

# Worker Misclassification in Virginia

Virginia Department of Labor and Industry

Virginia Occupational Safety and Health  
(VOSH) Program

# JLARC Report on Misclassification

- 2012 Report of the Joint Legislative Audit and Review Commission (JLARC) identified and defined the problem of worker “misclassification”.
  - <http://jlarc.virginia.gov/reports/Rpt427.pdf>
  - Undermines businesses that follow the law
  - Costs Virginia millions in tax revenue
  - Denies workers legal protections and benefits

# Governor's Executive Order Number 24

- The JLARC report recommended a task force of the relevant state agencies
- Governor McAuliffe issued his Executive Order 24 on August 14, 2014, establishing an inter-agency task force to investigate and report on the issue of misclassification

# Governor's Executive Order Number 24

- The EO is entitled: “Establishing an Inter-Agency Task Force on Worker Misclassification and Payroll Fraud”
- <https://governor.virginia.gov/media/3333/eo-24-establishing-an-inter-agency-task-force-on-worker-misclassification-and-payroll-fraud.pdf>
- Reference Document: May 13, 2015, Draft Memo on Misclassification in VOSH cases (will be put in policy memo format)

# What Is Misclassification?

- Misclassification occurs when an employer improperly classifies a worker as an independent contractor who should in fact be an employee.
  - A written agreement is not sufficient to determine a worker's status (Loomis Cabinet decision – discussed later)
  - Misclassification itself is not illegal, but it can result in payroll fraud, and violations of the tax code, workers' compensation and other laws designed to protect workers

# What Is Misclassification?

- Employers who are willing to commit payroll fraud and cut corners when it comes to providing employee protections such as workers' compensation and unemployment insurance may be willing to cut corners when it comes to providing a safe and healthy workplace

# What Is Misclassification?

- In VOSH terms, misclassifying workers can be construed as NOT acting in “good faith”
- It can also skew the “size” of a company for purposes of VOSH penalty calculation procedures

# Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud

- Chaired by the Secretary of Commerce and Trade
- Department of Labor and Industry
- Virginia Employment Commission
- Department of Professional and Occupational Regulation
- State Corporation Commission's Bureau of Insurance
- Workers' Compensation Commission
- Department of Taxation

# Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud

- Review statutes and regulations related to worker misclassification and payroll fraud
- Gather information and statistics on the prevalence of misclassification in various industries and the frequency with which agencies encounter the issue
- Evaluate current enforcement practices of the agencies involved

# Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud

- Develop procedures for more effective inter-agency cooperation and joint enforcement
- Implement a pilot project for joint enforcement
- Develop educational materials for and an outreach strategy to employers

# Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud

- Advise on any technological improvements in worker misclassification and payroll fraud detection
- Recommend any appropriate changes to relevant legislation or administrative rules

# Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud

- One of the early findings of the task force is that many impacted agencies do not have a good handle on how widespread the practice of misclassification is and do not track the issue in information systems

# VOSH Efforts to Identify and Track Misclassification

- The VOSH program will now start tracking misclassification issues in the OIS system through use of a State Strategic Initiative Program (SSIP) Code: "**Misclassification**".
- Regional Directors and CSHO's are directed to indicate on all *inspections* and *unprogrammed activities* whether the issue of misclassification has arisen during the inspection or investigation.

# VOSH Efforts to Identify and Track Misclassification

- Please review all cases opened since January 1, 2015, where you have *reasonable cause to believe* that misclassification may have occurred and update OIS by selecting the SSIP code **“Misclassification”**

# VOSH Efforts to Identify and Track Misclassification

- **Situation 1:** If Employer A alleges that certain workers are independent contractors but the CSHO only opens an inspection with Employer A and treats the workers as employees, then the SSIP "Misclassification" Code shall be entered for Employer A.

# VOSH Efforts to Identify and Track Misclassification

- **Situation 2:** If Employer A alleges that certain workers are independent contractors, and the CSHO has reasonable cause to believe they are employees, BUT opens an inspection with Employer A and with each worker designated by Employer A as independent contractors (Workers B, C and D as Employers B, C and D), then the SSIP "Misclassification" Code shall be entered for Employers A, B, C and D.

# VOSH Efforts to Address Misclassification

- On *July 1, 2015*, VOSH will begin implementing new procedures to address the issue of misclassification in VOSH cases.

# VOSH Efforts to Address Misclassification

- In the time leading up to *July 1, 2015*, **Outreach** materials will be provided to Regional Offices for dissemination during inspections, consultation visits, informal conferences, etc.
- A Misclassification **Webpage** will also be added to the DOLI website as a resource to employers and employees

# VOSH Efforts to Address Misclassification

- Beginning July 1, 2015, where VOSH has ***reasonable cause to believe*** that misclassification has occurred, the following actions will normally be taken:
  - In the event that citations and penalties are proposed for the employer, reductions for *size and good faith* will NOT be afforded to the employer

# VOSH Efforts to Address Misclassification

- In construction multi-employer worksite situations, each contractor (e.g., general contractors, prime subcontractors and other subcontractors) will be asked to provide proof of their Department of Professional and Occupational Responsibility (DPOR) contractor's license AND for proof of the DPOR license for any of its' subcontractors

# VOSH Efforts to Address Misclassification

- When it is determined that a construction employer has contracted with an unlicensed subcontractor, VOSH will make a written referral to DPOR for the contractor and its unlicensed subcontractor
- DPOR has the authority to penalize construction employers who contract with unlicensed subcontractors

# VOSH Efforts to Address Misclassification

- In cases where the contract value for the specific subcontractor's job is less than \$1,000.00, VOSH will make a written referral to the VEC and/or the VWCC for potential audits of the employer's employment practices.
- There may be instances where referrals will be made for contract values over \$1,000.00 as well.

# **BACKGROUND**

Misclassification – Is That Person  
an Employee or an Independent  
Contractor ?

# Importance of Misclassification

- Employers who properly classify workers incur higher payroll costs because they pay costs avoided by employers who misclassify
- Employers who misclassify can undercut the bids of those honest contractors who follow the law
- Misclassified workers are often denied benefits and legal rights

# Federal and State Employment Laws That Cover Employees

- Unemployment Compensation
- Minimum Wage
- Occupational Safety & Health
- Family Medical Leave
- Fair Labor Standards
- Workers' Compensation
- Age Discrimination in Employment
- Americans with Disabilities

# Most Misclassification is Thought to be Intentional

- Employers can improperly avoid payroll up to 40% by misclassifying employees
- For employees, but not independent contractors, the employer is required to:
  - Withhold and pay income, Social Security, Medicare (FICA), unemployment taxes
  - Pay for workers' compensation insurance

# Employee v. Independent Contractor

- **Virginia** occupational safety and health laws define a worker as an employee depending on:
  - Who the worker considers his/her employer
  - Who pays the worker's wages
  - ***Who has responsibility to control the worker***
  - ***Who has power to control the worker***
  - Whether the alleged employer has power to fire, hire, or modify the worker's employment conditions
  - Whether worker's ability to increase income depends on efficiency rather than initiative, judgment, foresight
  - How worker's wages are established

# Background of 7 Part Test

- Griffin & Brand of McAllen, Inc. 6 OSHC 1702
  - Migrant workers picking melons on a farm.
  - Crew leader ostensibly directed and paid the crew.
  - G & B exercised power to control by setting wages and holding power to hire and fire workers.
  - Worker's could not affect their income through their own initiative or judgment.
  - Judges held: Employees not independent contractors.
- First instance of use of test by federal OSHA

# Background of 7 Part Test, Cont'd

- Loomis Cabinet Co.
  - Inspected in March '87, January' 88, and July '88.
  - Cabinet workers became partners in Eastview Cabinet Company after January inspection.
  - Loomis denied it was an employer subject to OSH Act.
  - The case turned on whether the alleged employer controlled the workplace.
  - Loomis did all contracting, marketing and purchasing; set terms of work; controlled safety conditions.
  - Workers provided only their work.
- Loomis liable for citations

# Misclassification of Employees

- QUESTIONS?
- Resource:
  - Robert Feild, Senior Staff Attorney
  - Division of Legal Support, VPP, ORA and OPP
  - Virginia Department of Labor and Industry
  - Main Street Centre
  - 600 East Main Street
  - Richmond, VA 23219
  - [feild.robert@dol.gov](mailto:feild.robert@dol.gov)
  - 804.786.4777
- For more information, visit [www.doli.virginia.gov](http://www.doli.virginia.gov)