

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

**TO DAVID A. PATERSON,
GOVERNOR
STATE OF NEW YORK**

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TASK FORCE MEMBERS

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NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE
NEW YORK STATE WORKERS' COMPENSATION BOARD
NEW YORK STATE WORKERS' COMPENSATION BOARD—FRAUD
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Executive Summary

In 2009, the Joint Enforcement Task Force on Employee Misclassification (JETF) continued its efforts to address the serious problem of employee misclassification. The Task Force has engaged in joint enforcement sweeps, coordinated assignments, systematic referrals and data sharing between agencies. We have brought about an unprecedented level of coordination and focus on the problem of employee misclassification and have raised the level of scrutiny given to misclassification cases by State Agencies. Our joint activities have led to the following results:

*****Overall results:** Since the start of the Task Force in September 2007 and the present, the enforcement and data-sharing activities of the JETF have identified nearly 31,500 instances of employee misclassification and discovered over \$389.6 million in unreported wages. To date, this has resulted in the assessment of over \$11 million in unemployment taxes and over \$1.3 million in unemployment insurance fraud penalties, over \$14.5 million in unpaid wages, and over \$1.5 million in workers compensation fines and penalties.

In 2009, the Task Force identified nearly 19,200 instances of employee misclassification, discovered over \$235 million in unreported wages, assessed over \$6 million in unemployment taxes and nearly \$300,000 in unemployment insurance fraud penalties, over \$2.5 million in unpaid wages, and nearly \$200,000 in workers compensation fines and penalties.

*****Joint enforcement sweeps:** Since the start of the Task Force, 65 joint enforcement sweeps have been conducted: 27 in the Metropolitan New York City area and 38 in Upstate New York. 19 of these sweeps were conducted in 2009. Completed

audits of businesses found on the sweeps have so far shown over 15,600 misclassified workers and over \$144.5 million in unreported remuneration. The audits have so far resulted in the assessment of over \$4 million in additional unemployment taxes, nearly \$5 million in unpaid wages, and nearly \$1.3 million in Workers Compensation penalties.

*****Coordinated enforcement cases:** Since the start of the Task Force, an additional 2,413 misclassification investigations have been completed based on tips, information sharing among partners, and hotline calls generated by the Task Force. These completed investigations show that 15,891 workers were misclassified, over \$245 million in unreported wages, and the assessment of over \$7 million in unemployment insurance taxes. Most of these cases were completed in 2009 when the Unemployment Insurance Fraud unit completed 1761 investigations showing \$174.1 million in unreported remuneration and \$4.7 million in unreported wages. New procedures have been put in place during 2009 to ensure that these cases are reviewed for potential Labor Standards and Workers Compensation violations.

*****Criminal Prosecutions and Referrals:** All sweep cases in which elements of fraud have been found have been reviewed for possible criminal violations. Where appropriate, these cases are referred for prosecution to the New York State Attorney General's Office and to District Attorneys throughout the State. These referrals have, to date, resulted in six felony prosecutions. Several other cases are pending with District Attorneys.

*****Sweep cases referrals:** All completed sweep cases in which misclassification is found continue to be referred to the New York State Department of Taxation and

Finance for assessment of state income tax owed. Completed unemployment audits are also sent to the United States Internal Revenue Service.

*****Data-Sharing:** The Task Force agencies together with two additional New York state agencies continue to meet regularly to discuss and implement data-sharing processes to aid in fraud detection efforts. Several new data-sharing processes have been put into effect in 2009.

*****Cross-Training:** In 2009, the JETF held a series of cross-trainings across the State. Over 300 investigators from the partner agencies met in two day sessions in which they learned how to recognize violations in each others subject areas, discussed the law and standards concerning misclassification, and received training in areas such as interviewing techniques and recognizing criminal violations.

*****Coordination and information-sharing with other states:** The Task Force shared information and enforcement strategies with several other states that are actively addressing the problem of worker misclassification. In October 2009, New York and Massachusetts co-sponsored a Northeast Regional Summit on Misclassification which was attended by nine northeastern states. The Northeast states are working on strategies to continue working together both to share enforcement strategies and to share information about employers who work in several jurisdictions.

I. Background and Purpose of the Task Force

A. Employee Misclassification Defined

Employee misclassification occurs when a worker is improperly denied the benefits and protections provided to “employees” as that term is defined by state and federal law. Workers who are classified as employees receive a wide range of legal protections including eligibility for unemployment insurance if they are laid off, eligibility for workers compensation if they injured on the job, and, where applicable, the right to earn the minimum wage and overtime pay.¹ Employers with employees are subject to wage and hour laws, must register with the State and pay unemployment and social security taxes, must withhold state and federal income taxes, and must obtain workers compensation insurance. Employees who are classified as independent contractors may be provided with a Form 1099 for tax reporting purposes and the employer is not responsible for employment taxes and employee benefits.

There are two primary forms of worker misclassification.

Misclassification as an independent contractor: This occurs when a worker who meets the legal standards for classification as an employee is instead misclassified as an independent contractor. In New York State, whether a worker should be classified as an employee or an independent contractor is dependent on what is called the “common law test”. The essential elements of the common law test involve determining whether the worker is subject to the control and supervision

¹ Workers who are classified as employees are also protected by a number of Federal laws including the National Labor Relations Act.

of the employer and rendering services that are an integral part of the employer's business or whether the worker is genuinely involved in an independent business offering services to the public and assuming the profit and risk of providing services.

Employers who misclassify employees as independent contractors may do so because they believe that the employees meet the common law standard for classification as an independent contractor or they may deliberately misclassify their employees in order to lower the cost of employing workers.

Unreported Employment or "off-the-books" work. This form of misclassification involves employees who are paid "off-the-books" and are not reported at all for tax and other financial purposes. Some of these employees may work for businesses that do not register with State and Federal taxation agencies or do not have workers compensation insurance. Others work for businesses that register with state and federal authorities but underreport the number of workers employed by the business.

In 2006 and 2007, several studies were released describing the extent of worker misclassification in New York State. The Cornell University School of Industrial and Labor Relations issued a report in February 2007 estimating that approximately 10.3% of New York State's private sector workforce is misclassified each year.² The report also estimated that approximately 14.9% of construction industry workforce is

² 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).

misclassified in a given year. A study by the Fiscal Policy Institute analyzed the effects of misclassification in the construction industry.³

B, Executive Order Establishing the Joint Enforcement Task Force

On September 5, 2007, Governor Eliot Spitzer signed Executive Order #17 establishing the Joint Enforcement Task Force. Governor Paterson continued the Task Force with Executive Order # 9 on June 18, 2008. The six Task Force partners are:

**** The New York State Department of Labor** including the Unemployment Insurance Division, the Division of Labor Standards, the Division of Safety and Health, the Office of Special Investigations and the Bureau of Public Work. .

**** The New York State Workers Compensation Board**

**** The New York State Workers Compensation Fraud Inspector General**

**** The New York State Department of Taxation and Finance**

**** The New York State Attorney General's Office**

**** The Comptroller of the City of New York.**

Commissioner of Labor M. Patricia Smith was designated as Task Force Chair and the New York State Department of Labor is the lead agency in coordinating Task Force efforts.

The Executive Order establishing the Task Force stressed the multiple ways in which misclassification harmed New Yorkers. The practice deprives vulnerable workers of important protections and benefits, gives employers who misclassify their employees

³ 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).

an improper competitive advantage over law-abiding businesses and deprives the State of substantial revenues.

The Executive Order charges the Task Force with:

***sharing information about suspected employee misclassification violations and pooling and targeting investigative and enforcement resources to address them;

***developing strategies for systemically investigating employee misclassification within industries in which misclassification is most common;

***identifying significant cases of employee misclassification which should be investigated jointly and forming joint investigative teams to utilize the collective investigative and enforcement capabilities of the Task Force members;

***establishing protocols through which individual Task Force agencies investigating employee misclassification matters under their own statutory schemes will refer a matter to other participating agencies for assessment of liability;

***soliciting the cooperation and participation of local district attorneys and other relevant agencies, and to establish procedures for referring cases to prosecuting authorities as appropriate;

***facilitating the filing of complaints and identification of potential violators;

***working cooperatively with business, labor, and community groups in identifying and preventing misclassification and educating employers and the public about misclassification; and

***proposing appropriate administrative, legislative and regulatory changes to prevent employee misclassification from occurring.

The Executive Order requires the Task Force to issue a report to the Governor on February 1 of each year describing the record and accomplishments of the Task Force and proposing and identifying mechanisms for the improved enforcement by the Task Force. On February 1, 2008, the Task Force issued its first report documenting the first five months of operation of the Task Force and the initial efforts of the Task Force to undertake these challenges. These accomplishments included establishing committees to oversee the enforcement efforts of the Task Force, entering into a multi-agency Memorandum of Understanding setting forth the duties and responsibilities outlined in the Executive Order and allowing for data-sharing and cooperation between the partner agencies, and conducting 15 interagency enforcement sweeps revealing 2,078 misclassified workers and \$19.4 million in unreported remuneration paid to employees.⁴

On February 1, 2009, the Task Force submitted its second Annual Report to the Governor.⁵ The Report described in detail the procedures used to carry out the joint enforcement efforts including how tips and cases are generated, how the sweeps are conducted, and how audits and results are coordinated. The report described the overall results from the time the Task Force began in September 2007 and January 2009 including identifying over 12,300 instances of employee misclassification, the assessment of over \$4.8 million in unemployment taxes and over \$1 million in unemployment insurance fraud penalties, over \$12 million in unpaid wages, and over \$1.1 million in workers compensation fines and penalties

⁴ Report of the Joint Enforcement Task Force on Employee Misclassification to Eliot Spitzer, Governor, State of New York. February 1, 2008, available at [New York State Department of Labor - Misclassification of Workers](#)

⁵ Annual Report of the Joint Enforcement Task Force on Employee Misclassification to David A. Paterson, Governor, State of New York, February 1, 2009 available at [New York State Department of Labor - Misclassification of Workers](#)

II. Enforcement and Data-Sharing Efforts

In 2009, the JETF continued the enforcement and data-sharing efforts described in detail in the February 2009 report. Through joint enforcement sweeps, coordinated investigations, referrals of audit results, and data-sharing, the Task Force seeks to ensure a coordinated approach to enforcement of misclassification cases and has begun a process that provides that an employer that is found to be engaging in the misclassification of employees is financially and legally liable for all of the resulting violations. By sharing investigation resources and tips and by each agency learning to identify violations in other areas, the agencies involved in the Task Force are able to do more work with fewer resources.

A. Joint Enforcement Sweeps

Joint enforcement sweeps involve a coordinated visit and inspection of a worksite by members of the Task Force. On nearly every sweep, the sweep teams have included investigators from the Department of Labor Unemployment Insurance and Labor Standards Divisions, the Department of Labor's Office of Special Investigations, the Workers' Compensation Board Bureau of Compliance, and the Workers' Compensation Board Office of the Fraud Inspector General. On sweeps involving public work construction projects and some private construction jobs, the Department of Labor, Bureau of Public Work or the New York City Comptroller's Office have provided members of the sweeps teams.

(1) Results

In 2009, the Task Force conducted 19 joint sweeps bringing the total number of sweeps conducted since the Task Force began to 65. In 2009, completed audits of businesses found on these sweeps uncovered 8,065 misclassified workers and over \$63.1 million in unreported remuneration. This has resulted in the assessment of over \$1.4 million in additional unemployment taxes and nearly \$300,000 in unemployment insurance fraud penalties.

Wage audits completed in 2009 conducted by either the Department of Labor Division of Labor Standards or the New York City Comptroller's Office show over \$2.5 million in unpaid wages. The Workers Compensation Board issued approximately \$200,000 in civil penalties resulting from sweep cases in 2009.

Overall, the 65 joint enforcement sweeps that have been conducted in the 27 months since the Task Force began have uncovered \$144.50 million in unreported wages, over \$4 million in unemployment taxes due, nearly \$5 million in wages due, and \$1.3 million in Workers Compensation penalties.

(2) Procedural Improvements

During 2009, the Task Force partners began new procedures designed to improve the processing of enforcement cases coming out of joint sweeps. One week following the date of the sweeps, the Task Force holds conference calls between all participants in the sweeps. The participants in the conference call discuss the results of the sweep, make sure all parties are aware of what was found on the sweep, and ensure that all parties receive the documents or interviews that were obtained on the sweep. Each group

identifies the employers that were found on the sweep that may have violations in their subject area and discusses its plan for proceeding with their investigation of these employers. This process also ensures that each group is aware of which employers are being investigated by more than one agency or division.

During the post-sweep conference calls, the parties also discuss the logistics of the operation of the particular sweep. This allows the agencies and divisions to assess proper procedures on conducting the sweeps and learn from problems that can arise. For example, a continuing problem on sweeps is that employers will attempt to have employees leave the premises to avoid being interviewed. The sweep teams continue to develop strategies to prevent employees from leaving without being interviewed or counted in the total employees present.

The post-sweep conference calls also allow the parties to begin to identify cases that should be handled on an expedited basis and cases that could develop into criminal referrals. These cases are then monitored closely and coordinated by the Task Force in the months following the sweep to ensure that they are handled consistent with these goals.

(3) Criminal cases resulting from sweeps

In 2009, six felony prosecutions were either brought or resolved by the Attorney General's Office or District Attorneys offices in cases arising from Task Force sweeps. Several other referrals are pending. The following cases were brought or resolved through pleas in 2009:

Arthur Avenue Bakery/Walter Galiano: In March 2009, Walter Galiano, the owner of the Arthur Avenue Bakery in the Bronx, was arrested for failure to pay wages in excess of \$350,000; failure to pay unemployment insurance; and falsifying business records in an effort to hide his business' illegal practices. The charges stemmed from Galiano's practice of paying his employees "off-the-books". The Attorney General of New York State, Andrew M. Cuomo, is prosecuting this case.

Moreno Service, Inc. /Alex Moreno: In March 2009, Alex Moreno of Moreno Service, Inc. operating as Getty Gas Station and Car Wash on Jerome Avenue in the Bronx, was arrested for failure to pay wages in excess of \$225,000.00; failure to pay into the State's unemployment insurance fund; and failure to secure adequate Workers' Compensation Insurance. This case also involved the practice of paying employees "off-the-books". The Attorney General is also prosecuting this case.

Leonard Maracle: In June 2009, Joint Enforcement Task Force referrals led to a guilty plea by a Rochester-based contractor, Leonard Maracle. On a Task Force sweep at Staybridge Hotel/Brooks Landing Development in Rochester, Maracle was found to have misclassified employees as independent contractors, in an attempt to evade making proper contributions to the New York State unemployment insurance trust fund. As part of his guilty plea, Maracle was required to pay restitution to New York State in the amount of \$8,875.42. The Monroe County District Attorney, Michael C. Green, prosecuted the case.

Demarco Flooring/Thomas Demarco: In June 2009, Thomas Demarco of Demarco Flooring, Inc. pled guilty to a misdemeanor for his failure to report employees

in order to evade paying required contributions into the New York State Unemployment Insurance Fund. This investigation arose out of a Task Force sweep at a construction project located at the Park Point project, at the Rochester Institute of Technology. As a result of his failure to report his employees, Demarco evaded paying over \$5000 to the New York State Unemployment Insurance Fund. Demarco was required to pay \$10,804.64 in restitution and fines to New York State. The case was prosecuted by the Monroe County District Attorney.

Madrit's Gourmet Restaurant/Atmi Kurtishi: In July 2009, Madrit's Gourmet Restaurant, Inc. and its president, Atmi Kurtishi, pled guilty to violating the New York State Worker's Compensation Law Section 52(1) (a), a class E felony, and for a misdemeanor under the Labor Law for failure to pay wages. The restaurant, which operates under the name of Madrit's Pronto Pizza, is located at 55 West 55th Street in Manhattan. Madrit's and Kurtishi paid their employees "off-the-books". As a condition of the guilty pleas, the defendants are required to pay restitution of \$135,135.78, representing the unpaid wages. The Madrit's/Kurtishi case was prosecuted by the Attorney General's Office.

RNCZS/Rick Napora: In September 2009, Rick Napora the manager of RNCZS, Inc. operating as the Milestone Restaurant and Tap Room in Chafee, pled guilty to Penal Law §175.30 [Offering a False Instrument for Filing in the Second Degree, a class "A" misdemeanor] and Labor Law §633 [Willful Failure to Pay Contributions, an unclassified Labor Law misdemeanor]. The charges stemmed from Napora's practice of paying employees "off-the-books". On January 11th, 2010, Napora was sentenced and

was ordered to pay restitution to New York State in the amount of \$17,893.00. The case was prosecuted by the Erie County District Attorney, Frank A. Sedita, III.

B. Coordinated Assignments

Many misclassification cases do not require the coordination and resources involved in a joint enforcement sweep. The Department of Labor has a fraud hotline where many individuals, businesses, labor unions and community groups call and provide tips about misclassification. The Fraud unit within the Unemployment Insurance Division of the Department of Labor receives and reviews the tips that come in by telephone, e-mail and letter. They also review the referrals that come in through the data-sharing processes set up with other government agencies. The number of tips handled in this manner has increased dramatically since the creation of the Task Force and the start of data-sharing efforts between agencies. In 2006, the Labor Department received 325 fraud complaints and referrals. In 2009, the Department received 2,963.

In 2009, there were 1761 completed unemployment insurance audits that came from these tips and referrals. These audits found \$5,015,842 in additional unemployment insurance contributions due. Overall, since the start of the Task Force in September 2007, these miscellaneous unemployment insurance audits have found \$245.1 million in unreported income, and over \$7 million in additional unemployment insurance contributions due. Since the start of the Task Force, coordinated enforcement and data-sharing have led to the assessment of over \$10 million in unpaid wages.

In 2009, the Task Force implemented new procedures to ensure that the tips that come in to the hotline are properly screened for possible labor standards and workers

compensation issues and that cases containing potential violations in multiple areas are handled in a coordinated fashion. The Task Force holds bi-weekly meetings with representatives of the Unemployment Insurance Fraud unit and of the Labor Standards division in which individual cases are evaluated and determinations are made as to which of the Task Force partners will participate in investigating the employer. At these meetings, the group will consider not just tips that come in from the fraud hotline but also cases that have come in from local Labor Standards, Unemployment Insurance and Workers Compensation offices.

Because of the nearly tenfold increase in tips and referrals coming into the Unemployment Insurance Fraud Unit, the unit, which is federally funded, has increased the number of staff from six to nine people during the last year. The unit has also taken steps to use the staff time more efficiently by making use of clerical support staff to do the more routine portions of the fraud investigations.

C. Data-Sharing

Representatives of the Task Force agencies together with representatives of two additional state agencies, the New York State Department of Insurance and the Department of Motor Vehicles continue to meet regularly in a “Forms Team” to discuss the sharing and coordination of forms and information to aid in fraud detection efforts. The Forms team implements provision 141-C of the Workers Compensation Law that allows for the sharing and coordination of forms to aid in fraud detection efforts.

During 2009, the Forms team implemented several new procedures that allow the agencies or divisions within agencies to have access to information contained in each

other's files and to automatically notify partners of fraud found during investigations.

Some of the new procedures implemented in 2009 include:

***Developed a Memorandum of Understanding (MOU) between Unemployment Insurance and the Public Work Division to provide Public Work with limited access to Unemployment Insurance employer information and wage reporting data and allow Unemployment Insurance to request certified payroll records to be compared against wages reported to Unemployment Insurance as a means of identifying fraud.

***Developed a process for Labor Standards to provide back pay award information to UI.

***Developed a process for the DOL Safety and Health Division to notify Workers Compensation when asbestos abatement contractors do not appear to have Workers Compensation coverage.

***Developed a referral process for Labor Standards and Public Work to provide the Department of Taxation and Finance with back pay award information for withholding tax compliance purposes.

***Revised forms and violations notices used by Labor Standards and Public Work to include a compliance check for the Unemployment Insurance Notice to Employee posting and to uncover information from complainants that can assist Unemployment Insurance with their investigations.

D. Ongoing Unemployment Insurance Division Efforts

The Unemployment Insurance Division also continues to track the extent of

worker misclassification found on the thousands of employer tax audits and investigations that it conducts each year. This information is useful in demonstrating the extent of worker misclassification and can also assist in determining industries in which the incidence of misclassification is highest.

In 2009, the Unemployment Division completed over 13,200 audits and investigations, finding over 113,900 misclassified workers and unpaid taxes of over \$35.9 million. The job categories showing the highest incidence of worker misclassification included construction, healthcare, educational services, food services, professional services, amusement and recreation, and credit services.

III. Types of Violations Found

In the twenty-eight months that the Task Force has been in existence, we have observed many different forms of employee misclassification. What follows is a description of the three most common types of misclassification found during our enforcement efforts. The categories of misclassification described below are followed by examples of cases we have seen. In many of the descriptions, we do not identify the actual employer either because the case has not been concluded or because of restrictions on the disclosure of information contained in Unemployment Insurance files.⁶

A. Multi-layered “subcontracting” on construction sites

One of the most common violations we see, particularly on upstate construction sweeps, are multi-layered “subcontracting” in trades such as dry-walling, roofing, masonry and painting. The prime contractor on a project will subcontract work to a

⁶ See, Labor Law Section 537.

company that is registered for UI and Workers Compensation. That company supervises and controls all of the work in the particular trade. However, the subcontractor will then hire crews of workers either on a permanent or temporary basis and designate the foreperson of the crew as a second-tier subcontractor. The subcontractors on these cases and the crews of workers they hire are often from out-of-state which make the process of recovering underpayments more difficult. The workers on these crews are rarely on the books for tax or benefit purposes. They are also subject to labor standards violations, such as periods of unpaid wages, overtime violations and deductions for items like food and hotel rooms. We see this arrangement on all types of established construction projects, including those that are partially funded by public money.

Examples:

***Out of state framing contractor with a website detailing major construction projects throughout the United States including several major projects in New York State. Investigation of the company discloses that only office staff and the project supervisor are considered employees of the company. The framers all work together on the projects and are supervised by the project supervisor but are divided into crews. Company claims that each crew leader represents a separate company. None of the crew leaders, who had been working for the company for a substantial period, were registered for Unemployment Insurance or Workers Compensation until after the Task Force conducts a sweep of the contractor. Multiple violations of labor standards laws including overtime and deductions from wages are found during the sweep.

***Private construction project near a State University (private housing for students). Drywall company from out-of-state hired to do the project. The Department of Labor received a phone call from a clerk from a Hispanic grocery store in the western part of the state. A group of 13 workers who only spoke Spanish came into the store. The workers were hired to work drywall and worked for four weeks, sixty hours a week, received no pay for the entire time and were fired and stranded in their van with no money to get back to their home out-of-state. Our sweep of the site showed a new crew of workers and the same working conditions. All of the workers were “off-the-books” and the company claimed they were subcontractors.

B. Significant underreporting of employees (“off-the-books” work) in restaurants, retail establishments and construction firms

Another common form of misclassification is significant underreporting of employees in restaurants, retail establishments, and construction firms. Most of these businesses are registered for Unemployment Insurance and carry Workers Compensation Insurance but report only a small percentage of their workers on their filings with these agencies. The remainder of their employees are “off-the-books”. The “off-the-books” workers are generally subject to labor standards violations. Because this type of violations generally results in the false filings with a Government agency, this type of case can result in criminal charges.

Examples:

***Arthur Avenue Bakery/Walter Galiano: Commercial bakery in the Bronx. Company had no Workers Compensation insurance when we conducted our sweep and a

Stop Work Order was issued. Most employees were not listed on the Unemployment Insurance filings. Most workers received \$55 per day for a 10-12 day workweek leading to labor standards violations of over \$350,000. Case has been brought as a criminal prosecution.

***Sweep of a luxury coop renovation/conversion in lower Manhattan. Coops were being advertised for sale for up to several million dollars. A sweep of the location found 17 subcontractors on the site. 14 of the 17 subcontractors were either not registered with the Unemployment Insurance Division or were underreporting their workers, some substantially, leading to potential assessments of unpaid UI taxes of over \$300,000. A workers compensation stop work order was issued on one of the subcontractors. The same subcontractor was found to be underpaying workers by approximately \$100,000.

*** We conducted four “Main Street” sweeps in different parts of New York State where we walked door-to-door and investigated most businesses along a commercial strip. These sweeps were a sample of the extent of misclassification in the retail industry. Of the 303 businesses visited, nearly 40% had UI misclassification violations, nearly 25% had labor standards violations, and 6% were issued Workers Compensation stop work orders. These businesses showed over \$17 million in unreported payroll.

C. **Workers who are under the control of an employer yet classified as independent contractors**

This type of misclassification occurs when all of the employees in a particular category of work are designated as independent contractors yet they are (a) under the direction and control of their employer; (b) are performing work that is central to their employer's business, and (c) do not have a business independent of their work with a particular company. For example, we may see a drywall or roofing company, or a transportation or mortgage insurance business where employees regularly work only for a particular company and where the employer supervises and controls the work of the employees. However, each worker is issued a 1099 tax form, considered an independent contractor, and is asked to incorporate or become a member of a LLC and get liability insurance. Often, workers in this type of misclassification are not issued 1099 tax forms.

Examples:

*** Sweep case in which the unemployment audit was appealed to Unemployment Insurance Appeals Board and decision issued in January 2009. The Task Force discovered the company working as a glazing subcontractor on a construction sweep in Manhattan. The president of the company told investigators that he had no employees even though at least eight workers were present on the site. The Board rejected the employer's argument that the workers were independent contractors because there was sufficient direction and control of the workers to make them employees. The Board also rejected the company's argument that the additional day laborers that were hired on the project and were "off-the-books" were neither employees or independent contractors since there was no third status under the law. The company was ordered to pay taxes of over \$18,000 and a penalty of over \$9,000.

***A talent agency was found to be misclassifying its workers and ordered to pay over \$13,000 in unemployment taxes. The UI Division found that the company had sufficient direction and control over the musicians working for them for the workers to be classified as employees rather than independent contractors.

***Art Gallery in Manhattan found to be classifying all of its employees, including art handlers, interns, cleaners, and security guards as independent contractors. Unemployment Insurance Division found over \$20,000 in additional UI contributions due.

IV. Training, Outreach, and Legislative Activities

Consistent with the Executive Order, the Task Force goes beyond enforcement and engages in many other activities that further the goal of reducing the misclassification of workers. These activities include training, outreach to business, unions, community groups and other states involved in efforts to curb misclassification.

A. Cross-Training

During the fall of 2009, the Task Force conducted five two-day training cross-training sessions throughout the state. A sixth session will be held in March 2010. Approximately 300 investigators and auditors from the Task Force Agencies participated in the training. The trainings had several goals:

- (1) To give line investigators and supervisors a basic understanding of all of the areas of law enforced by the Department of Labor, the Workers Compensation Board and the Department of Taxation and Finance so that investigators can recognize violations in the other areas when they are investigating an employer;

- (2) To describe and discuss the law covering the misclassification of workers and to discuss common types of violations;
- (3) To train investigators and supervisors to recognize cases that should be referred to either the Task Force itself or to one of the Task Force partners;
- (4) To train investigators in areas such as effective interviewing techniques and recognizing criminal law issues;
- (5) To brief investigators on procedures and practices followed by the Task Force on sweeps and coordinated assignments;
- (6) To have investigators and supervisors work in small groups on case studies to apply the knowledge gained during the training sessions and to discuss enhanced investigative techniques.

The trainings were conducted in small groups of 50 to 80 investigators to ensure active participation on the part of the investigators. Supervisors from all of the agencies participated in panels and in the planning of the training.

Feedback from the program evaluations distributed at the end of each session was overwhelmingly positive. The participants appreciated the opportunity to learn about the other areas of the law covered by the Task Force agencies and the opportunity to discuss sweep procedures. Most participants enjoyed the opportunity to apply what they had learned during the presentations in the case studies done at the end of the program.

B. Outreach efforts

The Task Force continued its outreach efforts in 2009. The Task Force gave

public presentations and forums to several groups during the year including the Business Council of New York State, the New York County Lawyer's Association, the Tax Practitioner's Institute, the Construction Advancement Institute, several regional union councils, and foreign Consulate representatives. The Task Force also meets regularly with representatives from the Business Council, unions and community groups.

The Task Force also did a substantial amount of outreach and exchange with other states involved in combating misclassification. Since 2007 when our Task Force was started, nine other states have started Misclassification Task Forces, many of them modeled after New York's. The Task Force Executive Director, Jennifer Brand, spoke on panels on misclassification with other state and federal representatives at both the national conferences of the National Association of State Workforce Agencies and the Interstate Labor Standards Association. The Task Force also met with representatives of the states of Maryland and Maine which started Task Forces in 2009 and consulted by telephone with several other states including Iowa, New Jersey, and Massachusetts.

The New York Misclassification Task Force was also cited as an example of the benefits of coordinated targeted enforcement in the area of worker misclassification in the August 2009 Government Accounting Office report entitled "Employee Misclassification. Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention".⁷

In October 2009, New York and Massachusetts co-sponsored a one day Regional Summit on Misclassification in Holyoke, Massachusetts. Over 80 individuals representing the states of New York, Massachusetts, Maine, Vermont, New Hampshire, Connecticut, Rhode Island, New Jersey, and Maryland attended the event. Commissioner

⁷ See cited report at page 17.

of Labor M. Patricia Smith hosted the event with Massachusetts Director of Labor George Noel. Each state reported on their own activities surrounding misclassification and panels were held on Enforcement and Data-Sharing. The participants in the Summit discussed formats to continue sharing strategies to combat misclassification and to share information on specific violators who work in several states. New York has continued to work with the other states since the Summit to put these ideas into place. In his 2010 State of the State Address, Governor Paterson mentioned these efforts to share enforcement information amongst the Northeast states and to jointly pursue lawbreakers who move from jurisdiction to jurisdiction.

C. Legislation

The Task Force has continued to explore the issue of whether legislative changes to the definition of employee could assist in addressing the problem of worker misclassification. New York currently uses a “common law” control standard to determine employee status while a majority of states use a statutory definition commonly referred to as the “ABC” test. A common formulation of the “ABC” test provides that an individual providing a service will be considered an employee unless the three following factors can be demonstrated:

- (A) the individual is free from the control and direction in performance of the service, both under his or her contract and in fact; and
- (B) the service is performed outside the usual course of the business of the employer or outside of all of the employer’s places of business; and
- (C) the individual is customarily engaged in an independently established trade,

occupation, profession or business of the same nature as that involved in the service performed.

Discussions have been held with various stakeholders, with staff of the various Task Force agencies who are involved in enforcement, and with states that have an “ABC” test to determine the advantages and disadvantages of such a test. In December 2009, Governor Paterson accepted the report of the New York State Small Business Task Force which had been formed to study ways to make New York State more hospitable to small businesses. The report discussed the confusion caused by the current common law standard and by differing decisions among the various state agencies. Among the recommendations of the report was that the Misclassification Task Force propose legislation adopting the “ABC” test in all state agencies to ensure a clearer standard in determining employee status:

The Governor should direct the Employee Misclassification Task Force to draft Legislation to provide greater consistency and enforcement among State and federal partners, based on the three factors commonly referred to as the ABC test. New York is presently among a minority of states that apply the common law test for determining the status of workers, rather than an ABC test. The Employee Misclassification Task Force should address consistency in determinations among State agencies and develop a general approach to defining worker classifications, while also developing industry specific guidelines where needed. This will allow for fair and reasonable use of independent contractors while protecting legitimate employees.⁸

The Small Business Task Force also recommended that the Misclassification Task Force take steps to reach out to the small business community.

In January 2010, Jennifer Brand testified at two State Legislative Hearings. On

⁸ Report and Recommendations of the New York Small Business Task Force, December 1, 2009 at page 19. http://www.ny.gov/governor/press/pdf/Final_report.pdf

January 13, 2010, the New York State Senate Labor Committee held a public hearing on “Employee Misclassification in New York’s Underground Economy”. On January 27, 2010, the New York State Assembly Labor Committee held a public hearing on “Tax Evasion Through Employee Misclassification.” The Misclassification Task Force will be working with the Governor’s Office, the Legislature and stakeholders to develop the optimal approach to this issue.

V. Goals for 2010

The Task Force continues to work to decrease the incidence of misclassification through increased enforcement, data-sharing and outreach. The current economic climate makes it even more essential that we continue to do more with fewer resources by sharing the work of uncovering misclassification among state agencies and that we continue to recover lost tax revenue through our efforts. In the year ahead, the Task Force will:

Enforcement:

***Continue strategic and coordinated enforcement sweeps in the construction, manufacturing, retail and food service sectors and continue to take steps to move our strategic cases to completion more quickly;

***Continue to work on industry-specific proactive investigations in other industries with a high incidence of misclassification;

***Continue to pursue criminal prosecutions with local District Attorneys and the Attorney General’s Office in cases of serious employer fraud.

***Work with other states to pursue employers that operate in multiple jurisdictions.

Legislation:

***Work with the Governor's Office, the Legislature, and stakeholders on potential legislative changes to the standards used in employee classification.

Outreach:

***Increase outreach to the business community, including small businesses, to raise awareness of the problems of misclassification.

***Prepare educational materials for distribution to the public and to employers.

Coordination between agencies:

***Continue to improve processes for sharing enforcement information and moving cases through the enforcement process.

***Continue to work on identifying data-sharing processes.

***Get more State agencies involved in working with the Task Force on identifying and taking enforcement action against misclassification.