Audits Completed</b>	<b>Workers Misclassified</b>	<b>Additional Tax Collected</b>
2011	968	1,227	\$81,475.70
2012	764	1,292	\$78,030.03
2013	1,116	1,711	\$119,659.21
2014	833	1,224	\$106,878.06
2015	1,131	1,390	\$110,343.09
<b>2016</b>	<b>805</b>	<b>1,397</b>	<b>\$82,899.80</b>
<b>Total:</b>	<b>5,617</b>	<b>8241</b>	<b>\$579,285.89</b>

# Collaboration with **State & Federal** AGENCIES

The Contractor Registration/Employee Classification Unit staff works cooperatively with other agencies/divisions, including the NDOL UI Tax Division, NDOR and WCC, Homeland Security, and Occupational Safety and Health (OSHA). Staff has also on occasion collaborated with the Iowa Department of Labor's Misclassification Unit, and United States Department of Labor.

## **Nebraska Department of Labor Contractor Registration**

Contractor Registration/Employee Classification Unit staff and UI Tax field representatives play a critical role in processing contractor registration applications by reviewing the submitted applications to determine if the contractor is obligated to report quarterly wages and pay unemployment taxes. The purpose is to inform all contractors of wage reporting and unemployment tax obligations up front.

## **Nebraska Workers' Compensation Court**

NDOL Contractor Registration/Employee Classification Unit and UI field representatives provide the WCC with information about employers who have been found to have engaged in misclassification. The WCC reviews the information and takes appropriate steps to determine if the employer is providing workers' compensation coverage as required under Nebraska law. The WCC report is attached as Addendum I.

## **Nebraska Department of Revenue**

After NDOL has completed misclassification investigations, audits, and findings, cases are referred to the NDOR and WCC for investigation and collection of any income tax not withheld plus interest and penalties. Referrals of violations reasonably believed to be civil or criminal of the Employment Security Law, The Nebraska Revenue Act of 1967, and the Nebraska Workers' Compensation Act, or another law, are made to the appropriate prosecuting authority for appropriate action. Similarly, those entities share information with NDOL. NDOL has an agreement with the IRS that allows for the transfer of 1099 data related to misclassification. The NDOR report is attached as Addendum II.

## **Internal Revenue Service**

The UI Tax division has a Questionable Employment Tax Practices (QETP) agreement in place with the IRS that allows for data sharing of misclassification cases. The agreement allows NDOL to receive copies of IRS audit findings of Nebraska businesses that reflect potential misclassification of workers for state unemployment tax purposes. Each quarter, NDOL submits QETP data back to the IRS reporting on all audits that were generated by the 1099 extract program, the results of the audits, and the number of misclassified workers that were reclassified as employees.

# Addendum I:

# Nebraska Workers'

## COMPENSATION COURT

### Introduction

LB 563 from the 2010 session of the Nebraska Legislature provides that the Commissioner of Labor shall share any violations of the Employee Classification Act with the Nebraska Workers' Compensation Court. The compensation court shall then refer any such violation reasonably believed to be a violation of the Nebraska Workers' Compensation Act to the appropriate prosecuting authority for appropriate action. (See LB 563, Sec. 8, which is codified at Neb. Rev. Stat. §48-2908.)

The Department of Labor shall also provide an annual report to the Legislature regarding compliance with and enforcement of the Act, to include the number of referrals to the compensation court, and the appropriate prosecuting authority, and the outcome of such referrals. (See LB 563, Sec. 9, which is codified at Neb. Rev. Stat. §48-2909.)

In order to explain the outcome of referrals from the commissioner to the compensation court it is first necessary to understand the role of the court with regard to misrepresentation issues.

### Background

Under section 48-145 of the Nebraska Workers' Compensation Act most employers are required to provide workers' compensation insurance coverage for their employees. Independent contractors are not entitled to benefits under the Act, and in a disputed case a judge of the court will decide the status of a worker as an employee or independent contractor. This decision is based on factors established by Nebraska appellate case law, as there are no statutory criteria under the Workers' Compensation Act governing what constitutes an employee versus an independent contractor.

If a worker is ultimately determined to be an employee rather than an independent contractor, the employer or its workers' compensation insurer is obligated to provide benefits under the Workers' Compensation Act. This is true regardless of whether the worker was initially classified as an independent contractor, and regardless of whether an insurance premium was collected for coverage of the worker. (It is our understanding that the insurer will typically go back and collect the additional premium retroactively.)

Therefore, the primary concern of the Workers' Compensation Court is whether insurance coverage is in place for the employer. Misclassification itself is not a violation of the Workers' Compensation Act. Section 48-145.01 provides for injunctions, fines, and criminal penalties for failure to provide coverage, and the Attorney General is charged with representing the state in any action pursuant to that section.

Section 48-145.02 also allows the court to administratively require information from an employer regarding its employees and the nature of their work, the identity of its workers' compensation insurer, and information on its workers' compensation insurance policy.

Given this authority, the court has assigned administrative staff to investigate inquiries and complaints regarding lack of coverage. Such reports come from a variety of sources, including workers, attorneys, competitors, and state agencies. The staff also monitors all new corporation filings with the Secretary of State to insure that necessary coverage is in place, and reviews reports of cancellation or non-renewal of existing policies to verify that coverage is no longer required. Because the concern is with coverage, the cases investigated by the court staff may or may not involve a misclassification issue, and may or may not involve a contractor or delivery service.

Investigation by the staff ends if coverage is found to be in place, even though there may still be workers who are classified as independent contractors who could ultimately be determined to be employees. If no coverage is in place, a decision is made regarding whether the case should be referred to the Attorney General. If a case is referred to the Attorney General, that office will make its own determination as to whether to seek an injunction, monetary fines, or criminal penalties under section 48-145.01.

## **Outcome of NDOL Referrals**

The court received 11 referrals from the Department of Labor in 2016. Of those 11 cases:

- 3 had current workers' compensation coverage,
- 1 is no longer doing business in Nebraska,
- 5 businesses appear to have ceased operations,
- 1 was brought into compliance, and
- 1 was not able to be contacted.

For calendar year 2016, the court has, on its own, conducted an investigation of 5 employers involving independent contractor issues. Of those 5 cases, all appeared to be an appropriate use of independent contractors.

The court provided education regarding independent contractor issues with each employer that was contacted.

# Addendum II:

# Nebraska Department

## OF REVENUE REPORT

### Summary

For the reporting period of July 1, 2015 – June 30, 2016, the Nebraska Department of Revenue (NDOR) received 556 misclassification referrals from NDOL. The referrals included both businesses and misclassified employees. The average business referral included 3.2 misclassified employees, which resulted in a minimal income tax withholding liability of less than \$150 per employee. In addition, the average employee referral resulted in a minimal income tax liability of less than \$50, which, in most cases, had either been reported by the misclassified employee before the investigation by NDOL, or reported immediately thereafter. As of July 1, 2016, no examinations were conducted by NDOR as none were warranted.

The referrals suggest a limited compliance issue for purposes of state income tax, and the staff allocated to the project would be better utilized in other compliance programs with demonstrated higher rates of non-compliance and potential for more tax collection.

### Nebraska Income Tax Withholding Requirements

Neb. Rev. Stat. § 77-2753 requires every employer making payment of any taxable wages under the Nebraska Revenue Act of 1967, and subject to income tax withholding under the Internal Revenue Code, to withhold from these wages the amount of individual income tax reasonably estimated to be due for the year as the result of the employee's wages. Similarly, every individual or business making payments exceeding \$600 to a nonresident individual for personal services or making total payments exceeding \$5,000 must also withhold income tax from these payments.

### Income Tax Withholding Reporting Requirements

Neb. Rev. Stat. § 77-2756 requires every employer or payer to remit all income tax withholding collected during the prior reporting period (month, quarter, or year) on the last day of the following month. An employer or payer must also file a copy of each Federal Form W-2 or 1099 furnished by the employer or payer to each employee or payee with respect to income taxes withheld on wages or payments subject to income tax withholding by February 1st of the following year.

### Income Tax Withholding Penalties

The Nebraska Revenue Act imposes a variety of penalties on employers and payers for failing to withhold income tax on wages paid to employees or payees. The amount of the penalty (5% to 100%) is based upon a percentage of the income tax withholding due and the reason for failing to withhold and remit on an employee's or payee's wages, (for example, negligence or fraud). In addition, the Revenue Act authorizes the imposition of an additional penalty (not exceeding \$1,000) for cases involving fraud. See Neb. Rev. Stat. § 77-2790.

## **Investigative Process**

Upon receiving a referral from NDOL, the Compliance Division in NDOR performs a preliminary review of each referral to identify the business or employees included in each referral. If the referral provides insufficient information for purposes of identifying the employer or employee, the investigation does not go forward.

If NDOR can identify an employer or employee, the wages paid and potential income tax liability are evaluated before pursuing an enforcement action against the employer or employee due to resources and staff allocation required for a secondary review of the referral. For example, if 70% of NDOL referrals included less than three misclassified employees, NDOR typically would not conduct an investigation absent other compelling factors. The potential income tax liability would not warrant the time and resources dedicated to the enforcement action. A single review of a business includes at least two staff members – a Fiscal Compliance Analyst (or Examiner) and a Supervisor – and approximately five hours' worth of work in total. If an assessment is issued, an attorney is also assigned to the case.

## **Conclusion**

The results of the investigations of NDOL referrals to date do not warrant an independent enforcement effort beyond the current enforcement activities of NDOR because of the minimal amounts of unreported wages included in the referrals and the small number of employees misclassified under the Employee Classification Act per referral.





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