

# **CLASSIFICATION OF WORKERS IN THE CONSTRUCTION INDUSTRY TASK FORCE**

## **Minutes of the 3rd Meeting of the 2020 Interim**

**October 14, 2020**

### **Call to Order and Roll Call**

The 3rd meeting of the Classification of Workers in the Construction Industry Task Force was held on Wednesday, October 14, 2020, at 9:00 AM, in Room 171 of the Capitol Annex. Representative Jason Nemes, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Matt Castlen, Co-Chair; Representative Jason Nemes, Co-Chair; Senator Karen Berg; Representatives Terri Branham Clark and Sal Santoro; Jason Clark, Spencer Coates, Tommy Gumm, Marty Hammons, Patrick Jennings, Ken Lyons, Gary Morris, Anthony Russell, Kevin Sell, Allyson Smith, and Robert Swisher.

Guests: Ken Lyons, President, Indiana/Kentucky/Ohio Regional Council of Carpenters; Jason Clark, Political Director, Indiana/Kentucky/Ohio Regional Council of Carpenters; Patrick Jennings, Managing Partner, Commonwealth Alliances; and Allyson Watts Smith, Associate General Counsel, Kentucky Employers' Mutual Insurance.

LRC Staff: Andrew Manno, Audrey Ernstberger, Sasche Allen, and Kirsten Parker.

### **Approval of Minutes**

A motion to approve the minutes of the September 10, 2020 meeting was made by Representative Sal Santoro, seconded by Kevin Sell, and approved by voice vote.

### **Discussion of Issues and Potential Solutions**

Allyson Watts Smith, the Associate General Counsel for Kentucky Employers' Mutual Insurance (KEMI), presented KEMI's perspective on misclassification of workers and proposed a solution that could offer clarity, consistency, and simplification to the process from a carrier's standpoint. All state agencies use different multifactor subjective tests to determine whether a worker is an employee or independent contractor, which often yields varying results depending on the agency making the determination. The inconsistency causes issues for employers, workers, and workers' compensation insurance carriers. Ms. Smith presented a two factor process that could be used in both the public and private sectors and in all industries. The process has been considered by the U.S. Department of Labor and has been implemented in several other states. KEMI's proposed

solution is an independent contractor certification process. A worker who is an independent contractor would file an affidavit alleging or declaring his or hers independent contractor status with the assigned state agency. The certification approved by the assigned state agency could be used by the worker's employer, insurance carrier, or any other applicable body, system, or agency, and would be given presumptive weight. Specific to workers' compensation, the insurance carrier would not charge a premium for the independent contractor's wages and the worker would not be covered by the workers' compensation system in the event of an injury.

Answering a question from Co-Chair Jason Nemes, Ms. Smith explained that the proposed independent contractor certification process would change the dynamics of the worker status determination process. Currently, employers and insurance carriers determine if a worker is an employee or independent contractor, but under the proposed solution the worker would determine their own status. Replying to a follow up question, Ms. Smith stated KEMI goes through the employee and independent contractor determination process for about 7,000 of its policies. The proposed certification process would eliminate a large portion of the administrative back and forth that is involved in the current determination process.

Co-Chair Jason Nemes opened the floor for opinions on the certification process posed by Ms. Smith. Spencer Coates explained that the process would be cumbersome and stated that the IRS already has an adequate system in place. Kevin Sell voiced the opinion that he did not believe the General Assembly would pass any legislation that is both broad and could destroy future economic gains in the construction industry. He further stressed the need for uniform definitions, consistent messaging from all workers' compensation carriers, and data sharing amongst state agencies.

Representative Terri Branham Clark pointed out that the proposed certification process is similar to the process that business owners have to complete with the Secretary of State's Office. Answering a question from Representative Branham Clark, Ms. Smith clarified that Indiana and Montana are states that have a certification process.

Co-Chair Jason Nemes solicited more input from Spencer Coates and Kevin Sell. Spencer Coates made the point that some people often work as employees and independent contractors interchangeably, even on the same job. Kevin Sell explained that if the certification process was put in to place, then the General Assembly would have to decide which state agency would manage the program. He also stated that not all workers are technologically savvy which would eliminate them from the field or pose issues with their involvement in the certification process. Ms. Smith said KEMI in no way wants to make the process difficult for anyone to obtain independent contractor status. She pointed out that states with the certification process in place have a form downloadable form online.

Responding to a question from Jason Clark, Ms. Smith said evidence suggests that the certification process adopted in Montana reduced litigation pertaining to the determination of whether a worker is an employee or independent contractor.

Addressing Anthony Russell, Ms. Smith explained every state using the certification process has structured it under the authority of different state agencies. Some states have housed the program in the revenue department while others have housed it with the department of labor.

Replying to a question from Matt Gumm, a proxy for Tommy Gumm, Ms. Smith stated KEMI did not explore the applicability of fees in the certification process, but is open to discussing it.

Answering a question from Co-Chair Jason Nemes, Ms. Smith said KEMI, as a quasi-governmental entity, could not independently implement the certification process without corresponding legislation passed by the General Assembly.

Ken Lyons, President of the Indiana/Kentucky/Ohio Regional Council of Carpenters, and Jason Clark, Political Director of the Indiana/Kentucky/Ohio Regional Council of Carpenters, jointly presented a second alternative proposal. In support, they presented to members a video with a worker that has been consistently misclassified. The interviewee shown was treated as both an employee and independent contractor at different times during his work on public projects. In addition, he was also paid in cash and check and, at various times, did not have taxes taken out of his pay. Mr. Lyons explained that worker misclassification is the norm and, to combat the issue, the Indiana/Kentucky/Ohio Regional Council of Carpenters proposed language for future legislation.

Representative Terri Branham Clark described her experiences visiting public work sites where misclassified workers were present. Various workers communicated with her that they were being compensated with cash. She explained that the goal is not to hinder economic opportunities, but to stop the misclassification that limits Kentucky's construction businesses. Mr. Clark added that this issue is more common than what people may realize and, he has personally taken legislators on tours where misclassified workers are present. Mr. Lyons also stated that he believes the issue began when employers started hiring undocumented workers for cost savings purposes.

Patrick Jennings, a Managing Partner at Commonwealth Alliances, presented components of proposed legislation drafted in conjunction with the Indiana/Kentucky/Ohio Regional Council of Carpenters. Mr. Jennings' proposal requires any contractor bidding on a taxpayer incentivized project to list all subcontractors, and any subcontractor to the primary subcontractor with their bid. Any contractor bidding on a taxpayer incentivized project shall certify that they are not misclassifying employees, and all Kentucky agencies shall use Internal Revenue Service (IRS) standards to determine classification, simplifying

the process and limiting confusion for contractors. For taxpayer incentivized projects, the Department of Labor may investigate a job site to determine proper classification only when they receive a complaint. The complaint can come from the entity receiving the work product, local or state officials, an employee, law enforcement agency or a labor management cooperative committee. If it is determined that employees are misclassified on a taxpayer incentivized project, then work shall cease until all back taxes, penalty and interest is paid. The state or local entity reserves the right to withhold any tax incentive or state or local payment to the contractor until all appropriate taxes are paid. Lastly, if a contractor repeatedly violates this section of law, the state or local government reserves the right to prohibit that contractor from bidding on state or locally funded or incentivized projects for a period of time.

Representative Branham Clark explained there is a difference between those that unintentionally misclassify workers and those that repeatedly and knowingly misclassify workers. Mr. Jennings agreed and stated the intention of penalties and fines is to deter repeat misclassification offenders.

Co-Chair Jason Nemes pointed out that previously filed legislation exempted general contractors. He also added that imposing fines and ceasing work on a project if not in compliance, worries him; and he would not want to punish everyone involved with a single project when only a small group is not in compliance. Mr. Jennings clarified that whoever is making bids on projects should be held individually liable.

Responding to a question from Allyson Smith, Mr. Jennings clarified that in previous iterations of proposed language data sharing amongst state agencies was addressed but not data sharing with carriers. He said that could be further discussed.

Kevin Sell supported removing contractors from bid lists but said more thought should be put into the complaint process as far as which agency will manage it. He also added that the repeat offender list of contractors should most definitely be shared with the Labor Cabinet.

Co-Chair Jason Nemes suggested that going forward he would like for legislation incorporating the presented content to be drafted then circulated to members in an effort to have a piece of legislation prepared for the upcoming session. Representative Terri Branham Clark agreed and stated this plan of action will allow time to address any unintended consequences.

There being no further business, the meeting adjourned at 10:09 a.m.

