

ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON WORKPLACE FRAUD

DECEMBER 2010



Task Force Members:

Maryland Department of Labor, Licensing and Regulation

Alexander M. Sanchez, Secretary and Task Force Chair

Maryland Attorney General

Comptroller of Maryland

Maryland Insurance Administration

Maryland Workers' Compensation Commission



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 who engage in workplace fraud often do so 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. It is estimated that between 10%-30% of employers misclassify their workers.

Workplace fraud has real, negative consequences for workers, law-abiding businesses and taxpayers. Misclassified workers have no recourse if they are not paid their wages, forced to work excessive hours or in dangerous conditions, discriminated against, or 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 \$20 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 to coordinate enforcement efforts with the appropriate state agencies, facilitate data and information sharing, and increase awareness about workplace fraud.

Among other things, the Task Force has:

- Entered into a Memorandum of Understanding with agency members. This focuses on data sharing and joint auditing procedures.
- Participated in three joint audits, which identified 577 misclassified workers and approximately \$2.5 million in previously unreported taxable wages.
- Conducted extensive outreach to professionals, employers, and employees impacted by the Workplace Fraud Act.
- Participated in multi-state calls to identify best practices employed by task forces in other states.

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 pay, 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

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 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.**

¹ See Appendix C for a table summarizing these differences.

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.)

It is estimated that the state loses as much as \$20 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.

In recent years, there have been increasing efforts to combat workplace fraud on the state and federal levels. Some states including New York, Massachusetts, Michigan, and Maine have established task forces to examine workplace fraud and coordinate enforcement efforts. Other states have introduced new legislation to specifically prohibit the purposeful misclassification of an employee as an independent contractor, and/or establish a presumption of an employment relationship.⁴ Various bills have been introduced on the federal level that would strengthen existing law through amendment of the tax code, the Fair Labor Standards Act, or ERISA.⁵ The Government Accountability Office (GAO) also recently 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.⁶ Since the GAO released their report, the President's FY 2011 budget proposal included a \$25 million allocation to the Departments of Labor and Treasury to better address the problem of worker misclassification.⁷

B. ADDRESSING THE WORKPLACE FRAUD PROBLEM IN MARYLAND

In 2009 Maryland joined approximately 32 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 (2009, Ch. 188) (the Act) requires the different state agencies and divisions that are impacted by workplace fraud to share information when they find or suspect that misclassification has occurred.⁸ 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:

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://nelp.org/Justice/SummaryIndependentContractorReformsJuly2009.pdf>.

⁵ See <http://nelp.org/Justice/SummaryIndependentContractorReformsJuly2009.pdf>.

⁶ See GAO, *Employee Misclassification, Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention*, GAO-09-717.

⁷ See <http://www.nelp.org/page/-/Justice/2010/ICBudgetLetter.pdf?nocdn=1>

⁸ See Md. Code Ann., Lab. & Empl., § 3-901, *et. seq.*

IMPACT ON EMPLOYMENT STANDARDS LAW⁹

- The Act creates a separate violation for misclassification in the landscaping and construction industries;
- Adopts the “ABC Test” to identify legitimate independent contractors;¹⁰
- 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;
- Contains anti-retaliation provisions for workers who complain of misclassification.

IMPACT ON UNEMPLOYMENT INSURANCE LAW¹¹

- Keeps the existing presumption that a worker is a covered employee;
- Keeps the 50 year-old “ABC Test” to identify legitimate independent contractors;¹²
- 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.

IMPACT ON WORKERS’ COMPENSATION LAW¹³

- 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;¹⁴

⁹ See Md. Code Ann., Lab. & Empl., § 3-901, *et. seq.*

¹⁰ 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.

¹¹ See Md. Code Ann., Lab. & Empl., § 8-201, § 8-201.1.

¹² See footnote 9 for a brief description of the ABC test.

¹³ See Md. Code Ann., Lab. & Empl., § 9-202, § 9-402.1.

¹⁴ 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.

- 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.¹⁵ 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 designee;
- (4) The Chair of the Workers' Compensation Commission or designee;
- (5) The Insurance Commissioner or designee;
- (6) The Commissioner of Labor and Industry or designee;
- (7) The Assistant Secretary for Unemployment Insurance or 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 steps the Task Force has taken in the past year and its goals for the coming year.

¹⁵ See Appendix A.

II. TASK FORCE ACCOMPLISHMENTS

The principal charge of the Joint Enforcement Task Force (the 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 systematically 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 systematically share it with each other. The primary focus of the Task Force in its first few months of existence was to break down these traditional barriers, pool our information and resources, and create a new collaborative approach to workplace fraud enforcement.

At its first meeting in 2009, the Task Force agreed to create three workgroups made up of on-the-ground staff in the various divisions and agencies to meet and work together on issues of concern for the Task Force. These workgroups are: the enforcement workgroup, the data sharing workgroup, and the education and outreach workgroup.

A. COLLABORATIVE ENFORCEMENT

Enforcement workgroup members are meeting monthly to review complaints of workplace fraud, make referrals, talk through investigations, and identify cases appropriate for joint enforcement. The results of information sharing and collaborative enforcement are already producing worthwhile results. This fall, the Division of Labor & Industry (DLI), Division of Unemployment Insurance (DUI) and the Comptroller's Office participated in three (3) joint audits. The findings were as follows:

- Company 1: DUI found 537 misclassified employees with a total of \$2,257,596 in taxable unreported wages. DLI issued a citation to this company.
- Company 2: DUI found 28 misclassified employees with a total of \$146,482 in taxable unreported wages. DLI issued a citation to this company.
- Company 3: DUI found 12 misclassified employees with a total of \$30,352 in taxable unreported wages.
- While the Comptroller's data is not disaggregated, they uncovered a total of around \$295,000 in withholding tax and about \$5,000 in sales/use tax.

B. DATA SHARING

This year the partnering agencies of the Task Force completed a comprehensive Memorandum of Understanding (MOU) to allow for increased data sharing and strengthened enforcement efforts. The MOU demonstrates the Task Force members' ongoing commitment to Data Sharing, but gives them a way to do so within the boundaries of their existing laws and confidentiality provisions. The MOU allows any Task Force member to request access to another member's data, and allows any Task Force member to propose a joint enforcement action, and sets forth some of the procedures to be followed in the case of a joint enforcement action. However, it does not change Task Force members existing confidentiality requirements, or impede any ongoing data sharing arrangements that may have existed between members.

C. EDUCATION AND OUTREACH

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

- 2010 Annual Meeting of the Northeast Regional Insurance Auditors Association
- National Unemployment Insurance Conference: Workshop on "Effective Methods to Detect and Deter Worker Misclassification." Maryland was on the panel with representatives from New York and Washington State
- Advanced Tax Institute – Presentation with Ron Adler, CEO of Potomac human resources consulting firm Laurdan Associates
- Maryland Comptroller's Luncheon, sponsored by the Maryland Association of CPAs – shared speaking time with the Comptroller and Director of Maryland Department of Assessments and Taxation
- Maryland State Bar Association, Tax Section
- Public Justice Center Pro Bono Conference
- Baltimore Office of the National Labor Relations Board
- Eastern Shore Society for Human Resources Management at Chesapeake College
- Maryland Department of the Environment
- Maryland Department of General Services
- Washington Area Building Trades Council

- Baltimore Area Building Trades Council
- Construction Roundtable Meetings
- During pre-construction meetings, Prevailing Wage Unit staff members advise contractors in attendance of the Workplace Fraud Act

D. COLLABORATING WITH OTHER STATES AND UNITED STATES DEPARTMENT OF LABOR (USDOL)

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 and USDOL as a way to learn best practices, pool resources, and enhance enforcement efforts.

Task Force members participate in a monthly multi-state call organized by New York. Each monthly call focuses on a topic of interest to participating states. Often times, at the end of a call, state representatives will decide on the topic and presenter for next month's call.

The Department of Labor, Licensing, and Regulation (DLLR) has been in discussions with USDOL to create an MOU where DLLR's Division of Unemployment Insurance can make referrals to USDOL so they may investigate or help orchestrate a multi-state effort. This should be in place in the early part of 2011.

Two representatives from DLLR attended a one-day USDOL meeting focused on workplace fraud activities in states and how to increase collaboration between states and with the USDOL. The morning session focused on panel presentations about best practices and programs that have been effective in other states. The afternoon was an opportunity to share and discuss problem areas and work together to identify solutions.

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 Division of Labor and Industry (DLI) of the Department of Labor, Licensing and Regulation enforces Maryland's workplace protection laws, including the Wage Payment and Collection law, Living Wage law, Child Labor law, Prevailing Wage law, and Occupational Safety and Health laws.

The Workplace Fraud Act of 2009 created a new violation of the Employment Standards subtitle for misclassification of an employee in the landscaping and construction industries.¹⁶ The Division of Labor and Industry's Employment Standards Service (ESS) has staffed a unit that will investigate complaints of workplace fraud within the landscaping and construction industries and ensure compliance with the Act. The unit consists of a Director, a data specialist, three investigators, two auditors, a secretary and a clerk.

Since the unit became active in July 2010, they have initiated 105 investigations. The breakdown is as follows:

Status	Number of Investigations
Citations Issued	7
Closed Administratively	11
No Workplace Fraud Violations Identified	19
Pending	68
Total Investigations	105

In the case of the seven issued citations, investigators identified 32 misclassified employees.

¹⁶ See Md. Code Ann., Lab. & Empl., § 3-901, *et. seq.*

Finally, investigators from DLI's Living Wage and Prevailing Wage units are engaged in ongoing information sharing with other Task Force members regarding suspected misclassification of workers on government contracts.

2. DIVISION OF UNEMPLOYMENT INSURANCE

The Division of Unemployment Insurance (DUI) within the Department of Labor, Licensing and Regulation (DLLR) administers the collection of unemployment insurance contributions from employers and the payment of unemployment insurance benefits to eligible employees who have lost their jobs through no fault of their own. DUI routinely performs employer audits to ensure that Maryland employers are reporting all of their employees and making proper contributions. Some such audits begin when a worker files a claim for benefits but the employer has never reported their income or made unemployment insurance contributions for this income. DUI will conduct an audit to determine if the worker was actually an employee for whom the employer should have been making unemployment insurance contributions.

In 2009 DUI began to shift from random audits to more statistically-driven auditing. In 2008, only 4.6% of audits were non-random. That number jumped to 54.6% in 2009 and now 65.4% in 2010. The data clearly shows that by being strategic and focusing more on industries where misclassification is most prevalent, DUI has been able to increase the number of misclassified employees it found:

Quarter	Total Audits	Non-random Audits	Misclassified Workers Found	Taxable Wages Uncovered
2008-1	650	0	1,339	\$5,809,358
2008-2	720	0	1,055	\$4,708,354
2008-3	947	107	1,618	\$7,134,811
TOTAL	2,317	107	4,012	\$17,652,523
2009-1	863	306	3,914	\$33,050,770
2009-2	697	392	3,348	\$12,959,601
2009-3	513	434	1,212	\$4,976,734
TOTAL	2,073	1,132	8,474	\$50,987,105
2010-1	672	425	2,226	\$11,200,025
2010-2	725	442	2,743	\$12,038,513
2010-3	543	401	2,734	\$14,337,710
TOTAL	1,940	1,268	7,703	\$37,576,248

In 2010, DUI initiated 16 audits generated by referrals from the Task Force or Task Force partner agencies, including three joint audits with DLI and the Comptroller's Office. Many of these audits are ongoing. However, in the three completed joint audits, DUI identified 577 misclassified workers and approximately \$2.5 million in previously unreported taxable wages paid to these employees. The data does suggest that Task Force generated referrals and complaints will further help the DUI focus its audit resources on employers who are engaging in misclassification.

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. In particular, the Office of the Attorney General has assisted with general and specific enforcement advice, including such tasks as reviewing citations for legal sufficiency, and working with the Office of Administrative Hearings to establish procedures for the referral of contested case hearings. The Attorney General's designee attends all Task Force workgroup meetings to provide guidance on 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's Office also participated in the three (3) joint audits this year. These audits resulted in assessments being filed for unpaid taxes due to the state. The withholding tax amount is around \$295,000 and the sales/use tax amount is roughly \$5,000.

Finally, the Comptroller's Office is in the process of developing a data warehouse that will be able to store and cross-reference data from multiple agencies, including Unemployment Insurance and Workers' Compensation Commission. This will help the agencies be even more strategic when performing non-random audits.

D. INSURANCE ADMINISTRATION

The Maryland Insurance Administration (MIA) regulates licensed insurance carriers in Maryland, including workers compensation carriers. 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.¹⁷ The Insurance Article further requires that every regulated insurer file an insurance antifraud plan with the Insurance Commissioner.¹⁸

Pursuant to the results of a survey of *The Practices to Combat Fraud of the Eight Largest Licensed Workers' Compensation carriers in Maryland* in 2009, the MIA issued a bulletin recommending *best practices*. MIA recommends that workers' compensation carriers require any applicant who claims to use independent contractors to produce the following:

- Certificate of insurance for general liability coverage;
- Copy of the independent contractor's business license;
- Written subcontract for each job conducted by the subcontracted laborer;
- Signed copy of the *Workers' Compensation Commission's Sole Proprietor's Status as a Covered Employee* form.

The MIA also regularly collaborates with the Attorney General's office and local State's Attorney's Offices in prosecuting insurance fraud cases in all lines of insurance.

¹⁷ See Md. Code Ann., Insurance, § 27-406.

¹⁸ See Md. Code Ann., Insurance, § 27-803.

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 passage of the Workplace Fraud Act of 2009 created a separate violation for misclassification in the Workers' Compensation law. In order to make employers aware of the new law and bring them into compliance, the WCC continues to build an Employer Compliance Program. The program focuses on education and outreach to employers to enforce the statutory requirement under LE § 9-402 that employers secure compensation for covered employees. Through ongoing information sharing with the member agencies of the task force, the WCC is also investigating citizen complaints and referrals regarding employers in Maryland who are not in compliance with their responsibility to secure workers' compensation coverage.

IV. ADMINISTRATIVE AND LEGAL BARRIERS

In implementing the Executive Order and the Workplace Fraud Act, the Task Force has identified some potential barriers to enforcement that will require further exploration and bear mentioning here. Some of these were mentioned in the previous year's report, but remain on this list because they have not yet been resolved.

LIMITATIONS ON ABILITY TO PROSECUTE FRAUD. The Maryland Workers' Compensation Commission is required to share information regarding suspected insurance fraud with the Insurance Fraud Division of the Maryland Insurance Administration.¹⁹ However, the Insurance Fraud Division's ability to prosecute such fraud is hampered by another provision of the Workers' Compensation law which grants persons immunity from prosecution for "any act, transaction, matter, or thing about which the person testifies under oath or produces a document, on order of the Commission or an examiner or inspector of the Commission."²⁰ There is no case law clarifying whether this immunity extends to persons who voluntarily testify or produce documents to the Commission, or is limited to those persons who are subpoenaed by the

¹⁹ See Md. Code Ann., Lab. & Empl., § 9-310.2.

²⁰ See Md. Code Ann., Lab. & Empl., § 9-716.

Commission. However, this provision does represent a potential barrier to effective enforcement and the Task Force is exploring how to best address it.

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.

POTENTIALLY INCONSISTENT DETERMINATIONS. The Workplace Fraud Act helped standardize the different legal tests that Task Force member agencies and divisions use in determining if a worker is an employee or an independent contractor. However, the possibility for inconsistency in these tests remains. For example, the Workers' Compensation Commission uses common law to determine if a worker is an employee, while the DLLR Division of Unemployment Insurance and DLLR Division of Labor and Industry use the three-part "ABC test." Thus, while it is likely that in most instances a determination as to a worker's status will be the same under either legal standard,²¹ the Task Force must remain aware of the possibility of inconsistent determinations. This issue has become increasingly important to address as we have begun joint audits.

V. NEXT STEPS AND GOALS FOR 2011

DEVELOP MATERIALS TO EDUCATE EMPLOYERS ON THE DIFFERENT DETERMINATIONS THAT COULD RESULT FROM JOINT AUDITS. Since the Task Force completed three (3) joint audits this fall, a theme that continues to occur in debriefing sessions is how to explain why different agencies could come up with differing determinations from an audit. The Task Force has decided to create a pamphlet that can be sent to employers ahead of pre-audit meetings that will detail what each agency looks at when determining an employee versus an independent contractor and why these differences occur. More discussion on this will occur at the in-person pre-audit meetings where further questions can be answered.

CONTINUED OUTREACH TO WORKERS AND COMMUNITY MEMBERS. In its first few months of operation, 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 hopes to expand its outreach to affected workers so that they are more aware of their rights and the remedies available to them. Additionally, the Task Force would like to continue to hold town hall meetings and increase outreach to employers regarding our joint enforcement efforts.

IMPROVED DATA SHARING. The Comptroller's office is working with a project manager on the development of a data warehouse which will encompass data from the Comptroller's Office, Unemployment, and Workers' Compensation. We trust that this will be a tool for strategically choosing subjects for joint enforcement audits.

²¹ 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.

Appendices

Appendix A: The 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



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;

(12) 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

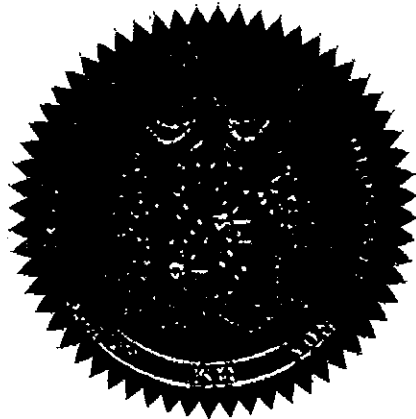
(4) Identify successful strategies for preventing workplace fraud that reduce the need for greater enforcement.

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.

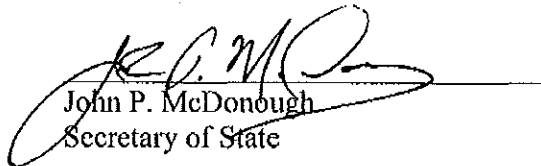
Given Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis this 14th day of July, 2009.



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

Type of tax	Individuals classified as employees		Individuals classified as independent contractors	
	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 analysts.

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

^aMost states also require payment of state income taxes.

^bEmployers 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).

^cFor estimated tax purposes, the year is divided into four payment periods.

^dThe 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).

^eEmployers 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.

^fAccording to DOL, these states are Alaska, New Jersey, and Pennsylvania.

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