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Annual Report of the Joint Enforcement Task Force on Employee Misclassification

Maine Department of Labor

Maine Joint Enforcement Task Force on Employee Misclassification

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**ANNUAL REPORT OF
THE JOINT ENFORCEMENT
TASK FORCE ON EMPLOYEE
MISCLASSIFICATION**

**TO JOHN E. BALDACCI
GOVERNOR
STATE OF MAINE**

February 25, 2010

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Introduction

The Joint Enforcement Task Force on Employee Misclassification was created by Executive Order in January, 2009. In response to concerns over the growing problem of the improper classification of workers as independent contractors rather than as employees, this Task Force was created to coordinate the investigation and enforcement of employee misclassification matters by state agencies. It was not created to interfere with or limit the legitimate use of independent contractors. The Executive Order requires this Task Force to issue an annual report summarizing the Task Force's activities during the preceding year. This report covers the Task Force's first year in existence.

The Task Force believes that combating misclassification is important to the State of Maine. The majority of Maine businesses are law-abiding and are disadvantaged when competing against businesses that artificially lower their costs by misclassifying workers. Reducing misclassification through outreach and better enforcement of the law will help to level the playing field for honest employers in the competitive marketplace.

The Task Force also believes that reducing misclassification will help Maine's workers. Misclassified workers are harmed, even if they agree or acquiesce to the misclassification. These workers may have no unemployment insurance in the event of a job loss, no workers' compensation in the event of an injury, and no employer-provided health

insurance or other employee benefits. The workers are also deprived of the protections of labor and employment laws.

Finally, the Task Force believes that improving enforcement of the misclassification laws will help the taxpayers of Maine. As a result of misclassification, Maine is losing substantial income tax revenue and being subjected to increased costs, thereby causing other taxpayers to pay more than their fair share.

As described in this report, while significant progress has been made during the Task Force's first year, its work has only just begun. The Task Force and its subcommittees are already working on plans for the future, with the ultimate goal of putting itself out of work. This will be established by creating sustainable, coordinated enforcement and information sharing processes within state government. At the same time, the Task Force hopes to make permanent cultural changes in the workplace.

Background and Purpose of the Task Force

Misclassification occurs when an employer hires a worker and improperly classifies the worker as an "independent contractor" rather than as an "employee". That is, misclassification occurs when employers treat workers who by law should be waged or salaried employees as independent contractors or "self-employed". As one report commissioned by the U.S. Department of Labor (U.S. DOL) put it, misclassification occurs "when workers (who should be) getting W-2 forms for income tax filing instead receive 1099-Miscellaneous Income forms." Misclassification can also occur when workers are paid in cash, "under the table" or "off the books". This

“underground” employment is usually not reported at all for tax, workers' compensation, unemployment, or other purposes. Without a paper trail, this type of misclassification is extremely challenging to find and eliminate.

When a worker meets the definition of “employee” or the work qualifies as “covered employment” but the worker is treated as an independent contractor, the worker is misclassified. The law gives employers no discretion to treat workers as independent contractors if those workers are legally employees. Employers must make unemployment contributions, obtain workers' compensation coverage, and make all payroll deductions required by state and federal law, and must comply with state and federal wage and hour, health and safety, and other employment laws.

While each employment law has its own definition of “employee” or “covered employment”, employees misclassified under one law tend to be misclassified under other laws. All tests of employment focus on whether the worker is subject to the control and supervision of the employer, regardless of whether that control is exercised or not, and whether the worker is genuinely engaged in an independent business.

Misclassification occurs at all employment levels and in many industries, although studies show that misclassification is more widespread in certain industries, such as construction, home health, and high tech. There is no typical misclassified worker: a misclassified employee can be male or female, young or old, educated or uneducated, skilled or unskilled. While some misclassification results from an honest mistake due to an employer's

misunderstanding about the law, many employers deliberately misclassify their employees in order to artificially reduce costs.¹

Harms Caused by Worker Misclassification

Impact on Workers

Employees who are misclassified as independent contractors may not be covered by the state and federal laws designed to protect workers. Such workers may lose out on workers' compensation, which protects a worker injured on the job; unemployment insurance, which protects a worker who becomes unemployed; payroll deductions to satisfy the workers' tax liabilities; and the employers' share of FICA. In addition, the workers lose out on the protections of laws like the Fair Labor Standards Act, guaranteeing minimum wage and overtime pay; laws prohibiting discrimination in the workplace; state and federal family and medical leave laws; the National Labor Relations Act, protecting workers' right to organize; and the Occupational Safety and Health Act, which requires a safe and healthy workplace. In addition, misclassified workers generally do not have access to employer-provided health insurance, retirement plans or other benefits typically offered to employees. Workers may also lose or have reduced social security benefits.

Impact on Employers

Employers that misclassify their employees undercut law-abiding employers who pay their fair share of employment-related costs. The law-

¹ See pp. 9-11 of this Report.

abiding employers face a competitive disadvantage when competing for business or bidding for jobs against employers who misclassify. These misclassifying employers have artificially low costs because they have not covered the cost of workers' compensation premiums, unemployment contributions, the employer's share of FICA, and employee benefits. Moreover, the law-abiding businesses who properly classify their employees often find themselves subsidizing costs of misclassifying businesses by paying higher workers' compensation premiums, unemployment contributions, and higher taxes than would be required if all employers paid their share.

Impact on the General Public

The general public loses through "cost shifting" when worker misclassification occurs. When a misclassified worker injured on the job receives medical care, hospitals and doctors must recoup these costs, resulting in higher healthcare costs and health insurance premiums for all. When misclassified workers become unemployed and do not receive unemployment compensation, demand for public assistance increases. Finally, the public is harmed when tax revenues not collected as a result of misclassifying employees must be made up by other taxpayers.

Impact on Government

State and federal government programs are adversely impacted by misclassification in the form of lost workers' compensation premiums, unemployment insurance contributions, and state and federal taxes. State

workers' compensation programs lose millions each year in unpaid, unreported premiums as a result of worker misclassification. For example, a 2004 Harvard Study examining misclassification in Massachusetts estimated that Massachusetts was losing approximately \$91 million each year in state workers' compensation premiums due to worker misclassification. Similarly, a 2006 Illinois Study found that \$97.9 million in workers' compensation premiums were lost in that state in 2004 due to worker misclassification, and a 2007 New York Study showed its shortfall to be \$500 million to \$1 billion annually.

State unemployment insurance trust funds also lose millions each year in unreported and unpaid state unemployment insurance contributions. The 2004 Harvard Study in Massachusetts found an annual loss of \$12.6 to \$35 million in unreported and unpaid unemployment taxes due to worker misclassification. Similarly, the 2006 Illinois Study calculated the annual loss in Illinois to be \$53.7 million.

Studies show that workers misclassified as independent contractors significantly under-report their personal income, causing state and federal governments to lose significant income tax revenues. Based on a 1989 study, the Internal Revenue Services estimated that the federal government loses between \$2.7 and \$4.2 billion annually in underpaid federal withholding tax as a result of worker misclassification. In that study, Coopers & Lybrand (now PricewaterhouseCoopers) estimated that proper classification of employees would have increased federal withholding tax receipts by \$34.7

billion over the period 1996-2004. In Massachusetts, its 2004 study conservatively estimated an annual loss of \$91 million in its state income tax.

More than half of all U.S. states have created task forces to combat the growing problem of worker misclassification. Two of the most active are here in the Northeast. New York's task force, created by Executive Order in September of 2007, has had tremendous success using joint enforcement sweeps, coordinated assignments, systematic referrals and data sharing between state agencies. Massachusetts' task force, established in March of 2008, has also been successful by coordinating enforcement actions and exchanging information. Massachusetts' task force has focused in large part on the underground economy.

The Harvard Study of the Construction Industry in Maine

In April of 2005, the Construction Policy Research Center, the Labor and Worklife Program at Harvard Law School, and the Harvard School of Public Health jointly issued a report on the misclassification of construction workers in Maine. In its report, entitled *The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry*, the cross-disciplinary team documented the dimensions of employee misclassification in Maine's construction industry and its implications for tax collection and workers' compensation insurance. Because this study relied on unemployment tax audits to develop estimates of misclassification, it primarily addressed the forms of misclassification that can be documented and therefore did not fully capture the scope of underground economy activities in construction.

The Harvard study concluded that worker misclassification in Maine is a compelling problem with significant consequences for workers, employers, insurers, and for tax revenues. The study found that the number one reason for misclassifying workers lies in avoiding payment of workers' compensation insurance premiums, followed by avoiding the costs of payroll taxes and mandated benefits. In industries such as construction, workers' compensation costs tend to be high.

The study concluded that for the period between 1999 and 2002 for the construction industry alone, the State of Maine lost between \$4.5 and \$6.5 million annually in workers' compensation premiums and \$314,319 annually in unemployment contributions. In addition, the study calculated the annual loss of income tax revenue as between \$2.6 and \$4.3 million per year. This tax loss results from the failure of misclassified workers to report 30 to 50% of their income. Applying the same methodology to these calculations that Harvard used to project lost state revenue from worker misclassification in Massachusetts, Maine DOL analysts determined that Maine could be losing between \$18 and \$36 million per year in lost income tax revenues across all industries. While these numbers are staggering by Maine standards, it is important to keep in mind that they are based upon numbers almost a decade old. Unquestionably, they would be significantly higher today.

After the study was released, the Maine Department of Labor (MDOL) reviewed unemployment audits. Whereas the Harvard study covered the period from 1999 to 2002, MDOL looked at subsequent years. It found that

the misclassification of employees occurred in 29 percent of employers audited across all industries in 2004, 39 percent in 2005, 43 percent of mostly construction employers in 2006, and 41 percent in 2007. These figures are consistent with evidence from other states that misclassification is increasing.

Maine is not only faced with decreased revenues but also with increased costs as a result of misclassification. Workers who are injured and have no workers' compensation coverage, workers who lose their jobs with no unemployment compensation, and workers with no employer-provided health insurance increase demand for public assistance and social service programs and may be a drain on the healthcare system. Child support collections are reduced in those situations, because an absent parent not willingly meeting child supports obligations may have no "wages" to attach. Without question, the misclassification of workers is an expensive problem for the workers, businesses, and taxpayers of Maine.

The Executive Order Establishing the Task Force

Recognizing the need for Maine to deal with this growing problem of misclassification, on January 14, 2009, Governor John E. Baldacci issued an Executive Order establishing the Joint Enforcement Task force on Employee Misclassification. Such task forces have proven to be effective mechanisms for coordinating and enhancing labor law enforcement in other states. Pursuant to the Executive Order, the Task Force is chaired by the Commissioner of the Department of Labor and includes representatives from the Department of Labor, including the Bureaus of Unemployment

Compensation (BUC) and Labor Standards (BLS), and the Center for Workforce Research and Information (CWRI); the Workers' Compensation Board (WCB), including the Office of Monitoring, Audit, and Enforcement; the Office of the Attorney General; the Department of Administrative and Financial Services (DAFS), including Maine Revenue Services (MRS); and the Department of Professional and Financial Regulation (P&FR), including the Bureau of Insurance .

According to the Executive Order, employee misclassification has a significant adverse impact on the residents, businesses and economy in Maine, reduces compliance with employment and safety standards depriving vulnerable workers of important protections and benefits to which they are legally entitled, gives employers who misclassify their employees an improper competitive advantage over law-abiding businesses, increases the risk of avoidance of child support, deprives the State of substantial revenues, decreases legitimate business activity, and increases demand for social services. The Executive Order stated that enforcement efforts can be enhanced and made more consistent and efficient through interagency cooperation, information sharing, and the prosecution of violators.

The Executive Order established the primary mission of the Task Force as the coordination of the investigation and enforcement of employee misclassification by state agencies. According to the Executive Order, the Task Force shall:

1. Facilitate the timely sharing of information relating to suspected employee misclassification violations between and among Task Force members to the maximum extent permitted by law;

2. Identify those industries and sectors where employee misclassification is most prevalent to help inform and focus Task Force members' investigative and enforcement resources;
3. Assess existing investigative, prevention and enforcement methods in Maine and develop and recommend strategies and measures to improve the effectiveness of these methods;
4. Facilitate the formation of joint enforcement teams where appropriate to leverage the collective investigative and enforcement capabilities of the Task Force members to combat employee misclassification;
5. Identify potential regulatory or statutory changes that would strengthen enforcement efforts, including any changes needed to resolve existing legal ambiguities or inconsistencies, as well as potential legal procedures for facilitating individual enforcement efforts;
6. Increase public awareness of the illegal nature of, and harms inflicted by, employee misclassification;
7. Work cooperatively with employers, labor and community groups to reduce the number of employee misclassifications by, among other means, disseminating educational materials regarding the legal differences between independent contractors and employees, and enhancing mechanisms for identifying and reporting potential employee misclassification; and
8. Meet with representatives of business, organized labor and community organizations, and members of the applicable legislative oversight committees to discuss the activities of the Task Force and ways to improve the effectiveness of its operation.

The Executive Order also requires the Task Force to make an annual report to describe the accomplishments of the Task Force. This document is the Task Force's first annual report.

The Task Force is made up of 20 members representing eight state agencies:

Laura Fortman, Task Force Chair and Commissioner, MDOL;
Paul Dionne, Executive Director, Workers' Compensation Board;

Janet Mills, Attorney General, Dept. of AG;
Ned McCann, Deputy Commissioner, MDOL;
Laura Boyett, Director, BUC, MDOL;
William Peabody, Director, BLS, MDOL;
John Dorrer, Director, CWRI, MDOL;
Chip Gavin, Director, Bur. General Services, DAFS;
Eric Cioppa, Deputy Director, Bur. Of Insurance, P&FR;
Steve Minkowsky, Deputy Director, Workers' Compensation Board;
John Rioux, Director Technical Services Division, BLS, MDOL;
Joyce Taylor, Asst. Director, Bur. Project Development, DOT;
Benjamin Yardley, Staff Attorney, Bur. Of Insurance, P&FR;
Elaine Corrow, Tax Analyst, Maine Revenue Services, DAFS;
Christopher Boudreau, CWRI, MDOL;
Adam Fisher, Assistant to the Commissioner, MDOL;
Lloyd Black, BUC, MDOL;
Deborah Friedman, Senior Policy Advisor, Governor's Office;
Dan Brennan, Dir. Development, Maine State Housing Authority; and
Patricia Ryan, Executive Director, Maine Human Rights Commission.

The Task Force met for the first time on February 26, 2009. At the first meeting, the Task Force received advice from Massachusetts Director of Labor George Noel, chair of Massachusetts' Joint Task Force on the Underground Economy and Employee Misclassification.

During the first several Task Force meetings, the Task Force heard presentations from the member agencies. In May the Task Force hired Julie Armstrong, a labor and employment attorney experienced in working with top management across all state agencies. Terry Hathaway from BLS provides clerical support to the Task Force.

Task Force Subcommittees

At its July meeting the Task Force established three subcommittees: Legal and Interagency Information; Targeting, Monitoring, and Enforcement; and Communications and Outreach. Agencies that enforce misclassification laws -- Bureau of Unemployment Compensation, Bureau of Labor Standards,

Workers' Compensation Board, and Maine Revenue Services -- all have representatives on each subcommittee. Other agencies are represented on the subcommittees as appropriate. The subcommittees are chaired and coordinated by the Task Force Coordinator, and all meetings are open to the public.

Communications and Outreach Subcommittee

The Communications and Outreach Subcommittee is responsible for overseeing communications, outreach, and education. The subcommittee has been seeking information in the form of comments, suggestions, ideas, feedback, and tips from interested parties and the public. At the same time, it has been providing information to the public and affected groups through education and outreach. This subcommittee has nine members, representing MDOL, WCB, MRS, and DAFS. Subcommittee members have knowledge of and experience with existing outreach channels or with public relations.

Specific responsibilities assigned to the Communications and Outreach Subcommittee are to: develop strategies to keep the public informed of Task Force activities; create a Task Force website where the public could obtain information about the Task Force and how to contact the Task Force to provide comments or suggestions or information to the Task Force or partner agencies; assess applicable existing outreach conducted by Task Force member agencies; determine how the Task Force can maximize the effectiveness of that outreach; meet with representatives of business and labor for input into the Task Force process; hold public meetings to receive input into the Task Force process from public, community based groups, and

other interested parties, and to get message out to the general public about the laws against misclassification, the work of Task Force, and the harm caused by misclassification through press releases and other means. The subcommittee also has the responsibility to determine avenues for getting the message to employers and employer representatives such as accountants, labor and employment attorneys, payroll processors, human resource groups, business groups, as well as to misclassified workers through contacts with labor unions, trade groups, community and other organizations, immigrant communities, technical high schools, community colleges and other trade schools. In addition, the subcommittee must determine whether other states have other effective communication tools Maine could replicate. The subcommittee works with other subcommittees and the full Task Force as necessary.

Targeting, Monitoring, and Enforcement Subcommittee

The Targeting, Enforcement, and Monitoring Subcommittee is charged with creating a plan for partner agencies to systematically work together to share information and enforce the laws relating to employee misclassification, including a plan to share information about audits and potential audits, develop strategies for more effective enforcement, and participate in joint enforcement efforts where appropriate. This subcommittee is also responsible for determining whether other states have successful enforcement models, and to work with other subcommittees and the full Task Force as necessary.

There are eleven members of the Targeting, Enforcement, and Monitoring Subcommittee, representing MDOL, WCB, MRS, DOT, and MSHA. All members have audit and enforcement responsibilities or knowledge for their agencies. Members have identified useful information held by other agencies, and in many cases, have already begun sharing that information. In other cases, the agencies are working together to overcome technological or legal limitations. Because the subcommittee meetings are public, specific enforcement actions, tips, and information are not discussed. The actual sharing of information and joint enforcement work occurs at newly-established regular meetings of agency enforcement supervisors.

Legal and Interagency Information Subcommittee

The Legal and Interagency Information Subcommittee is responsible for addressing legal issues arising out of the Task Force process and facilitating information sharing among Task Force agencies. There are ten members of this subcommittee, representing MDOL, WCB, MRS, and P&FR. Members have legal backgrounds, knowledge of applicable laws, or the responsibility for sharing information. This subcommittee has been working primarily on its goal of facilitating the sharing of appropriate information between partner agencies for the use in combating misclassification. The subcommittee continues to identify useful information, and, if necessary, figure out how to overcome any logistical or legal barriers to sharing.

Specific responsibilities assigned to the Legal and Interagency Information Subcommittee are to identify what information sharing exists between member agencies; identify and develop new and/or more effective

ways to share data collected by Task Force partner agencies; determine whether changes to law or policy are necessary to effectuate above information sharing, and if so, draft those changes to present to the Task Force for review; determine the extent to which the results of Task Force audits can legally be released to the public and press; evaluate the adequacy of existing statutory definitions, whether one common test should be adopted, and if so, make recommendation to the Task Force regarding such test; evaluate existing penalties for misclassification under the existing laws, determine whether those penalties are adequate, and if not, make recommendations to the Task Force as to needed changes; evaluate whether enforcement is adequate, and if it is not, determine what changes should be made; determine whether other states have more effective laws, regulations, policies, and methods; and work with other subcommittees and the full Task Force as necessary.

Task Force's First Year Accomplishments

Introduction

The work of the Task Force can essentially be divided into two broad categories: outreach and education, and enforcement. Ideally, outreach and education can dramatically reduce misclassification. By adequately disseminating information about the laws against misclassification, employers and workers will better understand how to comply with the law and the consequences of the failure to comply. The Task Force believes that once employers and workers understand the requirements of the law, most should voluntarily comply.

This subcommittee is attempting to educate and inform the public in a way that also begins to change the culture. Workers should understand when they must be treated as employees rather than as independent contractors. Businesses unknowingly misclassifying workers must be educated so that they no longer do so. Businesses that intentionally misclassify workers must understand that serious consequences will result from their refusal to comply with the law. For these employers, improved enforcement efforts are necessary.

The Task Force and its subcommittees are dismantling the silos that have traditionally existed between state agencies. The Task Force is working to create an unprecedented level of cooperation, coordination, and communications between all state agencies involved with misclassification. By doing so, enforcement of the misclassification laws can be dramatically improved even within the limited resources of the partner state agencies. The Task Force believes that during these difficult economic times, it is more important than ever to protect Maine's workers, help law-abiding businesses fairly and successfully compete, and to remove from Maine's taxpayers the burden of cost-shifting caused by misclassification.

Improved Enforcement

Improved enforcement results from better coordination between state agencies. Increased coordination with federal agencies and other states will also enhance Maine's enforcement capabilities. Partner agencies are now working together to better analyze and utilize available information in order to use their resources most effectively. In some cases, partner agencies are

rethinking how they use certain resources to maximize their effectiveness and to find additional resources as appropriate. As a result of the Task Force, state agencies are now beginning to do things never done before, such as sharing information to enable each agency to better target enforcement, sharing audit results, and working together to develop effective enforcement strategies. All information sharing is done only as allowed by law.

Because each agency doesn't have to start from scratch and duplicate the work of other agencies, greater results can be achieved. The Task Force and its subcommittees provide the opportunity to evaluate with a critical eye the way partner agencies do business, assisting each agency to figure out how to best use its resources, and how to take advantage of the resources and work products of other agencies.

The Task Force has many specific accomplishments. The Task Force has established a working group of enforcement supervisors who meet regularly, working cooperatively to share information, enforcement strategies, and work products. Prior to the Task Force, there was no regular means of sharing information, although in some instances information was passed from one agency to another. This enforcement group will continue to meet on an ongoing basis.

The Task Force has created a tip form that is now available on its website at <http://www.maine.gov/labor/misclass/tips.shtml>. The tip form can be filed electronically and will automatically be emailed to the Task Force Coordinator and to enforcement supervisors in BUC, BLS, WCB, and MRS. Tips can also be made via a tip telephone line listed on the Task Force

website, or through the U.S. mail. After being reviewed by the Task Force Coordinator and the supervisors, these tips are worked on at the next regular meeting of the enforcement supervisors. Since the form was created in November, the Task Force has received 27 tips. These are in addition to the tips partner agencies receive in the normal course of business.

Working with MDOL's Center for Workforce Research and Information, the Task Force now has a database that will track tips, agency actions taken, moneys recovered, and the number of workers found to be misclassified by each agency. The Targeting, Monitoring, and Enforcement Subcommittee is also working on a mechanism to track moneys and misclassified employees found as a result of the new cooperative efforts.

Partner agencies are now sharing useful information not shared in the past. For example, lists of employers and workers requesting predetermination of independent contractor status from the Workers' Compensation Board are now shared with BUC for analysis and review. Where audits are needed they are performed, and if misclassification is found, BUC will provide the WCB with audit reports. Prior to the Task Force, BUC did not receive this information.

BUC is now sharing its audit reports with the Workers' Compensation Board. Once it was determined that the unemployment audits would be extremely useful to the WCB, it was agreed that BUC would provide the WCB all audit and blocked claims reports where misclassification was found. These audit reports detailing findings of misclassified workers by BUC's field auditors provide an excellent source of review for workers' compensation,

because an employer misclassifying workers for unemployment purposes is likely to misclassify workers for workers' compensation purposes. In the past, the Workers' Compensation Board had access to BUC's misclassification information only as part of a larger database, and had no way of knowing what workers were found through an audit to be misclassified.

Representatives of BUC have had several meetings with representatives of the Workers' Compensation Board to discuss other ways to better share information. Some of the information the Workers' Compensation Board believes would be useful cannot be shared now due to technological limitations, but in the near future, sharing will be technologically possible. At that time, the information will be provided to the Workers' Compensation Board. The Workers' Compensation Board also learned that BUC auditors sometimes target an entire industry for audits. The Workers' Compensation Board informed BUC that it would like to be involved with these industry-wide audits, or at a minimum, have access to them.

The Workers' Compensation Board has just completed an online coverage database. This database will be an important tool in the fight against misclassification. It will enable other agencies or the public to determine whether a particular employer has workers' compensation coverage. In addition, the Workers' Compensation Board submitted legislation to clarify its ability to share certain information related to misclassification with other state agencies.

Although the coordinated enforcement and information sharing initiated by the Task Force is still in the early stages, it represents a fundamental change in the way state agencies perform their enforcement work. The Task Force believes that working together, partner agencies can use their limited resources more effectively and all achieve significantly better results than any agency could individually.

Outreach and Education

It is essential that employers and potential employers in Maine understand their obligations under the Maine law. Similarly, workers and potential workers must understand the requirements and protections of the law. If employers and workers understand the law, most will willingly comply with it. Accordingly, the Task Force has undertaken significant outreach efforts to ensure that employers and employees alike understand the laws against misclassification and the consequences of a failure to comply with the law. The Task Force already has plans to expand its outreach efforts for 2010.

The Task Force conducted three community forums around the state in order to help this Task Force better carry out its mission. These forums were designed to allow the Task Force to hear from the public, businesses, labor and community groups, and workers about how misclassification has affected them. All meetings were well attended. At the meetings, the Task Force announced that it would accept written public comments, and disseminated buck slips containing the tip form web address and tip line phone number.

Task Force Chair Laura Fortman opened each meeting with introductory remarks about the mission and work of the Task Force, and about the problem of misclassification in this state and around the country. The meetings were then opened up to the public to speak about misclassification. At these meetings, the Task Force heard from misclassified workers who described how they had been harmed by being misclassified, from labor groups who described how their members and contractors have been harmed by misclassifying businesses, and from businesses harmed by trying to compete against misclassifying businesses. A few highlights include:

- two workers told their sad story about the harms they suffered from an employer who misclassified them, and ultimately, refused to pay them even what was agreed upon. One of the workers lost his home as a result;
- one worker spoke about hospital bills he couldn't pay because he had been misclassified;
- a taxi company told us about being driven out of business by competing cab companies who misclassify their employees;
- a leader of a business association told the Task Force that the association's members know that misclassification is a problem, and that many of them have difficulty competing against the misclassifying businesses; and
- a staffing company told the Task Force it too was having trouble competing against many companies that misclassify.

A recurring theme from those who spoke at the Community Forums was that the Task Force needed to increase its education efforts in addition to increasing enforcement efforts.

The Task Force, through its Coordinator, its Communications and Outreach Subcommittee, and agency representatives, is placing a great deal of emphasis on its outreach and education campaign. The Task Force now has a misclassification website, found at <http://www.maine.gov/labor/misclass/index.shtml>. The website provides a mechanism for the public and interested parties to obtain substantive information about misclassification and to provide comments to the Task Force. The website also lists Task Force meetings and subcommittee meetings, contains background information such as the Executive Order and the Harvard Study, and provides links to partner agencies.

The Education and Outreach subcommittee has created a misclassification pamphlet to be widely disseminated, and has worked on updating required labor posters to include information about misclassification. It has also agreed that misclassification information will be inserted into first quarter unemployment tax notices sent to all Maine employers. Misclassification pamphlets will also be displayed in public offices of the Maine Revenue Services. The Communications and Outreach subcommittee will work with the Bureau of Employment Services in MDOL to communicate with job seekers and employers about misclassification.

The Task Force is excited about partnering with the Department of Education to provide misclassification awareness training to students receiving a career and technical education. In addition, such awareness training will be provided to students at the Community Colleges. The Task Force believes that this is a significant step in reaching potential workers,

especially those who may plan to enter into career fields with high misclassification rates.

The Task Force has sought out all possible opportunities for one or more of its representatives to speak about misclassification to the public, to employers, employer groups, employer representatives, workers, labor groups, and community organizations. Examples of public speaking engagements at which representatives of the Task Force have made presentations or conducted training about worker misclassification are:

- the Maine Tax Forum, a training program organized by Maine Revenue Services, attended by several hundred tax professionals;
- the Maine Employment Tax Seminar, also organized by Maine Revenue Services, attended by several hundred payroll and human resources professionals;
- meetings of trades councils and labor groups;
- the annual convention of the Maine AFL-CIO; and
- a large law firm's monthly meeting of their employer client group.

In addition, one or more Task Force representatives have met with various trades' representatives, a workers' compensation insurance company, various community groups, and all state agencies that have any connection to misclassification or deal with workers or employers. Representatives have also met with businesses expressing an interest in the misclassification problem. In furtherance of the Task Force's goal to disseminate information as widely as possible, any group interested in having a misclassification informational presentation should contact the Task Force to arrange one.

The Task Force heard, at the forums and elsewhere, of the importance of publicizing the efforts of the Task Force and its partner agencies in enforcing the law. Accordingly, for 2010, the Task Force, primarily through the Education and Outreach Subcommittee, will seek to reach substantially more people with its informational campaign. Subject to confidentiality constraints, the Task Force will seek publicity about successful enforcement efforts. Cases that go to court will be publicized, especially cases against chronic offenders. Other enforcement actions will be publicized without identifying information to the extent allowed by law. The Task Force will also release statistics about enforcement efforts and results on a regular basis.

In addition, staff of partner agencies should take advantage of all opportunities to speak to the public or to targeted groups. Field workers such as the field auditors in BUC will be even more proactive and emphasize the education and advisory components of their work, speaking to professional groups and business associations. Similarly, wage and hour inspectors and workers' compensation auditors should take advantage of speaking and public outreach opportunities whenever possible.

Unquestionably, informing and educating the public about how to comply with the law is critical in combating misclassification. The subcommittee will continue to analyze how to better reach all employers, workers, and future workers, and take whatever actions it can to further that goal.

Working with Other States

Maine's Task Force on Employee Misclassification has developed working relationships with task forces from other states. In October, Task Force Chairperson Laura Fortman and two other Task Force members attended the first-ever Northeast Regional Summit of State Misclassification Task Forces. In attendance were representatives of nine Northeast states: Maine, Massachusetts, New York, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, and Maryland. Task force members shared information, heard about the successes and missteps of other states, and learned strategies to improve task force effectiveness. Many of these states created a task force much earlier than did Maine.

The summit was only the beginning of state misclassification task forces working together. Our Task Force Coordinator has met with counterparts from Massachusetts and New York, and routinely communicates with them and task force representatives from other states. In addition, just this week task force representatives from the Northeast states began participating in regular monthly conference telephone calls to continue to share information. In addition to learning enforcement strategies and techniques from each other, the task forces hope to eventually be able to share substantive enforcement information. These relationships will prove to be extremely valuable as states deal with multistate misclassifying employers.

Activity on the National Level

In addition to the increased enforcement efforts against misclassification on the state level, there has been significant activity on misclassification on the national level. In August, the Government Accountability Office (GAO) issued a voluminous report to Congress urging better cooperation and coordination among state and federal agencies in addressing employee misclassification. Specifically, the GAO recommended a joint interagency effort to address the misclassification problem. That effort would involve the IRS and the U.S. DOL, as well as internal agencies within the U.S. DOL. The GAO also recommended that the Wage and Hour Division (WHD) increase its focus on the misclassification of employees, that OSHA and WHD share misclassification information with each other and with state agencies, and finally that U.S. DOL collaborate with the IRS to offer outreach and education to workers.

According to some reports, the IRS has already added 200 new employment tax auditors and will conduct 6,000 audits focused on employment tax issues over the next three years. The audits will not be limited to large companies.

The Questionable Employment Tax Practices Program created in 2007 allows the IRS and state workforce agencies to share and exchange employment tax information. Maine DOL participates in this program, which is a valuable source of leads on misclassification cases.

Recently, the National Council of Insurance Legislators (NCOIL) unanimously approved a Construction Industry Workers' Compensation

Coverage Model Act for states to consider adopting. The model targets construction employee misclassification through transparency, disclosure, and accountability. The model would mandate workers' compensation with the exception of sole proprietors on residential projects, and homeowners, and would hold primary contractors liable. The model also establishes auditing procedures, penalties for insurance fraud, and enhanced state enforcement authority. In 2010, NCOIL will also examine the use of independent contractors in the trucking industry.

Most recently, the Obama administration has sent strong signals that curbing misclassification is a priority. As part of the 2011 Budget, the Departments of Labor and Treasury are pursuing a joint proposal that they say would eliminate incentives in law for employers to misclassify their employees, enhance the ability of both agencies to penalize employers who misclassify, and restore protections to employees who have been denied them because of their improper classification. It is estimated that this proposal to crack down on misclassification would increase Treasury receipts by more than \$7 billion over 10 years. The 2011 budget includes an additional \$25 million to target misclassification with 100 additional enforcement personnel and to create competitive grants to boost States' incentives and capacity to address this problem.

The time has come for the tide to turn on misclassification. Working to eliminate misclassification is now a priority for the federal government, most states, and for the State of Maine.

New Task Force Recommendations

Over the course of 2009, this Task Force has already taken significant action to combat misclassification. Those actions are detailed above in this report. As the Task Force looks ahead to its second year, it has voted to take the following actions:²

- Establish a pilot program for BUC field auditors to apply the new 12 part workers' compensation test for employment at the same time they apply to ABC test to evaluate whether that test would yield different results from the ABC test, and if so, how. After the Workers' Compensation Board has gained experience applying this test to the construction industry, and BUC auditors have had experience applying the test, the Task Force can consider the issue of the appropriate legal standard of employment for misclassification purposes. This pilot project is already underway.
- Conduct more community forums in places where they have not yet been held in order to keep the Task Force's momentum going, keep the public informed, and continue to learn more about how misclassification affects Maine's workers and businesses.
- Support L.D. 1565, which would give stop work order authority to the Executive Director of the Workers' Compensation Board. The Task Force recommended that if L.D. 1565 is passed, the Workers' Compensation Board should ensure by rules and regulations that the stop work order power is not used in a way that would create a safety problem, such as issuing a stop work order against a flagging company on a DOT construction site without notice to DOT. Based upon this recommendation, the Task Force Coordinator presented testimony and information in favor of the bill before the Labor Committee.
- Through the Communications and Outreach Subcommittee, continue to expand outreach efforts, including working with and speaking to community groups. It should also seek more press coverage. A press release should be issued very soon about

² Task Force members did not receive advance notice of the specific recommendations to be voted on prior to the meeting. The vote was not unanimous due to the absence of some members.

the tip line and tip form, since they and the database are up and running.

- Meet with the Bureau of General Services in DAFS to put into place any procedures, training, and outreach necessary to ensure compliance with misclassification laws. The Task Force believes that the State must take all necessary action to ensure that State money is not used to support misclassification.
- Encourage Maine Revenue Services to partner with the other Task Force partner agencies beginning in the fall of 2010. MRS should meet with representatives of MDOL and the Task Force in the summer to work out a plan to be implemented in the fall. Areas for partnership include misclassification awareness training for MRS auditors, MRS sharing potential misclassification information with MDOL, and MRS implementing results of MDOL audits as appropriate.
- Create a subcommittee of representatives of the Workers' Compensation Board and the Bureau of Insurance to look at whether workers' compensation insurers should be required by law to share their misclassification audits with the Workers' Compensation Board. The information would then be shared with partner agencies. This recommendation arose from the discussion of the NCOIL Model Construction Industry Workers' Compensation Act adopted in late November. It was agreed that at this time, it would be premature for the Task Force to consider adopting this new law, given that there is not yet any experience with it in other states. The Task Force noted that model laws do not necessarily need to be adopted as is, but often states will adopt a model law with changes. In working on this issue, the subcommittee should meet with the insurance industry to hear its opinion. They should also monitor activity on the model law in other states.

Conclusion

Combating worker misclassification is important to the State of Maine. It is important to the misclassified workers, who are deprived of workers' compensation, unemployment compensation, overtime compensation, workplace safety and other legal protections, as well as the benefits normally

provided to employees like health insurance, vacation, sick leave, and paid holidays.

Combating misclassification is important to Maine's businesses. The vast majority of Maine's businesses are upstanding, law-abiding businesses. These businesses are harmed by having to compete against businesses that have lowered costs by violating the law.

Fighting misclassification is important for all the people of Maine. Especially in these difficult economic times, Maine must collect every dollar of tax revenue legitimately owed to it. Otherwise, law-abiding citizens and businesses must make up for those who are not paying their fair share.

The Task Force has taken significant steps towards creating a sustainable, coordinated enforcement and information sharing system within state government. At the same time, it has taken steps which will ultimately lead to permanent, cultural changes in the workplace and in the public. The Task Force looks forward to its second year and to making even more significant changes.

Dated: February 25, 2010