# HOUSE BILL 09-1310

# MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

# ANNUAL COMPLIANCE REPORT

# COLORADO REVISED STATUTES—TITLE 8, ARTICLE 72

Submitted to the Business, Labor, and Technology Committee of the Senate and the Economic and Business Development Committee of the House of Representatives

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Prepared in compliance with Colorado Revised Statutes Title 8, Article 72 by staff of the Colorado Department of Labor and Employment

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#### **EXECUTIVE SUMMARY**

Worker misclassification is the practice of an employer treating a worker as an independent contractor who should be a wage or salaried employee. When an employee is improperly classified as an independent contractor, the employer does not pay certain payroll-related taxes and fees, and an independent contractor is not covered by an employer's workers' compensation policy, wage and hour laws, and is generally excluded from employer-provided benefit plans.

Nationally, approximately 7.4 percent of total workers in the United States were classified as independent contractors, according to the Bureau of Labor Statistics in 2005.

A study conducted on behalf of the U.S. Department of Labor in 2000 found that 10 to 30 percent of workers were misclassified as independent contractors.

In Colorado, total audit results from the time period studied—June 2009 through December 2010—found that 14.2 percent of workers were misclassified.

Worker misclassification results in impacts to the Department of Revenue, the Unemployment Insurance Program, the Division of Workers' Compensation, and Labor Market Information.

The estimated financial impact to the state include \$167 million loss in income tax revenues annually, and during the audit period studied, \$744,359 in underpaid unemployment premiums and interest.

The Colorado Department of Labor and Employment (CDLE) recommends that the state does not adopt a common definition of an employee. CDLE also recommends that the employee-misclassification statute continue as it is currently written.

#### **HOUSE BILL 09-1310 REPORTING REQUIRMENTS**

Pursuant to House Bill (HB) 09-1310 (CRS 8-72-114, et seq.), CDLE is required to submit a report no later than two years following June 2, 2009, providing:

- Information on the operation of the division to investigate complaints of worker misclassification and enforce this statute, specifying at least the following:
  - o The number of complaints submitted to the Division of Employment and Training.
  - o The number of complaints investigated.
  - o The outcome of investigations, including whether any employers were found to have misclassified workers and the amount of unemployment insurance premiums, and interest not collected as a result of misclassified workers, and fines imposed against such employers.
  - o A recommendation regarding whether the division's functions pursuant to this section should be continued, modified, or repealed.
  - o Any other issues or information the executive director determines appropriate.
- Information gathered in the statewide study conducted since the passage of HB 09-1310, which included:
  - o The state departments, divisions, and agencies that are affected by worker misclassification.
  - o The amount of state revenue that is lost or not collected due to the misclassification of workers.
  - o Estimates of how widespread the problem of worker misclassification is and whether particular industries are more likely to engage in the misclassification of workers.
  - o Consideration of whether state law should specify a uniform definition of the employment relationship, and if so, how it should be defined.
  - o Any other issues the executive director determines appropriate.

This report complies with the requirements.

#### BACKGROUND AND STATUTE OVERVIEW

Worker misclassification is the practice of an employer treating a worker as an independent contractor who should be a wage or salaried employee. If an employee is improperly classified as an independent contractor, the employer does not pay certain payroll-related taxes and fees, such as social security, income tax, unemployment insurance, and workers compensation. In such cases, the worker is responsible for the payment of these payroll-related taxes and may not be afforded certain protections provided to employees. See Table 1 for a summary of payroll-related taxes.

Workers classified as independent contractors are not covered by wage and hour laws or an employer's workers' compensation policy and are often expected to carry their own workers' compensation policy, and are generally excluded from employer-provided benefit plans. Workers misclassified as independent contractors, may not have any workers' compensation coverage or may erroneously believe they are not eligible for unemployment insurance benefits. As a result, they may not receive minimum wage or overtime and may never apply for unemployment benefits, resulting in severe economic consequences to not only the misclassified worker and the worker's dependents, but also to the worker's community.

Table 1: General l Colorado	Table 1: General Differences in tax responsibilities of employees versus independent contractors in Colorado									
	Employees	Independent Contractors (IC)								
Federal Income Tax	Although paid by the employee, the business withholds from employees' pay	ICs are responsible for paying money owed to the IRS, possibly at a higher rate								
State Income Tax	Although paid by the employee, the business withholds from employees' pay	ICs are responsible for paying money owed to the state income tax agency, possibly at a higher rate								
Social Security and Medicare Taxes	Business withholds half from employees' pay and pays other half	ICs are responsible for paying full amount owed, but ICs don't always contribute, which impacts benefits at retirement								
Federal Unemployment Tax	Business pays full amount	No taxes paid								
State Unemployment Tax	Business pays full amount	No taxes paid								
Workers' Compensation	Business pays full amount	ICs may be required to pay for own coverage plan to work for a business								

Responsible employers may misclassify workers because they are unaware of proper classification requirements or are misinformed. Other employers intentionally misclassify workers to reduce costs associated with employment and to gain an unfair competitive advantage.

During economic downturns, misclassification increases as employers look for ways to reduce costs and compete. As an employer struggles to keep their business viable during a recession, using independent contractors reduces payroll and benefit costs.

#### **Nationally**

According to the U.S. Department of Labor, Bureau of Labor Statistics, approximately 10.3 million workers, or 7.4 percent, of total employees in the United States were classified as independent contractors in 2005.

Several states and federal agencies have undertaken similar studies to analyze the impacts of worker misclassification and to try to find ways to improve detection and prevention.

A study conducted for the U.S. Department of Labor (USDOL) in 2000 reported that the percentage of audited employers with misclassified workers ranged from approximately 10 to 30 percent nationwide<sup>1</sup>. Studies conducted in other states, such as New York, have reported that each year an estimated 10.3 percent of the total private sector workforce and 14.9 percent of workers in the construction industry are misclassified<sup>2</sup>. CDLE's findings of the percentage of workers misclassified are similar to the findings in other states.

Detailed audit data is provided Exhibit A.

#### Colorado

In Colorado, HB 09-1310 became law on June 2, 2009 (see Exhibit B). CRS 8-72-114 describes the impacts of a business that misclassifies an employee as an independent contractor and requires the Unemployment Insurance Program (the Program) to:

- Publicize a formal complaint process, and investigate written complaints, as appropriate.
- Impose a fine on employers who willfully disregard the law and misclassify an employee as an independent contractor.
- Provide, upon request, an advisory opinion on whether an individual should be classified as an employee or an independent contractor.
- Conduct a study on the issue of worker misclassification.

In order to meet the requirements, the Program established a complaint process and publicized the process to employers, unions, attorney groups, certified public accounting firms, and other interested parties. The complaint process can also be found on the CDLE Web site.

The Program also added information about the complaint process to the Notice to Workers poster published by CDLE. The poster is mailed to every new employer. Employers are required by statute, CRS 8-74-101 (2) to display this poster in conspicuous locations in the workplace or other locations where it can be seen by workers.

Pursuant to HB 09-1310, the Program also created a nonbinding advisory opinion process. Rules were adopted and became effective on May 31, 2010, that established the process for employers to request and receive an advisory opinion, as well as establishing the fees associated with issuing the advisory opinion.

Additionally, there are provisions in the law to assess fines if the Program finds that an employer willfully disregarded the law by misclassifying its employees as independent contractors. If it is determined that an employer is willfully disregarding the law on more than one occasion, the Program may also issue an order prohibiting an employer from contracting or receiving funds from contracts with the state for up to two years after the date of such order.

This report provides a summary of the Program's audit results from July 2009 through December 2010, the period immediately following the passage of HB 09-1310.

### ADMINISTRATION OF THE STATUTE

# **Audit Results**

The Program, like many other state unemployment insurance programs, performs audits that are both random and targeted. The purpose of performing targeted audits is to identify incidents of

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<sup>&</sup>lt;sup>1</sup> Planmatics, Inc., 2000

<sup>&</sup>lt;sup>2</sup> Cornell University ILR School, 2007

misclassification by employers in industries where misclassification is prevalent. Colorado selects targeted audits in several ways—through written complaints received as a result of HB 09-1310, analysis of Form 1099-MISC data received from the Internal Revenue Service (IRS), and selection of industries where misclassification may occur at a higher rate than other industries.

Between July 1, 2009, and December 31, 2010, the Unemployment Insurance Audit unit conducted 2,162 audits. Of these audits, 1,725 were random and 437 were targeted. Of the 437 targeted audits, 31 were the result of a written complaint received after the passage of HB 09-1310.

During this same period, the Program received 74 written complaints about worker misclassification from workers and employers. Of the complaints received, 31 audits have been completed. Of the 31 completed audits, 28 employers, or 93.5 percent, misclassified workers. The percentage of workers misclassified for the 31 completed written-complaint audits was 78.1 percent.

Table 2: Details from Written-Complaint Audits Completed							
Additional Chargeable Wages	\$2,613,095						
Workers Added	1,158						
Percentage of Employers Found Misclassifying	93.5%						
Percentage of Misclassified Workers	78.1%						
Premiums Assessed – One Year	\$49,559						
Interest Assessed – One Year	\$19,723						
All Years Premiums & Interest Assessed	\$225,170						

The other 406 targeted audits completed during the same period found 63.5 percent of employers had misclassified workers. Of the 406 audits completed, 258 employers were found to have misclassified at least one worker and had underreported unemployment premiums totaling \$13,382,671. The percentage of workers misclassified was 31.7 percent.

Of the 1,725 randomly selected audits completed during the same period, 643 employers, or 37.3 percent, had misclassified workers. Additionally, of the total workers audited, 7.8 percent of workers were found to be misclassified. Finding a lower percentage of misclassification in randomly selected audits and a higher percentage in the targeted audits is expected since the goal of targeted audits is to audit where misclassification is most likely to occur. For the purposes of reporting the rate of misclassification in Colorado, the results from all the audits completed during this time period were used. There are approximately 1.8 million employed workers in Colorado. Assuming the 14.2 percent of misclassified workers found in the audit sampling is representative of the total population of employed workers in Colorado, the Program estimates the number of misclassified workers in Colorado to be 255,723 by applying 14.2 percent to the total number of workers in Colorado (1,800,869) in Exhibit A.

Table 3: Audits Completed July 2009 to December 2010											
			Percent of	Number of	Percent of						
	Number of	Workers	Workers	Employers	Employers						
Type of Audit	Audits	Misclassified	Misclassified	Misclassifying	Misclassifying						
Written-Complaint	tten-Complaint 31 1,158		78.1%	29	93.5%						
Audits											
Targeted Audits	406	3,118	31.7%	258	63.5%						
Random Audits	1,725	3,281	7.8%	643	37.3%						
<b>Total Audits</b>	2,162	7,557	14.2%	930	43.0%						

Comparatively, all audits completed in the 18 months prior to the passage of HB 09-1310 (January 2008 through June 2009) found that 38.6 percent of employers misclassified workers and 9.1 percent of workers were misclassified. Since the Program conducted a higher percentage of random audits in the years prior to the passage of HB 09-1310, the rates of misclassification are expectantly lower. Based on the 9.1 percent rate of worker misclassification found during this time period, the total number of misclassified workers is estimated to be 163,879. See Table 4 for the results of audits completed in the last five years.

Table 4: Audits Completed Last Five Years											
	Number of Workers		Percent of Workers								
Calendar Year	Misclassified	Total Workers Audited	Misclassified								
2006	4,381	55,956	7.8%								
2007	4,645	61,199	7.6%								
2008	4,942	55,769	8.9%								
2009	3,760	31,653	11.9%								
2010	5,277	36,252	14.6%								

In 2010 the Program continued the ratio of randomly selected audits to targeted audits, completed 1,349 audits, and discovered 5,277 workers who were misclassified. In 2010 14.6 percent of all workers audited were found to be misclassified. This is a higher percentage than the January 2008 to June 2009 audit period (9.1 percent) and a very similar finding for audits completed from July 2009 to December 2010 (14.2 percent).

### Fines and Penalties for Willful Disregard

The statute allows the Program to levy a fine of up to \$5,000 for the first offense of willful disregard of the law and up to \$25,000 for any subsequent offense. To date no fines have been levied.

There have been no instances in which CDLE has issued orders prohibiting any employers from contracting with the state of Colorado.

CDLE has sought the advice of the Attorney General's Office in determining the standard of willful disregard and is working with interested stakeholders on adopting rules to administer employee misclassification fines.

# **Advisory Opinions Issued**

Employers seeking advice on proper classification of workers can submit a written request for an advisory opinion from the Unemployment Insurance Program. To date one request for an advisory opinion has been received, an advisory opinion was provided, and the \$100 fee for the opinion has been deposited into the Employee Misclassification Advisory Opinion Fund.

#### IMPACTS TO THE STATE

#### **State Departments Affected**

The Colorado state departments affected by worker misclassification include CDLE and the Department of Revenue. Within CDLE, the Division of Workers' Compensation and the Unemployment Insurance Program and Labor Market Information within the Division of Employment and Training are affected.

The impacts to the Department of Revenue and the Program are financial. Additionally, the impacts to the Program and the Division of Workers' Compensation also affect the workers. Finally, the impacts to Labor Market Information are statistical inaccuracies.

- *The Department of Revenue*. Since independent contractors tend to under-report wages, the amount the state collects in income taxes is reduced. The reduction in revenue impacts all state programs funded by state general revenue, including education and human services.
- *The Unemployment Insurance Program.* Employers do not report wages paid to independent contractors. Thus, fewer wages are reported and fewer unemployment premiums are collected to pay unemployment benefits. Additionally, benefit claims filed by improperly classified workers require investigations to be conducted, slowing the benefit payment process.

- *The Division of Workers' Compensation*. Employers generally do not cover independent contractors in the case of an injury on the job. While this does not have a direct fiscal impact on the Division of Workers' Compensation, it has an impact on the entire workers' compensation system and on the worker.
- Labor Market Information. Labor Market Information provides a variety of data to the Bureau of Labor Statistics. The Unemployment Insurance Program provides the source data for many of these statistics. Employees and wages that are not reported due to misclassification result in missing and/or inaccurate data, resulting in undercounted employees and wages.

#### **Colorado Revenue Loss**

The practice of misclassifying workers as independent contractors instead of employees has a direct financial impact on the State of Colorado. This is true because a number of state programs are funded through employer assessments against employee wages and through taxes levied against wages defined as income. The impact of underreporting wages paid to misclassified workers ranges from reduced collections to fund unemployment benefits and certain workers' compensation benefits, to reductions in both cash and general revenue funding used to support the administrative operations of a number of state programs.

### **Unemployment Insurance Premiums**

Unemployment insurance premiums are paid by employers based on the wages paid to each employee. Although the dollar amount paid by each employer varies, the premiums collected fund state unemployment benefits.

The percentage of underreported premiums in Colorado for the 18-month audit period was 10.3 percent; however, analysis of all audits completed in a three-year period (2008—2010) show the percentage of underreported premiums to be 7.4 percent.

For the 31 completed written-complaint audits, the amount of premiums assessed was just under \$50,000 for one year, interest was just under \$20,000 for one year, and the total for all years audited was \$225,170.

Table 5: Audits Completed July 2009 to December 2010 – Revenue Impact												
		Chargeable										
	Number of	Wages	Premiums	Interest	Total							
Type of Audit	Audits	Underreported	Underpaid	Underpaid	Underpayment							
Written-Complaint	31	\$2,613,095	\$49,559	\$19,723	\$69,282							
Audits												
Targeted Audits	406	\$13,382,671	\$332,517	\$133,859	\$466,376							
Random Audits	1725	\$10,208,403	\$163,083	\$75,618	\$238,701							
Total	2162	\$26,204,169	\$545,159	\$229,199	\$744,359							

Audits completed during the 18-month audit period revealed \$545,159 of underpaid unemployment insurance premiums and unpaid interest totaled \$229,199 for a total of unreported premiums and interest due of \$744,359. This was the amount underpaid specific to the audits completed. The average premium loss per worker as a result of misclassification is \$66.90 for this same period. This was determined by identifying those premiums that were underreported due to misclassification (\$505,555) and dividing it by the number of workers misclassified (7,557).

By assuming a misclassification rate of 14.2 percent is representative of the total worker population in Colorado, the Program estimates the number of workers misclassified statewide to be 255,723 annually. The amount of premium underpayments annually to the Colorado Unemployment Insurance Trust Fund

because of worker misclassification is approximately \$17,108,000 per year in 2009 and 2010. This was determined by multiplying \$66.90 by the estimated number of workers misclassified in Colorado.

Since the number of targeted audits increased during the 18-month period following the passage of HB 09-1310, it is reasonable that a greater number of misclassified workers were detected than in previous years.

For comparison, audits results from January 2008 to June of 2009 show unemployment insurance premiums not paid were \$387,775 for those audits completed. The average premium loss per worker as a result of misclassification was \$55.69 for this same period. The average premium loss per worker was determined by dividing the premiums that were under reported because of misclassification (\$357,617) by the number of workers misclassified (6,422) for this period. Applying the \$55.69 per worker average premium loss to the estimated number of misclassified workers in Colorado results in an estimated annual underpayment of \$14,241,214 in unemployment premiums.

#### Workers' Compensation Financial Impact

The state of Colorado does not directly insure employers for workers' compensation liability. Employers are instead covered by insurance policies obtained from commercial insurers or Pinnacol Assurance. Additionally, some larger employers are self-insured meaning these employers pay "out-of-pocket" all medical and wage replacement benefits resulting from a workplace injury or illness. Misclassification of workers does not mean a loss of insurance premiums for the state, but the Division of Workers' Compensation assesses a percentage of insurance premiums to fund administrative operations and pay benefits from the Subsequent Injury Fund and the Major Medical Insurance Fund. Insurers pay this assessment based on the total premium revenue paid by covered employers. If an employee is misclassified as an independent contractor, the premiums for that employee are not paid; resulting in a reduction of revenue to the Division.

Misclassification of workers is a loss suffered overall by the state's workers' compensation insurance industry. In cases where an insurer covers a particular employer, the insurer loses premium revenue if any workers are misclassified as independent contractors when they are in fact employees. The loss for the insurer can drastically increase if such employees are injured on the job and the insurer must pay medical and wage replacement benefits. Insurers are, however, authorized by statute to retroactively collect premiums when it is discovered that misclassification has occurred.

The circumstances can be even more serious if a particular employer misclassifies all workers as independent contractors and carries no insurance. If an employee is injured on the job in that event, the employer is directly liable for all medical and wage replacement benefits owed under the Workers' Compensation Act. This can be a devastating cost to any business and can result in the closure of the business. As dire as this may be for the employer, it can be far worse for the employee who may now have no income in the form of wage replacement benefits or medical coverage. Even if the individual has health insurance, an insurer typically denies medical coverage on a work-related injury. This can devastate the life of an injured worker and the worker's dependents. It is important to note that some states maintain an uninsured claim fund to help cover the costs in these situations; Colorado does not have such a fund.

#### Colorado Income Tax Revenue

According to published data and other studies on worker misclassification, misclassified workers underreport income at a greater rate than employees because taxes are not withheld from income paid by the employer. Additionally, independent contractors can deduct expenses that employees cannot to reduce income tax liability.

The IRS estimates that employees (wage earners) report 99 percent of total income, while independent contractors report approximately 68 percent of total income<sup>3</sup>. The IRS issued a report in 1984 that estimated nationally, employers misclassified approximately 15 percent of employees as independent contractors. As reported in a 2009 report issued by the U.S. Government Accountability Office (GAO)<sup>4</sup>, the IRS is reviewing the national extent of worker misclassification as part of a broader study of employment tax compliance and is expected to issue an updated report no earlier than 2013.

Based on the audits completed during 2009 and 2010, the estimated Colorado Income Tax revenue lost due to worker misclassification is \$167 million per year<sup>5</sup> (see detailed audit data in Exhibit A). This estimate is based on an assumption that 30 percent of the income earned by misclassified workers will not be reported to the Colorado Department of Revenue. Applying Colorado's income tax rate of 4.63 percent to the average wage earned in Colorado during the same 2009—2010 period (\$47,061) provides an estimate of income that will not be reported and therefore income tax not paid.

#### **INDUSTRY ANALYSIS**

A study commissioned by USDOL in 2000 found that from 10 to 30 percent of businesses audited in nine states had misclassified employees as independent contractors<sup>6</sup>. Several studies that have been conducted on worker misclassification have found misclassification occurring in 13 to 23 percent of all industries with individual state estimates ranging from 5 percent and up to 42 percent.

Table 6: Extent of Misclassification Indicated in Various Studies – All Industries (Percent of											
Workers Misclassified)											
Study	Low	Moderate	High								
USDOL 2000 Study by Planmatics, Inc. <sup>5</sup>	5-10%	13-23%	29-42%								
Government Accountability Office 1996		15%									
Massachusetts 2004	13%	19%									
Maine 2005	11%										
New York 2007	10.3%										
Illinois 2006		17.8%									

For Colorado, the percentage of workers that were misclassified as compared to the total number of workers audited reveals that 14.2 percent of workers were misclassified across the 2,162 audits completed from July 2009 to December 2010 (See Table 3).

Analysis based on the 2,162 audits completed from July 2009 through December 2010 indicates that worker misclassification is a significant issue in Colorado with the percent of employers misclassifying at 43 percent overall, with misclassification in specific industries ranging from 14.3 to 84.2 percent.

Analysis of the data based on the percentage of misclassified workers indicates that the top five industries with the highest rate of misclassification based on the percent change in wages reported are transportation and warehousing, construction, administrative support and waste management and remediation services, mining, and finance and insurance. Looking at the industries that had the highest rate of misclassification based on the number of workers misclassified indicates the top five industries are transportation and warehousing; education services; arts, entertainment, and recreation; information; and construction.

Table 7: Top Five Industries with High Incident of Misclassification							
By Percent Change in Wag	es Reported	By the Number of Workers Misclassified					
Industry	Industry Percent		Number of				

<sup>&</sup>lt;sup>3</sup> United States General Accounting Office, 1996

<sup>4</sup> United States Government Accountability Office, August 2009

<sup>&</sup>lt;sup>5</sup> The estimates regarding lost income tax revenue were made by CDLE based on data from the 2009 report issued by the U.S. GAO, information from Labor Market Information, and Unemployment Insurance Audit data. The estimates were not provided or made by the Colorado Department of Revenue.

<sup>&</sup>lt;sup>6</sup> Planmatics Inc., 2000

	Change in		Workers
	Wages		Misclassified
Transportation & Warehousing	39%	Transportation & Warehousing	84.2%
Construction	13%	Education Services	57.9%
Administrative Support &			
Waste Management &		Arts, Entertainment, &	
Remediation Services	13%	Recreation	55.6%
Mining	12%	Information	53.8%
Finance and Insurance	12%	Construction	53.3%

#### RECOMMENDATIONS

#### **Definition of Employee**

Whether a worker is an employee or an independent contractor is defined in statute, not by a business and the worker. In order to consider whether state law should specify a uniform definition of the employment relationship, the Program analyzed statutes associated with the definition of an employee and considered confidential attorney-client recommendations from the Attorney General's Office.

The programs to be included in this consideration are the Unemployment Insurance Program, Division of Workers' Compensation, the Division of Labor, and the Department of Revenue.

While each program uses a different definition of an employee—the Colorado Employment Security Act (unemployment insurance laws), the Workers' Compensation Act (workers' compensation laws), the Colorado Wage Claim Act (labor laws), and the Colorado Income Tax Act (revenue laws)—there are some similarities in the definition of an employee in the unemployment and workers' compensation laws (see Exhibit C).

Prior to 1995, the Workers' Compensation Act included language that specifically referenced the unemployment insurance laws in determining whether a worker is an employee. In 1995, the legislature amended the Workers' Compensation Act to remove these references and replaced them with language similar to that contained in the Colorado Employment Security Act. The changes in 1995 also added that exclusive work for one business is not conclusive evidence that a worker is an employee for workers' compensation purposes. Conversely, there are decisions issued by the Industrial Claims Appeals Office that support that exclusive work for a business may be conclusive evidence to determine if a worker is an employee for unemployment purposes.

The Colorado Wage Claim Act essentially states that if a worker is an employee under the unemployment or workers' compensation laws, the worker is an employee under the labor laws with two conditions:

- The worker's service must benefit the employer.
- The employer must have the ability to command when, where, and how much services are to be performed.

Although each statute is similar, the definition used by each program suits each program's needs and its legislative purpose. Each program functions independently of the other, and the potential exists for a common definition to create more conflict than it would prevent.

The Department of Revenue uses the IRS common-law definition. The facts that provide evidence of the degree of control and independence fall into three categories:

- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker's job controlled by the payer?

• Type of Relationship: Are there written contracts or employee type benefits, such as pension plan, insurance, vacation pay, etc.? Will the relationship continue and is the work performed a key aspect of the business?

When the revenue laws and its legislative intent are considered, the proper administration of a common definition for employees becomes more difficult. The three aforementioned programs are intended to provide a benefit or protection to the worker; the revenue laws do not provide a benefit or protection but instead are intended to simplify the preparation of a state income tax return and the interpretation of state income tax laws. Thus, revenue laws use a narrower definition of employment in a test to determine if the business controls the worker. The other three laws specifically exempt themselves from the control test. These significant differences again increase the potential for conflict since the purpose of each program differs.

The Program recommends that the state of Colorado does not utilize a common definition of an employee.

### The Future of the Employee Misclassification Law

This report must also provide a recommendation as to whether investigations on worker misclassification and all associated processes enacted in CRS 8-72-114 should be continued, modified, or repealed.

The Program recommends that the statute continue as currently written. The results of the audits completed based on written complaints establishes that the statute is effective and is being effectively administered. Increased unemployment insurance premiums have been collected and additional workers added as employees. Although no fines have been levied to date, there is a legal standard in practice that the courts have applied regarding willful disregard, which must be established for the Program to levy a fine. HB 09-1310 has not been in effect long enough to establish that legal standard.

Furthermore, the total audit results and rate of misclassification demonstrate that worker misclassification is a significant issue in Colorado, warranting consideration in statute, as written. Misclassification undermines fair market competition and negatively impacts the business environment in Colorado. In order to promote a competitive business environment the complaint process, advisory opinion, penalties, and fines should remain intact.

### OTHER WORKER MISCLASSIFICATION ACTIONS

At the federal level, several bills regarding worker misclassification have been introduced in recent years but have yet to be enacted. In April 2011, the Payroll Fraud Prevention Act was introduced to ensure that an employee is not improperly classified as a nonemployee.

At the state level, the percentage of unemployment insurance premiums underreported due to worker misclassification has been reported to range from 0.26 percent to 7.46 percent nationally. <sup>7</sup> State unemployment programs enact laws or rules to determine whether an individual is an employee for unemployment insurance purposes.

In recent years, many states' unemployment insurance programs have taken action to address worker misclassification. Some of these states, such as Iowa and New York, have formed task forces to study and find best practices for enforcing the laws. Others have passed laws to standardize the definition of an employee. Still others, including Massachusetts, Pennsylvania, and Wisconsin have enacted laws that impose severe penalties on employers who incorrectly classify an employee as an independent contractor. In addition to monetary penalties, some states allow for criminal prosecution for both intentional and unintentional violations.

<sup>&</sup>lt;sup>7</sup> Planmatics, Inc., 2000

#### **GLOSSARY OF TERMS**

Chargeable wages—The wages paid to an employee on which the employer is required to pay unemployment insurance premiums each calendar year. The chargeable wage is the first \$10,000 paid to each employee.

Industrial Claim Appeals Office—The unit of CDLE responsible for the review of both Unemployment Insurance decisions issued by Hearing Officers, and Workers' Compensation decisions issued by the Administrative Law Judges.

Interest—The amount of money accrued on premiums that are due but unpaid. The interest rate is 18 percent per annum or 1.5 percent per month on the total amount past due.

Premiums—The amount of money paid into the Unemployment Compensation Fund by employers used to pay state unemployment benefits.

Random audit—An audit performed by the Unemployment Insurance Program on a business that is selected indiscriminately.

Targeted audit—An audit performed by the Unemployment Insurance Program on a business that is selected based on its industry code.

Written-complaint audit—An audit performed by the Unemployment Insurance Program on a business as a result of a complaint that it is misclassifying employees as independent contractors.

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# Third Quarter through Second Quarter 2010 Averages Private Ownership Employment Data

Industry Description	NAICS	<b>Employers</b>	<b>Employment</b>	Total Wages, \$	Taxable Wages, \$	Contributions, \$
Agriculture, Forestry, Fishing and Hunting	11	1,395	13,579	391,292,714	170,275,381	2,934,779
Mining and Oil and Gas Extraction	21	1,526	22,926	2,195,880,763	289,957,521	7,409,279
Utilities	22	410	8,325	691,159,443	90,110,579	730,161
Construction	23	19,646	120,227	5,715,142,760	1,523,499,569	59,148,748
Manufacturing	31-33	5,537	125,776	7,355,246,906	1,396,021,016	34,359,698
Wholesale	42	12,614	91,160	6,014,724,350	1,045,321,225	22,674,632
Retail	44-45	17,665	236,334	6,310,914,167	2,386,261,003	34,708,896
Transportation and Warehousing	48-49	3,625	57,668	2,425,941,852	669,394,871	13,810,500
Information	51	3,204	72,779	5,722,198,860	814,010,053	23,469,565
Finance and Insurance	52	10,539	99,289	6,916,762,348	1,141,850,334	22,902,418
Real Estate and Rental and Leasing	53	9,507	41,859	1,714,352,409	478,642,440	10,021,018
Professional and Technical	54	29,075	166,901	13,090,832,364	1,971,512,628	47,897,968
Management of Companies	55	1,644	28,496	3,446,471,694	484,223,887	9,372,071
Administrative and Waste Services	56	10,023	131,928	4,358,480,531	1,607,563,652	37,983,076
Educational Services	61	2,252	28,539	1,055,380,138	215,426,513	4,257,779
Health Care and Social Assistance	62	13,456	228,540	10,070,396,129	1,729,539,148	27,428,777
Arts, Entertainment and Recreation	71	2,526	44,578	1,367,824,519	434,128,257	7,433,129
Accommodations and Food Service	72	11,901	216,333	3,744,589,433	2,106,986,301	30,060,222
Other Services	81	12,596	65,173	2,135,882,344	668,390,993	11,819,919
Unclassified	99	367	459	28,585,079	7,876,012	221,245
Totals		169,508	1,800,869	84,752,058,803	19,230,991,383	408,643,880

Annual average wage - Colorado		47,061
Percent of total workers misclassified		14.2%
Number of misclassified workers		255,723
Estimated income not reported (30%)	\$3	,610,379,650
Colorado Income Tax Rate		4.63%
Estimated annual income revenue loss	\$	167,160,578
Number of misclassified workers		255,723
Average premium loss per misclassified worker	\$	66.90
Estimated annual UI premium loss	\$	17,107,895

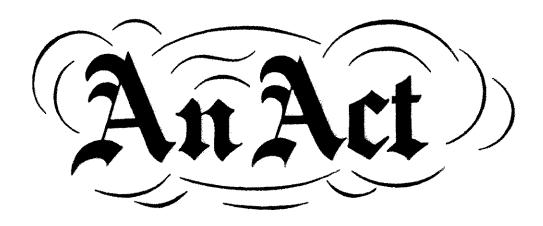
Exhibit A

		Number of	Total Wages Post	Total Wa	ges Under	Chargeable Wages		Chargeable Vages Under	Prei	miums Post			Premiums	_	remiums Under Reported Mis-	Beginning	Added	% of Total workers mis-	# Fmplovers Mis-	% Employers Mis-
Code	Code		Audit		orted	Post Audit		Reported		Audit	Interes	t l	Jnder Reporte		classification	Worker Count	Workers	classified	classifying	classifying
	Total Audits 07-2009 to 12-2010																			
11	Agriculture, Forestry, Fishing and Hunting	17	\$ 7,666,020	\$	258,248	\$ 3,189,068	\$	135,303	\$	34,226	\$ 2	235	\$ 1,161	\$	854	519	41	7.3%	8	47.1%
21	Mining	24	\$ 42,518,671	\$ 4,	567,898	\$ 5,505,569	\$	786,999	\$	69,260	\$ 2,7	763	\$ 12,382	\$	12,042	561	139	19.9%	10	41.7%
22	Utilities	11	\$ 20,655,852	\$	9,213	\$ 3,935,900	\$	19,834	\$	15,687	\$	43	\$ 114	\$	91	324	2	0.6%	2	18.2%
23	Construction	456	\$ 191,401,834	\$ 17,	038,939	\$ 58,707,794	\$	7,528,237	\$	1,587,623	\$ 79,6	003	\$ 186,880	\$	167,213	7477	1885	20.1%	243	53.3%
31	Manufacturing	12	\$ 2,795,594	\$	51,440	\$ 1,263,977	\$	24,062	\$	10,547	\$	00	\$ 262	\$	259	181	12	6.2%	5	41.7%
32	Manufacturing	25	\$ 17,878,710	\$	532,571	\$ 5,064,800	\$	215,313	\$	70,173	\$ 9	88	\$ 2,028	\$	1,851	558	101	15.3%	6	24.0%
33	Manufacturing	50	\$ 60,098,637	\$	598,704	\$ 14,301,144	\$	287,587	\$	260,947	\$ 2,3	393	\$ 5,819	\$	4,999	1625	52	3.1%	19	38.0%
42	Wholesale Trade	129	\$ 89,441,984	\$ 2,	583,386	\$ 19,698,130	\$	638,598	\$	271,997	\$ 3,8	355	\$ 11,439	\$	10,683	2238	163	6.8%	44	34.1%
44	Retail Trade	159		,	834,317	., ,	\$	1,123,675	\$	313,842		<b>7</b> 25	\$ 13,035		11,356	4034	260	6.1%	58	36.5%
45	Retail Trade	68			517,373			,	\$	82,028	,	44	\$ 4,547		3,837	1082	227	17.3%	34	50.0%
48	Transportation and Warehousing	50	, , , , , , , , , , , , , , , , , , , ,		622,199			.,,	\$	148,647	\$ 16,8		\$ 31,202		30,330	980	338	25.6%	25	50.0%
49	Transportation and Warehousing	19		+ -,	049,688	+ ,,		-,,	\$	189,573	,	375	\$ 84,772		81,917	2550	461	15.3%	16	84.2%
51	Information	26	+ -,, -	*	519,553	, - ,		188,287	\$	42,594	,	<b>'</b> 61	\$ 5,670		5,659	275	47	14.6%	14	53.8%
52	Finance and Insurance	70	- , - ,		050,267		\$	-, -	\$	81,702		91	\$ 9,649		7,877	675	164	19.5%	26	37.1%
53	Real Estate and Rental and Leasing	90	\$ 27,870,655		787,514		\$	524,070	\$	113,016		767	\$ 5,205		4,114	1013	139	12.1%	33	36.7%
54	Professional, Scientific, and Technical Services	240	\$ 144,423,272	\$ 5,	649,860	\$ 27,482,812	\$	2,043,485	\$	338,661	\$ 10,3		\$ 32,869		32,160	2927	475	14.0%	71	29.6%
55	Management of Companies and Enterprises	7	\$ 1,674,490	\$	92,131	\$ 466,033	\$	27,786	\$	8,104	\$	302	\$ 728	\$	221	49	4	7.5%	1	14.3%
	Administrative and Support and Waste																			
56	Management and Remediation Services	120			525,396			2,538,889	\$	,	\$ 30,4		\$ 59,059		58,307	3332	1346	28.8%	54	45.0%
61	Educational Services	19			292,703			234,660	\$	58,921		157	\$ 9,252		9,238	478	82	14.6%	11	57.9%
62	Health Care and Social Assistance	191	* -,,		,	\$ 33,425,578		1,232,767	\$	372,933		46	\$ 15,140		14,164	4288	467	9.8%	89	46.6%
71	Arts, Entertainment, and Recreation	36			052,233			,	\$	250,683		705	\$ 7,122		6,865	1569	225	12.5%	20	55.6%
72	Accommodation and Food Services	155		. ,	-, -	\$ 29,552,855		1,064,504	\$	274,651	+ -,	323	\$ 13,673		11,874	6170	448	6.8%	65	41.9%
81	Other Services (except Public Administration)	155			,	\$ 17,115,655		859,311	\$	234,998	\$ 6,8	340	\$ 19,079		17,831	2270	331	12.7%	62	40.0%
92	Public Administration	27	., .,		199,962			199,962	\$	36,808	\$	73	\$ 165		79	571	18	3.1%	9	33.3%
99	Not Specified	1	\$ 137,780		137,780			61,903	\$	1,560		)53	\$ 1,560		1,560	0	20	100.0%	1	100.0%
00	Not Specified		\$ 1,158,773		,	\$ 623,346	_	339,030	\$	20,030	,	26	\$ 12,350		10,175	18	110	85.9%	4	80.0%
TOT	AL .	2162	\$ 1,233,256,078	\$ 67,	600,215	\$ 337,610,855	\$	26,204,169	\$ :	5,290,620	\$ 229,2	200	\$ 545,159	\$	505,555	45764	7557	14.2%	930	43.0%

							Chargeable						Premiums Under			% of Total		
		Number of	Total Wages Post		ages Under	Chargeable Wages	Wages Under	Pre	emiums Post			niums	Reported Mis-	Beginning	Added	workers mis-		% Employers Mis-
Code		Audits	Audit	Rej	ported	Post Audit	Reported		Audit	Interest	Under R	Reported	classification	Worker Count	Workers	classified	classifying	classifying
	Targeted Audits																	
11	Agriculture, Forestry, Fishing and Hunting	2	\$ 355,788	\$	25,944	\$ 182,112	\$ 8,764	. \$	-,	\$ 103	\$	358	\$ 55	26	2	7.1%	1	50%
21	Mining	9	\$ 14,224,112	\$ 1	,503,378	\$ 2,053,181	\$ 349,629	\$	,	\$ 661	\$	2,414	\$ 2,398	220	77	25.9%	5	56%
22	Utilities	2	\$ 15,566,000	\$	-	\$ 2,166,074	\$ 10,000	\$	8,262	\$ 14	\$	40	\$ 40	217	1	0.5%	1	50%
23	Construction	181	\$ 45,110,477	\$ 10	,967,668	\$ 16,815,077	\$ 4,911,980	\$	457,949	\$ 54,125	\$ 12	29,188	\$ 119,165	1749	1176	40.2%	118	65%
31	Manufacturing	2	\$ 86,802	\$	26,299	\$ 52,600	\$ 12,385	\$	378	\$ 44	\$	87	\$ 87	6	4	40.0%	2	100%
32	Manufacturing	0	\$ -	\$	-	\$ -	\$ -	\$	-	\$ -	\$	-	\$ -	0	0	0.0%	0	0%
33	Manufacturing	8	\$ 18,908,513	\$	163,404	\$ 4,281,336	\$ 93,468	\$	114,964	\$ 886	\$	2,298	\$ 2,228	471	15	3.1%	3	38%
42	Wholesale Trade	13	\$ 24,273,617	\$ 1	,570,629	\$ 4,582,960	\$ 276,210	\$	62,117	\$ 2,120	\$	6,816	\$ 6,816	470	57	10.8%	7	54%
44	Retail Trade	22	\$ 8,328,322	\$ 1	,385,847	\$ 2,418,868	\$ 615,982	\$	23,868	\$ 2,914	\$	5,818	\$ 5,323	226	107	32.1%	12	55%
45	Retail Trade	8	\$ 3,340,435	\$	282,376	\$ 1,670,031	\$ 97,816	\$	28,736	\$ 724	\$	1,985	\$ 1,985	357	65	15.4%	6	75%
48	Transportation and Warehousing	10	\$ 1,343,590	\$	812,641	\$ 718,868	\$ 406,567	\$	21,802	\$ 1,725	\$	8,053	\$ 7,897	58	72	55.4%	6	60%
49	Transportation and Warehousing	15	\$ 5,487,890	\$ 4	,430,666	\$ 2,437,343	\$ 1,941,798	\$	74,379	\$ 24,888	\$ 6	64,693	\$ 61,838	87	278	76.2%	12	80%
51	Information	8	\$ 5,192,932	\$	313,838	\$ 1,191,272	\$ 112,428	\$	25,069	\$ 873	\$	3,268	\$ 3,268	114	30	20.8%	6	75%
52	Finance and Insurance	5	\$ 1,888,296	\$	241,741	\$ 396,229	\$ 121,061	\$	5,567	\$ 443	\$	965	\$ 427	34	27	44.3%	2	40%
53	Real Estate and Rental and Leasing	12	\$ 4,833,112	\$	388,811	\$ 1,374,324	\$ 248,906	\$	20,200	\$ 520	\$	1,775	\$ 1,730	173	37	17.6%	5	42%
54	Professional, Scientific, and Technical Services	28	\$ 24,460,287	\$ 2	,721,046	\$ 5,129,379	\$ 968,655	\$	74,697	\$ 5,952	\$ 1	19,313	\$ 18,937	466	232	33.2%	18	64%
55	Management of Companies and Enterprises	2	\$ 1,182,182	\$	51,678	\$ 307,749	\$ 334	\$	3,310	\$ 1	\$	4	\$ -	34	0	0.0%	0	0%
56	Administrative and Support and Waste Managem	22	\$ 13,648,350	\$ 2	,991,176	\$ 6,410,921	\$ 1,491,520	\$	120,548	\$ 24,027	\$ 4	45,099	\$ 45,021	1101	389	26.1%	11	50%
61	Educational Services	3	\$ 1,110,466	\$	184,088	\$ 521,420	\$ 166,935	\$	15,507	\$ 1,746	\$	7,554	\$ 7,554	57	54	48.6%	3	100%
62	Health Care and Social Assistance	15	\$ 18,992,669	\$	922,707	\$ 3,306,572	\$ 396,634	. \$	27,164	\$ 1,913	\$	6,086	\$ 5,943	402	61	13.2%	10	67%
71	Arts, Entertainment, and Recreation	8	\$ 1,645,421	\$	338,721	\$ 1,010,665	\$ 299,482	\$	13,101	\$ 1,957	\$	4,815	\$ 4,795	175	122	41.1%	7	88%
72	Accommodation and Food Services	10	\$ 1,032,924	\$	96,205	\$ 682,276	\$ 77,128	\$	5,778	\$ 350	\$	810	\$ 809	123	50	28.9%	5	50%
81	Other Services (except Public Administration)	16	\$ 2,921,201	\$	785,772	\$ 1,393,193	\$ 434,160	\$	24,016	\$ 3,328	\$	9,346	\$ 8,733	140	132	48.5%	13	81%
92	Public Administration	0	\$ -	\$	-	\$ -	\$ -	\$	-	\$ -	\$	-	\$ -	0	0	0.0%	0	0%
99	Not Specified	1	\$ 137,780	\$	137,780	\$ 61,903	\$ 61,903	\$	1,560	\$ 1,053	\$	1,560	\$ 1,560	0	20	100.0%	1	100%
00	Not Specified	4	\$ 937,322	\$	649,382	\$ 513,242	\$ 278,926	\$	16,595	\$ 3,494	\$ 1	10,175		1	110	99.1%	4	100%
TOT	AL	406	\$ 215,008,490	\$ 30	,991,797	\$ 59,677,593	\$ 13,382,671	\$	1,169,983	\$ 133,859	\$ 33	32,517	\$ 316,783	6707	3118	31.7%	258	63.5%

						Chargeable				Premiums Under			% of Total		
Code	<u>a</u>	Number of Audits	Total Wages Post Audit	Total Wages Under Reported	Chargeable Wages Post Audit	Wages Under Reported	Premiums Post Audit	Interest	Premiums Under Reported	Reported Mis- classification	Beginning Worker Count	Added Workers	workers mis- classified	# Employers Mis- classifying	% Employers Mis- classifying
Oout		1101001		Порологи										,	
4.4	Written Complaint Audits	0	Φ.	Φ.	Φ.	•	•	•	•	•		0	0.00/		0.00/
11	Agriculture, Forestry, Fishing and Hunting	0	*	\$ -	5 -	\$ -	<b>5</b> -	\$ -	\$ -	5 -	0	0	0.0%	0	0.0%
21	Mining	0	*	\$ -	5 -	\$ -	<b>5</b> -	\$ -	\$ -	5 -	0	0	0.0%	0	0.0%
22	Utilities		\$ -	\$ -	5 -	5 -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%		0.0%
23	Construction	8	-,,	\$ 1,915,102	\$ 1,404,586	\$ 703,985	\$ 32,398	\$ 6,333	\$ 14,370		136				87.5%
31	Manufacturing	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%		0.0%
32	Manufacturing	1	\$ 811,579	\$ 269,917	\$ 212,348	\$ 41,013	\$ 1,911	\$ 111	\$ 369	\$ 369	14	15			100.0%
33	Manufacturing	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%		0.0%
42	Wholesale Trade	1	\$ 203,659	\$ 48,609	\$ 145,010	\$ 14,090	\$ 3,654	\$ 62	\$ 355	\$ 355	42	2	4.5%	. 1	100.0%
44	Retail Trade	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%	0	0.0%
45	Retail Trade	0	*	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%		0.0%
48	Transportation and Warehousing	5	\$ 1,951,342	\$ 1,375,749	\$ 837,940	\$ 607,934	\$ 25,523	\$ 8,926	\$ 18,788	\$ 18,788	22	128		-	100.0%
49	Transportation and Warehousing	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%		0.0%
51	Information	1	\$ 78,588	* -/		\$ 18,445		\$ 460	\$ 1,535	\$ 1,535	3	5	62.5%		100.0%
52	Finance and Insurance	1	\$ 51,931	\$ 18,066	\$ 30,795	,	\$ 1,977	\$ 584	\$ 1,150		2	3	60.0%		100.0%
53	Real Estate and Rental and Leasing	1	\$ 85,519	\$ 15,132	\$ 35,619	\$ 14,391	\$ 1,111	\$ 101	\$ 449	\$ 449	3	3	50.0%	. 1	100.0%
54	Professional, Scientific, and Technical Services	3	\$ 1,792,229	\$ 1,404,518	\$ 597,062	\$ 524,894	\$ 4,135	\$ 169	\$ 3,595	\$ 3,595	10	91	90.1%	3	100.0%
55	Management of Companies and Enterprises	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%	0	0.0%
56	Administrative and Support and Waste Managem	4	\$ 970,353	\$ 820,058	\$ 620,867	\$ 550,114	\$ 6,033	\$ 2,107	\$ 5,636	\$ 5,636	11	726	98.5%	4	100.0%
61	Educational Services	1	\$ 76,285	\$ 24,415	\$ 42,415	\$ 12,415	\$ 382	\$ 39	\$ 112	\$ 112	3	2	40.0%	. 1	100.0%
62	Health Care and Social Assistance	2	\$ 1,338,780	\$ 2,917	\$ 506,819	\$ 941	\$ 8,320	\$ 4	\$ 11	\$ 11	65	5	7.1%	. 1	50.0%
71	Arts, Entertainment, and Recreation	1	\$ 137,820	\$ 67,689	\$ 90,282	\$ 45,268	\$ 2,275	\$ 243	\$ 1,141	\$ 1,141	14	15	51.7%	. 1	100.0%
72	Accommodation and Food Services	1	\$ 21,401	\$ 21,401	\$ 20,501	\$ 20,501	\$ 517	\$ 142	\$ 517	\$ 517	0	13	100.0%	. 1	100.0%
81	Other Services (except Public Administration)	1	\$ 70,133	\$ 60,133	\$ 51,201	\$ 41,201	\$ 1,905	\$ 443	\$ 1,533	\$ 1,533	0	14	100.0%	1	100.0%
92	Public Administration	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%	0	0.0%
99	Not Specified	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%	0	0.0%
00	Not Specified	0	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0	0	0.0%	0	0.0%
TOT	AL	31	\$ 10,978,339	\$ 6,084,251	\$ 4,638,944	\$ 2,613,095	\$ 93,760	\$ 19,723	\$ 49,559	\$ 48,275	325	1158	78.1%	29	93.5%

							Chargeable						Premiums Under			% of Total		
Code		Number of Audits	Total Wages Post Audit	Total Wages Und Reported	der Ci	hargeable Wages Post Audit	Wages Under Reported	Pr	remiums Post Audit	Interest		Premiums der Reported	Reported Mis- classification	Beginning Worker Count	Added Workers	workers mis- classified	# Employers Mis- classifying	% Employers Mis- classifying
Coul	L	Addits	Audit	Reported		1 OSt Addit	Reported		Audit	microsi	011	idei Reported	Classification	Worker Count	Workers	Classified	classifying	ciassilying
	Random Audits																	
11	Agriculture, Forestry, Fishing and Hunting	15	\$ 7,310,232	\$ 232,30	4 \$	3,006,957	\$ 126,539	\$	27,761	\$ 13	2 \$	803	\$ 799	493	39		7	46.7%
21	Mining	15	\$ 28,294,559	\$ 3,064,52	0 \$	3,452,388	\$ 437,370	\$	51,308	\$ 2,10	2 \$	9,968	\$ 9,644	341	62	15.4%	5	33.3%
22	Utilities	9	\$ 5,089,851	\$ 9,21	3 \$	1,769,825	\$ 9,834	. \$	7,425	\$ 2	9 \$	74	\$ 51	107	1	0.9%	1	11.1%
23	Construction	267	\$ 142,902,638	\$ 4,156,17	0 \$	40,488,132	\$ 1,912,272	\$	1,097,276	\$ 19,14	2 \$	- / -	\$ 34,962	5592	573	9.3%	118	44.2%
31	Manufacturing	10	\$ 2,708,792	\$ 25,14	1 \$	1,211,377	\$ 11,676	\$	10,169	\$ 5	6 \$	175	\$ 173	175	8	4.4%	3	30.0%
32	Manufacturing	24	\$ 17,067,131	\$ 262,65	5 \$	4,852,452	\$ 174,300	\$	68,262	\$ 87	8 \$	1,659	\$ 1,482	544	86	13.7%	5	20.8%
33	Manufacturing	42	\$ 41,190,124	\$ 435,30	0 \$	10,019,808	\$ 194,119	\$	145,983	\$ 1,50	7 \$	-,	\$ 2,771	1154	37	3.1%		38.1%
42	Wholesale Trade	115	\$ 64,964,708	\$ 964,14	7 \$	14,970,160	\$ 348,297		206,226	\$ 1,67	4 \$	4,268	\$ 3,512	1726	104	5.7%		31.3%
44	Retail Trade	137	\$ 60,628,984	\$ 1,448,47	0 \$	21,071,101	\$ 507,693	\$	289,974	\$ 2,81	1 \$	7,217	\$ 6,033	3808	153	3.9%	46	33.6%
45	Retail Trade	60	\$ 9,809,841	\$ 234,99	7 \$	4,399,285	\$ 163,552	\$	53,292	\$ 1,02	0 \$	2,562	\$ 1,852	725	162	18.3%	28	46.7%
48	Transportation and Warehousing	35	\$ 18,782,670	\$ 433,80	9 \$	6,249,567	\$ 248,350	\$	101,322	\$ 6,24	9 \$	4,361	\$ 3,645	900	138	13.3%	14	40.0%
49	Transportation and Warehousing	4	\$ 23,066,607	\$ 8,619,02	2 \$	9,145,427	\$ 1,404,225	\$	115,194	\$ 11,98	7 \$	20,079	\$ 20,079	2463	183	6.9%	4	100.0%
51	Information	17	\$ 4,288,908	\$ 165,17	0 \$	1,219,987	\$ 57,414	. \$	13,906	\$ 42	7 \$	867	\$ 856	158	12	7.1%	7	41.2%
52	Finance and Insurance	64	\$ 30,192,451	\$ 1,790,45	9 \$	5,948,440	\$ 636,216	\$	74,158	\$ 3,16	4 \$	7,535	\$ 6,300	639	134	17.3%	23	35.9%
53	Real Estate and Rental and Leasing	77	\$ 22,952,024	\$ 383,57	'1 \$	6,587,108	\$ 260,774	\$	91,704	\$ 1,14	6 \$	2,981	\$ 1,935	837	99	10.6%	27	35.1%
54	Professional, Scientific, and Technical Services	209	\$ 118,170,756	\$ 1,524,29	6 \$	21,756,371	\$ 549,935	\$	259,830	\$ 4,22	0 \$	9,961	\$ 9,628	2451	152	5.8%	50	23.9%
55	Management of Companies and Enterprises	5	\$ 492,309	\$ 40,45	3 \$	158,284	\$ 27,453	\$	4,794	\$ 30	1 \$	724	\$ 221	15	4	21.1%	1	20.0%
56	Administrative and Support and Waste Managem	94	\$ 30,224,975	\$ 714,16	2 \$	12,285,304	\$ 497,255	\$	274,827	\$ 4,35	9 \$	8,324	\$ 7,650	2220	231	9.4%	39	41.5%
61	Educational Services	15	\$ 14,072,642	\$ 84,19	9 \$	4,444,166	\$ 55,310	\$	43,033	\$ 67	2 \$	1,586	\$ 1,572	418	26	5.9%	7	46.7%
62	Health Care and Social Assistance	174	\$ 149,857,646	\$ 1,900,24	1 \$	29,612,187	\$ 835,193	\$	337,450	\$ 4,22	8 \$	9,043	\$ 8,211	3821	401	9.5%	78	44.8%
71	Arts, Entertainment, and Recreation	27	\$ 87,460,860	\$ 1,645,82	3 \$	6,611,788	\$ 139,735	\$	235,307	\$ 50	5 \$	1,167	\$ 929	1380	88	6.0%	12	44.4%
72	Accommodation and Food Services	144	\$ 48,942,242	\$ 1,158,67	4 \$	28,850,078	\$ 966,876	\$	268,356	\$ 4,83	2 \$	12,346	\$ 10,548	6047	385	6.0%	59	41.0%
81	Other Services (except Public Administration)	138	\$ 59,174,085	\$ 859,95	9 \$	15,671,261	\$ 383,951	\$	209,078	\$ 3,07	0 \$	8,200	\$ 7,565	2130	185	8.0%	48	34.8%
92	Public Administration	27	\$ 19,402,763	\$ 199,96	2 \$	19,402,763	\$ 199,962	\$	36,808	\$ 7	3 \$	165	\$ 79	571	18	3.1%	9	33.3%
99	Not Specified	0	\$ -	\$ -	\$	-	\$ -	\$	-	\$ -	\$	-	\$ -	0	0	0.0%	0	0.0%
00	Not Specified	1	\$ 221,451	\$ 171,45	1 \$	110,105	\$ 60,105	\$	3,435	\$ 1,03	3 \$	2,175	\$ -	17	0	0.0%	0	0.0%
TOT	AL	1725	\$ 1,007,269,249	\$ 30,524,16	7 \$	273,294,319	\$ 10,208,403	\$	4,026,877	\$ 75,61	8 \$	163,083	\$ 140,498	38732	3281	7.8%	643	37.3%



HOUSE BILL 09-1310

BY REPRESENTATIVE(S) Levy, Apuan, Court, McCann, Pace, Ryden, Casso, Fischer, Frangas, Gagliardi, Green, Merrifield, Middleton, Scanlan, Soper, Labuda, Todd; also SENATOR(S) Heath, Carroll M., Groff, Shaffer B.

CONCERNING THE MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS FOR PURPOSES OF THE "COLORADO EMPLOYMENT SECURITY ACT", AND MAKING AN APPROPRIATION THEREFOR.

Be it enacted by the General Assembly of the State of Colorado:

**SECTION 1.** Article 72 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

- 8-72-114. Employee misclassification investigations enforcement advisory opinions rules employee misclassification advisory opinion fund statewide study report definitions legislative declaration repeal. (1) The General Assembly Hereby Finds and Declares That:
- (a) MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS IN VIOLATION OF THE "COLORADO EMPLOYMENT SECURITY ACT" AND, IN PARTICULAR, THE PROVISIONS OF ARTICLE 70 OF THIS TITLE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

DEFINING THE EMPLOYMENT RELATIONSHIP, MAY POSE A SIGNIFICANT PROBLEM IN THIS STATE AND LEADS TO UNDERPAYMENT OF EMPLOYMENT TAXES THAT EMPLOYERS ARE OBLIGATED TO PAY THE STATE FOR COVERED EMPLOYMENT.

- (b) BUSINESSES THAT MISCLASSIFY EMPLOYEES GAIN AN UNFAIR COMPETITIVE ADVANTAGE OVER BUSINESSES THAT PROPERLY CLASSIFY EMPLOYEES AND PAY APPROPRIATE TAXES TO THE STATE.
- (c) When employees are misclassified, the protections available to properly classified employees against economic insecurity are unavailable to those misclassified employees, and the stream of revenue that should be paid to the state to provide protections to misclassified employees is not available.
  - (2) AS USED IN THIS SECTION:
  - (a) "ACT" MEANS THE "COLORADO EMPLOYMENT SECURITY ACT".
- (b) "COMPLAINANT" MEANS THE PERSON WHO FILES A COMPLAINT WITH THE DIVISION PURSUANT TO THIS SECTION.
- (c) "DIRECTOR" MEANS THE DIRECTOR OF THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.
- (d) "DIVISION" MEANS THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.
- (e) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF LABOR AND EMPLOYMENT.
- (f) "MISCLASSIFICATION OF EMPLOYEES" MEANS ERRONEOUSLY CLASSIFYING A PERSON AS AN INDEPENDENT CONTRACTOR, FREE FROM CONTROL AND DIRECTION OF THE EMPLOYER IN THE PERFORMANCE OF SERVICE FOR THE EMPLOYER, WHEN THE EMPLOYER CANNOT SHOW AN EXCEPTION, PURSUANT TO SECTION 8-70-103 (11), TO THE GENERAL RULE THAT SERVICE BEING PERFORMED FOR THE EMPLOYER IS PRESUMED TO BE EMPLOYMENT FOR PURPOSES OF THE ACT.

- (g) "RESPONDENT" MEANS THE PERSON AGAINST WHOM A COMPLAINT IS FILED PURSUANT TO THIS SECTION.
- (3) (a) THE DIVISION SHALL BE RESPONSIBLE FOR ACCEPTING AND INVESTIGATING COMPLAINTS REGARDING MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE REQUIREMENTS OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES AND PAYMENT OF TAXES.
- (b) ANY PERSON MAY FILE A WRITTEN COMPLAINT WITH THE DIVISION ALLEGING THAT A PERSON ENGAGED IN EMPLOYMENT IS BEING MISCLASSIFIED BY AN EMPLOYER AS AN INDEPENDENT CONTRACTOR. THE COMPLAINANT SHALL SPECIFY IN THE COMPLAINT THE FACTS SHOWING THAT THE PERSON CLASSIFIED AS AN INDEPENDENT CONTRACTOR IS ENGAGED IN EMPLOYMENT, AS DEFINED IN ARTICLE 70 OF THIS TITLE.
- (c) The director may investigate a complaint filed pursuant to this subsection (3) and shall focus on the investigation of the most egregious complaints or those complaints alleging intentional acts of misclassification of employees undertaken in order to gain a competitive advantage or to avoid the payment of taxes.
- (d) No later than thirty days after receipt of a complaint, the director shall determine whether or not an investigation is warranted. If the director determines that an investigation is warranted, the director shall notify the complainant and respondent that an investigation will be conducted and shall conduct the investigation in accordance with the act. The rules adopted pursuant to the act, and the complainant and respondent shall cooperate and provide information as necessary to facilitate the investigation.
- (e) (I) Upon conclusion of an investigation, the director shall issue a written order either dismissing the complaint or finding that the employer has engaged in the misclassification of employees and has failed to pay appropriate taxes for covered employment as defined in article 70 of this title.
- (II) IF THE DIRECTOR FINDS THAT AN EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION OF EMPLOYEES, THE DIRECTOR SHALL ORDER THE

- (III) UPON A FINDING THAT THE EMPLOYER, WITH WILLFUL DISREGARD OF THE LAW, MISCLASSIFIED EMPLOYEES, THE DIRECTOR MAY:
- (A) IMPOSE A FINE OF UP TO FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE FOR THE FIRST MISCLASSIFICATION WITH WILLFUL DISREGARD, AND FOR A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH WILLFUL DISREGARD, A FINE OF UP TO TWENTY-FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE; AND
- (B) Upon a second or subsequent misclassification with willful disregard, issue an order prohibiting the employer from contracting with, or receiving any funds for the performance of contracts from, the state for up to two years after the date of the director's order. Upon the issuance of such order, the director shall notify state departments and agencies as necessary to ensure enforcement of the order.
- (f) THE DIRECTOR SHALL PROVIDE A COPY OF THE WRITTEN ORDER TO THE RESPONDENT. THOSE PORTIONS OF THE WRITTEN ORDER THAT ARE NOT CONFIDENTIAL UNDER THE ACT SHALL BE A PUBLIC RECORD.
- (g) AN EMPLOYER SHALL HAVE THE RIGHT TO APPEAL THE DIRECTOR'S ORDER IN ACCORDANCE WITH SECTION 8-76-113.
- (4) (a) AN EMPLOYER MAY REQUEST A WRITTEN ADVISORY OPINION FROM THE DIRECTOR CONCERNING WHETHER THE EMPLOYER SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE FOR PURPOSES OF COMPLYING WITH THE ACT. THE EMPLOYER SHALL PROVIDE THE DIRECTOR WITH INFORMATION NECESSARY FOR THE DIRECTOR TO ISSUE AN ADVISORY OPINION.
- (b) Upon receipt of a request and pertinent information from an employer, the director shall issue an advisory opinion to the employer, indicating whether the employer should classify the individual as an employee in order to comply with the act. An opinion issued pursuant to this subsection (4) is only advisory, based on the information provided by the employer and the director's understanding of the circumstances at the time issued,

AND IS NOT BINDING ON THE DIVISION, THE EMPLOYER, OR ANY OTHER STATE OR LOCAL GOVERNMENTAL ENTITY.

- (c) The director shall promulgate rules in accordance with article 4 of title 24, C.R.S., establishing the process for issuing an advisory opinion and the fees to be charged the requesting employer to cover the director's and division's costs in providing the advisory opinion. Any fees charged pursuant to this subsection (4) for the costs associated with issuing an advisory opinion shall be deposited in the employee misclassification advisory opinion fund, which fund is hereby created. Moneys in the employee misclassification advisory opinion fund shall be subject to annual appropriation by the general assembly for the purposes of this subsection (4). Interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. At the end of any fiscal year, all unexpended and unencumbered moneys in the fund shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.
- (5) THE DIRECTOR, BY ALL MEANS REASONABLE AND WITHIN BUDGETARY CONSTRAINTS, SHALL PUBLICIZE THE COMPLAINT PROCESS ESTABLISHED IN THIS SECTION AND ITS AVAILABILITY TO THOSE WHO HAVE DISCOVERED MISCLASSIFICATION OF EMPLOYEES. THE DIRECTOR SHALL DEVELOP AND MAKE AVAILABLE FREE OF CHARGE TO EMPLOYERS A NOTICE EXPLAINING THE RIGHTS OF EMPLOYEES TO BE PROPERLY CLASSIFIED AND THE AVAILABILITY OF A COMPLAINT PROCESS PURSUANT TO THIS SECTION. EMPLOYERS SHALL POST THE NOTICE CONSPICUOUSLY IN THE WORKPLACE OR OTHERWISE WHERE IT CAN BE SEEN AS EMPLOYEES COME OR GO TO THEIR PLACES OF WORK.
- (6) (a) THE EXECUTIVE DIRECTOR SHALL CONDUCT A STATEWIDE STUDY OF THE ISSUE OF EMPLOYEE MISCLASSIFICATION, WHICH SHALL INCLUDE, WITHOUT LIMITATION, THE FOLLOWING INFORMATION:
- (I) THE STATE DEPARTMENTS, DIVISIONS, AND AGENCIES THAT ARE AFFECTED BY EMPLOYEE MISCLASSIFICATION;
- (II) THE AMOUNT OF STATE REVENUE THAT IS LOST OR NOT COLLECTED DUE TO THE MISCLASSIFICATION OF EMPLOYEES;

- (III) ESTIMATES OF HOW WIDESPREAD THE PROBLEM OF EMPLOYEE MISCLASSIFICATION IS AND WHETHER PARTICULAR INDUSTRIES ARE MORE LIKELY TO ENGAGE IN THE MISCLASSIFICATION OF EMPLOYEES;
- (IV) CONSIDERATION OF WHETHER STATE LAW SHOULD SPECIFY A UNIFORM DEFINITION OF THE EMPLOYMENT RELATIONSHIP AND, IF SO, HOW IT SHOULD BE DEFINED; AND
- (V) ANY OTHER ISSUES THE EXECUTIVE DIRECTOR DETERMINES APPROPRIATE.
- (b) THE EXECUTIVE DIRECTOR SHALL DEVOTE DEPARTMENT RESOURCES AS NECESSARY TO COMPLETE THE STATEWIDE STUDY.
- (c) THE EXECUTIVE DIRECTOR SHALL SEEK PUBLIC INPUT AND MAY CONDUCT PUBLIC HEARINGS OR APPOINT STUDY GROUPS AS NECESSARY TO OBTAIN INFORMATION NECESSARY TO COMPLETE THE STUDY.
- (7) NO LATER THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE EXECUTIVE DIRECTOR SHALL SUBMIT A REPORT ON THE STATEWIDE STUDY CONDUCTED PURSUANT TO SUBSECTION (6) OF THIS SECTION TO THE BUSINESS, LABOR, AND TECHNOLOGY COMMITTEE OF THE SENATE AND THE BUSINESS AFFAIRS AND LABOR COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OR THEIR SUCCESSOR COMMITTEES. THE REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE DIVISION TO INVESTIGATE COMPLAINTS OF EMPLOYEE MISCLASSIFICATION AND ENFORCE THIS SECTION, SPECIFYING AT LEAST THE FOLLOWING:
- (a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE DIVISION PURSUANT TO THIS SECTION;
- (b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY THE DIRECTOR;
- (c) The outcome of the complaints that were investigated, including whether any employers were found to have misclassified employees and the amount of taxes, interest, or fines imposed against such employers;
  - (d) A RECOMMENDATION REGARDING WHETHER THE DIVISION'S

FUNCTIONS PURSUANT TO THIS SECTION SHOULD BE CONTINUED, MODIFIED, OR REPEALED; AND

- (e) Any other issues or information the executive director deems appropriate.
- (8) SUBSECTIONS (6) AND (7) OF THIS SECTION AND THIS SUBSECTION (8) ARE REPEALED, EFFECTIVE JULY 1, 2012.
- SECTION 2. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the unemployment revenue fund created in section 8-77-106 (1), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine hundred seventy-five dollars (\$975) cash funds, or so much thereof as may be necessary, for the implementation of this act.
- (2) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the employee misclassification advisory opinion fund created in section 8-72-114 (4) (c), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine thousand eight hundred forty dollars (\$9,840) cash funds and 0.2 FTE, or so much thereof as may be necessary, for the implementation of this act.

SECTION 3. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Terrance D. Carroll

SPEAKER OF THE HOUSE OF REPRESENTATIVES Brandon C. Shaffer PRESIDENT OF THE SENATE

Marilyn Eddins

CHIEF CLERK OF THE HOUSE

OF REPRESENTATIVES

Karen Goldman

SECRETARY OF

June 2, 2009 at 5:44p. ..

THE SENATE

APPROVED

Bill Ritter, Jr.

GOVERNOR OF THE STATE OF COLORADO

Comparison of Independent Contractor Statutes									
<b>Unemployment Insurance: 8-70-115, CRS</b>	Workers' Compensation: 8-40-202, CRS								
(1)(b) Notwithstanding any other provision of this	(2)(a) Notwithstanding any other provision of this								
subsection (1) and notwithstanding the provisions of	section, any individual who performs services for pay								
section 8-80-101, service performed by an individual	for another shall be deemed to be an employee,								
for another shall be deemed to be employment,	irrespective of whether the common-law relationship								
irrespective of whether the common-law relationship	of master and servant exists, unless such individual is								
of master and servant exists, unless and until it is	free from control and direction in the performance of								
shown to the satisfaction of the division that such	the service, both under the contract for performance of								
individual is free from control and direction in the	service and in fact and such individual is customarily								
performance of the service, both under his contract for	engaged in an independent trade, occupation,								
the performance of service and in fact; and such	profession. or business related to the service								
individual is customarily engaged in an independent	performed. For purposes of this section, the degree of								
trade, occupation, profession, or business related to the	control exercised by the person for whom the service								
service performed. For purposes of this section, the	is performed over the performance of the service or								
degree of control exercised by the person for whom	over the individual performing the service shall not be								
the service is performed over the performance of the	considered if such control is exercised pursuant to the								
service or over the individual performing the service,	requirements of any state or federal statute or								
if exercised pursuant to the requirements of any state	regulation.								
or federal statute or regulation, shall not be considered.									
(c) To evidence that such individual is engaged in an	(b)(I) To prove that an individual is engaged in an								
independent trade, occupation, profession, or business	independent trade, occupation, profession, or business								
and is free from control and direction in the	and is free from control and direction in the								
performance of the service, the individual and the	performance of the service, the individual and the								
person for whom services are performed may either	person for whom services are performed may show by								
show by a preponderance of the evidence that the	a preponderance of the evidence that the conditions set								
conditions set forth in paragraph (b) of this subsection	forth in paragraph (a) of this subsection (2) have been								
(1) have been satisfied, or they may demonstrate in a	satisfied. The parties may also prove independence								
written document, signed by both parties, that the	through a written document.								
person for whom services are performed does not:	(II) To prove independence it must be shown that the								
	person for whom services are performed does not:								
(I) Require the individual to work exclusively for the	(A) Require the individual to work exclusively for the								
person for whom services are performed: except that	person for whom services are performed; except that								
the individual may choose to work exclusively for the	the individual may choose to work exclusively for								
said person for a finite period of time specified in the	such person for a finite period of time specified in the								
document;	document:								
(II) Establish a quality standard for the individual;	(B) Establish a quality standard for the individual;								
except that such person can provide plans and	except that the person may provide plans and								
specifications regarding the work but cannot oversee	specifications regarding the work but cannot oversee								
the actual work or instruct the individual as to how the	the actual work or instruct the individual as to how the								
work will be performed;	work will be performed;								
(III) Pay a salary or hourly rate but rather	(C) Pay a salary or at an hourly rate instead of at a								
a fixed or contract rate;	fixed or contract rate;								
(IV) Terminate the work during the contract period	(D) Terminate the work of the service provider during								
unless the individual violates the terms of the contract	the contract period unless such service provided								
or fails to produce a result that meets the specifications	violates the terms of the contract or fails to produce a								
of the contract;	result that meets the specifications of the contract;								
(V) Provide more than minimal training for the	(E) Provide more than minimal training for the								
individual;	individual;								

Comparison of Independent Contractor Statutes									
Unemployment Insurance: 8-70-115, CRS	Workers' Compensation: 8-40-202, CRS								
(VI) Provide tools or benefits to the individual; except	(F) Provide tools or benefits to the individual; except								
that materials and equipment may be supplied;	that materials and equipment may be supplied;								
(VII) Dictate the time of performance; except that a	(G) Dictate the time of performance; except that a								
completion schedule and a range of mutually	completion schedule and a range of negotiated and								
agreeable work hours may be established;	mutually agreeable work hours may be established;								
(VIII) Pay the individual personally but rather makes	(H) Pay the service provider personally instead of								
checks payable to the trade or business name of the	making checks payable to the trade or business name								
individual; and	of such service provider; and								
(IX) Combine his business operations in any way with	(I) Combine the business operations of the person for								
the individual's business, but instead maintains such	whom service is provided in any way with the								
operations as separate and distinct.	business operations of the service provider instead of								
	maintaining all such operations separately and								
	distinctly.								
(d) A document may satisfy the requirements of	(III) A document may satisfy the requirements of this								
paragraph (c) of this subsection (1) if such document	paragraph (b) if such document demonstrates by a								
demonstrates, by a preponderance of the evidence, the	preponderance of the evidence the existence of the								
existence of such factors listed in subparagraphs (I) to	factors listed in subparagraph (II) of this paragraph (b)								
(IX) of paragraph (c) of this subsection (1) as are	as are appropriate to the parties' situation. The								
appropriate to the parties' situation.	existence of any one of these factors is not conclusive								
(2) XXII (1 (2 (2 (2 (2 (2 (2 (2 (2 (2 (2 (2 (2 (2	evidence that the individual is an employee.								
(2) Where the parties use a written document pursuant	(IV) If the parties use a written document pursuant to								
to paragraph (c) of subsection (1) of this section, such	this paragraph (b), such document must be signed by								
document may be the contract for performance of	both parties and may be the contract for performance								
service or a separate document. Such document shall	of service or a separate document. Such document								
create a rebuttable presumption of an independent contractor relationship between the parties, where such	shall create a rebuttable presumption of an independent contractor relationship between the								
document contains a disclosure, in type which is larger	parties where such document contains a disclosure, in								
than the other provisions in the document or in bold-	type which is larger than the other provisions in the								
faced or underlined type, that the independent	document or in bold-faced or underlined type, that the								
contractor is not entitled to unemployment insurance	independent contractor is not entitled to workers'								
benefits unless unemployment compensation coverage	compensation benefits and that the independent								
is provided by the independent contractor or some	contractor is obligated to pay federal and state income								
other entity, and that the independent contractor is	tax on any moneys paid pursuant to the contract								
obligated to pay federal and state income tax on any	relationship. All signatures on any such document								
moneys paid pursuant to the contract relationship.	must be duly notarized.								