ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION

TO DAVID A. PATERSON, GOVERNOR STATE OF NEW YORK

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 INSPECTOR GENERAL
NEW YORK STATE ATTORNEY GENERAL
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Executive Summary

Since its creation by Executive Order in September 2007, the New York State Joint Enforcement Task Force on Employee Misclassification ("the Task Force") has been addressing the serious and pervasive problem of employee misclassification. Numerous studies and reports in New York State and nationally have discussed the need to approach the problem of employee misclassification with a strategic and coordinated multi-agency approach. For the last sixteen months, the Task Force has engaged in joint enforcement sweeps, coordinated assignments, and systematic referrals and data sharing between state agencies. This increased focus on the issue of worker misclassification and the unprecedented coordination between agencies and divisions involved in workplace enforcement has already led to the following results:

*** ***Overall results:*** The enforcement and data-sharing activities of the Task Force have identified 12,300 instances of employee misclassification and discovered over $157 million in unreported wages. To date, this has resulted in 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.

****Joint enforcement sweeps:*** 46 joint enforcement sweeps have been conducted to date: 20 in the Metropolitan New York City area and 26 in Upstate New York. These sweeps, which have primarily involved the construction industry, have resulted in investigations of 291 business entities. Completed unemployment insurance audits in 163 of these investigations show 7,789 misclassified workers and over $86 million in unreported remuneration and has resulted in the assessment of over $2.5 million in

additional unemployment taxes and over $1 million in unemployment insurance fraud penalties.

******Main Street Sweeps:*** The Task Force has conducted a series of door to door "Main Street" sweeps to investigate compliance with employment laws in retail and commercial strips. Teams of unemployment insurance, labor standards and workers compensation investigators went door-to-door to businesses in retail strips in four localities and visited a total of 304 businesses. In 67% of the businesses visited, investigators saw evidence of violations requiring follow-up enforcement action. Over 11% of the businesses were not registered at all for Unemployment Insurance and 23 stop work orders were issued by the Workers' Compensation Board for lack of workers compensation coverage. [1]

******Coordinated enforcement cases:*** An additional 1,118 misclassification investigations have been initiated based on tips, information sharing among partners, and hotline calls generated by the Task Force. 617 completed unemployment insurance investigations have shown 4565 misclassified workers and $71 million in unreported remuneration. To date, these cases have resulted in the assessment of over $2.3 million in additional unemployment insurance taxes.

**** Unpaid wages:* The joint enforcement sweeps have so far led to the assessment of over $2.2 million in unpaid wages. The coordinated enforcement and data sharing activities of the Task Force and its members have led to the assessment of an additional $10 million in unpaid wages.

[1] The Workers' Compensation Board has the authority to issue "stop work orders" ordering a business to halt operations until Workers' Compensation is obtained.

******Workers' Compensation stop work orders and penalties:*** The joint enforcement sweeps have led to the issuance of twenty-seven stop work orders, the assessment of $642,250 in civil penalties for failure to maintain workers compensation coverage pursuant to Workers' Compensation Law Section 52-5, and the assessment of $467,000 in civil penalties for the intentional misrepresentation of payroll leading to premium fraud pursuant to Workers' Compensation Law Section 52-(d) and failure to maintain business records pursuant to Workers' Compensation Law Section 131.3.

******Criminal Referrals:*** All sweep cases in which elements of fraud have been found have been reviewed for possible criminal violations. Many of the cases have been referred for prosecution to the New York State Attorney General's Office and to District Attorneys throughout the State. The Attorney General's Office has brought the first case stemming from a Task Force sweep charging a restaurant owner in a multi-count felony prosecution with submitting false filings to the Unemployment Insurance Division which undercount the number of workers employed, failing to secure workers' compensation coverage, and failing to pay overtime wages and make the required contributions to the Unemployment Insurance fund.

******Sweep Case Referrals:*** All completed sweep cases in which misclassification was found have been referred to the New York State Department of Taxation and Finance for assessment of state income tax owed. Audits have also been sent to the United States Internal Revenue Service.

******Data-Sharing:*** The Task Force agencies together with two additional New York State agencies have implemented several data-sharing processes to aid in fraud detection efforts. The data-sharing team has put in place several automatic referral processes that

will routinely notify partner agencies when employer violations have been detected within another agency. The agencies have also worked on revising forms used by field inspectors to allow for the collection of information that can be used by the partner agencies.

This annual report summarizes the ongoing enforcement efforts of the Task Force and looks ahead to future efforts. The Task Force has only begun to address this critical issue and much work lies ahead. The current economic crisis faced by our state makes enforcement of employment laws even more essential. Misclassification costs New York State millions of dollars each year. Addressing this issue protects workers and law-abiding employers and collects much-needed state revenues.

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 are injured on the job, and, where applicable, the right to earn the minimum wage and overtime pay. 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 the 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. [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

The Joint Enforcement Task Force was established by Executive Order on September 5, 2007. 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 Board 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.**

Commissioner of Labor M. Patricia Smith was designated as Task Force Chair and the New York State Department of Labor (DOL) 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] In the past year, the Task Force has made substantial progress on all of the goals outlined by the Executive Order. This report summarizes its efforts.

[4] Report of the Joint Enforcement Task Force on Employee Misclassification to Eliot Spitzer, Governor. State of New York. February 1, 2008.

II. Task Force Accomplishments

The primary accomplishment of the Task Force has been an unprecedented level of coordination and focus on the problem of employee misclassification. Employee misclassification cuts across many areas of state and local law enforcement. Prior to the efforts of the Task Force, the discovery of a misclassification violation by one agency or by one division within a particular agency did not result in a referral to another agency or division. Each enforcement agency pursued its own claims, tips and targets and carried out audits with information obtained in its own investigation.

Through joint enforcement sweeps, coordinated investigations, referrals of audit results, and data-sharing, the Task Force has ensured a coordinated approach to enforcement 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. This fact alone raises the costs and penalties of misclassification and leads to compliance and deterrence.

The Task Force has also raised the level of scrutiny given to misclassification cases. Joint sweep cases and coordinated enforcement cases are chosen strategically because they appear to present serious and ongoing examples of employee misclassification. The information obtained in these cases is evaluated in a coordinated fashion to ensure that all available evidence is being pursued. As more of these cases are done and evaluated in a centralized and coordinated manner, the enforcement teams have seen repeat patterns of behavior and are able to build on their knowledge and experience in future cases.

Case strategies are also pursued to allow for the greatest deterrent effect. All joint enforcement cases are evaluated by the partner agencies to determine whether the level of fraud in a case warrants referral for criminal prosecution. The agencies also assess any applicable fraud penalties where appropriate.

The interagency coordination involved in these cases also allows for enhanced enforcement capabilities by each agency. The Task Force does not currently have its own additional enforcement resources to carry out its efforts. Instead, it uses the existing resources of the partner agencies. The joint enforcement efforts allow for efficiencies that lead to greater enforcement abilities. Each agency can use the evidence, interviews, and audits obtained by the other agencies in conducting its own enforcement actions.

A. Initiation of cases

Cases and tips come in to the Task Force in a variety of manners. Task Force members have done outreach to community groups, labor unions, and business groups that result in general tips as to industry violations and specific tips as to violations at particular worksites or businesses. The Task Force also has a hotline number and website that receives tips. Nearly 2000 tips, e-mails and calls regarding misclassification have been received by the Task Force since the initiation of the hotline. Cases and complaints coming into the Task Force member agencies through outreach, intake or any other means are also referred to the Task Force for action. Calls and tips are received from a variety of groups including business owners and employees.

Task Force tips and calls are evaluated centrally and a determination is made whether to proceed with an investigation. All available information on a possible target is

obtained from the files of the member agencies, from potential witnesses and any other available sources. Based on the information obtained, the Task Force determines whether it will conduct a joint enforcement sweep or to refer the case for a coordinated enforcement action. Joint enforcement sweeps are chosen when Task Force members determine that a particular case would benefit from a larger scale enforcement effort involving an unannounced visit to a worksite or worksites involving several of the Task Force members. Coordinated enforcement occurs when joint action is warranted but where it can occur through the Task Force members taking a joint approach to an investigation and sharing results.

B. Joint Enforcement Sweeps

Since its creation, the Task Force has conducted forty-six joint enforcement sweeps. Twenty have been in the New York metropolitan area and twenty-six have been upstate. Twenty-nine of the sweeps took place in 2008. These sweeps have resulted in investigations of 291 business entities. Because of the wide-spread problem of misclassification identified in the construction industry, the majority of the sweeps have been conducted on construction sites. The sweeps have also involved restaurants, hotels, factories and retail establishments.

(1) Process

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 members from the Department of Labor Unemployment Insurance and Labor Standards Divisions, the Department of Labor Office of Special Investigations, the Workers'

Compensation Board Bureau of Compliance, and the Workers' Compensation Board Office of the Fraud Inspector General. [5] On sweeps involving public work construction projects, the Department of Labor, Bureau of Public Work or the New York City Comptroller have been members of the sweep teams. The Department of Labor, Bureau of Health and Safety has participated in sweeps involving asbestos contractors and provided safety training to staff prior to the construction sweeps. The agencies that participate in the sweeps have the legal authority to enter and inspect workplaces and require employers to produce records.

On each sweep, one of the partner agencies or divisions is designated the "sweep leader" for the purpose of organizing the logistics of the sweep. Depending on the complexity of the joint sweep, conference calls may be held between the sweep team members to discuss the target, any background information gathered and the most effective way to carry out the sweep. All sweep members meet at a designated location just prior to the sweep to discuss sweep operations.

During the sweep, some members of the sweep team meet with the employer or on-site employer representative to review records and ask questions about the employer's workforce, payroll, wage and hour practices and unemployment insurance and workers compensation coverage. Other members of the sweep team, usually investigators from the Department of Labor, Labor Standards Division, move throughout the worksite to interview workers. Labor Standards investigators with appropriate language skills are used on sweeps and workers who are interviewed are usually given palm cards that

[5] The Department of Taxation is statutorily limited with respect to participation in actual workplace sweeps (see Tax Law section 697(e) (3). However, the Department can receive and act upon information received during a sweep and use that information to conduct its own investigation of withholding and income tax fraud. The Attorney General's Office participates in cases once it is determined that a criminal referral to that office is appropriate.

describe the purpose and nature of the sweep. On all sweeps, the Department of Labor, Office of Special Investigations (OSI) arranges for law-enforcement protection from either local, county or state police. OSI also prepares and issues subpoenas to employers who do not comply with on-site requests for records. If an employer found on a sweep does not have Workers' Compensation Insurance, the Workers' Compensation Board will issue a Stop Work Order to that employer during or immediately following the sweep and also assess penalties based on failure to carry Workers' Compensation insurance.

After the sweep, the team members share all information obtained during the sweep. Issues concerning the application of the law concerning independent contractors are discussed between the members. Additional evidence is sought from the employer where applicable. The DOL Unemployment Insurance Division, the DOL Labor Standards Divisions or the New York City Comptroller's Office will then conduct audits of results found on the sweep.

Upon completion of an audit finding misclassification of workers, the DOL Unemployment Insurance Division will forward its completed audit and supporting materials to the Workers' Compensation Board, and the Department of Taxation and Finance. Both of these agencies will review the findings, do further investigation and, where warranted, issue fines and assessments under their own statutes. Completed investigations by the DOL Unemployment Insurance Division are also forwarded to the United States Internal Revenue Service pursuant to the Questionable Employment Tax Practices program.

Cases showing evidence of fraud or illegality are also evaluated for possible criminal referral. The DOL Office of Special Investigations coordinates review of these

cases with the Workers' Compensation Board Fraud Inspector General, the Department of Taxation and Finance Special Investigations Unit and the Attorney General's Office. Cases with strong evidence of criminality are then referred to either the Attorney General's Office or local District Attorney's Offices for prosecution. The misclassification cases can give rise to many possible felony criminal violations including Offering a False Instrument for Filing or Falsifying Business Records cases, tax fraud violations, failure to secure workers compensation insurance and insurance premium fraud violations, as well as misdemeanor crimes such as failure to pay wages.

(2) Results

The 46 joint enforcement sweeps have yielded the following results to date:

Unemployment Insurance: Completed unemployment insurance audits of 163 businesses show 7,789 misclassified workers and over $86 million in unreported remuneration and has resulted in the assessment of over $2.5 million in additional unemployment taxes and over $1 million in unemployment insurance fraud penalties.

Unpaid Wages: Completed wage audits show over $2.2 million in unpaid wages and violations of recordkeeping and child labor laws.

Workers' Compensation: Twenty-seven stop work orders were issued on the enforcement sweeps and $642,250 in civil penalties were assessed for failure to maintain Workers' Compensation coverage pursuant to Workers' Compensation Law Section 52-5. In addition $467,000 in civil penalties were assessed for the intentional misrepresentation of payroll leading to premium fraud pursuant to Workers' Compensation Law Section 52-(d) and failure to maintain business records pursuant to

Workers' Compensation Law Section 131.3. Fines and penalties for Workers' Compensation violations have so far totaled $1,109,250.

Criminal Prosecution: Many of these cases in which evidence of criminal fraud was found by the Task Force investigators have been referred to prosecutors throughout the state for possible criminal prosecution. In the first prosecution stemming from a Task Force case, the Attorney General's Office has charged a restaurant owner in New York City with 13 counts of fraud, all class E felonies, for submitting false documents to the Department of Labor which underreported its employees for the assessment of unemployment insurance taxes and for failing to provide workers compensation insurance. The restaurant owner was also charged with failing to pay over $88,000 in overtime wages.

The Task Force sweeps have shown a variety of different schemes to misclassify workers. On some sweeps, investigators observe and interview many more workers than are listed on unemployment insurance and workers' compensation filings of the target employer demonstrating extensive "off-the-books" employment. Audits are completed assessing liability and penalties for the employer that cover all workers found on the site. On other sweeps, the main employer found on the sweep may claim that it is not the employer of the workers on the site but will state that either each individual worker or group of workers is a separate company liable for filing for unemployment insurance and workers' compensation and for paying workers wages. In most instances, these supposed subcontractors have not complied with unemployment or workers' compensation

requirements. Investigators review and develop the evidence to determine which entities should be held liable as employers.

C. Main Street Sweeps

Four of the joint enforcement sweeps conducted by the Task Force were part of a new initiative of "Main Street" sweeps, in which teams of investigators from the Unemployment Insurance and Labor Standards Divisions of the DOL and from Workers' Compensation Board Compliance and Fraud Inspector General have gone door to door in retail and commercial strips in various parts of the state. These sweeps uncover the extent to which businesses in our shopping districts throughout the state are in compliance with unemployment and other tax laws, workers' compensation requirements, and labor standards laws.

By going door-to-door and viewing the operations of the business, the agencies can uncover the extent of unregistered businesses that do not appear at all on the records of the agencies and can gauge the extent of off-the-books employment at businesses that are registered. Small and mid-sized retail establishments are put on notice that they will be monitored for labor law compliance even where an employee has not complained or filed a claim and that they will be subject to penalties for failing to comply with employment laws.

The Task Force has already conducted four Main Street sweeps. The sweep locations were chosen because they represent different examples of the types of shopping districts in the State. Segments of two large commercial strips in New York City, one in

the Bronx and one in Queens, were included, together with a suburban strip in the Albany area and a downtown stretch in Buffalo. A total of 304 businesses were visited on the four Main Street sweeps. The businesses included restaurants, bars, grocery stores and delis, bakeries, clothing stores, sneaker and shoe stores, travel agencies, electronic stores, nail salons, hairdressers, jewelry stores, and other staples of retail strips.

Following the initial visits to the 304 businesses found on the four Main Street sweeps, investigators requested follow-up investigations on 205 businesses, a potential non-compliance rate of 67% in one or more of the areas of unemployment, labor standards or workers' compensation. Follow-up investigations were requested in 50 % of the businesses found in the two upstate sweeps and 78 % of the two downstate cases. Review of these cases is ongoing but initial results show numerous violations.

Of the 304 businesses visited on the Main Street sweeps, 34 or 11 % were found not to be registered at all to pay unemployment insurance. The unregistered businesses were largely concentrated on the two downstate streets with nearly 18% of the businesses on the two downstate cases found to be unregistered. 23 of the businesses or 7.6% were issued stop work orders because of a failure to carry workers' compensation insurance. Follow-up unemployment insurance audits have been requested on 148 of the 304 businesses. In the 54 audits that have been completed to date (approximately one third of the total), auditors found evidence of misclassified workers in 38 entities. In these 38 businesses, the UI division has found a total of 221 misclassified workers, $3,747,832 in unreported wages and $80,443 in unemployment taxes owed.

The Task Force will be continuing Main Street sweeps throughout the state combined with outreach to businesses to ensure that retail and commercial businesses

report all of their workers, comply with wage and hour laws and pay all applicable employment taxes.

D. Coordinated Enforcement

Not every proactive case initiated by the Task Force requires the coordination and resources involved in a joint enforcement sweep. Many cases that come in through tips and complaints are handled as coordinated enforcement actions where Task Force partners work together from the outset of an action and take coordinated enforcement action involving a particular business or businesses. Many of the tips that led to these coordinated efforts came in through the Department's Hotline as a result of the increased publicity on the issue of misclassification generated by the Task Force.

Since the start of the Task Force, 1,118 misclassification investigations have been initiated based on tips and hotline calls generated by the Task Force. 617 completed unemployment insurance investigations have shown 4,565 misclassified workers and $71 million in unreported remuneration. To date, these cases have resulted in the assessment of over $2.3 million in additional unemployment insurance taxes.

Coordinated enforcement cases have included businesses in many different fields including food services, courier and messengers, electronics and appliances stores, construction, healthcare, and real estate. Some typical examples of these enforcement cases include:

*** a mortgage service company that was classifying all of its loan processors as independent contractors or paying off the books. A call about the company was received

by the Fraud Hotline and the UI division found additional tax contributions of over $100,000;

***a medical transportation company classified its drivers as independent contractors. The UI division found that the drivers should have been classified as employees and assessed over $50,000 in tax contributions.

***a movie production company misclassified part-time workers including production assistants and editors and was assessed over $4,000 in tax contributions. The Task Force had received an anonymous tip on the Fraud hotline concerning the company.

*** a nightclub failed to pay wages to or report workers employed as bathroom attendants. The company was assessed over $43,000 in wages and over $13,000 in UI taxes.

E. Data-sharing

Representatives of the Task Force agencies together with representatives of the New York State Department of Insurance and Department of Motor Vehicle have met regularly since October 2007 in a "Forms Team" to discuss the sharing and coordination of forms to aid in fraud detection efforts. This team is charged with implementing provision 141-C of the Workers' Compensation Law that allows for the sharing and coordination of forms to aid in fraud detection efforts. The team devises processes to allow partner agencies to have access to information contained in each others files, to automatically notify partner agencies of fraud found during investigations, and to allow partner agencies to gather information useful to other agencies while engaged in their

own audits. This type of data-sharing ensures that employers found violating one type of employment law will held accountable for other violations of the employment laws.

The Forms team documented all of the types of data collected by each agency and determined which types of data would be useful to other agencies. The team then developed methods for sharing the data. Because of confidentiality provisions concerning the sharing of information, the agencies entered into supplemental written agreements to allow the information to be shared. Some of the types of information that is now shared between the agencies via monthly spreadsheets or other notifications include:

**Workers' Compensation stop work orders and other workers compensation coverage violations are referred to the Unemployment Insurance Division;

**DOL Public Work determinations of willful violations are referred to Unemployment Insurance Division and the Workers' Compensation Board;

**DOL Labor Standards sends all back pay award information to Unemployment Insurance Division;

**DOL Safety and Health notifies the Workers' Compensation Board and the Unemployment Insurance Division when asbestos abatement contractors who are actively engaged in work do not appear to have Workers' Compensation coverage.

**Several member agencies of the Forms team have access to WCB employer coverage and exemption databases and will notify the Workers' Compensation Board if coverage cannot be confirmed during the course of an audit or investigation;

** The Department of Taxation and Finance fills out an information form on its field audits whereby tax audit findings can be referred to the DOL.

The Forms team continues to meet regularly and develop additional data-sharing processes to improve fraud detection.

F. Ongoing Unemployment Insurance Division efforts

The Unemployment Insurance Division of the Department of Labor also continues to track the extent of worker misclassification found on the thousands of employer tax audits and investigations that it conducts each year. In 2007, the Division re-engineered its statistical tracking methods to better track the incidence of misclassification on its ongoing audits and investigations. This information goes beyond what is required for federal reporting purposes and is useful both in demonstrating the extent of worker misclassification and can also assist in determining industries in which the incidence of misclassification is highest.

In 2008, the UI Division completed nearly 12,300 audits and investigations finding over 85,000 misclassified workers and unpaid taxes of over $27.4 million. The job categories showing the highest incidence of worker misclassification included construction, healthcare, educational services, retail, accommodation and food services, arts and entertainment, auto repair, and waste management.

G. Consultations, Outreach and Education

The Task Force has continued to reach out to numerous groups throughout the state to aid in its goal of uncovering worker misclassification. These consultations provide important ongoing input into the enforcement work of the Task Force. The Task Force has held consultations with the Business Council of New York State, the National

Employment Law Project, the Empire State Development Corporation, with many state and local government officials, and with many labor organizations and community groups. The Task Force has also provided educational speakers to many forums including those hosted by bar associations, accountant and other tax practitioner organizations, unions, and community groups.

The Task Force has also consulted with government enforcement officials from other states that are addressing the issue of worker misclassification. These states have included Michigan, Massachusetts, Maryland, New Jersey, California, Iowa, Kansas, Connecticut, Vermont, and New Hampshire. Several of these states have recently organized multi-agency misclassification task forces and have sought information about how our Task Force is organized and our work carried out. Other states, most notably New Jersey and California, have provided the Task Force with valuable information about their existing efforts to combat misclassification.

Members of the Task Force also provided information about our practices, operations and enforcement results to the Federal General Accounting Office. We also provided information to a U.S. Senate committee studying federal legislative options to address misclassification.

The Task Force has also consulted with other states to analyze legislative options for improving enforcement. Our primary focus has been on bringing clarity and consistency to the definition of "employee" and "independent contractor" under state law. New York currently uses the "common law" test for employee misclassification which means that the agencies, administrative tribunals and courts look to how the definition of "employee" has been interpreted in administrative decisions and case law rather than to a

more precise definition contained in a statute or regulations. Decisions and determinations can also vary between Task Force agencies because of variations in the legal standards articulated in the case law.

More than half of the fifty states utilize variations on a test called the "ABC" test rather than the common law test in place in New York State.[6] While the language of the test varies slightly between different states, it is essentially a three prong test whereby an employer would have to meet all three of the following factors in order to properly classify a worker as an independent contractor:

(A) the worker must be free from direction and control of the employer in performance of the work;

(B) the worker's services must be performed either outside of the usual course of an employer's business or outside of all of the employer's places of business; and

(C) the worker must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service being provided.

The Task Force legal committee sent a questionnaire to states using the ABC test and its variations to assess the effectiveness of the test. A follow-up conference call was held with many of the states that answered the questionnaire to discuss the test further. Results of this information from other states is currently under review.

[6] Twenty-five other states use the ABC test and eight others use a variation of the test.

III Goals for 2009

In 2008, the Task Force has made significant strides in meeting many of the objectives outlined in the Executive Order. However, the extensive violations we have found are only the beginning. As we move forward, we will continue the work we have started and find new ways to address the pervasive problem of worker misclassification. In the year ahead, the Task Force will:

Enforcement:

**Continue strategic and coordinated enforcement sweeps in the construction, manufacturing, retail, and food services sectors.

**Begin industry-specific proactive sweeps or enforcement in other industries with a high incidence of misclassification.

**Address misclassification in industries where incorrect independent contractor classification is a common business model.

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

Legislation

**Consider proposal to have Task Force partners adopt an ABC test for employee classification.

**Evaluate other possible legislative proposals including individual liability for taxes and penalties related to misclassification and construction contractor registration.

Outreach

** Continue to publicize misclassification enforcement efforts.

**Expand educational seminars on misclassification and educational outreach to all parts of the state.

**Plan meetings and educational outreach to business groups in industries with a high incidence of misclassification. Work with these business groups on deterrence of misclassification.

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

Coordination between agencies

**Conduct interagency training for investigators in the partner agencies. Train investigators to recognize information on violations that would be useful to other partner agencies. Train investigators on enhanced methods to uncover and prove misclassification.

**Take steps to ensure that all misclassification cases handled by the partner agencies are either pursued jointly or are referred to the other partners.

**Continue work on identifying data-sharing processes

Conclusion

During 2008, the Task Force has actively enforced employment laws involving worker misclassification. During the current economic crisis, our mission becomes even more essential as we seek to protect the economic viability of employers who abide by the law, to preserve the State's tax base to provide essential services, and to stabilize the State's Unemployment Insurance Trust fund and workers compensation system. Workers in the State also need heightened protection from employers who may seek to cut financial corners during difficult economic times. The Task Force looks forward to continuing to work on this critical issue in the year ahead.

Dated: February 1, 2009