

Task Force Report Pursuant to Executive Order B 2018-3
(Joint Enforcement Task Force on Payroll Fraud and Employee Misclassification in the
Construction Industry)
November 30, 2018

Introduction and Summary:

On June 5, 2018, Governor John Hickenlooper issued Executive Order B 2018 003 (attached as **Appendix A**), creating the Joint Enforcement Task Force on Payroll Fraud and Employee Misclassification in the Construction Industry (the Task Force).¹ The Task Force submits this report to the Governor pursuant to the Executive Order.

The Task Force's roles are to assess the misclassification of employees as independent contractors in the Colorado construction industry, and to take steps to address misclassification. The Task Force's work is significant to Colorado's economic vitality because Colorado's construction industry is an engine for growth in our State, creating good, well-paying jobs. Yet misclassification slows that engine, for three reasons. *First*, misclassification, especially when undertaken by labor brokers with little connection to the State, robs workers of their lawful protections to wages, unemployment insurance, and workers' compensation. *Second*, the practice also places law-abiding construction contractors and construction workers at a competitive disadvantage because unscrupulous bidders can undercut contract pricing that reflects true and lawful payroll costs. *Third*, misclassification burdens ratepayers in the unemployment insurance and workers' compensation systems by creating uninsured/underinsured claims.

The Task Force aims to reduce and eventually eliminate non-compliance by identifying, and where possible, implementing improved tools for compliance assurance, including enforcement, education and compliance assistance. Listed below in the sections on accomplishments and outstanding discussion items are measures, which the Task Force has specifically targeted in order to achieve this goal.

As specified in the Executive Order, the Task Force has 7 members: the Executive Director of the Colorado Department of Labor and Employment (CDLE), and representatives from the

¹ "Payroll fraud" refers to failing to pay employees what they are due, including failing to make and remit required withholdings, and concealing those actions. "Misclassification" refers to treating workers as independent contractors when, in the eyes of the law, they are employees.

Associated General Contractors of Colorado (AGC), the South West Regional Brotherhood of Carpenters (the Carpenters), and designees of the Executive Directors of the Colorado Department of Revenue (DOR), the Colorado Department of Personnel and Administration (DPA) and the Colorado Department of Regulatory Agencies (DORA), as well as a representative from the Governor's Office.

The Task Force engaged other interested stakeholders from organized labor, the business community, and other community organizations about our work and progress. Many of those stakeholders also attended and participated in the Task Force meetings. A roster of names and organizations of invited and participating stakeholders and Task Force members is attached as **Appendix B**.

Leading up to this first annual report, the Task Force has met five times. The meeting agendas and minutes are attached as **Appendix C and D respectively**. The Task Force decided to break the specific issues discussed in this report into two categories--*first*, accomplishments and consensus items which are either already implemented or underway; and *second*, outstanding issues for further discussion by the Task Force in 2019.

Because of the focused expertise of the Task Force and the need to make significant progress to achieve the Executive Order's assignment, the Task Force concentrated on labor brokers providing workers to perform carpentry and interior systems work taking place at large-scale commercial and mixed-use projects. The work at issue typically includes steel stud framing, hanging, taping and finishing of drywall, and some floor and ceiling work. To the extent a labor broker provides workers to work on sites overseen but not paid by carpentry subcontractors, there likely is misclassification. There was evidence during the Task Force's meetings of misclassification in other trades, sometimes through the issuance of 1099s rather than W-2s, and by other means. But the consensus of the Task Force was to drive change as rapidly as possible within this focused ambit, believing that this is where the need is greatest, and that addressing this need will drive change in the construction industry more broadly.

The Task Force concluded that the use of labor brokers, and consequently misclassification, is a problem with carpentry and interior systems work taking place at large-scale commercial and mixed-use projects in Colorado. Some of the problem is driven by a shortage of skilled construction workers as Colorado experiences a boom in construction projects. Some owes to companies seeking a competitive bidding advantage. The problem is complex and urgent and, therefore, the Task Force means to address it with the full suite of our tools: communication and reinforcement of what the law requires to the regulated community; more effective coordination among the divisions and agencies with a role; better use of existing statutory authority to address non-compliance; and work to forge, with industry and organized labor, a more effective talent pipeline.



Accomplishments and Consensus

- *Improved Information Sharing & Coordinated Identification/Investigation of Tips and Leads.* CDLE formed a workgroup in conjunction with the Task Force, consisting of representatives from the Unemployment Insurance (UI) division, the Workers' Compensation (Workers' Comp) division, and the Division of Labor Standards and Statistics (DLSS). Early on, the group identified ways to share misclassification tips and leads within the agency to promote the mission of the Task Force. The group created a centralized database to share tips and leads among the divisions, and to coordinate division-specific investigations. The group also created a combined worker classification questionnaire for each division to use, so information could be easily shared and acted upon within the three divisions. The group identified fields for the CDLE tips and leads form so information collected through that form could be used by all three divisions. Since the formation of the workgroup, the three divisions have been sharing information and have acted on the shared information by conducting UI audits, wage and hour investigations, or workers compensation investigations, and have been reporting their progress to the Task Force.
- *Consolidated Tips and Leads Form for all CDLE divisions* (form attached as **Appendix E**).
- *Memorandum of Understanding between the Colorado Department of Revenue and the Colorado Department of Labor and Employment.* This agreement was executed on January 31, 2018, and has resulted in improved information sharing between the two agencies. **See Appendix F**
- *Monthly Enforcement Action Reporting.* (Completed and ongoing by UI, WC and DLSS; latest report attached as **Appendix G -**).
- *New DLSS program--Rulemaking for employer wide investigations.* DLSS has formally initiated rulemaking to create a Wage and Hour Direct Investigations Program that will allow it to exercise statutory authority to conduct employer-wide investigations of potential violations of Colorado wage and hour law, including failure to pay earned wages and failure to provide itemized pay statements to employees. DLSS will hold a public hearing on the proposed rules on December 17, 2018, the rules will become effective in February 2019, and direct investigations will begin shortly thereafter.



- *New UI Division Employer Pre-Audit Questionnaire and a Worker Classification Acknowledgement Form for all employers.* This is provided to all employers upon application of their UI account or audit completion. In an effort to obtain comprehensive information from the employer community regarding classification of workers and to continue to provide the business community with educational information regarding state worker classification laws, the UI Division is focused on a multi-dimensional approach. Specifically, the UI Division implemented a Pre-Audit Questionnaire which will be used to determine a company's current understanding of worker classification laws in Colorado and what information the company relied upon when determining whether to classify workers as independent contractors or covered employees. Simultaneously, the UI Division also implemented a Worker Classification Acknowledgment form as part of a standard Division form required to be filled out by every business that registers an account with the CDLE. The registration and acknowledgement process includes educational information on worker classification requirements in the state of Colorado and advises the company that willful disregard of state law will lead to misclassification penalties. The form will be required of employers who establish an account with the CDLE through traditional methods as well as in those instances where a Division audit results in reclassification of independent contractors as covered employees.

- *UI willful disregard criteria for first time offenders.* The UI Division has established willful disregard criteria to enable, in carefully prescribed instances, full imposition of fines for first-time misclassification by labor brokers in our focus area. According to the Colorado Employment Security Act (CESA) 8-72-114 (3)(e)(III)(A) and 8-72-114 (3)(e)(III)(B), upon a finding that a company acted with willful intent in misclassifying employees, the UI Division has the authority to impose penalties against the company and prohibit the company from receiving funds for performance of contracts from the state.

This is the first time the Division has established procedures to employ this statutory authority. Generally, the UI Division treated (and in most cases, will continue to treat) the first audit performed as educational to ensure compliance among employers. Subsequent (second) audits of the company with same or similar findings resulting in misclassified employees was recognized as the first instance of willful disregard. The approach did not allow first instance penalty action for egregious players, it assumed employers were motivated by voluntary compliance, and failed to use penalties to enforce equity.

The UI Division revised its processes so as to determine on a case-by-case basis whether a company's actions constituted willful disregard when it misclassified employees. The purpose of the revision was for the UI Division to apply a



standard that was objective and uniformly applied and consistent with the intent expressed in Colorado Employment Security Act. Through the use of the aforementioned newly implemented tools, such as the Employer Pre-Audit Questionnaire, and the improvement in the Worker Questionnaire and CDLE Misclassification Tip Form, the UI Division is focused on obtaining more information which would help determine the working relationship between the workers and the company and the company's knowledge of existing state unemployment insurance laws, allowing the UI Division to continue to offer educational opportunities for those companies that acted in good faith and to also hold bad faith actors responsible when warranted.

- *Meet with general contractors to support behavior change of labor brokers and subcontractors.* At the request of the Task Force, on November 13, 2018, the Executive Director of CDLE met with the president and the board chairman of the Associated General Contractors to begin discussions on a mutually acceptable process for educating and encouraging greater compliance by all parties involved at large commercial/mixed-use construction projects. This meeting was also attended by the CDLE's Director of Policy and Legislation and by the contract lobbyist for the AGC. As follow up to this meeting, the AGC is working with its board of directors to develop a proposed process for consideration by the Task Force at a future meeting (most likely in early 2019).
- *Coordinated prioritization of tips.* The Carpenters are working to design an internal system for prioritizing tips and leads which they submit to CDLE for investigation, as well as the collection of additional information to assist in such investigations.
- *All employers put on notice regarding classification.* In a continuing effort to provide education to ensure compliance with state worker classification laws, the UI Division will continue to provide educational seminars and to provide education during the audit process. The Division will also be conducting a targeted communications effort to certain employer groups in the community and also utilize the new registration and acknowledgement process, which contains information regarding worker classification laws and misclassification penalties in the state of Colorado.
- *Drywall industry/contractors/subcontractors and unions/workers targeted with communications regarding classification.* CDLE's public relations team, working in partnership with the AGC and the Carpenters, has designed a multi-faceted communications/education outreach campaign, targeted toward both workers and



job-site managers and employers. The Task Force has approved this outreach/education plan, and both AGC and the Carpenters are working to provide additional information to CDLE. Implementation of this plan is anticipated in early 2019. An overview of this plan is attached as an **Appendix F**.

- *Increased information sharing.* Also, to the extent permitted by law, the Task Force has agreed to provide information on the amount of wages, premiums, taxes, and other payments or penalties collected with the assistance of Task Force Activities, as well as the number of employers cited for violations related to misclassification and the approximate number of employees affected. Some of this information is collected in the Monthly Enforcement Action Reports discussed above. However, the Task Force needs to do additional research in order to specifically identify what information can be publicly disclosed. Depending on the results of this research, the Task Force will consider in 2019 whether to recommend any statutory changes in terms of public records.

2019 Task Force discussion items and outstanding Issues. The list below was developed as a guide on key issues, which the Task Force has identified for further discussion in 2019. In some cases, these issues might currently lack consensus/agreement among members, and in others they might require additional research, including a survey of national best practices, and in other cases they might require either legislation or additional resources for implementation. These items will be further developed and discussed in the 2019 report.

- *Field Investigations.* DLSS will meet with stakeholders and other individuals to gather input on best practices for field investigations that are both effective and mindful of employers' business practices and needs.
- *Improved guidance and education on employment dynamics.* The UI Division will continue to evaluate how to protect workers as our economy evolves and advances variations on the theme of a worker with a single employer. Examples include marketplace applications and how the test of employment should apply to them. Specifically relative to the construction industry, and thus the assignment of the Executive Order: There is an evident need to explain more clearly the economic realities of employment, for the sake of determining who the employer for a specific trade on a job site actually is. That opportunity calls for clearer internal guidance for the sake of equitable enforcement, and clearer external guidance for the sake of explaining the law and assisting employers in complying with it. The stakes are high because non-compliant companies offset the cost of unemployment insurance premiums unfairly onto other employers, while compromising employee protections.



- *Focus on Workers' Compensation issues.* Labor brokers who do not maintain workers' compensation coverage either pass along the cost of injuries to the companies who hired them or force injured workers to pay for medical treatment out of their own pockets. Also, by not paying proper workers' compensation insurance premiums, misclassifying labor brokers create an unequal economic playing field because they are able to undercut the bids of law-abiding companies. **Insurance, including workers' compensation insurance, works correctly when coverage for a risk is appropriately underwritten. Misclassification distorts this model and creates unfair costs. This is so because when there is an uninsured injury on a construction worksite, the concept of "statutory employer" comes into play. Under the law, the coverage obligation will fall to the first company in the upward chain of subcontractors or general/prime contractors with insurance. Hence, a general or prime contractor and its insurer may face a claim without knowing that one of its subs engaged a labor broker without insurance. The general contractor's insurer will experience a large claim and then increase the general contractor's premium, while the labor broker pays no premiums and experiences no liability. There is an opportunity to ally the interests of general contractors, insurers, and labor unions to address this aspect of the misclassification problem. One promising effort is the engagement of Workers' Compensation carriers to assist general/prime contractors in ensuring coverage of all workers.**

- *Construction Industry not covered in the Colorado Minimum Wage Order.* For a very short period of time, a portion of the Construction Industry was once a covered industry listed in the Colorado Minimum Wage Order. Construction companies grossing less than \$500,000 per year were added to Wage Order #21 in 1997 as a covered industry, and then removed the following year from Wage Order #22. After discussion with industry representatives, the then Division Director Mary Blue determined that the recent addition placed "an unfair advantage with larger construction firms which were not subject to the law." Going forward, the Division will continue to discuss this topic with task force members in future meetings.

- *Best Practices.* The Task Force will continue its research and analysis of best practices identified in other places throughout the U.S. in order to ensure we are considering latest innovative methods for addressing this overall set of challenges. Examples of practices identified for future research and discussion are legally enforced worker classification acknowledgement forms for all businesses (DE), and joint industry/labor/government collaboration systems (CA).



- *Posting penalties assessed.* In 2017, the legislature passed the Colorado Wage Theft Transparency Act, which requires the Division of Labor Standards and Statistics to treat as public record all final decisions where the division determined that the employer violated Colorado wage and hour laws. The division is required to release those decisions pursuant to a Colorado open records request unless the information contained in the decision is determined to be a trade secret. Since the Act's effective date of April 13, 2017, the division has publicly posted the names of employers who violated wage and hour laws, the employer's mailing address, and the amount of wages, penalties and fines the division ordered the employer to pay.

The UI Division is currently restricted from publicly sharing information pursuant to statute. The Task Force has talked about possibly proposing legislation similar to the Wage Theft Transparency Act that would allow UI to publicly share results of employer penalties associated with willful disregard of misclassification laws (*subject to conformance with Federal Laws regarding the privacy of UI data*). .

- *Voluntary Partnership - endorsement as a leader in the industry.* Both the AGC and the Carpenters have expressed interest in developing an “industry and worker leadership” program, designed to encourage best practices through improved education and other possible incentives.
- *Proactive industry-led self-regulation, as a possible next step after implementation of the communications/education plan discussed above.*
- *Industry led registration of all businesses on the job site with the Secretary of State.* In order to explore this discussion item, the Task Force will likely reach out to the Colorado Secretary of State, since that office is responsible for business registrations.
- *Labor brokers reporting/registration.* The Carpenters and the AGC have agreed to continue discussing possible legislation to require state registration of construction industry labor brokers doing business in the state. However, such meetings have not yet begun, and legislation in 2019 is unlikely.

