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Construction Industry Tax Fraud Dramatically Reduces Government Revenue and Undermines the American Dream

The gap between what taxpayers pay to the federal government and what they should pay is over \$450 billion a year.¹ Our country is being starved of resources that can help build schools and reduce class sizes, improve infrastructure, increase funding for first responders, and help veterans without adding anything more to the deficit.

The construction industry has been exposed as a major contributor to tax losses—responsible for a conservative estimated loss of \$2.6 billion a year in state and federal income taxes and Social Security and Medicare taxes. Those losses are the result of a staggering 1.2 million construction workers being paid off the books and 300,000 misclassified as independent contractors.² As has been seen in various reports, the construction industry leads the pack with off-the-books payments more common than misclassification by more than two to one.³ Simply put, these practices amount to tax fraud, and in construction, it is not a small-job thing—it happens frequently on large commercial projects. Our investigations have revealed cases involving hundreds of workers. We have seen tax fraud on construction projects at schools, military bases, veteran’s hospitals,⁴ universities, convention centers, hotels and condominium towers. Many suffer because of these illegal practices, including workers, honest contractors and taxpayers.

¹ H. Wayne Cecil and Teresa A. King, *Understanding the Federal Tax Gap, A Closer Look at Declining IRS Enforcement Activities*, *The CPA Journal* (October 2017), available at, <https://www.cpajournal.com/2017/11/06/understanding-federal-tax-gap> (accessed December 12, 2018).

² Smart Cities Preval, *SmartCitiesPrevail.org* (February 14, 2019) (A study done for the United Brotherhood of Carpenters and Joiners of America of tax losses in 2017 due to unreported wages and independent contractor misclassification of construction workers in the United States. The losses do not include city income taxes, business taxes, federal and state unemployment contributions or losses due to under-reported income).

³ See, *Contract to Cheat*, *McClatchy*, September 2014. This multi-part series explored fraud in construction, principally on tax-payer funded projects, in eight states ; Yvonne Yen Liu and Daniel Flaming, *Sinking Underground; The Growing Informal Economy in California Construction*, 1,2, 7 (2014) ; Dale Belman and Richard Block, *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, School of Labor and Industrial Relations, Michigan State University, 9 (2008). Both available at StopTaxFraud.net.

⁴ See, e.g., Sally Dworak-Fisher, *Workers Persevere to Hold Construction Contractors Accountable*, Shriver Center (2014)(Detailing allegations of workers misclassified as independent contractors at Walter Reed and John Hopkins hospitals).

It is obvious that voluntary compliance with our nation's employment and tax laws is evaporating within the construction industry. It is the industry's duty to become a good citizen by changing its destructive course. But lack of effective civil and criminal enforcement is also a major contributor to the crisis. Clearly, it is the duty of our government, at all levels, to protect law-abiding employers, their employees and taxpayers by collecting taxes owed.

Billions in tax dollars are stolen every year

Contractors engaged in tax fraud evade paying federal, state and local taxes, overtime and workers' compensation premiums, and they shirk safety precautions.⁵ These illegal savings allow scofflaws to underbid law-abiding employers. Because of the fiercely competitive nature of the industry, tax fraud has led to a downward spiral. Employers in many markets are faced with either joining in or going out of business.

The intentionality of the conduct is unmistakable. Non-reporting overshadows misclassification, and a growing number of large construction companies use crooked subcontractors or law-breaking labor brokers, shell companies and check cashing stores in their schemes.⁶ Their violations of basic labor and employment tax laws gain them a competitive edge while they use their subcontract relationship with labor brokers or crooked subcontractors as a shield against liability.⁷

The latest study by the IRS of taxes lost to misclassification was in 1984. Even then, the study disclosed, 15 percent of all employers misclassified their workforces, while the construction industry was the worst violator, at 19.8 percent.⁸ The resulting yearly loss in tax revenue, in 2006 dollars, was estimated at \$2.72 billion for all industries.⁹

⁵ See, e.g., *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, Occupational Safety & Health Admin., U.S. Department of Labor, 2, 6 and 8 (2015) (discussing how widespread misclassification of employees increases the likelihood of injuries).

⁶ See, e.g., David Borum and Geoffrey Branch, *Shell games: How construction cons steal workers-comp premiums*, *Journal of Insurance Fraud in America*, February 2017, reprinted by *Property Casualty 360* at, <https://www.propertycasualty360.com/2017/04/25/how-construction-cons-steal-workers-comp-premiums> (accessed Sept. 12, 2018) (describing the use of shell company identities by construction contractors in workers' compensation premium fraud schemes).

⁷ Demetria Kalodimos, *Some contractors avoid workers' comp to win low construction bids*, *WSMV*, February 17, 2016; and Michael Riley, *Labor brokers cut costs, corners: Fast-growing firms exploit immigrants to feed construction industry*, *Denver Post*, February 16, 2003.

⁸ *Employers do not Always Follow Internal Revenue Service Worker Determination Rulings*, Treasury Inspector General for Tax Administration, June 14, 2013, 1, available at, <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf> (accessed Sept. 12, 2018); and Natwar Gandhi, *Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors*, GAO/T-GGD-196-130, 1, 13 (June 20, 1996).

⁹ *Employment Arrangements: Improved Outreach could Help Ensure Proper Worker Classification*, GAO-06-565, 2 (July 2006).

More recent state and local studies of fraud in the construction industry have revealed even more staggering tax losses, making it obvious that the 2006 estimate was extremely conservative:

- In California there has been a 400 percent increase in illegal conduct since 1972, driving federal employment tax losses to \$302 million in 2011 alone,¹⁰
- \$115 million in federal income and employment taxes were lost in Tennessee in 2006,¹¹
- \$1.06 billion in federal income taxes was lost in Texas in 2012,¹²
- \$26.3 million loss of state taxes in New Jersey,¹³ and
- Twenty-five percent of New York City construction workers should be treated as employees but are not, leading to an \$11 million loss in city income taxes.¹⁴

The United States is not the only country facing this negative trend. Construction Industry tax fraud is a serious problem in Canada as well. The underground economy in Canada accounted for \$45.6 billion of economic activity in 2013.¹⁵ The largest slice of that activity came from the residential construction industry, amounting to 27.8 percent of the total, or \$12.7 billion, of the underground economy.¹⁶ A 2004 study of Ontario's underground construction economy put the annual losses in tax revenue and to the Workplace Safety and Insurance Board at greater than \$1.5 billion.¹⁷

Workers, honest contractors and voters want to see an end to tax fraud

Construction workers' and their families lose significant earnings because of fraud. Unreported employees earn just 52 cents for every dollar paid to payroll employees, and misclassified workers earn only 64 cents.¹⁸ (That is, when they are paid at all; the construction industry is also a leader in the heinous practice of wage theft.)¹⁹ On top of it all, "self-employed" workers

¹⁰ Liu, *supra* note 1 at 31.

¹¹ William Canak and Randall Adams, *Misclassified Construction Employees in Tennessee, v* (2010). Available StopTaxFraud.net.

¹² *Build a Better Texas: Construction Working Conditions in the Lone Star State*, Workers Defense Project and Community Engagement at University of Texas at Austin, 46 (2013). Available at StopTaxFraud.net.

¹³ Oliver Cooke, Deborah Figart and John Foonjian, *The Underground Construction Economy in New Jersey*, Stockton University William J. Hughes Center for Public Policy, 3 and 9 (2016).

¹⁴ *Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City's Construction Industry*, Fiscal Policy Institute, 20-21 (2007).

¹⁵ *The Underground Economy in Canada, 2013*, Statistics Canada, available at, <https://www150.statcan.gc.ca/n1/daily-quotidien/160620/dq160620b-eng.htm> (Accessed December 12, 2018).

¹⁶ *Id.*

¹⁷ Tim Armstrong and John O'Grady, *Attacking the Underground Economy in the ICI Sector on Ontario's Construction Industry*, I (March 2004), available at, <http://www.ogradey.on.ca/Downloads/Papers/Attacking%20The%20Underground%20Economy%20In%20The%20ICI%20Sector%20Of%20Ontario's%20Construction%20Industry.pdf> (accessed December 18, 2018).

¹⁸ Liu, *supra* note 1 at 2, 11 and 12.

¹⁹ Tom Juravich, Essie Ablavsky and Jake Williams, *The Epidemic or Wage Theft in Residential Construction in Massachusetts*, UMass Amherst Labor Center, 1-2 (May 11, 2015)

are expected to pay their income and employment taxes, their employers' employment taxes and shoulder the burden of injury and unemployment. Undoubtedly, the loss of wages²⁰ and safety net protections due to tax fraud is making the American dream for construction-worker families just that—a dream.

Worker advocates are not alone in calling for more rigorous law enforcement. Many employers in the industry want it as well.²¹ Law-abiding contractors are tired of losing work to outlaws and seeing their taxes and workers' compensation insurance costs rise while their unlawful competitors prosper.

The desire to clamp down on employment abuses is supported by Democratic, Republican and Independent voters.²² Seventy percent of voters believe that the increase in the use of subcontracted labor is bad for workers and 84 percent said it was a serious problem.²³ An overwhelming 71 percent of voters (67 percent among Republicans) want to see upper-tier companies held liable for their subcontractors' unpaid wages, unemployment insurance contributions, workers' compensation and Social Security taxes.²⁴ Clearly, workforce abuses are seen by voters as a threat to their economic well-being, and they want something done about it.

Stopping tax fraud is challenging for law enforcement

Stopping tax fraud in the construction industry is challenging for law enforcement. The growth of illegal activity coexists with an Internal Revenue Service that is increasingly incapable of meaningful enforcement. Cases of egregious employment tax violations have tripled while enforcement resources for the IRS have diminished.²⁵ Consequently, those who violate employment-tax laws feel emboldened. Many employers do not correct their behavior, even after receiving an SS-8 determination from the IRS stating that they have misclassified employees as independent contractors.²⁶ Misclassification and off-the-books employment

²⁰ Alejandro Cancino, *A growing way to cut pay: Companies treating workers as contractors*, Chicago Tribune, June 24, 2015.

²¹ Doug Burton, *To help NC businesses, end the misclassification fraud*, News & Observer (Op-Ed), June 3, 2015, available at StopTaxFraud.net; David Schechter, *Contractors slash bids by avoiding taxes, state lacks enforcement*, WFAA.Com, July 12, 2011.

²² Hart Research Associates, *Contracted Out: Finding from a National Voter Survey* (October 19, 2016), available at <http://www.nelp.org/content/uploads/Contracted-Out-NELP-National-Voter-Survey-Findings.pdf> (accessed December 7, 2018).

²³ *Id.* at 4 and 6.

²⁴ *Id.* at 7.

²⁵ A More Focused Strategy is Needed to Effectively Address Egregious Employment Tax Crimes, Treasury Inspector General for Tax Administration, March 21, 2017, available at <https://www.treasury.gov/tigta/iereports/2017reports/2017IER004fr.pdf> (accessed Sept. 12, 2018).

²⁶ *Employers do not Always Follow*, *supra* note 6, and *Understanding the Federal Tax Gap*, *supra* note 1.

further compound the tax losses that already occur among sole proprietors, who have been found to pay significantly less of their tax obligations than they should.²⁷

A primary law-enforcement flaw is that various law enforcement agencies frequently operate in “silos.” That is, they fail to share critical information or coordinate their investigations. For instance, a 2009 report from the Government Accountability Office criticized the Occupational Safety and Health Administration and the Wage and Hour Division, both within the U.S. Department of Labor (USDOL), for not sharing information and working together.²⁸ Some states have gotten the message and formed task forces to break out of the silo mentality.²⁹ There is an attempt at better coordination within the federal government as well. The USDOL and the IRS have signed a memorandum of understanding, but lack of coordination is still an issue.³⁰

Another significant problem is that law enforcement frequently focuses solely on crooked subcontractors or labor brokers, because they are low-hanging fruit and easier to pursue. But contractors can readily replace them. Accordingly, for enforcement to be effective, agencies must hold contractors who hire law-breakers accountable, either through conspiracy, joint employer findings or vicarious liability. Lawmakers in California, the District of Columbia, Maryland and Nevada have met this challenge by making upper-tier contractors automatically liable for the wage theft committed by their subcontractors.³¹

We all benefit when we fight construction industry tax fraud

The construction industry has been corrupted by an epidemic level of unlawful business practices that have ballooned to claim a wide swath of victims. Billions in federal, state and local taxes are going uncollected. Workers, honest businesses and taxpayers deserve protection.

²⁷ U.S. Gov’t Accountability Office, GAO-07-1014, *Tax Gap: A Strategy for Reducing the Gap Should Include Options for Addressing Sole Proprietor Noncompliance*, 3 & 9-10 (2007); and Natwar Gandhi, U.S. Gov’t Accountability Office, GAO/T-GGD-96-130, *Testimony Before the Subcommittee on Oversight Committee on Ways and Means; Tax Administration: Issues in Classifying Workers As Employees or Independent Contractors*, at 1 & 7 (1996).

²⁸ *Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, U.S. Government Accountability Office, 17 and 21 (August, 2009).

²⁹ See, e.g., Andre Burvant, *GAME ON: Louisiana Department of Revenue and Other State Agencies Look to Even the Score on Employee Misclassification*, Jones Walker Announcements, Tax News, March 7, 2018 (describing the Louisiana GAMEON task force), reprinted at, <https://www.cookingwithsaltlaw.com/2018/03/game-on-louisiana-department-of-revenue-and-other-state-agencies-look-to-even-the-score-on-employee-misclassification/> (accessed September 28, 2018); Exec. Order No. 17, N.Y. (2007) and Exec. Order No. 159, N.Y. (2016); and *Joint Task Force on Worker Exploitation and Employee Misclassification* (2018)(New York State misclassification web site), available at, <https://www.ny.gov/end-worker-exploitation/task-force-combat-worker-exploitation> (accessed December 7, 2018). Other states with task forces include Colorado, New Jersey and Massachusetts.

³⁰ *Additional Actions are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, Treasury Inspector General for Tax Administration (February 20, 2018), available at, <https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf> (accessed December 7, 2018).

³¹ Cal. Lab. Code §218.7; D.C. Code §32-1301, 2018 MD. Ch. 17 SB 853 and Nev. Rev. Stat. §608.150.

An array of measures need to be taken. Law enforcement agencies need to be given the resources to do their jobs effectively, and they need to break out of their silos and work together. Immigration reform is needed so workers will not fear standing up for their rights. Upper-tier contractors must be held accountable. The economic advantage for contractors who hire law-breakers must be taken away. Otherwise, tax fraud will continue to grow and billions will continue to be lost—billions of tax dollars that could improve our security, reduce the deficit, rebuild our crumbling infrastructure, build schools and secure the American dream for our children.