



ACT 85 OF 2020

JOINT TASK FORCE ON MISCLASSIFICATION OF EMPLOYEES

FINAL REPORT

DECEMBER 1, 2022

Task Force Member Designees:

Attorney General – Chief Deputy Attorney General Nancy Walker

Secretary of Labor and Industry (Chair) – Deputy Secretary Basil Merenda

Secretary of Revenue – Deputy Secretary Bryan Barbin

President Pro Tempore of the Senate – Joanne Manganello (Laborers' International Union of North America, Mid-Atlantic Region)

Minority Leader of the Senate – Drew Simpson (United Brotherhood of Carpenters & Joiners of America Local Union 445)

Speaker of the House of Representatives – Hank Butler (Pennsylvania Council of General Contractors)

Minority Leader of the House of Representatives – Lance Claiborne (General Building Contractors Association)

TABLE OF CONTENTS

INTRODUCTION FROM THE CHAIR 3

EXECUTIVE SUMMARY 6

MISCLASSIFICATION IN PENNSYLVANIA BY THE NUMBERS 12

RECOMMENDATIONS OF THE TASK FORCE TO THE GENERAL ASSEMBLY 13

FINAL REPORT 15

1. BEST PRACTICES 15

2. REGULATE LABOR BROKERS..... 17

3. COOPERATION AND COLLABORATION THROUGHOUT GOVERNMENT 20

4. INFORMATION AND OUTREACH 21

5. ENFORCEMENT AND EDUCATION 23

CONCLUSION: ENACT THE RECOMMENDATIONS OF THE TASK FORCE 25

INTRODUCTION FROM THE CHAIR

Dear Members of the General Assembly:

As Pennsylvania Secretary of Labor and Industry Jennifer L. Berrier's designee and Chair of the Joint Task Force on Misclassification of Employees ("Task Force"), it is my privilege to present to you our final report as required by Act 85 of 2020.¹ Act 85 created this Task Force as a bipartisan-nominated group of seven volunteers representing business, labor, the Department of Labor & Industry, the Department of Revenue, and the Attorney General's Office to investigate the practice of employee misclassification and develop a comprehensive plan to reduce it. To that end, the Task Force has held monthly meetings since January 2021 with the objective of being accessible, responsive, informative, and accountable to businesses, workers, and the public.

As the Task Force learned in its monthly meetings, the misclassification of employees is a growing challenge in Pennsylvania. It occurs when an employer wrongfully classifies a worker as an independent contractor, even though the nature, type, and oversight of their work dictates that under Pennsylvania law they should be considered an employee.

Misclassification has significant consequences for both the employees, who are denied protections and benefits, and law-abiding businesses, who are placed at a competitive disadvantage and lose contracts and other business to unlawful competitors. Despite these challenges, this Task Force has worked to find and expand the common ground upon which to build reasonable solutions for addressing these issues and concerns by being accessible, informative, and responsive.

On March 1, 2022, the Task Force submitted its annual report as required by Act 85, including 15 unanimously approved recommendations to the General Assembly, which can be found on page 13 of this final report. Since submitting the annual report in March, the Task Force continued to hold monthly meetings and

¹ Act of Oct. 29, 2020 (P.L. 724, No. 85) § 1, effective Dec. 28, 2020, which amended the act of April 9, 1929 (P.L. 177, No. 175), art. XXII, § 2209.4, known as The Administrative Code of 1929, *amended* October 30, 2017 (P.L. 379, No. 40); 71 P.S. § 569.4.

has hosted additional listening sessions with the International Brotherhood of Teamsters, the Pennsylvania Chamber of Business and Industry, the Philadelphia Drivers Union, and the National Federation of Independent Business.

During these sessions, the Task Force conducted detailed discussions on specific aspects of the worker misclassification issue, as well as accepted remarks, comments, and observations about its 15 policy recommendations. The Task Force has used this information to augment its findings and proposals, as reflected in this final report.

In this report, the Task Force offers the General Assembly an update on what it has learned about misclassification since March. This new information has reemphasized the prudence of the 15 unanimous recommendations that truly form a comprehensive blueprint for effectively addressing Pennsylvania's growing worker misclassification issue.

The Task Force urges the General Assembly to use these recommendations as a framework for their legislative efforts to address the problem of worker misclassification. Addressing the consequences of worker misclassification is important and, at the end of the day, this issue is about fairness: fairness to workers, fairness to law-abiding businesses, and fairness to working families.

As chair of this Task Force these last 23 months, I have noted a consistent theme in the comments, presentations, and analyses we have reviewed. Specifically, the issue of worker misclassification boils down to a question of fairness:

- Fairness to workers, low and highly compensated, entry-level and experienced, in rural and urban counties across the commonwealth;
- Fairness to law-abiding businesses who are forced to compete on an uneven playing field against competitors who misclassify workers, violate the law, and fail to pay their fair share in taxes;
- Fairness to working families who unfairly bear a higher tax burden because of the responsibility shirked by misclassifying businesses.

The origins of misclassification may be complex, but the responsibility to act is simple: it is what is fair.

On behalf of my fellow Task Force members, I would like to thank the General Assembly for considering our report and recommendations. We also thank Attorney General Josh Shapiro, Secretary of Labor & Industry Jennifer Berrier, and Secretary of Revenue C. Daniel Hassell for the staff support they have provided to the Task Force, which proved to be so vitally essential to our work.

Finally, I would like to personally thank my fellow Task Force members, Chief Deputy Attorney General Nancy Walker, Deputy Secretary of Taxation Bryan Barbin, Hank Butler, Drew Simpson, Joanne Manganello, and Lance Claiborne for their service and for the time and effort they put into the work of the Task Force, as well as the support that they provided to me as Chair. It was indispensable.

The commitment by Nancy, Bryan, Hank, Drew, Joanne, and Lance to work together, to keep an open mind, and to think outside the box was critical in delving so effectively and vigorously into the vexing and widespread problem of worker misclassification.

Basil L. Merenda, Esq.

Chair, Joint Task Force on Misclassification of Employees

Deputy Secretary for Safety and Labor–Management Relations

Pennsylvania Department of Labor & Industry

EXECUTIVE SUMMARY

The Task Force submitted its Annual Report on March 1st, 2022, and since then has continued to conduct monthly meetings and listening sessions, to gather information on specific aspects of the worker misclassification problem. The Task Force listened diligently to the perspectives of all stakeholders on misclassification. It received and reviewed comments (in support and in opposition) and observations about its 15 unanimous recommendations. It heard from workers, global online platform (“gig”) companies, a Pennsylvania-based trucking company, a small business federation, representatives of other states and jurisdictions with experience enacting reforms addressing misclassification, labor organizations, organizers and activists, and other experts in misclassification and independent contracting.

Since March 2022, the Task Force has been considering the various presentations, discussions, and suggestions from several outside groups. The Task Force focused its attention on five notable subtopics related to the causes and effects of worker misclassification. The various presentations and information provided to the Task Force – to assist it in understanding the scope, scale, and individual experiences of misclassification and to continue its work to inform the General Assembly – focused broadly on several themes and recommendations.

First, Best Practices: The Task Force learned of methods, both direct and indirect, employed by other states to address problems with the misclassification of employees as independent contractors (and potentially vice-versa) as well as misclassification by unlicensed or unregistered labor brokers.

Second, Labor Brokers: The Task Force heard about how labor brokers operate in Pennsylvania without regulation and are key contributors to the problem of misclassification in construction and other industries.

Third, Cooperation and Collaboration: The Task Force recognized that existing inter-agency and intra-agency cooperation has facilitated enforcement and education about existing laws and regulations that address the problem of misclassification. The Task Force agreed that more collaboration is necessary and possible but that certain barriers to data-sharing and joint enforcement between enforcement agencies can only be torn down by the General Assembly.

Fourth, Information and Action: A consistent theme across the lifespan of the Task Force was the lack of information about what misclassification is and what individuals and businesses can do about it. This has been true as it heard from workers themselves and businesses that have suffered because of misclassification by competitors. Funding and infrastructure for a broad campaign of public education that dovetails with notifications to workers at the start of a new work opportunity is critically necessary.

Fifth, Enforcement and Education: The Task Force heard objections from business groups about the recommendations for enhanced penalties, increased fines, and stop-work authority for misclassification violations. The Task Force sought to address these concerns by focusing on knowing violations to encourage education and to discourage penalizing a true misunderstanding of the law. Relatedly, it

became abundantly clear that many workers enter labor agreements without realizing their true employment status—employee or independent contractor—and what protections and rights they enjoy as employees that do not exist for independent contractors.

The statements, presentations, and discussions the Task Force has hosted since March 2022 have reenforced the urgent need for the General Assembly to adopt the 15 unanimous recommendations made by the task force in its annual report. We again call on the General Assembly to do so at its earliest opportunity.

1. Best Practices

The Task Force heard repeatedly from businesses and workers about their difficulty in determining actual worker status under the various Pennsylvania laws and definitions. The broad interest in a single common standard for Pennsylvania led the Task Force to consider a single, multi-factor test that takes into account the control and direction of the work, whether the work occurs within or outside the usual course of the business of a company, and whether the worker is customarily engaged in an independent profession, occupation, or trade. Such a standard already exists in Pennsylvania for construction workers and, in part, under the Unemployment Compensation Law.²

The Task Force considered how other jurisdictions have enacted statutes and policy initiatives to address the misclassification of employees. It welcomed additional examples and testimony in favor of and in opposition to such a test, which the Task Force supports as an appropriate baseline standard for the commonwealth’s businesses, workers, and enforcement agencies.³

The Task Force heard recommendations for limiting the applicability of the single statewide standard. However, it declines to recommend a financial exemption to such a test, since it is a baseline test for delineating between an employee and independent contractor that turns on the nature of work, how work is organized and controlled without any consideration of financial terms and wage rates.

The Task Force also considered how Montana established and implemented an independent contractor certification process,⁴ that requires employers to establish the worker’s status from the outset of the employment arrangement, rather than having that determination thrust upon the enforcement agency to be resolved later. The Task Force considered the opportunities and barriers to a similar system in Pennsylvania.

² The Construction Workplace Misclassification Act (Act 72) includes a multi-factor test for construction employees, and Pennsylvania’s Unemployment Compensation Law includes a similar test.

³ Many jurisdictions have codified multi-factor tests for delineating whether a worker should be considered an employee or legitimate independent contractor.

⁴ **Montana Independent Contractor Certification Law**, MCA 39-71-417. <https://codes.findlaw.com/mt/title-39-labor/mt-code-ann-sect-39-71-417.html>.

2. Labor Brokers

The Task Force heard how labor brokers⁵ operate in Pennsylvania without regulation and are key contributors to the problem of misclassification in several industries, including construction. Some unscrupulous labor brokers in the construction industry pay workers in cash with no record of what was actually paid or what taxes, if any, were deducted. This can lead to complex insurance fraud schemes, tax avoidance plans, wage theft violations and even a willingness to use a worker’s immigration status for leverage to cheat on the payment of wages and neglect other workplace issues.

With the understanding that registration would facilitate and enhance enforcement of misclassification laws and increase accountability by bringing labor brokers into light, the Task Force examined examples of labor broker registration programs enacted and proposed in other states, including Delaware,⁶ New York,⁷ Oregon,⁸ and Iowa⁹. The information received by the Task Force since its March 2022 report reiterates the need to regulate labor brokers by requiring their registration and to put all industries on notice of the laws and obligations of labor brokers in the commonwealth.

3. Cooperation and Collaboration

The Task Force recognizes a need for greater inter-agency and intra-agency cooperation to facilitate and coordinate enforcement strategies to address misclassification violations that are occurring every day under current law. Enhanced coordination and collaboration may best be accomplished through legislative action that provides statutory authority and direction for collaboration between agencies. The Task Force considered successful examples of cooperation in the Department of Labor & Industry’s (L&I’s) internal misclassification group and in the joint investigatory and enforcement actions with criminal enforcement agencies including district attorneys and the Office of the Attorney General.

The information considered by the Task Force since March has reiterated the value of a formal inter-agency working group—including at minimum the Attorney General’s Office, Revenue, and L&I, as well as local civil and criminal enforcement agencies interested in participating. Such a group could meet quarterly and coordinate enforcement strategies to

⁵ “[Labor broker](https://www.lawinsider.com/dictionary/labor-broker)” refers to “an entity or individual that hires employees and sells the services of the employees to another employer in need of temporary employees.” <https://www.lawinsider.com/dictionary/labor-broker>.

⁶ **Delaware Workplace Fraud Act** – Requires all contractors and subcontractors to register, then prohibits all registered employers from acting as labor brokers (19 Del.C. § 3503); 19 Del.C. §§ 3501 – 3515; <https://delcode.delaware.gov/title19/c035/index.html>.

⁷ **New York Construction Industry Wage Theft Law** - Contractors liable for any wages or related benefits not paid by their subcontractors or labor brokers. Labor brokers are not required specifically to register. N.Y. Lab. Law § 198-e; <https://www.nysenate.gov/legislation/laws/LAB/198-E>.

⁸ **Oregon Labor contractors; Duties Generally; Prohibited Acts** - Requires all Construction Labor Contractors to register; Or. Rev. Stat. Ann. § 658.440; https://oregon.public.law/statutes/ors_658.440; See also, Oregon Bureau of Labor and Industries: Construction Labor Contractors, <https://prod.oregon.gov/boli/employers/Pages/construction-labor-contractors.aspx>.

⁹ **Iowa Senate File No. 493**, Eighty-Ninth General Assembly-2021 Session; Would include “labor broker” or “recruiter” in the definition of “Contractor.” <https://www.legis.iowa.gov/legislation/BillBook?ba=SF%20493&ga=89>.

address current and future worker misclassification issues across the commonwealth. Critically, any improvements in collaboration and cooperation among agencies and enforcement officers would require the sharing of certain tax and financial information. As the evidence before the Task Force has repeatedly made clear, tax and wage audits are critical tools for uncovering misclassification, but these actions must be matched with a system of referrals that can lead to administrative action, criminal charges, and accountability. Too often the Task Force has heard of law-abiding businesses losing opportunities to unscrupulous competitors who willingly violated current misclassification statutes, secure in the knowledge that by the time an investigation can be conducted they will have completed their illegal acts and scattered the evidence.

4. Information and Outreach

The Task Force recognized the critical need to educate the public, workers, and businesses about worker misclassification issues and what is and is not permissible under the law, how it affects workers, and adversely impacts law abiding businesses. It came to understand the urgent need for addressing misclassification; namely, the increased tax burden borne by law-abiding businesses and taxpayers stemming from the growing number of workers for whom misclassifying employers do not pay unemployment compensation or state taxes, federal FICA, Social Security, and Medicare/Medicaid taxes. It also agreed that an adequately funded broad campaign of public education by the General Assembly should dovetail with notifications to workers at the start of a new work opportunity.

Further, the Task Force discussed additional options to raise awareness about misclassification and the law. It considered the potential benefits of a forum sponsored by the General Assembly on the changing nature of work which could serve as the centerpiece of a statewide public outreach effort. It also considered how to understand misclassification in the wider context of changes to the nature of work in the 21st century, and whether an advisory group including labor unions, business and management groups, gig worker associations, public policy advocacy groups, law enforcement, and representatives from state agencies might help further broaden understanding of the issues and their implications.

5. Education and Enforcement

In hearing from businesses and workers, the Task Force noted the need for greater education about worker status and its implications and, from the businesses particularly, to ensure that enforcement agencies focus helping businesses reach compliance and not simply penalize them. In that vein, the Task Force heard concerns from the business community about how the recommendation to enhance penalties and fines for misclassification violations might somehow ensnare otherwise law-abiding businesses. However, the Task Force's recommendation on enhancing civil and criminal penalties only for intentional violations, a specific and high legal standard, was intended to address these concerns. Businesses also shared what they are already doing to provide workers with information about what working as an independent contractor entails.

One persistent issue the Task Force recognized as a problem contributing to the growth of misclassification is the misconception that a worker, or employer, can choose their status: employee or independent contractor. In all contexts, the status of the worker is determined by the nature and conditions of their work, not their preference. The Task Force supports a single, multi-factor test because it promotes a clear standard for determining worker status that can be more clearly understood by both worker and businesses.

The Task Force learned that too often, employees learn of their misclassification only after being laid off, injured at work, or having experienced another negative outcome. Many misclassified employees initially enter work arrangements without fully understanding their true legal employment status as an employee or independent contractor; the protections and rights they enjoy as employees that do not exist for independent contractors; and the consequences of being misclassified as an independent contractor. The Task Force recognized the need for businesses and workers to have a shared and clear understanding of the nature of the working relationship at the start of an employment or contracting relationship. Such notice and common understanding could go a long way to reducing costly litigation for businesses and lost unemployment and workers' compensation benefits for workers. The Task Force was pleased to hear that there may be broad support for such a worker notice and that many businesses already provide workers with an explanation of what working as an independent contractor entails.

As part of its ongoing consideration of labor brokers and misclassification, the Task Force considered the opportunities and potential benefits that could emerge if the Office of Attorney General, County District Attorneys, the Pennsylvania State Police, and other enforcement agencies collaborated on potential amendments to the criminal code that would focus on the specific activities of illegal labor brokers.

Conclusion

Across these thematic focuses that emerged from the monthly meetings and listening sessions, the prudence and need for the implementation of the Task Force's 15 unanimous recommendations offered to the General Assembly in its March 2022 report remains clear and even more urgent. The problem of misclassification continues to harm working Pennsylvanians and law-abiding businesses, and improvements and enhancements to existing statutes remain critically necessary. The Task Force offers the information in this Final Report to the General Assembly to supplement and bolster its March 2022 report.

Worker misclassification is a complex issue in an evolving economy. But complexity does not inhibit resolution and evolution does not prohibit progress. This final report is evidence of a plain truth: broad common ground exists on which both labor and business groups and all interested stakeholders have developed common-sense and unanimous recommendations for the General Assembly to address the problem of worker misclassification in a comprehensive, fair, and effective manner.

The Task Force has used the final stage of its statutory duties to focus on misclassification issues and concerns that have emerged and to fine-tune the recommendations of its previous report into the most effective measures to address worker misclassification. As the way in which

work is performed continues to evolve, so too must the laws that govern that work. Enacting the recommendations in this report would serve as a starting point, but continued review of issues related to worker misclassification is critical to protect both workers and the businesses that employ them.

MISCLASSIFICATION IN PENNSYLVANIA BY THE NUMBERS

Act 85 of 2020 explicitly charged the Task Force with investigating the practice of employee misclassification occurring within the commonwealth. 71 P.S. §569.4(a). The following statistics best demonstrate the current landscape of this problem in Pennsylvania's workforce.

5.3: Average number of misclassified employees found per employer audit conducted by the Office of Unemployment Compensation Tax Services (OUCTS) based on 2021Q3 to 2022Q2 data.

10,892: Estimated number of misclassified employees who suffered injury or illness at work and were denied Workers' Compensation in 2021.

48,939: Annual number of employers who currently misclassify at least one employee (2021Q3 to 2022Q2 OUCTS data).

259,000: Annual number of misclassified employees in Pennsylvania (2020Q3 to 2021Q2 OUCTS data).

\$383,414.74: Estimated losses to the Uninsured Employers Guarantee Fund (UEGF) due to misclassification in 2021.

\$91,000,000: Annual lost revenue to UC Trust Fund due to misclassification (2021Q3 to 2022Q2 OUCTS data).

\$6.4 million to \$124.5 million: Estimated range of lost revenue to General Fund due to misclassification in tax year 2019 (PA Department of Revenue).

\$153,365,895.20: Estimated losses to misclassified employees who suffered injury or illness at work in 2021 without workers' compensation insurance.

All estimates and figures were generated by the PA Department of Labor & Industry unless otherwise noted.

RECOMMENDATIONS OF THE TASK FORCE TO THE GENERAL ASSEMBLY

The following 15 recommendations were approved unanimously by the Joint Task Force at its January 28, 2022, meeting and included in its March 1, 2022, Annual Report and are modified slightly herein.

1) The Joint Task Force recommends that the Pennsylvania General Assembly extend Act 72, the Construction Workplace Misclassification Act, beyond the construction trades to cover other industries in the commonwealth.

2) The Joint Task Force recommends that the Pennsylvania General Assembly adopt a single, multi-factor test that takes into account the control and direction of the work, whether the work occurs within or outside the usual course of the business of a company, and whether the worker is customarily engaged in an independent profession, occupation, or trade to clearly delineate the difference between “employee” and “independent contractor.”

3) The Joint Task Force recommends that the Pennsylvania General Assembly expand the statewide clearance programs to require all state agencies to pull current licenses or not renew current licenses if a business is determined to have knowingly misclassified workers and has not paid the fines and fees associated with that violation or previous violations.

4) The Joint Task Force recommends that the Pennsylvania General Assembly require appropriate state agencies to share FEIN and employment information under proper confidential safeguards on all state agency business applications so that compliance crossmatches can be done efficiently. The purpose of this would be to ensure compliance and provide education and assistance to first violators so that they can reach compliance or, if there is evidence of a knowing violation, to initiate an investigation.

5) The Joint Task Force recommends that the Pennsylvania General Assembly enhance the penalties associated with worker misclassification violations under Act 72 by increasing the fines in tiers for first, second, and subsequent violations and by enhancing criminal penalties for knowing violations while maintaining summary offenses for negligent violations.

6) The Task Force recommends that the Pennsylvania General Assembly provide Labor & Industry with the following:

- resources to hire additional investigative and support staff, such as forensic accounting and computer support; and
- subpoena authority to acquire records of employers as part of investigations into misclassification

7) The Task Force recommends that the Pennsylvania General Assembly provide Labor & Industry with authority to issue administrative stop work orders against entities and/or individuals that have been found to have employed misclassified workers.

8) The Task Force recommends that the Pennsylvania General Assembly provide Labor & Industry with statutory authority to debar companies or individuals for knowing violations or for multiple violations of Act 72.

9) The Joint Task Force recommends that the Pennsylvania General Assembly statutorily authorize that liability shall be imposed by law on general contractors any time their subcontractors are found to have misclassified workers on a project only if the general contractor had clear evidence of a knowing misclassification violation.

10) The Joint Task Force recommends that the Pennsylvania General Assembly require labor brokers doing business in the commonwealth to be registered and bonded, including but not limited to reporting requirements for workers' compensation, unemployment compensation, and federal and state taxes, to safeguard workers from being misclassified as independent contractors.

11) The Joint Task Force recommends the creation of an interagency working group to meet quarterly to coordinate enforcement strategies involving state agencies, such as Labor & Industry and Revenue, along with the Attorney General's Office and County District Attorneys' Offices.

12) The Joint Task Force recommends that the Pennsylvania General Assembly allocate funds and expand posting requirements for a statewide effort of education and public outreach led by state agencies in conjunction with stakeholders to educate the public, workers, and business owners about the worker misclassification issue and the obligations under the law.

13) The Joint Task Force recommends that the Pennsylvania General Assembly authorize the Department of Revenue, the Bureau of Workers' Compensation, and the Bureau of Labor Law Compliance to share data, in addition to existing authority to share data with the Office of Unemployment Compensation Tax Services, for the purposes of investigating employee misclassification.

14) The Joint Task Force recommends for misclassification violations that the Pennsylvania General Assembly authorize the Department of Labor & Industry to recover investigative costs and attorneys' fees from violators and authorize courts to assess investigative costs and attorneys' fees incurred by the Office of Attorney General and District Attorneys' Offices against criminal violators who are found guilty, or plead guilty or nolo contendere, for knowing violations.

15) The Joint Task Force recommends that the Pennsylvania General Assembly consider a private right of action for misclassified employees and impose a penalty to be paid directly to plaintiffs that successfully establish a claim of misclassification in addition to other rights to which they are entitled under the WPCL and modeled after N.J.S.A. § 34:1A-1.18.

FINAL REPORT

Since submitting its Annual Report in March 2022, the Task Force has continued to study the problem of misclassification and considered possible solutions. It received constructive feedback through discussions and presentations from business and labor groups about its 15 unanimous recommendations. It heard about how other states have addressed the problems of misclassification, including issues surrounding labor brokers. Across these discussions, overarching themes emerged as to the nature of both the problems of and possible solutions to misclassification.

1. BEST PRACTICES

Throughout its existence, the Task Force heard frequently from businesses, workers, and the advocates of both that much confusion exists in Pennsylvania regarding the standards of employment and independent contracting. Different tests and standards at the state level—from Unemployment Compensation to the Construction Workplace Misclassification Act (Act 72)¹⁰ to the Department of Revenue and the Workers' Compensation Act—and the federal level, lead some workers and businesses to believe that employment status is a choice. This, of course, is incorrect.

In exploring ways to illuminate the line between employment and independent contractor status, the Task Force looked at what other states, including our neighbor New Jersey, have done to clarify this persistent challenge for both workers and businesses. As a result, the Task Force recommends that the General Assembly adopt a single, multi-factor test, which would clarify and brighten the line between employment and independent contracting in Pennsylvania.

A single, multi-factor test that takes into consideration who controls and directs the work, whether the work occurs within or outside the usual course of the business of a company, and whether the worker is customarily engaged in an independent profession, occupation, or trade would not introduce a totally new and unfamiliar standard to Pennsylvania. This test already exists in practice in the Construction Workplace Misclassification Act (Act 72). The Unemployment Compensation Law effectively includes an A-C test¹¹ and serves as one of the key tools for uncovering the prevalence of and correcting misclassification in Pennsylvania.

The adoption of a single, multi-factor test in Pennsylvania would provide a uniform standard applicable across all enforcement agencies—the Department of Labor & Industry, the Department of Revenue, and the Office of the Attorney General—instead of slightly varied tests

¹⁰ Act of Oct. 13, 2010, P.L. 506, No. 72, *effective* Feb. 10, 2011; 43 P.S. §§ 933.1 – 933.17; <https://www.dli.pa.gov/laws-regs/laws/Pages/default.aspx>.

¹¹ Section 4, **Unemployment Compensation Law**, act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*; 43 P.S. § 753(l)(b)(2); <https://www.dli.pa.gov/laws-regs/Pages/default.aspx>.

and rules for each entity. In other words, a single, multi-factor test would replace a series of standards applicable under certain conditions and in limited contexts with one, universal, statewide standard that would be easily understood and adhered to by businesses, workers, and enforcement agencies.

In the interest of thoroughness, however, the Task Force examined what other states have done to address the pressing problem of misclassification. The Task Force heard from the Montana Department of Labor & Industry about its independent contractor exemption certificate system. Upon application by a worker who is by default considered an employee, Montana relies on a point-based system of relevant workplace factors to determine the legal status of that worker.

Members of the Task Force considered whether such a statutory provision could be adopted or adapted in Pennsylvania to determine the status of the employment relationship from the outset of the work relationship, with the intention of avoiding contentious litigation after the fact. For example, under Montana's statutory scheme, if an issue arises about a worker's employment status, that worker is considered an "employee" *per se* unless the worker has, prior to entering the employment relationship in question, either 1) obtained the state's independent contractor certificate or 2) has proof of coverage under a workers' compensation insurance policy.¹²

By considering the default employment status to be that of employee and by requiring that to be considered an independent contractor a worker must first meet a set of predetermined standards, the Montana system is similar to the presumption advocated by the Task Force: that a worker is an employee unless proven otherwise and at the start of the work relationship. This means that the worker and the employer must identify and establish the employment status from the outset of the employment arrangement. Accordingly, this may reduce the investigatory burden on the enforcement agency and may reduce the potential for unnecessary litigation if either party seeks to assert a different employment status at some point.

Montana also has the authority to impose a monetary fine if there is a violation of this statutory provision. If Pennsylvania were to adopt a similar system, the enforcement agency should have the same statutory authority to levy financial penalties for violations and conduct investigations, including the authority to issue administrative stop work orders.

Such a system may be best considered supplemental to, and not in place of, a single, multi-factor standard test as the baseline for Pennsylvania. The implementation of such a system would also clarify that the status of the employment relationship must be established at its

¹² Montana has not enforced the certification requirement with ride share workers, such as Uber and Lyft, because a statute was enacted under the Montana Public Service Commission determining that the ride share platforms do not control the drivers. MCA § 69-12-340(5).

inception, which may benefit both employers and workers if the system is used ethically and enforced effectively.

The Task Force did express some concerns about the potential misuse of such a system, which could leave workers without recourse if they are ultimately misclassified despite agreeing to the registration scheme. Additionally, initiating an independent contractor certification program in Pennsylvania would potentially be costly if made the responsibility of L&I. For example, Montana, with a workforce almost one-twelfth the size of Pennsylvania's, processes approximately 11,000 contractor certifications annually. Even a rough approximation between the two states suggests that Pennsylvania would need to process about 132,000 contractor certificates each year with a unique score based on the relevant workplace factors of each applicant.¹³

2. REGULATE LABOR BROKERS.

Perhaps the most challenging issue the Task Force studied during this final stage of its statutory duty was how to regulate the conduct of labor brokers effectively through a tracking and registration process. The close connection between the issue of misclassification and the apparent need to regulate labor brokers was frequently part of the presentations before the Task Force.

The Task Force heard from several of its own members with experience in the trades or with contractors, all of whom noted their first-hand interaction with the metastatic effect labor brokers can have on the problem of misclassification. Many unscrupulous labor brokers take advantage of workers – sometimes at a crucially vulnerable time of their lives – by misclassifying them as independent contractors and use this leverage as an unfair advantage to the detriment of the legitimate contractors who properly classify their workforce. Some labor brokers engage in conduct that includes insurance fraud schemes, tax avoidance plans, wage theft violations and the willingness to use a worker's immigration status for leverage to cheat on the payment of wages and neglect other workplace issues. These practices also negatively impact workers, legitimate contractors, and contractors who choose only to work with legitimate labor brokers.

In its recommendations, the Task Force endorsed requiring labor brokers in Pennsylvania to be registered, bonded, and subject to reporting on workers' compensation, unemployment compensation and federal and state taxes. The Task Force also reviewed and considered how

¹³ In July 2022, the Bureau of Labor Statistics reported Montana's civilian labor force at 566,000 and Pennsylvania's at 6,445,700. Montana's civilian labor force is 8.78 percent the size of Pennsylvania's.

other states track labor brokers that provide businesses or individuals with workers on either a temporary basis or as a permanent labor force.¹⁴

The Task Force reviewed how other states license or register labor brokers, including Delaware, Minnesota, New York,¹⁵ Texas, Oregon, and Iowa. L&I's Policy Office presented information to the Task Force on these state statutory schemes for registering and tracking labor brokers. Each state employed different strategies and provisions that impose much needed accountability on labor brokers.

Even though some of these states' statutes are not specific to labor brokers, they still have a significant impact on them. For example, the Minnesota law focuses on contractor registration and is not explicitly focused on labor brokers. However, it does impact labor brokers indirectly, because it requires that any person who performs construction services in the state register with the Minnesota Department of Labor's commissioner. Under this statute, "employee" is defined as "an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual."¹⁶

Laws establishing employment relationships necessarily impact labor brokers. Most states do not regulate labor brokers directly but instead address the problems through legislation on worker misclassification. In Minnesota, workers hired by construction contractors are automatically classified as employees and can only be considered independent contractors if they meet a nine-part statutory test.¹⁷ Therefore, a construction contractor who utilizes a labor broker to supply part of its workforce is required to consider those workers as employees. States have achieved success in addressing the problems associated with unregulated and unlicensed labor brokers through their misclassification actions by drawing on existing enforcement tools and worker protections, namely through the unemployment insurance/compensation and workers' compensation systems.

In many states, including Pennsylvania, dishonest employers in the construction industry who fail to provide adequate workers' compensation coverage to their employees or who do not pay unemployment compensation taxes are subject to significant fines, penalties, and prohibitions. As the Task Force learned, the unemployment compensation and workers'

¹⁴ Under the law, a labor broker is legally free to supply workers to businesses and individuals provided complete time records are kept for all workers, showing that correct wages, including the proper overtime rate, were paid, and that taxes were deducted, as well as proof that the workforce was directed and supervised by the labor broker.

¹⁵ **New York Construction Industry Wage Theft Law** - Contractors are liable for any wages or related benefits not paid by their subcontractors or labor brokers, but labor brokers are not required specifically to register; N.Y. Lab. Law § 198-e; <https://www.nysenate.gov/legislation/laws/LAB/198-E>.

¹⁶ **Minnesota Construction Contractors**, M.S. § 181.723(3); <https://www.revisor.mn.gov/statutes/cite/181.723>.

¹⁷ **Minnesota Construction Contractors**, M.S. §§ 181.723 (3), (4); <https://www.revisor.mn.gov/statutes/cite/181.723>.

compensation systems are critical partners in identifying misclassification. They should also be partners in preventing the spread of misclassification.

A handful of states attempt to address labor brokers more directly. Delaware requires contractors and subcontractors to register with the state and prohibits registered employers from acting as labor brokers.¹⁸ Iowa has introduced a bill that would require labor brokers to register as contractors with the state if they bring one or more workers to a construction work site in Iowa in the name of an already-registered contractor.¹⁹ Texas requires labor brokers, although only those providing electrical services, to register with the state's Public Utilities Commission for electrical licensing purposes.²⁰

Oregon's construction labor contractors law requires labor contractors to hold a valid license issued by the Commissioner of the Bureau of Labor and Industries.²¹ Oregon's statute defines construction labor contractors as "any person that: (A) For an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in construction; (B) For an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers on behalf of an employer engaged in construction; or (C) Enters into a subcontract with another for any of the activities described in subparagraph (A) or (B) of this paragraph."²² The plain language of this text suggests that labor brokers, like a building contractor who directly employs workers, may be considered as construction labor contractors in Oregon and be required to register.

Pennsylvania may find it practical to combine the registration and regulation of labor brokers with an expansion of existing provisions affecting construction contractors. This may take the form of expanding, as the Task Force has recommended, the Construction Workplace Misclassification Act (Act 72). Addressing abuses by labor brokers is critical to addressing misclassification, because the general practices and unregulated nature of labor brokers exacerbate the problem of misclassification in Pennsylvania. Labor brokers appeal to construction contractors and other employers by offering large groups of low-paid workers

¹⁸ **Delaware Workplace Fraud Act** – Requires all contractors and subcontractors to register, then prohibits all registered employers from acting as labor brokers (19 Del.C. § 3503); 19 Del.C. §§ 3501 – 3515; <https://delcode.delaware.gov/title19/c035/index.html>.

¹⁹ **Iowa Senate File No. 493**, Eighty-Ninth General Assembly-2021 Session; Iowa's bill would add to the definition of "Contractor" as follows: "Contractor" includes a labor broker or recruiter who brings one or more workers to a construction jobsite in this state."
<https://www.legis.iowa.gov/legislation/BillBook?ba=SF%20493&ga=89>.

²⁰ **Texas Utilities Code**, T.C.A., Utilities Code § 39.3555(a);
<https://statutes.capitol.texas.gov/Docs/UT/htm/UT.39.htm>.

²¹ **Oregon Labor Contractor License Requirement**, O.R.S. § 658.410; https://oregon.public.law/statutes/ors_658.410. See, also, **Oregon Labor contractors; Duties Generally; Prohibited Acts** - Requires all Construction Labor Contractors to register; O.R.S. § 658.440; https://oregon.public.law/statutes/ors_658.440; **Oregon Construction Labor Contractors**, <https://prod.oregon.gov/boli/employers/Pages/construction-labor-contractors.aspx>.

²² Oregon Employment Agencies; Farm Labor Contractors and Construction Labor Contractors; Farmworker Camps, Definitions, O.R.S. § 658.405, https://oregon.public.law/statutes/ors_658.405.

rapidly and may lower costs even more by improperly misclassifying the workers as independent contractors. Therefore, labor brokers impact the consequences of misclassification issues – including the exploitation of workers, unfair competition for legitimate contractors, and tax evasion – on a much greater scale overall than a single employer.

An initial appropriation sufficient to create a comprehensive registration process will be critical to any effort to register labor brokers. Once implementation is complete, a Pennsylvania labor broker registration process could be self-financing through registration fees, in the same way contractor registration fees fund the commonwealth’s registration process for home improvement contractors as administered by the Attorney General’s Consumer Protection Bureau and other licensing boards overseen by the Department of State’s Bureau of Professional and Occupational Affairs (BPOA). These agencies already have the necessary infrastructure in place for the administration and enforcement of licensing programs, bypassing some of the startup costs. A labor broker registration-tracking system, along with a significant monetary penalty if violated, could serve as a significant deterrent to unscrupulous labor brokers, especially those engaged in the construction industry.

Given the multitude of ways that labor brokers can and do avoid properly classifying employees, the General Assembly may find useful input from law enforcement officials including the Attorney General’s Office and County District Attorneys.

3. COOPERATION AND COLLABORATION THROUGHOUT GOVERNMENT

The Task Force recognizes the need for formalized cooperation and collaboration between enforcement agencies to enforce the current laws on misclassification more effectively. It also sees the value in enhancing coordination with outside advocates of both business and workers to ensure that the standards as articulated in the law are known, understood, and followed. L&I has established an internal misclassification work group that demonstrates the importance of collaboration between different government units in addressing misclassification issues. Extending governmental cooperation on worker misclassification to all responsible agencies is critical to progress in discouraging and addressing misclassification issues.

L&I’s internal misclassification work group includes the Bureau of Labor Law Compliance (BLLC), Office of Unemployment Compensation Tax Services (OUCTS), and Bureau of Workers’ Compensation (BWC). These three bureaus share information, conduct tax and wage audits, make referrals to each other, and share permissible information to permit appropriate administrative action.

The Task Force considered successful examples of cooperation in L&I’s internal misclassification group and in the joint investigatory and enforcement actions with criminal enforcement agencies including district attorneys and the Office of the Attorney General. Even though the Construction Workplace Misclassification Act (Act 72) currently provides limited

powers to BLLC for worker misclassification enforcement in the construction trades, OUCTS has the statutory powers to perform more in-depth audits and investigations, including the ability to review certain business records not available to BLLC. BLLC then relies on the outcome of OUCTS audits to levy Act 72's fines and penalties, in addition to the result of its own investigations. This sharing of information between the two L&I divisions provides a basis for both entities taking remedial action against employers who are intentionally misclassifying workers, because both agencies have evidence indicating violations of their respective statutes.²³

In addition to this example of intra-agency cooperation, L&I has seen the benefits of inter-agency cooperation on misclassification issues. For example, BWC successfully worked with the Delaware County District Attorney's Office on a recent criminal prosecution involving a roofing contractor who illegally misclassified a worker who had been injured on the job.

These examples of collaboration show the potential that communication and information sharing between agencies and other levels of government has for addressing worker misclassification. The General Assembly should consider establishing a formal inter-agency coalition consisting of L&I, Revenue, and the Attorney General's Office as well as local civil and criminal enforcement agencies interested in participating.²⁴

4. INFORMATION AND OUTREACH

It became clear to the Task Force that both employees and employers are frequently unaware of the obligations and benefits of an employment relationship or the costs of worker misclassification. This lack of understanding has significant consequences including the increased tax burden borne by law-abiding businesses and taxpayers stemming from the growing number of workers for whom misclassifying employers, knowingly or not, do not pay unemployment compensation or state taxes, or federal FICA, Social Security, and Medicare/Medicaid taxes.

Public outreach and education are needed. Many workers do not understand the implications of being misclassified as independent contractors. Workers should be fully aware

²³ OUCTS has the ability to conduct audits of not only construction businesses, but also employers *across all industries*, identifying employees and wages unreported because of error and omission, as well as misclassification. 43 P.S. § 766(a); 34 Pa. Code § 63.6. Between 2017 and 2020, UC Tax Services discovered more than \$1.1 billion in unreported wages for 72,000 misclassified employees amounting to UC taxes owed to the Trust Fund of \$29.9 million.

²⁴ Task Force Recommendation #4 urged the General Assembly to require appropriate state agencies to share certain FEIN and employment information, with proper confidentiality measures, so that compliance crossmatches can be done efficiently. The sharing of certain federal tax information by the commonwealth's Department of Revenue is prohibited by federal law, even with state authorization. However, Task Force Member Barbin has noted that FEIN and other employee/tax information also cannot be shared with other state agencies currently, even as part of an inter-agency cooperation effort on misclassification, until the General Assembly amends the state law and authorizes the sharing of Pennsylvania state tax information.

that misclassification disqualifies them from unemployment compensation and workers' compensation insurance and leaves them without the protections of most Pennsylvania and federal wage protection laws. All workers—particularly online platform gig workers, behavioral health specialists, and those in the construction and finishing trades—should have a complete understanding of their rights and protections when they initially enter work relationships.

Both workers and employers are frequently unaware of the insurance implications involved with misclassification. Unscrupulous contractors, particularly those in the construction industry, may intentionally misclassify workers to evade insurance obligations and the costs of claims by injured workers. These liabilities are borne by other insurance carriers, and in turn, premium payers.²⁵ This can produce an unfair advantage to such knowing violators of misclassification laws when competing for contracts with law-abiding businesses, since misclassification can reduce labor costs (*i.e.*, overtime and minimum wage requirements; unemployment, Medicare/Medicaid, and Social Security taxes; and Workers' Compensation insurance coverage).

To facilitate education of both employees and employers, funding should be considered for a public outreach plan to increase awareness about worker misclassification, educate workers, inform businesses and the public about what is permissible and what is not under the law. An outline of a potentially effective public outreach plan would include hyperlinks to local news sites' stories about misclassification, expanded work signage, workshops co-organized with advocacy groups, public service announcements about worker misclassification, and information on social media.

The Task Force discussed the potential for a conference on the changing nature of work and the role of misclassification. This type of public forum would have the goal of considering the role of misclassification in the larger context of the changing face of work in the 21st century, and how work will be valued, organized, insured, and impacted by technology in the future. This type of conference could serve to initiate policy discussions, highlight just how vexing and widespread misclassification has become and how it might even adversely affect jobs. It could examine emerging business models and ultimately serve as a venue that could educate the public about the changing nature of work and its consequences and complications.

²⁵ During the Task Force's May 22 meeting, Marianne Saylor, Director of L&I's Workers' Compensation Bureau, explained how reputable businesses are being negatively impacted by businesses that are misclassifying employees, how workers' compensation intersects with the misclassification issue, and how the workers' compensation insurance costs need to cover an injured employee who was misclassified by an "uninsured" employer is ultimately funded by insurance carriers. The Workers' Compensation Act provides for the Uninsured Employers Guaranty Fund, which was established, in part, to pay the costs of workers' compensation liabilities that arise from injuries in the workplace where the employer failed to insure or self-insure the employee. The Fund is replenished by assessments on insurers and self-insured employers, reimbursements, interest on the money contained therein, and administrative penalties. 77 P.S. §§ 2702, 2707; 34 Pa. Code § 125.13.

Such a forum, focusing on the changing nature of work in the 21st century, could bring together for a robust discussion a wide group of stakeholders, labor unions, business and management groups, gig worker associations, public policy advocacy groups, law enforcement, and the insurance industry.

5. ENFORCEMENT AND EDUCATION

During several Task Force sessions, members of the business community expressed concerns about some of the 15 recommendations, as well as other issues and concerns related to worker misclassification. For instance, the Pennsylvania Chamber of Business and Industry expressed apprehension with the Task Force’s recommendations for enhanced civil and criminal penalties, increased fines and stop work authority for misclassification violations.

The Task Force already addressed these concerns by focusing its recommendations on intentional violations—a specific and high legal standard—to encourage education and discourage penalizing unintentional violations rooted in a misunderstanding of the law.

Several of the Task Force’s recommendations are intended to facilitate enhanced enforcement tools and penalties, extended debarment, and expanded liability of general contractors for intentional violations. For example, the stronger penalties in Recommendation 5 would only apply to these intentional violations, while unintentional violations would be subject to a tiered penalty assessment for a first offense, followed by higher penalties for second and subsequent violations. Similarly, the expansion of L&I’s debarment authority for violations of Act 72 in Recommendation 8 would only be available for intentional or repeated violations. The proposed liability of a general contractor for its subcontractor’s misclassification on a project (Recommendation 9) can be found only if the general contractor clearly knew of the subcontractor’s violation.²⁶ In all cases, the enhancement or increase of any penalties or fines proposed by the Task Force are contingent upon the finding that the violation was intentional.

In the Task Force’s September session, the National Federation of Independent Business (NFIB), which represents 13,000 Pennsylvania based small businesses, voiced concern about extending misclassification requirements beyond construction trades and asserted that it would have a detrimental effect on its membership, which employ an average workforce of 10 employees in the service sector, and other small businesses. The NFIB suggested that, if a single, multi-factor test is enacted by the General Assembly, a financial exemption should be made for small, independent businesses.

To support this claim, the NFIB explained that small businesses have utilized independent contractors because it provides necessary financial flexibility in the unforgiving economic

²⁶ Recommendation 4, which covers the use of financial information against businesses that are found to have misclassified, specifies its purpose is “to ensure compliance and provide education and assistance to first time violators so that they can reach compliance.”

environment of small business. The NFIB asserts that many workers prefer independent contractor status because it provides them with work schedule flexibility.

The Task Force was unable to find any financial exemption in states using a single, multi-factor test. It noted that such a financial exemption would be unsuitable and inappropriate because the multi-factor test is a baseline standard for delineating the difference between an employee and independent contractor, which turns on what work is being done, how it is directed, and who exercises control of the final work product. It includes no consideration of financial terms or wage rates.²⁷

If coupled with an extensive public education and notification program about misclassification and appropriate classification, an independent contractor certification process effectively enforced and used ethically in Pennsylvania, like Montana's certificate program, could provide small businesses and their workers with much needed certainty and clarity about their actual employment status. As explained earlier, an independent contractor certification program could accomplish this through a process that verifies the independent contractor status from the outset of a work relationship and thus avoids confusion, surprise or contentious litigation later. However, the tremendous differences between the Montana and Pennsylvania economies, from complexity to sheer size, present significant challenges to implementation. Again, such a system would require a sizeable investment, in funds and permanent staffing, to adequately operate the system for the hundreds of thousands of true independent contractors currently working in the commonwealth.

Education may help mitigate one problem the Task Force has encountered repeatedly: the misconception that a worker, or employer, can choose whether to be classified as an employee or an independent contractor. The status of a worker is determined by the nature and conditions of their work, not their preference. The Task Force supports the single, multi-factor test because it promotes a clear standard for determining worker status that can be more readily understood by both worker and businesses. It also understands that much work remains to ensure that the public, both employers and workers, are fully informed.

²⁷ The Task Force notes that enforcing such an exemption would be difficult because businesses under investigation may attempt to take the focus off the allegations and instead argue that they should be considered below the established threshold for endless creative reasons. With no exemption provided, **all** businesses would compete on a level playing field and **all** employees would enjoy the protections.

CONCLUSION: ENACT THE RECOMMENDATIONS OF THE TASK FORCE

Since finishing its annual report in March 2022, the Task Force has continued to work diligently to understand the problem of and create solutions to the challenge of misclassification in Pennsylvania. It is the steadfast hope of the members of the Task Force that the General Assembly, with whom the power to make lasting progress on this front resides, will use both this final and the March 2022 annual reports as valued primers for addressing misclassification.

With the submission of this report, the work of this Task Force will be completed, and the enabling legislation will soon sunset. The responsibility to continue progress on ending worker misclassification will belong to the General Assembly. Take action on this issue, on this report, and above all, on these unanimous recommendations.

The Task Force's comprehensive recommendations would extend the Construction Workplace Misclassification Act beyond the construction trades to cover other industries and business sectors in the commonwealth. To better combat misclassification in Pennsylvania, legislation is needed to expand Act 72's protections to all business sectors, provide a statewide test for independent contractors and provide L&I's BLLC with some much-needed tools to pursue administrative enforcement of violations more effectively, such as administrative stop-work authority, subpoena power, and the ability to enter work sites and review documents. Further, L&I's debarment authority should be expanded so that L&I could pursue debarment from publicly funded contracts for intentional misclassification violations, while providing remedies for unintentional violators. The Prevailing Wage Act contains similar provisions²⁸ that could be used as a model.

Increasing civil and criminal penalties and fines for misclassification would have a deterrent effect. The General Assembly should also consider providing workers with a right to challenge misclassification directly, as the General Assembly has already done in the Wage Payment and Collection Law and the Minimum Wage Act.²⁹

Therefore, the Task Force urges the General Assembly to give serious consideration to the policy recommendations found in this final report as part of its legislative review and process. If the Task Force's recommendations are incorporated into legislation, Pennsylvania will be able to establish a statewide misclassification policy that could find common ground and be supported across the board by business, labor, workers, and all stakeholders and could serve as a model for the nation.

²⁸ Section 11, **Pennsylvania Prevailing Wage Act**, 43 P.S. § 165-11; <https://www.dli.pa.gov/laws-regs/Pages/default.aspx>.

²⁹ See, e.g., Section 9.1, **Wage Payment and Collection Law**, 43 P.S. § 260.9a; Section 13, **Minimum Wage Act**, 43 P.S. § 333.113; <https://www.dli.pa.gov/laws-regs/Pages/default.aspx>.

Accordingly, the Joint Task Force on Misclassification of Employees submits its final report herein to the General Assembly pursuant to Act 85 of 2020.