

Employee Classification Act

Annual Report | July 2018 – June 2019

NEBRASKA

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DEPARTMENT OF LABOR

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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

Background and Purpose

NDOL efforts enforce labor standards and deter labor violations that result in the misclassification of employees as independent contractors. 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.

A misclassification investigation is initiated when workers, businesses, or government agencies provide tips, referrals, or 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. Educational information on the Employee Classification Act (ECA) and the penalty for violation to employers and workers is provided during work-site visits and field audits. Investigations are particularly directed at industries that have higher rates of violations, such as construction, transportation, childcare, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.

Additionally, 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 ECA. Other enforcement actions may be taken to protect Nebraska workers and help businesses properly classify workers.

NDOL works to improve proper classification of workers through continual review of its programs. 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.

Misclassification Investigative Programs

NDOL investigates misclassification in two program areas: Contractor Registration/Employee Classification and Unemployment Insurance Tax.

1. The Employee Classification Unit in the Contractor Registration program investigates possible ECA violations, creating and assigning a file for every valid tip, referral, and lead received. Assigned files are prioritized and their resolution 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.

- Nineteen UI Tax program field representatives conduct employer wage verification 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 from the 1099 extract files for targeted industries identifies potential employers for misclassification audit purposes. Data can also be refined to identify specific trades within North American Industry Classification System (NAICS) codes.

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.

Summary of Activities

Website/Hotline

NDOL maintains a website, provides 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 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).

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

A 1-800 Hotline was established to allow for reporting suspected violations of the ECA. Suspected violations may be reported by calling **1-800-627-3611**.

Employee Classification/Contractor Registration Unit

On-Site Construction Inspections	Interviews With Walk-In Customers
663	722

Contractor registration investigators conducted 663 on-site construction inspections in FY 2018-2019. They also conducted interviews with 722 walk-in customers regarding the law.

Cases and Investigations

For the reporting period of July 1, 2018 through June 30, 2019, the Employee Classification/Contractor Registration Units yielded 31 misclassification investigations through the following:

Construction Site Visits	14
Website	11
Wage Claims	5
Hotline	1

Closed Without Hearings or Penalties	Open Cases	Cases with Investigative Findings of Misclassification
13	5	13

During the reporting period, 13 cases were closed without hearings or penalties. At the conclusion of fiscal year 18-19, 5 cases remain open, while 13 were closed with investigative findings of misclassification.

Total Cases with Investigative Findings of Misclassification	Total Misclassified Workers
13	45
Cases Settled	Misclassified Workers from Settled Cases
11	38
Fines Collected	
\$16,800	N/A

Of the 13 cases that were closed with investigative findings of misclassification, 2 cases remain unpaid after notice and hearing bringing our total to 12 cases with unpaid citations. As of this report, businesses with unpaid citations involve 416 individuals and \$134,955 in citations, including cases from prior reporting periods.

Additionally, during the course of one investigation it was discovered the contractor being investigated provided our office with fraudulent proof of worker’s compensation coverage certificates for their alleged subcontractors. The case was forwarded to the Nebraska Department of Insurance for investigation and the status is pending.

	Cases	Cases with Investigative Findings of Misclassification	Open Cases	Closed without Hearing or Penalty
Initiated by Onsite Visit	14	8	1	5
Initiated by Website	11	4	0	7
Initiated by Wage Claim	5	0	4	1
Initiated by Hotline	1	1	0	0

Unemployment Tax Field Representative Audit Program

The field representatives in NDOL's UI Tax division provide education and services to more than 61,123 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.

From July 1, 2018 – June 30, 2019, UI Tax field representatives completed 959 audits, resulting in 2,339 workers who were originally classified as contractors being added to the employer's tax/wage files with an additional \$145,717.22 in tax collections. Generally, audits are derived from the 1099 data extract file, which includes industries identified as potential users of contract labor workers.

Employers who have active UI tax account numbers may be involved in the audit process when a UI Benefit claim is filed by a worker who has not been reported to the UI tax/wage system. UI Tax representatives investigate whether the worker's services are that of a contractual nature or have been misclassified as such by the employer. For the state fiscal year, 173 misclassified workers were identified through this process, which resulted in \$16,245.00 in tax collections.

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

Audit Activity

State Fiscal Year	Audits Completed	Workers Misclassified	Additional Tax Collected
2014	833	1,224	\$106,878.06
2015	1,131	1,390	\$110,343.09
2016	936	1,397	\$97,561.96
2017	1,001	2,080	\$131,358.82
2018	1,019	2,930	\$184,900.47
2019	959	2,339	\$145,717.22
Total:	5,879	11,360	\$776,759.62

Collaboration with State and Federal Agencies

The Contractor Registration/Employee Classification Unit and UI Tax staff work cooperatively with other agencies including, the Nebraska Department of Revenue, Nebraska Workers' Compensation Court, Homeland Security, and Occupational Safety and Health (OSHA). Staff has also on occasion collaborated with the Iowa Department of Labor's Misclassification Unit and the United States Department of Labor.

Nebraska Workers' Compensation Court (WCC)

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 (NDOR)

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. The NDOR report is attached as Addendum II.

Internal Revenue Service (IRS)

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. NDOL has an agreement with the IRS that allows for the transfer of 1099 data related to misclassification. 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 no referrals from the Department of Labor in fiscal year 2018-2019. The Nebraska Workers' Compensation Court conducted investigations of seven other employers on independent contractor issues during fiscal year 2017-2018. Of those seven cases:

- 5 appeared to be appropriate uses of independent contractors,
- one inquiry yielded insufficient information to prove that the business had any employees,
- one business was referred to the Attorney General's Office, was brought into compliance, and paid \$756 in fines.

The court provided education regarding independent contractor issues to each employer who was contacted.

Addendum II: Nebraska Department of Revenue

Summary

For the reporting period of July 1, 2018 – June 30, 2019, the Nebraska Department of Revenue (NDOR) received 813 referrals from NDOL. No reviews were conducted and no additional revenue was collected.

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 1 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.

