



**DEPARTMENT OF BUSINESS AND INDUSTRY  
OFFICE OF THE LABOR COMMISSIONER**

April 5, 2024

Steve Hamile  
Chair, Nevada Solar Association  
c/o Dallas A. Harris, Esq.  
Davison Van Cleve PC  
4675 W. Teco Ave., Suite 240  
Las Vegas, NV 89118

**Re: Request for Advisory Opinion—Employee/Independent Contractor “Dual Compensation Structures”**

Dear Mr. Hamile,

Pursuant to Nevada Administrative Code (“NAC”) Section 607.650, an Advisory Opinion has been requested clarifying whether “Dual Compensation Structures” are permitted for residential solar energy salespeople under Nevada labor law. Per the description from your request, a “Dual Compensation Structure” happens when a private company pays an individual hourly wages as a W-2 employee then pays the same individual commission wages as a 1099 Independent Contractor for sales transactions that occurred during the employee’s workday. Specifically, you inquire “whether Licensed Contractors and/or Dealers may enter into...separate 1099 IC Relationships with Salespeople despite being compensated for the same sale under a W-2 Employment Relationship.”

As set forth in NAC 607.650, this Advisory Opinion is limited to the facts and circumstances set forth in the request. This Advisory Opinion shall not apply to any pending administrative, civil, or criminal proceeding and shall not be relied upon by any party, whether a party at issue in the facts or not, in any future proceeding unrelated to the specific and unique facts and circumstances set forth in the request.

**I. Summary of Presented Facts**

During the 82<sup>nd</sup> Legislative Session of the Nevada Legislature held in 2023, Senate Bill 293 (“SB 293”) passed and was signed into law. SB 293 requires persons who “directly or indirectly perform or offer to perform, provide any proposal or bid for or execute a contract to perform any work concerning a residential photovoltaic system used to produce electricity” to be a Licensed Contractor or an employee of a Licensed Contractor. Said plainly: persons selling residential solar energy installation services must be a Licensed Contractor or employees of a

Licensed Contractor.

According to the Request for Advisory Opinion, many Licensed Contractors and independent sales teams (“Dealers”) are attempting to hire Salespeople to engage customers in obtaining a “residential photovoltaic system used to produce electricity” under a “Dual Compensation Structure.” This describes an employment structure wherein Salespeople are paid a minimum wage hourly rate pursuant to a W-2 Employee Relationship for their time worked while commissions for sales made during that same time are paid under a 1099 Independent Contractor structure.

## II. Applicable Law

Employee misclassification describes a type of labor law claim wherein an employer improperly classifies a person as an Independent Contractor when the employer should have classified that person as an employee. Employers commonly misclassify employees as Independent Contractors to lessen tax liability, however, this is prohibited by Nevada law. The Nevada Office of the Labor Commissioner (“OLC”) has jurisdiction over employee misclassification in the private sector. Nevada Revised Statute (“NRS”) 608.010 states an employee “includes both male and female persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.”

Nevada law requires employers to “pay to the employee wages for each hour the employee works.” NRS 608.016. Pursuant to NRS 608.012 “wages” includes:

1. The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time;
2. Commissions owed the employee; and
3. Amounts due to a discharged employee or to an employee who resigns or quits pursuant to NRS 608.040, but excludes any bonus or arrangement to share profits.

NRS 608.0155 provides a test for the OLC to use when evaluating whether an individual is properly classified as an Independent Contractor:

1. Except as otherwise provided in subsection 2, for the purposes of this chapter, a person is conclusively presumed to be an Independent Contractor if:
  - (a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;
  - (b) The person is required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding in order to operate in this State; and
  - (c) The person satisfies three or more of the following criteria:  
...

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result

of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

↪ The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. A natural person is conclusively presumed to be an Independent Contractor if the person is a Contractor or Subcontractor licensed pursuant to chapter 624 of NRS or is directly compensated by a Contractor or Subcontractor licensed pursuant to chapter 624 of NRS for providing labor for which a license pursuant to chapter 624 of NRS is required to perform and:

(a) The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;

(b) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and

(c) The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

3. The fact that a person is not conclusively presumed to be an Independent Contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

4. As used in this section:

(a) “Foreign national” has the meaning ascribed to it in NRS 294A.325.

(b) “Providing labor” does not include the delivery of supplies.

NRS 608.400 prohibits employee misclassification in Nevada. The law expressly states:

1. An employer **shall not**:

- (a) Through means of coercion, misrepresentation or fraud, require a person to be classified as an Independent Contractor or form any business entity in order to classify the person as an Independent Contractor; or
- (b) Willfully misclassify or otherwise willfully fail to properly classify a person as an Independent Contractor. (*Emphasis Added*).

### III. Analysis

Under the facts presented, “Dual Compensation Structures” for solar energy salespeople run afoul of Nevada law. Most notably, a person cannot be both an employee and an Independent Contractor at the same time for the same transaction on behalf of the same employer. When analyzing the presented facts under the rules set by NRS 608.0155, the salespeople receiving “Dual Compensation Structures” are not Independent Contractors. First, the employees are working for Contractors licensed under NRS 624, however, as described by the Request for Advisory Opinion, the Contractors and/or Dealers maintain control and direction over the work performed. Second, selling photovoltaic systems used to produce electricity is not outside of the usual course and scope of business of the solar industry Contractors and Dealers. Finally, the solar energy salespeople are not performing work in the course of an independently established trade, occupation, profession or business in which the solar energy salesperson is customarily engaged. On the contrary, the solar energy salespeople are being *employed* on an hourly basis to make sales transactions on behalf of the Contractors and/or Dealers. The only explanation for separating the way the wages are paid is employee misclassification.

This is further supported by the plain definition of employee wages under NRS 608.012. Pursuant to Nevada law, “wages” includes commission payments, so there is no lawful way an employer can pay hourly minimum wage to an employee then classify the same person as an Independent Contractor for commission wages earned during the hourly work. As such, transactions resulting in commission wages that are completed during the employee’s workday for the same employer cannot be separated into 1099 payments. To do so clearly demonstrates willful employee misclassification and is prohibited in Nevada.

Please be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. The Office of the Labor Commissioner may revisit this issue through the Administrative Rulemaking Process. Please be further advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which any opinion is based may require modification or abandonment of this Advisory Opinion.

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Thank you for reaching out to the Office of the Labor Commissioner with your questions. We appreciate the opportunity to provide information and education regarding Nevada labor laws, and their application. Should you need any additional clarification, please do not hesitate to contact our office at (702) 486-4650.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett K. Harris". The signature is stylized and cursive.

Brett K. Harris, Esq.  
Labor Commissioner