



**State of Utah**  
GARY R HERBERT  
*Governor*  
SPENCER J. COX  
*Lieutenant Governor*

**Labor Commission**  
JACSON R. MAUGHAN  
*Commissioner*

CHRISTOPHER C. HILL  
*Deputy Commissioner and  
General Counsel*

August 30, 2019

Governor Gary R. Herbert  
Senator Curtis S. Bramble  
Representative James A. Dunnigan

To Governor Herbert, Senator Bramble, Representative Dunnigan, and the members of the Business and Labor Interim Committee.

This is the ninth annual report from the Worker Classification Coordinated Enforcement Council (“Council”), submitted pursuant to Utah Code Ann. §34-47-202. The Council is made up of the commissioner of the Labor Commission or designee and is the chair of the Council, the executive director of the Department of Commerce or designee, the executive director of the Department of Workforce Services or designee, and the chair of the State Tax Commission or designee, along with counsel from the Office of the Attorney General. In the year since the Council’s August 2018 report, the Council has continued to meet on a quarterly basis. Agenda and Minutes for all Council meetings are available on Utah’s Public Notice Website.

### **The Nature and Extent of Misclassification in Utah**

Misclassification of employees remains an issue requiring attention in Utah. The Council continues to see improper strategies used by unscrupulous employers seeking to evade their obligations to pay a proper wage, to provide protections to their employees through workers compensation and unemployment insurance, and to pay a proper tax. Among others, the Council continues to see inappropriate use of labor broker and owner-worker models to misclassify employees. Industries where misclassification continues to be a concern include professional services, construction, and janitorial services. In addition to negative impacts upon misclassified employees, misclassification results in law-abiding employers having to compete on an unlevel playing field. Additionally, Utah citizens suffer lost tax revenue because of employers not complying with the law.

As detailed in this report, over the last year the Council has continued its efforts to cooperatively investigate and address worker classification issues. The efficiency of information sharing and referrals continues to improve between Council member agencies. Investigations, enforcement actions, collection of penalties and fines, and obtaining agreements from offending employers to comply with the law have all been successfully pursued by the member agencies of the Council. Each member agency and the Attorney General’s office continue to view the Council as an effective body in addressing misclassification of workers in Utah.

## **Results of Regulatory and Law Enforcement Efforts, and the Status of Sharing Information by Member Agencies**

### **The Labor Commission**

Since 2012 the Utah Labor Commission (the “Commission”) has maintained a web page explaining worker misclassification issues in the State of Utah. The web page defines employee misclassification, describes the negative impacts it can have across all facets of society and educates the public on how to file a complaint of misclassification with the Commission. The Commission has also monitored a misclassification hotline since 2012 and has received a number of misclassification complaints through the hotline.

The Commission is responsible for ensuring each employee in the State of Utah is covered by workers’ compensation coverage. When the Commission receives a misclassification complaint, either directly or as a referral through one of the Council’s member agencies, the Commission’s Industrial Accidents Division (the “IA Division”) investigates the complaint to ensure the employer carries appropriate workers’ compensation coverage for its employees. The IA Division also conducts internal investigations on hundreds of employers each year to ensure compliance with workers’ compensation requirements. The Commission has assessed and collected thousands of dollars in penalties against noncompliant employers based on misclassification complaints and referrals, as well as these internal investigations.

The Commission reviewed 45 specific complaints of misclassification for workers’ compensation compliance during fiscal year 2019. These complaints were received primarily through the hotline or were referred from the Department of Workforce Services and other agencies. Some of the complaints were received from the Commission’s Wage Claim Unit or from the Commission’s Occupational Safety and Health Division and arose during investigations performed by these divisions. The Commission assessed penalties in the total amount of \$1,665,337.

Of the 45 cases reviewed by the IA Division, 33.3% involved employers engaged in the professional services industry, which includes employers providing health services in either a home or an office setting. 20% of these cases involved employers engaged in the construction industry. Additionally, other notable types of employers from which these cases originated include: 11.1% from professional services such as accounting firms, staffing agencies, design agencies, travel agencies and counseling services; 8.8% from janitorial services; 6.6% from food and alcohol related businesses; 4.4% from hair and nail salons; and 4.4% from dance and/or yoga studios.

The Commission, like the Council’s other member agencies, shares with the other member agencies of the Council the misclassification complaints it receives, the results of subsequent investigations, and the results of its internal investigations. This ability to share information between member agencies has been and continues to be critically important to the Council’s work in addressing employee misclassification in Utah. The Commission feels the Council remains an effective tool in addressing employee misclassification in Utah.

## The Department of Commerce

The methods of worker misclassification that the Department of Commerce continues to encounter include the following:

- (1) Companies inappropriately classifying employees as “owners”;
- (2) Contractors inappropriately paying workers as independent contractors rather than employees;
- (3) Contractors accepting 1099 payments to avoid payroll taxes and to avoid reporting to governmental agencies either as employees or independent contractors.

During this fiscal year, the Division of Occupational and Professional Licensing (“DOPL”) opened a worker misclassification investigation which centered on an unlicensed drywall and framing company. Because the investigation is currently pending, the name has been withheld in this report. Based on the investigation, approximately 50 associated licensed construction companies were interviewed, and their financial records examined. This ongoing investigation has over approximately \$1,000,000 in potential fines.

The subject of the investigation had been sending representatives to job sites and construction company offices, with the offer to provide skilled workers to install drywall and frame structures. The subject of the investigation gave each construction company a copy of an active State of Utah contractor license for an entity similarly named to the unlicensed subject of the investigation along with unverified certificates of liability and workers compensation insurance and an IRS Form W-9 issued to the unlicensed entity. Most of the construction companies who hired the subject as their subcontractor did not notice the discrepancy of the name on the license. Those who did were falsely informed that unlicensed entity was a DBA of the similarly named licensed entity. The construction companies were told to write their checks to unlicensed subject of the investigation.

DOPL Investigations has currently verified payments totaling approximately \$9,000,000 to the subject of this investigation from approximately 35 of the associated construction companies; this figure will be updated as the investigation continues. This matter is one of the largest DOPL investigations concerning worker misclassification in the last decade.

Additionally, education and outreach were undertaken with both the companies and the workers to clarify and confirm the compliance expectations of the Utah Construction Trades Licensing Act.

To date, DOPL’s efforts have resulted in the following:

- 737 opened cases;
- 780 closed cases;
- 487 cases closed with administrative sanctions including fines, probation, and/or revocation of licensure; and
- \$516,300 in fines through signed stipulations and orders.

The Department of Commerce continues to benefit from information exchanged through the Worker Classification Coordinated Enforcement Council. The exchange of information with other agencies has assisted the Department of Commerce to take action against contractor licensees that are not complying with employee classification, hiring, and payment requirements. And, the Department of Commerce's actions against these contractors have assisted the Department of Workforce Services in its collection efforts for the Unemployment Insurance Fund.

### **The Department of Workforce Services**

As required by the U.S. Department of Labor (DOL), the Department of Workforce Services Unemployment Insurance Division (DWS/UI) audits active Utah employers for compliance with UI law. DWS/UI completes both "random" and "targeted" audits on Utah employers.

During fiscal year 2019, a total of 1,165 random audits were completed. Findings for the year include a total of \$14.8 million in unreported wages and 1,437 misclassified workers; an average of 1.2 misclassified workers per audit. (This compares to a total of 890 random audits, \$8.6 million in unreported wages, and 1,241 misclassified workers; an average of 1.4 misclassified workers per audit during 2018.)

During fiscal year 2019, a total of 228 targeted audits were completed. These audits primarily use information from the IRS Form 1099 to identify potential unreported workers. Findings for the year include a total of \$13.0 million in unreported wages and 1,791 misclassified workers; an average of 7.9 misclassified workers per audit. (This compares to a total of 284 targeted audits, \$19.4 million in unreported wages, and 2,593 misclassified workers; an average of 9.1 misclassified workers per audit during 2018.)

The random and targeted audit results demonstrate that the majority of registered Utah employers are reporting workers properly, with less than half of all audits resulting in a change to the original wage reports. However, there continues to be an issue with worker misclassification in Utah and across the nation.

The DOL has issued repeated guidance to all state UI agencies that worker misclassification detection and enforcement is a priority. Since 2011, DOL has calculated an Effective Audit Measure Score for each state. The DOL measure is comprised of four factors: 1) Percent of employers audited annually; 2) Percent of total wage change from audit; 3) Percent of total wages audited; and 4) Average number of misclassifications detected per audit. DWS/UI achieved an effective audit score of 9.8 for the year ending December 31, 2018, surpassing the minimal acceptable score of 7.

DWS/UI continues to work with the Council partners in addressing the issue of worker misclassification. Commerce coordinates investigations with DWS/UI when contractors are violating unemployment insurance laws. As a direct result of this partnership, DWS/UI collected \$16,640 in past-due contributions from 20 Utah employers in calendar year 2018. The Labor Commission refers investigations from their hotline number and Worker's Compensation investigations. The Tax Commission also identified and referred numerous instances where employers issued Internal Revenue Service W-2 forms to employees that were not properly reported to DWS/UI.

During fiscal year 2018 DWS referred 16 unemployment insurance audits to Commerce, the Labor Commission, and the Tax Commission, identifying about 444 workers who were determined to be employees, not independent contractors.

The collaboration facilitated through the Council continues to support the DWS/UI goal and DOL requirement of detecting worker misclassification and enforcing state laws that ensure qualified workers receive unemployment insurance coverage.

### **The Tax Commission**

The Tax Commission continues to benefit from the referrals it receives from the different agencies that participate on the Council. This information is utilized in Tax Commission assessments and collection activities that benefit the citizens of the State of Utah. So far for the 2019 year the Auditors have assessed \$42,826 in tax, penalty and interest.

There are times when the Tax Commission will refer cases to the IRS for prosecution when it appears that the actions of the employer are deemed criminal. These referrals open the door for the IRS to work jointly with the different agencies to obtain investigative reports and records to enhance compliance.

Last year legislation was passed allowing the Department of Workforce Services (DWS) access into the Tax Commission's withholding tax file in order to cross match compliance with the DWS information. We anticipate this will be an excellent tool for DWS to ensure that employers reporting to the Tax Commission will also be reporting properly to DWS.

### **Recommended Legislative Changes**

The Council appreciates the attention the Legislature has given to worker classification issues. The Council has no specific recommendations for the 2019 legislative session.

We look forward to continuing to report annual progress and are glad to provide any other requested information or answer any questions.

Sincerely,

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CHAIR, WORKER CLASSIFICATION  
ENFORCEMENT COUNCIL  
DEPUTY COMMISSIONER, UTAH  
LABOR COMMISSION

AMY ARNN  
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PAUL H. TONKS  
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cc: Senator Karen Mayne