

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
			338	No Misclassification	58.99%	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
			73	No Misclassification	58.40%	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
			189	No Misclassification	54.47%	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
			65	No Misclassification	52.42%	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?

Data Related to Audited Employers with Audit Adjustments – Out of Business and Transferred to Another Entity

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?

IT Improvements

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.