

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

**TO ELIOT SPITZER, GOVERNOR
STATE OF NEW YORK**

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I. Executive Summary

The problem of worker misclassification in New York State harms workers and law-abiding businesses within the state. The trend in New York mirrors similar trends in other states. Unprincipled businesses have made a concerted effort to avoid their obligations, including the payment of legally mandated wages and overtime, employment taxes, and obtaining workers' compensation coverage. Many workers are not treated as employees, and are thus denied the safeguards and benefits that should be afforded them.

In many cases, workers are being improperly classified as independent contractors and others are being paid off-the-books as part of the underground economy. Some workers are being forced to "volunteer" their labor. Workers are being transported across state borders, entirely beholden to and dependent upon their employer for food, transportation, and lodging. These workers are with little recourse should they complain about working excessive hours, working without benefits, or working in unsafe conditions. Workers have been killed or severely injured while working "under-the-table" as the normal safeguards afforded workers are not in place.

In addition to the very real impact of misclassification upon workers, employee misclassification adversely impacts legitimate employers in the State who are forced to compete in the marketplace against employers who lower their operating costs and increase their profits by misclassifying their employees,. It is critical to remove economic incentives for the unscrupulous employers and to take steps to level the playing field for legitimate employers.

There are also significant costs to the state: the failure to properly classify workers as employees costs the state millions of dollars in lost tax revenues. In addition, the failure to provide misclassified workers with the benefits and protections afforded to employees means that they and their families must turn to taxpayer-supported public programs such as Medicaid, food stamps, TANF, and other safety net programs.

Several studies have analyzed the extent of the problem. These studies point to the fact that New York had done little over the past decade to address the issue. Each state agency in New York is charged with enforcing its own laws and often agencies have been engaged in disparate and uncoordinated efforts at achieving compliance. The studies also call attention to the costs borne by all law abiding businesses and by the people of New York as a result of misclassification.

In response to this problem, on September 5, 2007, Governor Eliot Spitzer signed Executive Order # 17 establishing a Joint Enforcement Task Force on Employee Misclassification (the "Task Force"). The Governor charged the Task Force with coordinating efforts by appropriate state agencies to ensure that all employers comply with all the State's employment and tax laws, and that their compliance is across the board and in-full. The six Task Force agencies are charged with working together to address the issue in a coordinated manner, sharing both data and resources in order to fulfill its charge.

As of the writing of this report, the Task Force is only four months old, yet in those four months it has made great inroads in meeting the obligations outlined in the Executive Order.

Among other things, the Task Force has:

- Established an Oversight Committee and six subcommittees to address enforcement issues, coordinate compliance efforts, and develop strategies for achieving increased compliance on the part of the employer community.
- Signed a multi-agency Memorandum of Understanding which sets forth the duties and responsibilities outlined in the Executive Order.
- Coordinated initial efforts targeted at selected employers determined to be actively engaged in employee misclassification and other fraudulent employment and employment tax related activities.
- Continued action on the State Workforce Agency – Internal Revenue Service Questionable Employment Tax Practices (QETP) program established in 2006. This effort coordinates IRS and Labor enforcement programs aimed at uncovering employment tax fraud and abuse.
- Integrated data sharing as called for by the 2007 Workers' Compensation reform initiative (Chapter 6 of the Laws of 2007) focused on reducing Workers' Compensation fraud.
- Established an employment fraud hotline, website, and E-mail address. Approximately 570 calls and E-mails were received through these sources, which resulted in 200 Unemployment Insurance tax audits.
- 15 interagency enforcement efforts (sweeps) were conducted between August and December 2007, with 117 employers identified at the sweep locations.
- Initiated 35 Task Force-coordinated unemployment insurance tax investigations, completing 16 in 2007. Completed investigations revealed 2,078 misclassified workers and \$19.4 million in unreported remuneration paid to employees. Additional Unemployment Insurance taxes alone amounted to over \$856,000. Many of these investigations resulted from dozens of staff jointly inspecting construction and other sites throughout the state.
- Initiated 17 Labor Standards investigations based on 545 employee interviews. While some investigations are still in process, \$3,020,000 in underpaid wages has already been found to be due to 646 employees and \$5,000 in fines have been assessed for child labor violations.
- Engaged in discussions with several other states in regard to New York's efforts and provided technical assistance to Illinois, Massachusetts, and Ohio. Included in these efforts is discussion between the big-four states, New York, California, Florida, and Texas, on State-Federal Labor matters.
- Received extensive press coverage on the issue of worker misclassification.

II. Background on Worker Misclassification

A. Introduction

Determining Worker Status

New York uses common law tests, published industry guidelines, and case law in making determinations of worker status. Each agency in New York is responsible for its own determination of who is and who is not an employee.

Worker Misclassification

Workers who are categorized as employees receive a wide range of legal protections, and their employers' face a number of legal obligations. Among other things, employees are entitled to minimum wage and overtime, they are eligible for unemployment insurance, and they may collect workers' compensation if they are injured on the job. Their employers, accordingly, must pay minimum wage and overtime, pay unemployment insurance taxes, and obtain workers' compensation insurance. They must also withhold state and federal taxes.¹

Worker misclassification falls into two general categories.

Misclassification as an Independent Contractor:

Certain employers may classify workers as 'independent contractors.' This classification may be based on a well-founded belief that those workers are indeed independent of the employer's direction and control. At other times, this classification may be intentional, utilized solely for the purpose of avoiding taxation and other employment protections. The employer provides these individuals with a Form 1099 for tax reporting purposes while the employer remains relieved of responsibility for employment taxes such as the employer's share of FICA and Medicare, Unemployment Insurance, FUTA, and Workers' Compensation coverage. In these cases, 'independent contractors' are not afforded the protections normal employees have such as health insurance and retirement benefits.

Employer determinations of independent contractor status are subject to review by the Task Force and other agencies. Those reviews may determine that the employer's belief was based on assumptions that do not meet the common law standard for worker independence or prior case law determinations, or may reveal that the employer was engaging in a scheme of intentional misclassification.

Unreported (Off-the-Books) Employment:

Some employers do not even go through the process of formally misclassifying their employees and do not provide 1099 forms or W2 forms. They simply do not declare or acknowledge their

¹ In addition to these state laws, a number of federal and local laws cover employees while leaving independent contractors unprotected, such as the National Labor Relations Act, the Family and Medical Leave Act, anti-discrimination laws, and the Occupational Safety and Health Act.

workers are employees on any payroll records or business documents. These employers pay workers “off-the-books” and structure their financial records in an attempt to hide these payments as well as the terms and conditions under which they are made. These employers attempt to avoid taxation, wage and hour compliance, worker safety provisions, workers’ compensation coverage, or any benefits typically provided to employees.

These trends appear to be increasing over the past decade, with large numbers of employees misclassified and therefore unprotected by the most basic labor rights. Immigrant workers are particularly vulnerable for a variety of reasons, including language limitations, economic necessity, and fear of reporting employer violations. Hard working, law abiding employers and their employees are put at a competitive disadvantage. Their dedication to fair contracting and competition in the marketplace is undercut by these schemes. Violating employers focus on bottom line cost reduction, tax savings, and a higher profit margin, to the detriment of their own employees and of employers that abide by applicable laws and regulations.

Companies who intentionally misclassify and hide workers are actively engaged in perpetuating a fraud on their workers and on the people of New York. While some employers may be acting in good faith, unintentionally misclassifying workers, the overall issue of misclassification must be addressed so as to provide the broadest protection for all workers as well as an economically healthy and competitive business environment.

Additional Information Supporting the Extent of Misclassification

Early in 2007, the Unemployment Insurance Division of the New York State Department of Labor (UI) began a process of re-engineering its statistical tracking methods related to the number of misclassified workers found in its ongoing and traditional audits and investigations. Formerly, NYSDOL only captured detail audit information related to the 10,000-11,000 federally mandated audits it performed each year. That detail met strict and prescriptive federal requirements defining which workers were to be counted as a misclassified worker per federal reports.

However, NYSDOL, by following the requirements set by the United States Department of Labor (“USDOL”), captured only a limited set of information. NYSDOL had not been capturing all information related to misclassified workers found via NYSDOL’s own UI audits, investigations and other enforcement efforts, as well as unreported (off the books) workers found even within the federally-mandated audits it conducted. Statistical tracking programs were revised in August 2007 and the revised tracking process was completely rolled out to all field offices as of September 30, 2007. Results from the fourth quarter 2007 indicate that the extent of misclassification uncovered was 254% greater than the numbers that were reported to the federal government.

The following table indicates findings for the September 1, 2007 through December 31, 2007 period:

Month	Audits and Investigations	Total Misclassified Workers Found	Reported to US-DOL	Difference
September	997	5,964	2,160	3,804
October	1,852	10,472	3,624	6,848
November	1,591	14,234	3,776	10,458
December	1,371	4,740	926	3,814
Total	5,811	35,410	10,486	24,924

This increased level of information will not only address the extent of this problem as detected in the Unemployment Insurance Division’s ‘traditional’ audits and investigations, it will also assist in the strategic analyses that are part of Task Force enforcement activities and planning as well.

B. Recent History

Background

Over the past decade, enforcement and compliance efforts have focused on blatantly egregious violations of the law, the cost-benefit of overall enforcement and compliance efforts, and fulfilling federal mandates for audit and enforcement. While those goals had value, they did not adequately address the evolution of schemes aimed at purposefully misclassifying employees, avoiding taxation, and arranging a business’ financial transactions so as to make them almost undetectable.

In 2006 and early 2007, several studies were released pointing to the extent of worker misclassification in New York State. The Cornell University School of Industrial and Labor Relations study of the issue¹ noted that approximately 10% of private-sector employers did not comply with state regulations when classifying new hires and those companies in the construction industry accounted for an estimated 14.9% of that group. The data also show that approximately 10.3% of private-sector workers are misclassified as independent contractors and about 14.8% of these workers are in construction.

Executive Order

In response to these misclassification concerns, on September 5, 2007, Governor Eliot Spitzer signed Executive Order # 17 establishing a Joint Enforcement Task Force on Employee Misclassification.

In signing this Executive Order, Governor Spitzer stated:

“For too long, State government has turned a blind eye on a growing epidemic that is keeping wages and benefits artificially low for working New Yorkers. This Executive Order - a key component of my economic security agenda - protects worker rights

¹ Linda H. Donahue, James Ryan Lamare, Fred B. Kotler, J.D., “The Cost of Worker Misclassification in New York State” (Cornell University, ILR School, February 2007).

while leveling the playing field for law abiding employers so that they are not at a competitive disadvantage to employers who refuse to play by the rules as they exploit hard working New Yorkers.”

The Task Force consists of the Commissioner of Labor, the Attorney General, the Commissioner of Taxation and Finance, the Chair of the Workers’ Compensation Board, the Workers’ Compensation Fraud Inspector General, and the Comptroller of the City of New York. The Commissioner of the Department of Labor serves as the chair of the Task Force.

The Task Force is charged with coordinating the investigation and enforcement of employee misclassification matters by the Task Force members and other relevant agencies. It seeks to enhance enforcement through interagency cooperation, information sharing, and joint prosecution of serious violators.

IRS Questionable Employment Tax Practice (QETP) Initiative

Concurrent with the activities of the Task Force, the problem of worker misclassification – particularly in cash based industries – is actively being addressed by a joint Questionable Employment Tax Practices (QETP) workgroup that consists of several states, including New York, and the Internal Revenue Service. New York is one of five states that played a key role in developing this initiative.

Crimes Against Revenue Project (CARP)

New York State is also focusing on the larger issue of tax fraud through the Crimes Against Revenue Project (CARP). This project is coordinating the enforcement of tax crimes among New York’s Division of Criminal Justice Services, the Department of Taxation and Finance, and local District Attorneys. While the project did not specifically address misclassification and tax fraud relating to misclassification, the Task Force has benefited from the Project’s experience in developing inter-agency cooperation. Since Workers’ Compensation is not a tax issue, it was not made part of the project.

In December 2007, a report was issued by the Fiscal Policy Institute² which specifically addressed misclassification and the cost of misclassification in the construction industry. It pointed out the costs of misclassification within the construction industry. noting³:

The costs of the illegal underground construction industry to taxpayers are substantial and growing. These fiscal costs were an estimated \$489 million in 2005 and are likely to reach at least \$557 million in 2008. Contractors in the underground economy skirt payment of legally required payroll taxes and workers compensation premiums and

² Fiscal Policy Institute, “Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City’s Construction Industry” (December 5, 2007), p. 8.

³ Fiscal Policy Institute, p. 1.

shift these and other costs onto taxpayers and their competitors who play by the rules. Three categories of costs were estimated for 2005:

- *\$272 million in unpaid legally mandated payroll taxes for social security and Medicare, and social insurance premiums covering workers' compensation, unemployment insurance and disability insurance.*
- *\$148 million in health care costs shifted onto the workers themselves, taxpayers and other employers that provide employee health insurance.*
- *\$70 million in lost personal income taxes because there is no withholding for underground economy workers and/or they are paid off the books.*

This report acknowledged the work started by Governor Spitzer to address this problem, citing the Executive Order signed in September and the priority assigned to this effort by Commissioner Smith.

III. Task Force Accomplishments

A. Introduction

The initial impetus for addressing the issue of misclassified workers came from the New York State Commissioner of Labor, M. Patricia Smith, and was based on discussions at the Executive level. Prior to the signing of the Executive Order, partner agencies entered into pre-planning discussions on how to best carry out Task Force activities.

On May 18, 2007, an initial meeting was held which involved the Department of Labor, Workers' Compensation Board, Fraud Inspector General of the Workers' Compensation Board, Department of Taxation and Finance, and the Internal Revenue Service. The partners discussed a broad framework for addressing the issue of misclassified workers, and each partner's ability to contribute to a joint enforcement effort. Based on those discussions, more partners were added. These included the New York City Comptroller's Office and New York State Attorney General's Office. An Oversight Committee was established, composed of top leaders from the various partner agencies. The Oversight Committee is focused on overall coordination, drafting and approving strategies, reviewing and reporting on results, and driving future enforcement efforts.

Over the following month, six sub-teams were established to address the performance of different aspects of a joint enforcement effort.

The sub-teams and their focus are:

- Research/Targeting: To develop and review leads for the Task Force.
- Sweeps Team: To plan and carry out coordinated on-site inspections and visits (sweeps).
- Audits/Investigations Team: To plan and carry out follow-up audits and investigations on any non-compliance found in the course of the sweeps conducted.
- Legal Team: To address legal issues arising in connection with the implementation of Executive Order #17 and the Memorandum of Understanding between the Task Force members.
- Communications Team: To develop strategies focused on keeping the public informed of Task Force activities, to develop multilingual documents for sweeps, and to assist in providing avenues for the public to contact the Task Force with tips and complaints.
- Reporting Team: To coordinate and develop the Report to the Governor required by the Executive Order.

Early on, the Research/Targets team began to gather information on egregious non-compliance from internal data sources as well as from community-based organizations. Subsequent planning meetings were held and targets were selected. Prior to the signing of the Executive Order, a plan was established to perform sweeps of selected sites. These activities were conducted under existing law and in accordance with a Memorandum of Understanding between selected partners. These early enforcement actions laid the groundwork for the later Task Force sweeps.

The following efforts were conducted in preparation for Task Force sweeps:

- We held discussions with community based groups and other interested parties providing tips on non-compliance. A tip form was eventually developed to better document the information received.
- We gathered background information from partners' files and from licensing agencies.
- We cross-checked the selected targets against other enforcement agencies so as not to interfere with on-going investigations (especially criminal investigations).
- We developed employer and employee interview sheets, subpoenas, employer and employee palm cards advising them as to the purpose of the investigation as well as certain rights, a frequently asked questions script, and scripts dealing with State agency authority and the employer's need to comply. There was a specific focus in the scripts and palm cards advising the employer against non-interference and prohibited retaliation against employees for cooperating. Employees are provided with contact information and off-site locations where they can discuss their situation confidentially.
- We reviewed each agency's authority as it relates to demands for records, the records an employer must keep and make available for inspection, and the accessibility of a business location/construction site in order to conduct employee interviews.
- We reviewed laws regarding the ability of agencies to share data.
- We took preliminary steps to reach agreement on data sharing and to draft an acceptable Memorandum of Understanding among the partners to accomplish this.
- An assessment was made of the language skills necessary for employee interviews.
- Assessments were made of potential safety and health issues that might be faced by public employees.
- Pre-sweep briefings were held in which public employees were trained on sweep activities, safety issues, and the aspects of the law related to active on-site intervention.
- We held discussions were held with the New York State Police and other police agencies. Police officers accompany sweep teams to provide security for State employees.
- Supplies and equipment were acquired for sweep related activities including personal safety equipment, portable computers and scanners, and two-way radios.

Task Force teams generally consist of Unemployment Insurance Tax Auditors, Labor Standards Investigators, Public Work Investigators, Workers' Compensation compliance staff and members of the Workers' Compensation Fraud Inspector General's staff, Investigators from the Department of Labor's Office of Special Investigations, and State or local police officers. Depending on the size of the sweep target, between six and forty staff may be involved in a sweep. The first Labor Department sweep was conducted on July 26, 2007 in conjunction with the Workers' Compensation Fraud Inspector General.

B. Overall Metrics As of December 31, 2007

The following numbers provide a glimpse into the level of public interest in the Governor's focus on misclassification as well as a sense of the scope of the sweep activities conducted in the first months following the issuance of the Executive Order:

218 potential targets were identified:

- 90 were received from the public.
- 91 were developed from the sweeps themselves.
- 37 were developed based on partner agency data mining and data sharing.

15 interagency sweeps were conducted between August and December 2007.

- 8 were conducted in Upstate New York
- 7 were conducted in the Metropolitan New York Region

117 employers were identified at the 15 sweep locations.

A total of 35 tax-related investigations were initiated against employers who appeared to be in violation of the law.

- 22 investigations were initiated based on information obtained directly from these sweeps.
- 13 other investigations were initiated on employers as a result of tips received through Task Force efforts.

C. Reports by the various Partner Agencies

Department of Labor - Unemployment Insurance Division

The Unemployment Insurance Division (UID) administers the State Unemployment Insurance program, including both unemployment insurance benefit payments and the collection of unemployment insurance taxes from employers. The UI employer payroll tax supports the benefit portion of the program.

The Division took the lead in overall coordination of Task Force efforts. These efforts included arranging for meetings of the Oversight Committee and the various sub-teams, assessing all leads and tips, marshalling the various resources and supplies for the conduct of the sweeps, tactical coordination during the conduct of the sweeps, and the initial audits and investigations conducted as a follow-up to the sweeps. The UID plays a key role, sharing data from the sweeps as well as the results of its audits and investigations with all Task Force partners.

- In follow up to the 15 interagency sweeps conducted during 2007, initiated 35 unemployment insurance tax investigations, completing 16 investigations in 2007. Many of these investigations resulted from dozens of staff jointly inspecting construction and other sites throughout the state as well as employers' places of record.
- Reports from the investigations completed to date indicate that 2,078 persons were misclassified and that over \$856,000 in Unemployment Insurance taxes was underpaid.

- Those taxes represent over \$19.4 million in unreported remuneration paid to employees.
- In addition to unpaid taxes, UID assessed over \$381,000 in fraud penalties under Labor Law §570(4) and approximately \$220,000 in interest on unpaid taxes.
- Total UI assessments exceed \$1.4 million.

In addition to the measures called for under the Executive Order, the UID undertook to better count the number of misclassified workers found in the course of all its audits and investigations. Formerly, the UID only counted the number of workers found to be “Independent Contractors” under tightly prescribed Federal criteria. Now, the UID is counting all instances of misclassification in accordance with the common law standard in the UI Law and in keeping with established case law. Utilizing these broader counting criteria, in the fourth quarter 2007, the UID counted a total of 29,446 misclassified workers through both the sweeps as well as its audits and investigations. Use of this more accurate counting approach will better enable the Division, the Department, and the Governor to measure the effectiveness of the Department’s activities with regard to finding and addressing misclassification and its impact on UI program revenues and administration.

Department of Labor - Division of Labor Standards

The Labor Standards Division is responsible for enforcing the State Labor law provisions relating to minimum wages, overtime, unpaid agreed wages, unpaid agreed wage supplements, child labor, illegal industrial homework, migrant farm labor, equal pay, day of rest, meal periods, and other related provisions.

Under the auspices of the Task Force, the Division had the primary responsibility of interviewing workers at job sites. The testimony of workers is a key element in the execution of the investigation, not only for Labor Standards purposes, but also for enforcement of all other relevant laws. When employers are violating the laws, payroll records are often inaccurate regarding matters such as total number of employees, employee job duties, and wages paid to employees – crucial issues for determining liability under UI, Workers’ Compensation, Prevailing Wage, and Wage and Hour laws. Employee interviews are critical for assessing the accuracy of payroll records and for providing complete information regarding staffing levels, compensation and work schedules, safety conditions, and other matters.

The Division used its multilingual capabilities to conduct employee interviews in languages other than English at every job site. The Division visited sweep sites between July 2007 and December 2007 in order to interview workers. Each site had several subcontractors performing work of different types. Employee interviews at those sites identified a mixture of compliance and non-compliance for workers employed by the same subcontractors and performing the same duties. The Division was able to use the information obtained to look further into the operations of several subcontractors. There were apparent violations of overtime and record keeping requirements for some employees, which are also being followed-up by the Division. The Task Force has also enabled enhanced data sharing which has resulted in significant findings in targeted businesses identified through that data sharing.

Overall results show:

- 17 construction sites, 12 retail establishments, and 1 restaurant have been inspected.
- 545 employees were interviewed.
- Based on inspections, 17 firms are currently under investigation.
- Approximately 646 employees were found to be underpaid. Thus far it is estimated that at least \$3,020,000 is due to these employees. The Division expects to find additional underpayments in currently open investigations.
- One firm was also found to have child labor violations (Labor Law §133.2i) and was served with an Order to Comply in the amount of \$5,000.
- Six downstate firms are being investigated for recordkeeping violations only. Three others have already been issued recordkeeping violations.

The following cases provide examples of the violations encountered:

An employer in the Bronx was found to have a sixteen (16) year old minor working as an electrician's assistant, a prohibited occupation under the child labor laws because of the hazards involved.

The Division was already investigating an employer in Brooklyn based on an outstanding complaint. During the sweep, and in a subsequent review, it was found that the employer failed to pay overtime as required. In addition, the employer did not maintain records of hours worked by employees or provide them with wage statements.

Another employer was found at three different sweep locations. Interviews at the first location showed a pattern of overtime underpayments as well as a failure by the employer to furnish wage statements to its workers. By the time the next two locations were visited, there was a significant change in the interview results. Most of the interviewees at these subsequent visits indicated that they worked fewer than forty hours per week and that they did receive wage statements. The Division is currently verifying these statements through independent means but this case illustrates the risk that when an employer anticipates a Task Force inspection, workers may be coached in how to answer inspectors and may be fearful of retaliation if they answer questions honestly.

Department of Labor - Division of Safety and Health

The Division of Safety and Health (DOSH) is responsible for all safety enforcement activities and standards which are outside the purview of the Federal Occupational Safety and Health Act of 1970, or for which specific Federal standards have not been promulgated under the terms of the Act.

The Division supported the activities through raising awareness and giving training to members of the Task Force on hazards they may encounter during their sweep activities. It also recommended appropriate personal protective equipment and safety precautions, thereby allowing a better prepared visit by Task Force members.

Given the type of construction activities the Task Force was initially focused on, the Division also provided input on potential asbestos disturbance issues. The Division determined if the target site location had been notified as an abatement project and coordinated the notifications with the New York City Department of Environmental Protection. DOSH conducted site visits to locations that were conducting renovations, rather than new construction, given the higher potential for disturbance of asbestos. It performed 16 pre-inspection site visits, with the majority of these not involving asbestos-related concerns. Violations were issued on two occasions during the sweep to a contractor for disturbing asbestos in the course of performing demolition work, for performing unlicensed asbestos removal, and for using uncertified workers.

Department of Labor – Office of Special Investigations

The Office of Special Investigations provides investigative support for the NYS Attorney General's Office and for county district attorneys who will seek criminal prosecutions in unemployment insurance fraud cases.

The Office of Special Investigations is an integral part of the Task Force and assisted in early planning sessions for the enforcement sweeps. The Task Force determined that law enforcement should be invited to support the enforcement sweeps. The Office of Special Investigations was assigned as liaison to law enforcement. Members of the Office participated in every sweep around the State. Staff aided in logistical and safety planning for each sweep, designed a sweep survey form, reviewed the completed forms for each action, and advised the Task Force on technology for both the safety and security of the staff, as well as productivity while at the targeted sites.

The Office of Special Investigations, with the support of the Department's Counsel's Office and the Attorney General, prepared subpoenas for each sweep to be served if the employer proved uncooperative. Special Investigations staff brought signed subpoenas to each sweep ready to serve if needed to enforce compliance. Subpoenas were served on three of the sweeps to date. Special Investigations assisted the audit staff in obtaining compliance with the subpoenas. In each case, the employers provided the required records quickly in accordance with the subpoena. The intervention of the Executive Director and Deputy Director of Special Investigations was valuable in several instances in advising employers and their counsel of the purposes of the enforcement and in obtaining compliance with the Labor Law.

Special Investigations' relationship with law enforcement proved an asset to each of the sweeps. The cooperation extended by law enforcement to the Task Force through Special Investigations provided for orderly conduct of the sweeps, protection for state staff, and on several occasions facilitated employer cooperation with the investigation.

Special Investigations expects to support future enforcement sweeps, participating in every enforcement action as requested by the Task Force. The Office of Special Investigations will continue to prepare and deliver subpoenas, assist in tactical planning, consult with staff, employers, and law enforcement to obtain compliance with the Labor Law, and coordinate with law enforcement to protect Task Force staff.

Department of Labor – Bureau of Public Work

The Bureau of Public Work is responsible for administration of Articles 8 and 9 of the New York State Labor Law, covering prevailing wage and supplements, and other related issues for all public work projects and building service contracts involving a state and/or local governmental entity.

Under the auspices of the Task Force, the Bureau provided support in the conduct of worker interviews at job sites, primarily in upstate New York. The Bureau used its multilingual capabilities to conduct interviews at upstate job sites. In addition, the Bureau is actively researching its old case files to determine whether additional investigation might be warranted by Task Force partners. Based on that review, Public Work has provided tips to the Research/Targets team.

Workers' Compensation Board--Bureau of Compliance

Workers' compensation insurance provides weekly cash payments and the cost of full medical treatment, including rehabilitation, for covered employees who become disabled as a result of a disease or injury connected with their employment. It also provides payments for qualified dependents of a worker who dies from a compensable injury or illness. In administering this program, the Workers' Compensation Board receives and processes workers' claims for benefits, employers' reports of injury, and medical reports from physicians and other health care providers. The board adjudicates and resolves all issues and makes awards and findings to ensure that an entitled claimant receives benefits and medical treatment promptly.

Two units within the Workers' Compensation Board's Bureau of Compliance have worked closely with the Task Force to attack the misclassification problem that exists in the State. The Enforcement Unit participated in the Task Force construction sweeps, collecting information related to Workers' Compensation insurance requirements. The unit was instrumental in obtaining the building permits from the New York City Building Department in advance of the July 2007 New York City sweep. Individual investigators are now inviting their NYSDOL counterparts to participate in on-site employer investigations where, in addition to Workers' Compensation Law violations, a violation of Labor law is also suspected. Similarly, individual NYSDOL investigators are contacting their Workers' Compensation Board Enforcement Unit counterparts when a violation of Workers' Compensation Law is suspected. This information sharing will benefit the Board's enforcement efforts including stop work orders, debarment and misclassification/noncompliance penalties.

A subpoena for employer business records is now issued on every investigation. Where the employer fails to submit the records, or where the records submitted are not adequate, the Data Administration unit now issues a WCL Section 131(3) penalty. In addition, for those employers that have obtained a Workers Compensation insurance policy, the WC Data Administration Unit will be able to compare the employer's records against the insurance carrier's records. If it is determined that the employer misrepresented payroll pertinent to determining premium, the Data Administration Unit will issue a WCL Section 52(1) d (misrepresentation of payroll) penalty.

The Data Administration Unit has also worked directly with several NYSDOL units in an effort to share information. For example, the unit has met with the Bureau of Public Work in an attempt to identify Public Work violators who might also be targets for WCL 52(1) d penalties.

Unfortunately, a WCL Section 52(1) d misrepresentation penalty cannot be issued against employers who are self-insured or employers who are members of self-insured trusts. While the statute specifically references premium, neither of these two groups pay premium. Self-insured employers pay their own claims, while members of self-insured trusts pay contributions to the trusts. A language change in the legislation is necessary to issue Section 52(1) d penalties against self-insureds and members of self-insured trusts.

Office of the Fraud Inspector General of the Workers' Compensation Board

The Fraud Inspector General serves on the Misclassified Worker Task Force Oversight Committee and has provided valuable advice concerning the Workers' Compensation insurance fraud issues which will be encountered during the Task Force's construction site sweeps and during subsequent Department of Labor and Office of Fraud Inspector General's (OFIG's) investigatory audits of employers who have employees working off the books and/or misclassified as independent contractors. The Fraud Inspector General directed the Assistant Inspector Generals, investigators and auditors to help ensure that the construction sweeps and subsequent audits/investigations would be properly planned and coordinated through their participation in the Sweep and Audit Team meetings. OFIG downstate and upstate investigators have participated in all the construction site sweeps conducted and helped collect Workers' Compensation insurance coverage and workforce size documentation for each construction contractor or subcontractor.

At a November 9 meeting of OFIG and NYSDOL audit management, it was decided that separate rather than joint NYSDOL/OFIG audits would be conducted of construction contractors whose construction sweep data indicated that they appeared to have large numbers of workers being paid off the books and many workers misclassified as independent contractors. This decision was made principally because of the differing purposes of the NYSDOL and OFIG audits, since NYSDOL's are focused on civil enforcement of the Unemployment Insurance Law and Regulations; whereas OFIG's forensic audits are focused on determining whether an employer has criminally committed premium fraud under Section 114 of the Workers' Compensation Law. A preliminary agreement was prepared regarding these separate audit processes under which NYSDOL would complete its investigatory audits first and share the results with OFIG for use in its employer premium fraud audits. OFIG will share the results of its construction company premium fraud audits with NYSDOL and both agencies will jointly pursue the prosecution of any criminal violations identified of either Workers' Compensation or State Labor laws through the Attorney General's Office. On December 13, NYSDOL staff shared the results of its first eight construction company audits with OFIG and it has selected five for assessment of their premium fraud potential.

Department of Taxation and Finance

The Department of Taxation and Finance (DTF) provides a system of tax administration through collection of individual and employer tax revenues and associated receipts in support of government services in New York State.

The Department of Taxation and Finance participated in the drafting and negotiation of the Memorandum of Understanding in connection with this Task Force. Representatives from the Department's Office of Counsel attended several meetings and participated in several conference calls throughout several drafts of the MOU. The MOU was signed on behalf of the Department of Taxation and Finance by Acting DTF Commissioner Barbara G. Billet on November 20, 2007.

The participation of the Department of Taxation and Finance is statutorily limited with respect to its participation in actual workplace sweeps (See Tax Law section 697(e)(3)). The Department is, however, permitted to receive and act upon information received during a sweep and use that information to conduct its own investigation of withholding and income tax fraud or failure to file. The Department will receive copies of the completed investigations generated from the sweeps once an operating agreement, building upon the Task Force Memorandum of Understanding, is in place and training has been provided on the use of audits prepared by the Department of Labor's Unemployment Insurance Division.

New York City Comptroller's Office

The mission of the New York City Comptroller's Office is to ensure the financial health of New York City by advising the Mayor, the City Council, and the public of the City's financial condition. The Comptroller's Bureau of Labor Law enforces New York State laws that require private sector contractors engaged in City public work projects to pay no less than the prevailing wages and supplemental benefits to their employees. The Comptroller also issues prevailing wage schedules, which list the wage rates and supplemental benefits required for the trades and occupations covered under prevailing wage laws.

New York City Comptroller William C. Thompson, Jr. is pleased to be a member of the Joint Enforcement Task Force that is addressing the problem of employee misclassification. The Office of the New York City Comptroller is the sole City agency participating on the Task Force.

The Comptroller's Office participated in the meetings to plan the activities of the Task Force. The Office also participated in the drafting and negotiation of the Memorandum of Understanding executed by all of the Task Force members. Comptroller Thompson signed the MOU on November 26, 2007. As well, the Bureau of Labor Law has shared numerous leads and tips for consideration and possible investigations by the Task Force Sweeps Team.

Comptroller Thompson is sending a letter to New York City government contractors to remind them that misclassification of workers is a crime that is punishable by law and that the various

agencies comprising the Task Force are now working together to coordinate enforcement efforts on this issue and ensure a level playing field for law-abiding businesses.

Office of the Attorney General

As New York State's Chief Legal Officer, the Attorney General defends and protects the people of New York. The Attorney General's authority to prosecute is found throughout the laws of New York State.

The Office of the New York State Attorney General (OAG) has been an active participant in the Task Force. The OAG took part in the early planning sessions for the enforcement sweeps. Together with the NYSDOL Counsel's Office and the Office of Special Investigations, the OAG conducted a training session for investigators from the participating agencies prior to the initial sweep on issues such as the authority to enter the workplace and inspect records and protocols to follow when an employer declines to provide payroll records. The OAG also helped draft the subpoenas to be used by the NYSDOL if an employer failed to provide payroll and other records and has consulted with enforcement staff when legal issues have arisen in the course of sweeps. The Attorney General's Office has also worked with the Task Force Legal Team on understanding the legal issues that could arise in sweeps. The Attorney General will provide legal support in the event that court intervention is necessary to ensure compliance with the law, or to address potential retaliation cases by employers against witnesses.

Pursuant to the Memorandum of Understanding, the Attorney General's Office is the lead agency on criminal prosecutions that may arise from the Task Force. The OAG, together with the Office of Special Investigations, will review all sweep results to determine whether criminal action is warranted.

D. Early Lessons Learned

Task Force operations bring the resources of the partner agencies together in an unprecedented level of cooperation and collaboration. Open communication and the sharing of data have allowed the partners to leverage their resources to best effect compliance with employment and tax laws.

In preparing for Task Force operations, the partners identified the operational items needed in order to carry out sweep operations. Among the needs identified were communication gear which allowed agencies to inter-communicate, appropriate safety equipment for staff, operational planning documents, and informational brochures for employers and employees at sweep sites.

We also identified a number of logistical challenges, such as coordinating the schedules of five to fifty staff members to converge on one location at the same time, and also the need to mobilize quickly in instances when a given stage of construction is about to be concluded or when workers are likely to depart the region imminently. Another challenge has been to coordinate follow up stages of investigations among the agencies and divisions, beyond the initial on-site inspection. In addition, we have learned that investigations in the construction industry present particular challenges, given the variety of subcontractors present, the time-

limited nature of the job (and resultant transience of the workforce on any given site), and the safety considerations.

Key lessons learned from initial sweep efforts relate to the nature of worker misclassification. Traditional UI auditing practices rarely delved into the actual business practices of an employer from the perspective of its workers. However, the sweep's focus on obtaining employee interviews as a primary source of information presented investigators with details regarding employment relationships and working conditions that otherwise might have been missed under normal audit scrutiny. In addition, the review of transactions in the construction industry showed cash flows from developers and general contractors to sub-contractors that were not accounted for in the records of the sub-contractors. We also gained a better understanding into the true value of cash transactions with the number and value of cash transactions being an important focus. Employers may believe that using cash provides an opportunity for non-disclosure and avoidance of accountability. The Task Force's partnerships break down this façade.

As noted, 15 sweeps yielded 117 employing entities when taking into account sub-contractors who were identified on-site. The extent of the inter-relationship and specialization involved, especially in the construction industry was a key lesson. Key players in construction jobs are the property owner, construction manager, the general contractor, and sub-contractors. Each has respective responsibilities and its own employees. In many ways, the general contractor is the entity that links all these related entities together. They determine the subcontractors with which they contract, and play a role in seeking out the reputable versus the disreputable.

It was quickly apparent that some employers would react negatively to Task Force efforts and would, in some cases, attempt to coerce workers into not cooperating with the effort. In certain instances, employees were told to turn in any information provided to them during sweeps or advised against speaking with Task Force investigators. Awareness of the likelihood of threats and intimidation to workers is important. Employers who illegally hinder Task Force members by intimidating and threatening employees must be held accountable for these actions. While some employers did react negatively, attempting to hinder investigators and reviews of their records, others have cooperated fully. Those who were cooperative typically either were found to be in compliance or have made a good faith effort to come into compliance due to the scrutiny brought to bear by the Task Force.

One particular employer, found on the very first sweep that was conducted, subsequently delayed filing of its second quarter NYS45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return. Upon subsequent filing, it was found that the employer had significantly increased the number of employees reported as well as its reporting of new hires. A remarkable jump in employees reported occurred in the second quarter showing 90 additional employees. A further jump occurred in the third quarter showing 115 additional employees.

It has also been reported that employers have 'run out the next day' to obtain Workers' Compensation insurance.

Each member of the Task Force understands that employers have due process rights. Task Force members are committed to spending the time necessary to properly analyze data obtained via sweeps and investigations, arriving at a solid and defensible conclusion in keeping with the law.

IV. Administrative and Legal Barriers

A. Introduction

Implementation of the Executive Order and the conduct of a number of joint enforcement actions have identified a number of legal issues that require further discussion and clarification.

Data Sharing Restrictions:

The extent to which the agencies involved with the Joint Task Force are able to share relevant data among themselves, and with other law enforcement authorities, is a topic of particular concern. State and federal confidentiality requirements weigh heavily in this process, and Memoranda of Understanding require that all parties adhere to data sharing and confidentiality standards. Further, information shared by the Internal Revenue Service for tax enforcement purposes may only be used by taxing agencies and cannot be further shared among the partners.

The Department of Taxation and Finance advises that it is statutorily limited with respect to its participation in actual workplace sweeps and its ability to share its audit results with other Task Force members (See Tax Law §697(e)). However, information shared with the Department of Taxation and Finance by other Task Force members will prove invaluable to the Department in its enforcement efforts and will generate additional tax revenues for the state. The need to balance confidentiality concerns with the desire to maximize data sharing, to efficiently and effectively focus Task Force activities and maximize Task Force results, will continue to be a challenge that will be addressed by members of the Legal Team and Task Force in general.

Access to Records and Work Sites:

Significant effort has been focused on the best means of coordinating activities designed to obtain records for the conduct of investigations as well as access to employees for their testimony. Each agency is able to issue subpoenas on their own authority. The Task Force will review and establish protocols as needed to take appropriate action in the event of employer non-compliance with demands for records or access to employees.

Inconsistent Worker Classification Among Partner Agencies:

An area of concern, and a possible legal barrier to the implementation of the Task Force's charge as set forth in the Executive Order, is the lack of consistency among participating agencies with regard to the identification of misclassified workers. Currently, each member agency has the authority to make its own worker status determinations. The Task Force is aware of a number of instances, unrelated to the sweeps, in which member agencies have not reached the same conclusion as to whether a group of individuals were employees or independent contractors. This situation seriously impedes efforts to engage in joint enforcement. Inconsistent worker classification creates difficulty for employers genuinely interested in complying with the law who desire clarity with respect to worker classification. One of the primary goals of the Task Force for 2008 is to address the issue of inconsistency and make recommendations for addressing this issue whether through interagency agreement, regulation, or legislation.

Common Forms:

Task Force members have encountered some technological and administrative barriers to the development of joint forms to assist with and support Task Force activities. A workgroup has been established to address these barriers consistent with the charge set forth in Workers' Compensation Law §141-c, as added by the 2007 Workers' Compensation reform initiative (Chapter 6 of the Laws of 2007).

V. Task Force Consultations and Proposals

A. Introduction

The Executive Order calls for consultations with representatives of business and organized labor, as well as the Empire State Development Corporation in regard to the activities of the Task Force. This is in order to solicit their recommendations for ways to improve its operations. It also calls for the identification of administrative and legal barriers to cooperation and for the Task Force to propose appropriate administrative, legislative, or regulatory changes to:

- i. reduce or eliminate any barriers to the Task Force's operations;
- ii. prevent employee misclassification from occurring;
- iii. investigate potential violations of the laws governing employee misclassification; and
- iv. improve enforcement where such violations are found to have occurred

B. Consultations

Three consultations were held with interested parties in regard to worker misclassification.

The National Employment Law Project in conjunction with the AFL-CIO and the Brennan Center for Justice:

The first consultation was held on December 5th with the National Employment Law Project in conjunction with the AFL-CIO and the Brennan Center for Justice.

There was significant discussion on the role these parties could play as an active collaborator, especially with respect to the abuse low-wage workers are facing. One area in which they might complement the work being done on the sweeps is to assist as a liaison or structure for community and organizing groups in their communication with the Task Force. These groups would provide "safe" avenues of contact for reporting abusive employment schemes, misclassification, and fraud. They would also provide avenues for their constituents in finding information on services offered. These groups are also in contact with other states working on independent contractor reforms and have forwarded various suggestions as to reforms. The Department of Labor's Executive Assistant for Labor Affairs and the Director of the Bureau of Immigrant Workers' Rights will act as points of contact and will further develop avenues of cooperation where it is fitting.

The Business Council of New York State:

A consultation was held on December 18th with the Business Council of New York State. The Business Council presented a series of questions on behalf of their membership. Much of the information requested in these early meetings was unavailable prior to the drafting of this report. Specific areas of concern, related to sectors within their constituency, were brought to the attention of the Task Force.

Both of these groups, as well as other interested parties, will be provided with an opportunity to meet on a regular basis in order to address their questions and concerns. The next meetings are planned for Spring 2008.

Empire State Development Corporation:

This Report has been shared with the Empire State Development Corporations for their input.

C. Proposals

As the Task Force is only four months old, the following are considerations that may be developed into more formal proposals in 2008:

Single Standard for Worker Classification:

The Task Force would benefit from administrative or legislative action that would identify a single standard for determining whether an individual is an employee or an independent contractor. Adoption of a consistent standard for determining employment status could be achieved most easily through legislation. It could also be achieved administratively among the Task Force agencies. In the alternative, some states have addressed this issue by authorizing one agency to make determinations regarding employee classification. This approach would also require legislative action. Either approach, however, would assure consistency and would avoid situations in which a single employer must treat individuals as both employees and independent contractors, depending upon the law being enforced or the benefit involved.

Corporate Officer Responsibility:

Task Force enforcement of laws regarding misclassification would also benefit from statutory changes that would extend or clarify individual liability of corporate officers and/or shareholders, members of LLC's and LLP's, as well as successor or substantially-owned, affiliated entities for misclassification actions enforced by all Task Force agencies.

Data sharing:

Labor Law §537 authorizes the Department of Labor to disclose unemployment insurance and wage reporting data to State and local agencies in the investigation of fraud. The Department also has the authority to share such data with the Workers' Compensation Board for purposes of determining compliance with the coverage of workers' compensation insurance. This authority provides a basis under which the Department can share information with Task Force member agencies for purposes of the Task Force, specifically, the investigation and enforcement of employee misclassification.

While the Department of Labor has authority to share data, the Department of Taxation and Finance is limited in its ability to participate in actual workplace sweeps and share its audit results with other partners. In order to efficiently use resources, and to avoid numerous duplicative audits, legislation would be needed to authorize the Department of Taxation and Finance to participate in sweeps and to share audit results.

Multi-state Employers:

The issue of employers who cross state lines, essentially moving employees from place to place while avoiding taxation and accountability in any locale, is an identified concern. The Unemployment Insurance Division of the Department of Labor uses a four step localization of

employment test based upon Labor Law §561(2). The Task Force will consider, in coordination with other states, possible avenues aimed at resolving this issue.

Provision of Books and Records:

Unemployment Insurance Law provides for a minor misdemeanor charge should an employer fail to make books and records available (see Labor Law §575). The Minimum Wage Act also contains criminal penalties for failure to keep required records (Labor Law § 662). The provisions contained in 12 NYCRR §§472.2 and 472.5 in regard to the keeping of records, as well as the misdemeanor charges for not making them available, often fail to bring about compliance. Under the UI law, there is no penalty for not ‘keeping’ records, although such penalties do exist under Labor Law § 218, which covers the wage and hour laws. In addition, District Attorneys are reticent about bringing minor misdemeanor charges in an effort to enforce compliance. The Task Force will review the various laws affecting its members and may recommend changes to bring about a consistent set of penalties in addition to criminal sanctions.

VI. Preventing Employee Misclassification

A. Introduction

The Executive Order requires that the Task Force work cooperatively with business, labor, and community groups to seek ways to prevent employee misclassification.

Efforts at preventing misclassification fall into three broad categories:

Education:

The Task Force has established a web site linked to the Department of Labor's homepage that deals with misclassification. Over the next year, it is expected that additional information will be added aimed at better educating business, labor, and the public on issues of misclassification. Partner agencies will eventually link up with this page.

Thus far, the Executive Order and the New York State Department of Labor – IRS QETP agreement have received significant press. Through broad exposure we are beginning to see businesses and individuals ask the question: What is misclassification? Am I misclassifying my employees? And, am I being misclassified?

Moreover, as sweeps continue and begin to yield more conclusive results, the Communications Team will make proactive efforts to publicize the Task Force's activities in the media, including among business association newsletters and among the specialty press, which will further serve to educate employers and workers about the issue. Employer training seminars may also be held as requested by trade associations and other employer groups.

The Labor Department's Bureau of Immigrant Worker Rights is working closely with immigrant communities, community groups, and advocates in an effort to inform business owners and workers of their rights and responsibilities. On November 6, 2007, the Bureau as well as the Unemployment Insurance Division and the Division of Labor Standards joined the NYC Central Labor Council in a "Day of Action Against Worker Misclassification." This event helped to spread the word among workers and the general public.

Deterrence:

Sweep efforts, as well as consistent efforts at active, comprehensive, and coordinated enforcement, are key to deterring those who may consider non-compliance. The deterrent effect is demonstrated by an anecdote concerning an employer who, seeing the 'handwriting on the wall,' revised its tax returns. Media coverage of enforcement activities, as described above, will also play a significant role in deterrence.

Consistent Treatment:

While efforts at education are underway, sometimes inconsistent, program-specific criteria for determining who is and who is not an employee hinder the prevention of misclassification. Both employers and employees are confused by this lack of consistent treatment. As noted above,

some states have benefited from (a) establishing a single authority to make decisions regarding the classification of workers and (b) establishing a single test by which to make such determinations. These approaches could help to avoid confusion and inconsistency, which can lead to greater non-compliance on the part of the employer community. This is also consistent with effective employer education and outreach efforts. At the same time, the Task Force would encourage developing strong and open lines of communication with advocacy groups, business groups, and other interested constituencies who can serve as effective information and education outlets for their members or constituents.

VII. Goals for 2008

The Task Force is committed to carrying out the directives of the Governor's Executive Order. For the year ahead, it is expected that the Task Force will:

- Develop strategies to continue the early successes of our enforcement efforts by:
 - Expanding into a wider geographic area including northern New York State, Long Island, Utica-Rome, Western New York, and the Southern Tier.
 - Addressing additional industries beyond the commercial construction and restaurant industries such as residential construction, retail, janitorial, auto repair, and cosmetology services.
 - Extensive mining of already existing agency data to identify targets.
- Further consider legislative and regulatory changes including:
 - An evaluation of the merits of the various tests related to employee classification such as the common law and ABC test.
 - The possibility of achieving consistent employee classification criteria among state agency partners.
 - The possibility of designating a single agency to determine classification.
 - Discussions with labor and business groups aimed at developing consistent criteria for determining worker status.
- Increase information sharing between the partners and with other states:
 - To better mine agency data aimed at uncovering abuse.
 - To share tips and information so as to bring about compliance with all laws and regulations.
 - To learn from other states and share our best practices with them.
 - To coordinate with other states on enforcement against interstate trafficking of employees for the purpose of avoiding taxation as well as on other issues.
 - To formalize relationships with other state agencies, Federal agencies, local governments, and other states aimed at coordinated information sharing.
 - To consider an expansion of joint enforcement efforts.

VIII. Summary

In its first four months of operation, the Task Force has proactively engaged the issue of employee misclassification in New York State. Even so, we have not yet begun to scratch the surface. The Task Force is committed to an active, full-fledged effort at routing out misclassification. Its strategies include independent investigations, coordinated investigations, full-scale sweeps, and the sharing of results between the partners and others engaged in addressing these types of abuses.

Whether a given case involves an employer misclassifying ten employees or hundreds, New York's economy and the protections afforded its workers, businesses, and consumers are hurt by non-compliance. As such, the Task Force will counteract non-compliance wherever and whenever it might be found. Further, unlike past practice in which a noncompliant employer might be investigated by one agency but not by others, the unscrupulous will no longer be afforded an opportunity to comply with one aspect of one law while avoiding other laws. We fully expect employers to be in compliance in-full and across-the-board.

The members of the Task Force appreciate the challenge Governor Spitzer has put forward. We are invigorated by our charge, and look forward to meeting it in new and inventive ways.