

## MISCLASSIFICATION IN CONSTRUCTION: THE ORIGINAL GIG ECONOMY

MARK ERLICH\*

---

The misclassification of employees as independent contractors has been the focus of recent attention as a result of the implementation of that employment model by ride-share and other gig employers. But the practice long predates the emergence of the gig economy, particularly in the construction industry. This article traces the history of misclassification in construction and the subsequent emergence of a cash-based underground system of compensation, which have lowered standards and been among the major causes of the decline of union density in the industry. In addition, the author examines the regulatory environment at the federal level, which has largely enabled misclassification as well as attempts by state agencies to adopt more aggressive enforcement policies.

---

In September 2019, California Governor Gavin Newsom signed Assembly Bill 5 (AB 5), a piece of legislation that imposed stringent criteria to determine whether a worker is an employee or an independent contractor. The California Chamber of Commerce, business associations, and gig economy employers strenuously opposed the law. Uber, Lyft, DoorDash, and other similar companies argued that AB 5 posed a fundamental threat to their business model, one that relies on drivers to operate as independent contractors. Lawsuits have been filed and referenda proposed to overturn the bill.<sup>1</sup> The outsized nature of the California economy and the pervasive influence of Silicon Valley drew national attention to the legislative battle.

---

<sup>1</sup>On November 3, 2020, California voters approved Proposition 22, a ballot measure that exempted ride-share and delivery drivers from the provisions of AB 5. Financed to the tune of \$200 million by Uber, Lyft, DoorDash, and others, proponents outspent opponents by a 10-1 margin. The electoral victory undermined the legislative intent of AB 5 and may well serve as a model for similar initiatives in other states.

---

\*MARK ERLICH is a Wertheim Fellow at the Harvard Labor and Worklife Program, Harvard University Law School, and retired Executive Secretary-Treasurer of the New England Regional Council of Carpenters. Correspondence concerning this article should be addressed to the author at [merlich@law.harvard.edu](mailto:merlich@law.harvard.edu).

KEYWORDS: construction industry, independent contractors, misclassification, labor regulations, union decline, gig economy, federal and state wage enforcement agencies

Previously, the debate over the legitimacy and legality of independent contracting had been limited to employment professionals, union activists, academics, attorneys, and regulatory enforcement agencies.

But the misclassification of employees as independent contractors is not new, nor is it restricted to ride-sharing firms. The controversy over the interpretation of federal and state employment laws predates the rise of Silicon Valley and the lure of flexible employment. The presence of independent contracting is actually more common in other sectors of the economy such as construction, trucking, hospitality, retail, landscaping, janitorial, and a host of service industries. Construction, in particular, was “gig” long before the term *innovation economy* entered popular consciousness. Building projects start and finish, workers move from employer to employer, location to location, and the breaks in employment and pay caused by inclement weather all add to the inherently insecure nature of the trades. Although independent contractors represent only 7% of the total national workforce, roughly 20% of all independent contractors work in construction (U.S. BLS 2018). The fluidity of the workforce and minimal regulation of a decentralized industry have created an environment that encourages the purposeful misclassification of employees as independent contractors—a business strategy that has led to a decline in union density and contributed to decreased standards in the industry over the past 50 years.

Misclassification was one element of a broader strategy to reduce building trades’ union power and to lower labor costs. Beginning in the late 1960s, corporate leaders who had formed the Business Roundtable joined with construction allies to develop an effective agenda that involved restructuring labor relations within the industry, reinventing the owner/contractor relationship, and rolling back long-standing pro-union legislative initiatives and political influence. Toward the end of the 20th century, construction employers took advantage of the emergence of a changing workforce, often undocumented immigrants, to further depress wages and conditions. The business model of misclassification and the expansion of immigration combined to create a perfect storm of precarious employment. In many parts of the country, construction workers—once considered the aristocrats of labor—now operate near the lower rungs of the occupational ladder in terms of compensation, safety, and security (Allen 1988; Erlich and Grabelsky 2005).

During this period, federal regulatory agencies charged with enforcing the nation’s employment laws failed to address the issue of misclassification—either ignoring the growing abuse, lagging in effective response, or even sanctioning the stratagem. In the Trump administration era, the U.S. Department of Labor (DOL) has shown little interest in cracking down on illegal misclassification in construction and has supported independent contracting in the gig economy. As a result, any meaningful administration of employment laws has devolved to state Departments of Labor or

Attorneys General offices, agencies with limited resources and commitments to enforcement that depend on the will of political administrations.

AB 5 has added a new component to the national debate about the definition of independent contracting and the very future of work. The passage of the legislation and the increased enforcement of employment laws in a number of states mark a rejection of what had been an almost unquestioned celebration of informal work arrangements as the harbinger of an unfettered climate of entrepreneurialism in which workers are presumed to be autonomous individuals charting their own way through a flexible world of work without the intrusion of complicated legal standards and public regulatory agencies.

The experience of construction workers over the past half-century represents an alternative narrative. The rise of independent contracting did not provide increased flexibility and opportunity for trades workers. On the contrary, those workers who had once been treated as employees now face precarious conditions as independent contractors, though their daily work tasks are unchanged. Misclassification has been a conscious employer ploy to reduce the costs of labor and part of a broader scheme to eliminate the influence of unions as a central force in the construction industry. Construction workers who are compensated as independent contractors or paid in cash off-the-books are thus similar to ride-share and other gig workers in that all of them operate outside the safety net of the nation's employment laws. The fate of these workers going forward will rest on their ability and willingness to organize for a collective voice and a commitment to apply and enforce a rigorous definition of employment status by federal, state, and local agencies.

### **Managing an Industry—The Rise and Decline of the Union Model**

Nearly 100 years ago, skyscraper builder William Starrett described his industry as “disjointed” and “disorganized” with an excess of competing participants—architects, bankers, contractors, owners, trades workers, and so on—that resulted in an environment of “absolute anarchy.” “Is it any wonder,” Starrett fretted, “that we have never met seriously to stabilize labor relationships?” (Starrett 1928: 288). The multiple actors in construction, coupled with limited project duration, created unstable labor relations as well as short-term connections between contractors and owners. The building owner may have hired the general contractors who, in turn, employed trades workers directly as well as engaged specialty subcontractors with their own workforce, but the unions’ hiring halls were the primary stable source of a labor force for general contractors and subcontractors alike. Starrett’s overheated rhetoric reflected the reality of an industry without a clearly defined center but underestimated the critical role of construction unions in injecting a high degree of order into the chaos.

Since their inception in the late 19th century, building trades unions have overseen the entry of new workers into the industry and referred workers on an as-needed basis to contractors working in their jurisdiction, eventually providing basic training to apprentices and skill enhancement training to more experienced journey-level workers, coordinating the members' health and retirement security benefits programs, and formalizing dispute resolution mechanisms to handle the inevitable day-to-day conflicts that arise in a fast-moving business. This level of involvement created a culture of loyalty to the union environment. For the most part, contracting employers tolerated and even welcomed the unions' comprehensive intervention in labor relations. Union administration freed contractors to focus on business development, estimating, project management, and bill collecting—sufficient challenges for companies with limited office staff and, frequently, little experience with the nuances of labor relations. In addition, many of the smaller subcontractors were often former union members who perceived their success as inextricably linked to the smooth functioning of the unions' programs (Erllich 1986; Weil 2005). Given the large number of small- and medium-sized employers with limited capacity to manage employment issues, in addition to the sufficiently complex challenge of running and maintaining construction operations, building trades unions in the United States functioned as the equivalent of the human resource departments for an entire industry, regulating the labor market to the benefit of employers as well as workers.

Not all industry actors embraced union control of the labor market. Business owners periodically attempted to wrest power from the unions over the course of the first half of the 20th century, but their short-term engagement with the industry served as a barrier to a long-term, focused attention span. Still, industry observers routinely compared construction unfavorably to their more forward-looking and purposeful colleagues in manufacturing. Twenty years after Starrett's lament, the editors of *Fortune* published a cover article on homebuilding titled "The Industry Capitalism Forgot," in which they mocked its "feudal character" and "picayune scale" (*Fortune* 1947: 61). From the owners' perspective, union influence blossomed into a full-fledged crisis by the late 1960s. An article in the December 1968 issue of *Fortune* described building trades unions as "the most powerful oligopoly in the American economy" and blamed the "passive stance of management" as enabling the unions' stranglehold (O'Hanlon 1968: 102). Nearly one-fourth of all worker days on strike in 1969–70 occurred in the construction industry. In 1972, construction accounted for one-half of all major strikes (U.S. BLS 1975). The combination of a building boom, the strike wave, and labor shortages due to the number of young men overseas in Vietnam resulted in a series of unusually high union wage increases. In 1970, Edwin Gott, of US Steel, claimed that the most serious problem affecting the overall economy was "the effect of the high costs of labor settlements in the construction industry" (BNA CLR 1970).

In 1969, a group of executives from most of the nation's largest corporations—that is, clients or “users” of the construction industry—formed the Construction Users Anti-Inflation Roundtable, to be renamed the Business Roundtable in 1972. Prior to becoming one of the country's principal corporate voices on national policy discussions, the organization's founding goal was to reduce inflationary building costs and rein in what was perceived as excessive union power in the building trades, namely, the power to elevate wages and to control the day-to-day culture of the job site (Linder 2000). These owners wanted to realign the interests and power relations between owners, contractors, and unions. They rebelled at what they viewed as an excessively cozy relationship between contractors and unions. The long-standing and relatively stable system of labor relations may have been effective in terms of developing and retaining a skilled workforce, but owners chafed at the power ceded to the unions. Unlike their manufacturing counterparts, construction users were not focused on introducing advances in mechanization. Instead, they adopted a laser-like focus on creating an environment in which construction employers pledged obedience to the client who was paying the bills rather than the labor organizations that represented the employees.

### **The Business Roundtable Restructuring Agenda**

The Roundtable issued a series of reports titled “More Construction for the Money,” in which they bemoaned the “inordinate fragmentation” of the industry. In the absence of cost-effective management systems, the reports concluded that “the big losers are owners” (Business Roundtable 1983: 12, 29). Describing itself as an educational mechanism, the Roundtable sought to rationalize the industry along the lines of conventional large-scale corporations. Winton Blount, head of one of the nation's larger general contracting firms, helped found the Roundtable and held several other high-profile positions, including the presidency of the US Chamber of Commerce and Postmaster General in the Nixon administration. In 1968, he described construction labor relations as “chaotic at best” and went on to suggest that “despotic or unbelievable may be better terms” (BNA CLR 1968). Blount and his colleagues argued that foremen, superintendents, and even the principals of subcontracting firms placed more loyalty to the union than to the general contractor or the owner. The Roundtable's aim was to place supervision firmly in management's hands, both in the executive office and on the job site.

The Roundtable proposed a restructuring of industry responsibilities. At the time of the reports' publication, the traditional self-performing general contractor system dominated the industry. General contractors typically employed crews of carpenters, laborers, and masons and often owned substantial pieces of excavating equipment. The mechanical work on a project (electrical, plumbing, pipefitting, and so forth) was usually farmed out to

specialty subcontractors, but the general contractors still provided much of the overall labor force on a construction site. Roundtable leaders believed this system produced higher costs. Not only did powerful building trades unions drive up wages, but contractors had no real incentive to reduce costs and, on the contrary, often had incentives to increase them. A 1977 textbook on construction management pointed out that it was common practice to bid jobs low and make money through add-ons. “In negotiations for changes and extras, the general contractor tends to side with subcontractors against the owner,” the authors wrote. “He, after all, will probably work with the same subcontractors on another job, while his commitments to the owner beyond the contract may be negligible” (Goldhaber, Jha, and Macedo 1977: ix).

The shift away from the traditional general contractor to a construction manager model was a response to owner complaints. After all, the owners paid the bills. Like the general contractor, the reinvented construction manager negotiated a contract with the owner, handled all the subcontracts, and was responsible for coordinating the flow and outcome of the project. But the construction manager now worked for a fee rather than a lump sum bid. The burden of risk—the ability to make or lose money on the basis of a fixed estimate—and the responsibility of managing crews had been shifted to the multiple subcontractors and created, at times, an adversarial relationship between the former partners. The new construction managers were essentially service companies that found clients and marketed products produced by subcontractors. Between 1967 and 1997, general contractors’ share of direct construction worker employment fell from 35% to 24% of the labor force whereas specialty subcontractors’ portion increased from 48% to 63% (Bosch and Philips 2003). By the end of the 20th century, the change was well established. A 2000 textbook on project management suggested that the era in which general contractors “performed significant amounts of work with their own forces is largely over” (Levy 2000: 6). The construction manager was now an extension of the owners’ vision and wallet.

In some ways, the restructuring of the construction industry over the past 50 years paralleled changes in industrial relations across industries. Corporations shed traditional legal and social obligations to employees as they shifted from the long-standing role as the primary source of employment to a growing utilization of and reliance on supply chains and multi-tier systems of subcontractors in industries as varied as hospitality, warehousing, retail, and manufacturing (Weil 2014). The shift from general contracting to construction management was similar to a fissuring business strategy that transferred the coordination of employment relations and product standards to a multitude of franchisees, labor brokers, and other third-party managers—all in the name of freedom from direct responsibilities for a workforce and the resultant cost savings (Weil 2014).

Construction was sheltered from many of the more notorious managerial innovations of the 1980s, such as globalization, automation, and

outsourcing. To this day, industry analysts deride the lack of technological sophistication. In a 2017 report, McKinsey & Company blamed limited productivity improvements on “poor project management and execution . . . underinvestment in skills development, R&D, and innovation” (McKinsey 2017). Except for the introduction of power tools, the methods and techniques used in the latter half of the 20th century would have been largely familiar to earlier generations of trades workers. Buildings could not be erected overseas and deposited on domestic sites and so contractors continued to rely on a local workforce. While the Roundtable proposed the adoption of modern techniques from aerospace and defense management systems, they were less interested in technological advances than in simply clarifying the primacy of the owner in the construction food chain.

### **The Business Roundtable Political Agenda**

The Roundtable’s powerful affiliates had the resources to launch a comprehensive long-term campaign to limit union impact at a time the bulk of the nation’s major projects was still built with unionized workers. When planning privately funded capital projects, many of the member corporations chose to hire non-union general contractors as a means of subsidizing and promoting the open shop—or non-union—sector. In addition, they supported the expansion of the Associated Builders and Contractors (ABC) as a counterweight to the existing employer associations dominated by contractors with collective bargaining agreements to serve as an anti-union political voice in the halls of Congress and state legislatures around the country.

The Roundtable and its allies attempted, but failed, to deliver sufficient congressional votes to repeal or weaken the Davis-Bacon Act, a 1931 law that mandated hourly wage rates (usually the union scale in a given locality) on federally financed construction projects. Instead, they successfully supported efforts to repeal state prevailing wage or “mini-Davis-Bacon” laws. Whereas Davis-Bacon covered public buildings or public works supported by federal dollars, the state prevailing wage laws applied to all the state-funded public school, town library, and fire and police station projects. The union rates on these sites served as the standard for the entire industry in a given state. Legislative or referendum-based campaigns to accomplish repeal gained momentum in the 1970s and 1980s. Nine states repealed these laws during the decade beginning in 1979. Seven more have taken similar action since then. The pace of repeal is accelerating once again. Of these last seven, six have occurred since 2015. As of 2020, 24 states never had or now have no prevailing wage law (U.S. DOL 2020a). Peter Philips has argued that in construction, the attack on state prevailing wage laws was the equivalent of deregulatory legislation and rule-making in trucking, airlines, and other industries (Erlich 1990; Bosch and Philips 2003).

Just as significantly, lobbyists were able to convince Congress to enact Section 530 of the Revenue Act of 1978. Congressional supporters argued

that the Internal Revenue Service (IRS) had inappropriately increased vigilance in the enforcement of employment tax laws over the previous decade. Companies that treated workers as independent contractors complained that the IRS was imposing costly reclassification penalties that created past and future liabilities. Section 530, and additional amendments in 1982, granted a “safe harbor” to employers that had a “reasonable basis” for treating workers as non-employees. Congress explicitly defined reasonableness as the standard in situations for which the use of independent contractors was a “long-standing recognized practice of a significant segment” of an industry. From the perspective of a formerly compliant construction contractor, Section 530 gave a green light to reclassifying its workforce based on the argument that a significant segment of its competitors may already have been treating their workers as non-employees (Kessler 1994).

The consequences of Section 530 still resonate. Thirty-six years after the law’s passage, former IRS commissioner Steve Miller described the bill as “Congress’ slap at the IRS when the IRS was active in this area” (Ordoñez and Locke 2014). A 2009 Government Accountability Office report cited additional IRS staffers who claimed that the safe harbor was a major reason they could not examine many suspected cases of misclassification (U.S. GAO 2009). In 2014, IRS revenue officer Dean Prodromos told a reporter that promising cases frequently hit a wall once referred up the chain of command. He claimed that he would routinely receive a “blunt, if cryptic-sounding, message: ‘Safe harbor.’ ” Prodromos went on to say, “It’s gotten widely [*sic*] out of control with the result of Section 530. It’s the Wild West out there” (Ordoñez and Locke 2014). The result of the confluence of these political and organizational developments was a workplace setting that welcomed the growth of misclassification.

### **Misclassification as a Business Model**

The increased use of independent contractors in construction was comparable to the broader breakdown of the system of labor relations during the 1980s. A large swath of corporations in many industries sought to reduce the fixed aspect of labor costs represented by a core workforce and to eliminate implicit employment guarantees by contracting out work more freely, developing subcontracts for business services, and using more part-time, freelance, and temporary workers. At the time, economist Audrey Freedman argued that the practice of relying on contingent workers might not have been a new concept, but “using contingent worker and subcontracting techniques to gain more adaptability and flexibility—to gain power for rapid downsizing and cost-cutting—is what is new” (Freedman 1988: 35). Using independent contractors on building projects similarly limited risk and shifted the employment burden through the expansion of multi-tier subcontracting. Construction differed from other major industries, however,

in that it already depended on a long-standing system of subcontracting, which enabled a simpler extension of an existing set of contractual relations. Further, the political and legislative developments of the 1970s and 1980s had opened the floodgates for the evolution of a new business model.

Stan Marek, CEO of Houston-based Marek, one of the largest interior systems contractors in the South, termed Section 530 as “by far the most abused change in the history of the IRS” (Steffy and Marek 2020). He attributed the destruction of the union sector of the building industry in Texas in the 1980s to the growth of independent contracting enabled by the amended tax code. The newly emboldened non-union contractors opted to lower labor costs by compensating tradesmen as independent contractors even though their daily tasks and methods of work remained unchanged. Workers no longer filled out the standard W-4 form when hired. Instead, their employer sent them a year-end 1099-MISC form and left the tax consequences to each individual worker. According to Marek, Texas firms demanded that workers sign a waiver saying they would provide their own insurance for work-related injuries. When workers were hurt on the job, they went to local emergency rooms where they were considered indigent, as few had the resources to purchase a health insurance policy (Steffy and Marek 2020).

The Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA), a union employer group, described misclassification as “an epidemic in the construction industry” (BNA CLR 1999). Though the Associated Builders and Contractors (ABC) fiercely opposed periodic legislative attempts to repeal Section 530, responsible non-union employers such as Marek complained that it was becoming “impossible for companies like ours that play by the rules to compete” when, by his estimation, half the workers were hired as independent contractors (ENR 2013: 10).

The motivation driving the elimination of employee status was simple. The various state and federal tax and insurance obligations associated with hiring employees constituted a significant portion of total compensation costs. The ability to eliminate as much as 30% (or more) of labor costs by simply reclassifying a company’s workforce as independent contractors was a clever and effective method to gain a competitive edge over other contractors who continued to bear the burden of required mandates. Similar to employers in other industries, construction contractors abandoned the obligations to pay their share of income, unemployment, Social Security, and Medicare taxes (as well as earned sick time in some states) by redefining employees as independent contractors.

Construction firms had an additional incentive. They shed the burden of workers’ compensation insurance policies that carry above-average premiums because of the risks inherent in the dangerous construction industry. For example, a typical Boston union concrete subcontractor currently pays 35% of a carpenter’s wages in taxes and insurances (Al Peciaro, Vice President, Marguerite Concrete, Boston, in an interview by the author, March 18, 2020). A company that employs ironworkers engaged in the

hazardous erection of high-rise structural steel would be faced with still higher workers' compensation premiums. Unionized companies are contractually unable to adopt misclassification schemes because collective bargaining agreements require that their workforce be treated as employees. For non-union contractors that already pay lower wages than their union counterparts and provide few, if any, benefits, however, the temptation to realize significant labor cost savings and to further extend the compensation gap and competitive edge became virtually irresistible.

Legitimate independent contractors and small firms do, and always have, existed in the world of construction. The plumber who visits homes to install a new water heater or kitchen sink may well run a genuine small business—scheduling appointments, providing estimates, carrying out the physical labor, and recording financial information at home in the evenings. The 1982 Census of Construction Industries reported that 932,608 of the nation's 1.4 million construction establishments functioned without any employees at all (U.S. Bureau of the Census 1985). There was also a tradition in the less formal residential industry of summer help, side jobs, or young people starting in the trades—an electrician's helper, a member of a wood-framing crew—being paid by check without deductions and receiving a 1099 form at the end of the year. Frequently, individual workers have not been considered real employees in the trades unless and until they had indicated a career commitment to the trade and the employer. The emergence of misclassification as a broader phenomenon, however, is associated with the now more common use of independent contractor trades workers on large-scale apartment, commercial, institutional, and industrial buildings. No longer confined to building backyard decks or even single-family homes in suburban developments, workers classified as independent contractors have become a regular presence on multi-million dollar projects working for sizable construction employers.

### **The Misclassification Industry**

The legal definition of an independent contractor is hotly contested. The conventional understanding is that a worker is presumed to be an employee if she or he is operating under the direction and control of another, but the exact definition varies depending on the geographical and legal jurisdiction. At the federal level, the IRS has a 20-factor test and the Fair Labor Standards Act uses six criteria to determine if an individual is a legitimate independent contractor. Every state has its own statutory definition and, often, slightly contradictory definitions between regulatory agencies within the same state depending on when the enabling legislation was written. The "ABC" test codified in California's AB 5 (modeled on a 2004 Massachusetts statute) is the clearest; it presumes workers to be employees unless they are free from another's direction and control, perform services outside the employer's usual course of business, and, customarily engage in that trade, occupation, or profession.

These varied definitions are sufficiently ambiguous to have generated a cottage industry of employment professionals looking for loopholes. The shades of gray can be difficult to distinguish in some occupations and industries but, for all its seeming chaos, construction operates with a relatively clear organizational structure. Owners arrive at an agreement with general contractors/construction managers to handle all on-site activity. The general contractor executes a series of subcontracts with specialty trades contractors who employ the bulk of the trades workers on the project. The project manager and superintendent coordinate the various subcontractors whose foremen, in turn, supervise workers carrying out the day-to-day tasks. There is no room for a worker to operate independently from the chain of command. It simply would not work. Self-direction is the antithesis of coordination, the single most important element of the successful execution of a construction project.

The lure of cost savings in a highly competitive environment drove non-union subcontractors to embrace the use of misclassification. While the routine work practices of the supposedly independent craft worker may have appeared to be those associated with the status of an employee, the chances of an employer being caught and punished were minimal, particularly in the lightly regulated private construction market. Construction employers made a simple cost-benefit analysis and reached a business decision. The likelihood of regulatory enforcement was negligible and, even if sanctioned, the tax and insurance savings generally outweighed potential penalties.

Individual workers bore the costs associated with misclassification. Anyone who is misclassified foregoes substantial rights available to employees. In addition to being responsible for any health and retirement security benefits, the individual loses all legal rights to minimum wage or overtime payments, workers' compensation coverage in case of an on-the-job injury, unemployment benefits in case of layoff, anti-discrimination defenses, and the right to form a union. Contractors sometimes chose to sweeten the pot, for example, by offering one hourly rate if the worker insisted on being an employee or a slightly higher one upon acceptance of independent contractor status. The actual work was identical, but the short-term gain of additional hourly pay sometimes was sufficient inducement for the worker to sacrifice legal protections, and the contractor still realized net savings.

Consultants around the country provided counsel to construction employers who sought to cut costs through this newly refined mechanism. Legal and accounting firms sustained a specialized practice by writing hundreds of articles and convening regular seminars to teach clients how to take advantage of the safe harbor provision. As an example, attorney Simon Leeming opened a small law firm in southern New Hampshire in 1988. The mainstay of his practice quickly became a group of subcontractors who hoped to take advantage of the opportunities in the growing drywall sector of the industry. As a product, drywall (also known by the brand name Sheetrock) had been introduced to the industry in the early part of the

20th century. Ads in pre-WWII trade journals portrayed pipe-smoking carpenters in white overalls leisurely hammering 4' × 8' sheets of drywall with individual nails. By the second half of the century, metal stud framing and drywall hanging had become a major sub-trade as the method of choice for creating interior and exterior partitions in buildings. The speed of installation (aided by the introduction of electric screw guns) rendered the new sub-specialty unappealing to traditional generalist carpenters who looked down on the go-go production nature of the work and left it to others to fill the vacuum.

In New England, that void was filled by a generation of French-Canadians who had crossed the border during the 1980s to take advantage of job prospects. Individual construction trades have always had a strong ethnic affiliation and this cohort, bound by ties of language and communities of origin, gravitated as a group toward the opportunities afforded in drywall. Many had started their careers as employees in Quebec, a province with stringent labor laws, but, in the spirit of the prevailing winds of US employment law, Leeming, like other construction management attorneys, instructed employers to treat this workforce as independent contractors. The goal was to create a paper-intensive, legally defensible wall of protection. At Leeming's direction, clients insisted "that each independent contractor signed an independent contract outlining the duties towards taxes, unemployment, Workers' Comp, and all the other indicia of employment" (Simon Leeming, attorney at Preti Flaherty, Boston, in an interview by the author, July 27, 2018).

Leeming's small-scale approach was mirrored across the country. The American Bar Association's Construction Lawyers Guide even developed a five-page boilerplate independent contractor agreement for construction contractors (Seeman, Hennessey, and Cooper 2001). Though the character of the work remained unchanged in terms of the underlying criteria of direction and control, many courts accepted the existence of this type of document as solely determinant. As an example, a Pennsylvania carpenter named Mulzet was hired in 1998 by drywall contractor R.L. Reppert. According to subsequent court documents, the company supplied all the necessary power tools and Mulzet brought his hand tools—standard practice in the industry. The federal judge in the case acknowledged that Mulzet performed the same work as company employees, was paid hourly as were company employees, and his work was assigned and evaluated by the same supervisors. But Reppert had required Mulzet to sign an independent contractor agreement as a condition of employment and, as a result, the judge ruled that the document alone "tips the scales decidedly in favor of the conclusion that Mulzet was an independent contractor" (BNA CLR 2002).

### **The Impact of Immigration**

The use of misclassification was further accelerated as a result of the passage of the 1986 comprehensive Immigration Reform and Control Act (IRCA), a

bill intended to stem the flow of migrants crossing the Mexican border into the United States. Many business associations opposed IRCA because it contained penalties against employers who knowingly hired undocumented workers. The provision was intended to pressure employers to abandon the practice of exploiting the lack of citizenship status as a means of reducing labor costs. The attempt was largely unsuccessful since the legal standard of “knowingly” was difficult to prove, but businesses found an additional unintended consequence of the legislation. Since the employer sanctions were only triggered if the new hire was an employee, one obvious conclusion was to hire new workers as independent contractors rather than employees. In a 1987 Associated General Contractors (AGC) Q&A sheet on the new legislation, one of the questions posed was: “What if I decide just to give up and have no one in my business other than independent contractors and leased employees?” (Hyman 2018: 252). The answer was self-evident. In the wake of IRCA, immigration and misclassification became inextricably linked.

As early as 1984, Rice University economist Donald Huddle claimed that one-third of all commercial construction jobs in the Houston area were filled by undocumented workers from Mexico, Central America, and South America. His study suggested that these workers were being treated as independent contractors so that employers could avoid paying taxes (*U.S. News & World Report* 1984). According to the many Pew Research Center studies on immigration, the proportion of Hispanic male workers in construction increased four times as fast as the increase of white male workers between 1990 and 2000 (Kochhar 2005). By the end of 2006, nearly one-third of recently arrived foreign-born Hispanics were working in construction, predominantly in the South and, to a slightly lesser extent, in the West (Pew Research Center 2007). The Center for Migration Studies and the Migration Policy Institute estimated 1.7 million undocumented workers in Texas alone in 2014, 24% of whom worked in construction (Warren 2016; Migration Policy Institute, n.d.). Undocumented immigrants made up 15% of the total national construction workforce, outnumbering immigrant workers with valid working papers (Passell and Cohn 2016). Construction continues to employ the largest share of undocumented workers of any major industry category.

The Austin-based Workers Defense Project has conducted two studies on construction workers’ conditions—one in Texas and one across the South. Their findings demonstrated that half of the workforce in Texas was foreign-born and that, in six southern states, nearly one-third was undocumented (Workers Defense Project 2013, 2017). In certain non-licensed trades with a tradition of piecework—drywall, ceilings, wood framing, roofing, bricklaying, painting, and taping—the numbers were even higher. The lack of acceptable immigration documentation exposed these workers to a work life characterized by unsafe conditions, poverty-level payments, and wage theft. More than 40% of the surveyed group in Texas reported that they routinely experienced nonpayment of overtime and, in many cases, nonpayment of any wages.

### **Labor Brokers and the Shift to Cash Compensation**

The tectonic shift in construction workforce demographics depended on a steady labor supply chain. The people who recruited workers and their families to cross the border illegally were referred to as “coyotes,” a colloquial term dating back to the 19th century. The coyote system of smuggling groups of people for a fee was well suited for the multi-tier subcontracting system of construction. Coyotes expanded their role to become labor brokers, using smart phones with hundreds of contacts to function as informal hiring halls, supplying subcontractors with workers wherever and whenever they were needed. The relationship between subcontractors and labor brokers also provided a shield against legal liability unless overburdened regulators and auditors took on the herculean task of applying joint employer or criminal conspiracy standards to connect the two entities.

In one of the rare examples of criminal prosecution at the time, David Cantu of San Antonio, Texas, pleaded guilty to conspiracy, money laundering, and tax evasion stemming from his role in providing drywall carpenters to a contractor working on a FedEx headquarters project in Memphis, Tennessee, in 2000. Cantu had referred 148 undocumented workers to the site, many of whom were crowded into apartments that he leased. The carpenters typically worked 56 to 64 hours per week without overtime pay and, according to the U.S. Attorney’s filing, Cantu had forced the workers to sign independent contractor agreements under the threat of termination. During the trial, Cantu cited the agreements as a defense and further argued that he was not responsible for the workers’ legal work authorization status (BNA CLR 2003).

Though Cantu’s strategy failed in this particular case, the growth of the immigrant workforce had begun to undermine the rationale for a paper-intensive legal approach to misclassification. If a question of uncertain citizenship status already existed, many employers and labor brokers began to wonder why they should bother with lengthy legal documents and 1099 forms. Entering the world of the underground economy through a system of paychecks without deductions or straight cash was a simpler and more cost-effective method of compensation.

The transition from independent contracting with a legal paper trail to off-the-books unrecorded cash compensation further complicated regulatory options. Active enforcement agencies had been able to track the advance of independent contracting by monitoring the issuance of 1099 forms. But the descent into the underground economy and under-the-table payments posed new and nearly insurmountable obstacles. The challenge of measuring, let alone regulating, employer behavior when the entire system of compensation was unrecorded, stymied investigators accustomed to building cases through documentation. In 1996 the Department of Homeland Security introduced the E-Verify system to block the employment of undocumented workers. The new system failed. In many cases, the result was a boom in the black market for fake social security cards or, in the case of a

document mismatch, to drive workers further into the shadows of the underground economy.

Rebuilding the Gulf Coast after Hurricane Katrina enhanced the power of the labor broker system, by then the only source for desperately needed labor across the South. Legal employment is now a rarity on construction sites in the region. On a 2015 project in Houston built by one of the area's largest general contractors with a reputation for quality and safety, one of the major subcontractors supplemented its hourly workforce through a staffing company. Forty-five of the 60-member crew worked for the labor broker. They were undocumented and earned \$14 an hour and received no overtime pay, whereas the 15 documented workers were paid \$22 an hour for identical work. The labor broker did not provide workers' compensation insurance and, to the contrary, told the workers if they tried to obtain coverage, they would be deported (Steffy and Marek 2020).

The growing use of undocumented workers coupled with the practice of payroll fraud and wage theft spread from the South to the rest of the country in the early 2000s. By 2010, for example, a New York Building Congress analysis claimed that 45% of the city's trades workers were not US citizens, and a Fiscal Policy Institute study suggested that the level of payroll fraud was particularly acute in the city's affordable housing industry, in which fully two-thirds of the workforce either worked as independent contractors or were paid off-the-books (Fiscal Policy Institute 2007; *Real Deal* 2011). Further north, management attorney Leeming noticed that his French-Canadian clients in New England were being supplanted by a system of Hispanic workers working for labor brokers who were "less compliant with the law" (Leeming 2018).

Employers took pains to ensure that the new workforce operated in the shadows of the industry. In 2007, the New England Regional Council of Carpenters filed a petition for an election to represent carpenters working for National Carpentry Contractors, one of the region's most active non-union wood-framing companies. National Carpentry had erected thousands of units of apartments in Massachusetts and Connecticut for national merchant builders such as Avalon Bay Communities. Dozens of carpenters worked on every National Carpentry job site under the direction of a company superintendent. Yet, in response to the union's petition, owner John Kirk asserted that he "never employed any employees." The Regional Office of the National Labor Relations Board concluded that "the fact that the Employer may have exercised some supervisory authority over the employees . . . or that it may have paid employees directly, or participated in their hiring, or set their initial wage rates, or provided them with tools does not, however, provide conclusive evidence that it was the Employer alone who employed them." Kirk told the Board that the real employers were a group of 14 subcontractors. When the Board sent subpoenas to the addresses of the subcontractors, all were returned "undeliverable" (National Carpentry Contractors 2008).

### **The Response to Misclassification, the Absence of a Federal Agenda, and the Emergence of State Initiatives**

As misclassification and wage theft spread, industry participants attempted a variety of reforms. Building trades union leaders recognized that union standards were threatened and that their members were losing job opportunities to fraudulent contractors. Immigrant advocacy groups lamented eroding pay and safety conditions. Insurance companies took note of the lost workers' compensation premiums. Legitimate employers resented having to compete against firms that had gained an unfair competitive edge in an already highly competitive industry. And academics began to study the public policy implications and resulting tax revenue losses when employers misclassified workers.

Union leaders and their political allies sought solutions. In 1995, for example, the City Council of Cambridge, Massachusetts, passed a Responsible Employer Ordinance (REO) that further defined the word "responsible" in the phrase "low responsible bidder" that governed the awarding of contracts on publicly funded projects under the state's prevailing wage law. The ordinance spelled out a series of mandates that bidders had to meet in order to qualify, including a requirement to classify all workers on the project as employees rather than independent contractors. The intent of the law was to be proactive, that is, to prevent the award of a public project to a fraudulent contractor rather than relying on regulatory agencies to monitor violations once projects had been awarded. Dozens of communities around the country enacted similar legislation. Some building trades officials understood, however, that a larger movement to stop misclassification in construction required an understanding that the dangers of the practice extended beyond its impact on union workers.

In 2004, the Harvard Labor and Worklife Program issued one of the first reports to quantify the impact of misclassification and argued that the scheme had broad negative public policy consequences (Carré and Wilson 2004). The report demonstrated that taxpayers were paying the price for the growing use of independent contractors even in a state with an above average rate of unionization and regulatory activity. Using data from the Massachusetts Division of Unemployment Assistance (DUA), the authors calculated that 14 to 24% of all construction employers misclassified their workers from 2001 to 2003 (Carré and Wilson 2004). As a result of misclassification across all industries, the Commonwealth of Massachusetts lost an estimated total of \$152 million in uncollected income tax revenues and up to \$35 million in unemployment insurance taxes during those years. In addition, insurance companies were deprived of \$91 million in unpaid workers' compensation insurance premiums. The study concluded that the prevalence and severity of misclassification had substantially increased over the previous 10 years (Carré and Wilson 2004).

The Harvard study received widespread publicity and spawned a series of similar reports in California, Colorado, Illinois, Michigan, Minnesota, New

Jersey, New York, Tennessee, and other states. Government policymakers welcomed the information. Elected officials of both parties embraced the possibility of increasing revenues without raising taxes by escalating enforcement activity against irresponsible employers. It was difficult to make a political case justifying cheating. In Massachusetts, for example, the administration of Republican Governor Mitt Romney authorized the DUA to open its records to the Harvard research team. In 2004, following the release of the study, Romney signed the Massachusetts Misclassification Law, a bill that clarified previously conflicting statutes and codified the ABC test to determine employment status.

The emerging activity on the state level was a recognition of the failure of federal enforcement agencies to staunch the growth of misclassification. The IRS presumably had the authority and the responsibility to regulate aggressively but Section 530 had constituted a virtual blessing of the business model. The combination of the IRS safe harbor rule and the decline in funding for the U.S. DOL's Wage and Hour Division (WHD) had lowered expectations of effective enforcement activity from the federal government. Between 1978 and 2008, the number of WHD inspectors was reduced from 1,343 to 709. At the same time, the number of establishments covered by the federal Fair Labor Standards Act increased by 112% (Fine and Gordon 2010). The diminishing threat of adequate federal policing of workplaces encouraged labor standards violations. As funding for inspectors dwindled, many agencies responded by pulling remaining staff off the streets and into their offices. The shifting of personnel produced a cultural change that emphasized a more passive complaint-based model of enforcement (Weil and Pyles 2005). As a result, employers had fewer apprehensions about authorities routinely looking over their shoulders. Investigators focused on responding to calls about violations from individual workers in a seemingly random variety of workplaces. By 2004, complaints triggered 78% of all inspections undertaken by WHD (Weil and Pyles 2005).

The energy for innovation in enforcement devolved to the state level, especially in blue states where workers' rights remained a somewhat higher priority. Massachusetts Governor Deval Patrick had donned a hard hat and work boots during his 2006 campaign and accompanied union organizers to several job sites where he talked openly to workers who were being paid in cash. As a result of his direct exposure, Patrick established the Task Force on the Underground Economy involving nine state agencies with overlapping jurisdictions to ensure that if one agency had a case involving payroll fraud, all agencies would take up the case under their statutory authority (Sacchetti 2008). New York had launched the first state-level task force in 2007 and other states soon followed. A 2020 National Employment Law Project (NELP) policy brief suggested that 28 states have either a formal or informal interagency task force and that 8 were created or expanded as recently as 2018 and 2019 (National Employment Law Project 2020).

Julie Su, California's Labor Commissioner from 2010 to 2018 and Labor Secretary since 2019, has been one of the most effective leaders of state-based workers' rights programs. The California Division of Labor Standards Enforcement (DLSE) has prioritized enforcing wage theft and misclassification violations. According to Su, "We are on the side of employers who play by the rules; we are on the side of employees whose rights have been violated" (Su 2015). Su has embraced the concept of "co-enforcement," an approach in which governmental agencies collaborate with outside organizations, such as worker centers and unions, to maximize the expertise and knowledge of both sets of partners. In an era of limited public investigatory resources, state Departments of Labor and Attorneys General offices increasingly rely on unions, workers centers, community organizations, and high-road employers as sources of information about the industries the agencies monitor (Fine 2018). These connections have been particularly effective with building trades unions that have developed the capacity to track employment patterns on job sites and identify instances of misclassification and payroll fraud. In 2003, for example, the national United Brotherhood of Carpenters hired a full-time employee dedicated exclusively to addressing the challenges of the underground economy from a legal and political perspective. At the local and regional levels, many unions have assigned organizers with multiple language skills to develop relationships with non-union trades workers and workers centers in order to act as their advocates with enforcement agencies in cases of wage theft. The joint efforts have produced dozens of successful civil and criminal actions across the country (McNicholas, Mokhiber, and Chalkof 2017; Erlich and Gerstein 2019).

California also paved the way in addressing the issue of joint employment as a result of the 2018 passage of AB 1701, a bill that holds general contractors liable for their subcontractor's wage theft violations. This law offers enforcement agencies a tool to uncover the underlying decision-making dynamics on construction sites where individual workers are often uncertain about who is their actual employer. On May 29, 2019, the Labor Commissioner's office issued citations totaling \$597,933 to Universal Structural Building Corporation (USBC) and an additional \$68,657 to J. H. McCormick Inc., USBC's general contractor. Su's announcement noted that "up-the-chain general contractors are now responsible for wage theft committed by their subcontractors on all construction projects in the state" (California Department of Industrial Relations 2019).

### **Federal Enforcement in the Obama and Trump Eras**

As David Weil's studies have shown, workers who may be most willing to take the initiative to contact agencies about potential problems may have a union or other agent to assist them, which means they do not necessarily operate in the industries with the highest incidence of violations. Conversely,

workers who are less likely to voice complaints are often immigrants, less skilled and less educated, and tend to be in workplaces with a higher degree of informal work arrangements (Weil and Pyles 2005). In 2014, Weil was appointed head of WHD. He suggested that the fissuring of employment had increased incentives for noncompliance, particularly at the bottom of several levels of subcontractors or among small franchisees where profit margins were thin and competition was fierce. The fissured workplace also created greater complexity in defining who was ultimately responsible for that compliance, given the multiple organizations with a hand in setting working conditions. During his relatively brief tenure, Weil steered the DOL away from a complaint-based model toward a strategic enforcement orientation that focused on workplaces and industries in which major labor standards problems existed but in which workers might be less likely to complain because of the barriers they faced.

In 2015, WHD issued a far-reaching interpretative memorandum on misclassification that concluded, “Most workers are employees under the [Fair Labor Standards Act’s] broad definitions” (U.S. DOL 2015). The memorandum provided the intellectual and legal foundation for a heightened level of enforcement against employers who treated their workers as independent contractors in violation of the newly clarified DOL parameters. WHD entered into a series of memoranda of understanding on the issue of misclassification with multiple state agencies as well as the IRS and moved to ramp up enforcement programs (U.S. DOL 2015). The resulting federal–state cooperation sparked hope for a reinvigorated era of labor standards protection. An Economic Policy Institute report, for example, claimed that \$2 billion in stolen wages had been recovered for workers in 2015 and 2016 as a result of actions by the U.S. DOL, by state Departments of Labor and Attorneys General, and class action settlements (McNicholas et al. 2017).

Federal enforcement was severely curtailed as part of the Trump administration’s campaign to weaken or eliminate initiatives undertaken in nearly every arena of public policy during the Obama presidency. The federal government’s stance on misclassification underwent a complete reversal. In 2017, then Secretary of Labor Alexander Acosta withdrew the 2015 guidelines on independent contracting, removed the interpretative memorandum from the Department’s website, and curtailed federal investigations of cases involving misclassification (U.S. DOL 2017). The Trump administration continued to loosen constraints on employers’ ability to characterize their workers as independent contractors. On April 16, 2019, the general counsel of the National Labor Relations Board (NLRB) waded into the long-standing dispute over the correct classification for ride-sharing services by determining that Uber drivers were independent contractors rather than employees (NLRB 2019). Two weeks later, in response to a request from a virtual marketplace company, the U.S. DOL issued an opinion letter on April 29 concluding that the workforce of a firm that operates in the “on-demand” or “sharing” economy should be considered independent

contractors, not employees (U.S. DOL 2019). In August 2019, the NLRB held that misclassification of an employee does not constitute an unfair labor practice (Velox Express 2019).

The directives generated by Trump administration labor officials widened a growing gulf between federal and state agencies tasked with similar missions. While the leadership at the U.S. DOL and the NLRB sought to minimize the importance of misclassification as an enforcement priority, many state labor standards agencies have been substantially increasing their focus on the issue over the past decade (Erich and Gerstein 2019). Ironically, in the same month that the NLRB and DOL released their positions on the status of Uber and other on-demand workers, several states announced plans to take an alternate path, ramping up efforts to combat misclassification. On April 15, 2019, Wisconsin Governor Tony Evers signed an executive order to form the Joint Enforcement Task Force on Employee Misclassification, and Montana Governor Steve Bullock issued an executive order to create the Task Force on Integrity in Wage Reporting and Employee Classification (Wisconsin Department of Workforce Development 2019; Montana.gov 2019). One week later, Michigan Attorney General Dana Nessel established the Payroll Fraud Enforcement Unit (LeBlanc 2019). If the formation of these new bodies did not sufficiently indicate divergent paths, a statement by New Jersey Department of Labor Commissioner Rob Asaro-Angelo amplified the chasm between federal and state agency interpretations of their respective legal responsibilities when he said “[the DOL] opinion letter has zero effect on how the New Jersey Department of Labor enforces state laws” (Biryukov 2019). Seven months later, the New Jersey Department of Labor demanded that Uber pay \$649 million in unpaid unemployment taxes as a result of misclassification (Haag and McGeehan 2019). As the state with the most active regulatory history of challenging misclassification, California continues to wrestle with the consequences of AB 5. In the wake of the announcement of a ballot initiative to overturn the bill, the state’s Attorney General and a group of city attorneys filed suit on May 5, 2020, charging Uber and Lyft with wrongfully classifying their drivers as independent contractors under the terms of the new law (Conger 2020).

Other state and even local regulatory bodies have expanded their efforts. In September 2019, Manhattan District Attorney Cyrus R. Vance Jr. announced the indictment of labor broker Salvador Almonte Jr. on multiple fraud charges stemming from a scheme that resulted in the underpayment of approximately \$1 million of workers’ compensation insurance premiums (Jacobs 2019). In November of the same year, Minnesota’s Hennepin County District Attorney adopted the legal theory of human trafficking to charge a contractor with the exploitation of immigrant construction workers, and the Louisiana Workforce Commission won a grand jury indictment of a drywall contractor for misclassification resulting in \$794,000 in insurance fraud (Feshir 2019; Grand Jury Indictment 2019). In July 2020,

the Massachusetts Attorney General filed suit in Superior Court seeking a declaratory judgment that Uber and Lyft drivers are employees under the state's misclassification law (Johnston and Vaccaro 2020).

For many years, misclassification occurred most commonly in the basic construction trades that had a tradition of piecework payments. Treating employees as independent contractors was less common within the mechanical trades as licensing requirements tended to promote conventional conditions of employment. But misclassification has come to permeate every corner of the industry. In January 2020, the Attorney General of the District of Columbia reached a \$2.75 million settlement with Power Design Inc., a large national electrical contractor, for wage theft and misclassification. The lawsuit accused the Florida-based firm and two Maryland labor brokers of failing to “classify at least 535 electrical workers as employees in a scheme to cut costs and avoid legal responsibilities” on more than 10 projects in the District. “If you cheat workers out of wages and benefits they’ve earned, or commit payroll fraud to gain an unlawful edge,” said Attorney General Karl Racine, “you will be held accountable” (Office of the Attorney General of the District of Columbia 2020).

Efforts by watchful enforcement agencies to rein in the spread of misclassification has prompted some employers to modify their employment strategies by instituting a hybrid model consisting of a core of employees and a periphery of non-employees in order to deflect the spotlight of oversight. In areas with strong building trades unions and workers centers as well as sympathetic state administrations, companies that once classified all their workers as independent contractors now operate with a smaller group of employees and meet the legally required tax and insurance obligations. Once projects are in full swing and additional manpower is needed, however, these contractors often turn to labor brokers who typically pay their workers in cash. If questioned, the company of record can demonstrate compliance to authorities while the labor brokers are recorded in the books as vendors or lower-tier subcontractors with an invisible workforce. Solving this puzzle requires extensive investigatory legwork and forensic accounting to identify the misclassified workers—resources that even the most aggressive state agencies may be lacking.

Attorney Simon Leeming spent most of his career helping construction employers that worked in Massachusetts to expand their use of independent contractors, but he now points to constant union campaigns, the passage of the independent contractor bill in 2004, and a succession of perceived pro-union state attorneys general as the reasons he has altered his legal advice. “The companies that I continued to represent,” he claimed, “have their own employees predominantly.” Yet Leeming acknowledged that “as the jobs change and as the labor needs change, they will go out and get work from labor companies” (Leeming 2018). For every contractor that chooses to “go straight,” more non-union firms continue to play in the swamp of the

underground economy, driven by the imperatives of success that depend on underbidding their competition through lower labor costs.

### **The COVID-19 Era**

The COVID-19 pandemic exposed and amplified the dynamics of how the construction industry has evolved. While construction workers had to struggle with the same dilemma that all workers faced, that is, balancing the need to earn a living and pay the bills against the desire to stay safe and healthy and to protect families and friends from potential on-the-job exposure to the coronavirus, union trades workers had options that were unavailable to their non-union counterparts. Building trades unions around the country called on governors to either shut down construction projects or institute safety protocols on the job sites that remained open. In some cases, union workers walked off jobs when colleagues tested positive for the virus. In the absence of a collective voice, non-union workers faced the solitary choice of determining whether they should risk going to work every day or stay at home and potentially face the wrath of an unforgiving employer (Baird-Remba 2020; Erlich 2020).

Given their status as employees in an uncertain industry, most union trades workers have experienced being laid off and collecting unemployment benefits consistent with the nature of construction's gig environment. For those non-union workers who have operated as independent contractors or cash recipients, traditionally layoffs have meant a halt to any income and a scramble to find alternate sources of employment. Fortunately, the CARES Act passed by Congress on March 27, 2020, took the unprecedented step of explicitly authorizing access to unemployment benefits by those who had been classified as independent contractors. Yet the hundreds of thousands of trades workers in the United States who were paid in cash in the underground economy still had no access to relief when their projects were slowed or shut down.

The federal–state divide in regulatory oversight was replicated in the decision-making process to determine if construction should have been considered an essential industry. In the absence of any coherent federal policy, individual governors made the decision to eliminate, reduce, or not interfere with construction activity in their states. For example, as of April 20, 2020, one state had closed all construction projects, 15 had allowed some projects to stay open, and the remainder left the industry largely untouched (*Construction Dive* 2020). Similarly, without any federal mandates from the Occupational Safety and Health Administration (OSHA), safety guidelines were left to the states to establish and monitor. Construction sites are, by their very nature, unsanitary, unhygienic, and problematic in terms of social distancing. States, municipalities, unions, employer associations, and individual contractors all had to develop their own policies and procedures to ensure or ignore worker protections. As criticism of OSHA's passive stance mounted,

and following a May 18 AFL-CIO lawsuit designed to compel the agency to issue an emergency temporary standard (ETS), OSHA finally issued a set of recommendations on May 26. But the document was clear in its reluctance to provide firm guidance. The opening sentences of the guidelines emphasized that they did not represent a standard or regulation, created no new legal obligations for employers, and the recommendations were solely “advisory in nature, informational in content” (Goodman 2020a; Scheiber 2020; U.S. DOL 2020b). Two weeks later, 21 construction employer associations issued a statement opposing a House bill that would have upgraded the OSHA guidelines into requirements (ForConstructionPros.com 2020). On July 27, Virginia Governor Ralph Northam announced the nation’s first state-level ETS for employers “in the face of federal inaction” (Slowey 2020).

As the economy gradually reopened, building trades unions in strong union areas provided information sessions for their members and typically insisted that antibody testing, personal protective equipment, staggered schedules, and other measures become integrated into project management (Hallum 2020). A \$26 million Chicago office built in 2020 was engineered for maximum social distancing, touch-free operation, and air and surface sanitization during both construction and occupancy phases (Goodman 2020b). By contrast, in predominantly non-union areas, the lack of an organized worker voice and proactive safety measures drove up infection rates, particularly among low-waged Latino construction workers. In mid-June, Dr. Betsey Tilson, North Carolina’s Director of the Department of Health and Human Services, called construction sites high-risk settings. She cited Durham County, where Latinos represented nearly 61% of all confirmed COVID-19 cases while accounting for just 14% of the population, and pointed out that the greatest number of cases was found among construction workers (Bonner 2020).

### **Looking Backward and Forward**

The transformation of the world of work in construction has been swift and severe. Writing in *Fortune* in 1979, Gilbert Burck contrasted the building trades’ “impregnable monopoly position” in the late 1960s with their “disorderly retreat” only a decade later. Open shop contractors, he continued, “now plausibly claim to dominate the industry” (Burck 1979). Similarly, Business Roundtable leader Charles Brown, formerly CEO of DuPont, claimed in 1982 that construction had once been “monopolized by the union segment with no apparent alternative in sight.” Now, he crowed, “the capitalistic system worked again” (ENR 1982: 132). Measuring union density in construction has always been challenging, but available data indicate that Burck’s and Brown’s claims were not exaggerated. According to Steven Allen, the percentage of workers in the construction industry who were union members declined from 42% in 1970 to 22% in 1992. The decline in union density lowered compensation throughout the industry. Construction workers experienced a 17% drop in real wages between 1980 and 1992

(Allen 1994). And the trend only continued. In 1983, the median weekly earnings in the construction trades exceeded the median for all workers by 20%. By 1999, the derisive term “labor aristocrat” had lost much of its relevance. The pay difference between construction and all other workers had sunk to only 3% (Erllich and Grabelsky 2005). The plunge was so complete that in 2001, Frank Yancey, an executive with open shop Kellogg Brown & Root, the nation’s third largest contractor, told his colleagues that “if low pay was a felony, I think most of us would be on death row today” (BNA CLR 2001).

Construction work today differs dramatically from what it was a half-century ago. The work remains dangerous but, despite the physical demands, construction had long served as a path to the middle class for smart and ambitious young men (and increasingly women) who could not afford or chose not to attend college. The decline of union density, the resulting deterioration of wage rates, and the presence of payroll fraud and the underground economy has removed that path for trades workers. In many parts of the country, construction employers complain that it is nearly impossible to find a sufficient number of skilled workers, conveniently ignoring the reality that reduced compensation and training opportunities have degraded the value of the trades as an employment option.

Many of the elements of the Roundtable’s realignment wish list were realized over a remarkably short period of time. The adoption of the construction management model and much of the political, legislative, and regulatory agenda were achieved during the 1970s and 1980s. In many ways, that transformation is complete. The willful misclassification of employees as independent contractors, the shift to cash compensation, and the use of a vulnerable undocumented workforce has become the dominant labor model in certain areas of the country—deeply institutionalized as a result of the construction industry’s version of a successful deregulatory agenda. Misclassification, low cash compensation, and precarious employment conditions have diminished the appeal of the trades as an attractive career.

How severe is the problem? It is difficult to measure accurately the prevalence and severity of misclassification and payroll fraud in construction. Independent contractors have a high incidence of not reporting earnings to state and federal tax authorities, and the question of what differentiates conventional employee status from genuine independent contracting clouds the clarity of the data. Furthermore, off-the-books compensation is, by its very nature, unrecorded and therefore difficult to quantify. All the studies on the subject, however, indicate payroll fraud of either type is an alarming problem. The most recent and comprehensive national study suggested that in 2017, between 12.4% and 20.5% of the construction industry workforce (1.3 to 2.2 million workers) were either improperly classified as independent contractors or employed informally off-the-books (Ormiston, Belman, and Erllich 2020). Depending on worker income assumptions, the study concluded that fraudulent employers may have realized between \$6.2 and \$17.3

billion in labor cost savings, an amount lost annually to state and federal coffers as well as workers' compensation insurers (Ormiston et al. 2020).

Rebuilding union market share in construction is primarily a matter of making a commitment to organizing and adopting the perspective that unions must speak on behalf of all workers—union and non-union. A growing number of unions have taken steps in that direction and achieved some level of success. The predominantly white male, exclusive, “country-club” unionism that once characterized the building trades has been diminishing. Membership has become more diverse in terms of race and gender; and unions have exhibited a greater willingness to look beyond their crafts, connect with worker centers, and participate in community-labor coalitions at the local level. In the urban areas of the Northeast, Midwest, and West Coast, where building trades unionism remains an effective vehicle for improving workers' lives, unions continue to mobilize members and win decent contracts.

It is difficult to imagine a viable long-term union growth strategy in the absence of a successful regulatory assault on misclassification and the conditions of the underground economy. Presumably a Biden administration DOL will reinvigorate action against the various forms of payroll fraud. As a candidate for president, Joe Biden was outspoken in his support for AB 5 and his platform proposed “an aggressive, all-hands-on-deck enforcement effort that will dramatically reduce worker misclassification.”<sup>2</sup> As in any other form of law enforcement, the protection of labor standards is a constant cat-and-mouse game between those who violate and those who administer the laws. From an enforcement perspective, it may be preferable to deter rather than punish illegal behavior, but chasing unlawful employers is usually a matter of playing catch up. From an employer perspective, the decision to misclassify workers in construction has always been a straightforward business matter—that is, assessing the financial trade-off between the savings realized from labeling workers independent contractors versus suffering the potential monetary penalties if caught. For many years, the answer was simple. The extension of payroll fraud into nearly every corner of the industry provided a competitive advantage to those who did not play by the rules. An effective regulatory logic of deterrence in construction has to incorporate a sophisticated understanding of financial incentives and disincentives.

Patricia Smith, a veteran of the misclassification wars, described the practice as stripping workers of “all labor rights” (Smith 2018). During her career, Smith has been the labor bureau chief of the New York State Attorney General's office, the New York State Commissioner of Labor, and the U.S. DOL's Solicitor. She has recommended that state enforcement agencies adopt the tactics of interagency cooperation, both in terms of data sharing and coordinated enforcement actions. In addition, Smith urged the

---

<sup>2</sup>See <https://joebiden.com/empowerworkers/#>.

development of a comprehensive media outreach infrastructure to inform the public and to encourage employer deterrence (Smith 2018). Ultimately, creative worker organizing is the only path to increased union density. But as long as employers continue to violate employment laws in an effort to gain a cost advantage, a level playing field in a highly competitive industry will remain in jeopardy. If owners select contractors to build their projects based on price alone, even the most well-conceived organizing campaigns will falter in the face of the sheer economics of bidding predicated on illegal and unethical employment arrangements. As a result, the future conditions of work in the industry hinge, to some degree, on the prevailing political winds and the resulting policy and enforcement choices of both federal and state agencies.

### References

- Allen, Steven G. 1988. Declining unionization in construction: The facts and the reasons. *Industrial and Labor Relations Review* 41(3): 343–59.
- . 1994. Developments in collective bargaining in construction in the 1980s and 1990s. NBER Working Paper No. 4674. Cambridge, MA: National Bureau of Economic Research.
- Baird-Remba, Rebecca. 2020. Construction shutdown highlights divide in benefits, pay between union and non-union. *Commercial Observer*, April 3. Accessed at <https://commercialobserver.com/2020/04/coronavirus-construction-shutdown-union-open-shop-divide/>.
- Biryukov, Nikita. 2019. Federal labor opinion won't affect state labor laws. *New Jersey Globe*, May 1. Accessed at <https://newjerseyglobe.com/governor/federal-labor-opinion-wont-affect-state-labor-laws/>.
- [BNA CLR] BNA Construction Labor Report. 1968. Bureau of National Affairs. Newsletter, November 20.
- . 1970. Bureau of National Affairs. Newsletter.
- . 1999. Bureau of National Affairs. Newsletter, April 28.
- . 2001. Bureau of National Affairs. Newsletter, August 15.
- . 2002. Bureau of National Affairs. Newsletter, Jan. 2.
- . 2003. Bureau of National Affairs. Newsletter, March 26.
- Bonner, Lynn. 2020. Construction sites are 'high-risk' settings for coronavirus infection, NC official says. *Raleigh News & Observer*, June 15. Accessed at <https://www.newsobserver.com/news/local/article243550137.html>.
- Bosch, Gerhard, and Peter Philips (Eds.). 2003. *Building Chaos: An International Comparison of Deregulation in the Construction Industry*. New York: Routledge/Taylor & Francis.
- Burck, Gilbert. 1979. A time of reckoning for the building unions. *Fortune* 99 (June 4): 82–85.
- Business Roundtable. 1983. More construction for the money: Summary report of the Construction Industry Cost Effectiveness Project. January.
- California Department of Industrial Relations. 2019. Labor commissioner's office issues wage theft citations for subcontractor's failure to pay 62 construction workers. News Release No. 2019-43, May 29.
- Carré, Françoise, and Randall Wilson. 2004. The social and economic costs of employee misclassification in construction. Report. Cambridge, MA: Harvard Labor and Worklife Program.
- Conger, Kate. 2020. California sues Uber and Lyft, claiming workers are misclassified. *New York Times*, May 5. Accessed at <https://www.nytimes.com/2020/05/05/technology/california-uber-lyft-lawsuit.html>.
- Construction Dive. 2020. Mapping the coronavirus impact on US construction, April 20. Accessed at <https://www.constructiondive.com/news/mapping-high-impact-construction-across-the-us/551042/>.

- [ENR] *Engineering News-Record*. 1982. December 15, p. 132.
- . 2013. June 3, p. 10.
- Erlich, Mark. 1986. *With Our Hands: The Story of Carpenters in Massachusetts*. Philadelphia: Temple University Press.
- . 1990. *Labor at the Ballot Box: The Massachusetts Prevailing Wage Campaign of 1988*. Philadelphia: Temple University Press.
- . 2020. COVID-19 outbreak shows importance of unions. *CommonWealth Magazine*, April 16. Accessed at <https://commonwealthmagazine.org/opinion/covid-19-outbreak-shows-importance-of-unions/>.
- Erlich, Mark, and Terri Gerstein. 2019. Confronting misclassification and payroll fraud: A survey of state labor standards enforcement agencies. Report. Cambridge, MA: Harvard Labor and Worklife Program.
- Erlich, Mark, and Jeff Grabelsky. 2005. Standing at a crossroads: The building trades in the twenty-first century. *Labor History* 46(4): 421–45.
- Feshir, Riham. 2019. Hennepin County's first labor-trafficking case ends in guilty plea. *MPR News*, November 18. Accessed at <https://www.mprnews.org/story/2019/11/18/contractor-ricardo-batres-pleads-guilty-in-rare-labor-trafficking-case>.
- Fine, Janice. 2018. New approaches to enforcing labor standards: How co-enforcement partnerships between government and civil society are showing the way forward. *University of Chicago Legal Forum* Vol. 2017 (Article 7): 143–76.
- Fine, Janice, and Jennifer Gordon. 2010. Strengthening labor standards through partnerships with workers' organizations. *Politics and Society* 38(4): 552–85.
- Fiscal Policy Institute. 2007. The underground economy in the New York City affordable housing industry. April 17. Accessed at <http://fiscalspolicy.org/the-underground-economy-in-new-york-citys-affordable-housing-construction-industry>.
- ForConstructionPros.com. 2020. Construction industry against proposed COVID-19 Protect Every Worker Act. June 8. Accessed at <https://www.forconstructionpros.com/business/article/21136036/construction-industry-against-proposed-covid19-protect-every-worker-act>.
- Fortune*. 1947. The industry capitalism forgot. Volume 36, August.
- Freedman, Audrey. 1988. How the 1980's have changed industrial relations. *Monthly Labor Review* 111(5): 35–38.
- Goldhaber, Stanley, Chandra K. Jha, and Manuel C. Macedo, Jr. 1977. *Construction Management: Principles and Practices*. New York: John Wiley & Sons.
- Goodman, Jenn. 2020a. Court rejects bid for OSHA COVID-19 emergency standard. *Construction Dive*, June 12. Accessed at <https://www.constructiondive.com/news/court-rejects-bid-for-osha-covid-19-emergency-standard/579714/>.
- . 2020b. Chicago office building constructed with coronavirus-fighting features. *Construction Dive*, July 9. Accessed at <https://www.constructiondive.com/news/chicago-office-building-constructed-with-coronavirus-fighting-features/581201/>.
- Grand Jury Indictment. 2019. <https://wcc-public-news-storage-4081.s3-us-west-2.amazonaws.com/2019/11/14/nyregion/uber-new-jersey-drivers.html>. November 21.
- Haag, Matthew, and Patrick McGeehan. 2019. Uber fined \$649 million for saying drivers aren't employees. *New York Times*, November 14. Accessed at <https://www.nytimes.com/2019/11/14/nyregion/uber-new-jersey-drivers.html>.
- Hallum, Mark. 2020. Construction unions adapt to new landscape with COVID-19 under Phase I reopening. *amNY*, June 16. Accessed at <https://www.amny.com/coronavirus/construction-unions-adapt-to-new-landscape-with-covid-19-under-phase-i-reopening/>.
- Hyman, Louis. 2018. *Temp: How American Work, American Business, and the American Dream Became Temporary*. New York: Viking.
- Jacobs, Shayna. 2019. Construction middlemen put workers in danger by cheating workers comp insurance providers: DA. *New York Daily News*, September 5. Accessed at <https://www.nydailynews.com/new-york/ny-labor-broker-worker-comp-charge-20190906-553aosawevbxzo53owd3cpumby-story.html>.
- Johnston, Katie, and Adam Vaccaro. 2020. State sues Uber and Lyft, saying they cheat drivers by calling them contractors. *Boston Globe*, July 14. Accessed at <https://www.bostonglobe.com/2020/07/14/business/state-sues-uber-lyft-over-driver-misclassification-independent-contractors/>.

- Kessler, Andrew. 1994. Independent contractor safe-harbor rules await Congressional amendment. *Tax Lawyer* 47(4): 1077–88.
- Kochhar, Rakesh. 2005. The occupational status and mobility of Hispanics. Pew Research Center, December 15. Washington, DC: Pew Research Center.
- LeBlanc, Beth. 2019. Nessel creates enforcement unit to crack down on payroll fraud. *Detroit News*, April 22. Accessed at <https://www.detroitnews.com/story/news/politics/2019/04/22/nessel-creates-unit-crack-down-payroll-fraud/3541002002/>.
- Linder, Marc. 2000. *Wars of Attrition: Vietnam, the Business Roundtable, and the Decline of Construction Unions*. Iowa City, IA: Fanpihua Press.
- Levy, Sidney. 2000. *Project Management in Construction*. New York: McGraw-Hill.
- McKinsey & Company. 2017. Reinventing construction: A route to higher productivity. Report. February 27. Accessed at <https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/reinventing-construction-through-a-productivity-revolution>.
- McNicholas, Celine, Zane Mokhiber, and Adam Chalkof. 2017. Two billion dollars in stolen wages were recovered for workers in 2015 and 2016—and that’s just a drop in the bucket. Economic Policy Institute. Report. December 13. Accessed at <https://www.epi.org/publication/two-billion-dollars-in-stolen-wages-were-recovered-for-workers-in-2015-and-2016-and-thats-just-a-drop-in-the-bucket/>.
- Migration Policy Institute. n.d. Profile of the unauthorized population: Texas. Washington, DC: MPI. Accessed at <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/TX>.
- Montana.gov. 2019. On tax day, Governor Bullock creates task force to ensure Montanans receive fair pay. April 15. Accessed at <https://news.mt.gov/on-tax-day-governor-bullock-creates-task-force-to-ensure-montanans-receive-fair-pay>.
- National Carpentry Contractors. 2008. 1-RC-22133, Decision and order of regional director, January 11.
- National Employment Law Project. 2020. Public task forces take on employee misclassification: Best practices. Policy Brief, August. Accessed at <https://www.nelp.org/publication/public-task-forces-take-on-employee-misclassification-best-practices/>.
- [NLRB] National Labor Relations Board. 2019. Office of the General Counsel, Advice Memorandum. April 16.
- Office of the Attorney General of the District of Columbia. 2020. AG Racine announces national electrical contractor will pay \$2.75 million to workers and the district to resolve wage theft lawsuit. January 15. Accessed at <https://oag.dc.gov/release/ag-racine-announces-national-electrical-contractor>.
- O’Hanlon, Thomas. 1968. Unchecked power of the building trades. *Fortune* 78(7): 102. December 1.
- Ordoñez, Franco, and Mandy Locke. 2014. IRS’ “safe harbor” loophole frustrates those fighting labor tax cheats. McClatchy Washington Bureau, December 14. Accessed at <https://www.mcclatchydc.com/news/nation-world/national/economy/article24777397.html>.
- Ormiston, Russell, Dale Belman, and Mark Erlich. 2020. An empirical methodology to estimate the incidence and costs of payroll fraud in the construction industry. Report. Accessed at <http://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>.
- Passell, Jeffrey, and D’Vera Cohn. 2016. Occupations of unauthorized immigrant workforce. Pew Research Center, November 3. Washington, DC: Pew Research Center.
- Pew Research Center. 2007. Construction jobs expand for Latinos despite slump in housing market. Pew Research Center, March 7. Washington, DC: Pew Research Center.
- Real Deal, The*. 2011. Non-U.S. citizens make up 39% of NYC’s construction workforce. December 21.
- Sacchetti, Maria. 2008. Governor moves to halt labor scofflaws: Initiative targets employers who fail to pay taxes. *Boston Globe*, March 13. Accessed at [http://archive.boston.com/jobs/news/articles/2008/03/13/governor\\_moves\\_to\\_halt\\_labor\\_scofflaws/](http://archive.boston.com/jobs/news/articles/2008/03/13/governor_moves_to_halt_labor_scofflaws/).

- Scheiber, Noam. 2020. Protecting workers from coronavirus: OSHA leaves it to employers. *New York Times*, April 22. Accessed at <https://www.nytimes.com/2020/04/22/business/economy/coronavirus-osha-workers.html>.
- Seeman, Charles, Edward Hennessey, and Richard Cooper (Eds.). 2001. *The Construction Lawyer's Guide to Labor and Employment Law*. Chicago: American Bar Association.
- Slowey, Kim. 2020. Virginia first state to enact COVID-19 emergency temporary standard. *Construction Dive*, July 28. Accessed at <https://www.constructiondive.com/news/virginia-first-state-to-enact-covid-19-emergency-temporary-standard/582402/>.
- Smith, Patricia. 2018. Testimony to the New Jersey Misclassification Task Force Public Forum. December 5. New York: National Employment Law Project.
- Starrett, W. A. 1928. *Skyscrapers: And the Men Who Build Them*. New York: Scribner's.
- Steffy, Loren C., and Stan Marek. 2020. *Deconstructed: An Insider's View of Illegal Immigration and the Building Trades*. College Station: Texas A&M Press/Stoney Creek Publishing Group.
- Su, Julie. 1975. Enforcing labor laws. David Feller Memorial Lecture, April 14. Berkeley, CA. [U.S. BLS] U.S. Bureau of Labor Statistics. 1975. Work stoppages in contract construction, 1962–73. Bulletin 1847. Washington, DC: U.S. Department of Labor.
- . 2018. Contingent and alternative employment arrangements. News Release, June 7.
- U.S. Bureau of the Census. 1985. 1982 census of construction industries: U.S. Summary: Establishments With and Without Payroll. Washington, DC: U.S. Department of Commerce.
- [U.S. DOL] U.S. Department of Labor. 2015. Wage and Hour Division. Administrator's Interpretation No. 2015-1, July 15.
- . 2017. US Secretary of Labor withdraws joint employment, independent contractor informal guidance. News Release, June 7.
- . 2019. U.S. Department of Labor issues new wage and hour opinion letter, concludes service providers for a virtual marketplace company are independent contractors. News Release, April 29.
- . 2020a. Wage and Hour Division. Dollar threshold amount for contract coverage. January 1.
- . 2020b. Occupational Safety and Health Administration. Construction work, COVID-19 control and prevention. March 9. Accessed at <https://www.osha.gov/SLTC/covid-19/construction.html>.
- U.S. Government Accountability Office. 2009. Employee misclassification: Improved coordination, outreach, and targeting could better ensure detection and prevention. GAO-09-717. August 10. Accessed at <https://www.gao.gov/products/GAO-09-717>.
- U.S. News & World Report*. 1984. Crackdown on illegal aliens—the impact. July 2.
- Velox Express. 2019. 368 NLRB No. 61, August 29.
- Warren, Robert. 2016. US undocumented population drops below 11 million in 2014, with continued declines in the Mexican undocumented population. *Journal on Migration and Human Security* 4(1): 1–15.
- Weil, David. 2005. The contemporary industrial relations system in construction: Analysis, observations and speculations. *Labor History* 46(4): 447–71.
- . 2014. *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Cambridge, MA: Harvard University Press.
- Weil, David, and Amanda Pyles. 2005. Why complain? Complaints, compliance, and the problem of enforcement in the U.S. workplace. *Comparative Labor Law & Policy Journal* 27(1): 59–92.
- Wisconsin Department of Workforce Development. 2019. Governor Evers signs executive order creating Joint Task Force on Payroll Fraud and Worker Misclassification. News Release, April 15. Accessed at [https://dwd.wisconsin.gov/news/2019/190415\\_joint\\_task\\_force\\_creation.htm](https://dwd.wisconsin.gov/news/2019/190415_joint_task_force_creation.htm).
- Workers Defense Project. 2013. Build a better Texas: Construction working conditions in the Lone Star State. A report from Workers Defense Project in collaboration with the Division of Diversity and Community Engagement at the University of Texas at Austin.
- . 2017. Build a better South: Construction working conditions in the southern U.S. Workers Defense Project and the Partnership for Working Families.