TASK FORCE ON

PAYROLL FRAUD AND WORKER MISCLASSIFICATION REPORT

2020

STATE OF WISCONSIN

DWD

Department of Workforce Development

SEC-18760-P (N.03/2020)

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INTRODUCTION AND BACKGROUND SUMMARY

On April 15, 2019, Governor Tony Evers signed Executive Order # 20 (attached as Appendix 1), creating the Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification. Governor Evers recognized that worker misclassification not only denies vulnerable workers various labor protections, worker's compensation, and unemployment benefits, but results in millions of dollars in losses to state government and taxpayers due to the underpayment of wages, unemployment insurance contributions, worker's compensation insurance, and payroll taxes. For example, the estimated amount of UI tax underreported statewide for workers misclassified as independent contractors in 2019 is over $56 million and the average of worker's compensation benefits paid to workers injured while working for illegally uninsured employers over the past 10 years is $2.6 million annually. In addition, the Department of Revenue estimates that potentially $91.2 million in personal income tax revenue was forgone in 2019 due to worker misclassification as well as approximately $50.7 million lost in business taxes from the construction industry on an annual basis. Moreover, employers that misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid and out-compete law-abiding employers. Executive Order # 20 created the Task Force and charged the members with evaluating existing laws and practices to determine ways to enhance enforcement mechanisms currently used to combat worker misclassification; facilitate information sharing and investigative resources between agencies; and work cooperatively with business, labor, and community groups to raise public awareness and prevent worker misclassification through the further dissemination of educational materials and other resources.

Task Force Membership

The Task Force consists of the following members:

- Caleb Frostman (Task Force Chair), Secretary, Department of Workforce Development (DWD)
- Michael Morris, Assistant Attorney General, Department of Justice
- Maria Guerra Lapacek, Assistant Deputy Secretary, Department of Revenue
- Nathan Houdek, Deputy Commissioner of Insurance, Office of the Commissioner of Insurance
- Steve Peters, Administrator, DWD's Worker's Compensation Division
- Mark Reihl, Administrator, Unemployment Insurance Division
- Jesús Villa, Administrator, Equal Rights Division
- Rep. Rob Brooks, State Representative for Assembly District 60, Wisconsin State Assembly
- Senator Dave Hansen, Senator for Senate District 30, Wisconsin State Senate
- Senator Dale Kooyenga, Senator for Senate District 5, Wisconsin State Senate
- Rep. Christine Sinicki, State Representative for Assembly District 20, Wisconsin State Assembly
- Pete Braun, President and CEO, Wall-Tech
- Cynthia Buchko, General Counsel, Construction Business Group
- Andy Buck, Government Affairs Director, Painters and Allied Trades District Council 7
- Tim DeMinter, Business Manager, Financial Secretary/Treasurer, Ironworkers Local 383
- Gary Rockweiler, Vice President and CEO, Rockweiler Insulation Inc.
- Jerry Shea, President, Market and Johnson
- Steuart Wilson, Business Representative, Sheet Metal, Air, Rail, and Transit

The Executive Order also directed the Task Force to review the work of the Worker Misclassification Task Force established by the Department of Workforce Development (DWD) in 2008 and review the recommendations contained in the June 2009 report.

Efforts in Response to the Recommendations in the 2009 Task Force

The DWD Secretary created the Worker Misclassification Task Force in October 2008 to examine problems relating to worker misclassification and recommend administrative and legislative approaches to address those problems. The 2008-2009 Task Force was composed of individuals representing the interests of workers and business communities in industries affected by misclassification, as well as representatives from DWD's Unemployment Insurance and Workers Compensation Divisions, the Department of Revenue and the Department of Commerce.

The 2008-2009 Task Force heard from stakeholders impacted by worker misclassification, enforcement personnel, and experts from other states to determine the best practices to address the problems of misclassification. The 2008-2009 Task Force weighed a wide range of options to develop recommendations that would be the most effective strategies for Wisconsin. The 2008-2009 Task Force made the following eight recommendations:

- **Recommendation 1:** Create an Office of Worker Misclassification; empower the Office to issue stop work orders.
- **Recommendation 2:** Increase information sharing among state agencies.
- **Recommendation 3:** Support the operations of the Department of Commerce Builder Contractor Registration (BCR) program.
- **Recommendation 4:** Establish a "hotline" to facilitate reports from workers, contractors, and the general public about misclassification abuses.
- **Recommendation 5:** Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.
- **Recommendation 6:** Withhold 2% on form 1099 payments made by contractors to subcontractors, including individuals operating as independent contractors.
- **Recommendation 7:** Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.
- **Recommendation 8:** Conduct additional study of other policy options designed to combat worker misclassification.

Seven out of the eight recommendations contained in the June 2009 final report were implemented in Wisconsin. The only recommendation that was not implemented was the recommendation to withhold 2% on form 1099 payments made by contractors to subcontractors, including individuals operating as independent contractors. Despite the recommendation of the Task Force, the Department of Commerce BCR program was eliminated in July 2013.

The complete 2009 Report of the Worker Misclassification Task Force is available here: dwd.wisconsin.gov/misclassification/pdf/2009-task-force-report.pdf

ACTIVITIES OF THE 2019 JOINT ENFORCEMENT TASK FORCE ON PAYROLL FRAUD AND WORKER MISCLASSIFICATION

The Task Force held six meetings at locations throughout Wisconsin from August 2019 through February 2020. Due to the number of agencies that have potential jurisdiction over the issue of misclassification, and the vast reach of its consequences impacting both workers and business across agencies and programs, the Task Force focused its initial efforts on ensuring Task Force members had a clear understanding of the current state of worker classification in Wisconsin and current efforts to address the issue of worker misclassification.

Governor Evers kicked off the first meeting of the Task Force on August 28, 2019. At that meeting, Task Force members received an overview of the 2009 report and heard presentations from DWD's Unemployment Insurance, Worker's Compensation, and Equal Rights Divisions on the current state of worker misclassification. Members discussed areas where additional information/-data was necessary to gain a better understanding of specific issues and to develop potential solutions.

The Task Force held its second meeting on September 25, 2019 in Wisconsin Rapids where members learned about the tests and standards used to determine whether a worker is an independent contractor or an employee and heard perspectives from key program experts on the advantages and limitations when applying the different tests.

At the following meetings held in Madison, Milwaukee, and La Crosse, the Task Force enlisted outside experts from the National Employment Law Project (NELP), National Legal Advocacy Network, and UMOS to educate Task Force members on other adverse consequences resulting from worker misclassification such as human trafficking and to highlight the different strategies and best practices utilized by other states, such as the New York State Joint Enforcement Task Force.

The Task Force also examined existing investigation and enforcement policies, and the procedures utilized by Wisconsin state agencies and associated entities to identify and combat worker misclassification. See Appendix 4 for all meeting materials.

THE EXTENT AND COSTS OF MISCLASSIFICATION AND RECOVERY EFFORTS

In addition to learning about the investigation and enforcement processes, the Task Force evaluated the amounts of taxes, penalties, and collections resulting from those activities. Misclassification not only negatively affects workers and employers who comply with the law, it also has a negative impact on state government. To quantify the adverse consequences of worker misclassification and demonstrate the effect worker misclassification has on state resources, the Task Force was provided data and statistics on the results of investigation and enforcement efforts from: DWD's Unemployment Insurance Division – Field Audit and Worker Classification Sections; DWD's Worker's Compensation Division; DWD's Equal Rights Division; the Wisconsin Compensation Rating Bureau; the U.S. Department of Labor – Wage and Hour Division; and the Wisconsin Department of Revenue.

DWD Unemployment Insurance Division – Field Audit Section

To calculate the estimated cost of misclassification on the UI program, the UI Division provided Task Force members metrics from its Field Audit and Worker Classification Sections.

Based on UI audit data, the estimated amount of underreported taxes statewide for workers misclassified as independent contractors increased from $16,609,705 (3.8% of total UI taxes collected statewide) in 2000 to $56,950,205 (10.2% of total UI taxes collected statewide) in 2019. See Appendix 2 for additional details.

UI also provided information on industries with the highest percentage of misclassified workers. Based on UI audit assignments from January 1, 2013 to November 1, 2019, the industries with the highest percent of misclassified workers found include:

- Educational Services, having misclassified workers found at 47.58% of audits;
- Agriculture, Forestry, Fishing and Hunting having misclassified workers found at 47.2% of audits; and
- Real Estate and Rental and Leasing having misclassified workers found at 45.53% of audits.

Over 40% of UI audits of employers in the construction industry discovered misclassified workers and that industry included the highest total number of individual workers being misclassified. See Appendix 2 for additional details.

DWD Unemployment Insurance Division – Worker Classification Section

The UI Worker Classification Section conducts proactive field investigations at construction worksites and a variety of other businesses. Approximately 61% of the Section's investigations are at construction sites. From the time the UI Worker Classification program was initiated in May 2013 through January 2020, misclassification investigators conducted 2,740 worker classification investigations, resulting in 622 audits and the identification of 8,274 misclassified workers. This resulted in the assessment of more than $2.7 million in UI taxes and interest. As of January 2020, $66,000 in administrative penalties have been issued in 13 cases for intentional misclassification. The UI Tax Field Audit Section identified an additional 43,174 misclassified workers since 2013 resulting in tax assessments and interest of $12.6 million.

The tax field auditors and worker classification investigators perform follow-up activities for continued noncompliance by employers through daily operations and special follow-up by the UI Division's Worker Classification Section on referred employers.

DWD Worker's Compensation Division

Worker misclassification can lead to a loss of premiums for the insurance industry and higher premiums passed onto insured businesses. The Worker's Compensation Division is unable to estimate the total costs to the worker's compensation program resulting from worker misclassification but identified the amount of insurance premiums generated by new employers brought into compliance, much (but not all) of which is related to misclassification. From 2009 to 2018 over $13.7 million in additional insurance premiums were generated from employers brought into compliance. See Table 1 & Chart 1 in Appendix 3 for additional details.

The Worker's Compensation Division has a team of seven consumer protection investigators who conduct investigations to help ensure that employers subject to the Worker's Compensation Act have proper worker's compensation insurance coverage. These investigators conduct approximately 22,000 investigations annually and issue about 200 penalties per month. The average penalty resulting from an investigation is $2,567 and the Worker's Compensation Division assesses around $5.5 million in penalties annually.

The Uninsured Employers Fund (UEF) pays worker's compensation benefits on claims filed by employees injured while working for illegally uninsured employers. Payments vary substantially from year-to-year, depending on the severity of claims accepted. The annual average for the last 10 full years is $2.6 million. The Worker's Compensation Division investigates and issues penalties against illegally uninsured employers to recover funds for UEF. There were approximately 226 injuries in UEF claims from 2009-2019, of which 134 (or 59%) were covered by nine industries. The industries with the highest number of UEF injuries from 2009 – 2019 (those with four or more injuries during the 10-year period) include:

- Construction
- Trucking
- Automotive
- Bus Co.
- Tree Pruning, Spraying and Repairing
- Restaurant
- Healthcare
- Landscape, Gardening & Drivers
- Farm Products

See Chart 2 in Appendix 3 for additional details.

There were approximately 15,539 UEF penalties issued against employers during 2009-2019. The top 10 industries (those with over 500 penalties, which together account for 11,078 or 71% of the total penalties) include:

1. Clerical Office Employees (not otherwise classified)
2. Restaurants
3. Salesperson or Collectors, Outside
4. Construction
5. Child Day Care Center
6. Bar/Nightclub
7. Store Retail (not otherwise classified)
8. Healthcare
9. Barber Shop/Beauty Parlor/Hair Styling Salon
10. Trucking

See Chart 3 in Appendix 3 for additional details.

The Worker's Compensation Division is able to identify repeat offenders when it discovers any employer with multiple penalty accounts (vs. injury reimbursement accounts). There were approximately 2,475 multiple penalty accounts for employers from 2009-2019. Eleven industries account for 56% of all employers that were assigned multiple penalty accounts during that time period. *See Chart 4 in Appendix 3 for additional details.*

DWD Equal Rights Division

The Equal Rights Division (ERD) enforces over 40 state laws covering labor standards and civil rights in employment, housing, and public accommodations. The ERD also provides research and technical assistance to employers on how to comply with those laws. ERD staff investigate complaints, identify law violations, work to resolve disputes among parties, and make determinations of liability. The ERD is only able to address worker misclassification to the extent it relates to other labor standards issues, such as wage theft and minimum wage violations. As a result, the ERD cannot actively seek out worker misclassifications cases and, while it does not maintain statistics on the matter, anecdotally the ERD receives approximately 15 complaints a month on wage and hour matters where worker classification is an issue. Last year, the Equal Rights Division processed over 4,000 complaints and recovered over $1.1 million in wages owed to Wisconsin workers.

The Task Force also received overviews from the Department of Revenue, Office of the Commissioner of Insurance, Wisconsin Compensation Rating Bureau and U.S. DOL on their procedures for investigating and identifying worker misclassification and metrics on the effectiveness of their enforcement efforts.

Department of Revenue

The Department of Revenue estimates that potentially $91.2 million in personal income tax (PIT) revenue was forgone in 2019 due to worker misclassification. This amount was calculated using DWD's estimated total of taxable wages underreported statewide based on UI audit data of $1.85 billion and an effective tax rate of 4.93% (the average rate for all workers) for calendar year 2019. Total underreported wages could be higher than $1.85 billion to the extent that total wages paid exceed the $14,000 per employee per employer limit for wages subject to UI tax. This could result in the upper limit of foregone PIT being greater than $91.2 million.

However, the actual amount of foregone revenue is likely to be less than $91.2 million for two reasons:

- First, for state personal income tax purposes, a worker who is misclassified as an independent contractor may still pay tax on their income by reporting a 1099-MISC instead of a W-2. Consequently, unreported income for PIT is likely to be significantly less than unreported wages for UI. PIT revenue will be foregone to the extent that earnings are altogether unreported, not just improperly reported for a misclassified worker.
- Second, some workers who are paid in cash may have a total income low enough that they would not have a filing requirement for personal income tax (for tax year 2019, a tax return is not required for a gross income level below $11,560 for filing single, or $21,510 if married filing jointly). It's also possible that a worker's income could be low enough to qualify for the refundable earned income tax credit, in which case not only would they not have a net tax liability but they could receive a payment from the state, an additional cost to the state from worker misclassification.

In addition to the potential $91.2 million in forgone income taxes on unreported wages, the Department of Revenue estimates that there is roughly a $50.7 million loss in business taxes from the construction industry on an annual basis.

DOR used IRS tax gap data and some assumptions to determine the amount of forgone business tax revenue for the construction industry. DOR focused on the construction industry due to the high potential of worker misclassification and the prevalence of misclassified workers found in that industry.

Based on information in the IRS 2019 Tax Gap report, the tax gap related to business income for individuals is equivalent to approximately 10.6% of net collections. A similar measure for small corporations suggests an underreporting tax gap of 4.2% among corporate tax filers. Construction businesses make up approximately 1.5% of net tax collections for corporations in Wisconsin, while construction companies make up 4.6% of state GDP. The Department of Revenue does not have information on the industrial mix of business income reported by individuals. Assuming 5.0% of business income is attributable to construction businesses, DOR estimates that forgone taxes on business income from the construction industry is about $50.7 million on an annual basis.

Barriers to Interagency Enforcement, Coordination, and Data Sharing

To get a first-hand perspective on the challenges faced when combating worker misclassification, the Task Force enlisted the expertise of agency staff to discuss pain points they experience relating to worker misclassification prevention and enforcement, and what obstacles prevent them from addressing those issues as effectively as possible. Agency staff informed the Task Force members of the coordinated activities and data sharing that occurs between agencies but explained that there are areas where additional information is needed to improve investigation and enforcement.

Some of the most common barriers to the efficient exchange of information between agencies are the confidentiality restrictions imposed on certain types of data and information. Unemployment insurance records are generally confidential under federal and state law and cannot be disclosed unless specific exceptions apply. Confidential UI records may be shared with most governmental entities at the local, state, and federal levels only if certain legal requirements are met.

Similarly, Wisconsin worker's compensation law provides that any record maintained by DWD that reveals the identity of an employee who claims worker's compensation benefits, other injury or medical information relating to a worker's compensation claim, and any financial information provided to DWD by an employer regarding self-insurance are generally confidential and not open to public inspection. Additionally, no information from the Wisconsin Compensation Ratings Bureau (WCRB) about worker's compensation insurance coverage, including the names of insured employers, employer addresses, business status, type, dates of coverage, manual premium code, policy numbers, cancellations, terminations, endorsement and reinstatement dates, obtained by DWD may be made public by the department except as authorized by the WCRB.

Utilizing Existing Successful Mechanisms to Prevent Worker Misclassification

There are several practices currently in place to encourage compliance. DWD has developed a multi-faceted program to ensure that workers in Wisconsin are properly classified. The program consists of these elements: worksite investigations and employer audits; active collaboration with other government agencies on worker classification issues; a website that provides guidance to workers and employers on worker classification; and public outreach and educational activities. The Task Force recommends continuing to use the strategies that have proven effective through the years but also looking for opportunities to build on the success of those efforts.

Recommendations

Worker misclassification is a nation-wide problem and each state's approach to solving it may be different based on what methods are best suited for that state. The Task Force heard recommendations from outside experts on best practices employed by other states and took those into consideration when developing recommendations for this report.

Recommendation 1: Create an enhanced Contractor Registration Program that requires all individuals representing themselves as contractors in Wisconsin to register with the Department of Safety and Professional Services (DSPS) before performing services.
Require that all individuals performing construction or improvement services register with the Department of Safety and Professional Services before performing services in Wisconsin.

- Require the following basic information for registration: 1) name, contact information, and physical address for the business principal, 2) a business registration with the Department of Financial Institutions (DFI), 3) a valid UI account, and 4) proof of a worker's compensation policy.
- Require a minimal fee that would cover the cost of administering the program.
- Include in the registration process a form that requires acknowledgment of worker classification laws and penalties to ensure registered contractors are aware of their obligations under the law.

Background: The 2008-2009 Task Force recommended supporting the operations of the Department of Commerce Builder Contractor Registration program. Despite the 2008-2009 Task Force's recommendation, that program was eliminated in July 2013.

Worker misclassification investigators, field auditors, and other key program experts indicated a public database that lists the status of all contractors (registered/suspended) in the state would be of great assistance identifying employers and workers during misclassification investigations. Task Force members also expressed the benefit to members of the public who wish to select and support law-abiding contractors.

NOTE: Additional information regarding the Construction Contractor Registration program is included under the "Penalties" section in Recommendation 4.

Recommendation 2: Create an Interagency Coordinated Enforcement Team, consisting of the Departments of Workforce Development, Revenue, Justice, and Financial Institutions and the Office of the Commissioner of Insurance, to address interagency coordination and data sharing improvements to the extent permitted by law.

- Require Team to meet regularly to address confidentiality restrictions and improve the sharing of data necessary for coordinated investigation and enforcement actions by reviewing and updating memorandums of understanding between appropriate agencies and developing recommendations and systems to address data-sharing needs.
- Direct Team to develop recommendations targeting insurance fraud, including a data sharing agreement between the Worker's Compensation Division and worker's compensation insurance providers to allow the results of insurance company audits to be reported to DWD.
- Require Team to report to the Task Force at least annually on its activities and recommendations.

Background: Facilitating and engaging in the systematic exchange of data relating to worker misclassification between appropriate agencies was a charge for the Task Force included in Governor Evers' Executive Order, a recommendation of the 2008-2009 Task Force, and a best practice recommended by outside

experts. While state agencies involved in the Task Force can and do share data to the extent permitted by law, the Task Force identified areas where the coordinated exchange of information could be improved to better facilitate worker misclassification investigations and enforcement efforts.

Recommendation 3: Increase the capacity of the Department of Workforce Development to investigate and enforce the laws regarding worker classification.

- Authorize new positions to hire more UI field auditors.
- Require DWD's UI Division, with the assistance of Department of Administration's Division of Personnel Management, to review all recruitment and on-boarding processes to ensure that auditor positions are properly classified and are keeping pace with comparable positions and the associated compensation in the labor market.
- Direct DWD to review the current resources available to investigators and auditors to evaluate additional strategies and improvements that could be implemented with increased resources, such as the following:

  Cross training of agency investigators (worker's compensation investigators, UI worker classification investigators, field auditors, etc.);

  More bilingual staff; and

  IT improvements that will allow the more efficient exchange of information.

Background: Hiring additional UI field auditors would increase the number of audits completed, provide a greater presence in the employer community, and improve the turnaround time of these audits. Audit visibility is a crucial aspect of compliance and creating a "fair playing field" for all employers. Because audits that identify misclassification are typically more time consuming, additional staff would increase the likelihood of identifying worker misclassification while assisting the field audit section in meeting the Effective Audit Measure (EAM) required by the U.S. Department of Labor. UI field auditors' salaries have not kept pace with other state agencies with staff performing similar audit functions, which has made recruitment and retention of field auditors difficult.

Recommendation 4: Develop Penalty Structure for Worker Classification Violations that Deter Repeat Violations

- Create escalating penalties for repeat violators of non-compliance with worker's compensation law and to "scale" the penalties by the size of the business (i.e., number of workers).
- Expand the intentional misclassification penalty for violations of the unemployment insurance program to other industries and eliminate monetary caps on the current intentional misclassification penalty.
- Create an escalating administrative penalty for repeat offenders (e.g., penalties double for second violation with no monetary cap and continued referral for criminal prosecution for second and subsequent violations).
- Utilize the reconstituted Construction Contractor Registration program to ensure construction contractors are complying with the law.

DSPS would assess a penalty for contractors performing services in the state without being registered. In addition, DSPS would establish penalties for contractors that hire an unregistered or suspended contractor under the Construction Contractor Registration program to include escalating penalties for continued violations up to suspension or revocation of a contractor's own registration and/or disqualification from being eligible to bid on any public project (state, municipal, school district) or certain tax credits.

NOTE: local municipalities' building inspectors could be a resource to verify a contractor is registered to assist with enforcement efforts.

Allow for waiver of part or all of the penalty for first-time violations if the contractor comes into compliance within a specified amount of time.

Background: Wisconsin's worker's compensation law provides an employer that does not obtain and maintain a worker's compensation insurance policy as required may be subject to a penalty of double the insurance premiums they should have been paying during the uninsured period, or $750, whichever is greater. The penalty has been in effect since January 1990 and the majority of employers penalized for failure to carry worker's compensation insurance are never penalized again; however, there are employers in the state with multiple penalties (some exceeding 10). This suggests that the current penalty for failure to carry worker's compensation insurance is sufficient in most cases to deter non-compliance but there are employers who accept the risk of being penalized as the "cost of doing business."

The intentional misclassification penalties for unemployment insurance have been in effect since October 2016. The penalties for construction employers who knowingly and intentionally provide false information to DWD for the purpose of misclassifying or attempting to misclassify an employee, are $500 for each employee who is misclassified, not to exceed $7,500 per incident. In addition, the criminal penalty for intentional misclassification by construction employers is a fine of $1,000 for each employee misclassified up to a maximum fine of $25,000 for each violation. There is also a separate administrative penalty for construction employers who coerce individuals to adopt non-employee status.

Currently, the penalties for intentional misclassification for unemployment insurance only apply to the construction industry; however, data shows misclassification is occurring in other industries as well. In many cases, the penalties are being treated by construction employers as a cost of doing business.

Recommendation 5: Educate Workers and Employers on the Rules, Requirements, and Penalties Associated with Worker Misclassification

- Require the Department of Financial Institutions to include informational materials and resources on worker misclassification with new business registrations.
- Require DWD to design work site posters that employers must display with information on worker classification laws, requirements, and penalties for non-compliance.
- Expand DWD's worker classification website to an all-state agency website that explains the common elements of all employee classification tests and lists information on who to contact with questions.
- Direct agencies to provide more targeted multilingual educational outreach to employers, workers, and allied organizations that serve vulnerable populations. Emphasize in the communications who to contact and the protection of anonymity to help overcome fear of retaliation.
- Direct OCI to educate insurance professionals on misclassification issues so they can identify potential violations and report them to the appropriate agency.
- Develop a communication plan that coordinates activities around Labor Day, such as PSAs, conferences, etc. to call attention to the issues of worker misclassification.

Background: DWD and other agencies currently have robust education and outreach efforts to inform employers and workers on worker misclassification issues, but the Task Force saw opportunities to build on those effort to further prevent worker misclassification through improved education and outreach.

Topics for Further Discussion and Study by the Governor's Task Force

The Task Force has identified several topics of interest that it intends to further examine during future meetings that may inform future recommendations.

1. Increased education, outreach, and enforcement of labor trafficking issues.

2. Options of making public repeat violators of UI, WC, and tax violations while addressing due process concerns and federal confidentiality requirements.

3. Deterrence of worker's compensation insurance premium fraud.

4. Evaluations of other states' worker classification tests and the outcomes from implementing a new test. In addition, re-examine the experiences with Wisconsin's worker classification tests after the other recommendations of the Task Force have been implemented to assess whether a revised test would be beneficial.

5. Greater partnerships and outreach opportunities with community groups.

6. Allowing DWD's Equal Rights Division to investigate third-party violations of labor standards and civil rights laws without the need for an individual who has been wronged to bring forward the complaint.

7. Explore education and resources that can assist businesses with bringing themselves into compliance.

8. Explore strict liability as a means of enforcement.

9. Examine existing DFI registration requirements for the purposes of enforcing worker misclassification laws.

The Task Force plans to engage the Unemployment Insurance Advisory Council (UIAC), Worker's Compensation Advisory Council (WCAC), and stakeholder groups to gather their views and input on implementing the proposed recommendations and solutions.

Conclusion

Over the past year, the Task Force evaluated the current efforts by Wisconsin state agencies to combat worker misclassification, studied the best practices implemented in other states to identify areas for improvement and determined which strategies would be effective in Wisconsin. During their evaluation, the Task Force identified key issues that needed to be addressed to increase compliance with worker classification laws, which are: the need for improved access to information and more efficient sharing of data and communication between relevant entities; greater interagency coordination; increased penalties to hold repeat violators accountable; and the need for expanded outreach and education with specific attention on vulnerable populations.

The recommendations presented in this report were the items the Task Force members agreed should be the primary focus for addressing those key issues but encourage continued study of additional measures that could be taken to combat worker misclassification. Going forward, the Task Force will focus on worker's compensation insurance premium fraud, the feasibility of establishing single employee status tests across all agencies and programs, combating labor trafficking in connection with worker misclassification, and additional ways to foster interagency collaboration and enforcement efforts.

The Task Force looks forward to working with the Governor's Office, the Legislature, other agencies, UIAC and WCAC, and stakeholders to implement these recommendations and develop solutions to further combat worker misclassification.

APPENDIX

Appendix 1 – Executive Order

EXECUTIVE ORDER #20

Relating to the Creation of the Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification

WHEREAS, a significant number of employers in Wisconsin and elsewhere are improperly classifying individuals they hire as "independent contractors" even when those workers should be classified as employees;

WHEREAS, in 2009 the Wisconsin Department of Workforce Development, Unemployment Insurance Division found that 44% of the workers investigated during employer audits had been misclassified as independent contractors;

WHEREAS, from January 2016 to April 2019, the Worker Misclassification Section of the Department of Workforce Development conducted 1,963 investigations, with 422 resulting in audits. The 422 audits found 5,841 workers misclassified, found under-reported gross wages of almost $70 million, and assessed approximately $1.8 million in unemployment insurance taxes, interest, and penalties;

WHEREAS, worker misclassification denies vulnerable workers legal protections and benefits;

WHEREAS, this fraudulent practice also results in millions of dollars of losses to state government and taxpayers due to underpayments of wages, unemployment insurance contributions, worker's compensation insurance, and payroll taxes;

WHEREAS, employers that misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid and out-compete law-abiding employers;

WHEREAS, enforcement activities in this area have historically been divided among different agencies, which can reduce the efficiency and effectiveness of enforcement without intentional collaboration;

WHEREAS, research and experience in other states suggest that enforcement efforts to address the problem of misclassification can be enhanced and made more efficient through interagency cooperation, information-sharing, and joint enforcement efforts against serious violators; and

WHEREAS, research and experience in other states suggest that the creation of a joint task force has proven to be an effective mechanism for coordinating, enhancing, and streamlining enforcement in this area.

NOW, THEREFORE, I, TONY EVERS, Governor of the State of Wisconsin, by the authority vested in me by the Constitution and the Laws of the State, including Section 14.019 of the Wisconsin Statutes, do hereby create the Joint Enforcement Task Force on Worker Misclassification ("Task Force") and order the following:

1. The Task Force shall be staffed by the Department of Workforce Development with technical assistance provided by staff of other agencies as needed. The Task Force shall consist of:

    a. The Secretary of Workforce Development or a designee, who shall serve as the chair;
    b. The Attorney General or a designee;
    c. The Secretary of the Department of Revenue or a designee;
    d. The Commissioner of Insurance or a designee;
    e. The Administrator of the Worker's Compensation Division of the Department of Workforce Development;
    f. The Administrator of the Unemployment Insurance Division of the Department of Workforce Development;
    g. The Administrator of the Equal Rights Division of the Department of Workforce Development;
    h. Other individuals appointed by the Governor to serve at the pleasure of the Governor, including at least one individual representing workers and at least one individual from the business community in an industry affected by misclassification, such as construction.

2. The Task Force shall facilitate coordination of investigation and enforcement of worker misclassification matters by the Department of Workforce Development, Department of Revenue, Commissioner of Insurance, Department of Justice, and other relevant agencies. This includes, but is not limited to:

    a. Reviewing the work of the Worker Misclassification Task Force established by the Department of Workforce Development in October 2008, including its final report of June 2009, and the recommendations contained therein;
    b. Examining and evaluating existing misclassification enforcement by agencies and reviewing the subsequent work on this issue by the Department of Workforce Development Misclassification Section;
    c. Facilitating the sharing among the Task Force members of information relating to suspected worker misclassification violations, in a timely manner and to the maximum extent permitted by law;
    d. Developing recommendations for pooling, focusing, and targeting investigative and enforcement resources;
    e. Assessing existing methods, both within Wisconsin and in other jurisdictions, of preventing, investigating, and taking enforcement action against worker misclassification violations, and to develop best practices for participating agencies to improve their prevention and enforcement efforts;
    f. Facilitating the filing of complaints and identification of potential violators;
    g. Facilitating cooperation and participation of local district attorneys and other relevant state and federal agencies;
    h. Working cooperatively with business, labor, and community groups interested in reducing worker misclassification, including but not limited to:

        i. Seeking ways to prevent worker misclassifications, such as through the further dissemination of educational materials regarding the legal differences between independent contractors and employees; and
        ii. Enhancing mechanisms for identifying and reporting worker misclassification where it does occur;

    i. Increasing public awareness of the illegal nature of and harms inflicted by worker misclassification;
    j. Working cooperatively with federal, state, and local social services agencies to aid vulnerable populations that have been exploited by

worker misclassification, including but not limited to immigrant workers; and

k. Reviewing statutes and regulations related to worker misclassification and recommending any appropriate changes to relevant legislation or administrative rules.

3. The Task Force shall issue a report to the Governor on or before March of each year, which shall:

   a. Describe the accomplishments and recommendations of the Task Force;
   b. Include the amounts of wages, premiums, taxes, and other payments or penalties collected with coordinated agency activities, as well as the number of employers cited for legal violations related to misclassification and the approximate number of workers affected;
   c. Identify any administrative or legal barriers impeding the more effective agency coordination, including any barriers to information sharing or joint action;
   d. Propose, after consultation with representatives of business and organized labor, members of the legislature and other agencies, appropriate administrative, legislative, or regulatory changes to:

      i. Reduce or eliminate any barriers to coordinated agency investigations;
      ii. Prevent worker misclassification from occurring;
      iii. Investigate potential violations of the laws governing worker misclassification; and
      iv. Improve enforcement where such violations are found to have occurred; and

   e. Identify successful mechanisms for preventing worker misclassification, and thereby reducing the need for greater enforcement.

4. Every agency, department, office, division, or public authority of the State of Wisconsin shall cooperate with the Task Force and furnish such information and assistance as the Task Force determines is reasonably necessary to accomplish its purposes.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great seal of the State of Wisconsin to be affixed. Done in the City of Madison this fifteenth Day of April in the year of two thousand nineteen.

TONY EVERS
Governor

By the Governor:

DOUGLAS LA FOLLETTE
Secretary of State

Appendix 2 – UI Data and Projections

In February 2000, the U.S. Department of Labor issued a report "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs." To demonstrate the costs worker misclassification has on Wisconsin's unemployment insurance program, the UI Division used unemployment insurance audit data from calendar year 2019 to extrapolate projections derived from the same computation methodology used by U.S. DOL in their February 2000 report. These projections are conservative estimates based on UI audit statistics and they do not reflect factors such as underground employers or hidden wages (i.e., cash or other compensation paid "off the books"). See below:

	CY 2019	CY 2000
Tax underreported statewide for workers misclassified as independent contractors	$56,950,205	$16,609,705
Percentage of state UI taxes underreported due to workers misclassified as ICs	10.2%	3.8%
Percentage of audited employers with misclassified workers	33.3%	23.0%
Total number of employers in state with workers misclassified	47,716	32,863
Percentage of workers misclassified as IC at audited employers	10.6%	6.2%
Number of workers statewide misclassified as ICs	302,540	158,458

Appendix 2 – UI Data and Projections (continued)

To show the industries where worker misclassification is most prevalent, the table below gives a breakdown of the industries with the highest percentage of misclassified workers discovered based on outcomes of unemployment insurance audits.

MISCLASSIFICATION BY INDUSTRY BASED ON UI AUDIT ASSIGNMENT RESULTS (01/01/2013 – 11/01/2019)

Industry NAICS Code	WI Employer Count in 2019[1]	Audit Results	2013-19 Completed Audits	Audit % Resulting in Reclassified Workers	# of Workers Reclassified	Taxable Wages Identified	Employer UI Tax Identified
11 Agriculture, Forestry, Fishing and Hunting[2]	2,634	Misclassified	59	47.2%	892	$6,077,693	$192,336
		Total Audits	125				
23 Construction[3]	14,475	Misclassified	1,145	40.6%	8,416	$58,261,522	$3,008,121
		Total Audits	2,820				
48-49 Transportation & Warehousing[4]	4,923	Misclassified	235	41%	5,140	$28,686,762	$969,665
		Total Audits	573				
51 Information[5]	1,642	Misclassified	52	41.6%	953	$5,420,071	$158,298
		Total Audits	125				
53 Real Estate & Rental & Leasing[6]	4,033	Misclassified	158	45.5%	1,256	$5,993,106	$195,483
		Total Audits	347				
61 Educational Services[7]	1,397	Misclassified	59	47.6%	874	$4,050,232	$141,781
		Total Audits	124				

[1]Count of employers in Wisconsin with open UI accounts that are subject to UI tax and laws

[2]The **Agriculture, Forestry, Fishing and Hunting sector** comprises establishments primarily engaged in growing crops, raising animals, harvesting timber, and harvesting fish and other animals from a farm, ranch, or their natural habitats.

[3]The **Construction sector** comprises establishments primarily engaged in the construction of buildings or engineering projects (e.g., highways and utility systems). Establishments primarily engaged in the preparation of sites for new construction and establishments primarily engaged in subdividing land for sale as building sites also are included in this sector.

[4]The **Transportation and Warehousing sector** includes industries providing transportation of passengers and cargo, warehousing and storage for goods, scenic and sightseeing transportation, and support activities related to modes of transportation.

[5]The **Information sector** comprises establishments engaged in the following processes: (a) producing and distributing information and cultural products, (b) providing the means to transmit or distribute these products as well as data or communications, and (c) processing data.

[6]The **Real Estate and Rental and Leasing sector** comprises establishments primarily engaged in renting, leasing, or otherwise allowing the use of tangible or intangible assets, and establishments providing related services. The major portion of this sector comprises establishments that rent, lease, or otherwise allow the use of their own assets by others. The assets may be tangible, as is the case of real estate and equipment, or intangible, as is the case with patents and trademarks.

[7]The **Educational Services sector** comprises establishments that provide instruction and training in a wide variety of subjects. This instruction and training is provided by specialized establishments, such as schools, colleges, universities, and training centers.

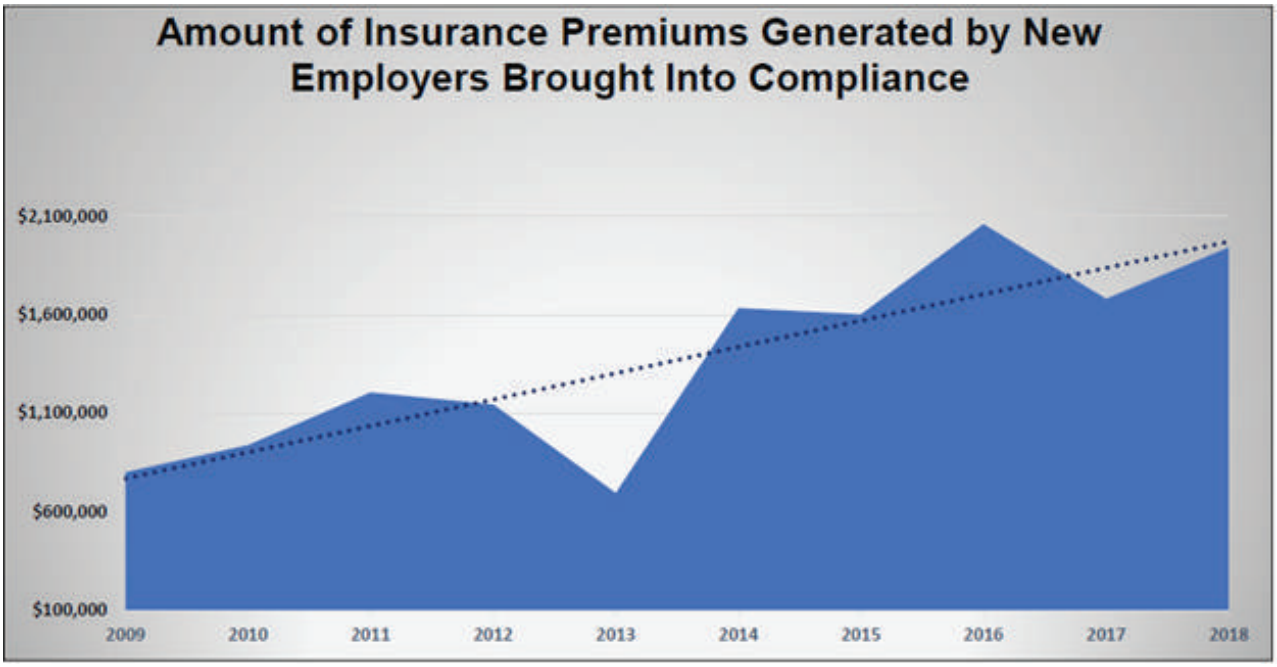
Appendix 3 – Worker's Compensation Data (continued)

RESULTS OF INVESTIGATIONS IN PREMIUM DOLLARS

Table:

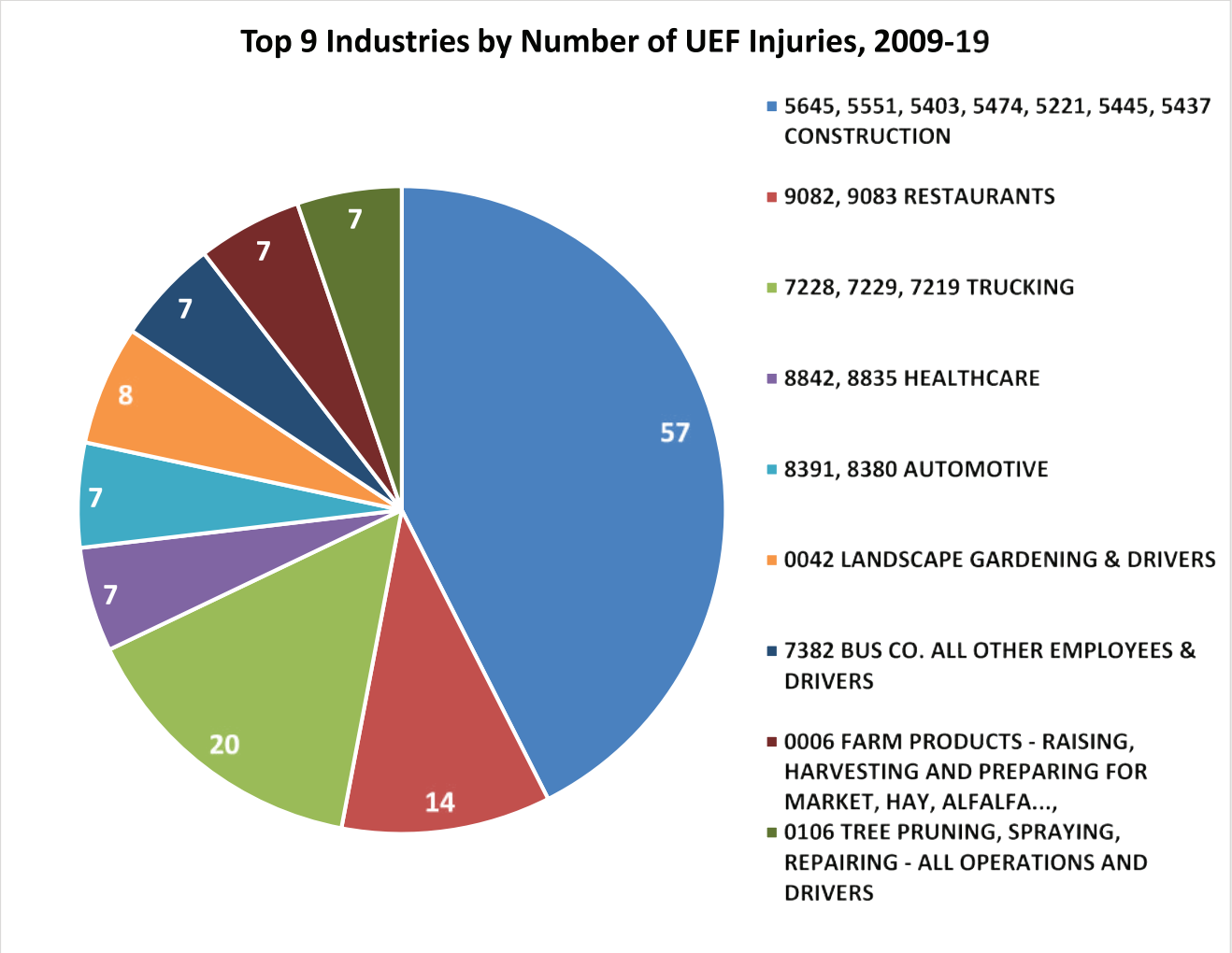
2009	$799,879
2010	$938,014
2011	$1,205,422
2012	$1,145,081
2013	$694,812
2014	$1,634,048
2015	$1,602,597
2016	$2,059,910
2017	$1,680,822
2018	$1,941,501

Chart 1:



Appendix 3 – Worker's Compensation Data

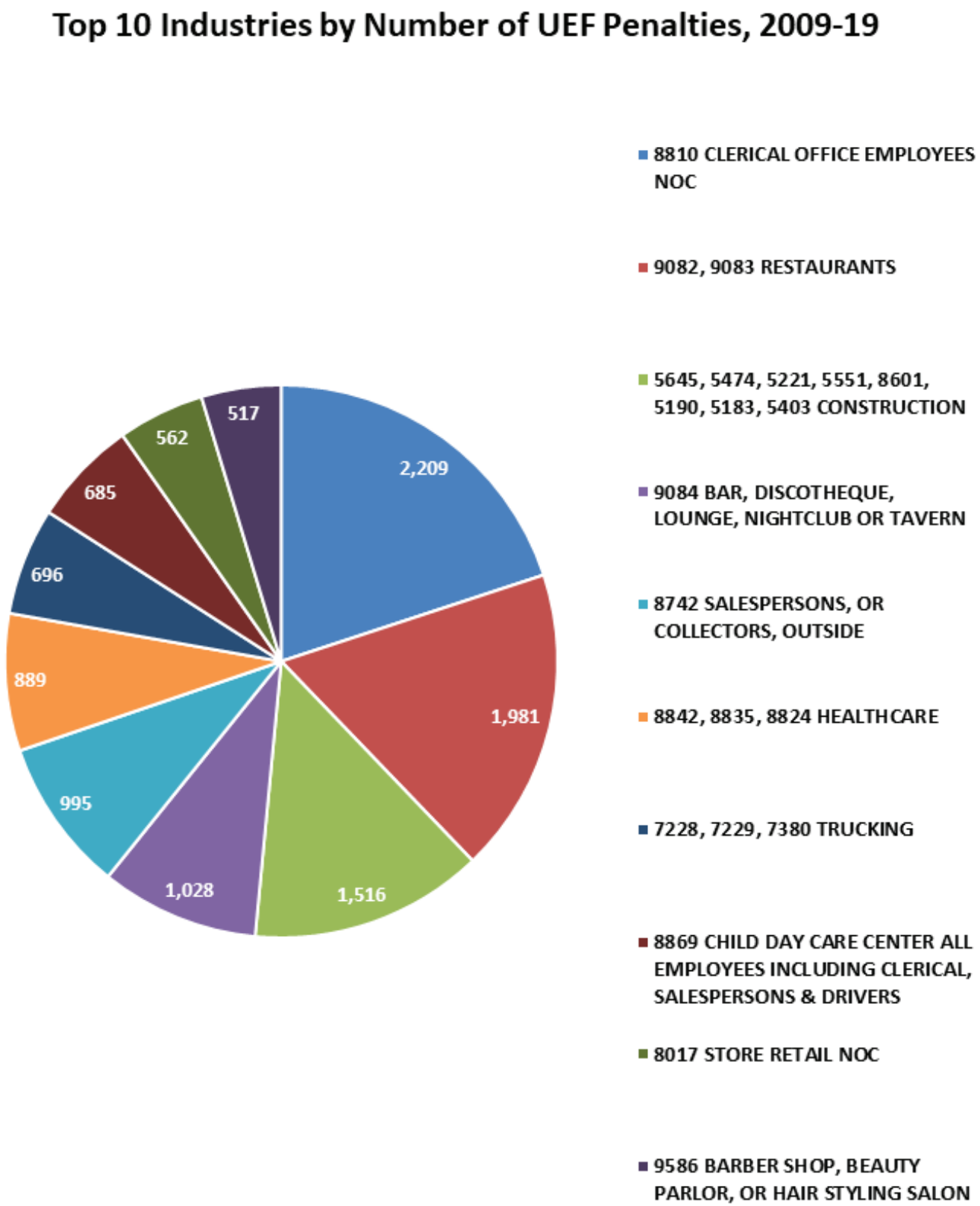
Chart 2:



Appendix 3 – Worker's Compensation Data (continued)

There were 15,539 UEF penalties issued against employers during 2009-2019. The top 10 industries (those with over 500 penalties, which together account for 11,078 or 71% of the total penalties) is shown in the following chart (Note NOC = Not otherwise classified):

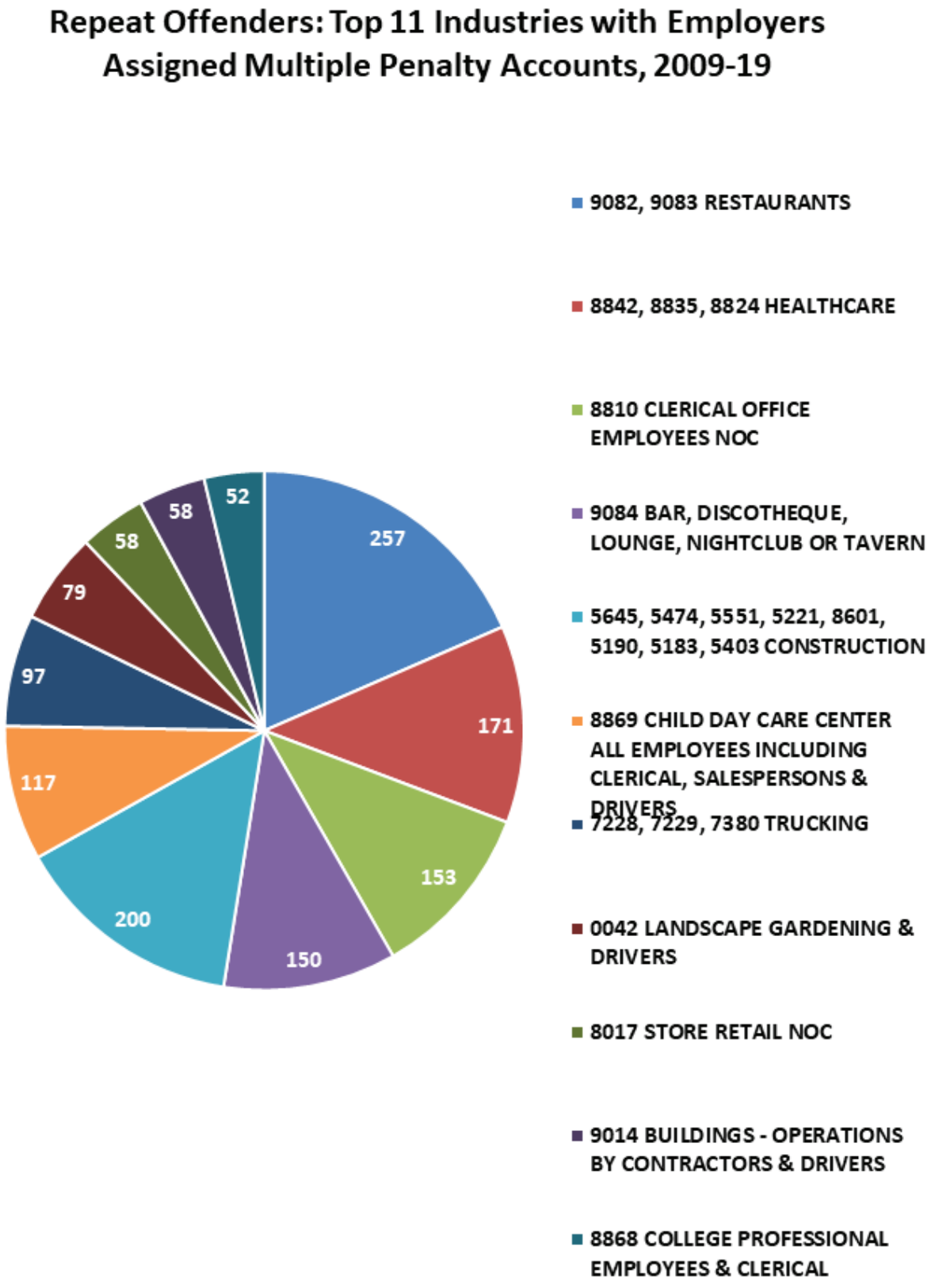
Chart 3:



Appendix 3 – Worker's Compensation Data (continued)

Chart 4:

The following table shows the top 11 industries with employers that were assigned multiple penalty accounts. There were 1,392 accounts covered by these 11 industries (those with 50 or more multiple penalty accounts).



Appendix 4 – Task Force Meeting Materials & Presentations

August 28, 2019

- Meeting Agenda
- Unemployment Insurance Division - Worker Misclassification Presentation
- Workers Compensation Division - Worker Misclassification Presentation
- Equal Rights Division - Worker Misclassification Presentation
- DWD Worker Misclassification Webpages

September 25, 2019

- Meeting Agenda
- Task Force on Misclassification and Payroll Fraud - Legal
- Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification - Department of Revenue
- Independent Contractor Tests - Unemployment Insurance
- Worker Misclassification Task Force: WC Statutes & Case Law - Worker's Compensation
- Worker Misclassification - Equal Rights Division

October 23, 2019

- Meeting Agenda
- Worker Misclassification Task Force: WC Enforcement
- Worker's Compensation Division: Handouts
- WCRB and the Workers Compensation Classification System
- Unemployment Insurance - Field Audit Section
- U.S. Department of Labor - Wage & Hour Section
- State of Minnesota vs. Ricardo Batres
- Wisconsin Regional Anti-Human Trafficking Programs

November 20, 2019

- Public Meeting Notice
- Meeting Agenda
- Parking Handout
- The OCI and Worker's Compensation Insurance
- Fissured Workplace: The Staffing Industry
- New York State: Report of the Joint Enforcement Task Force on Employee Misclassification
- Presentation of M. Patricia Smith Before the Wisconsin Joint Enforcement Task Force on Misclassification and Payroll Fraud
- M. Patricia Smith: Presentation Resources

January 29, 2020

- Public Meeting Notice
- Meeting Agenda
- Equal Rights Division Response to Requests for Information
- Worker's Compensation Division Response to Requests for Information
- Unemployment Insurance Division Response to Requests for Information

February 25, 2020

- Public Meeting Notice
- Meeting Agenda

TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD AGENDA

Wednesday, August 28, 2019
10:00 a.m. – 2:00 p.m.
Department of Workforce Development
201 E. Washington Avenue, Madison, Wisconsin
GEF-1, Room D203

Welcome 10 Minutes
Governor Tony Evers
DWD Secretary Caleb Frostman, Task Force Chair

Task Force Overview – DWD 5 Minutes

- Purpose and Charge Under Executive Order
- Operational Processes/Roles and Responsibilities

Member Introduction 60 minutes

- Who you are
- What your role is
- Why you are part of the task force

Break and Lunch – (Box lunch provided) 20 Minutes

Overview of 2009 Reports and
Current State of Classification Issues at DWD 60 Minutes
Presentations by:
Unemployment Insurance Division
Workers Compensation Division
Equal Rights Division

Break 10 Minutes

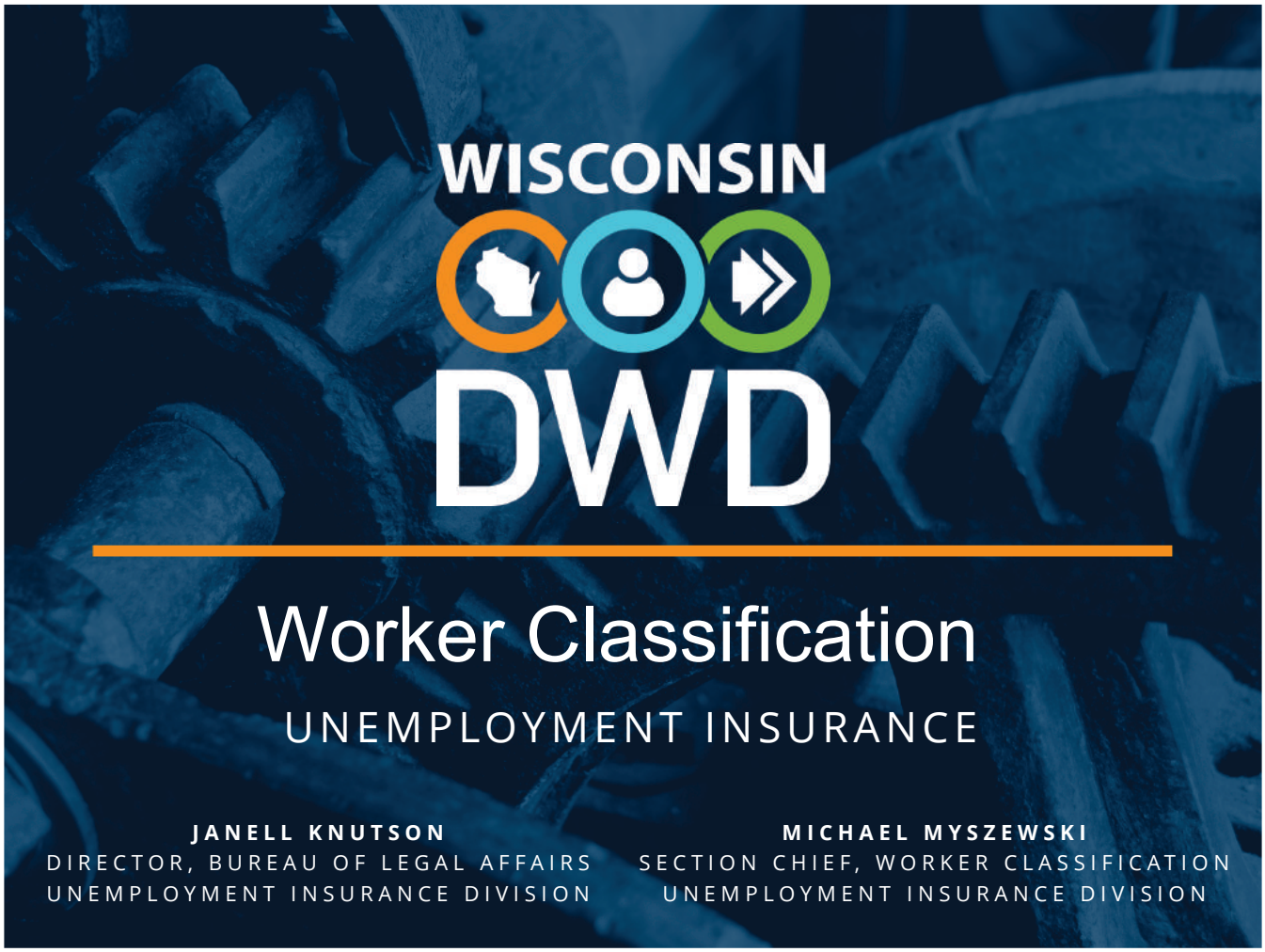
Task Force Member Discussion - 75 Minutes

- Goal Setting
- Topics for future meetings and desired information
- Tentative Meeting Dates through February 2020
  - September 25
  - October 23.
  - November 20
  - December 18
  - January 15
  - February 12
- Locations/ length of meetings
  - Statewide (Eau Claire, Milwaukee, Fox Valley)
  - Three hours

Adjournment

*For press inquiries including interview requests, please contact the DWD Communications Office:

Media Line – 608-266-2722 or E-Mail – DWDSOCommunicationsOffice@dwd.wisconsin.gov



Worker Classification

UNEMPLOYMENT INSURANCE

JANELL KNUTSON
DIRECTOR, BUREAU OF LEGAL AFFAIRS
UNEMPLOYMENT INSURANCE DIVISION

MICHAEL MYSZEWSKI
SECTION CHIEF, WORKER CLASSIFICATION
UNEMPLOYMENT INSURANCE DIVISION

Wisconsin 's Unemployment Insurance Program

- Unemployment Insurance (UI) is financed by federal and state taxes paid by employers who are subject to federal and state UI laws.
- The UI program primary roles are to provide:
  - Temporary economic assistance to individuals who are out of work through no fault of their own while they look for employment.
  - Economic stability in the state during periods of economic downturn.
- WI was the first state to enact UI legislation in 1932 to help stabilize the effects of the Great Depression.

UI & Worker Misclassification

- **Worker misclassification negatively impacts the UI program through:**
- **The loss of UI tax revenue** from employers who misclassify workers;
- **The creation of an unfair business climate** that places those who follow the law at a competitive disadvantage; and
- **Denying workers access to the UI benefits** they may have been eligible for if properly classified.

Worker Misclassification Task Force (2009)

- **Established in 2008** by DWD Secretary and chaired by the UI Division Administrator.
- **Charged with** examining the problems relating to misclassifying workers and recommending administrative and legislative steps to address those problems.
- **Members included** individuals representing the interest of workers and business communities from industries impacted by misclassification.
- Also included personnel from **DWD, DOR, and Wisconsin Department of Commerce.**

Recommendations of the Task Force

- **Recommendation 1:** Create an Office of Worker Misclassification; empower the Office to issue stop work orders.
- **Recommendation 2:** Increase information sharing among state agencies.
- **Recommendation 3:** Support the operations of the Department of Commerce Builder Contractor Registration (BCR) program.
- **Recommendation 4:** Establish a "hotline" to facilitate reports from workers, contractors, and the general public about misclassification abuses.

Recommendations of the Task Force

- **Recommendation 5:** Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.
- **Recommendation 6:** Withhold 2% on form 1099 from payments made by contractors to subcontractors, including individuals operating as independent contractors.
- **Recommendation 7:** Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.
- **Recommendation 8:** Conduct additional study of other policy options designed to combat worker misclassification.

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DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **DWD drafted legislation** with input from stakeholders impacted by worker misclassification.
- **2009 Wis. Act 292** became effective January 1, 2011 and required DWD to:
  - **Educate employers, employees, nonemployees, and the public about the proper classification of employees and nonemployees.**
  - **Receive and investigate complaints alleging misclassified workers or investigate any alleged violations on its own initiative and referring these complaints to other appropriate agencies.**

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **2009 Wis. Act 292** further authorized DWD to**:**
  - **Cooperate with other state or local agencies in the investigation and enforcement of laws whose enforcement depends on the proper classification of employees.**
  - **Issue a "stop work" order at the work site if an employer fails to demonstrate compliance with any requirements.**
  - **An employer that does not comply with a stop work order may be assessed a forfeiture of $250 per day until the employer either stops work or complied with the requirements.**

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **Initial efforts by UI Division:**
  - **One BOLA staff hired in May 2010**
  - **Investigative policy was created**
  - **Website was created to inform employers on how to properly classify workers as employees or independent contractors**

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **Creation of the Worker Classification Section**
  - **DWD initially financed the worker misclassification initiative almost exclusively through federal grants.**
  - **In 2018, a formal Worker Classification Section was officially created in BOLA.**
  - **Team consists of seasoned investigators with extensive experience in white collar and economic crime investigations.**

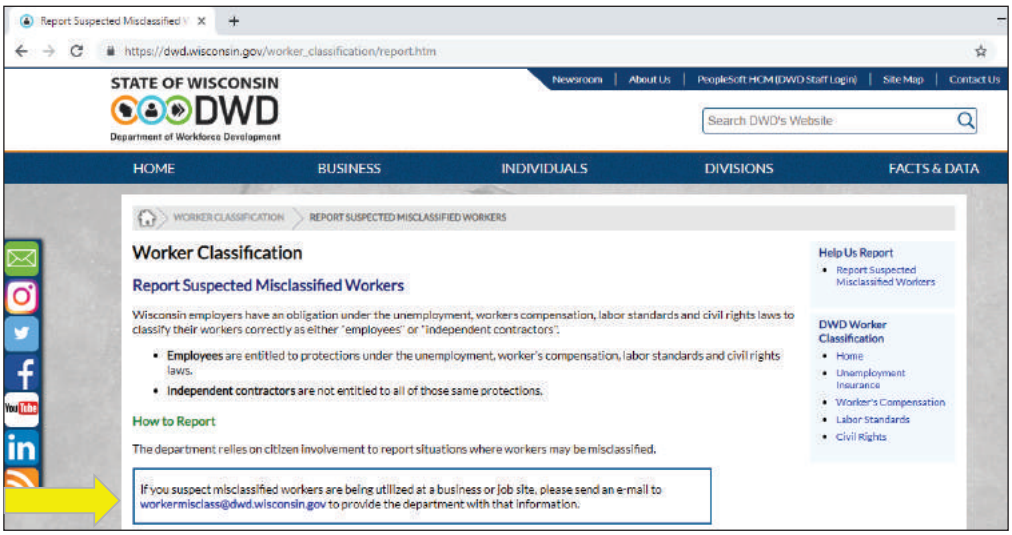
DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 2: Increase information sharing among state agencies.

- **Referrals from other Divisions within DWD (e.g., Workers Compensation and Equal Rights)**
- **Referrals with other WI state agencies (DOR, DOJ, law enforcement, etc.)**
- **In 2014, DWD signed MOU with USDOL to share information and coordinate law enforcement efforts to reduce employee misclassification**
- **Collaboration with OSHA on referrals and joint investigative operations with OSHA inspectors**

DWD UI's Efforts in Response to 2009 Task Force Recommendations

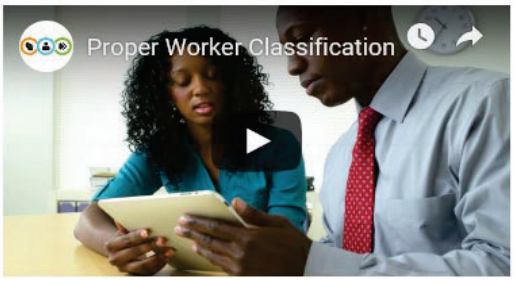
Recommendation 4: Establish a "hotline" to facilitate reports from workers, contractors, and the general public about misclassification abuses.



DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 5: Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.

- **DWD launched a first-of-its-kind worker classification website in 2013:** https://dwd.wisconsin.gov/worker-classification/
- **Two informational videos were added to the website in 2016**



Proper Worker Classification

Worker Classification: Preparing for a Tax Appeal

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 5: Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.

- **UI supplements the educational value of the website through education & outreach efforts such as:**
  - Providing speakers to employers and trade unions;
  - Presenting at construction industry events, labor union meetings and other public forums;
  - Holding meetings with individual contractors;
  - Forums such as Labor Law Clinics and Friday Fundamental webinars;
  - Radio Public Service Announcements; and
  - Annual Rate Notice Newsletter.

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DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 7: Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

- **2009 Wis. Act 28 (2009-2011 state budget):** provided that any employer engaged in construction projects who willfully misclassified a worker as an independent contractor with intent to evade any requirement of workers compensation, fair employment or UI law would be subject to **a fine of $25,000 for each violation**.
    - The provision relating to penalties for willful misclassification was later **amended by 2009 Wis. Act 288** to include employers engaged in painting or drywall finishing of buildings/other structures.

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 7: Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

- **2015 UIAC agreed bill (2015 Wis. Act 334)** contained numerous law changes for intentional misclassification penalties. Effective Oct. 2016:
    - Any construction employer who knowingly and intentionally misclassifies workers is subject to a **civil penalty of $500 per employee** intentionally misclassified with a maximum penalty of **$7,500 per employer per incident**.
    - A new administrative penalty was created for construction employers who coerce individuals to adopt independent contractor status.
        - **The penalty is $1,000 per employee coerced with a maximum penalty of $10,000 per employer per year**

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 7: Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

- **2015 UIAC agreed bill (2015 Wis. Act 334)** contained numerous law changes for intentional misclassification penalties. Effective Oct. 2016:
  - A construction employer who knowingly and intentionally provides false information in order to misclassify workers, **after having been assessed an administrative penalty**, is subject to a **criminal fine of $1,000 per misclassified worker up to $25,000** for each violation.
  - Criminal penalties for intentional worker misclassification are prosecuted by the DOJ or local district attorneys.

DWD UI's Efforts in Response to 2009 Task Force Recommendations

Recommendation 8: Conduct additional study of other policy options designed to combat worker misclassification.

- **2007 UIAC agreed bill (2007 Wis. Act 59)** required that the UIAC appoint a committee to study the definition of "employee" under UI law.
- UIAC approved the study committee's recommendations and included the proposed changes in the **2009 UIAC agreed bill (2009 Wis. Act 287)**.
  - 2009 Wis. Act 287 changed the test for determining employee status under UI law.
  - A worker must meet the criteria of **a two-part test to be considered an independent contractor for UI purposes under Wis. Stat. § 108.02(12)(bm).**

1. The worker must perform services free from direction or control of the employing unit, and
2. Be engaged in an independently established trade, business or profession (meets 6 of 9 conditions).

The Report of the Study Committee to Review the Unemployment Insurance Statutory Definition of "Employee" can be found at the link below:

https://dwd.wisconsin.gov/uibola/uiac/reports/2009eedefinition.pdf

DWD UI's Efforts in Response to 2009 Task Force Recommendations

- **Ongoing efforts of the Worker Classification Section:**
  - The UIAC receives regular reports on the activities of the Worker Classification Section
  - The UI Division works with the UIAC to examine best practices utilized by other UI programs
  - Continued efforts to educate employers on proper worker classification
    - **Achieved success bringing select Wisconsin industries into compliance**

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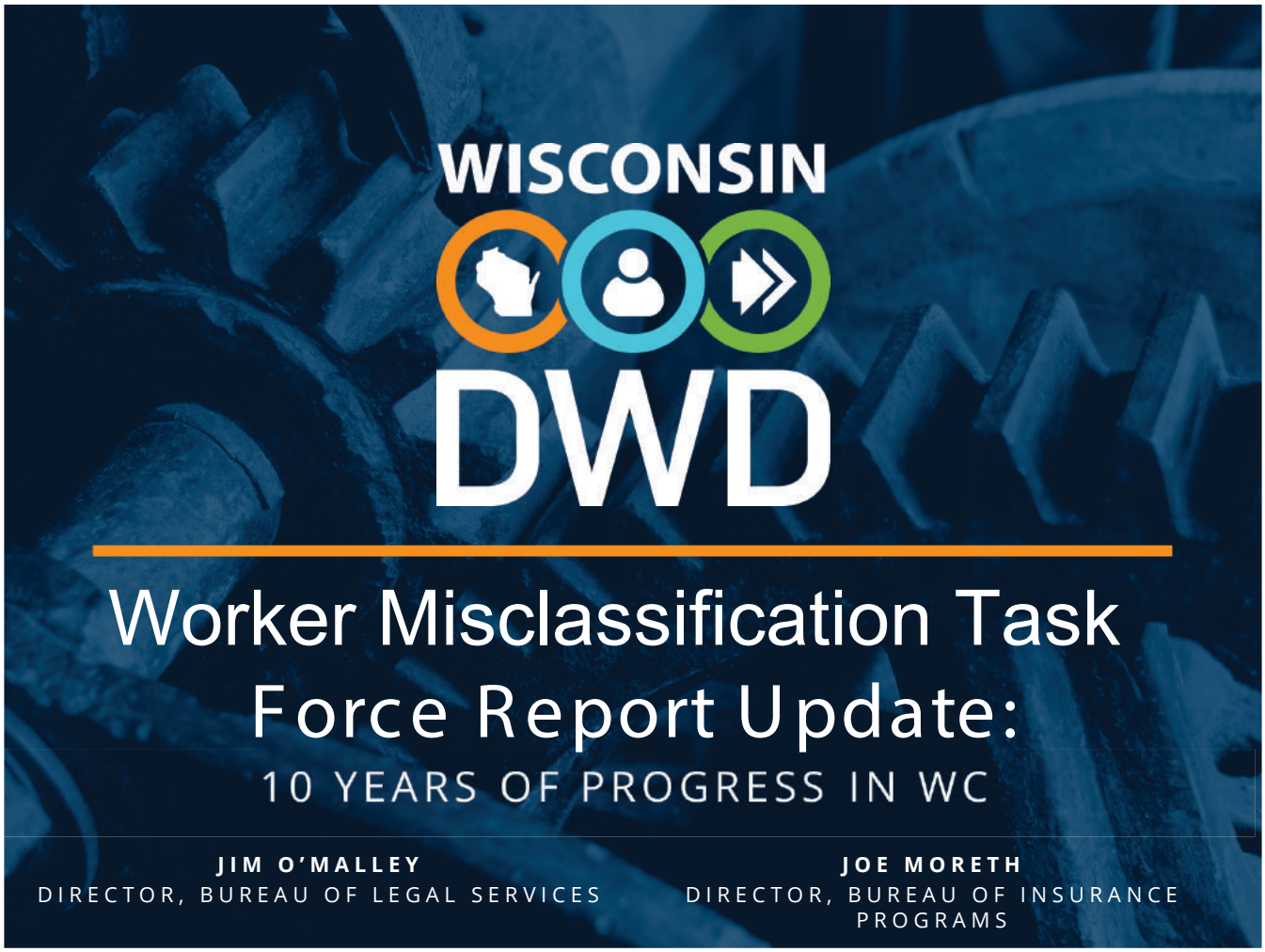

Worker Misclassification Task Force Report Update:

10 YEARS OF PROGRESS IN WC

JIM O'MALLEY
DIRECTOR, BUREAU OF LEGAL SERVICES

JOE MORETH
DIRECTOR, BUREAU OF INSURANCE PROGRAMS

Division of Worker 's Compensation

- **Mission:** Promotion of healthy, safe work environments for the benefit of employers and workers by maintaining a balanced system of services to ensure compliance with Wisconsin Worker's Compensation (WC) Act
  - **WI passed nation's first constitutionally valid WC Act in 1911**, based on 'grand bargain' → Workers give up right to sue for negligence & employers pay for economic costs of injuries regardless of fault
- **Responsibilities:** monitoring of payments to injured workers, dispute resolution, investigations, enforcement, supplemental pay to certain injured workers, promotion of workplace safety and self-insurance regulation
- **Budget/Staffing:** $12.3M annually (no GPR funding), 70 FTE
- **Bureaus of Insurance Programs, Claims Management and Legal Services**
- Supports **Worker's Compensation Advisory Council, Self-Insurers Council, Health Care Provider Advisory Committee**

WC & Worker Misclassification Task Force

- **Worker Misclassification Task Force:** Established in 2008 by DWD Secretary Gassman
- **Membership Included WC Division Administrator:** Was chaired by UI Administrator
- **Task Force Report submitted in June 2009:** Included summary of ongoing practices and recommendations
- **Practices in WCD Division (2009):**
  - Employer Education
  - Investigation of Complaints & Complaint Referrals to UI Division
  - Utilized 9-Point Test to Determine Employee or Independent Contractor
  - Collaboration and Data-Sharing with other DWD Divisions, State Agencies

WC & Worker Misclassification Task Force

- **Legislative Changes since 2009**
  - **Section 102.07 (8) (d), created by 2009 Wis. Act 28:** provided for a fine of $25,000 for each violation of employers who willfully and with the intent to evade any requirement of Ch. 102, Wis. Stats. for misclassifying an individual who is an employee as a non-employee.
    - Section was **amended by 2009 Wis. Act 288** to include employers engaged in painting or drywall finishing of buildings/other structures.
  - **Section 102.07 (6), was repealed by 2015 Wis. Act 180:** Eliminated the statutory definition of persons selling or distributing newspapers or magazines on the street or door to door as employees, and required these persons to meet all elements of s. 102.07 (8) (b) to be independent contractors for worker's compensation purposes.
  - **Section 102.04 (2r) was created by 2015 Wis. Act 203:** Excluded franchisors as employers of franchisees unless certain conditions are met.

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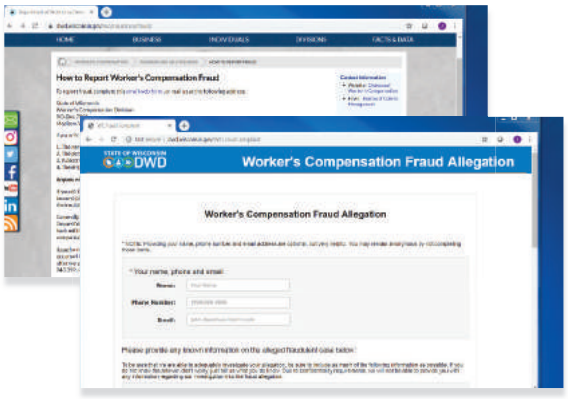
WC & Worker Misclassification Task Force

- **Legislative Changes since 2009 (continued)**
  - **Section 102.125 (2) was created by 2015 Wis. Act 180:** Authorized DWD to request that DOJ assist with investigation and prosecution of suspected fraudulent activity on the part of an employer, employee, insurer, health care provider or any other person related to worker's compensation.



- Act also provided for DWD to fund one (1) FTE position at DOJ to assist with the investigation and prosecution of fraud.
- DWD debuted online form in 2016 to collect reports of suspected WC fraud from public for possible referral to DOJ.

WC & Worker Misclassification Task Force

- **Legislative Changes since 2009 (continued)**
  - **Section 102.078 was created by 2015 Wis. Act 258:** Provided real estate brokers and salespersons are not employees of a real estate firm, unless the firm elects coverage, when there is a written agreement that provides the broker or salesperson shall not be treated as an employee for federal and state tax purposes and 75% or more of compensation was from brokerage services performed on behalf of the firm.
  - **Section 102.07 (8) (d) was repealed by 2015 Wis. Act 334, and s. 108.221 (2) was created:** To establish a new administrative penalty for construction employers who coerce individuals to adopt independent contractor status.
    - **The penalty is $1,000 per employee coerced with a maximum penalty of $10,000 per employer per year.**

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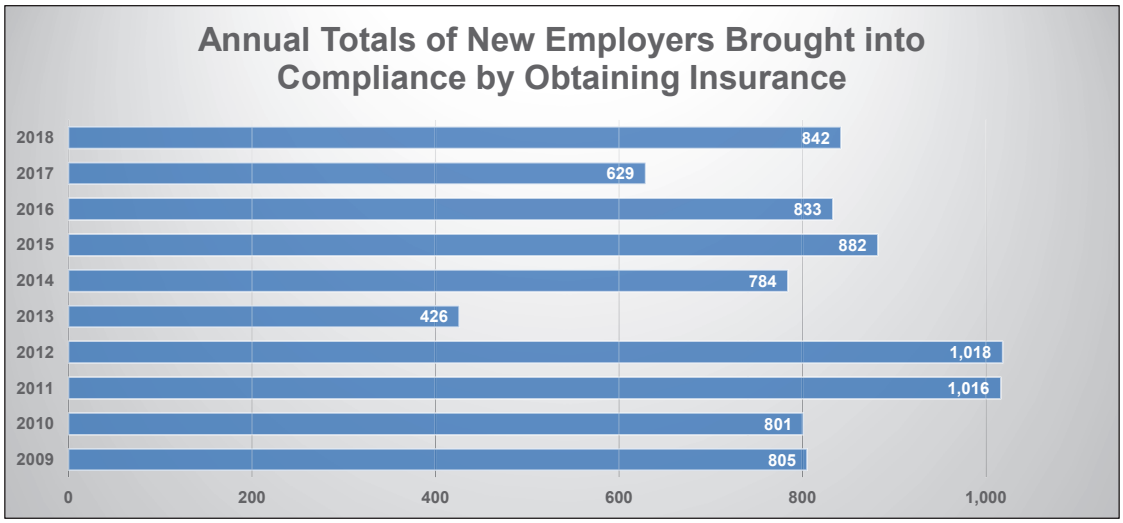
WC & Worker Misclassification: 10 Years Later

- **WCD conducts investigations to make sure that employers subject to the WC Act have worker's compensation insurance coverage.**

- **A WC insurance policy covers <u>all</u> workers who are determined to be employees of the employer** regardless of whether the employer claims them as employees.
- Employers who misclassify their employees to its worker's compensation insurance carrier to avoid premiums are subject to **audits by the insurer and will be required by the insurer to pay the proper premiums.**
- WCD has metrics on **investigative activities and performance.**

WC & Worker Misclassification: 10 Years Later

- **WC Investigators Hold Employers Accountable:** Validating proof of WC insurance on front-end can prevent issues later



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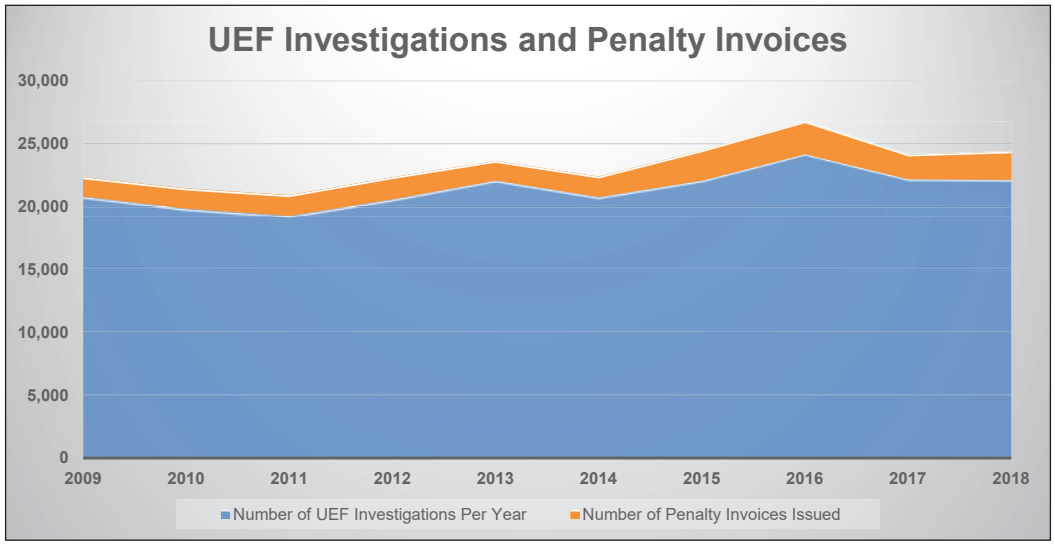
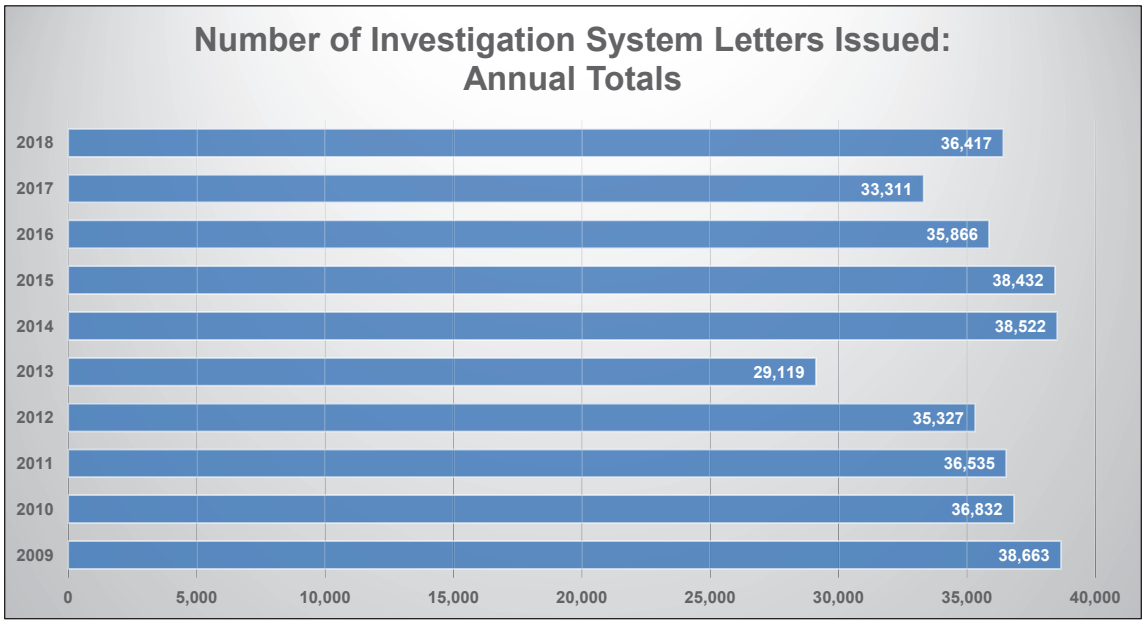
WC & Worker Misclassification: 10 Years Later

- **Uninsured Employers Fund (UEF)** investigations have increased in volume from 2009-18, along with penalty invoices against illegally uninsured employers



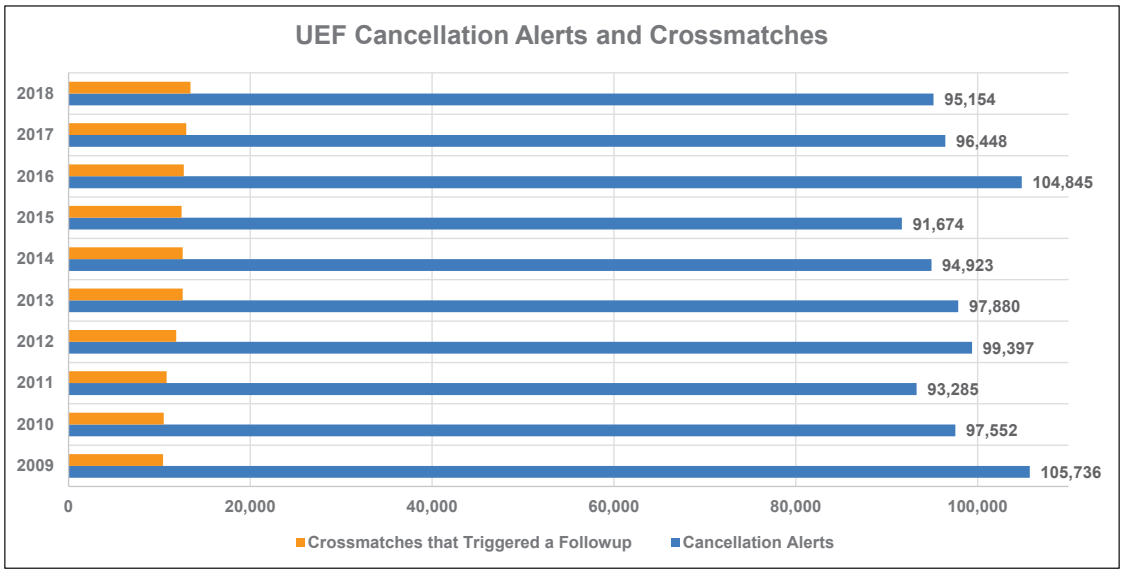
WC & Worker Misclassification: 10 Years Later

- UEF Investigators **Issue Tens of Thousands** of Letters Annually



WC & Worker Misclassification: 10 Years Later

- **Annual Employer Cancellation Notices & Crossmatch Activities** show increase in crossmatch "hits," sustained cancellation notices prompting follow-up investigation and education



Questions?

Steven Peters

Administrator

608-266-6841

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http://dwd.Wisconsin.gov

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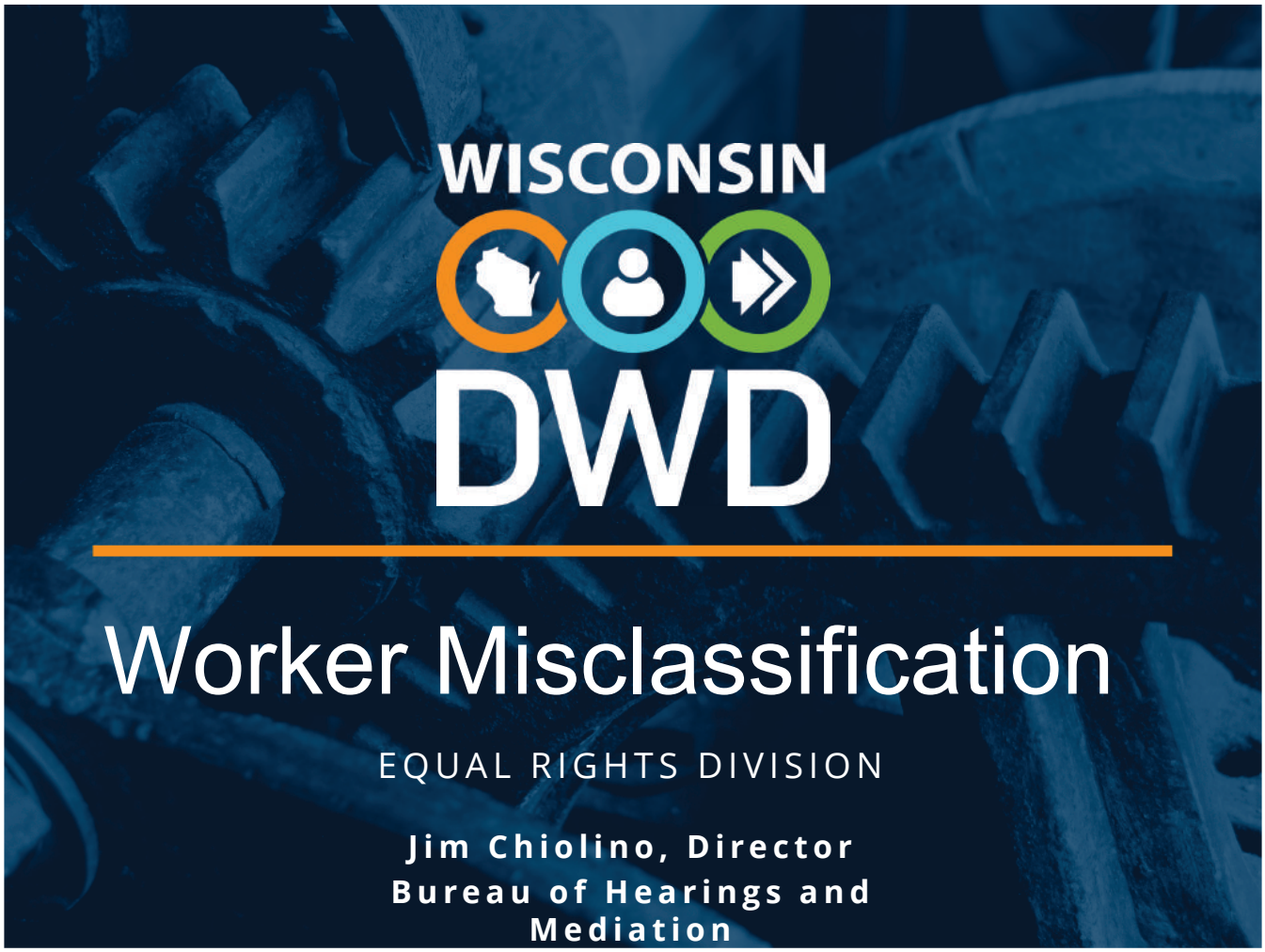

Worker Misclassification

EQUAL RIGHTS DIVISION

Jim Chiolino, Director
Bureau of Hearings and Mediation

Equal Rights Division - Overview

- ER enforces over 40 laws covering labor standards and civil rights in employment, housing, and public accommodations.
- Last year, ER processed over 4,000 complaints and recovered over $1.1 million in wages owed to Wisconsin workers.
- ER conducts outreach and serves as a resource to Wisconsin employers and entrepreneurs.

2009 Report of the Worker Misclassification Task Force

- The 2009 Report defined misclassification generally and discussed enforcement efforts. The ERD portion related to enforcement is short. It:
  - Acknowledged that ERD encounters misclassification.
  - Noted that definitions of "employee" differ from those under other laws.
  - Explained that employee paycheck stubs are to include certain pay calculation and that there is a penalty for failing to do so.
  - Explained that employers are required to maintain records related to hours worked and wages paid.

Updates Since 2009

- There have been no law changes in regard to the laws enforced by ERD. In 2011 or 2012, the Department put together an excellent resource: https://dwd.wisconsin.gov/worker-classification/, a Worker Classification web page that helps individuals decide whether misclassification has occurred.
  - ERD laws are divided between "Labor Standards" and "Civil Rights".
  - We provide our statutory definitions of "employee," and information about the common law tests that have developed in both areas.

ERD Enforcement - Misclassification

Labor Standards (Wage & Hour) Cases

- ERD does not have initiatory powers except when child labor is involved, and so, ERD cannot affirmatively seek out misclassification cases.

- Although we do not keep statistics on this, in wage and hour matters, we receive approximately 15 complaints a month where worker classification is an issue.

    - We accept all wage claims filed and wait for employer to raise the issue during the course of our investigation. If a purported employer tells us that the relationship was not employment, we investigate that as an initial matter.

    - We consider statutory definitions and a six part "economic realities" test.

ERD Enforcement - Misclassification

Economic Realities Test

- **Part One:** The degree of control exercised by the employer;

- **Part Two:** The worker's opportunity for profit or loss based upon his/her managerial skills;

- **Part Three:** The worker's investment in equipment or employment of helpers;

- **Part Four:** The degree of special skill required for the work;

- **Part Five:** The degree of permanence of the relationship between the parties;

- **Part Six:** Whether the services constitute an integral part of the employer's business.

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ERD Enforcement - Misclassification

- We have a Memorandum of Understanding (MOU) with the US Department of Labor, Wage and Hour Division (WHD) under which we can refer misclassification matters to DOL. This helps workers who do not want to file a complaint.
    - We have referred matters to them when the workers are reluctant to file complaints.
    - We are aware of WHD success in some of these wage matters.

ERD Enforcement - Misclassification

Common industries where we find misclassification issues (as reported by investigators):

- Construction industry
- Trucking
- Entertainers (and sometimes they are independent)
- Exotic dancers
- Small businesses
- Seasonal businesses
- Home health industry
- Cleaning companies
- Gyms / Personal trainers

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ERD Enforcement - Misclassification

Civil Rights Complaints

- Individuals who believe they have been discriminated against file complaints under the Wisconsin Fair Employment Act (WFEA). The definitions of employer and employee under the WFEA are limited, so case law has also shed light on interpreting the WFEA.
- Under the Civil Rights Laws we enforce, we look to the hybrid common law right of control test / economic realities test that was adopted by federal courts. *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).
- The test looks to the purported employer's right to control the means and manner of the worker's performance as the most important factor, but also considers eleven additional factors.

ERD Enforcement - Misclassification

Eleven Additional Factors

1. The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision.
2. The skill required in the particular occupation.
3. Whether the "employer" or the individual in question furnishes the equipment used and the place of work.
4. The length of time during which the individual has worked.
5. The method of payment, whether by time or by the job.
6. The manner in which the work relationship is terminated: i.e. by one or both parties, with or without notice and explanation.
7. Whether annual leave is afforded.
8. Whether the work is an integral part of the business of the employer.
9. Whether the worker accumulates retirement benefits.
10. Whether the "employer" pays social security taxes.
11. The intention of the parties.

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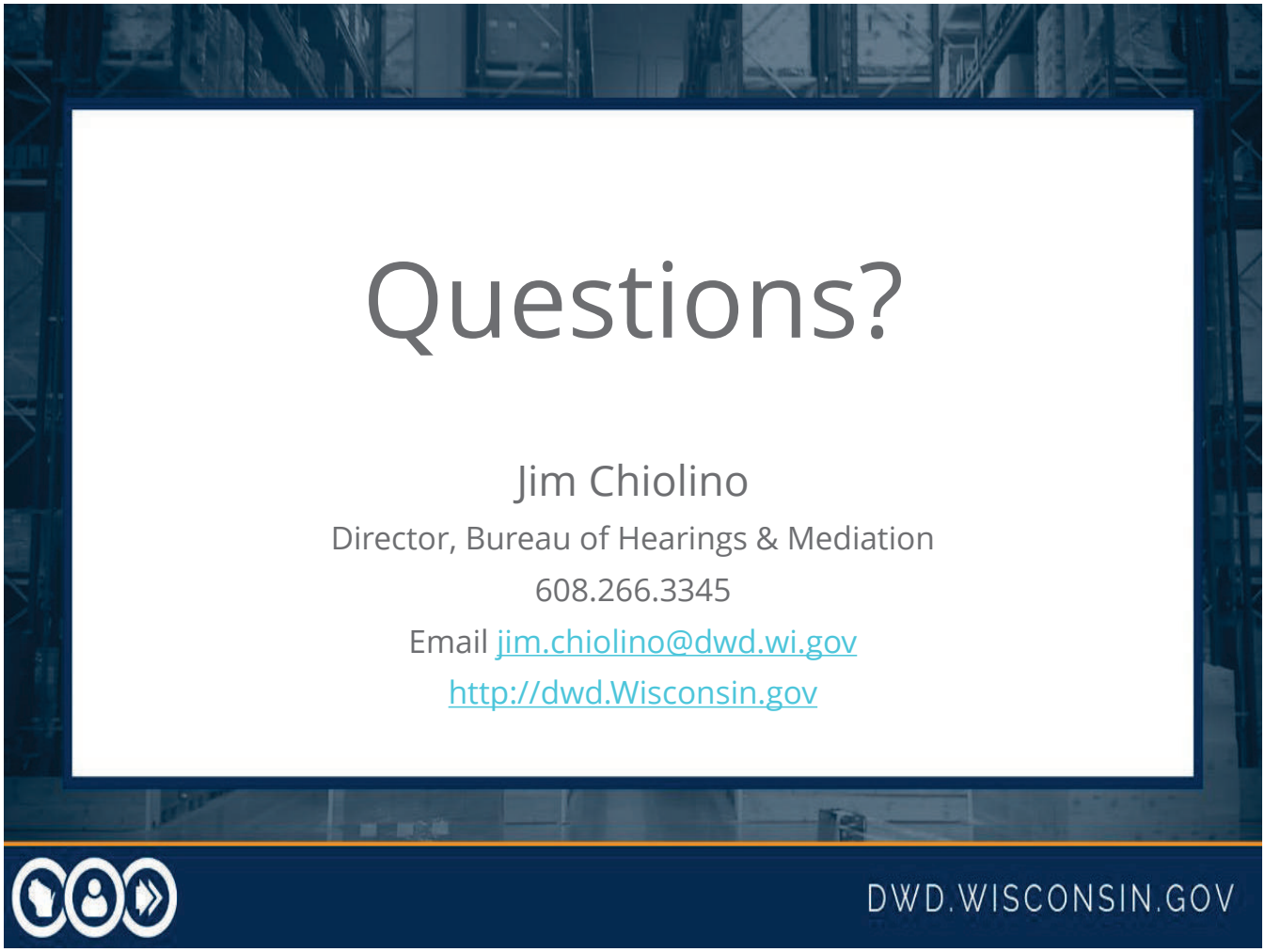
ERD Enforcement - Misclassification

- In the Civil Rights process, the question of coverages is a question of law often left to the Administrative Law Judges (ALJs) to decide after hearing.

- ALJs report that they rarely hear cases involving a classification issue. Again, we do not have statistics on use of affirmative defenses, so this is simply our impression.



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Department of Workforce Development

Worker Classification

Welcome! This site was designed to provide employers with a clear and understandable process to assist them in determining if their workers are employees or independent contractors.

The questions in the evaluation process are derived directly from Wisconsin statutes that govern the classification of workers. We hope this site is helpful both to employers and others involved in worker classification.

Is a Worker an "Employee" or an "Independent Contractor"?

Employers are required by law to correctly classify each worker as either an "employee" or "independent contractor."

Legal Obligations

It is important for employers to correctly classify their workers. Worker classification determines whether or not the employer has legal obligations under the law for unemployment insurance, worker's compensation, wage payments, work hours, record keeping and civil rights protections. There are consequences for misclassifying or attempting to misclassify a worker as an independent contractor.

Steps to Classify a Worker

This website will guide you through Wisconsin's worker classification laws. Select the appropriate law(s) to begin the process to evaluate how to correctly classify a worker as either an employee or independent contractor:

Unemployment Insurance	Worker's Compensation
Labor Standards	Civil Rights

Disclaimer

Employee or Independent Contractor

Why it Matters

Worker classification is important to employers because the correct classification determines whether the employer has legal obligations for:

- Unemployment Insurance
- Workers Compensation
- Wage Payments
- Work Hours
- Record Keeping
- Civil Rights Protections

When employers intentionally misclassify workers as independent contractors, they avoid:

- Unemployment Insurance Taxes
- Workers Compensation Coverage
- Withholding State and Federal Income Taxes
- Paying Social Security and Medicare Taxes

Employers who misclassify workers as independent contractors gain an unfair competitive advantage

Legal Consequences

Under the law, workers are presumed to be employees and subject to tax unless determined by law to be independent contractors. An employer found to be utilizing misclassified workers may be liable for additional tax, interest and penalties. Employers engaged in the construction trades may also be subject to a stop work order. In addition, employers engaged in the painting or drywall finishing of buildings or other structures who willfully provide false information to DWD for the purpose of misclassifying or attempting to misclassify a worker as an independent contractor can be fined $25,000 for each violation.

Steps to Classify a Worker

DWD has developed a website to help employers correctly classify their workers:

http://dwd.wisconsin.gov/worker_classification

This online test takes employers through each factor in the law that is used to determine whether a worker is an independent contractor. The website also provides employers with real life case examples and case law to help them evaluate whether their workers are independent contractors.

If a worker does not meet the independent contractor criteria, report the worker as an employee and file wage and tax reports at **http://dwd.wisconsin.gov/uitax.**

The decision of an employer to classify a worker as an independent contractor is subject to review and determination by the department.

Report Suspected Misclassified Workers

If you suspect an employer is utilizing misclassified workers, please contact us:

- E-mail: **workermisclass@dwd.wisconsin.gov**
- Call: **(608) 261-5835**

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UCD-17430-P (N. 06/2013)

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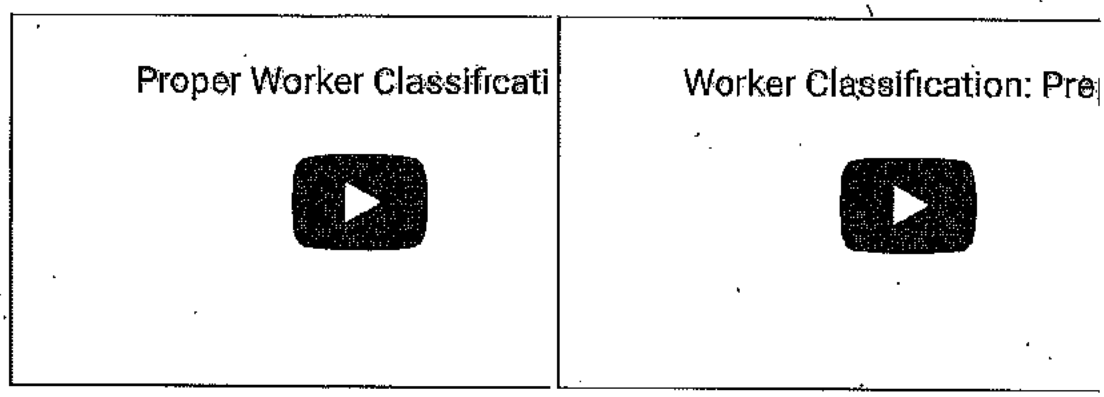
Unemployment Insurance - Worker Classification

Is a Worker an "Employee" or an "Independent Contractor"?



Wisconsin employers (referred to as "employing units" in the unemployment insurance law until unemployment insurance coverage or an employee/employer relationship is established) have an obligation under the unemployment insurance law to classify workers correctly as either "employees" or "independent contractors". Employees are covered by the unemployment insurance law; independent contractors are not covered.

If a worker is or has been "performing services for pay" for an employing unit, there is a presumption in the law that the worker is an "employee," not an independent contractor. That presumption can only be overcome by evidence under the applicable unemployment insurance law that the worker is an independent contractor.

NOTE: The department has utilized the term "employer" in this website with the recognition that not all "employing units" are covered under the unemployment insurance law or have employee/employer relationships with their workers. Nevertheless, for ease of discussion in the context of deciding whether a worker is an independent contractor or an employee, the term "employer" is frequently used, rather than "employing unit."

Compliance and Penalties

The department works to ensure that workers are properly classified as employees or independent contractors through compliance programs. If an employer is found to be improperly classifying workers as independent contractors, penalties may result.

Steps to Classify a Worker

Choose Category of Employer

The first step in the process of determining an employer's obligation under the unemployment insurance law is to determine which of the following categories describes the employer:

- **General Private Employers** (services performed for any other person or entity)
- **State and local government employers** (service performed for a unit of state or local government)
- **Nonprofit employers** (services performed for an organization that is described in §501(c)(3) and exempt from federal income tax under §501(a) of the Internal Revenue Code)
- **Trucking employers** (services performed as a truck driver for a licensed motor carrier that leases a vehicle from the contract operator)
- **Logging employers** (services performed as a piece cutter or skidding operator for a forest products manufacturer or logging contractor)
- **Indian tribal government employers** (services performed for an Indian tribe that is federally recognized under 25 USC 450B(e))

Select the appropriate employer category to continue to worker classification tests:

General Private Employers	State and Local Government
Nonprofit Employers	Trucking Employers
Logging Employers	Indian Tribal Government

Compliance

The department works to ensure that workers are properly classified as employees or independent contractors through the field audit process and worksite compliance investigations.

Department field auditors conduct routine periodic examinations of employer records. The specific audit objectives include investigating alleged independent contractor issues, determining compliance with unemployment insurance reporting requirements, and investigating suspected unemployment insurance benefit fraud.

The department is authorized by Wis. Stat. § 103.06, to conduct compliance investigations at construction worksites as defined in Wis. Stat. § 108.18 (2)(c) to determine if workers are being properly classified as employees or independent contractors.

Penalties

If an employer is found to be utilizing misclassified workers, the employer may be liable for additional tax, interest and penalties. If as a result of an investigation an employer is found to be utilizing misclassified workers, additional tax, interest and civil penalties, including the issuance of stop work orders, may result. In addition, an employer may be subject to criminal penalties for intentional misclassification.

Administrative Penalty for Intentional Misclassification:

Wis. Stat. § 108.221(1) provides that employers engaged in construction as described in Wis. Stat. § 108.18 (2)(c), or who are engaged in the painting or drywall finishing of buildings or other structures, who knowingly and intentionally provide false information to the department for the purpose of misclassifying or attempting to misclassify an employee, shall for each incident, be assessed a penalty by the department in the amount of $500 for each employee who is misclassified, not to exceed $7,500 per incident.

The department shall consider the following factors in determining whether an employer knowingly and intentionally provided false information to the department: (1) whether the employer was previously found to have misclassified an employee in the same or substantially similar position; and (2) whether the employer was the subject of litigation or a government investigation relating to worker misclassification and the employer, as a result of that litigation or investigation, received an opinion or decision from a federal or state court or agency that the subject position or a substantially similar position should be classified as an employee. The statute provides those factors are non-exclusive; therefore, the department may also consider other factors.

Criminal Penalty for Intentional Misclassification:

Under Wis. Stat. § 108.24 (2m), any employer engaged in construction as described in § 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures who, after having previously been assessed an administrative penalty by the department under § 108.221 (1), knowingly and intentionally provides false information to the department for the purpose of misclassifying or attempting to misclassify an individual as a nonemployee shall be fined $1,000 for each employee who is misclassified, subject to a maximum fine of $25,000 for each violation.

The department may refer violations of this subsection for prosecution by the department of justice or the district attorney for the county in which the violation occurred.

Administrative Penalty for Coercion:

Under Wis. Stat. § 108.221 (2) (c), any employer described in § 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures who, through coercion, requires an individual to adopt the status of a nonemployee shall be assessed a penalty by the department in the amount of $1,000 for each individual so coerced, but not to exceed $10,000 per calendar year.

Employers described in Wis. Stat. § 108.18 (2)(c), include those engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects.

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Worker's Compensation - Worker Classification

Is a Worker an "Employee" or an "Independent Contractor"?

Employers are required by law to correctly classify each worker as either an "employee" or "independent contractor" for purposes of the employer's obligations under the law for worker's compensation insurance.

The worker's compensation insurance law uses a definition of "employee" (with exceptions) to separate those individuals (workers) whose employer is obligated to provide worker's compensation benefits (employees) from those whose employer is not obligated to provide worker's compensation benefits (independent contractors).

The Wisconsin Worker's Compensation Act (Act) defines an employee as "every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees" but not including (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer unless the employer elects to cover them."

It is important that you carefully read the definition of "employee" and the exceptions in the worker's compensation law: Wis. Stats. 102.07(4)(a) and 102.07(8).

Steps to Classify a Worker

If you are an employer or a worker and want to determine how to properly classify a worker as either an employee or an independent contractor for worker's compensation insurance, continue to the worker classification test to begin the process:

Begin the Process

Definitions

Any Contract of Hire

A contract of hire means that the person performs services for which he or she is compensated. Compensation is something of value and may be cash or in-kind.

Domestic Servant

Although neither the statutes nor case law provide a definition of "domestic servant" as it is used in s. 102.07(4) of the Act, the department has consistently ruled that persons hired in a private home to perform general household services such as nanny, baby-sitting, cooking, cleaning, laundering, gardening, yard and maintenance work and other duties commonly associated with the meaning of domestic servant, meet the definition of domestic servant intended by the Act.

Trade, business, profession or occupation of the employer

Cornelius v. Industrial Commission, 242 Wis. 183, 185 (1943) defines a trade or business as an occupation or employment habitually engaged in for livelihood or gain. If a person's employment is in the trade, business, profession or occupation of the employer, he or she is an employee, no matter how casual or isolated the employer's trade, business, profession or occupation may be. For example, typically a home-owner who hires someone to mow his or her lawn is not an employer subject to the Act because being a home-owner is not associated with a trade, business, profession or occupation.

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Labor Standards

Is a Worker an "Employee" or an "Independent Contractor"?

Employers are required to correctly classify each worker as either an "employee" or an "independent contractor" for the purposes of the employer's obligations under the wage and hour laws.

The wage and hour laws contain definitions of "employee" to separate those individuals (employees) who have protections under the wage and hour laws from those individuals (independent contractors) who do not. These definitions of "employee" do not determine which individuals should or should not be paid under prevailing wage laws, Secs. 66.0903 and 103.49, Wis. Stats.

The statutes enforced by the Labor Standards Bureau contain **three definitions of employee**:

- Section 103.001 (5) of the Wisconsin employment regulations law defines an employee as any person who may be required or directed by any employer in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.
- Section 104.01 (2) (a) of the Wisconsin minimum wage law defines an employee as every individual who is in receipt of or is entitled to any compensation for labor performed for any employer.
- Section 109.01 (1r) of the Wisconsin wage payments, claims and collections law defines an employee as any person employed by an employer, except that "employee" does not include an officer or director of a corporation, a member or manager of a limited liability company, a partner of a partnership or a joint venture, the owner of a sole proprietorship, an independent contractor, or a person employed in a managerial, executive, or commissioned sales capacity or in a capacity in which the person is privy to confidential matters involving the employer-employee relationship.

The Labor Standards Bureau presumes that a worker is an employee unless the worker meets one of the exceptions listed in sections 104.01 (2) (b) and 109.01 (1r) of the Wisconsin Statutes.

Note: The Labor Standards Bureau also follows interpretations of the U.S. Department of Labor's Wage and Hour Division in this regard.

See U.S. Department of Labor Guidance - Wage and Hour Division.

Steps to Classify a Worker

If you are an employer or a worker and want to determine how to properly classify a worker as either an employee or an independent contractor for wage and hour laws continue to the worker classification tests to begin the process:

Begin the Process

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Civil Rights - Worker Classification

Is a Worker an "Employee" or a "Non Employee"?

The statutory definition of "employee" is found in Section 111.32 (5) of the Wisconsin Fair Employment Act. Section 111.32(5) of the act states that an "employee" does not include any individual employed by his or her parents, spouse or child. The definition of employer is found in Section 111.32 (6) of the act. These definitions are limited, so in Wisconsin the definitions of employee, non employee and employer are primarily developed in case law interpreting the Wisconsin Fair Employment Act.

Steps to Classify a Worker

If you are employer or a worker and want to determine how to properly classify a worker as either an employee or a non employee under the Wisconsin Fair Employment Act, continue to the worker classification tests to begin the process:

Begin the Process

Department of Workforce Development
Secretary's Office
201 E. Washington Avenue
P.O. Box 7946
Madison, WI 53707
Telephone: (608) 266-3131
Fax: (608) 266-1784
Email: sec@dwd.wisconsin.gov

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

AGENDA

Wednesday, September 25, 2019
9:15 am – 12:00 pm
McMillan Memorial Library
490 E. Grand St.
Wisconsin Rapids, WI 54494

Identifying an Independent Contractor
What are the tests or standards? How do they work?

Welcome

9:15-9:35 Conflicts of Interests/Ethics, Open Meetings and Public Records
DWD Chief Legal Counsel, Pam McGillivray

Perspectives from DOR and DWD

9:35 – 10:05 Department of Revenue
10:05 -10:50 Unemployment Insurance Division
10:50-11:20 Workers Compensation Division
11:20 – 11:50 Equal Rights Division
11:50-12:00 Discussion

Adjournment

*****For press inquiries including interview requests, please contact the DWD Communications Office:

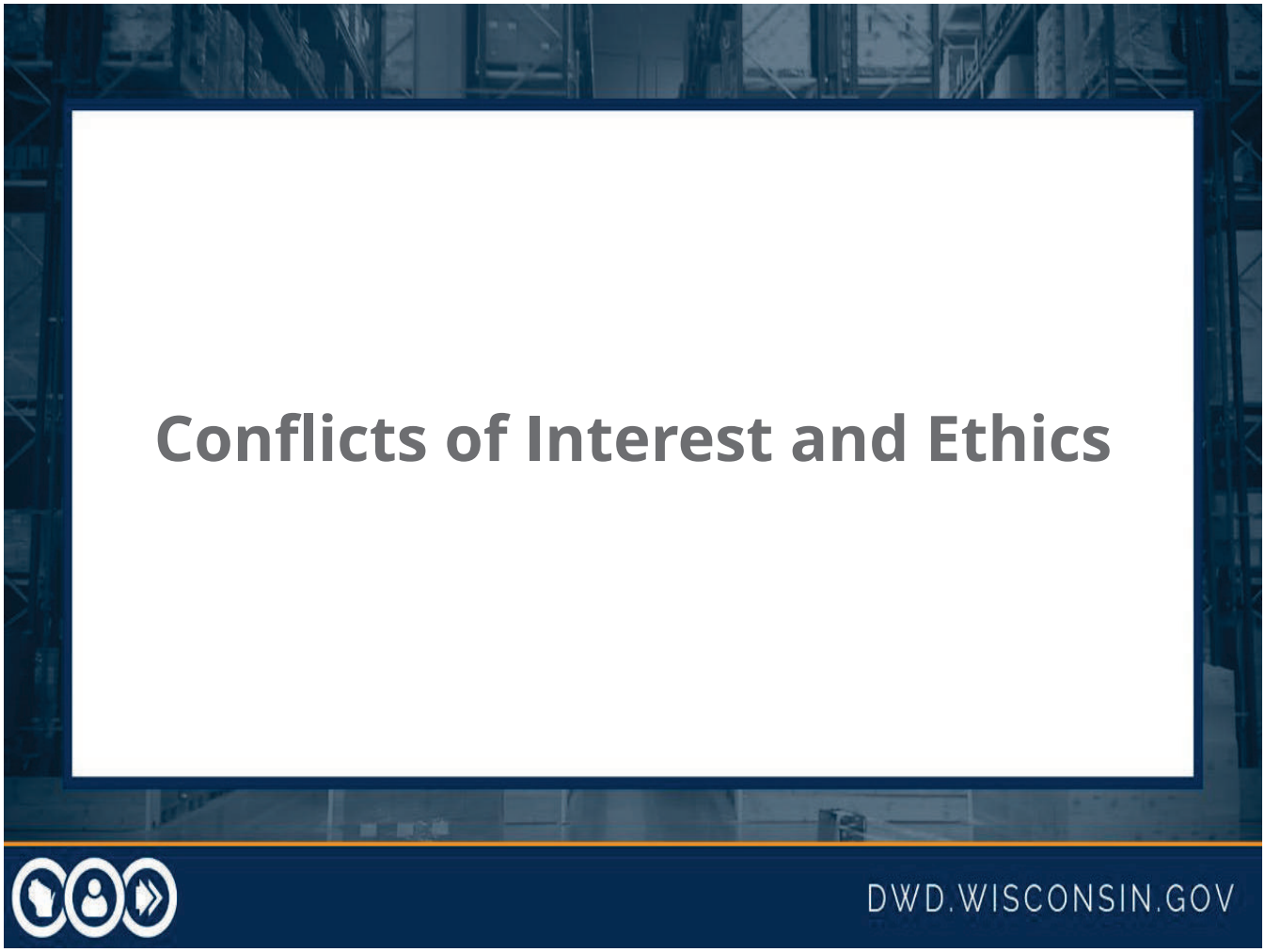
Media Line – 608-266-2722 or E-Mail – DWDSOCommunicationsOffice@dwd.wisconsin.gov

Task Force on Misclassification and Payroll Fraud

PAMELA McGILLIVRAY
Chief Legal Council
Department of Workforce Development

Topics

- Conflicts of Interest and Ethics
- Open Meetings
- Public Records



Conflicts of Interest and Ethics for State Public Officials

- 2019 Executive Order #20 created the Joint Enforcement Task Force on Worker Misclassification to propose legislation, rules, or policy to address misclassification of workers

- Task force members appointed by Governor are “State Public Officials”

Long-standing statutory policy:

- "The legislature hereby reaffirms that a state public official holds his or her position as **a public trust**, and any effort to realize substantial personal gain through official conduct is a violation of that trust."

Wis. Stat. § 19.45

Balanced with …

- "The legislature… recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government."

Wis. Stat. § 19.45

Restrictions on state public officials:

- A state public official may not use his or her position to produce or assist in producing a substantial direct or indirect benefit for him or herself, immediate family, or an associated organization.

Wis. Stat. §§ 19.45, 19.46

Nonetheless, SPO may participate where there is a private interest **if**:

- The action will affect a whole class of similarly-situated interests;
- The private interest is not significant when compared to all affected interests in class;
- The action's effect is neither significantly greater nor less than upon other class members.

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The Wisconsin Open Meetings Law

- Wis. Department of Justice – Office of Open Government, October 2016

- https://www.doj.state.wi.us/office-open-government/open-government-law-and-compliance-guides

Open Meetings Law
Wis. Stat. § 19.81

- "In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that **the public is entitled to the *fullest and most complete information* regarding the affairs of government as is compatible with the conduct of governmental business**."

Task Force is a "governmental body"

- All Task Force meetings
  - Must be preceded by public notice, and
  - Must be held in a public place that is open and reasonably accessible to all members of the public.

A “meeting ” occurs whenever:

- Members **convene** for the **purpose** of conducting governmental business; and
- The **number** of members present is sufficient to determine the body's course of action

State el rel. Newspapers v. Showers, 135 Wis. 2d 77 (1987)

Meetings presumed open

- Meetings begin in open session
  - Citizens right to attend and observe
  - Allow recording, filming, or photographing the meeting

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Meetings presumed open (cont.)

- By motion, may go into closed session
  - Votes of each member must be recorded
  - Chair must announce the statutory exemption authorizing closed session and the nature of the business to be considered

Public Records

The Wisconsin Public Records Law

- Wis. Department of Justice – Office of Open Government, October 2016

- https://www.doj.state.wi.us/office-open-government/open-government-law-and-compliance-guides

Public Records Law
Wis. Stat. § 19.31

- The public records law "shall be construed in every instance with **a presumption of complete public access, consistent with the conduct of government business**. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

The Task Force must produce records upon request

- "Record" is "[a]ny material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which **has been created or is being kept by** an authority."

Wis. Stat. § 19.32(2)

Not a "record"

- Drafts, notes, and preliminary documents
- Published material available for sale or at library
- Purely personal property
- Material with limited access rights, such as copyrights or patents

Emails, text messages, and documents on private accounts

- May be “records”
- Content determines whether it is a “record”, not the medium, format or location
- **Personal materials on the same private accounts are not subject to disclosure**

Sufficient request

- May be in writing or oral
- “Magic words” not required
- Must be reasonably specific as to time and subject matter
- Must reasonably describe the information or records requested

Response

- As soon as practicable, without delay:
  - Provide records
  - Deny or partial denial
  - Respond that there are no records

If Task Force receives a request:

- DWD will assist with the response
- Do not delay – forward the request to DWD Legal: OpenRecords@dwd.wisconsin.gov
- Council members will likely need to search for responsive records

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Questions?
PAMELA McGILLIVRAY
Chief Legal Council
(608) 261-6705
PamelaR.McGillivray@dwd.Wisconsin.gov
www.dwd.wisconsin.gov
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Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification

Jayne Kulberg

Wisconsin Department of Revenue

September 25, 2019

Tony Evers, Governor

Peter Barca, Secretary

This presentation is an informal explanation and is not a guidance document as defined in sec. 227.01(3m)(a), Wis. Stats.

Objectives

- Department of Revenue Mission
- Wisconsin Statutes
- Employee vs Independent Contractor
- What is DOR doing?

DOR Mission

- Administer Wisconsin's tax system to provide revenue to fund state and local government services.

General Statutes

- Sec. 71.63(2), Wis. Stats.

- "Employee" means a resident individual who performs or performed services for an employer anywhere or a nonresident individual who performs or performed such services within this state...

General Statutes

- Sec. 71.63(3), Wis. Stats.
- “Employer" means a person, partnership or limited liability company, whether subject to or exempt from taxation under this chapter, for whom an individual performs or performed any service as an employee of that person, partnership or company ...

General Statutes

- Sec. 71.63(6), Wis. Stats.

- “Wages" means all remuneration..., for services performed by an employee for an employer...

Employment Related Taxes DOR Administers

- Individual Income Tax (IIT)
- Corporation Tax, both C-corp and S-corp
- Partnership Income (P-ship)
- Withholding

Employer Reports to DOR

- Wisconsin income tax withheld from employee wages
- Annual report of income tax withheld
  - # of employee W-2s
  - # of 1099s with Wisconsin income tax withheld

Employer & Payer Report to DOR

- Information returns
  - W-2s
  - 1099s reporting WI withholding
  - 1099s reporting rents and royalties ($600 or more)
  - 1099s reporting certain nonwage payments ($600 or more)

Employee vs Independent Contractor

Employee

- Issued W-2 by employer
- Employer withholds, unless exempt from withholding or exemption claimed
- Employer claims expenses on its income/franchise tax return
- May have federal misc. itemized deduction for unreimbursed employee expenses (pre-2018)

Independent Contractor

- May be issued 1099-Misc by entity
- Makes estimated payments for income tax
- Reports income on Sch C or as "other income"
- Claims expenses to offset Sch C income

How Determination Made

- Wisconsin follows federal
- Publication 1779 IC or Emp. Brochure: 3 areas of consideration:
  - Behavioral Control
  - Financial Control
  - Relationship of the Parties
- Publication 15-A **Employer's Supplemental Tax Guide**

Misclassification Impact on Employer

- Sec. 71.74(4) , Wis. Stats. Disallowance of wage deduction

- Sec. 71.82(2)(d) , Wis. Stats. 18% delinquent interest on amounts required to be withheld but not deposited or paid over to the department as required

Employer Impact

Penalties

- Sec. 71.83(1)(a)1m, Wis. Stats. Failure to file information return, $10 per violation
- Sec. 71.83(1)(b)3 , Wis. Stats. Failure to file wage statement, $20 for each failure
- Sec. 71.83(1)(a)2, Wis. Stats. Incomplete or incorrect return, 25% of the amount otherwise payable
- Sec. 71.65(6) , Wis. Stats. Construction contractors- employer willfully misclassifies employee as nonemployee, $25,000 per violation

Misclassification Impact on Mission

- Unreported income by unidentified workers leading to lost income and franchise tax revenue
- Potential that entities and/or workers are operating in Wisconsin and not filing required tax returns
- Difficulty in locating out-of-state workers

What is DOR doing?

- Nexus Section:
  - Review information and documents to determination if an entity has "nexus" requiring the filing of WI income/franchise and/or sales/use tax returns
  - Voluntary disclosure

Nexus

Vendor Law:

- Sec. 77.66 , Wis. Stats.
- Certification for collection of sales and use tax

Nexus Results

Year	# of cases completed	$ collected
June FY17	1512	$30,270,278
June FY18	1965	$46,760,113
June FY19	2036	$64,363,195

Nexus Impact

- Creates a level playing field for WI businesses by ensuring out-of-state businesses file returns and pay taxes to WI
- Of the cases closed, about 33% result in returns being filed
- Once a business is brought into compliance,
  - It continues to file for future years
  - Related entities start to file

DOR Actions

- Comparisons of W-2s and 1099s submitted to the wages, salaries, and labor on the issuer's tax income/franchise tax return (entity level comparison)
- Processing comparison of 1099s and W-2s from employer/payer against the IIT return filed by the taxpayer
- Annual non-filer project to identify and contact entities and individuals who are not filing WI returns
- Publication 166 Withholding Tax Guide

DOR Actions

- Audit and Case activities:
  - Non-filer review by Nexus and/or Audit, including requests to file
  - Filers reviewed by Audit
  - Individual workers referred to IIT for review

Independent Contractor Tests

UNEMPLOYMENT INSURANCE

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Unemployment Insurance Worker Classification

Benefits of Proper Worker Classification for UI Purposes:

- Eliminates unfair competition among employers bidding for work
- Ensures employers are paying their fair share of tax contributions
    - Contributes to a healthy UI Trust Fund – lowering taxes overall for all employers
- Results in proper and timely claims charging
- WI has proportional claims charging
    - Failure to properly classify workers results in possibly one employer being charged for all benefits even though worker worked for multiple employers
- Results in proper application of UI's partial wage formula when the worker is receiving UI benefits
- Worker receives UI benefits when unemployed and meeting all other eligibility requirements

Variations of Worker Classification Tests

- "ABC" Test
  - A.) Worker is free from direction or control, B.) The work performed is outside the usual course of the business operations or is performed outside of the usual location of the business enterprise, and C.) The worker is engaged in an independent trade or business.
- Common Law Test
  - Previously, the IRS used 20 factors to determine whether an employer-employee relationship existed. Currently, the IRS uses common law rules that provide evidence of degree of control and independence which fall into three categories:

    1.) Behavioral, 2.) Financial, and 3.) Type of relationship.
- California Revised Test (AB-5)
  - Codifies the recent CA court decision (*Dynamex*), requiring that employers prove that their workers can meet the three-part ABC test to be classified as independent contractors and exempts from the test certain specific occupations.

History of Wisconsin's Unemployment Insurance Worker Classification Test

- **2007 UIAC agreed bill (2007 Wis. Act 59)** required that the UIAC appoint a committee to study the definition of "employee" under UI law.
- The Report of the Study Committee to Review the Unemployment Insurance Statutory Definition of "Employee" can be found at the link below:

  https://dwd.wisconsin.gov/uibola/uiac/reports/2009eedefinition.pdf

Unemployment Insurance Worker Classification UI Test – Before Jan. 1, 2011

- **Seven of Ten Conditions** - Prior law determined that individuals were independent contractors when the individual met any 7 of the following 10 conditions:
- **Condition 1**: The individual holds or has applied for an identification number with the IRS.
- **Condition 2**: The individual has filed business or self-employment income tax returns with the IRS based on such services in the previous year or, in the case of a new business, in the year in which the services were first performed.
- **Condition 3**: The individual maintains a separate business with his or her own office, equipment materials or other facilities.
- **Condition 4**: The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing services.

Unemployment Insurance Worker Classification UI Test – Before Jan. 1, 2011

- **Seven of Ten Conditions (cont.)**:
- **Condition 5:** The individual incurs the main expenses related to the services that he or she performs under contract.
- **Condition 6**: The individual is responsible for satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.
- **Condition 7**: The individual receives compensation for services performed under a contract on a commission or per-job basis and not on any other basis.
- **Condition 8**: The individual may realize a profit or suffer a loss under contracts to perform such services.
- **Condition 9**: The individual has recurring business liabilities or obligations.
- **Condition 10**: The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

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History of Wisconsin's Unemployment Insurance Worker Classification Test

The UIAC study committee recognized that the test for "employee" status for UI purposes has historically centered around two fundamental factors:

1. Freedom from direction & control
2. Existence of an independently established trade or business

History of Wisconsin's Unemployment Insurance Worker Classification Test

- UIAC approved the study committee's recommendations and included the proposed changes in the **2009 UIAC agreed bill (2009 Wis. Act 287)**.
  - 2009 Wis. Act 287 changed the test for determining employee status for general private employers under UI law.
  - A worker must meet the criteria of **a two-part test to be considered an independent contractor for UI purposes under Wis. Stat. § 108.02(12)(bm).**

1. The worker must perform services free from direction or control of the employing unit, and
2. Be engaged in an independently established trade, business or profession (meets 6 of 9 conditions).

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History of Wisconsin's Unemployment Insurance Worker Classification Test

- The study committee recommended Wisconsin's UI Worker Classification test could be improved by:
  - Eliminating former Conditions #1 and #2
  - Improving clarity, predictability and fairness by using simpler language to establish the criteria of an independently established business – Amended Conditions #3, #4, #6, #7 and #10
  - Retaining in tact the factors that have been observed to be working well – Retained Conditions #5, #8 and #9

History of Wisconsin's Unemployment Insurance Worker Classification Test

- The committee recommended improving the test by specifying direction and control as a separate, stand-alone condition essential for determining whether an individual is an employee.
- The committee's recommendation did not limit the range of factors that could be considered but clearly indicates five essential factors that should be the focus when determining whether an individual performs services free from direction and control.
- The committee recommended that, in addition to being free from direction or control, a worker must satisfy six of nine conditions to be considered an independent contractor.

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UI Definition of Employee – Current Law (For-Profit Businesses)

Wis. Stat. § 108.02(12)(a) – **"'Employee' means any individual who is or has been performing services for pay for an employing unit**, whether or not the individual is paid directly by the employing unit…" unless an exception applies.

The exceptions include:

- Independent contractors for general private employers;
- Independent contractors for government units, nonprofit organizations, loggers, or truckers;
- A sole proprietor; and,
- A partner in a partnership

Two-Part Independent Contractor Test (For-Profit Businesses)

The exception to the definition of "employee" for general private employers:

Wis. Stat. § 108.02(12)(bm) – "An individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than a logger or trucker, if the employing unit satisfies the department that the individual meets the conditions specified in subs. 1 and 2 by contract and in fact"

- Two areas to be assessed:
  1. Free from Direction and Control, **and**
  2. Independently Established Business

Part 1: Free from Direction and Control:
(Five Factors to Assess)

1. Comply with instructions concerning how to perform the services
2. Receives training from the employing unit with respect to the services performed
3. Personally performs the services
4. Services are required to be performed at times or in a particular order or sequence established the employing unit
5. Required to make oral or written reports to the employing unit on a regular basis

Part 2: Independently Established Business
(6 of 9 Conditions Must Be Met)

1. Advertises or otherwise affirmatively holds out as being in business
2. Maintains own office or performs most of the services in a facility or location chosen by the individual or uses own equipment or materials in performing the services
3. Operates under multiple contracts with one or more employing unit to perform specific services
4. Incurs the main expenses related to the services performed under contract

Part 2: Independently Established Business (6 of 9 Conditions Must Be Met)

5. Obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work
6. Services performed do not directly relate to the employing unit retaining the services
7. May realize a profit or suffer a loss under contracts to perform such services
8. Recurring business liabilities or obligations
9. Not economically dependent upon a particular unit with respect to the services being performed

Summary – Current Law (For-Profit Businesses)

- To be considered as an independent contractor, the worker must meet both parts of the two part test
- If the worker meets one part but not the other, the worker is an employee

Unemployment Insurance Worker Classification Tests

In addition to general private employers, Wisconsin UI law has tests for determining independent contractors status for the following categories of employer:

- **Nonprofit employers** - services performed for an organization that is described in § 501(c)(3) and exempt from federal income tax under § 501(a) of the Internal Revenue Code
- **State and local government employers** - service performed for a unit of state or local government
- **Trucking employers** - services performed as a truck driver for a licensed motor carrier that leases a vehicle from the contract operator
- **Logging employers** - services performed as a piece cutter or skidding operator for a forest products manufacturer or logging contractor
- **Indian tribal government employers** - services performed for an Indian tribe that is federally recognized under 25 USC § 450B(e) – utilize the test found under Wis. Stat. § 108.02(12)(bm).

Independent Contractor Test (Nonprofit Employers & Government Units)

The exception to the definition of "employee" for nonprofit employers and state and local government units:

Wis. Stat. § 108.02(12)(c) – "An individual performing services for a **government unit** or **nonprofit organization**, or for any other employing unit in a capacity as a logger or trucker if the employing unit satisfies the department…"

1. Freedom from Direction and Control, and
2. Independently Established Business (5 *Keeler* Factors)
    - These five interrelated factors are described in *Keeler v. LIRC, 154 Wis. 2d 626 (Ct. of App. 1990).*

Independent Business - Five 'Keeler' Factors

- The purpose of this part of the test is to determine if the worker is operating an independent business separate from that of the employer.
- In determining whether the services of the worker were performed as an independently established trade or business in which the individual was customarily engaged, five interrelated factors must be examined. These five interrelated factors are described in Keeler v. LIRC, 154 Wis. 2d 626 (Ct. of App. 1990).
- The five factors should be applied in a manner consistent with the purpose of the unemployment compensation statute: -- "to effect unemployment compensation coverage for workers who are economically dependent on others in respect to their wage-earning status." Larson v. LIRC, 184 Wis.2d 378, 391 (Ct. App. 1994).

Independent Business – Five 'Keeler' Factors (continued)

- **Factor One: Integration** – The services performed directly relate to the activities conducted by the company retaining those services
- **Factor Two: Advertising or holding out** – The individual must make the public aware that he/she is engaged in a business endeavor
- **Factor Three: Entrepreneurial risk** – The individual assumed the financial risk of the business undertaking
- **Factor Four: Economic dependence** - The individual is independent of the alleged employer, performs services and then moves on to perform similar services for another
- **Factor Five: Proprietary interest** – The individual owns tools, equipment, or machinery necessary to perform the services, and has the ability to sell or give away parts of the business enterprise

Independent Contractor Test
Truckers (Motor Carriers and Contract Operators)

The exception to the definition of “employee” for truckers:

- The two-part test is found in Wis. Stat. §§ 108.02 (12)(c)1 and 108.02 (12)(c)2.
    1. Freedom from Direction and Control, and
    2. Independently Established Business
- Each of the two parts of the test is interpreted in detail in **Wis. Admin. Code DWD ch. 105**
- If the employer's and driver's circumstances do not fit the definitions of "carrier" and "contract operator" under Wis. Admin. Code DWD § 100.02, then the test for general private employers under Wis. Stat. § 108.02(12)(bm) should be applied

Independent Contractor Test
Loggers (Piece Cutter or a Skidding Operator)

The exception to the definition of “employee” for piece cutter or a skidding operator (both occupations known generically as "loggers"):

- The two-part test is found in Wis. Stat. §§ 108.02 (12)(c)1 and 108.02 (12)(c)2.
    1. Freedom from Direction and Control, and
    2. Independently Established Business
- Each of the two parts of the test is interpreted in detail in **Wis. Admin. Code DWD ch. 107** (Employment Relationships in the Logging Industry).
- If the employer's and logger’s circumstances do not fit the definitions of "piece cutter" and "skidding operator“ under Wis. Admin. Code DWD § 100.02, then the test for general private employers under Wis. Stat. § 108.02(12)(bm) should be applied


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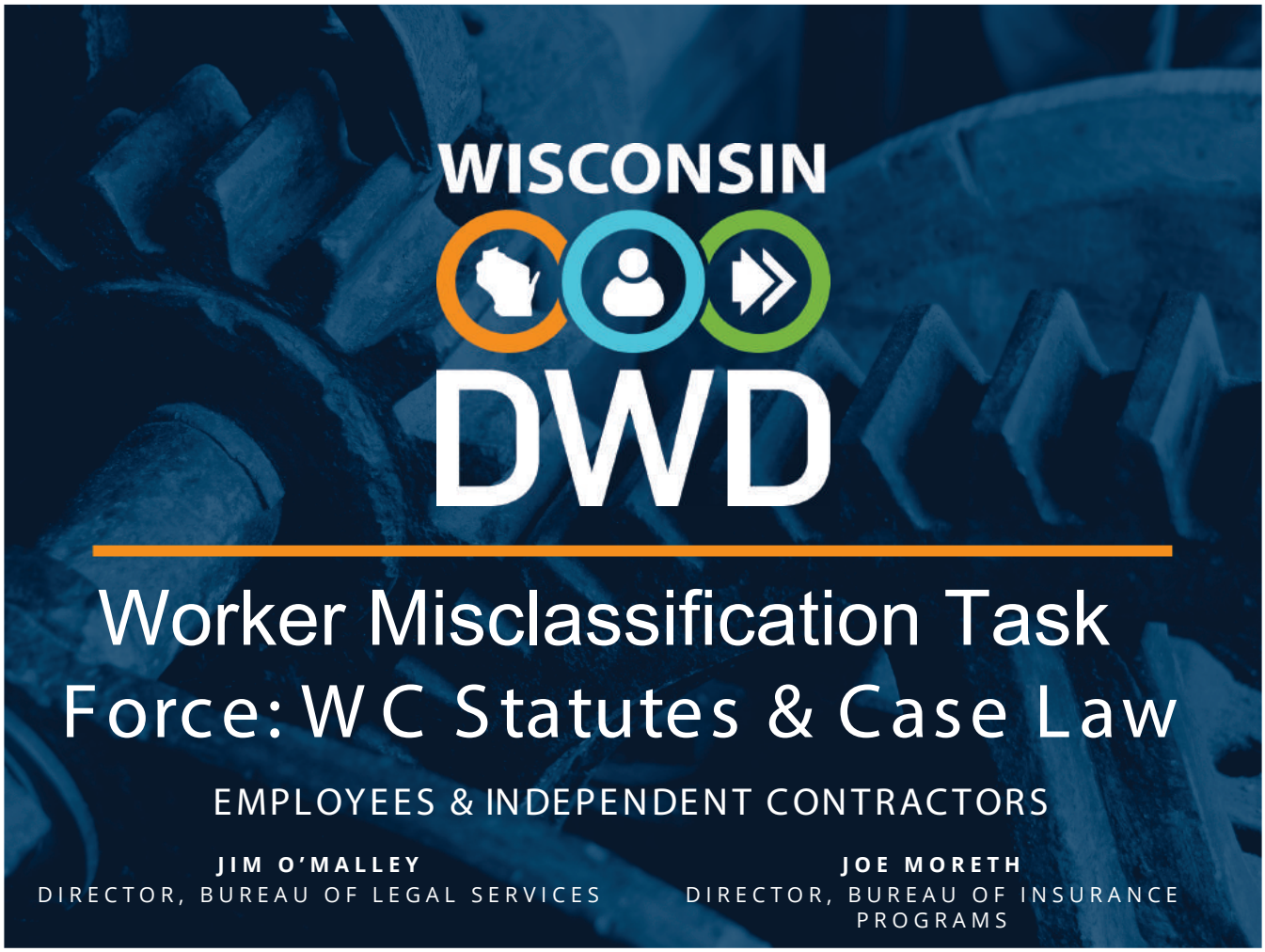

Worker Misclassification Task Force: WC Statutes & Case Law

EMPLOYEES & INDEPENDENT CONTRACTORS

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Employees & Independent Contractors

General definition of employee is included in s. 102.07 (4) (a), Wis. Stats.

"Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or , if employed with the knowledge , actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, ***but does not include the following:***

1. *Domestic servants.*
2. *Any person whose employment is not in the trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them."*

Employees & Independent Contractors

- Domestic servants and people whose employment is not in the course of the trade, business, profession or occupation of the employer are not covered by the ch. 102, Wis. Stats., unless the employer voluntarily elects to cover them.
- Partners, members of limited liability companies and sole proprietors are not covered under ch. 102, Wis. Stats., unless they voluntarily elect to cover themselves.
- Worker's compensation coverage is elected by an employer obtaining an endorsement on a current worker's compensation insurance policy or obtaining a new policy.

Employees & Independent Contractors

- **Every independent contactor is, for purpose of ch. 102, Wis. Stats., an employee of any employer under ch. 102, Wis. Stats.,** for whom he or she is performing services in the course of the trade, business, profession or occupation of such employer at the time of injury **unless the independent contractor meets all nine (9) conditions in s. 102.07 (8) (b), Wis. Stats**.
    - The nine (9) element test in s. 102.07 (8) (b), Wis. Stats., has been in effect since January 1, 1990. The nine (9) element test was developed by a Study Commission created by the Worker's Compensation Advisory Council.
    - To be an independent contractor and not an employee under ch. 102, Wis. Stats., an individual **must meet and maintain all nine (9) of the elements** in s. 102.07 (8) (b), Wis. Stats.

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Nine-Part Test: Condition #1

s. 102.07 (8) (b) 1, Wis. Stats: "Maintains a separate business with his or her own office, equipment, materials and other facilities."

- The separate business requirement is a common factor for the determination of independent contractors. This satisfies the requirement the individual is not dependent on others to do his or her work.
- This condition is evidence the individual has the facilities necessary to do the job and is providing more than just labor. This condition is designed to determine whether the individual makes a significant investment in or incurs a significant obligation related to facilities (equipment or premises), tools or materials used in performing services for others and which are not typically furnished by an employer.

Nine-Part Test: Condition #2

s. 102.07 (8) (b) 2, Wis. Stats: "Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment tax returns with the federal internal revenue service based on the work or service in the previous year."

- True independent contractors are in business and should represent this to the federal government.
- They should have a FEIN, have applied for a FEIN or filed business or self-employment tax returns.
- This is a good test of the individual's intention or decision to be independent.

Nine-Part Test: Condition #3

s. 102.07 (8) (b) 3, Wis. Stats: "Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work."

- This condition adopts the traditional right of direction and control test and clarifies there can be no direction and control over the means by which the work is to be accomplished.
- The good business practice and certainty afforded by the use of contracts is emphasized.
- The means by which the work is completed contributes to the competitive nature of bidding for projects and may cause the work to be profitable or nonprofitable.

Nine-Part Test: Condition #4

s. 102.07 (8) (b) 4, Wis. Stats: "Incurs the main expenses related to the service or work that he or she performs under contract."

- The key point in this subdivision is the requirement the independent contractor has the principle burden for expenses incurred in connection with the work. This reflects the variable of profitability and to the autonomy and self-reliance of the independent contractor.
- Independent contractors do not perform work the employer assigns with the expectation of pay raises. The details of the activity and the compensation are agreed to in advance.

Nine-Part Test: Condition #5

s. 102.07 (8) (b) 5, Wis. Stats: "Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for the failure to complete the work or service."

- The obligation of an independent contractor is contractual with potential sanctions if the work is not completed.

Nine-Part Test: Condition #6

s. 102.07 (8) (b) 6,Wis. Stats: "Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis."

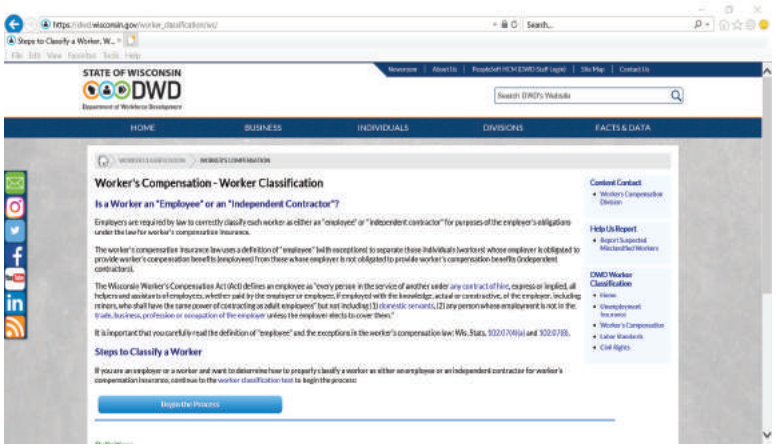
- This subdivision is intended to show that payment is made on factors related to the work performed and not solely on the basis of hours or time expended. It removes the certainty of profitability or outcome for independent contractors.

- Method of payment should be based on the amount of work completed rather than on a simple time factor.

Nine-Part Test: Condition # 7

s. 102.07 (8) (b) 7, Wis. Stats: "May realize a profit or suffer a loss under contracts to perform work or services."

- This subdivision covers a major distinction of an individual being in business rather than being an employee.



Nine-Part Test: Condition # 8

s. 102. 07 (8) (b) 8, Wis. Stats: "Has continuing or recurring business liabilities or obligations."

- Business receipts and expenditures separate legitimate independent contractors from employees.
- True independent contractors have continuing or recurring business liabilities and obligations. The liabilities and obligations occur in a steady succession, time after time.

Nine-Part Test: Condition # 9

- **s. 102.07 (8) (b) 9, Wis. Stats: "The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures."**
- An independent contractor will need to make a profit from the work or services performed to remain in business.
- Business receipts and expenditures separate independent contractors from workers who simply furnish services for a wage or fixed payment with no risk of loss, and whose only investment is the time it takes to do the work.

Employees & Independent Contractors

s. 102.17 (8) (c), Wis. Stats: "The division may not admit into evidence any state or federal law, regulation, or document granting operating authority , or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3."

- Government requirements mandating certain elements of control such as safety and recordkeeping are not fair determinants of whether an employer actually has the right of direction and control over an independent contractor.

Employees & Independent Contractors: Case Law

- There has been very little litigation on the issue of whether workers are employees or independent contractors for purposes of worker's compensation since s. 102.07 (8) (b), Wis. Stats., went into effect on January 1, 1990.

- We are aware **of three (3) published opinions from appellate courts on the issue of whether a worker was an independent contractor or employee** under s. 102.07 (8) (b), Wis. Stats.

Employees & Independent Contractors: Case Law

Jarrett v. LIRC, 233 Wis. 2d 174 (Wis. Ct. App. 2000)

- A trucker was found to be an independent contactor since all nine requirements under s. 102.07 (8) (b), Wis. Stats., were satisfied.

- The Wisconsin Court of Appeals held that s. 102.07 (8) (b), Wis. Stats., supplants the common law and provides the sole test for determining whether a worker is an independent contractor for purposes of ch. 102, Wis. Stats.

Employees & Independent Contractors: Case Law

Acuity Ins. Co. v. Olivas, 298 Wis. 2d 640 (2007)

- The Wisconsin Supreme Court held workers were employees and not independent contractors because they did not satisfy each of the nine (9) requirements under s. 102.07 (8) (b), Wis. Stats.
- The workers incurred no risk of suffering a loss on the job because they supplied only their labor and simple tools and the success or failure of the worker's business did not depend on the relationship between business receipts and expenditures.

Employees & Independent Contractors: Case Law

Lloyd Frank Logging v. Healy, 306 Wis. 2d 385 (Ct. App. 2007)

- An individual hired by the employer to cut trees, who purchased a worker's compensation insurance policy for his sole proprietorship, who did not have any employees, was an employee of the employer for worker's compensation purposes.

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Employees & Independent Contractors: Case Study

Nikola Petrovic v. Labor and Industry Review Commission
345 Wis. 2d 847 (Ct. App. 2012) (Unpublished)

- Individual owned a truck and hauled cargo for other motor transport companies.
- Trucker had a FEIN and filed a Schedule C for several years.
- He was paid only for freight hauling assignments he accepted and he could refuse assignments.
- Trucker paid for all costs of maintaining the truck including license fees, registration and repairs.
- He chose his own route for each hauling assignment he accepted.

Nikola Petrovic v. LIRC Case Study (cont'd.)

- Trucker received 90% of gross receipts for each load that was delivered.
- Trucker was responsible for the expenses, including fuel and tolls, associated with hauling each load of cargo.
- He reported a profit and deducted business expenses including insurance.
- All records necessary for the business were kept at his home or in the truck.
- He spent a period of time driving for another trucking company.
- **Bottom Line: WC Appeals Court affirmed lower court's ruling (which affirmed LIRC's ruling siding with ALJ decision: Trucker was an independent contractor, not an employee, for WC purposes.**

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Independent Contractor Definition under s. 102.07 (8), Wis. Stats.

Under section 102.07 (8)[1] of the Wisconsin Statutes, a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so. The nine-part statutory test set forth under s. 102.07 (8) of the Act, must be met before a person working under another person is considered not to be an employee. To be considered an independent contractor and not an employee, an individual *must meet and maintain all nine of the following requirements:*

1. Maintain a separate business.
2. Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) ***or*** have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (See note below.)
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

Note: When requesting a Federal Employer Identification Number (FEIN) from the IRS, you must inform the IRS that you are ***required by Wisconsin Worker's Compensation law*** to obtain a FEIN. A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07 (8).

---

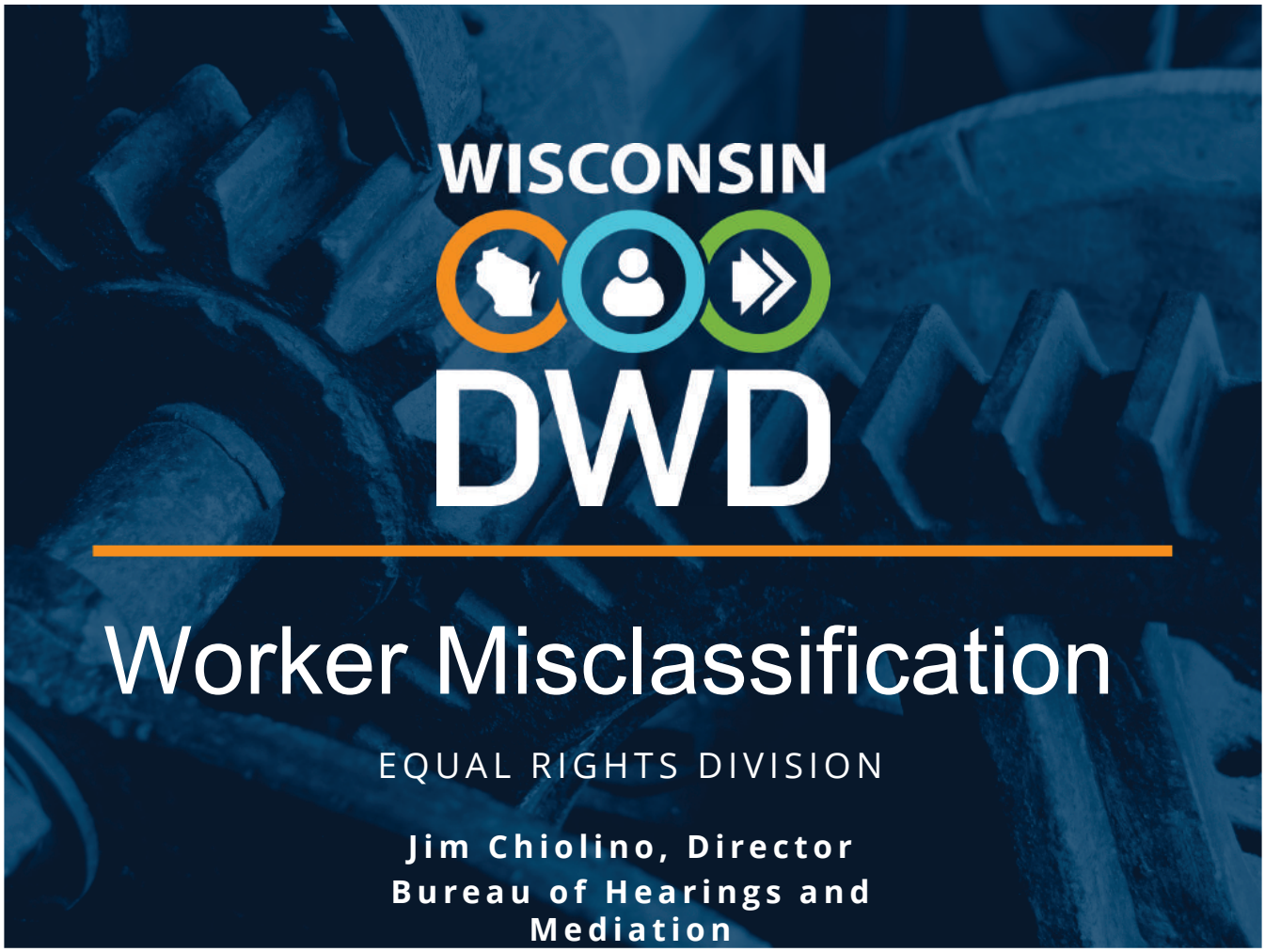
[1] Except as provided in pars. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(bm) A real estate broker or salesperson who is excluded under s. 452.38 is not an employee of a firm, as defined in s. 452.01 (4w), for whom the real estate broker or salesperson performs services unless the firm elects under s. 102.078 to name the real estate broker or salesperson as its employee.

(c) The division may not admit in evidence any state or federal law, regulation, or document granting operating authority, or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.



Worker Misclassification

EQUAL RIGHTS DIVISION

Jim Chiolino, Director
Bureau of Hearings and Mediation

"Employee" Defined

Labor Standards (Wage & Hour) Cases

Wisconsin's labor standards laws include several definitions of "employee."

- Wis. Stat. §103.001(5) defines an employee as any person who may be required or directed by any employer in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.
- Wis. Stat. §104.01(2)(a) of the Wisconsin minimum wage law defines an employee as every individual who is in receipt of or is entitled to any compensation for labor performed for any employer (some specific exclusions are indicated in the statute).

“Employee” Defined

- Wis. Stat. §109.01(1r) of the Wisconsin wage payment act defines an employee as any person employed by an employer, except that "employee" does not include an officer or director of a corporation, a member or manager of a limited liability company, a partner of a partnership or a joint venture, the owner of a sole proprietorship, an independent contractor, or a person employed in a managerial, executive, or commissioned sales capacity or in a capacity in which the person is privy to confidential matters involving the employer-employee relationship.

Labor Standards Laws

Independent contractor, though mentioned in the wage payment law, is not defined. ERD looks to the common law “Economic Realities” test.

- This is a six part test using many factors similar to those examined under other laws. A determination must be based on all of the relevant circumstances.

1. The degree of control exercised by the purported employer
2. The worker’s opportunity for profit or loss based upon his/ her managerial skill
3. The worker’s investment in equipment or employment of helpers
4. The degree of special skill required
5. The degree of permanence of the relationship
6. Whether the services constitute an integral part of the business

Labor Standards Laws

- The Division also looks to the US Department of Labor, Wage & Hour Division (WHD) for guidance in this area since minimum wage and overtime requirements under Wisconsin law and the Fair Labor Standards Act (FLSA) are similar.
  - WHD Fact Sheet 13 spells out the federal test, which is a form of the "Economic Realities" test. Among the factors courts have considered significant:

1. "Integral Part"
2. Permanency of the relationship
3. Investment in facilities & equipment
4. Nature & degree of control
5. Opportunity for profit or loss
6. Amount of initiative, judgment, or foresight in open market competition required
7. Degree of independent business organization & operation

Labor Standards Examples

- Painter
  - 19-year-old woman finds work as a painter
  - Purported employer states she was "breaking away" from her father's construction company and forming her own painting business.
  - Worker states she was hired as an employee to paint (employer was a leasing consultant and had properties that needed painting).
  - Purported employer paid her on a per-job basis and employed her as needed. She was instructed where to report and given supplies.
  - Company alleged she "bid" on projects, but had no proof of that.
  - ERD found her to be an employee.

Labor Standards Examples

- Trucking Industry
  - A trucking firm put out job solicitations in may areas where individuals apply for work, including Indeed.com.
  - When worker was hired, was given a contract to sign and asked to sign up to form a Limited Liability Company registered with the State of Wisconsin.
  - Worker didn't want to do this, but went to work anyway. He hadn't signed anything.
  - Contract contained a duties clause saying he "will provide truck driving as required by Company."
  - Trucking firm wouldn't pay him until he signed the paperwork. He refused and filed a claim with the Equal Rights Division.

"Employee" Defined

Civil Rights Cases

- The statutory definition of "employee" states that an "employee" does not include any individual employed by his or her parents, spouse, or child. Wis. Stat. §111.32(5).
- The definition of "employer" is fairly broad, covering the state and local governments and "any other person engaging in any activity, enterprise or business employing at least one individual." It excludes social or fraternal clubs under ch. 188, with respect to jobs for which the club seeks to employ or employs a member, if the job is advertised only within the membership. Wis. Stat. §111.32(6).
  - Because these definitions are so broad, case law fleshes this out.

Civil Rights Laws

- The ERD uses a hybrid common law "right of control" / "economic realities" test adopted by federal courts. *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979). Adopted by Wisconsin courts in *Moore v. LIRC*, 175 Wis.2d 561, 569 (Ct. App. 1993)
  - Right to control the means and manner of the worker 's performance is the most important factor.
  - There are eleven additional factors that the court must consider.

1. Direction
2. Skill
3. Equipment
4. Time worked
5. Payments
6. Termination
7. Annual Leave
8. "Integral Part"
9. Retirement
10. SSA Taxes
11. Intentions

Civil Rights Case Law

Economic Realities Test

Spirides v Reinhardt, 613 F.2d 826 (D.C. Cir. 1979)

- Despina Spirides was a foreign language broadcaster for Voice of America 's Greek Service from 1968 to 1974. She worked pursuant to a "Purchase Order Vendor" contract and was treated as independent. Her contract was renewed each year.
- In 1974, the Greek Service decided not to renew Spirides ' contract since it had hired two female foreign nationals as employees.
- Spirides felt this was sex discrimination and filed a complaint with EEO office of the agency.
- The agency dismissed without investigation

Civil Rights Case Law

Spirides

- Spirides appealed to the Appeals Review Board of the Civil Service Commission, which found the agency had failed to investigate & therefore violated civil service rules; remanded to the agency.
- EEO Office at the agency again found no evidence of sex discrimination. She appealed to a hearing before a complaints examiner. That examiner found discrimination, but the agency refused to follow the remedy, asserting that Spirides was an independent contractor. A second appeal to the Appeals Review Board affirmed the dismissal.
- She filed an appeal in the District Court. The District Court agreed that Spirides was an independent contractor.

Civil Rights Case Law

Spirides

- She appealed to the Court of Appeals.
- The agency argued that Spirides was not an employee because she was not "appointed to the civil service."
- The Court disagreed, first noting that as a remedial statute Title VII of the Civil Rights Act of 1964 should be liberally construed.
- The Court then enumerated the "economic realities" test… essentially saying that although Spirides was not a civil service employee by way of appointment, she was treated like one, based upon the record. This relied significantly on the application of the common law of agency.
- The **right to control the means and manner** of performance of work is key.

DWD.WISCONSIN.GOV

Civil Rights Case Law

Spirides

- Spirides was provided an office by the agency.
- She worked there for five years.
- The agency provided all the materials for her work.
- She worked for the same supervisor who gave her instructions about voice inflection, reading tempo, and inflection.
- There were gaps in the fact -finding, so the matter was remanded for further proceedings.

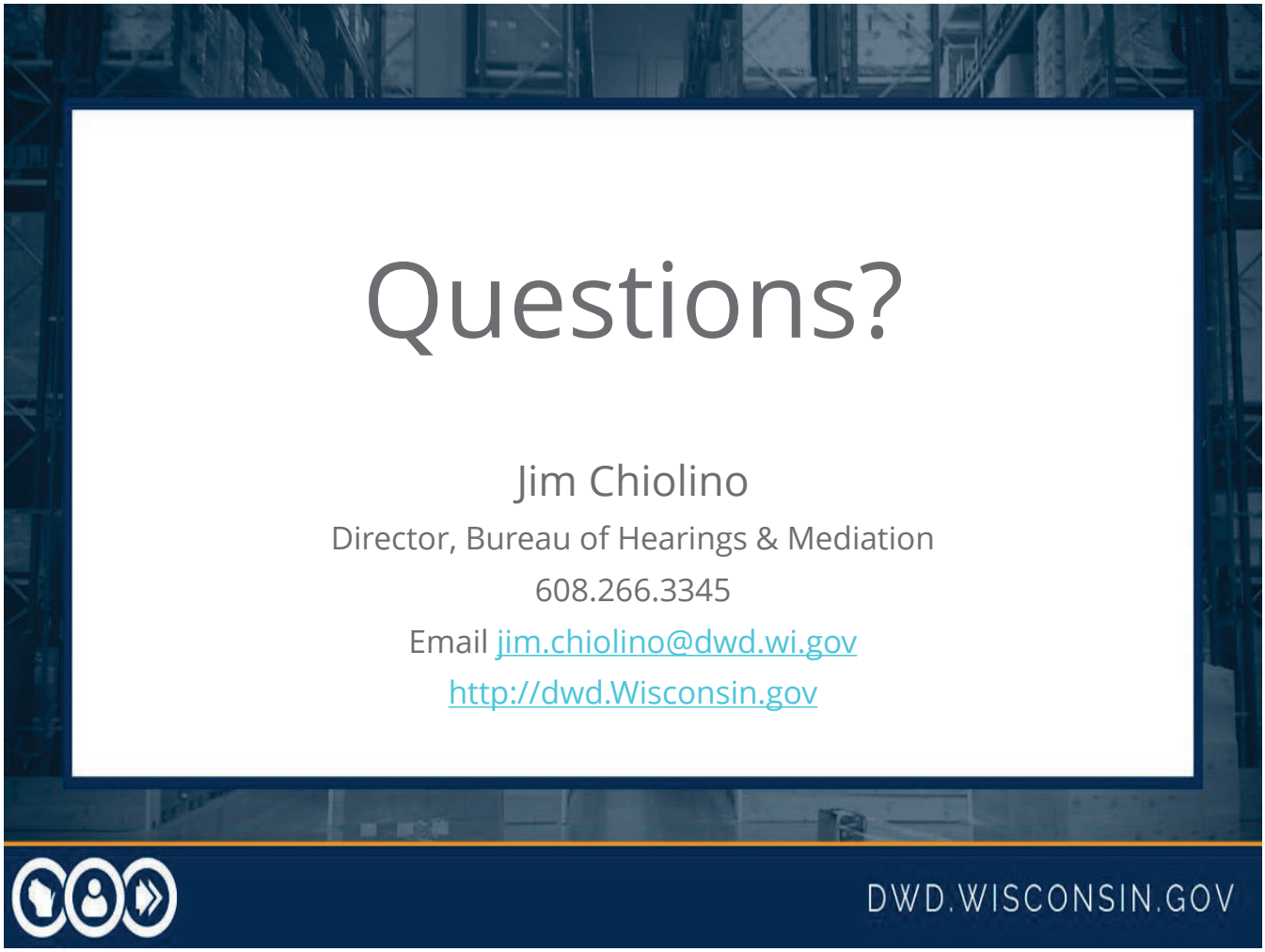
Civil Rights Examples

Sneed v. Milwaukee Board of School Directors, ERD Case No. CR200201543 (June 17, 2003).

- Lois Sneed entered into a professional services contract with the Milwaukee Board of School Directors to provide services as a hearing interpreter for deaf and hearing impaired students. She was terminated from her position. Sneed appealed her termination, claiming that she was an employee and not a contractor. In her petition for review to the Labor and Industry Review Commission (LIRC), Sneed cited an IRS ruling in which the IRS set forth several factors it uses to determine if a worker is an independent contractor.
- The LIRC rejected these arguments stating that Wisconsin adopted the *Spirides* test for determining whether an individual is an employee under the Wisconsin Fair Employment Act.

Civil Rights Examples

- *Ingram v. Bridgeman Machine Tooling and Packaging, Inc.* , ERD Case No. CR200301821 (June 27, 2005).
    - Gary Ingram was hired as a placement, recruitment, and retention specialist by Bridgeman Machine Tooling. Ingram filed a complaint alleging that he was fired in retaliation for filing a complaint about minimum wage problems.
    - The deciding issue in this case was whether Ingram provided his services as an employee or independent contractor. The LIRC stated that Ingram, as the plaintiff, had the burden of proof as to whether he was an employee or an independent contractor.
    - The LIRC then found that Ingram failed to prove the existence of an employment relationship and dismissed.



Department of Workforce Development
Secretary's Office
201 E. Washington Avenue
P.O. Box 7946
Madison, WI 53707
Telephone: (608) 266-3131
Fax: (608) 266-1784
Email: sec@dwd.wisconsin.gov

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

AGENDA

Wednesday, October 23, 2019
10:00 am- 2:00pm
201 W. Washington Ave., Room 121
Madison, WI 53703

Enforcement and Investigation Issues

Welcome

10:00 Welcome

10:05-10:35 Worker's Compensation – Enforcement and investigation process

10:35-11:00 Workers Compensation Ratings Bureau and the Workers Compensation Classification System

11:00-11:45 Unemployment Insurance – Enforcement and Investigation process

11:45-12:30 Lunch/break/networking

12:30-1:00 United States Department of Labor – Wage and Hour Division

1:00-1:15 Worker Exploitation – Minnesota Prosecution

1:15-1:45 UMOS

1:45-2:00 Wrap up – Discussion about next steps

Adjournment

*****For press inquiries including interview requests, please contact the DWD Communications Office:

Media Line – 608-266-2722 or E-Mail – DWDSOCommunicationsOffice@dwd.wisconsin.gov

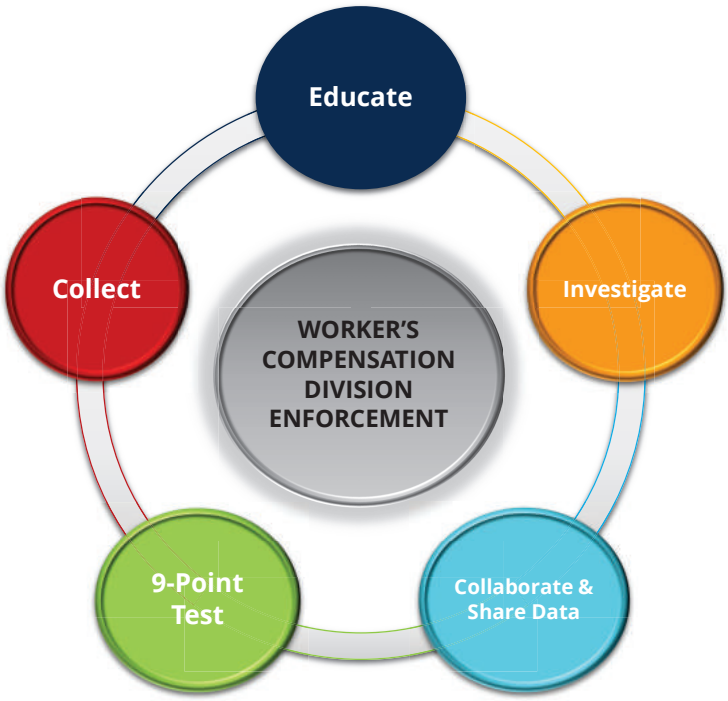
WISCONSIN DWD

Worker Misclassification Task Force: WC Enforcement

LAURIE CONLEY
SECTION CHIEF
UNINSURED EMPLOYERS FUND

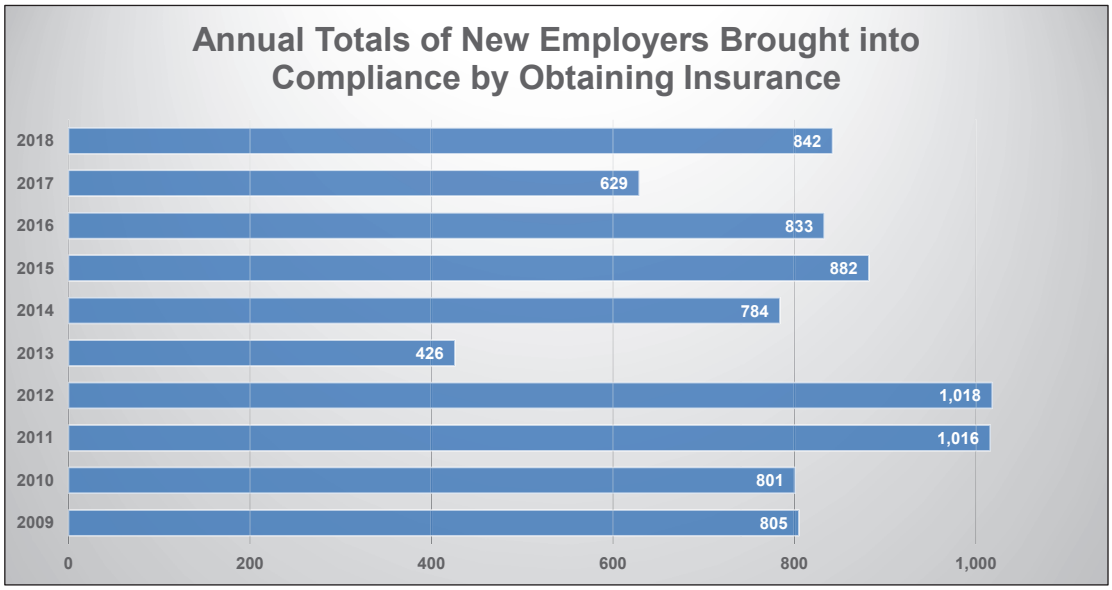
AARON GALAROWICZ
COLLECTIONS SPECIALIST
UNINSURED EMPLOYERS FUND

WC Enforcement



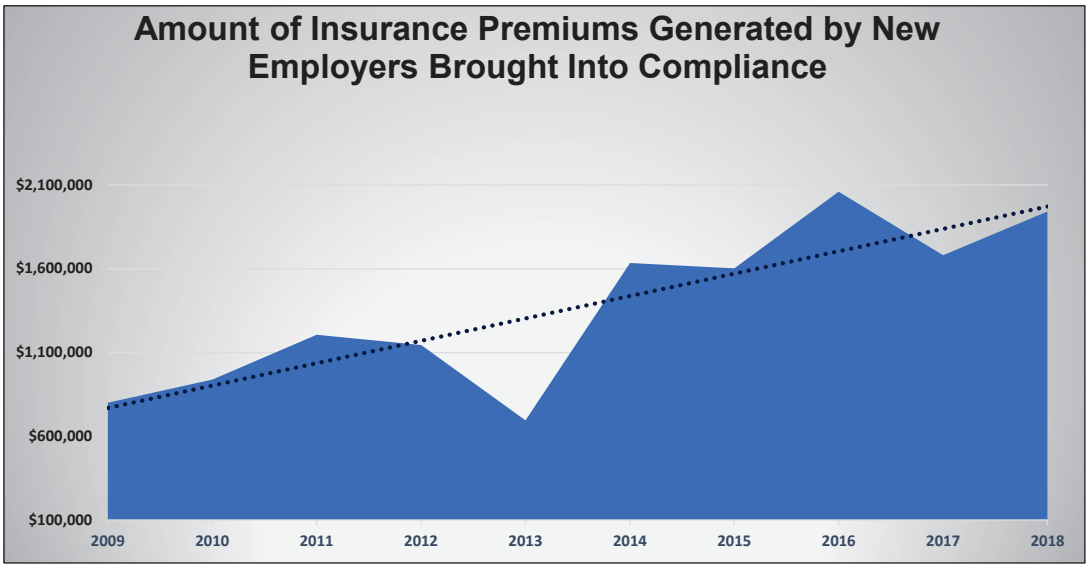
WC Education & Prevention

- WC Division **Validates Proof of WC Insurance**



New Employers ’ Insurance Premiums

- **WC Enforcement:** Upward Trend New Employer Premium Payments

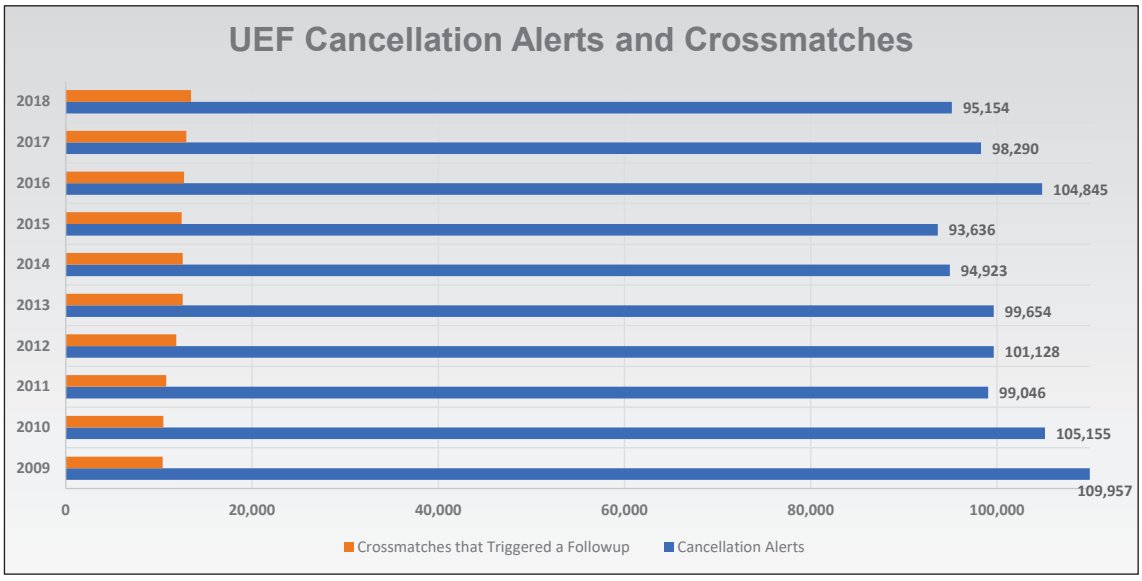


WC Education: Cancellation Notices

- **Raise employer awareness of requirements of WC Act**
- **Employers are notified prior** to expiration of policy
  - **60 days prior** to cancellation
  - **10 days prior** to cancellation
  - **30 days after** cancellation
- **Average number** of notices sent per year: **100,000**
- **Investigation is opened** if no response or if employer's response requires further verification
- Example in packet

Employer Cancellation Notices

- **WC Historical Cancellation Activity**



WC Enforcement Methods & Tools

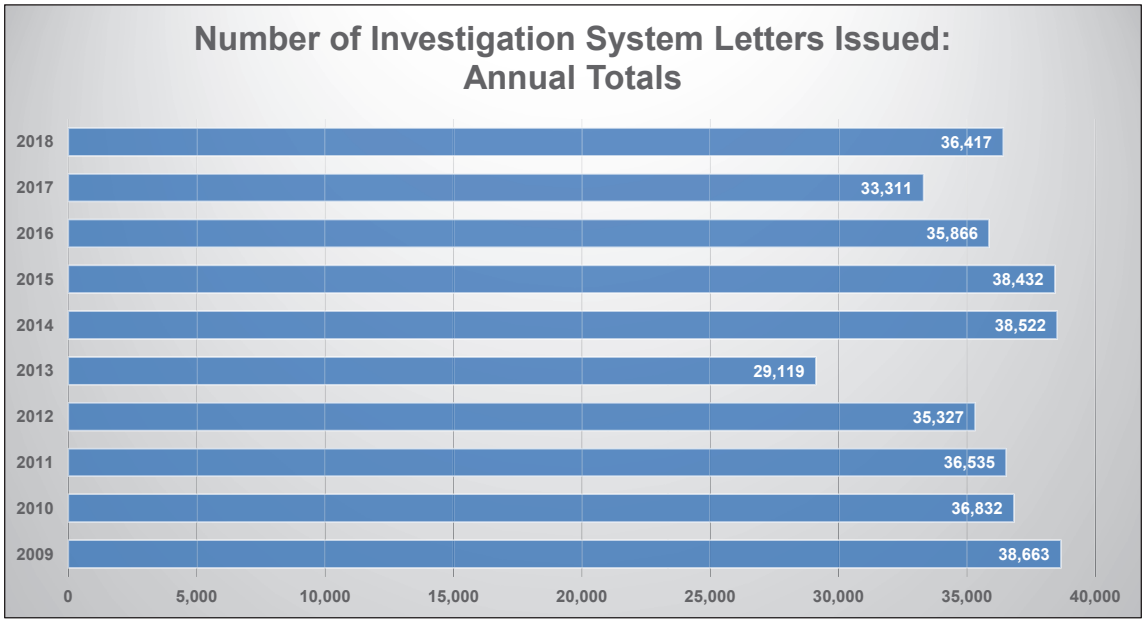
- **Multiple Databases Reviewed for Compliance**
  - **Unemployment Insurance (UI) database** → Does entity have employees?
  - **Wisconsin Compensation Rating Bureau (WCRB) database** → Do they have WC insurance coverage? Is there a lapse in coverage? Did the officers opt out of coverage?
  - **Department of Financial Institutions (DFI) corporate** records → What is the business status? Who are the officers?
- **WC Investigation System Programmed for Automated Cross-Matches**
- **Referrals from public, other agencies**
- **Investigations initiated via letters to businesses**

WC Investigation Team: By the Numbers

From upper left: Jeff Breunig, Norman Eberhardt, Victoria Swenson, Davidian Rumph, Denise Madigan-Doucette, Kathi Ashmore, Rhonda SearVogel

- Staff: **7 Investigators**
- **22,000** investigations/yr
- **20,000** phone calls/yr (approx.)
- Issue about **200** penalties/mo
- Avg. penalty = **$2,567 ($750 min.)**
- Assess **$5.5 million/yr**

WC Investigators Issue 1,000s of Letters/Year



WC Independent Contractor Inquiries

- **Most are resolved through discussion with WC Investigators explaining 9-Pt Test**
- **Of those continuing to maintain they have Independent Contractors, WC Investigators send the E50 form requesting documentation for further review**
- **Many of these are not returned by the employer. With no response, the workers are determined to be employees**
- **Upon receipt of details from the employer, the E51 is sent to each purported Independent Contractor**

WC Independent Contractor Inquiries

- **619 Independent Contractor (IC) investigation inquiries to employers since 2009** (E50) explaining the 9-Point Test and requesting IC names and details
  - **210 Independent Contractor inquiries** to the purported independent Contractors during this period (E51)
- **Also use UI audit information and results** to assist with determinations

WC Investigations: Continued Non -Compliance

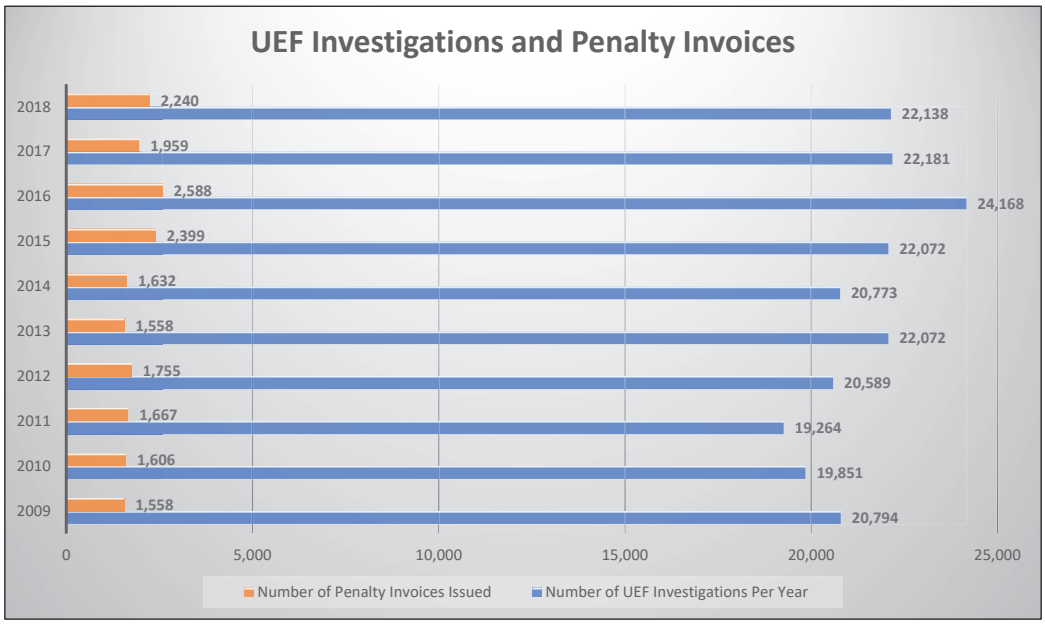
- Use of **progressive enforcement**
- Series of **letters to include information, instructions, and consequences** of non-compliance
- Up to and including **closure of business** (infrequent)
- Often the **letters and phone calls encourage them to comply**

WC Investigations: Non -Compliance

After the Assessment…

- Due **30 days** after it is assessed
- Begin to accrue statutory **interest of 1% per month** after 1 month
- Issue account past due notice

WC Investigates & Issues Penalties



WC Enforcement: Collection Efforts

- Staff of **3 Collection Specialists**
- **UEF System tracks liability** through the collection process
- If payments are not received and a payment plan is not in place, accounts are eligible for **legal action to secure and collect the debt** from the employer and responsible parties
- **Collection tools**
  - Filing a judgment establishing a **lien on real property**
  - **Wage garnishment**
  - **Bank levy**
  - **Intercept of State tax refund, lottery winnings, state contracts**
- Collections average approximately **$400,000 per month**
- Proceeds **pay claims against illegally uninsured employers**

Department of Workforce Development
Worker's Compensation Division
Uninsured Employers Fund
201 E. Washington Ave., Rm. C100
P.O. Box 7901
Madison, WI 53707-7901
Telephone: (608) 266-3046
Fax: (608) 266-6827

STATE OF WISCONSIN
DWD
Department of Workforce Development

WORKER'S COMPENSATION INSURANCE CANCELLATION ALERT

Example

Date: SEPTEMBER 19, 2019 (N)

WCRB #:
Policy #:
Policy Period:
FEIN:

Dear Employer:

This cancellation alert is being sent as a courtesy to bring the potential cancellation of your policy to your attention. The notice is for those employers who must have worker's compensation insurance and are in the process of renewing or replacing their policy. It is intended to help employers avoid penalties resulting from an illegal lapse in worker's compensation coverage by alerting them to the potential termination of their worker's compensation insurance.

No reply is necessary if you have paid or intend to pay your premium due, or if you have obtained or intend to obtain a worker's compensation insurance policy from another insurance carrier prior to the cancellation date of your current policy. Your payment must be received by the insurance carrier prior to the date due to ensure continuous worker's compensation insurance coverage. Worker's compensation insurance policies do not have grace periods for late payment.

Your current insurance carrier PHOENIX INSURANCE COMPANY has notified us that it intends to cancel your worker's compensation insurance policy , effective 10/18/19 at 12:01 a.m.. The reason given by your insurance carrier for the cancellation was NON-PAYMENT OF PREMIUM DUE.

Contact your insurance carrier or insurance agent for a detailed explanation or to ask any questions you have regarding the cancellation, your coverage, the renewal process or payments. If your policy has been renewed, reinstated, replaced, and/or is currently in force, disregard this cancellation alert.

The following penalty information is provided only to advise you about the potential cost of lapsed worker's compensation insurance coverage. The penalty for failure to carry worker's compensation insurance when required, is twice the amount of premium not paid during an uninsured time period or $750, whichever is greater. Under certain circumstances, an employer who has a lapse in worker's compensation insurance coverage can be subject to a penalty of $100 for each day they are uninsured up to 7 days. In addition, an uninsured employer is personally liable for reimbursement to the Uninsured Employers Fund for benefit payments made by the Fund under section 102.81(1) of the Wisconsin Statutes, to an injured employee (or the employee's dependents) of the uninsured employer. The penalties and reimbursements to the Fund are mandatory and non-negotiable.

A reply is necessary only if you are no longer an employer or feel you are no longer required to carry worker's compensation insurance coverage. If either situation applies to you, please provide the information requested on the back of this form and return it to the Worker's Compensation Division, P.O. Box 7901, Madison, WI 53707-7901. Take the time now to complete and return the form. The information is necessary for the Division to determine whether or not you are required to continue your worker's compensation insurance coverage.

Correspondence will continue until your insurance carrier notifies us that your insurance policy has been renewed, reinstated, replaced, or you notify us why you are no longer carrying worker's compensation insurance. If you have questions regarding the necessity to maintain your worker's compensation coverage, call (608) 266-3046.

If you are no longer an employer or feel you are no longer required to carry a worker's compensation insurance policy, please answer the questions below indicating why this business no longer carries worker's compensation insurance coverage. Please provide the information requested and return the form to the Worker's Compensation Division, P.O. Box 7901, Madison, WI 53707-7901 or fax it to (608) 266-6827. Please read the following information before answering questions 1 through 5.

- ▶ Sole proprietors, partners and members of limited liability companies are not counted as employees.
- ▶ Family members count as employees.
- ▶ Corporate officers count as employees.
- ▶ Minors count as employees.
- ▶ Part-time employees count as employees. Whether an employee works part-time or full-time has no bearing on the requirement to carry worker's compensation insurance.

IMPORTANT NOTE REGARDING SUBJECT EMPLOYERS: If an employer that is subject to the Worker's Compensation Act (Act) lays off all his or her employees, the employer may drop its worker's compensation insurance while they have no employees, however, the employer remains subject to the Act. Therefore, because the employer has already become subject to the Act, *if the employer hires an employee at a later date, the employer must have a worker's compensation insurance policy in place on the date any employee begins working,* unless the employer has withdrawn from the Act. (Corporations cannot withdraw from the provision of the Act, but may be eligible to file a Notice of Corporate Officer Option. See note below regarding corporations.)

NOTE REGARDING CORPORATION: A closely held corporation (defined as having 10 or fewer shareholders) that has 1 or 2 corporate officers and no other employees or officers, is not required to have a worker's compensation policy if each officer elects not to be subject to the Act by filing a *Notice of Corporate Officer Option* with the Division. If a closely held corporation has more than 2 officers or any other employee or employees, a worker's compensation insurance policy is required and the exclusion for officers must be made by an endorsement on the policy. An officer who so elects still counts as an employee and the officer's wages count, for the purpose of determining whether the corporation is an employer under s. 102.04(1)(b), Wis. Stats.

CALL US AT (608) 266-3046 if you are not sure whether or not you are subject to the Act or if you are not sure when you are required to have a worker's compensation insurance policy.

Personal information you provide may be used for secondary purposes [Privacy Law, s. 15.04(1)(m)].

1. Has this business closed? ☐ Yes ☐ No
If yes:
On what date did it close? ___/___/___

Is the business closed permanently? ☐ Yes ☐ No

Last date any employee worked: ___/___/___

2. Has this business been sold or transferred? ☐ Yes ☐ No
If yes:
Date the business sold or transferred: ___/___/___

Last date any employee worked for you: ___/___/___

Name of New Owner: _____

Street Address: _____

City: _____

State: _____ Zip Code: _____

3. Is this business a sole proprietorship, partnership or a limited liability company that is currently operating without any employees? ☐ Yes ☐ No
If yes:
Last date any employee worked: ___/___/___

4. Is this an out-of-state employer that no longer has any employees working in the State of Wisconsin? ☐ Yes ☐ No
If yes:
Last date any employee worked in Wisconsin: ___/___/___

5. Is this business a closely held corporation (defined as having 10 or fewer shareholders) with no more than 2 corporate officers and no other employees? ☐ Yes ☐ No

If yes, you must file a Notice of Corporate Officer Option form with the Worker's Compensation Division. You may obtain the form on the division's web site at http://dwd.wisconsin.gov/dwd/forms/WKC/wkc_7602.htm or by calling (608) 266-3046. Return the completed form (with this cancellation alert) to the Worker's Compensation Division, P.O. Box 7901, Madison, WI 53707-7901 or fax the forms to (608) 266-6827.

Authorized Signature	Name Printed	
Title	Telephone Number ( )	Date Signed

If you have any questions regarding your requirement to maintain worker's compensation insurance, please call (608) 266-3046.

FILE:

Department of Workforce Development
Worker's Compensation Division
Bureau of Insurance Programs

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS
Department of Workforce Development

EMPLOYER'S REPORT

October 14, 2019

BIP #:
WCRB #:

RE: WISCONSIN EMPLOYEES ONLY

Example

Wisconsin's Worker's Compensation Act protects employees from undue hardship and employers from liability which may result from a job-related injury. That law requires most employers of Wisconsin workers to carry private worker's compensation insurance and to respond to our requests for information. The same law requires us to make sure that employers comply.

Please complete and return pages 1 & 2 of the following form to us within 15 days of receipt to comply with the laws regulating worker's compensation. The rest of this form will answer your questions about the purpose of the Worker's Compensation Act, conditions that make an employer liable, penalties for noncompliance, and special exemptions. Call us at (608) 266-3046 if you have any other questions. *Send the completed form within 15 days to:* Worker's Compensation Division, Bureau of Insurance Programs, P.O. Box 7901, Madison, WI 53707-7901

Personal information you provide may be used for secondary purposes [Privacy Law, s. 15.04(1)(m)]

1. Name by which your business is known	
2. Legal name, if different from 1	
3. Business street address	
City / State / Zip Code	
4. Telephone Number	5. Federal Employer Identification Number
6. How many employees do you now have working in Wisconsin? ____ • ***Count*** corporate officers, family members, minors and part-time employes • ***Do not count*** sole proprietors, partners, members of limited liability companies or domestic servants	If you do not currently have any employees working in Wisconsin, what was the last date any employee worked for you in Wisconsin? Date: _____
7. How many employees do you usually have?	
8. Have you paid a combined total of $500 or more in wages for work performed in Wisconsin during any calendar quarter (Jan - March; April - June; July - Sept; Oct - Dec)?	This year? ☐ Yes ☐ No Last year? ☐ Yes ☐ No
9. What is the nature of your business?	

WKC-53-2 (R. 07/2003)

(continued on page 2)

Worker's Compensation Division, Bureau of Insurance Programs
201 East Washington Avenue, Room C100 (P.O. Box 7901), Madison, WI 53707-7901
Telephone: (608) 266-3046 Fax: (608) 266-6827

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS

Department of Workforce Development

EMPLOYER'S REPORT

BIP #: WCRB #:

10. What type of ownership is your business? If other, please explain:

- ☐ Sole Proprietorship
- ☐ Partnership
- ☐ Limited Liability Company
- ☐ Corporation (If qualified, complete and return Corporate Officer Option Notice found on page 3. See page 4 for additional information.)
- ☐ Farm Operation
- ☐ Other, please explain _____

11. Name the sole proprietor, partners, corporate officers, or members of a limited liability company.

Name and Title (please print)	Social Security Number:

12. What insurance company currently provides your worker's compensation insurance coverage? ***Attach a copy*** of the Information Page or Declaration Page of your current worker's compensation policy.

Name of Insurance Company:

13. Policy Number:

14. Effective dates of the policy:

15. Name of your insurance agent or agency:

Telephone number of your insurance agent or agency:

16. Has your business closed? If yes, on what date did it close?

☐ Yes, date closed: _____ ☐ No

Is the business closed permanently?

☐ Yes ☐ No

If yes, what is the last date any employee worked?

Last date employee worked: _____

Is the business seasonal? If yes, which months do you normally operate?

☐ Yes _____ ☐ No

17. Has your business been sold or transferred?

☐ Yes ☐ No

If yes, what date was your business sold or transferred?

Date sold or transferred : _____

Provide the name and address of the person or organization who bought or received the transfer of your business:

Name: _____

Address: _____

Authorized Signature	Title
Printed Name / Telephone Number	Date Signed

Thank you for completing this form. *Please mail pages 1 & 2 to us within 15 days of receipt.* The pages that follow will answer most of your questions, but call us if we can help. We are the Worker's Compensation Division of the Wisconsin Department of Workforce Development at (608) 266-3046.

Worker's Compensation Division, Bureau of Insurance Programs
201 East Washington Avenue, Room C100 (P.O. Box 7901), Madison, WI 53707-7901
Telephone: (608) 266-3046 Fax: (608) 266-6827

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS
Department of Workforce Development

Corporate Officer Option

A closely held corporation having no more than two corporate officers and no other employees may elect not to be subject to the Wisconsin Worker's Compensation Act by completing the Corporate Officer Option Notice below. Attach the completed notice to the Employer's Report form on pages 1 & 2 and mail or fax it to us within 15 days.

Please see page 5 for a detailed explanation of the Corporate Officer Option Notice and the eligibility requirements to file one. If you have any questions about whether you qualify to file a Corporate Officer Option Notice, please call (608) 266-3046 before you complete and return this form.

CORPORATE OFFICER OPTION NOTICE

Federal Employer Identification Number
Corporation Name (Please Print)
Corporation Address
City, State, Zip Code

As an officer of the above named corporation I elect not to be subject to provisions of the Wisconsin Worker's Compensation Act until such election is rescinded by written notice to the Wisconsin Worker's Compensation Division or the corporation obtains a worker's compensation insurance policy. I understand that buying a policy will cancel this election.

The corporation has no other employees or corporate officers than those listed below.

Before any employee is hired, the corporation will obtain a worker's compensation policy. I also understand that the failure to obtain a worker's compensation insurance policy, if required by the Wisconsin Worker's Compensation Act, will result in a mandatory penalty assessed by the State of Wisconsin. The penalty for failure to carry worker's compensation insurance, if required, is twice the amount of premium not paid during an uninsured time period or $750, whichever is greater. Under certain circumstances, an employer who has a lapse in worker's compensation insurance coverage can be subject to a penalty of $100 for each day they are uninsured up to 7 days. (ss. 102.82(2)(a) and 102.82(2)(ag), Wis. Stats.)

Corporate Officer Name (Please Print)	Corporate Officer Name (Please Print)
Corporate Officer Signature	Corporate Officer Signature
Title	Title
Telephone Number	Telephone Number
Date Signed	Date Signed

Worker's Compensation Division, Bureau of Insurance Programs
201 East Washington Avenue, Room C100 (P.O. Box 7901), Madison, WI 53707-7901
Telephone: (608) 266-3046 Fax: (608) 266-6827

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS
Department of Workforce Development

As an employer, when am I required to carry worker's compensation insurance?

Under the Worker's Compensation Act (Act), you must carry worker's compensation insurance if you do any one of the following:

1. Usually employ three or more full-time or part-time employees. You must have insurance immediately upon employing a third person.
2. Employ one or more full-time or part-time employees to whom you have paid combined gross wages of $500 or more in any calendar quarter for work done at one or more locations in Wisconsin. You must have insurance by the 10th day of the first month of the next calendar quarter.
3. If you are a farmer who employs 6 or more workers on the same day for any 20 days during the calendar year. You must have insurance by the 10th day after the 20th day of employment. A calendar year is January through December. Note: Some of your relatives may not count as employees. Call us at (608) 266-3046 to see whether you need to count all your relatives among your employees.

Must out-of-state employers carry Wisconsin worker's compensation insurance?

Yes, you must carry the insurance if you have employees working in Wisconsin. The policy must be with an insurance company licensed to write worker's compensation in Wisconsin and endorsed to name Wisconsin as a covered state in section 3-A. Your insurance company must file the properly endorsed policy with the Wisconsin Compensation Rating Bureau. The Bureau's mailing address is P.O. Box 3080, Milwaukee, Wisconsin 53201-3080. The telephone number is (262) 796-4540. The Bureau's internet address is http://www.wcrb.org

Who is considered an employee and covered by the Worker's Compensation Act?

Nearly all private and public employees in Wisconsin are considered employees and covered under the Act, including:

- Part-time employees. Whether an employee works part-time or full-time has no bearing on the requirement to carry worker's compensation insurance.
- Family members. An employee's relationship to the owner has no bearing on the requirement to carry worker's compensation insurance (except for certain relatives of a farmer).
- Minors. An employee's age has no bearing on the requirement to carry worker's compensation insurance.
- Corporate officers.

Who is not considered an employee under the Worker's Compensation Act?

The following are the only workers who are not considered employees under the Act. Call us if you are not sure.

- Domestic servants.
- Any person whose employment is not in the trade, business, profession or occupation of the employer.
- Some farm employees (certain relatives of a farmer).
- Sole proprietors, partners and members of limited liability companies.
- Qualified and certified members of certain religious sects.
- Volunteers of non-profit organizations receiving salary or in-kind compensation totaling not more than $10 per week.
- Employees of Native American tribal enterprises (including casinos), unless the tribe elects to waive its sovereign immunity and voluntarily become subject to the Act.

All worker's compensation policies exclude sole proprietors, partners or members of limited liability companies unless there is a specific written endorsement to include them. Sole proprietors, partners and members of limited liability companies may voluntarily purchase worker's compensation insurance to cover their own work-related injuries and illnesses.

What about independent contractors?

Under the Act, a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so. The nine-part statutory test set forth under s. 102.07(8), Wis. Stats., must be met before a person working under another person is considered not to be an employee.

Worker's Compensation Division, Bureau of Insurance Programs
201 East Washington Avenue, Room C100 (P.O. Box 7901), Madison, WI 53707-7901
Telephone: (608) 266-3046 Fax: (608) 266-6827

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS
Department of Workforce Development

What about corporations and corporate officers?

All worker's compensation policies covering corporations include corporate officers. However, in a closely held corporation, defined as a corporation with not more than 10 shareholders, no more than 2 officers may exclude themselves from coverage. If the corporation has other employees, and/or officers, an insurance policy is required and the exclusion for officers must be made by endorsement on the worker's compensation policy. The name(s) of the officer(s) must be given. The exclusion will remain in effect for the policy period. Officers who are excluded will still be counted in determining whether the employer is subject to the Act under s. 102.04(1)(b), Wis. Stats.

If a closely held corporation has no more than 2 corporate officers and has no other employees, a worker's compensation policy is not required if both officers elect not to be subject to the Act by completing and filing with the Department a Corporate Officer Option Notice. ***A qualified corporation must complete and return a copy of the Corporate Officer Option Notice found on page 3.*** Attach the completed notice to the Employer's Report form on pages 1 & 2 and mail or fax it to us within 15 days. ***Note:*** A corporation with more than two corporate officers or any other employee or employees is not eligible to file a Corporate Officer Option Notice with the department and must obtain and/or maintain a worker's compensation insurance policy.

If I'm a new employer and I do not have worker's compensation insurance, what must I do?

A new employer without worker's compensation insurance is subject to penalties and closure action under s. 102.82(2)(a) & 102.28(4),Wis. Stats., if it fails to comply with the insurance requirements of the Act. If you are an employer under the Act and do not have a worker's compensation insurance policy, you must:

- ***Obtain a worker's compensation policy within 12 days from the date this form was mailed.***
- Return the completed Employer's Report form to us within 15 days of receipt.
- Maintain coverage under your worker's compensation insurance policy.
- A closely held corporation with no more than 2 corporate officers and no other employees, must take one of the following actions ***within 12 days*** from the date this form was mailed: (1) obtain a worker's compensation policy or, (2) complete the Corporate Officer Option Notice found on page 3. Attach the notice to the Employer's Report form on pages 1 & 2 and mail or fax it to us within 15 days.

What penalties may I receive for not carrying worker's compensation insurance?

We must and do enforce mandatory penalties if an employer does not obtain and maintain a worker's compensation insurance policy when required to have one. If you do not comply, you risk one or all of the following:

- You are subject to a penalty of double the insurance premiums you should have been paying during the uninsured period, or $750, whichever is greater. Under certain circumstances, you may be subject to a penalty of $100 for each day you're uninsured up to 7 days. (ss. 102.82(2)(a) and 102.82(2)(ag), Wis. Stats.)
- You face closure of your business, including a suspension of all operations. (s. 102.28(4), Wis. Stats.)
- You are personally liable for uninsured benefit claims for which your injured employees are eligible. (s. 102.28(5), Wis. Stats.)

How do I obtain worker's compensation insurance?

To obtain worker's compensation insurance, contact an insurance company or its agent and ask whether the company writes worker's compensation insurance for Wisconsin. If you have or know an insurance agent, you may contact him or her. If you are refused insurance coverage by a company, you may obtain coverage from the Wisconsin Compensation Rating Bureau through the Worker's Compensation Insurance Pool upon prepayment of premium. The Wisconsin Compensation Rating Bureau is located at 20700 Swenson Drive, Suite 100, Waukesha, Wisconsin. The mailing address is P.O. Box 3080, Milwaukee, Wisconsin 53201-3080. The telephone number is (262) 796-4540. The Bureau's internet address is http://www.wcrb.org

Note: The Wisconsin Compensation Rating Bureau *is not a State agency* and is not part of the Wisconsin Worker's Compensation Division. The State of Wisconsin *does not* write or provide worker's compensation insurance coverage.

I currently have a worker's compensation policy. What can I do to help the Worker's Compensation Division update its records to show I have a policy?

Please attach a copy of the Information Page or Declaration Page of your current worker's compensation policy to the Employer's Report form found on pages 1 & 2 and mail or fax it to us within 15 days.

Worker's Compensation Division, Bureau of Insurance Programs
201 East Washington Avenue, Room C100 (P.O. Box 7901), Madison, WI 53707-7901
Telephone: (608) 266-3046 Fax: (608) 266-6827

State of Wisconsin

WORKER'S COMPENSATION INSURANCE REQUIREMENTS
Department of Workforce Development

Once an employer is required to get a worker's compensation insurance policy, how long does the employer have to keep it?

Quite a while. Once an employer becomes subject to the Wisconsin Worker's Compensation Act (Act) under s. 102.04(1)(b), Wis. Stats., he or she remains subject to the Act unless the employer withdraws from the provisions of the Act under s. 102.05(1), Wis. Stats.

A subject employer is required to have a worker's compensation policy as long as he or she has one or more part-time or full-time employees. Even if a subject employer has only one part-time employee making less than $500 per quarter, the employer must maintain the insurance for the remainder of that calendar year--and for the next calendar year--(a calendar year is January through December) before he or she is eligible to withdraw from being subject to the provisions of the Act.

If a subject employer lays off all his or her employees, the employer may drop their worker's compensation insurance while they have no employees, ***however, the employer remains subject to the Act.*** Therefore, because the employer has already become subject to the Act, ***if the employer hires an employee at a later date, the employer must have a worker's compensation insurance policy in place on the date any employee begins working,*** unless the employer has withdrawn from the Act.

Once a farmer is subject to the Act, the farmer is required to have a worker's compensation policy as long as he or she has one or more part-time or full-time employees. Even if a subject farmer has only one part-time employee, the farmer must maintain the insurance until he or she has gone a full calendar year without employing 6 or more employees on 20 or more days before he or she is eligible to withdraw from being subject to the provisions of the Act.

Note: Corporations can not withdraw from the provision of the Act. Closely held corporations (a corporation with not more than 10 stockholders) that have no more than two corporate officers and no other employees, may elect to exclude themselves from coverage under the Act by completing and filing with the Department a *Corporate Officer Option Notice*. A corporation with more than two corporate officers or any other employee is not eligible to file a Corporate Officer Option Notice and must obtain and/or maintain a worker's compensation insurance policy.

Call us at (608) 266-3046 if you are not sure whether or not you are subject to the Act or if you are not sure when you are required to have a worker's compensation policy.

As an employer, how do I benefit from the Wisconsin Worker's Compensation Act?

You receive benefits that can mean the difference between the success or failure of your business. If one of your employees gets hurt while working for you, you could be sued for damages, medical care, lost wages, and much more. By complying with the law and carrying appropriate worker's compensation insurance, you receive:

- Protection from most law suits brought by an employee because of a work-related illness or injury.
- Fair and prompt delivery of benefits to your employee who is injured on the job.
- Fair adjudication of disputes by a Worker's Compensation Division Administrative Law Judge.
- Fair and standard insurance premium rates approved by the Office of the Commissioner of Insurance.

Does my employee benefit from the Worker's Compensation Act?

If your employee does get hurt on the job, he or she can look to the worker's compensation system for prompt payment of benefits and fair adjudication of disputes.

I have additional questions regarding the requirement to obtain worker's compensation insurance. Who can I contact?

If you have questions regarding your obligation to obtain worker's compensation insurance, please write or call the Wisconsin Worker's Compensation Division, Bureau of Insurance Programs. Our mailing address is P.O. Box 7901, Madison, Wisconsin 53707-7901. Our telephone number is (608) 266-3046 or you can reach us by fax at (608) 266-6827. The Division's internet address is http://www.dwd.state.wi.us/wc/

DWD is an equal opportunity employer and service provider. If you have a disability and need information in an alternate format, or need it translated to another language, please contact (608) 266-1340 voice or 1-866-265-3142 TTY.

Tony Evers
Governor

Caleb Frostman
Secretary

STATE OF WISCONSIN
DWD
Department of Workforce Development

WORKER'S COMPENSATION
P.O. Box 7901
Madison, WI 53707-7901
FAX: (608) 266-6827

State of Wisconsin
Department of Workforce Development

Example
to employer

October 16, 2019

BIP #:
WCRB #:

Dear Employer:

Your response to our recent inquiry indicated that you have no employees. You indicated only independent contractors and/or subcontractors work with you. Under section 102.07(8) of the Wisconsin Worker's Compensation Act, a person is required to meet a nine point test of independence before they can be considered an independent contractor rather than an employee.
I have included a copy of the Independent Contractor Definition on the reverse side of this letter. Please retain this information for future reference.

Please complete the attached *Questionnaire For Determining Whether An Individual Performing Services For Pay Is An Employee Or An Independent Contractor* to clarify how each independent contractor and/or subcontractor has met the nine point test of independence under section 102.07(8). Complete and submit a separate questionnaire for each independent contractor you are contracting with. You may make additional copies of the enclosed questionnaire.

Remember, to qualify as an independent contractor and not an employee, an individual *must meet and maintain all nine points of the requirements*. Be sure to provide a copy of the contract(s) signed by the independent contractor(s).

Please respond within 15 days of the date this letter was mailed.

Sincerely,

Denise Madigan-Doucette

Denise Madigan-Doucette, Investigator - Worker's Compensation Division
Enforcement/Investigation Unit
(608) 267-0516 Fax # (608) 266-6827 denise.madigandoucette@dwd.wisconsin.gov

INDEPENDENT CONTRACTORS AND WORKER'S COMPENSATION IN WISCONSIN

Independent Contractor Definition s. 102.07(8)[1], Wis. Stats.

This is a nine part test which must be met before a person can be considered an independent contractor rather than an employee. To qualify as an independent contractor and not as an employee, a person must meet and maintain all nine of the following requirements:

1. Maintain a separate business.
2. Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) ***or*** have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (See note below.)
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

Note: When requesting a Federal Employer Identification Number (FEIN) from the IRS, you must inform the IRS that you are ***required by Wisconsin Worker's Compensation law*** to obtain a FEIN.
A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8).

Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the pervious year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(c) The department may not admit in evidence state or federal laws, regulations, documents granting operating authority or licenses when determining whether an independent contractor meets the conditions specified in par. (b) 1 or 3.

Business or Organization Name:	Development
BIP Number:	
WCRB Number:	

Wisconsin Department of Workforce

Worker's Compensation Division
201 East Washington Avenue
PO Box 7901
Madison, WI 53707-7901
FAX: (608) 266-6827

QUESTIONNAIRE FOR DETERMINING WHETHER AN INDIVIDUAL PERFORMING SERVICES FOR PAY IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

Personal Information you provide may be used for secondary purposes [Privacy Law, s. 15.04(1)(m)].

Name of Individual Providing Service	Work Telephone Number ( )
Social Security Number	Home Telephone Number ( )

Mailing Address of Individual	Street Address of Individual's Business (*if different from mailing address*)
Is this address separate from the individual's home? ☐ Yes ☐ No	Is this address separate from the individual's home? ☐ Yes ☐ No

Please describe the service provided by the individual.

Services Performed From: (start date) _____ To: (end date) _____

Amount Paid to Individual: 2016 $_____ 2017 $_____ 2018 $_____ 2019 $_____

Under section 102.07(8) of the Wisconsin Statutes, an independent contractor is required to meet a nine point test to be considered an independent contractor rather than an employee. To qualify as an independent contractor and not as an employee of an employer for whom the independent contractor performs work or services in the course of the trade, business, profession or occupation of such employer, a person must meet and maintain all nine of the following requirements.

Describe in detail how the above named person meets and/or has met all of the following nine points of the independent contractor definition while providing services to you. Specifically address all nine points and attach documentation where requested. You may attach a separate sheet if additional space is necessary.

1. Maintains a separate business with his or her own office, equipment, materials and other facilities. *Please describe where and what.*

2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the pervious year.

It is mandatory that one of the two following conditions be met for an individual to be considered an independent contractor rather than an employee. (A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8) of the Wisconsin Statutes.)

(a). The individual has a Federal Employer Identification Number (FEIN). The number is: ___ ___ ___ ___ ___ ___ ___ ___ ___ ☐ does not have a FEIN ☐ has applied for a FEIN on _____ (date)	(b). The individual filed a business or self-employment income tax return with the Federal Internal Revenue Service based on this type of work or service in the year prior to providing services to your firm. (e.g., Form1040 Schedule C, Schedule SE, Schedule F): ☐ Yes ☐ No *If yes, attach copies or other verifiable evidence.*

CONTINUED→

3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls means of performing the services or work. *Attach copies of all contracts worked under while working for your firm.*

4. Incurs the main expenses related to the service or work that he or she performs under contract. *Please describe what and how.*

5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service. *Please describe how.*

6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

   What was and/or is the basis of this individual's compensation from your firm?

   ☐ Commission ☐ Competitive Bid ☐ Piecework ☐ Hourly

   ☐ Per Job ☐ Lump Sum ☐ Salary ☐ Other _____

   At what intervals was and/or is this individual paid by your firm?

   ☐ Regular (Weekly, Bimonthly, etc.) ☐ Completion of Job ☐ After Customer Pays

7. May realize a profit or suffer a loss under contracts to perform work or service. *Please describe how.*

8. Has continuing or recurring business liabilities or obligations. *Please describe what and how.*

9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures. *Please describe how.*

Name of Person Completing This Questionnaire (Please Print)	Telephone Number ( )	Fax Number ( )
I certify that to the best of my knowledge and belief, the information provided in this form is true and correct. Signature		Date Signed

Tony Evers
Governor

Caleb Frostman
Secretary

STATE OF WISCONSIN
DWD
Department of Workforce Development

WORKER'S COMPENSATION
P.O. Box 7901
Madison, WI 53707-7901
FAX: (608) 266-6827

State of Wisconsin
Department of Workforce Development

October 16, 2019

BIP #:
WCRB #:

Example
to independent contractor

Dear :

During a recent worker's compensation insurance compliance investigation of BIP TEST / DBA JOE'S GARAGE, it was determined that you may have received payment from this firm for services performed as an independent contractor. As part of our investigation, we need to verify your status as an independent contractor under the guidelines of Wisconsin's Worker's Compensation Law.

Please take a few moments to complete the enclosed *WORKER STATUS QUESTIONNAIRE*, and return this letter and the questionnaire to me using the enclosed self-addressed, postage paid envelope by .

Thank you for your cooperation in this matter.

Sincerely,

Denise Madigan-Doucette

Denise Madigan-Doucette, Investigator - Worker's Compensation Division
Enforcement/Investigation Unit
(608) 267-0516 Fax # (608) 266-6827 denise.madigandoucette@dwd.wisconsin.gov

Worker Status Questionnaire For Services Performed For The Firm:
BIP TEST / DBA JOE'S GARAGE

BIP Number: 674-53-76
WCRB Number: 201-54-69

Personal Information you provide may be used for secondary purposes [Privacy Law, s. 105.04(1)(m)].

A1. Briefly describe the work you performed for this firm.

A2. What dates did you work for this firm? From: (start date) _____ To: (end date) _____

A3. Did you and/or do you consider yourself an independent contractor while performing services for this firm? ☐ Yes ☐ No

If no, did you and/or do you consider yourself an employee of this firm while performing services for the firm? ☐ Yes ☐ No

A4. Were you in business as an independent contractor performing similar services prior to working for this firm? ☐ Yes ☐ No

A5. Do you perform similar services for other firms? ☐ Yes ☐ No

Under section 102.07(8) of the Wisconsin Statutes, a person is required to meet a nine point test before they can be considered an independent contractor rather than an employee. To qualify as an independent contractor and not as an employee, a person must *meet and maintain* all nine of the following requirements.

Please answer the following nine questions to clarify your status as an independent contractor under the nine point test of Wisconsin's worker's compensation law. Please answer all nine questions and attach documentation where appropriate. You may attach a separate sheet if additional space is necessary. Thank you for your cooperation in this matter.

1. Did you and/or do you maintain a separate business with your own office, equipment, materials and other facilities? ☐ Yes ☐ No

   If yes, please describe where and what.

2. Do you hold or have you applied for a federal employer identification number with the federal internal revenue service *or* have you filed business or self-employment income tax returns with the federal internal revenue service based on this work or service in the year prior to working for this firm? (e.g., Form 1040 Schedule C, Schedule SE, Schedule F) ☐ Yes ☐ No

   If yes, please answer the following questions and attach documentation where appropriate.

   A. Do you have a Federal Employer Identification Number? ☐ Yes ☐ No

   If yes, the number is ___ ___ ___ ___ ___ ___ ___ ___ ___

   If no, have you applied for a FEIN? ☐ Yes ☐ No

   If yes, date applied _____

   B. Have you filed business tax returns with the Internal Revenue Service based on this work or services? ☐ Yes ☐ No

   If yes , for which of the following years did you file a business tax return with the IRS? ☐ **2016** ☐ **2017** ☐ **2018**

   Please attach copies of your 2016, 2017 & 2018 Schedule C as appropriate.

3. Did you and/or do you operate under contracts to perform specific services or work for specific amounts of money and under which you control the means of performing the services or work while working for this firm? ☐ Yes ☐ No

   If yes, attach copies of the contracts you worked under while working for this firm.

CONTINUED →

4. Did you and/or do you incur the main expenses related to the service or work that you perform and/or performed under contract while working for this firm?

If yes, please describe what and how.

☐ Yes ☐ No

5. Were you and/or are you responsible for the satisfactory completion of work or services that you contracted to perform?

☐ Yes ☐ No

Were and/or are you liable to complete the work or service while working for this firm?

☐ Yes ☐ No

If yes to either, please describe how.

6. Did you and/or do you receive compensation for work or service performed under a contract on a commission or per job or competitive basis and not on any other basis while working for this firm?

☐ Yes ☐ No

What was and/or is the basis of your compensation from this firm?

☐ Commission ☐ Competitive Bid ☐ Piecework ☐ Hourly

☐ Per Job ☐ Lump Sum ☐ Salary ☐ Other _____

At what intervals were and/or are you paid by this firm?

☐ Regular (Weekly, Bimonthly, etc.) ☐ Completion of Job ☐ After Customer Pays

7. Did you and/or do you realize a profit or suffer a loss under a contract to perform work or service while working for this firm?

If yes, please describe which and how.

☐ Yes ☐ No

8. Did you and/or do you have continuing or recurring business liabilities or obligations?

If yes, please describe what and how.

☐ Yes ☐ No

9. Did and/or does the success or failure of your business depend on the relationship of business receipts to expenditures?

If yes, please describe how.

☐ Yes ☐ No

Please add any additional comments you may have.

Name (Please Print Full Name)	Social Security Number	
Signature	Date Signed	Telephone Number ( )

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

Date: 10/12/2019
Employer Number:
Account Number:
Lapse Period:

Example

Penalty Notification

Department of Workforce Development
Division of Worker's Compensation

Pursuant to section 102.82 of the Wisconsin Statutes, you are being assessed a penalty for a lapse in Worker's Compensation insurance coverage. As an employer subject to the Wisconsin Worker's Compensation Act (Chapter 102 of the Wisconsin Statutes), you were legally required to have valid Worker's Compensation insurance in force during the lapse period.

Wisconsin law provides that employers who are subject to the Worker's Compensation Act (s. 102) must carry Worker's Compensation insurance or be subject to fines levied by the State of Wisconsin. These fines are mandatory and the law is not open to any flexibility or interpretation.

You were notified of the apparent lapse in coverage, but we have no record of you being insured during the lapse period. The Worker's Compensation Act provides serious penalties for being uninsured. Section 102.82(2)(a) requires that all uninsured employers shall pay to the Department (DWD) the greater of $750.00 or twice the amount of premium the employer should have paid while uninsured. Under certain circumstances, an employer who has a lapse in Worker's Compensation coverage can be subject to a penalty of $100.00 for each day they are uninsured up to seven (7) days (s. 102.82(2)(ag)).

Payment of this penalty is due 30 days from the date of this notification. To avoid collection proceedings, you are required to complete one of the options below within **30 DAYS** of the date of this notification:

☐ **Payment in full in the amount of** $750.00

☐ **Installment payments:**
Please indicate the amount of your proposed monthly payment, $_____
Your first payment must be enclosed.

Installment payments are submitted monthly by the 1st of each month. Proposed payment agreements exceeding four (4) months in length are subject to Department approval; contact one of the Collection Specialists below.

1) Make payment online at: **https://dwd.wisconsin.gov/epaywc**

or

2) Submit payment with this notification to:

DWD – Worker's Compensation
P.O. Box 7948
Madison, WI 53707

Include your employer number on your check.

Continued failure to insure results in the penalty increasing and additional penalties that can reach $100.00 PER DAY for every day without insurance, plus any additional court imposed penalties.

Failure to pay the penalty will result in a 1% interest charge per month on the unpaid portion of the penalty and may result in judicial action to collect the penalty. Judicial action may include (but is not limited to) a warrant placing a lien on all real and personal property, a garnishment action, levy, forced seizure and sale of real or personal property at a sheriff's auction and attachment of any income tax refund, lottery winnings or state contracts for which you may be eligible to secure satisfaction of this liability.

Please pay the amount shown on the enclosed account statement promptly to avoid interest, additional charges and costly legal action. Continued or future lapses of Worker's Compensation insurance coverage will subject you to closure proceedings (s. 102.28(4)).

If you have questions concerning this notice, please contact one of the Specialists below.

Jean Culbert
Deputy Collector
(608) 266-6898

Patrick Culbert
Deputy Collector
(608) 266-5459

Aaron Galarowicz
Deputy Collector
(608) 267-2396

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

Statement Date: 10/15/2019
Employer Number:
Amount Due:

Example

Account Statement

Payment Options:

- **Free online payment** at https://dwd.wisconsin.gov/epaywc
- Mail payments to:
  DWD - Worker's Compensation
  P.O. Box 7948
  Madison, WI 53707

  Checks payable to: Worker's Compensation UEF (include your employer number)

Employer Number:

PENALTY ACCOUNT(S):

ACCOUNT NUMBER:
LAPSED PERIOD: 9/10/2018 - 1/31/2019
STATEMENT #: 1

DATE	DESCRIPTION	REF NUMBER	AMOUNT	BALANCE DUE
10/15/2019	INITIAL BALANCE			$750.00
10/15/2019	AMOUNT DUE FOR THE ACCOUNT:			$750.00
10/15/2019	Total Amount Due for All Account(s):			$750.00

Keep the prior page(s) for your records.

Free Online Payment Option

Pay Your Uninsured Employers Fund Assessment Online
Quick - Convenient - No Service Fees

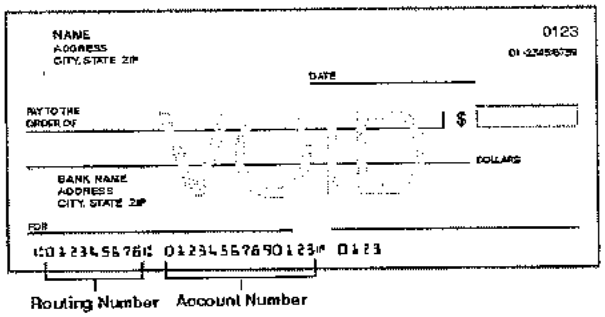
Go to: https//dwd.wisconsin.gov/epaywc

Uninsured Employers Payments Online
The Department of Workforce Development – Uninsured Employers Fund (UEF) offers the option of paying Uninsured Employers Fund assessments using E-Checks via the Internet.

- No additional cost
- You can print a receipt of your payment
- It's available 24 hours a day, seven days a week

What information will I need to pay online?

- Employer Number
- Your Bank's Routing Number (This is a nine digit number that identifies your bank. The routing number appears as the first group of numbers at the bottom of your check.)
- Your Checking Account Number (This is the second group of numbers at the bottom of your check.) Be careful not to include the check number, which is the last group of numbers at the bottom of a check.



Can I pay by credit card?
No, we can't accept credit card payments. Payments must be made through a checking account.

Remittance

Return this portion with your check to:
Worker's Compensation
P.O. Box 7948
Madison, WI 53707

Make check payable to Worker's Compensation UEF

Amount Enclosed: $

Employer Number:
Employer Name:

Please note your employer number on the check.

If you have multiple accounts and you want the payment applied to a specific account, please indicate below the account number in which you want the payment applied.

Apply the payment to Employer Account Number:

If you have questions, call any of the contacts below:

Jean Culbert	Patrick Culbert	Aaron Galarowicz
(608) 266-6898	(608) 266-5459	(608) 267-2396

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

Date: 10/15/2019

Example

Employer Number:
Account Number:

PAST DUE NOTICE

Dear Employer:

Our records indicate you have not made satisfactory arrangements to pay your liability in the amount of This liability was assessed under section 102.82 of the Wisconsin Statutes for failure to carry Worker's Compensation insurance as required by law.

Your account is therefore PAST DUE and requires you to make payment immediately.

Failure to respond to this notice will be considered acknowledgement that you do not intend to pay this debt and judicial action will be required to secure payment. Judicial action may include (but is not limited to) a warrant placing a lien on all real and personal property, a garnishment action, levy, forced seizure and sale of real or personal property at a sheriff's auction and attachment of any income tax refund, lottery winnings or state contracts for which you may be eligible to secure satisfaction of this liability.

To avoid these collection proceedings, we expect you to complete one of the options below within **10 DAYS** of the date of this letter:

1. Pay in full online at: **DWD.Wisconsin.gov/epaywc**
2. Request installment payments online: **Your first payment must be submitted online at the time of the request.** Make your request for a payment plan in the Comments Section of the online payment website.
3. Submit payment in full in the amount of
4. Request installment payments:
   Please indicate the amount of your proposed monthly payment, **$_____.**
   Your first payment must be enclosed.

*Installment payments are submitted monthly on the 1st of each month. Proposed payment agreements exceeding four (4) months in length are subject to Department approval; contact one of the Collection Specialists below.

For options 3 and 4, mail payment with this letter to the address provided below:

DWD – Worker's Compensation
P.O. Box 7948
Madison, WI 53707-7948

Include your employer number on your check.

In the case of a non-response, the Wisconsin Worker's Compensation Division will initiate the filing of a warrant against you with the clerk of circuit court in your county to secure satisfaction of this liability.

NO FURTHER NOTICES WILL BE SENT.

If you have questions concerning this notice, please contact one of the Specialists below.

Jean M Culbert Patrick R. Culbert Aaron Galarowicz

Jean Culbert
Deputy Collector
(608) 266-6898

Patrick Culbert
Deputy Collector
(608) 266-5459

Aaron Galarowicz
Deputy Collector
(608) 267-2396

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

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STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

10/10/2019

Employer Number:

Example

Warrant Docketed Notice

Department of Workforce Development
Division of Worker's Compensation

You have previously been notified of an unpaid liability to the Department of Workforce Development, Division of Worker's Compensation in the amount of $10,898.20. This liability was assessed under section 102.82 of the Wisconsin Statutes for failure to carry Worker's Compensation Insurance as required by law.

The following warrant(s) placing a lien on all of your real and personal property have been docketed with the County Clerk of Courts: PIERCE, ST CROIX

Additional legal action to collect this debt will be taken without further notification unless this liability is paid within 10 days of the date of this letter. Legal action may include (but is not limited to) a garnishment action, levy, forced seizure and sale of real or personal property at a sheriff's auction and attachment of any income tax refund, lottery winnings or state contracts for which you may be eligible to secure satisfaction of this liability.

We therefore expect you to select one of the payment options listed below and return it with payment within **10 days** from the date of this letter.

☐ **Payment in full in the amount of $10,898.20**

☐ **Installment payments**
Please indicate the amount of your proposed monthly payment, $_____.
Your first payment must be enclosed.

Installment payments are submitted monthly on the 1st each month. Proposed payment agreements exceeding four (4) months in length are subject to Department approval; contact one of the Collection Specialists below.

1) Make payment online at **https://dwd.wisconsin.gov/epaywc**
or
2) Submit payment with this letter to the address provided below.

Return payments with this notice to: DWD – Worker's Compensation
P.O. Box 7948
Madison, WI 53707

Include your employer number on your check.

To avoid further collection action, submit payment as indicated above. If you have questions concerning this notice, please contact one of the Specialists below.

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Deputy Collector
(608) 266-5459

Aaron Galarowicz
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(608) 267-2396

Jean Culbert
Deputy Collector
(608) 266-6898

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

October 10, 2019

Example

Notice of Intent to Certify Debt
Department of Workforce Development
Division of Worker's Compensation

Employer Number:

Pursuant to section 71.93, Wis. Stats., you are hereby notified that the Wisconsin Department of Workforce Development – Division of Worker's Compensation (DWD-WC) intends to certify to the Wisconsin Department of Revenue (DOR) that you are indebted to DWD-WC for assessments issued under section 102.82, Wis. Stats., for failure to have Worker's Compensation Insurance as required by law, as follows:

Warrant Number:	
Date Issued:	10/10/2019
County(ies):	PIERCE, ST CROIX
Assessment:	$10,408.28
Interest:	$416.32
Legal Fees:	$73.60
Total Due:	$10,898.20

The purpose of the certification is to make a claim for the total due DWD-WC against refunds, overpayments, lottery payments, or vendor payments owed you by the Wisconsin Department of Revenue or Wisconsin Department of Administration.

- If your debt is not satisfied by the time you file your Wisconsin State Income Tax Return, all or part of your refund may be intercepted to pay your debt.
- If your debt is not satisfied and you win a lottery prize, all or part of your winnings may be intercepted to pay your debt.
- If your debt is not satisfied by the time the Department of Administration disburses vendor payments for work performed for the state, your vendor payment may be intercepted to pay your debt.

Any remaining amount that is due to you will be delayed an additional 4-8 weeks on top of normal processing time.

You have the opportunity to satisfy the debt with any of the following payment options below. Your debt will remain certified to the Wisconsin Department of Revenue until the debt is paid in full.

☐ **Payment in full in the amount of $10,898.20**

☐ **Installment payments:**
Please indicate the amount of your proposed monthly payment, $_____.

Your first payment must be enclosed.

Installment payments are submitted monthly by the 1st of each month. Proposed payment agreements exceeding four (4) months in length are subject to Department approval, contact one of the Collection Specialists below.

1) Make payment online at: **https://dwd.wisconsin.gov/epaywc**

or

2) Submit payment with this notice to:

DWD – Worker's Compensation
P.O. Box 7948
Madison, WI 53707

Include your employer number on your check.

You have the right to appeal this action. However, appeal is limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the uninsured employer (s. 102.835(19), Wis. Stats.).

An appeal must be made in writing, must state the specific grounds for the objection, and must be postmarked within 14 days after the mailing date of this notice to the Wisconsin Division of Worker's Compensation, P.O. Box 7948, Madison, WI 53707.

If you have questions concerning this notice, please contact one of the Specialists below.

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Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

October 10, 2019

Example

Notice of Legal Action

Department of Workforce Development
Division of Worker's Compensation

Employer Number:

Our records indicate you have not paid your delinquent liabilities in the amount of $5,631.30 for worker's compensation penalties and/or injury reimbursement assessments issued under sec. 102.82 of the Wisconsin Statutes by the State of Wisconsin, Division of Worker's Compensation for failure to carry Worker's Compensation insurance as required by law.

A warrant placing a lien on all of your real and personal property has been docketed covering the liability in the County(ies) of MILWAUKEE.

Additional legal action to collect this debt will be taken without further notification unless this liability is paid within 10 days of the date of this letter.

We therefore expect you to select one of the payment options listed below and return this notice and payment within **10 days** from the date of this letter.

☐ **Payment in full in the amount of $5,631.30**

☐ **Installment payments**
Please indicate the amount of your proposed monthly payment, $_____.
Your first payment must be enclosed.

Installment payments are submitted monthly by the 1st of each month. Proposed payment agreements exceeding four (4) months in length are subject to Department approval; contact one of the Collection Specialists below.

1) Make payment online at **https://dwd.wisconsin.gov/epaywc**

or

2) Submit payment with this notice to:

DWD – Worker's Compensation
P.O. Box 7948
Madison, WI 53707

Include your employer number on your check.

If you do not respond as requested, we will proceed with legal action to collect the debt. Additional legal actions may include (but are not limited to) a garnishment action, levy, forced seizure and sale of real or personal property at a sheriff's auction and attachment of any income tax refund, lottery winnings or state contracts for which you may be eligible to secure satisfaction of this liability.

To avoid this action, submit payment as indicated above. If you have questions concerning this notice, please contact one of the Specialists below.

Patrick Culbert
Deputy Collector
(608) 266-5459

Aaron Galarowicz
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(608) 267-2396

Jean Culbert
Deputy Collector
(608) 266-6898

Department of Workforce Development
Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

10/10/2019

Example

Notice of Levy Action

Department of Workforce Development
Division of Worker's Compensation

In reply please refer to employer number:

You are hereby notified that a levy has been issued pursuant to section 102.835, Wisconsin Statutes which attaches any of your personal property in the possession of or under control of ASSOCIATED BANK, NA.

This levy action is being taken to collect liabilities assessed by the State of Wisconsin, Department of Workforce Development, Division of Worker's Compensation for failure to carry Worker's Compensation insurance as required by law.

The present amount due is $1,052.82, which includes penalties and/or reimbursement assessments, interest and legal costs computed to date. Interest will continue to accrue on the principal portion of this debt at the rate of 1% per month until paid.

The levy is effective from the time the levy is first served on the above named third party until the liability out of which the levy arose is satisfied, until the levy is released or until one year from the date of the service, whichever occurs first.

No Property is Exempt From This Levy.

You have the right to appeal this levy proceeding; however, your appeal is limited to (1) questions of prior payment of the debt or (2) mistaken identity. THE LEVY IS NOT STAYED PENDING APPEAL. If you want to appeal, your request for hearing must:

1. Be filed (delivered to and received by the Department or postmarked) not later than 21 days after the mailing date of this notice; and,
2. Be made in writing and specify whether you're appealing on the basis of (1) or (2) above and specify the reasons why you object to this notice; and,
3. Be filed with DWD - Worker's Compensation, Collections Section, P.O. Box 7948, Madison, Wisconsin 53707.

If you have any questions concerning this notice, please contact one of the Specialists below.

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Division of Worker's Compensation
P.O. Box 7948
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STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

10/10/2019

ASSOCIATED BANK, NA
PO BOX 19097
MS 7023
GREEN BAY WI 54307

Notice of Levy: Non-Wage

Department of Workforce Development
Division of Worker's Compensation

Re: Debtor Name:
Employer Number:
Debtor SSN:

To Whom It May Concern:

You are hereby required, within forty-five (45) days after service of this levy upon you, to answer whether you are indebted to or have in your possession or under your control any personal property belonging to the above named debtor.

The debtor is indebted to the Wisconsin Department of Workforce Development, Division of Worker's Compensation, upon a warrant (judgment) for failure to carry Worker's Compensation insurance as required by law. The present amount due is $1,052.82, which includes penalties and/or reimbursement assessments, interest and legal costs computed to date.

If you are indebted to or possess earnings or other property belonging to the debtor, you are ordered to retain and surrender a quantity sufficient to satisfy the debt to the Department of Workforce Development, Division of Worker's Compensation, by check payable to the Worker's Compensation – Uninsured Employers Fund. Include the debtor's employer number, , on all payments. The check should be sent to: DWD, Worker's Compensation, Collections Section, P.O. Box 7948, Madison, WI 53707.

No Property is Exempt From This Levy.

The levy is effective from the time the levy is first served on you until the liability out of which the levy arose is satisfied, until the levy is released or until one year from the date of service, whichever occurs first.

You are entitled to a levy fee of $5.00 for each levy if there is property to retain. If the property retained is money, you may deduct the fee from the proceeds of the levy.

If you fail to surrender any property or rights to property subject to levy, upon demand of the Department, you will be subject to proceedings to enforce this levy.

If you have any questions concerning this notice, please contact one of the Specialists below.

Aaron Galarowicz
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(608) 267-2396

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Division of Worker's Compensation
P.O. Box 7948
Madison, WI 53707
Fax: (608) 266-6827

E-Payment URL: https://dwd.wisconsin.gov/epaywc

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

10/10/2019

ASSOCIATED BANK, NA
PO BOX 19097
MS 7023
GREEN BAY WI 54307

Third Party Levy Answer: Non-Wage

Department of Workforce Development
Division of Worker's Compensation

Re: Debtor Name:
Employer Number:
Debtor SSN:

Third Party to Levy – Complete All Sections Below:

A.

Third Party to Levy was served with this levy on: →	Month	Day	Year	Time: ☐ AM ☐ PM

B. At the time and date of levy, the Third Party had in its possession or was obligated with respect to property or rights to property of the debtor subject to levy as follows:

1. If none, check here ☐ ; or
2. _____

_____

Amount withheld _____ $_____

Less Third Party Levy fee (see reverse side) $_____

NET RETAINED ► ► ►. $_____

With respect to the net amount withheld, the Third Party to Levy should enclose a check payable to the Worker's Compensation – Uninsured Employers Fund. Include the debtor's employer number, , on all payments. (See reverse side.)

Third Party acknowledges that the levy is effective from the time the levy is first served on the Third Party until the liability out of which the levy arose is satisfied, until the levy is released or until one year from the date of service, whichever occurs first.

Net withheld levy amounts for future property of the debtor in the Third Party's possession should be sent to the State of Wisconsin – Division of Worker's Compensation, by check payable to the Worker's Compensation – Uninsured Employers Fund on a monthly basis. Include the debtor's employer number, , on all payments. (See reverse side.)

C.

Signature of Third Party or Representative			Date Signed
Name and Title of Third Party or Representative (please print)			Telephone Number
Street Address	City	State	Zip Code

Third Party $5.00 Levy Fee - Section B

Under section 102.835(20) you are entitled to a one-time levy fee of $5.00 if property is secured through the levy. We have not included the $5.00 fee in the amount due the Department from the debtor. If the property you are holding for the debtor is less than what the debtor owes the Department, deduct your $5.00 levy fee from your first payment to the Department. If the property you are holding for the debtor is greater than what the debtor owes the Department, pay the Department the full amount stated on the levy and deduct your $5.00 levy fee from the additional property.

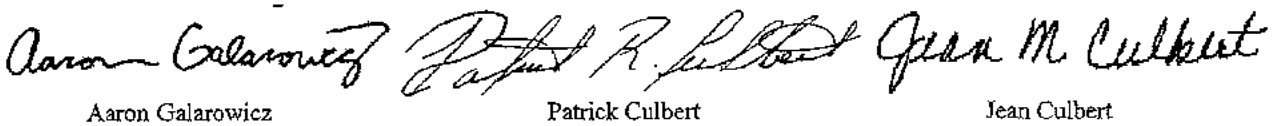
EXAMPLES	**1. Levy Amount**	**2. You Hold**	**3. You Pay the Department**
	A. $1000	$ 950	$ 950 - $5 = $945
	B. $1000	$1500	$1000
	C. $1000	$1002	$1002 - $5 = $997

Payment Information - Section B

All payments should be made in the form of a check payable to Worker's Compensation – Uninsured Employers Fund. Include the debtor's employer number on all payments.

Send payments to: DWD – Workers Compensation
Collections Section
P.O. Box 7948
Madison, WI 53707

If you have questions concerning this notice, please contact one of the Specialists below.



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Information Sheet for Third Party

This sheet outlines s. 102.835 of the Wisconsin Statutes in its entirety. This information may be useful to you in complying with the levy.

Section 102.835 Levy for delinquent payments.

(1) DEFINITIONS. In this section:

(a) "Debt" means a delinquent payment.

(ad) "Debtor" means an uninsured employer or an individual found personally liable under s. 102.83(8) who owes the department a debt.

(d) "Levy" means all powers of distraint and seizure.

(e) "Payment" means a payment owed to the department under s. 102.82 and includes interest on that payment.

(f) "Property" includes all tangible and intangible personal property and rights to that property, including compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, amounts paid periodically pursuant to a pension or retirement program, rents, proceeds of insurance and amounts paid pursuant to a contract.

(2) POWERS OF LEVY AND DISTRAINT. If any debtor who is liable for any debt fails to pay that debt after the department has made demand for payment, the department may collect that debt and the expenses of the levy by levy upon any property belonging to the debtor. If the value of any property that has been levied upon under this section is not sufficient to satisfy the claim of the department, the department may levy upon any additional property of the debtor until the debt and expenses of the levy are fully paid.

(3) DUTIES TO SURRENDER. Any person in possession of or obligated with respect to property or rights to property that is subject to levy and upon which a levy has been made shall, upon demand of the department, surrender the property or rights or discharge the obligation to the department, except that part of the property or rights which is, at the time of the demand, subject to any prior attachment or execution under any judicial process.

(4) FAILURE TO SURRENDER; ENFORCEMENT OF LEVY.

(a) Any debtor who fails to surrender any property or rights to property that is subject to levy, upon demand by the department, is subject to proceedings to enforce the amount of the levy.

(b) Any 3rd party who fails to surrender any property or rights to property subject to levy, upon demand of the department, is subject to proceedings to enforce the levy. The 3rd party is not liable to the department under this paragraph for more than 25 percent of the debt. The department shall serve a final demand as provided under sub. (13) on any 3rd party who fails to surrender property. Proceedings may not be initiated by the department until 5 days after service of the final demand. The department shall issue a determination under s. 102.82 to the 3rd party for the amount of the liability.

(c) When a 3rd party surrenders the property or rights to the property on demand of the department or discharges the obligation to the department for which the levy is made, the 3rd party is discharged from any obligation or liability to the debtor with respect to the property or rights to the property arising from the surrender or payment to the department.

(5) ACTIONS AGAINST THIS STATE. (a) If the department has levied upon property, any person, other than the debtor who is liable to pay the debt out of which the levy arose, who claims an interest in or lien on that property, and who claims that that property was wrongfully levied upon may bring a civil action against the state in the circuit court for Dane County. That action may be brought whether or not that property has been surrendered to the department. The court may grant only the relief under par. (b). No other action to question the validity of or to restrain or enjoin a levy by the department may be maintained.

(b) In an action under par. (a), if a levy would irreparably injure rights to property, the court may enjoin the enforcement of that levy. If the court determines that the property has been wrongfully levied upon, it may grant a judgment for the amount of money obtained by levy.

(c) For purposes of an adjudication under this subsection, the determination of the debt upon which the interest or lien of the department is based is conclusively presumed to be valid.

(6) DETERMINATION OF EXPENSES. The department shall determine its costs and expenses to be paid in all cases of levy.

(7) USE OF PROCEEDS.

(a) The department shall apply all money obtained under this section first against the expenses of the proceedings and then against the liability in respect to which the levy was made and any other liability owed to the department by the debtor.

(b) The department may refund or credit any amount left after the applications under par. (a), upon submission of a claim for a refund or credit and satisfactory proof of the claim, to the person entitled to that amount.

(8) RELEASE OF LEVY. The department may release the levy upon all or part of property levied upon to facilitate the collection of the liability or to grant relief from a wrongful levy, but that release does not prevent any later levy.

(9) WRONGFUL LEVY. If the department determines that property has been wrongfully levied upon, the department may return the property at any time, or may return an amount of money equal to the amount of money levied upon.

(10) PRESERVATION OF REMEDIES. The availability of the remedy under this section does not abridge the right of the department to pursue other remedies.

(11) EVASION. Any person who removes, deposits or conceals or aids in removing, depositing or concealing any property upon which a levy is authorized under this section with intent to evade or defeat the assessment or collection of any debt is guilty of a Class I felony and shall be liable to the state for the costs of prosecution.

(12) NOTICE BEFORE LEVY. If no proceeding for review permitted by law is pending, the department shall make a demand to the debtor for payment of the debt which is subject to levy and give notice that the department may pursue legal action for collection of the debt against the debtor. The department shall make the demand for payment and give the notice at least 10 days prior to the levy, personally or by any type of mail service which requires a signature of acceptance, at the address of the debtor as it appears on the records of the department. The demand for payment and notice shall include a statement of the amount of the debt, including costs and fees, and the name of the debtor who is liable for the debt. The debtor's failure to accept or receive the notice does not prevent the department from making the levy. Notice prior to levy is not required for a subsequent levy on any debt of the same debtor within one year after the date of service of the original levy.

(13) SERVICE OF LEVY.

(a) The department shall serve the levy upon the debtor and 3rd party by personal service or by any type of mail service which requires a signature of acceptance.

(b) Personal service shall be made upon an individual, other than a minor or incapacitated person, by delivering a copy of the levy to the debtor or 3rd party personally; by leaving a copy of the levy at the debtor's dwelling or usual place of abode with some person of suitable age and discretion residing there; by leaving a copy of the levy at the business establishment of the debtor with an officer or employee of the debtor; or by delivering a copy of the levy to an agent authorized by law to receive service of process.

(c) The department representative who serves the levy shall certify service of process on the notice of levy form and the person served shall acknowledge receipt of the certification by signing and dating it. If service is made by mail, the return receipt is the certificate of service of the levy.

(d) The failure of a debtor or 3rd party to accept or receive service of the levy does not invalidate the levy.

(14) ANSWER BY 3RD PARTY. Within 20 days after the service of the levy upon a 3rd party, the 3rd party shall file an answer with the department stating whether the 3rd party is in possession of or obligated with respect to property or rights to property of the debtor, including a description of the property or the rights to property and the nature and dollar amount of any such obligation. If the 3rd party is an insurance company, the insurance company shall file an answer with the department within 45 days after the service of the levy.

(15) DURATION OF LEVY. A levy is effective from the date on which the levy is first served on the 3rd party until the liability out of which the levy arose is satisfied, until the levy is released or until one year after the date of service, whichever occurs first.

(18) RESTRICTION ON EMPLOYMENT PENALTIES BY REASON OF LEVY. No employer may discharge or otherwise discriminate with respect to the terms and conditions of employment against any employee by reason of the fact that his or her earnings have been subject to levy for any one levy or because of compliance with any provision of this section. Whoever willfully violates this subsection may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

(19) HEARING. Any debtor who is subject to a levy proceeding made by the department may request a hearing under s. 102.17 to review the levy proceeding. The hearing is limited to questions of prior payment of the debt that the department is proceeding against, and mistaken identity of the debtor. The levy is not stayed pending the hearing in any case in which property is secured through the levy.

(20) COST OF LEVY. Any 3rd party is entitled to a levy fee of $5 for each levy in any case where property is secured through the levy. The 3rd party shall deduct the fee from the proceeds of the levy.

History: 1993 a. 81; 1995 a. 117; 1997 a. 187, 283; 2001 a. 109; 2005 a. 442; 2007 a. 185.

WCRB AND THE WORKERS COMPENSATION CLASSIFICATION SYSTEM

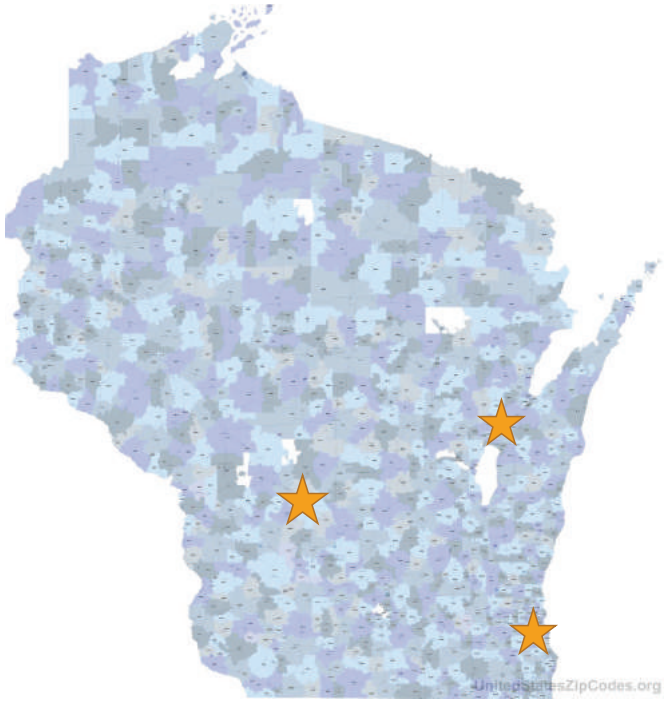
CLASSIFICATION CODE DETAILS

- 532 total codes currently
- 5 industry groups
- Basis of premium = payroll
- Premium = Rate for class/$100 of payroll

- Inspections
- Notice to Carrier letters
- Policy and Unit Statistical Report review

WORKERS COMPENSATION CLASSIFICATION OVERSIGHT

INSPECTIONS



INSPECTION DETAILS

- External request vs. internal request
- Approximately 600 conducted per year
- Communication of results

SCOPE OF INSPECTIONS

What it is	What it is not
Interview	A premium audit
Tour	Determination of employee vs. independent contractor status
Determination of class codes	

DISPUTE RESOLUTION PROCESS

Direct appeal to the WCRB

Hearing before the WCRB's Rating Committee

Appeal to the Office of the Commissioner of Insurance

QUESTIONS?

Field Audit Section

UNEMPLOYMENT INSURANCE

Becky Craig
UI Field Audit Section Chief
Bureau of Tax and Accounting

UI Field Audit Mission Statement

- Achieve a balanced tax program that will **safeguard the integrity** of the UI trust fund, ensure the tax provisions of the law are **equitably enforced**, and **educate employers** as to their rights and responsibilities under the law.

- Accomplished by administering a comprehensive auditing program that conducts routine periodic field audits and other special investigations of employers' records to ensure proper reporting and compliance with UI law.

Field Audit Staffing - 28

Three supervisors (Section Chief, Eastern Unit, and Western Unit)

One scheduler/clerical

Twenty-four auditors

- Seven in Madison
- One in Wausau
- One in Wisconsin Rapids
- Three in Eau Claire
- Two in Mt. Pleasant/Racine
- Six in Menomonee Falls
- Four in Appleton

Misclassification Auditors

All auditors perform misclassification tests on each audit.

Three auditors recently designated to work on the referrals from the Bureau of Legal Affairs (BOLA) Worker Classification Section, along with other audit assignments.

Types of Audits

Verification Audits (random, increase/decrease in payroll/other factors)

Request Audits

- Benefit Fraud
- Collection Investigation
- Replace estimates with actuals
- Independent Contractor (IC) Investigation
- Subjectivity
- Business Transfers
- Proper payroll reporting and exclusions

Effective Audit Measure (EAM)

- The Department of Labor (DOL) monitors states' field audit programs.

- In January 2011, the DOL updated UI field audit performance measures to focus on misclassification.

Four Measures - EAM

1. Percent of Contributory Employers Audited Annually (1% minimum).
2. Percent of Total Wage Change from Audit (2% minimum).
3. Percent of Total Wages Audited (1% minimum).
4. Average Number of Misclassified Workers Detected per Audit (1 minimum).

- Must pass all four AND have an extra two points in any of the categories for a minimum of 7 to pass.

Wisconsin's 2018 Performance

1. Percent of Contributory Employers Audited – 1.8%
2. Percent of Total Wage Change from Audit – 5.1%
3. Percent of Total Wages Audited – 1.4%
4. Average Misclassified Workers per Audit – 3.5

- Wisconsin's score in 2018: 11.8

Employment

Workers are presumed to be employees unless the IC criteria is met.

- Free from direction and control
- Meet at least 6 of 9 criteria to show independently established business

All workers should be reported:

- Casual labor
- Part-time employees
- Employees in training
- Employees receiving cash or in-kind wages

Employment

Some employment is excluded by statute:

- Sole proprietor and their spouse
- Minor children
- Parents of sole proprietor
- LLC members
- Certain classifications excluded by the Federal Unemployment Tax Act (FUTA)

Audit Process - Misclassification

- Employer records are examined to search for misclassified workers and hidden wages.
  - Records related to contract labor (1099s and master vendor files)
  - Cash disbursements
  - Detailed general ledger
  - Examination of miscellaneous reports and accounts such as the federal tax returns, financial statements, profit and loss statements, etc.

Audit Process - Misclassification

Any payments for services performed by an individual are investigated.

The employer has the burden of proof to show workers meet the IC criteria.

Auditors do the following in conjunction with the audit:

- Send out Worker Status Questionnaires (WSQs) to individuals who provided services to determine if the IC criteria are met
- Review bid documents
- Review invoices
- Review business cards
- Do internet searches for business information

DWD.WISCONSIN.GOV

2018 Statistics

- Number of audits performed – 2,459
  - Request audits 283
  - Verification audits 2,176
  - Audits with changes 1,031
  - Large employer audits (LEA) 83
    - An LEA is over 100 employees or over $1M in taxable payroll for the calendar year preceding the first quarter being audited
  - Calls – not included in federal stats 287

2018 Statistics

Calendar year statistics reported to DOL are from audits only, calls are not included.

Misclassified workers found (TPS)	8,677
Gross payroll audited	$1,857,245,776
Total taxable payroll audited	$ 679,594,418
Contributions underreported	$ 1,380,928
Misclassified workers from calls	509

Misclassified Worker Statistics

2013 to October 2019

- Audit assignments – 18,754
- Workers misclassified – 50,150 (includes BOLA referrals)
- Gross payroll audited – $13.7 billion
- Taxable payroll audited – $5.1 billion
- Contributions underreported – $13.3 million

Misclassification by Industry (2013 to 0ct. 2019)

Construction – 8,322 workers found; 3,379 audit assignments

Categories with the greatest number of misclassified workers found during audits:

- Residential remodelers – 1,578
- Residential drywallers – 1,227
- New single family general contractors – 813
- Commercial building construction – 398
- Nonresidential drywall contractors – 287

Misclassification by Industry (2013 to Oct. 2019)

Administrative and Support Services – 4,488 workers found; 1,330 audit assignments

Categories with the greatest number of misclassified workers found during audits:

- Landscaping services – 1,752
- Janitorial services – 1,652
- Security guards and patrol services – 101

Misclassification by Industry (2013 to Oct. 2019)

Accommodation and Food Services – 4,213 workers found; 2,291 audit assignments

Categories with the greatest number of misclassified workers found during audits:

- Full-service restaurants – 2,066
- Drinking places, alcoholic beverages – 837

DWD.WISCONSIN.GOV

Misclassification by Industry (2013 to Oct. 2019)

Retail Trade – 4,091 workers found; 1,268 audit assignments

Categories with the greatest number of misclassified workers found during audits:

- Electronic shopping and mail-order houses – 1,548
- Direct selling establishments – 446
- Supermarkets – 390
- Shoe stores – 288

Misclassification Effort Effectiveness

Closed audits – 2013 to October 2019

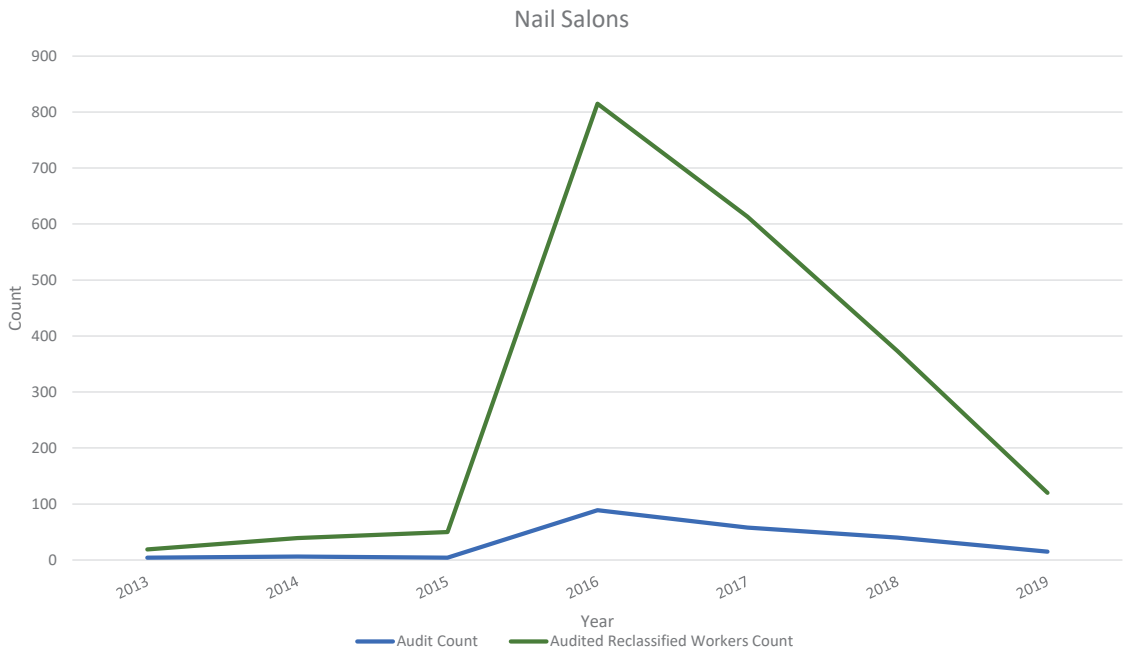
Nail salons audited based primarily from BOLA misclassification investigations: 216

- 202 audit assignments of nail salons since 1/1/2016

Total Misclassified Workers Found: 2,029

Moving toward compliance

Misclassification Effort Effectiveness



Summary

- The Department of Labor (DOL) governs and monitors the effectiveness of the UI Field Audit Section through the Effective Audit Measure.
- Proper classification of workers is a primary goal of the Wisconsin DWD and the DOL.
- Education of employers and enforcement of proper classification is essential.

U.S. Department of Labor
Wage & Hour Division

Jenna Carte
Assistant District Director
Milwaukee Area Office

About WHD

- Laws administered by WHD cover 7.3 million businesses and 135 million workers
- Employees are entitled to the protections of laws enforced by WHD regardless of immigration status
- WHD has over 200 offices across the country
- More than half of all investigators are bilingual
  - Over 600 investigators speak another language other than English
  - 46 languages spoken
  - 461 investigators speak Spanish

Laws Enforced by WHD

- Fair Labor Standards Act
- Family and Medical Leave Act
- Davis Bacon and Related Acts
- Service Contract Act
- Polygraph Protection Act
- Wage Garnishment
- Temporary Worker Programs

Employee or Independent Contractor?

- There is no single test for determining whether a worker is an employee (like most workers) or an independent contractor under the FLSA.

- A worker is an employee if he or she is economically dependent on the employer, whereas a worker is an independent contractor if he or she is in business for himself or herself.

Employee or Independent Contractor?

- The *economic reality* of the worker's relationship with the employer determines whether the worker is economically dependent on the employer (and therefore, an employee) or is in business for himself or herself (and therefore, an independent contractor).
- Courts generally apply a number of "economic realities" factors as guides when making the determination, but the factors applied can vary and no one set of factors is exclusive.

Overarching Considerations

- No single "economic realities" factor determines whether a worker is an employee or an independent contractor.
- The six factors discussed in this presentation are not exclusive.
- Courts may consider additional factors that shed light on whether a worker is an employee or an independent contractor.

"Economic Realities" Factors

We generally consider the following factors when determining if a worker is an employee or independent contractor:

1. **The extent to which the work performed is an integral part of the employer's business;**
2. **Whether the worker's managerial skills affect his or her opportunity for profit and loss;**
3. **The relative investments in facilities and equipment by the worker and the employer;**
4. **The worker's skill and initiative;**
5. **The permanency of the worker's relationship with the employer;**
6. **The nature and degree of control by the employer.**

Misclassification

- Studies suggest that 10 to 30 percent of employers may misclassify their employees as independent contractors.

❖ *Source: USDOL Prevailing Wage Seminars (2017)*

DOL-WHD Investigation Process

- Initial Conference/Tour Establishment
- Fact Finding
  - Interviews
  - Records Review
- Determination of Compliance
- Final Conference
- Remedies

WHD Fiscal Year 2018 Numbers

(All Acts)

- 19,534 – Complaints registered;
- 28,397 – Cases concluded;
- $304,914,114 – Back wages collected;
- 265,027 – Employees receiving back wages

- **Source: https://www.dol.gov/whd/data**

DOL Misclassification Enforcement Activity

- A painting and water-proofing company based in Sunrise, Florida was ordered to **$86,530 in overtime back wages to 25 employees**. WHD investigators determined that the firm incorrectly classified the majority of its employees as independent contractors, paying them a straight-time rate for all hours worked, which resulted in overtime violations when the employees worked more than 40 hours in a workweek. (2019) https://www.dol.gov/newsroom/releases/whd/whd20190226

- Investigations by the U.S. Department of Labor's Wage and Hour Division resulted in the recovery of **$5,579,939 in back wages and benefits owed to 993 employees** of nine subcontractors that provided power generator operation support for hurricane recovery efforts in Puerto Rico. Among other infractions, WHD investigators discovered violations that included to pay required wages to employees misclassified as independent contractors. (2018) https://www.dol.gov/newsroom/releases/sol/sol20190211

- After an investigation by USDOL-WHD, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, issued an opinion affirming the Department's assertion that a security and traffic control services provider based in Louisville, Kentucky violated the overtime and recordkeeping provisions of the FLSA. WHD investigators determined that the employer incorrectly classified employees as independent contractors, leading to overtime violations when the employer failed to pay employees time-and-a-half for any hours they worked over 40 in a workweek. (2019) https://www.dol.gov/newsroom/releases/whd/whd20190305-1

** Source: DOL-WHD Press Releases on Misclassification*
https://www.dol.gov/whd/media/press/whdprssToc.asp?topic=MIS#CurrentTopic

DOL Misclassification Resources

- DOL-WHD Misclassification Webpage
  https://www.dol.gov/whd/workers/misclassification/
- DOL 'Know Your Rights! – Misclassification (YouTube)
  https://www.youtube.com/watch?v=BTUkKFYBdrU&feature=youtu.be
- DOL-WHD Press Releases on Misclassification
  https://www.dol.gov/whd/media/press/whdprssToc.asp?topic=MIS#CurrentTopic
- E-laws – Independent Contractor
  https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp
- 'Get the Facts – Misclassification Under the FLSA (Pamphlet)
  https://www.dol.gov/whd/workers/Misclassification/misclassification-facts.pdf
- DOL Employment Relationship Fact Sheet #13
  https://www.dol.gov/whd/regs/compliance/whdfs13.htm

Additional DOL Resources

- Visit the WHD home page: www.dol.gov/whd
- Frequently Asked Questions (FAQs)
- Fact Sheets
- Opinion Letters
- 1-866-4US-WAGE (1-866-487-9243)
- Call or visit the nearest Wage and Hour Division Office: WHD Offices

State of Minnesota
County of Hennepin

District Court
4th Judicial District

Prosecutor File No. 18A09225
Court File No. 27-CR-18-24013

State of Minnesota,

Plaintiff,

vs.

RICARDO ERNESTO BATRES DOB: 08/17/1972

5644 Vera Cruz Avenue North
Crystal, MN 55430

Defendant.

COMPLAINT

Order of Detention

The Complainant submits this complaint to the Court and states that there is probable cause to believe Defendant committed the following offense(s):

COUNT I

Charge: Labor Trafficking; Individuals age 18 or older.
Minnesota Statute: 609.282.2, with reference to: 609.282.2
Maximum Sentence: 15 YEARS AND/OR $30,000
Offense Level: Felony

Offense Date (on or about): 08/24/2017

Control #(ICR#): 17002179

Charge Description: On or about August 24 to November 14, 2017, in Hennepin, Carver and Washington Counties, Minnesota, RICARDO ERNESTO BATRES, date of birth 8/17/72, Defendant herein, knowingly engaged in the labor trafficking of victim, a known adult male.

COUNT II

Charge: Theft-By Swindle
Minnesota Statute: 609.52.2(a)(4), with reference to: 609.52.3(1)
Maximum Sentence: 20 YEARS AND/OR $100,000
Offense Level: Felony

Offense Date (on or about): 11/14/2017

Control #(ICR#): 17002179

Charge Description: That on or about November 14, 2017, in Hennepin County, Minnesota, RICARDO ERNESTO BATRES, date of birth 8/17/72, Defendant herein, obtained property or services in public funds for himself, or another, by swindling Hennepin County Emergency Medical Assistance Program using artifice, trick, device or other means, and the property or services had a value in excess of Thirty-Five Thousand Dollars ($35,000.00).

COUNT III

Charge: Insurance Fraud-Present False Representation/Conceals Facts-Policy Application
Minnesota Statute: 609.611.1(a)(1), with reference to: 609.52.3(2)
Maximum Sentence: 10 YEARS AND/OR $20,000
Offense Level: Felony

Offense Date (on or about): 01/01/2017

Control #(ICR#): 17002179

Charge Description: That on or about January 1, 2017 through December 31, 2017, in Hennepin County, Minnesota, RICARDO ERNESTO BATRES, date of birth 8/17/72, Defendant herein, with intent to defraud, presented or caused to be presented, or prepared with knowledge or reason to believe that it would be presented, on behalf of an insured, claimant, or applicant to an insurer, insurance professional, or premium finance company, information that contained a false representation as to a material fact, or concealed a material fact concerning an application for, rating of, or renewal of, an insurance policy for the purpose of depriving another of property or for pecuniary gain that had a value in excess of Five Thousand Dollars ($5,000.00).

STATEMENT OF PROBABLE CAUSE

Your complainant, Ephraim Holmgren, is a Special Agent with Minnesota Commerce Fraud Bureau. In that capacity, and working in conjunction with Fraud Bureau Senior Analyst Jill Bean, complainant has investigated the circumstances of this case and discovered the following facts that establish probable cause to believe that RICARDO ERNESTO BATRES (DOB 08/17/1972), Defendant herein, did commit the crimes of labor trafficking, insurance fraud, and theft of public funds.

Defendant recruited and enticed persons to work for his company, American Contractors and Associates, LLC, to complete wood framing and wall board installation construction work. Defendant knew the men he employed were undocumented workers and used that knowledge as leverage to force them to work long hours, for less than market pay, and without adequate safety protections. Defendant also knew that he had not purchased workers' compensation insurance as required by law. When workers were injured, Defendant told his employees that they would lose their jobs and be deported if they sought medical attention. In at least one instance, Defendant forced an employee to work for him through a combination of threats of physical restraint, threatened abuse of the legal process, and possession and control of immigration documents.

Defendant also repeatedly made false statements to insurance companies with the purpose of evading workers' compensation laws. In addition, when one employee was seriously injured, Defendant provided false information about the injury in support of an application for emergency medical insurance, resulting in more than $45,000 of public funds going to cover medical bills that should have been covered by Defendant's mandatory workers' compensation policy.

Based on the facts as set forth below, Defendant is charged with labor trafficking, theft by swindle of public funds and insurance fraud.

I. AMERICAN CONTRACTORS AND ITS EMPLOYEES.

Defendant registered his company, American Contractors and Associates, as a Limited Liability Company with the Minnesota Secretary of State in 2008 and obtained a Residential Building Contractor license from the Minnesota Department of Labor and Industry that same year.

The business was run by Defendant out of locations in Crystal, Hennepin County, Minnesota. The company provided wood framing, wallboard installation work, and other construction work throughout Hennepin County and several adjoining counties. The number of employees fluctuated over time, but at its height in the summer of 2017, Defendant had over a dozen workers. Defendant knowingly recruited and hired undocumented workers, because doing so allowed him to take more profit for himself, at the expense of his workers' safety and wellbeing.

As an employer and registered contractor, Defendant was obligated under Minnesota law to maintain workers' compensation insurance. Defendant knew of those obligations as he submitted Certificates of Compliance for Minnesota Workers' Compensation Law in 2008, 2012, 2014, 2016, and 2018. Defendant also applied for workers' compensation through a government managed plan in 2008 and 2009. After this policy was canceled, Defendant improperly operated without insurance for a period of time. After he faced administrative action by the Minnesota Department of Labor and Industry ("DOLI") in 2013, he reapplied for insurance from the government plan, but was not granted insurance because he did not provide the documents they needed to complete an audit and because of issues stemming from his operation in 2009 and 2010. He then applied for a new policy from a private insurance company. He provided false statements on that application, which lead that company to issue an insurance policy and which lead to

substantially lower premiums that he would have been required to pay had he been truthful.

Interviews with several of Defendant's former employees revealed the same facts – Defendant hired them as hourly employees. They did not bid on jobs and did not buy their own construction materials. While some of them had their own tools, Defendant provided some tools and also provided larger construction machinery needed for their work. Defendant directed them where to work and when to work. They submitted their hours to Defendant, who paid them based on the number of hours worked. Defendant made no deductions from their paychecks for taxes or any other reason. The employees did not maintain their own businesses, were not registered with the Minnesota Department of Labor and Industry as independent contractors, did not have federal or state tax payer identification numbers, and did not maintain their own workers' compensation policies. Under Minnesota law, and under the plain understanding of the term, they were Defendant's employees. Defendant knew they were employees and he treated them as such, requiring them to log their hours, moving them from one project to the next, and hiring and firing them. Defendant made false statements on his applications for workers' compensation insurance and during his audits with his insurance company to hide the fact he had employees and to lower his premium payments. These false statements included, but were not limited to, the fact that he had employees and the type of work they completed.

While Defendant operated his company in this manner for many years, this complaint focuses on Defendant's actions in 2017. Starting in or around May 2017, Defendant began to recruit workers for the summer construction season. He enticed as many as twelve people to work for him by promising an hourly wage, benefits, and in some cases, housing. In at least one instance, he recruited an undocumented worker to move to Minnesota to work for his company. Defendant had his employees work at elevation, sometimes as high as six stories, and without proper safety equipment. Employee job duties primarily involved framing work, using prefabricated wood walls at large development projects located in Golden Valley, Bloomington, and Maple Grove, Hennepin County, Minnesota, and in other locations in other counties in Minnesota. Defendant had his employees work 10 to 12 hours per day, Monday through Saturday and occasionally on Sunday. He did not pay overtime and did not take deductions from their paychecks. Bank records show Defendant paid his workers each week for the hours they worked and that none of the workers shared in the profit from the jobs.

II. EMPLOYEE INJURIES.

Due to the risks involved in construction work, particularly in light of inadequate safety protections for his employees, several of Defendant's employees sustained injuries while working for Defendant.

Employees were injured when they stepped on nails, when heavy prefabricated walls fell on them, and by falling from heights as they worked on multiple-story buildings. Due to the risks inherent in the construction industry, Minnesota law requires employers to maintain workers' compensation insurance to provide medical care, lost income, and vocational rehabilitation for injured employees. Defendant knew that he had made false statements on his workers' compensation policy applications denying that he had employees, so, when workers began to suffer injuries he told them not to seek medical attention and not to report the injuries. Defendant told his workers that if they reported the injuries, they and their coworkers would lose their jobs. He also told them that they would be deported for illegally working in the United States. Defendant sent workers to a massage therapist / traditional healer who would provide massages and other types of care for injured workers. Defendant sent at least three workers to this "traditional healer" in the summer of 2017. Defendant told these workers he would pay them while they were unable to work, but he did not follow through with that promise. As such, multiple workers returned to working for Defendant while still injured, without receiving adequate medical attention and without being compensated while they were injured at work.

III. DETENTION BY ICE

On or about July 5, 2017, after a number of workplace injuries had occurred, a group of employees decided they could no longer work for Defendant. In addition to the concerns about injuries and lack of medical care, Defendant had put the workers up in an overcrowded house in Bloomington with no hot water. Defendant then stopped paying their rent. Defendant expressed concern about losing his workers and being left in ruins if he didn't have people to work for him. On the morning of July 11, 2017, as the men left the Bloomington house to go to work for Defendant, they were stopped by officers with Immigration Customs and Enforcement ("ICE"). Multiple workers were arrested and detained. Several of them were quickly deported, but others remained in ICE custody as their immigration cases proceeded. During this time, Defendant went to see these employees in custody multiple times. Defendant gave the men advice on how to handle the immigration proceedings and told them he had hired a lawyer for them. No attorney showed up at any court proceedings and records indicate that no attorney hired by Defendant did any work on their cases. After about a month in custody, on August 23, 2017, one of the employees was able to get an immigration bond set on his case.

When he was released, Defendant was waiting for him outside of the detention center. Defendant spoke on the employee's behalf to the immigration officials in English, and also completed the release and bond paperwork. The employee does not speak English and could not participate in the interview or forms. The employee knew that Defendant was claiming to be a friend and listed Defendant's address and phone number as the contact information for the employee. In order to be in compliance with the terms of his release from detention, the employee had to go to Defendant's home every week to complete his "check in" call with immigration officials. Defendant also told this employee that he had to go with him to his monthly meetings with immigration officials. On the way to the first of these meetings, Defendant told the employee that several years ago Defendant had considered working for ICE and, although he decided not to take the job, he knew people at ICE. Defendant's message to the employee was, "don't leave me, you have to continue working with me until we finish this, if you try to leave I can harm you. If you leave me, you'll lose all of the good opportunities you have with me." This statement made the employee fearful of what would happen to him if he tried to stop working for Defendant.

After his release from ICE custody, Defendant told this employee that he had paid $7,000 for an attorney for him and another $6,000 to get him out of custody. Defendant said the employee now owed Defendant $13,000 and had to work for him to pay off the debt. The day after his release, Defendant sent the employee back to work, doing the same work he had done before his arrest and detention. Defendant lowered the employee's hourly rate of pay, ostensibly to be repaid for the $13,000, but did not keep track of how much was paid back and the employee did not know how much Defendant was claiming was still owed.

Over the coming weeks and months, Defendant used his knowledge of the employee's immigration status and his claim that the employee owed him money to force the employee to work for him. Defendant made promises to the employee to help with his immigration status. For example, Defendant told him that he had hired an attorney who would help the employee obtain a work permit, licenses, and a residency card. Other times, Defendant threatened the employee, saying that he was responsible for him and that if he didn't do what Defendant said he would be deported. For example, Defendant led the employee to believe that he was responsible for the employee's arrest by ICE and for his subsequent release from custody. He also told the employee about people he knows in ICE and suggested that he would use his connections to have the employee deported if he tried to quit. Through a combination of promises to help and threats of deportation Defendant made the employee fearful that he would be deported if he stopped working for Defendant. The employee continued working for Defendant until November of 2017, when he was badly injured at a work site.

IV. EMPLOYEE INJURIES IN NOVEMBER 2017.

On November 14, 2017, while working for Defendant, the employee was seriously injured. A large, prefabricated wall fell on top of him causing multiple spinal fractures. The employee was hospitalized for six days and required extensive follow-up treatment. The injury happened while the employees were attempting to put a large prefabricated wall into position when a strong wind caused it to fall. When the wall fell, it landed on the employee's back and pinned him to the ground. His coworkers were able to lift the wall and pull the employee out from underneath. Following the accident, the employee was in intense pain and could not walk. The workers called Defendant, who told them not to call an ambulance. He said the ambulance would alert immigration officials and the employee would be deported. He told them to bring the employee to the woman who had given massages to the workers that summer. When the men insisted that the employee needed medical treatment, Defendant told them to wait for him to arrive. The men waited for about 30 minutes, but they decided they could not wait any longer because of the severity of the employee's injuries. Defendant, however, intercepted them in route to the hospital and took the employee to the hospital himself.

Defendant took this employee to the Hennepin County Medical Center, located in Minneapolis, Hennepin County, Minnesota. When they arrived at the hospital, emergency medical professionals put the employee on a backboard and brought him to the emergency room. He was examined by neurology and surgery specialists, and diagnosed with multiple spinal fractures. Initially, the doctors thought he would be need surgery. After several days of observation, however, the doctors decided on a more conservative plan of treatment and fitted the employee with a body cast to immobilize him. The employee was discharged after spending six days in the hospital and continues to have physical therapy appointments nearly a year later. He still experiences pain from the injury, he has difficulty bending over, and cannot stay in the same position for long periods of time.

When the employee was admitted to the emergency room, Defendant was with him and acted as a translator. Defendant lied to the hospital staff about how the injury happened, telling them that the employee was injured at Defendant's home as they tried to lift a heavy object into a dumpster. Defendant told the employee to go along with that story because he would be deported if he told the truth about being injured at work.

Because Defendant lied about how the employee was injured, the hospital did not know that his injuries occurred on the job. On the day he was first admitted to the hospital, November 14, 2017, a financial counselor with HCMC met with him. Defendant was present during this conversation and had already coerced and convinced his employee to deny the injury happened at work. The employee went along with Defendant's story, telling the financial counselor that he was injured in an accident at home. Defendant knew this was false information submitted to obtain government assistance for the employee and Defendant knew that since the employee was injured while working for him that the injury should have been submitted to his workers' compensation policy. The employee went along with these false statements because Defendant told him he would be deported if he said he was injured at work.

Based on the false representations, Hennepin County approved emergency medical assistance for the employee. The cost of the medical treatment was covered by a combination of publically funded programs. Over $31,000 was covered by Medicaid, over $10,000 was paid for by Minnesota Care, and an additional $4,200 was paid for by Hennepin County Charity Care program. In total, more than $45,000 in public funds paid for the employee's medical care because Defendant lied about how the employee was injured and failed to report the injury to workers' compensation insurance.

V. EFFORTS TO CONCEAL CRIMINAL ACTS.

Defendant knew that he had defrauded his insurance company and he knew of his obligations to his employees. Because of this, he took steps to hide his crimes after they were discovered. For example, Defendant tried to get several workers to sign documents that indicated they were actually independent contractors, who would be responsible for their own workers' compensation insurance. Defendant only asked them to sign the documents long after they had been working for him and he withheld paychecks from the employees to force them to sign the documents. The employees could not read English and did not know what the documents said. Defendant forced and coerced his employees into signing these documents by claiming they could force deportation if they didn't, by withholding pay, and by otherwise intimidating and lying to his workers.

Defendant also made false statements to an insurance company to cover up his crimes. After it was discovered that Defendant had employees that he did not disclose on his applications for workers' compensation insurance and during his audits, Defendant's insurance company asked him questions about his company and its employees. Defendant lied to them about his company, claiming that he only worked with subcontractors. He specifically lied about the employee who suffered the spinal fracture and another employee, claiming that they did not work for him. During his conversation with the insurance company, Defendant expressed an understanding of workers' compensation laws and his requirement to maintain insurance to cover employees.

VI. DEFENDANT'S FINANCES.

By evading his workers' compensation insurance obligations, and by underpaying his workers, Defendant was able to obtain significant personal gain from his business. For example, starting in June 2017, he took more than $50,000 out of his company and used it to buy a home. In 2017, he withdrew more than $20,000 in cash and he used company money to pay for personal expenses. He paid almost $4,000 in 2017 for health insurance for himself, at the same time as he failed to maintain required insurance for his workers. He spent more than $4,000 at gas stations and more than $3,000 on groceries and he spent nearly $12,000 purchasing a car.

VII. SEARCH WARRANT AND ARREST

On September 25, 2018, a search warrant was executed at Defendant's business and home. Records relating to the operation of American Contractors, including time cards and payroll information for employees were located. Electronic devices were also seized and will be analyzed, along with the records taken pursuant to the warrant.

On that same date, Defendant was located and taken into custody and transported to the Hennepin County Detention Facility. Due to the seriousness of the offenses, in particular labor trafficking that resulted in serious injury to an employee, theft of public funds and insurance fraud, the State is requesting that bail be ordered in the sum of $200,000.

SIGNATURES AND APPROVALS

Complainant requests that Defendant, subject to bail or conditions of release, be:
(1) arrested or that other lawful steps be taken to obtain Defendant's appearance in court; or
(2) detained, if already in custody, pending further proceedings; and that said Defendant otherwise be dealt with according to law.

Complainant declares under penalty of perjury that everything stated in this document is true and correct. Minn. Stat. § 358.116; Minn. R. Crim. P. 2.01, subds. 1, 2.

Complainant

Ephraim Holmgren
Special Agent
85 7th Place East
Suite 100
St. Paul, MN 55101
Badge: 109

Electronically Signed:
09/25/2018 03:36 PM
Hennepin County, Minnesota

Being authorized to prosecute the offenses charged, I approve this complaint.

Prosecuting Attorney

Morgan D Kunz
Assistant Hennepin County Attorney
300 S 6th St
Minneapolis, MN 55487
(612) 348-5550

Electronically Signed:
09/25/2018 03:10 PM

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant's arrest or other lawful steps be taken to obtain Defendant's appearance in court, or Defendant's detention, if already in custody, pending further proceedings. Defendant is therefore charged with the above-stated offense(s).

☐ **SUMMONS**

THEREFORE YOU, THE DEFENDANT, ARE SUMMONED to appear on **_____ ___, _____ at _____ AM/PM** before the above-named court at 300 S Sixth Street, Minneapolis, MN 55487 to answer this complaint.

IF YOU FAIL TO APPEAR in response to this SUMMONS, a WARRANT FOR YOUR ARREST shall be issued.

☐ **WARRANT**

To the Sheriff of the above-named county; or other person authorized to execute this warrant: I order, in the name of the State of Minnesota, that the Defendant be apprehended and arrested without delay and brought promptly before the court (if in session), and if not, before a Judge or Judicial Officer of such court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon as such Judge or Judicial Officer is available to be dealt with according to law.

☐ ***Execute in MN Only*** ☐ ***Execute Nationwide*** ☐ ***Execute in Border States***

☒ **ORDER OF DETENTION**

Since the Defendant is already in custody, I order, subject to bail or conditions of release, that the Defendant continue to be detained pending further proceedings.

Bail: $200,000.00
Conditions of Release:

This complaint, duly subscribed and sworn to or signed under penalty of perjury, is issued by the undersigned Judicial Officer as of the following date: September 25, 2018.

Judicial Officer Toddrick Barnette
District Court Judge

Electronically Signed: 09/25/2018 03:57 PM

Sworn testimony has been given before the Judicial Officer by the following witnesses:

COUNTY OF HENNEPIN
STATE OF MINNESOTA

State of Minnesota

Plaintiff

vs.

RICARDO ERNESTO BATRES

Defendant

LAW ENFORCEMENT OFFICER RETURN OF SERVICE
I hereby Certify and Return that I have served a copy of this Order of Detention upon the Defendant herein named.

Signature of Authorized Service Agent:

DEFENDANT FACT SHEET

Name:	RICARDO ERNESTO BATRES
DOB:	08/17/1972
Address:	5644 Vera Cruz Avenue North Crystal, MN 55430
Alias Names/DOB:	
SID:	MN05043444
Height:	
Weight:	
Eye Color:	
Hair Color:	
Gender:	MALE
Race:	White
Fingerprints Required per Statute:	Yes
Fingerprint match to Criminal History Record:	Yes
Driver's License #:	
SILS Person ID #:	322180
SILS Tracking No.	3027160
Case Scheduling Information:	This case should be blocked to the serious felony calendar, due to its complexity, length of trial, and because it was charged from the HCAO complex crime unit.
Alcohol Concentration:	

STATUTE AND OFFENSE GRID

Cnt Nbr	Statute Type	Offense Date(s)	Statute Nbrs and Descriptions	Offense Level	MOC	GOC	Controlling Agencies	Case Numbers
1	Charge	8/24/2017	609.282.2 Labor Trafficking; Individuals age 18 or older.	Felony	M8603		MN062095Y	17002179
	Penalty	8/24/2017	609.282.2 Labor Trafficking; Individuals age 18 or older.	Felony	M8603		MN062095Y	17002179
2	Charge	11/14/2017	609.52.2(a)(4) Theft-By Swindle	Felony	U1061		MN062095Y	17002179
	Penalty	11/14/2017	609.52.3(1) Theft-Firearm or Property Value Over $35,000	Felony	U1061		MN062095Y	17002179
3	Charge	1/1/2017	609.611.1(a)(1) Insurance Fraud-Present False Representation/Conceals Facts-Policy Application	Felony	U1119		MN062095Y	17002179
	Penalty	1/1/2017	609.52.3(2) Theft-Value over $5,000 or Trade Secret, Explosive, Controlled Substance I or II	Felony	U1119		MN062095Y	17002179

WISCONSIN REGIONAL ANTI-HUMAN TRAFFICKING PROGRAMS

UMOS, LATINA RESOURCE CENTER

UMOS ANTI-HUMAN TRAFFICKING SERVICES

"LBS"
Look Beneath the Surface

-Training and Education
-Public Awareness
-Screening and Identification
-Technical Assistance

"OVC"
Office of Victims of Crime

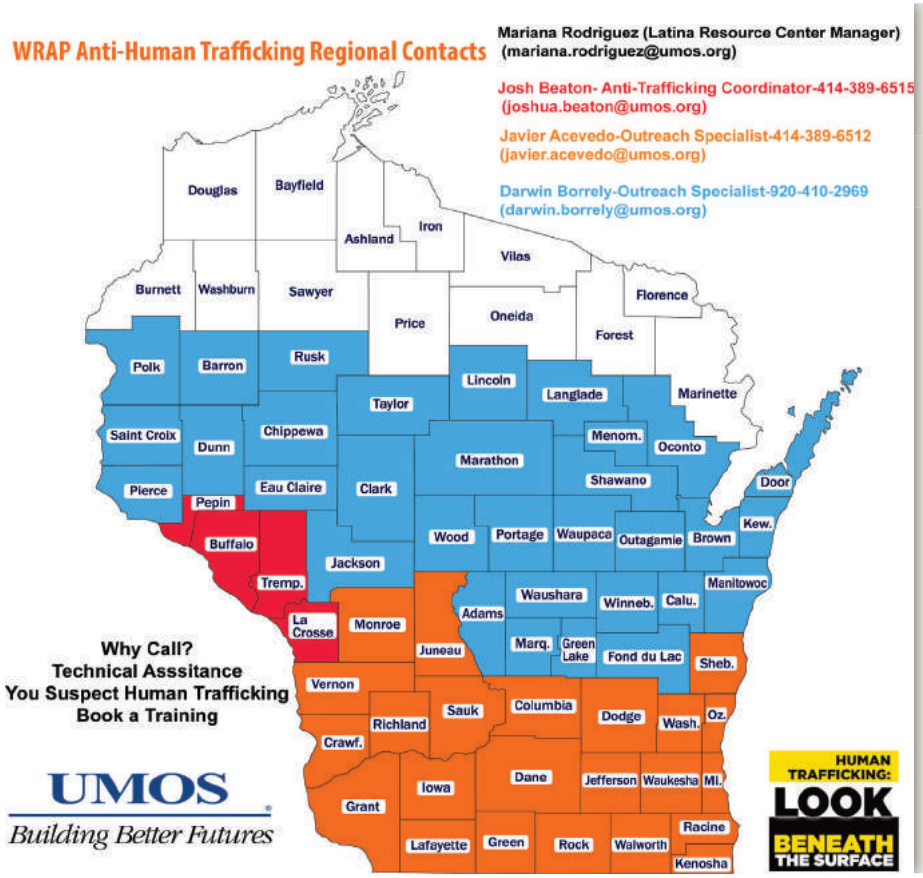
Enhanced collaborative model. Emergency funds for victims of trafficking. Foreign born, domestic, Adult, or child.

"TVAP"
Trafficking Victims Assistance Program

Emergency funding for foreign National victims of trafficking

"LAV"
Legal Assistance for Victims Grant

Legal assistance in conjunction With Lotus Legal Clinic, providing Legal relief for victims of non-intimate Sexual violence in the Eastern District Of Wisconsin.



THE WISCONSIN REGIONAL ANTI-HUMAN TRAFFICKING PROGRAM

WHAT DO WE DO?

- *Outreach*
- *Public Awareness*
- *Training*
- *Screening and Identification*
- *Technical Assistance*
- *Advocacy*
- *Collaboration*

WISCONSIN VULNERABILITIES

EASILY ACCESSIBLE HIGHWAY SYSTEM

RICH AGRICULTURAL INDUSTRY

HOSPITALITY INDUSTRY AND TOURISM

WISCONSIN & LABOR TRAFFICKING

- Anti-Human Trafficking awareness and initiatives are primarily focused on sexually exploited and sex trafficked youth-Domestic victims
- Minimal awareness of sex and labor trafficking of foreign nationals
- Minimal awareness of labor trafficking, identification, and assisting victims

VICTIMS CAN BE FOUND IN

- ❑ Domestic Service Situations (As Nannies Or Maids)
- ❑ Factories
- ❑ Canneries (Food Processing)
- ❑ Construction Sites
- ❑ Hospitality
- ❑ Farm/Migrant/Agricultural Work
- ❑ Dairy Farms
- ❑ Restaurants/Bars/Pubs
- ❑ Panhandling
- ❑ Resorts and Theme Parks
- ❑ Water Parks

UMOS, LATINA RESOURCE CENTER
WISCONSIN REGIONAL ANTI-HUMAN TRAFFICKING PROGRAM

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Department of Workforce Development
Secretary's Office
201 E. Washington Avenue
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Madison, WI 53707
Telephone: (608) 266-3131
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Email: sec@dwd.wisconsin.gov

STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

AGENDA

Wednesday, November 20, 2019
9:00 am – 12:00 pm

Milwaukee Area Technical College – Oak Creek Campus
Lecture Hall A
6665 South Howell Avenue
Oak Creek, WI 53154-1196
(parking and entrance map attached)

Welcome

9:00	Welcome
9:05-10:10	Patricia Smith, Senior Counsel, National Employment Law Project
10:10-10:25	Break
10:25-11:25	Chris Williams, Co-Director, National Legal Advocacy Network (NLAN)
11:25 – 11:55	Timothy Cornelius, Attorney, Office of the Commission of Insurance Overview of OCI's role in administering Wisconsin's workers compensation system
11:55-12:00	Wrap up – Next meeting (Next meeting will be December 18 in Madison)

Adjournment

*For press inquiries including interview requests, please contact the DWD Communications Office:

Media Line – 608-266-2722 or E-Mail – DWDSOCommunicationsOffice@dwd.wisconsin.gov

PRESENTATION

Presentation of M. Patricia Smith Before the Wisconsin Joint Enforcement Task Force on Misclassification and Payroll Fraud

November 20, 2019

M. Patricia Smith
Senior Counsel
National Employment Law Project
90 Broad St., Suite 1100
New York, New York 10004
psmith@nelp.org

Thank you for the opportunity to participate in this forum on misclassification of workers as independent contractors in Wisconsin. My name is M. Patricia Smith and I am Senior Counsel at the National Employment Law Project (NELP). NELP is a national legal, research and policy organization that for nearly 50 years has focused on the ways in which various work structures – such as classifying workers as "independent contractors" –drive labor standards erosion, rising income and wealth inequality, enduring and evolving structural racism and occupational segregation, and the shifting of power away from workers and toward corporations.

I have been involved in the problem of misclassification of workers and developing strategies on how government can best respond to the problem, for at least twenty years. First, at the Attorney General's office in New York, where I was chief of the Labor Bureau for eight years. Then, as Commissioner of Labor in New York State, I directed the nation's first Joint Task Force on Employee Misclassification ("New York Task Force"). Finally, as Solicitor of the U. S. Department of Labor ("USDOL") for seven years, I spearheaded that Department's efforts to combat misclassification. I would like to talk a little about the scope of the problem and then recommend some enforcement best practices. I am sure you have already heard about the scope of the problem in prior presentations, but I think it bears some repetition.

According to the last Bureau of Labor Statistics Contingent Worker Survey, in the United States, over 10 million workers—about 7 percent of the workforce classified as independent contractors.[1] Notably, this number excludes the many workers who have a traditional main job but engage in an independent contractor work arrangement on the side, which appears to be increasingly common.[2] For example, according to recent reports, 1 in 6 teachers are working part time on the side—such as driving for Uber or Lyft—to supplement their meager teaching salaries.[3]

For decades, corporations have characterized workers as "self-employed" or "independent contractors," as a tactic to shift risk downwards onto workers, while shifting wealth towards investors and CEOs. Corporations can save as much as 30 percent on their payroll costs by labeling their workers as independent contractors rather than employees.[4] These arrangements – often presented to workers as take it or leave it propositions – strip them of all labor rights, from core labor standards like minimum wage and anti-discrimination laws, to social insurance and employer benefit programs, like unemployment benefits and health insurance.

Misclassification harms not only workers, but also law-abiding employers that cannot compete, and the integrity of our tax coffers and safety nets systems.

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[1] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements News Release (June 7, 2018), https://www.bls.gov/news.release/archives/conemp_06072018.htm.
[2] Bureau of Labor Statistics, Labor Force Statistics about the Current Population Survey, Frequently Asked Questions about Data on Contingent and Alternative Work Arrangements, https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm#collected.
[3] Alexia Fernandez Campbell, *"I Feel Mentally Numb": More Teachers are Working Part-Time Jobs to Pay their Bills*, VOX, Apr. 4, 2018, https://www.vox.com/policy-and-politics/2018/4/4/17164718/teachers-work-part-time-jobs.
[4] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Sept. 2017, https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

Independent contractor misclassification can take several forms. In some cases, even though the employer controls most aspects of the job, including how the work is performed, what the worker is paid, and relationships with clients, employers call workers "independent contractors". In other cases, the employer will require its workers to form a limited liability corporation or franchise company-of-one as a condition of getting a job. These workers are sometimes required to sign boilerplate contracts attesting to independent contractor status, even where the functional relationships do not reflect true independence and the workers are not running their own business under any definition. Finally, some employers do not even go through the process of formally misclassifying their employees, and do not provide 1099 or W2 forms. They pay their employees "off the books," and structure their financial records to hide these workers and the payments to them. If caught by a government agency, they use the "independent contractor" classification as a defense to their actions.

Available evidence suggests that misclassification is widespread. Federal studies and state-level agency audits, along with unemployment insurance and workers' compensation data, indicate that between 10 and 30 percent of employers misclassify at least one employee as an independent contractor, meaning that several million workers nationally may be misclassified.[5] Here in Wisconsin in 2009 the Department of Workforce Development found that 44% of workers investigated during UI audits were misclassified as independent contractors.

Misclassification is especially prevalent in construction, janitorial, home care, trucking and delivery services, and other labor-intensive low-wage sectors, where employers can gain a competitive advantage by driving down payroll costs.[6] This means that the employers that correctly classify workers as W-2 employees are often unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. This also means that people of color—who are overrepresented in many of these sectors—toil in jobs that are insecure, underpaid and have no workplace protections or benefits, which exacerbates income inequality and economic insecurity for black and brown communities.

A 2009 study of port truckers in New Jersey showed how drivers classified as independent contractors operated with little autonomy.[7] The trucking companies prohibited their drivers from making deliveries for other companies, thereby controlling the drivers' access to work. Many drivers also leased their trucks from and obtained their insurance through their trucking company, which meant that the companies took possession of the leases and deducted insurance from the drivers' pay. At the same time, the drivers were excluded from workplace protections and benefits, like health insurance and workers' compensation, which are critically important in high-risk sectors like truck driving. These drivers bore all the risks and costs of being in business for themselves with virtually none of the benefits.[8]

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[5] *Id*. at 2.
[6] *Id*. at 2, 7
[7] Francoise Carre, *(In)dependent Contractor* Misclassification, Economic Policy Institute, June 8, 2015, at 11, https://www.epi.org/publication/independent-contractor-misclassification/
[8] *Id.; see also* David Benson, *Port Trucking Down the Low Road: A Sad Story of Deregulation,* Demos, 2009, https://www.demos.org/sites/default/files/publications/Port%20Trucking%20Down%20the%20Low%20Road.pdf.

More recently, well-capitalized online platform companies have joined the trend of labelling their workers as independent contractors while maintaining control of the work performed. Technology has enabled platform companies to surveil every second of work. Uber's technology, for example, allows it to track drivers in granular detail, including the speed at which the car is driven and the route taken for each ride.[9] The technology also matches drivers with customers and determines the rate for each ride and the payment to each driver. According to recent reports, Uber regularly makes unilateral changes to driver's pay and work conditions, often with the effect of squeezing more out of drivers.[10] As I am sure you know there are major issues going on in California with their recently passed AB5, which will make it much more difficult for these companies to classify their employees as independent contractors because it enshrines the so-called "ABC test" for determining whether someone is a contractor or employee. Some form of an ABC test is already law in many states, including Massachusetts, Virginia, and New Jersey. I discuss the ABC test in my legislative recommendations. And just last Friday NJ found Uber drivers to be employees for purposes of their workers comp and disability insurance laws assessing $650 million in taxes and interest.

An employer who is illegally misclassifying workers is likely breaking not one state law, but multiple laws. Several laws are implicated, including Wage and Hour, Unemployment Insurance, Workers Compensation, and Tax laws. Misclassification exacts a huge toll on state treasuries: researchers found that misclassifying just one percent of workers as independent contractors would cost unemployment insurance (UI) trust funds $198 million annually.[11] In New Jersey audits indicate that misclassification has deprived that state of over $500 million in tax revenue every year.[12] The issue, then, is enforcement.

New York, Other States and Federal Independent Contractor Taskforces

In order to fight misclassification, in 2007 New York State established the nation's first Joint Enforcement Task Force on Employee Misclassification. The New York Task Force created a partnership consisting of representatives of five New York State agencies, each of which had its own interest in preventing worker misclassification.[13] The goal of the New York Task Force was to combine agency resources to conduct statewide industry enforcement sweeps, to improve interagency date sharing and to develop policy solutions. Within four months of its establishment, the New York Task Force was required to issue the first of its yearly reports. In

[9] Alex Rosenblat, *When Your Boss is an Algorithm,* NEW YORK TIMES, Oct. 12, 2018, https://www.nytimes.com/2018/10/12/opinion/sunday/uber-driver-life.html?smid=tw-nytopinion&smtyp=cur.
[10] Alex Rosenblat, *Uber May Have Imposed 12-Hour Driving Limits, but It's Still Pushing Drivers in Other Troubling Ways,* SLATE, MARCH 2, 2018, https://slate.com/technology/2018/03/uber-may-have-imposed-12-hour-driving-limits-but-its-still-pushing-drivers-in-other-troubling-ways.html.
[11] NELP, *supra* note 4, at 2.
[12] New Jersey Exec. Order No. 25, May 3, 2018, https://nj.gov/infobank/eo/056murphy/pdf/EO-25.pdf.
[13] The Labor Department enforces wage hour laws, including the prevailing wage law on state projects and the unemployment compensation law. The Worker's Compensation Board enforces the worker's compensation laws. The Department of Taxation and Finance enforces state tax laws and 1099 fraud. The Comptroller of the City of New York enforces the prevailing wage law on City projects. The New York Attorney General has criminal enforcement powers upon referral of cases from the agencies.

that short period, it had conducted 117 sweeps of business, uncovered 2,078 misclassified employees and identified $19 million in unreported wages. It found unpaid back wages owed of $3 million.[14] A year later, the New York Task Force reported that it had identified 12,300 cases of misclassified employees, $157 million in unreported wages and $12 million in unpaid wages owed.[15] In 2015, the last year it operated independently,[16] the New York Task Force reported that since 2007 it had identified nearly 140,000 instances of employee misclassification and discovered nearly $2.1 billion in unreported wages that resulted in lost income tax revenue.[17]More than half of the states have established independent contractor task forces or entered into Memoranda of Understanding with the USDOL. Nine states have established their own misclassification task forces. I have provided a list of those states with links to information about them, including reports.

The US DOL during the Obama administration also began a misclassification initiative. The Wage Hour Division, along with the Solicitor's Office, worked with the Internal Revenue Service and 34 states to share information and coordinate enforcement to ensure that all were using their resources most strategically and effectively to combat the misclassification problem. From September 2011 to January 2013, the Wage and Hour Division collected more than $9.5 million in back wages, which resulted from more than 11,400 workers being misclassified as independent contractors or otherwise not properly treated as employees. This represented an 80% increase in back pay and 50% increase in the number of workers receiving back pay since DOL began to implement these agreements with the States.[18]

Recommendations

Based upon my experience with these efforts, I recommend you consider recommending adopting the following best practices that may not require legislation.

1. To the extent legally possible, engage in interagency coordinated enforcement.
2. Whether or not interagency coordinated enforcement is adopted, engage in data sharing and systematic referrals to appropriate agencies. This was o a recommendation of the 2009 Wisconsin Task Force Report.
3. Establish a public outreach infrastructure including a dedicated hotline, website, and e-mail address. A robust press strategy is an important component to public outreach. Again, this was also a recommendation of the Wisconsin 2009 report.

[14] Report of the Joint Enforcement Task Force on Employee Misclassification, February 1, 2008, available at https://www.labor.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf.
[15] Report of the Joint Enforcement Task Force on Employee Misclassification to David A. Paterson, Governor, State of New York, Feb. 1, 2009, https://www.labor.ny.gov/ui/PDFs/2009_02_02_12_38_52.pdf.
[16] In 2016, the Governor issued a new executive and created the Joint Task Force on Worker Exploitation and Worker Misclassification. See https://www.ny.gov/end-worker-exploitation/task-force-combat-worker-exploitation.
[17] Annual Report of the Joint Enforcement Task Force on Employee Misclassification to Hon. Andrew Cuomo, Governor State of New York, Feb. 1, 2015, https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf
[18] Staci Ketay Rotman, *DOL's Misclassification Initiative Continues*, Wage & Hour Insights, Jan. 13, 2013, https://www.wagehourinsights.com/2013/01/dols-misclassification-initiative-continues/.

4. Provide interagency cross training and joint education and require frequent meetings between partner agencies that assures information about possible misclassification is appropriately shared.
5. Make criminal referrals in appropriate cases.
6. Require reports to the legislature or the governor for transparency and accountability. This is included in your Executive Order

I cannot emphasize enough that these best practices take planning and real work on the part of the partner agencies, and of course, additional resources will enhance the efforts and results. However, they can be implemented, as happened in New York, without additional resources. Planning, especially at the beginning, is crucial. I recommend the first report of the New York Task Force, which set forth in detail the extent of initial planning that occurred.[19] Coordinated interagency enforcement effort involves research, both to develop leads and to address any legal issues that arise. They need to be carefully planned and then just as carefully carried out. The sharing of information obtained, and follow-up audits also need planning. Communications strategies must be developed, both to keep the public informed and to assist the public in contacting the Task Force members with tips and complaints.

Coordinated Enforcement

Coordinated interagency enforcement can involve a number of strategies.[20] It involves participants from multiple agencies conducting on-the- ground investigations of possible misclassification. While this is not how government investigations typically work, there is precedent for it and it is well suited to misclassification, which implicates many different laws. It generally involves more than looking at books and records, because misclassification often cannot be identified only by looking at books and records. When employers violate the law, payroll records are often inaccurate regarding the number of employees, wages paid, and employee job duties. Employee interviews are critical for assessing the accuracy of company records. In addition, understanding if a worker is properly classified involves gaining an understanding of a company's business practices. This most often involves talking to workers about what services they perform, the extent to which they are running a separate business, and the amount of control the company has over the provision of those services.

I recognize that not all agency partners are necessarily skilled in this type of fact intensive investigation. In New York, we addressed this issue by joint training and delegation of investigation responsibilities. For example, when talking to workers during sweeps, the Wage & Hour investigators, who had years of experience talking to workers, took the lead while the Unemployment Insurance investigators took the lead in looking at the company's books and records. This type of joint investigation takes planning but much of it is no different than planning a single agency investigation. Development of employer and employee interview sheets; scripts explaining to employers each agency's authority and their need to comply with information requests; handouts, in various languages explaining to workers what the purpose of

[19] See Report of the Joint Enforcement Task Force on Employee Misclassification, Footnote 15 at 9.
[20] In New York, these investigations took two forms. Sometimes a particular industry, usually construction, was the subject of interagency "sweeps". Other times a "main street" approach was taken when investigators would go door to door to all businesses in a shopping district. Each strategy successfully uncovered illegal misclassification.

the investigation is and their right to talk to investigators without retaliation; all of these will make investigations easier. The first New York Task Force Report details the steps taken before conducting coordinated interagency enforcement sweeps.[21]

Of course, these coordinated enforcement actions do not end with the on the ground investigation. An analysis of the facts gathered in the investigation must be performed; then the application of each agency's governing law to determine if there are violations. When violations are found, appropriate audits must be conducted to determine back wages owed, unemployment contributions owed, workers compensation premiums owed, and taxes owed. However, when multiple agencies participated in the fact gathering aspect of the investigation, that one investigation can often be used to support violations of multiple state laws with appropriate remedies and penalties. This saves state resources since one and not several investigations took place. I also recognize there may be legal limits on the ability of the partner agencies to engage in coordinated interagency enforcement. For example, tax investigations may have strict confidentiality requirements. However, to the extent legally possible, coordinated interagency enforcement is the best "best practice" because it allows the agency partners to best leverage their resources in achieving compliance with little or no additional resources.

Data Sharing

Data sharing is critical, whether or not coordinated interagency enforcement is in place. Not all investigations merit a coordinated enforcement action. Moreover, as mentioned above, there may be legal limits on the ability of certain agency partners to engage in coordinated enforcement actions. For example, in New York, the Department of Taxation and Finance was statutorily limited in its ability to participate in sweeps. However, it was able to receive and act upon information received during a sweep and to use that information to begin and conduct its own investigation into possible tax fraud.

Data sharing makes targeted enforcement a real possibility. Reliance upon random audits as a sole investigatory strategy results in undercounts of violations and unpaid taxes. For example, between 2008 and 2012, the state of Utah conducted both random and targeted unemployment insurance audits of employers. The 5233 random audits identified $42 million in unreported wages to 6949 workers misclassified as independent contractors. By contrast, 913 targeted audits identified $138 million in unreported wages and 18,114 misclassified employees. While the random audits identified violations in 2.9% of cases, the targeted audits found violations in 14% of the cases.[22] A quick glance at the reports of the New York Task Force from 2008 to 2015 demonstrates the impressive results of targeted enforcement in New York.

Data sharing was the principle mechanism that the USDOL used to coordinate with the states and the IRS on misclassification. As I earlier mentioned, the USDOL entered into memoranda of understanding with 34 states. Each memorandum was a little different depending on the states' interest and their legal ability to share date with other agencies.. I cannot speak to how the states use the data that USDOL shares with them, but I can say that some of the largest and most

[21] Report of the Joint Enforcement Task Force on Employee Misclassification, Footnote 15 at 9.
[22] Jody McMillian, Chief of Contributions, Utah Department of Workforce Services, *Effective Methods to Detect and Deter Worker Misclassification*, Oct. 21, 2012)

impactful misclassification cases brought by USDOL were initiated based upon information received from the states. For example, based upon information received from the State of Utah, the USDOL forced 17 businesses in Arizona and Utah to reclassify over 1,000 of their workers as employees and pay over $1.3 million in back wages and penalties, as well as paying all federal, state and local taxes owed.[23]

Data sharing abilities must be carefully researched. Each agency is likely to have confidentially requirements that must be observed. I recommend that Memoranda of Understanding be entered into by all agencies that will participate in data sharing so that responsibilities and any limitations are clearly understood by all parties
Data sharing can take many forms. Shared data can be the basis of coordinated interagency investigations. Shared information can trigger separate investigations by separate agencies. Agencies can share completed audits with other agencies, allowing them to spend fewer resources on their own investigations. Each of these forms of data sharing contribute to the success of interagency cooperation.

Public Outreach

Educating the public about the activities of the Wisconsin Task Force and giving them an opportunity to provide information is crucial to success. I recommend that you establish an employment fraud hotline, website and email address. In just the first 4 months of the New York Task Force, these types of portals resulted in 200 new unemployment insurance tax audits. A robust press strategy is also important in keeping the public, including workers and employers, aware of your activities and encouraging participation in the information portals.

Cross Training

In order to make coordinated enforcement and data sharing effective, cross training of agency partners is critical. It is the foundation of successful interagency coordination. At a minimum, agency investigators need to be able to understand the laws their sister agencies enforce. With training, in investigations that do not involve sister agencies, potential violations of other laws can be identified and referred to the appropriate agencies. In New York, cross training resulted in agencies being better prepared to participate in coordinated interagency enforcement. It also resulted in agencies sometimes inviting sister agencies to participate in their own investigations when possible violations of the sister agencies' laws were identified. However, one or two training is insufficient. Agency partners must meet frequently to assess the information coming into the Task Force and to decide upon the appropriate response to that information.

Criminal Referrals

In appropriate cases, criminal referrals should be considered. In New York, the Attorney General's Office was the lead agency on criminal prosecutions that resulted from the Task Force operations.

[23] U.S. Dep't of Labor, Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified, Apr. 23, 2015, https://www.dol.gov/newsroom/releases/whd/whd20150518.

Reports

Transparency is important especially when the government begins new initiatives. Both the public and the state must be able to assess the success of new initiatives. In addition, transparency allows for critical review of actions taken and possible corrections or new actions if the results are not as expected. The Task Force should recommend to the governor that some sort of transparency, in the form of an annual report, be required.

Legislative recommendations

1. Adopt a broad uniform test for who is an employee.
2. Empower Task Force Agencies to issue stop work orders when they discover noncompliance with the laws they enforce.

Adopt a broad form of the ABC test.

Many states adopted a broad test for who is an employee, usually under its Wage & Hour and Unemployment Insurance laws, and sometimes its worker's compensation laws. These standards lead to easy identification of independent contractor misclassification. California just enacted AB5, which enshrines what is called the "ABC" test. Generally, the ABC test for employment classification, presumes that a worker is an employee unless the employer can demonstrate three factors:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under the contract of service and in fact;
(B) Such service is either outside the usual course of business for which such service is performed, or is performed outside of all the places of business of the enterprise for which such service is performed; and
(C) Such individual is engaged in an independently established trade, occupation, profession or business.

The "ABC test" means that companies cannot outsource core aspects of their enterprise to so-called independent contractors while maintaining control of the performance of the work. Some—but not all—of the states that use the test include Hawaii, California, Louisiana, Mississippi, Alabama, Pennsylvania, Vermont, New York, Connecticut, Idaho, Colorado, and Illinois. In addition to having a broad test, a uniform definition across relevant laws of whom is an employee makes the coordinated work of agencies easier. Currently New Hampshire, Minnesota and Washington State have uniform definitions. Even if it is not possible to have the same definition of employee for all relevant state agencies, make it as uniform as possible.

Empower State Agencies to issue Stop Work Orders

Stop Work Orders are a powerful tool that allows agencies to stop the work of an employer when they encounter violations of the laws they enforce and keep the work stopped until the violations

are corrected. Currently California, Connecticut, Florida, Massachusetts, New Jersey and New York give some agencies some form of stop work power.

California

1. Budget Act of 2012 (Assembly Bill 1464, Chapter 21, Statutes of 2012) established Department of Industrial Relations, Labor Enforcement Task Force
2. 2012 Annual Report: https://www.dir.ca.gov/LETF/LETF_Annual_Report_2012.pdf
3. 2012-2014 Report: https://www.dir.ca.gov/letf/LETF_Legislative_Report.pdf
4. 2012-2016 Report: https://www.dir.ca.gov/letf/LETF_Legislative_Report_2016.pdf
5. 2012-2018 Report: https://www.dir.ca.gov/letf/LETF-Legislative-Report-2019.pdf

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REPORT OF THE
JOINT ENFORCEMENT TASK FORCE ON
EMPLOYEE MISCLASSIFICATION

TO ELIOT SPITZER, GOVERNOR
STATE OF NEW YORK

February 1, 2008

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I. Executive Summary

The problem of worker misclassification in New York State harms workers and law-abiding businesses within the state. The trend in New York mirrors similar trends in other states. Unprincipled businesses have made a concerted effort to avoid their obligations, including the payment of legally mandated wages and overtime, employment taxes, and obtaining workers' compensation coverage. Many workers are not treated as employees, and are thus denied the safeguards and benefits that should be afforded them.

In many cases, workers are being improperly classified as independent contractors and others are being paid off-the-books as part of the underground economy. Some workers are being forced to "volunteer" their labor. Workers are being transported across state borders, entirely beholden to and dependent upon their employer for food, transportation, and lodging. These workers are with little recourse should they complain about working excessive hours, working without benefits, or working in unsafe conditions. Workers have been killed or severely injured while working "under-the-table" as the normal safeguards afforded workers are not in place.

In addition to the very real impact of misclassification upon workers, employee misclassification adversely impacts legitimate employers in the State who are forced to compete in the marketplace against employers who lower their operating costs and increase their profits by misclassifying their employees,. It is critical to remove economic incentives for the unscrupulous employers and to take steps to level the playing field for legitimate employers.

There are also significant costs to the state: the failure to properly classify workers as employees costs the state millions of dollars in lost tax revenues. In addition, the failure to provide misclassified workers with the benefits and protections afforded to employees means that they and their families must turn to taxpayer-supported public programs such as Medicaid, food stamps, TANF, and other safety net programs.

Several studies have analyzed the extent of the problem. These studies point to the fact that New York had done little over the past decade to address the issue. Each state agency in New York is charged with enforcing its own laws and often agencies have been engaged in disparate and uncoordinated efforts at achieving compliance. The studies also call attention to the costs borne by all law abiding businesses and by the people of New York as a result of misclassification.

In response to this problem, on September 5, 2007, Governor Eliot Spitzer signed Executive Order # 17 establishing a Joint Enforcement Task Force on Employee Misclassification (the "Task Force"). The Governor charged the Task Force with coordinating efforts by appropriate state agencies to ensure that all employers comply with all the State's employment and tax laws, and that their compliance is across the board and in-full. The six Task Force agencies are charged with working together to address the issue in a coordinated manner, sharing both data and resources in order to fulfill its charge.

As of the writing of this report, the Task Force is only four months old, yet in those four months it has made great inroads in meeting the obligations outlined in the Executive Order.

Among other things, the Task Force has:

- Established an Oversight Committee and six subcommittees to address enforcement issues, coordinate compliance efforts, and develop strategies for achieving increased compliance on the part of the employer community.
- Signed a multi-agency Memorandum of Understanding which sets forth the duties and responsibilities outlined in the Executive Order.
- Coordinated initial efforts targeted at selected employers determined to be actively engaged in employee misclassification and other fraudulent employment and employment tax related activities.
- Continued action on the State Workforce Agency – Internal Revenue Service Questionable Employment Tax Practices (QETP) program established in 2006. This effort coordinates IRS and Labor enforcement programs aimed at uncovering employment tax fraud and abuse.
- Integrated data sharing as called for by the 2007 Workers' Compensation reform initiative (Chapter 6 of the Laws of 2007) focused on reducing Workers' Compensation fraud.
- Established an employment fraud hotline, website, and E-mail address. Approximately 570 calls and E-mails were received through these sources, which resulted in 200 Unemployment Insurance tax audits.
- 15 interagency enforcement efforts (sweeps) were conducted between August and December 2007, with 117 employers identified at the sweep locations.
- Initiated 35 Task Force-coordinated unemployment insurance tax investigations, completing 16 in 2007. Completed investigations revealed 2,078 misclassified workers and $19.4 million in unreported remuneration paid to employees. Additional Unemployment Insurance taxes alone amounted to over $856,000. Many of these investigations resulted from dozens of staff jointly inspecting construction and other sites throughout the state.
- Initiated 17 Labor Standards investigations based on 545 employee interviews. While some investigations are still in process, $3,020,000 in underpaid wages has already been found to be due to 646 employees and $5,000 in fines have been assessed for child labor violations.
- Engaged in discussions with several other states in regard to New York's efforts and provided technical assistance to Illinois, Massachusetts, and Ohio. Included in these efforts is discussion between the big-four states, New York, California, Florida, and Texas, on State-Federal Labor matters.
- Received extensive press coverage on the issue of worker misclassification.

II. Background on Worker Misclassification

A. Introduction

Determining Worker Status

New York uses common law tests, published industry guidelines, and case law in making determinations of worker status. Each agency in New York is responsible for its own determination of who is and who is not an employee.

Worker Misclassification

Workers who are categorized as employees receive a wide range of legal protections, and their employers' face a number of legal obligations. Among other things, employees are entitled to minimum wage and overtime, they are eligible for unemployment insurance, and they may collect workers' compensation if they are injured on the job. Their employers, accordingly, must pay minimum wage and overtime, pay unemployment insurance taxes, and obtain workers' compensation insurance. They must also withhold state and federal taxes.[1]

Worker misclassification falls into two general categories.

Misclassification as an Independent Contractor:

Certain employers may classify workers as 'independent contractors.' This classification may be based on a well-founded belief that those workers are indeed independent of the employer's direction and control. At other times, this classification may be intentional, utilized solely for the purpose of avoiding taxation and other employment protections. The employer provides these individuals with a Form 1099 for tax reporting purposes while the employer remains relieved of responsibility for employment taxes such as the employer's share of FICA and Medicare, Unemployment Insurance, FUTA, and Workers' Compensation coverage. In these cases, 'independent contractors' are not afforded the protections normal employees have such as health insurance and retirement benefits.

Employer determinations of independent contractor status are subject to review by the Task Force and other agencies. Those reviews may determine that the employer's belief was based on assumptions that do not meet the common law standard for worker independence or prior case law determinations, or may reveal that the employer was engaging in a scheme of intentional misclassification.

Unreported (Off-the-Books) Employment:

Some employers do not even go through the process of formally misclassifying their employees and do not provide 1099 forms or W2 forms. They simply do not declare or acknowledge their

[1] In addition to these state laws, a number of federal and local laws cover employees while leaving independent contractors unprotected, such as the National Labor Relations Act, the Family and Medical Leave Act, anti-discrimination laws, and the Occupational Safety and Health Act.

workers are employees on any payroll records or business documents. These employers pay workers "off-the-books" and structure their financial records in an attempt to hide these payments as well as the terms and conditions under which they are made. These employers attempt to avoid taxation, wage and hour compliance, worker safety provisions, workers' compensation coverage, or any benefits typically provided to employees.

These trends appear to be increasing over the past decade, with large numbers of employees misclassified and therefore unprotected by the most basic labor rights. Immigrant workers are particularly vulnerable for a variety of reasons, including language limitations, economic necessity, and fear of reporting employer violations. Hard working, law abiding employers and their employees are put at a competitive disadvantage. Their dedication to fair contracting and competition in the marketplace is undercut by these schemes. Violating employers focus on bottom line cost reduction, tax savings, and a higher profit margin, to the detriment of their own employees and of employers that abide by applicable laws and regulations.

Companies who intentionally misclassify and hide workers are actively engaged in perpetuating a fraud on their workers and on the people of New York. While some employers may be acting in good faith, unintentionally misclassifying workers, the overall issue of misclassification must be addressed so as to provide the broadest protection for all workers as well as an economically healthy and competitive business environment.

Additional Information Supporting the Extent of Misclassification

Early in 2007, the Unemployment Insurance Division of the New York State Department of Labor (UI) began a process of re-engineering its statistical tracking methods related to the number of misclassified workers found in its ongoing and traditional audits and investigations. Formerly, NYSDOL only captured detail audit information related to the 10,000-11,000 federally mandated audits it performed each year. That detail met strict and prescriptive federal requirements defining which workers were to be counted as a misclassified worker per federal reports.

However, NYSDOL, by following the requirements set by the United States Department of Labor ("USDOL"), captured only a limited set of information. NYSDOL had not been capturing all information related to misclassified workers found via NYSDOL's own UI audits, investigations and other enforcement efforts, as well as unreported (off the books) workers found even within the federally-mandated audits it conducted. Statistical tracking programs were revised in August 2007 and the revised tracking process was completely rolled out to all field offices as of September 30, 2007. Results from the fourth quarter 2007 indicate that the extent of misclassification uncovered was 254% greater than the numbers that were reported to the federal government.

The following table indicates findings for the September 1, 2007 through December 31, 2007 period:

Month	Audits and Investigations	Total Misclassified Workers Found	Reported to US-DOL	Difference
September	997	5,964	2,160	3,804
October	1,852	10,472	3,624	6,848
November	1,591	14,234	3,776	10,458
December	1,371	4,740	926	3,814
Total	**5,811**	**35,410**	**10,486**	**24,924**

This increased level of information will not only address the extent of this problem as detected in the Unemployment Insurance Division's 'traditional' audits and investigations, it will also assist in the strategic analyses that are part of Task Force enforcement activities and planning as well.

B. Recent History

Background

Over the past decade, enforcement and compliance efforts have focused on blatantly egregious violations of the law, the cost-benefit of overall enforcement and compliance efforts, and fulfilling federal mandates for audit and enforcement. While those goals had value, they did not adequately address the evolution of schemes aimed at purposefully misclassifying employees, avoiding taxation, and arranging a business' financial transactions so as to make them almost undetectable.

In 2006 and early 2007, several studies were released pointing to the extent of worker misclassification in New York State. The Cornell University School of Industrial and Labor Relations study of the issue[1] noted that approximately 10% of private-sector employers did not comply with state regulations when classifying new hires and those companies in the construction industry accounted for an estimated 14.9% of that group. The data also show that approximately 10.3% of private-sector workers are misclassified as independent contractors and about 14.8% of these workers are in construction.

Executive Order

In response to these misclassification concerns, on September 5, 2007, Governor Eliot Spitzer signed Executive Order # 17 establishing a Joint Enforcement Task Force on Employee Misclassification.

In signing this Executive Order, Governor Spitzer stated:

> *"For too long, State government has turned a blind eye on a growing epidemic that is keeping wages and benefits artificially low for working New Yorkers. This Executive Order - a key component of my economic security agenda - protects worker rights*

[1] Linda H. Donahue, James Ryan Lamare, Fred B. Kotler, J.D., "The Cost of Worker Misclassification in New York State" (Cornell University, ILR School, February 2007).

while leveling the playing field for law abiding employers so that they are not at a competitive disadvantage to employers who refuse to play by the rules as they exploit hard working New Yorkers."

The Task Force consists of the Commissioner of Labor, the Attorney General, the Commissioner of Taxation and Finance, the Chair of the Workers' Compensation Board, the Workers' Compensation Fraud Inspector General, and the Comptroller of the City of New York. The Commissioner of the Department of Labor serves as the chair of the Task Force.

The Task Force is charged with coordinating the investigation and enforcement of employee misclassification matters by the Task Force members and other relevant agencies. It seeks to enhance enforcement through interagency cooperation, information sharing, and joint prosecution of serious violators.

IRS Questionable Employment Tax Practice (QETP) Initiative

Concurrent with the activities of the Task Force, the problem of worker misclassification – particularly in cash based industries – is actively being addressed by a joint Questionable Employment Tax Practices (QETP) workgroup that consists of several states, including New York, and the Internal Revenue Service. New York is one of five states that played a key role in developing this initiative.

Crimes Against Revenue Project (CARP)

New York State is also focusing on the larger issue of tax fraud through the Crimes Against Revenue Project (CARP). This project is coordinating the enforcement of tax crimes among New York's Division of Criminal Justice Services, the Department of Taxation and Finance, and local District Attorneys. While the project did not specifically address misclassification and tax fraud relating to misclassification, the Task Force has benefited from the Project's experience in developing inter-agency cooperation. Since Workers' Compensation is not a tax issue, it was not made part of the project.

In December 2007, a report was issued by the Fiscal Policy Institute [2] which specifically addressed misclassification and the cost of misclassification in the construction industry. It pointed out the costs of misclassification within the construction industry. noting[3]:

The costs of the illegal underground construction industry to taxpayers are substantial and growing. These fiscal costs were an estimated $489 million in 2005 and are likely to reach at least $557 million in 2008. Contractors in the underground economy skirt payment of legally required payroll taxes and workers compensation premiums and

[2] Fiscal Policy Institute, "Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City's Construction Industry" (December 5, 2007), p. 8.
[3] Fiscal Policy Institute, p. 1.

shift these and other costs onto taxpayers and their competitors who play by the rules. Three categories of costs were estimated for 2005:

- *$272 million in unpaid legally mandated payroll taxes for social security and Medicare, and social insurance premiums covering workers' compensation, unemployment insurance and disability insurance.*
- *$148 million in health care costs shifted onto the workers themselves, taxpayers and other employers that provide employee health insurance.*
- *$70 million in lost personal income taxes because there is no withholding for underground economy workers and/or they are paid off the books.*

This report acknowledged the work started by Governor Spitzer to address this problem, citing the Executive Order signed in September and the priority assigned to this effort by Commissioner Smith.

III. Task Force Accomplishments

A. Introduction

The initial impetus for addressing the issue of misclassified workers came from the New York State Commissioner of Labor, M. Patricia Smith, and was based on discussions at the Executive level. Prior to the signing of the Executive Order, partner agencies entered into pre-planning discussions on how to best carry out Task Force activities.

On May 18, 2007, an initial meeting was held which involved the Department of Labor, Workers' Compensation Board, Fraud Inspector General of the Workers' Compensation Board, Department of Taxation and Finance, and the Internal Revenue Service. The partners discussed a broad framework for addressing the issue of misclassified workers, and each partner's ability to contribute to a joint enforcement effort. Based on those discussions, more partners were added. These included the New York City Comptroller's Office and New York State Attorney General's Office. An Oversight Committee was established, composed of top leaders from the various partner agencies. The Oversight Committee is focused on overall coordination, drafting and approving strategies, reviewing and reporting on results, and driving future enforcement efforts.

Over the following month, six sub-teams were established to address the performance of different aspects of a joint enforcement effort.

The sub-teams and their focus are:

- Research/Targeting: To develop and review leads for the Task Force.
- Sweeps Team: To plan and carry out coordinated on-site inspections and visits (sweeps).
- Audits/Investigations Team: To plan and carry out follow-up audits and investigations on any non-compliance found in the course of the sweeps conducted.
- Legal Team: To address legal issues arising in connection with the implementation of Executive Order #17 and the Memorandum of Understanding between the Task Force members.
- Communications Team: To develop strategies focused on keeping the public informed of Task Force activities, to develop multilingual documents for sweeps, and to assist in providing avenues for the public to contact the Task Force with tips and complaints.
- Reporting Team: To coordinate and develop the Report to the Governor required by the Executive Order.

Early on, the Research/Targets team began to gather information on egregious non-compliance from internal data sources as well as from community-based organizations. Subsequent planning meetings were held and targets were selected. Prior to the signing of the Executive Order, a plan was established to perform sweeps of selected sites. These activities were conducted under existing law and in accordance with a Memorandum of Understanding between selected partners. These early enforcement actions laid the groundwork for the later Task Force sweeps.

The following efforts were conducted in preparation for Task Force sweeps:

- We held discussions with community based groups and other interested parties providing tips on non-compliance. A tip form was eventually developed to better document the information received.
- We gathered background information from partners' files and from licensing agencies.
- We cross-checked the selected targets against other enforcement agencies so as not to interfere with on-going investigations (especially criminal investigations).
- We developed employer and employee interview sheets, subpoenas, employer and employee palm cards advising them as to the purpose of the investigation as well as certain rights, a frequently asked questions script, and scripts dealing with State agency authority and the employer's need to comply. There was a specific focus in the scripts and palm cards advising the employer against non-interference and prohibited retaliation against employees for cooperating. Employees are provided with contact information and off-site locations where they can discuss their situation confidentially.
- We reviewed each agency's authority as it relates to demands for records, the records an employer must keep and make available for inspection, and the accessibility of a business location/construction site in order to conduct employee interviews.
- We reviewed laws regarding the ability of agencies to share data.
- We took preliminary steps to reach agreement on data sharing and to draft an acceptable Memorandum of Understanding among the partners to accomplish this.
- An assessment was made of the language skills necessary for employee interviews.
- Assessments were made of potential safety and health issues that might be faced by public employees.
- Pre-sweep briefings were held in which public employees were trained on sweep activities, safety issues, and the aspects of the law related to active on-site intervention.
- We held discussions were held with the New York State Police and other police agencies. Police officers accompany sweep teams to provide security for State employees.
- Supplies and equipment were acquired for sweep related activities including personal safety equipment, portable computers and scanners, and two-way radios.

Task Force teams generally consist of Unemployment Insurance Tax Auditors, Labor Standards Investigators, Public Work Investigators, Workers' Compensation compliance staff and members of the Workers' Compensation Fraud Inspector General's staff, Investigators from the Department of Labor's Office of Special Investigations, and State or local police officers. Depending on the size of the sweep target, between six and forty staff may be involved in a sweep. The first Labor Department sweep was conducted on July 26, 2007 in conjunction with the Workers' Compensation Fraud Inspector General.

B. Overall Metrics As of December 31, 2007

The following numbers provide a glimpse into the level of public interest in the Governor's focus on misclassification as well as a sense of the scope of the sweep activities conducted in the first months following the issuance of the Executive Order:

218 potential targets were identified:

- 90 were received from the public.
- 91 were developed from the sweeps themselves.
- 37 were developed based on partner agency data mining and data sharing.

15 interagency sweeps were conducted between August and December 2007.

- 8 were conducted in Upstate New York
- 7 were conducted in the Metropolitan New York Region

117 employers were identified at the 15 sweep locations.

A total of 35 tax-related investigations were initiated against employers who appeared to be in violation of the law.

- 22 investigations were initiated based on information obtained directly from these sweeps.
- 13 other investigations were initiated on employers as a result of tips received through Task Force efforts.

C. Reports by the various Partner Agencies

Department of Labor - Unemployment Insurance Division

The Unemployment Insurance Division (UID) administers the State Unemployment Insurance program, including both unemployment insurance benefit payments and the collection of unemployment insurance taxes from employers. The UI employer payroll tax supports the benefit portion of the program.

The Division took the lead in overall coordination of Task Force efforts. These efforts included arranging for meetings of the Oversight Committee and the various sub-teams, assessing all leads and tips, marshalling the various resources and supplies for the conduct of the sweeps, tactical coordination during the conduct of the sweeps, and the initial audits and investigations conducted as a follow-up to the sweeps. The UID plays a key role, sharing data from the sweeps as well as the results of its audits and investigations with all Task Force partners.

- In follow up to the 15 interagency sweeps conducted during 2007, initiated 35 unemployment insurance tax investigations, completing 16 investigations in 2007. Many of these investigations resulted from dozens of staff jointly inspecting construction and other sites throughout the state as well as employers' places of record.
- Reports from the investigations completed to date indicate that 2,078 persons were misclassified and that over $856,000 in Unemployment Insurance taxes was underpaid.

- Those taxes represent over $19.4 million in unreported remuneration paid to employees.
- In addition to unpaid taxes, UID assessed over $381,000 in fraud penalties under Labor Law §570(4) and approximately $220,000 in interest on unpaid taxes.
- Total UI assessments exceed $1.4 million.

In addition to the measures called for under the Executive Order, the UID undertook to better count the number of misclassified workers found in the course of all its audits and investigations. Formerly, the UID only counted the number of workers found to be "Independent Contractors" under tightly prescribed Federal criteria. Now, the UID is counting all instances of misclassification in accordance with the common law standard in the UI Law and in keeping with established case law. Utilizing these broader counting criteria, in the fourth quarter 2007, the UID counted a total of 29,446 misclassified workers through both the sweeps as well as its audits and investigations. Use of this more accurate counting approach will better enable the Division, the Department, and the Governor to measure the effectiveness of the Department's activities with regard to finding and addressing misclassification and its impact on UI program revenues and administration.

Department of Labor - Division of Labor Standards

The Labor Standards Division is responsible for enforcing the State Labor law provisions relating to minimum wages, overtime, unpaid agreed wages, unpaid agreed wage supplements, child labor, illegal industrial homework, migrant farm labor, equal pay, day of rest, meal periods, and other related provisions.

Under the auspices of the Task Force, the Division had the primary responsibility of interviewing workers at job sites. The testimony of workers is a key element in the execution of the investigation, not only for Labor Standards purposes, but also for enforcement of all other relevant laws. When employers are violating the laws, payroll records are often inaccurate regarding matters such as total number of employees, employee job duties, and wages paid to employees – crucial issues for determining liability under UI, Workers' Compensation, Prevailing Wage, and Wage and Hour laws. Employee interviews are critical for assessing the accuracy of payroll records and for providing complete information regarding staffing levels, compensation and work schedules, safety conditions, and other matters.

The Division used its multilingual capabilities to conduct employee interviews in languages other than English at every job site. The Division visited sweep sites between July 2007 and December 2007 in order to interview workers. Each site had several subcontractors performing work of different types. Employee interviews at those sites identified a mixture of compliance and non-compliance for workers employed by the same subcontractors and performing the same duties. The Division was able to use the information obtained to look further into the operations of several subcontractors. There were apparent violations of overtime and record keeping requirements for some employees, which are also being followed-up by the Division. The Task Force has also enabled enhanced data sharing which has resulted in significant findings in targeted businesses identified through that data sharing.

Overall results show:

- 17 construction sites, 12 retail establishments, and 1 restaurant have been inspected.
- 545 employees were interviewed.
- Based on inspections, 17 firms are currently under investigation.
- Approximately 646 employees were found to be underpaid. Thus far it is estimated that at least $3,020,000 is due to these employees. The Division expects to find additional underpayments in currently open investigations.
- One firm was also found to have child labor violations (Labor Law §133.2i) and was served with an Order to Comply in the amount of $5,000.
- Six downstate firms are being investigated for recordkeeping violations only. Three others have already been issued recordkeeping violations.

The following cases provide examples of the violations encountered:

An employer in the Bronx was found to have a sixteen (16) year old minor working as an electrician's assistant, a prohibited occupation under the child labor laws because of the hazards involved.

The Division was already investigating an employer in Brooklyn based on an outstanding complaint. During the sweep, and in a subsequent review, it was found that the employer failed to pay overtime as required. In addition, the employer did not maintain records of hours worked by employees or provide them with wage statements.

Another employer was found at three different sweep locations. Interviews at the first location showed a pattern of overtime underpayments as well as a failure by the employer to furnish wage statements to its workers. By the time the next two locations were visited, there was a significant change in the interview results. Most of the interviewees at these subsequent visits indicated that they worked fewer than forty hours per week and that they did receive wage statements. The Division is currently verifying these statements through independent means but this case illustrates the risk that when an employer anticipates a Task Force inspection, workers may be coached in how to answer inspectors and may be fearful of retaliation if they answer questions honestly.

Department of Labor - Division of Safety and Health

The Division of Safety and Health (DOSH) is responsible for all safety enforcement activities and standards which are outside the purview of the Federal Occupational Safety and Health Act of 1970, or for which specific Federal standards have not been promulgated under the terms of the Act.

The Division supported the activities through raising awareness and giving training to members of the Task Force on hazards they may encounter during their sweep activities. It also recommended appropriate personal protective equipment and safety precautions, thereby allowing a better prepared visit by Task Force members.

Given the type of construction activities the Task Force was initially focused on, the Division also provided input on potential asbestos disturbance issues. The Division determined if the target site location had been notified as an abatement project and coordinated the notifications with the New York City Department of Environmental Protection. DOSH conducted site visits to locations that were conducting renovations, rather than new construction, given the higher potential for disturbance of asbestos. It performed 16 pre-inspection site visits, with the majority of these not involving asbestos-related concerns. Violations were issued on two occasions during the sweep to a contractor for disturbing asbestos in the course of performing demolition work, for performing unlicensed asbestos removal, and for using uncertified workers.

Department of Labor – Office of Special Investigations

The Office of Special Investigations provides investigative support for the NYS Attorney General's Office and for county district attorneys who will seek criminal prosecutions in unemployment insurance fraud cases.

The Office of Special Investigations is an integral part of the Task Force and assisted in early planning sessions for the enforcement sweeps. The Task Force determined that law enforcement should be invited to support the enforcement sweeps. The Office of Special Investigations was assigned as liaison to law enforcement. Members of the Office participated in every sweep around the State. Staff aided in logistical and safety planning for each sweep, designed a sweep survey form, reviewed the completed forms for each action, and advised the Task Force on technology for both the safety and security of the staff, as well as productivity while at the targeted sites.

The Office of Special Investigations, with the support of the Department's Counsel's Office and the Attorney General, prepared subpoenas for each sweep to be served if the employer proved uncooperative. Special Investigations staff brought signed subpoenas to each sweep ready to serve if needed to enforce compliance. Subpoenas were served on three of the sweeps to date. Special Investigations assisted the audit staff in obtaining compliance with the subpoenas. In each case, the employers provided the required records quickly in accordance with the subpoena. The intervention of the Executive Director and Deputy Director of Special Investigations was valuable in several instances in advising employers and their counsel of the purposes of the enforcement and in obtaining compliance with the Labor Law.

Special Investigations' relationship with law enforcement proved an asset to each of the sweeps. The cooperation extended by law enforcement to the Task Force through Special Investigations provided for orderly conduct of the sweeps, protection for state staff, and on several occasions facilitated employer cooperation with the investigation.

Special Investigations expects to support future enforcement sweeps, participating in every enforcement action as requested by the Task Force. The Office of Special Investigations will continue to prepare and deliver subpoenas, assist in tactical planning, consult with staff, employers, and law enforcement to obtain compliance with the Labor Law, and coordinate with law enforcement to protect Task Force staff.

Department of Labor – Bureau of Public Work

The Bureau of Public Work is responsible for administration of Articles 8 and 9 of the New York State Labor Law, covering prevailing wage and supplements, and other related issues for all public work projects and building service contracts involving a state and/or local governmental entity.

Under the auspices of the Task Force, the Bureau provided support in the conduct of worker interviews at job sites, primarily in upstate New York. The Bureau used its multilingual capabilities to conduct interviews at upstate job sites. In addition, the Bureau is actively researching its old case files to determine whether additional investigation might be warranted by Task Force partners. Based on that review, Public Work has provided tips to the Research/Targets team.

Workers' Compensation Board--Bureau of Compliance

Workers' compensation insurance provides weekly cash payments and the cost of full medical treatment, including rehabilitation, for covered employees who become disabled as a result of a disease or injury connected with their employment. It also provides payments for qualified dependents of a worker who dies from a compensable injury or illness. In administering this program, the Workers' Compensation Board receives and processes workers' claims for benefits, employers' reports of injury, and medical reports from physicians and other health care providers. The board adjudicates and resolves all issues and makes awards and findings to ensure that an entitled claimant receives benefits and medical treatment promptly.

Two units within the Workers' Compensation Board's Bureau of Compliance have worked closely with the Task Force to attack the misclassification problem that exists in the State. The Enforcement Unit participated in the Task Force construction sweeps, collecting information related to Workers' Compensation insurance requirements. The unit was instrumental in obtaining the building permits from the New York City Building Department in advance of the July 2007 New York City sweep. Individual investigators are now inviting their NYSDOL counterparts to participate in on-site employer investigations where, in addition to Workers' Compensation Law violations, a violation of Labor law is also suspected. Similarly, individual NYSDOL investigators are contacting their Workers' Compensation Board Enforcement Unit counterparts when a violation of Workers' Compensation Law is suspected. This information sharing will benefit the Board's enforcement efforts including stop work orders, debarment and misclassification/noncompliance penalties.

A subpoena for employer business records is now issued on every investigation. Where the employer fails to submit the records, or where the records submitted are not adequate, the Data Administration unit now issues a WCL Section 131(3) penalty. In addition, for those employers that have obtained a Workers Compensation insurance policy, the WC Data Administration Unit will be able to compare the employer's records against the insurance carrier's records. If it is determined that the employer misrepresented payroll pertinent to determining premium, the Data Administration Unit will issue a WCL Section 52(1) d (misrepresentation of payroll) penalty.

The Data Administration Unit has also worked directly with several NYSDOL units in an effort to share information. For example, the unit has met with the Bureau of Public Work in an attempt to identify Public Work violators who might also be targets for WCL 52(1) d penalties.

Unfortunately, a WCL Section 52(1) d misrepresentation penalty cannot be issued against employers who are self-insured or employers who are members of self-insured trusts. While the statute specifically references premium, neither of these two groups pay premium. Self-insured employers pay their own claims, while members of self-insured trusts pay contributions to the trusts. A language change in the legislation is necessary to issue Section 52(1) d penalties against self-insureds and members of self-insured trusts.

Office of the Fraud Inspector General of the Workers' Compensation Board

The Fraud Inspector General serves on the Misclassified Worker Task Force Oversight Committee and has provided valuable advice concerning the Workers' Compensation insurance fraud issues which will be encountered during the Task Force's construction site sweeps and during subsequent Department of Labor and Office of Fraud Inspector General's (OFIG's) investigatory audits of employers who have employees working off the books and/or misclassified as independent contractors. The Fraud Inspector General directed the Assistant Inspector Generals, investigators and auditors to help ensure that the construction sweeps and subsequent audits/investigations would be properly planned and coordinated through their participation in the Sweep and Audit Team meetings. OFIG downstate and upstate investigators have participated in all the construction site sweeps conducted and helped collect Workers' Compensation insurance coverage and workforce size documentation for each construction contractor or subcontractor.

At a November 9 meeting of OFIG and NYSDOL audit management, it was decided that separate rather than joint NYSDOL/OFIG audits would be conducted of construction contractors whose construction sweep data indicated that they appeared to have large numbers of workers being paid off the books and many workers misclassified as independent contractors. This decision was made principally because of the differing purposes of the NYSDOL and OFIG audits, since NYSDOL's are focused on civil enforcement of the Unemployment Insurance Law and Regulations; whereas OFIG's forensic audits are focused on determining whether an employer has criminally committed premium fraud under Section 114 of the Workers' Compensation Law. A preliminary agreement was prepared regarding these separate audit processes under which NYSDOL would complete its investigatory audits first and share the results with OFIG for use in its employer premium fraud audits. OFIG will share the results of its construction company premium fraud audits with NYSDOL and both agencies will jointly pursue the prosecution of any criminal violations identified of either Workers' Compensation or State Labor laws through the Attorney General's Office. On December 13, NYSDOL staff shared the results of its first eight construction company audits with OFIG and it has selected five for assessment of their premium fraud potential.

Department of Taxation and Finance

The Department of Taxation and Finance (DTF) provides a system of tax administration through collection of individual and employer tax revenues and associated receipts in support of government services in New York State.

The Department of Taxation and Finance participated in the drafting and negotiation of the Memorandum of Understanding in connection with this Task Force. Representatives from the Department's Office of Counsel attended several meetings and participated in several conference calls throughout several drafts of the MOU. The MOU was signed on behalf of the Department of Taxation and Finance by Acting DTF Commissioner Barbara G. Billet on November 20, 2007.

The participation of the Department of Taxation and Finance is statutorily limited with respect to its participation in actual workplace sweeps (See Tax Law section 697(e)(3)). The Department is, however, permitted to receive and act upon information received during a sweep and use that information to conduct its own investigation of withholding and income tax fraud or failure to file. The Department will receive copies of the completed investigations generated from the sweeps once an operating agreement, building upon the Task Force Memorandum of Understanding, is in place and training has been provided on the use of audits prepared by the Department of Labor's Unemployment Insurance Division.

New York City Comptroller's Office

The mission of the New York City Comptroller's Office is to ensure the financial health of New York City by advising the Mayor, the City Council, and the public of the City's financial condition. The Comptroller's Bureau of Labor Law enforces New York State laws that require private sector contractors engaged in City public work projects to pay no less than the prevailing wages and supplemental benefits to their employees. The Comptroller also issues prevailing wage schedules, which list the wage rates and supplemental benefits required for the trades and occupations covered under prevailing wage laws.

New York City Comptroller William C. Thompson, Jr. is pleased to be a member of the Joint Enforcement Task Force that is addressing the problem of employee misclassification. The Office of the New York City Comptroller is the sole City agency participating on the Task Force.

The Comptroller's Office participated in the meetings to plan the activities of the Task Force. The Office also participated in the drafting and negotiation of the Memorandum of Understanding executed by all of the Task Force members. Comptroller Thompson signed the MOU on November 26, 2007. As well, the Bureau of Labor Law has shared numerous leads and tips for consideration and possible investigations by the Task Force Sweeps Team.

Comptroller Thompson is sending a letter to New York City government contractors to remind them that misclassification of workers is a crime that is punishable by law and that the various

agencies comprising the Task Force are now working together to coordinate enforcement efforts on this issue and ensure a level playing field for law-abiding businesses.

Office of the Attorney General

As New York State's Chief Legal Officer, the Attorney General defends and protects the people of New York. The Attorney General's authority to prosecute is found throughout the laws of New York State.

The Office of the New York State Attorney General (OAG) has been an active participant in the Task Force. The OAG took part in the early planning sessions for the enforcement sweeps. Together with the NYSDOL Counsel's Office and the Office of Special Investigations, the OAG conducted a training session for investigators from the participating agencies prior to the initial sweep on issues such as the authority to enter the workplace and inspect records and protocols to follow when an employer declines to provide payroll records. The OAG also helped draft the subpoenas to be used by the NYSDOL if an employer failed to provide payroll and other records and has consulted with enforcement staff when legal issues have arisen in the course of sweeps. The Attorney General's Office has also worked with the Task Force Legal Team on understanding the legal issues that could arise in sweeps. The Attorney General will provide legal support in the event that court intervention is necessary to ensure compliance with the law, or to address potential retaliation cases by employers against witnesses.

Pursuant to the Memorandum of Understanding, the Attorney General's Office is the lead agency on criminal prosecutions that may arise from the Task Force. The OAG, together with the Office of Special Investigations, will review all sweep results to determine whether criminal action is warranted.

D. Early Lessons Learned

Task Force operations bring the resources of the partner agencies together in an unprecedented level of cooperation and collaboration. Open communication and the sharing of data have allowed the partners to leverage their resources to best effect compliance with employment and tax laws.

In preparing for Task Force operations, the partners identified the operational items needed in order to carry out sweep operations. Among the needs identified were communication gear which allowed agencies to inter-communicate, appropriate safety equipment for staff, operational planning documents, and informational brochures for employers and employees at sweep sites.

We also identified a number of logistical challenges, such as coordinating the schedules of five to fifty staff members to converge on one location at the same time, and also the need to mobilize quickly in instances when a given stage of construction is about to be concluded or when workers are likely to depart the region imminently. Another challenge has been to coordinate follow up stages of investigations among the agencies and divisions, beyond the initial on-site inspection. In addition, we have learned that investigations in the construction industry present particular challenges, given the variety of subcontractors present, the time-

limited nature of the job (and resultant transience of the workforce on any given site), and the safety considerations.

Key lessons learned from initial sweep efforts relate to the nature of worker misclassification. Traditional UI auditing practices rarely delved into the actual business practices of an employer from the perspective of its workers. However, the sweep's focus on obtaining employee interviews as a primary source of information presented investigators with details regarding employment relationships and working conditions that otherwise might have been missed under normal audit scrutiny. In addition, the review of transactions in the construction industry showed cash flows from developers and general contractors to sub-contractors that were not accounted for in the records of the sub-contractors. We also gained a better understanding into the true value of cash transactions with the number and value of cash transactions being an important focus. Employers may believe that using cash provides an opportunity for non-disclosure and avoidance of accountability. The Task Force's partnerships break down this façade.

As noted, 15 sweeps yielded 117 employing entities when taking into account sub-contractors who were identified on-site. The extent of the inter-relationship and specialization involved, especially in the construction industry was a key lesson. Key players in construction jobs are the property owner, construction manager, the general contractor, and sub-contractors. Each has respective responsibilities and its own employees. In many ways, the general contractor is the entity that links all these related entities together. They determine the subcontractors with which they contract, and play a role in seeking out the reputable versus the disreputable.

It was quickly apparent that some employers would react negatively to Task Force efforts and would, in some cases, attempt to coerce workers into not cooperating with the effort. In certain instances, employees were told to turn in any information provided to them during sweeps or advised against speaking with Task Force investigators. Awareness of the likelihood of threats and intimidation to workers is important. Employers who illegally hinder Task Force members by intimidating and threatening employees must be held accountable for these actions. While some employers did react negatively, attempting to hinder investigators and reviews of their records, others have cooperated fully. Those who were cooperative typically either were found to be in compliance or have made a good faith effort to come into compliance due to the scrutiny brought to bear by the Task Force.

One particular employer, found on the very first sweep that was conducted, subsequently delayed filing of its second quarter NYS45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return. Upon subsequent filing, it was found that the employer had significantly increased the number of employees reported as well as its reporting of new hires. A remarkable jump in employees reported occurred in the second quarter showing 90 additional employees. A further jump occurred in the third quarter showing 115 additional employees.

It has also been reported that employers have 'run out the next day' to obtain Workers' Compensation insurance.

Each member of the Task Force understands that employers have due process rights. Task Force members are committed to spending the time necessary to properly analyze data obtained via sweeps and investigations, arriving at a solid and defensible conclusion in keeping with the law.

IV. Administrative and Legal Barriers

A. Introduction

Implementation of the Executive Order and the conduct of a number of joint enforcement actions have identified a number of legal issues that require further discussion and clarification.

Data Sharing Restrictions:

The extent to which the agencies involved with the Joint Task Force are able to share relevant data among themselves, and with other law enforcement authorities, is a topic of particular concern. State and federal confidentiality requirements weigh heavily in this process, and Memoranda of Understanding require that all parties adhere to data sharing and confidentiality standards. Further, information shared by the Internal Revenue Service for tax enforcement purposes may only be used by taxing agencies and cannot be further shared among the partners.

The Department of Taxation and Finance advises that it is statutorily limited with respect to its participation in actual workplace sweeps and its ability to share its audit results with other Task Force members (See Tax Law §697(e)). However, information shared with the Department of Taxation and Finance by other Task Force members will prove invaluable to the Department in its enforcement efforts and will generate additional tax revenues for the state. The need to balance confidentiality concerns with the desire to maximize data sharing, to efficiently and effectively focus Task Force activities and maximize Task Force results, will continue to be a challenge that will be addressed by members of the Legal Team and Task Force in general.

Access to Records and Work Sites:

Significant effort has been focused on the best means of coordinating activities designed to obtain records for the conduct of investigations as well as access to employees for their testimony. Each agency is able to issue subpoenas on their own authority. The Task Force will review and establish protocols as needed to take appropriate action in the event of employer non-compliance with demands for records or access to employees.

Inconsistent Worker Classification Among Partner Agencies:

An area of concern, and a possible legal barrier to the implementation of the Task Force's charge as set forth in the Executive Order, is the lack of consistency among participating agencies with regard to the identification of misclassified workers. Currently, each member agency has the authority to make its own worker status determinations. The Task Force is aware of a number of instances, unrelated to the sweeps, in which member agencies have not reached the same conclusion as to whether a group of individuals were employees or independent contractors. This situation seriously impedes efforts to engage in joint enforcement. Inconsistent worker classification creates difficulty for employers genuinely interested in complying with the law who desire clarity with respect to worker classification. One of the primary goals of the Task Force for 2008 is to address the issue of inconsistency and make recommendations for addressing this issue whether through interagency agreement, regulation, or legislation.

Common Forms:

Task Force members have encountered some technological and administrative barriers to the development of joint forms to assist with and support Task Force activities. A workgroup has been established to address these barriers consistent with the charge set forth in Workers' Compensation Law §141-c, as added by the 2007 Workers' Compensation reform initiative (Chapter 6 of the Laws of 2007).

V. Task Force Consultations and Proposals

A. Introduction

The Executive Order calls for consultations with representatives of business and organized labor, as well as the Empire State Development Corporation in regard to the activities of the Task Force. This is in order to solicit their recommendations for ways to improve its operations. It also calls for the identification of administrative and legal barriers to cooperation and for the Task Force to propose appropriate administrative, legislative, or regulatory changes to:

i. reduce or eliminate any barriers to the Task Force's operations;
ii. prevent employee misclassification from occurring;
iii. investigate potential violations of the laws governing employee misclassification; and
iv. improve enforcement where such violations are found to have occurred

B. Consultations

Three consultations were held with interested parties in regard to worker misclassification.

The National Employment Law Project in conjunction with the AFL-CIO and the Brennan Center for Justice:

The first consultation was held on December 5th with the National Employment Law Project in conjunction with the AFL-CIO and the Brennan Center for Justice.

There was significant discussion on the role these parties could play as an active collaborator, especially with respect to the abuse low-wage workers are facing. One area in which they might complement the work being done on the sweeps is to assist as a liaison or structure for community and organizing groups in their communication with the Task Force. These groups would provide "safe" avenues of contact for reporting abusive employment schemes, misclassification, and fraud. They would also provide avenues for their constituents in finding information on services offered. These groups are also in contact with other states working on independent contractor reforms and have forwarded various suggestions as to reforms. The Department of Labor's Executive Assistant for Labor Affairs and the Director of the Bureau of Immigrant Workers' Rights will act as points of contact and will further develop avenues of cooperation where it is fitting.

The Business Council of New York State:

A consultation was held on December 18th with the Business Council of New York State. The Business Council presented a series of questions on behalf of their membership. Much of the information requested in these early meetings was unavailable prior to the drafting of this report. Specific areas of concern, related to sectors within their constituency, were brought to the attention of the Task Force.

Both of these groups, as well as other interested parties, will be provided with an opportunity to meet on a regular basis in order to address their questions and concerns. The next meetings are planned for Spring 2008.

Empire State Development Corporation:

This Report has been shared with the Empire State Development Corporations for their input.

C. Proposals

As the Task Force is only four months old, the following are considerations that may be developed into more formal proposals in 2008:

Single Standard for Worker Classification:

The Task Force would benefit from administrative or legislative action that would identify a single standard for determining whether an individual is an employee or an independent contractor. Adoption of a consistent standard for determining employment status could be achieved most easily through legislation. It could also be achieved administratively among the Task Force agencies. In the alternative, some states have addressed this issue by authorizing one agency to make determinations regarding employee classification. This approach would also require legislative action. Either approach, however, would assure consistency and would avoid situations in which a single employer must treat individuals as both employees and independent contractors, depending upon the law being enforced or the benefit involved.

Corporate Officer Responsibility:

Task Force enforcement of laws regarding misclassification would also benefit from statutory changes that would extend or clarify individual liability of corporate officers and/or shareholders, members of LLC's and LLP's, as well as successor or substantially-owned, affiliated entities for misclassification actions enforced by all Task Force agencies.

Data sharing:

Labor Law §537 authorizes the Department of Labor to disclose unemployment insurance and wage reporting data to State and local agencies in the investigation of fraud. The Department also has the authority to share such data with the Workers' Compensation Board for purposes of determining compliance with the coverage of workers' compensation insurance. This authority provides a basis under which the Department can share information with Task Force member agencies for purposes of the Task Force, specifically, the investigation and enforcement of employee misclassification.

While the Department of Labor has authority to share data, the Department of Taxation and Finance is limited in its ability to participate in actual workplace sweeps and share its audit results with other partners. In order to efficiently use resources, and to avoid numerous duplicative audits, legislation would be needed to authorize the Department of Taxation and Finance to participate in sweeps and to share audit results.

Multi-state Employers:

The issue of employers who cross state lines, essentially moving employees from place to place while avoiding taxation and accountability in any locale, is an identified concern. The Unemployment Insurance Division of the Department of Labor uses a four step localization of

employment test based upon Labor Law §561(2). The Task Force will consider, in coordination with other states, possible avenues aimed at resolving this issue.

Provision of Books and Records:

Unemployment Insurance Law provides for a minor misdemeanor charge should an employer fail to make books and records available (see Labor Law §575). The Minimum Wage Act also contains criminal penalties for failure to keep required records (Labor Law § 662). The provisions contained in 12 NYCRR §§472.2 and 472.5 in regard to the keeping of records, as well as the misdemeanor charges for not making them available, often fail to bring about compliance. Under the UI law, there is no penalty for not 'keeping' records, although such penalties do exist under Labor Law § 218, which covers the wage and hour laws. In addition, District Attorneys are reticent about bringing minor misdemeanor charges in an effort to enforce compliance. The Task Force will review the various laws affecting its members and may recommend changes to bring about a consistent set of penalties in addition to criminal sanctions.

VI. Preventing Employee Misclassification

A. Introduction

The Executive Order requires that the Task Force work cooperatively with business, labor, and community groups to seek ways to prevent employee misclassification.

Efforts at preventing misclassification fall into three broad categories:

Education:

The Task Force has established a web site linked to the Department of Labor's homepage that deals with misclassification. Over the next year, it is expected that additional information will be added aimed at better educating business, labor, and the public on issues of misclassification. Partner agencies will eventually link up with this page.

Thus far, the Executive Order and the New York State Department of Labor – IRS QETP agreement have received significant press. Through broad exposure we are beginning to see businesses and individuals ask the question: What is misclassification? Am I misclassifying my employees? And, am I being misclassified?

Moreover, as sweeps continue and begin to yield more conclusive results, the Communications Team will make proactive efforts to publicize the Task Force's activities in the media, including among business association newsletters and among the specialty press, which will further serve to educate employers and workers about the issue. Employer training seminars may also be held as requested by trade associations and other employer groups.

The Labor Department's Bureau of Immigrant Worker Rights is working closely with immigrant communities, community groups, and advocates in an effort to inform business owners and workers of their rights and responsibilities. On November 6, 2007, the Bureau as well as the Unemployment Insurance Division and the Division of Labor Standards joined the NYC Central Labor Council in a "Day of Action Against Worker Misclassification." This event helped to spread the word among workers and the general public.

Deterrence:

Sweep efforts, as well as consistent efforts at active, comprehensive, and coordinated enforcement, are key to deterring those who may consider non-compliance. The deterrent effect is demonstrated by an anecdote concerning an employer who, seeing the 'handwriting on the wall,' revised its tax returns. Media coverage of enforcement activities, as described above, will also play a significant role in deterrence.

Consistent Treatment:

While efforts at education are underway, sometimes inconsistent, program-specific criteria for determining who is and who is not an employee hinder the prevention of misclassification. Both employers and employees are confused by this lack of consistent treatment. As noted above,

some states have benefited from (a) establishing a single authority to make decisions regarding the classification of workers and (b) establishing a single test by which to make such determinations. These approaches could help to avoid confusion and inconsistency, which can lead to greater non-compliance on the part of the employer community. This is also consistent with effective employer education and outreach efforts. At the same time, the Task Force would encourage developing strong and open lines of communication with advocacy groups, business groups, and other interested constituencies who can serve as effective information and education outlets for their members or constituents.

VII. Goals for 2008

The Task Force is committed to carrying out the directives of the Governor's Executive Order. For the year ahead, it is expected that the Task Force will:

- Develop strategies to continue the early successes of our enforcement efforts by:
  - Expanding into a wider geographic area including northern New York State, Long Island, Utica-Rome, Western New York, and the Southern Tier.
  - Addressing additional industries beyond the commercial construction and restaurant industries such as residential construction, retail, janitorial, auto repair, and cosmetology services.
  - Extensive mining of already existing agency data to identify targets.
- Further consider legislative and regulatory changes including:
  - An evaluation of the merits of the various tests related to employee classification such as the common law and ABC test.
  - The possibility of achieving consistent employee classification criteria among state agency partners.
  - The possibility of designating a single agency to determine classification.
  - Discussions with labor and business groups aimed at developing consistent criteria for determining worker status.
- Increase information sharing between the partners and with other states:
  - To better mine agency data aimed at uncovering abuse.
  - To share tips and information so as to bring about compliance with all laws and regulations.
  - To learn from other states and share our best practices with them.
  - To coordinate with other states on enforcement against interstate trafficking of employees for the purpose of avoiding taxation as well as on other issues.
  - To formalize relationships with other state agencies, Federal agencies, local governments, and other states aimed at coordinated information sharing.
  - To consider an expansion of joint enforcement efforts.

VIII. Summary

In its first four months of operation, the Task Force has proactively engaged the issue of employee misclassification in New York State. Even so, we have not yet begun to scratch the surface. The Task Force is committed to an active, full-fledged effort at routing out misclassification. Its strategies include independent investigations, coordinated investigations, full-scale sweeps, and the sharing of results between the partners and others engaged in addressing these types of abuses.

Whether a given case involves an employer misclassifying ten employees or hundreds, New York's economy and the protections afforded its workers, businesses, and consumers are hurt by non-compliance. As such, the Task Force will counteract non-compliance wherever and whenever it might be found. Further, unlike past practice in which a noncompliant employer might be investigated by one agency but not by others, the unscrupulous will no longer be afforded an opportunity to comply with one aspect of one law while avoiding other laws. We fully expect employers to be in compliance in-full and across-the-board.

The members of the Task Force appreciate the challenge Governor Spitzer has put forward. We are invigorated by our charge, and look forward to meeting it in new and inventive ways.

FISSURED WORKPLACE: THE STAFFING INDUSTRY

A business model premised on the motto "we break the law so you don't have to"

Chris Williams, National Legal Advocacy Network

November 20, 2019

As with any industry, there are good actors and bad actors, but the staffing industry seems to be populated by an inordinate number of bad actors. For many of these bad actors, they seemed to have adopted a motto of "we break the law so you don't have to", attempting to create some distance between the end user employer, the ultimate beneficiary of the work, and the employment laws that protect the workers.

Areas of violations litigated:

Straight Wage Theft:

- Staffing agencies often charge a mark-up for the hours worked by the staffing agency workers (e.g. if a worker is paid the Illinois minimum wage of $8.25, a staffing agency might bill its client company around $11.00 per hour, or a 135% mark-up, which is supposed to cover workers' comp insurance, unemployment insurance, payroll costs, overhead and profit).
    - In multiple cases, comparing a staffing agency's pay records for the hours worked by its laborers with its billing records to the client company for those hours have revealed millions of dollars of shorted pay for work which was billed;
    - In one interesting case, whistleblowers alleged that whenever a staffing agency laborer complained about hours being shorted, the staffing agency would investigate the claim, bill the company for the hours, cut a check but then stick the check in a drawer until the check expired and keep the money;
    - Staffing agencies will often only pay laborers for a fixed 8 hour shift even if the company requires the laborers to work beyond the 8 hour shift.

Unpaid Overtime Wages:

- Staffing agencies will frequently send workers to two different client companies in the same work week for more than 40 hours, but pay the workers with separate checks for each assignment, not paying overtime;
- In some cases, a client company will utilize two staffing agencies to employ the same laborers at its work site for more than 40 hours, having the laborers clock out from one agency and clock into the second agency at 40 hours, thereby avoiding overtime;
- We have seen a few cases where a staffing agency has the same laborers work under two different names to avoid paying overtime;
- Illegal ride charges: see https://www.propublica.org/article/taken-for-a-ride-temp-agencies-and-raiteros-in-immigrant-chicago

Discrimination:

- Staffing agencies often serve as a screener for their client companies to allow them to hire (or not hire) the type of worker they want, often illegally discriminating. The practice was well documented in a series of articles by Will Evans of Reveal News.[1] Code words are common for discriminatory requests based on race, gender, age, disability, etc. Some examples:
    - Race: guapos/feos; bilingual workers; basketball players/soccer players/basketball players;
    - Gender: heavies/lights

[1] *See,* for example, www.chicagoreporter.com/growing-temp-industry-shuts-out-black-workers-exploits-latinos/; www.revealnews.org/article/how-a-temp-agency-can-get-away-with-discrimination/; https://www.revealnews.org/episodes/decoding-discrimination-in-americas-temp-industry/; www.al.com/news/2016/01/temp_agency_workers_detail_pre.html.

Coming…

- Uberworks, Shiftgig, etc.

Working Toward Some Solutions:

- Legislative regulation – see Illinois Day and Temporary Labor Services Act, 820 ILCS 175/1, *et seq.*:
    - Employment notice (or written contract terms) – *See* Section 10
    - Record-keeping requirement – *See* Section 12(a) – some key records
        - Bill, pay, time records
        - Race/gender of assignees
    - Requirement for staffing agencies to register with IDOL – *See* Section 45
    - Penalties for companies doing business with unregistered agencies - *See* Section 85(a)
    - Strict liability for wage and hour violations by staffing agencies – *See* Section 85(b)
    - Workers' access to the bill/pay/time records for their work - *See* Section 12(b)
- Government enforcement and litigation: In Illinois, we have tackled race discrimination cases through cooperation with the AG, IDOL and through private litigation. *See*, for example, some of the race discrimination cases brought in Illinois.[2]

[2] *See* www.chicagoreporter.com/whistleblowers-and-lawsuits-expose-racial-discrimination-by-temp-agencies/; *see* also, for example, *Lucas, et al. v. Vee Pak, Inc., et al.*, Case No. 12 C 9672 (N.D. Ill.); *Green, et al. v. Vee Pak, Inc., et al.*, Case No. 13 C 1524 (N.D. Ill.); *Lucas, et al. v Ferrara Candy Company, et al.*, 13 C 1525 (N.D. Ill.); *Hunt, et al. v. Personnel Staffing Group, LLC d/b/a MVP, et al.*, Case No. 16 C 11086 (N.D. Ill.); *Pruitt, et al. v. Personnel Staffing Group, LLC d/b/a MVP, et al. d/b/a MVP*, Case No. 16 C 05079 (N.D. Ill.); *Pruitt, et al. v. Quality Labor Services, Inc., et al.*, Case No. 16 C 05079 (N.D. Ill.);

The OCI and Worker's Compensation Insurance

Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification

Wednesday
November 20, 2019

Timothy Cornelius
David Haushalter

What/Who does the OCI regulate and license?

- Wisconsin Compensation Rating Bureau (WCRB)
- Insurance companies
- Insurance agents

Chapter 626

- Applies to all worker's compensation insurance written on risks or operations in Wisconsin.
- Insurance companies that write worker's compensation insurance in Wisconsin are members of the WCRB.

Chapter 626

Insurance companies selling worker's compensation insurance in Wisconsin must use the following that have been approved by the OCI.

- rates,
- rating plans, and
- classifications

Chapter 626

- WCRB documents filed with the OCI:
  - Rules
  - Rates
  - Rating Plans
  - Classifications

OCI reviews filings ➔
Approved/Disapproved

Chapter 626

- Insurance companies selling worker's compensation insurance in Wisconsin must use rates, rating plans, and classifications that have been approved by OCI.

Insurance Complaint Process

OCI receives insurance complaints.

Complaints prompt an investigation.

- OCI will seek a written response from the insurance company and/or agent.

OCI is focused on compliance with Wisconsin insurance law.

Administration of Workers Compensation Policies

Overall goal: ensuring coverage

Estimated vs. Final Earned Premium

Carrier Audits:

Both a right and a responsibility

Primary mechanism to ensure accuracy of information

Mechanisms to Ensure Accuracy of Information

- Audit Noncompliance Charge:
  - allows carriers to charge two times the estimated premium if employers do not cooperate with the audit
- WCRB Inspection:
  - a comprehensive review of an employer's business operation
- OCI Complaints

Uninsured Subcontractors

Rules set up to ensure coverage for uninsured subcontractors

Evidence of insurance

Fraudulent Certificates of Insurance

- Section 628.34 (14), Wis. Stat., prohibits any person from preparing, issuing or providing false, misleading or deceptive certificates of insurance.
- Provides OCI with specific authority to pursue enforcement actions against any person or entity that engages in the misconduct.
- Application of the law regarding contractors/subcontractors.

Contact Information

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STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

AGENDA

Wednesday, January 29, 2020
9:00 am – 1:30 pm

Risser Justice Center
120 Martin Luther King Jr. Blvd.
Room 150A
Madison, Wisconsin

Welcome

9:00-9:10	Welcome
9:10-10:20	Panel discussion of outstanding questions
10:20-10:30	Break
10:30-11:00	Recap of Task Force activities and discuss 2020 Report
11:00-12:30 (With working lunch)	Task Force brainstorm of recommended strategies in small groups
12:30-1:15	Brainstorming report out
1:15-1:30	Wrap up

Adjournment

*****For press inquiries including interview requests, please contact the DWD Communications Office:

Media Line – 608-266-2722 or E-Mail – DWDSOCommunicationsOffice@dwd.wisconsin.gov

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STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD
Wednesday, January 29, 2020
9:00 am – 1:30 pm
Risser Justice Center
120 Martin Luther King Jr. Blvd.
Room 150A
Madison, Wisconsin

Equal Rights Division Response to Requests for Information

1. Information Requests

A. What is the break down by industry of noncompliance?

The Equal Rights Division does not keep specific data, but we identified common industries where we find misclassification issues, as reported by investigators:

- Construction industry
- Trucking
- Entertainers (and sometimes they are independent)
- Exotic dancers
- Small businesses
- Seasonal businesses
- Home health industry
- Cleaning companies
- Gyms / Personal trainers

B. Is there a difference in compliance between large and small employers?

ERD does not collect this data, but our impression is that misclassification is more common among small employers.

C. Is there a way to identify the repeat offenders – by person/company other?

Our Equal Rights Officers are assigned to territories, so they may generally remember repeat cases, but ERD does not have a process or system in place that offers any automatic ticklers or flags that identify repeat offenders. In some cases, where an ERO finds an issue likely to affect more people than just the complainant, we issue a "self-audit order" to determine whether there are additional violations and pay employees who are similarly impacted. If employers do not conduct the self-audit and we later find violations, we impose additional penalties.

D. Can we quantify the level or percentage of misclassification?

No – we can only count complaints filed and violations found, and misclassification is not a violation in and of itself, so it is difficult to gather even that data.

2. Data Sharing

A. What MOUs or other data sharing agreements currently exist?

We have an MOU with the United States Department of Labor (USDOL) related to case referrals, but not ongoing data reporting. We have data sharing agreements with the U.S. Equal Employment Opportunity Commission (EEOC) and Madison Equal Opportunities Division (MEOD) related to civil rights enforcement, not labor standards.

B. What other data sharing occurs with other agencies or companies?

None other than what is listed above in 2A.

C. What laws, rules, or policies prohibit or impeded data sharing with other governmental agencies, including counties and municipalities?

None

D. What laws, rules, or policies prohibit or impeded data sharing with private companies

None

3. Input from practitioners

A. What tools do you currently have that seem to be effective? How do you know they are effective (data)?

We conduct and resolve investigations when we receive a complaint, but we do not otherwise audit or pursue enforcement.

B. What tools or strategy would you recommend in order to be more effective?

The ERD addresses misclassification only insofar as it underlies other labor standards issues, such as minimum wage violations or wage theft. If the ERD is to be more impactful at combatting misclassification, we should probably have a process in place for alerting other divisions (UI) when misclassification is found or is likely. There may also be more for us to do in aggressively pursuing retaliation against misclassification whistleblowers, but this would need to be examined more closely.

C. Do you have the data you need? If not, what do you need and who has it?

Under current enforcement processes, unsure what additional data would be helpful.

D. What barriers do you face and is there a way to break those barriers?

Increased education and outreach, particularly targeted to those industries where misclassification appears more common, would help.

E. What education do you do (aside from the enforcement letters already discussed)?

We conduct labor law clinics and outreach, but it is not targeted and generally not focused on misclassification as a topic.

F. Do the penalties currently available seem to have an effect?

Unsure. The scope of our work is to remedy specific labor standards complaints. We are not currently investigating or pursuing misclassification outside of those processes.

Department of Workforce Development
Unemployment Insurance Division
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STATE OF WISCONSIN
DWD
Department of Workforce Development

Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

Wednesday, January 29, 2020
9:00 am – 1:30 pm
Risser Justice Center
120 Martin Luther King Jr. Blvd.
Room 150A
Madison, Wisconsin

Unemployment Insurance Division Response to Requests for Information

1. Information Requested:

A. Loss of taxes and other effect on taxpayers –

In February 2000, USDOL issued a report "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs". The figures in the table below are projected numbers derived from the same computation methodology used by USDOL in their report from February 2000.

	4Q18 – 3Q19	CY 2000
Tax underreported statewide for workers misclassified as independent contractors	$56,361,874	$16,609,705
Percentage of state UI taxes underreported due to workers misclassified as ICs	10%	3.8%

*Calculations based on UI audit data

B. What is the breakdown by industry noncompliance?

Misclassification by Industry Based on Audit Assignment Results (01/01/2013 – 11/01/2019)

NAICS	Count of Open, Subject Taxable 2019	Audit Count	Audit Assignment Results	Percent of Change vs No Change	Sum of Audited Reclassified Workers Count	Sum of Audited Taxable Wages Under Amount	Sum of Audited Contribution Under Amount
11 Agriculture, Forestry, Fishing and Hunting		59	Misclassified Workers Found	47.20%	892	$6,077,693	$192,336
		66	No Misclassification	52.80%	0	$0	$0
	2,634	**125**		**100.00%**			
The Agriculture, Forestry, Fishing and Hunting sector comprises establishments primarily engaged in growing crops, raising animals, harvesting timber, and harvesting fish and other animals from a farm, ranch, or their natural habitats.							
23 Construction		1,145	Misclassified Workers Found	40.60%	8,416	$58,261,522	$3,008,121
		1,675	No Misclassification	59.40%	0	$0	$0

	14,475	**2,820**		**100.00%**			
The Construction sector comprises establishments primarily engaged in the construction of buildings or engineering projects (e.g., highways and utility systems). Establishments primarily engaged in the preparation of sites for new construction and establishments primarily engaged in subdividing land for sale as building sites also are included in this sector.							
48-49 Transportation and Warehousing		235	Misclassified Workers Found	41.01%	5,140	$28,686,762	$969,665
		338	No Misclassification	58.99%	0	$0	$0
	4,923	**573**		**100.00%**			
The Transportation and Warehousing sector includes industries providing transportation of passengers and cargo, warehousing and storage for goods, scenic and sightseeing transportation, and support activities related to modes of transportation.							
51 Information		52	Misclassified Workers Found	41.60%	953	$5,420,071	$158,298
		73	No Misclassification	58.40%	0	$0	$0
	1,642	**125**		**100.00%**			
The Information sector comprises establishments engaged in the following processes: (a) producing and distributing information and cultural products, (b) providing the means to transmit or distribute these products as well as data or communications, and (c) processing data.							
53 Real Estate and Rental and Leasing		158	Misclassified Workers Found	45.53%	1,256	$5,993,106	$195,483
		189	No Misclassification	54.47%	0	$0	$0
	4,033	**347**		**100.00%**			
The Real Estate and Rental and Leasing sector comprises establishments primarily engaged in renting, leasing, or otherwise allowing the use of tangible or intangible assets, and establishments providing related services. The major portion of this sector comprises establishments that rent, lease, or otherwise allow the use of their own assets by others. The assets may be tangible, as is the case of real estate and equipment, or intangible, as is the case with patents and trademarks.							
61 Educational Services		59	Misclassified Workers Found	47.58%	874	$4,050,232	$141,781
		65	No Misclassification	52.42%	0	$0	$0
	1,397	**124**		**100.00%**			
The Educational Services sector comprises establishments that provide instruction and training in a wide variety of subjects. This instruction and training is provided by specialized establishments, such as schools, colleges, universities, and training centers.							

C. Is there evidence of what happens to companies that "go out of business" after some type of classification related investigation or notice of noncompliance?

<u>Data Related to Audited Employers with Audit Adjustments – Out of Business and Transferred to Another Entity</u>

Out of business and transferred accounts based on audits performed:

- Between January 2013 and November 15, 2019, 5.56% of audited employers went out of business during this same timeframe, which could have been years after being audited and for a variety of reasons.

- During this same time period, 5.95% of employers audited subsequently transferred their UI account experience to another business

D. Is there a difference in compliance between large and small employers?

Difference in Compliance between Large and Small Employers (2013-2019 audits):

- Total reclassified employees = 46,836
- Percentage of Misclassified Workers from Large Employers = 15%
- Percentage of Misclassified Workers from Small Employers = 85%

A "Large Employer Audit" is over 100 employees or over $1M in taxable payroll for the calendar year preceding the first quarter being audited.

E. Is there a way to identify the repeat offenders – by person/company other?

- BTA and BOLA's Worker Classification Section perform follow-up activities for continued noncompliance through daily operations and special follow-up by BOLA on referred employers.

F. Can we quantify the level or percentage of misclassification?

In February 2000, USDOL issued a report "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs." The figures in the table below are projected numbers derived from the same computation methodology used by USDOL in their report from February 2000.

	4Q18 – 3Q19	CY 2000
Percentage of audited employers with misclassified workers	32.3%	23.0%
Total number of employers in state with workers misclassified	45,887	32,863
Percentage of workers misclassified as IC at audited employers	10.6%	6.2%
Number of workers statewide misclassified as ICs	297,479	158,458

*Calculations based on UI audit data

2. Data Sharing

A. What MOUs or other data sharing agreements currently exist?

- UI has more than 500 active data sharing agreements. Data sharing agreements are required to share confidential UI records with other parties in almost all cases.

Examples of UI data sharing agreements with relevant agencies/entities include:
- Wisconsin Department of Revenue
- Wisconsin Department of Justice
- Wisconsin Department of Transportation
- Wisconsin Department of Natural Resources – Environmental Crimes Unit
- Office of Commissioner of Insurance
- U.S. Department of Labor
- U. S. Department of Justice – Bureau of Alcohol, Tobacco, Firearms, and Explosives
- Internal Revenue Service
- National Association of State Workforce Agencies
- Various State and Local Law Enforcement Entities

B. What other data sharing occurs with other agencies or companies?

- Data sharing agreements are required to share confidential UI records with other parties in almost all cases. Exceptions are set forth in federal and state law (e.g., IRS, US DHHS – National Directory of New Hires, etc.).

C. What laws, rules or policies prohibit or impeded data sharing with other governmental agencies, including counties and municipalities?

- UI records are confidential and cannot be disclosed (20 CFR § 603.4 and DWD § 149.02(1)) unless specified by law. Laws permit the sharing of confidential UI records with most governmental entities at the local, state, and federal levels. Disclosure to non-government entities is more restrictive, and in many cases is prohibited.
- Even when disclosure is mandatory or permissible, certain legal prerequisites normally apply (data sharing agreements, signed consents, payment of costs, providing a service to the individual such that the individual expects to receive a benefit, and/or for the purpose of carrying out the administration or evaluation of a public program) before disclosure is allowable.

D. What laws, rules or policies prohibit or impede data sharing with private companies (for example a developer or contractor looking for construction work, a company looking to subcontract IT work, etc.)?

- Federal and state law provide, with very few exceptions, that unemployment records are confidential and not subject to disclosure.

3. Input from practitioners

A. What tools do you currently have that seem to be effective? How do you know they are effective (data)?

- The Worker Classification Section has the authority under Wis. Stat. § 103.06 to enter any construction site without warrant and interview anyone present to determine whether those present are properly classified. We also have the authority to issue subpoenas for documents for worker classification investigations. BOLA has kept statistics since 2013 that show that of the 2,740 worker classification investigations conducted, 61% have involved investigations at construction worksites.

B. What tools or strategy would you recommend in order to be more effective?

<u>IT Improvements</u>
Field auditors enter data, such as cash disbursements to individuals who were not on payroll and 1099s issued to individuals to generate worker status questionnaires (WSQ), into the field audit application. For large employers who have paid for services to individuals outside of their payroll system, this data entry can take days or even weeks. Updated functionality within the field audit application would reduce data entry time, increase the number of audits completed, and ultimately increase the number of misclassified workers who would be properly classified as employees. The estimate IT impact to implement updated functionality to the field audit applications is approximately 80 hours total.

C. Do you have the data you need? If not, what do you need and who has it?

The Worker Classification Section, with the assistance of the Field Audit Section maintains comprehensive statistics over the number, types and results of worker classification investigations. The issue is not necessarily a lack of data, but a lack of information that would be of assistance in worker misclassification investigations, such as:

- Name, contact information (phone number, email address, etc.), and physical address for the business principal,
- a confirmed business registration with DFI,
- proof of a valid UI account, and
- proof of a worker's compensation policy.

D. What barriers do you face - is there a way to break those barriers?

UI Field Audit Staff and Compensation

Additional auditors would increase the number of audits completed, provide a greater presence in the employer community, and potentially increase the turnaround time of these audits (delays can be caused by employer noncompliance). Audit visibility is a crucial aspect of compliance and creating a "fair playing field" for all employers. Since audits that identify misclassification are typically more time consuming, additional staff would increase the number of misclassified workers found while assisting the field audit section in meeting the Effective Audit Measure (EAM) required by the DOL. Four additional auditors and replacing a half-time LTE BOLA worker classification investigator position with an FTE would be sufficient for this purpose.

UI Field Auditors' salaries have not kept pace with other state agencies with staff performing similar audit functions, which has made recruitment and retention of Field Auditors difficult. An extremely low number of applicants have applied for auditor positions. In addition, several auditors have left for higher paying jobs - one even left after receiving a significant raise. Due to their high level of education and the importance of their work, it is essential these auditors are compensated appropriately for the important and impressive work they perform. Audit staff are scheduled for four or five audits per week, which is a significant workload for each auditor. Over the years, the Wisconsin Compensation Plan (Comp Plan) has had numerous pay adjustments for individuals in positions comparable to UI field auditors. It may be helpful to review all field auditor positions to determine the appropriateness of the work and related compensation level as they relate to other comparable state positions with similar duties. UI, with the assistance of Department of Administration's Division of Personnel Management, could review all recruitment and on-boarding processes to ensure that auditor positions are properly classified and are keeping pace with comparable positions and the associated compensation in the labor market.

E. What education do you do (aside from the enforcement letters already discussed)? What are ways to reach employers and employees to decrease the amount of misclassification?

The UI Division currently has a robust education and outreach approach to inform employers and workers on worker misclassification issues. Education and outreach efforts by the UI Division include:

- BOLA does extensive public outreach including presentations at Friday Fundamentals and Labor Law Clinics. We also give presentations to labor and employer organizations.
- Two series of public service announcements on worker classification were produced. The PSA's were broadcast more than 20,000 times between the fall of 2017 and spring of 2018, and were heard on virtually every radio station in Wisconsin.
- The Department launched a first-of-its-kind worker classification website in July 2013 that provides employers with a clear and understandable process to assist them in determining whether a worker is an employee or an independent contractor.
- Two informational videos were added to the worker classification website in 2016 aimed at educating employers on how to properly classify workers in Wisconsin for UI tax purposes.
- The website also provides a mechanism for employers and workers to report business that are engaged in worker misclassification.
- In 2019 the Department updated the text on the UI Employer Portal and the cover letter of the New Employer Packets with additional information on how to determine if workers are considered employees or independent contractors, the consequences of worker misclassification, as well as links to the UI Handbook for Employers and the worker misclassification website. The text on the Registration Information summary page also includes a certification by the employer that states "By your submission you certify the information provided is true and complete to the best of your knowledge and belief."

F. Do the penalties currently available (in a limited industry) seem to have an effect? Why or why not? What could be changed? What about other industries?

- The intentional misclassification penalties have been in effect since October 2016. The penalties for construction employers who knowingly and intentionally provide false information to the Department for the purpose of misclassifying or attempting to misclassify an employee, are $500 for each employee who is misclassified, not to exceed $7,500 per incident. In addition, the criminal penalty for intentional misclassification by construction employers is a fine of $1,000 for each employee misclassified up to a maximum fine of $25,000 for each violation. There is also a separate administrative penalty for construction employers who coerce individuals to adopt non-employee status.
- In almost all cases, the penalties are being treated by construction employers as a cost of doing business.
- Currently the penalties for intentional misclassification only apply to the construction industry; however, our data shows misclassification is occurring in other industries as well. Consideration could be given to expanding the penalties to other industries.

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STATE OF WISCONSIN
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Department of Workforce Development

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JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

Wednesday, January 29, 2020
9:00 am – 1:30 pm
Risser Justice Center
120 Martin Luther King Jr. Blvd.
Room 150A
Madison, Wisconsin

Worker's Compensation Division Response to Requests for Information

1. Information Requests

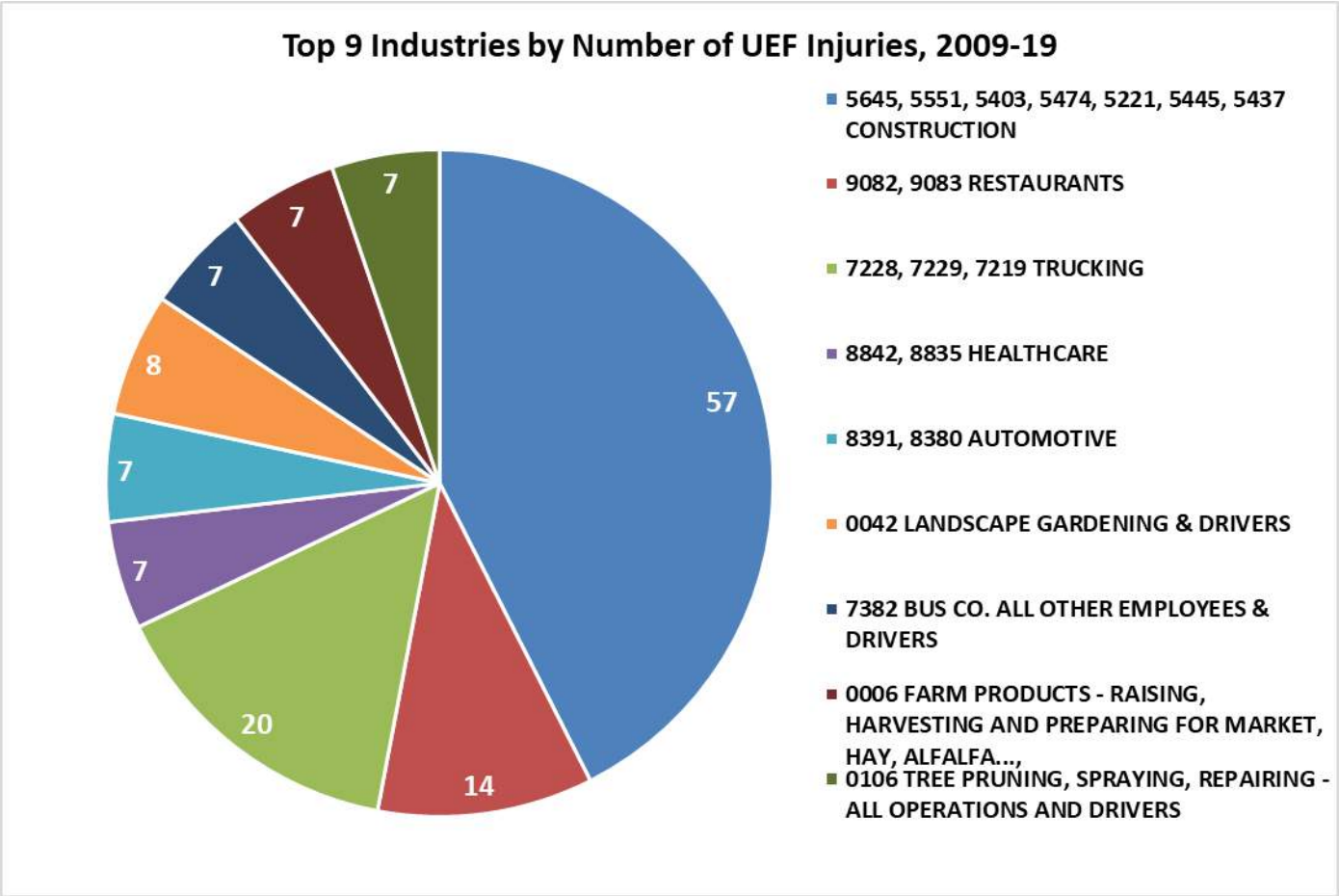
A. Loss taxes and other effect on taxpayers due to worker misclassification:

Worker misclassification can lead to a loss of premiums for the insurance industry and higher premiums passed onto insured businesses. The WC Division is unable to estimate loss in taxes but can identify amount of premiums brought in due to compliance (not all of that is related to misclassification). The result of investigations in premium dollars is listed below. Since the last task force in 2009, the average is $1.37M/year:

2009	$799,879.00
2010	$938,014.00
2011	$1,205,422.00
2012	$1,145,081.00
2013	$694,812.00
2014	$1,634,048.00
2015	$1,602,597.00
2016	$2,059,910.00
2017	$1,680,822.00
2018	$1,941,501.00

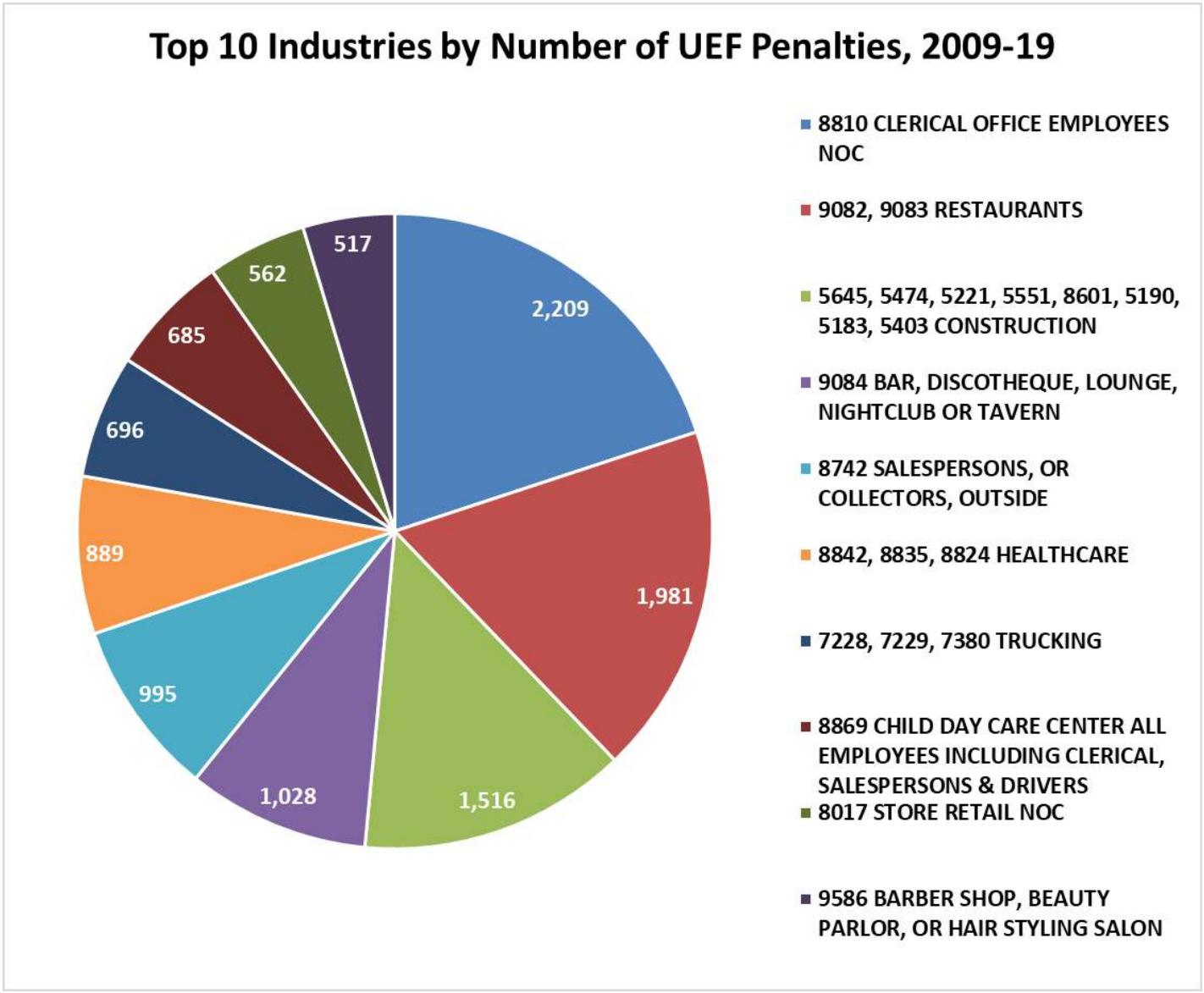
B. WC uninsured claims be broken down by industry:

There were approximately 226 injuries in Uninsured Employers Fund (UEF) claims from 2009-19, of which 134 were covered by nine industries. The following pie chart shows the top nine industries by number of UEF claims 2009-19 (those with 4 or more injuries during the 10-year period). A complete list is available upon request:



C. **What is the break down by industry of noncompliance?**

There were approximately 15,539 UEF penalties issued against employers during 2009-19. The top 10 industries (those with over 500 penalties, which together account for 11,078 of the penalties) is in the following chart. A complete list is available upon request. *Note NOC = Not otherwise classified.*



D. Is there evidence of what happens to companies that "go out of business" after some type of classification related investigation or notice of non-compliance?

The WC law allows for personal liability of corporate officers and LLC members, which remains even if the business closes. The UEF System allows for linking of responsible parties in different businesses. With this, we can identify a responsible party with ownership in more than one entity or a subsequent entity. We could create a report from the linked entities/responsible parties on the UEF System.

Doing this would require the following questions/issues to be addressed:

- What would we do with these types? Accelerated investigation timeline? Change law for stiffer penalty?
- We would need to somehow identify them for misclassification purposes. If that were the case, we could have the boots on the ground in UI pay them a visit if they are still open and non-compliant, next time. Maybe flag them to UI for investigation purposes. We want them to be compliant. WC and UI could collaborate on investigating them at the same time.

E. Is there a difference in compliance between large and small employers?

Yes. Large employers are generally insured in the voluntary market and rarely have lapses. In the voluntary market they have the option for the carrier to back-date coverage. They can close

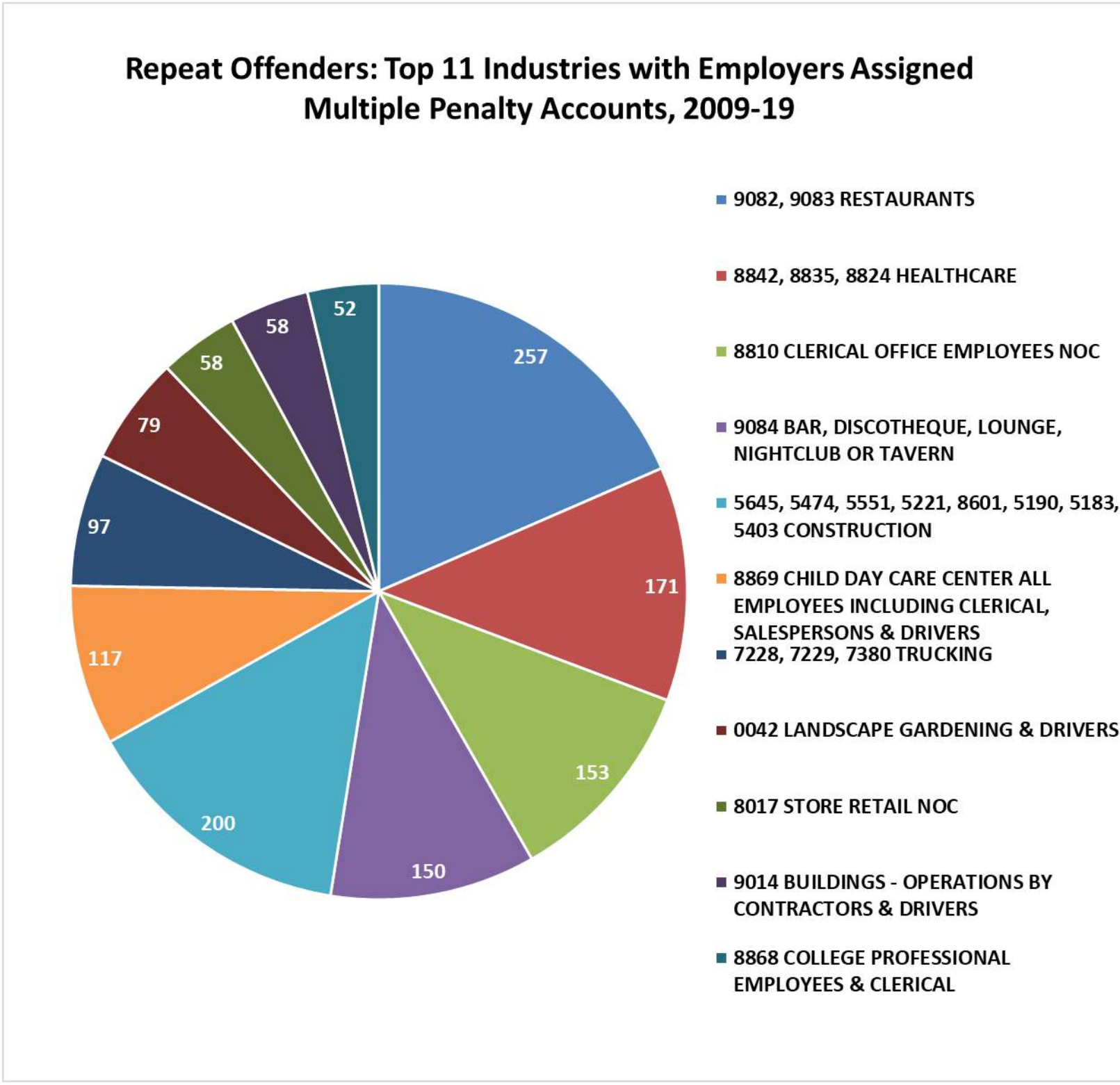
the lapse, with no penalty or have a penalty rescinded after coverage is put in place. Smaller businesses that are not able to find coverage in the voluntary market need to be insured by the Pool. The Pool is not allowed to back-date coverage.

The Wisconsin Compensation Rating Bureau (WCRB) Pool Manual states the following: "To avoid a lapse in coverage, every effort will be made to have the effective date of Pool coverage coincide with the termination date of prior coverage. Back-dating of coverage is not permitted in the Pool. Wisconsin Pool coverage is available to employers who need to satisfy the requirements of the Wisconsin Worker's Compensation Law."

We would need to define small and large in order to quantify the information. We recommend that small employers be defined as having 20 or fewer employees. The Worker's Compensation Division (WCD) has conducted very few investigations with large employers for not having required worker's compensation insurance coverage. The great majority of investigations involved employers with 20 or fewer employees. Please also note "number of employees" in UEF's report is not a hard stop for Investigators. There were 131 employers on the report with zero employees.

F. **Is there a way to identify the repeat offenders – by person/company other?**

Yes. Any employer with multiple penalty accounts (vs. injury accounts). There were approximately 2,475 multiple penalty accounts for employers from 2009-19. The following table (on next page) shows the top 11 industries with employers that were assigned multiple penalty accounts. There were 1,392 accounts covered by these 11 industries (those with 50 or more multiple penalty accounts). A complete list is available upon request. Note *NOC = Not otherwise classified*.



G. Can we quantify the level or percentage of misclassification?

Not in WC through WC's data system.

2. Data sharing

A. What MOUs or other data sharing agreements currently exist?

The WC Division has MOUs and other data sharing agreements with the following entities:

- Wisconsin Compensation Rating Bureau
- Wisconsin Department of Revenue (2)
- Department of Natural Resources
- DWD/Unemployment Insurance Division (multiple agreements)
- DWD/Division of Vocational Rehabilitation
- Department of Transportation, Division of Motor Vehicles
- Department of Health Services (multiple agreements)
    - Division of Health Care Access and Accountability
    - Division of Public Health, Bureau of Environmental and Occupational Health
- Department of Safety and Professional Services/Safety and Buildings Unit
- U.S. Department of Health and Human Services Administration for Children and Families/Office of Child Support Enforcement
- Wisconsin State Lab of Hygiene
- Boston University, School of Public Health
- Worker's Compensation Research Institute
- Department of Justice
- Department of Administration/Division of Hearings and Appeals
- Labor and Industry Review Commission

Copies of/details about individual agreements are available upon request.

B. What other data sharing occurs with other agencies or companies?

WC and the Wisconsin Compensation Rating Bureau share WC insurance coverage data as provided in s. 102.31 (8), Wis. Stats.

Other data sharing occurs with the UI Division, Division of Employment and Training, ASU (our TPA) and the state departments of Financial Institutions, Revenue, Transportation, Children & Families and the Office of the Commissioner of Insurance.

C. What laws, rules or policies prohibit or impede data sharing with other governmental agencies, including counties and municipalities?

Section 102.33 (2) (b), Wis. Stats., provides that any record maintained by the department that reveals the identity of an employee who claims worker's compensation benefits, the nature of a claimed injury, the employee's past or present medical conditions, the extent of an employee's disability, the amount, type, or duration of benefits, and any financial information provided to the department by an employer regarding self-insurance are generally confidential and not open to public inspection.

Section 102.31 (8), Wis. Stats., provides that no information from the Wisconsin Compensation Rating Bureau (WCRB) about WC insurance coverage including the names of insured employers, employers' addresses, business status, type, dates of coverage, manual premium code, policy numbers, cancellations, terminations, endorsement and reinstatement dates, obtained by the department may be made public by the department except as authorized by the WCRB.

Additionally, other issues include federal requirements for UI data to be held confidential, as well as DFI registration doesn't require LLC members

D. What laws, rules or policies prohibit or impede data sharing with private companies (for example a developer or contractor looking for construction work, a company looking to subcontract IT work, etc.)?

Section 102.33 (2) (b), Wis. Stats., provides that any record maintained by the department that reveals the identity of an employee who claims worker's compensation benefits, the nature of a

claimed injury, the employees past or present medical conditions, the extent of an employee's disability, the amount type or duration of benefits and any financial information provided to the department by an employer regarding self-insurance. Section 102.31 (8), Wis. Stats., provides that no information from the Wisconsin Compensation Rating Bureau (WCRB) about WC insurance coverage including the names of insured employers, employers' addresses, business status, type, dates of coverage, manual premium code, policy numbers, cancellations, terminations, endorsement and reinstatement dates, obtained by the department may be made public by the department except as authorized by the WCRB.

3. Input from practitioners –

A. What tools do you currently have that seem to be effective? How do you know they are effective (data)?

- Unemployment Insurance Division (UI) SUITES: Database cross matches are completed weekly and quarterly to identify businesses with employee wage reporting that do not currently have coverage. The weekly cross match tool identifies and generates an average of 12,000 investigations annually. These investigations cover potential misclassification issues. UI Audit information within SUITES is another tool used to gather information regarding ownership, contact information, number of employees and independent contractors, and wage information.

- Wisconsin Compensation Rating Bureau (WCRB) – Spectrum: Policy information is generated from Spectrum identifying and notifying entities that have a cancelled policy or have not renewed a policy. A notification is sent to each entity requesting a response. The cases that are not resolved with a response or coverage put in place generate a new investigation. In 2018, this tool was used to initiate 9,950 investigations.

- The ASU Group: This is our third-party administrator organization used to investigate uninsured claims. Uninsured claims reported to our section generate both the claim investigation and simultaneous compliance investigation. Relevant subjectivity and compliance information gathered by either ASU or the UEF investigator is shared to move each investigation forward.

- Department of Financial Institutions (DFI) Corporate Search: This tool is used to identify the current legal status of an entity, effective date of status, any change in status, and contact and address information. Articles of incorporation and annual reports are requested from DFI to gather ownership information, ownership changes, and entity legal name changes. This information is acted on regularly during investigation and collection processes.

- Department of Transportation (DOT) Public Abstract Request System (PARS): Investigators and Collection Specialists use address information from driver, ID, and vehicle registration provided through this tool to track down owners/responsible parties for both investigation and collection activities. It provides both historical and most recent address and name change information. This information is used regularly to determine the correct individual and their most current address and contact information.

- Wisconsin Court System: Warrants are docketed by county clerks in the Consolidated Court Automation Program (CCAP). These warrants place liens on real property owned by the warranted party. It is a tool to facilitate collections at the time of sale, purchase, or applying for a loan. The lien stops the transaction. It requires a contact be made with the Worker's Compensation (WC) Division to make financial arrangements to satisfy the associated liability. CCAP is also a public tool. Anyone can conduct a search on a business or responsible party and identify outstanding or delinquent liabilities with the Worker's Compensation Division. The WC Division does not file warrants if the debtor pays voluntarily.

- Wisconsin Department of Financial Institutions**:** DFI has an online corporate records search that provides information such as registered agent, office address, registration effective date and other information.

- Wisconsin Department of Revenue (DOR):

  1. *Tax Refund Intercept Program (TRIP)*: Upon a warrant being docketed to an entity or responsible party, the liability is certified to DOR. Section 71.93, Wis. Stats., permits the DOR to intercept, or set off, taxpayer refunds, refundable credits and lottery payments against certain state agency debts. This is an effective tool, averaging collections of over $200,000 annually.

  2. *State Debt Collection (SDC)*: Under the provisions of Section 71.93(8), Wis. Stats., DOR provides debt collection services to DWD. Under the current agreement, WC is required to send debts greater than $50.00 to DOR for collection purposes. This is an effective tool, since 2017, averaging collections of over $600,000 annually.

B. What tools or strategy would you recommend in order to be more effective?

- Access to LLC members as a requirement during DFI registration
- UI to have employers update registration information or owners more frequently
- UI business transfer information easier to access to determine owners/officers/members
- WCRB Spectrum to require the ownership information on all policies

C. Do you have the data you need? If not, what do you need and who has it?

- We often need ownership info at both investigation and collection levels
- Business or owners email address
- Place on WC Investigation System to store email address rather than notes
- Ability to send letter via email at same time it is sending the letter via USPS.

D. What barriers do you face - is there a way to break those barriers?

- Bad addresses
- Limited budget for updating IT resources and applications
- Inability to determine if the business is still in operation/possibly more collaboration with agencies/law enforcement to provide an update

E. What education do you do (aside from the enforcement letters already discussed)? What are ways to reach employers and employees to decrease the amount of misclassification?

- UEF staff make presentations on request to trade groups/conferences with a focus on that industry
- OCI/DWD/WCRB all have robust information on respective websites on requirements to have WC insurance, and how to buy it.
- DWD has had a booth at different employer-focused events around the state over the years, but the type of employer that attends these events is normally compliant already with the law; the non-compliant smallest employers typically do not have the resources to attend such events, or they know they are non-compliant and operate "under the radar."
- Potential ideas
  - Poster, distribution associated with UI posters as distribution stream is already set up.
  - Place on website so employers may also print it.
  - Video on basic requirements, where to purchase coverage

- More prominent WC info on a central location on how to start up a business.

F. Do the penalties currently available (in a limited industry) seem to have an effect? Why or why not? What could be changed? What about other industries?

The WC law allows for personal liability of corporate officers and LLC members, which remains even if the business closes. The UEF System allows for linking of responsible parties in different businesses. With this we can identify a responsible party with more than one business. A majority of employers penalized for failure to carry WC insurance are never penalized again. This suggests that the current penalty is sufficient in most cases to deter non-compliance. Given that there are employers with multiple penalties (some exceeding 10), it may be appropriate to consider a graduated penalty structure where the penalty increases beginning with, say, the third or fifth penalty.

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Tony Evers, Governor
Caleb Frostman, Secretary

JOINT ENFORCEMENT TASK FORCE ON MISCLASSIFICATION AND PAYROLL FRAUD

AGENDA

Tuesday, February 25, 2020
10:00 am – 12:30 pm

La Crosse Public Library
800 Main Street, Auditorium
La Crosse, WI 54601

Welcome

10:00-11:30	Discussion and Approval of Recommendations
11:30-11:45	Break
11:45-12:00	Discussion and Approval of Report
12:00-12:30	Discussion and Plan for Future Task Force Activities

Adjournment

***** Times above are approximations.

For press inquiries including interview requests, please contact the DWD Communications Office:

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STATE OF WISCONSIN

DWD

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