

# **ADMINISTRATION AND ENFORCEMENT OF THE CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT IN**

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The Construction Workplace Misclassification Act, 43 P.S. §§ 933.1 -- 933.17 ("Act 72" or "Act"), went into effect on February 10, 2011. The Act prohibits employers from misclassifying construction workers as independent contractors who do not satisfy all of the definitional criteria of an independent contractor. The Act establishes a definition of "independent contractor" for purposes of workers' compensation, unemployment compensation, and Act 72.

Act 72 grants administrative enforcement powers to the Secretary of Labor & Industry ("Secretary"). The Department of Labor & Industry's ("Department") Bureau of Labor Law Compliance ("BLLC" or "Bureau") enforces the Act on behalf of the Secretary. The Office of Attorney General and local district attorneys have concurrent jurisdiction for the prosecution of the Act's criminal provisions.

Act 72 provides for the imposition of criminal and administrative penalties against employers, or officers or agents thereof, which are found to have committed violations. Additionally, the Act empowers the Secretary to petition a court to issue a stop-work order mandating the partial or complete cessation of work at the site of an ongoing intentional misclassification.

Section 4(c) of the Act authorizes the Secretary to undertake remedial action if she receives evidence establishing that a person has violated the Act. Section 10(a) explicitly prohibits an employer from discriminating in any manner or taking adverse action against any person for exercising any right protected by the Act, including the filing of a complaint with the Department or informing any person about an employer's noncompliance. Section 10(b) makes clear that a complainant's failure to prevail on the merits on allegations of employer noncompliance does not remove the retaliation prohibition set forth in subsection (a), so long as the complainant's allegations were made in good faith. Finally, section 10(c) creates a rebuttable presumption that the taking by an employer of adverse action against a person within 90 days of that person's exercise of rights protected by the Act constitutes prohibited retaliation.

Section 14 of the Act requires the Department to submit annually, by March 1, a report to Pennsylvania's General Assembly "detailing, to the maximum extent possible, data on the previous calendar year's administration and enforcement of [Act 72]."<sup>1</sup> The Department is permitted to include in the report all relevant facts and statistics that it believes to be necessary.

Section 17 of the Act provides that "[t]he [D]epartment shall not be required to enforce this [A]ct until adequate funding is appropriated." The Bureau continues to enforce the provisions of Act 72, and collect penalties, despite never receiving any additional funding for the administration of the Act.

In 2017, the Department collected \$360,360 in administrative penalties

from Act 72 enforcement efforts. While the 2017 figure represents a 5% decrease in penalties collected from the 2016 penalty amount, it is notable that several contractors are on payments plans that may lead to an overall increase in 2018 collection.

The 2017 fine collections were either the product of an investigation conducted by the Bureau or the product of the Bureau's settlement efforts with employers referred by the Department's Office of Unemployment Compensation Tax Services (OUCTS) for misclassification.

OUCTS uses the Act 72 criteria for its audits of employers concerning the proper collection and calculation of unemployment compensation insurance. The Department's Bureau of Workers' Compensation (BWC) also uses the Act 72 criteria for its investigations of employers who did not include certain workers under their workers' compensation insurance plans. BLLC works with OUCTS and BWC to identify potential violators of Act 72 for further prosecution under the Act.

In order to protect the confidentiality of complainants and the integrity of open investigations, this report contains general geographic, temporal, and substantive information regarding complaints, referrals, and collections

## **Bureau of Labor Law Compliance Overview**

The BLLC enforces and administers the following 13 laws: the Construction Workplace Misclassification Act (Act 72), the Prevailing Wage Act, the Wage Payment and Collection Law, the Minimum Wage Act, the Child Labor Act, the Underground Utility Line Protection Law ("One Call Law"), the Apprenticeship and Training Act, the Prohibition of Excessive Overtime in Health Care Act (Act 102), the Seasonal Farm Labor Act, the Industrial Homework Law, the Personnel File Inspection Act, the Employer to Pay Employment Medical Examination Fee Act, and the Equal Pay Law.

## **Current BLLC Complement**

To complete these tasks, the Bureau has a staff complement of 43. The Director's office includes the Director, program managers, and clerical support. Each of BLLC's regional offices includes a supervisor and investigative team. The Bureau currently has 27 investigators on staff; each is responsible for all 13 labor and safety laws. The staff complement breakdown is as follows:

	TOTAL	FILLED	VACANT
Director's Office	8	7	1
Harrisburg/ Altoona	8	7	1
Philadelphia	9	8	1
Pittsburgh	10	8	2
Scranton	8	8	0
TOTALS	43	37	6

## **Enforcement Issues**

Act 72 prohibits contractors from treating construction employees as independent contractors. The Act provides that in order for a worker to be deemed an independent contractor, the worker must: (1) have a written contract to perform services, (2) be free from control or direction over the performance of work under contract, and (3) be customarily engaged in an independently established trade or business.

There are six factors that establish an independent trade or business: (1) Worker possesses his/her own essential tools and equipment; (2) Worker realizes profit or loss through services; (3) Worker has a proprietary interest in business through which services are performed; (4) Worker has a business location separate from contractor; (5) Worker previously performed similar services for others, holds himself/herself out to do work for others, and is free from direction or control of the contractor; and (6) Worker maintains liability insurance of at least \$50,000.

## **How the Department Enforces Act 72**

Act 72 is primarily enforced by BLLC, which has 27 investigators in four district offices throughout the Commonwealth. There are three mechanisms for finding alleged Act 72 violations: (1) complaints filed with the Bureau, (2) findings made during construction job site visits, and (3) referrals from OUCTS. Alleged violations are assigned to an investigator who interviews the contractor and workers, and requests all pertinent documentation, such as a copy of the contract or the insurance certificate. If there is evidence of a violation, the case is referred to the Department's Office of Chief Counsel for prosecution, unless there is a settlement. If there conclusive evidence of a violation, the investigation is closed after review by a supervisor.

The following graphics represent an historical accounting of Act 72 cases the Bureau investigated since the inception of the law in February 2011:

<b>YEAR 2011</b>	<b>27 CASES</b>
<b>YEAR 2012</b>	<b>9 CASES</b>
<b>YEAR 2013</b>	<b>25 CASES</b>
<b>YEAR 2014</b>	<b>50 CASES</b>
<b>YEAR 2015</b>	<b>297 CASES</b>
<b>YEAR 2016</b>	<b>185 CASES</b>
<b>YEAR 2017</b>	<b>211 CASES</b>

### **Cases filed with BLLC in 2017**

In 2017, with continued awareness of the Act and increased enforcement, a significant number of cases were filed. In addition, the Bureau's central office is conducting a review of many new cases that may result in further action, including warnings, fines, or penalties. A breakdown of the district office caseload is as follows:

Office	Claims
Harrisburg/ Altoona	105
Scranton	32
Pittsburgh	28
Philadelphia	46
TOTALS	211

### **2017 Construction Site Visits**

Bureau of Labor Law Compliance conducted over 364 on-site investigations during the construction season in 2017. This amounts to a significant 506% increase in productivity when compared to 2016. During those visits, Bureau investigators distributed educational materials, interviewed workers on the construction sites, and reviewed payroll information when deemed appropriate. Several of these visits triggered follow up correspondence or investigations under Act 72.

The Bureau intends on regularly visiting job sites, performing outreach for various laws, including Act 72, and auditing contractors in violation of Act 72 in 2017, while balancing the workload of complaints being sent, and reviewing cases sent by OUCTS

## **Unemployment Compensation Tax Referrals**

In 2017, the Bureau continued to refine its process for sharing information on worker misclassification with OUCTS. OUCTS performs unemployment compensation tax audits on many Pennsylvania businesses, including construction companies. These audits reveal whether such businesses have misidentified employees as independent contractors. BLLC personnel meet regularly with OUCTS personnel. As a result of these meetings, the Bureau has both received information on potential violations and shared a number of cases with OUCTS.

In 2017, OUCTS referred 126 cases to the Bureau. Beyond that referral number, the Bureau received 85 written Act 72 complaints.

The following chart represents actions that have taken place regarding these referrals, including cases from previous years that were still under review during 2017.

PAYMENT PLANS	10
PENALTIES PAID BY VIOLATING PARTY	122
AWAITING MORE INFORMATION FROM OUCTS	12
SENT TO LEGAL FOR ORDER TO SHOW CAUSE AND FULL FINE	10

## **Adjudications of Act 72 complaints**

The Department had its first Act 72 adjudication issued on February 24, 2015. Clark Mechanical was determined to be in violation of the Act when it misclassified an employee as an independent contractor and was fined \$500. Prior to that, all Act 72 violations had been settled between the Department and the contractors.

## **Shut-Down Orders under the Act**

The process for the Secretary to shut down a job site is as follows: (1) the Department must receive information that there is a potential violation; (2) the Bureau must conduct an investigation into the allegation; (3) the Department must issue an administrative Order to Show Cause; (4) the employer is afforded 20 days to file an

answer in writing; (5) the employer is then provided notice and a hearing is conducted; (6) if evidence presented at the hearing establishes the finding of a violation, the Secretary must petition a court of competent jurisdiction for an Order; and (7) the employer must be served the Order so it may take effect. As of December 31, 2017, the Secretary had not initiated proceedings to issue a shut-down order on a job site.

### **Administrative Penalties in 2017**

The Department collected \$360,360 in administrative penalties during 2017. In 2016, the Department Collected \$383,033. In 2015, the Department collected \$217,450. In 2014, the Bureau collected \$12,700. In 2011 through 2013, the Bureau collected \$2,500 in penalties.

The increase in fine collections from 2015 through present represent a continued greater role and more proactive approach to Act 72 violations, an increase in cooperation between agencies, and a process constantly being streamlined for productivity.

### **Penalty Distribution**

The Bureau enforces 13 labor laws, several of which provide for settlements, administrative penalties, and enforcement actions. In very limited circumstances, statutory authority allows the Bureau to keep fines and penalties it collects for future enforcement activities (e.g., Underground Utility Line Protection Law).

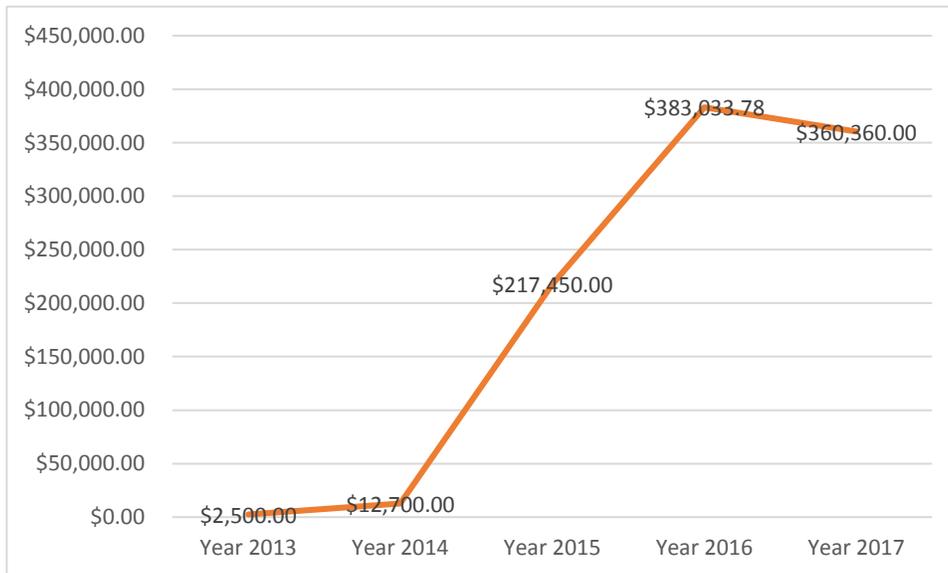
The Bureau's collection of penalties under Act 72 is different. By statute, any fines or penalties collected under Act 72 are deposited into a fund that is administered and utilized by either OUCTS or BWC for auditing and enforcement actions.

### **Analysis of Complaint Dispositions in 2017**

Throughout the 2017 calendar year, the Bureau collected \$360,360 in fines from 122 entities that violated Act 72. The dollar amount tells only one aspect of the full story. The Bureau has been systematically expediting referrals from OUTCS, quickly attempting to visit job sites due to the fast-paced nature of certain types of construction, and modernize internal processes as meaningfully as possible.

### History of Administrative Penalties under Act 72

Year 2011	\$ -
Year 2012	\$ -
Year 2013	\$2,500.00
Year 2014	\$12,700.00
Year 2015	\$217,450.00
Year 2016	\$383,033.78
Year 2017	\$360,360.00
<b>TOTAL</b>	<b>\$976,043.78</b>



The following graph and chart compares investigations performed in 2015 to 2017.

Office	Year		
	<b><u>2017</u></b>	<b><u>2016</u></b>	<b><u>2015</u></b>
Harrisburg/ Altoona	105	75	64
Scranton	32	40	20
Pittsburgh	28	20	15
Philadelphia	46	50	198
<b>Totals</b>	<b>211</b>	<b>185</b>	<b>297</b>

## **Conclusion: Future Enforcement Efforts under Act 72**

Increased enforcement will help vulnerable workers, who are unaware of the Act or fear retaliation if they file a complaint, to better understand their rights under the law. Therefore, the Bureau will continue its educational efforts by proactively engaging industry organizations and workers through informative presentations, as well as making Act 72 posters available at construction sites (in both English and Spanish) and other locations where day laborers may be looking for work. Moreover, Labor Law Compliance investigators will continue job site visits to include reviews of all labor laws, including Act 72. Through these enhanced compliance and enforcement efforts, the Department has sent a strong message to contractors that it is enforcing the Act.

As a result of these efforts, it is anticipated that next year's penalties will surpass 2017's collections.

The Bureau will continue working closely with other agencies, accepting referrals, and conducting joint investigations when feasible.

The Bureau will continue its cooperative collaboration with OUCTS. For example, OUCTS referred over 126 cases to the Bureau in 2017, and the Bureau continues to receive referrals as of this report.

As a result of those referrals, the Bureau already collected \$97,281 in just the first few weeks of 2018. The additional collection now represents \$1,073,324 since 2011, with 89% of that being collected in the last 36 months. The Bureau foresees between 150 and 250 OUCTS referrals per year to be the norm. As the relationship between both enforcement agencies develops, plans will be refined to include on-site audits with both Bureau personnel and OUCTS auditors to combine efforts. The cooperative referral process will continue to be groomed to ensure proper education and proactive enforcement are accomplished. In addition to case referrals, the Bureau has partnered with the Unemployment Compensation division for the Department's "Get Classified" initiative, a collaborative, public relations effort between the U.S. Department of Labor and Pennsylvania's Department of Labor & Industry.

In addition, the Bureau plans to increase its collaborative efforts with the Bureau of Workers' Compensation, with a similar model of its cooperation with OUCTS. Moreover, the Bureau will work more closely with the U.S. Department of Labor through a Memorandum of Understanding, executed between the two departments in 2016 to foster communication and collaboration between state and federal enforcement agencies.