

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

To

Honorable Andrew M. Cuomo  
Governor State of New York

*February 1, 2015*

## **TASK FORCE MEMBERS**

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

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Chair, Joint Enforcement Task Force



## **Executive Summary**

Governor Andrew M. Cuomo's Executive Order No. 2 continued the Joint Enforcement Task Force on Employee Misclassification (JETF), originally established in 2007 by Executive Order No. 17. Noting that employee misclassification has a significant adverse impact on the residents, businesses and economy in New York State, the Order charged the JETF with:

- investigating the practice of worker misclassification;
- coordinating state agencies to ensure enforcement of the laws violated when employers misclassify workers; and
- developing legislative proposals and other tools 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 improved enforcement by the JETF.

Misclassification occurs when an employee is incorrectly labeled an independent contractor, or is not reported by the employer in any capacity (i.e. "off the books"). This practice hurts the government which is deprived of substantial revenues due to nonpayment of taxes and decreased legitimate business activity; hurts law abiding businesses which must compete with employers who engage in this illegal cost-cutting practice; and hurts employees by denying them the protection of various employment and labor laws by reducing compliance with employment and job safety standards.

New York State took an aggressive step toward combating misclassification when it passed the Construction Industry Fair Play Act which went into effect in October 2010. Initially the JETF focused considerable effort on ensuring awareness of the new law, and continues to focus its efforts on enforcement of the law. Additionally, in furtherance of New York State's mission to combat misclassification, New York State passed the New York State Commercial Goods Transportation Industry Fair Play Act which became effective April 10, 2014. As with the Construction Industry Fair Play Act, initial efforts by the JETF concentrated on alerting employers to the new law and implementing enforcement efforts toward this industry.

In 2014, the Joint Enforcement Task Force on Employee Misclassification continued its efforts to address the serious problem of employee misclassification. The JETF carried out its mission by:

- engaging in joint enforcement sweeps;
- coordinating assignments among agency partners;
- making systematic referrals to appropriate law enforcement agencies; and
- implementing the sharing of data between agencies.

In 2014, the JETF:

- identified nearly 26,000 instances of employee misclassification;
- discovered nearly \$316 million in unreported wages; and
- assessed nearly \$8.8 million in unemployment insurance contributions.

## **Coordinated Enforcement Cases**

In addition to the JETF investigations conducted in 2014, the Department of Labor completed over 1,800 fraud investigations discovering over \$264 million in unreported wages and nearly \$7.2 million in unemployment insurance contributions due.

### **I. Background and Purpose of the Task Force**

#### **A. Employee Misclassification Defined**

Employers with employees are subject to wage and hour laws, must register with the State, must pay unemployment and social security taxes, must withhold state and federal income taxes, and must obtain workers' compensation insurance. 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 are injured on the job and, where applicable, the right to be paid the minimum wage and overtime pay.<sup>1</sup> Workers who are properly classified as independent contractors should be provided with a Form 1099 for tax reporting purposes, but 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 as 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 in performing the job, whether the work that is performed is part of the usual work of the employer's business, and whether the worker has an independently established business offering services to the public, similar to the service they are performing for the employer. The implementation of the Construction Industry Fair Play Act, and the New York State Commercial Goods Transportation Industry Fair Play Act, results in a different test applicable to those working in the construction and commercial goods transportation industries, known as the "ABC test." For additional information regarding these laws, see page 7 - 9. Ultimately, the question is who is responsible for this worker's taxes and bills if he or she is injured on the job? Employers who misclassify employees as independent contractors may do so because they believe that the employees meet the standard for classification as an independent contractor or they may deliberately misclassify their employees in order to evade the regulations and taxes protecting employees.

Since August 2007 enforcement and data sharing activities have identified nearly 140,000 instances of employee misclassification and discovered nearly \$2.1 billion in unreported wages.

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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.

## **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.

Tax evasion by some increases costs to all responsible taxpayers. In addition, when taxpayers perceive that others who should be paying taxes are able to get away with underpaying by failing to report all their income, this has a corrosive effect on public trust of the tax system and the state government. In construction, contractors who evade the law can discount labor costs and unfairly underbid those contractors who accurately account for their labor expenses. State unemployment and worker compensation systems are shortchanged, hurting states’ ability to provide the assistance to which workers are entitled.<sup>2</sup> In the case of the port trucking industry, employee misclassification places substantial financial responsibility for buying and maintaining expensive trucks on individual drivers rather than on trucking companies. These workers suffer the best of both worlds – they toil without the protections and benefits of employees, yet are without the control over their work that truly legitimate independent contractors enjoy.<sup>3</sup>

### **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 Office of Special Investigations is the lead agency coordinating Task Force efforts.

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<sup>2</sup> Brian F. Curran, Linda H. Donahue, “Tax and Policy Implications of Changes to Reporting Requirements for Construction Services” (Cornell University, ILR School, December 2013).

<sup>3</sup> Smith, Rebecca, David Berisman and Paul Marvy, “The Big Rog: Poverty, Pollution and Misclassification of Truck Drivers at America’s Port.” National Employment Law Project (NELP): New York

The Executive Order establishing the Task Force stressed the multiple ways in which misclassification harmed New Yorkers. The practice:

- gives employers who misclassify their employees an improper competitive advantage over law-abiding businesses;
- deprives vulnerable workers of important protections and benefits; 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 systematically 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 or administrative schemes will refer a matter to other participating agencies for assessment of liability under their statutory or administrative schemes;
- Soliciting the cooperation and participation of local district attorneys and other relevant agencies, and establishing procedures for referring cases to prosecuting authorities as appropriate;
- Facilitating identification of potential violators and the filing of complaints, including soliciting referrals and other relevant information from the public through an advertised telephone hotline;
- Working cooperatively with business, labor, and community groups in identifying and preventing misclassification, educating employers and the public about misclassification, and enhancing mechanisms for identifying and reporting employee misclassification;
- Proposing appropriate administrative, legislative and regulatory changes to eliminate barriers to the Task Force's operations, prevent employee misclassification from occurring and improve enforcement where such violations are found to have occurred;
- Assessing existing methods of preventing and investigating employee misclassification, and subsequent enforcement actions, and recommending that participating agencies adopt appropriate measures to improve prevention and enforcement efforts;
- Increasing public awareness of the harms inflicted by employee misclassification;
- Working cooperatively with federal, state and local social services agencies to provide assistance to vulnerable populations exploited by worker misclassification; and

- Consulting with representatives of business, organized labor, members of the legislature, and other agencies regarding the activities of the Task Force and ways of improving its operations.

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 eighth 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 2014, the JETF continued its joint enforcement and data-sharing efforts. Through joint enforcement sweeps, coordinated investigations, referrals, audit results, and data-sharing, the JETF seeks to ensure an efficient and comprehensive approach to enforcement of misclassification cases ensuring 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 2014, the JETF conducted 83 sweeps bringing the total number of sweeps conducted since the JETF began to 290. 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 was also included. 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.

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<sup>4</sup> Annual reports from 2008, 2009, 2010, 2011, 2012 and 2013 are available at <http://www.labor.ny.gov/ui/employerinfo/employer-misclassification-of-workers.shtm>

## **Results**

The 2014 sweeps were conducted at construction sites, bars/restaurants, automotive tire and repair centers, grocery stores, retail/wholesale establishments, beauty supply stores and nail salons. In 2014, completed audits and investigations of businesses found through the JETF sweeps:

- uncovered nearly \$52 million in unreported wages;
- resulted in the assessment of nearly \$1.6 million in additional unemployment insurance contributions; and
- revealed over 10,300 misclassified workers.

## **B. Coordinated Assignments**

Some of the most significant results of the JETF's work have been in the area of Unemployment Insurance (UI) fraud. As of December 31, 2014 the state's UI Trust Fund has a deficit of approximately \$1.53 billion. The JETF's efforts to secure proper employer payments into the UI Trust Fund help to restore solvency to the UI system.

- In 2014, there were over 1,800 completed unemployment insurance audits and investigations that came from tips and referrals.
- The audits and investigations found over \$7.2 million in additional unemployment insurance contributions due.

The JETF's public efforts include 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.

In addition, the JETF coordinates the investigation and resolution of cases that do not rise to the level of a sweep. The JETF works to coordinate each member agency's approach to bad actors and to mediate disputes between employers and employees in cases that do not rise to the level of criminality. In 2014, the number of coordinated misclassification assignments continued to grow significantly.

Internally, 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, as well as possible underpayment of unemployment insurance contributions, and that cases containing potential violations in multiple areas are handled in a coordinated fashion. At these meetings, the group also considers cases that come in from local Labor Standards, Unemployment Insurance and Workers' Compensation offices.

Examples of cases handled include:

- A call was received on the Misclassified Worker Task Force hotline indicating that a restaurant in Brooklyn was paying workers off the books, not paying the correct rate for overtime work, and not giving its workers a day off. It was found that the restaurant was not registered for unemployment insurance purposes. The employer had incomplete records and did not maintain a bank account. The employer claimed that he had two overlapping shifts of four employees each. However, a site visit resulted in seven employees observed working. Due to the failure of the employer to maintain adequate records, the field representative estimated contributions due based on the hours the business was open and the number of employees observed onsite. As a result, for the audit period of the first quarter of 2011 through the first quarter of 2014 \$39,000 in unemployment insurance contributions were found to be due. A 50% fraud penalty was assessed for failing to maintain records of cash payroll.
- A telephone complaint was received that an employer was misclassifying customer service workers as independent contractors, and not paying the correct overtime rate. The employer, a marketing and entertainment company, misclassified 22 individuals as independent contractors in 2013. Also, the employer failed to report amounts paid to the officers. Additional contributions of \$8,478.80 were determined due for the period from the second quarter of 2013 through the first quarter of 2014.
- A complaint against an employer was filed through an online form on the Department of Labor website. The complaint stated that the employer paid workers cash on a prevailing wage job, and took deductions from the paychecks without reporting them. The employer had not reported wages for unemployment insurance purposes. Additionally, a claimant for unemployment insurance stated that he was paid cash wages by the employer. The field representative found that the employer, a sole proprietor who was a painting contractor, had limited books and records. The employer filed a registration form stating he had one employee, when in fact he had 26. Due to the failure of the employer to maintain adequate records, the auditor estimated wages based on the hours worked per week and the rate of pay. Contributions due of \$5,619.82 were assessed for the first quarter of 2013 through the third quarter of 2013, the time period in which the employer worked on the job.
- The Office of Special Investigations received a complaint which was referred from the NYS Inspector General's Office. The complaint alleged that an unregistered employer paid wages off the books. Subsequently, a telephone complaint was received from a worker for this employer corroborating the information and further indicating that illegal deductions were being taken from the worker's pay. The employer was a moving company which utilized vehicles which would fall under the purview of the Commercial Goods Transportation Industry Fair Play Act. The field representative found that the employer paid workers in cash and did not keep any records of how much was paid to each individual. Bills of lading contained information on how long each job took and the number of individuals on the job. Due to the employer's failure to maintain adequate records, these were used to calculate contributions due of \$5,980.18 for the first quarter of 2011 through the second quarter of 2014. The workers were found to be employees pursuant to the Commercial Goods Transportation Industry Fair Play Act.

### **C. Construction Industry: Enforcement and Legislative Efforts**

Based on research and statistics, the construction industry has some of the highest incidents of employee misclassification. Therefore, the JETF has, and will continue to, focus attention on this industry. The inception of the Construction Industry Fair Play Act in August 2010 has assisted in refining the investigative process by creating a presumption of employment in the construction industry unless an employer can meet the ABC test.<sup>5</sup>

Additionally, the Fair Play Act contains a twelve 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. The Construction Industry Fair Play Act has, and will continue to, make investigation and enforcement of employee misclassification in the construction industry a more precise and uniform process.

- The JETF conducted 6 sweeps of construction sites in New York State in 2014.
- 1 was conducted in the NYC Metropolitan area which resulted in the initiation of 3 investigations.
- 5 were conducted in upstate NY resulting in 15 investigations.

The sweeps resulted in the discovery of nearly \$2.7 million in unreported wages, nearly \$104,000 in unemployment insurance contributions due, the imposition of fraud penalties and the identification of nearly 230 misclassified workers.

### **D. Commercial Goods Transportation Industry: Enforcement and Legislative Efforts**

A recent study revealed that 82% of port truck drivers are classified as independent contractors. In response, in 2014 New York State passed the New York State Commercial Goods Transportation Industry Fair Play Act which became effective April 10, 2014. Like the Construction Industry Fair Play Act, the law creates a presumption of employment in the commercial goods transportation industry unless an employer can meet the ABC test. Moreover, the law contains an eleven part test to determine when a sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity shall be considered a separate business entity from the commercial goods transportation contractor for whom the service is being provided. The passage of this law will contribute to a more consistent and refined approach to investigations and enforcement in the commercial goods transportation industry.

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<sup>5</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.

- Since April 10, 2014 the Department of Labor has completed 118 audits/investigations of employers in the commercial goods transportation industry. The audits/investigations came from a variety of sources including referrals from other agencies.
- 25 of the audits/investigations were initiated based on tips received.
- 25 of the audits/investigations were initiated based on a random selection of employers.
- The Department of Labor registered 24 previously unregistered employers in this industry based on unreported employees' applications for unemployment insurance.
- Underpayments totaling \$379,000 have been assessed.

In addition to the above efforts, the Department of Labor worked with the NYS Department of Transportation and the New York State Thruway Authority to distribute posters on the new law to be displayed in numerous rest areas across the state in an effort to disseminate information about the law. Also, the Department of Labor sent notices of the new law to warehouse locations across the state to be posted prominently so that commercial goods transportation drivers may be alerted to the new law.

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

In 2014, the Department of Labor completed over 12,000 audits and investigations, finding over 133,000 misclassified workers and unpaid contributions due of over \$40.4 million. The job categories showing the highest incidence of worker misclassification include:

- Professional, Scientific and Technical Services;
- Construction of Buildings;
- Food Services and drinking places;
- Publishing industries (except internet);
- Administrative and Support Services;
- Specialty trade contractors;
- Ambulatory Health Care Services;
- Personal and Laundry Services;
- Performing Arts, Spectator Sports, and Related Industries;
- Educational Services;
- Motion Picture and Sound Recording Industries;
- Merchant Wholesalers, Nondurable Goods.

### **III. 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 continue to meet periodically 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 automatically notify partners of fraud found during investigations.

During 2014, 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;
- Continued development of compliance reviews between partner agencies to develop routine due diligence processes;
- Added technical enhancements to the automated Due Diligence Application to improve search functionalities and improve business rules; and
- Began preliminary discussions with the State Liquor Authority to enter into a data sharing agreement for fraud detection purposes.

Additionally, an enforcement team comprised of Department of Labor's Public Work, Labor Standards, OSI and UI continue to meet regularly to review referral cases from within the DOL to determine penalties for notice and misclassification violations as well as cases referred from Department of Taxation and Finance and the Workers' Compensation Board.

In 2014, DOL UI issued 40 employee determinations utilizing the employment tests under the Construction Industry Fair Play Act. The DOL enforcement team identified 28 violations of the posting provisions for failing to conspicuously display Fair Play Act posters at job sites. The team also issued its first misclassification penalty based on the misclassification of 18 employees. To date, 596 poster violations have been issued resulting in the assessment of \$90,550 in fines, \$63,400 of which has been paid.

#### **IV. Labor Law Legislation**

As stated in other sections of this report, the New York State Commercial Goods Transportation Industry Fair Play Act was passed, and became effective, April 10, 2014. The law creates a new standard for determining whether a driver of commercial vehicles who transports goods is an employee or independent contractor. The law presumes that such workers are employees unless they meet the "ABC test" and are a separate business entity. More information on this new law can be found at [www.labor.ny.gov/legal/commercial-goods-transportation-industry-fair-play-act.shtm](http://www.labor.ny.gov/legal/commercial-goods-transportation-industry-fair-play-act.shtm)

#### **V. Goals for 2014**

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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.

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:

- Continue to focus on UI fraud and its prevention;
- Focus on expanding awareness and enforcement of the Commercial Goods Transportation Industry Fair Play Act; and
- Consider expanding the Task Force to include additional members.

### **Enforcement**

- Continue strategic and coordinated enforcement sweeps;
- Identify industry-specific proactive investigations in industries with a high incidence of misclassification;
- Continue to work on effective and coordinated enforcement of the Fair Play Acts;
- 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; and
- Identify whether additional programmatic, legislative, or regulatory fixes are needed to combat employee misclassification.

### **Outreach**

- Continue to conduct outreach to business, labor and community groups to ensure awareness of the Task Force and encourage communication therewith; and to ensure awareness of the Commercial Goods Transportation Industry Fair Play Act and compliance therewith.
- Increase outreach to the business community, including small businesses, to raise awareness of the problems of employee 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.

## **VII. Conclusion**

During 2014, the JETF has actively enforced employment laws involving worker misclassification in order to protect workers and law-abiding businesses and to collect contributions 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. The JETF looks forward to continuing its work on these critical issues in 2015.