

US Department of Labor Follows the Fissures in the Fracking Industry

Wage and Hour Division drills to remedy the misclassification of employees as independent contractors, other wage violations

The fracking industry is intimately familiar with downward pressure. Intense pressure from water and sand fractures shale deposits to maximize the extraction of natural gas from the earth. Pressure creates results. For those in this industry, similar pressures exist in their budgets. Pressures in this arena likewise affect results.

As is the case in any competitive, profit-driven business, even in this growing industry employers look for every avenue to improve their bottom lines. Prime contractors often coordinate production, but increasingly contract out specialized tasks to smaller subcontractors who employ workers themselves or who further subcontract the work on the actual site. Job sites that used to be run by a single company may now see dozens of smaller contractors performing work. This splintered structure, or this fissured industry, if you'll pardon the pun, creates downward economic pressures on the lower level subcontractors. Because they must compete against numerous other small contractors in their localities to win bids, and because profit margins shrink the further down the contractor ladder you go, subcontractors face an intense pressure to lower the cost of their services, often at the expense of workers' wages and employment conditions.

Whether it's a contract to provide a derrick operator or a rotary drill operator, for hauling equipment or waste water, clearing land, building temporary roads, installing water lines, building scaffolding, or providing security services, contractors throughout the fracking industry are subject to this pressure to be the "low bidder". The U. S. Department of Labor's Wage and Hour Division (WHD) is employing new strategies to combat this 'race to the bottom' culture so that workers in this country will not see their wages and benefits undercut and so that law-abiding employers will not face unfair competition from contractors who use a workforce so eager for work that it is willing to settle for substandard wages and work in unsafe conditions.

The Wage and Hour Division enforces federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act (FLSA). Covered, nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Nonexempt workers must be paid overtime at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek. Complete and accurate records of all hours worked must be maintained. The FLSA also prohibits hazardous work for minors under age 18 and restricts minors under age 16 to certain occupations and hours of employment.

WHD is committed to combating pay practices in the oil and gas extraction industry that violate the FLSA, such as paying straight time for overtime (often in cash, "off the books"); allowing employees to "bank" overtime hours which are later paid at straight time when they have a "short week"; failing to pay for work performed prior to or after regular working hours, such as loading and unloading materials and tools needed for the day; failing to pay travel time to and from jobsites; and failing to maintain complete and accurate records of each employee's daily and weekly hours worked. Many such violations stem from contractors misclassifying employees as "independent contractors."

WHD is currently conducting an enforcement initiative focusing on the fracking industry in the Northeast. This ongoing initiative involves on-site investigations of work sites, including payroll record reviews, employee interviews, and the examination of potential joint-employment situations to determine employment relationships and to identify and eradicate FLSA violations. Investigations include all levels of contractors and subcontractors on a job site.

When violations are found, the Agency vigorously pursues corrective action, using all enforcement tools available – including back wage collection, the issuance of administrative subpoenas or search warrants, and the assessment of civil money penalties and/or liquidated damages – to ensure accountability and to deter future violations. Last year WHD hired over 300 new investigators to help address violations. In FY-2011, the Wage and Hour Division collected over \$5.3 million in back wages for employees who had been misclassified.

According to Bureau of Labor Statistics and Bureau of Economic Analysis data, mining, quarrying and oil & gas extraction have seen a dramatic increase in the number of workers not covered by unemployment insurance. In 2005, 67% of this industry's workers were covered by unemployment insurance. By 2010, only 55% remained covered. According to BEA data, during this same time period the industry grew by more than 350,000 jobs. This evidence suggests a major shift in the industry toward classifying workers as independent contractors rather than employees. Raw numbers are up, while the percentage of workers treated as employees is down. Simply placing employees on "1099s" instead of W-2s does not transform them into legitimate independent contractors.

Such misclassification is an emerging and alarming trend, particularly in construction-related industries. The practice is a serious threat both to workers entitled to good and safe jobs, as well as to employers who obey the law. Too often workers are deprived of overtime and minimum wages protections, forced to pay taxes that their employers are legally obligated to pay, and are left with no recourse if they are injured or discriminated against in the workplace. By misclassifying these workers as independent contractors and not employees, these workers are further denied protections like unemployment insurance and Family and Medical Leave, which are afforded to employees. Honest employers have a difficult time competing against those who circumvent the law through such misclassification and may not be paying the proper overtime compensation, FICA, unemployment insurance taxes, or workers compensation premiums. The department is committed to leveling the playing field for employers who play by the rules, as well as for the American taxpayers who are, in turn, severely cheated by such practices when billions of dollars in annual tax revenues go uncollected.

The Department's Misclassification Initiative, launched under the auspices of Vice President Biden's Middle Class Task Force, is making great strides in combating this pervasive issue and to restoring these rights to those denied them. In September 2011, Secretary of Labor Hilda L. Solis announced a major step forward with the signing of a Memorandum of Understanding (MOU) between the Department and the Internal Revenue Service (IRS). Under this agreement, the agencies will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws. Wage and Hour is also partnering with individual states, whose statutes are also being skirted by this practice.

Wage and Hour's strategic enforcement policies aim to change employer behavior at the industry level, rather than on a case-by-case basis, so such evasive practices that result in underpayment of wages and other labor violations are prevented from occurring in the first place. Increasingly, WHD is seeking the assistance of upper-tier contractors to assist in ensuring that their various subcontractors operate in compliance. Where appropriate, WHD is asserting joint employment relationships and holding upper-tier contractors jointly-liable for the violations of their subcontractors. When upper-tier subs face financial consequences for the sins of their subcontractors, they are far more likely to concern themselves with the business practices of the contractors they hire. Wage and Hour is starting at the top, engaging and investigating the major contractors, and then "following the fissures," investigating every layer of subcontractor below who may benefit from the perceived "savings" of employee misclassification. Through this mapping of the industry, this proactive approach aims to identify key industry players who can influence compliance industry-wide. In industry-speak, the Department is moving forward to cap the well rather than waiting to clean up a spill.

WHD engages key employer associations to help provide employers with compliance assistance information, and to secure cooperation in promoting such industry-wide compliance and accountability. Similarly, WHD conducts outreach to workers and community groups to demonstrate the agency's commitment to addressing systemic violations and to encourage vulnerable workers to come forward with potential violations. In 2010, the agency launched the Secretary of Labor's "We Can Help" campaign, specifically to reach such vulnerable workers who may not otherwise be aware of their rights or file complaints if those rights have been violated for fear of losing their jobs. The Department of Labor supports the use of legitimate independent contractors, who play an important role in the U.S. economy. Under the FLSA, an employment relationship must be distinguished from a strictly contractual one. An employee- as distinguished from a person who is engaged in a business of his or her own - is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business that he or she serves. For more information, visit <http://www.dol.gov/whd/regs/compliance/whdfs13.htm>.

The Wage and Hour Division remains committed to providing the tools necessary to assist companies in the oil and gas extraction industry in achieving and maintaining full compliance with the labor statutes administered by the agency. For more information about the requirements of the FLSA, call the Division's toll-free helpline 1-866-4US-WAGE (1-866-487-9243). Information is also available on the internet at <http://www.dol.gov/whd>.