
DEPARTMENT OF EMPLOYMENT SERVICES



Testimony of Lisa María Mallory
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Public Hearing

before the

COMMITTEE ON HOUSING & WORKFORCE DEVELOPMENT
Honorable Councilmember Michael A. Brown, Chairperson

on

B19-0169 “Workplace Fraud Amendment Act of 2011”;
B19-0247 “Car Wash Employee Overtime Act of 2011”; and
B19-0380 “Unemployment Compensation Funds Appropriation
Authorization Act of 2011”

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Room 120
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Good afternoon Chairperson Brown and members and staff of the Committee on Housing & Workforce Development. My name is Lisa Mallory, and I am the Director of the Department of Employment Services (DOES). I am pleased to be here today to testify on the three bills before us, “Workplace Fraud Amendment Act of 2011,” “Car Wash Employee Overtime Act of 2011,” and “Unemployment Compensation Funds Appropriation Act of 2011.” These bills each seek to improve conditions for workers in the District of Columbia.

Workplace Fraud Amendment Act of 2011

It is generally accepted in the District that the majority of our employers meet their tax obligations, properly and legally classify their workers, and contribute to the economy and vitality of the District. However, some employers have been paying their workers “off the books,” paying sub-minimum wages, and illegally misclassifying their workers—consequently avoiding payment of taxes. This activity is commonly known as “workplace fraud” or “employee misclassification.” Whether employers do these activities intentionally or unintentionally, the effects of misclassifying employees leave individuals unshielded by various laws designed to protect workers.

The issue of worker misclassification impacts employers, workers, and government. A few of the problems of employee misclassification include:

- The definition of “employee” itself. It is comprised of many laws, rules, and court cases, and it is a complex term. Standards and definitions vary greatly, and some employers classify an “employee” as an “independent contractor” for tax purposes, but it is widely understood that the difference between an “employee” and an “independent contractor” lies mainly in how much authority an employer has and exerts over a worker.
- No one local or federal agency has sole jurisdiction over employee classification. This creates a difficult administrative burden in establishing enforcement.
- Employee misclassification puts law-abiding employers in a distinct competitive disadvantage, as they have a higher cost of business simply because they’re playing by the rules. They also pay more in workers’ compensation, unemployment, and other taxes.
- Workers who are misclassified as independent contractors but are actually employees pay their own income and self-employment taxes but are not protected by most state and federal employment laws, including the Fair Labor Standards Act.
- Misclassification of workers as “independent contractors” rather than bona fide employment deprives the District and federal government of revenue.

These are a few examples of the problem of worker misclassification. The bill before us, “Workplace Fraud Amendment Act of 2011,” attempts to address these concerns. The bill, among other provisions, requires the government to investigate allegations of employers who improperly classify individuals as independent contractors instead of bona fide employees. The Administration supports the proper classification of employees to ensure adherence to local and federal law, to guarantee protection of workers, and to ensure District tax obligations are met. Individuals should also know what “independent contractor” and “employee” classifications actually entail before they enter into relationships with employers.

Over the last few years, misclassification has received increased attention at the state and national level. The IRS, for example, addresses this issue using behavioral, financial, and type of relationship common law rules. Several states including Connecticut, Massachusetts, Michigan, Nevada, New York, and Washington State created task forces or commissions to investigate this problem, and legislation was created in several states.

It should be noted that no office in DOES currently targets industries where misclassification may be most prevalent. The agency only responds to complaints for wage and hour concerns specifically, not worker misclassification as a whole. Audits for unemployment insurance are only done randomly on only 2% of covered employers. Figures on the scope of this concern in the District are not readily available. Also, no single factor is determinative for an investigator to find that a worker is an independent contractor or an employee.

In conclusion, as we have heard here today, the issue of worker misclassification is complex but very important. Misclassification prevents individuals from obtaining the benefits due them under the existing laws designed to protect health, safety, and rights of workers, and it deprives the government of revenue. We look forward to working with this Committee on this important issue.

Car Wash Employee Overtime Act of 2011

The “Car Wash Employee Overtime Act of 2011” removes the exemption prohibiting car wash employees from receiving the protections of the District’s overtime law. Overtime laws were designed to promote fuller employment, reduce on-the-job injury, and support work-life balance. Overtime laws are an important tool to ensure workers are protected.

The Mayor supports the Car Wash Employee Overtime Act of 2011 to allow specific car wash employees to be included in the District’s overtime law. DOES’ Office of Wage and Hour is also prepared to administer this change in the law.

Unemployment Compensation Funds Appropriation Act of 2011

Earlier this year, Mayor Gray introduced, and the Council passed, emergency and temporary legislation to authorize the District to spend \$27 million in federal American Recovery & Reinvestment Act (ARRA) funds. The permanent bill is before us today, and the Mayor continues to support this important legislation.

As the Committee knows, the District's seriously out-dated and antiquated legacy mainframe unemployment insurance computer system does not meet the needs of District residents or businesses. The current unemployment rate of 11.1% exacerbates the concerns of this already taxed system. The existing system also forces the agency to be dependent upon contactors. In the past, these contractors were also performing data validation – a task that state agencies should do internally to ensure accuracy and timeliness in reporting. The integrity of this data is critical because it allows the agency to receive our federal reimbursements from the U.S. Department of Labor (DOL) and other federal agencies. Internal validity of the data collected by the contractors is now a process requirement. Modernization will build on this model to ensure accuracy, timeliness, and complete system integrity.

Our current economic situation requires the District to transform its system by ensuring payments are made timely, correctly, and efficiently and in a way that fully supports an individual's return to the workforce. These special ARRA funds will allow the District to do this important transformation.

We are also preparing our IT mainframe system for this full-scale, multi-year unemployment compensation modernization. Research has shown that states that attempt modernization without the support of other states have failed. So, we are collaborating with other jurisdictions and the National Association of State Workforce Agencies (NASWA) to pool our resources with other states, learn best practices, and ensure that we avoid pitfalls other states have experienced. Our new system will meet or exceed DOL's stringent data and administration requirements.

Finally, next month, we will eliminate the use of paper checks for unemployment insurance recipients by using prepaid debit cards to align the District with other states who use debit cards and direct deposit only. This effort – a national best practice – signals a real beginning to the modernization the District's unemployment compensation system, supports the Mayor's sustainability efforts by eliminating paper checks, and protects the District from theft associated with relying on paper checks.

Thank you for the opportunity to testify on these three bills. I am happy to answer any questions you may have.