

2018

Evader, Avoider, or None of the Above? Shedding Light on the Implications of the Illinois Employee Classification Act on Small Construction Contractors, and Considerations for their Exemption, 51 J. Marshall L. Rev. 341 (2018)

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EVADER, AVOIDER, OR NONE OF THE
ABOVE? SHEDDING LIGHT ON THE
IMPLICATIONS OF THE ILLINOIS
EMPLOYEE CLASSIFICATION ACT ON
SMALL CONSTRUCTION CONTRACTORS,
AND CONSIDERATIONS FOR THEIR
EXEMPTION

TASO TSIGANOS

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I. INTRODUCTION

Imagine yourself as a small roofing contractor, and every day, whether in fair weather, burning heat, or blistering cold, you arise from sleep to willfully endure the “joys” of residential roofing. These include, among other things, the joy of carrying heavy tools and materials up a steep ladder; the joy of maneuvering around safety lines and air hoses strung across the roof surface; the joy of extreme burning sensations in your feet from standing all day long on an inclined plane; the joy of an achy back and sore shoulders from the bent-over position required for nailing down shingles; the joy of micro-cuts along your knuckles and palms from the coarse granules covering the shingles’ surface, despite your obsessive use of gloves; and of course, the joy of worrying about whether you got the tarp down in time to beat the freak rainstorm that just appeared out of

nowhere.¹

In addition to these “joys” and despite your most articulate planning, you willfully and simultaneously endure the various headaches associated with overseeing the subcontractors you hire, to install the other products you offer, such as windows, siding, and gutters.² These headaches include, among other things, dealing with unreasonable customers outraged by late-arriving contractors; limitless excuses as to why the job was not finished on time or within budget; and of course, the infamous, “Can you front me some cash so I can pay my guys today? People have been dragging their feet in paying me, sorry to put you on the spot.” Sounds pleasant, doesn’t it?

Having worked in this manner for thirty-five years, you managed to frugally put away \$400,000 for your retirement, which brings you some level of comfort, knowing that this manner of life will not continue indefinitely. Despite your love for what you do, you’re tired of the headaches, and the work has taken its toll on your body.³ You think to yourself, “a few more years of this, and I’ll be able to rest from my labors and enjoy time with my family, maybe do a little contracting on the side for my friends and family if they need the help.” Too bad for you, however, that’s not how things will pan out.

In the blink of an eye your whole world is turned upside down, because you just learned from the Illinois Department of Labor (“IDOL”) that everything you think you own isn’t really yours, and that the people you thought were happily helping you over the years, and vice versa, were not happy with you at all. You learned that at least two and perhaps more of your subcontractors, whom you deeply trusted, have been unhappy with you for some time, particularly with their pay. You learned that your payment method has at some point been deemed “unlawful,” and that, “[I]f you have in fact misclassified the workers as alleged ... you face possible fines and penalties of up to \$1.68M.”⁴ In a panic you realize that your nest-egg may be wiped out, and that you may even have to file for bankruptcy protection. You ask yourself: “How can this be? What are they talking about? We all pay and get paid like this, I didn’t ‘misclassify’ anyone!⁵ Is this a bad dream, a fantastical nightmare?!”

1. See Leah Glodman, *The 10 Worst Jobs in the World*, BUS. INSIDER (Jan. 10, 2011), www.businessinsider.com/10-worst-jobs-in-america-2011-1 (illustrating that roofing and other construction-related jobs are some of the most physically demanding jobs in the world). Also referencing my twenty-plus years of experience in the industry as a sub and general contractor.

2. *Id.*

3. See *Bartlow v. Costigan*, 2014 IL 115152, ¶¶ 1-7; Brief for Appellant at 18, *Bartlow v. Costigan*, 2014 WL 4244271 (2014) (No. 14-230) (providing the basis for this scenario).

4. *Costigan*, 2014 IL 115152 at ¶¶ 1-14.

5. See generally, Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State*

No. It's simply the Illinois Employee Classification Act ("IECA" or "Act") at work.⁶

In the construction industry context, the IECA is intended to "encourage" hiring parties to put their subs on the payroll, rather than issue them 1099s at the end of the year.⁷ The premise for this makes sense. The state loses money when contractors shift tax and benefit obligations to others who may not pay them.⁸ But there is a major flaw in assuming "misclassification" is necessarily the result of one's *unwillingness* to increase operational costs. Issuing 1099s is not de facto illegal, nor do all contractors do it to "cheat the system."⁹ Many do it to survive the absurdly competitive bidding environment within the residential industry – an environment that does not support the financial demands the Act places upon those attempting to work within it.¹⁰

As this Comment will illustrate, the construction industry is complex. Within its multiple sectors exist a myriad of general and sub-contractors, financing mechanisms, and varying degrees of regulation.¹¹ Some sectors are governed by stringent bidding

Treasuries, NATL EMP. LAW PROJECT, 1-4 (2012), available at www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf (affirming that individuals receive 1099s as an alternative to the employer withholding taxes, and that 1099 issuances are disproportionately higher in the construction industry compared to other service industries).

6. 820 ILL. COMP. STAT. § 185/3 (2017) *et seq.*; see also *Costigan*, 2014 IL 115152 at ¶¶ 1-14, 54-56 (providing that the Employee Classification Act [was] upheld as constitutional; possible penalty of \$1,683,000 for allegedly misclassifying ten individuals for between 8 and 160 days); see also *World Painting Co., LLC v. Costigan*, 2012 IL App (4th) 110869, ¶ 5 (holding that painting contractor was not entitled to injunctive relief and that the Department of Labor's investigation [of misclassification] did not violate due process; possible penalty of \$40,500 for allegedly misclassified six workers for twenty-seven days).

7. See *e.g.*, IRS Section on Business and Self-Employed, *Reporting Payments to Independent Contractors*, <https://www.irs.gov/businesses/small-businesses-self-employed/reporting-payments-to-independent-contractors> (last visited Sept. 1, 2018) (explaining the tax treatment of contracts. In the trade/service industry, anyone earning more than \$600 is subject to reporting that income to the IRS on a 1099-MISC form).

8. *Id.*

9. See Illinois Department of Labor, www2.illinois.gov/idol/Employees/Pages/Employer-Misclassification-of-Workers.aspx (last visited Aug. 15, 2016) (guiding principles from the Department of Labor; defending the proposition that a significant amount of money is "lost" from misclassification, but simultaneously acknowledging the reality that most individuals are issued 1099s, a federally acceptable tax practice).

10. See *infra* Section III(C) (explaining that small, residential contractors attempting to price their services sufficiently to comply with the IECA, under certain circumstances, prices them out of work).

11. See Ill. Admin. Code tit. 44, § 650.10-160 (2017) (demonstrating that a contractor wishing to do work for the state, in this example for IDOT, must first prove to the Department that their company has the capacity and means to complete the project. The process is extensive and requires the applicant to provide, inter alia: (1) A Federal Employer's Identification Number; (2)

regulations,¹² while others have none at all.¹³ Contractors in the former sector utilize millions of dollars of equipment and liquid capital via complex financing vehicles, while the latter includes contactors working out of their vans or pickup trucks, their wages paid from home-owner savings scraped together over years of hard work.¹⁴ Despite these critical differences, the IECA places upon each hiring party the same financial demands and penalties for violation.¹⁵ The Act ignores the fact that the industry in which small contractors operate, i.e. residential building and remodeling, makes IECA compliance under certain circumstances not only unreasonable, but nearly impossible.¹⁶

II. BACKGROUND

A. A Real-Life Story

Generally speaking, statutes wielding heavy financial penalties serve a practical purpose in ordering society. After all, absent fear of eternal consequence, the only thing standing between the transgressor and the prohibited act is the deprivation of liberty, assets, or both.¹⁷ However, in the world of business and labor regulation, any misapplication of such power, even if unintentional, can have devastating personal and economic effects.¹⁸ In discussing the Legislature's power, Justice Marshall once said, "[T]he power to

Department of Human Rights Identification Number; (3) detailed financial statements including all related company assets and debts; (4) performance records of work performed the previous year; (5) proof of experience; (6) proof of ownership/access to adequate equipment necessary to complete the job; and (7) proof of capacity to perform, i.e. - adequate operating capital. *Id.* at § 10-270). See *infra* note 13 (illustrating the relative ease of obtaining work in the residential market).

12. *Id.*

13. *Watson Lumber Co. v. Mouser*, 333 N.E.2d 19, 22 (5th Dist. 1975) (illustrating the ease by which a residential contractor can enter into an agreement for work). In this case, the homeowner and contractor entered into an oral agreement to build a house for approximately \$29,000 dollars, with the only written aspect being the blueprints with some additional changes. *Id.* Although many would consider this far from "best practices," this "hand-shake" deal is common in the industry.

14. See *Remodeler's Guide: Financing Your Remodeling Project*, NH BUS. REVIEW, 2007, at 14 (discussing ways individuals finance their remodeling projects. Contrast this with the obvious method of project funding for municipal building projects, i.e. - tax dollars).

15. See 820 ILL. COMP. STAT §185/10 (2017) (illustrating the difficulty by which an individual performing services, outside of existing as a bona fide corporation, may qualify as a legitimate sole proprietor, thereby alleviating the contractor [payor] of liability).

16. *Id.*

17. *Matthew* 25:31-46 (New King James) (referencing the punishment or reward awaiting a man's soul at the final judgment).

18. *Costigan*, 2014 IL 115152 at ¶¶ 1-14, 54-56.

tax is the power to destroy.”¹⁹ In the case at bar, a small-time construction contractor can say the same regarding the power to fine.²⁰

Jack and Rhonda Bartlow operated a small roofing business in Illinois by the name of Jack’s Roofing.²¹ The company marketed, sold, and installed roofing, windows, siding, and other residential products.²² After the company secured a sale with a customer, it would subsequently hire a crew to install the product(s).²³ This process was standard operating procedure for the Bartlows, that is, until an unhappy sub decided to make a phone call.²⁴

In September of 2008, the IDOL contacted the Bartlows and requested an investigation of their business records.²⁵ An individual from a crew the Bartlows hired filed a complaint with the IDOL, alleging that he and others similarly situated were misclassified as independent contractors.²⁶ The IDOL’s “preliminary determination concluded that Jack’s Roofing had misclassified ten workers ... and calculated a potential penalty of \$1.683M.”²⁷

The Bartlows immediately filed suit against the IDOL challenging the constitutionality of the Act and sought injunctive relief.²⁸ Three state court levels upheld the Act, due in part to procedural amendments pushed through while the Bartlows were pushing their case through the courts.²⁹ Facing financial ruin and seeking to prevent their alleged injustice from harming others similarly situated, the Bartlows petitioned the United States Supreme Court for writ of certiorari.³⁰ Prior to the lawsuit, “the

19. *M’Culloch v. State*, 17 U.S. 316, 327 (1819) (Chief Justice John Marshall elucidating why the State of Maryland could not impose a state tax on a federally chartered bank).

20. See IRS SMALL BUSINESS AND SELF-EMPLOYED TAX CENTER, www.irs.gov/businesses/small-businesses-self-employed (last visited on Oct. 6, 2016) (illustrating that a “small” business is any construction-related company with total assets less than \$500K, or whose “usual course of services” require less than four individuals to perform). Cf. William Apgar et al., *Emerging Trends in the Remodeling Market*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., 11-12 (2015), www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_improving_americas_housing_2015.pdf (illustrating the relative ease by which an unsophisticated individual can enter the remodeling industry) (hereafter referred to as *Apgar*).

21. *Bartlow v. Costigan*, 2012 IL App (5th) 110519, ¶¶ 1-6.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Costigan*, 2014 IL 115152 at ¶ 7.

28. *Id.* at ¶¶ 9-11.

29. *Id.* (The *Costigan* Court holding that amendment to the Act rendered petitioner’s due process claim moot and that the Act was not unconstitutionally vague on its face.).

30. Petition for cert. at 18-19, *Bartlow v. Costigan*, 2014 IL 115152 (2014) (No. 14-230), 2014 WL 4244271 at 18-19 (*cert. denied*).

Bartlows had frugally saved \$400,000 during their thirty-five years of doing business as Jack's Roofing - that money has been spent litigating [their] suit."³¹ Their petition to the United States Supreme Court was denied.³²

B. *Questions Moving Forward*

The IECA's central purpose is to generate employment tax and benefit revenues for the State by targeting, defining, and penalizing particular contractor/worker compensation agreements.³³ Undoubtedly, real-life situations exist wherein the IECA and its fines are completely justifiable. However, the question remains: how does rendering a company insolvent assist in fulfilling the Act's purpose? One can only speculate whether the Bartlows have now been coerced into placing everyone on the payroll; if the litigation has quenched their zeal to remain entrepreneurs; or, perhaps an across-the-board price-hike remedied further issues. The latter begs the question as to whether the residential market would even support such a hike.³⁴ If the answer is no, then at least part of the IECA seriously conflicts with the most basic of economic principles. This Comment will analyze this proposition, and in the process, reveal that the Act cannot be applied as a "one-size-fits-all."

The following section provides an overview of the Act's intended purpose, relevant definitions, and practical commentary. Next, it touches on the construction industry sectors, i.e. civil (large), commercial/ light-industrial (medium), and residential, (small). It then illustrates each sector's funding source and bidding requirements. Lastly, it demonstrates the incongruences of the Legislature's reasoning, as applied through the Act, pointing out that the IECA should be inapplicable to small construction contractors under certain but very common circumstances.

C. *Purpose and Function of the IECA*

The IECA's primary purpose is to generate revenue for the State. This revenue is generated by financially penalizing construction contractors³⁵ who structure their service contracts in a

31. *Id.*

32. Rhonda Bartlow, et al. v. Joseph Costigan, 135 U.S. 377 (2014) (No. 14-230) (*cert. denied*).

33. ILL. ADMIN. CODE tit. 56, § 240.100 (2017).

34. *See infra* Section III(C) (explaining that small, residential contractors attempting to price their services sufficiently to comply with the IECA, under certain circumstances, prices them out of work). The state contends that the primary reason construction contractors misclassify workers is to save on labor costs and pocket the savings as additional profit. This Comment seeks to analyze that assumption and provide other, equally valid reasoning for "misclassification."

35. *See* 820 ILL. COMP. STAT. §185/5 (2017) (defining "Construction" as any

way that, at least from the Federal Government's perspective, absolves them of any tax liability as an employer.³⁶ The State's goal is to eliminate this tax-shifting methodology by labeling it "*misclassification*" when any one of several conditions are met within the payor/payee relationship, then fining the violator harshly. The State claims, "[T]he practice of misclassification puts contractors that comply with tax and employment laws at a competitive disadvantage, deprives the misclassified worker of better pay and employment benefits, and deprives the state of hundreds of millions of tax dollars."³⁷

D. *Relevant Law & Commentary*

The crux of the IECA lies within its multi-factor employee-determinative checklists. Anyone who cannot satisfy all three conditions set forth under §10(b) and its applicable subparts; anyone who is not deemed a sole proprietor or partnership under the twelve-part test set out under §10(c);³⁸ or anyone who is not a *bona fide* LLC or corporation as laid out under, Ill. Admin. Code tit. 56, §240.110, is presumed to be an employee.³⁹

Starting from the top, §10(b)(1) through §10(b)(4) presumes the individual is an employee unless

"constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project"). One should note here that the term is meant to encapsulate the entire gamut of the construction industry [i.e., each and every conceivable sector therein]. This becomes problematic in attempting to reconcile the legislatures' intent with the Act realistic effects.

36. *Leberstein, supra* note 5, at 3. *But see e.g.*, ILL. ADMIN. CODE tit. 56, § 240.100 (2017) (defining "Liabilities" as including but not limited to: employee payroll taxes, workers' compensation premiums, overtime wages and unemployment benefits).

37. ILL. ADMIN. CODE tit. 56, § 240.100 (2017). *See also* Michael P. Kelsay et al., *The Economic Costs of Employee Misclassification In the State of Illinois*, DEPT OF ECON. U. OF MO.-KAN. CITY, (December 6, 2006), www.faircontracting.org/PDFs/prevaling_wages/Illinois_Misclassification_Study.pdf. [Hereinafter *Economic Cost Report*], (illustrating the significant impact of misclassification on the state); Ill. Senate Transcript, 2007 Reg. Sess. No. 43 (Senator Halvorson expressing his concern that "Illinois is losing tax revenue because of the misclassification of workers.").

38. 820 ILL. COMP. STAT. §185/10 (2017).

39. 56 ILL. ADMIN. CODE 240.110 (2017) (illustrating that an LLC or corporation is *bona fide*, for the purposes of the Act, by qualifying via an extensive check list found under "Definitions"); *see also* Michael v. Pella Prod., Inc., 2014 IL App (1st) 132695, ¶ 27-32 (holding a *bona fide* corporation existed where incorporated company managed, hired, and payed its own employees while performing services for another incorporated business).

- (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;
- (2) the service performed by the individual is outside the usual course of services performed by the contractor; *and*
- (3) the individual is engaged in an independently established trade, occupation, profession or business; *or*
- (4) the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this Section.⁴⁰

Section 10(b)(1) focuses on the level of control the hiring party exerts over the individual in executing the service; the more control, the more likely a finding of employee status. To determine the requisite level of control, the IDOL considers (1) whether under the contract the individual would “be eligible for a pension, health insurance, bonuses,” or other employee benefits;⁴¹ (2) whether the hiring party carries unemployment or workers’ compensation insurance on the individual; (3) whether the hiring party withholds taxes from the individual’s pay; (4) whether the hiring party controls the individual’s work-hours; (5) whether the hiring party provides the individual with tools and/or equipment necessary to complete the work; (6) whether the individual is free to leave at any time in order to attend other jobs not controlled by the hiring party; (7) whether the individual and not the hiring party purchases the materials to be installed; and (8) whether the hiring party determines the means and manner by which the work is to be performed.⁴² Considerations (4) through (6) provide solid counter-arguments to employee status, as these outline a few of the most basic benefits a sole proprietor in the construction industry enjoys; however, §10(c)(3) and §10(c)(4) discussed *infra* render them moot. Moving along to §10(b)(2).

Section 10(b)(2), also known as the “usual course of services test,” focuses on the *scope* or *type* of work being performed.⁴³ It

40. 820 ILL. COMP. STAT §185/10 (2017).

41. Andrew J. Martone & Mindy K. Mahn, A Plain-English Guide to the Illinois Employee Classification Act, BOBROFF, HESSE, LINDMARK & MARTONE, P.C. ATT’Y COUNS., 2-3 (n.d.) www.hessemartone.com/library/pdfs/Guide_Illinois_ECA_120709.pdf.

42. *Id.* See also Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLANMATICS REP., 7-9 (February, 2000), www.wdr.doleta.gov/owsdrr/00-5/00-5.pdf [hereinafter *Planmatics*] (discussing variables of consideration in classifying independent contractors); *Surdacki v. Alliance Express Services, Inc.*, 05 I.L.W.C. 46794 (Ill.Indus.Com’n Apr. 4, 2008) (finding that requiring a truck driver to move and count boxes prior to leaving them, placing him outside of the vehicle where he sustained injuries, was enough control over the payee to be deemed an employee under the Act.)

43. See *Plain-English Guide* at 3 (indicating that “usual course of services” refers to tasks not incidental to the type of work being performed).

specifically focuses on whether the hired party's performance is substantially similar to, or within the scope of, the work the hiring party holds itself out as performing on a regular basis.⁴⁴ Take for example a cement installer, hired to place fresh cement for a new patio. The owner requests a patio with a smooth finish, requiring a technique the installer feels comfortable performing. In the middle of the preparation stage, however, the homeowner changes his mind and asks for a different finish, much more difficult to achieve: 6' x 6' diagonal squares, broom-finished with smooth picture-framed edging.⁴⁵ The installer is uncomfortable with the techniques required for this type of finishing, and hires a cement finisher to comply with the owner's request. Because the type of services performed by both installer and finisher are "*common in nature*," the work performed by the finisher is within the usual course of services performed by the installer, and the finisher would be deemed an employee of the installer.⁴⁶ Put differently, because cement finishing is cement-related work, it is arguably a task a cement installer would be required to perform on a regular basis, despite the noted distinction.⁴⁷

This is problematic for a few reasons. Many cement *installers* (generically referred to as cement contractors), specialize in only pouring vertical cement structures like foundation walls and slabs, where little to no finishing is required, while cement *finishers* (also generically referred to as cement contractors), focus exclusively on horizontal or flatwork, utilizing several techniques for the various desired finishes.⁴⁸ In other words, not all cement contractors' work scope is cookie-cutter. Different cement contractors specialize in different areas of the trade creating hundreds of distinctions, making work scope difficult to identify. §10(b)(2) makes payments and subsequent 1099 issuances resulting from these distinctions subject to fines and penalties.

Consider another example. A contractor in the hauling business uses his dump truck to remove debris from a work site over the course of several weeks. Because of overflow work and pressing deadlines, he is forced to "hire another contractor with a dump truck to help him catch up. The hired contractor would be considered an employee of the hiring contractor because of the same *type* and *scope*

44. *Id.*

45. See *Broom Finish Concrete Patio*, PINTEREST, www.pinterest.com/pin/531002612296044302/?lp=true (last visited Apr. 13, 2018) (illustrating the above-referenced finish).

46. *Plain-English Guide* at 3. See also PCS, www.cement.org/cement-concrete-applications/working-with-concrete/placing-and-finishing-concrete (last visited Apr. 2, 2018) (illustrating the distinction between concrete placement and concrete finishing).

47. PCS, www.cement.org/cement-concrete-applications/working-with-concrete/placing-and-finishing-concrete (last visited Apr. 2, 2018).

48. *Id.*

of work,”⁴⁹ despite owning his or her own truck.⁵⁰ This, too, is problematic for obvious reasons. How is the individual compensated for the expenses associated with *his* truck, a benefits package? How are depreciation and deductible expenses handled as to the hired driver? Only the written agreement between the parties would be able to tell us, assuming one existed.

Now consider a different but very common situation leading to an opposite outcome. A plumbing contractor is hired to cut and remove a section of cement floor and to repair and/or replace some underground plumbing. Because the plumber has the requisite concrete saw, he feels comfortable cutting the floor, but does not feel comfortable placing or finishing the new cement. The plumber completes the plumbing repair and hires a cement contractor to place and finish the cement. Because the two trades involved are clearly distinct, the work performed by the finisher would not be within the “usual course of services performed” by the plumber, despite the questionable overlap in work scope.⁵¹

Now assume a few additional, but commonly encountered facts. After removing the section of floor, the plumber discovers a much larger plumbing issue, requiring more floor removal and plumbing work. The plumber must hire an additional plumber to accelerate⁵² the project, but the cement contract says that he can

49. *Plain-English Guide* at 3.

50. *Id.* This begs the question as to how the owner of the truck is compensated for the expenses incurred by using his own equipment. Fuel, insurances, and wear and tear values are difficult to ascertain, especially when calculated over a short period of time. A more reasonable approach would take into consideration the nature of the equipment being used. Heavy equipment operation, such as for dump trucks or semi-tractor trailers, requires a special CDL license to operate, expensive registration, and the like. These issues should trigger special consideration under the rule.

51. See IBISWORLD CONCRETE CONTRACTORS IN THE US: MARKET RESEARCH REPORT (2016), www.ibisworld.com/industry/default.aspx?indid=200 (illustrating that “usual course of services performed” can be tricky to define because of the complexities within the building trades themselves). For example, many cement contractors specialize in pouring foundations, which require special forms and equipment. It would be plausible for this type of contractor to hire a cement finishing contractor, who specializes in flatwork, to pour and finish the floor within the foundation, or sidewalks, or any other type of flatwork. The same can be said regarding carpentry; there are rough carpenters who specialize in framing (physical structure of the building) and carpenters who specialize in interior finishing (cabinetry, trim and the like). These distinctions should not be overlooked in identifying work scope. See also IBISWORLD CARPENTERS IN THE US: MARKET RESEARCH REPORT (2016), www.ibisworld.com/industry/default.aspx?indid=195 [hereinafter IBISWORLD CARPENTERS] (illustrating that within both industries (as well as others) there exist several sub-industry activities).

52. LYNN R. AXELROTH ET AL., *FUND. OF CONSTR. LAW* 231 (L. Franklin Elmore et al. eds., 2nd ed. 2013) (defining acceleration). Acceleration refers to the “[p]erformance of the work in a time period that is shorter than originally scheduled.” *Id.* Consider, for example, the construction of a 100-unit apartment building. Things are moving along, but the plumbing contractor, who promised

handle the additional cutting, placing, and finishing work. At the end of the project the hiring plumber pays the additional plumber and cement contractor, both non-incorporated “sole proprietors,” and issues them 1099s. Under §10(b)(2), the hiring plumber gets fined for the additional plumber but not the finisher. This result seems not only unjust but rather arbitrary, given the complex work-scope issues prominent in the construction industry.⁵³ It also makes §10(b)(3) *infra*, nearly unworkable.

Section 10(b)(3) requires “the individual [be] engaged in an independently established trade, occupation, profession or business.”⁵⁴ What qualifies as being “independently established in a trade, occupation, or business?” Your guess is as good as mine. Assume the additional plumber hired in the above scenario owns his own van and tools, which he uses for work, and holds himself out as a plumbing contractor. Is he independently established? According to §10(b)(2), only if he gets hired by someone other than a plumber. Others have suggested that, “[I]f an individual performing a service has a proprietary interest in such business, to the extent that the individual is free to operate without hindrance from another individual, and can sell or transfer relevant assets, then the individual is independently established.”⁵⁵ Does this mean that if our above hypothetical plumber, hired to accelerate the project, can sell his own van and tools, then he is independently established? Frustratingly and according to §10(b)(4), the answer is, not if he is a contractor operating with few assets.

Section 10(b)(4) exempts legitimate sole proprietorships and partnerships if they are able to meet the criteria set forth in each of §10(c)’s twelve-factor test. Note that only the most problematic factors, as they relate to small construction contractors, are listed below. The omitted can be found in the endnotes.⁵⁶ The factors are

contractually to “man the project appropriately” begins to fall behind schedule due to insufficiently manning the project, effecting the overall finish date of the project. The general contractor can then demand that the plumber “accelerate” the project by adding more manpower and/or resources to catch up and finish on time.

53. *Id.*

54. 820 ILL. COMP. STAT §185/10(b)(3) (2017).

55. *Plain English Guide* at 3 and *supra* note 50. The argument raised in note 50 creates a scenario in which this conclusion is untenable. Notwithstanding the owner/operator’s right to transfer title of his or her own equipment necessary to carry out the hired task, employee status could still be found just based on the payor’s control.

56. (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;

(6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

- (1) the sole proprietor or partnership is performing the service *free from the direction or control* over the *means and manner* of providing the *service*, subject only to the right of the contractor for whom the service is provided to specify the *desired result*;
- (3) the sole proprietor or partnership has a *substantial investment of capital* in the sole proprietorship or partnership *beyond ordinary tools and equipment and a personal vehicle*; [and]
- (4) the sole proprietor or partnership *owns the capital goods* and gains the profits and bears the losses of the sole proprietorship or partnership;⁵⁷

Section 10(c)(1) and §10(b)(1) noted *supra* are largely redundant in that the major focus is on how the task is executed, in what manner, and under whose authority.⁵⁸ The language of these factors collectively supports the idea that in order to classify as a legitimate independent contractor, thereby exempting the hiring party from liability under the IECA, the hiring party may only dictate to the individual the end result or product, not the means and manner by which the hired party arrives at that end.⁵⁹ These requirements in and of themselves make sense. The problem arises, however, when they are taken in conjunction with §10(c)(3) and (4), which make qualifying as a sole proprietor virtually impossible for any small contractor operating with few assets.

Section 10(c)(3) requires the sole proprietor to “own a substantial investment of capital in the sole proprietorship or partnership *beyond* the normal tools, equipment, and personal

(7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship’s or partnership’s name;

(8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship’s or partnership’s name;

(9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees’ income to the Internal Revenue Service;

(11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; *and*

(12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses (emphasis added).

57. 820 ILL. COMP. STAT § 185/10(c)(1)-(12) (2017).

58. *Id.*

59. *See* 820 ILL. COMP. STAT § 185/10 §§(b)(1) and (c)(1) (2017) (referencing the language “free from control or direction,” which refers to the manner by which an end, i.e. - finished product or service - is achieved).

vehicle necessary to perform the service.”⁶⁰ This raises a particular issue with small construction contractors, the majority of which lack “a substantial investment of capital” and whose only assets include “tools, equipment, and personal vehicle” necessary to carry out the service.⁶¹ The language of this section makes it nearly impossible for an individual not owning real property or “substantial investment” related to the business, to qualify as a sole proprietor or partner.⁶² Remember our hypothetical plumber hired to accelerate? How would he fair under this rule? It would all depend on what assets he owned, whether these assets would qualify as substantial, and whether these assets are in fact related to his business.

Section 10(c)(4) requires that the sole proprietor or partner own the capital goods/materials, gain the profits, and bear the loss, presumably from the installation of said goods.⁶³ Gaining profit and bearing loss is axiomatic, but rare is the situation in which a small contractor, building a house, or remodeling a bath or kitchen, owns the materials he is installing.⁶⁴ Normally, to secure materials for a small residential project, the customer pays a deposit to the contractor who subsequently uses the deposit to purchase the requisite materials from box stores or specialty suppliers.⁶⁵ Another common product-procurement method is one in which the customer selects, purchases, and makes available for pickup, the products for

60. 820 ILL. COMP. STAT. § 185/10(c)(3) (2017) (emphasis added).

61. *Id.* See *Planmatics* at 28-31 (presenting common factors interviewees stated were motivating factors in becoming independent contractors as opposed to employees, low cost of start-up being one of them). Take for example an individual who wishes to start a tile installation business. The only necessary tools could be purchased for less than a thousand dollars, tile saw included, and could be transported in the individual’s car; this person would be considered an employee to any contractor who hired him for work, to the extent that the “scope and control” elements are satisfied. *Id.* This in no way promotes entrepreneurship, but rather creates a fearful environment for small contractors to work.

62. *Id.*

63. 820 ILL. COMP. STAT. §185/10(c)(4) (2017).

64. Angie Hicks, *What Is a Reasonable Down Payment for a Contractor?*, ANGIE’S LIST (June 25, 2012) www.angieslist.com/articles/what-reasonable-down-payment-contractor.htm (stating that more than half of contractors require a down payment; response to client indicating that down payments for materials are common [because the contractor does not own the materials to be installed]). Cf. Mark Griffith, *Construction Loans - A review of Problem Areas*, CHICAGO TITLE INS. CO., 1-12 (2006) www.northcarolina.ett.com/docs/CONSTRUCTION%20LOANS-REVIEW%20OF%20PROBLEM%20AREAS.pdf (indicating that when a payor/prospective owner of real property contracts directly with the sub-contractor, and materials used on said property are released on credit from a third party but ordered by the sub-contractor, the third party providing the materials may exact a mechanics lien on the property. This indicates that the contractor does not come to “own the capital goods,” but merely acts as a liaison).

65. *Id.*

installation.⁶⁶ This latter method is typical in applications where the homeowner wishes to control the cosmetics of the project. Conversely, many of the large civic contractors do in fact own and supply the products they use, such as gravel and asphalt.⁶⁷ Therefore, the language in §10(c)(4) seems to favor these larger construction companies, such as those discussed in section III(A) *infra*, not the typical “sole proprietor.”

Lastly, *bona fide* corporations and LLCs are exempt from the Act’s “protections.”⁶⁸ Under 56 Ill. Adm. Code 240.110, which defines a bona fide LLC and corporation, a hiring party/contractor *doing business with one or the other* must verify a nine and ten-point checklist respectively.⁶⁹ For purposes of this Comment, it is sufficient to note that a *bona fide* corporation or LLC must be sufficiently capitalized, carry the appropriate workers’ compensation and unemployment insurances on its employees, and maintain all other recording and filing requirements under state and federal corporate law.⁷⁰ Meeting these requirements deems the entity IECA compliant to the extent that it will not be classified as an employee when hired.⁷¹ Put differently, the mere act of filing articles of incorporation or organization is inadequate to be IECA compliant.

E. What’s The Bottom Line?

The Act dishes out a hefty \$1,000 fine per person per diem for first-time offenders, and doubles that fine for repeat offenders, making it one of the strictest employment laws in the nation.⁷² And triggering an IDOL audit under the Act is quite simple. “The IDOL, the Department of Employment Securities (IDES), The Illinois Department of Revenue (IDOR), and the Illinois Workers’ Compensation Commission (IWCC) all share information concerning suspected misclassification,” increasing the potential fines significantly.⁷³ What this means for the small construction contractor is that when an individual, for whatever reason, initiates

66. *Id.*

67. PLOTE CONSTRUCTION INC., www.plote.com/company-history/ (last visited Oct. 30, 2016).

68. 56 Ill. Adm. Code 240.110 (2017).

69. *Id.*

70. *Id.*

71. *Id.* This point is critical to keep in mind throughout this Comment.

72. 820 ILL. COMP. STAT. § 185/40 (2017), *see also* Todd Lebowitz, *Ill. S. Ct. Upholds One of the Nation’s Strictest Worker Misclassification Laws; Employers May Face Millions of Dollars in Penalties*, EMPLOYMENT LAW SPOTLIGHT (Mar. 2 2014), www.employmentlawspotlight.com/2014/03/illinois-supreme-court-upholds-one-of-the-nations-strictest-worker-misclassification-laws-employers-may-face-millions-of-dollars-in-penalties/ (discussing the exorbitant fine administered in the Bartlow case discussed *supra*).

73. 820 ILL. COMP. STAT. §185/75 (2017).

a claim against him with one of the aforementioned agencies, he can safely bet that (1) the Act will come into play at some point in determining the individual's status as an employee; and (2) if the complainant is deemed an employee, liability may result across the board, creating a hostile business environment for anyone hiring help – as §10(c)(3) points out – with only his truck and his tools.⁷⁴

F. *Construction Industry Sectors, Project Financing, and the Bidding Process - A 40,000 Foot Overview*

The construction industry consists of several sectors,⁷⁵ and funding for projects within these sectors, as well as the means by which contractors are awarded the opportunity to bid them, are relevant factors to be considered in the application of the IECA.⁷⁶ First, large civil contractors who build highways, bridges, and other infrastructures are compensated with tax revenues and other financing vehicles.⁷⁷ Second, given the level of public exposure and high stakes arising from potential failures to perform, the State goes to great lengths to insure that these projects are awarded to companies with the capacity and resources not only to start them, but to finish them.⁷⁸ Third, interwoven into this bid-requirement

74. 820 ILL. COMP. STAT. §185/10(c)(1) (2017); cf. *Bartlow* 2014 WL 4244271 at 1219 (illustrating that small contractors in the building and remodeling industry, for example roofers or carpenters, who have relatively few assets, from time to time hire additional contractors to complete a job too big to complete themselves. The hiring contractors are now subject to the IECA, and the same is true for the rest of the trades. My point is that these individuals who then hire other individuals receive the same financial penalty as a large corporate contractor who may be able to survive the types of penalties the IECA can dish out).

75. A. Alsalman & D. Sillars, *Modeling the Effects of Sub-Optimal Risk Allocation in the Construction Industry*, OR. ST. U. PRESS, 21 (2013) [Section: *Limitations of the Study*] www.epossociety.org/epoc2013/Papers/Alsalman_Sillars.pdf [Hereinafter *Modeling the Effects*] (recognizing that the construction industry includes but is not limited to: “large civil (roads/bridges), institutional, industrial, commercial and residential projects.”).

76. See Maurice Baskin, *The Case Against Union-Only Project Labor Agreements on Government Construction Projects*, 19 J. OF LAB. RES. 115, 115-24 (1998) (discussing the discrimination against non-union contractors and employees arising from the bidding requirements set forth by the government for civil projects).

77. *Id.* See also PLOTE CONSTRUCTION INC., PUBLIC PROJECTS, www.plote.com/public-projects.com (last visited Sept. 29, 2016) (referencing I-55 resurfacing project. Client was the Illinois Department of Transportation (IDOT); contract amount: \$35M, noting that the company covers privately owned projects also).

78. ILL. ADMIN. CODE tit. 44, § 650.10,160 (2017). A contractor wishing to do work for the state, in this example for IDOT, must first prove to the Department that his/its company has the capacity and means to complete the project. The process is extensive and requires the applicant to provide, inter alia, the following: (1) A Federal Employer's Identification Number; (2) Department of Human Rights Identification Number; (3) detailed financial statements

framework are the local unions' constitutions and bylaws, which inevitably lead to a unionized recipient of the awarded contract.⁷⁹ Translated into English, these contractors are already paying everything the IECA requires, constructively and statutorily exempting them from the IECA's net as bona fides.

However, referencing the point made earlier, this only means that the contractor is exempt as to its relationship with the State; it is *not* exempt as to its relationship with the people or entities it subsequently hires. For every payor/payee relationship, unless there is union – that is collective bargaining – intervention, another IECA analysis is likely required, affording the opportunity for potential IECA recourse. It is entirely possible for a large civic contractor to violate the IECA when it hires a person or entity to carry out designated work, the point is that union scrutiny and statutory procurement rules make it much harder. Put another way, state-compliant contractors are bidding against other state-compliant contractors.⁸⁰

Small contractors, however, targeting the residential sector with a particular emphasis towards remodeling and refinishing services, operate in a completely different market environment.⁸¹

including all related company assets and debts; (4) performance records of work performed the previous year; (5) proof of experience; (6) proof of ownership/access to adequate equipment necessary to complete the job; and (7) proof of capacity to perform, i.e. - adequate operating capital. *Id.* at § 650.10-270.

79. *See id.* (Indicating that large projects, whether state or private, require large quantities and types of heavy equipment). In Illinois, Local 150, which is the International Union of Operating Engineers, represents roughly twenty-three thousand operators working in Northern Illinois and surrounding areas. *See Id.* and INTERNATIONAL UNION OF OPERATING ENGINEERS, ABOUT LOCAL 150, www.local150.org/about-us/ (last visited on October 7, 2016) (suggesting that most equipment operators, whether individual owner/operator or employee of a heavy equipment company, are members of the union. Given the steep and enforceable penalties imposed on union members who cross picket lines or do work for non-union outfits, the inference becomes clear; in order for the project to operate smoothly, it must be unionized). Local 165, Int'l Bhd. of Elec. Workers, AFL-CIO v. Bradley, 149 Ill. App. 3d 193, 197 (1986); WorkplaceReport, *Ex-Union Member Fights \$200,000 Union Fine For Working Non-Union*, REDSTATE (July 31, 2011, 9:00 AM), www.redstate.com/diary/laborunionreport/2011/07/31/ex-union-member-fights-200000-union-fine-for-working-non-union/.

80. *See supra* notes 76, 77 & 78 (illustrating that union involvement at the civic level renders the IECA a moot point because of labor agreements and requirements). Non-union companies in smaller commercial projects do not have this hurdle to deal with.

81. *Apgar* at 1-2, 28-29 (illustrating that the home improvement/remodeling industry is large; nationally, approximately \$300B a year or 1.8% of U.S. economic activity, over 30% of which arises out of discretionary projects such as kitchen and bath remodels, room additions/alterations, and outside attachments such as porches, decks, garages or carports. The report also illustrates the volume of professionally hired out transactions). Keep in mind that these are national figures, and that unreported projects are not

These jobs, which may include but are not limited to, kitchen and bath remodels, additions, roofing, siding, landscaping, painting and finish carpentry, are awarded by homeowners whose decisions are based largely, if not exclusively, on price and word-of-mouth credibility.⁸² Moreover, an average complete bathroom remodel costs approximately \$7,000 for labor *and* material; kitchens average around \$14,200.⁸³ Although this may equate to “big money” in the homeowner’s eyes, comparatively speaking, it is not.⁸⁴ And financing for these types of projects stems from savings, unsecured credit lines, or secured equity lines of credit, none of which require the homeowner or contractor to pay prevailing wage, unemployment benefits, and the like.⁸⁵ The result is a market-driven pricing mechanism that favors the most “bang-for-the-buck,” with little concern for the contractor’s contentment of his wages.⁸⁶

represented herein. Nor included are figures representing expenditures by do-it-yourselfers [although the report does provide some figures which could be used to quantify material costs under professionally hired projects], but the following figures provide a contextual environment in which the analysis of this Comment applies. In 2013, homeowners reported hiring out 3,210,000 discretionary projects. *Id.* at 29. Including labor and materials, the following are average expenditures of major and minor remodels, per category respectively: kitchens, \$24,292 to \$4,109; baths: \$11,690 to \$2,217 (end of major/minor pricing, only average available hereafter): porches and decks: \$8,322; garage and carports: \$19,427; roofing: \$7,099; siding: \$5,665; windows and doors: \$3,448; insulation: \$1,587; flooring, paneling, and ceiling: \$3,330; other interior: \$4,962. *Id.*

82. ANGIE’S LIST, www.angieslist.com/research/hiring-a-contractor/ (last visited Nov. 19, 2016) (discussing the importance of getting references).

83. *Apgar* at 1-2, 28-29 (illustrating figures based on national data comprised of home improvement expenditures for 2013). Also note that there is essentially a sliding-scale of available income to the contractor, as much depends on the quality of materials the homeowner decides to incorporate into the project. Therefore, a \$7,000 bathroom remodel may equate to only \$2,000 to \$3,000 of available resources for the contractor to complete the installation and finishing work. The contractor obviously has his or her limits, but these are often pushed after the fact; the homeowner wants to change the quality of the product but keep the labor cost the same, after the agreement to work has been entered and despite the additional time required to install the higher quality product. Add to this scenario an average a three-week time to complete, the attractiveness of 1099-help, and the stage is set for the typical, residential remodeling project. *Cf. DPE Report* at 3 (indicating annual employer savings per misclassified individual, *see also NELP Costs on Federal and State Treasuries*, 6 (July 2015) (affirming that individuals receiving 1099s are disproportionately high in the construction industry).

84. *See supra* note 81, *but compare supra* note 77 (illustrating the vast disparity in project scope and associated costs).

85. New Hampshire Business Review, *Remodeler’s Guide: Financing Your Remodeling Project*, NH BUSINESS REVIEW, 2007, at 14.

86. *See* Joanne Cleaver, *Home Renovation: 3 Rules for Hiring Contractors*, CBS MONEY WATCH, (May 26, 2010, 3:00 AM), www.cbsnews.com/news/home-renovation-3-rules-for-hiring-contractors/ (indicating that homeowners will inevitably try to negotiate a lower contract price without wanting to sacrifice quality, but in many instances, price and speed prevail); *see also Picking a Remodeler: Do Your Research*, N.H. BUSINESS REVIEW, Feb. 22 - Mar. 7, 2002,

Somewhere in between these two extremes lie the commercial/light-industrial sector; this sector is a type of hybrid.⁸⁷ In this sector, procurement requirements, union involvement, labor pool size, and state and local regulations vary drastically.⁸⁸ Due to these drastic differences, each variable creates a type of sliding scale with respect to the contractor's ability to push the envelope of misclassification.⁸⁹ It is here where the IECA can be most effective.

Keeping these points in mind, we proceed to our analysis of the following propositions: (1) that the IECA should not presume all non-bona fide contractors, whether the hiring or the hired, are synonymous; (2) that misclassification is a non-issue in most civil projects; (3) that misclassification is most likely to occur where union involvement is minimal at best and bid requirements are privately dictated; and (4) that hiring subcontractors and subsequently administering them 1099s, as opposed to creating employer/employee relationships, is a matter of survival not misclassification for smaller contractors, because of the size of the industry, the ease by which one can enter it, and a flawed pricing model.⁹⁰

Section (III)(A) of this analysis will lay out a more detailed picture of the civil industry and its bidding environment. Section (III)(B) highlights the main factors driving misclassification in the commercial sector. Section (III)(C) discusses the residential sector and provides insight into what an average remodeling project entails, including a basic cost analysis of labor and materials, and what this scenario looks like under the IECA. Finally, this section explains why small construction contractors within particular sectors that meet certain criteria should be exempt from the Act.

III. ANALYSIS

A. *Contrary to the State's contention, contractors in compliance with the IECA are bidding against other, IECA compliant contractors*

In pushing the IECA through legislation, the State contended that "[T]he practice of misclassification puts contractors that

at 7a (discussing the importance of word of mouth credibility; also supporting the proposition that haggling too much over price may result in poorer quality and/or unsatisfied customers, but budget prevails).

87. Modeling the Effects, *supra* note 75 (recognizing that the construction industry includes but is not limited to: "large civil (roads/bridges), institutional, industrial, commercial and residential projects").

88. See LYNN R. AXELROTH ET AL., FUND. OF CONSTR. LAW 84 (L. Franklin Elmore et al. eds., 2nd ed. 2013) (illustrating the vast disparity between public and private construction projects and the legal challenges within them).

89. *Id.*

90. *Apgar* at 1 & *supra* note 1.

comply with tax and employment laws at a competitive disadvantage, deprives the misclassified worker of better pay and employment benefits, and deprives the State of hundreds of millions of tax dollars.”⁹¹ The first contention, and the focal point of this section’s analysis, requires the assumption that contractors who comply with tax and employment laws [i.e. contractors who have employees on the payroll] are competing against those who do not.⁹² It also presumes that all contract prices are sufficient to cover liabilities created by the IECA, and that contractors are purposefully bypassing the Act in order to pocket the money instead of paying it to the State.⁹³ This is simply an erroneous generalization of what takes place in the construction industry.⁹⁴ Construction contractors differ greatly in size and resources, abide by bidding requirements that vary from sector to sector, and are paid through different forms of financing, sometimes insufficient to cover even the most basic of operations.⁹⁵

Contractors in the civil sector bid against one another in sealed bidding environments, where work scope is dictated by the State, and labor terms and costs are typically dictated by collective bargaining agreements, not discretionary management decisions.⁹⁶

91. Illinois Senate Transcript, 2007 Reg. Sess. No. 43; 26 No. 2 Ill. Emp. L. Letter 5. (discussing the reasoning behind the Act.)

92. Cf. Jane P. Kwak, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. LEGIS., 295, 295-96 (2011), <http://scholarship.law.nd.edu/jleg/vol39/iss2/4/> (illustrating that it is nonsensical to think that a company with substantial assets and workers, set up to build interstate bridges or high-rise buildings under collective bargaining agreements, would be competing against a two-man outfit that lays tile or finishes basements; the former bid against the former.) See also ILLINOIS TOLLWAY - CONSTRUCTION CONTRACT TRACKER, *Regan Memorial Tollway (I-88)*, *Veterans Memorial Tollway (I-355)*, *Tri-State Tollway (I-94/I-294/I-80)*, *Jane Addams Memorial Highway (I-90)*, *Elgin O’Hare Western Access, Systemwide*, www.illinoistollway.com/projects/construction-tracker (last visited Nov. 11, 2016) (listing the Illinois construction contractors, contracts, and expenditures).

93. Illinois Senate Transcript, 2007 Reg. Sess. No. 43.

94. *Supra* notes 77-80.

95. Compare *supra* note 77 (\$35M dollars contract) with *Darwin Co. v. Sweeney*, 110 Ill. App. 3d 331 (1982) (illustrating the amount of monies small contractors are dealing with; in this case, the entire amount of \$2,114.68 was withheld because the homeowner felt that the repair did not “solve the problem” for which the contractor was hired. The contractor was hired to repair homeowner’s overhangs and replace the gutters).

96. See *supra* notes 81-83 & 86 (referencing the basis for homeowners’ decisions in the contractor hiring process); see also 30 ILL. COMP. STAT. §500 Illinois Procurement Code (discussing the extensive qualification process contractors must go through to qualify as a bidder). Only after the qualification process has been successfully completed are contractors allowed to submit their bids to the State, and then, only under confidential or “closed” conditions. *Id.* Once all bids are in, they are “opened” and reviewed and the contract is awarded to the lowest bidder. Once the contractor has submitted their bid, however, the contractor cannot amend it; there are no negotiations as with typical

This virtually eliminates employee misclassification.⁹⁷ Also, State and local governments are not ignorant of project scope and cost.⁹⁸ Based on their experience and protocol, they know the costs associated with building roads and bridges; they are well aware of prevailing wage requirements; and they know what size of workforce is needed to complete such massive projects.⁹⁹ What this means in reality is that sticker shock is rare.¹⁰⁰

Civil contractors bidding these types of projects also profit much differently than smaller companies; their profit margin is not solely dependent upon the typical labor/material formula.¹⁰¹ Many of the companies bidding these large, civil projects, own and process

construction contracts. This demands accurate estimation of labor and material costs the first time. These factors should not be overlooked because they support the propositions that the contractors (1) are generally at arm's length in sophistication and capacity; (2) will have knowledgeable estimators that are aware of the project's strict requirements; and (3) will have knowledge that all of their competitors are using union workers in order to comply with the scope of the project; union involvement makes misclassification virtually impossible. This refutes the State's proposition, or at least makes it implausible, that a contractor would be disadvantaged by misclassification since it is highly unlikely that its competitors will be misclassifying given the risk of not being awarded the bid). See also Robert H. Harbuck, *Competitive Bidding for Highway Construction Projects*, AACE INTERNATIONAL TRANSACTIONS, Est.09-04 (2004), www.eds.a.ebscohost.com.ezproxy.rasmussen.edu/eds/pdfviewer/pdfviewer?sid=6a543b54-5537-4dfd-9d64-0f5c2d223f1e%40sessionmgr4006&vid=10&hid=4102. (explaining the process and benefits of competitive bidding for highway projects). Remember also, that when a contractor, who is awarded a bid through this process, hires another or different contractor during the project, he must notify the hiring entity to ensure the relationship meets the procurement guidelines. This is laid out in the procurement code.

97. ILLINOIS DEPARTMENT OF LABOR, www.illinois.gov/idol/faqs/pages/contractor-faq.aspx#faq6 (last visited on Nov. 2, 2016) (illustrating the requirements of the Prevailing Wage Act).

98. See ILLINOIS DEPARTMENT OF TRANSPORTATION, *US Rout 45 Reconstruction and Widening*, www.idot.illinois.gov/projects/us45-reconstruction-and-widening, (last visited Nov. 10, 2016) (noting that the Department executes a project Study, consisting of project scope development, environmental studies, and preliminaries, followed by contract planning and finally construction).

99. *Id.* & ILL. ADMIN. CODE tit. 44, § 650.10,160 (2017), <ftp://www.ilga.gov/JCAR/AdminCode/044/04400650sections.html> (defining the purpose and financial rating system under government contracts).

100. See Kenneth, Elie Azar, & Carol C. Menassa, *Recession Effects in United States Public Sector Construction Contracting: Focus on the American Recovery and Reinvestment Act of 2009*, 28 J. OF MGMT. IN ENGINEERING, 354-61 (2012) (illustrating the source of funding for a large percentage of civil projects).

101. Stacey Freed, *Pricing Remodeling Jobs Just Rights*, REMODELING, (April 06, 2009), www.remodeling.hw.net/business/sales/pricing-remodeling-jobs-just-right (illustrating that in a simple construction bid, the two main components are labor and materials. The materials are generally fixed and set by market demand, while labor costs are governed by the owner's discretion and market forces).

much of the materials they use for them. For example, Plote Construction, a privately owned, \$95M a year Illinois company specializing in excavation and road construction, owns and operates its own cement trucks, sand and gravel pits, asphalt plants, and recycling equipment used to recycle the very roads it removes to replace.¹⁰² Gravel and asphalt are two of the most prominent materials used in the road-building process.¹⁰³ The result is that Plote gains a competitive advantage from both installation and sale of its products because of the ability to supply the materials at a lower cost than those purchasing the product outright from third parties.¹⁰⁴ The same holds true for Plote's massive inventory of specialized heavy equipment; it profits from the entire spectrum of specialized work its machines are able to perform.¹⁰⁵ Although elementary, this point is important.

This creates a profit-generating framework greatly independent of labor-related profits, a principle well received by the unions, but overlooked by the State's presumption.¹⁰⁶ This is significant because the State asserts that companies are being disadvantaged *because* of misclassification. This is simply not true - at least here. In the civil industry funded by tax dollars, the bidding and payroll environments are hostile to misclassification.¹⁰⁷ Nevertheless, should misclassification cross the mind of a contractor operating within this sector, a \$1,000 per person, per day fine, although painful, would unlikely render the company insolvent. The fine would more than likely represent a line-item cost in its cost/risk analysis and nothing more.¹⁰⁸

102. PLOTE CONSTRUCTION INC., www.plote.com/company-history/ (last visited Oct. 30, 2016).

103. See USGS, MATERIALS IN USE IN U.S. INTERSTATE HIGHWAYS 1-2 (2006), pubs.usgs.gov/fs/2006/3127/2006-3127.pdf (noting the required 21" of natural aggregates for road base), and Omer M. Osman, *Special Provision for Reclaimed Asphalt Pavement (RAP) and Reclaimed Asphalt Shingles (RAS) - Section 1031*, IDOT (Apr. 1, 2014), www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Specialty-Lists/Highways/Design-&-Environment/BDE-Special-Provisions/Nov-7-2014-Letting/80306.pdf (illustrating the shift from new asphalt to using recycled asphalt [blacktop]).

104. See USGS, MATERIALS IN USE IN U.S. INTERSTATE HIGHWAYS 1-2 (2006), pubs.usgs.gov/fs/2006/3127/2006-3127.pdf (noting the need for new aggregate, but that a great deal of material is also reused in the recycle process).

105. PLOTE CONSTRUCTION INC., www.plote.com/company-history/ (last visited Oct. 30, 2016).

106. *Id.*

107. See 30 ILL. COMP. STAT. §500 Illinois Procurement Code (illustrating the several requirements a contractor must meet to even bid the job - labor agreements are one of them); and *Baskin, supra* note 76 at 115 (illustrating that because of the union involvement, prices are essentially set with regard to labor costs).

108. Modeling the Effects, *supra* note 75, at 21 (discussing the inner workings of risk management in the construction industry, including but not limited to: contractors and subcontractors, government regulations, union involvement, inspections, insurances, and the agreements governing them. The

B. *The type of misclassification the State alleges is more likely to occur in smaller commercial projects, awarded by private owners to contractors not pressured by wage and bid requirements*

Contractors unable to meet statutory procurement requirements, but too large for small-scale residential, bid in an environment that nurtures misclassification.¹⁰⁹ Unlike public projects “which are subject to a number of different statutory and regulatory schemes including but not limited to: (1) competitive bidding laws; (2) payment and performance bond statutes; (3) federal and state false claims acts; (4) prompt pay legislation; (5) preference programs for disadvantaged business enterprises; (6) special procurement regulations; and (7) special procedures for filing and prosecuting claims,” private projects are subject only to state lien laws, local licensure requirements, and the contract itself.¹¹⁰ In other words, procurement standards go out the window and union consideration and influence dissolve, granting contractors *and* owners the freedom and authority to determine the means and manner by which their projects are completed.¹¹¹ Add to this deep, “financial wells” from which to draw, and you have the requisite ingredients for misclassification. There are also a few other factors that contribute to misclassification in this sector.

To reiterate, union influence and involvement with respect to wages and benefits at this level are minimal. Unions do not like to expend resources pressuring private owners or their contractors into collective bargaining agreements when few political or financial incentives exist.¹¹² Lobbying efforts supporting harsh

idea is to weigh the risk involved with each respective relationship, give it a cost, and analyze that cost in relation to the overall goal of the project. This ideology reduces financial penalties associated with the aforementioned relationships to line-item costs).

109. *Baskin* at 117 and Byron Anstine, Jr., *Analysis for the Development of an 8 Unit Apartment Building*, JOHNS HOPKINS U., 14-18 (2011), jscholarship.library.jhu.edu/bitstream/handle/1774.2/35984/Anstine_Analysis%20for%20the%20Development%20of%20An%208%20Unit%20Apartment%20Building_2012_Ely.pdf (touching on the factors of consideration [i.e. - environment] for the building process in this industry).

110. See LYNN R. AXELROTH ET AL., *FUND. OF CONSTR. LAW* 84 (L. Franklin Elmore et al. eds., 2nd ed. 2013) (illustrating the vast disparity between public and private construction projects and the legal challenges within them); *Cf.* John T. Dunlop, *Project Labor Agreements*, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIVERSITY - Project Labor Agreements 19-23, 2002, www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w02-7_dunlop.pdf

(illustrating the pervasiveness of labor agreements in the construction industry, but also, by inference, indicating that as the scope and cost of the projects decrease, so too does the need for union-based labor agreements).

111. *Id.*

112. *Id.* *But see infra* note 115 (indicating that unions still attempt certain

wage laws – i.e. the implementation of this Act, are far more effective.¹¹³ But the pool of available workers either unwilling to go through the union-scale process while paying union dues, or who are union members but simply cannot find union employment, is substantial.¹¹⁴ And because most if not all projects in this sector are erected on private property, managing union pressure in the event a local chapter catches wind of the non-union project, is easier to deal with.¹¹⁵ With little to no union pressure, free reign to negotiate contract terms, plus a large pool of eager workers, labor price almost exclusively becomes the focal point.¹¹⁶

The *nature* of this sector also affects whether a contractor or owner is more likely to misclassify.¹¹⁷ As alluded to above, large civil projects are unilateral in nature (no negotiating), require contractors with significant assets, require unrestricted access to large amounts of raw or semi-processed materials (controlled by only a few specialty suppliers), and require large quantities of specialized heavy equipment, normally owned and operated by these same companies; profits are largely determined by these two latter categories.¹¹⁸ Conversely, smaller commercial projects, such

tactics to pressure owners and contractor to go union).

113. *Id.*

114. Augustus T. White, *Subsidizing Contracts to Gain Employment: Construction Union Job Targeting*, 17 BERK. J. OF EMP. L., 62, 64 (1996), scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1239&context=bjell (stating that in 1973, building and construction unions covered 40% of the industry's labor force; this number was reduced to 18.2% by 1994). *See also* CARPENTERS UNION LOCAL 13, www.carpentersunionlocal13.org/ (last visited on Dec. 19, 2016) (illustrating that the union only represents 2,000 carpenter-workers in the Chicago area).

115. *See* Hector Barreto, *Losing Power; Union Bosses Resort to Stalking and Harassment*, TOWNHALL (Mar. 27, 2014, 12:01 AM), www.townhall.com/columnists/hectorbarreto/2014/03/27/losing-power-union-bosses-resort-to-stalking-and-harassment-n1814925 (illustrating scare tactics used by union picketers). Unions have a reputation for making non-union jobsite conditions anything but peaceful for both owners and contractors. *Id.* Aside from continual harassment in the form of political speech campaigns, promulgated by union stewards raging on bullhorns about fair wages, pensions, and the like, there are also the giant, inflatable rates; picketers holding signs with inaccurate, accusatory information; vehicle blockades; and the occasional stalking, threatening, and taking pictures of family members for purposes of intimidation. *Id.*

116. *Supra* note 86 (discussing the prominence of price).

117. *See supra* note 78 (illustrating contractor requirements for the bidding process in heavy civil industries) and *supra* note 86 (referencing the basis for homeowners' decisions in the contractor hiring process).

118. *Cf.* USGS, MATERIALS IN USE IN U.S. INTERSTATE HIGHWAYS 1-2 (2006), www.pubs.usgs.gov/fs/2006/3127/2006-3127.pdf (illustrating the massive quantity of aggregate (crushed rock or recycled concrete) and cement, necessary to build roads and highways), *and* PLOTE CONSTRUCTION INC., www.plote.com/sustainability (last visited Feb. 2, 2017) (indicating that this particular company has the capacity to produce these products for use in its awarded projects).

as restaurants, strip-malls, 4-to-12-unit apartment buildings and the like are highly negotiable, meaning that owners and contractors may engage in the hiring process. They also require contractors with far less working capital, materials largely available via common third-party suppliers,¹¹⁹ and comparatively insignificant amounts of basic construction equipment—also provided by third-party owner/operators.¹²⁰ These distinctions illustrate that project owners and contractors are free to shop around for the best labor, material, and equipment/operator pricing, further nurturing misclassification, assuming the respective parties have agreed upon who will exercise what control over what aspects of the project.¹²¹

Lastly, materials used in these types of projects, such as dimensional lumber, steel, concrete, drywall, water/sewer pipe, paint, glass, and shrubs for landscaping, are easy to quantify via shop drawings, unlike certain civil projects where differing site conditions and load variables make material calculation (for aggregate and other fill) much more difficult.¹²² Simply put, an owner can submit his project's blueprint to Menards or Metal Fabricators, Inc. just as easy as the contractor, shifting the pressure of price reduction to labor, a variable directly under the control of the contractor, supported by a sizable labor pool, and greatly

119. Elliott C. Mest, *Newer Construction Methods Offer Developers Options*, 231 HOTEL MGMT. 24 (2016) (discussing different types of construction materials in modular (prefabricated) building components).

120. See INTERNATIONAL UNION OF OPERATING ENGINEERS, HEAVY EQUIPMENT OPERATOR, www.iuoe.org/jobs/heavy-equipment-operator (illustrating the requirements for becoming a unionized owner/operator); compare with Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence From The Construction Industry*, 60 ILR REVIEW, 67, 77 (Oct. 2006), www.faircontracting.org/wp-content/uploads/2014/05/Union-Wages-and-Union-Decline-in-Construction.pdf (evincing non-union involvement of owner operators in the field [footnote 18]). This is an important point. As alluded to in the background, Local 150 is the union for operating engineers. As any Illinoisan driving down an interstate during a construction project can attest, road construction requires massive amounts of equipment, and therefore operators. Obviously, when only one or two operators are required for short periods of time as in most smaller commercial projects [i.e. - setting roof trusses or grading a parking lot], the pool of private, non-union owner/operators from which a contractor can draw increases dramatically. This reduces union exposure and therefore presence, making the job less likely to be picketed or harassed by union stewards.

121. *Id.*

122. See Nick Gromicko & Kake Tarasenko, *Introduction to Blueprint Reading for Inspectors*, INT'L. ASS'N OF CERTIFIED HOME INSPECTORS, www.nachi.org/blueprint-reading.htm (Nov. 11, 2016) (discussing many of the items considered in the bidding process). This point is important because it makes the profit margin almost exclusively dependent upon profits generated by labor. *Id.* Normally, site-condition surprises can be mitigated with bore samples, testing, and the like, but this is not always the case. While excavating, I have been surprised by finding wet, soft, and unstable soil underneath dense clay, requiring additional excavation and stone base.

influenced by the owner.¹²³ By now, we have established that minimal statutory intervention, lower contractor qualification requirements, freedom of contract, and open-market material procurement are factors contributing to misclassification, but fail to mention a few words with respect to funding these projects, i.e. the “deep wells.”

Commercial/non-civil projects require significant amounts of bank financing, established through objective appraisals,¹²⁴ and basic assurances that the job will be completed.¹²⁵ This is unlike the small residential industry, where finished product values are highly subjective, and unlike the civil industry, where prices are dictated by the closed-bid process.¹²⁶ Banks and the municipalities in which these projects are being constructed want assurance that they will not be left with partially completed buildings riddled with mechanics liens.¹²⁷ Therefore, municipalities, somewhat like the State but not as stringent, require contractors to comply with basic regulations such as licensure requirements, registration fees, building permits, and building inspections – none of which govern pay.¹²⁸ Banks and private investors also require contractors to carry insurances and adhere to payout processes administered by title companies – none of which govern pay.¹²⁹ Moreover, these requirements are so minimal that almost any contractor with liability insurance and a state-issued license (if required) can qualify to bid and perform the awarded job.¹³⁰ The bottom line is

123. Krishna Mochtar & David Arditi, *Pricing Strategy in the US Construction Industry*, 19 CONST. MGMT. & ECON. 405, 405-08 (2001) (discussing various strategies in the construction bidding industry, and the narrow profit margins within); *Belman* at 71-4; *Planmatics* at 25; & *supra* note 61 (discussing the relationship between worker preferences in the decision to become an independent contractor, and its influence on shaping economic and social landscapes - i.e., choosing non-union over union companies for the most obvious of reasons).

124. David C. Nahas, *Appraising Affordable Multifamily Housing*, 62 APPRAISAL J., 455, 458-60 (1994) (discussing different appraisal approaches).

125. See *Byron Anstine* at 15-18 (discussing the hurdles developers face in getting particular projects approved - i.e., city approvals, permitting, zoning, etc.).

126. Illinois Procurement Code, 30 ILL. COMP. STAT. § 500 *et seq.* (2015); *supra* note 96.

127. *Id.*

128. See COOK COUNTY GOVERNMENT, BUILDING PERMITS, www.cookcountyil.gov/service/building-permits (last visited on Oct. 30, 2016) (illustrating Cook County building permit requirements and the licensing requirements for different types of contractors).

129. Porterwright, *Construction Loan Draw Procedures - Residential and Commercial*, PORTERWRIGHT RESOURCES (n.d.), www.porterwright.com/pubs/xpqPublicationDetail.aspx?xpST=PubDetail&pub=d6fd45bb-c333-4f04-8e90-050a753d3903&op=&ajax=no (last visited Nov. 15, 2016).

130. *Id.* Municipalities generally require state-issued licenses from plumbers, electricians, heating and cooling technicians, and sometimes roofers; this requirement is in addition to the building permit, needed to commence work. Carpenters, landscapers, and finishers generally only need a building

that contractors bidding and winning these projects are playing with hundreds of thousands to millions of dollars, amounts likely able to support IECA requirements,¹³¹ without the State or the unions breathing down their necks – that is, until the IECA was passed. Therefore, *under these circumstances* the State’s reasons for IECA implementation are reasonably justified.

C. *Small construction contractors within certain areas of the residential and remodeling industry should be exempt from the IECA, because the additional labor costs it creates prices them out of work*

What would be your response to a state agency commanding you to pay a new business expense specific to your occupation? You may vent a few choice words, but eventually comply. But what if your response is, “I barely make it as it is; I mathematically cannot afford it; you will put me out of business.” Their response to you is, “That’s OK, just charge more!” Perhaps for some, and within certain areas of the remodeling industry, raising prices sufficient to cover state-imposed business expenses is plausible,¹³² but for many, the proposition is absurd.¹³³

permit, relevant to their specific type of work; no state license is required, just a fee and simple application. *Id.* In construction lending for smaller projects such as these, banks work with title insurance companies to ensure that the project is completed correctly and within budget. *Id.* The owner or project manager will submit to the bank what is called a “draw request,” which is essentially a line-item form with the names of the contractors, the type and amount of work that has already been completed, the amount of work still left to be completed, and the dollar amount requested by the contractor. *Id.* The bank will then send its own inspectors out to inspect and ensure that the work said to be completed is in fact completed; the title company may also require its own inspection. Once the work has been approved, the funds are released to the title company, who then issues checks to the appropriate companies. *Id.* The company picking up the funds must then sign a partial or final lien waiver, waving all rights to the project up to the designated amount, specified in the waiver. *Id.*

131. 820 ILL. COMP. STAT. §185/40 (2017).

132. See Ryan Paul Adams, *Finding Your Remodeling Niche is Crucial and Makes Everything Else Easier*, RYAN PAUL ADAMS (May 13, 2013), www.ryanpauladams.com/blog/finding-your-remodeling-niche-is-crucial (discussing the benefits of concentrating on one area of remodeling, one of which being higher profits) (another possibility is to focus on wealthy homeowners, assuming they are willing to pay the additional costs and ignore certain factors within a cost/benefit analysis).

133. Cf. WYN LYDECKER & PAUL MCLAUGHLIN, *THE PURPOSE IS PROFIT* 225, 1st ed. 2016 (discussing the basic principles of competitive advantage). Why should the homeowner hire you over your competitor? The million-dollar question. A reasonable inference to be drawn from the discussion in the text is that, if the business [or individual] could charge more for the product or service, it/he would. These are elementary economic principles that are ignored when the IECA treats contractors as if all are equal and operate within a vacuum.

Many small contractors working in the residential sector, especially those providing residential remodeling and refinishing services to frugal, low and middle income homeowners, are operating on shoe-string budgets.¹³⁴ These homeowners obtain funding for their projects, not through tax dollars, or through bank loans supported by appraised building values, but through their own savings, credit cards, and on *rare* occasion, home equity lines of credit.¹³⁵ Of course there are the niche markets – the expendable income homeowners – but these are few and far between; therefore, the focus remains on the sole proprietors operating within the parameters set forth below.

Keeping in mind that many, if not most, remodeling projects go unreported, a nationwide market study done by the Joint Center for Housing Studies of Harvard University illustrates that in 2013, approximately 2.495 million homeowners remodeled their bathrooms; 1.826 million homeowners remodeled their kitchens; 633 thousand homeowners built new decks; and just over 3.8 million homeowners replaced their roofs.¹³⁶ The report also illustrates the expenditures for these projects, categorizing homeowners who hired professionals and those who completed the projects on their own.¹³⁷ This provides a basis for determining labor costs by simply subtracting the latter expenditure from the former.¹³⁸ The following is an excerpt from Table A-2 of the Professional and Do-It-Yourself Home Improvement Expenditures, 2013:¹³⁹

	Baths	Decks
Professional Hire	\$6,650	\$8,332

134. *Cf. Apgar, Emerging Trends* at 29 (indicating that the amount of available funds for labor costs in the listed remodeling projects are insufficient to cover IECA demands); also *Cf. Jason Michael White, What to Expect with a Remodeling Consultation.*, ANGIE'S LIST, July 30, 2015, www.angieslist.com/articles/what-expect-remodeling-consultation.htm (referencing the proposition that the homeowner's budget is always the starting and ending point of a possible sale of services in the remodeling industry. The contractor is confined by what the homeowner can pay; also acknowledging, hypothetically, that a bathroom remodel could range from \$10K to \$50K).

135. New Hampshire Business Review, *Remodeler's Guide: Financing Your Remodeling Project*, NH BUSINESS REVIEW, 2007, at 14.

136. *Apgar, Emerging Trends* at 28.

137. *Id.* at 29.

138. *Id.*; *see also id.* at 26 (illustrating the costs of basic remodeling projects for do-it-yourselfers and homeowners who hired the process out). It is reasonable to infer from the study that the expenditures provided under the "Do-It-Yourself" column do not reflect labor costs, and the expenditures under "Professional" include both labor and materials. Therefore, to arrive at the labor figure for the "Professional" expenditure, the former is simply subtracted from the latter.

139. *Id.* at 29.

DIY	\$2,668	\$2,830
Available for Labor	\$3,982	\$5,502

Starting with bathrooms, and based on the figures from the Harvard study, \$3,982 is what average homeowners spent on the labor portion of their bathroom remodel.¹⁴⁰ The average full-scale tear out and rebuild of a small bathroom takes approximately twenty-three days.¹⁴¹ Assuming an 8-hour workday, this equates to just over \$173 per day, which is enough for one person before taxes to gross almost \$45K annually.¹⁴² This also assumes the individual works alone all the time, which is exceptionally unrealistic. Entirely discounting my 20-plus years of experience in this industry and hundreds of related conversations with colleagues similarly situated, it is reasonable to infer that the individual, without the help of another, would be unable to successfully carry and install a five-foot cast-iron bathtub, maneuver eight-foot sheets of drywall through the customer's home, or run for additional materials while simultaneously progressing on installation, reducing the per diem significantly – and remember, the bid price does not change.¹⁴³ Nevertheless, according to the IECA, \$173 gross per day is enough to pay workers' compensation benefits, unemployment, social security, and state tax liabilities on any potential help the individual would need to hire to complete the job.

Decks seem to be more lucrative, although seasonal, generating approximately \$367 per day over a fifteen day period.¹⁴⁴

140. *Id.*

141. Lee Wallender, *This Is How Long It Takes To Remodel a Small Bathroom*, ABOUT HOME, BATHROOM DESIGN (May 10, 2016), www.homerenovations.about.com/od/bathrooms/a/artbathtimetabl.htm; Jessica Cumberbatch Anderson, *Forget What Your Contractor Said, This Is How Long Renovations Really Take*, THE HUFFINGTON POST, (Oct. 10, 2014), www.huffingtonpost.com/2014/10/10/renovation-timeline-truth_n_5967136.html; and Josh Garskof, *Read This Before You Redo a Bath*, THIS OLD HOUSE (2016) www.thisoldhouse.com/ideas/read-you-redo-bath (last visited on Oct. 30, 2016). See *supra* note 1 (referencing my two decades of experience in the industry).

142. *Id.*; and see *Apgar*, *Emerging Trends* at 29 (available funds for labor: \$3,982, divided by the total number of days to complete a bathroom remodel: 23, equals \$173.13).

143. *Id.* An individual working on his or her own is also responsible for other tasks. For example, running and obtaining additional tools or materials during the course of the project and answering phone calls from other potential clients, are tasks that take away from production and therefore negatively affect profits.

144. HOMEDECKS.COM, www.homedecks.com/deck-questions.php. (providing basic deck-related cost information). The average material cost for a standard, pressure-treated deck is approximately \$7 per square foot. The price for “DIY Decks” of \$2,830 was divided by the square foot price of \$7 to reach the approximate size of the deck represented in the study; approximately 400 square feet. This figure was then used to determine the approximate number of days necessary to build this sized deck). *Id.*; see also BEST RATE REPAIR

The likelihood of an individual building a 400 square foot deck (20' x 20') in fifteen days, however, seems impracticable, especially if the deck were built at an elevation exceeding standing reach.¹⁴⁵ Being conservative and allotting for an additional helper for half the time or 7.5 days at reasonable pay, the gross per diem drops to just over \$183 for the helper and just over \$275 for the individual who worked the entire time; approximately \$47.5K annually for the former and just over \$71K annually for the latter.¹⁴⁶

However, northern Illinois winters freeze the ground for a minimum of three months.¹⁴⁷ Frozen ground prohibits digging the appropriate footings for deck posts; additionally, the likelihood of someone hiring a contractor during the winter to build a deck is virtually non-existent. Therefore, reducing the aforementioned gross earnings to 39 weeks, they become \$35.6K annually (\$137 per day) and \$53.6K annually (\$206 per day) respectively.¹⁴⁸ These two examples are illustrative of several other project categories listed in the report.¹⁴⁹ These illustrations provide context for the difficult environment in which - and variables with which - the small contractor is operating.¹⁵⁰

It is equally important to note that although the IECA does not require a contractor to pay unemployment, workers' compensation, etc., §75 of the Act states that “. . . upon determining that an employer or entity has misclassified . . . the Department shall notify the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission who shall . . . check such employer or entity's compliance with their laws.”¹⁵¹

Unemployment liability rates for employers range from 5.5% to 7.2%, or an average of 6.35%.¹⁵² Workers' compensation

COMPANY, www.best-rate-repair.com/2012/04/how-long-does-it-take-to-build-a-deck-or-patio/ (last visited in Oct, 30, 2016) (discussing the variables needed to determine reasonable completion times for deck projects).

145. *Id.*

146. *Apgar* at 29 (calculating \$5,502 divided by 15 days equals \$366.80 per day, rounded up to \$367. Half of \$367 is \$183.50; this was multiplied by 7.5, the number of days for the additional worker, which equals \$1,376.25; this was subtracted from the \$5,502 total, to reach the individual's total who worked the entire time - \$4,134.75. This figure was then divided by the total number of days, 15, to reach \$275.67. The annual figures are reached by generously multiplying the per diem by 5 (days per week), by 52 (weeks per year).

147. See Dr. Jim Angel, *Statewide Records and Normals for Illinois*, STATE CLIMATOLOGIST OFF. FOR ILL. (n.d.), www.isws.illinois.edu/atmos/statecli/general/averages.htm (illustrating normal temperatures based on 1981-2010 averaging periods).

148. *Apgar* at 29 (\$183 multiplied by 5 days per week, multiplied by 39 weeks, equals \$35,685. \$275 multiplied by 5 days per week, multiplied by 39 weeks, equals \$53, 625).

149. *Id.*

150. *Id.* at 28-30.

151. 820 ILL. COMP. STAT. §185/75 (2017).

152. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, www.ides.

insurance rates, aside from being difficult to calculate due to several variables, range drastically according to class codes,¹⁵³ but nevertheless require the employer to pay a percentage of every \$100 paid out in payroll, over and above wages earned; in the case at bar, figure a conservative 12%.¹⁵⁴ Tack on employer FICA matching of 7.65%¹⁵⁵, and the “employer” is left with an additional out-of-pocket expense equal to 26% of what is owed to the “employee.” Using the gross per diem earnings from the examples above of \$189.50, \$49.50 per day is what the “employer” would have to take out of his or her pocket to cover the additional expense. Therefore, for every day the helper shows up, gross earnings drop nearly \$50 for the employer automatically. Now deduct state and federal income taxes, and the “employer” would be fortunate to clear \$15 an hour.

At this point in the Comment you may be asking yourself, “Ok, but hiring the additional person should theoretically shorten the duration of the project, thereby increasing gross income – right?” In theory, yes, but in reality, no. Remember, earlier I stated that homeowners make their decision to hire a contractor based largely, if not exclusively, on word-of-mouth credibility and price. In practice, price is king, and the majority of owners are willing to gamble on credibility. Because pricing is critical, the baseline from which a contractor begins his bidding process, i.e., what he will charge for labor, is even more critical.¹⁵⁶ The problem is that this baseline is erroneously set by factors for which contractors

illinois.gov/Pages/annual_employer_contribution_tax_rates.aspx (last visited on Oct. 30, 2016) (averaged for purpose of this example).

153. See John G. Thompson & Willard S. Thompson, *Experience Modification Rating for Workers' Compensation Insurance*, 121 J. OF CONST. ENG'R & MGMT, 66 (1995) (indicating that all business are classified and assigned different rates based on the nature of the work performed within the business, how physically hazardous the work is to perform, and the experience of the employer, which is determined by the length of time the business has been in existence and whether the business has had any injury claims in the past). For example: (per \$100 payroll) x classification rate x experience modifier = premium. *ABCs of Experience Rating*, NATIONAL COUNCIL ON COMPENSATION INSURANCE 1, 8 (2016), www.ncci.com/Articles/Documents/UW_ABC_Exp_Rating.pdf.

154. See Workers Compensation Shop, *IL Rates for Select Work Comp Class Codes*, WORKERS COMP. SHOP (2017), www.workerscompensationshop.com/insurance-states/illinois/rates.html (illustrating examples of low/high percentage rates per \$100 of payroll: tiles work - code 5348: 6.78/17.67 [12.23% avg.]; carpentry - code 5437: 8.34/21.73 [14.86 avg.]).

155. *Publication 15*, IRS (2017) www.irs.gov/publications/p15/ar01.html.

156. See Joanne Cleaver, *Home Renovation: 3 Rules for Hiring Contractors*, CBS MONEY WATCH (May 26, 2010, 3:00 AM), www.cbsnews.com/news/home-renovation-3-rules-for-hiring-contractors/ (indicating that homeowners will inevitably try to negotiate a lower contract price without wanting to sacrifice quality, but in many instances, price and speed prevail); see also *Picking a Remodeler: Do Your Research*, N.H. BUSINESS REVIEW (Feb. 22 - Mar. 7, 2002) at 7a (discussing the importance of word of mouth credibility; also supporting the proposition that haggling too much over price may result in poorer quality and/or unsatisfied customers, but budget prevails); *supra* notes 1, 86, & 130.

generally are to blame.

There is a constant influx of inexperienced individual contractors,¹⁵⁷ due in part to the ease by which one can enter the field¹⁵⁸ who incorrectly bid a project by assuming (1) that the project will take X number of days when in fact it will take more; (2) that the project will only require X number of workers when in fact it requires more; and/or (3) that the project scope has accurately been identified when in fact it has not. The result is obviously a low bid compared to actual work performed because homeowners rarely agree to pay more for the contractor's ignorance, laziness, or both. Ask a handful of people who have had remodeling services done at some point and you are sure to hear one or more of these factors come up. Add to this low-standard or unsuspecting homeowners and you begin to see the issue taking form, but this is only the beginning.

On the other end of the spectrum, you have very experienced and skilled small contractors who (1) are afraid to raise prices, either because they have in the past, resulting in less work, or because they fear upsetting their well-established client base, possibly tarnishing their good name and being labeled "greedy"; (2) lack the requisite knowledge and/or finances to create and/or enforce mechanics liens and general contract law, including contract modifications and the like, thereby allowing injustices to continue, keeping homeowner expectations unreasonably low as to price; and/or (3) lack the resources, due in part to the aforementioned, to reach out and advertise to higher income or niche market homeowners. These combined factors aid homeowners in keeping bids low, creating a market-established cost basis that is extremely difficult – if not impossible – to break.¹⁵⁹ Therefore, hiring additional help to presumably decrease project duration does not, in effect, increase gross income.

In closing, residential remodeling and refinishing is nearly a \$300B a year industry.¹⁶⁰ It is made up of thousands of small contractors operating under the same presumptions and conditions just mentioned,¹⁶¹ yet the IECA - as applied to contractors who

157. IBISWORLD REMODELING – US MARKET RESEARCH REPORT, www.ibisworld.com/industry-trends/market-research-reports/construction/building-developing-general-contracting/remodeling.html (last visited Apr. 14, 2018) (illustrating the rate of growth in the industry and factors for that growth).

158. See *Planmatics* at 28-31 (presenting common variables interviewees stated were motivating factors in becoming independent contractors as opposed to employees—low cost of start-up being one of them); *supra* note 61.

159. *Supra* notes 1, 131, 132 & 133.

160. *William Apgar*, *Emerging Trends* at 1.

161. See Mary Ellen Biery, *Guess Which Small Businesses Are Growing The Fastest?*, *Forbes* (Oct. 20, 2013), www.forbes.com/sites/sageworks/2013/10/20/fastest-growing-small-businesses-sageworks/#6b28f6b4984c (illustrating the growth of small business in the residential finishing industry), and Caron

misclassify - does not distinguish between them. Companies the size of Plote Construction and bathroom refinishers operating out of a pickup truck are viewed as analogous.¹⁶² It makes little sense, given the purpose of the Act, to ignore the vast disparity between contractors throughout each sector, and to allow a penalty to be administered that would no doubt irreparably harm a paycheck-to-paycheck operation. Contractors that fall within the latter context are forced to take a gamble: bypass the IECA and issue their 1099s, or go without work. Sole proprietors who get caught are either put out of business or forced to start from ground zero.¹⁶³ It is doubtful that this result is what the legislature had in mind in passing the IECA; therefore, the following should be considered when a final order from the IDOL would do just that.

IV. PROPOSAL

Small construction contractors (referred to herein as “individuals”) able to satisfy either proposed (A) or (B) below, and any one condition as set forth under proposed sub (1) through (5), should be exempt from the IECA’s reach. If, during the investigation process, the individual can provide evidence sufficient for a reasonable person to conclude based on the preponderance of the evidence, that paying the proposed fine and/or penalty (A) will result in a substantial financial hardship for the individual; or (B) will render the individual insolvent; and (1) that the individual’s average contract price is insufficient to cover IECA requirements as to additional hirees and sustain a reasonable pay for him or herself; reasonable pay shall be determined from the United States Department of Labor’s Bureau of Labor Statistics average pay scale for related work;¹⁶⁴ (2) that the individual has, in the past,

Beesley, *How to Start a Small Construction or General Contracting Business*, U.S. SMALL BUSINESS ADMINISTRATION (July 21, 2016), www.sba.gov/blogs/how-start-small-construction-or-general-contracting-business (discussing the growth of small businesses in the residential market).

162. *Construction Industry Sectors, Project Financing, and the Bidding Process - A 40,000 Foot Overview*, ¶¶ 1 & 2 *supra*.

163. See Brief for Appellant at 18, *Bartlow v. Costigan*, 2014 WL 4244271 (2014) (No. 14-230) (implying that Jack Bartlow was in business for 35 years under the name of Jack’s Roofing and the IECA has financially ruined his company). One may argue that if IDOL determined that he misclassified, then the Act has fulfilled its purpose; this misses the point. Whether or not Mr. Bartlow in fact misclassified is irrelevant. The point to be made is that unless the contractor (in this case Jack’s Roofing) hires a bona fide LLC or Corporation, the result will always end in violation if the payee lacks sufficient capital investment. 820 ILL. COMP. STAT. Ann. 185/10(c)(3) (West 2017); see also *Michael v. Pella Prod., Inc.*, 2014 IL App (1st) 533, 537 (holding that a bona fide corporation [defined in the case] is exempt from the Act, nor can it seek benefits otherwise owed to an employee).

164. See *Carpenters*, U.S. DEP’T OF LAB. BUREAU OF LAB. STAT., www.bls.gov/ooh/construction-and-extraction/carpenters.htm (last visited Feb.

attempted to raise his or her prices, but doing so primarily resulted in the rejection of said bids; (3) that the individual, during all relevant times, or a substantial portion therein, lacked adequate resources to sustain payroll liabilities created by the IECA for any hirees alleging that they have been misclassified during said time(s); (4) that the duration of the project(s) and/or employment agreement(s) during which time the alleged violation occurred was too intermittent or too short-term to justify the imposition of payroll liabilities upon the individual for any hirees during the time in question; separate projects controlled by the individual but on which the hiree worked separated by more than 10 business days shall be per se too irregular, and/or projects lasting 45 or less business days shall be per se too short-term in duration;¹⁶⁵ or (5) that the hiree at the onset of the relationship agreed with the individual in writing to work as a sub-contractor and had knowledge that he or she prior to or at the time of hire was not eligible for employee benefits notwithstanding a latter IECA claim, then the individual shall be absolved of liability.

Factor (1) allows the individual to show, based on the preponderance of the evidence, that his or her contract price and therefore gross income is inadequate to comply with the IECA, and that compliance would subject the individual to an unreasonable hourly compensation rate. The individual can achieve this by producing profit and loss statements, or receipts of expenses and proof of income, along with evidence sufficient to establish the duration of the job. Generally Accepted Accounting Principles can then be applied to determine net income as to the individual, and this figure can be compared with the National Standards Allowable Living Expenses as set forth by the Internal Revenue Service and the United States Department of Labor's Bureau of Labor Statistics average pay scale for related work.¹⁶⁶ Any reasoning that suggests the individual should simply "charge more" to meet this basic standard should be barred. The logic supporting this is laid out clearly in section III(C) *supra*. An argument to the contrary would suggest that charging \$25 for a loaf of bread would be an acceptable effect of a law demanding that grocery clerks be paid \$45 per hour with full benefits and pension, and further assumes that people would in fact be willing to pay the \$25 – an absurd proposition.

Factor (2) allows the individual to produce evidence that he or she has attempted to raise prices in the past, but failed. Acceptable evidence may include past, rejected bids, prior advertisements that indicate higher prices than those currently offered but resulted in

4, 2017) (illustrating an average of \$20 per hour gross, pursuant to the relevant trade as illustrated on the U.S. Bureau of Labor).

165. See *supra* Section III(c) (providing practical and mathematical methodology to determine applicable duration).

166. 2018 Allowable Living Expenses National Standards, IRS (2018), www.irs.gov/pub/irs-utl/national_standards.pdf

no corresponding work, or affidavits from clients who negotiated for lower-than-offered prices based on competitor bids or their own frugality.

Factor (3) allows the individual to claim he or she was, and currently is, financially incapable of complying with the IECA, i.e. that the individual is significantly undercapitalized. If during the investigation the individual produces evidence indicating a “paycheck to paycheck” lifestyle, then the individual should not be penalized for earning a living requiring him or her to issue hires 1099s out of necessity. Although subjective in nature, it is quite simple to determine from the investigative process whether lavish living is the source of one’s financial condition or the general market. Yes, sometimes administrative agencies must apply subjectivity to determine an outcome – here is a good place to do it.

Factor (4) acknowledges that contractors, especially in the residential industry, do not work at a single location for extended periods of time. Their jobs are transient, sometimes lasting only a few days or weeks or are so sporadic that continual employment is difficult to achieve at times.¹⁶⁷ Therefore, the proposition of maintaining workers’ compensation, unemployment insurance, and the like for someone in such a position is unreasonable. A sole proprietor privileged to work within the State should bear his or her financial obligations, but those obligations must be plausible. Moreover, it is common knowledge and practice to operate a business as competently as possible; however, market conditions determine the going rate for that competence.

Factor (5) places basic contract principles above the IECA under certain circumstances.¹⁶⁸ Two or more unsophisticated individuals of legal capacity should be able to enter a binding service agreement without fear of one party unilaterally and

167. *Supra* notes 131, 132 & 133.

168. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

A long-shot? Of course, but the Contract Clause is not dead. The Supreme Court has said:

[A]lthough the absolute language [of Art. 1 §10] of the Clause must leave room for “the ‘essential attributes of sovereign power,’ . . . necessarily reserved by the States to safeguard the welfare of their citizens,” that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, legislation adjusting the rights and responsibilities of contracting parties must be upon *reasonable conditions* and of a character *appropriate to the public purpose* justifying its adoption.”

Id. (emphasis added). The argument, of course, is that it is unreasonable to place upon a person or business a financial obligation they cannot pay, not out of disobedience, but circumstance. Moreover, the public purpose is better served when the law yields positive results for its people. This is undermined when otherwise sustainable business operations are rendered insolvent, notwithstanding that they are merely one, two, or three-man operations.

substantially modifying that agreement, using the IECA as the vehicle (or weapon). It is one thing for an adequately capitalized employer-contractor to take advantage of an uninformed worker or to fraudulently disadvantage the State; it is quite another when two sole proprietors enter an agreement for mutual benefit, and for reasons beyond the scope of this Comment, one decides to run the other through the IDOL gamut, subjecting him or her to financial and/or emotional ruin.

Investigators should require evidence reasonably proportionate to the length of time the individual has been working in his or her trade, and consider the factors prevalent in the small residential bidding environment, mentioned in Section III(C) *supra*, when analyzing and applying particular facts to proposed exemption factors (1) through (3). Likewise, the amount of operating capital of the individual working with minimal assets should be given great weight. The investigator should consider all evidence and view it in a light most favorable to the hiring party. Absent fraudulent misrepresentation of facts and/or ability to pay, there should be no liability for alleged violators who qualify under this proposed section.

V. CONCLUSION

Small construction contractors are vital contributors to the economy and the general welfare of the State.¹⁶⁹ Those enforcing the IECA should distinguish between contractors who issue 1099s out of necessity and those who issue them unethically. They should recognize that several market areas within the residential construction industry cannot financially support the demands the IECA places upon those attempting to work within them. Although generating more revenue for the State and paying workers sounds more appealing, the reality is that market forces in this specific context will not allow it. The IECA, as applied, attempts to achieve this end, placing small contractors in a catch-22. The more logical approach is to analyze the circumstances and position of the alleged violator, and focus the State's resources only where there is a showing of unethical behavior and ability to pay.

169. *Apgar, Emerging Trends* at 1. See also Steven F. Hipple & Laurel A. Hammond, *Spotlight on Statistics, Self-employed in the United States*, BUREAU OF LAB. STAT. 4, 11 (2016), www.bls.gov/spotlight/2016/self-employment-in-the-united-states/home.htm (indicating the quantity of self-employed in the construction industry (slide 11) and percentages distributed by state (slide 4)).

