

ANNUAL REPORT OF THE  
JOINT ENFORCEMENT TASK FORCE ON  
EMPLOYEE MISCLASSIFICATION  
To  
Honorable Andrew M. Cuomo  
Governor State of New York

*February 1, 2011*

**TASK FORCE MEMBERS**

NEW YORK STATE DEPARTMENT OF LABOR  
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE  
NEW YORK STATE WORKERS' COMPENSATION BOARD  
NEW YORK STATE WORKERS' COMPENSATION BOARD  
FRAUD INSPECTOR GENERAL  
NEW YORK STATE ATTORNEY GENERAL  
COMPTROLLER OF THE CITY OF NEW YORK

*Submitted by:*

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Commissioner of Labor  
Chair, Joint Enforcement Task Force  
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Executive Director, Joint Enforcement Task Force



## **Executive Summary**

The Joint Enforcement Task Force on Employee Misclassification (JETF) was originally established in 2007 by Executive Order No. 17, and the Executive Order creating the JETF was recently reviewed and continued by Governor Andrew M. Cuomo through Executive Order No. 2. Recognizing the tremendous financial burden that misclassification of workers puts on both the worker and the State, the Order charged the JETF with investigating the practice, coordinating State agencies to enforce the laws employers violate when they misclassify workers, and developing legislative and other solutions to combat the problem. The Executive Order also requires the JETF to issue a report to the Governor on February 1 of each year describing its record and accomplishments and proposing and identifying mechanisms for the improved enforcement by the JETF.

Misclassification occurs when an employee is incorrectly labeled an independent contractor or is completely “off-the-books”. This practice hurts employees who are denied the protections of various employment and labor laws, hurts legitimate businesses which must compete with employers who engage in this cost-cutting practice, and hurts government which does not receive proper taxes from all employers.

In 2010, the Joint Enforcement Task Force on Employee Misclassification completed its third year of efforts to address the serious problem of employee misclassification. The JETF continued its work by engaging in joint enforcement sweeps, coordinated assignments, systematic referrals and data sharing between agencies.

Misclassification in the construction industry took center stage in 2010. The JETF participated in legislative hearings concerning misclassification and announced several enforcement actions in that industry. One of the most notable advancements in 2010 was the passage of the Construction Industry Fair Play Act, which was signed into law in August 2010 and went into effect on October 26, 2010. The JETF has taken the lead in the implementation of the Act.

As an early leader in enforcement concerning misclassification, New York also continued to play a national role in efforts to address worker misclassification. In June 2010, Commissioner of Labor and Task Force Chair Colleen C. Gardner testified about misclassification enforcement efforts before the U.S. Senate Committee on Health, Education, Labor and Pensions. JETF Executive Director Jennifer S. Brand participated in a strategy forum on misclassification convened by the President’s Middle-class Task Force and the United States Department of Labor. The New York JETF also began to lead monthly phone conferences among the Northeast states to discuss misclassification enforcement strategies. In September 2010, the National Association of State Workforce Agencies awarded its annual State Excellence Award for Leadership (SEAL) to New York State in recognition of the work of the JETF.

JETF activities have led to the following results:

## **Overall Results**

Since the start of the JETF in September 2007, enforcement and data-sharing activities have identified over 50,000 instances of employee misclassification and discovered over \$704 million in unreported wages. To date, this has resulted in the assessment of over \$21.5 million in unemployment taxes and over \$1.85 million in unemployment insurance fraud penalties, over \$16.5 million in unpaid wages, and over \$2.3 million in workers' compensation fines and penalties.

In 2010, the JETF identified over 18,500 instances of employee misclassification, discovered over \$314 million in unreported wages, assessed over \$10.5 million in unemployment taxes, over \$2 million in unpaid wages and over \$800,000 in workers' compensation fines and penalties.

## **Joint Enforcement Sweeps**

Since the start of the JETF, 79 joint enforcement sweeps have been conducted: 32 in the Metropolitan New York City area and 47 in other parts of New York State. Fourteen of these sweeps were conducted in 2010. Completed audits of businesses found on the sweeps have so far shown nearly 20,000 misclassified workers and over \$205 million in unreported remuneration. These audits have resulted in the assessment of over \$5 million in additional unemployment taxes, over \$7 million in unpaid wages, and over \$2.3 million in Workers' Compensation penalties.

## **Coordinated Enforcement Cases**

Since the start of the JETF, 4,524 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 30,446 workers were misclassified, over \$499 million in unreported wages, and the assessment of over \$16.4 million in unemployment insurance taxes. A large number of these cases were completed in 2010 when the Department of Labor completed 2,111 fraud investigations showing \$324.9 million in unreported remuneration and \$9.4 million in unemployment insurance due.

## **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.<sup>1</sup> Employers with employees are subject to wage and hour laws, must register with the State and

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

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 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.<sup>2</sup> The report also estimated that approximately 14.9% of the construction industry workforce is misclassified in a given year. A study by the Fiscal Policy Institute analyzed the effects of misclassification in the construction industry.<sup>3</sup>

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<sup>2</sup> 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).

<sup>3</sup> 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).

## **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 David Paterson continued the Task Force with Executive Order # 9 on June 18, 2008. Governor Andrew Cuomo continued the Task Force with Executive Order # 2 on January 3, 2011. The six JETF 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; and
- The Comptroller of the City of New York.

The Commissioner of Labor is 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 an improper competitive advantage over law-abiding businesses, and deprives the State of substantial revenues.

The Executive Order charges the JETF 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 JETF members;
- Establishing protocols through which individual JETF 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 JETF to issue a report to the Governor on February 1 of each year describing its record and accomplishments and proposing and identifying mechanisms for improved enforcement. This is JETF's fourth annual report. Previous reports 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. Previous reports also described the type of misclassification seen by the JETF and also discussed the extensive cross-training conducted by the JETF in 2009-2010.<sup>4</sup>

## **II. Enforcement and Data-Sharing Efforts**

In 2010, the JETF continued its joint enforcement and data-sharing efforts. Through joint enforcement sweeps, coordinated investigations, referrals of audit results, and data-sharing, the JETF seeks to ensure an efficient and comprehensive approach to enforcement of misclassification cases and 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 JETF are able to do more work with fewer resources.

### **A. Joint Enforcement Sweeps**

In 2010, the JETF conducted 14 joint sweeps bringing the total number of Sweeps conducted since the JETF began to 79. Joint enforcement sweeps involve a coordinated visit and inspection of a worksite by JETF members. 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 were also included. In addition to the post-sweep meetings and conference calls to discuss the results of and strategize on particular sweeps, the JETF members now have bi-monthly enforcement meetings divided by the upstate and downstate regions in order to discuss progress and share strategies on particular cases. These meetings also result in a timely evaluation of whether a case should be referred for criminal prosecution. 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.

#### **(1) Results**

The 2010 sweeps were conducted at construction sites, restaurants, and retail establishments. In 2010, completed audits of businesses found on JETF sweeps have uncovered over \$81 million in unreported wages, resulted in the assessment of over \$1.7 million in additional unemployment

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<sup>4</sup> Annual reports from 2008, 2009, and 2010 are available at <http://www.labor.ny.gov/agencyinfo/MisclassificationofWorkers.shtml>

taxes, over \$800,000 in workers compensation fines and penalties and shown over \$2 million in unpaid wages.

Overall, the 79 joint enforcement sweeps that have been conducted in the over three years since the JETF began have uncovered over \$205 million in unreported wages, over \$5 million in unemployment taxes due, over \$7 million in wages due, and \$2.3 million in Workers' Compensation penalties.

## **(2) Criminal Cases Resulting from Sweeps**

In 2010, the Task Force continued to evaluate all sweep cases for potential criminal violations. The Department of Labor's Office of Special Investigations leads this process. Cases that show evidence of criminal violations are referred to the Attorney General's Office or District Attorneys' offices for prosecution. In 2010, the Office of Special Investigations continued to cooperate with these offices on preparing cases previously referred for prosecution and referred three additional criminal cases.

One felony prosecution was resolved through a plea in 2010. Walter Galiano, the owner of the Arthur Avenue Bakery in the Bronx and his corporation pled guilty to one count of Falsifying Business records in the First Degree, in violation of Penal Law section 175.10, a class E Felony; one count of Failure to Pay Wages, in violation of Labor Law section 191(1)(a)(i), a class A misdemeanor; one count of Failure to File a Return or Report, in violation of Tax Law Section 1801(a), a class A misdemeanor; and one count of False Statements or Representations-Unemployment Insurance, in violation of Labor Law Section 632(b), a class A misdemeanor. The charges stemmed from Galiano's practice of paying his employees off-the-books. The defendant agreed to pay back wages, taxes and Workers' Compensation insurance premiums and penalties totaling \$353,310.42. The defendant was also sentenced to 30 days in prison and five years probation. The defendant began serving his 30 day sentence on January 19, 2011. The Attorney General of New York State prosecuted this case.<sup>5</sup>

### **A. Coordinated Assignments**

In 2010, the number of coordinated misclassification assignments continued to grow significantly. 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 Department of Labor receives and reviews the tips that come in by telephone, e-mail and letter. Referrals that come in through the data-sharing processes set up with other government agencies are also reviewed.

Some of the most significant results of the JETF's work have been in the area of Unemployment Insurance (UI) fraud. The state's UI Trust Fund currently has a \$ 3.2 billion deficit that has been exacerbated by high unemployment, and the JETF's efforts to secure proper employer payments into the UI Trust Fund help to restore solvency to the UI system. In 2010, there were 2,138 completed unemployment insurance audits that came from these tips and

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<sup>5</sup> See Attorney General's press release at [http://www.ag.ny.gov/media\\_center/2009/mar/mar26a\\_09.html](http://www.ag.ny.gov/media_center/2009/mar/mar26a_09.html)

referrals. The audits found \$9.4 million in additional unemployment insurance contributions due. These numbers represented a significant increase over 2009 when there were 1,761 completed unemployment insurance audits that came from these tips and referral and \$5 million in additional unemployment insurance contributions due. Overall, since the start of the JETF in September 2007, these miscellaneous unemployment insurance audits have found over \$499 million in unreported income, and over \$16.4 million in additional unemployment insurance contributions due.

In 2010, the JETF continued to hold bi-weekly meetings with representatives of the Unemployment Insurance Division and the Labor Standards Division 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. At these meetings, the group considers 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.

Some examples of cases handled in this manner include:

- An anonymous phone call to the tip hot-line from an employee led to an investigation of a bail bonds agency that was paying bookkeepers, sales associates, and a receptionist "off-the-books". The Department of Labor found UI tax contributions due of close to \$11,000;
- Referral from the Department of Taxation and Finance showed that a retail and wholesale tile sales company was underreporting the number of workers on its payroll. A UI audit resulted in additional contributions due of \$14,767.23 and a fraud penalty;
- A language school was investigated and was found to be misclassifying many language instructors, program assistants, receptionists, and building maintenance employees as independent contractors. A UI audit resulted in additional contributions due of \$8,804.56 and a fraud penalty; and
- A balloon and party store was found to be paying cash wages off-the-books for employees who filled the balloons with helium and delivered the balloons. A UI audit showed contributions due of \$14,774.94 and a fraud penalty was also assessed.

## **B. Ongoing Department of Labor Unemployment Insurance Efforts**

The Department of Labor also continues to track the extent of worker misclassification found on the thousands of employer UI 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 2010, the Department of Labor completed over 14,500 audits and investigations, finding nearly 218,000 misclassified workers and unpaid taxes of \$40 million. The job categories showing the highest incidence of worker misclassification included insurance carriers, professional services, construction, healthcare, performing arts, food services, educational services, and amusement and recreation.



### C. Data-Sharing

- Representatives of the JETF agencies together with representatives of two additional state agencies, the New York State Department of Insurance and the Department of Motor Vehicles 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<sup>6</sup> that allows for the sharing and coordination of forms to aid in fraud detection efforts. The team has implemented a number of procedures that give agencies access to information contained in each other’s files and to automatically notify partners of fraud found during investigations.

During 2010, the Forms Team:

- Continued to refine and troubleshoot existing agency data-sharing processes to allow for the sharing of the most relevant and beneficial information;
- Finalized a data-sharing agreement between the Unemployment Insurance Division and the Division of Safety and Health at the Department of Labor;
- Developed draft data-sharing agreements between the Department of Labor and the State Liquor Authority and the Department of Motor Vehicles that are currently under review;
- Began development of compliance reviews between partner agencies to develop routine due diligence processes; and
- Played a central role in the development of forms and data-sharing under the new Construction Industry Fair Play Act of 2010 (discussed at page 19) including production and translation of the posting required by the Act.

### (3) Construction Industry: Enforcement and Legislative Efforts

Since its inception, the JETF has focused its attention on the high incidence of misclassification in the construction industry. In June 2010, the JETF highlighted the problem with the announcement of four different enforcement actions involving construction projects. In August 2010, Governor David Paterson signed into law the Construction Industry Fair Play Act of 2010 which creates a presumption of employment in the construction industry unless an employer can meet a three factor “ABC” test<sup>7</sup>.

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<sup>6</sup> Section 141-c of the Workers’ Compensation Law: Coordination of forms. The board, the commissioner of labor, the commissioner of taxation and finance, the commissioner of motor vehicles, and the superintendent of insurance shall consult on an ongoing basis to coordinate the amendment of forms used to gather data helpful in identifying fraud, so as to promote effective use and sharing of such information for identifying fraud in the area of workers’ compensation. Through such consultations and other means, these agencies shall study the implementation of appropriate practicable technology to verify the authenticity of forms, including certificates of coverage.

<sup>7</sup> Under the ABC Test, an individual is considered an employee unless he or she is free from direction and control in performing the job, AND the work that is performed is not part of the usual work done by the business that hired the individual, AND the individual has an independently established business.

## **A. Construction Industry Enforcement Actions**

In June 2010, the JETF highlighted and announced the results of four different construction sweeps carried out in 2009 and 2010. All four projects were major construction projects carried out by well-established prime contractors or owners where many of the workers employed by subcontractors on the project were either misclassified as independent contractors or were “off-the-books” workers. These projects represented some of the worst violations that we have found on construction sites. The four projects are described below:

### **1. The Province at RIT**

The Province at RIT is a privately owned student housing project built by Edwards Communities Construction Company on land adjacent to the Rochester Institute of Technology. The JETF conducted two enforcement sweeps on the project in January and February of 2010 and found widespread violations of State labor laws by the subcontractors on the site including non-payment of overtime, off-the-books employment, failure to pay unemployment insurance taxes, and misclassification of employees as independent contractors. The JETF announced the results of the sweeps on June 9, 2010.<sup>8</sup> The JETF found twenty-one subcontractors on the worksite and twelve of them had labor law and/or workers’ compensation law violations. The pervasiveness of the violations among so many contractors on the site made this one of the worst sites visited by the JETF.

The twelve subcontractors were found to have misclassified a total of 211 workers and to owe the Unemployment Insurance Trust Fund more than \$80,000 in unemployment insurance taxes. Four of the subcontractors were found to owe a total of \$42,835 in unpaid wages and liquidated damages and were assessed an additional \$22,500 in penalties. Three subcontractors were issued stop-work orders by the Workers’ Compensation Board for not carrying workers’ compensation insurance.

Many of the subcontractors who were found to be in violation on the Province at RIT project were out-of-state contractors who had two-tiered payrolls. They had crews of core employees who were on-the-books and were paid properly but they hired crews of additional workers who were “off-the-books” and were not paid overtime. One painting contractor hired as many as 55 painters on the project and considered each one an independent contractor. Despite the fact that most of the subcontractors were out-of-state contractors with no ties to New York State, the JETF has been able to collect nearly all of the money due on the project.

### **2. Student Housing Projects near SUNY Brockport and SUNY Cortland**

On June 14, 2010, the JETF announced the results of two sweeps conducted in 2009 at construction sites for privately owned student housing near the State Universities at Cortland and Brockport. The developer of the project was United Development of Troy, NY. The JETF found widespread labor law violations for subcontractors on both sites that led to the assessment

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<sup>8</sup> A press release concerning the announcement can be found at [www.labor.ny.gov/pressreleases/2010/June09\\_2010\\_1.shtml](http://www.labor.ny.gov/pressreleases/2010/June09_2010_1.shtml)

of wages, interest and penalties totaling \$412,749 for both projects. For the two projects, nine subcontractors were found to have misclassified 135 workers and to owe over \$26,000 in unemployment insurance taxes. Nearly all of the violations concerned employees who were paid off-the-books, were not paid for overtime wages, and were not reported for unemployment insurance purposes. Some of the contractors were out-of-state contractors and some were from New York State.<sup>9</sup>

The Brockport project highlighted some of the conditions faced by crews of out-of-state workers brought in to do construction work. One crew of workers from North Carolina on the project worked for three weeks without receiving pay and were fired and left stranded without money to get home. The Department of Labor received a call from the workers after they were left stranded by their employer. Another group of workers worked for three months without being paid wages and were only given an apartment and some money for food. Wages for these workers were included in the restitution amounts.

### **3. Orange County Regional Medical Center**

On June 9, 2010, the JETF announced the results of a June 2009 enforcement sweep at the construction site for Orange County Regional Medical Center. The Department of Labor cited New York Professional Drywall (NYPD), the carpentry subcontractor on the project for nonpayment of overtime, off-the-books employment and illegal deductions from wages. The Department found a total of \$118,274.76 to be owed to workers for unpaid overtime and illegal deductions and assessed another \$129,589 in penalties. The Department held NYPD liable for underpayments to workers who NYPD claimed to be working for three different subcontractors on the project. NYPD has appealed the orders to the Industrial Board of Appeals.<sup>10</sup>

This case also involved non-payment of wages to a crew of out-of-state workers. The Department of Labor collected over \$17,000 in wages for 15 workers who were not paid at all for a portion of their work on the project.

### **4. Construction Industry Fair Play Act**

In 2010, the New York State Legislature took action to address the issue of misclassification in the construction industry. Legislative hearings were held in January 2010 that focused on the issue of misclassification in general but highlighted the issue of misclassification in the construction industry. On 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.” JETF Executive Director Jennifer Brand testified at both hearings.

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<sup>9</sup> A press release concerning the announcement can be found at [www.labor.ny.gov/pressreleases/2010/June12\\_2010\\_1.shtm](http://www.labor.ny.gov/pressreleases/2010/June12_2010_1.shtm)

<sup>10</sup> A press release concerning the announcement can be found at [www.labor.ny.gov/pressreleases/2010/June012\\_2010\\_1.shtm](http://www.labor.ny.gov/pressreleases/2010/June012_2010_1.shtm)

In June 2009, the Construction Industry Fair Play Act was first introduced in the State Senate and Assembly. The JETF worked with the Governor's Office, the Legislature and interested parties including the construction industry, labor unions, and members of the public during the first half of 2010 to discuss and comment on the proposals. A final version of the Act was passed by the Legislature and signed into law on August 27, 2010. The Act became effective on October 26, 2010.<sup>11</sup>

The Fair Play Act creates a new standard for determining whether a worker is an employee or an independent contractor in the construction industry, makes the act of misclassification itself a violation of the law,<sup>12</sup> and provides enhanced penalties for employers who fail to properly classify their employees. The law adopts the "ABC test" used in many jurisdictions for determining employee classification. An individual performing services for an employer is presumed to be an employee unless they meet all three of the following criteria:

- They are free from the control and direction in performing the job, both under contract and in fact;
- They are performing services outside of the usual course of business of the company; and
- They are engaged in an independently established trade, occupation or business that is similar to the service they are performing.

The new law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a "separate business entity" from the contractor for whom it provides a service. If an entity meets all of the twelve criteria, it will not be considered an employee of the contractor. Instead, it will be considered a separate business that is subject to the new law regarding its own employees.<sup>13</sup> Thus, if the separate business entity test is met, the law allows two businesses which are in the same business to work side-by-side on a project without one business responsible for all employees.

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<sup>11</sup> A full copy of the text of the Act is available on the Department of Labor's website at [www.labor.ny.gov/sites/legal/laws/construction-industry-fairplay-act.page](http://www.labor.ny.gov/sites/legal/laws/construction-industry-fairplay-act.page).

<sup>12</sup> Under the law in existence before the passage of the Fair Play Act, an employer was subject to penalties and restitution for the results of misclassification such as failure to pay overtime or failure to pay unemployment insurance taxes but not for the act of misclassification itself.

<sup>13</sup> To be considered a separate business entity from the business to which services are provided, a sole proprietor, partnership, corporation or other entity must: (1) be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the contractor to specify the desired result; (2) not be subject to cancellation when its work with the contractor ends; (3) have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle; (4) own the capital goods and gain the profits and bear the losses of the entity; (5) make its services available to the general public or business community on a regular basis; (6) include the services provided on a federal income tax schedule as an independent business; (7) perform the services under the entity's name; (8) obtain and pay for any required license or permit in the entity's name; (9) furnish the tools and equipment necessary to provide the service; (10) hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employee's income to the Internal Revenue Service; (11) have the right to perform similar services for others on whatever basis and whenever it chooses; and (12) the contractor does not represent the entity or the employees of the entity as its own employees to its customers. The entity must meet all twelve criteria to be considered a separate business entity.

The new standards apply to all contractors in the construction industry and to all employment determinations made under the Labor Law (including labor standards, prevailing wage, and unemployment insurance) and the Workers' Compensation Law. They do not apply to determinations under the New York State Tax law, which will continue using its current standard that is consistent with the standards used by the Internal Revenue Service. However, the enhanced penalties under the new law apply to all determinations under the Labor Law, Workers' Compensation Law and the New York State Tax law.

An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to \$2,500 per misclassified employee for a first violation and up to \$5000 per misclassified employee for a second violation within a five year period. Employers may also be subject to criminal misdemeanor prosecution and remain subject to all of the existing penalties, taxes and restitution that accompany the misclassification. Further, the law also requires contractors to post a notice concerning rights and obligations under the Fair Play Act and provides penalties for failure to post the notice; the JETF developed and published a sample notice that contractors can use to comply with the notice provisions of the law.

The new law requires extensive data sharing between the Department of Labor, the Workers' Compensation Board and the Department of Taxation and Finance concerning misclassification and other fraud violations. It also provides that only one agency issue a Fair Play Act penalty for a particular instance of misclassification.

Because the Fair Play Act is enforced by multiple agencies and multiple programs within the Department of Labor, it presents its own unique coordination challenges. The agencies and divisions have been meeting regularly to discuss consistent enforcement of the law and to establish systems for data-sharing, case referrals and tracking of cases to ensure that only one penalty is issued for an instance of misclassification. The JETF, together with the Forms group, has taken the lead in this process and will continue to oversee implementation of the Act to ensure consistency.

The JETF has also engaged in outreach to business leaders and their representatives, unions and the general public about the law by giving information sessions on the Act to various groups throughout the State. The JETF has created a Fact Sheet on the law that is posted on the Department of Labor and Workers' Compensation Board websites and has been distributed at the various educational forums.<sup>14</sup>

## **5. Outreach and National Activities**

New York State was an early leader in enforcement against the problem of misclassified workers. Since 2007, when the JETF began its multi-agency efforts, at least twelve other states have begun task forces. As more states and the Federal government put increased attention on the issue of misclassification, New York has been called on to discuss its enforcement efforts in a variety of forums.

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<sup>14</sup> Fact Sheet available at [www.labor.ny.gov/sites/legal/laws/construction-industry-fairplay-act.page](http://www.labor.ny.gov/sites/legal/laws/construction-industry-fairplay-act.page) .

On June 17, 2010, Commissioner Colleen Gardner gave testimony entitled “Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification” before the United States Senate Committee on Health, Education, Labor and Pensions.<sup>15</sup> The testimony addressed New York’s and other states’ enforcement efforts, how misclassification hurts state governments through the loss of tax revenue or payment for public programs, and the impact of federal legislative proposals under review by the Senate.

In May, 2010, JETF Executive Director Jennifer Brand, together with representatives of six other states, participated in a state forum on misclassification sponsored by the United States Department of Labor and the President’s Middle-class Task Force. The States detailed their enforcement efforts and met with representatives of several federal agencies to discuss best practices. In August 2010, James Konicki, Manager of Tax Program Analysis and Support in the Unemployment Insurance Division of the Department of Labor presented information to other state unemployment insurance officials on the Department’s misclassification and fraud detection efforts at a state forum sponsored by the United States Department of Labor.

New York coordinated monthly conference calls between nine northeast states to discuss enforcement, legislation, and other best practices concerning misclassification enforcement as well as to share tips on specific employers that may be working in multiple states. New York continues to respond to inquiries from other states beginning multi-agency misclassification efforts and provides documents from and information concerning the JETF and other fraud detection efforts.

The JETF continues to engage in outreach and education on the issue of misclassification. In addition to the Fair Play forums discussed in Section III, supra, the outreach has included presentations at the Cornell University Labor and Employment Forum, the Labor and Employment Section of the New York State Bar Association, and the Unemployment Insurance National meeting of the National Association of State Workforce Agencies.

In September, 2010, the National Association of State Workforce Agencies (NASWA) whose members are the state Departments of Labor throughout the country awarded its annual State Excellence Award for Leadership (SEAL award) to New York State for the work of the Joint Enforcement Task Force on Employee Misclassification. The award is given to a workforce related program which addresses an issue and results in significant improvement of performance.<sup>16</sup>

### **III. Goals for 2011**

The JETF continues to work to decrease the incidence of misclassification through increased enforcement, data-sharing and outreach. In the year ahead, the JETF will:

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<sup>15</sup> A full copy of the testimony is available at <http://help.senate.gov/imo/media/doc/Gardner.pdf>

<sup>16</sup> Award write-up can be viewed at [www.workforceatm.org/sections/pdf/2010/2010\\_naswa\\_awards.pdf](http://www.workforceatm.org/sections/pdf/2010/2010_naswa_awards.pdf)

## **Enforcement**

- Continue strategic and coordinated enforcement sweeps in the construction, manufacturing, retail and food service sectors;
- Identify industry-specific proactive investigations in other industries with a high incidence of misclassification;
- Work on effective and coordinated enforcement of the Fair Play Act;
- Continue to pursue criminal prosecutions with local District Attorneys and the Attorney General's Office in cases of serious employer fraud; and
- Work with other states to pursue employers that operate in multiple jurisdictions.
- Identify whether additional programmatic, legislative, or regulatory fixes are needed to combat employee misclassification.

## **Outreach**

- Conduct outreach to business, labor and community groups concerning the Construction Industry Fair Play Act. Prepare additional educational materials concerning the Act;
- Increase outreach to the business community, including small businesses, to raise awareness of the problems of misclassification; and
- Prepare additional educational materials for distribution to the public and to employers.

## **Coordination Between Agencies**

- Improve processes for sharing enforcement information and moving cases through the enforcement process; and
- Continue to work on identifying data-sharing processes.

## **IV. Conclusion**

During 2010, the JETF has actively enforced employment laws involving worker misclassification in order to protect workers and law-abiding businesses and to collect taxes due. Through coordinated enforcement and data-sharing between the JETF agencies, we are able to share resources and make all of our work more efficient. This year, we will implement and enforce the newly enacted Construction Industry Fair Play Act and will seek to remedy the rampant violations in the construction industry. The JETF looks forward to continuing its work on this critical issue in 2011.