
**JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL
Upstream Liability Workgroup**

Virtual Meeting via WebEx

October 27, 2021
11:00 AM – 1:00 PM

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Agenda

- A. Welcome – Mark Reihl, Chair
 - a. Attendees: Andy Buck, Derek Allen, Mark Kessenich, Mary Beth George (Rep Sinicki), Mark Reihl, Matt Marcellis, Nathan Jurowski, Call in User
- B. Review
 - a. Action Items from Previous Meeting
 - i. Weren't able to meet earlier in October
 - ii. Upstream Liability for Wisconsin – follow the lead of other states?
 - 1. General Contractors responsible for sub-contractors
 - 2. New York, California, Maryland
 - iii. Reach out to other organizations
 - 1. Whatever recommendation came out of this would likely have to go through the legislature
 - 2. Would need buy in from other organizations to have a better chance at passing through the legislature
 - 3. Mark Reihl reached out
 - a. John Mielke initially said they would participate, but later declined
 - b. Wisconsin Builders Association – initially agreed, but declined because of legislative priorities
- C. Discussion
 - a. Labor Trafficker Investigative Report Video
 - b. Recommendation for Task Force
 - c. Suggestions/Thoughts from newer work group members on Upstream Liability
 - i. Mark K. hasn't formulated a definitive agreement/plan across the board, but most of their work revolves around sub-contractors, may not pertain to most members

1. Biggest issue is placing the burden of policing/managing administrative tasks and enforcement
2. No one supports pushing illegal labor onto job sites
 - a. Concern with the unintended consequences
3. Jerry Shea also expressed this concern
- ii. What could be done at the level of the contractor to engage in whatever relations with the sub-contractor? Avoid the general contractors
- iii. Commercial construction
 1. Collective bargaining agreements
- iv. New York just passed legislation regarding policing sub-contractors
 1. Permits, certifications, and "sign offs"/agreements
 - a. Subs agreeing to not commit violations
 - b. Proof of awareness on the side of the contractor if caught in violation
 - c. Statements from the subs that they understand
 - d. Subs agree to not violate criminal law by doing business in a state
 - i. Not sure if another piece of paper would do anything
 - e. Representatives from nonunion contractors would be helpful
 - f. Most states seem to focus on the construction industry
 2. Other states that Mark Reihl is looking at for examples of laws or policies?
 - a. Latest "trend"
 - b. Policing for state agencies is difficult
 - c. Finding a way to increase enforcement on the job site
 - i. Having others responsible than just the state agency investigators
 3. Would this be enough?
 - a. Don't think subs would have an issue signing this, but not sure how effective this would be
 - b. Liability on the general contractor
 - c. What power do general contractors have and what do we want them to do?
 4. See how other states' legislation plays out and learn from their experience
- v. Back log
 1. Investigators refer to auditors, gets audited, and are required to pay back money owed plus interest
 2. Audits take time
 3. Work with other agencies to make referrals
 4. Task force has recommended increasing penalties
 5. A different work group is looking at one set of standards for misclassification
 6. Upstream liability is pretty specific to the construction industry
- vi. How much of this is within our sphere?
 1. Would be all construction
 2. Proposal for contractor certification/registration
 - a. Repealed around 2011
 - b. Investigators would find this helpful
 - c. So many other states do this
- vii. Contracting process for construction
 1. Owner (public or private) will contract with a general contractor (gc), commercial office building
 - a. Contractor will likely not do their own work
 - b. Contractor will contract with sub-contractors
 - c. In some instances, sub-contractors may have their own sub-contractors
 2. Generally, the general contractor is responsible to the owner
 3. Owner has a contract with the general and the general has contract with subs
 4. The general contractors knowing the subs further down the ladder depends, but the subs can pick their own subs
 5. Often times sub-contractors are required to have sub-contractors
 6. Layers of complications
 7. Certain industries are affected by this more than others

- viii. First party complaint
 - 1. Folks aren't going to "tell on themselves"
- ix. Discussion about linking this to the bid process
 - 1. Has been talked about but hasn't been any more discussion
 - 2. Tiers allow ways to hide bids
 - 3. Link liability to bid process
 - 4. Documentation that sub-contractors have to abide by
 - 5. Some policies will be more specified
 - 6. Standard AIA contract for smaller sub-contractors
 - 7. Matt's experience was no one was writing their own contractors or having a lawyer tailor theirs
- x. GCs vs. their subs
 - 1. Liability on who should have known
 - a. Could take back to members
 - b. Sub that engaged the person should have known?
 - c. Is this harder to prove than if you violate, you're responsible?
 - 2. Legislative requirement for construction contracts to include x
 - 3. Education for subs
 - a. Having conversations with subs
 - b. Webinars on misclassification for general contractors
 - i. Unsure if that's flowing down to the subs
 - 4. Milwaukee area's biggest concern likely isn't misclassification
 - a. Prevalence isn't as alarming
 - 5. Enforcement issue
 - 6. Due diligence if there's a reason
 - a. Bids coming in extra low or something suspicious for the general contractors and subs to look into
 - b. Scale of the projects are relative
 - i. Reasonable bids
 - c. Once problem is identified, who should've spotted it
- d. What would be taken up by our legislator
- e. What is workable most of the time
 - i. Penalties
 - 1. Public information that was assessed
 - 2. Criminal penalties already public
 - a. Administrative penalties and cannot reveal names of employers
 - 3. Pennsylvania has a law that contractors who misclassify become public
 - 4. Making the sub-contractor public who misclassifies
 - a. Upstream liability
 - b. Link to database of sub-contractors and if gc's checked
 - c. Challenge may be that business becomes a different business under a different name
 - d. Tactics violators are subject to
 - 5. Education on misclassification and penalties
 - a. General contractors to sub-contractor
 - ii. Responsibility
- f. Provision of the law
 - i. Power of determination
 - ii. Criminal code change
 - iii. Making worker misclass criminal instead of administrative code?

D. Next Steps

- a. Recommendation to full task force
 - i. Publicize the violators of misclassification
 - ii. Not feasible to move forward with upstream liability at this time, but in the meantime would recommend making public the names of violators of misclassification laws
 - iii. Do we need another meeting?

Adjourn

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