
ADMINISTRATION AND ENFORCEMENT OF THE CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT

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INDUSTRY

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Department of Labor & Industry

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 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 there is 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].” 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 “The department shall not be required to enforce this Act 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.

Bureau of Labor Law Compliance (BLLC) Overview

BLLC enforces and administers the following 13 laws:

1. Construction Workplace Misclassification Act (Act 72),
2. Prevailing Wage Act,
3. Wage Payment and Collection Law,
4. Minimum Wage Act,
5. Child Labor Act,
6. Apprenticeship and Training Act,
7. Prohibition of Excessive Overtime in Health Care Act (Act 102),
8. Seasonal Farm Labor Act,
9. Industrial Homework Law,
10. Personnel File Inspection Act,
11. Employer to Pay Employment Medical Examination Fee Act,
12. Equal Pay Law,
13. The Construction Industry Employee Verification Act.

Current BLLC Complement

The Bureau has a staff complement of 36.

The Director's office includes the Director, two program managers, and two persons in clerical support. The Bureau has a complement of four investigative supervisors.

The Bureau currently has 26 investigators on staff; each is responsible for all 13 labor and safety laws. The staff complement breakdown is as follows:

| ALL STAFF BY OFFICE | TOTAL | FILLED | VACANT |
|----------------------------|--------------|---------------|---------------|
| Director's | 5 | 5 | 0 |
| Altoona | 5 | 5 | 0 |
| Harrisburg | 5 | 5 | 0 |
| Philadelphia | 8 | 8 | 0 |
| Pittsburgh | 5 | 5 | 0 |
| Scranton | 8 | 8 | 0 |
| TOTAL | 36 | 36 | 0 |

| INVESTIGATOR STAFF ONLY BY OFFICE | TOTAL | FILLED | VACANT |
|--|--------------|---------------|---------------|
| Altoona investigators | 4 | 4 | 0 |
| Harrisburg investigators | 4 | 4 | 0 |
| Philadelphia investigators | 7 | 7 | 0 |
| Pittsburgh investigators | 5 | 5 | 0 |
| Scranton investigators | 7 | 6 | 1 |
| TOTAL INVESTIGATORS | 27 | 26 | 1 |

Enforcement Overview

Act 72 prohibits contractors from treating construction employees as independent contractors. The Act provides that 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 26 current investigators in five district offices throughout the Commonwealth.

Alleged violations may be 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 is not conclusive evidence of a violation, the investigation may be closed after review by a supervisor.

Additionally, BLLC is referred cases from both Office of Unemployment Compensation Tax Services (OUCTS) and the Bureau of Workers Compensation (BWC). Those concluded referrals can then render administrative penalties issued by BLLC. The Bureau also refers cases to these offices in instances when it discovers probable misclassification.

The following graphics represent an historical accounting of Act 72 cases BLLC has investigated since the inception of the law in February 2011 through 2021:

| YEAR | CASES |
|--------------|-------------|
| 2011 | 27 |
| 2012 | 9 |
| 2013 | 25 |
| 2014 | 50 |
| 2015 | 297 |
| 2016 | 185 |
| 2017 | 211 |
| 2018 | 182 |
| 2019 | 192 |
| 2020 | 72 |
| 2021 | 88 |
| TOTAL | 1338 |

Cases filed with BLLC in 2021

This is a listing of counties assigned to District Offices within BLLC:

- **The Altoona District Office** is comprised of Armstrong, Bedford, Blair, Cambria, Cameron, Centre, Clearfield, Clarion, Clinton, Elk, Forest, Fulton, Huntingdon, Indiana, Jefferson, McKean, Mifflin, Potter, Somerset, and Warren Counties
- **The Harrisburg District Office** is comprised of Adams, Cumberland, Dauphin, Franklin, Juniata, Lancaster, Lebanon, Perry, and York Counties
- **The Pittsburgh District Office** is comprised of Allegheny, Beaver, Butler, Crawford, Erie, Fayette, Green, Lawrence, Mercer, Venango, Washington, and Westmoreland Counties
- **The Philadelphia District Office** is comprised of Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties
- **The Scranton District Office** is comprised of Berks, Bradford, Carbon, Columbia, Lackawanna, Lehigh, Luzerne, Lycoming, Monroe, Montour, Northampton,

Northumberland, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, and Wyoming Counties

A regional breakdown of Act 72 cases filed in 2021 is as follows:

- Altoona District Office: **8 cases**
- Harrisburg District Office: **30 cases**
- Philadelphia District Office: **19 cases**
- Pittsburgh District Office: **10 cases**
- Scranton District Office: **21cases**

2021 Construction Site Visits

The Bureau utilizes site visits for in-person interviews, document review, visual observation of work being conducted, and auditing when applicable.

In 2021, the Bureau conducted over 70 on-site investigations of construction sites.

During visits, BLLC investigators distributed educational materials, interviewed workers on the construction sites, and reviewed payroll information when deemed appropriate.

In recent years, the Bureau conducted several job site inspections with the Office of Unemployment Tax Service (OUCTS) tax agents and the Bureau of Workers Compensation in joint compliance efforts.

While the Covid-19 pandemic has limited in-person interactions, visual observations are instrumental in establishment facts.

In an effort to maximize resources, BLLC established an internal working group with the department's OUCTS and BWC. The working group has regular meetings to share information, initiate and further task force investigations, and discuss strategies.

Unemployment Compensation Tax Services

The Office of Unemployment Compensation Tax Services (OUCTS) routinely performs unemployment compensation tax audits on all Pennsylvania businesses. Unemployment Compensation Tax Services has data sharing agreements with the Internal Revenue Service, Pennsylvania Department of Revenue, and Pennsylvania Compensation Rating Bureau that provide an avenue to cross-matched data to identify employers that may not be registered or identify employers reporting different employment levels to different agencies during the same timeframe.

In 2021, OUCTS found 104 construction employers had misclassified 1,250 employees as independent contractors, representing \$26,076,434.82 in underreported wages.¹

Once OUCTS has concluded its audit on construction employers and received either payment from the employer for its misclassification or a final determination from an adjudicator that an employer misclassified its workers, the information is given to BLLC for Act 72 enforcement.

Stop-Work 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) BLLC 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, 2021, the Secretary has never initiated proceedings to issue a shut-down order on a job site.

¹ The data reflects overall Act 72 results and includes those cases pending appeal or individuals removed later due to classification error. Actual results may be lower as a result.

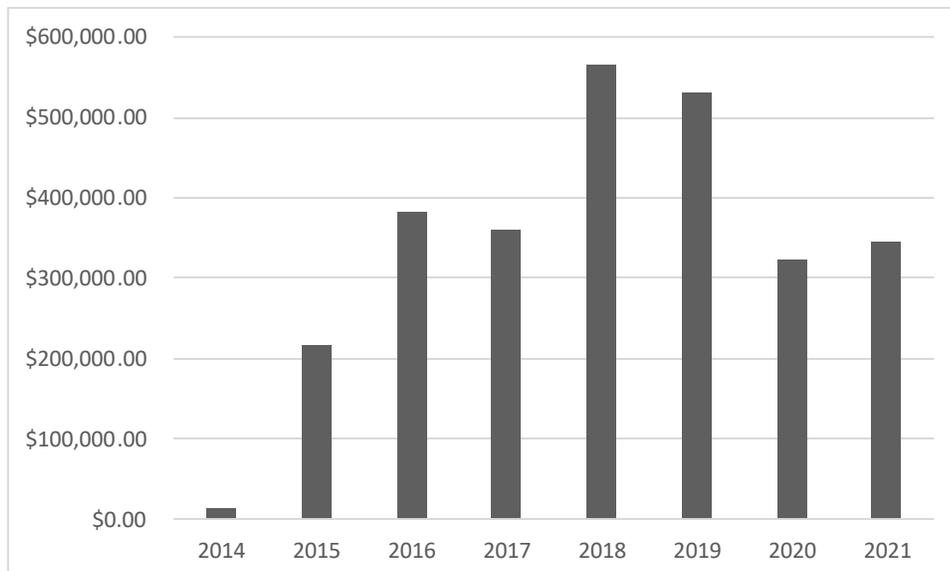
Adjudications of Act 72 Complaints

There were no orders to show cause that resulted in Secretary's Orders being issued against contractors in 2021. Since 2018, 31 Secretary's Orders have been issued, totaling \$325,500 in fines.

Administrative Penalties

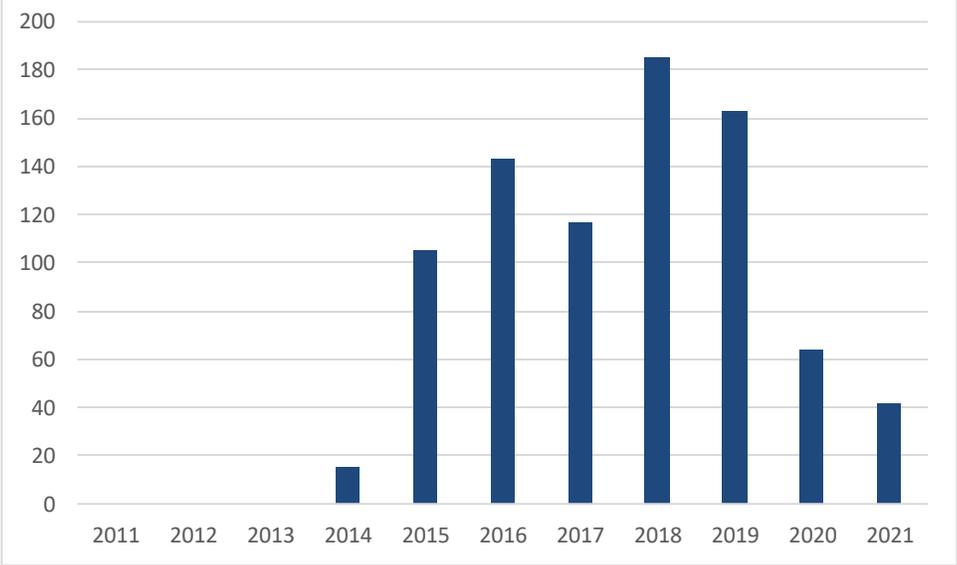
The Bureau collected \$344,148 from 42 contractors in Act 72 violations in 2021. The total fines collected from 2011 through 2021 are \$2,740,440.81.

| YEAR | FINES COLLECTED |
|--------------|-----------------------|
| 2011 | \$ - |
| 2012 | \$ - |
| 2013 | \$ - |
| 2014 | \$12,500.00 |
| 2015 | \$217,450.00 |
| 2016 | \$383,033.28 |
| 2017 | \$360,359.98 |
| 2018 | \$566,845.16 |
| 2019 | \$531,874.73 |
| 2020 | \$324,229.60 |
| 2021 | \$344,148.06 |
| TOTAL | \$2,740,440.81 |



Contractors in Violation

| YEAR | CONTRACTORS IN VIOLATION |
|--------------|--------------------------|
| 2011 | 0 |
| 2012 | 0 |
| 2013 | 0 |
| 2014 | 15 |
| 2015 | 105 |
| 2016 | 143 |
| 2017 | 117 |
| 2018 | 185 |
| 2019 | 163 |
| 2020 | 64 |
| 2021 | 42 |
| TOTAL | 834 |



Act 85: Joint Task Force on Misclassification of Employees

The Joint Task Force on Misclassification of Employees was created when Governor Tom Wolf signed Act 85 (House Bill 716) into law on October 29, 2020. Act 85 called for the Joint Task Force to be comprised of seven members (or their designees) and chaired by the Secretary of Labor & Industry. The seven members include:

- The Secretary of Labor & Industry
 - Deputy Secretary Basil L. Merenda serves as Secretary Jennifer Berrier's designee
- The Secretary of Revenue
 - Deputy Secretary Brian Barbin serves as Secretary C. Daniel Hassell's designee
- The Attorney General of the Commonwealth of Pennsylvania
 - Chief Deputy Attorney General Nancy A. Walker serves as Attorney General Josh Shapiro's designee
- An individual appointed by the Speaker of the House of Representatives
 - Mr. Hank Butler
- An individual appointed by the President Pro Tempore of the Senate
 - Ms. Joanne Manganello
- An individual appointed by the leader of the House Minority caucus
 - Mr. Lance Claiborne
- An individual appointed by the leader of the Senate Minority caucus
 - Mr. Drew Simpson

Act 85 included specific instructions and requirements to guide the work of the Joint Task Force:

- (1) Create a workplan that outlines how to approach its duties.
- (2) Examine and evaluate the commonwealth's existing enforcement efforts.
- (3) Ensure commonwealth agencies are assessing penalties for violations of employee misclassification laws.
- (4) Review current procedures and establish best practices for accepting and processing complaints.
- (5) Identify barriers that prevent commonwealth agencies from sharing information about and coordinating employee misclassification identification and enforcement.
- (6) Develop recommendations for statutory changes as necessary to address worker misclassification more effectively.
- (7) Determine how much revenue is lost annually to the a) General Fund; b) Workers' Compensation Administrative Fund; c) and the UC Trust Fund because of employee misclassification.
- (8) Prepare a plan of action with businesses, labor organizations, and the community to increase public awareness of employee misclassification and to reduce its pervasiveness and harmful effects.

The Joint Task Force has submitted its annual report to the General Assembly by March 1, 2022, as required by Act 85 of 2020.

In the report, the members of the Joint Task Force include estimates of the cost of misclassification to the UC Trust Fund, the Workers' Compensation system, and the General Fund. The report also includes 15 unanimously agreed upon recommendations to the General Assembly to address the problem of misclassification of employees.

Analysis and Conclusions

The COVID-19 pandemic continued to have a considerable impact over job site visits and the number of cases that the Bureau addressed in 2021.

In 2021, the Joint Task Force on Misclassification of Employees began its public meetings on the serious nature of misclassification and the widespread impacts it can have on state and local areas. It will continue to meet until its statutory authority expires in December 2022.

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.

The Bureau will continue its educational efforts by proactively engaging industry organizations and workers through informative presentations.

The Bureau will continue its cooperative collaboration with OUCTS. As a result of those referrals, the Bureau has already collected \$34,000 from 13 contractors in violation.

ADDENDUM

Contractors Who Paid Act 72 Fines in 2021

| CONTRACTOR IN VIOLATION | FINE AMOUNT PAID | DISTRICT OFFICE |
|---|------------------|-----------------|
| AJ's Carpentry | \$6,973.06 | Harrisburg |
| All Phase Fence Co. Inc | \$1,500.00 | Philadelphia |
| Allegheny City Electric | \$1,500.00 | Pittsburgh |
| Angelilli Services LLC | \$500.00 | Harrisburg |
| Blinov Constriction LLC | \$5,000.00 | Pittsburgh |
| Brant Builders Inc | \$3,750.00 | Harrisburg |
| Buterbaugh Construction LLC | \$1,000.00 | Harrisburg |
| Carpenter's Tool LLC | \$750.00 | Harrisburg |
| Chase Construction *First payment | \$3,600.00 | Philadelphia |
| Citaly LLC | \$3,000.00 | Harrisburg |
| Citline-Hamilton Builders LLC | \$25,875.00 | Scranton |
| CJM Property Maintenance Inc | \$2,250.00 | Scranton |
| Coffee Run Construction LLC | \$750.00 | Harrisburg |
| Commercial Flooring Professionals Inc | \$2,500.00 | Harrisburg |
| Commercial Interiors North America LLC | \$10,500.00 | Philadelphia |
| Detwiler Roofing LLC | \$41,250.00 | Harrisburg |
| E Morales Drywall LLC | \$12,000.00 | Harrisburg |
| Final Grade Inc | \$2,400.00 | Harrisburg |
| Geiers Construction & Ironwork | \$3,000.00 | Harrisburg |
| GPR Drywall Service LLC | \$9,500.00 | Altoona |
| Grant Hilfiger Contracting LLC | \$1,500.00 | Scranton |
| Hamacher Contracting LLC | \$2,250.00 | Altoona |
| JE Horst Builder LLC | \$13,500.00 | Harrisburg |
| JN Wire | \$2,000.00 | Philadelphia |
| JS General Contracting Inc | \$6,000.00 | Altoona |
| Lebanon Valley Concrete Contractors LLC | \$750.00 | Harrisburg |
| Marc E Fenker Inc | \$500.00 | Scranton |
| Markles Home Improvements | \$3,000.00 | Harrisburg |
| McVicar General Services | \$2,000.00 | Harrisburg |
| MPC Construction Inc | \$400.00 | Scranton |
| Oheler Masonry | \$1,500.00 | Philadelphia |
| Painting Excellence | \$750.00 | Philadelphia |
| Riano Brothers LLC | \$5,250.00 | Altoona |
| RL Groves & Sons Inc | \$6,000.00 | Harrisburg |
| Ryan Wenger Construction LLC | \$2,250.00 | Harrisburg |

| | | |
|-----------------------------|---------------------|--------------|
| Scott Hoar Siding & Windows | \$4,000.00 | Harrisburg |
| Super Seal Coating | \$750.00 | Pittsburgh |
| Superior Construction | \$6,000.00 | Harrisburg |
| Swan Paving & Concrete Inc | \$1,500.00 | Philadelphia |
| Window Specialists Inc | \$750.00 | Harrisburg |
| Win-Weld LLC | \$1,500.00 | Harrisburg |
| Y&O Metal Framing LLC | \$144,400.00 | Altoona |
| TOTAL | \$344,148.06 | |