

MARK ERLICH

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Selling out workers' safety

By Mark Erlich | July 7, 2007

ON MARCH 8, a 27-year-old Ecuadoran carpenter fell to his death on a 450-unit residential project in Woburn. The builder, Avalon Bay, a giant national development firm, had been cited by OSHA in December for failure to meet fall protection standards on similar sites in Newton and Danvers. The carpenter was being paid in cash, one of the growing army of invisible workers in the underground economy that was the focus of congressional hearings earlier this year.

The hearings focused on the misclassification of employees as independent contractors -- a relatively obscure aspect of employment law that is gaining attention because of the enormous economic and social impact. Companies move their employees off payrolls and label them as "independent contractors," a practice that allows them to avoid tax, insurance, and benefit obligations. It is fraud, and it is illegal, but the practice has mushroomed at the expense of legitimate employers, workers, and taxpayers.

According to federal data, the number of independent contractors has increased by 20 percent since 2000. An IRS official estimated that 30 percent of the nation's \$290 billion "tax gap" can be attributed to misclassification. A series of state studies have shown substantial losses in tax revenues. As cities and towns struggle to meet basic education and public safety needs, Massachusetts officials like Governor Deval Patrick and Attorney General Martha Coakley have argued that cracking down on misclassification offenders is a legally significant and fiscally responsible strategy for state government.

Predictably, the problem is most severe in industries where insurance costs are high and regulatory oversight has been limited. For example, fully 22 percent of those listed as independent contractors are in construction. While there are individuals who legitimately fall within the guidelines of the legal definitions, the vast majority of the growth can be attributed to a fraudulent drive to cut costs and a change to a subcontractor-based construction industry in which large general contractors shift risk, liability, and employment responsibilities to a series of smaller employers.

Springfield contractor John Kendzierski told the committee that it is "almost impossible" for employers that play by the rules to compete against those who cheat and subsequently cut their labor costs by 25 to 30 percent. In addition, many of those firms that misclassify have simply shifted employees completely off the books. The nation's underground economy has now reached nearly \$1 trillion a year. Cash compensation has become an integral part of the largely unregulated and non union private residential sector of the industry.

A 2007 New York study of the city's housing industry claims that more than two-thirds of the residential workforce is no longer treated as employees, split between so-called independent contractors and those who are off the books. These workers are not covered by the most basic labor laws such as overtime, unemployment, and workers compensation and will never be eligible for Social Security.

The final element in the story is the expanding immigrant workforce in construction and other industries. Employers that already skirt legally mandated tax and insurance obligations are more likely to take advantage of a worker's uncertain citizenship status. It has become a perfect storm -- a broad social trend away from employer responsibility for employee benefits, an industry trend to push employment risk down the subcontracting chain, an illegal mechanism to avoid costly obligations, a history of weak enforcement, and a workforce where the threat of deportation inhibits the likelihood of individual or collective response.

There are inevitable safety consequences to the rush to shed legal responsibilities. The decreasing size of contractors -- whether the result of the pressure to subcontract or fewer employees listed on payrolls -- results in an ever more dangerous industry. Small non union firms have limited resources to apply to safety, and typically those that cheat in one arena are more likely to cut corners in others.

The New York study found that more than two-thirds of construction fatalities occurred with employers with fewer than 10 employees and reported a 40 percent increase in fatalities in 2006 compared with the previous five years.

The carpenter who died in Woburn was the human face of these statistics. Without the rights that come with conventional employee status, he was just one more example of the high cost of doing business off the books.

Mark Erlich is executive secretary-treasurer of the New England Regional Council of Carpenters. ■

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