Public Task Forces Take on Employee Misclassification: Best Practices

A person's job is just one part of who that person is, but the work we do shapes our identities and our lives. Work should be a place where we learn, contribute, and connect. In return for our labor, we should have fair pay, ample social benefits, and the right to come together with our coworkers to negotiate for more. A good job enables us to provide for ourselves and our families, and to join with employers and coworkers to ensure that communities thrive together.

For decades, however, too many businesses have chosen not to live up to these values. Corporations have mischaracterized their employees as "independent contractors," "self-employed," "partners," or "freelancers," or required them to form "limited liability companies"—or simply paid them off the books—as a tactic to shift risk downward onto workers, while channeling wealth upward to investors and CEOs. When they engage in this sham practice, companies shed responsibility for their workers but often maintain strict controls over when, where, how, and for how much money workers perform their jobs. The practice has been especially prevalent in construction, retail, janitorial, home care, trucking, delivery services, transportation, and other low-wage industries where people of color have historically been shunted. More recently, well-capitalized online platform companies have joined the trend. The practice is commonly referred to as "misclassification" or "payroll fraud." We will use those terms interchangeably in this paper.

> Since 2007, more than half the states have formed interagency task forces to take on misclassification. In 2018 and 2019, there was a task force resurgence, with eight new or revitalized task forces.

Workers' organizations, cities, and states have taken a variety of approaches to address this problem, including passing new laws that assess higher penalties for misclassification, employing more expansive tests to determine whether workers are "employees" or not, or addressing misclassification with sector-specific laws. Over the course of a decade, more than half of the states formed formal or informal interagency task forces to take on companies that abuse their power vis-à-vis their workers by illegally misclassifying them. In 2018 and 2019, especially, there has been a resurgence of task forces, with a total of eight new or revitalized task forces. This report is meant as a guide to legislatures and executives wishing to adopt best practices to hold business accountable and restore rights to dispossessed workers.

Summary of Recommendations

1. Establish the task force through legislation, with a broad mandate and broad participation by state agencies with jurisdiction over employment and tax laws, and enforcement of each. Consider adding an advisory council of business and labor leaders.
2. Ensure that the task force can plan for enforcement, research, auditing, legal, communications, and reporting functions.
3. For efficient use of resources and maximum deterrence value, enable the task force to engage in targeted enforcement, and name a point person at each participating agency.
4. Each agency brings specific competencies and specific powers to the table: make use of all the tools available to the task force.
5. Continually cross-train agency personnel, so they can spot violations of laws enforced by sister agencies; establish within agency operations a routine method for referral of appropriate cases.
6. To streamline investigations, develop materials to support joint activities, including internal tools like checklists, and external tools such as "know your rights" information for workers and employers.
7. Share data between agencies to improve efficiency of enforcement actions.
8. Educate the public about the workings of the task force, and solicit information from affected workers and businesses. Work closely with community organizations to identify lawbreakers.
9. Seek continuous improvement by mandating periodic reports from the task force for review, reflection, and course correction.
10. Extend the reach of the task force and share best practices by working with similar task forces in other states, and with the federal Department of Labor.

Independent Contractors in the United States

More than 10 million workers—about 7 percent of the U.S. workforce—are classified as independent contractors, according to the most recent figures from the Bureau of Labor Statistics.[1] "Independent contractor" and "employee" are not just labels; the designation has concrete and long-term implications for workers, law-abiding employers, and the public. Being an employee, under most states' laws, means that a worker will make at least the minimum wage, and be protected from discrimination and harassment on the job. An employee gets unemployment insurance if she loses a job, and workers' compensation if she gets injured on the job. In some states, she will get paid sick leave or paid family leave. At the federal level, in addition to basic federal wage and anti-discrimination protections, she also has the protected right to come together with her colleagues to discuss work conditions and seek to improve them by bargaining with the employer or joining a union. Workers who are not employees get none of these protections and benefits.

A true independent contractor is someone who runs her own separate business, sets her own rates, builds a customer base, and takes on the risk of business failure. With few exceptions, none of the panoply of workplace laws that level the playing field between employers and employees and prohibit abusive employment practices apply to independent contractors. As independent businesses, they are considered to have sufficient economic power and business acumen to provide these protections for themselves.

When a worker is improperly called something other than an employee, they lose out on the workplace protections to which they should be entitled. These protections create the minimum foundation for what any person who works should expect from their job.

Misclassification (payroll fraud) can take several forms.
In some cases, employers call workers "independent contractors" even though the employer controls most aspects of the job, such as how the work is performed, what the worker is paid, and relationships with clients. In other cases, employers will require their workers to form a limited liability corporation or a franchise-company-of-one as a condition of getting a job. In still other cases, employers simply pay workers in cash, off the books. Many workers are required to sign long take-it-or-leave-it contracts attesting to independent contractor status, even where they have little or no true independence.

Available evidence suggests that 10 to 30 percent of businesses misclassify workers.
Payroll fraud is illegal and 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 wrongly label at least one employee as an independent contractor, meaning that several million workers nationally may be misclassified. Law violations of this magnitude exact a huge toll on state treasuries: in 2000, researchers found that misclassifying just 1 percent of workers as independent contractors would cost unemployment insurance (UI) trust funds $198 million annually.[2] Among many more recent state studies, a Washington State report found that worker misclassification in that state has risen substantially over the last 10 years, costing the state $87 million annually in unpaid unemployment and workers' compensation premiums.[3]

Payroll fraud is prevalent across the labor market.
Misclassification is especially prevalent in labor-intensive low-wage sectors, where employers can gain a competitive advantage by driving down payroll costs. People of color are overrepresented in many of these sectors, shunted into jobs that are insecure, underpaid, and have no workplace protections or benefits, which exacerbates income and wealth inequality and economic insecurity for Black and brown communities.

The practice has also led to the deterioration of standards in what were once thought to be middle-class jobs, notably construction. It touches nearly every sector of the workforce, including high-tech, professional services, and the entertainment industry.

Employers who cheat harm not only workers but also the integrity of our social benefits systems.
Federal, state, and local governments suffer hefty losses of revenue due to payroll fraud, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[4] A 2009 report by the Government Accountability Office estimates independent contractor misclassification cost federal revenues $2.72 billion in 2006.[5]

Companies' willful refusal to be accountable to their employees undercuts the business of law-abiding employers.

Employers that treat their workers with fairness and accountability and correctly classify them as W-2 employees are often unable to compete with low-road companies that reap the benefits of artificially low labor costs. Misclassification, as the U.S. Treasury's inspector general found, "plac[es] honest employers and businesses at a competitive disadvantage."[6] Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as free-riding employers pass off costs to employers that play by the rules.

The State Task Forces

Laws that govern who is an employee versus who is in business for themselves are broadly written to cover the vast majority of workers in our country as "employees." Often, the problem is that states and cities do not have the resources to address lawbreaking in a systematic and comprehensive way. Since 2007, however, many states have created task forces intended to pool the efforts of state agencies, maximize resources, and bring entire industries into compliance with the law. The experiences of the task forces show that when a worker is being treated as an independent contractor instead of as an employee, the business is likely to have broken several laws, including those related to minimum wage, overtime pay, health and safety, payroll taxes for workers' compensation and unemployment insurance, and other taxes. Simply stated, using a task force to approach payroll fraud is good and efficient use of government resources.

Laura Fortman, Maine Task Force Chair and Commissioner of the Maine Department of Labor, describes some of the benefits of interagency task forces: "Because each agency doesn't have to start from scratch and duplicate the work of other agencies, greater results can be achieved. The Task Force and its subcommittees provide the opportunity to evaluate with a critical eye the way partner agencies do business, assisting each agency to figure out how to best use its resources, and how to take advantage of the resources and work products of other agencies."[7]

Currently, there are 28 U.S. states with formal or informal task forces established to address the issue of employee misclassification. Most were created via executive order[8] or through the legislature.[9] Some are more in the nature of a coordinated project of one or more state agencies.[10] Of the 28 task forces, nine were created or expanded during 2017 to 2019.[11] Twelve state task forces have been in operation for the past nine years or longer, with the oldest continuing task force being New York's Joint Enforcement Task Force on Employee Misclassification, established in 2007. Some of the task forces appear inactive and ripe for updating and renewal.[12] Model taskforce enabling orders or legislation, as well as most recent reports, are linked in the Appendix.

Task Force Best Practices

1. <u>Establishing the task force</u>: **Establish the task force through legislation, with a broad mandate and broad participation by state agencies with jurisdiction over employment and tax laws, and enforcement of each. Consider adding an advisory council comprised of business and labor representatives.**

Task forces are usually established either by executive order or by legislation. Strong leadership and support for the task force's work is central to its success. An executive order–based task force has the advantage of not requiring legislative action, but a legislatively established task force can have a longer, more predictable life span less subject to changing politics. For example, Maine's Task Force was established by executive order in 2009 but was abolished by that state's new governor in 2011.[13]

Some task forces are made up entirely of agency personnel, which means that agencies have the time and space to devote to coordinated enforcement activities. A best practice is to ensure that agency personnel can privately plan enforcement actions but have the ability to seek community input. The Maine Task Force was made up of agency personnel but conducted three community forums where workers, law-abiding businesses, and business associations testified.[14] A number of task forces, including Wisconsin's new Task Force, are formally directed to consult with representatives of business and labor and others as they develops recommendations.[15]

Other task forces are established as joint labor-management entities. These may be subject to state open-meetings laws and thus limited in their ability to plan enforcement actions. They can, however, review existing agency practices and legislation to recommend changes. The recently formed Montana Task Force is mandated to improve the existing system of enforcement rather than to identify leads for investigations.[16]

Task force mandates often include elements of information-sharing across agencies; strategic enforcement, including joint investigations; referral protocols; criminal referrals; and complaint hotlines. A model task force enabling executive order is reprinted in the Appendix.

The task force should also be authorized to make criminal referrals. In New York, the Attorney General's Office was originally the lead agency on criminal prosecutions that resulted from task force operations. In Washington, joint activities in FY 2017 resulted in two criminal prosecutions by the AG's office, and seven criminal referrals were made in FY 2018.[17]

States vary in the composition of their task forces, with implications for how they can coordinate agency work and increase efficiency. In Connecticut, the Task Force includes, in addition to Labor, Revenue Services, and the Workers' Compensation Commission, the Attorney General and Chief State's Attorney.[18] Maine's Task Force, established in 2009, included representatives from the Department of Labor, including the Bureaus of Unemployment Compensation and Labor Standards, and the Center for Workforce Research and Information; the Workers' Compensation Board, including the Office of Monitoring,

Audit, and Enforcement; the Office of the Attorney General; the Department of Administrative and Financial Services, including Maine Revenue Services; and the Department of Professional and Financial Regulation, including the Bureau of Insurance.[19]

Many task forces are focused on a particular industry, typically construction. In the case of Colorado, in 2018 the Task Force focused even more narrowly on labor brokers in construction.[20] Notably. Task Force legislation passed in Nevada in 2019 codifies the most expansive test for determining employee status, often called the "ABC" test, for the construction industry.[21]

Most recently, New York Governor Andrew Cuomo proposed establishing a task force focused on developing standards for workers in the gig economy.[22] While each of these sectors is well known for mislabeling workers (or, in the case of construction, simply paying them off the books), a better practice is to establish a broader task force that can focus on other common offenders in the various industries affected by misclassification. For example, in Washington State, the state Department of Labor and Industries focuses its audits on industries with high injury rates. Assessments in FY 2018 included construction, service, retail, wholesale trade, and manufacturing.[23] In Utah, in FY 2017, the most frequent industry for noncompliance was the professional services industry, including employers that provide health services in a home or an office.[24]

The First Task Force

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. 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 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. 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. In 2015, the last year it operated independently, 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. That report indicated that in 2014, the New York Task Force uncovered nearly $52 million in unreported wages, resulted in the assessment of nearly $1.6 million in unemployment insurance contributions, and revealed over 10,300 misclassified workers.

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2. <u>Planning</u>: **Ensure that the task force can plan for its critical functions, including enforcement, research, auditing, legal, communications, and reporting.**

Effective task forces take planning and real work on the part of the partner agencies. The New York Task Force initially brought together five agencies that developed a broad framework for addressing misclassified workers and discussed each partner's ability to contribute to the effort.[25] They formed an Oversight Committee of leaders from the agencies, and several sub-teams: a research team to focus on research to develop leads; a sweeps team to plan and carry out coordinated on-site inspections; an audit team to plan and carry out follow-up audits on noncompliance discovered during the inspections; a legal team to address any legal issues that might arise; a communications team to develop strategies to keep the public informed and to assist the public in contacting the Task Force members with tips and complaints; and a reporting team in charge of developing the report to the Governor that was required by the executive order that established the task force. Similarly, Maine's Task Force included subcommittees for Communications and Outreach; Targeting, Monitoring and Enforcement; and Legal and Interagency Information.[26]

While not all task forces will choose this structure, the areas of focus for the New York sub-teams create a template for planning. In particular, a communications strategy, broadcasting the successes of the task force's enforcement efforts, is an essential element in deterring noncompliance.

3. **Targeting of high-violation industries: For efficient use of resources and maximum deterrence value, enable the task force to engage in targeted enforcement, and name a point person at each participating agency.**

Many states rely on complaint-driven systems to enforce their laws, but effective and strategic enforcement systems begin with the understanding that complaint-driven approaches alone are not effective. This is because the majority of workers—particularly the most vulnerable and most exploited—do not file complaints when they experience workplace violations, allowing employers to "fly under the radar." According to a study conducted by Dr. David Weil, former administrator of the Wage and Hour Division of the U.S. Department of Labor, for every complaint case conducted by the WHD, 130 cases of employees paid in violation of overtime laws go undetected.

Enforcement is meant to satisfy two goals: first, making the aggrieved worker whole, and second, deterring future violations to protect future employees and current employers in the industry from the unfair competition.[27] Sole reliance on complaint-driven inspections satisfies neither goal. Such actions restore lost wages to very few aggrieved workers and may incentivize further violations by allowing violators to get away with paying only a fraction of what they owe. In order to broadly attack lawbreaking by employers, task forces must engage in targeted enforcement, including targeted impact cases that a single agency alone would not have the capacity to undertake.

Reliance upon random audits as the 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 5,233 random audits identified $42 million in unreported wages to 6,949 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.[28] In California, noncompliant employers are targeted for inspection based on both referrals and data-matching techniques.[29] As a result, in 2017 to 2018, 9 out of 10 businesses inspected were found to be out of compliance by at least one partner agency, and two out of five resulted in findings of violations by *every* participating agency. The California effort resulted in more than $7.8 million assessed in lost wages.[30]

4. <u>**Coordinating across state agencies**</u>**: Each agency brings specific competencies and specific powers to the table; make use of all the tools available to the task force.**

Coordinated enforcement means efficiencies for government. When multiple agencies participate 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 because only one, and not several, investigations take place. It can also mean efficiencies for businesses that are the subject of audits, for they can address all potential violations at once, rather than separately.

Coordinated interagency enforcement can involve a number of strategies.[31] Agencies should cooperate in multi-agency on-the-ground enforcement actions, including reviewing books and records and interviewing employees. Although investigators must review payroll records, when employers violate the law, these records are often inaccurate regarding the number of employees, wages paid, and employee job duties. Employee interviews are critical for two reasons: first, for assessing the accuracy of company records; and second, investigators must talk 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.

During investigations, coordination can lead to the most efficient and best use of an agency's existing toolbox. When talking to workers during sweeps, the investigating agencies with experience talking to workers, such as wage and hour agencies, can take the lead. Others more versed in a company's books and records can take on reviewing these. This type of joint investigation takes planning, but much of it is no different than planning a single agency investigation with multiple investigators.

Coordinated enforcement actions do not end with the on-the-ground investigation. Agencies must engage in thorough analysis of the facts gathered and apply the agency's governing laws. When violations are found, appropriate auditors can determine back wages owed, unemployment contributions owed, workers' compensation premiums owed, and taxes owed.

Legal limits. 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.) Legal analysis will determine the extent of coordination 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.

Not all agency partners are necessarily skilled in fact-intensive, on-the-ground investigations. In some states, agencies might have varying investigative powers. Some may have access to all places of employment; others may not. Some agencies have stop-work-order authority, and others may be able to suspend a business's license until penalties are paid.[32] In some states, agencies might operate under different definitions of which workers are covered under a particular law.

5. <u>Cross-training staff</u>: **Continually cross-train agency personnel, so they can spot violations of laws enforced by sister agencies; establish within agency operations a routine method for referral of appropriate cases.**

Cross-training of agency partners makes coordinated enforcement and data-sharing effective. It is, in fact, the foundation of successful interagency coordination. At a minimum, agency investigators need to be able to understand and issue-spot the laws their sister agencies enforce. With training, investigators can identify potential violations and refer cases to the appropriate agencies. Continuous training is necessary so that all agency partners have the tools to accurately assess the information coming into the task force and decide upon the appropriate coordinated response to that information.

6. <u>Materials to support joint activities</u>: **To streamline investigations, develop materials to support joint activities, including internal tools like checklists, and external 'know your rights' information for workers and employers.**

Agencies should collaborate to develop materials to support joint activities. These include 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 the investigation is and their right to talk to investigators without retaliation; and know-your-rights materials (sometimes industry-specific) for workers and employers. In Colorado, the Task Force developed new forms, including a pre-audit questionnaire to determine a company's understanding of the law, and a Worker Classification Acknowledgment form required of every business that registers an account with the state.[33] In Delaware, such a form is legally enforced.[34]

7. <u>Data-sharing</u>: **Share data between agencies to improve efficiency of enforcement actions.**

Data-sharing is critical, and task forces can play a role in identifying data-sharing opportunities and systems. Data-sharing is effective whether or not coordinated interagency enforcement is in place, for at least three reasons. First, more informed, targeted investigations mean less wasted time by agencies and less disruption of businesses that are in compliance with the law. In Washington State, the number of employers referred for audits and found to owe premiums remains steady at about 80 percent. That state's Department of Labor and Industries keeps this percentage consistently high by screening and refining referrals and focusing resources on those businesses most likely to be found out of compliance in an audit, while limiting the number of audits of businesses in compliance.[35] Second, data can show that a particular investigation can be performed with fewer agencies and personnel. Finally, there may be legal limits on the ability of certain agency partners to

engage in coordinated enforcement actions. An agency that may not have the ability to engage in coordinated enforcement actions may nonetheless be able to receive and act upon information received during an on-site investigation and begin and conduct its own investigation.

California Targeting Protocol

The Labor Enforcement Task Force (LETF) targeting protocol involves a multiphase process that all inspectors follow. Teams identify potential targets and conduct research to develop a business profile. Lists of potential targets are sent to the Employment Development Department (EDD) for screening to learn if the employer is registered with EDD and to determine how many employees the employer has reported. The target lists are screened through the Workers' Compensation Insurance Rating Bureau (WCIRB) to determine if the employer is adequately insured. In addition, LETF screens business names using other agency databases to match a variety of fields that may indicate areas of noncompliance. The results are added to the business profile and used to prioritize and prepare inspectors for joint enforcement action.

Data-sharing abilities must be carefully researched. Each agency is likely to have confidentiality requirements that must be observed. Memoranda of understanding should be entered into by all agencies that will participate in data-sharing so that responsibilities and any limitations are clearly understood by all parties.

8. <u>Public outreach</u>: **Educate the public about the workings of the task force, and solicit information from affected workers and business. Work closely with community organizations to identify lawbreakers.**

Educating the public about the activities of the task force and giving them an opportunity to provide information is essential to identify bad actors and protect law-abiding businesses. Many task forces have employment fraud hotlines, websites, or public email addresses where workers and members of the public can report suspected violations. The recently established Wisconsin Task Force has both a website and an email for reporting. Connecticut has an online complaint form.[36] Public outreach in Michigan has resulted in more than 100 complaints over just a few months of operation.

As a corollary to targeted enforcement, task forces must have the trust of community groups that work directly with their members. Community and workers' organizations can reach workers in low-wage jobs with whom they already have relationships, including workers of diverse languages and cultures and in diverse industries. They can offer support to workers who may be afraid to make a complaint directly to a state agency. Businesses that are losing ground to competitors who cheat can also be a resource. Working with (and funding) community groups frees up the city to prepare and file solid cases.[37]

A robust press strategy is also important in keeping the public, including workers and employers, aware of activities and encouraging participation in the information portals.

9. **Reports: Seek continuous improvement by mandating periodic reports from the task force for review, reflection, and course correction.**

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. Reports should include the number of actions, numbers of workers found to be misclassified and penalties assessed, as well as the activities and recommendations of the task force. In a number of states covered by our survey, reports have been sporadic or have been discontinued: Connecticut (no reports since 2012); Indiana (no reports since 2010); Iowa (no reports since 2010); Maine (task force abolished, no reports since 2010); Michigan (no reports in recent years but the new unit formed in 2019 might change that); Minnesota (no reports); and Ohio (no reports since 2009). By contrast, four states have produced reports every year for the past three or more consecutive years. Most recent reports are linked in the Appendix.[38]

Two recent task forces have made recommendations that resulted in changes in state law. In Virginia, the state passed legislation to create a private cause of action for misclassification, including retaliation; to call on the state Department of Taxation to oversee investigations; and to allow the Department of Taxation to share information with other agencies, including the Department of Labor and Industry.[39] In New Jersey, following task force recommendations, the legislature passed laws allowing the DOL to issue stop-work orders to employers who violate the law, assess fines and penalties, hold employers and staffing agencies jointly liable for misclassification, and acquire confidential tax information and investigative reports.[40]

Examples of Task Force Outcomes: Reports

Oregon: In 2018, the Department of Revenue and the Oregon Employment Department joint audits included $31.9M of reported payroll. Auditors discovered an additional $77.69M in unreported payroll during the course of these audits, and identified 6,986 misclassified workers. These audits resulted in additional assessments of $448,610 in unemployment insurance taxes in 2017 and $1,944,921 in unemployment insurance taxes in 2018. In sum, for the previous two years the Department of Revenue and the Oregon Employment Department have concluded 20 joint audits resulting in additional assessments of $2.39M in unemployment insurance taxes and the reclassification of 7,525 employees.[41]

Tennessee: During a one-year period ending in October 2018, the Employee Misclassification Education and Enforcement Fund unit assessed 26 penalties against employers for misclassifying their employees, for a total assessment amount of $3,029,963.29. The Uninsured Employers Fund unit assessed 234 penalties against employers for not maintaining workers' compensation insurance from September 2017 through October 2018, for a total assessment amount of $2,730,269.60.[42]

10. **Interstate and federal collaboration: Extend the reach of the task force and share best practices by working with similar task forces in other states, and with the federal Department of Labor.**

In October 2009, state task forces met in the first-ever Northeast Regional Summit of State Misclassification Task Forces. In attendance were representatives of nine Northeast states: Maine, Massachusetts, New York, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, and Maryland. These summits can serve as forums to exchange best practices and coordinate enforcement where companies are operating across state lines. The new Virginia Task Force is charged with making recommendations based on research of other states' practices and cataloguing the enforcement roles of each state agency.[43] Regional meetings could operate as task forces on a macro level, allowing individual states to devise methods to share data and strategy, as well as evaluation.

Federal Efforts

The U.S. Department of Labor during the Obama administration began a misclassification initiative. The Wage and Hour Division, along with the Solicitor's Office, worked with the Internal Revenue Service and most of the states. Under the initiative, the agency began expanding enforcement efforts to combat employee misclassification through increased investigations and prosecutions. Since 2011, 45 states and the District of Columbia have entered into memoranda of understanding, partnership agreements, cooperative agreements, or common-interest agreements with the Department to facilitate state-federal agency information-sharing needed to identify and detect firms misclassifying workers.[44] These documents have a similar purpose and effect. None are legally binding, and all are intended to encourage communication between the Department of Labor's Wage and Hour Division and the appropriate state-level agencies. 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 the Department began to implement these agreements with the states.[45]

Data-sharing was the principle mechanism that the U.S. Department of Labor used to coordinate with the states and the IRS on misclassification. Some of the largest and most impactful misclassification cases brought by the Department were initiated because of information received from the states. For example, based upon information received from the State of Utah, the Department forced 17 businesses in Arizona and Utah to reclassify more than 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.[46]

Appendix I: Task Force Model Language

WHEREAS, an increasing number of employers are improperly classifying individuals they hire as "independent contractors", even when those workers legally should be classified as "employees" (hereinafter referred to as "employee misclassification"); and

WHEREAS, employers sometimes engage in employee misclassification in an attempt to avoid the employers' legal obligations under the federal and state labor, employment and tax laws, including laws governing minimum wage, overtime, prevailing wage, unemployment insurance, workers' compensation insurance, temporary disability insurance, wage payment and income tax; and

WHEREAS, employee misclassification has a significant adverse impact on the residents, businesses and economy in [state], because this practice: (1) deprives vulnerable workers of protections and benefits that they need and to which they are legally entitled; (2) reduces compliance with employment and safety standards; (3) gives employers who misclassify their employees an improper competitive advantage over law-abiding businesses; (4) deprives the State of substantial revenues; and (5) imposes indirect costs on the State from decreased legitimate business activity and increased demand for social services; and

WHEREAS, a recent study [insert references to any studies in the state]; and

WHEREAS, law enforcement activities in this area historically have been divided among various agencies, reducing the efficiency and effectiveness of enforcement; and

WHEREAS, enforcement efforts to address the problem of employee misclassification can be enhanced and made more efficient through interagency cooperation, information sharing, and joint prosecution of serious violators; and

WHEREAS, the creation of joint task forces has proven to be an effective mechanism for coordinating and enhancing labor law enforcement, including efforts by other States to address the problem of employee misclassification;

1. There is hereby established the Joint Enforcement Task Force on Employee Misclassification (Task Force).

2. The Task Force shall consist of the [Labor agencies, workers' compensation, unemployment insurance, attorney general and tax authorities]. The Commissioner of Labor shall serve as the Chair of the Task Force.

3. Each member of the Task Force must designate an agency representative to act on his or her behalf. A majority of the members of the Task Force shall constitute a quorum, provided that the Task Force may hold meetings and conduct business even in the absence of a quorum.

4. The Task Force shall coordinate the investigation and enforcement of employee misclassification matters by the members of the Task Force and other relevant agencies. In fulfilling this mission, the Task Force shall have the power and duty:

a. to identify barriers to information and data sharing among the Task Force members relating to suspected employee misclassification violations; and to create a system for information and data sharing in a timely manner and to the maximum extent permitted by law;

b. to pool, focus and target investigative and enforcement resources;

c. to assess existing methods, both within [state] and in other jurisdictions, of preventing, investigating and taking enforcement action against employee misclassification violations, and to recommend that participating agencies adopt appropriate measures to improve their prevention and enforcement efforts;

d. to develop strategies for systematically investigating employee misclassification within those industries in which misclassification is most common;

e. to facilitate the filing of complaints and identification of potential violators, including by soliciting referrals and other relevant information from the public through an advertised telephone hotline;

f. to identify significant cases of employee misclassification which should be investigated jointly, and to form joint enforcement teams to utilize the collective investigative and enforcement capabilities of the Task Force members;

g. to establish protocols through which individual Task Force agencies investigating employee misclassification matters under their own statutory or administrative schemes will refer a matter to other participating agencies for assessment of potential liability under all their other relevant statutory or administrative schemes;

h. to solicit the cooperation and participation of local district attorneys and other relevant agencies, and to establish procedures for referring cases to prosecuting authorities as appropriate;

i. to work cooperatively with business, labor, and community groups interested in reducing employee misclassification, including but not limited to: (i) seeking ways to prevent employee misclassifications, such as through the dissemination of educational materials regarding the legal differences between independent contractors and employees; and (ii) enhancing mechanisms for identifying and reporting employee misclassification where it does occur;

j. to increase public awareness of the illegal nature of and harms inflicted by employee misclassification;

k. to work cooperatively with federal, state, and local social services agencies to provide assistance to vulnerable populations that have been exploited by employee misclassification, including but not limited to immigrant workers;

l. to consult with representatives of business and organized labor, and other agencies including [list specific agencies], in regard to the activities of the Task Force and its members, and ways of improving its operation; and

m. to explore information and data-sharing with sister agencies in other local, state and federal jurisdictions.

5. The Task Force shall issue a report to the Legislature on [date] of each year, which shall:

a. describe the record and accomplishments of the Task Force, including the amounts of wages, premiums, taxes and other payments or penalties collected with the assistance of Task Force activities, as well as the number of employers cited for legal violations related to misclassification and the approximate number of employees affected;

b. identify any administrative or legal barriers impeding the more effective operation of the Task Force, including any barriers to information sharing or joint action;

c. propose, after consultation with representatives of business and organized labor, members of the legislature and other agencies including the [list agencies], 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; and

d. identify successful mechanisms for preventing employee misclassification, and thereby reducing the need for greater enforcement.

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

7. The Task Force may, as appropriate, make inquiries, studies, investigations, hold hearings, and receive comments from the public. The Task Force may also consult with outside experts in order to perform its duties, including, but not limited to, experts in the private sector, organized labor, government agencies, and at institutions of higher education.

8. The Task Force shall be staffed by [insert staffing].

9. The Task Force may hire or retain contractors, sub-contractors, advisors, consultants, and agents, and may make and enter into contracts necessary or incidental to the exercise of the powers of the Task Force and the performance of its duties as the Commissioner deems necessary.

TASK FORCES BY STATE			
State	Source of Task Force	MOU with USDOL?	Most recent report
California	Cal. Unemp. Ins. Code § 329, AB 1464, Ch 21, p. 628 (2012)	yes	Department of Industrial Relations, Labor Enforcement Task Force Report to Legislature, March 2019.
Colorado	Hickenlooper EO B 2018 003	yes	Colorado Department of Labor and Employment, Task Force Report Pursuant to Executive Order B 108-3, November 30, 2018.
Connecticut	CT Gen Stat § 31-57h (2008)	yes	State of Connecticut, Auditor's Report Dept of Labor 2011-2012.
Illinois	SB0161 (Pub. Act 101-0527)	yes	Report must be submitted no later than December 1, 2020.
Indiana	Senate Bill 23 (2010), Ind Code 22-2-15-2		Indiana Department of Labor Report to Pension Management Oversight Commission on Employee Misclassification, September 29, 2010.
Iowa	Culver EO No. 8 (2008)		Iowa Misclassification Task Force 2nd Report, December 30, 2010.
Louisiana	Internal effort, not a TF		Press Release, LOUISIANA DEP'T OF REVENUE, *Dept. of Revenue sues three businesses in statewide crackdown on payroll tax fraud*, January 30, 2018. State of Louisiana, Annual Tax Collection Report 2017-2018.
Maryland	O'Malley EO 01.01.09	yes	Maryland Department of Labor, Licensing and Regulation, the MD Joint Enforcement Task Force on Workplace Fraud, February 12, 2019.
Maine	Baldacci EO 23 FY08/09	yes	Maine Department of Labor, Annual Report of the Joint Enforcement on Employee Misclassification, February 25, 2010.
Massachusetts	Patrick EO 499, Mass. Gen. Laws Chapter 23 § 25	yes	Council on the Underground Economy 2017 Annual Report
Michigan	Granholm EO 2008-1		No reports. Newly re-established Payroll Fraud Enforcement Unit in AG's office.
Minnesota	Minn. Stat. 181.723	yes	

Montana	Bullock EO 4-2019	yes	Montana Department of Labor and Industry, Task Force on Wage Integrity and Misclassification in the Construction Industry.
Nebraska	LB 563 (2010)		Nebraska Employee Classification Act Annual Report, July 1, 2011–June 30, 2012.
New Hampshire	SB 500 (2008), Lynch EO 2010-3	yes	Eighth Report of the Joint Agency Task Force on Employee Misclassification Enforcement, September 1, 2018.
New Jersey	Murphy EO 25 (2018)	yes	Report of Gov. Murphy's Task Force on Employee Misclassification, July 2019.
New York	Spitzer EO 17	yes	Annual Report of the Joint Enforcement Task Force on Employee Misclassification to Hon. Andrew Cuomo, Governor State of New York, February 1, 2015.
Nevada	SB 493 (2019)	yes	Bulletin No. 11-07, Employee Misclassification, Legislative Counsel Bureau, January 2011.
North Carolina	Perdue EO 125 (2012) SB 407 (2017)	yes	North Carolina Industrial Commission 2018 Annual Report, for FY 2017-2018.
Ohio			Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio, 2009.
Oregon	HB 2815 (2009)	yes	Interagency Compliance Network Report to the Oregon Legislature, March 2019.
Pennsylvania	HB 716 (2019)(pending as of August 2020))	yes	
Rhode Island	SB 3099/HB 7907B (2008); Art 8 FY 15 State Budget		Underground Economy on Employee Misclassification Task Force Annual Report 2018.
Tennessee	TN Code 50-6-919	yes	Annual Report of Employer Coverage Compliance, Bureau of Workers' Compensation, February 1, 2019. (Although the law requiring the report sunsetted in 2014, the Bureau of Workers' Compensation has continued reporting.)
Utah	U.C.A. §14-46-201 et.seq.		State of Utah Labor Commission, Results of Regulator and Law Enforcement Efforts, and the Status of Sharing Information by Member Agencies.
Vermont	Shumlin EO 21-9 (2012)	yes	Performance Audit Recommendations and Corrective Actions for Audit: Action Needed to Better Detect and Prevent Worker

			[Misclassification](#) Report of the Vermont State Auditor, August 31, 2015.
Virginia	Northam [EO-16](#) (2018)		[Report for Executive Order 38 (EO38) from the Inter-Agency Taskforce on Misclassification and Payroll Fraud.](#)
Washington	[SB 5926](#) (2007); RCW 18.27.800		[Underground Economy Benchmark Report, 2019 Annual Report to Legislature](#), December 2019.
Wisconsin	Evers [EO 20](#) (2019)		[Task Force on Payroll Fraud tne Worker Misclassification Report 2020,](#) Wisconsin Department of Workforce Development.

Endnotes

1 U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements News Release*, June 7, 2018, https://www.bls.gov/news.release/archives/conemp_06072018.htm. 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. U.S. Dep't of Labor, Bureau of Labor Statistics*, Frequently asked questions about data on contingent and alternative employment arrangements*, https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm#collected. 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 salaries. Alexia Fernandez Campbell, "'I feel Mentally Numb': More Teachers are Working Part Time Jobs to pay the Bills, Vox, April 4, 2018, https://www.vox.com/policy-and-politics/2018/4/4/17164718/teachers-work-part-time-jobs.

2 Catherine Ruckelshaus and Ceilidh Gao, National Employment Law Project, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, December 2017, https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

3 Lisa Xu and Mark Erlich, "Economic Consequences of Misclassification in the State of Washington," Harvard Labor and Worklife Program, December 2019, https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf.

4 U.S. Dep't of Labor, Wage and Hour Division, *Misclassification of Employees as Independent Contractors*, https://www.dol.gov/whd/workers/Misclassification/.

5 U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, August 2009, http://www.gao.gov/new.items/d09717.pdf.

6 U.S. Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, February 20, 2018, https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf.

7 State of Maine, Annual Report of the Joint Enforcement Task Force on Employee Misclassification, February 25. 2010, https://digitalmaine.com/cgi/viewcontent.cgi?article=1029&context=mdol_docs.

8 Colorado, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Jersey, New York, Pennsylvania (but legislation is pending), Vermont, Virginia, Wisconsin.

9 California, Connecticut, Illinois, Indiana, Maine, Minnesota, New Hampshire, Nebraska, Nevada, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Washington.

10 For example, In April 2019 in the state of Michigan, Attorney General Dana Nessal established a Payroll Fraud Enforcement Unit within the AG's office. Michigan Department of Attorney General, "Nessel: Payroll Fraud Charges in the Works," https://www.michigan.gov/ag/0,4534,7-359-92297_47203-501080--,00.html. Similarly, the Illinois effort is one of coordinated enforcement among agencies. IL HB 1795, http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=51&GA=95&DocTypeId=HB&DocNum=1795&GAID=9&LegID=30630&SpecSess=&Session=. In Louisiana, the LA Department of Revenue created its GAME ON (Government Against Misclassified Employees Operational Network) Task Force, in collaboration with that state's unemployment insurance and workers' compensation divisions. For the tax years 2013 through 2015, the total tax, penalty, and interest owed by three companies that were the subject of litigation is more than $242,000. Press Release, Louisiana Dep't of Revenue, *Dept. of Revenue sues three businesses in statewide crackdown on payroll tax fraud*, (Jan. 30, 2018), https://revenue.louisiana.gov/NewsAndPublications/NewsReleaseDetails/11458.

11 Colorado, Illinois, Louisiana, Montana, New Jersey, Nevada, North Carolina,Virginia, Wisconsin.

12 Meaning states that have not produced reports in 5 or more years. Connecticut (no reports since 2012); Indiana (no reports since 2010); Iowa (no reports since 2010); Maine (no reports since 2010); Michigan (no reports in recent years but new unit formed in 2019 might change that); Minnesota (no reports); Nebraska (no reports since 2012); Nevada (no reports since 2011, but task force reestablished in 2019); Pennsylvania (no reports, but pending legislation); Vermont (no reports since 2015).

13 In 2011, the governor issued an Executive Order abolishing the state employee misclassification Task Force. See An Order Abolishing the Joint Enforcement Task Force on Employee Misclassification, January 20, 2011, https://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=186554&v=article2018.

14 Maine Department of Labor, Annual Report of the Joint Enforcement Task Force on Employee Misclassification, February 25, 2010, https://digitalmaine.com/cgi/viewcontent.cgi?article=1029&context=mdol_docs

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17 Underground Economy Benchmark Report, 2018 Annual Report to the Legislature, December 2018, https://agencymeddirectors.wa.gov/Main/AboutLNI/Legislature/PDFs/Reports/2018/Underground EconomyBenchmarkReport.pdf; Underground Economy Benchmark Report, 2019 Annual Report to Legislature, December 2019, https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2019UndergroundEcono myBenchmarkReport_a8e37651-117f-455e-9506-541daad7f05d.pdf.

18 Sec. 31-57h, Ct. Gen Stat, https://wcc.state.ct.us/law/rel-stat/2011/31-57h.htm.

19 Maine Department of Labor, Annual Report of the Joint Enforcement Task Force on Employee Misclassification, February 25. 2010.

20 Colorado Department of Labor and Employment, Task Force Report Pursuant to Executive Order B 108-3, November 30, 2018, https://www.colorado.gov/pacific/sites/default/files/2018%20Final%20Report%20-%20Carpenters.pdf.

21 See, NV Rev Stat § 608.0155 (2019)

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24 State of Utah Labor Commission, Results of Regulator and Law Enforcement Efforts, and the Status of Sharing Information by Member Agencies, https://le.utah.gov/interim/2017/pdf/00003838.pdf

25 See, Annual Report of the Joint Enforcement Task Force on Employee Misclassification, **https://www.labor.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf,** Footnote 15 at 9.

26 Annual Report of the Joint Enforcement Task Force on Employee Misclassification, February 25. 2010.

27 Diego Rondon Ichikawa and Rebecca Smith, "Delivering $15: Community-Centered Wage and Hour Enforcement in Seattle," National Employment Law Project, 2014, https://s27147.pcdn.co/wp-content/uploads/2015/01/Delivering-15-Community-Centered-Wage-and-Hour-Enforcement-Seattle.pdf.

28 Jody McMillian, Chief of Contributions, Utah Department of Workforce Services, *Effective Methods to Detect and Deter Worker Misclassification*, Oct. 21, 2012).

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33 N. 31.

34 Underground Economy Benchmark Report, 2018 Annual Report to the Legislature, December 2018, https://agencymeddirectors.wa.gov/Main/AboutLNI/Legislature/PDFs/Reports/2018/Underground EconomyBenchmarkReport.pdf.

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https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf.

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https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-16-Establishing-An-Inter-agency-Task-Force-On-Worker-Misclassification-And-Payroll-Fraud.pdf.

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https://www.dol.gov/newsroom/releases/whd/whd20150518.