ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON WORKPLACE FRAUD

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Maryland Insurance Administration
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MARYLAND

DEPARTMENT OF LABOR,LICENSING AND REGULATION

Martin O'Malley, Governor Anthony G. Brown, Lt. Governor

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EXECUTIVE SUMMARY

Workplace fraud is the intentional misclassification of employees as independent contractors or through "off-the-books" labor. Employers often engage in workplace fraud in an attempt to circumvent the payment of overtime wages, employment taxes, and workers' compensation coverage that employers are legally obligated to provide to their employees. Maryland data shows that about 20 percent of employers in the state misclassify their employees as independent contractors. A Department of Labor study found that as many as 30 percent of businesses misclassified employees as independent contractors.

Workplace fraud has real, negative consequences for workers, law-abiding businesses and taxpayers. Misclassified workers may have no recourse if they are not paid their wages, forced to work excessive hours or in dangerous conditions, discriminated against, or are hurt on the job. Responsible businesses are forced to compete in the marketplace against employers that have lowered their payroll expenses and increased their profits through workplace fraud. These responsible employers also pay higher unemployment insurance taxes and workers' compensation premiums on behalf of those that do not. Finally, workplace fraud costs the taxpayers millions of dollars in tax revenues that could be used for the benefit of the state. A recent study estimated that Maryland loses approximately $22 million to the Unemployment Insurance Trust Fund alone due to misclassification.

Maryland has recently joined a growing state and federal movement to combat workplace fraud or employee misclassification. The General Assembly passed the Workplace Fraud Act of 2009, which took effect on October 1, 2009. The Workplace Fraud Act strengthened the State's existing enforcement powers and created a new misclassification violation in the construction and landscaping industries. Governor Martin O'Malley also established a Joint Enforcement Task Force on Workplace Fraud (Task Force) to coordinate enforcement efforts with the appropriate state agencies, facilitate data and information sharing, and increase awareness about workplace fraud.

Since the enactment of the Workplace Fraud Act more than two years ago, and the creation of Task Force, the Task Force has led member state agencies and divisions in joint investigations.

The Task Force is also in the process of developing "best practices" with respect to workplace fraud detection and prevention. Similar to approximately 33 other states that have taken assertive measures to address the misclassification problem, Maryland's Task Force consists of the Department of Labor, Licensing and Regulation, including the Commissioner of Labor and Industry and the Assistant Secretary for the Division of Unemployment Insurance; the Attorney General; the Comptroller; the Workers' Compensation Commission; and the Maryland Insurance Administration. In 2011, the Task Force conducted seven (7) joint investigations in which one or more member agencies participated.

Among other things, since 2009, the Task Force has:

- Established three workgroups to focus on enforcement, data sharing, and communications;
- Coordinated information sharing procedures and the signing of necessary memoranda of understanding to make this inter-agency information sharing possible;
- Established a website and phone number for complaints;
- Conducted extensive outreach to professionals and employers impacted by the Workplace Fraud Act;
- Studied best practices employed by task forces working on these issues in other states;
- Assisted New York State with a multi-state workplace fraud prosecution;
- Created an internal website to facilitate data sharing among agencies; and
- Partnered with federal agencies, including the Internal Revenue Service and the U.S. Department of Labor, to share information and coordinate law enforcement efforts related to reducing misclassification of employees by businesses in order to avoid providing employment protections.

In addition, each member agency has accomplished the following:

- The Division of Labor and Industry has opened 660 investigations, of which 12 companies have been issued citations.

- The Division of Unemployment Insurance (UI) has completed 76 UI Workplace Fraud Audits and identified 3,178 misclassified workers and over $17 million in unreported wages paid to employees. UI Workplace Fraud Audits resulted in $618,752 paid into the UI trust fund.

- The Comptroller has completed seven (7) joint audits with the Task Force which resulted in $394,408.23 assessed for Withholding Taxes.

- The Maryland Insurance Administration has conducted a survey of the eight largest licensed workers' compensation carriers in Maryland to determine if, *inter alia*, the Plans on file detailed specific procedures for detecting and preventing premium avoidance fraud.

- The Workers' Compensation Commission has focused its Employer Compliance Program on education and outreach to employers to bring them into compliance before a violation is reported or found; and reached out to new employers in Maryland providing information regarding their responsibility to provide compensation to their injured employees through workers' compensation insurance coverage

I. BACKGROUND ON WORKPLACE FRAUD

A. WHAT IS EMPLOYEE MISCLASSIFICATION AND WORKPLACE FRAUD?

Many of our state and federal employment and anti-discrimination laws are based on the employer-employee relationship. Workers who are classified as "employees" receive a range of legal protections, including the right to minimum wage and overtime, the availability of anti-discrimination laws, and eligibility for unemployment insurance if they are laid off and workers' compensation if they are injured. Businesses with employees are subject to wage and hour laws; required to pay unemployment insurance taxes, social security taxes, and workers' compensation premiums for their employees; and withhold federal and state income taxes.[1]

[1] *See* Appendix C for a table summarizing these differences.

Recent Maryland and federal studies estimate that approximately 20% of employers misclassify their workers.[2] Some of these employers may be confused about the definition of an "employee" or may believe that their employees are true independent contractors. Other employers deliberately misclassify their employees as "independent contractors" or pay them "off-the-books" in an effort to avoid the costs and obligations associated with employees. When employers intentionally misclassify their employees in this way, they engage in workplace fraud.

Workplace Fraud negatively impacts workers, law-abiding employers, and taxpayers:

(1) **Workplace fraud harms workers who lose out on workplace protections**. Misclassified employees may have no recourse if they are hurt or killed on the job, laid off, discriminated against or harassed. They are also more likely to be paid sub-minimum wages or to work in dangerous conditions.

(2) **Workplace fraud unfairly disadvantages employers who play by the rules.** Responsible employers lose a competitive edge because their payroll costs are higher than employers who manipulate the system. Responsible employers also pay higher Workers' Compensation premiums and Unemployment Insurance tax on behalf of those who fail to pay.

(3) **Workplace fraud deprives our communities of much-needed revenue.** It is estimated that the state loses as much as $22 million a year to the Unemployment Insurance Trust Fund due to misclassification.[3] Millions of dollars in tax revenues are also lost to the general fund.

Misclassification has continued to receive growing attention at the state level, in part due to studies showing billions of dollars of lost revenues.[4] In the last several years, there have been increasing efforts to combat workplace fraud on the state and federal levels. Several states including New Hampshire and Utah have joined New York, Massachusetts, Michigan, and Maine in establishing task forces to examine workplace fraud and coordinate enforcement efforts.[5] Other states have introduced legislation to establish a presumption of an employment relationship such as Ohio, Virginia, and North Carolina and other states specifically prohibit the

[2] David W. Stevens, An *Estimate of Maryland's Annual Net Unemployment Compensation Tax Loss from Misclassification of Covered Employees*, Baltimore, Md, February 1, 2009 (estimating that approximately 20% of Maryland employers misclassify their employees); Planmatics, Inc. *Independent Contractors: Prevalence and Implications for Unemployment Insurance Program*, Rockville, Md, February 2000 (finding that between 10-30% of employers in nine (9) states misclassify their employees.)

[3] David W. Stevens, *An Estimate of Maryland's Annual Net Unemployment Compensation Tax Loss from Misclassification of Covered Employees*, Baltimore, MD, February 1, 2009.

[4] *See http://www.nelp.org/page/-/Justice/2011/2011IndependentContractorReformUpdate.pdf?nocdn=1*

[5] *Id.*

purposeful misclassification of an employee as an independent contractor in a sector-specific industry such as Pennsylvania, Delaware, and Maine.[6]

On the federal level, various bills have been introduced to address misclassification, including the Payroll Fraud Prevention Act and the Taxpayer Responsibility, Accountability and Consistency Act.[7] The U.S. Department of Labor has also initiated a multi-agency initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification.[8] In addition, the Internal Revenue Service recently launched the "Voluntary Worker Classification Settlement Program," which allows employers to resolve past worker misclassification problems by making a settlement payment to cover past payroll tax obligations and voluntarily reclassifying their workers prospectively without waiting for an IRS audit.[9] The Government Accountability Office also issued a report to Congress concluding that different federal agencies could and should be doing more to coordinate enforcement efforts utilizing existing federal laws, and exploring possible legislative changes to strengthen these laws.[10]

B. ADDRESSING THE WORKPLACE FRAUD PROBLEM IN MARYLAND

In 2009, Maryland joined approximately 33 other states that have taken measures to address the misclassification problem by passing the Workplace Fraud Act of 2009 and creating the Joint Enforcement Task Force on Workplace Fraud.

THE WORKPLACE FRAUD ACT

The Workplace Fraud Act (Chapter188, Acts of 2009) (the Act) requires the different state agencies and divisions that are impacted by workplace fraud to share information when they find

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See* GAO, *Employee Misclassification, Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Preven*tion, GAO-09-717.

or suspect that misclassification has occurred.[11] The Act, which took effect on October 1, 2009, creates violations of state law for misclassification and provides for penalties to strengthen enforcement in three areas of state law:

IMPACT ON EMPLOYMENT STANDARDS LAW [12]

- The WFA creates a separate violation for misclassification in the landscaping and construction industries;
- Adopts the "ABC Test" to identify legitimate independent contractors;[13]
- Requires that employers maintain records and documentation on the independent contractors with whom they do business, and that they provide these independent contractors with a notice explaining their classification;
- Employers who "improperly misclassify" workers have 45 days to pay restitution and come into compliance with all applicable laws;
- Employers who "knowingly" misclassify their workers are subject to a civil penalty of up to $5,000 per employee;
- Creates a private right of action for workers who believe they were misclassified; and
- Contains anti-retaliation provisions for workers who complain of misclassification.

IMPACT ON UNEMPLOYMENT INSURANCE LAW [14]

- Keeps the existing presumption that a worker is a covered employee;
- Keeps the 50 year-old "ABC Test" to identify legitimate independent contractors;[15]
- Employers who "knowingly" misclassify their workers are subject to a civil penalty of up to $5,000 per employee;
- Civil penalties of up to $20,000 are also available for "knowingly' advising an employer to violate the Act.

[11] *See* Md. Code Ann., Lab. & Empl., § 3-901, *et. seq;*
[12] *See* Md. Code Ann., Lab. & Empl., § 3-901, *et. seq.*
[13] The three prongs of the so-called "ABC test" are: (a) the individual is free from control and direction; (b) the individual is customarily engaged in an independent business of the same nature; and (c) the work is outside the usual course of business of the employer or performed outside of any place of business of the employer.
[14] *See* Md. Code Ann., Lab. & Empl., § 8-201, § 8-201.1.
[15] *See* footnote 9 for a brief description of the ABC test.

IMPACT ON WORKERS' COMPENSATION LAW [16]

- Establishes a misclassification violation and a presumption that a worker is a covered employee unless the employer proves otherwise;
- Determination of independent contractor status remains based on the common law;[17]
- Adds a civil penalty not to exceed $5,000 if the Workers' Compensation Commission finds that an employer has "knowingly" violated the Act;
- Adds a civil penalty not to exceed $20,000 if the Workers' Compensation Commission finds a person has "knowingly" advised an employer on how to violate the Act.

THE EXECUTIVE ORDER

On July 14, 2009, Governor O'Malley signed Executive Order No. 01.01.2009.09, creating a Joint Enforcement Task Force on Workplace Fraud.[18] The Executive Order, which is modeled after those used in other states, finds that "law enforcement and regulatory efforts to combat and prevent workplace fraud have been divided historically among various agencies, reducing their efficiency and effectiveness." The Executive Order further finds that the implementation and enforcement of the Workplace Fraud Act of 2009 "can be enhanced further and made more efficient through interagency cooperation, information sharing, and joint prosecution of serious violators." As such, the Executive Order charges the Task Force with, among other things: facilitating referrals and information sharing related to suspected workplace fraud; engaging in collaborative enforcement; and raising awareness about the problem of workplace fraud through education and outreach.

The Task Force consists of:

(1) The Secretary of Labor, Licensing and Regulation, or designee;

(2) The Attorney General or designee;

(3) The Comptroller or the Comptroller's designee;

[16] *See* Md. Code Ann., Lab. & Empl., § 9-202, § 9-402.1.
[17] Among factors traditionally considered by the Maryland Court of Appeals are: whether the employer has the power to hire or terminate the individual; whether the employer controls or directs the work; whether the work is part of the employer's regular business; and the payment of wages.
[18] *See* Appendix A.

(4) The Chair of the Workers' Compensation Commission or the Chair's designee;

(5) The Insurance Commissioner or the Commissioner's designee;

(6) The Commissioner of Labor and Industry or the Commissioner's designee;

(7) The Assistant Secretary for Unemployment Insurance or the Assistant Secretary's designee.

The Secretary of Labor, Licensing and Regulation serves as the Task Force chair, convening the meetings and coordinating Task Force efforts. This report documents the progress and initial steps the Task Force has taken since its creation, accomplishments during the past year and its goals for the coming year.

II. TASK FORCE ACCOMPLISHMENTS

The principal charge of the Joint Enforcement Task Force (Task Force) is coordination and collaboration in addressing the problem of workplace fraud. Before the creation of the Task Force, agencies or divisions that discovered or suspected misclassification did not share this information with other agencies or divisions. Although various state agencies and divisions had data relevant to employee misclassification and fraud investigations, they did not share it with each other. The Task Force created three workgroups to accomplish its goals. These workgroups are: the enforcement workgroup, the data sharing workgroup, and the education and outreach workgroup. In 2011, enforcement workgroup members routinely met to review complaints of workplace fraud, make referrals, talk through investigations, and identify cases appropriate for joint enforcement. This past year, the Task Force also created a Software Development workgroup to create and manage an information sharing website.

On September 19, 2011, the Division of Unemployment Insurance and the Division of Labor & Industry entered into a partnership agreement with the United States Department of Labor, Wage and Hour Division and the Internal Revenue Service (IRS). The purpose of this agreement is to more effectively and efficiently communicate and cooperate on areas of common interest,

including sharing training materials, providing employers and employees with compliance assistance information, and enhancing enforcement by conducting coordinated investigations. Along with 10 other states, plus four added later, the agreement emphasizes the importance of reducing employee misclassification for the federal government as well as across the United States.

A. DATA SHARING

Agencies and divisions have created plans to share data and information in ways that will help them identify significant cases of workplace fraud and strengthen their enforcement efforts.

- The Workers' Compensation Commission and the Division of Unemployment Insurance executed a Memorandum of Understanding and are engaged in ongoing data exchange regarding open and closed employer accounts.
- The Division of Labor & Industry, the Division of Unemployment Insurance and the Comptroller routinely exchange information regarding suspected misclassification on state contracts.
- The Division of Unemployment Insurance has executed a Memorandum of Understanding with the IRS to exchange tips and referrals regarding suspected misclassification.

Workplace Fraud Taskforce Website

In 2011, the Department of Labor, Licensing and Regulation's Office of Information Technology has created a SharePoint 2010 inter-agency collaboration site to enhance the ability of the taskforce and its related sub-committees to collaborate and to work more closely together. The site features centralized calendars, committee lists, community announcements and alerts, common links, and a central file repository to enable the four disparate taskforce agencies to pool resources, save time, and eliminate redundancies.

Worker Misclassification Database

The Department of Labor, Licensing and Regulation's Office of Information Technology (OIT) worked with the Unemployment Division to acquire federal funding ($98,981) to create a database to help track cases that are referred to taskforce agencies for better enforcement. The database will be web based and will enable all taskforce agencies to view its data. It will lead to data-driven audits and prevent using resources for audits that other taskforce agencies have

already determined to be unproductive. Joint audits conducted by member agencies will be identified more quickly.

The Task Force has appointed a Software Development Workgroup with the responsibility of developing requirements and managing the project. The project began its planning phase with the appointment of the committee. The Department of Labor's Office of Information Technology will develop the database with an anticipated implementation date of December 2012.

B. EDUCATION AND OUTREACH

Since 2009, in an effort to educate the public about workplace fraud, the changes in Maryland law and the work of the Task Force, Task Force members have participated in numerous outreach events, including the following:

- AFL-CIO Biennial Convention;
- Carroll County Business Luncheon;
- Commissioner of Labor & Industry's monthly construction roundtable discussions;
- Fed/State Tax Institute Seminars (in Greenbelt, Baltimore, Easton, and Frederick);
- Harford County Chamber of Commerce, Legislative Committee;
- Howard County Business event on Workplace Fraud, sponsored by Delegates Bates and Miller and Senator Kittleman;
- Maryland Association of CPAs - State Taxation Committee;
- Maryland Chamber of Commerce;
- Maryland National Capital Home Care Conference;
- Maryland State Bar Association, Labor and Employment Section Annual Dinner;
- Employer Workplace Fraud Meeting, Frederick, Maryland;

- Maryland Workplace Fraud and Misclassification Law Meeting at Chesapeake College; and
- Maryland Workplace Fraud and Misclassification Law Meeting at Salisbury State University.

C. PARTNERING WITH OTHER STATES

Task Force members recognize that workplace fraud is a national problem that does not stop at the state line. Applying the same principles that guide the Task Force's collaboration among different state agencies and stakeholders, the Task Force has been building partnerships with other states as a way to learn best practices, pool resources, and enhance enforcement efforts.

The Division of Unemployment Insurance and Maryland Office of the Attorney General participated in the September 19, 2011 Misclassification Memorandum of Understanding Signing Event hosted by the United States Department of Labor. Task Force member agencies also participated in a national press call and a multi-state work-group session following the Misclassification Signing Event. In addition, the Maryland Office of the Attorney General and the Workplace Fraud Unit participated in the first national misclassification call with various states hosted by the United States Department of Labor regarding best practices and barriers to enforcement. Task Force agencies and divisions will continue to work with other states to share information and lessons learned, engage in collaborative enforcement, and increase awareness about problem of misclassification and workplace fraud.

III. TASK FORCE MEMBER REPORTS

The different state agencies and divisions that make up the Task Force are impacted differently by workplace fraud. The following summary provides an overview of Task Force member agencies' and divisions' respective efforts to combat workplace fraud and how these efforts complement the work of the Task Force.

A. DEPARTMENT OF LABOR, LICENSING AND REGULATION

1. DIVISION OF LABOR AND INDUSTRY

The Maryland Division of Labor and Industry (DLI) a part of the Department of Labor, Licensing and Regulation administers the enforcement of worker protection laws, including the Wage Payment and Collection law, Living Wage law, Child Labor law, Prevailing Wage law, Occupational Safety and Health law and the Workplace Fraud Act.

The Workplace Fraud Act was enacted on October 1, 2009 and became fully operational approximately one year after enactment of the law. The Workplace Fraud Unit (Unit) was established within DLI and works hand, in hand, with the other employment law programs. The Unit began active investigations in the third quarter of calendar year 2010 and is staffed with trained investigators, auditors, data analysts, a program administrator who manages the activities and an assistant attorney general who provides legal guidance and advice. Unit field staff has participated in construction site safety training; Unemployment Insurance (UI) investigative techniques training; Workplace Fraud legal training conducted by the Office of Attorney General (OAG) and ongoing intra-agency trainings. The Unit is special-funded through the Worker's Compensation Commission.

The Commissioner of DLI has statutory authority pursuant to the Workplace Fraud Act to investigate as necessary to determine compliance with the law. The statute provides the Commissioner with authority in only two industries; Construction and Landscaping. Investigators conduct audits of employers based on the Commissioner's statutory authority, by acting on complaints from individual workers or through referrals from business partners. The

Unit has been successful in establishing partnerships with employers who have agreed to report suspected misclassification in the construction and landscaping industries. Partners are prohibited from filing malicious claims and can be sanctioned for such action.

After an investigation is completed, and a closing conference is held, if misclassification is found, the Unit will issue citations to employers. All citations are forwarded to Task Force member agencies and information is exchanged to ensure compliance with all applicable labor laws. The Unit is responsible for administering the law to provide misclassified workers with protections they would not otherwise be entitled such as the benefit of anti-retaliation and discrimination laws, unemployment insurance, workers' compensation, and workplace safety and health protection.

Workplace Fraud Unit Activity Report

Data below represents activity conducted between January 1, 2011 and December 31, 2011:

# of Cases Received	**626**
# of Cases Closed	**468**
# of Citations Issued	**4**
Amount of Penalties Collected – Misclassification	**$0**
Amount of Wages Collected	**$0**

Investigators from DLI's Living Wage and Prevailing Wage units are engaged in ongoing information sharing with the Unit and Task Force member agencies regarding misclassification of employees. The Unit conducts joint audits with Task Force member agencies and has made significant progress in recouping state revenue through its referrals and data sharing. The efforts of the Unit in referring employers to Task Force member agencies have increased unreported taxable wages to UI; increased withholding tax assessments due Comptroller; expanded workers' compensation coverage to benefit more employees and reviews of insurance premiums.

In fulfillment of DLI's outreach goals for calendar year 2011, the Unit in conjunction with Task Force member agencies either participated in or conducted presentations at the following programs:

- DLI Commissioner's Monthly Construction Roundtable
- Attorney General' Labor Council meeting
- Interstate Labor Standards Association conference on employee misclassification
- National Association of Governmental Labor Officials conference on employee misclassification
- National State Attorneys General Labor Law Enforcement Program on misclassification
- Maryland Workplace Fraud and Misclassification Law Meeting at Chesapeake College
- Maryland Workplace Fraud and Misclassification Law Meeting at Salisbury State University
- Employer Workplace Fraud Meeting, Frederick, Maryland
- AFL-CIO Convention
- Metro AFL-CIO Conference
- Maryland Builders Transportation Materials Association
- Associated Builders and Contractors
- DLI Employment Rights and Safety Forum

The purpose of these outreach programs is to educate the public, employers and employees about Workplace Fraud, encourage voluntary compliance, and provide a forum for discussion regarding employee misclassification.

2. DIVISION OF UNEMPLOYMENT INSURANCE

The Division of Unemployment Insurance (UI) within the Department of Labor, Licensing and Regulations is touched in a number of ways by the issues of the misclassification of employees as independent contractors generally, and the Workplace Fraud of 2009 in particular.

A. U.S. Department of Labor Mandated Audits

For decades USDOL has mandated that the Division of Unemployment Insure conduct audits of Maryland businesses to encourage compliance. This was true long before the passage of the Workplace Fraud of 2009. Before 2009, unrelated to Maryland law, USDOL required that randomly 2% of Maryland's businesses be audited for UI compliance purposes, including the

misclassification of employees as independent contractors. However, in 2009, again unrelated to Maryland law, USDOL changed its audit mandate, and one of these changes required UI to conduct some of its audits driven by data about where potential violators might be found. Such a strategy not only saves precious investigatory resources, but also spares those playing by the rules from the trouble of an audit. As you will see, while the USDOL mandate to allow data to drive audits has lowered their raw number, while boosting effectiveness.

Year	Total DOL Mandated Audits	Data Driven DOL Audits	Total Workers Found in Mandated Audits	Taxable Wages Unreported
2009	2,810	1,608	10,265	$59,227,749
2010	2,675	1,232	10,951	53,376,239
2011	2,094	1,514	12,668	$57,885,388

B. Workplace Fraud Act Audits

UI auditors also work in the context of the Workplace Fraud Act, starting in October 2009. UI auditors are assigned workplace fraud audits following receipt of workplace fraud complaints from the general public and DLLR inter-office referrals, and due to information sharing related to suspected workplace fraud from the Joint Enforcement Task Force, and other taxing authorities. In collaboration with the Task Force members, UI auditors perform joint audits with auditors from the Division of Labor and Industry, and the Comptroller's Office. These data driven audits are performed in industries with a history of large numbers of misclassification issues based on historical data, and on employers with disputed claims resulting from workers misclassified as independent contractors. Directly below are the number of such audits and their results for the last three years:

Year	UI Participation in Workplace Fraud Audits & Joint Audits	New Workers Discovered	Unreported taxable Wages	Unreported Tax to Trust Fund
2009	2	187	$1,030,791	$17,805
2010	22	1094	$5,994,629	$347,083
2011	52	1897	$10,092,230	$253,864

C. Penalties

The Workplace Fraud Act provides penalties for knowingly violating the law. However, no employer has been charged with penalties under the UI audit program.

B. ATTORNEY GENERAL

As Maryland's chief legal officer, the Attorney General has general charge, direction and supervision of the legal business of the state, focusing primarily on the representation of state agencies. As such, the Office of the Attorney General has provided legal guidance on all aspects of Maryland's efforts to combat workplace fraud, including: assisting with the drafting of the statute itself, including appropriate amendments; drafting regulations to implement the Workplace Fraud Act; and providing guidance as to the legality of inter-agency data and information sharing. Assistant Attorneys General who represent DLLR also attend various meetings and provide advice to the Division of Unemployment Insurance and the Division of Labor and Industry regarding implementation of the Workplace Fraud Act. The Attorney General's designee attends all Task Force workgroup meetings to provide guidance on any and all new questions that may arise regarding joint enforcement and information sharing. The Office of the Attorney General also represents the state in all litigation related to the enforcement of the Act.

C. COMPTROLLER

One of the Comptroller's primary duties is to administer the collection of the individual and employer taxes that make up an essential part of the State revenue needed to provide services to its citizens. The Comptroller's ability to collect these taxes is greatly impaired when employers fail to report all of their employees or properly withhold income and employment taxes on their behalves. Although the Comptroller is bound by certain confidentiality provisions, the Comptroller's Office is permitted to receive and act upon information from other departments and use that information to conduct its own investigation of withholding and income tax fraud or failure to file. The Comptroller will receive referrals from other Task Force member agencies

when an investigation or audit has revealed workplace fraud. The Comptroller is also working with the Division of Unemployment Insurance and the Workers' Compensation Commission to gain access to their ongoing data exchanges.

The Comptroller's Office followed up on the citations issued by the Workplace Fraud Unit of the Division of Labor and Industry. The Comptroller's main goal is to bring these businesses into compliance with reporting and remitting of the Maryland Withholding Tax. This is accomplished this by audit, verbal contact with taxpayers and through the issuance of estimated assessments. In many cases, the businesses that were cited contacted the office and made arrangements to remit the withholding tax prior to the Comptroller's Office initiating any progressive compliance steps. While the initial revenue generated on these cases is nominal, the long term continued reporting and remitting of the tax is of great benefit to the Comptroller's Office.

During 2011, the Comptroller's audit staff completed seven (7) joint audits with the Task Force which resulted in $394,408.23 assessed for Withholding Taxes. Not only has the office been able to use the joint audit program to discover new revenues for Withholding Taxes, some of the businesses audited have also been liable for other taxes due the Comptroller. During 2011 the Comptroller's Office conducted 23 Withholding Tax audits and issued assessments in the amount of $730,895.06.

D. INSURANCE ADMINISTRATION

The Maryland Insurance Administration (MIA) regulates licensed insurance carriers in Maryland, including workers compensation carriers, not employers – and it is the employers who commit the acts penalized by the Workplace Fraud Act. The MIA has no jurisdiction over unemployment insurance fraud; that is handled by the Department of Labor, the U.S. Department of Labor, and the Office of the Attorney General. Pursuant to the Task Force's Memorandum of Understanding, MIA shares information on companies not properly classifying its workers, with the Worker's Compensation Commission, Unemployment Insurance and the Comptroller.

Under the Insurance Article, the MIA may investigate and prosecute fraudulent insurance acts, which include the making of false or fraudulent statements or representations in or with reference to an application for insurance, including misclassification of employees or under-reporting of

payroll (premium avoidance fraud).[19] The Insurance Article further requires that every regulated insurer file an insurance antifraud plan with the Insurance Commissioner.[20]

As part of its statutory duty to review antifraud plans, the MIA conducted a survey of the eight largest licensed workers' compensation carriers in Maryland to determine if, *inter alia*, the Plans on file detailed specific procedures for detecting and preventing premium avoidance fraud. Pursuant to the results of this survey, the MIA issued a bulletin recommending as a 'best practice' that workers' compensation carriers require any applicant who claims to use independent contractors to produce a certificate of insurance for general liability coverage, a copy of the independent contractor's business license, a written subcontract for each job conducted by the sub-contracted laborer, and a signed copy of the Workers' Compensation Commission's Sole Proprietor's Status as a Covered Employee form.

The MIA is also collaborating with the Attorney General's office and local State's Attorneys Offices in prosecuting insurance fraud cases. In one recent case, though it does not involve misclassification *per se*, a construction subcontractor is alleged to have cheated his workers out of workers' compensation insurance coverage. On October 25, 2011, misdemeanor insurance fraud charges were filed in Baltimore County District Court against the subcontractor, alleging that he misrepresented to his general contractor that he had workers' compensation insurance by presenting a false Certificate of Insurance. The maximum sentence for misdemeanor insurance fraud is 18 months incarceration and/or a fine of up to $10,000. Trial is scheduled for March 20, 2012.

E. WORKERS' COMPENSATION COMMISSION

The Maryland Workers' Compensation Commission (WCC) adjudicates and resolves issues regarding entitlement to benefits to workers who have become injured as a result of disease or injury connected to their employment. The WCC has developed an enhanced Employer Compliance Program which works closely with the Workplace Fraud Unit to find employers who are not providing the required compensation for injured workers, as well as those employers who are misclassifying workers as independent contractors to avoid paying workers'

[19] *See* Md. Code Ann., Insurance, § 27-406.
[20] *See* Md. Code Ann., Insurance, § 27-803.

compensation premiums. The WCC continues with its long standing relationship with the Maryland Insurance Administration Fraud Division to report possible premium fraud when employers misclassify their workers. The Employer Compliance Program also focuses on education and outreach to employers to bring them into compliance before a violation is reported or found. Through the ongoing information sharing with the Department of Labor, Licensing and Regulation, and specifically the Division of Unemployment Insurance, the WCC is also reaching out to new employers in Maryland providing information regarding their responsibility to provide compensation to their injured employees through workers' compensation insurance coverage.

IV. ADMINISTRATIVE AND LEGAL BARRIERS

DIFFERING FORMS, PROCEDURES, AND DATA COLLECTION TOOLS. Task Force member agencies and divisions have different intake procedures, protocols, and referral forms. Similarly, Task Force members collect and keep their data in different forms, using different systems. A major challenge for the Task Force is to minimize these differences and help develop more standardized forms, procedures, and modes of data collection to ensure that (1) all referrals from a Task Force members contain the basic information of interest to all other member agencies and divisions; and (2) the data shared among Task Force members can be effectively analyzed by other member agencies and divisions. To address this concern, the Workplace Fraud Reporting Form and Task Force Complaint Form are located on the Department of Labor's Workplace Fraud website.

DATA SHARING RESTRICTIONS. Although Task Force member agencies are required to share data among themselves and with other law enforcement authorities, the degree to which they can share this data is restricted by state and federal confidentiality requirements. For example, although the Division of Unemployment Insurance receives information on misclassification from the Internal Revenue Service, this information cannot be further shared among the partner agencies. Similarly, Task Force investigations as well as any audits conducted by member agencies/divisions are confidential. Balancing confidentiality concerns with the need to maximize data sharing potential will be an ongoing challenge for the Task Force.

POTENTIALLY INCONSISTENT DETERMINATIONS. The Workplace Fraud Act helped clarify the different legal tests that Task Force member agencies and divisions use in determining if a worker is an employee or an independent contractor. For example, the Workers' Compensation Commission uses common law to determine if a worker is an employee, while the Department of Labor Divisions of Unemployment Insurance and Labor and Industry use the three-part "ABC test." The outcome is likely to be the same because both tests focus on similar factors such as who directs and controls the work, and whether the individual has an independent business separate from the employers' usual business. Although it is possible for a worker to be correctly classified differently under the different standards, that is not common and in most cases, applying the various laws (federal and state) results in the same worker classification. The Task Force remains aware that there is always a possibility that different agencies, using different tests, may have inconsistent determinations.

V. NEXT STEPS AND GOALS FOR 2012

- **IMPROVE TASK FORCE WEBSITE.** The Task Force has created a webpage that will be expanded and made accessible through the websites of the member agencies and divisions. The webpage includes an online complaint form to allow members of the public to submit complaints more easily. The webpage also includes information on the Workplace Fraud Act and the Task Force for workers, employers and the general public.

  In 2011, the Task Force created an internal SharePoint website to allow member agencies to collaborate on investigations, share information, and track misclassification trends. In addition, the website will facilitate greater coordination among agencies and divisions in terms of referrals and suspected workplace fraud as required by the Executive Order that established the Task Force.

- **HIGH-IMPACT ENFORCEMENT ACTIONS.** In the coming year, the Task Force plans to continue its enforcement efforts by participating in joint enforcement actions in which representatives from Task Force member agencies and divisions visit work sites together to conduct field investigations and interview workers. In addition, the Task Force will establish a system to track investigations in order to improve record keeping and data management.

- **INCREASE PUBLIC OUTREACH.** In the past, the Task Force focused on educating industry groups and professionals, including employment lawyers and accountants, about misclassification and the Workplace Fraud Act. In 2011, the Task Force held informational sessions for employers to educate them on the law. In the next year, in addition to the information sessions, the Task Force plans to expand its outreach to affected workers so that they are more aware of their rights and the remedies available to them.

- **TOWN HALL MEETINGS.** In an effort to increase public awareness about workplace fraud, the Task Force held a series of Town Hall meetings and plans to schedule additional meetings throughout the state. Similar task forces in other states have found Town Hall meetings effective and recommended such meetings as a way of reaching workers and employers who are farther from the urban centers.

- **IMPROVE DATA SHARING.** Task Force members developed an internal website to improve data sharing but plan to create a more complex database through which all task force members can access, search and download data. This would facilitate ongoing data sharing by providing a single secure place for data and would streamline the investigative process.

APPENDICES

Appendix A: Executive Order
Appendix B: Summary of the Workplace Fraud Act: Amendments and Additions to the Maryland Code, Labor and Employment Article
Appendix C: Differences between General Tax Responsibilities of Employees and Independent Contractors
Appendix D: Memorandum of Understanding Between the U.S. Department of Labor and the Maryland Department of Labor, Licensing and Regulation, Division of Unemployment Insurance and Division of Labor and Industry

The State of Maryland

Executive Department

EXECUTIVE ORDER
01.01.2009.09

The Joint Enforcement Task Force on Workplace Fraud

WHEREAS, Workplace fraud, a business practice where employers fail to properly classify individuals as employees, is an ongoing problem;

WHEREAS, Employers engaging in workplace fraud avoid their obligations under federal and state labor, employment, and tax laws, including laws governing minimum wage, overtime, prevailing wage, living wage, unemployment insurance, workers' compensation insurance, temporary disability insurance, wage payment, and income taxes;

WHEREAS, Workplace fraud adversely impacts individuals, businesses, and Maryland's economy in significant ways, including: depriving workers of critical protections and benefits to which they are legally entitled; reducing compliance with employment and occupational safety standards; giving employers who fail to properly classify their employees an unfair competitive advantage over law-abiding employers; denying the State millions of dollars in tax revenues, unemployment insurance contributions, and workers' compensation premiums; and increasing the demand for social services;

WHEREAS, Recent audits show that approximately 20% of Maryland employers misclassify employees as independent contractors;

WHEREAS, Law enforcement and regulatory efforts to combat and prevent workplace fraud have been divided historically among various agencies, reducing their efficiency and effectiveness;

WHEREAS, The Workplace Fraud Act of 2009, Chapter 188 of the 2009 Laws of Maryland, enhanced the ability of the State to take enforcement actions against workplace fraud violations;

WHEREAS, These enforcement efforts can be enhanced further and made more efficient through interagency cooperation, information sharing, and joint prosecution of serious violators; and

WHEREAS, The creation of joint task forces in other states has proven an effective mechanism for coordinating and enhancing law enforcement to address the problem of workplace fraud.

NOW THEREFORE, I, MARTIN O'MALLEY, GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND THE LAWS OF MARYLAND, HEREBY PROCLAIM THE FOLLOWING EXECUTIVE ORDER, EFFECTIVE IMMEDIATELY:

A. There is a Joint Enforcement Task Force on Workplace Fraud (Task Force).

B. For purposes of this Executive Order, "workplace fraud" means an employer's failure to properly classify an individual as an employee in violation of applicable law.

C. The Task Force shall consist of:

(1) The Secretary of Labor, Licensing and Regulation or the Secretary's designee;

(2) The Attorney General or the Attorney General's designee;

(3) The Comptroller or the Comptroller's designee;

(4) The Chair of the Workers' Compensation Commission or the Chair's designee;

(5) The Insurance Commissioner or the Commissioner's designee;

(6) The Commissioner of Labor and Industry or the Commissioner's designee; and

(7) The Assistant Secretary for the Division of Unemployment Insurance or the Assistant Secretary's designee.

D. The Secretary of Labor, Licensing and Regulation or the Secretary's designee shall serve as the Chair of the Task Force.

E. Members of the Task Force may not receive any compensation for their services, but may be reimbursed for reasonable expenses incurred in the performance of their duties, in accordance with the Standard State Travel Regulations, and as provided in the State budget.

F. The Department of Labor, Licensing and Regulation shall provide publication, operational, and other support as needed to the Task Force.

G. The Task Force may identify and add members from governmental units whose participation would further its mission.

H. The Task Force shall coordinate the investigation and enforcement of workplace fraud. In fulfilling this mission, the Task Force shall have the following powers and duties:

(1) To facilitate among Task Force members the timely sharing of information related to suspected workplace fraud to the maximum extent permitted by law;

(2) To pool, focus, and target investigative and enforcement resources;

(3) To assess existing methods and best practices, in both Maryland and other jurisdictions, with respect to workplace fraud prevention and enforcement, and to recommend that participating agencies adopt appropriate measures to improve their prevention and enforcement efforts;

(4) To develop strategies for systematic investigations of workplace fraud within those industries in which misclassification is most common;

(5) To identify and facilitate the filing of complaints against potential violators, including soliciting referrals and other relevant information from the public through the development of an education and outreach campaign;

(6) To identify significant cases of workplace fraud which should be investigated and addressed collaboratively, and to form joint enforcement teams to utilize the collective investigative and enforcement capabilities of the Task Force members;

(7) To establish protocols, consistent with applicable law, through which individual Task Force agencies investigating

workplace fraud matters under their own statutory or administrative schemes will refer appropriate matters to other agencies for assessment of potential liability under all relevant statutory or administrative schemes;

(8) To establish referral procedures and solicit the cooperation and participation of local state's attorneys and other relevant agencies, where appropriate;

(9) To coordinate efforts with federal agencies;

(10) To work cooperatively with business, labor, and community groups interested in reducing workplace fraud by:

(a) Developing ways to prevent workplace fraud through effective outreach, including notices and educational materials; and

(b) Enhancing mechanisms to identify and report workplace fraud;

(11) To increase public awareness that employee misclassification is illegal and causes harm;

(l2) To work cooperatively with federal, State. and local social service agencies to provide assistance to individuals who have been harmed by workplace fraud; and

(13) To consult with representatives of business, organized labor, and other agencies to improve and expand the operation and effectiveness of the Task Force and its members.

I. The Task Force shall issue a report to the Governor by December 31 of each year which shall:

(1) Describe the record and accomplishments of the participating agencies of the Task Force, including the amounts of wages, premiums, taxes, and other payments or penalties collected, as well as the number of employers cited for legal violations related to workplace fraud and the approximate number of employees affected;

(2) Identify any administrative or legal barriers impeding the more effective operation of the Task Force, including any barriers to information sharing or joint action;

(3) Propose, after consultation with representatives of business, organized labor, members of the General Assembly, and other affected agencies, appropriate administrative, legislative, or regulatory changes to:

(a) Reduce or eliminate any barriers to the Task Force's operations;

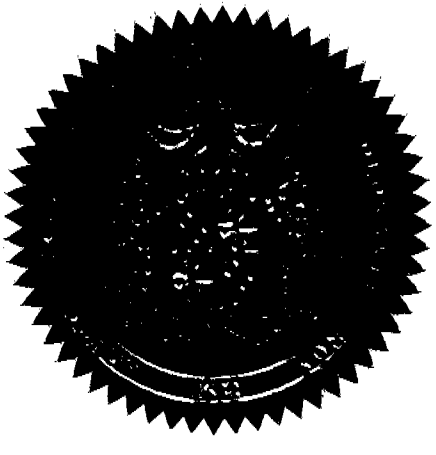
(b) Enhance the investigation, enforcement, and prevention of workplace fraud; and

(4) Identify successful strategies for preventing workplace fraud that reduce the need for greater enforcement.

J. Every agency, department, office, division, or public authority of the State shall cooperate with the Task Force and, to the fullest extent permitted by law, shall furnish such information and assistance as the Task Force determines is reasonably necessary to accomplish its purpose.

Given Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis this 14th day of July, 2009.

Martin O'Malley
Governor



ATTEST:

John P. McDonough
Secretary of State

Summary of the Workplace Fraud Act:

Amendments and Additions to the Maryland Code Annotated, Labor and Employment Article

Title 3: Employment Standards and Conditions

§3–101.
(a) In this title the following words have the meanings indicated.

(b) "Commissioner" means the Commissioner of Labor and Industry.

(c) (1) "Employ" means to engage an individual to work.
(2) "Employ" includes:
(i) allowing an individual to work; and
(ii) instructing an individual to be present at a work site.

§3–102.
(a) In addition to any duties set forth elsewhere, the Commissioner shall:
(1) enforce Subtitle 2 of this title;
(2) carry out Subtitle 3 of this title;
(3) enforce Subtitle 4 of this title; and
(4**)** enforce Subtitle 9 of this title.

(b) If the Governor declares an emergency or disaster, then, with the consent of the Governor, the Commissioner may suspend enforcement of any provision of Subtitle 2 of this title until the emergency or disaster ends.

§3–103.
(a) The Commissioner may conduct an investigation under Subtitle 2 of this title, on the Commissioner's own initiative or may require a written complaint.

(b) The Commissioner may conduct an investigation under Subtitle 4 of this title, on the Commissioner's own initiative or on receipt of a written complaint.

(c) The Commissioner may conduct an investigation to determine whether Subtitle 5 of this title has been violated on receipt of a written complaint of an employee.

(d) (1) The Commissioner may investigate whether § 3–701 of this title has been violated on receipt of a written complaint of an applicant for employment;
(2) The Commissioner may investigate whether § 3–702 of this title has been violated on receipt of a written complaint of an applicant for employment or an employee.

(e) The Commissioner may investigate whether Subtitle 9 of this title has been violated:
(1) on the Commissioner's own initiative;
(2) on receipt of a written complaint signed by the person submitting the complaint; or
(3) on referral from another unit of State government.

§3–104.
The Commissioner may delegate any power or duty of the Commissioner under Subtitles 2, 4, 5, and 9 of this title.

§3–901.
(a) In this subtitle the following words have the meanings indicated.

(b) "Construction services" includes the following services provided in connection with real property:
(1) building;
(2) reconstructing;
(3) improving;
(4) enlarging;
(5) painting;
(6) altering;
(7) maintaining; and
(8) repairing.

(c) "Employer" means any person that employs an individual in the State.

(d) "Exempt person" means an individual who:
(1) performs services in a personal capacity and employs no individuals other than:
(i) a spouse of the exempt person;
(ii) children of the exempt person; or
(iii) parents of the exempt person;
(2) performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;
(3) furnishes the tools and equipment necessary to provide the service;
(4) operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities:
(i) in which the individual:
1. owns all of the assets and profits of the business; and
2. has sole, unlimited, personal liability for all of the debts and liabilities of the business, unless the business is organized as a single–owned corporate entity, to which sole, unlimited personal liability does not apply; and
(ii) for which:
1. the individual does not pay taxes for the business separately but reports business income and losses on the individual's personal tax return; and
2. if the business is organized as a corporate entity and the individual otherwise qualifies as an exempt person under this subsection, the individual files a separate federal informational tax return for the entity as required by law;
(5) exercises complete control over the management and operations of the business; and
(6) exercises the right and opportunity on a continuing basis to perform the services of the business for multiple entities at the individual's sole choice and discretion.

(e) "Knowingly" means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

(f) "Landscaping services" includes the following services:

(1) garden maintenance and planting;
(2) lawn care including fertilizing, mowing, mulching, seeding, and spraying;
(3) seeding and mowing of highway strips;
(4) sod laying;
(5) turf installation, except artificial;
(6) ornamental bush planting, pruning, bracing, spraying, and removal; and
(7) ornamental tree planting, pruning, bracing, spraying, and removal.

(g) (1) "Place of business" means the office or headquarters of the employer.

(2) "Place of business" does not include a work site at which the employer has been contracted to perform services.

(h) "Public body" means:

(1) the State;
(2) a unit of State government or an instrumentality of the State; or
(3) any political subdivision, agency, person, or entity that is a party to a contract for which 50% or more of the money used is State money.

§3–902.

This subtitle applies only to the following industries:

(1) construction services; and
(2) landscaping services.

§3–903.

(a) An employer may not fail to properly classify an individual who performs work for remuneration paid by the employer.

(b) An employer has failed to properly classify an individual when an employer–employee relationship exists as determined under subsection (c) of this section but the employer has not classified the individual as an employee.

(c) (1) For purposes of enforcement of this subtitle only, work performed by an individual for remuneration paid by an employer shall be presumed to create an employer–employee relationship, unless:

(i) the individual is an exempt person; or
(ii) an employer demonstrates that:

1. the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

2. the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

3. the work is:

A. outside of the usual course of business of the person for whom the work is performed; or

B. performed outside of any place of business of the person for whom the work is performed.

(2) Work is outside of the usual course of business of the person for whom it is performed under paragraph (1) of this subsection if:

(i) the individual performs the work off the employer's premises;

(ii) the individual performs work that is not integrated into the employer's operation; or

(iii) the work performed is unrelated to the employer's business.

(3) By contract, an employer may engage another business entity, which may have its own employees, to do the same type of work in which the employer engages, at the same location where the employer is working, without establishing an employer–employee relationship between the two contracting entities.

(d) The Commissioner shall adopt regulations to explain further and provide specific examples of the application of subsection (c) of this section.

§3–904.

(a) An employer may not knowingly fail to properly classify an individual who performs work for remuneration paid by the employer.

(b) An employer has knowingly failed to properly classify an individual when:

(1) an employer–employee relationship exists as determined under § 3–903(c) of this subtitle; and

(2) the employer has knowingly failed to properly classify the individual as an employee.

(c) The Commissioner shall consider, as strong evidence that the employer did not knowingly fail to properly classify an individual, whether:

(1) before a complaint was filed against the employer or the Commissioner began an investigation of the employer, the employer:

(i) sought and obtained evidence that the individual:

1. is an exempt person; or

2. as an independent contractor:

A. withholds, reports, and remits payroll taxes on behalf of all individuals working for the independent contractor;

B. pays unemployment insurance taxes for all individuals working for the independent contractor; and

C. maintains workers' compensation insurance; and

(ii) provided to the exempt person or independent contractor a written notice as required by § 3–914 of this subtitle; or

(2) the employer:

(i) 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and

2. reports the income of the workers to the Internal Revenue Service as required by federal law; and

(ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.

(d) The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an employee.

§3–905.

(a) The Commissioner shall investigate as necessary to determine compliance with this subtitle and regulations adopted under this subtitle.

(b) (1) Any written or oral complaint or statement made by a person as part of an investigation under this section is confidential and may not be disclosed without the consent of the person until the investigation is concluded and a citation is issued.

(2) Any written or oral statement made by an individual alleged to be employed by the respondent as part of an investigation under this section is confidential and may not be disclosed without the consent of the individual.

(c) The Commissioner may enter a place of business or work site to:

(1) observe work being performed;

(2) interview individuals on the work site, including those identified as employees and independent contractors; and

(3) review and copy records.

(d) The Commissioner may require each employer to:

(1) identify and produce all records relevant to the classification of each individual;

(2) attest to the truthfulness of each record that is copied in accordance with subsection (c)(3) of this section and to sign the copy; or

(3) at the option of the employer, submit a written statement about the classification of each employee on the form provided by the Commissioner, with any relevant records attached.

(e) An employer that fails to produce records or a written statement under subsection (d) of this section within 15 business days after the Commissioner's request shall be subject to a fine not exceeding $500 per day for each day the records are not produced.

(f) (1) The Commissioner may issue a subpoena for testimony and the production of records.

(2) If a person fails to comply with a subpoena issued under this subsection, the Commissioner may file a complaint in the circuit court for the county where the person resides, is employed, or has a place of business, requesting an order directing compliance with the subpoena.

§3–906.

(a) If, after investigation, the Commissioner determines that an employer has violated this subtitle or a regulation adopted under this subtitle, the Commissioner shall promptly issue a citation to the employer.

(b) Each citation shall:

(1) describe in detail the nature of the alleged violation;

(2) cite the provision of this subtitle or any regulation that the employer is alleged to have violated; and

(3) state the civil penalty, if any, that the Commissioner proposes to assess.

(c) Within a reasonable time after issuance of a citation, the Commissioner shall send by certified mail to the employer:

(1) a copy of the citation; and

(2) notice of the opportunity to request a hearing.

(d) Within 15 days after an employer receives a notice under subsection (c) of this section, the employer may submit a written request for a hearing on the citation and proposed penalty.

(e) If a hearing is not requested within 15 days, the citation, including any penalties, shall become a final order of the Commissioner.

(f) If the employer requests a hearing, the Commissioner shall delegate to the Office of Administrative Hearings the authority to hold a hearing and issue findings of fact, conclusions of law, and an order, and assess a penalty under § 3–909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government Article.

(g) Within 15 days after a request, in accordance with Title 10, Subtitle 6 of the State Government Article and the applicable regulations of the Department and the Office of Administrative Hearings, the Commissioner shall provide copies of all relevant evidence, including a list of potential witnesses, on which the Commissioner intends to rely at any administrative hearing under this subtitle.

(h) The Commissioner has the burden of proof to show that an employer has knowingly failed to properly classify an individual as an employee.

(i) A decision of an administrative law judge issued in accordance with Title 10, Subtitle 2 of the State Government Article shall become a final order of the Commissioner.

(j) Any party aggrieved by a final order of the Commissioner under subsection (i) of this section may seek judicial review and appeal under §§ 10–222 and 10–223 of the State Government Article.

§3–907.

(a) If, after investigation, the Commissioner determines that an employer failed to properly classify an individual as an employee in violation of § 3–903 of this subtitle, or knowingly failed to properly classify as an employee an employee in violation of § 3–904 of this subtitle, and issues a citation, the Commissioner shall notify the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission to enable these agencies to assure an employer's compliance with their laws, utilizing their own definitions, standards, and procedures.

(b) (1) An employer found in violation of § 3–903 of this subtitle by a final order of a court or an administrative unit shall be required, within 45 days after the final order:

(i) to pay restitution to any individual not properly classified; and

(ii) to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

(2) The requirement for compliance with applicable labor laws under subsection (b)(1)(ii) of this section may include requiring the employer to enter into an agreement, within 45 days after the final order, with a governmental unit for payment of any amounts owed by the employer to the unit.

(3) The requirement for compliance with applicable labor laws under paragraph (b)(1)(ii) of this section:

(i) may not require payments for more than a 12–month period; and

(ii) may not require payments due for a period before the 12–month period before the citation was issued.

(c) An employer found in violation of § 3–904 of this subtitle by a final order of a court or an administrative unit shall be required, within 45 days after the final order:

(1) to pay restitution to any individual not properly classified; and

(2) to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

3–908.

(a) An employer in violation of § 3–903 of this subtitle who comes into timely compliance with all applicable labor laws as required by § 3–907(b) of this subtitle may not be assessed a civil penalty.

(b) (1) An employer in violation of § 3–903 of this subtitle who fails to come into timely compliance with all applicable labor laws as required by § 3–907(b) of this subtitle shall be assessed a civil penalty of up to $1,000 for each employee for whom the employer is not in compliance.

(2) In determining the amount of the penalty, the Commissioner shall consider the factors set forth in § 3–909(b) of this subtitle.

(c) (1) An employer may be assessed civil penalties under this section by only one final order of a court or administrative unit for the same actions constituting noncompliance with applicable labor laws as required by § 3–907(b) and (c) of this subtitle.

(2) Notwithstanding paragraph (1) of this subsection, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by multiple final orders of a court and all relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission.

(d) Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that:

(1) has one or more of the same principals or officers as the employer against whom the penalty was assessed; and

(2) is engaged in the same or equivalent trade or activity.

§3–909.

(a) An employer found to have knowingly failed to properly classify an individual in violation of § 3–904 of this subtitle shall be assessed a civil penalty of up to $5,000 for each employee who was not properly classified.

(b) In determining the amount of the penalty, the Commissioner or the administrative law judge shall consider:

(1) the gravity of the violation;

(2) the size of the employer's business;

(3) the employer's good faith;

(4) the employer's history of violations under this subtitle; and

(5) whether the employer:

(i) has been found, by a court or an administrative unit, to have deprived the employee of any rights to which the employee would have been entitled under a State protective labor law, including but not limited to:

1. any provision of this article;

2. the State prevailing wage law, under §§17–221 and 17–222 of the State Finance and Procurement Article; or

3. the living wage law, under § 18–108 of the State Finance and Procurement Article; and

(ii) has made restitution and come into compliance with all such State protective labor laws with respect to the employee.

(c) If the court or an administrative unit determines that an individual or class of individuals is entitled to restitution as a result of the employer's violation of § 3–904 of this subtitle, the court or administrative unit:

(1) shall award each individual any restitution to which the individual may be entitled; and

(2) may award each individual an additional amount up to three times the amount of such restitution.

(d) An employer in violation of § 3–904 of this subtitle may be assessed double the administrative penalties set forth in subsection (a) of this section if the employer has been found previously to have violated this subtitle by a final order of a court or an administrative unit.

(e) An employer who has been found by a final order of a court or an administrative unit to have violated § 3–904 of this subtitle three or more times may be assessed an administrative penalty of up to $20,000 for each employee.

(f) (1) An employer may be assessed civil penalties under this section or § 8–201.1 or § 9–402.1 of this article by only one final order of a court or administrative unit for the same actions constituting a violation of this subtitle.

(2) Notwithstanding paragraph (1) of this subsection, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court and all relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission.

(g) Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that:

(1) has one or more of the same principals or officers as the employer against whom the penalty was assessed, unless the principal or officer did not or with the exercise of reasonable diligence could not know of the violation for which the penalty was imposed; and

(2) is engaged in the same or equivalent trade or activity.

§3–910.

As authorized by State and federal law, units within the Department of Labor, Licensing, and Regulation and the Department of Budget and Management, the Secretary of State, the Comptroller, the Maryland Insurance Administration, and other State agencies shall cooperate and share information concerning any suspected failure to properly classify an individual as an employee.

§3–911.

(a) (1) Except as provided in paragraph (2) of this subsection, an individual who has not been properly classified as an employee may bring a civil action for economic damages against the employer for any violation of this subtitle.

(2) An individual may not bring a civil action under this section if a final order of an administrative unit or of a court has been issued under § 3–906 of this subtitle.

(b) An action filed under this section shall be filed within 3 years after the date the cause of action accrues.

(c) If the court determines that an individual or class of individuals is entitled to judgment in an action against an employer filed in accordance with this section, the court may award each individual:

(1) any damages to which the individual may be entitled under subsection (a) of this section;

(2) an additional amount up to three times the amount of any such damages, if the employer knowingly failed to properly classify the individual;

(3) reasonable counsel fees and other costs of the action; and

(4) any other appropriate relief.

§3–912.

(a) An employer may not discriminate in any manner or take adverse action against an individual because the individual:

(1) files a complaint with the employer or the Commissioner alleging that the employer violated any provision of this subtitle or any regulation adopted under this subtitle;

(2) brings an action under this subtitle or a proceeding involving a violation of this subtitle; or

(3) testifies in an action authorized under this subtitle or a proceeding involving a violation of this subtitle.

(b) (1) An individual who believes that an employer has discriminated in any manner or taken adverse action against the individual in violation of subsection (a) of this section may submit to the Commissioner a written complaint that alleges the discrimination and that includes the signature of the individual.

(2) An individual shall file a complaint under this subsection within 180 days after the alleged discrimination occurs.

(c) (1) On receipt of a complaint under subsection (c) of this section, the Commissioner may investigate.

(2) The Commissioner shall provide the employer with an opportunity to respond to the allegations in the complaint.

(3) If, after investigation and consideration of any response from the employer, the Commissioner determines that an employer or other person has violated subsection (a) of this section, the Commissioner shall file a complaint to enjoin the violation, to reinstate the employee to the former position with back pay, and to award any other appropriate damages or other relief in the circuit court for:

(i) the county in which the alleged violation occurred;

(ii) the county in which the employer has its principal office; or

(iii) Baltimore City.

(4) Within 120 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection.

§3–913.

(a) Where, after investigation, the Commissioner issues a citation for a violation of this subtitle or regulations adopted under this subtitle by an employer engaged in work on a contract with a public body, the Commissioner shall promptly notify the public body.

(b) (1) On notification, the public body shall withhold from payment due the employer an amount that is sufficient to:

(i) pay restitution to each employee for the full amount of wages due; and

(ii) pay any benefits, taxes, or other contributions that are required by law to be paid on behalf of the employee.

(2) The public body shall release:

(i) on issuance of a favorable final order of a court or an administrative unit, the full amount of the withheld funds; and

(ii) on an adverse final order of a court or an administrative unit, the balance of the withheld funds after all obligations are satisfied under paragraph (1) of this subsection.

§3–914.

(a) An employer shall keep, for at least 3 years, in or about its place of business, records of the employer containing the following information:

(1) the name, address, occupation, and classification of each employee or independent contractor;

(2) the rate of pay of each employee or method of payment for the independent contractor;

(3) the amount that is paid each pay period to each employee or, if applicable, independent contractor;

(4) the hours that each employee or independent contractor works each day and each workweek;

(5) for all individuals who are not classified as employees, evidence that each individual is an exempt person or an independent contractor or its employee; and

(6) other information that the Commissioner requires, by regulation, as necessary to enforce this subtitle.

(b) An employer shall provide each individual classified as an independent contractor or exempt person with written notice of the classification of the individual at the time the individual is hired.

(c) The written notice shall:

(1) include an explanation of the implications of the individual's classification as an independent contractor or exempt person rather than as an employee; and

(2) be provided in English and Spanish.

(d) The Commissioner shall adopt regulations establishing the specific requirements for the contents and form of the notice.

§3–915.

(a) A person may not knowingly incorporate or form, or assist in the incorporation or formation of, a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability corporation, or other entity for the purpose of facilitating, or evading detection of, a violation of this subtitle.

(b) A person may not knowingly conspire with, aid and abet, assist, advise, or facilitate an employer with the intent of violating this subtitle.

(c) (1) Except as provided in paragraph (2) of this subsection, a person that violates this section shall be subject to a civil penalty not exceeding $20,000.

(2) A person that violates this section may not be subject to a civil penalty under this section if the person:

(i) holds a professional license as a lawyer or a certified public accountant; and

(ii) was performing an activity in the ordinary course of that person's license when the violation occurred.

(3) If the person is exempt from sanction under paragraph (2) of this subsection, the Commissioner shall promptly refer the person for investigation and possible sanction to the unit of State government that has regulatory jurisdiction over the business activities of that person.

(d) The procedures governing investigations, citations, and administrative and judicial review of an alleged violation under this section shall be the same as those set forth in §§ 3–905 and 3–906 of this subtitle.

(e) A person may be assessed civil penalties under this section by only one final order of a court or administrative unit for the same actions constituting the violation.

§3–916.

(a) A person may not:

(1) make or cause to be made a groundless or malicious complaint to the Commissioner or an authorized representative of the Commissioner;

(2) in bad faith, bring an action under this subtitle or a proceeding related to the subject of this subtitle; or

(3) in bad faith, testify in an action under this subtitle or a proceeding related to the subject of this subtitle.

(b) The Commissioner shall investigate any allegations that a person has violated any provision of this section.

(c) (1) If the Commissioner determines that a person has violated any provision of this section, that person may be subject to an administrative penalty of up to $1,000, assessed by the Commissioner.

(2) A sanction under paragraph (1) of this subsection shall be subject to the notice and hearing requirements of § 3–906 of this subtitle.

(3) If the person found in violation of this section is a person alleged to be employed by the respondent, the Commissioner shall disclose the identity of the complainant.

(d) Any person who must defend an action taken as a result of a groundless or malicious complaint may be entitled to recover attorneys' fees.

§3–917. The Commissioner shall adopt regulations to carry out this subtitle.

§3–918. Each civil penalty under this subtitle shall be paid into the General Fund of the State.

§3–919.

(a) The proposed budget of the Division of Labor and Industry shall include an appropriation from the Workers' Compensation Commission to cover the cost of administering this subtitle.

(b) The Workers' Compensation Commission shall pay the cost of administering this subtitle from money that the Commission receives under § 9–316 of this article.

§3–920.

(a) The Commissioner shall prepare an annual report for the Secretary on the administration and enforcement of this subtitle, that shall include:

(1) the number and nature of complaints received;

(2) the number of investigations conducted;

(3) the number of citations issued;

(4) the number of informal resolutions of the citations;

(5) the number of final administrative orders, with a description, that shall include:

(i) whether the alleged violation was found; and

(ii) whether the order affirmed or overturned a proposed decision of the Office of Administrative Hearings;

(6) the number of orders of the Commissioner reviewed by the Secretary and whether they were affirmed or overturned; and

(7) the number of requests for judicial review of administrative orders and whether the orders were affirmed or overturned.

(b) The Commissioner's report shall be a public record.

Title 8: Unemployment Insurance

§8–201.

(a**)** Employment is presumed to be covered employment if:

(1) regardless of whether the employment is based on the common law relation of master and servant, the employment is performed:

(i) for wages; or

(ii) under a contract of hire that is written or oral or express or implied; and

(2) the employment is performed in accordance with § 8–202 of this subtitle.

(b) To overcome the presumption of employment, an employing unit shall establish that the person performing services is an independent contractor in accordance with § 8–205 of this subtitle or is specifically exempted under this subtitle.

§8–201.1.

(a) In this section, "knowingly" means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

(b) An employer may not fail to properly classify an individual as an employee.

(c) (1) If the Secretary determines that an employing unit has failed to properly classify an individual as an employee, any and all contribution or reimbursement payments resulting from the failure to properly classify that are due and unpaid shall accrue interest as provided in paragraph (2) of this subsection.

(2) An employer who fails to pay the contribution or reimbursement payments within 45 days shall be assessed interest at the rate of 2% per month or part of a month from the first due date following notice of the misclassification until the Secretary receives the contribution or payment in lieu of contributions and interest.

(d) The Secretary shall consider, as strong evidence that an employer did not knowingly fail to properly classify an individual, whether the employer:

(1) (i) classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and

(ii) reports the income of the workers to the Internal Revenue Service as required by federal law; and

(2) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same tasks for the employer is an independent contractor.

(e) If the Secretary determines that an employing unit has knowingly failed to properly classify an individual as an employee, the employing unit shall be subject to a civil penalty of not more than $5,000 per employee.

(f) (1) A person may not knowingly advise an employing unit or a prospective employing unit to take action for the purposes of violating this section.

(2) A person found in violation of this subsection shall be subject to a civil penalty of not more than $20,000.

(g) An employing unit found to have knowingly violated this section who has also been found previously to have knowingly violated this section by a final order of a court or administrative unit may be assessed double the administrative penalties set forth in subsection (d) of this section for the new violation.

(h) (1) An employing unit may be assessed civil penalties by only one order of a court or administrative unit for the same actions constituting a knowing failure to properly classify an individual as an employee.

(2) Notwithstanding paragraph (1) of this subsection, an employing unit may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court, the Secretary, and all other relevant administrative units, including the Comptroller, the Workers' Compensation Commission, the Insurance Administration, and the Division of Labor and Industry.

(i) If the Secretary determines that an employing unit has failed to properly classify an individual as an employee, the Secretary shall promptly notify the Workers' Compensation Commission, the Division of Labor and Industry, the Insurance Administration, and the Comptroller.

(j) As authorized by State and federal law, units within the Department of Labor, Licensing, and Regulation and the Department of Budget and Management, the Secretary of State, the Comptroller, the Insurance Administration, and other State agencies shall cooperate and share information concerning any suspected violation of this title.

(k) (1) The Secretary shall adopt regulations to carry out this section.

(2) The regulations shall:

(i) require that the Secretary provide an employer with the factual basis for any violations charged;

(ii) establish procedures regarding the audit process and any agency level review available before appeal; and

(iii) provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an individual as an employee.

§8–205.

(a) Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

(1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

(2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

(3) the work is:

(i) outside of the usual course of business of the person for whom the work is performed; or

(ii) performed outside of any place of business of the person for whom the work is performed.

(b) The Secretary shall adopt regulations to provide:

(1) general guidance about the application of subsection (a) of this section; and

(2) specific examples of how subsection (a) of this section is applied to certain industries, including the construction industry, the landscaping industry, and the home care services industry.

§8–610.1.

An employing unit that has knowingly failed to properly classify an individual as an employee under § 8–201.1 of this title shall pay contributions for 2 years:

(1) at a rate applied to the taxable wage base that would have been assigned to the employing unit under this subtitle if the employing unit had not knowingly failed to properly classify an individual as an employee; plus

(2) two percentage points.

§8–628.

Except as provided in § 8–201.1 of this title, a contribution or reimbursement payment that is due and unpaid shall accrue interest at the rate of 1.5% per month or part of a month from the date on which it is due until the Secretary receives the contribution or payment in lieu of contributions and the interest.

Title 9: Workers' Compensation

§9–202.

(a) An individual, including a minor, is presumed to be a covered employee while in the service of an employer under an express or implied contract of apprenticeship or hire.

(b) A minor may be a covered employee under this section even if the minor is employed unlawfully.

(c) To overcome the presumption of covered employment, an employer shall establish that the individual performing services is an independent contractor in accordance with the common law or is specifically exempted from covered employment under this subtitle.

§9–315.1.

The Commission shall pay the costs of the administration of the workforce fraud program by the Commissioner of Labor and Industry under Title 3, Subtitle 9 of this article.

§9–402.1.

(a) In this section, "knowingly" means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

(b) An employer may not fail to properly classify an individual as an employee.

(c) If the Commission determines that an employer failed to properly classify an individual as an employee, the Commission shall order the employer to secure compensation for the covered employee in accordance with § 9–407 of this subtitle.

(d) If the Commission determines that an employer knowingly failed to properly classify an individual as an employee, the Commission shall, in conformance with § 9–310 of this title, assess a civil penalty of not more than $5,000.

(e) (1) A person may not knowingly advise an employer to take action for the purpose of violating this section.

(2) A person found in violation of this subsection shall be subject to a civil penalty of not more than $20,000.

(f) An employer found to have knowingly violated this section who has also been found previously to have knowingly violated this section by a final order of a court or administrative unit may be assessed double the administrative penalties set forth in subsection (d) of this section for the new violation.

(g) (1) An employer may be assessed civil penalties by only one order of a court or administrative unit for the same actions constituting a knowing failure to properly classify an individual as an employee.

(2) Notwithstanding paragraph (1) of this subsection, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court, the Commission, and all other relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Division of Labor and Industry.

(h) If the Commission determines that an employer has failed to properly classify an individual as an employee, the Commission shall promptly notify the Office of Unemployment Insurance, the Division of Labor and Industry, the insurer, if any, the Insurance Administration, and the Comptroller.

(i) As authorized by State and federal law, units within the Department of Labor, Licensing, and Regulation and the Department of Budget and Management, the Secretary of State, the Comptroller, the Insurance Administration, and other State agencies shall cooperate and share information concerning any suspected violation of this title.

(j) The Commission may adopt regulations to carry out this section.

Table 1: Differences between General Tax Responsibilities of Employees and Independent Contractors

	Individuals classified as employees		Individuals classified as independent contractors	
Type of tax	**Businesses' general responsibilities**	**Workers' general responsibilities**	**Businesses' general responsibilities**	**Workers' general responsibilities**
Federal income tax[a]	Withhold tax from employees' pay	Pay full amounts owed, generally through withholding	Generally, none[b]	Pay full amounts owed, generally through estimated tax payments[c]
Social Security and Medicare taxes[d]	Withhold one half of taxes from employees' pay and pay other half	Pay half of total amounts owed, generally through withholding	None	Pay full amounts owed, generally through estimated tax payments[c]
Federal unemployment tax[e]	Pay full amount	None	None	None
State unemployment tax	Pay full amount, except in certain states[f]	None, except pay partial amount in certain states[f]	None	None

Source: GAO analysis.

Note: There are various exceptions to the general responsibilities included in this table.

[a]Most states also require payment of state income taxes.

[b]Employers are generally required to withhold taxes at a rate of 28 percent from independent contractors who do not provide, or provide incorrect, taxpayer identification numbers (this practice is known as backup withholding).

[c]For estimated tax purposes, the year is divided into four payment periods.

[d]The overall tax rates for Social Security and Medicare for 2009 are 12.4 percent and 2.9 percent of income, respectively. Social Security taxes are to be paid for earnings up to the established wage base limit ($106,800 for 2009).

[e]Employers generally are required to pay federal unemployment insurance on the first $7,000 of employee pay at a rate of 6.2 percent, which can be offset by a credit of up to 5.4 percent for timely payment of state unemployment insurance taxes, resulting in an effective rate as low as 0.8 percent. The rate is set to decrease to 6.0 percent in 2010. 26 U.S.C. §§ 3301, 3302.

[f]According to DOL, these states are Alaska, New Jersey, and Pennsylvania.

PARTNERSHIP AGREEMENT

BETWEEN

THE U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION

AND

MARYLAND DEPARTMENT OF LABOR, LICENSING, AND REGULATION, DIVISION OF UNEMPLOYMENT INSURANCE AND DIVISION OF LABOR AND INDUSTRY

This Agreement is made and entered into by and between The United States Department of Labor's Wage and Hour Division (hereinafter referred to as "WHD" or "Department") and the Maryland Department of Labor, Licensing, and Regulation, Division of Unemployment Insurance, and the Maryland Department of Labor, Licensing, and Regulation, Division of Labor and Industry, (hereinafter referred to collectively as "DLLR"), together collectively referred to as "the agencies" or "the parties".

With the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting coordinated investigations and sharing information consistent with applicable law, the parties agree to enter into this partnership.

THEREFORE, IT IS MUTUALLY AGREED THAT:

Purpose

The agencies recognize the value of establishing a collaborative relationship to promote compliance with laws of common concern in the State of Maryland. The agencies are forming this partnership to more effectively and efficiently communicate and cooperate on areas of common interest, including sharing training materials, providing employers and employees with compliance assistance information, conducting coordinated investigations, and sharing information as appropriate.

Agency Responsibilities

WHD is responsible for administering and enforcing a wide range of labor laws, including the Fair Labor Standards Act, the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, worker protections provided in several temporary visa programs, and the prevailing wage requirements of the Davis-Bacon and Related Acts and the Service Contract Act. Nothing in this agreement limits the WHD's enforcement of these and other statutes.

DLLR is a Maryland agency responsible for administering and enforcing a wide range of laws, including laws regulating labor and unemployment insurance. Within DLLR, the Division of Labor and Industry is responsible for enforcing Maryland's labor laws, including laws governing employment standards, prevailing wage, living wage, and safety inspection. The Division of Unemployment Insurance is responsible for administering Maryland's Unemployment Insurance

Program, including managing employer contributions and the payment of unemployment insurance benefits.

Contacts

- The agencies will designate a contact person responsible for coordinating the partnership activities.
- The agencies will designate a representative to meet annually to review areas of mutual concern and the terms and conditions of the partnership.

Enforcement

Where appropriate and to the extent allowable under law,

- The agencies may conduct coordinated investigations periodically in the State of Maryland, if opportunity provides.
- The agencies will coordinate their respective enforcement activities and assist each other with enforcement, as appropriate.
- The agencies will make referrals of potential violations of each other's statutes, as appropriate.

Effect of Agreement

- This agreement does not authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligation.

- By entering into this partnership, the agencies do not imply an endorsement or promotion by either party of the policies, programs, or services of the other.

- Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions.

- This agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or be binding upon the parties. This agreement is not intended to confer any right upon any private person or other third party.

- Nothing in this agreement will be interpreted as limiting, superseding, or otherwise affecting the parties' normal operations. This agreement also does not limit or restrict the parties from participating in similar activities or arrangements with other entities.

- This agreement will be executed in full compliance with the Privacy Act of 1974, and any other applicable federal and Maryland state laws.

Exchange of Information

- It is the policy of WHD to cooperate with other government agencies to the fullest extent possible under the law, subject to the general limitation that any such cooperation must be consistent with the WHD's own statutory obligations and enforcement efforts. It is WHD's view that an exchange of information in cases in which both entities are proceeding on basically the same matter is to our mutual benefit. There is a need for WHD to provide information to other law enforcement bodies without making a public disclosure.
- Exchange of such information pursuant to this agreement is not a public disclosure under the Freedom of Information Act, 5 U.S.C. § 552.
- When confidential information is exchanged it shall be used and accessed only for the limited purposes of carrying out activities pursuant to this agreement as described herein. The information shall not be duplicated or redisclosed without the written authority of the other party.
- Confidential information may be accessible only to those agents and/or employees of the recipient who require the data in the official performance of their job duties. All data will be kept in the strictest confidence and will be made available to the receiving agency's staff on a "need-to-know" basis. The parties shall instruct all such authorized individuals about the confidentiality requirements under both applicable state and federal law and the Partnership Agreement itself, and about the potential sanctions for unauthorized use, browsing, or disclosure of confidential information.
- Confidential information means information that may be exempt from disclosure to the public or other unauthorized persons under state and federal statutes. Confidential information includes: the identities of persons who have given information to the parties in confidence or under circumstances in which confidentiality can be implied; any employee statements in WHD's enforcement files that were obtained under these conditions; internal opinions and recommendations of federal or state personnel, including (but not limited to) investigators and supervisors; information or records covered by the attorney-client privilege and the attorney work-product privilege; personal information on living persons; individually identifiable health information; and confidential business information and trade secrets.
- In the event that there is a public proceeding, such as a trial, in which confidential information may be used or testimony of WHD's employees sought, the WHD requires that DLLR notify WHD.
- Confidential unemployment information means any confidential information maintained by the Maryland Department of Labor, Licensing and Regulation, Division of Unemployment Insurance that is required to be kept confidential under 20 C.F.R. 603.4 or its successor law or regulation, regardless of the form in which it is disclosed (paper or electronic).
- In addition to the requirements above, confidential unemployment compensation information may be exchanged or redisclosed only subject to the confidentiality requirements of 20 C.F.R. 603.4, Md. Labor and Employment Code § 8-625, and any other applicable laws. See Appendix A.

Subject to the foregoing constraints:

- The agencies agree to exchange information on laws and regulations of common concern to the agencies, to the extent practicable.
- The agencies will establish a methodology for exchanging investigative leads, complaints, and referrals of possible violations, to the extent allowable by law and policy.
- The agencies will exchange information (statistical data) on the incidence of violations in specific industries and geographic areas, if possible.

Outreach and Education

- When appropriate and feasible, the agencies agree to coordinate, conduct joint outreach presentations, and prepare and distribute publications of common concern for the regulated community.

- The agencies agree to provide a hyperlink on each agency's website linking users directly to the outreach materials in areas of mutual jurisdiction and concern.

- The agencies agree to jointly disseminate outreach materials to the regulated community when appropriate.

- All materials bearing the United States Department of Labor ("DOL") or WHD name, logo, or seal must be approved in advance by DOL.

Resolution of Disagreements

- Disputes arising under this Agreement will be resolved informally by discussions between Agency Points of Contact, or other officials designated by each agency.

Period of Agreement

- This agreement becomes effective upon the signing of both parties, and will expire 3 years from the effective date. This agreement may be modified in writing by mutual consent of both agencies. The agreement may be cancelled by either party by giving thirty (30) days advance written notice prior to the date of cancellation. Renewal of the agreement may be accomplished by written agreement of the parties.

This agreement is effective as of the 19th day of September, 2011.

United States Department of Labor
Wage and Hour Division

By: _____
Nancy J. Leppink
Deputy Administrator

Maryland Department of Labor, Licensing, and Regulation
Division of Labor and Industry

By: _____
Julie Squire
Assistant Secretary for Unemployment Insurance

Maryland Department of Labor, Licensing, and Regulation
Division of Labor and Industry

By: _____
J. Ronald DeJuliis
Commissioner of Labor and Industry

Appendix A

Confidential unemployment information may only be exchanged subject to the following safeguards:

- Only confidential unemployment information relating to misclassification of employees as independent contractors will be disclosed, and this disclosure will be made only to authorized individuals.
- Parties to this Agreement shall: (1) instruct all personnel having access to the confidential unemployment information about confidentiality requirements and the sanctions for unauthorized disclosure, (2) sign an acknowledgement that all personnel having access to the confidential unemployment information have been so instructed, (3) maintain a system sufficient to allow an audit of compliance with the requirements of this Agreement with respect to confidential unemployment information and (4) allow with reasonable notice on-site inspections of its systems for storing confidential unemployment information by the party providing the confidential unemployment information, under terms and conditions agreed upon by the parties.
- Confidential unemployment information shall be stored in a place physically secure from access by unauthorized persons.
- Confidential unemployment information maintained in electronic format must be stored so that unauthorized persons cannot obtain the information by any means.
- Confidential unemployment information shall be returned to the agency providing the information or destroyed according to standard procedures when no longer needed for the purposes of this Agreement or upon termination of this Agreement.
- All parties should be notified of any breach of security or system changes (hardware or software).
- If a recipient of confidential unemployment information fails to comply with any provision of this Agreement, the providing party must, in accordance with 20 C.F.R. 603.10(c), suspend the agreement, and not make further disclosure until the agency providing the information is satisfied that corrective action has been taken and there will be no further breach. In the absence of prompt and satisfactory corrective action, the agency providing the information will cancel the Agreement, the receiving agency will surrender all confidential information (and copies thereof) obtained under the Agreement and any other information relevant to the Agreement.
- In the event that either party determines that the agreement has been breached, that party may, in addition to suspending this Agreement, undertake any other action under State or Federal law to enforce the agreement, secure satisfactory corrective action or return of the information, and subject the receiving party to penalties provided by Federal or State law for unauthorized disclosure of confidential information. In addition, that party may take other remedial actions permitted under State or Federal law, including seeking damages, penalties, and

restitution as permitted under such law for any charges to granted funds and all costs incurred by the party in pursuing the breach of the Agreement and the enforcement required by Federal regulation.

- To the extent practicable, the receiving party shall mitigate any harmful effect on individuals whose information was accessed or disclosed in an incident that the receiving party was responsible for.
- The parties will adhere to any subsequent federal and state guidelines on handling data, as agreed, when particular data is exchanged.