



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

MEMORANDUM

TO: Virginia Occupational Safety and Health Staff
FROM: C. Ray Davenport *C. Ray Davenport*
Commissioner
DATE: June 02, 2015
SUBJECT: Addressing Misclassification of Employees in VOSH Cases

PURPOSE

In furtherance of the Department's mission to make Virginia a better place to work, live and conduct business, the following policy is being adopted to assure to the fullest extent of the law that the rights of employees and employers are protected from worker misclassification during Virginia Occupational Safety and Health (VOSH) inspections and investigations.

Misclassification occurs when an employer improperly classifies a worker as an independent contractor who should in fact be an employee.

This policy is intended to improve protections for workers because misclassification can result in payroll fraud, reduced workers' compensation and unemployment insurance protections and violations of the tax code and other laws designed to protect workers. 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.

This policy is intended to level the playing field for employers who currently provide all legal protections for their workers against those who misclassify workers. 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. Assuring that all employers are playing by the same rules when it comes to classifying employees will help to assure that the construction bid process is fair for all and improve safety and health and other legal protections for workers.

POLICY

VOSH will undertake an outreach program to employers and employees to explain worker misclassification and provide notification of new VOSH procedures that will be implemented July 1, 2015, to address misclassification in VOSH cases:

Where VOSH has reasonable cause to believe that worker misclassification has occurred in a VOSH case, the following actions will normally be taken:

- In the event that citations and penalties are proposed for the employer, penalty reductions for size and good faith will NOT be afforded to the employer.
- In construction multi-employer worksite situations, each contractor (e.g., general contractors, prime subcontractors and lower tier subcontractors) will be asked to provide proof of their Department of Professional and Occupational Regulation (DPOR) contractor's license AND for proof of the DPOR license for any of its' subcontractors.
- 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 sanctions for contracting with unlicensed subcontractors may include fines, probationary terms, suspension or license revocation).
- 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 Virginia Employment Commission (VEC) and/or the Virginia Workers' Compensation Commission (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.

Outreach materials will be provided to Regional Offices for dissemination during inspections, consultation visits, informal conferences, etc.

The Department will also be establishing a webpage dedicated to worker misclassification issues that can be used as a resource by employees and employers (a copy of this document will be posted along with other outreach and informational materials and links to other websites).

BACKGROUND

JLARC Report and Governor's Executive Order 24

A [2012 Report of the Joint Legislative Audit and Review Commission \(JLARC\)](#) identified and defined the problem of worker misclassification:

"Correct classification is important for employers, workers, and the State. Misclassification occurs when an employer improperly classifies a worker as an independent contractor instead of an employee. This can happen when the employer or worker does not understand the legal distinctions between employees and independent contractors, or when an employer wishes to avoid paying certain taxes and benefits on the worker's behalf. Employees have taxes withheld from their paychecks and have legal protections such as the minimum wage law, unemployment benefits, and workers' compensation insurance. Independent contractors are generally responsible for paying all of their own taxes and benefits, and are often not eligible for legal protections."

Worker misclassification:

- Undermines businesses that follow the law
- Costs Virginia millions in tax revenue
- Denies workers legal protections and benefits

The report concluded that:

"A comprehensive approach to the problem of worker misclassification would include strategies to prevent misclassification before it happens, find it when it occurs, and penalize employers who misclassify."

The report recommended a task force comprised of the relevant state agencies look further into the issue of misclassification.

Governor Terry McAuliffe issued [Executive Order 24](#) on August 14, 2014, entitled "Establishing an Inter-Agency Task Force on Worker Misclassification and Payroll Fraud":

The Commissioner of Labor and Industry is a participating member on the task force and the Secretary of Commerce and Trade is leading the task force in its preparation of a report and recommendations on the issue. Other agencies participating are:

- Virginia Employment Commission (VEC)
- Workers' Compensation Commission (VWCC)
- Department of Labor and Industry
- Department of Professional and Occupational Regulation (DPOR)
- Department of Taxation
- State Corporation Commission Bureau of Insurance

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

OSHA Information System (OIS) Procedures

The VOSH program will now start tracking misclassification issues in the OIS system through use of a State Strategic Initiative Program (SSIP) Code entitled "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.

NOTE: 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**".

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.

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.

For an inspection, the SSIP code can be selected under the "Inspection Type" tab:

Inspection Investigation Violation Citation Assembly ISA PPA Contested Appeal Case S&H Assessment

Go Back Go to Document Sellers Sampling FINAL Undo Delete Inspection Exit

Inspection Info

Inspection #: 995142 Establishment Name: Miller Roofing Inc Citation Status: Issued RID: 0355118 Create a Copy Generate Long Report Generate Short Report

Site Info CSHO Info Related Activities Inspection Dates **Inspection Type** Contact Info Hazardous Facility Factors Detail of Entry Case Summary

Inspection Types

Initiating Type: Program Planned Other Initiating Type:
Secondary Types: Select One Or More

Inspection Emphasis Programs

National Emphasis Program: Select
State Emphasis Program: FALL (14-201 - LEP - FALL HAZARDS)
Local Emphasis Program: Select
Primary Emphasis Program: FALL(14-201 - LEP - FALL HAZARDS) Enter the Primary Emphasis Program that initiated the inspection

Inspection Category*: Safety Partnership Program:
Sampling Performed*: Yes No Migrant Farm Worker: Yes No
Scope of Inspection*: Partial Reason No Inspection: Select One
SVEP: Yes No Explanation:

Strategic Plan Activity

Federal Strategic Initiative Program: Select
State Strategic Initiative Program: MISCLASSIFICATION

Additional Codes

Type	ID	Value	Description
		RRI	

For an unprogrammed activity, the SSIP code can be selected under the "Program Info" tab:

The screenshot shows the OIS (Occupational Injury System) interface for managing unprogrammed activities. At the top, there are navigation buttons: Go Back, Go to, Documents, Letters, and a status indicator 'FINAL'. Action buttons include Delete UPA, Print, and Exit. The main header reads 'Manage Unprogrammed Activity'. Below this, activity details are displayed: Activity Number: 930854, Establishment/DBA Name: Aetna Insulated Wire, LLC, and RID: 0355112. A series of tabs are visible: Establishment Info, Receipt/Activity Info, Source Information, PACE/AT/SP, Camp/Ref Actions, Program Info (selected), and Assign/Transfer. The 'Program Information' section contains several dropdown menus: National Emphasis Program (AMPUTATE (REDUCING MACHINE HAZARDS LEADING TO AMPUTATIONS)), State Emphasis Program (Select), Local Emphasis Program (Select), Federal Strategic Initiative Program (Select), State Strategic Initiative Program (empty), and Migrant Farm Worker Camp (MISCLASSIFICATION). The 'MISCLASSIFICATION' option is highlighted, and a red arrow points to it. Below the dropdowns are 'Save' and 'Reset' buttons. The 'Additional Codes' section is currently empty, with columns for Type, ID, Value, and Description. At the bottom, there are buttons for Add, Edit, Remove, Add from Reference, and Add from State Reference.

Statutes and Regulations

"Employee" and "employer" are defined in Va. Code §40.1-49.3 and apply specifically to the VOSH program and track definitions from the federal OSH Act. There is no definition in Title 40.1 for "independent contractor" or "misclassification". The definitions from §40.1-49.3 are identical to the regulatory definitions set out in our Administrative Regulations Manual, §16 VAC 25-60-10.

§ 40.1-49.3. Definitions.

For the purposes of §§[40.1-49.4](#), [40.1-49.5](#), [40.1-49.6](#), [40.1-49.7](#), and [40.1-51.1](#) through [40.1-51.3](#) the following terms shall have the following meanings:

••••

"Employee" means an employee of an employer who is employed in a business of his employer.

"Employer" means any person or entity engaged in business who has employees, but does not include the United States.

Employees and employers are both given rights and responsibilities under VOSH law.

Employees have the duty to comply with VOSH laws and regulations and the right to make complaints to the Commissioner or their employer about safety and health conditions in the workplace; to accompany the inspector during an inspection; and to be informed of the results of a complaint. §40.1-51.2, Rights and duties of employees.

Employees also have the right to be free from discrimination for exercising any rights granted under VOSH law. Misclassification of an employee as an independent contractor could deny them the protection from discrimination for making a complaint or at least stifle their freedom to complain about safety and health conditions for fear of being let go from the job. §40.1-51.2:1, Discrimination against employee for exercising rights prohibited; and §40.1-51.2:2, Remedy for discrimination.

The employer's duties are to furnish employees safe and healthy employment free of recognized hazards; to comply with occupational safety and health rules and regulation; to provide employees information about toxic materials or harmful physical agents in the workplace; to post copies of citations issued; to report fatalities or catastrophes to the Department within eight hours of the incident; and to post a notice of the employee's rights and responsibilities under the VOSH law. Employers also have the right to accompany the inspector during the inspection. §40.1-51.1. Duties of employers.

VOSH Enforcement Practices

In order to uphold violations and penalties, VOSH must demonstrate that an employee was exposed to a hazard to be able to issue a citation to the employer. VOSH encounters the issue of misclassification during its inspections, particularly in the construction industry. The CSHO will first identify who is exposed to the hazard. If the exposed person is identified as an independent

contractor or working for another contractor, the investigator will examine the facts behind that “classification” to determine whether the person is actually an employee or an independent contractor.

VOSH considers the following factors in making this determination:

- Who has responsibility to control the workers?
- Does the alleged employer have the power to control the workers?
- Who pays the worker's wages?
- Whom do the workers consider their employer?
- Does the alleged employer have power to hire, fire, or modify the employment conditions of the workers?
- Does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment or foresight?
- How are the worker's wages established?

Source: VOSH Field Operations Manual (based on federal case law).

The most important of the above factors are the power and responsibility to control the worker. The result is that VOSH analyzes the situation to determine if the person exposed is an employee versus an independent contractor. VOSH does not rely solely upon the label the employer who is being inspected puts on the person. If VOSH finds that an exposed person is actually an employee, it will issue citations to that employer.

Multi-Employer Worksite Policy

Even if VOSH finds that the exposed person is an independent contractor, a citation can often still be issued under the multi-employer worksite citation policy. See VOSH ARM §16VAC25-60-260.F. That policy provides that an employer who controls or creates a worksite safety or health hazard may be held liable under VOSH laws and regulations even if the employees threatened by the hazard are solely employees of another employer.

Therefore, an employer who creates or controls the hazard to which the independent contractor is exposed can be cited for that violation when the independent contractor has its own employees exposed; or in situations where the independent contractor is the individual exposed and has incorporated his or her business – in such a case, the owner/independent contractor is considered an “employee” of the corporation for purposes of VOSH citation policy.

General Duty Citations

General duty citations under §40.1-51.1(a) can only be issued in situations where the employee exposed works for the employer being cited. An independent contractor who is a sole owner (i.e., not incorporated) and has no employees cannot be cited for a general duty violation if the owner is the only person exposed to the violation.