

# **Misclassified Construction Employees in Tennessee**

**Dr William Canak**

**&**

**Dr. Randall Adams**

**January 15, 2010**

Dr. William Canak is Professor of Sociology, Middle Tennessee State University. He received his doctorate from the University of Wisconsin-Madison in 1981 and has published in such professional journals as the *Industrial & Labor Relations Review*, *the Journal of Collective Negotiations in the Public Sector* and *the Proceedings of the Industrial Relations Research Association*. Dr. Randall Adams received his doctorate from the University of Tennessee, Knoxville in 2008. He is a faculty member at Tennessee Technological University and has published in the *Encyclopedia of Career Mobility* and the *Encyclopedia of Leadership*

This report is based on empirical research using data from multiple public sources, including the U.S. Census Bureau, Bureau of Labor Statistics, National Council on Compensation Insurance, Inc., TN Dept. of Labor & Workforce Development, TOSHA, US OWS DOLETA and interviews with experts and professionals whose practice focuses on the Tennessee Construction Industry. This research received funding from the Mid-South Carpenters Regional Council.

	<b>Page</b>
<b>CONTENTS .....</b>	<b>i</b>
<b>Tables.....</b>	<b>ii</b>
<b>Graphs.....</b>	<b>iii</b>
<b>Executive Summary .....</b>	<b>iv</b>
<b>Misclassification in Construction.....</b>	<b>1</b>
<b>Construction in Tennessee.....</b>	<b>5</b>
<b>Workers Compensation &amp; Unemployment Insurance .....</b>	<b>15</b>
<b>Federal Impact of Misclassification .....</b>	<b>20</b>
<b>Foreign Born Worker Profiles .....</b>	<b>22</b>
<b>Appendices:</b>	
<b>A. State &amp; Federal Responses to Misclassification.....</b>	<b>24</b>
<b>B. 2006 Tennessee Non-Employer Statistics – US Census from     IRS Filings .....</b>	<b>33</b>
<b>C. Non-Employer Definitions .....</b>	<b>37</b>
<b>D. National Conference of Insurance Legislators Statement Supporting     Legislation to Control Employer Misclassification in Construction, Nov.     2009.....</b>	<b>38</b>
<b>E: NCCI Construction Industry Occupation Codes Used to Calculate Workers’     Compensation Premium Payments – 2003 – 2006 &amp; Estimate Missing Premiums     Due to Misclassified and Unreported Workers in Tennessee Construction     Industry .....</b>	<b>46</b>
<b>Sources .....</b>	<b>49</b>

<b>Tables</b>	<b>Page</b>
<b>Table 1: Test for Determining “Independent Contractor” Status</b>	<b>2</b>
<b>Table 2: Estimated Revenue Loss Due to Misclassification of Workers by State</b>	<b>3</b>
<b>Table 3: 2006 Distribution of Wage and Salary Workers in Construction by Segment</b>	<b>6</b>
<b>Table 4: Persons Employed in Construction in TN Including 2 Estimates of Self-employed (2006) from IRS data &amp; US Census American Community Survey</b>	<b>8</b>
<b>Table 5: Persons Employed in Construction in TN Including Self-employed &amp; Estimated Misclassified &amp; Unreported (2006)</b>	<b>9</b>
<b>Table 6: US Department of Labor required State Audits of Unemployment Insurance and Report of Misclassified Workers for All Employers in Tennessee 2008</b>	<b>10</b>
<b>Table 7: Average Annual Wages for All Industries and Construction in Tennessee 1998-2008</b>	<b>12</b>
<b>Table 8: Average Hourly Wage in TN Construction, Mining and Logging 2007-2009</b>	<b>13</b>
<b>Table 9: Estimated Workers’ Compensation Insurance Premiums Lost based on Misclassification &amp; Unreported Workers Based on TN DOL Reported Employment &amp; NCCI TN Construction Industry Codes for Employees in 2006 Assuming 100% of Self-Employed Paid Workers’ Compensation Premiums</b>	<b>16</b>
<b>Table 10: Estimated Workers’ Compensation Insurance Premiums Lost based on Misclassification &amp; Unreported Workers Based on TN DOL Reported Employment &amp; NCCI TN Construction Industry Codes for Employees in 2006 Assuming Less Than 100% of Self-Employed Paid Workers’ Compensation Premiums</b>	<b>16</b>
<b>Table 11: Estimated Unemployment Insurance Premiums Lost based on Misclassification &amp; Unreported Workers Based on TN DOL Reported Employment &amp; 2% Audit of Unemployment Insurance Payments</b>	<b>19</b>
<b>Table 12: Estimated Federal Income Tax for Tennessee Construction Workers</b>	<b>21</b>

<b>Table 13: Estimated Social Security/ Medicare Tax for Tennessee Construction Workers</b>	<b>21</b>
---	-----------

<b>Table 14: Foreign-born Civilian Workers in TN 1990-2007</b>	<b>23</b>
--	-----------

## **Graphs**

<b>Graph 1: TN Residential and Nonresidential Construction Units 2004-2008</b>	<b>7</b>
--	----------

<b>Graph 2: Annual Wages Paid in TN Building Construction 2004-2008</b>	<b>7</b>
---	----------

<b>Graph 3. Nonemployers TN Construction 2002-2006</b>	<b>10</b>
--	-----------

<b>Graph 4. Annual Average Wages in TN 1998 – 2008</b>	<b>12</b>
--	-----------

<b>Graph 5. Average Monthly earnings by Quarter 2002-2008</b>	<b>13</b>
---	-----------

<b>Graph 6: Average Hourly Wage in TN Construction, Mining and Logging 2007-2009</b>	<b>14</b>
--	-----------

<b>Graph 7: TN Average Weekly Hours Worked in Construction 2007-2009</b>	<b>14</b>
--	-----------

## Executive summary

The Tennessee construction industry employs over 220,000 workers (Census, American Community Survey 2006). State payroll job numbers record just over 130,000 in 2006 (TN DOL&WD) according to official state government payroll reports. Based on two sources, IRS non-employer tax filings and Census Bureau's American Community Survey, in 2006 between 61,000 and 78,000 independent contractors (non-employer businesses) operate establishments in Tennessee's construction industry. Residential construction employs nearly two-thirds of construction workers in Tennessee and overall construction activity grew rapidly, just under 10%, from 2004 to 2008. Commercial construction employment in 2008 was over 40% lower than in 2004. The Tennessee construction industry's growth and volatility are also characterized by worsening wage and employment standards as unregulated workplace relations and job site practices have come to profile an underground segment of the industry.

Recognizing the potential negative impact of construction industry misclassification and underreporting of workers, cities, states and the federal government have funded a series of empirical research studies. In sum, these studies, reviewed in the main report, document extensive violation of existing labor laws, such as misclassification of employees as independent contractors and off-the-book workers, by employers whose practices place significant burdens on taxpayers, other employers, and health care providers. In response, states in every region of America, including the Southeast, have strengthened enforcement and passed new legislation in order to restore a level playing field for contractors and workers in both residential and commercial construction.

- As buildings go up in Tennessee more and more construction work has gone underground, signifying violation of several employment and tax laws. Using US Census or IRS tax filing data to calculate Tennessee construction employment and self-employed, an estimated 12,000 to 29,000 Tennessee construction workers are either misclassified as independent contractors or employed off-the-book.
- The US Department of Labor, Office of Workplace Security requires states to audit state unemployment insurance payments in order to determine workers misclassified as self-employed. Based on a 2008 audit of Tennessee's unemployment insurance performed by the Tennessee Department of Labor and Workforce Development Employment Security division, we estimate 9,098 misclassified self-employed construction workers in 2006. Based on this adjustment to reported self-employed workers, we estimate that misclassified and unreported 2006 construction workers in Tennessee range from 21,990 to 38,680.
- The costs of the illegal underground construction industry to taxpayers are substantial and growing. Contractors employing misclassified and unreported workers avoid payment of legally required payroll taxes and workers compensation premiums and shift these and other costs onto taxpayers and their competitors who play by the rules.

### Potential Losses to Tennessee

- Unemployment Insurance missing payments 2006 estimated at between **\$4,935,702 and \$11,444,152** based on IRS and ACS calculations of Tennessee misclassified workers
- Using US Department of Labor mandated audits of unemployment insurance payments by Tennessee employers, an estimated additional 9,098 workers in Tennessee's construction industry are misclassified as self-employed. Missing unemployment insurance payments, incorporating these UI audit data, are estimated at between **\$8,418,872 and \$14,927,321** in 2006
- Workers Compensation Premiums unpaid 2006 – estimated at between **\$30,541,148 and \$70,814,148** based on IRS and ACS calculations of Tennessee construction employment.
- Using US Department of Labor mandated audits of unemployment insurance payments by Tennessee employers, an estimated additional 9,098 workers in Tennessee's construction industry are misclassified as self-employed. Missing workers' compensation premiums, incorporating these UI audit data, are estimated at between **\$52,099,310 and \$91,632,920** in 2006.
- The underground construction industry is concentrated in residential construction, but also exists in commercial construction and even among some infrastructure projects that are entirely government-funded. While two-thirds of the affordable housing sector is underground, it accounts for only about one-fifth of the entire underground construction sector.
- For Tennessee self-employed construction workers reporting less than 100% of their wages, the estimated Federal Income tax loss for 2007 filings would have been between a low of **\$15,225,452 and a high of \$73,414,752**. The Social Security and Medicare losses range from **\$7,786,768 to \$42,058,044**.

The taxpayer costs quantified above do not include harder-to-quantify economic costs to workers and contractors who correctly classify employees.

- Construction safety reached crisis proportions in 2008 when 33 construction workers were killed on the job in Tennessee. TOSHA data indicate a strong correlation between construction fatalities and the characteristics of the underground economy: half of the deaths occurred among workers at very small construction companies, three-fourths of the workers involved worked for non-union companies, and failure to provide safety training was cited in over half of the cases.

- Despite the dangerous working conditions, workers misclassified and unreported are paid very low wages, are denied the protections of universal social insurance programs (workers' compensation, unemployment insurance, disability), do not have health coverage or retirement benefits, are not able to join a union, and rarely are they entitled to paid sick leave, holidays or vacations. Working in the underground construction economy is like working in the 19<sup>th</sup> century when it comes to labor rights, protections and employment standards.
- Median wage in Tennessee's construction industry equaled \$14.34 per hour in 2006, not much above the federal poverty guideline for a family of four that year of \$20,614.
- Contractors operating in the underground economy also disadvantage law-abiding construction companies by shifting costs to vulnerable workers and law abiding employers. Among other things, law abiding construction contractors pay several hundred dollars per worker to cover medical costs for the employees of underground businesses not providing health coverage.

The underground economy in construction has grown rapidly in recent years. Industry practices have made it difficult for public agencies to enforce employment standards and tax laws. As in the case of environmental pollution, markets on their own do not force businesses to "internalize" all the costs they generate. Over past decades, state government established a series of employment standards and social insurance systems to protect workers and responsible businesses from unchecked competition that degrades working conditions and the economic well being of workers and businesses that play by the rules. In particular, state government has found it difficult to act to curb the spread of illegal misclassification of workers as independent contractors. Some businesses do this to skirt employer obligations for workers' compensation, social insurance premiums and other mandated employment costs. These practices affect an estimated 11 to 21 percent of Tennessee construction workers. Unfair cost advantages for underground contractors make it increasingly hard for legitimate contractors to compete.

The underground economy shifts many costs to others. In contrast, responsible construction companies accept these legally mandated costs and also provide their workers with health insurance and retirement security, and compensate their workers at levels that make possible a middle class living standard.

### ***Recommendations***

An underground construction economy in the Tennessee construction industry negatively affects employment practices and wages. Costs in the form of decreased safety, lower wages and economic insecurity get shifted to workers who lack coverage from established programs such as unemployment insurance, workers' compensation, and health care coverage. Responsible contractors and taxpayers pay the price for these practices. Government and the construction industry have an obligation to curb the underground

economy, enforce long-standing employment laws, ensure compliance with essential social insurance protections and eliminate the unfair competitive advantage from contractors who fail to properly classify employees and pay workers off-the-books.

- Consistent with current state government initiatives elsewhere in the United States, Tennessee should vigorously enforce employment laws, ensure compliance with health and safety regulations, workers' compensation programs and social insurance requirements, and use various leverage points to improve pay and working conditions.
- Enforcement efforts should take into consideration an often vulnerable construction sector workforce with a focus on sustaining basic workplace protections afforded workers in others sectors, plus achieving good wages, skill development opportunities and support for career advancement.
- Increase the capabilities of law enforcement agencies through better funding, sharing of information, dedicated counsel and enforcement task forces-including more cooperation with federal authorities and other states where appropriate.
- Strengthen laws by creating more enforcement tools, like stop work orders and private causes of action. In most jurisdictions the failure to properly classify an individual as an employee is not in and of itself a violation of the law-the failure to report wages, for instance, is the violation. Make the failure to properly classify an individual as an employee unlawful.
- If definitions of "employment" are changed, create uniform definitions with presumptions of employment. Any new definition should not weaken "employment." Also, some states have taken steps to reduce the incentive to misclassify by treating employees and independent contractors similarly. We recommend that Tennessee enact similar treatment of employees and independent contractors and thereby provide consistent standards and protection to all workers in the construction industry.
- More concern needs to be shown for employers who play by the rules. Reward them by adopting policies that will discourage irresponsible contractors from bidding public work.
- Encourage better self-policing by the construction industry through enforcement actions using joint employment, conspiracy and racketeering charges. Thorough investigations need to be done on potential impact cases. Also, we recommend that Tennessee require disclosure on workers compensation certificates of classification codes and the wages upon which premiums are based. Workers compensation certificates should be required with applications for building permits. In addition, employers need to keep records that describe their use of independent contractors.

- Track cases where misclassification fraud is found to determine the effectiveness of specific statutes and enforcement strategies.
- We recommend that Tennessee conduct an assessment of business and individual income tax returns, unemployment insurance and workers' compensation payments to better document the impacts of misclassification.

## **Misclassification in Construction**

Workers classified as employees are covered by a substantial set of federal and state laws and programs that provide protections, rights and responsibilities for employers. These include unemployment insurance, workers' compensation, overtime pay and wage and hours standards. Employers of employees are required to pay unemployment and social security tax and withhold state and federal income tax and secure workers' compensation insurance. In contrast, when employers classify workers as independent contractors, responsibility for employment tax, employee benefits and other labor standards do not apply, but employers are required to provide employees with an IRS 1099-Miscellaneous Form reporting payments for work.

The basis for classification derives from the common law questions of control and supervision within the normal course of business activity, on the one hand, and the independent provision of services by a business that may be a sole proprietorship, partnership or corporation. Misclassification derives from two possible sources. First, it may result from an employer's claim that a worker who meets a common law standard as an employee is actually an independent contractor. This may be an error or an intentional action to avoid employer legal and financial responsibilities. Second, misclassification may involve unreported workers whose employment, whether as an employee or an independent contractor, is not reported in order to avoid employer responsibilities.

### **Overview**

Mounting employment problems have accompanied the recent and rapid changes in employment and labor relations in the vast, globalizing interior of the United States. Sweat-shop working conditions, underemployment, unemployment, occupational injuries and poverty are some of the employment problems facing both native born American workers and new immigrants in American states only recently exposed to demographic changes that earlier concentrated on the coasts and a few large cities of America's North Central region. In this rapidly globalizing, interior region of the nation, low levels of unionization, lax enforcement of labor standards and a search for competitive advantages has encouraged some employers to pursue practices that avoid legally mandated employer responsibilities. The misclassification of workers as independent contractors has become a widespread practice in some industries and, in the construction industry, now threatens to impose significant costs on workers and the larger society. The extent of these misclassification practices and their fiscal and economic impact on states and municipalities has been the focus of recent empirical research. (See Appendix A)

These academic and government sponsored studies indicate that the misclassification of workers results in loss of revenues and proves a detriment to workers, legitimate businesses, taxpayers, and social insurance programs designed to aid workers in times of distress. The purpose of this study is to identify potential effects of misclassified workers on Tennessee's ability to collect revenue dollars defined by law.

## Classifying Workers

More than twelve million workers or 9.8% of the US workforce were identified as “alternative workers” in 2000 (Planmatics 2000). These workers differ from standard workers in one or more of the following: the absence of an employer, a distinction between the organization that employs the worker and the one for whom the person works (temp services), or the temporal instability of the job (day laborer). The complexity of these alternative relationships combined with the desire to cut labor costs often results in a worker being classified wrongly. Planmatics (2000) identified the number one motivation for misclassifying workers as the desire to avoid paying workers’ compensation premiums and the avoidance of responsibility in disability and workplace injury-related disputes. Misclassification of workers can result in a 20-40% reduction in labor cost for employers classifying workers as “independent contractors” (Belman and Block 2008).

While state laws governing who is an employee and who may be classified as an independent contractor vary according to economic and social ideology, every state uses some defined criteria. In 2000, Planmatics determined that “fourteen states plus the District of Columbia use the common law test to define employees for the purpose of unemployment insurance coverage, while twenty-two states use the ABC test; ten states use their own test and four states use the IRS’s 20-point test (Planmatic pg.15).” A summary of these tests appears in Table 1. Tennessee uses the common law test to determine who qualifies as an independent contractor for workers’ compensation and the ABC test for unemployment.

**Table 1: Test for Determining “Independent Contractor” Status**

<b>Test</b>	<b>Criteria</b>
<b>The Common Law Test</b>	Based on a master-servant type relationship. The employer (master) retains the right to control the way work is done by the employee (servant).
<b>ABC Test</b>	Depends on the existence or no existence of the right to control the means and method of work. Employment consists of service performed by an individual unless:(A) the individual has been and will continue to be free from any control or direction over the performance of services both under his contract and in fact; (B) the service is either outside the usual course of the business for which it is performed, or is performed away from its business; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is of the same nature as that involved in the service.
<b>IRS Test</b>	A multi-factor common law test with the factors classified in three categories: behavior control, financial control and the relationship of the worker to the firm.
<b>Economic Realities Test</b>	An employer-employee relationship exists if a worker is financially dependent on one business for a substantial part of their livelihood. Broadest test for worker classification.
<b>AC Test</b>	Two-part test using A and C from the ABC test
<b>ABC plus 123 test</b>	ABC test plus three additional criteria: (1) on the effective date of the contract of service, the individual is responsible for filing a schedule of expenses with the IRS; (2) the individual has established an account with the Department of Revenue; and, (3) the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting.

## Potential results of Misclassification

A number of states and a limited number of metropolitan areas have conducted studies to determine the economic, fiscal and social impact of misclassified workers. Much of the focus has been concentrated on the construction industry where the practice of misclassification has been identified as common and widespread. Impacts from misclassification generally fall in the broad categories of 1) loss of state revenue impacting income tax collections and social insurance programs including workmen' compensation insurance and unemployment insurance, 2) a disadvantage for legitimate businesses effecting the bidding process and labor cost, 3) social impacts on workers who are unable to access social insurance programs, and 4) loss of Federal tax dollars. Table 2 summarizes the potential revenue loss from a selected number of studies.

**Table 2: Estimated Revenue Loss Due to Misclassification of Workers by State**

State	% Workers Misclassified	Unemployment Insurance	State Income Tax	Social Security Tax	Workers' Compensation	Data Year
MI	8%	\$17 million	\$20-30 million	\$34-57 million		2004
NY*	10%	\$272 million**	\$70 million			2005
IL	7.5%	\$39-53 million	\$124 million		\$96 million	2001-2005
ME	11%	\$314,000	\$4.3 million	\$10.3 million	\$6.5 million	1999-2002
MA	13%	\$12-35 million	\$152 million		\$91 million	2001-2003
WA		\$14.8 million	\$52 million		\$34.5 million	2004
PA	9%	\$200 million**			\$81 million	2008
OH		\$100 million	\$180 million	\$500-600 million	\$510 million	2009

Sources: See Sources

\*Annual average of construction only in New York City

\*\* Includes all mandated payroll taxes

An independent contractor assumes full responsibility for payroll taxes. Many construction workers, however, experience difficulty meeting basic needs for themselves and their families. Many construction workers earn below the federally mandated poverty line or barely above. A recent study in Austin, TX found that the median wage for Austin was \$14.05 per hour while the median wage for construction workers was only \$10.68. These low-wage workers cannot afford their payroll taxes and studies have shown that self employed workers fail to report 30-50% of their earnings as compared to wage-earners reporting 99% of their earnings thus having a significant impact of state and federal income taxes collected. While the state and federal government are losing tax dollars, legitimate businesses are experiencing additional economic difficulties.

Legitimate businesses attempt to classify workers properly and to observe the labor laws of the state. Businesses which misclassify workers can cut labor cost by 2% by avoiding unemployment insurance premiums alone and by classifying workers as independent contractors, thus avoiding all payroll taxes, can cut labor cost by 20-40%. This practice creates an unlevel playing field where legitimate businesses are forced to place higher bids when attempting to secure projects. In the recent Austin study, statistics demonstrated that misclassifying businesses also engaged in practices such as failing to pay overtime, offering no benefits, and failing to pay workers for work done. These practices further reduce labor cost thus advantaging the businesses who engage in such practices. Workers in Austin reported the following:

- 45% earned poverty level wages
- 20% reported not being paid for work completed
- 50% reported not receiving overtime pay
- 76% received no health benefits
- 81% participated in no pension program
- 87% received no sick days
- 77% reported no vacation days
- 20% reported injuries on the job that required medical attention
- 64% lacked basic health and safety training and many had no safety equipment
- 47% of residential construction workers had to provide their own hardhat

Source: Workers Defense Project & University of Texas-Austin, 2009

Each of these reductions represents substantial savings in labor cost for businesses that use a classification of “independent contractor” to avoid providing not only mandated taxes and pay, but to avoid various benefit programs that would enhance the quality of life for their employees. Misclassified workers account for 38% of the workers in the Austin construction industry which has remained healthy even during recent economic turndowns. However, these substantial labor cost savings through illegal means do not simply disappear but are often transferred to the taxpayer, legitimate construction companies, and state and private enterprises.

Many workers are unaware or fail to understand the consequences of being classified as an independent contractor or being paid off-the-books. Immigrants and minorities are particularly vulnerable to misclassification. These low-wage workers often believe that they are covered by workers compensation and unemployment insurance and only realize the lack of coverage when they are injured and/or lose their job. Due to the fact that many do not qualify for Medicaid and lack health insurance, they commonly turn to taxpayer supported programs and the emergency room for healthcare. A lack of health and safety training, as well as a failure of illegitimate businesses to provide safety equipment, means that these unprotected workers are more susceptible to injury or death on the job. An injured worker must rely on the taxpayer and the hospital for care; an injured worker may also pursue lengthy and expensive litigation in order to pay medical bills. While states have become more acutely aware of the cost to taxpayers, the Federal government has been less diligent.

A 2009 report issued by the Treasury Inspector General for Tax Administration states that misclassification data have not been inspected in twenty years (1984 data) and that “the

IRS does not know the size of the problem today and is unable to determine the overall effectiveness of its actions to address this issue (Phillips 2009).” However, based upon 1984 data, the IRS estimates that 15% of employers misclassify 3.4 million workers which contribute to a revenue loss of \$2.72 billion.

The misclassification of workers has steadily increased in the states where studies have been undertaken (See Appendix A). The economic and social cost to taxpayers and legitimate businesses is well documented by these studies. The present research project will follow the methodological rigor of these recent empirical analyses of misclassification and provide quantitative estimates of the cost of misclassification to workers, the state and taxpayers of Tennessee.

### **Construction in Tennessee**

In 2006, Tennessee recorded 12,000 construction businesses (TN DOL). Most of these firms were small businesses (88.8%) with less than twenty employees. Tennessee Department of Labor & Workforce Development data from 2008 indicated that 134,000 Tennessee workers were employed in the construction industry and that in 2007, 307,000 were directly and indirectly supported by nonresidential construction alone. Due to evidence that the construction industry is one of the leading violators of “independent contractor” misclassification and off-the-books payments and that firms who engage in such behavior tend to continue violation, Tennessee’s construction industry may contribute to substantial revenue loss for the state and to a degradation of workers’ social well-being.

Until September 7th 2004, the state of Tennessee had a form, I-18, to declare someone a sub-contractor for auditing purposes. Tennessee’s Workers’ Compensation Division discontinued that form simply because employees were signing it and compromising their rights. After many legal challenges the form was left virtually useless. The Tennessee construction industry has now turned to either having the general contractors charge the subs for coverage under their policies or requiring the subs to get their own policy. Given wages and working conditions in construction, the cost of a workers’ compensation policy that would cover the subcontractor is commonly considered prohibitive. Most subcontractors simply obtain the \$745 piece of paper that says they have a policy, but it provides no protection to the subcontractor, only an employee. If the subcontractor has the employee for over 80 hours of work, the subcontractor then has to pay an additional amount to the carrier for that employee. Most subcontractors hire more subcontractors and avoid the additional expense. The chain of command for a home builder (with misclassification issues) usually looks like this: GEN Contractor hires Subcontractor for Siding who hires Subcontractor to do Siding who hires Subcontractor to do siding, who does some siding but can't finish the job in time so he hires a subcontractor to do siding. Usually the General Contractor and the 1st Subcontractor have workers' compensation policies (Holmes, 2009, Pitts, 2009).

### **Overview of the Construction Industry**

#### *National Overview*

In the Bureau of Labor Statistics' (BLS) *Career Guide to Industries* (<http://data.bls.gov/cgi-bin/print.pl/oco/cg/cgs003.htm> ) four significant points about construction are presented as follows:

- Job opportunities are expected to be excellent for experienced workers, particularly for certain occupations.
- Workers have relatively high hourly earnings.
- About 65% of establishments employ fewer than five people.
- Construction includes a very large number of self-employed workers.

Construction activities include the building of new structures, modifications and additions to existing structures as well as maintenance, repairs, and improvements of existing structures. Construction is generally divided into three major segments: *construction of buildings, heavy and civil engineering construction contractors, and specialty trades contractors*. The focus of this report is upon the construction of buildings (commonly general contractors) and specialty trade contractors (specialized activities with the crafts of carpentry, plumbing, painting, and electrical work).

Construction in 2006 in the U.S. provided earnings for 7.7 million wage and salary jobs and 1.9 million self-employed and unpaid family workers. Specialty trades accounted for 64% of wage and salary jobs and 24% of jobs were mostly residential or nonresidential building (see Table 3).

**Table 3: 2006 Distribution of Wage and Salary Workers in Construction by Segment**

Segment	Employment	Percent
Total construction	7,689*	100.0
Construction of Buildings	1,806	23.5
Residential	1,018	13.2
Nonresidential	789	10.3
Specialty Trade Contractors	4,900	63.7
Heavy & Civil Engineering	983	12.8

Source: <http://data.bls.gov/cgi-bin/print.pl/oco/cg/cgs003.htm>

\*employment in thousands

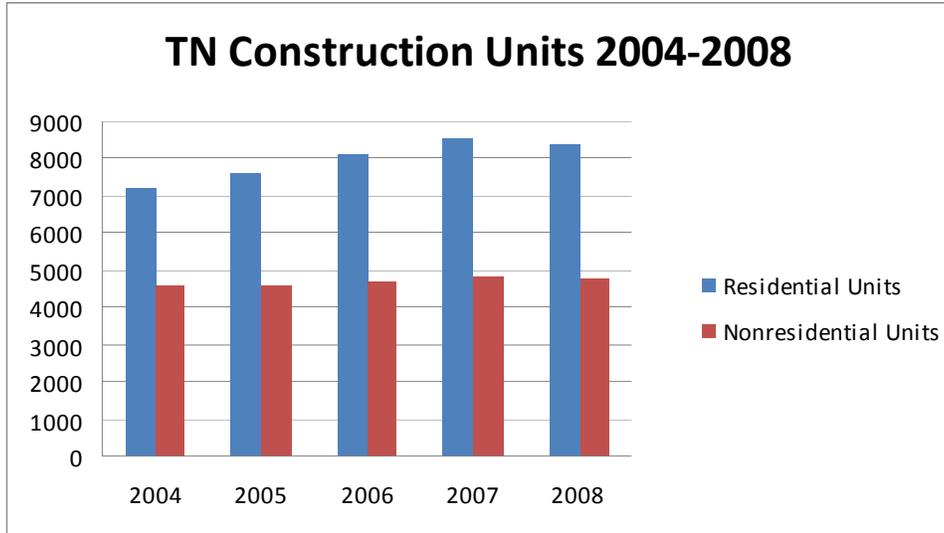
Of the 883,000 construction establishments existing in 2006, 268,000 were building contractors and 550,000 were specialty trade contractors with the residual being in heavy and civil engineering. The BLS predicts that through 2016 the construction industry jobs will grow 10% compared to 11% for all other industries combined. The largest number of new jobs is predicted to be in the specialty trades with a growing demand for subcontractors.

### *Tennessee Overview*

Building construction in Tennessee demonstrated a continuous growth pattern from 2004 through the preliminary data available for 2008 as collected by the Tennessee Department of Labor and Workforce (TN DOL). Residential units increased by 16% over the five year period while nonresidential units increased by 5%. Unit growth fell slightly from 2007 to 2008 (approximately 1% for nonresidential units and 2% for residential units) as seen in Graph 1. Graph 2 shows wage growth over the same five year period. Nonresidential

wages grew 53% or approximately \$1 billion while residential wages grew by 27% or \$349 million.

**Graph 1: TN Residential and Nonresidential Construction Units 2004-2008**



Source: Tennessee Department of Labor and Workforce Development 2009

**Graph 2: Annual Wages Paid in TN Building Construction 2004-2008**



Source: Tennessee Department of Labor and Workforce Development 2009

## Employment

While units and wages increased, reported construction employment remained fairly flat from 1998 through 2008. According to the TN DOL, construction employment only increased by 6,718 workers which only represents 6% increase or the same as the employment increase in all industries.

According to the 2006 American Community Survey, 280,925 workers were working in the Tennessee construction industry. These data include all construction industry workers, including public and private sectors, management, self-employed and workers in the construction industry involved in sales, production and transport. However, TN DOL construction figures include wage workers except, sales, service, production, transport and material moving. These categories, therefore, are deleted from the ACS calculations in order to produce comparable populations that serve as the basis for calculating a total construction industry employment of 221,931 in 2006.

The 2006 Tennessee Department of Labor and Workforce Development total wage workers in construction is reported as 130,235. Self-employed 2006 Tennessee construction worker estimates are available from two sources, the US Census – American Community Survey and the US Internal Revenue Service report based on tax filings. Using these two data sources, we are able to estimate a high and low total self-employed population for the Tennessee construction industry. When combined with the TN DOL report for wage workers in construction, we calculate a range of total construction employment for 2006, with a low of 192,039 and high of 209,039.

**Table 4: Persons Employed in Construction in TN Including Estimates of Self-employed (2006) from IRS, US Census American Community Survey and US DOL**

Construction	Employed TN DOL Emp. Sec Res.	Self-employed (ACS)**	Self-Employed IRS	Total Construction
Total: Residential & Non-residential	130,235*	61,804	78,804	192,039 (low) 209,039 (high)
US DOL Audit of State UI payments - Self-Employed Misclassified 2008***		52,706	69,706	182,941 (low) 199,941 (high)
Census American Com Survey 2006				221,931

Sources:

Self-Employed and TN Construction totals from US Census: American Community Survey 2006 and IRS 2006 Non-employer statistics, TN Construction (see Appendix B), Employed in Construction from Tennessee Department of Labor and Workforce Development Employment Security Research and Statistics 2006

\*TN DOL construction employee totals include broad sector categories of 1. construction of buildings; 2. heavy construction and civil engineering; and 3. specialty trade contractors; sub-sectors include residential/nonresidential, maintenance/remodelers, management, and office personnel etc.

\*\*ACS reported TN construction employment was adjusted to provide an accurate comparison with TN DOL data. Removing employee categories in the ACS that are not included in the TN DOL data led to reduction of the ACS total TN construction employment from 280,925 to 221,931.

\*\*\*[http://ows.doleta.gov/unemploy/pdf/UI\\_taxinfo/2008/AuditPerformance.pdf](http://ows.doleta.gov/unemploy/pdf/UI_taxinfo/2008/AuditPerformance.pdf)

In 2006, Tennessee Construction Employers totaled 12,814. Using the US Department of Labor audit for Unemployment Insurance findings, Tennessee employers averaged .71 misclassified workers per employer. Therefore, based on these UI audits of Tennessee employers, one can estimate a total of 9,098 wage workers in Tennessee's construction industry who are misclassified as self-employed. Deducting these workers from the total estimated self-employed in Tennessee based on IRS filings and ACS reports, we determine a range of self-employed Tennessee construction workers between 52,706 and 69,706. These state unemployment insurance audits have been used in many recent studies estimating employment misclassification including studies in Illinois, Maine and Massachusetts (see Sources). Section 90.3 of the California Labor Code requires the Labor Commissioner to compare employer unemployment insurance and workers' compensation premium payment data as a method to identify employers who fail to provide required coverage.

In Table 5 we estimate the misclassified and unreported workers in Tennessee's 2006 construction industry, based on the difference between a sum of Tennessee wage workers and self-employed, on the one hand, and total construction employment, on the other. We provide a high and low estimate using the alternative self-employed reports originating with the IRS and the Census' ACS.

**Table 5: Persons Employed in Construction in TN Including Self-employed & Estimated Misclassified & Unreported (2006)**

Construction Residential & Non-residential	Employed & Self Employed (low)	Employed & Self-Employed (high)	Misclassified & Unreported (based on ACS estimate)	Misclassified & Unreported based on IRS filings	Total Adjusted TN Construction Employment*
Total	192,039	209,039	29,892	12,892	221,931
Adjusted for UI Audit	182,941	199,941	38,680	21,990	

Sources:

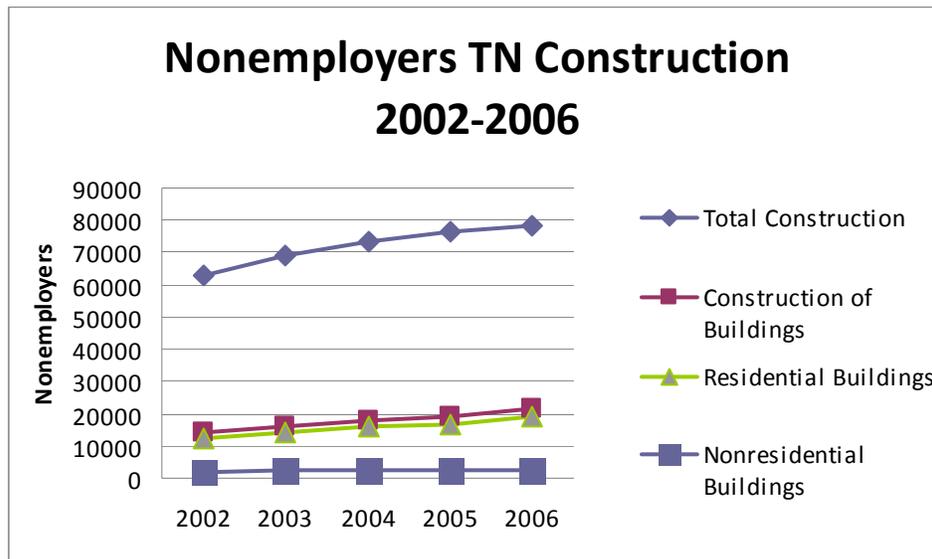
Census: American Community Survey 2006 & Tennessee Department of Labor and Workforce Development Employment Security Research and Statistics 2006, Census Bureau, 2006 Non-Employer Statistics based on IRS filings, 2008 USDOL required State Audit of Unemployment Insurance Payments

\*TN total construction employment adjusted from Census 280, 925 to 221,931 by deleting employment categories in ACS that are not included in the TN DOL report for construction employment.

Many of these potentially misclassified workers are recorded as a nonemployer. In our study of Tennessee, we provide estimates using a conservative assumption that all the nonemployers are correctly classified, but also adjust these estimates to include US Department of Labor unemployment insurance audit data to calculate workers who are misclassified as self-employed. In addition, we also provide estimates, following Table 8, that estimate missing workers' compensation premium revenues should some of these self-employed construction workers not pay premiums. In the years from 2004 – 2008, Tennessee construction units increased substantially, while wage employment grew slowly. Nonemployers, however, saw a 50% growth over these same years, suggesting that new work was assigned to workers classified as independent contractors or sole proprietorships. The

U.S. Census and Internal Revenue Service (IRS) define nonemployers as “a business that has no employees, has an annual business receipt of \$1000 or more (\$1 or more in the construction industries), and is subject to Federal income taxes. Most nonemployers are self-employed individuals operating very small unincorporated businesses, which may or may not be the owner’s principle source of income.” (<http://census.gov>) Graph 3 shows the growth of nonemployers in Tennessee construction from 2004 to 2006. Nonemployers in the construction of buildings increased by 50% over the five year period. The TN DOL indicates that in December of 2008 at least 13.7% of construction firms reported zero employees. (See Appendix C: Non-Employer Definitions)

**Graph 3. Nonemployers TN Construction 2002-2006**



Sources: U.S Census Bureau, EPCD, Nonemployer Stats  
U.S. Census Bureau, 2002 Economic Census, Nonemployer Statistics

**Table 6: US Department of Labor required State Audits of Unemployment Insurance and Report of Misclassified Workers for All Employers in Tennessee 2008**

**Audit Performance  
Calendar Year Ending December 31, 2008**

State	Taxable Employers*	2% Penetration Requirement			Large Employer Requirement			Misclassified Workers**
		Required Audits	Completed Audits	Percent Completed	Required Audits	Completed Audits	Percent Completed	
TN	113,863	2,277	2,280	2%	23	23	1%	1,631

Source: US Department of Labor 2009

\* Number of contributory employers reported on previous year's ETA 581 Report for the third quarter

\*\* Number of workers misclassified as independent contractors

Annual Desired Levels of Achievement (DLAs):

Total Audit Penetration—2% of Contributory Employer Total at end of preceding FY

Large Employers—1% of total audit penetration requirement

In 2006, Tennessee Construction Employers totaled 12,814. Using the US Department of Labor audit for Unemployment Insurance findings, Tennessee employers averaged .71 misclassified workers per employer. Therefore, based on these UI audits of Tennessee employers, one can estimate a total of 9,098 wage workers in Tennessee's construction industry who are misclassified as self-employed. Deducting these workers from the total estimated self-employed in Tennessee based on IRS filings and ACS reports, we determine a range of self-employed Tennessee construction workers between 52,706 and 69,706 for purposes of calculating unemployment insurance payments. These misclassified workers in Tennessee construction may, however, be paying federal taxes and other fees associated with self-employed status.

### Construction wages in Tennessee

The U.S. Bureau of Labor Statistics (BLS) reported the average hourly earnings for production and nonsupervisory workers in the construction industry to be \$22.54 per hour in May of 2009 as compared to \$21.90 per hour in July of 2008 (<http://data.bls.gov/cgi-bin/print.pl/news.release/empsit.t16.htm>). The projected hourly earnings for July 2009 are \$22.71 per hour or approximately \$878.88 per week. Using BLS figures, indications are that construction wages have continuously improved over time. In 2006 average wages for workers in construction of building was \$19.73 per hour nationally with residential workers earning an average of \$18.39 per hour and nonresidential workers earning \$21.23 per hour (<http://data.bls.gov/cgi-bin/print.pl/oco/cg/cgs003.htm>). BLS figures reflect growth, but wage levels well below the national average for construction workers in Tennessee. The mean wage for Tennessee construction workers in 2007 was \$15.68 per hour with a median of \$14.34 per hour ([http://bls.gov/oes/2007/may/oes\\_tn.htm#67b47-0000](http://bls.gov/oes/2007/may/oes_tn.htm#67b47-0000)) and rose to a mean of \$16.34 per hour with a median of \$14.95 per hour in 2008 ([http://bls.gov/oes/2008/may/oes\\_tn.htm#67b47-0000](http://bls.gov/oes/2008/may/oes_tn.htm#67b47-0000)).

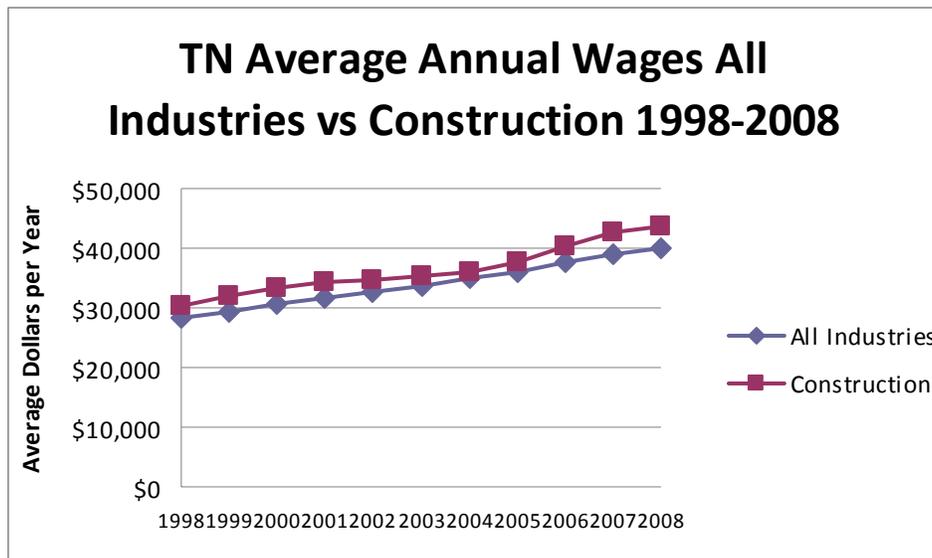
Table 7 reflects the historical average annual wages for Tennessee. The average annual wage for all industries increased 37% from 1998-2008 while construction industry wages increase 40% or slightly more than \$1000.00 per month on the average.

**Table 7: Average Annual Wages for All Industries and Construction in Tennessee 1998-2008**

Year	Average Annual Wages for all Industries	Average Annual Wages for Construction
1998	\$28,462	\$30,443
1999	\$29,478	\$32,072
2000	\$30,554	\$33,237
2001	\$31,520	\$34,193
2002	\$32,531	\$34,602
2003	\$33,581	\$35,239
2004	\$34,925	\$36,010
2005	\$35,879	\$37,623
2006	\$37,564	\$40,282
2007	\$39,082	\$42,680
2008	\$39,984	\$43,717

Source: TN Department of Labor and Workforce Development

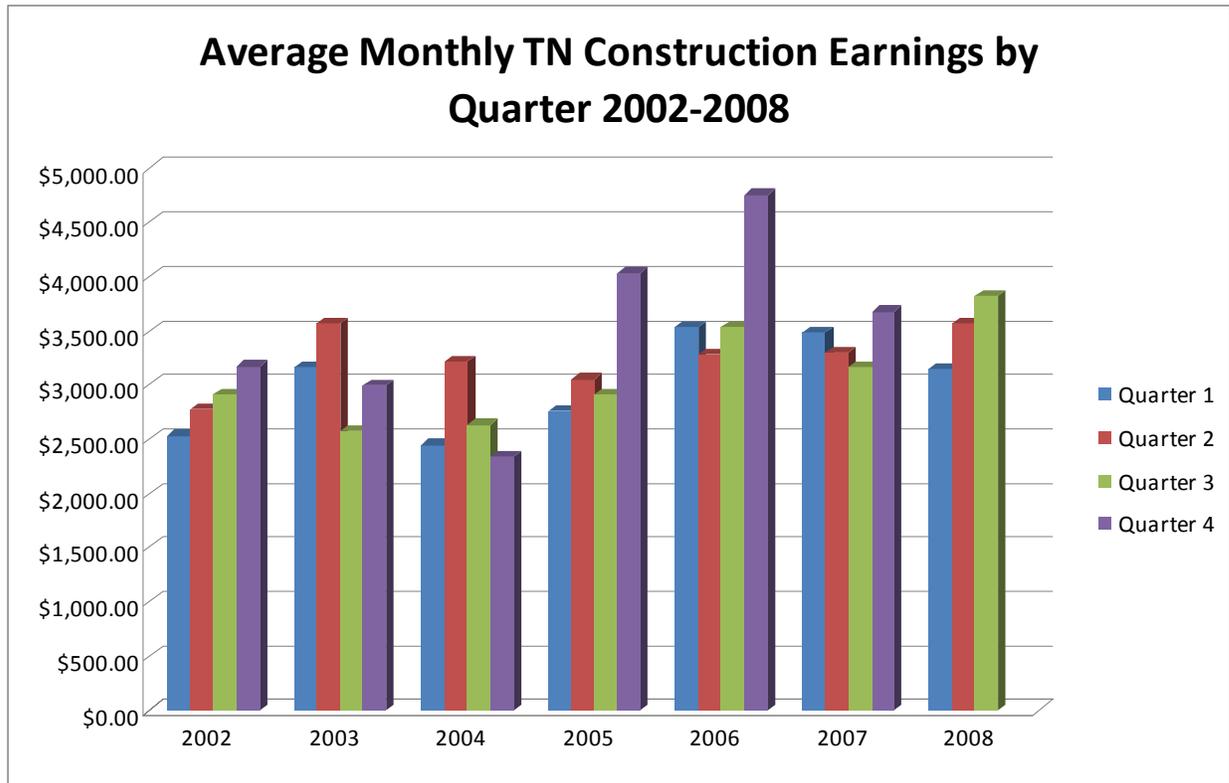
**Graph 4. Annual Average Wages in TN 1998 - 2008**



Source: TN Department of Labor and Workforce Development

Using Tennessee longitudinal data of quarterly average monthly earnings of construction workers, wages demonstrate a similar increase as seen in Graph 5. Slight declines are indicated in 2004 and 2007 while average monthly wages peaked in 2006.

**Graph 5. Average Monthly earnings by Quarter 2002-2008**



Source: 2006 LEHD State of Tennessee County Reports - Quarterly Workforce Indicator  
<http://www.lehd.census.gov/led/datatools/qwiapp.html>

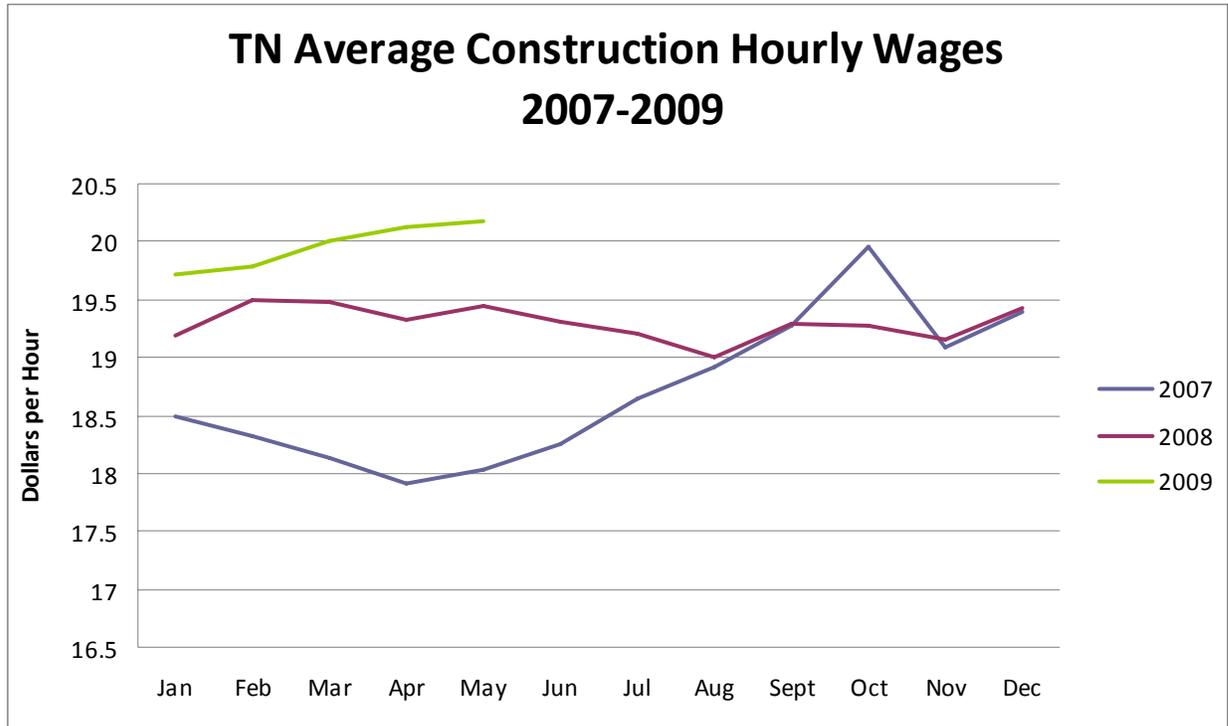
Hourly wages from 2007-2009 reflect a similar growth in wages for Tennessee construction workers as seen in Table 7 and Graph 8. However, Graph 7 shows that the number of hours worked by construction workers in the first part of 2009 has declined.

**Table 8: Average Hourly Wage in TN Construction, Mining and Logging 2007-2009**

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
2007	18.49	18.32	18.14	17.72	18.04	18.25	18.65	18.91	19.27	19.95	19.08	19.39
2008	19.19	19.50	19.48	19.32	19.45	19.31	19.21	19.01	19.29	19.27	19.15	19.42
2009	19.78	20.00	20.12	20.18								

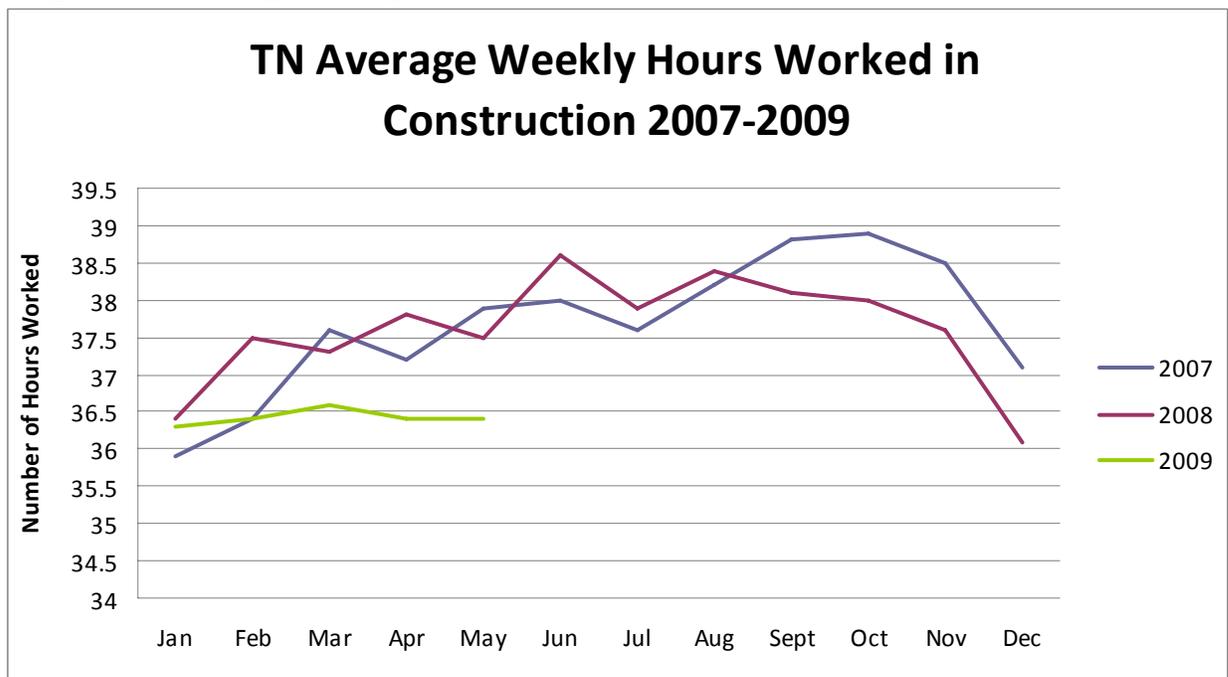
Source: <http://www.bls.gov/sae/experimental/sae47.htm>

**Graph 6: Average Hourly Wage in TN Construction, Mining and Logging 2007-2009**



Source: <http://www.bls.gov/sae/experimental/sae47.htm>

**Graph 7: TN Average Weekly Hours Worked in Construction 2007-2009**



Source: <http://www.bls.gov/sae/experimental/sae47.htm>

## Conclusions

Construction wages in Tennessee have mirrored national growth and slightly exceeded the growth of wages in all other industries in Tennessee. However, monthly and quarterly earnings may fluctuate depending on the availability of work and the environment as Graphs 5, 6, and 7 exhibit. It must also be noted that although Tennessee construction wages have remained healthy, they do not provide a living wage for Tennessee workers.

A living wage is defined as “the hourly rate that an individual must earn to support their family, if they are the sole provider and are working full-time (2080 hours per year) (Glasmeier, 2009) Using the Pennsylvania State University Living Wage calculator (<http://livingwage.geog.psu.edu/states/47>) a hourly earnings of \$25.42 are required to support a family of four in the state of Tennessee. The average hourly earnings for construction workers during the first quarter of 2009 was \$20.02 (see Table 7). The \$20.02 suggests that Tennessee construction workers officially reported to the TN Department of Labor and Workforce Planning fall \$5.40 below the living wage standard for a family of four in Tennessee and approximately \$10,000 annually short according to 2008 annual earnings capabilities (see Table 7).

## Workers’ Compensation & Unemployment Insurance

Workers’ compensation premium payment data are collected by the National Council on Compensation Insurance, Inc., based in Boca Raton, FL. NCCI, Inc. manages the nation’s largest database of workers compensation insurance information. NCCI analyzes industry trends, prepares workers compensation insurance rate recommendations, determines the cost of proposed legislation, and provides a variety of services and tools to maintain a healthy workers compensation system. For this study, NCCI provided data summarizing Tennessee workers’ compensation premiums paid for all Construction Industry Codes. The source data are NCCI workers’ compensation statistical plan submissions which are required for each insured policy issued. NCCI does not collect information from self insured employers. NCCI data are reported for fiscal years, June 1 – May 31.

### **TN Construction**

#### **Workers’ Compensation Premiums for Occupational Codes in Construction**

	<b>Total Premiums Value</b>
6/1/2005 - 5/31/2006	<b>\$320,320,995</b>
6/1/2004 - 5/31/2005	<b>\$300,659,766</b>
6/1/2003 - 5/31/2004	<b>\$294,459,236</b>
6/1/2002 - 5/31/2003	<b>\$284,802,573</b>
6/1/2001 - 5/31/2002	<b>\$248,082,742</b>

Source: NCCI, 2009

To provide comparisons with data from other sources that are reported for calendar years, the authors have converted these data to estimates for the calendar year. Following a conservative approach to estimating losses, we have calculated premiums at \$2,369 per employee and assumed that all reported self-employed construction workers have fully paid workers' compensation premiums.

**Table 9: Estimated Workers' Compensation Insurance Premiums Lost based on Misclassification & Unreported Workers Based on TN DOL Reported Employment & NCCI TN Construction Industry Codes for Employees in 2006 Assuming 100% of Self-Employed Pay Workers' Compensation Premiums**

2006 Data Sources	Reported Employment	Average Per capita Workers' Compensation Premium***	Estimated Misclassified & Unreported Workers ACS source for self-emp*	Estimated Premium Loss Misclassified & Unreported Workers **	Estimated Misclassified & Unreported Workers ACS source for self-emp	Estimated Premium Loss Misclassified & Unreported Workers
TNDOL	130,251	\$2,369	29,892	\$70,814,148	12,892	\$30,541,148
Adjusted US DOL Est. Misclassified		\$2,369	38,680	\$91,632,920	21,990	\$52,099,310

Source: Tennessee Department of Labor and Workforce Development Employment, Security, and Statistics 2009; Census: American Community Survey 2006; NCCI, 2009 IRS 2006, OWS USDOLETA required 2008 Unemployment Insurance Payment Audits  
 \*Estimated misclassified based on American Community Survey, 2006 report of self-employed in TN construction industry  
 \*\*Estimated misclassified based on IRS 2006 report of self-employed in TN construction industry.  
 \*\*\*Using the logic that 130,251 (employed) workers pay \$310,190,818 in 2006, we can estimate that an average workers compensation premium would be \$2,369.

**Table 10. Estimated Workers' Compensation Insurance Premiums Lost based on Misclassification & Unreported Workers Using TN DOL Reported Employment & NCCI TN Construction Industry Codes for Employees in 2006 – Assuming Less Than 100% of Self-Employed Pay Workers' Compensation Premiums**

Percentage of Self-employed paying Workers Compensation premium	Average Per capita Workers' Compensation Premium**	Estimated Misclassified & Unreported Workers ACS source for self-emp	Estimated Premium Loss Misclassified Workers	Estimated Misclassified & Unreported Workers IRS source for self-emp	Estimated Premium Loss Misclassified Workers
100%	\$2,369	29,892	\$70,814,148	12,892	\$30,541,148
75%		49,593	\$117,485,817	28,343	\$67,144,567
50%		69,294	\$164,157,486	43,794	\$103,747,986
25%		88,995	\$210,829,155	59,352	\$140,604,888
0%		108,696	\$257,500,824	74,696	\$176,954,824

In addition to these calculations, we can estimate the Workers' Compensation Insurance premiums that would have been paid in 2006 had the new Tennessee Workers' Compensation Law - Public Chapter 1041 been in effect. According to the US Census, American Community Survey, 2006, Tennessee's construction industry employment, when adjusted to include only those categories included in the Tennessee Department of Labor & Workforce Development wage data, totaled 221,931. **Based on an average per capita workers' compensation premium of \$2,369, the state total for 2006 would be \$525,754,539.**

**Method for Estimating 2006 Calendar Year Workers' Compensation Average Premium Based on NCCI reported TN Construction Industry Premiums paid in fiscal years 2002 – 2006**

- For the years 02-06, the average annual workers' compensation payments equal \$300,060,642 in premiums for those classified as Employed (excludes self-employed)
- 06/07 premiums should be the average above at minimum
- Using ½ of 05/06 figure and ½ of estimated 06/07 figure (average), we can calculate an estimated calendar year collection of \$310,190,818 for 2006
- Our breakdown of workers for 2006: Employed (59%); Self-employed (28-26%); Misclassified/ Unreported (6-13.5%)
- Logic: If the 130,251 construction employees reported by the TN DOL represent 59% of the total ACS reported for comparable occupational categories, then these workers' compensation premiums accounted for an estimated \$310,190,818 in 2006 based on NCCI reported premium payments. Extrapolating from these figures, were we to estimate the total potential workers' compensation premium payments for 221,931 employees in 2006, then all workers would represent premium payments of \$525,747,149 (estimated). Thus we calculate:

**2006 TN Construction Sector Workers' Compensation premium = \$2,369 per worker per year**

Misclassification of construction employees as independent contractors and underreporting of workers has a strong impact on worker's compensation insurance industry loses on premium collection. Earlier research, Planmatics (2000) found that some surreptitiously added workers to a firm's worker compensation policies subsequent to an injury. For these workers, benefits are paid out even though premiums were not collected. In some states, recent task force investigations of misclassification led to substantial employer penalties. For example, a New York State 2008 set of 46 employer investigations "... led to the issuance of twenty-seven stop work orders, the assessment of \$642,250 in civil penalties for failure to maintain workers compensation coverage ..... and the assessment of \$467,000 in civil penalties for the intentional misrepresentation of payroll leading to premium fraud." (NY DOL, 2008, p. 5)

In November 2009, recognizing the extensive persistence of employee misclassification in the U.S. construction industry, the National Conference of Insurance Legislators unanimously approved the [\*Construction Industry Workers' Compensation Coverage Act\*](#). (Appendix D). This model state legislation passed unanimously for workers' compensation coverage in the construction industry. The model:

- 1) requires workers' compensation coverage for employees, sole proprietors and independent contractors. There is an exemption: sole proprietors and independent contractors do not have to be covered if they are working directly for the property owner. Anyone working under a person falling under that exemption, though, does have to be covered.
- 2) provides for auditing procedures for insurance companies,
- 3) preserves existing state criminal penalties for premium fraud and non-coverage, but
  - a) prescribes civil penalties for non-coverage and premium fraud, and
  - b) includes strong stop work order language.

### **State Unemployment Insurance Benefits**

In general, the Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own (as determined under State law), and meet other eligibility requirements of State law.

- Unemployment insurance payments (benefits) are intended to provide temporary financial assistance to unemployed workers who meet the requirements of State law.
- Each State administers a separate unemployment insurance program within guidelines established by Federal law.
- Eligibility for unemployment insurance, benefit amounts and the length of time benefits are available are determined by the State law under which unemployment insurance claims are established.
- In the majority of States, benefit funding is based solely on a tax imposed on **employers**. (Three (3) states require minimal employee contributions.)

Classification as an independent contractor or unreported work eliminates a workers eligibility for unemployment insurance benefits, regardless of hours worked or reasons for unemployment. Thus misclassification produces serious negative economic consequences for effected workers and for state programs.

Multiple recent state level empirical studies of employment and misclassification have documented extensive patterns of misclassification with resulting lost revenue to fund established unemployment insurance programs. For example, a recent study by Belman and Block using a survey of Unemployment Insurance payments found that

Almost one third, 30.1 percent, of Michigan employers covered by the unemployment insurance system misclassified employees or failed to report payments to employees covered by the unemployment insurance system (Table 1 & Figure 1). The proportion of employers with misclassified employees varied considerably by sector. In construction, 26.4 percent of employers misclassified employees or employee payments. (*The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, p. 9)

Other empirical research projects in New York, Maine, Massachusetts and Illinois, among others, confirm substantial levels of lost revenues for income tax, unemployment insurance and workers compensation programs. For example, a 2009 study of misclassified employees in Michigan found that

In construction, \$169 million dollars of payroll was under reported, of this \$52 million was subject to unemployment tax and \$2.5 million in unemployment insurance taxes were not paid to the state of Michigan. (Belman & Block, p. 13).

A 2005 Harvard University, School of Public Health study of misclassified employees in Maine documented a substantial negative impact on taxes and unemployment insurance receipts:

The worker's compensation insurance industry loses on premium collection, a significant issue if, as is reported in previous studies, misclassified workers are surreptitiously added onto companies' worker compensation policies *after* they are injured. For these workers, benefits are paid out even though premiums were not collected. We estimate that up to \$6.5 million of worker compensation premiums are not paid annually for misclassified construction workers. (Françoise Carré and Randall Wilson, 2005, p. 2)

A 2008 New York state joint task force on Employment Misclassification identified 12,300 instances of employee misclassification and over \$157 million in unreported wages.

As a result, New York assessed over \$4.8 million in additional unemployment taxes and over \$1 million in unemployment insurance fraud penalties, over \$12 million in unpaid wages, and over \$1.1 million in workers' compensation fines and penalties. (Smith & Brand, 2009 p. 3)

In addition to these fiscal consequences, the US Department of Labor (Planmatics, 2000) report on Independent Contracting and its impact on Unemployment Insurance concluded that impacts on individual workers can be substantial:

Misclassification has little impact on workers who file claims. Once a claim is filed, their rights are protected and the employment security agency ensures that the individuals receive benefits if they are eligible. It must be stressed however, that misclassification has a big impact on individuals who believe their employers when they inform them they are not employees, but are independent contractors. Such individuals do not file for unemployment, though they could be eligible. It affects them financially and affects their ability to sustain themselves and their families during times of unemployment. There are also the independent contractors operating in the underground economy who are often misclassified employees, and who are paid in cash for their services. Most of them do not file for unemployment either. It is difficult to estimate what percentage of unemployed workers do not file claims for the above reasons. (Planmatics, 2000, p. 88)

**Table 11: Estimated Unemployment Insurance Premiums Lost based on Misclassification & Unreported Workers Based on TN DOL Reported Employment & 2% Audit of Unemployment Insurance Payments**

Year 2006	TN DOL Reported Employment	Average Per capita UI Premium	Estimated Misclassified & Unreported Workers ACS	Estimated UI Premium Loss Misclassified & Unreported Workers*	Estimated Misclassified & Unreported Workers ACS	Estimated UI Premium Loss Misclassified & Unreported Workers**
ACS & IRS	130,251	\$382.85	29,892	\$11,444,152	12,892	\$4,935,702
Adjusted for UI Audit ***		\$382.85	38,680	\$14,808,638	21,990	\$8,418,715

Source: Tennessee Department of Labor and Workforce Development Employment, Security, and Statistics 2009; Census: American Community Survey 2006

\*Estimated based on American Community Survey, 2006

\*\*Estimated based on IRS self-employed filings 2006

\*\*\* US Department of Labor 2008 2% Audit of Unemployment Insurance Payments

[http://ows.doleta.gov/unemploy/pdf/UI\\_taxinfo/2008/AuditPerformance.pdf](http://ows.doleta.gov/unemploy/pdf/UI_taxinfo/2008/AuditPerformance.pdf)

### **Federal Impact of Misclassification**

Misclassification of workers can also lead to a substantial loss in the collection of Federal Income Taxes The Current population Survey as well as the American Time Use Survey define a full-time worker as a person who works 35 hours or more per week (<http://www.bls.gov/bls/glossary.htm#F>). Cornell defines Full-Time/Full-Year Employment Rate (CPS) as follows:

A person is considered employed full-time/full-year if he or she reported to have worked 50 weeks or more and an average of 35 hours or more per week in the calendar year. This is the Census Bureau's definition of full-time/full-year work experience in the CPS. This definition does not indicate whether the person is eligible health insurance benefits.

[http://www.ilr.cornell.edu/edi/DisabilityStatistics/glossary.cfm?g\\_id=204&view=true](http://www.ilr.cornell.edu/edi/DisabilityStatistics/glossary.cfm?g_id=204&view=true)

For the purposes of this estimate, we are using the 35 hours per week for a person who is paid for 50 weeks in a year and files Federal Income taxes. Using the 2007 Tax schedule found at <http://www.irs.gov/formspubs/article/0,,id=164272,00.html> , we can estimate the taxes that a full-time construction worker in Tennessee should pay. The 2006 mean wage for a Tennessee construction worker was \$15.00 an hour. Therefore using the above criteria and the material presented earlier in this study (Austin) which suggests that self-employed workers fail to report 30-50% of their wages while an 1984 IRS report suggested that workers may fail to report as much as 70% of earnings if they did not receive a 1099 form, Table 10 presents estimated federal income taxes for workers reporting 100%, 70%, 50% and 30% of their earnings who file as single or married while Table 11 indicates estimated losses in Social Security and Medicare payments.

**Table 12: Estimated Federal Income Tax for Tennessee Construction Workers**

Yearly Construction Earnings	Federal Income Tax due (Single)	Estimated Tax Loss	Federal Income Tax due (Married)	Estimated Tax Loss
\$26250 (100% earnings reported)	\$3546	\$0	\$3155	
\$18375 (70% earnings reported)	\$2365	\$1181	\$1974	\$1181
\$13125 (50% earnings reported)	\$1577	\$1969	\$1313	\$1842
\$7875 (30% earnings reported)	\$790	\$2456	\$788	\$2367

Earlier estimates suggest that as many as 12,892 to 29,892 Tennessee construction workers are misclassified or unreported. These estimates increase when federally mandated state audits of unemployment insurance payments are considered. As reported above, in 2008 Tennessee audits of unemployment insurance may be used to estimate that 9,098 construction workers were misclassified as self-employed. Thus the total misclassified for 2006 may actually range between 21,990 and 38,680. For Tennessee self-employed construction workers reporting less than 100% of their wages, the estimated Federal Income tax loss for 2007 filings would have been between a low of \$15,225,452 and a high of \$73,414,752.

**Table 13: Estimated Social Security/ Medicare Tax for Tennessee Construction Workers**

Yearly Construction Earnings	Social Security Tax due (6.2%)	Estimated Tax Loss per capita	Medicare Tax due (1.45%)	Estimated Tax Loss per capita
\$26250 (100% earnings reported)	\$1628	\$0	\$381	\$0
\$18375 (70% earnings reported)	\$1139	\$489	\$266	\$115
\$13125 (50% earnings reported)	\$814	\$814	\$190	\$191
\$7875 (30% earnings reported)	\$488	\$1140	\$114	\$267

Payments to Social Security would have been shorted between an estimated \$6,304,188 to \$34,076,880 while payments to Medicare would have incurred estimated losses between \$1,482,580 and \$7,981,164.

## **Foreign-born Worker Profiles**

### **Immigrants and Misclassification**

While worker misclassification is not isolated to immigrant populations, individuals with poor language skills and low levels of educational attainment are often victims of those wishing to avoid financial responsibility. Authors of *The Construction Chart Book* suggest that many Baby-boomers have left the construction industry thus leaving a shortage of workers. Baby-busters, born from 1965-1976 who are now in the workforce cannot fill this shortage. New immigrants, particularly Hispanic immigrants, tend to replace a departing workforce. In 2005, only the agriculture industry employed more foreign-born workers than the construction industry and in the same year, 84% of foreign-born construction workers were from Latin American countries. Twenty-five percent of these workers spoke a language other than English at home.

The authors also state, “In addition, large numbers of immigrant workers were employed in the “informal” economy (such as some day-laborer hiring sites) and their economic activities are not recognized, regulated, or protected by law.” These immigrants are often the victims of pay fraud, injuries, and fatalities (<http://www.buildaustin.org/>). A study of the construction industry in Austin (<http://www.buildaustin.org/>) found that construction workers were increasingly foreign-born. Foreign-born construction workers in Austin increased from 49% of workers in 2000 to 70% of construction workers by 2006. Worker rights violations in construction were common but often went unreported due to fears of retaliation including firings, arrest, reports to immigration enforcement agencies, and physical violence. A New York study

(<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/NY%20Misclass%20Task%20Force%20Report%20for%202008--Issued%202-09.pdf>) suggests that immigrant workers are particularly vulnerable to employer violations because of language limitations, the need to work to support themselves and family, and a fear of employer retaliation. Given the current growth of the foreign-born in the US workforce and especially in the construction industry, misclassification of these workers presents a particularly vulnerable area subject to misclassification.

National Profile ([http://migration.ucdavis.edu/mn/comments.php?id-3518\\_0\\_2\\_0](http://migration.ucdavis.edu/mn/comments.php?id-3518_0_2_0))

The American Community Survey (<http://census.gov/acs/www>) estimates that 12.6% of the U.S. population of 2007 was composed of foreign-born individuals. These 38.1 million people represent individuals residing in the United States at the time of the census who were not citizens at the time of birth. As a group, the median age was 40 years old as compared to 36 years old for native-born individuals. Individuals born in Mexico and Central America were the least likely to receive a High School education while 32% of all foreign-born individuals lacked a High School diploma. A full 85% of Mexican-born US residents 25 years and older had not completed High School. Of the Mexican-born US residents in 2007, 21% of the 5 million male residents were employed in construction while in 2008, the BLS estimates that 17.2% of all foreign-born males work in construction (<http://data.bls.gov/cgi-bin/print.pl/news.release/forbrn.t04.htm>). Twenty-three percent of full-time, foreign-born

US workers earned less than \$20,000 a year in 2007 and 14% of foreign-born families had earnings below the federal poverty threshold.

Tennessee Profile (<http://migrationinformation.org/datahub/state3.cfm?ID=TN#4> )

In 2007, out of all 50 states and the District of Columbia, Tennessee ranked 22<sup>nd</sup> out of 51 for the number of foreign-born civilian workers. Between 2000 and 2007, the number of immigrant workers in Tennessee grew by 65.5% changing from 91,053 workers to 150,711 workers. Immigrant workers as part of the workforce have steadily increased in the last two decades. In 1990, immigrants represented 1.4% of the civilian workforce in Tennessee but had grown to 3.4% of the workforce by 2000. In 2007, immigrants represented 5.3% of Tennessee’s civilian workforce and accounted for 7.7% of all low-wage, full-time workers. Low-wage workers are defined as those who earn less than twice the federal minimum wage which was \$5.15 in 2006. The federal minimum wage went to \$7.25 on July 24, 2009. Twenty-four states had a higher state minimum wage at the end of 2008 and fourteen states matched the federal minimum wage. However, Alabama, Louisiana, Mississippi, South Carolina, and Tennessee have no state minimum wage ([http://migration.ucdavis.edu/mn/comments.php?id=3518\\_0\\_2\\_0](http://migration.ucdavis.edu/mn/comments.php?id=3518_0_2_0)).

**Table 14: Foreign-born Civilian Workers in TN 1990-2007**

<b>Year</b>	<b>Civilian Employed Workers, Age 16 and older</b>	<b>Percent of Civilian Workforce</b>	<b>Native-born</b>	<b>Percent of Civilian Workforce</b>	<b>Foreign-Born</b>	<b>Percent of Civilian Workforce</b>
<b>1990</b>	2,252,049	100%	2,219,799	98.6%	32,250	1.4%
<b>2000</b>	2,650,695	100%	2,559,642	96.6%	91,053	3.4%
<b>2007</b>	2,848,236	100%	2,697,525	94.7%	150,711	5.3%

Source: Migration Policy Institute  
<http://migrationinformation.org/datahub/state3.cfm?ID=TN#4>

Immigrants employed in Tennessee share similar characteristic with the national profile. Of civilian employees with no High School diploma, immigrants compose 14.1%. The largest share of Tennessee immigrant workers arrive from Latin America. On the national level, 55.9% of immigrant workers were form Latin America. Forty-eight percent of Tennessee immigrant workers were from Latin America. The Migration policy Institute reports that the top two industries drawing immigrants were manufacturing and construction. Construction employed 16.8% of immigrant workers.

## Appendix A

### Survey of National and State Studies

In Carre & Wilson's (Harvard University, 2004) *The Social and Economic Costs of Employee Misclassification in Construction*, the author's summarize the issue and motives for misclassification. "Misclassification occurs when employers treat workers who would otherwise be waged or salaried employees as independent contractors (self-employed). Or as one report commissioned by the U.S. Department of Labor put it, misclassification occurs "when workers (who should be) getting W-2 forms for income tax filing instead receive 1099-Miscellaneous Income forms." The author's go on to note that "Forces promoting employee misclassification include the desire to avoid the costs of payroll taxes and of mandated benefits. Chief among these factors is the desire to avoid payment of worker compensation insurance premiums." (See Sources below). In addition, there are employers who operate in the underground economy-they don't bother to report all or a sizable portion of their workers. As will be seen, most studies of the problem do not quantify the degree or cost of the underground economy.

Fraud in construction is more common than in other industries, because of competitiveness, mobility of employers and the workforce, the temporary nature of the work and the multiple layers of contractors and subcontractors. In the construction industry misclassification and underreporting gives some employers significant competitive advantages over those who comply with states laws and regulations. And in a competitive industry like construction that means responsible employers who play by the rules (and their employees) lose work

Below are brief descriptions of numerous national and state studies and other research of the size and cost of misclassification fraud. Many are available at: [www.carpenters.org/misclassification/key\\_studies.html](http://www.carpenters.org/misclassification/key_studies.html).

### National Studies

\*A 1984 study by the Internal Revenue Service found that 19.8 percent of construction employers misclassified their employees.<sup>1</sup> The rate for all industries was 15%.<sup>2</sup> The total income, unemployment and Social Security tax loss was \$1.6 billion.<sup>3</sup> Moreover, the IRS estimated that the loss of Social Security and unemployment taxes alone would be \$2.3 billion in 1987 and \$3.3 billion in 1992.<sup>4</sup> A different estimate by the Government Accountability Office put the IRS' 1984 number in 2006 dollars for a tax loss of \$2.72 billion.<sup>5</sup>

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<sup>1</sup> Described in *Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors*, Statement of Natwar Gandhi, GAO/T-GGD-196-130, p. 13 (June 20, 1996).

<sup>2</sup> *Ibid*, p 1.

<sup>3</sup> *Ibid*. pp. 4-5.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Employment Arrangements: Improved Outreach could Help Ensure Proper Worker Classification*, GAO-06-565, p. 2 (July 2006).

\*In 1994 **Coopers & Lybrand** estimated that the federal government would lose \$3.3 billion in revenues in 1996 due to misclassification, and from 1996 to 2004 misclassification would cost the government \$34.7 billion.<sup>6</sup>

\*A study released in 2000 for the **US Department of Labor Employment and Training Administration by Planmantics, Inc.** found an unemployment tax loss of \$198 million annually due to misclassification of employees as independent contractors.<sup>7</sup> Again, the construction industry was cited by sources as the most likely to offend.<sup>8</sup>

Unemployment tax audits in the following states found these percentages of employers with misclassified workers:<sup>9</sup>

California 29%, Connecticut 42%, Maryland 19.9%, Minnesota 13.4%, Nebraska 10%, New Jersey 9.15 %, Wisconsin 23% and Washington 10.3%.

\***Many studies do not include the extent of unreported pay** in the underground economy.<sup>10</sup> A **Bear Stearns 2005** report estimated that the United States is losing \$35 billion a year due to the number of jobs that are now “off the books.”<sup>11</sup>

\***The Government Accountability Office (GAO) issued a 2009 report on misclassification.**<sup>12</sup> The report begins with: “The national extent of employee misclassification is unknown; however, earlier and more recent, though not as comprehensive, studies suggest that it could be a significant problem with adverse consequences.”<sup>13</sup> The GAO had several recommendations to the executive branch to improve law enforcement including increasing referrals to other state and federal agencies and the formation of an interagency group including the IRS, DOL and other state and

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<sup>6</sup> *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers*, by Coopers & Lybrand, p. 3 (June 1994).

<sup>7</sup> *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, by Planmantics, Inc., pp. iv, 69 and 93 (2000).

<sup>8</sup> *Ibid.*, pp. 41-44.

<sup>9</sup> *Ibid.*, pp. 57.

<sup>10</sup> *The Social & Economic Cost of Employee Misclassification in Construction*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (December 2004) (Massachusetts Study), *The Social & Economic Cost of Employee Misclassification in the Maine Construction Industry*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (April 2005) (Maine Study), *Economic Costs of Employee Misclassification in the State of Illinois*, Dep. Of Economics, Univ. Missouri-Kansas City, by Kelsay, Sturgeon and Pinkham, p. 2 (December 2006) (Illinois Study) and *Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor, State of Minnesota, p. 15 (November 2007).

<sup>11</sup> *The Underground Labor Force is Rising to the Surface*, Bear Stearns Asset Management, by Justich and Ng, p. 3 (January 3, 2005).

<sup>12</sup> *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* GAO-09-717 (August 2009).

<sup>13</sup> *Ibid.*

federal agencies to identify best practices and to improve efficiency of enforcement.<sup>14</sup> The IRS and DOL agreed with the recommendations.<sup>15</sup>

### **State Studies and Reports**

\*Interviews of over 300 construction workers in **Austin, TX in 2008 to 2009** found that 38 percent of them working on vertical construction projects were misclassified as independent contractors or paid unreported compensation, costing \$8.6 million in lost federal and unemployment taxes.<sup>16</sup>

\*A **2007 study done for the California Commission on Health and Safety and Workers' Compensation** disclosed that employers in all industries failed to report up to 23 percent of their payroll to workers' compensation carriers, resulting in \$100 billion in underreporting.<sup>17</sup> Because carriers shift costs to customers that do pay what they should, responsible employers who have workers in dangerous occupations are paying eight times more than they should be paying.<sup>18</sup>

\*A **2001 Florida study** reported that in 1997 \$912 million in workers compensation premiums were paid by construction industry employers, and that an additional \$1.3 billion was lost due to employer premium fraud and the state's exemption policies.<sup>19</sup> Reforms were enacted in 2003 to reduce costs and toughen enforcement.

\*A **2008 Florida Grand Jury report on fraud and check cashing businesses** cited a fraud scheme by ten contractors that resulted in **\$1 billion of unreported cash** being paid to construction workers over three years.<sup>20</sup> The report concluded its discussion on money laundering by check cashing businesses engaged in workers compensation premium fraud by writing:

In the short term, it may be prudent for the legislature to inquire of the [construction] industry, when considering this Grand Jury's recommendations, why they have apparently decided over the last few years to move increasingly to an all cash payroll.<sup>21</sup>

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<sup>14</sup>*Ibid.*, pp. 41-42.

<sup>15</sup>*Ibid.*, pp. 42-43.

<sup>16</sup>*Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry*, by the Workers Defense Project, pp. 49-50 (2009).

<sup>17</sup>*Up to One Fifth of California Payroll Not Reported*, WorkCompCentral, by Jim Sams (April 30, 2007). This study was of all employers, and not just construction. *Fraud in Workers' Compensation Payroll Reporting: How Much Employer Fraud Exists and How are Honest Employers Impacted*: Report for the Commission on Health and Safety and Workers' Compensation, by Frank Neuhauser and Colleen Donovan, University of California, Berkeley (August 2007).

<sup>18</sup>*How Much Employer Fraud Exists*, pp. 1-3.

<sup>19</sup>*A Study on the Magnitude of Loss of Workers' Compensation Premiums in 1997 due to Employer Fraud and Exemptions in the Florida Construction Industry*, by Construction Concepts, Coble Ph.D, Hinze Ph.D. P.E., pp. 27-28 (March 2001).

<sup>20</sup>*Eighteenth Statewide Grand Jury Case No. SC 07-1128, Second Interim Report of the Statewide Grand Jury: Check Cashers: A Call for Enforcement*, p. 13. (West Palm Beach, Florida, March 2008).

<sup>21</sup>*Ibid.* p. 14

**\*Illinois 2006:**<sup>22</sup>

	All Industries	Construction
Degree employers who misclassify	17.8%	17.8% est
Unemployment taxes lost	\$ 53.7 million	\$ 2.5 million
State income taxes	248.4 million	17.3 million
Workers comp prem.	<u>97.9 million</u>	<u>34.8 million</u>
Total	\$400 million	\$54.6 million

This study does not include the degree of unreported pay in the underground economy.<sup>23</sup>

The report further states that the **nationwide rate of misclassification** in all industries has not been static; it grew by 42 percent from 2001 to 2002.<sup>24</sup>

**In 2008 research was done in Kentucky of people with work-place injuries seeking emergency treatment.**<sup>25</sup> Twenty percent did not have workers compensation coverage, and 92 percent of them also did not have any health insurance.<sup>26</sup> Within that number of the uninsured, 54.2 percent were in the construction industry.<sup>27</sup> The authors conclude:

Hiring practices that allow employers to avoid paying for both WC and health insurance have the effect of shifting the cost of injured workers' care to taxpayer-funded programs such as Medicaid's disproportionate share [sic] hospital funding.<sup>28</sup>

**\*Maine study 2005:**<sup>29</sup>

	All Industries	Construction
Degree employers who misclassify	11%	14%
Unemployment taxes lost	not quantified	\$ 0.3 million
State income taxes	nq	4.3 million
Workers comp prem.	nq	6.5 million
FICA	nq	<u>10.3 million</u>
Total		\$21.4 million

<sup>22</sup> *Economic Costs of Employee Misclassification in the State of Illinois*, Dep. Of Economics, Univ. Missouri-Kansas City, by Kelsay, Sturgeon and Pinkham, pp. 4 to 8 and 15 (December 2006) (Illinois Study). The rate of misclassification in construction used here is the rate of misclassification for all industries. The Illinois study was unable to quantify exactly the construction rate, because the state did not provide industry specific audit data. It is fair to assume that construction rate is at a minimum the same as the overall rate, and that it is probably higher, because the Illinois data is based only on random audits, and the data from the other states shows a greater incidence of misclassification in construction.

<sup>23</sup> Illinois Study, p. 2.

<sup>24</sup> *Ibid.*, fn. 1, p. 2.

<sup>25</sup> *Disparities in Work-Related Injuries Associated With Worker Compensation Coverage Status*, Valerie, J. Nicholson, et. al. *American Journal of Industrial Medicine* (Author Proof document) (May 2008).

<sup>26</sup> *Ibid.*, pp. 2-3.

<sup>27</sup> *Ibid.* p. 3.

<sup>28</sup> *Ibid.* p. 4.

<sup>29</sup> *The Social & Economic Cost of Employee Misclassification in the Maine Construction Industry*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, pp. 1-2 (April 2005) (Maine Study)

This study does not include the degree of unreported pay in the underground economy.<sup>30</sup>

**\*Maine Unemployment Audits 2004-2007:**<sup>31</sup>

A review of Main Department of labor unemployment audits for all industries showed that 29% of employers misclassified employees as independent contractors in 2004, 39% in 2005, 43% in 2006 and 41% in 2007. Most of the misclassification in 2006 was by construction employers.

**\*Maryland study 2009:**

Written testimony from the Maryland Governor's Office puts the number of employers who fail to properly classify at 20 percent for all industries to as high as 25 percent in some industries.<sup>32</sup> The cost to the state is a \$22 million a year loss to the unemployment trust fund and \$81 million in unpaid state income taxes.

**\*Massachusetts study 2004:**<sup>33</sup>

	All Industries	Construction
Degree employers who misclassify	up to 19%	up to 24%
Unemployment taxes lost	\$ 35 million	\$ 3.9 million
State income taxes	152 million	6.9 million
Workers comp prem.	<u>91 million</u>	<u>7 million</u>
Total	\$278 million	\$17.8 million

This study does not include the degree of unreported pay in the underground economy.<sup>34</sup>

**\*Michigan 2008 study:**<sup>35</sup>

30 percent of employers underreport their employee payroll by misclassifying employees as self employed or underreporting payroll. 8 percent of Michigan employees are misclassified as self-employed or receive undeclared income from their employers, resulting in \$1.5 billion in unreported payroll to state unemployment insurance annually.<sup>36</sup> 26 percent of construction employers misclassify employees or pay unreported payroll, 24% of trucking

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<sup>30</sup> Maine Study, p. 1.

<sup>31</sup> Exec. Order No. 23 FY 08/09, Office of the Governor ME (January 14, 2009)

<sup>32</sup> Testimony of Carolyn Quattrocki, Deputy Legislative Officer, Thomas Perez, Secretary of labor, Licensing and Regulation, Vicki Schultz, Senior Advisor for Consumer Protection, Labor Licensing and Regulation on House Bill 819, Workplace Fraud Act of 200; House Economic Matters Committee, p. 2, (March 3, 2009).

<sup>33</sup> *The Social & Economic Cost of Employee Misclassification in Construction*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (December 2004) (Massachusetts Study).

<sup>34</sup> Massachusetts Study, p. 1.

<sup>35</sup> *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, Dale L. Belman and Richard Block, School of Labor and Industrial Relations, Michigan State University (2008) (Michigan Study).

<sup>36</sup> Michigan Study, p. 5.

employers and 56% of security-guard firms.<sup>37</sup> **Construction employers, though, were much more likely to engage in payroll fraud** rather than routine misclassification as an independent contractor.<sup>38</sup>

	All Industries <sup>39</sup>	Construction <sup>40</sup>
Degree employers who misclassify	30%	26%
Unemployment taxes lost	\$ 17 million	\$2.5 million
State income taxes	\$20-33 million	\$2.2-3.7 million
Social Security	\$34-57 million	nq
Fed. Income Tax	<u>\$58-96 million</u>	<u>nq</u>
Total	\$129-203 million	

**\*Minnesota 2007 study:**<sup>41</sup>

	All Industries	Construction
Degree of employers who misclassify	14%	15%

Within construction, the study found that 31% of drywall employers misclassify their employees as independent contractors.<sup>42</sup>

This study does not include the degree of unreported pay in the underground economy.<sup>43</sup>

**\*New Jersey 2007**

In testimony before Congress, New Jersey’s Labor & Workforce Development Commissioner David J. Socolow reported that a sample audit of 2.2% of employers uncovered **42%, in all industries, misclassifying employees as independent contractors** or paying them cash “off the books.”<sup>44</sup> Those 2006 audits found 25,000 misclassified workers and **\$565 million in unreported wages.**

**\*New York state study 2007:**<sup>45</sup>

	All Industries	Construction
Degree employees misclassified	10.3%	14.8%
Unemployment taxes lost	\$176 million	nq

<sup>37</sup> *Ibid.*, p. 7

<sup>38</sup> Of those who run afoul of the law, 38% misclassified and 62% didn’t report payroll at all. *Ibid.*, p. 9.

<sup>39</sup> *Ibid.*, p. 5 and 10.

<sup>40</sup> *Ibid.*, p. 9-10.

<sup>41</sup> *Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor, State of Minnesota, pp 15 and 18 (November 2007).

<sup>42</sup> *Ibid.*, p. 20.

<sup>43</sup> Minnesota Study, p. 15.

<sup>44</sup> *Congressional Probe Look sat Misclassified Workers*, by Michael Whiteley, Workcompcentral (August 1, 2007).

<sup>45</sup> *The Cost of Worker Misclassification in New York State*, Cornell Univ., ILR School, by Donahue, p. 2 (February 2007) (New York Study).

\*A sense of **the size of unreported-cash pay in the underground economy** can be found in the **Fiscal Policy Institute’s study of the residential construction market in New York City**. They compared residential building permits and FW Dodge construction activity data to construction employment from 2000 to 2005.<sup>46</sup> Conservatively, New York City had 82,000 residential construction workers in 2005. 30,000 of those construction workers were employed illegally.<sup>47</sup> (13,000 may have been misclassified and the other 17,000 were completely off the books.<sup>48</sup>) That means that a minimum of 21 percent of New York City residential construction workers received unreported pay. The numbers were worse in the city-funded affordable-housing construction market, where up to two thirds of the 13,350 construction workers were employed illegally.<sup>49</sup>

\*The **Fiscal Policy Institute also released a study in December 2007 on illegal employment practices in the entire New York City construction market**.<sup>50</sup> Like the study of the residential market, this study captures workers who are improperly misclassified as well as those paid unreported compensation.<sup>51</sup> The study made the following findings of losses in 2005:<sup>52</sup>

Total number of construction workers:	200,000
Number misclassified or paid off the books:	50,000
Health care cost shifting:	\$148 million
Fed income tax lost:	43.5
Fed employment tax/comp. premium lost:	271.6
New York state income tax lost:	15.2
New York City income tax lost:	<u>11.0</u>
Total cost:	\$489.3 million

FPI further estimates that fraud in New York City will cost the \$557 million in 2008.

**\*Ohio 2009 study:**

The Ohio Attorney General’s office did a study on the size and cost of misclassification based on 2005 unemployment-tax audits and findings in other state studies.<sup>53</sup>

Number of misclassified employees:	459,000 <sup>54</sup>
State Unemployment taxes lost:	\$100 million
Workers comp. premiums	\$510 million

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<sup>46</sup> *The Underground Economy in the New York City Affordable Housing Construction Industry*, Fiscal Policy Institute (New York City Housing), p. 1, 9. (April 2007).

<sup>47</sup> New York City Housing, pp. 1, 10-12.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, pp. 1, 8-9.

<sup>50</sup> *Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City’s Construction Industry*, Fiscal Policy Institute (New York City Construction) (December 2007).

<sup>51</sup> New York City Construction, p. 1.

<sup>52</sup> *Ibid.*, pp. 1, 20-21.

<sup>53</sup> *Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (February 18, 2009)

<sup>54</sup> *Ibid.*, p. 19.

State income taxes	\$180 million
Local income taxes	\$100 million
Total annual loss	\$890 million

In addition, they estimated that the lost federal Social Security and Medicare taxes are \$500 to 600 million and federal income taxes are \$500 million.<sup>55</sup>

**\*Pennsylvania 2008 study**

9 percent, 580,000, workers are misclassified as independent subcontractors annually, costing the unemployment compensation trust fund over \$200 million a year in lost revenue.<sup>56</sup> The cost to the worker’s compensation system is \$81 million in lost premiums.<sup>57</sup>

This study does not include the degree of unreported pay in the underground economy.<sup>58</sup>

**\*Vermont 2007 study**

The Vermont Department of Labor, assisted by the Department of Banking, Insurance, Securities & Health Administration studied (1) the feasibility of having an on-line proof of coverage database through the National Council of Compensation Insurance (2) the extent and nature of class code and independent contractor misclassification and (3) the effectiveness of current Vermont law to counter misclassification.<sup>59</sup> Most of the answers came from a survey of the top 9 workers’ compensation insurers in the state.<sup>60</sup> They concluded that it is feasible to have an on-line proof-of-coverage open to the public.<sup>61</sup> Also, they found that insurance companies don’t believe that class-code misclassification is a serious problem.<sup>62</sup> They do believe that independent contractor misclassification is a problem and that it is a particular problem in the construction industry.<sup>63</sup> The insurers say that misclassification of class codes and especially employees as independent contractors raises premium costs.<sup>64</sup> Regarding current statutes, the Department of Labor recommends a uniform definition of independent contractor for its unemployment and workers compensation codes.<sup>65</sup>

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<sup>55</sup> *Ibid.*, p. 22.

<sup>56</sup> Testimony of Patrick T. Beaty, Deputy Secretary for Unemployment Compensation Programs, Pennsylvania Department of Labor and Industry, before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act, p. 3 (April 23, 2008) (hereinafter *Beaty*).

<sup>57</sup> Testimony of Timothy L. Wisecarver and Bruce Decker, Pennsylvania Compensation Rating Bureau, Summary of Testimony before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act, p. 3 (April 23, 2008).

<sup>58</sup> *Beaty*, p. 3.

<sup>59</sup> *Vermont Department of Labor Study Required by Act 57 (S 196) 2007 Legislative Session: The Misclassification of Workers in Vermont’s Workers’ Compensation System*, p. 3 (December 2007).

<sup>60</sup> *Ibid.* p. 21.

<sup>61</sup> *Ibid.* at p. 3.

<sup>62</sup> *Ibid.* at pp. 3 and 15.

<sup>63</sup> *Ibid.* at pp. 4 and 15-16

<sup>64</sup> *Ibid.* at p. 15.

<sup>65</sup> *Ibid.* at pp. 4-5 and 9-10

**\*Washington 2007 study:**<sup>66</sup>

In-state and out-of-state business registered with the IRS but not with Washington in 2004 cost the state \$274 million in unpaid taxes (that includes taxes for workers compensation coverage). Unpaid taxes for Washington employers are \$101.3 million. Industry breakdowns for these employers are available.

In 2001, an additional \$183 million of unpaid taxes can be added for business that are neither registered with the IRS and Washington. Industry breakdowns for these employers are not available.

Breakdown in millions:

	In&Out of State All Industries	In-State All Ind.	In-State Construction
State income tax	225.0	52.0	1.0
State unemplmnt	14.8	14.8	3.4
workers comp.	34.5	34.5	8.7
Total	\$274.3	\$101.3	\$13.1

The study cites construction as an area where the number is probably higher, because they don't have an industry breakdown of the employers who aren't registered (don't pay taxes) to either the federal and state. Construction is cited as a focus for enforcement.

**A report released by the Wisconsin Misclassification Task Force** disclosed that 44% of workers of companies audited by unemployment tax were reclassified as employees.<sup>67</sup>

NB: Appendix A is presents information compiled by Matthew Capece and available from the following web site: [http://www.carpenters.org/misclassification/key\\_studies.html](http://www.carpenters.org/misclassification/key_studies.html)

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<sup>66</sup> *Unregistered Business Study: Joint Report of the Washington State Dept. of Revenue, Washington State Dept. of Labor and Industries and the Washington State Employment Security Dept.*, pp. 2, 3-7, 11-17 and 19 (November 2007).

<sup>67</sup> *Report of the Worker Misclassification Task Force Submitted to Secretary Roberta Gassman, Department of Workforce Development*, pp. 6-7 (2009).



## Nonemployer Statistics, 2006 Construction Tennessee

Nonemployer Statistics originate from tax return information of the Internal Revenue Service. The data are subject to nonsampling error such as errors of self-classification by industry on tax forms, as well as errors of response, nonreporting and coverage. Values provided by each firm are slightly modified to protect the respondent's confidentiality. For further information about methodology and data limitations, see [Survey Methodology](#). For descriptions of column headings and rows (industries), click on the appropriate underlined element in the table.

NAICS Code	Description	<u>Nonemployers</u>	
		<u>Firms</u>	<u>Receipts (\$1,000)</u>
23	<u>Construction</u>		
	All Establishments	78,078	5,370,445
	Corporations	1,359	285,940
	Individual Proprietorships	74,559	4,564,264
	Partnerships	2,160	520,241
236	<u>Construction of buildings</u>		
	All Establishments	21,511	2,264,142
	Corporations	630	160,987
	Individual Proprietorships	19,979	1,829,881
	Partnerships	902	273,274
2361	<u>Residential building construction</u>		
	All Establishments	18,808	2,087,564
	Corporations	539	136,674
	Individual Proprietorships	17,445	1,695,948
	Partnerships	824	254,942
2362	<u>Nonresidential building construction</u>		
	All Establishments	2,703	176,578

NAICS Code	Description	Nonemployers	
		Firms	Receipts (\$1,000)
	Corporations	91	24,313
	Individual Proprietorships	2,534	133,933
	Partnerships	78	18,332
237	<a href="#">Heavy and civil engineering construction</a>		
	All Establishments	1,834	192,445
	Corporations	88	18,748
	Individual Proprietorships	1,456	94,389
	Partnerships	290	79,308
2371	<a href="#">Utility system construction</a>		
	All Establishments	279	13,692
	Corporations	D	D
	Individual Proprietorships	272	12,994
	Partnerships	5	540
2372	<a href="#">Land subdivision</a>		
	All Establishments	661	112,246
	Corporations	57	14,973
	Individual Proprietorships	356	26,487
	Partnerships	248	70,786
23721	<a href="#">Land subdivision</a>		
	All Establishments	661	112,246
	Corporations	57	14,973
	Individual Proprietorships	356	26,487
	Partnerships	248	70,786
2373	<a href="#">Highway, street, and bridge construction</a>		
	All Establishments	177	11,193
	Corporations	7	1,422
	Individual Proprietorships	162	7,816
	Partnerships	8	1,955
23731	<a href="#">Highway, street, and bridge construction</a>		
	All Establishments	177	11,193
	Corporations	7	1,422

NAICS Code	Description	Nonemployers	
		Firms	Receipts (\$1,000)
	Individual Proprietorships	162	7,816
	Partnerships	8	1,955
2379	<a href="#">Other heavy and civil engineering construction</a>		
	All Establishments	717	55,314
	Corporations	22	2,195
	Individual Proprietorships	666	47,092
	Partnerships	29	6,027
23799	<a href="#">Other heavy and civil engineering construction</a>		
	All Establishments	717	55,314
	Corporations	22	2,195
	Individual Proprietorships	666	47,092
	Partnerships	29	6,027
238	<a href="#">Specialty trade contractors</a>		
	All Establishments	54,733	2,913,858
	Corporations	641	106,205
	Individual Proprietorships	53,124	2,639,994
	Partnerships	968	167,659
2381	<a href="#">Foundation, structure, and building exterior contractors</a>		
	All Establishments	11,640	713,666
	Corporations	79	16,538
	Individual Proprietorships	11,407	669,109
	Partnerships	154	28,019
2382	<a href="#">Building equipment contractors</a>		
	All Establishments	8,224	428,633
	Corporations	144	18,836
	Individual Proprietorships	7,878	374,686
	Partnerships	202	35,111
23821	<a href="#">Electrical Contractors</a>		
	All Establishments	3,593	149,327
	Corporations	54	4,795
	Individual Proprietorships	3,469	134,542

NAICS Code	Description	Nonemployers	
		Firms	Receipts (\$1,000)
	Partnerships	70	9,990
23822	<a href="#">Plumbing, heating, and air-conditioning contractors</a>		
	All Establishments	4,217	253,967
	Corporations	79	12,713
	Individual Proprietorships	4,023	219,408
	Partnerships	115	21,846
23829	<a href="#">Other building equipment contractors</a>		
	All Establishments	414	25,339
	Corporations	11	1,328
	Individual Proprietorships	386	20,736
	Partnerships	17	3,275
2383	<a href="#">Building finishing contractors</a>		
	All Establishments	19,953	964,973
	Corporations	127	24,832
	Individual Proprietorships	19,593	901,145
	Partnerships	233	38,996
2389	<a href="#">Other specialty trade contractors</a>		
	All Establishments	14,916	806,586
	Corporations	291	45,999
	Individual Proprietorships	14,246	695,054
	Partnerships	379	65,533
	<a href="#">Top</a>	<a href="#">All-sector table</a>	<a href="#">Data in formats for downloading</a>

Source: U.S. Census Bureau, EPCD, [Nonemployer Statistics](#)



# Nonemployer Definitions

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## **Nonemployer**

A nonemployer business is one that has no paid employees, has annual business receipts of \$1,000 or more (\$1 or more in the construction industries), and is subject to federal income taxes. Most nonemployers are self-employed individuals operating very small unincorporated businesses, which may or may not be the owner's principal source of income.

## **Receipts**

Includes gross receipts, sales, commissions, and income from trades and businesses, as reported on annual business income tax returns. Business income consists of all payments received for services rendered by nonemployer businesses, such as payments received as independent agents and contractors.

The composition of nonemployer receipts may differ from receipts data published for employer establishments. For example, for wholesale agents and brokers without payroll (nonemployers), the receipts item contains commissions received or earnings. In contrast, for wholesale agents and brokers with payroll (employers), the sales and receipts item published in the Economic Census represents the value of the goods involved in the transactions.

## **Number of Firms**

Generally, a firm is a single physical location where business is conducted or services or industrial operations are performed. However, for nonemployers we count each distinct business income tax return filed by a nonemployer business as a firm. A nonemployer business may operate from its owner's home address or from a separate physical location. Most geography codes are derived from the business owner's mailing address, which may not be the same as the physical location of the business.

## **Legal Form of Organization (LFO)**

The legal form of organization for nonemployer businesses is derived from administrative record sources. The following three legal forms of organization are included in this report:

Individual proprietorship Also referred to as a "sole proprietorship," an unincorporated business owned by an individual. Also included in this category are self-employed persons.

Partnership An unincorporated business owned by two or more persons having a shared financial interest in the business.

Corporation. A legally incorporated business under state laws.

## Appendix D

### **National Conference of Insurance Legislators Statement Supporting Legislation to Control Employer Misclassification in Construction, Nov. 2009**

Considered by the National Conference of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee on November 19, 2009.

Sponsored for discussion by Rep. Charles Curtiss (TN) and Sen. Ralph Hudgens (GA)

#### Table of Contents Page Numbers

Section 1. Summary (1)

Section 2. Definitions (1)

Section 3. Coverage Requirements (1-2)

Section 4. Liability (2-3)

Section 5. Employer/Contractor Disclosure Requirements (3)

Section 6. Payroll Audit Procedures (3)

Section 7. Penalties (3-5)

Section 8. Enforcement (5-6)

Section 9. Severability (6)

Section 10. Effective Date (6)

Section 1. Summary

This Act mandates workers' compensation coverage in the construction industry, with certain exemptions; establishes auditing procedures; specifies liability; provides penalties for insurance fraud; and addresses enforcement powers.

#### Section 2. Definitions

A. "Employee" means any entity as defined by [Insert Applicable Reference to State Definition].

B. "Employer" means any entity as defined by [Insert Applicable Reference to State Definition].

C. "Partner" means any person as defined by [Insert Applicable Reference to State Definition].

D. "Principal Contractor" and "subcontractor" mean any entity as defined under [Insert Applicable State Agency].

E. "Sole proprietor" means any entity as defined under [Insert Applicable Reference to State Definition].

#### Section 3. Coverage Requirements

A. Every person engaged in the construction industry, including principal contractors, intermediate contractors and subcontractors shall be required to carry workers' compensation insurance, regardless of the number of employees, unless exempted as indicated in subsections (C) and (D).

*Drafting Note: States may want to consider the cost impact of this subsection on sole proprietors and self-employed small contractors. Options to consider include exemptions for individuals with high-quality health insurance plans, the use of deductibles to bring down insurance costs, and monthly premium payment plans.*

B. For purposes of this Section, “a person engaged in the construction industry” means any person or entity assigned to the Contracting Group as those classifications are designated by the rate service organization designated by the [Insert State Department of Insurance].

*Drafting Note: For the purposes of this Act, the [Insert State Department of Insurance] could use standard industrial classification codes and the definitions thereof developed by the National Council on Compensation Insurance (NCCI) and the U.S. Department of Labor Bureau of Labor Statistics (BLS) North American Industry Classification System (NAICs) codes to meet the criteria of the term "construction industry" as set forth in this Act.*

C. A sole proprietor or partner engaged in the construction industry shall not be required to carry workers’ compensation on themselves if they are doing work directly for the owner of the property pursuant to Section 3(D), but shall be required to carry workers’ compensation insurance on any subcontractor, employee or worker not otherwise covered by a policy of workers’ compensation; however, if a sole proprietor or partner is working as an intermediate contractor or subcontractor then workers’ compensation insurance shall be required on themselves.

D. The provisions of this Section shall not apply to individuals performing work on their own property. As used in this subsection (D), an individual is a natural person.

*Drafting Note: States may want to look to state definitions of employer, employee, and existing treatment of homeowners on residential projects to avoid duplicating and conflicting language.*

#### Section 4. Liability

A. Every principal contractor shall be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers' compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the principal contractor rather than the [Insert State Uninsured Employer Fund], if applicable, should be responsible for the payment of statutory benefits.

B. If an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers' compensation coverage or was not an approved self-insured employer, and the principal contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the principal

contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the principal contractor, provided that an intermediate subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, become the principal contractor for the purposes of this section.

C. 1. The contractor and subcontractor shall provide proof of continuing coverage to the principal contractor throughout the term of the contract between the contractor and subcontractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the principal contractor and the subcontractor.

2. A subcontractor who allows coverage to lapse because of non-payment during a contract but fails to notify a contractor under Subsection (C) becomes liable to the injured employee and subject to all recovery of payments, plus administrative costs and attorneys' fees.

D. 1. If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the [Insert State Uninsured Employer Fund], if applicable, both the principal contractor and subcontractor are jointly and severally liable for any payments made by the [Insert State Uninsured Employer Fund], and the [Insert State Insurance Commissioner] may seek recovery of the payments, plus administrative costs and attorneys' fees, from the principal contractor, the subcontractor, or both.

2. A principal contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys' fee and costs.

## Section 5. Employer/Contractor Disclosure Requirements

A. Employers shall make available to their workers' compensation insurance carrier all records necessary for the payroll verification audit and permit the auditor to make a physical inspection of the employer's operation.

B. A principal contractor may require a subcontractor to provide evidence of workers' compensation insurance.

C. An insurance carrier may require each employer to submit a copy of the quarterly earning report at the end of each quarter to the insurance carrier and submit self-audits supported by the quarterly earnings reports and the rules adopted by the state agency providing unemployment tax collection services. The reports must include an attestation by an officer or principal of the employer attesting to the accuracy of the information contained in the report.

D. A principal contractor may require a subcontractor to be able to produce on demand at their principal place of business information required by Section 5(B).

#### Section 6. Payroll Audit Procedures

A. In no event shall employers in the construction class, generating more than the amount of premium required to be experience rated, be audited less than annually. A minimum of ten percent of employers in the construction class that do not generate more than the amount of premium required to be experience rated will be inspected annually and audited, if necessary. The annual audits required for construction classes shall consist of physical onsite audits.

B. Payroll verification audit rules must include, but need not be limited to, the use of state and federal reports of employee income, payroll and other accounting records, certificates of insurance maintained by subcontractors, and duties of employees.

C. Upon conclusion of an employer audit, the insurance carrier shall report to the [Insert State Workers' Compensation Department or Appropriate Agency] any unresolved employee or independent contractor misclassification, any uncovered or unreported employees, and any other violation of this Act.

#### Section 7. Penalties

A. For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of Section 3. However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.

B. In addition to any other penalty prescribed by this section, the department shall assess against any employer who has failed to secure the payment of compensation as required by Section 3 a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this section within the preceding 3-year period or \$750, whichever is greater.

C. 1. Any person that knowingly submits an initial application, renewal application, or certificate of insurance as proof of coverage, that is false, forged, misleading, or incomplete information for the purpose of avoiding or reducing the amount of premiums for workers' compensation coverage is subject to a civil penalty, per violation, not less than [Insert Applicable Amount].

2. In determining intent, the [Insert Appropriate State Agency] shall consider whether a person or organization in a similar size and type of business could reasonably be expected to understand that information being submitted was false or likely to mislead. In assessing the amount of the civil penalty, the [Insert Appropriate State Agency] shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following:

- a. the nature and seriousness of the misconduct;
- b. the number of violations;
- c. the persistence of the misconduct;
- d. the length of time over which the misconduct occurred;
- e. the willfulness of the defendant's misconduct; and
- f. the defendant's assets, liabilities, and net worth.

3. The [Insert Appropriate State Agency] may also require, as civil penalty, that the entity repay any compensation received through such violation, with interest at the rate of [Insert Applicable Percentage].

*Drafting Note: States can insert references to existing criminal penalties in their workers' compensation or insurance fraud codes.*

D. 1. Whenever the [Insert State Workers' Compensation Department or Appropriate Agency] determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this Act has failed to secure the payment of workers' compensation required by this Act or to produce the required business records under Section 5 within five (5) business days after receipt of the written request of the [Insert State Workers' Compensation Department or Appropriate State Agency], such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the [Insert State Workers' Compensation Department or Appropriate State Agency] of a stop-work order on the employer, requiring the cessation of all business operations. If the [Insert State Workers' Compensation Department or Appropriate State Agency] makes such a determination, the [Insert State Workers' Compensation Department or Appropriate State Agency] shall issue a stop-work order within 72 hours.

2. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance; provided that, if the employer cannot be found and served under due diligence the

department may execute service by publishing the stop work order for one week in a news publication having general circulation in the [names of cities] metropolitan areas.

3. A stop-work order may be served with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The order shall remain in effect until the [Insert State Workers' Compensation Department or Appropriate State Agency] issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this Act and has paid any penalty assessed under this section.

4. The [Insert State Workers' Compensation Department or Appropriate State Agency] may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this section and has agreed to remit periodic payments of the penalty pursuant to a payment agreement schedule with the [Insert State Workers' Compensation Department or Appropriate State Agency]. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due.

5. The [Insert State Workers' Compensation Department or Appropriate State Agency] may require an employer who is found to have failed to comply with the coverage requirements of Section 3 to file with the [Insert State Workers' Compensation Department or Appropriate State Agency], as a condition of release from a stop-work order, periodic reports for a probationary period that shall not exceed 2 years that demonstrate the employer's continued compliance with this section. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall by rule specify the reports required and the time for filing under this subsection.

E. Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity, including spouses, that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

F. It shall be unlawful for any person to knowingly violate a stop-work order issued by the [Insert State Workers' Compensation Department or Appropriate State Agency] and it is punishable as a felony of the third degree.

G. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall assess a penalty of not less than \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

H. Any agency action by the department under this section, if contested, must be contested as provided in [Insert State Chapter Relating to Judicial or Administrative Review].

## Section 8. Enforcement

The [Insert State Workers' Compensation Department or Appropriate State Agency] shall have the authority to enforce the requirements of this Act.

*Drafting Note: States may wish to consider the following enforcement provisions:*

A. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under [Insert State Statute], the [Insert State Workers' Compensation Department or Appropriate State Agency] shall have the power to:

1. Conduct investigations for the purpose of ensuring employer compliance.
2. Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.
3. Examine and copy business records.
4. Administer oaths and affirmations.
5. Certify to official acts.
6. Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.
7. Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.
8. Enforce the terms of a stop-work order.
9. Levy and pursue actions to recover penalties.
10. Seek injunctions and other appropriate relief.

B. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall designate representatives who may serve subpoenas and other process of the [Insert State Workers' Compensation Department or Appropriate State Agency] issued under this Act.

C. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall specify by rule the business records that employers must maintain and produce to comply with this Act.

D. Any law enforcement agency in the state may, at the request of the [Insert State Workers' Compensation Department or Appropriate State Agency], render any assistance necessary to carry out the provisions of this section, including, but not limited to, preventing any employee or other person from remaining at a place of employment or job site after a stop-work order or injunction has taken effect.

E. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall adopt rules to administer this section.

*Drafting Note: States could use part or all of penalties in Section 7 to offset enforcement and other expenses incurred by the implementation of this Act.*

#### Section 9. Severability

If any section, paragraph, sentence, clause, phrase, or any part of this Act passed is declared invalid, the remaining sections, paragraphs, sentences, clauses, phrases, or parts thereof shall be in no manner affected and shall remain in full force and effect.

#### Section 10. Effective Date

This Act shall take effect immediately.

*Drafting Note: States would benefit by comparing data from different state agencies, e.g. Unemployment and Workers' Comp Departments, to help identify problem employers.*

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Appendix E: NCCI Construction Industry Occupation Codes Used to Calculate Workers' Compensation Premium Payments – 2003 – 2006 & Estimate Missing Premiums Due to Misclassified and Unreported Workers in Tennessee Construction Industry

**Tennessee Contracting Class Codes - 3/1/09 Filing**

Class Code	Class Description
3365	WELDING OR CUTTING NOC & DRIVERS
3719	OIL STILL ERECTION OR REPAIR
3724	MACHINERY OR EQUIPMENT ERECTION OR REPAIR NOC & DRIVERS
3726	BOILER INSTALLATION OR REPAIR-STEAM
5020	CEILING INSTALLATION-SUSPENDED ACOUSTICAL GRID TYPE
5022	MASONRY NOC
5037	PAINTING: METAL STRUCTURES-OVER TWO STORIES IN HEIGHT-& DRIVERS
5040	IRON OR STEEL: ERECTION-FRAME STRUCTURES
5057	IRON OR STEEL: ERECTION NOC
5059	IRON OR STEEL: ERECTION-FRAME STRUCTURES NOT OVER TWO STORIES IN HEIGHT
5069	IRON OR STEEL: ERECTION-CONSTRUCTION OF DWELLINGS NOT OVER TWO STORIES IN
5102	DOOR, DOOR FRAME OR SASH ERECTION-METAL OR METAL COVERED
5146	FURNITURE OR FIXTURES INSTALLATION-PORTABLE-NOC
5160	ELEVATOR ERECTION OR REPAIR
5183	PLUMBING NOC & DRIVERS
5188	AUTOMATIC SPRINKLER INSTALLATION & DRIVERS
5190	ELECTRICAL WIRING-WITHIN BUILDINGS & DRIVERS
5213	CONCRETE CONSTRUCTION NOC
5215	CONCRETE WORK-INCIDENTAL TO THE CONSTRUCTION OF PRIVATE RESIDENCE
5221	CONCRETE OR CEMENT WORK-FLOORS, DRIVEWAYS, YARDS OR SIDEWALKS-& DRIVERS
5222	CONCRETE CONSTRUCTION IN CONNECTION WITH BRIDGES OR CULVERTS
5223	SWIMMING POOL CONSTRUCTION-NOT IRON OR STEEL- & DRIVERS
5348	CERAMIC TILE, INDOOR STONE, MARBLE, OR MOSAIC WORK
5402	HOTHOUSE ERECTION-ALL OPERATIONS
5403	CARPENTRY NOC
5437	CARPENTRY-INSTALLATION OF CABINET WORK OR INTERIOR TRIM
5443	LATHING & DRIVERS
5445	WALLBOARD INSTALLATION WITHIN BUILDINGS & DRIVERS

5462 GLAZIER-AWAY FROM SHOP & DRIVERS  
 5472 ASBESTOS CONTRACTOR-PIPE AND BOILER WORK EXCLUSIVELY & DRIVERS  
 5473 ASBESTOS CONTRACTOR-NOC & DRIVERS  
 5474 PAINTING OR PAPERHANGING NOC & SHOP OPERATIONS, DRIVERS  
 5478 FLOOR COVERING INSTALLATION--RESILIENT FLOORING -- CARPET AND LAMINATE  
 5479 INSULATION WORK NOC & DRIVERS  
 5480 PLASTERING NOC & DRIVERS  
 5491 PAPERHANGING & DRIVERS  
 5506 STREET OR ROAD CONSTRUCTION: PAVING OR REPAVING & DRIVERS  
 5507 STREET OR ROAD CONSTRUCTION: SUBSURFACE WORK & DRIVERS  
 5508 STREET OR ROAD CONSTRUCTION: ROCK EXCAVATION & DRIVERS  
 5535 SHEET METAL WORK - INSTALLATION & DRIVERS  
 5537 HEATING, VENTILATION, AIR-CONDITIONING AND REFRIGERATION  
 5539 METAL BUILDING ERECTION-PREFABRICATED & DRIVERS  
 5551 ROOFING-ALL KINDS & DRIVERS  
 5604 CONSTRUCTION-- EXECUTIVES, SUPERVISORS OR FOREMEN OVERSEEING JOBSITES--NOT PERFORMING ACT  
 5606 CONTRACTOR--PROJECT MANAGER, CONSTRUCTION EXECUTIVE, CONSTRUCTION MANAGER  
 5610 CLEANER-DEBRIS REMOVAL  
 5613 CLEANER - DEBRIS REMOVAL - TEMPORARY LABOR SERVICE  
 5645 CARPENTRY-DETACHED ONE OR TWO FAMILY DWELLINGS  
 5651 CARPENTRY-DWELLINGS-THREE STORIES OR LESS  
 5703 BUILDING RAISING OR MOVING  
 5705 SALVAGE OPERATION-NO WRECKING OR ANY STRUCTURAL OPERATIONS  
 6003 PILE DRIVING  
 6005 JETTY OR BREAKWATER CONSTRUCTION-ALL OPERATIONS TO COMPLETION & DRIVERS  
 6017 DAM OR LOCK CONSTRUCTION: CONCRETE WORK-ALL OPERATIONS  
 6018 DAM OR LOCK CONSTRUCTION: EARTH MOVING OR PLACING-ALL OPERATIONS & DRIVERS  
 6045 LEVEE CONSTRUCTION-ALL OPERATIONS TO COMPLETION & DRIVERS  
 6204 DRILLING NOC & DRIVERS  
 6206 OIL OR GAS WELL: CEMENTING & DRIVERS  
 6213 OIL OR GAS WELL: SPECIALTY TOOL OPERATION NOC-BY CONTRACTOR-ALL EMPLOYEES  
 6214 OIL OR GAS WELL: PERFORATING OF CASING-ALL EMPLOYEES & DRIVERS  
 6216 OIL OR GAS LEASE WORK NOC-BY CONTRACTOR & DRIVERS  
 6217 EXCAVATION & DRIVERS  
 6229 IRRIGATION OR DRAINAGE SYSTEM CONSTRUCTION & DRIVERS  
 6233 OIL OR GAS PIPELINE CONSTRUCTION & DRIVERS  
 6235 OIL OR GAS WELL: DRILLING OR REDRILLING & DRIVERS  
 6236 OIL OR GAS WELL: INSTALLATION OR RECOVERY OF CASING & DRIVERS  
 6237 OIL OR GAS WELL: INSTRUMENT LOGGING OR SURVEY WORK & DRIVERS  
 6251 TUNNELING-NOT PNEUMATIC-ALL OPERATIONS  
 6252 SHAFT SINKING-ALL OPERATIONS  
 6260 TUNNELING-PNEUMATIC-ALL OPERATIONS  
 6306 SEWER CONSTRUCTION-ALL OPERATIONS & DRIVERS

6319 GAS MAIN OR CONNECTION CONSTRUCTION & DRIVERS  
6325 CONDUIT CONSTRUCTION-FOR CABLES OR WIRES-& DRIVERS  
6400 FENCE ERECTION-METAL  
7538 ELECTRIC LIGHT OR POWER LINE CONSTRUCTION & DRIVERS

7855 RAILROAD CONSTRUCTION: LAYING OR RELAYING OF TRACKS OR MAINTENANCE OF WAY  
8227 CONSTRUCTION OR ERECTION PERMANENT YARD  
9534 MOBILE CRANE AND HOISTING SERVICE CONTRACTORS-NOC-ALL OPERATIONS-INCLUDING  
9554 SIGN INSTALLATION, MAINTENANCE, REPAIR OR REMOVAL & DRIVERS

Sources:

US Census Fact Finder [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-gr\\_name=ACS\\_2006\\_EST\\_G00\\_S2406&-geo\\_id=04000US47&-context=st&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-tree\\_id=306&-lang=en&-format=&-CONTEXT=st](http://factfinder.census.gov/servlet/STTable?_bm=y&-gr_name=ACS_2006_EST_G00_S2406&-geo_id=04000US47&-context=st&-ds_name=ACS_2006_EST_G00_&-tree_id=306&-lang=en&-format=&-CONTEXT=st)

Austin

<http://www.buildaustin.org/>

NY

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/NY%20Misclass%20Task%20Force%20Report%20for%202008--Issued%202-09.pdf>

Ohio

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Report%20Ohio%20AG%20on%20Impact%20of%20Misclassification-2-18-09.pdf>

Mass

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Harvard--Social%20and%20Economic%20Costs%20of%20Misclassification%20in%20Construction.pdf>

NY FPI

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Taxpayer%20Impact%20of%20Underground%20Constr%20Economy%20in%20NYC%20-FPI%2012-07.pdf>

Minn

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Misclassification%20of%20Employees%20as%20Independent%20Contractors%2011-07.pdf>

Maine

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Harvard--Economic%20Costs%20of%20Misclassification%20in%20Maine%20Construction.pdf>

Illinois

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Economic%20Costs%20of%20Employee%20Misclassification%20in%20Illinois.pdf>

Michigan

<http://www.lir.msu.edu/faculty/workingpapers/Misclassification%20in%20Michigan%2012-9-2008.pdf>

2000. *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*. Planmatics, Inc for the U.S. Department of Labor

<http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>

2008. "Foreign-born Workers in Construction and Other Industries." *The Construction Chart Book, 4<sup>th</sup> Ed.*

<http://www.cpwr.com/rp-chartbook.html>