



**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 31, 2020

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 tenth 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 2019 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. 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 40 specific complaints of misclassification for workers’ compensation compliance during fiscal year 2020. 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 collected penalties in the total amount of \$1,298,578.

Of the 40 cases reviewed by the IA Division, 22.5% of these cases involved employers engaged in the construction industry. Additionally, other notable types of employers from which these cases originated include: 17.5% from dance schools or exercise studios; 15% from auto sales and repair businesses; 5% from private investigators; 5% from taxicab companies; and 5% from the textile industry.

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.

Below is a summary of two significant, Commerce investigations during the last fiscal year. In the first, it was discovered that an unlicensed company was hired to work as a subcontractor by 47 licensed contractors. The unlicensed subcontractor had approached the licensees on job sites or in their offices, stating they could provide any number of workers needed for drywall, framing, and flooring jobs; and for any length of time necessary. The subcontractor presented a copy of what appeared to be a valid Utah contractor’s license for the subcontractor, on which was a name very similar to the one they were using. The subcontractor also presented copies of liability and workers compensation insurance policies in their own name, tax ID information, and a printed sheet of instructions which requested that all payments be made to them in their name, and not the exact name printed on the alleged contractor license. Almost every licensed contractor wrote their paychecks in the name of the unlicensed company and not the name listed on the purported license. The subcontractor was paid at least \$13,880,254.37 in over 1,119 checks. There was no evidence that any of the workers of the subcontractor's crews were being paid as W-4 employees. Beginning in September 2019, Commerce, through the Division of Occupational and Professional Licensing (DOPL), initiated action against the 47 contractors for hiring the unlicensed company, including assessing fines. Based on the violations discovered in this investigation, Commerce assessed approximately \$443,102.00 in fines this last year, with more fine assessments pending.

In a separate matter, a licensed drywall contractor who, in 2016, 2017 and 2018, paid 42 unlicensed individuals as 1099 employees to perform construction. The employees were issued 549 checks, totaling approximately \$536,589. Some of the employees received 1099s over multiple years. Commerce has concluded its investigation and has initiated agency action, which is currently pending.

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

- 19 pending opened cases;
- 827 closed cases;
- 533 cases closed with administrative sanctions including fines, probation, and/or revocation of licensure; and
- \$973,401 in total 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. 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. Targeted audits are based on tips from businesses, customers or other government agencies.

During fiscal year 2020, a total of 340 random audits were completed. Findings for the year include a total of \$3.1 million in unreported wages and 523 misclassified workers; an average of 1.5 misclassified workers per audit. (This compares to a total of 1,165 random audits, \$14.8 million in unreported wages, and 1,437 misclassified workers; an average of 1.2 misclassified workers per audit during 2019.)

During fiscal year 2020, a total of 496 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 \$37.8 million in unreported wages and 6,227 misclassified workers; an average of 12.6 misclassified workers per audit. (This compares to a total of 228 targeted audits, \$13.0 million in unreported wages, and 1,791 misclassified workers; an average of 7.9 misclassified workers per audit during 2019.)

The random and targeted audit results demonstrate Utah employers are reporting workers properly, however, more than half of all audits resulted in a change to the original wage reports. 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 11.4 for the year ending December 31, 2019, 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 \$33,115 in past-due contributions from 51 Utah employers in calendar year 2019. 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 2020 DWS referred 90 unemployment insurance audits to Council partners, identifying about 2,591 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 in the Council. The Tax Commission utilizes this information for assessment and collection activities that benefit the citizens of the State of Utah. During the fiscal year 2020 auditors assessed \$242,249.60 in tax, penalty and interest.

There are times when the Tax Commission refers cases to the IRS for prosecution when it appears the actions of employers 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.

In 2019 legislation passed that allowed the Department of Workforce Services (DWS) access to the Tax Commission's withholding tax files to cross-match with the DWS information. This has been an excellent tool for DWS to ensure that employers reporting to the Tax Commission are also reporting accurately 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 2020 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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cc: Senator Karen Mayne