

February 12, 2019

The Honorable Larry Hogan  
Governor of Maryland  
State House  
100 State Circle  
Annapolis, MD 21401

The Honorable Boyd Rutherford  
Lieutenant Governor  
100 State Circle  
Annapolis, MD 21401

Re: Joint Enforcement Task Force on Workplace Fraud  
2018 Annual Report (MSAR #9404)

Dear Governor Hogan and Lieutenant Governor Rutherford:

The State of Maryland has long recognized that the misclassification of employees as independent contractors deprives workers of wages and benefits to which they are entitled to under the law and puts businesses who comply with the law at a competitive disadvantage. As a result, Maryland enacted the Workplace Fraud Act in 2009 in order to combat the misclassification of employees in the construction and landscaping industries.

On July 14, 2009, Governor Martin O'Malley signed Executive Order No. 01.01.2009.09, creating a Joint Enforcement Task Force on Workplace Fraud. The purpose of the Task Force was to allow interagency cooperation, information sharing, and joint enforcement actions in the case of serious violators.

The Task Force includes the following individuals or their designees: the Secretary of Labor, Licensing and Regulation; the Attorney General; the Comptroller; the Chair of the Workers' Compensation Commission; the Insurance Commissioner; the Commissioner of Labor and Industry; and the Assistant Secretary for the Division of Unemployment Insurance.

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The Executive Order that established the Task Force also requires the Task Force to submit an annual report to the Governor. Accordingly, we are submitting this report for your consideration.

Best regards,



James Rzepkowski  
Acting Secretary

Attachment

## TASK FORCE MEMBER REPORTS

### I. Department of Labor, Licensing and Regulation

#### A. Division of Labor and Industry

The Division of Labor and Industry administers the enforcement of laws that protect the rights of workers. These include laws pertaining to the payment of wages, the employment of minors, the payment of prevailing and living wages under certain State contracts, occupational safety and health laws, as well as Maryland's Workplace Fraud Act. The Worker Classification Protection Unit (WCPU) within the Division of Labor and Industry is specifically tasked with the responsibility of enforcing the Workplace Fraud Act.

In order to combat misclassification under the Workplace Fraud Act, the WCPU participates in a variety of outreach events for businesses and workers in the construction and landscaping industry. These include educational workshops and guidance conferences as well as trade shows and other industry and organization sponsored events. The WCPU also investigates reports of misclassification in the construction and landscaping industries which it receives from workers and other interested parties, as well as from other units of State government. In addition to the complaint and referral driven investigations, the WCPU conducts random investigations at work sites throughout the State.

The data below represents the activity of the WCPU in 2018.

<b>Worker Classification Protection Unit</b>	<b>2018</b>
Number of Outreach Events	40
Number of Persons Participating in Outreach Events	805
Number of Guidance Conferences/Consultations	19
Number of Misclassification Reports Received	47
Number of Misclassification Reports Referred to the Task Force	16
Number of Misclassification Reports Referred to UI	46
Number of Cases Open as of January 1, 2018	158
Number of Cases Opened January 1 – December 31	254
Number of Cases Closed January 1 – December 31	214
Number of Citations Issued for Misclassification	30
Number of Penalties Issued for Non-Response	61
Amount of Penalties Collected for Misclassification	\$16,903
Amount of Penalties Collected for Non-Response	\$3,600

## **B. Division of Unemployment Insurance**

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

For decades, USDOL has mandated that the Division of Unemployment Insurance conduct audits of Maryland businesses to encourage compliance. This was true long before the passage of the Workplace Fraud Act 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 review of whether employees were misclassified as independent contractors. However, in 2009, again unrelated to Maryland law, USDOL changed its audit mandate, and 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.

In 2017, the tax paying employers in the State of Maryland increased to 143,700 and the reported gross wages increased accordingly. Conversely, the USDOL's funding of state unemployment insurance program declined, leaving the State with fewer auditors to cover Maryland's employing community. The Division recruited ten (10) auditors in the fourth quarter of 2017, which contributed to the increased raw numbers of audit results in 2018, in terms of total completed audits, under-reported taxable wages, unreported tax and new workers discovered. In 2018, the Division enhanced its strategic audit assignment selection method alongside the improved tax audit system to ensure continued audit effectiveness and quality results, which are on target to meet and exceed the USDOL measures. In an effort to foster the business climate in the State, the Division sponsored a bill which was enacted as Maryland UI Code Section 8-604 effective October 1, 2017. The new law provides businesses with more time and additional level of appeal to the Lower Appeals Division to pursue protests of audit findings. We continue to educate Maryland's employers on the UI Law of covered employment in an effort to improve their compliance and provide excellent customer service.

The Division of Unemployment Insurance has a proven history of quality audit results. In 2014, Maryland also scored the second highest in the nation in the minimum measurement scores, has the highest effective audit measure of the states that passed, and is the only state in the region (Region 2 includes Delaware, District of Columbia, Pennsylvania, Virginia and West Virginia) to receive a passing grade. USDOL encouraged the efforts of the Division in combating misclassification of workers by awarding Maryland with a "High Performance Bonus" of \$400,099 in 2014, one of four states in the nation to receive the "High Performance Bonus" that year. In addition, USDOL rated Maryland the "Highest Performing State." USDOL's high rating is an indication of the quality and effectiveness of the Maryland Division of Unemployment's

audit program which ensures that Maryland employers are in compliance with the Maryland UI law and report covered workers.

<b>Year</b>	<b>Total DOL Mandated Audits</b>	<b>Total Completed Audits</b>	<b>Data Driven DOL Audits</b>	<b>Total Workers Found in Completed Audits</b>	<b>Taxable Wages Unreported</b>
2009	1,399	2,810	1,617	10,265	\$59,227,749
2010	1,339	2,675	1,657	10,951	\$53,376,239
2011	1,343	2,086	1,519	12,715	\$58,074,178
2012	1,339	1,769	1,569	11,899	\$58,097,828
2013	1,348	2,270	1,182	9,223	\$39,396,299
2014	1,364	2,212	1,659	7,811	\$31,273,346
2015	1,366	1,921	1,829	9,141	\$46,598,991
2016	1,402	1,684	1,645	7,584	\$36,259,922
2017	1,423	1,618	1,586	6,853	\$35,262,825
2018	1,437	2,124	2,046	9,344	\$42,806,603

### **A. Workplace Fraud Act Audits**

Since 2009, UI auditors have also worked in the context of the Workplace Fraud Act. UI auditors conduct workplace fraud audits following receipt of complaints from the general public, DLLR inter-office referrals, and due to information sharing from the Joint Enforcement Task Force and other taxing authorities related to suspected workplace fraud. In collaboration with Task Force member agencies, 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 benefit claims resulting from workers misclassified as independent contractors. Following is information resulting from those audits from the last ten years:

<b>Year</b>	<b>UI Participation in Workplace Fraud Audits &amp; Joint</b>	<b>New Workers Discovered</b>	<b>Unreported Taxable Wages</b>	<b>Unreported Tax to Trust Fund</b>
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	<b>Audits</b>			
2009	2	187	\$1,030,791	\$17,805
2010	22	1,094	\$5,994,629	\$347,083
2011	52	1,897	\$10,092,230	\$253,864
2012	24	304	\$1,718,513	\$99,710
2013	14	542	\$4,303,886	\$140,092
2014	65	1,547	\$6,834,763	\$283,975
2015	81	1,716	\$11,634,998	\$292,740
2016	47	1,718	\$8,381,760	\$353,774
2017	45	631	\$3,581,080	\$119,897
2018	51	1,197	\$8,230,192	\$149,668

## **B. Penalties**

The Workplace Fraud Act provides penalties for knowingly violating the law. However, no employer in Maryland has been charged with penalties under the UI audit program. Penalties may be assessed by the Division of Labor and Industry in connection with citations issued by the Commissioner of Labor and Industry.

## **II. 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 misclassification of employees, including: assisting in the drafting of the statute itself, 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 Task Force member agencies. The Office of the Attorney General also represents the State in all litigation related to the enforcement of the Workplace Fraud Act.

## **III. Comptroller**

During 2018, the Comptroller's audit staff was unable to complete a joint audit as part of the Work Place Fraud Task Force for Withholding Taxes. In 2018, the Comptroller's Office conducted twenty-five (25) Withholding Tax audits and issued assessments in the amount of \$2,716,588.87.

Also during this past calendar year, the Comptroller's Office has been able to indirectly derive a benefit from the complaints and referrals that are shared among the agencies via the Work Place Fraud Share Point Web Application. Many of these complaints and

referrals led to additional revenue generated across the tax types the Comptroller administers.

#### **IV. Workers' Compensation Commission**

The goal of the Workers' Compensation Commission Employer Compliance Program is to enforce compliance with the requirement that employers secure workers' compensation insurance for covered employees, thereby protecting Maryland workers and reducing the cost associated with workers' compensation for all stakeholders. In 2018, the Commission investigated those employers whose workers' compensation insurance policies had lapsed and/or cancelled without corresponding new coverage. In addition, the Commission reviewed information provided from the public regarding potentially non-insured employers.

#### **V. Insurance Administration**

The Maryland Insurance Administration (MIA) regulates licensed insurance carriers in Maryland, including workers' compensation carriers. The MIA does not regulate employers. Accordingly, the MIA has no statutory authority to enforce violations of workers' compensation insurance laws under the Workplace Fraud Act by employers who misclassify employees as independent contractors. Pursuant to the Task Force's Memorandum of Understanding, MIA may share information on companies not properly classifying their workers with the Workers' Compensation Commission, the Division of Unemployment Insurance, and the Comptroller.

Under the Maryland Code, MIA may investigate and prosecute fraudulent insurance acts, including the making of false or fraudulent statements or representations in or with reference to an application for insurance, including the misclassification of employees or under-reporting of payroll (premium avoidance fraud). See Md. Code Ann., Insurance, § 27-406 and § 27-803.

### **ADMINISTRATIVE AND LEGAL BARRIERS**

#### **I. Data Sharing Restrictions**

Although Task Force member agencies are permitted to share data among themselves, and do, in fact, maintain open communications among the members, the degree to which members can share data is restricted by both state and federal privacy and confidentiality laws and regulations. All Task Force member agencies are committed to protecting the privacy and confidentiality of business and individual tax and other records.

## **II. Different Legal Tests for Different Purposes**

For purposes of the Workplace Fraud Act as well as Maryland's Unemployment Insurance laws, the Division of Labor and Industry's Worker Classification Protection Unit and the Division of Unemployment Insurance apply what is referred to as the "A-B-C Test" to determine whether an individual is an employee or an independent contractor. For purposes of Maryland's wage and hour laws the Division of Labor and Industry's Employment Standards Service unit applies what is known as the "Economic Realities Test." This is the same test utilized by the U.S. Department of Labor for purposes of the federal Fair Labor Standards Act. For purposes of Maryland's income tax withholding and Workers' Compensation laws, the Comptroller and the Workers' Compensation Commission apply what is referred to as the "Common Law Test." This is the same test utilized by the Internal Revenue Service for purposes of federal income tax withholding, Social Security and Medicare taxes, and federal unemployment tax.

While all three tests share some common elements, the tests are not identical and may be interpreted differently by different state or federal agencies and courts. As a result, different agencies may come to different conclusions regarding a worker's status for different statutory purposes. Task Force members are cognizant of this possibility and are prepared to assist employers to insure that they are able to comply with the laws of each state agency.

## **III. Proposed Administrative, Legislative or Regulatory Changes**

The Task Force members have no proposed administrative, legislative or regulatory changes that would reduce or eliminate any barriers to the Task Force's operations or enhance the investigation, enforcement and prevention of misclassification at this time.

## **IV. Strategies for Preventing Misclassification**

In 2016 at the direction of then Secretary of Labor, Licensing and Regulation, Kelly Schulz, the Division of Labor and Industry initiated a comprehensive outreach program throughout the State. The purpose of this program is to educate businesses as well as workers, so they may better understand the law, and improve voluntary compliance with the Workplace Fraud Act as well as other wage and hour, labor, and employment laws. In 2018, the Division of Labor and Industry's Employment Standards Service, Worker Classification Protection, and Prevailing Wage Units conducted 40 outreach events covering worker classification law, wage and hour laws, and prevailing wage laws. These outreach events were held in various locations throughout the State for the convenience of businesses and individuals in all parts of the State. Response to these outreach events has been overwhelmingly positive, with approximately 805 attendees in 2018. The Division of Labor and Industry has partnered with the community colleges in Anne Arundel County, Baltimore County, and Montgomery County to continue this educational campaign in 2019. Individuals who attend these educational outreach programs held in conjunction with the community colleges will be eligible to receive Continuing Education Unit (CEU) credits from the colleges. In addition, attendees may

also earn up to two professional development credits toward SHRM-CP and SHRM-SCP recertification from the Society for Human Resource Management. The Division of Labor and Industry intends to continue offering educational workshops in other venues throughout the state in 2019 to insure that employers and workers in all areas of the State are armed with the latest information regarding worker classification and compliance with Maryland's labor and employment laws.