
JOINT LEGISLATIVE TASK FORCE ON THE UNDERGROUND ECONOMY IN THE CONSTRUCTION INDUSTRY

FINAL REPORT January 20, 2009

Co-Chairs

Senator Jeanne Kohl-Welles* and Representative Steve Conway*

Task Force Members

Asterisk (*) denotes Executive Committee Members

Senator Janéa Holmquist*
Representative Cary Condotta*

Bob Abbott, Labor Member
John Bratton, Business Member
Dave Johnson, Labor Member*
John Littel, Labor Member
Randy Loomans, Labor Member
Craig Munson, Business Member
Rick Slunaker, Business Member*
Hilary Stern, Business Member

Agency Liaisons

Carl Hammersburg and Brian Fordham, Department of Labor and Industries*
Lisa Marsh and Lorenda Lillard, Employment Security Department*
Drew Shirk, Department of Revenue*

Staff

Senate Committee Services

Kathleen Buchli, Counsel
Mac Nicholson, Coordinator/Counsel
Nancy Osmundson, Committee Assistant

House Office of Program Research

Joan Elgee, Counsel
Alison Hellberg, Counsel
Billie Schubert, Legislative Assistant

Washington State Institute for Public Policy

Jim Mayfield, Senior Research Associate

TABLE OF CONTENTS

	Page
Letter from Task Force	3
Part I – Background on the Task Force	5
Part II – 2008 Legislation	7
Part III – Activities of the Task Force in 2008	9
Part IV – 2008 Recommendations of the Task Force	12
Appendices	Attached
Appendix A - Preliminary Report of the Benchmark Advisory Committee	
Appendix B - 2008 Legislation	
Appendix C - List of materials available on website	

JOINT LEGISLATIVE TASK FORCE ON THE UNDERGROUND ECONOMY IN THE CONSTRUCTION INDUSTRY

January 20, 2009

Members of the Legislature:

We are pleased to present the Final Report of the Joint Legislative Task Force on the Underground Economy in the Construction Industry.

During the 2007 interim, the Task Force heard presentations and public testimony that confirmed the underground economy is costly to the state in lost revenue and unfair to law-abiding businesses and workers. Our recommendations from the 2007 work led to the enactment of two important pieces of legislation. ESHB 3122 clearly defines who is an independent contractor for persons working in the construction industry. 2SSB 6732 gives the Department of Labor and Industries additional tools to identify and impose consequences on people working underground. In addition, the 2007-09 supplemental budget included funding for the Department to increase enforcement as well as to educate consumers about unregistered contractors.

A key recommendation enacted in 2008 was to allow the Task Force to continue its work through the 2008 interim and 2009 session. Our work during the 2008 interim led to a broad range of recommendations which are further detailed in this report. The recommendations include increased regulation and education of contractors and greater education for consumers. A significant issue came to our attention late in 2008, that of the use of stop work orders for enforcement. A subcommittee is continuing to work on this issue.

During the 2008 interim, a Benchmark Advisory Committee staffed by the Washington State Institute for Public Policy worked on establishment of benchmarks for the monitoring of activities recommended in the 2008 legislation. The Advisory Committee's preliminary report is included as part of this report.

It became apparent during our study that the need for monitoring the underground economy is ongoing and beyond the use of benchmarks. The Task Force therefore recommends that an interagency advisory committee be formed, with labor and business stakeholders, to address issues identified by the Task Force as well as emerging issues regarding the underground economy in construction and other areas. Some of the recommendations listed in this report are long-range and appropriate for evaluation by an ongoing advisory committee.

We believe these recommendations will assist in protecting the economic vitality of the state.

Sincerely,



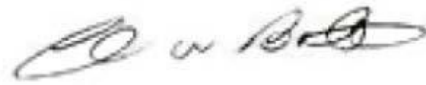
Senator Jeanne Kohl-Welles, Co-Chair



Representative Steve Conway, Co-Chair



Bob Abbott, Business Manager,
Wash. and North Idaho District Council
of Laborers



John Bratton, Legislative Policy Chair,
Building Industry Association of Wash.



Dave Johnson, Executive Secretary,
Wash. State Building & Construction
Trades Council, AFL-CIO



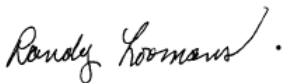
Craig Munson, Owner
Seattle Floor Service



John Littel, Political Director
Pacific Northwest Regional
Council of Carpenters



Rick Slunaker,
Director of Government Affairs
Associated General Contractors of Wash.



Randy Loomans
Government Relations Director,
International Union of Operating Engineers
Local 302



Hilary Stern
Executive Director, CASA Latina

PART I BACKGROUND ON THE TASK FORCE

In 2007, the Legislature enacted Senate Bill 5926.¹ The bill created a joint legislative task force to formulate a state policy to establish cohesion and transparency between state agencies to increase oversight and regulation of the underground economy practices in the construction industry. The Task Force met in the 2007 interim and developed findings and recommendations. The recommendations from the 2007 work led to enactment during the 2008 legislative session of two bills -- ESHB 3122 and 2SSB 6732 -- and budget provisos, all of which are further discussed in Part II. The 2008 legislation extended the Task Force for an additional year and required a final report to the Legislature by December 31, 2008. (Section 10, 2SSB 6732)

The Task Force conducted its work with the goal of reducing or eliminating the underground economy in the construction industry.

For a full understanding of the Task Force's activities, reviewing the Findings and Recommendations from the 2007 work in addition to this report is recommended. Those findings and recommendations are available online, as are other Task Force meeting materials.²

Findings, Declarations, and Intent

The bill creating the Task Force, SB 5926, expressed legislative findings and declarations as well as the Legislature's intent. The Legislature found "that some current estimates place the percentage of unreported employment in Washington State's construction industry at between twenty percent and fifty percent, although solid data on this phenomenon is not readily available in Washington." The Legislature also found "that unreported construction employment may result in the loss of a worker's employment rights and protections, including workers' compensation and unemployment insurance compensation." The Legislature further found "that unreported construction employment also could deny the state the revenues it is due, including sales taxes, business and occupation taxes, and other business fees paid to the state." The Legislature declared "that the underground economy in this state may permit unfair conditions to exist against persons working in the construction industry who do follow the employment laws and appropriately pay taxes." The Legislature's intent was "to determine the extent and potential costs to the state of the underground economy in the construction industry."

Joint Legislative Task Force

The Task Force consisted of the following members: four legislative members designated as the chairs and the ranking minority members of the Senate Labor, Commerce, Research and Development Committee and the House Commerce and Labor Committee; four members representing the construction business; four members representing construction laborers; and nonvoting agency liaison members from the Employment Security Department, the Department of Labor and Industries, and the Department of Revenue. The Washington State Institute for Public Policy (Institute) maintained a nonvoting liaison representative to the Task Force as well.

¹ The companion to SB 5926 was HB 2086 which passed the House Commerce and Labor Committee.

² <http://www1.leg.wa.gov/Joint/Committees/UECI>

The 2007 legislation directed the Task Force to contract with the Institute to assist the Task Force and determine the extent of and projected costs to the state and workers of the underground economy in the construction industry. (see Appendix to Findings and Recommendations) The 2008 legislation directed the Institute to establish benchmarks for the future monitoring of activities recommended by the Task Force. The preliminary Benchmark Report is Appendix A.

Funding for the work of the Task Force in FY 2008 was provided for in the 2007-09 operating budget, SHB 1128. For FY 2008, \$56,000 was appropriated for the House of Representatives and \$56,000 was appropriated for the Senate. For FY 2009, the Legislature appropriated \$46,000 directly to the Institute. ESHB 2687.

PART II 2008 LEGISLATION

In 2008, the Legislature passed ESHB 3122 and 2SSB 6723. (The Governor vetoed two sections of 2SSB 6732, discussed below.) Budget provisos related to the underground economy in the construction industry were also enacted in the supplemental 2007-09 budget, ESHB 2687.

ESHB 3122 established a seven part independent contractor test for purposes of unemployment insurance and industrial insurance. The new test is similar to the six-part test for all industries, but is limited to the construction industry. An individual meeting the test must have a valid contractor registration or electrical contractor license on the effective date of the contract and active and valid accounts with the Department of Revenue and any other state agencies.

In **2SSB 6732**, the Legislature adopted items relating to penalties, data-sharing and detection, enforcement, and education and outreach activities. These provisions include:

Penalties.

- The Department of Labor & Industries (L&I) must deny a contractor registration application and suspend an active registration if L&I determines that the applicant falsified information on the application or the applicant does not have an active and valid certificate of registration with the Department of Revenue.
- A person who submits false information on an application for registration is subject to a penalty of up to \$10,000.
- A contractor is prohibited from bidding on public works projects if two or more specified violations are committed within a five year period.

Data-sharing and detection.

- Employers must keep records of the compensation paid to contractors and electricians.
- State agencies may disclose records between themselves if the agencies would otherwise be permitted to obtain the information directly.

Education and outreach.

- L&I must create an expanded social marketing campaign to warn consumers of the risks and potential consequences of hiring unregistered contractors.

The term of the Task Force was extended to June 30, 2009.

Vetoes. The Governor vetoed a section requiring L&I to add staff to the Fraud Audit Infracton and Revenue (FAIR) contractor fraud team and requiring both L&I and the Employment Security Department to hire additional auditors. The vetoed section also required that funding be dedicated to the Attorney General's office for contractor compliance cases. However, funding was provided in the budget for L&I and the Attorney General's office and the Governor's veto message indicated she was directing L&I to hire investigative staff. (L&I provided updates to the Task Force on the hiring of FAIR team inspectors, auditors, and an additional Attorney General.)

Also vetoed was a section providing for a pilot project between L&I and local jurisdictions to explore ways to improve the collection and sharing of building permit information.

Budget provisos:

Funding was addressed in the 2007-09 supplemental budget to implement 2SSB 6732:

- Attorney General's Office.
- Department of Labor and Industries.
- Employment Security Department.
- Washington State Institute for Public Policy.

The text of the bills and bill reports are in Appendix B.

PART III ACTIVITIES OF THE TASK FORCE

In 2007, Task Force topics included an overview of the current oversight of the underground economy in the construction industry as presented by the Employment Security Department (ESD), the Department of Labor and Industries (L&I), and the Department of Revenue (DOR); impediments to collection of taxes and recommendations for improvement; experiences from other states; perspectives on the underground economy from both business and labor representatives; the role of local governments in monitoring the construction economy; current independent contractor laws in this state and other states; laws regarding data sharing among state agencies; enforcement and penalty issues; and contractor registration requirements. Further detail is in the 2008 findings and recommendations.

In 2008, Task Force topics included a review of the 2008 legislation; Benchmark Advisory Committee activities; best practices from other states; local government data sharing and suggestions for addressing the underground economy; Department of Licensing (DOL) sunrise review of residential contractors; updates from the three liaison agencies; new hire reporting, and stop work orders. (Dates in parentheses below are dates of the meetings at which particular topics were discussed.)

Organizational Matters

Procedures: In 2008, the Task Force maintained the procedures adopted in 2007. The procedures addressed the organization and conduct of the Task Force, the appointment of Task Force subcommittees; the data request process; and the decision making process. The Executive Committee agreed to meet after Task Force meetings as necessary to make data requests of staff and agencies and to identify agenda items for the next meeting.

Schedule: The Task Force planned four meetings and held one additional short meeting. (May 28, September 10, October 1, November 12, December 4)

Reports: Presentations and reports given to the Task Force by state agency representatives, the Institute, and other presenters are available online.³ Appendix C contains a list of all these reports for both 2007 and 2008.

Public Comment: The Task Force meetings (other than the final meeting) included an opportunity for public comment.

Subcommittees and Advisory Committees: Two advisory committees and two subcommittees assisted with the Task Force's work.

Independent Contractor Subcommittee. This subcommittee looked into creating a uniform definition of "independent contractor" and met three times in late 2007. See discussion of ESHB 3122. (November 7, December 3, December 17)

³ <http://www.leg.wa.gov/Joint/Committees/UECI/>

Local Government Advisory Committee. The Task Force asked the Local Government Advisory Committee to investigate ways to improve data sharing between the state and local governments. The Advisory Committee met once in 2007 (December 6) and once in 2008 (August 7)

Benchmark Advisory Committee. The Task Force created a Benchmark Advisory Committee, to be led by the Washington State Institute for Public Policy (Institute), in late 2007. 2SSB 6732 then specifically directed the Institute to organize the advisory committee, with the assistance of the three liaison agencies, with a goal of establishing benchmarks for the future monitoring of activities recommended by the Task Force. The advisory committee met twice in 2008 and also presented updates to the Task Force. The preliminary report is Appendix A. (March 21, July 9)

Stop Work Subcommittee. The Task Force formed a Stop Work Subcommittee to consider issuance of stop work orders by L&I as an enforcement tool. The Subcommittee met twice in December 2008. (December 1, December 16)

Substantive Issues Addressed in 2008

Implementation of 2008 legislation and related updates from agencies. Agency representatives presented information on implementation of the 2008 legislation and related activities.

L&I addressed the hiring of the additional staff (Fraud Audit Infracton and Revenue (FAIR) team compliance inspectors, auditors, and Assistant Attorney General) and the implementation of the marketing campaign, new penalties, and new independent contractor test. L&I also provided copies of the new contractor application form.

ESD also provided information on the implementation of the new independent contractor test as well as data on enforcement efforts.

ESD and L&I both addressed workers' compensation and unemployment insurance coverage of sole proprietors and persons in other types of business relationships. ESD also addressed release of subcontractor information. (May 28, September 10)

Budget requests. L&I and ESD discussed their 2009-11 decision packages related to the underground economy in construction. ESD provided general information on funding for auditors. (October 1)

Benchmarks and future monitoring. The Institute provided updates on the work of the Benchmark Advisory Committee, including identification of data elements and baseline data to measure the impact of 2SSB 6732. (May 28, September 10, October 1)

Best Practices. The Task Force heard from national business and labor representatives regarding best practices in regulating the underground economy in the construction industry to achieve the goal of reducing or eliminating the underground economy. Matt Capece, Representative of the General President, United Brotherhood of Carpenters and Joiners of America, presented a survey of federal and state actions to counter misclassification fraud. Alex Strong, National Association of

Home Builders Government Affairs Manager, provided information on independent contractor legislation in Congress and the effects of misclassifying workers as independent contractors. (September 10)

Local governments. L&I, representatives of the Washington Association of Building Officials, and cities, presented information on the Local Government Advisory Committee discussions with cities and counties on data sharing. Additionally, the city of Lacey worked with L&I representatives and demonstrated the data they currently collect and the format in which such data is kept.

The Institute presented information on lost revenue to cities and counties from the underground economy.

Representatives from cities and counties made suggestions to address the underground economy. (September 10, October 1)

Contractor regulation. The Department of Licensing presented information on the sunrise review of contractor regulation. The Task Force also heard a staff presentation on regulation of contractors in California and Oregon, which have competency testing. (September 10, October 1)

Prevailing wage classification. L&I provided information on links between enforcement of prevailing wage and workers' compensation laws, including classification issues. (October 1)

New hire registry. The Division of Child Support of the Department of Social and Health Services (DSHS) presented an overview of the requirement that employers report new hires to DSHS. DSHS also reported on states which require reporting of independent contractors in addition to employees, and new hire reporting compliance in Washington. L&I and ESD provided information on data sharing with DSHS. (October 1, November 12)

Stop work orders. Staff presented information on stop work order laws in other states and a bill draft for discussion. (October 1, November 12)

PART IV RECOMMENDATIONS OF THE TASK FORCE

During the 2008 interim, the Task Force carried forward the broad list of possible recommendations identified in 2007 that were not adopted in 2008. Business and labor were asked to prioritize and submit recommendations for 2009 from this carry forward list and to identify any additional items. At the November 12 meeting, the Task Force adopted a number of the carry forward items, deferred some items to the December 4th meeting, deferred some items long-term, and added to the list of possible recommendations. At the December 4 meeting, a majority of the Task Force ratified the adoption of the November 12th recommendations, discussed and adopted some of the deferred items, and took action on other items.

Some task force members requested that it be entered into the record that the state is facing a difficult budget situation and that the Task Force should not necessarily be recommending additional spending. Consequently, the Legislature should consider the costs and benefits of funding the recommendations of this report in light of the current economic situation.

Overall, the business members believe that there should be a balance between education and enforcement so that adequate resources are devoted to make sure persons working in construction receive information on their obligations under the law and that enforcement resources are directed to those who choose to fail to follow the law.

RECOMMENDATIONS

The following recommendations were adopted by the Task Force at the November 12th meeting, and were ratified (except for #5 and with one change to item # 1) by a majority of the Task Force on December 4th, with two members abstaining. After the December 4th meeting, the business community withdrew support for a portion of # 18(b).

1. Contractor registration - identification requirements. A valid photo identification should be required for contractor registration and renewal. The registration should be available for review by consumers to verify the identity of the contractor.
2. Registration availability. All contractors should be required to have a list of all first tier subcontractors and their registrations available.⁴
3. Unregistered contractor criminal penalty. The unregistered contractor criminal penalty should be increased from a gross misdemeanor to a class C felony for the 3rd offense.
4. Construction training and outreach team. The Department of Labor & Industries (L&I) should establish a construction training and outreach team. Add two staff to provide direct contractor education/outreach to put on contractor training days, attend home shows, perform outreach to consumers and contractors. This also requires funding for travel, mailings, and materials. Add two underwriting staff for education and outreach on workers' compensation

⁴ On January 9, 2009, this language was modified at the request of the Co-Chairs and Business and Labor representatives after concerns were raised about what was intended by the vote on this item.

requirements and premium responsibilities, including independent contractor issues. They would work with new firms individually, and help establish mass education campaigns. Funding for travel, mailings and materials is also needed.

5. Education and outreach. Requirements should be explored for new and out-of-state contractors to attend a contractor training class before allowing registration/licensing, as well as a minimum of 8 hours of ongoing education on law/regulations each year. Add one staff person to implement these changes.^{5 6}
6. Employment Security Department (ESD) and L&I priority. ESD and L&I should be given priority to collect amounts owed from retainage on public works projects.
7. Unemployment insurance records penalty. A stringent penalty should be provided for failure to keep unemployment insurance records.
8. Master business application system funding. Funding for the Master Business Application Systems should be enhanced.
9. Employer fraud detection system funding. Funding should be provided to L&I for the employer fraud detection system based on results of the feasibility study.
10. Enforcement - local government. Local governments should be required to verify compliance with registration and other requirements before issuing a business license. Local governments need funding to implement the requirements.

Items deferred for long-term consideration:

11. Homeowner penalty. The issue of whether penalties should be created for homeowners who intentionally do not follow the rules should be deferred for long-term consideration. (In its discussions of this issue, the Task Force noted that whether penalties should be created for all owners, not just homeowners, should be part of any future consideration of this issue.)
12. Undocumented cash penalty. The issue of whether penalties should be created for persons who accept undocumented cash payments should be deferred for long-term consideration. (In its discussions of this issue, the Task Force noted that whether penalties should be created for persons who offer, in addition to those who accept, undocumented cash payment should be part of any future consideration of this issue.)

The following recommendations were discussed and adopted by a majority of the Task Force at the December 4th meeting, with two members recommending item #18 not be adopted and one member abstaining from #14.

⁵ Although the Task Force voted to endorse the concept of affirmative training for newly established businesses in Washington State, business members of the Task Force do not support the continuing education element, feeling that it is impractical to implement, and that state agencies as well as trade associations already perform this function.

⁶ The labor members of the Task Force strongly recommend that competency testing for contractors be a component of education and outreach. Competency testing should be similar to that required in California or at a minimum a competency test on contracting and registration laws and regulations of the state.

13. Stop work orders. The issue of stop work orders merits further consideration and the Stop Work Subcommittee should continue to meet. The Task Force acknowledges some difference of opinion as to whether stop work legislation is a priority for the 2009 session. Passage of a stop work bill is the top priority for the 2009 session for some members. Other members do not think it is necessary to pass the bill during the 2009 session, but want to continue working on the issue and moving towards agreement.
14. Future monitoring. An ongoing interagency advisory committee should be formed, with labor and business stakeholders, to address issues identified by the Task Force as well as emerging issues regarding the underground economy in construction and other areas. One member abstained from this recommendation. (The discussion of future monitoring included discussion of ongoing reporting of measures recommended by the Benchmark Advisory Committee.)
15. DSHS new hire information. The Legislature should consider the possibility of a shorter reporting time as a means of improving state agency data cross-matching capabilities and usefulness, while also enhancing compliance with new hire reporting requirements. DSHS should be encouraged to use its existing tools to obtain compliance. One task force member brought up concerns about changing the target when so few businesses are meeting the current target and this current target is not being enforced. Reservations were also expressed about setting the reporting requirements too tight to be practical for those who may outsource employment and payroll reporting functions.
16. Independent contractor definition - prevailing wage. The Legislature should define who is an independent contractor for purposes of prevailing wage laws. Some members would like to use the existing workers' compensation definition while others suggest that this definition should not automatically be used.
17. Local government tax issues. It is important that the interagency advisory committee address the items that were brought to the attention of the Task Force by the representatives of the cities and the counties. These include the issue of resale certificates, which is being explored by the Department of Revenue, and whether contractors should be required to place subcontractor UBI numbers on checks.
18. Sunrise review of residential contractors. A majority of the Task Force recommends that the following recommendations made by the Department of Licensing in their sunrise review of residential contractors receive consideration in the 2009 legislative session. Two members do not agree with this recommendation.
 - a. Registration requirements. Strengthen registration requirements by authorizing the Department of Labor & Industries to suspend registration for cause. Establish mechanisms for monitoring industry performance.
 - b. Strengthen registration. Strengthen registration by requiring disclosure of prior business names and/or bankruptcy, two years experience in the construction industry,

and evidence of training regulations and business practices in the construction industry. Consider higher bonding limits.⁷

- c. Central complaint repository. Create a central complaint repository within state government. Establish a database and encourage state agencies and local authorities to share information in a uniform format.
- d. Consumer awareness. Enhance L&I's current efforts to increase consumer skills and awareness of issues, resources, and strategies that are important in the area of residential contracting. Connect this effort to the issues identified as critical in this study. Set goals and targets and define metrics for consumer awareness.

⁷Recommendation #18 was handled in haste at the end of the last meeting, and the maker of the motion mistakenly included the experiential, training, and bonding elements of element (b). The intent was only to include the disclosure of prior business activity and bankruptcy history; deleting the remaining elements. There is no support from the business members of the Task Force for any of the elements beyond prior business activity disclosures. There was no discussion of this recommendation, which would have brought out that mistake and resulted in an altered motion. Had an informed vote been taken, there would have been no majority for the original motion and an amended motion may have been considered. Since there are no subsequent meetings of the Task Force which would offer the opportunity for reconsideration of this action, business members want the report to acknowledge that they do not support the elements of recommendation (b) beyond disclosure of prior business names and bankruptcies.

December 2008

MONITORING REGULATION AND ENFORCEMENT ACTIVITIES ASSOCIATED WITH THE UNDERGROUND CONSTRUCTION ECONOMY: PRELIMINARY REPORT

Introduction

In 2007, the Washington State Legislature enacted Senate Bill 5926 relating to the underground economy in the construction industry. The legislation created a joint legislative task force to “formulate a state policy to establish cohesion and transparency between state agencies so as to increase the oversight and regulation of the underground economy practices in the construction industry.”¹

In addition, the Joint Task Force on the Underground Economy in the Construction Industry (Task Force) was directed to contract with the Washington State Institute for Public Policy (Institute) to assist in determining the extent of and costs associated with the underground construction economy. Subsequent legislation in 2008 instructed the Institute to organize a committee to identify benchmarks to measure the effect of Task Force recommendations and to provide a preliminary report by December 31, 2008.²

The Benchmark Advisory Committee, comprising members of the Task Force and representatives of the Department of Revenue (DOR), Employment Security Department (ESD), and Department of Labor and Industries (L&I), met three times during calendar year 2008. The Committee reviewed enacted legislation that was recommended by the Task Force (2SSB 6732 and ESHB 3122³) and identified new activities and initiatives for which data could be collected to monitor progress and results.

This report describes data (currently available or soon to be collected) that can be used to monitor the implementation of legislatively enacted policies associated with the Task Force’s recommendations. Because many of the activities enacted during the 2008 legislative session were not implemented until late summer or fall of 2008, the data presented here only represent a baseline against which to

measure future outcomes. Data reflecting the first fiscal year of implementation will be available prior to the 2010 legislative session.

Background

State Revenue Losses Associated With Underground Construction Activity. The Task Force was directed to contract with the Institute to provide assistance in estimating the size of and costs associated with the underground construction economy.⁴ The primary focus was to estimate the total state revenue (sales and business and occupation [B&O] taxes and unemployment insurance and workers’ compensation premiums) owed to Washington State by participants in the underground construction industry.⁵

Due to the hidden nature of the underground economy, there is little detailed data available at the state or even the national level. However, based on an extensive review of the research literature and in consultation with staff at DOR, ESD, and L&I, the Institute developed a rough estimate of the size of the underground construction industry.⁶

Based on the estimated size of the underground construction economy and a cumulative tax rate provided by the three revenue-collecting agencies, in fiscal year 2006, the unpaid sales and B&O taxes and premiums associated with underground construction activity were valued at roughly \$109

¹ Chapter 288, Laws of 2007

² 2SSB 6732, Chapter 120, Laws of 2008

³ This legislation consolidated, aligned, and clarified exception tests for determination of independent contractor status under unemployment compensation and workers’ compensation laws.

⁴ Underground construction activity includes any work in the building construction trades that is not reported (yet is required to be reported) to government agencies charged with taxing or regulating the activity.

⁵ SB 5926, Sec. 2(2), Chapter 288, Laws of 2007.

⁶ J. Mayfield. (2007, September). *The underground construction economy in Washington state: A review of the literature and preliminary findings*. PowerPoint presentation to the Joint Task Force on the Underground Construction Economy.

million.⁷ This estimate includes only the sales and B&O taxes that could have been collected by DOR and the premiums collected by ESD and L&I. This estimate does not include the revenue losses experienced by city and county governments.⁸

Underground construction activity also influences workers' wages, worker safety, healthcare costs associated with uninsured workers, and other regulatory activities. These economic and social costs were not evaluated for this study.

Task Force Recommendations and Legislation.

During the 2008 session, the Task Force submitted a report to the Legislature recommending a number of legislative, agency, and budget actions intended to improve regulation and oversight in the construction industry with respect to underground activity.⁹

The Task Force recommended new registration requirements and penalties, increased enforcement activities, increased education and outreach, and continuation of data sharing and detection capabilities. They also recommended consolidating, aligning, and clarifying tests for determination of independent contractor status under unemployment compensation and workers' compensation laws.

Enacted legislation resulting from these recommendations is embodied in two bills: 2SSB 6732 and ESHB 3122. The former addressed penalties, registration, enforcement, and education, the latter the definition of covered employment.¹⁰

⁷ Due to the high premiums paid for workers' compensation and unemployment insurance in the construction industry, the great majority of lost revenue (88 percent) is estimated to be in unpaid premiums to ESD and L&I.

⁸ Local governments lose revenue from a variety of sources, including local sales and B&O taxes, building permit and licensing fees, and property taxes. Data to estimate the size of those revenue losses, however, are not available. And the considerable uncertainty around the statewide estimate is greatly compounded when attempting to estimate revenue losses at the local level.

⁹ http://www.leg.wa.gov/documents/joint/UECI/UE_FINAL_FINDINGS_RECOMMENDATIONS_021508.pdf.

¹⁰ The work of the Task Force was continued to another year and recommendations for the 2009 legislative session were being finalized at the time of this report.

Monitoring the Activities Recommended by the Task Force

The Benchmark Advisory Committee reviewed relevant legislation and identified policy areas where data are or may eventually be available to monitor activities recommended by the Task Force. Data are or will be available in the future to monitor activities associated with the following policy areas:

- Contractor registration and records
- Penalties
- Enforcement
- Education and outreach
- Data sharing and detection

The 2007 recommendations of the Task Force have been implemented. This report describes the activities to be monitored, the data used to monitor those activities, the agency compiling the data, and when those data may be available.¹¹ Where baseline data are available, they are presented in this report.¹²

Contractor Registration and Records.

Contractors must register with the Department of Labor and Industries. The revised statute requires that the registration application include a Department of Revenue Universal Business Identifier (UBI).¹³ The statute also allows for denials and suspensions of applications of contractors who do not have a UBI, are not registered, or submit false information on their registration application.¹⁴ Additionally, employers are now required to keep a record of compensation paid to contractors performing work.¹⁵

- **Contractor registration UBI requirement.** While a requirement for a UBI was not previously in statute, it effectively is a requirement because a UBI is necessary for entry into L&I's Contractor Registration Information System (CRIS). As a result, since third quarter 2004, there are no

¹¹ The "activities to be monitored" are the activities and policies enacted for which agencies can or will be able to provide data for ongoing monitoring. They were identified in consultation with the Benchmark Advisory Committee.

¹² Only 2SSB 6732 included statutory changes for which ongoing data monitoring is applicable. ESHB 3122 simplified the test to determine independent contractor status.

¹³ 2SSB 6732 Sec. 1(1)(b)

¹⁴ 2SSB 6732 Sec. 1(3)(a)(iv-v), 1(3)(b)(iv-v), and 2(7)(c)

¹⁵ 2SSB 6732 Sec. 5(1)(b)

registered contractors without UBI numbers (Exhibit 1).

Exhibit 1
Year-end Contractor Registrations
With and Without UBIs

Fiscal Year ¹⁶	With UBI	Without UBI
2004	65,701	285
2005	67,731	0
2006	70,370	0
2007	74,601	0
2008*	75,210	0

*Second quarter
Source: L&I

- **Application denials and suspensions.** If applications or denials occur, L&I will be able to report the number of application denials and registration suspensions in a given year. As of December 15, 2008, however, there have been none. DOR is also able to report tax recoveries associated with any denials and suspensions reported to them by L&I.

Penalties. Several new penalties targeting contractors in violation of rules were enacted in the 2008 legislation. Contractors are now subject to a fine of up to \$10,000 for falsifying information on an application for registration.¹⁷ Also, contractors who misrepresent payroll or employee hours, operate without a certificate of L&I coverage, or have multiple contractor registration violations may be prohibited from bidding on public works contracts for one year.¹⁸

- **Up to \$10,000 fine.** There are no baseline data regarding this new penalty and no cases have been initiated or resolved as of December 15, 2008. In the future, L&I will be able to provide the number of fines assessed, collection amounts, and accompanying narratives associated with any violations resulting in this penalty.

- **Public works contract prohibition.** There are no baseline data available regarding this new sanction and no cases have been initiated or resolved as of December 15, 2008. In the future, L&I will be able to provide the number of these sanctions resulting from construction audits and provide narrative accounts associated with violations resulting in a sanction.

ESD will also be able to provide the number of referrals (following appeal) to L&I for firms that misrepresent payroll or employee hours.

Enforcement. The Task Force sought to increase resources allocated to enforcement by adding more L&I investigative and auditing staff and dedicating funds for prosecution of compliance cases. The specific details of these recommendations adopted in legislation were vetoed by the Governor;¹⁹ however, funds provided in the 2008 supplemental budget were used by L&I to implement increased enforcement activities. As a result, L&I increased its auditing and investigative staff.

In addition to increased investigative and auditing staff, the Legislature directed L&I to dedicate funds (if available in the 2008 supplemental budget) to the attorney general's office to be used in the enforcement of contractor compliance cases.²⁰ A prosecutor was appointed in the fall of 2008.

- **Additional investigative and auditing staff.** L&I is able to report the number of audits filed and total dollars assessed for all industries and construction. Baseline data for all industry and construction audits are provided in Exhibits 2 through 5. It is important to note, however, that the four additional auditors described above are not dedicated to only auditing the construction industry.

In fiscal year 2008, L&I's auditing staff consisted of 67 FTEs at a total cost of \$4,566,295. L&I currently fields 71 FTE auditors at \$4,926,951 for fiscal year 2009.

¹⁶ The state fiscal year runs from July through June (e.g., FY04 lasts from July 2003 through June 2004).

¹⁷ 2SSB 6732 Sec. 2(8)(a)

¹⁸ 2SSB 6732 Sec. 3

¹⁹ 2SSB 6732 Sec. 11(1)(a) and 11(2), were vetoed.

²⁰ This section was also vetoed, but L&I funded this effort using available resources.

Exhibit 2
Number of Labor and Industries Audits:
All Industries

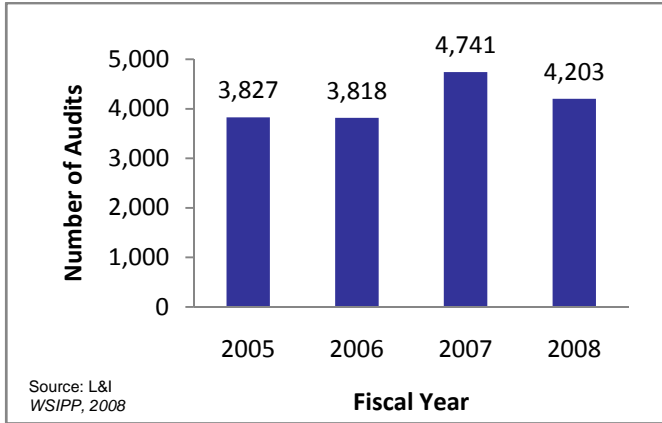


Exhibit 5
Labor and Industries Audits: Construction Only
Total Dollars Assessed (in Thousands)

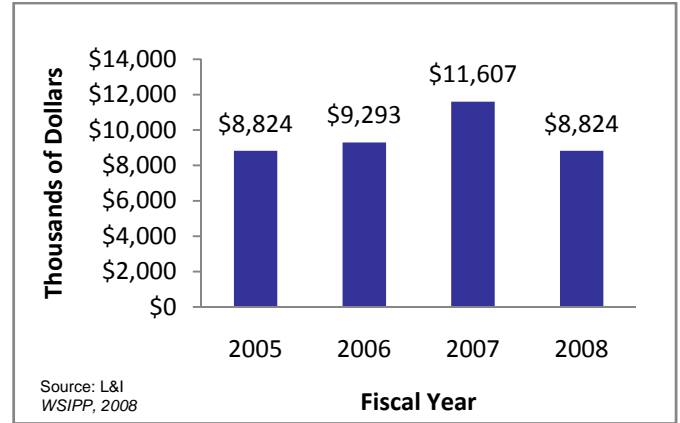
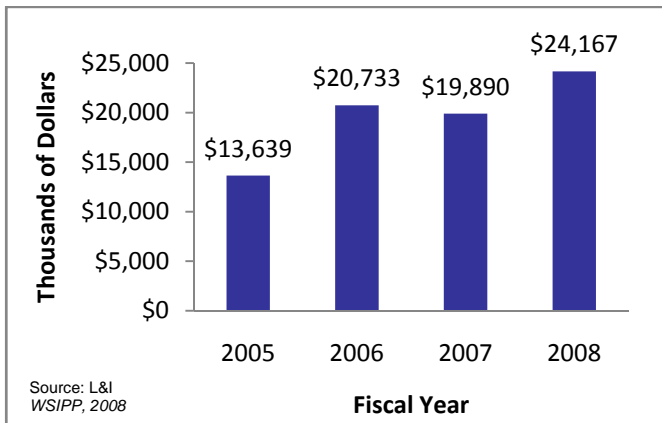


Exhibit 3
Labor and Industries Audits: All Industries
Total Dollars Assessed (in Thousands)



L&I is also able to report on the activities of the FAIR Team.²¹ The FAIR Team began operations in 2006 and focus on unlicensed construction contractors and firms not paying workers' compensation. Baseline audit and collection referrals and the total dollars assessed and collected are provided in Exhibits 6 and 7, respectively.

In fiscal year 2008, the FAIR Team consisted of 3 FTEs at a cost of \$277,404 per year. There are currently six FAIR Team staff at a cost of \$636,829 for fiscal 2009.²²

Exhibit 4
Number of Labor and Industries Audits:
Construction Only

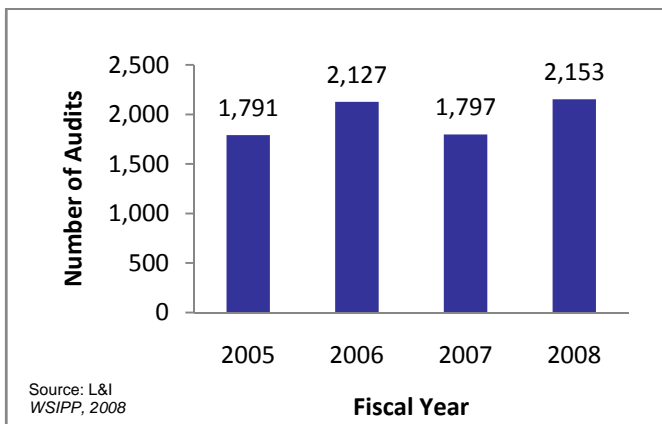
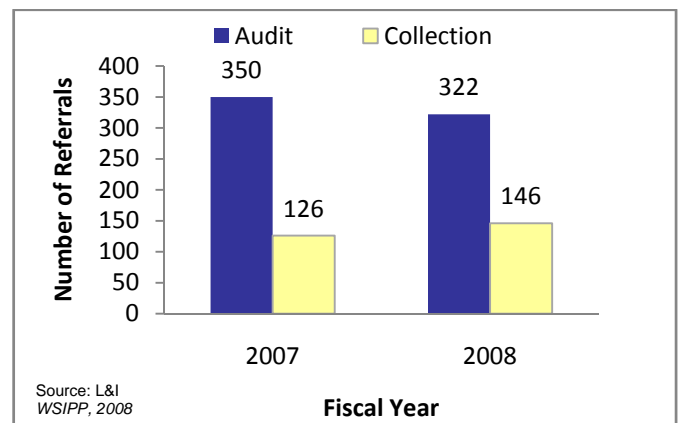


Exhibit 6
Number of Labor and Industries FAIR Team
Audit and Collection Referrals



²¹ Fraud, Audit, Infraction, and Revenue.

²² FY10 funding will be \$595,535, lower than FY09 due to one-time costs associated with new FTEs in FY09.

Exhibit 7
Labor and Industries FAIR Team
Audit Assessments and Collections
(in Thousands)

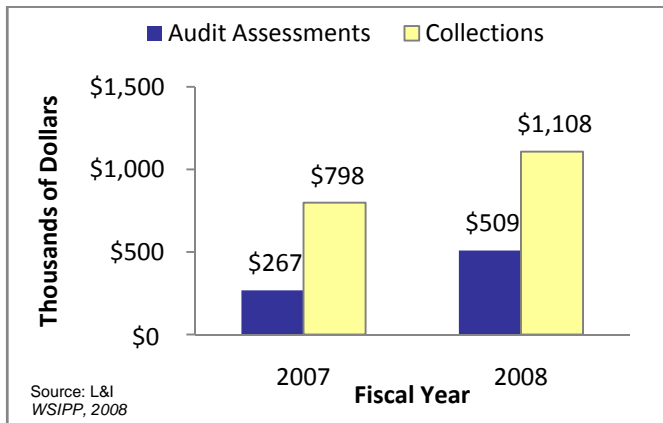
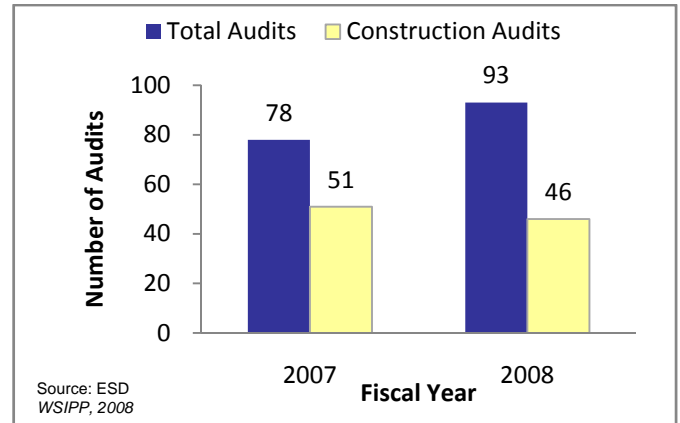


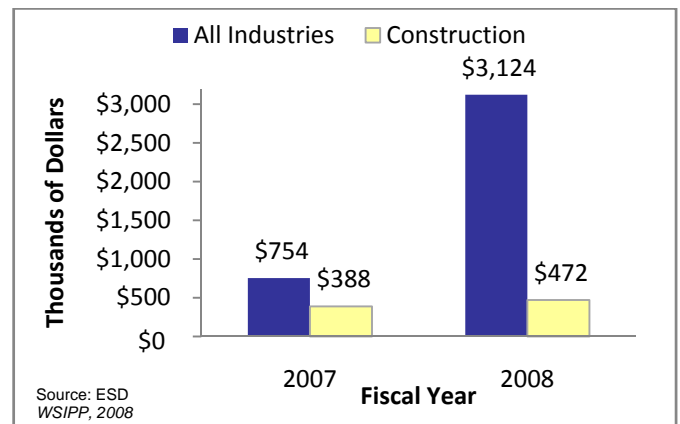
Exhibit 8
Number of Employment Security Department
Underground Economy Unit Audits



- Attorney general enforcement of contractor compliance cases.** A prosecutor was assigned in the fall of 2008. By December 15, 2008, however, no cases had been initiated. In the future, L&I will be able to report the number of cases initiated for prosecution and prosecution outcomes, and provide narrative accounts of cases brought to prosecution.
- Employment Security Department Underground Economy Unit.** The ESD's Underground Economy Unit focuses on locating businesses (not just construction) that are not registered with the Department. While the Task Force recommended no additional auditors for ESD, this activity merits inclusion as a possible benchmark for future monitoring. ESD is able to report tax discoveries, penalties, and interest owed for all industries and construction. The Underground Economy unit began operation in FY07. Baseline data for their first two years of operation are provided in Exhibits 8 and 9.

In fiscal year 2008, the ESD Underground Economy unit was staffed with 4 FTEs at a cost of \$361,384. Their efforts generated \$8.64 in tax discovery, penalties, and interest for every dollar spent that year.

Exhibit 9
Employment Security Department Underground
Economy Unit: Tax Discoveries Plus Penalties and
Interest (in Thousands)



Education and Outreach. 2008 legislation directed L&I to “create an expanded social marketing campaign using currently available materials and newly created materials as needed. This campaign should be aimed at consumers and warn them of the risks and potential consequences of hiring unregistered contractors or otherwise assisting in the furtherance of the underground economy. The campaign may include: providing public service announcements and other similar materials, made available in English as well as other languages, to the media and to community groups; providing information on violations and penalties; and encouraging legitimate contractors and the public to report fraud.”²³

²³ 2SSB 6732 Sec. 12

A comprehensive strategy targeting contractors and consumers is in development; in addition, L&I's media campaign is scheduled to begin in early 2009. The Department has updated educational materials²⁴ and continues to stage contractor classes and other events such as home shows across the state.²⁵ L&I is able to describe the number of classes and events and the total attendance and contacts made at each event. Baseline data are provided in Exhibit 10.

Exhibit 10
Labor and Industries Contractor Classes and Home Shows: Events, Attendance, and Contacts Made

Calendar Year	Classes	Class Attendance	Home Shows	Event Contacts
2005	9	988	46*	18,273
2006	7	1,036	37	18,557
2007	8	1,103	35	20,746
2008**	6	989	30	21,731

*This figure includes special series of fraud events.

**Partial year data.

Source: L&I

Data Sharing and Detection. The task force recommended legislation to ensure that agencies continue to share data for the purpose of investigating unregistered businesses and other compliance issues. The legislation passed ensures that records or information obtained can be used for purposes “(a) directly connected to the official purpose for which the records or information were obtained or (b) to another governmental agency which would be permitted to obtain the records or information under subsection[s]...of this section.”²⁶

Agencies continue to routinely share information and data. Related to these efforts, the Department of Revenue tracks the number of referrals across agencies and dollars assessed and collected from those referrals. During fiscal year 2008 (the first full year these data were

²⁴ Dept. of Labor and Industries. (2008, March). *Recent changes to the Contractor Registration Law*, Olympia: L&I, see: <<http://www.lni.wa.gov/TradesLicensing/Contractors/files/3-27-2008factsheet.pdf>>; and Dept. of Labor and Industries. (2007, May). *A guide to hiring independent contractors in Washington state*, Olympia: L&I see:

<<http://www.lni.wa.gov/IPUB/101-063-000.pdf>>.

²⁵ In 2008, home shows were held in Everett, Skagit County, Lynden, Bellevue, Wenatchee, Spokane, Tri-Cities, Walla Walla, Yakima, Vancouver, Olympia, Tacoma, and Seattle.

²⁶ 2SSB 6732 Sec. 6(9)

compiled), there were 8,805 referrals among DOR, ESD, and L&I (Exhibit 11), \$658,056 assessed, of which \$601,905 had been collected by the end of the fiscal year. DOR continues to compile these data on a quarterly basis.

Exhibit 11
Cross-agency Referrals During Fiscal Year 2008

Referral From...To	Number of Referrals
DOR to L&I	508
DOR to ESD	1,069
L&I to DOR	5,320
L&I to ESD	2,009
ESD to L&I*	49
ESD to DOR*	85
Total	9,040

*These data queries were under development during fiscal year 2008.

Source: DOR

Other Available Monitoring Data. Data described thus far are specific to initiatives recommended by the Task Force. The primary goal of these initiatives is to reduce the amount of underground construction activity. An obvious benchmark to monitor the overall effectiveness of these efforts would be some measure of the amount of underground activity over time.

Unfortunately, because underground activity is hidden, there are no conveniently available means of measurement. All three agencies, however, compile data that may be useful for future monitoring efforts.

- **Bi-annual non-compliance study.** DOR publishes a study every other year in which they describe revenue losses due to non-compliance. While the report does not focus on the construction industry, it provides an on-going record of DOR revenue losses attributable to non-compliance in general. The 2010 report will include data from audits conducted in 2008 and earlier years.

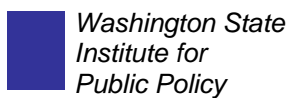
- **Employee misclassification.** One issue related to underground construction activity is the misclassification of employees as independent contractors. Based on targeted and other audits, the ESD is able to report the percentage of audited construction firms misclassifying workers and the number of workers misclassified by these audited firms. Historical data are available, and data reflecting audits conducted in calendar year 2009 could be available in January 2010.
- **Unregistered contractors.** L&I currently compiles data on construction audits, identifying the number of uncovered workers and hours worked, and dollars assessed. They also have the capacity to report the total number of unregistered contractors identified by investigative and audit staff. Data on unregistered contractors were not available for this report, but will be in the future.

Future Updates

The data elements described above are or will be available on a regular basis to monitor activity associated with recommendations of the Task Force and related 2008 legislation. Data reflecting the first fiscal year of implementation will be available for a December 2009 update report and can be used to establish benchmarks for continued monitoring of the impacts of regulatory changes and enforcement activities.

*For further information, contact Jim Mayfield
(360) 586-2783 or Mayfield@wsipp.wa.gov*

Document No. 08-12-4101



The Washington Legislature created the Washington State Institute for Public Policy in 1983. A Board of Directors—representing the legislature, the governor, and public universities—governs the Institute and guides the development of all activities. The Institute's mission is to carry out practical research, at legislative direction, on issues of importance to Washington State.

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE HOUSE BILL 3122

Chapter 102, Laws of 2008

60th Legislature
2008 Regular Session

INDEPENDENT CONTRACTOR STATUS

EFFECTIVE DATE: 06/12/08

Passed by the House February 14, 2008
Yeas 92 Nays 2

FRANK CHOPP

**Speaker of the House of
Representatives**

Passed by the Senate March 6, 2008
Yeas 33 Nays 16

BRAD OWEN

President of the Senate

Approved March 20, 2008, 4:07 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 3122** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 21, 2008

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 3122

Passed Legislature - 2008 Regular Session

State of Washington

60th Legislature

2008 Regular Session

By House Commerce & Labor (originally sponsored by Representatives Conway, Green, Hunt, Kenney, Roberts, Haler, Morrell, Ericks, Hankins, Eddy, Wood, Sells, Chase, Ormsby, Hasegawa, Appleton, Williams, Moeller, Simpson, Sullivan, and McIntire)

READ FIRST TIME 02/05/08.

AN ACT Relating to consolidating, aligning, and clarifying exception tests for determination of independent contractor status under unemployment compensation and workers' compensation laws; amending RCW 50.04.145, 51.08.070, 51.08.180, and 51.08.195; adding a new section to chapter 51.08 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 50.04.145 and 1983 1st ex.s. c 23 s 25 are each amended to read as follows:

The term "employment" shall not include services which require registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW rendered by (~~(any person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW)~~) an individual when:

(1) (~~(Contracting to perform work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW)~~) The individual has been and will continue to be free from control or direction over the

performance of the service, both under the contract of service and in fact;

(2) (~~The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services~~) The service is either outside the usual course of business for which the service is performed, or the service is performed outside of all the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;

(3) (~~The person, firm, or corporation maintains~~) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes, other than that furnished by the employer for which the business has contracted to furnish services;

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified

business identifier number from the state of Washington;

(6) On the effective date of the contract of service, 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; and

~~((4) The work which the person, firm, or corporation has contracted to perform is:~~

~~— (a) The work of a contractor as defined in RCW 18.27.010; or~~

~~— (b) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW; and~~

~~— (5) A contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW does not supervise or control the means by which the result is accomplished or the manner in which the work is performed))~~

(7) On the effective date of the contract of service, the individual has a valid contractor registration pursuant to chapter 18.27 RCW or an electrical contractor license pursuant to chapter 19.28 RCW.

Sec. 2. RCW 51.08.070 and 1991 c 246 s 2 are each amended to read as follows:

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as ~~((a separate alternative,))~~ an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in section 5 of this act for work performed that requires

registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

~~((For the purposes of this title, a contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not an employer when:~~

~~—— (1) Contracting with any other person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;~~

~~—— (2) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;~~

~~—— (3) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and~~

~~—— (4) The work which the person, firm, or corporation has contracted to perform is:~~

~~—— (a) The work of a contractor as defined in RCW 18.27.010; or~~

~~—— (b) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.))~~

Sec. 3. RCW 51.08.180 and 1991 c 246 s 3 are each amended to read as follows:

~~((1)) "Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as ((a separate alternative,)) an exception to the definition of worker, a~~

person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in section 5 of this act for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

~~((2) For the purposes of this title, any person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not a worker when:~~

~~— (a) Contracting to perform work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;~~

~~— (b) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;~~

~~— (c) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and~~

~~— (d) The work which the person, firm, or corporation has contracted to perform is:~~

~~— (i) The work of a contractor as defined in RCW 18.27.010; or~~

~~— (ii) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.~~

~~(3) Any person, firm, or corporation registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW including those performing work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is a worker when the contractor supervises or controls the means by which the result is accomplished or the manner in which the~~

~~work is performed.~~

~~(4) For the purposes of this title, any person participating as a driver or back-up driver in commuter ride sharing, as defined in RCW 46.74.010(1), is not a worker while driving a ride-sharing vehicle on behalf of the owner or lessee of the vehicle.)~~

Sec. 4. RCW 51.08.195 and 1991 c 246 s 1 are each amended to read as follows:

As ~~((a separate alternative))~~ an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

NEW SECTION. **Sec. 5.** A new section is added to chapter 51.08 RCW to read as follows:

For the purposes of this title, any individual performing services that require registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW for remuneration under an independent contract is not a worker when:

(1) The individual has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact;

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income

tax purposes other than that furnished by the employer for which the business has contracted to furnish services;

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington;

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting; and

(7) On the effective date of the contract of service, the individual has a valid contractor registration pursuant to chapter 18.27 RCW or an electrical contractor license pursuant to chapter 19.28 RCW.

NEW SECTION. **Sec. 6.** If any part of this act is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is hereby declared to be inoperative solely to the extent of the conflict, and such finding or determination may not affect the operation of the remainder of this act. The rules under this act shall meet federal requirements which are a necessary condition to

the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state.

NEW SECTION. **Sec. 7.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed by the House February 14, 2008.

Passed by the Senate March 6, 2008.

Approved by the Governor March 20, 2008.

Filed in Office of Secretary of State March 21, 2008.

FINAL BILL REPORT

ESHB 3122

C 102 L 08

Synopsis as Enacted

Brief Description: Consolidating, aligning, and clarifying exception tests for determination of independent contractor status under unemployment compensation and workers' compensation laws.

Sponsors: By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Green, Hunt, Kenney, Roberts, Haler, Morrell, Ericks, Hankins, Eddy, Wood, Sells, Chase, Ormsby, Hasegawa, Appleton, Williams, Moeller, Simpson, Sullivan and McIntire).

House Committee on Commerce & Labor

Senate Committee on Labor, Commerce, Research & Development

Background:

In 2007 the Legislature enacted Senate Bill 5926, which created a Joint Legislative Task Force on the Underground Economy in the Construction Industry (Task Force). The Task Force was directed to formulate a state policy to establish cohesion and transparency between state agencies to increase oversight and regulation of the underground construction economy. Over the 2007 interim, the Task Force met six times and adopted recommendations at its final meeting.

One of the issues the Task Force discussed was the determination of independent contractor status. The term "independent contractor" is not defined in law; rather, this concept is embodied in several exception tests to the definition of "worker" in industrial insurance law and "employment" in unemployment compensation law. If a person fulfills the tests, the person is not covered for purposes of workers' compensation and unemployment insurance, and no industrial insurance premiums or unemployment taxes are due. Otherwise, the person is covered, and premiums and taxes are due.

Industrial insurance and unemployment insurance laws share a four-part exception test that applies only to construction. These laws also share a six-part test that applies to all industries, including construction. Persons working under independent contract, the essence of which is personal labor, are covered under industrial insurance. Both sets of laws also contain exceptions for specific industries, and sole proprietors and other business owners are exempt. The analysis also otherwise differs somewhat for unemployment insurance and industrial insurance.

The Task Force recommended that the different definitions of covered worker and employment exceptions be blended into one consistent definition.

Summary:

A new test is established to determine when work is done by independent contract in the construction industry for purposes of unemployment insurance and industrial insurance. The existing construction-specific tests are eliminated. All parts of the following test must be met:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under contract and in fact.
- (2) The service is either outside the usual course of business for which the service is performed, or outside of all the places of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the place of business.
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature, or the individual has a principal place of business that is eligible for a business deduction for federal income tax purposes, other than that furnished by the employer.
- (4) On the effective date of the contract, the individual is responsible for filing, under the contract and in fact, a schedule of expenses with the Internal Revenue Service.
- (5) On the effective date of the contract or within a reasonable period after the effective date, the individual has an active and valid certificate of registration with the Department of Revenue (DOR) and an active and valid account with any other state agencies, and has a Unified Business Identifier number.
- (6) On the effective date of the contract, the individual is maintaining a separate set of books or records.
- (7) On the effective date of the contract, the individual has a valid contractor registration or electrical contractor license if the work requires the registration or license.

The new test is similar to the six-part test for all industries. The test differs in that the individual must have a valid contractor registration or electrical contractor license on the effective date of the contract and the accounts the individual must have with the DOR and any other state agencies must be active and valid. In addition, the principal place of business that is eligible for a business deduction must be other than that furnished by the employer.

Votes on Final Passage:

House 92 2
Senate 33 16

Effective: June 12, 2008

CERTIFICATION OF ENROLLMENT

SECOND SUBSTITUTE SENATE BILL 6732

Chapter 120, Laws of 2008

(partial veto)

60th Legislature
2008 Regular Session

CONSTRUCTION--UNDERGROUND ECONOMY

EFFECTIVE DATE: 06/12/08

Passed by the Senate March 10, 2008
YEAS 47 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 5, 2008
YEAS 94 NAYS 2

FRANK CHOPP

**Speaker of the House of
Representatives**

Approved March 21, 2008, 2:12 p.m.,
with the exception of sections 11
and 13 which are vetoed.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of
the Senate of the State of
Washington, do hereby certify
that the attached is **SECOND
SUBSTITUTE SENATE BILL 6732**
as passed by the Senate and
the House of Representatives on
the dates hereon set forth.

THOMAS HOEMANN

FILED

March 24, 2008

**Secretary of State
State of Washington**

SECOND SUBSTITUTE SENATE BILL 6732

AS AMENDED BY THE HOUSE
Passed Legislature - 2008 Regular Session

State of Washington 60th Legislature 2008 Regular Session

By Senate Ways & Means (originally sponsored by Senators Kohl-Welles, Kline, Keiser, Marr, Murray, Hobbs, Regala, Tom, Oemig, and Fairley)

READ FIRST TIME 02/12/08.

AN ACT Relating to implementing the recommendations of the joint legislative task force on the underground economy in the construction industry; amending RCW 18.27.030, 18.27.100, 51.16.070, 50.13.060, 50.12.070, 51.48.103, and 51.48.020; amending 2007 c 288 s 2 (uncodified); adding a new section to chapter 39.12 RCW; adding new sections to chapter 18.27 RCW; adding a new section to chapter 43.22 RCW; creating new sections; and providing expiration dates.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 8. RCW 18.27.030 and 2007 c 436 s 3 are each amended to read as follows:

(1) An applicant for registration as a contractor shall submit an application under oath upon a form to be prescribed by the director and which shall include the following information pertaining to the applicant:

(a) Employer social security number.

(b) Unified business identifier number(~~(, if required by the department of revenue)~~).

(c) Evidence of workers' compensation coverage for the applicant's employees working in Washington, as follows:

(i) The applicant's industrial insurance account number issued by the department;

(ii) The applicant's self-insurer number issued by the department;
or

(iii) For applicants domiciled in a state or province of Canada subject to an agreement entered into under RCW 51.12.120(7), as permitted by the agreement, filing a certificate of coverage issued by the agency that administers the workers' compensation law in the applicant's state or province of domicile certifying that the applicant has secured the payment of compensation under the other state's or province's workers' compensation law.

(d) Employment security department number.

~~(e) ((State excise tax registration number.~~

~~——(f))~~ Unified business identifier (UBI) account number may be substituted for the information required by (c) and (d) of this subsection if the applicant will not employ employees in Washington ~~((and by (d) and (e) of this subsection))~~.

~~((g))~~ (f) Type of contracting activity, whether a general or a specialty contractor and if the latter, the type of specialty.

~~((h))~~ (g) The name and address of each partner if the applicant is a firm or partnership, or the name and address of the owner if the applicant is an individual proprietorship, or the name and address of the corporate officers and statutory agent, if any, if the applicant is a corporation or the name and address of all members of other business entities. The information contained in such application is a matter of public record and open to public inspection.

(2) The department may verify the workers' compensation coverage information provided by the applicant under subsection (1)(c) of this section, including but not limited to information regarding the coverage of an individual employee of the applicant. If coverage is provided under the laws of another state, the department may notify

the other state that the applicant is employing employees in Washington.

(3)(a) The department shall deny an application for registration if: (i) The applicant has been previously performing work subject to this chapter as a sole proprietor, partnership, corporation, or other entity and the department has notice that the applicant has an unsatisfied final judgment against him or her in an action based on work performed subject to this chapter or the applicant owes the department money for penalties assessed or fees due under this chapter as a result of a final judgment; (ii) the applicant was an owner, principal, or officer of a partnership, corporation, or other entity that either has an unsatisfied final judgment against it in an action that was incurred for work performed subject to this chapter or owes the department money for penalties assessed or fees due under this chapter as a result of a final judgment; ~~((or))~~ (iii) the applicant does not have a valid unified business identifier number ~~((, if required by the department of revenue))~~; (iv) the department determines that the applicant has falsified information on the application, unless the error was inadvertent; or (v) the applicant does not have an active and valid certificate of registration with the department of revenue.

(b) The department shall suspend an active registration if (i) the department has determined that the registrant has an unsatisfied final judgment against it for work within the scope of this chapter; (ii) the department has determined that the registrant is a sole proprietor or an owner, principal, or officer of a registered contractor that has an unsatisfied final judgment against it for work within the scope of this chapter; ~~((or))~~ (iii) the registrant does not maintain a valid unified business identifier number ~~((, if required by the department of revenue))~~; (iv) the department has determined that the registrant falsified information on the application, unless the error was inadvertent; or (v) the registrant does not have an active and valid certificate of registration with the department of revenue.

(c) The department may suspend an active registration if the department has determined that an owner, principal, partner, or officer of the registrant was an owner, principal, or officer of a previous partnership, corporation, or other entity that has an unsatisfied final judgment against it.

(4) The department shall not deny an application or suspend a registration because of an unsatisfied final judgment if the applicant's or registrant's unsatisfied final judgment was determined by the director to be the result of the fraud or negligence of another party.

Sec. 9. RCW 18.27.100 and 2001 c 159 s 8 are each amended to read as follows:

(1) Except as provided in RCW 18.27.065 for partnerships and joint ventures, no person who has registered under one name as provided in this chapter shall engage in the business, or act in the capacity, of a contractor under any other name unless such name also is registered under this chapter.

(2) All advertising and all contracts, correspondence, cards, signs, posters, papers, and documents which show a contractor's name or address shall show the contractor's name or address as registered under this chapter.

(3) (a) All advertising that shows the contractor's name or address shall show the contractor's current registration number. The registration number may be omitted in an alphabetized listing of registered contractors stating only the name, address, and telephone number: PROVIDED, That signs on motor vehicles subject to RCW 46.16.010 and on-premise signs shall not constitute advertising as provided in this section. All materials used to directly solicit business from retail customers who are not businesses shall show the contractor's current registration number. A contractor shall not use a false or expired registration number in purchasing or offering to purchase an advertisement for which a contractor registration number

is required. Advertising by airwave transmission shall not be subject to this subsection (3)(a).

(b) The director may issue a subpoena to any person or entity selling any advertising subject to this section for the name, address, and telephone number provided to the seller of the advertising by the purchaser of the advertising. The subpoena must have enclosed a stamped, self-addressed envelope and blank form to be filled out by the seller of the advertising. If the seller of the advertising has the information on file, the seller shall, within a reasonable time, return the completed form to the department. The subpoena must be issued no more than two days after the expiration of the issue or publication containing the advertising or after the broadcast of the advertising. The good-faith compliance by a seller of advertising with a written request of the department for information concerning the purchaser of advertising shall constitute a complete defense to any civil or criminal action brought against the seller of advertising arising from such compliance. Advertising by airwave or electronic transmission is subject to this subsection (3)(b).

(4) No contractor shall advertise that he or she is bonded and insured because of the bond required to be filed and sufficiency of insurance as provided in this chapter.

(5) A contractor shall not falsify a registration number and use it, or use an expired registration number, in connection with any solicitation or identification as a contractor. All individual contractors and all partners, associates, agents, salesmen, solicitors, officers, and employees of contractors shall use their true names and addresses at all times while engaged in the business or capacity of a contractor or activities related thereto.

(6) Any advertising by a person, firm, or corporation soliciting work as a contractor when that person, firm, or corporation is not registered pursuant to this chapter is a violation of this chapter.

(7) An applicant or registrant who falsifies information on an application for registration commits a violation under this section.

(8)(a) The finding of a violation of this section by the director

at a hearing held in accordance with the Administrative Procedure Act, chapter 34.05 RCW, shall subject the person committing the violation to a penalty of not more than ten thousand dollars as determined by the director.

(b) Penalties under this section shall not apply to a violation determined to be an inadvertent error.

NEW SECTION. **Sec. 10.** A new section is added to chapter 39.12 RCW to read as follows:

A contractor shall not be allowed to bid on any public works contract for one year from the date of a final determination that the contractor has committed any combination of two of the following violations or infractions within a five-year period:

- (1) Violated RCW 51.48.020(1) or 51.48.103; or
- (2) Committed an infraction or violation under chapter 18.27 RCW for performing work as an unregistered contractor.

NEW SECTION. **Sec. 11.** A new section is added to chapter 18.27 RCW to read as follows:

A contractor found to have committed an infraction or violation under this chapter for performing work as an unregistered contractor shall, in addition to any penalties under this chapter, be subject to the penalties in section 3 of this act.

Sec. 12. RCW 51.16.070 and 1997 c 54 s 3 are each amended to read as follows:

(1) (a) Every employer shall keep at his or her place of business a record of his or her employment from which the information needed by the department may be obtained and such record shall at all times be open to the inspection of the director, supervisor of industrial insurance, or the traveling auditors, agents, or assistants of the department, as provided in RCW 51.48.040.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a

record of the unified business identifier account number for and the compensation paid to the person or entity performing the work. Failure to obtain or maintain the record is subject to RCW 39.06.010 and to a penalty under RCW 51.48.030.

(2) Information obtained from employing unit records under the provisions of this title shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties), but any interested party shall be supplied with information from such records to the extent necessary for the proper presentation of the case in question: PROVIDED, That any employing unit may authorize inspection of its records by written consent.

Sec. 13. RCW 50.13.060 and 2005 c 274 s 322 are each amended to read as follows:

(1) Governmental agencies, including law enforcement agencies, prosecuting agencies, and the executive branch, whether state, local, or federal shall have access to information or records deemed private and confidential under this chapter if the information or records are needed by the agency for official purposes and:

(a) The agency submits an application in writing to the employment security department for the records or information containing a statement of the official purposes for which the information or records are needed and specific identification of the records or information sought from the department; and

(b) The director, commissioner, chief executive, or other official of the agency has verified the need for the specific information in writing either on the application or on a separate document; and

(c) The agency requesting access has served a copy of the application for records or information on the individual or employing unit whose records or information are sought and has provided the department with proof of service. Service shall be made in a manner which conforms to the civil rules for superior court. The requesting agency shall include with the copy of the application a statement to

the effect that the individual or employing unit may contact the public records officer of the employment security department to state any objections to the release of the records or information. The employment security department shall not act upon the application of the requesting agency until at least five days after service on the concerned individual or employing unit. The employment security department shall consider any objections raised by the concerned individual or employing unit in deciding whether the requesting agency needs the information or records for official purposes.

(2) The requirements of subsections (1) and (9) of this section shall not apply to the state legislative branch. The state legislature shall have access to information or records deemed private and confidential under this chapter, if the legislature or a legislative committee finds that the information or records are necessary and for official purposes. If the employment security department does not make information or records available as provided in this subsection, the legislature may exercise its authority granted by chapter 44.16 RCW.

(3) In cases of emergency the governmental agency requesting access shall not be required to formally comply with the provisions of subsection (1) of this section at the time of the request if the procedures required by subsection (1) of this section are complied with by the requesting agency following the receipt of any records or information deemed private and confidential under this chapter. An emergency is defined as a situation in which irreparable harm or damage could occur if records or information are not released immediately.

(4) The requirements of subsection (1)(c) of this section shall not apply to governmental agencies where the procedures would frustrate the investigation of possible violations of criminal laws or to the release of employing unit names, addresses, number of employees, and aggregate employer wage data for the purpose of state governmental agencies preparing small business economic impact statements under chapter 19.85 RCW or preparing cost-benefit analyses

under RCW 34.05.328(1) (c) and (d). Information provided by the department and held to be private and confidential under state or federal laws must not be misused or released to unauthorized parties. A person who misuses such information or releases such information to unauthorized parties is subject to the sanctions in RCW 50.13.080.

(5) Governmental agencies shall have access to certain records or information, limited to such items as names, addresses, social security numbers, and general information about benefit entitlement or employer information possessed by the department, for comparison purposes with records or information possessed by the requesting agency to detect improper or fraudulent claims, or to determine potential tax liability or employer compliance with registration and licensing requirements. In those cases the governmental agency shall not be required to comply with subsection (1)(c) of this section, but the requirements of the remainder of subsection (1) of this section must be satisfied.

(6) Governmental agencies may have access to certain records and information, limited to employer information possessed by the department for purposes authorized in chapter 50.38 RCW. Access to these records and information is limited to only those individuals conducting authorized statistical analysis, research, and evaluation studies. Only in cases consistent with the purposes of chapter 50.38 RCW are government agencies not required to comply with subsection (1)(c) of this section, but the requirements of the remainder of subsection (1) of this section must be satisfied. Information provided by the department and held to be private and confidential under state or federal laws shall not be misused or released to unauthorized parties subject to the sanctions in RCW 50.13.080.

(7) Disclosure to governmental agencies of information or records obtained by the employment security department from the federal government shall be governed by any applicable federal law or any agreement between the federal government and the employment security department where so required by federal law. When federal law does not apply to the records or information state law shall control.

(8) The department may provide information for purposes of statistical analysis and evaluation of the WorkFirst program or any successor state welfare program to the department of social and health services, the office of financial management, and other governmental entities with oversight or evaluation responsibilities for the program in accordance with RCW 43.20A.080. The confidential information provided by the department shall remain the property of the department and may be used by the authorized requesting agencies only for statistical analysis, research, and evaluation purposes as provided in RCW 74.08A.410 and 74.08A.420. The department of social and health services, the office of financial management, or other governmental entities with oversight or evaluation responsibilities for the program are not required to comply with subsection (1)(c) of this section, but the requirements of the remainder of subsection (1) of this section and applicable federal laws and regulations must be satisfied. The confidential information used for evaluation and analysis of welfare reform supplied to the authorized requesting entities with regard to the WorkFirst program or any successor state welfare program are exempt from public inspection and copying under chapter 42.56 RCW.

(9) The disclosure of any records or information by a governmental agency which has obtained the records or information under this section is prohibited unless the disclosure is (a) directly connected to the official purpose for which the records or information were obtained or (b) to another governmental agency which would be permitted to obtain the records or information under subsection (4) or (5) of this section.

(10) In conducting periodic salary or fringe benefit studies pursuant to law, the department of personnel shall have access to records of the employment security department as may be required for such studies. For such purposes, the requirements of subsection (1)(c) of this section need not apply.

(11)(a) To promote the reemployment of job seekers, the commissioner may enter into data-sharing contracts with partners of the one-stop career development system. The contracts shall provide

for the transfer of data only to the extent that the transfer is necessary for the efficient provisions of workforce programs, including but not limited to public labor exchange, unemployment insurance, worker training and retraining, vocational rehabilitation, vocational education, adult education, transition from public assistance, and support services. The transfer of information under contracts with one-stop partners is exempt from subsection (1)(c) of this section.

(b) An individual who applies for services from the department and whose information will be shared under (a) of this subsection (11) must be notified that his or her private and confidential information in the department's records will be shared among the one-stop partners to facilitate the delivery of one-stop services to the individual. The notice must advise the individual that he or she may request that private and confidential information not be shared among the one-stop partners and the department must honor the request. In addition, the notice must:

(i) Advise the individual that if he or she requests that private and confidential information not be shared among one-stop partners, the request will in no way affect eligibility for services;

(ii) Describe the nature of the information to be shared, the general use of the information by one-stop partner representatives, and among whom the information will be shared;

(iii) Inform the individual that shared information will be used only for the purpose of delivering one-stop services and that further disclosure of the information is prohibited under contract and is not subject to disclosure under chapter 42.56 RCW; and

(iv) Be provided in English and an alternative language selected by the one-stop center or job service center as appropriate for the community where the center is located.

If the notice is provided in-person, the individual who does not want private and confidential information shared among the one-stop partners must immediately advise the one-stop partner representative of that decision. The notice must be provided to an individual who

applies for services telephonically, electronically, or by mail, in a suitable format and within a reasonable time after applying for services, which shall be no later than ten working days from the department's receipt of the application for services. A one-stop representative must be available to answer specific questions regarding the nature, extent, and purpose for which the information may be shared.

(12) To facilitate improved operation and evaluation of state programs, the commissioner may enter into data-sharing contracts with other state agencies only to the extent that such transfer is necessary for the efficient operation or evaluation of outcomes for those programs. The transfer of information by contract under this subsection is exempt from subsection (1)(c) of this section.

(13) The misuse or unauthorized release of records or information by any person or organization to which access is permitted by this chapter subjects the person or organization to a civil penalty of five thousand dollars and other applicable sanctions under state and federal law. Suit to enforce this section shall be brought by the attorney general and the amount of any penalties collected shall be paid into the employment security department administrative contingency fund. The attorney general may recover reasonable attorneys' fees for any action brought to enforce this section.

Sec. 14. RCW 50.12.070 and 2007 c 146 s 1 are each amended to read as follows:

(1)(a) Each employing unit shall keep true and accurate work records, containing such information as the commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the commissioner or his or her authorized representatives at any reasonable time and as often as may be necessary. The commissioner may require from any employing unit any sworn or unsworn reports with respect to persons employed by it, which he or she deems necessary for the effective administration of this title.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for and compensation paid to the person or entity performing the work. Failure to obtain or maintain the record is subject to RCW 39.06.010 and to a penalty determined by the commissioner, but not to exceed two hundred fifty dollars, to be collected as provided in RCW 50.24.120.

(2) (a) Each employer shall register with the department and obtain an employment security account number. Registration must include the names and social security numbers of the owners, partners, members, or corporate officers of the business, as well as their mailing addresses and telephone numbers and other information the commissioner may by rule prescribe. Registration of corporations must also include the percentage of stock ownership for each corporate officer, delineated by zero percent, less than ten percent, or ten percent or more. Any changes in the owners, partners, members, or corporate officers of the business, and changes in percentage of ownership of the outstanding shares of stock of the corporation, must be reported to the department at intervals prescribed by the commissioner under (b) of this subsection.

(b) Each employer shall make periodic reports at such intervals as the commissioner may by regulation prescribe, setting forth the remuneration paid for employment to workers in its employ, the full names and social security numbers of all such workers, and the total hours worked by each worker and such other information as the commissioner may by regulation prescribe.

(c) If the employing unit fails or has failed to report the number of hours in a reporting period for which a worker worked, such number will be computed by the commissioner and given the same force and effect as if it had been reported by the employing unit. In computing the number of such hours worked, the total wages for the reporting period, as reported by the employing unit, shall be divided by the dollar amount of the state's minimum wage in effect for such reporting period and the quotient, disregarding any remainder, shall be credited

to the worker: PROVIDED, That although the computation so made will not be subject to appeal by the employing unit, monetary entitlement may be redetermined upon request if the department is provided with credible evidence of the actual hours worked. Benefits paid using computed hours are not considered an overpayment and are not subject to collections when the correction of computed hours results in an invalid or reduced claim; however:

(i) A contribution paying employer who fails to report the number of hours worked will have its experience rating account charged for all benefits paid that are based on hours computed under this subsection; and

(ii) An employer who reimburses the trust fund for benefits paid to workers and fails to report the number of hours worked shall reimburse the trust fund for all benefits paid that are based on hours computed under this subsection.

Sec. 15. RCW 51.48.103 and 2003 c 53 s 283 are each amended to read as follows:

(1) It is a gross misdemeanor:

(a) For any employer to engage in business subject to this title without having obtained a certificate of coverage as provided for in this title;

(b) For the president, vice president, secretary, treasurer, or other officer of any company to cause or permit the company to engage in business subject to this title without having obtained a certificate of coverage as provided for in this title.

(2) It is a class C felony punishable according to chapter 9A.20 RCW:

(a) For any employer to engage in business subject to this title after the employer's certificate of coverage has been revoked by order of the department;

(b) For the president, vice president, secretary, treasurer, or other officer of any company to cause or permit the company to engage

in business subject to this title after revocation of a certificate of coverage.

(3) An employer found to have violated this section shall, in addition to any other penalties, be subject to the penalties in section 3 of this act.

Sec. 16. RCW 51.48.020 and 1997 c 324 s 1 are each amended to read as follows:

(1) (a) Any employer, who knowingly misrepresents to the department the amount of his or her payroll or employee hours upon which the premium under this title is based, shall be liable to the state for up to ten times the amount of the difference in premiums paid and the amount the employer should have paid and for the reasonable expenses of auditing his or her books and collecting such sums. Such liability may be enforced in the name of the department.

(b) An employer is guilty of a class C felony, if:

(i) The employer, with intent to evade determination and payment of the correct amount of the premiums, knowingly makes misrepresentations regarding payroll or employee hours; or

(ii) The employer engages in employment covered under this title and, with intent to evade determination and payment of the correct amount of the premiums, knowingly fails to secure payment of compensation under this title or knowingly fails to report the payroll or employee hours related to that employment.

(c) Upon conviction under (b) of this subsection, the employer shall be ordered by the court to pay the premium due and owing, a penalty in the amount of one hundred percent of the premium due and owing, and interest on the premium and penalty from the time the premium was due until the date of payment. The court shall:

(i) Collect the premium and interest and transmit it to the department of labor and industries; and

(ii) Collect the penalty and disburse it pro rata as follows: One-third to the investigative agencies involved; one-third to the

prosecuting authority; and one-third to the general fund of the county in which the matter was prosecuted.

Payments collected under this subsection must be applied until satisfaction of the obligation in the following order: Premium payments; penalty; and interest.

(d) An employer found to have violated this subsection shall, in addition to any other penalties, be subject to the penalties in section 3 of this act.

(2) Any person claiming benefits under this title, who knowingly gives false information required in any claim or application under this title shall be guilty of a felony, or gross misdemeanor in accordance with the theft and anticipatory provisions of Title 9A RCW.

Sec. 17. 2007 c 288 s 2 (uncodified) is amended to read as follows:

(1) The joint legislative task force on the underground economy in the Washington state construction industry is established. For purposes of this section, "underground economy" means contracting and construction activities in which payroll is unreported or underreported with consequent nonpayment of payroll taxes to federal and state agencies including nonpayment of workers' compensation and unemployment compensation taxes.

(2) The purpose of the task force is to formulate a state policy to establish cohesion and transparency between state agencies so as to increase the oversight and regulation of the underground economy practices in the construction industry in this state. To assist the task force in achieving this goal and to determine the extent of and projected costs to the state and workers of the underground economy in the construction industry, the task force shall contract with the institute for public policy, or, if the institute is unavailable, another entity with expertise capable of providing such assistance.

(3) (a) The task force shall consist of the following members:

(i) The chair and ranking minority member of the senate labor, commerce, research and development committee;

(ii) The chair and ranking minority member of the house of representatives commerce and labor committee;

(iii) Four members representing the construction business, selected from nominations submitted by statewide construction business organizations and appointed jointly by the president of the senate and the speaker of the house of representatives;

(iv) Four members representing construction laborers, selected from nominations submitted by statewide labor organizations and appointed jointly by the president of the senate and the speaker of the house of representatives.

(b) In addition, the employment security department, the department of labor and industries, and the department of revenue shall cooperate with the task force and shall each maintain a liaison representative, who is a nonvoting member of the task force. The departments shall cooperate with the task force and the institute for public policy, or other entity as appropriate, and shall provide information and data as the task force or the institute, or other entity as appropriate, may reasonably request.

(c) The task force shall choose its chair or cochairs from among its legislative membership. The chairs of the senate labor, commerce, research and development committee and the house of representatives commerce and labor committee shall convene the initial meeting of the task force.

(4) (a) The task force shall use legislative facilities and staff support shall be provided by senate committee services and the house of representatives office of program research. Within available funding, the task force may hire additional staff with specific technical expertise if such expertise is necessary to carry out the mandates of this study.

(b) Legislative members of the task force shall be reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members, except those representing an employer or organization, are entitled to be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060.

(c) The expenses of the task force will be paid jointly by the senate and house of representatives. Task force expenditures are subject to approval by the senate facilities and operations committee and the house of representatives executive rules committee, or their successor committees.

(5) The task force shall report its preliminary findings and recommendations to the legislature by January 1, 2008, and submit a final report to the legislature by December 31, 2008.

(6) This section expires July 1, (~~2008~~) 2009.

NEW SECTION. *Sec. 18. (1) (a) Three staff members, one being a working supervisor, must be added to the department of labor and industries' fraud audit infraction and revenue contractor fraud team.

(b) The department of labor and industries and the employment security department shall hire more auditors to assist with their enforcement activities relating to the underground economy in the construction industry. At a minimum, the department of labor and industries shall hire three more auditors.

(2) If funds are made available in the 2008 supplemental budget, money must be dedicated to the attorney general's office to be used in the enforcement of contractor compliance cases.

Sec. 11 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 19. A new section is added to chapter 18.27 RCW to read as follows:

The department shall create an expanded social marketing campaign using currently available materials and newly created materials as needed. This campaign should be aimed at consumers and warn them of the risks and potential consequences of hiring unregistered contractors or otherwise assisting in the furtherance of the underground economy. The campaign may include: Providing public service announcements and other similar materials, made available in English as well as other languages, to the media and to community groups; providing information on violations and penalties; and encouraging legitimate contractors and the public to report fraud.

NEW SECTION. *Sec. 20. A new section is added to chapter 43.22 RCW to read as follows:

(1) A pilot project must be established between the department and certain local jurisdictions to explore ways to improve the collection and sharing of building permit information. Participation must be voluntary for the local jurisdictions who participate, but one large city, some smaller cities, and at least one county are encouraged to participate.

(2) The department must report back to the appropriate committees of the legislature on the progress of the pilot project by November 15, 2013.

(3) The department may adopt rules to undertake the pilot project under this section.

(4) This section expires December 1, 2014.

Sec. 13 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 21. An advisory committee must be organized by the Washington state institute for public policy with the assistance of the department of revenue, the department of labor and industries, and the employment security department, with a goal of establishing benchmarks for future monitoring of activities recommended by the task force on the underground economy in the construction industry. Benchmarks should measure the effect of task force recommendations to determine their efficiency and effectiveness and to determine if additional approaches should be explored. Establishment of these benchmarks along with a more concerted effort to develop data that answer the baseline question of the magnitude of the problem could be discussed in a legislative extension of the task force. The institute must provide a preliminary report to the senate labor, commerce, research and development committee and the house of representatives commerce and labor committee by December 31, 2008.

NEW SECTION. Sec. 22. If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of

this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state.

NEW SECTION. **Sec. 23.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 24.** If specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2008, in the omnibus appropriations act, this act is null and void.

Passed by the Senate March 10, 2008.

Passed by the House March 5, 2008.

Approved by the Governor March 21, 2008, with the
exception of certain items that were vetoed.

Filed in Office of Secretary of State March 24, 2008.

Note: Governor's explanation of partial veto is as follows:

"I am returning, without my approval as to Sections 11 and 13, Second Substitute Senate Bill 6732 entitled:

"AN ACT Relating to implementing the recommendations of the joint legislative task force on the underground economy in the construction industry."

This bill provides precise tools to both the Department of Labor and Industries and the Employment Security Department to crack down on the underground construction economy. This legislation strengthens the ability of the two departments to enforce the statutes most frequently

violated by unregistered contractors. It also provides the enforcement staff and the penalties necessary to make an impact on the underground construction economy.

Section 11 directs the Department of Labor and Industries to hire three staff members, including a working supervisor. While it is understandable that the Legislature wishes to make clear its intent regarding the Department's enforcement staff, specific reporting relationships and staffing levels are decisions best left to the Department and its management. The underlying strategies and tools described in the bill as a whole depend upon increased staffing in the Department's fraud audit infraction and revenue team. Therefore, I am directing the Department of Labor and Industries to hire investigative staff, consistent with the legislative appropriation provided for implementation of this bill, to carry out the activities and functions necessary to curb the activities of the underground construction economy.

Section 13 directs the Department of Labor and Industries to establish a pilot program with local jurisdictions surrounding the collection and sharing of building permit information. The intent and makeup of this study is unclear and the language provides little direction as to the nature of the pilot project. Since the pilot was intended to run until the end of 2014, I believe the legislature can revisit this idea in the next session.

For these reasons, I have vetoed Sections 11 and 13 of Second Substitute Senate Bill 6732.

With the exception of Sections 11 and 13, Second Substitute Senate Bill 6732 is approved."

FINAL BILL REPORT

2SSB 6732

PARTIAL VETO C 120 L 08 Synopsis as Enacted

Brief Description: Implementing the recommendations of the joint legislative task force on the underground economy in the construction industry.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Kohl-Welles, Kline, Keiser, Marr, Murray, Hobbs, Regala, Tom, Oemig and Fairley).

Senate Committee on Labor, Commerce, Research & Development
Senate Committee on Ways & Means
House Committee on Commerce & Labor
House Committee on Appropriations

Background: In 2007 the Legislature enacted SB 5926 (C 288 L 07) relating to the underground economy in the construction industry. The act created the Joint Legislative Task Force on the Underground Economy in the Construction Industry (Task Force) to formulate a state policy to establish cohesion and transparency between state agencies to increase oversight and regulation of the underground economy practices in the construction industry.

At its final meeting in 2007, the Task Force developed a list of recommendations for legislative and budgetary action during the 2008 Legislative Session. The recommendations included items relating to penalties, data-sharing and detection, enforcement, and education and outreach activities. A report listing the Task Force's findings and recommendations will be distributed to the Legislature in January 2008.

Summary: Applicants for registration as a contractor must submit a unified business identifier (UBI) number. The Department of Labor and Industries (L&I) must deny an application for registration as a contractor and suspend an active registration if L&I determines that the applicant has falsified information on the application or the applicant does not have an active and valid certificate of registration with the Department of Revenue (DOR). Additionally, a person who submits false information on an application for registration is subject to a penalty of up to \$10,000.

A contractor is prohibited from bidding on public works projects for one year if, within a five year period, the contractor commits two violations of any of the following: willfully violates contractor registration laws; knowingly misrepresents the amount of his or her payroll or employee hours to L&I; engages in business without a certificate of coverage under the industrial insurance provisions; or commits a second violation of the contractor registration laws.

Employers must keep records of the compensation paid to contractors and electricians with whom they contract. Government agencies may disclose records between themselves if the agencies would be otherwise permitted to obtain that information.

L&I must add staff to the Fraud Audit Infraction and Revenue contractor fraud team and both L&I and the Employment Security Department must hire additional auditors. If funds are available, funding must be dedicated to the Office of the Attorney General for contractor compliance cases.

An expanded social marketing campaign must be created to warn consumers of the risks and potential consequences of hiring unregistered contractors.

A pilot project must be established between L&I and local jurisdictions to explore ways to improve the collection and sharing of building permit information.

The term of the Task Force is extended to December 31, 2008.

Votes on Final Passage:

Senate	48	0	
House	94	2	(House amended)
Senate	47	0	(Senate concurred)

Effective: June 12, 2008

Partial Veto Summary: The provisions requiring L&I and the Employment Security Department to hire additional staff are removed. The requirement that funding be dedicated to the Office of the Attorney General for contractor compliance cases is removed. The requirement that L&I and local jurisdictions establish a pilot project to improve the collection and sharing of building permit information is removed.

Appendix C - List of Materials Available on Website

The following materials are available at <http://www.leg.wa.gov/Joint/Committees/UECI/>

July 10, 2007

- Department of Labor and Industries Fraud Prevention and Compliance presentation
- Employment Security Department Underground Economy Unit handout
- Department of Revenue unregistered business presentation

August 1, 2007

- Joint agency presentation on barriers and impediments
- Joint agency definition sampling handout
- Senate Committee Services and Office of Program Research Report on Other States handout

September 26, 2007

- Washington State Institute for Public Policy "The Underground Economy in Washington State" presentation
- Staff reports on independent contractor laws in Washington:
 - Office of Program Research Summary
 - Office of Program Research Overview: Employee or Independent Contractor?
 - Office of Program Research Selected Laws and Rules
 - Office of Program Research Coverage Under Selected Laws
- Staff reports on independent contractor laws in other states:
 - Office of Program Research Definitions for Selected States Table
 - Senate Committee Services Definitions for Selected Overview
- Senate Committee Services Unemployment Insurance Confidentiality Laws handout

October 31, 2007

- Employment Security Department handouts on enforcement and penalty issues:
 - Summary
 - District Tax Offices
 - Penalty and interest charges on employer accounts
- Department of Revenue handouts on enforcement and penalty issues:
 - FTEs by region, Audit Division
 - FTEs by region, Compliance Division
- Department of Labor and Industries presentation on enforcement and penalty issues
- Department of Labor and Industries handouts on contractor registration:
 - Recent changes to the contractor registration law and FAQs
 - Application for Contractor Registration
 - Contractor Training Days
 - Home Shows 2007
 - Contractor registration example of training
- Staff reports on classification of independent contractors and employees:
 - Office of Program Research Summary
 - Office of Program Research Coverage Under Selected Laws
 - Office of Program Research Overview Diagram – Employee or Independent Contractor?
 - Office of Program Research Selected Laws and Rules
 - Office of Program Research Brief Overview of Independent Contractor Definitions for Selected States
 - Senate Committee Services Definitions for Selected States Table
- Preliminary Labor recommendations for the Underground Economy Taskforce
- The News Tribune article “Unfinished business - Can you trust your contractor?”, October 23, 2007

November 19, 2007

- Washington State Institute for Public Policy "Taxes Owed by the Underground Construction Industry" presentation
- Department of Labor and Industries handout on penalties assessed by auditors
- Employment Security Department questions and answers on penalty and related issues
- Department of Revenue handout on penalty structure
- Governor's GMAP - Economic Vitality Accountability Forum Auditor Recruitment and Retention Assignment handout
- Department of Labor and Industries "Response to Proposals - a Potential Model for 09-11 and 11-13 Biennia" presentation
- Employment Security Department data sharing handout
- Association of Washington Cities Overview of City Building Permit Revenues and Expenses
- Staff Reports:
 - Office of Program Research Brief Overview of Independent Contractor Definitions for Selected States with Exception/Test/Factors other than 6-part Test
 - Senate Committee Services Independent Contractor Definitions for Selected States table
 - Senate Committee Services Brief Overview of the Positive and Negative Aspects of Mandating Worker's Compensation and Unemployment Insurance for Independent Contractors
 - Office of Program Research Montana Independent Contractor Provisions summary
- Office of Program Research Responses to Proposed Recommendations handout

December 13, 2007

- Employment Security Department definitions changes discussion draft Title 50 handout
- Department of Labor and Industries definitions changes discussion draft Title 51 handout
- Staff Reports on proposed recommendations:
 - Office of Program Research Recommendation Matrix - Summary of Responses
 - Office of Program Research Recommendations for Action in 2008
 - Senate Committee Services Research Recommendation Matrix - Timeframe and Type of Action Needed

May 28, 2008

- Department of Labor and Industries L&I Update presentation
- Office of Program Research Possible Items for Study/Recommendation in 2008 presentation

September 10, 2008

- Matt Capece, United Brotherhood of Carpenters and Joiners of America:
 - Federal and State Actions to Counter Misclassification Fraud presentation
 - 2007 and 2008 State Legislation and Executive Orders handout
 - Size and Cost of Misclassification Fraud and Unreported Pay handout
 - Federal and State Actions to Counter Misclassification Fraud handout
- Alex Strong, National Association of Homebuilders:
 - Independent Contractor Legislation handout
 - Statement on Independent Contractor Classification handout
- Washington State Institute for Public Policy " Benchmark Advisory Committee Update" handout
- Employment Security Department independent contractors handout
- Department of Labor and Industries L&I Update presentation
- Department of Labor and Industries handouts:
 - A Guide to Hiring Independent Contractors in Washington State

- Contractor Registration Application Draft
- Worker's Compensation, Unemployment Insurance, and Prevailing Wage for Owners and Corporate Officers
- Office of Program Research reports:
 - Selected Provisions of Construction Contractor Regulation in California, Oregon, and Washington
 - Possible Items for Study/Recommendation in 2008

October 1, 2008

- Department of Licensing Sunrise Review of Residential Contractors handout
- Employment Security Department handouts:
 - Independent Contractors (Electrical & Construction Industries)
 - Independent Contractors (All Industries)
- Washington State Institute for Public Policy "Underground Construction Activity and Local Tax Revenue: An Example Using Thurston County" handout
- Department of Social and Health Services child support registry of new hires presentation
- Senate Committee Services Stop Work Orders in Selected States handout
- Connecticut Law Tribune article "New Law Shuts Down Dozens of Work Sites," by Thomas B. Scheffey (distributed by John Littel, Underground Economy Task Force member)

November 12, 2008

- Department of Social and Health Services new hire registry presentations:
 - New Hire Reporting Follow-up
 - New Hire Letter
- Department of Labor and Industries Florida Stop Work Orders handout
- Washington State Institute for Public Policy lost revenue to local governments handout
- Senate Committee Services handouts:
 - Stop Work Order Bill Draft
 - Priority Items of Labor and Business, Sunrise Review Report Recommendations, and Other Items Remaining from 2007-2008 Discussions

December 4, 2008

- Department of Labor and Industries Stop Work Orders for Workers' Compensation Violations handout
- Department of Labor and Industries Application for Contractor Registration handout
- Senate Committee Services and Office of Program Research handouts:
 - Items Adopted or Deferred for Long-term Consideration at November 12, 2008 Meeting
 - DOL Sunrise Review Recommendations
 - Items for Possible Consideration: Labor and Business Priorities and Other Items Remaining from 2007-2008 Discussions