

JOINT ENFORCEMENT TASK FORCE ON WORKPLACE FRAUD
2020 Annual Report

Executive Order 01.01.2009.09

Maryland Department of Labor

September 23, 2021

[insert date]

The Honorable Larry Hogan
Governor
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
2020 Annual Report

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; 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.

The Honorable Larry Hogan, Governor
The Honorable Boyd Rutherford
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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,

Tiffany Robinson
Secretary

TASK FORCE MEMBER REPORTS

I. Department of Labor

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 2020.

Worker Classification Protection Unit	2020
Number of Outreach Events	6
Number of Persons Participating in Outreach Events	156
Number of Guidance Conferences/Consultations	0
Number of Misclassification Reports Received	7
Number of Misclassification Reports Referred to the Task Force	
Number of Misclassification Reports Referred to UI	5
Number of Cases Open as of January 1, 2020	171
Number of Cases Opened January 1 – December 31	43
Number of Cases Closed January 1 – December 31	14
Number of Citations Issued for Misclassification	0
Number of Penalties Issued for Non-Response	5
Amount of Penalties Collected for Misclassification	\$0.00
Amount of Penalties Collected for Non-Response	\$0.00

B. Division of Unemployment Insurance

Worker Misclassification Database

In 2012, the Department of Labor's Office of Information Technology (OIT) worked with the Unemployment Insurance 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 purpose was to create a database that would be web based and enable all taskforce agencies to view its data. It would 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 would be identified more quickly.

In 2013, the Department of Labor's Office of Information Technology developed the database in partnership with Task Force member agencies. The Worker Misclassification Database allows member agencies to collaborate on investigations, share information, and track misclassification trends. In addition, the web-based database facilitates 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. The database also made it easier for agencies to submit cases to member agencies for review. In 2020, 5 cases were entered into the database. However, COVID-19 pandemic resulted in the closing of State offices and teleworking by the field auditors during most part of the calendar year 2020, which prevented the completion of any joint investigation of the cases. From the last six years since 2015, 92 cases were entered into the database, 12 joint investigations were opened and 6 joint investigations were concluded; and they resulted in 198 misclassified workers discovered, \$923,671.36 unreported taxable wages, and \$35,720.47 additional tax revenue to the Unemployment Insurance Trust Fund.

2. DIVISION OF UNEMPLOYMENT INSURANCE

The Division of Unemployment Insurance (DUI) within the Department of Labor 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.

A. U.S. Department of Labor mandated audits

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 2019, the tax paying employers in the State of Maryland increased to one hundred and forty-five thousand, nine hundred thirty-seven (145,937) and the state’s reported gross wages increased exponentially to \$120.6 billion. Conversely, the USDOL funding of state unemployment insurance program declined tremendously leaving the State with fewer auditors to cover Maryland’s employing community. In 2020, the Division continued to implement strategic audit assignment selection method alongside the improved tax audit system to ensure continued audit effectiveness and quality results. The Division was on target to meet and exceed the USDOL measures as of March 31, 2020, but unfortunately, the COVID-19 pandemic negatively impacted the field audit effort tremendously. The pandemic business climate did not permit the field auditors to perform their audit assignments at full capacity, and the field auditors were temporarily reassigned to processing special federal Pandemic Unemployment Assistance claims. Even USDOL recognized the difficulty in conducting audits during the initial COVID-19 pandemic environment and suspended field audit assignments from March 15 through July 31, 2020; field audit assignments were resumed on Monday, August 3, 2020 but with much lower performance capacity because of the pandemic era. The audit assignments continue to be performed remotely in order to prevent the spread of the COVID-19 virus. The field auditors continue to be partially utilized to process the unprecedented volume of the federal Pandemic Unemployment Assistance claims. Also, we continue to educate Maryland employers on the UI Law of covered employment in an effort to improve their compliance and provide excellent customer service.

Maryland Department of Labor’s DUI 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 our 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.

Year	Total DOL Mandated Audits	Total Completed Audits	Data Driven DOL Audits	Total Workers Found in Completed Audits	Taxable Wages Unreported
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
2019	1,448	1,662	1,391	9,462	\$52,235,733
2020	1,460	703	464	4,406	\$30,297,599

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, Department of Labor’s 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. Directly below is information resulting from those audits from the last eleven 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	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

2019	35	1,579	\$11,925,621	\$336,402
2020*	6	18	\$98,800	\$4,986

* For 2020, the Workplace Fraud Audits and Joint Audits results were generally from January 1 to March 15 before COVID-19 outbreak and the Governor’s Executive Order for State of Emergency.

A. 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.

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 MDLabor 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 the 2020 calendar year, the Comptroller’s Audit staff did not completed any joint audits as part of the Workplace Fraud Task Force due to the Covid-19 Pandemic and resulting State of Emergency issued by Governor Hogan. The Comptroller continues to use the joint program to discover new revenues for Withholding Taxes and widen the scope of investigating workplace fraud.

There was one audit completed in 2020 from a referral from the DLLR. This audit resulted in a Withholding Tax Assessment in the amount of \$41,160. Currently, there are two Withholding Tax Audits in progress resulting from referrals from the DLLR for possible misclassification of workers. In the abbreviated 2020 audit schedule, the Comptroller’s office conducted seven (7) Withholding Tax audits and issued assessments in the amount of \$ 87,361.84.

The Comptroller’s Office also indirectly derives a benefit from the complaints and referrals that are shared among agencies via the Workplace Fraud Share Point Web Application. Many of these complaints and referrals lead to additional revenue generated across other tax types that the Comptroller administers.

IV. Workers' Compensation Commission

The goal of the Maryland Workers' Compensation Commission (the "Commission") Employer Compliance Program is to enforce compliance with the requirement that employers secure compensation for covered employees, thereby protecting Maryland workers and reducing the cost associated with workers' compensation for all stakeholders. In 2020, the Commission continued to work with those employers whose workers' compensation insurance policies had lapsed and/or cancelled without corresponding new coverage and held hearings to determine if additional action was required. The Commission continues its work to enforce the workers' compensation law of Maryland.

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 "ABC 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 2020, the Division of Labor and Industry's Worker Classification Protection Unit conducted 4 outreach events covering the worker classification law. These outreach events were held virtually for the convenience of businesses and individuals in all parts of the State. Response to these outreach events has been overwhelmingly positive, with approximately 156 attendees in 2020. The Division of Labor and Industry intends to continue offering educational workshops in 2021 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.