



Report on Misclassification Enforcement  
And  
Activities of the Misclassification Task Force

January 15<sup>th</sup>, 2016

Submitted by:  
Commissioner Anne M. Noonan

In calendar year 2015, the Vermont Department of Labor (VDOL), in compliance with Vermont statutory requirements and the Governor's 2012 Executive Order, continued the enforcement of employee misclassification in the Unemployment Insurance (UI) and Workers' Compensation (WC) Programs and to outreach and educate the public of the issue of employee misclassification. There are a total of 10 full time UI Auditors and 5 WC investigators, as well as additional staff located in the Central Office (Program Integrity) involved in the collection of taxes, penalties and interest due to the State.

During the 1<sup>st</sup> quarter of 2015, Vermont had 20,087 private firms actively reporting to the VDOL. Of these, 80% have 9 or fewer employees, 10% have 10 to 19 employees, 6.34% have 20 to 49 employees, and 3.66% have 50 or more employees. 90% of Vermont companies have less than 20 employees.

### **Unemployment Insurance (UI) Program**

In CY 2015, the UI Auditors completed 455 full-scale audits. The USDOL Employment and Training Administration requires state UI programs to audit 1% of the state's employers every year. VDOL has set a goal of auditing 2% of Vermont employers annually. Approximately 22,000 employers in Vermont are required to register in the UI system which equates to an annual goal of 440 audits.

Investigations and audits are initiated through various means includes, but not limited to:

1. tips and referrals received from the public, WC or other state entities, chargeable employers, or concerned citizens;
2. cross match of data received from the Internal Revenue Service and Vermont Department of Taxes;
3. quarterly audits with random and targeted (based on size and industry) selection; and internal programs designed to detect transfer of all or part of an employer's workforce to a new employer (without the statutorily required transfer of existing experience rating) and employer.

Audits are frequently initiated when a former employee is laid off or fired and contacts VDOL UI Call Center to open a claim. Sometimes the former employee will not have any wage records in VDOL database, yet still claim to be a former employee of the business. When this occurs, an assignment is created and a UI Auditor investigates whether or not the individual was an employee for purposes of UI and/or WC coverage. If the individual is determined to be an employee a full audit would be initiated and the employer may be assessed delinquent contributions.

Assignments and audits completed by the UI Auditors found 1,066 misclassified workers netting approximately \$230,000 in employer contributions<sup>1</sup>, along with 18% annual interest.

### **Workers Compensation (WC)**

Investigations are initiated as a result of receiving tips or referrals from UI, VOSHA, Wage and Hour, an online complaint form, and other state entities, employers, and/or the public. Once a tip is received, various databases are checked to determine if the employer was registered with the Secretary of State or the VDOL's UI system. The NCCI Proof of Coverage (POC) database is also checked to determine if the business is listed as having a current WC policy. If the POC database does not show a current policy in place, the investigator visits the employer's establishment, or

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<sup>1</sup> UI has not been assessing penalties associated with misclassified employees pending drafting and adoption of administrative rules clarifying a penalty structure and appeal procedure. VDOL anticipates filing such rules in the near future.

worksites to confirm whether there are workers paid by the employer and advise the employer of the requirement to have WC coverage for those workers. If proof of coverage is not provided a Stop Work Order is issued, and additional investigative work is conducted to determine how long the employer lacked coverage, and to estimate the number of workers that should have been covered during that period. The initial focus is to get WC insurance in place. An administrative citation is issued and a penalty assessed. If the POC database reveals a policy, that information is cross-checked with the UI database or the tip that was received to make sure all employees are covered.

## **Investigations**

In 2015, the WC investigations unit opened 178 new investigations. 59 of these were closed after determining the employer was in compliance. Fourteen Stop Work Orders were issued. In addition, 20 administrative penalty citations were issued assessing a total of \$71,350 in penalties. Of the \$71,350 in penalties assessed, \$10,307.91 has been collected. Employers in 9 of the 20 citation cases are paying the penalty on a monthly basis. All penalties collected are deposited into the State General Fund. Overall, a total of \$43,051.07 has been collected in 2015 for WC penalties. Many of these funds collected are from citations that were issued prior to 2015. By comparison, in 2014, 136 investigations were opened and 72 were closed as in compliance. Twenty-five Stop Work Orders were issued. In addition, 26 administrative citations were issued in 2014.

Although the investigations unit has an adequate number of assigned positions, investigation and enforcement has been hampered by staff turnover and staff out on extended medical leave, effectively reducing the number of WC Investigators to two. VDOL continues recruitment efforts and it expects that with a fully staffed investigative unit, the number of stop work orders, administrative citations, and penalty amounts will increase.

Accurately calculating the number of misclassified workers is complicated and difficult in WC investigations because of two factors. First, under the workers' compensation statute it is permissible for a worker to be an Independent Contractor provided that the worker is covered by a workers' compensation policy. Secondly, when an employer purchases a workers' compensation policy, the employer and the insurance agent estimate the anticipated payroll. It is understood that during the policy year the actual payroll may fluctuate. At the end of the policy year the workers' compensation insurance company performs an annual audit of the insured, and the estimated payroll is adjusted to reflect the actual payroll during the policy year. The audit will include uninsured subcontractors in the calculation of the correct premium to be collected.

STATE OF VERMONT  
EXECUTIVE DEPARTMENT  
EXECUTIVE ORDER NO. 08-12

[Governor's Task Force on Employee Misclassification]

WHEREAS, Vermont law provides that all workers are considered employees unless a worker is lawfully exempt as an "independent contractor," and

WHEREAS, when an employee is misclassified as an independent contractor, the employer potentially violates numerous laws, and

WHEREAS, the misclassification of employees harms Vermont workers by depriving them of important legal rights, harms Vermont taxpayers and the State's economy through the loss of state and federal payroll taxes, and harms employers who abide by the law by enabling non-compliant business to gain an unfair advantage, and

WHEREAS, Vermont's laws regarding misclassification must be aggressively enforced in a coordinated, timely, and consistent manner by all agencies and departments.

NOW, THEREFORE, BE IT RESOLVED that I, Peter Shumlin, by virtue of the authority vested in me as Governor of the State of Vermont, do hereby create the "Governor's Task Force on Employee Misclassification" as set forth below.

I. Composition, Appointments, and Process

The Task Force shall consist of the following members: The

- Secretary of Administration or designee
- The Commissioner of Labor or designee
- The Commissioner of Financial Regulation or designee
- The Commissioner of Taxes or designee
- The Commissioner of Buildings of General Services or designee
- The Secretary of Transportation or designee
- The Secretary of Human Services or designee
- The Secretary of Commerce or designee
- The Commissioner of Liquor Control or designee

The Task Force may also request the participation of other state officials, including the Attorney General or designee and the Secretary of State or designee.

The Commissioner of Labor or his or her designee shall chair the Task Force. The Task Force may elect a deputy chair. The Department of Labor shall provide administrative support. The Task Force shall meet every two months at the call of the Chair or deputy chair.

## II. Charge

The Task Force is charged with combating the practice of employee misclassification and shall report its findings to the Governor on January 15 of each year.

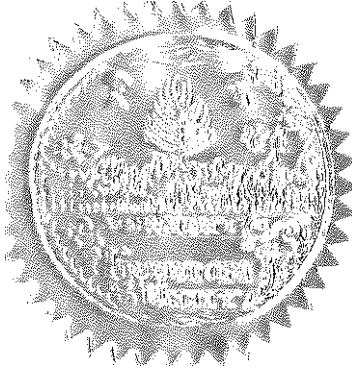
The Task Force shall:

- A. Examine and evaluate existing misclassification enforcement by agencies and departments;
- B. Develop and implement a campaign to educate and inform employers, workers, and the general public about misclassification;
- C. Coordinate review of existing law and other methods to improve monitoring and enforcement of misclassification;
- D. Review and establish reasonable mechanisms to accept complaints and reports and non-compliance;
- E. Review templates for state contracts and grants and monitor systems to ensure compliance by contractors and grant recipients;
- F. Identify barriers to information sharing and recommend statutory changes where necessary;
- G. Work collaboratively with businesses, labor, and other interested stakeholders in the effort to reduce employee misclassification;
- H. Ensure that agencies and departments are engaged in timely enforcement and that any penalties and debarment periods are posted to a publicly available website in a timely manner, where permitted by law. Additional methods of public notice and information sharing shall be reviewed and recommended by the Task Force.
- I. Engage in other activities as deemed necessary and appropriate by the Task Force, as permitted by law.

All agencies and departments shall cooperate with the Task Force and furnish information in a timely fashion. The Task Force is authorized to receive monetary and other assistance in furtherance of its duties upon approval of the Governor in accordance with law. The Department of Labor shall be the fiscal recipient of any such funds.

III. Effective Date

This Executive Order shall take effect upon signing and shall continue in full force and effect until further order by the Governor.



Dated September 8, 2012.

A handwritten signature in black ink, appearing to read "Peter Shumlin", written over a horizontal line.

Peter Shumlin Governor

Executive Order No. 08-12

**Misclassification Task Force (The Task Force)**

**Members:**

Secretary Justin Johnson	Agency of Administration (AoA)
Commissioner Anne M. Noonan	Vermont Department of Labor (VDOL)
Commissioner Susan L. Donegan	Department Financial Regulation (Fin Reg)
Commissioner Mary N. Peterson	Department of Taxes (DoT)
Commissioner Mike Obuchowski	Building and General Services (BGS)
Secretary Chris Cole	Vermont Agency Transportation (VTrans)
Secretary Hal Cohen	Agency of Human Services (AHS)
Secretary Pat Moulton	Agency of Commerce and Community Development (ACCD)
Attorney General William H. Sorrell	Attorney General (AG)
Commissioner James C. Giffin	Department of Liquor Control (DLC)

**Participating Members:**

Commissioner Anne M. Noonan	VDOL	Interim Commissioner James C. Giffin	DLC
Cathy Hilgendorf, Audit Chief	VTrans	Bradley Kukenberger, Financial Director II	AoA
Kirby Keeton, Tax Policy Analyst	DoT	Bill Duchac, Risk Management Policy & Mediation Director	DFR
Kevin Gaffney, Insurance Rates & Forms Director	Fin Reg		
Secretary Pat Moulton	ACCD		
Michael Duane, Senior Assistant Attorney General	AG		
Commissioner Mike Obuchowski	BGS		
Allan Sullivan, General Counsel	AHS		
Paul Rousseau, Chief Financial Officer	AoA		

The Task Force convened on July 15<sup>th</sup>, September 2<sup>nd</sup>, October 7<sup>th</sup>, December 3<sup>rd</sup>, and December 18<sup>th</sup>, 2015. The Task Force will continue meeting every other month. This year the Task Force focused on outreach and education, and “(F). Identify barriers to information sharing and recommend statutory changes where necessary.”

On September 2<sup>nd</sup>, 2015, the Task Force took testimony from Cathy Lamberton (AGC), Mike Plageman (Plageman, Gagnon & Daughters, Inc.), David Mickenberg (Working Vermont), Matt Durocher (Carpenters Local 1996), Ward Smyth (Turtle Creek Builders) and Jill Maynard (Hull Maynard Insurance Company)<sup>2</sup>.

The Task Force specifically discussed the application of the WC “nature of the business” test and the UI “ABC” test to the many state contracts for services. It was evident that in many instances, notwithstanding the contract, the State is a “statutory employer” for WC purposes and may be liable for

<sup>2</sup> See Appendix D – Minutes from September 2<sup>nd</sup> Task Force meeting

UI payments for many of those contractors. The Vermont Supreme Court has found the State liable for benefits under both WC and UI. This is largely due to the broad range of services and occupations in State government. For example, the State has custodians and plow drivers employed as state employees in some state buildings, but in more remote portions of the State may contract with a person to provide custodial services or plow parking lots. Because these contractors are performing work that otherwise falls within the nature of the state's business, these contractors are considered employees under both WC "nature of the business" and the UI "ABC" tests. The Task Force discussed the possibility of carving out an exemption for the State, but the majority of the Task Force thought the State should follow the same rules as the private sector.

With input from stakeholders and the Task Force, VDOL crafted language amending the WC and UI statutes to address issues that have been identified:

- The application of the WC "nature of the business" test to determine who is an employer for WC purposes especially given the broad interpretation of that test by the Court in several cases;
- The difficulty determining when a sole proprietor or partnership is truly an independent contractor and not a "statutory employee" for WC purposes
- The treatment of excluded corporate officers or excluded LLC members as a "statutory employee" for WC purposes
- The broad interpretation of the UI "ABC" test, especially part "B" of the test which many small independent contractors fail.

Key provisions of the VDOL proposal would:

- Specifically create a presumption that a worker being paid for services was an employee, and require the employer to demonstrate that the worker was an independent contractor;
- Modifying the application of the WC "nature of the business" test permit consideration of whether a sole proprietor, partnership, small corporation, or LLC operated a distinct and separate business;
- Provide that excluded corporate officers or LLC members are not "statutory employees" when specified conditions are met;
- "soften" part "B" of the UI "ABC" test to permit consideration of whether a sole proprietor, partnership, or single member LLC operated a distinct and separate business; and,
- Amend and enhance enforcement provisions to enable VDOL to more easily identify violations and enforce compliance.

## **Outreach and Education**

In 2015, VDOL sought out and received a federal grant to create a media campaign pertaining to misclassification. The purpose is to make the public more aware of misclassification and the effect it has on Vermont's economy. The media planning and production was contracted for with HMC, Richmond, VT.

The VDOL assisted HMC with gathering interested stakeholders together to share their thoughts on misclassification and how the campaign should be produced. The campaign launched on December 28th and will run through February 28<sup>th</sup>, 2016. It is our intention to continue using these commercials to further our goal of being as clear, and transparent, as possible on this issue.

The commercial was produced with the intention of discussing misclassification from an educational perspective and to help Vermonters understand misclassification is a problem, that it is being taken seriously, and that it is the responsibility of employers and workers to understand and comply with the law.





Below is the script for the commercial:

“Workers who are misclassified by their employers as independent contractors instead of as employees is a problem in Vermont.

Misclassification of workers is illegal, hurts our economy, and creates unfair advantages for some businesses. Business owners need to classify workers correctly to avoid penalties and sanctions, and workers need to be properly classified so they get the protections and benefits provided by law. Because when it comes to classification, it’s important to get it right.”

<https://www.youtube.com/watch?v=ct3aAYmnlzs>

### **Summary**

The misclassification of employees is prohibited by both federal and Vermont state laws. Misclassification undermines law-abiding/compliant businesses by creating an unfair advantage for the non-compliant business when competing or bidding for work. Misclassification adversely impacts the employee, when benefits such as minimum wage, overtime, family medical and parental leave, unemployment insurance, workplace safety protections, or workers’ compensation are not provided because the worker is misclassified as an independent contractor. Misclassification creates substantial losses in tax revenues, which undermines Vermont’s economy. While Vermont’s statutory language might need to be clarified and/or updated as it relates to misclassification and independent contractors, the Vermont Department of Labor is statutorily tasked with, and committed to, the enforcement of the law regarding misclassification.

The Misclassification Report issued in 2015 by the Auditor’s Office identified areas of concern in VDOL’s administrative, data collection and documentation processes. VDOL is working diligently to address those areas of concern and improve its internal processes. In addition, VDOL continues to work cooperatively with other state agencies to achieve the goals identified in the Governor’s Executive Order.



Misclassification Task Force Minutes  
 December 18, 2015  
 1:00-3:00

Vermont Department of Labor – Lobby Conference Room

Attendance

Task Force	Guests
Anne M. Noonan, VDOL	Bryan Mills, Ellis-Mills
Bill Duchac, AoA – Risk Management	Mike Plageman, Gagnon & Daughters
Michael Duane, AG	Rebecca Ramos, Working VT
Kirby Keeton, Dept. of Tax	Tess Kennedy, William Shouldice & Associates LLC
Kevin Gaffney, DFR	Katrina Delabruere, VT Realtors
Patricia Moulton, ACCD	Chris Rice, MMR
Allan Sullivan, AHS	
Michael Obuchowski, BGS	
Cathy Hilgendorf, AoT	
Tracy Phillips, VDOL	
Matt Hill, VDOL	
Dirk Anderson, VDOL	
Stephen Monahan, VDOL	

Pat Moulton motions to accept December 3<sup>rd</sup> Minutes, Kevin Gaffney Seconds

Vote 10-0-0

Attorney General and Risk Management language proposal:

**Michael Duane** – Chatham Woods case applying to the state, the State kind of does everything.

- Everything in the nature of the business
- There are definitions of public employment
- Includes any person under a special agreement or retainer – no definition for either
- When the State enters a personal agreement, could a classified employee do this?
- Stephen Monahan gave guidance on the language, and then was sent to Bill Duchac for edits
- Not exaggerating, everyone contracting with the State could be an employee of the State

**Commissioner Noonan** – VDOL is almost completely federal funds, and many people receive federal grants. Given the broad language (of the proposed language) “grant” isn’t necessarily true.

- I think what you are trying to say when the State contracts with someone, we have to be clear what we are talking about

**Bill Duchac** – I think we could take it out, the first priority would be a personal service contract

**Tracy Phillips** – From an employer perspective, “well I may only need someone for one week and why is the State exempted and not us?” For a temp service contract, under UI, she State wouldn’t be on the hook unless they filed a claim.

**Stephen Monahan** – For WC, I would caution they can still sue or use some other public safety net.

**Bill Duchac** – If you are not required otherwise, why would it be on use to provide it?

**Stephen Monahan** – This is the same argument on the Business side

Bill Duchac – Right now, I have an obligation by law yet no authority in statute

**Stephen Monahan** – There is no law against making these people carry WC in order to contract with the State, that may prohibit sole proprietors but that would also level the playing field

**Cathy Hilgendorf** – We contract with sole proprietors for consulting or inspections and just wondering about that, but I do like the idea of leveling the playing field

**Michael Duane** – Will requiring WC add costs?

**Secretary Moulton** – It certainly will

**Stephen Monahan** – is the state subsidizing the worker? Or may have require some sort of policy, having a separate disability policy

**Ward Smyth** – Small business owners are going through the same thing

**Kevin Gaffney** – are we creating a different threshold? It seems we would but also maybe creating a barrier. We could say the default is WC coverage. In State we may or may not want to.

**Secretary Moulton** – To be in business for yourself you are responsible, there shouldn't be 2 thresholds.

**Ward Smyth** – My insurance agent told me years ago, WC is the very best policy, we ought to have it no matter what

**Secretary Moulton** – The state will pick up the tab one way or another if someone gets hurt.

**Commissioner Noonan** – If you grant Washington County Mental Health to run we shouldn't cover their employees because they are not the State's employees

**Mike Plageman** – if the State hires a sole proprietor they should be held to the same standard

**Secretary Moulton** – as a tax payer, I have a problem paying someone's insurance

**Michael Duane** – Boiler Plate contract say “in accordance with Vermont Law”

**Secretary Moulton** – could just make it mandatory to contract with State, if you contract with state, you must carry WC

**Cathy Hilgendorf** – There will be a lot of debate trying to get WC for all. What was behind the idea of exemptions?

**Stephen Monahan** – in the beginning WC was mandatory for over 10 employees, eventually worked down to any employees. In the 80s they added exemptions

**Commissioner Noonan** – is there a way to quantify the cost of WC? For example, your contract is for \$45,000 but we deduct the cost of WC if you don't have it.

APPENDIX B



Misclassification Task Force Minutes  
 December 3, 2015  
 1:00-3:00  
 Vermont State House – Room 10

Commissioner Noonan – intro

Approval of Minutes – Bill Duchac motions to accept, Kirby seconds – 5-0-2

Attendance

Task Force	Guests
Anne M. Noonan, VDOL	Tony St. Hilaire, Teamsters
Bill Duchac, AoA – Risk Management	Kelly Connolly, USDOL
Michael Duane, AG	Merle Hyman, USDOL
Kirby Keeton, Dept. of Tax	Dennis Labounty, VT AFL-CIO
Kevin Gaffney, DFR	Bryan Mills, Ellis-Mills
Patricia Moulton, ACCD	Mike Plageman, Gagnon & Daughters
Allan Sullivan, AHS	Cathy Lamberton, AGC VT + VIECA
Jeff Lively, BGS	Heather Shouldice, William Shouldice & Associates LLC
Deb Damore, BGS	Ben Johnson, VT AFL-CIO
Matt Hill, VDOL	Rebecca Ramos, Working VT
Dirk Anderson, VDOL	David Mickenberg, VT Building Trades
Stephen Monahan, VDOL	Katrina Delabruere, VT Realtors
	Chris Rice, MMR

Introductions of USDOL Staff,

**Daniel Cronin** – USDOL Wage + Hour (W+H)

- He enforces various Labor statutes throughout NE including, but not limited to, FLSA, agriculture, immigrant protection, W+H, OSHA, Maine safety, including Granite.
- Common interest agreement with VDOL interested in improvement in Misclassification Statutes in VT.

**Kelly Connolly** – Works out of Burlington and Manchester offices, enforces all laws in Labor, previously worked at VDOL.

**Merle Hyman** – Works with W+H, usually gets a referral and either tries to settle the case or go to court.

**Michael Felsen** – Goal is to enhance collaboration with VDOL to closer collaborate with common interest with State law with Workers’ Compensation (WC) and state revenue that may not be coming in when there is misclassification. Years ago it was much easier to discern who is an employee. It’s not so clear now who your employer is and who the employees are, how do all of these things work with subcontractors, franchises and the whole thing?

**Commissioner Noonan** – We work closely with USDOL for guidance and advice often and appreciate all of the support from USDOL. Questions for USDOL?

**David Mickenberg** – Do you know of any trends on misclassification on a National level?

**Daniel Cronin** – That isn't something we collect although we are seeing it in non-traditional areas like kitchen workers, hotel room cleaners, etc.

**Michael Felsen** – Millions of workers in the US that are classified as Independent Contractors (IC) and not employees. Some companies are “franchising” a single person to get around the employee relationship. It is almost a race to the bottom. Ultimately, its misclassifying service jobs to cut corners.

**Secretary Moulton** – Are there any examples of best practices of states with the same issues and have complete the processes?

**Michael Felsen** – We have seen different efforts in different States. Massachusetts has done a lot of work. The goal is to strategically focus since resources are not there. The people who are actually employees is the main focus, not legitimate ICs. A big part is leveling the playing field; who are doing it right and trying to get the word out.

**Michael Duane** – How much flexibility do the states have to bend Unemployment Insurance (UI) statutes?

**Michael Felsen** – UI is not a part of my purview.

**Dirk Anderson** – Any UI program has to be in compliance with US and Social Security. Any legislation proposed goes to D.C. and they OK it. Vermont maintains the Trust Fund, and USDOL funds the administration of the program.

**Steve Monahan** – (Beginning explanation of Proposal)

(3) Adds to clarify that all criteria of the subsection are met.

**David Mickenberg** – How would this language work with other industries?

**Steve Monahan** – I don't think it changes any of that. There is still a presumption that if you pay for work they are an employee. We start with the assumption you are an employee that's the explanation of (14). (i) has now been rewritten in an effort to clarify that someone operates a clear and distinct business.

**Michael Duane** – Thinking since last meeting, thinking of nature of the business, and the state contract with someone else, how can the state contract without being the employer, given the breadth of work the State of Vermont preforms?

**Steve Monahan** – This may change that.

**Secretary Moulton** – This is the part that “softens” the nature of the business test.

**Michael Duane** – What is the difference between the struck language and the new?

**Steve Monahan** – We look at work being done and how often they contract with someone else. You have to be out there, actually doing the work for a period of time. And a General Contractor (GC) can't hire multiple people to do the same job.

**Bill Duchac** – the standard to have to register could preclude many people from getting side work. We contract with people for a very short time.

**Steve Monahan** – The cost to register is minimal.

**Secretary Moulton** – it screams for more education, if you want to run your own business you have to play by the rules.

**Mike Plageman** – to be able to hire another business of like kind. If I hire another framing company, and it is a separate entity and has UI and WC, am I in violation?

**Steve Monahan** – No

**Commissioner Noonan** – David Mickenberg mentioned enforcement previously, we will look at that later, right now we wanted to build the framework and have some quicker resolutions.

**Cathy Lambertson** – as an IC in the construction industry, you should be responsible to pay WC and UI you are addressing not having an employee/employer relationship with everyone.

**Dirk Anderson** – Sole proprietors and single member LLCs cannot opt-in. There was a change in the IRS regs, I can look into that.

**Cathy Lambertson** – The UI audits doing “like work” when they are true ICs, why not allow the individual to pay their own UI?

**Dirk Anderson** – UI will not let us carve out industries. However, you tax one, you have to tax all.

**Deb Damore** – large project contracting we will be using more than one bricklayer, plow driver, etc. We have them all over the state.

**Steve Monahan** – Right now they are your employees, you are currently their statutory employer. The State and anyone can say, “you must have WC to contract with me.”

**Deb Damore** – We also no longer check registration with Secretary of State’s (SoS) office either.

**Commissioner Noonan** – we can ensure they know their responsibilities by giving a register a checklist at SoS’ office.

**David Mickenberg** – Who would this open up to be legally allowed to go without WC? There would be no one there to be responsible for the injuries that occur.

**Steve Monahan** – This is the same thing that happens now.

**David Mickenberg** – If you “soften” these people are more likely to go without WC and the higher up will not be responsible.

**Steve Monahan** – The goal is to return to the way it was to before Chatham Woods.

**Secretary Moulton** – What if you are a startup and you are exclusively working for one person at the moment but plan to take on others.

**Commissioner Noonan** – We thought of that, we would look at other aspects, have to show you are advertising and trying to line up work. If you have been in business for 3 years and work for one person, that’s called an employee.

**Secretary Moulton** – That could be addressed in rules.

**Mike Plageman** – Why do we have the change in (21 V.S.A. § 1301 (6)(B)(ii)) what is the point?

**Dirk Anderson** – it is designed to track with WC language (F)(i), but limitation of ICs in one job is not in UI, if we wanted to move one we need to do it for both.

**Mike Plageman** – UI and WC should go hand in hand.

**Commissioner Noonan** – We have to be careful of running afoul of Federal law yet be consistent and not move to less protection for employees.

**Secretary Moulton** – in a perfect world, definitions would be the same.

**Steve Monahan** – I look at it as “are there narrow exceptions we can provide.”

**Chris Rice** – Wondering about the issue of having more than one sole proprietor. Having one attorney that handles a specific part of business, another as a lobbyist and another for a different aspect.

**Kevin Gaffney** – There is a quantitative and a qualitative aspect to the UI side, the “separate job sites or Projects”

**Secretary Moulton** – What if we have separate and distinct expertise or specialty?

**Steve Monahan** – I would like that. I would like something that people wouldn’t have to get into the weeds. If you exclude yourself, you have an explicit right to file a personal injury claim. We think it was a drafting error and it should be clarified that there is a separate remedy.

#### **Other Business**

One more meeting before January 5<sup>th</sup>

Secretary Moulton motions to adjourn, Kevin Gaffney seconds.



Misclassification Task Force Minutes  
 October 7, 2015  
 1:30-3:30

Vermont Department of Labor – Lobby Conference Room

Attendance

Task Force	Guests
Anne M. Noonan, VDOL	Dennis Labounty, VT AFL-CIO
Bill Duchac, AoA – Risk Management	Bryan Mills, Ellis-Mills
Michael Duane, AG	Mike Plageman, Gagnon & Daughters
Kirby Keeton, Dept. of Tax	Cheri L’Esperance, William Shouldice & Associates
Kevin Gaffney, DFR	David Mickenberg, Building Trades
Lucy Leriche, ACCD	Rebecca Ramos, Working VT
Allan Sullivan, AHS	Jeff Potvin, VT Building Trades
Michael Obuchowski, BGS	Kevin Potter, Bricklayers Local #2
Cathy Hilgendorf, AoT	Dan Mulcahy, Sheet Metal Local 63
Bradley Kukenberger, AoA	Tara Lapointe, Sheet Metal Local 63
Dirk Anderson, VDOL	Ward Smyth, Turtle Creek Builders
Maureen Tivnan, VDOL	
Matt Hill, VDOL	
Tracy Phillips, VDOL	

**Commissioner Noonan** – intro

**Dirk Anderson** - Walk through of proposed changes. Tries to slightly “soften” the very broad interpretation.

**Kevin Gaffney** – I am aware of the goal (601 (F)(i)), I’m not use if the “Softening” is getting there, It is definitely getting there but I don’t want to misinterpret the “Distinct” (language)

**Bill Duchac** – “Distinct” in larger firms may be hard to do, they could be in the same Business.

**Ward Smyth** – Is this addressing the doing the, “I have carpenters but I hire 6 more” is this part of “distinct?” I get the point behind #7 ((vii) a person shall not hire multiple sole proprietors or partnerships to perform the same work on a project or jobsite)

**Dirk Anderson** – The intent is if your guys are doing the framing and you bring in a sheet rocker, that individual would not trip you up.

**Kirby Keeton** – But if a contractor dabbles in that, that will trip them up.

**Brad Kukenberger** – Sub 1 ((i) The individual ~~performs work that is distinct and separate from that of the person with whom the individual contracts~~ or partner owner or partner owners operate a separate and distinct business from that of the person with whom the individual contracts, and is actively registered with the Vermont Secretary of State) is easing the burden in ways Mike (Plageman) spoke about and Sub 7 ((vii) a person shall not hire multiple sole proprietors or partnerships to perform the same work on a project or jobsite) is enhancing competitive equality.



**Ward Smyth** – It is hard to tread that line of “keeping it fair”

**Cathy Hilgendorf** – adding business “entity” would do it ((i) The individual performs work that is distinct and separate from that of the person with whom the individual contracts or partner owner or partner owners operate a separate and distinct business entity from that of the person with whom the individual contracts, and is actively registered with the Vermont Secretary of State)

**David Mickenberg** – I appreciate the effort; the other side of the equation is the enforcement side. I would like to talk about that in the construction context, this would apply to every sector in the economy. Sector by sector there are different concerns that this could have a dramatic impact on.

**Michael Duane** – “B” is the most difficult to meet the activity is employment unless free of control. The “unless” is throwing me off. (Such service is ~~either~~ outside the usual course of the business for which such service is performed, unless it can be demonstrated that such individual provides such service to multiple businesses, and holds him- or herself out to the public as a provider of such service)

**Lucy Leriche** - Cathy’s story about a cleaning lady Independent Contractor that was found to be an employee. It may be good having an Avenue to allow someone to pick up work here and there.

**Tracy Phillips** – If we give too much latitude some will try to file a claim and no one will have UI coverage.

**Cathy Hilgendorf** – Did we consult with Secretary of State, do they inform the Independent Contractor they will not have UI, etc.?

**Commissioner Noonan** – The Business Portal gets business registrants and brings them through the process and what you are responsible for, UI, WC, etc.

**Cathy Hilgendorf** – Lucy’s “retiree” will have to register it would comfort them to know that may or may not be able to take advantage of UI, WC.

**Commissioner Noonan** – Someone that works solely for Mike (for example) for 6 months and goes to Florida for winter they are Mike’s employee, but the Italian Tiler that works for one week, then comes back to finish is not Mike’s employee.

**Tracy Phillips** – [Adding] the Secretary of State registry was a way to “formalize” the business.

**Bill Duchac** – [The State] has contracts to proof files and they don’t work again until the next contract comes up, are they employees?

**Tracy Phillips** – Yes

**Kevin Gaffney** – In addition to changes in the “written agreement” how can we put more “meat around the bones” for the written agreement?

**New Business:**

**Kevin Gaffney** – During the 100<sup>th</sup> WC anniversary, a speaker talked about the “Predetermination process” could be interesting to discuss.

**Commissioner Noonan** – Just a reminder the WC rules are filed and public hearing is Nov. 5<sup>th</sup>.

Kevin Gaffney moved to adjourn, Cathy Hilgendorf seconded.

APPENDIX D



Misclassification Task Force Minutes

September 2, 2015

1:00-3:00

Vermont Department of Labor – Lobby Conference Room

Attendance

Task Force	Guest
Anne M. Noonan, VDOL	Jill Maynard-Nolan, Maynard Insurance
Jim Giffin, DLC	Ward Smyth, Turtle Creek Builders
Bradley Kukenberger, AoA	Matt Durocher, Carpenters Local 1996
Michael Duane, AG	David Mickenberg, Building Trades
Kevin Gaffney, DFR	Rebecca Ramos, Working Vermont
Mike Obuchowski, BGS	Heather Shouldice, William Shouldice & Associates
Dawn O’Toole, AHS	Cathy Lamberton, AGC
Cathy Hilgendorf, AoT	Mike Plageman, Plageman & Daughters
Faith Brown, VTrans	Kendal Melvin, VT Chamber of Commerce
Stephen Monahan, VDOL	Bryan Mills, Ellis Mills
Mike Hoyt, VDOL	
Tracy Phillips, VDOL	
Dirk Anderson, VDOL	
Matt Hill, VDOL	
Kirby Keeton, Tax	

**Commissioner Noonan** – intro

H.762 made it through House, did not go through Senate for unrelated issues.

Guest Speaker Introductions

1:10pm – **Mike Plageman (Plageman, Gagnon and Daughters) and Cathy Lamberton (AGC)**

Mike-

I have run the quintessential Vermont small business for 25 years. We remodel and renovate homes. What comes out of these meetings may negatively affect us, so I am pleased to be here.

Cathy –

- Auditor’s report could be unfair to DOL.
- People that are being fined are appealing the fines that are being assessed and feel some are too strong.
- Many use construction as an example of the “bad guys” of Misclassification, but there are others in the “creative economy” that are also in on this.

- Then there are some people who do not have to carry Workers' Compensation (WC), i.e. LLC officer
- In one case a cleaning company was found to be an employee because it was the only company she worked for.
- The companies that work together to skirt WC costs [are the issue]

Mike –

- [In past years] We had many state jobs and won our fair share
- 10 years ago Sole Proprietors that didn't carry WC were undercutting the competition
- Finally, we got out of the game because it was a waste of time [to prepare a bid]

Cathy –

- Lamberton Electric, had 50 employees and carried WC, but Wayne (Lamberton) did not have to carry WC on himself, but when he was on the job, the GC would have to carry WC for him.
- If laws allow people to exempt themselves then we should require WC for all
- H. 378 (was a bill introduced last year) it had multiple co-sponsors in place

Mike –

- There are 3 issues concerning this issue
  1. The nature of the business test
  2. Independent Contractors/Sole Proprietors
  3. Legislation of Marijuana
- 1. Nature of the Business
  - 90% of the time there is a specialized occupation i.e. plumber, electrician, etc.
  - Because of the "nature of the business" we have to classify them as employees
  - How can I assemble the team if I have to cover them for Unemployment Insurance (UI) and WC?
  - Customers want me to come in and handle the entire job and they would be de facto General Contractors (GC) if I couldn't
- 2. Independent Contractors and Sole Proprietors
  - I need them on projects, they do not want to be employees and I can't employ them
  - WC gets audited yearly, so I make them get WC so I won't get dinged, and they do
- 3. Legalizing Marijuana
  - Put aside personal points, it is going to affect worksite safety and WC rates
  - WC rates are the most expensive costs
  - It will be doubly tough to find employees that "don't want to give up their weed"

Cathy –

- Random audits are a sufficient way to audit

Mike –

- Auditor's report seems to be a little self-serving

**David Mickenberg (Building Trades) and Matt Durocher (Carpenters Local 1996)**

David –

- Essentially agree with Cathy and Mike
- Not going after the companies that are going aloof unknowingly
- It is about finding those who are intentionally breaking laws to get a competitive edge
- More currently “labor brokers” have become prevalent, mostly taking advantage of undocumented workers
- Does changing the test fix Mike’s, Cathy’s and Ward’s issues? It may, but it could also make it easier for others to get away with it
- The actual cheating has been happening in the construction industry
- What happens when an injured worker goes uncovered? What are the societal costs?

Matt –

- I sympathize with Mike on this issue, the subs working a specific occupation should not be an employee
- Seems to be convoluted language with “like business”
- Every worker should have WC
- Misclassification Language should have separate section for construction because it is a separate issue
- The Hoffer report was a little harsh, some I agree with
- Every Independent Contractor should register with the state; tax needs to follow up on 1099s
- Some GCs are taking advantage of workers, if you pay someone \$18 an hour, they are actually bringing home around \$10 after taxes/healthcare
- We don’t agree on everything but we agree everyone needs to pull their weight with the economy
- FOYAs can get payroll sheets and on some payroll sheets all workers are 1099s
- Sub base needs to be cleaned up

Cathy Hilgendorf – sometimes workers wait for an injury to find out they don’t have WC

Ward Smyth (Turtle Creek Builders)

- Past president of the Home Builders
- I have started requiring [WC] certificates
- It is very difficult to run an honest business
- It is easy to check for WC, but we cannot check UI
- I found 95 contractors in the yellow pages, use NAIC code looks up, hard to find on DOL’s website
- 49.5% of YP contractors had WC (handout)
- When I go to bid on a job I will ask who else bid and if certain people have bid, I won’t waste my time.
- I would like WC for everyone or a state registration
- At what point do I say, “I’ll just start operating ‘under the table’”?
- In Connecticut, the homeowner is responsible for WC if claim is made and the employer doesn’t have WC
- Careers in Construction are available and you can have a good career. The stigma in construction is different in VT than it is around the country.

**Jill Maynard (Hull, Maynard, Hersey Insurance)**

- Would like to try to bring clarity to insurance side
- Many Sole Proprietors are proud to say they have subs
- WC audits can be \$4,000 per employee
- A sole proprietor can go in with \$1,000 policy and at the end of the year goes to \$350
- Some say they had their friend or brother but “they weren’t employees”
- Some agencies have a simple process to determine a sole proprietor
- It would be great if a form came to the state and a 3<sup>rd</sup> party determined if someone has WC/UI and have a live feed

**Dirk Anderson (General Counsel VDOL)**

- Courts will immediately look for the benefit of the worker
- GCs can’t always sub with another firm with employees and that is where you start having UI issues, if they are an individual with no employees
- It is the hardest to pass the “B” test, nature of the business

**Mike Plageman –**

- There has to be some responsibility to be their own boss.



Misclassification Task Force Minutes  
July 15, 2015  
1:00-3:00  
Vermont State House – Room 10

Attendance

Anne M. Noonan, VDOL
Kevin Gaffney, DFR
Lucy Leriche, ACCD
Dawn O’Toole, AHS
Frank Partsch, Tax
Bill Duchac, Risk Management
Michael Duane, AG
Cathy Hilgendorf, AoT
Mike Obuchowski, BGS
Paul Roussea, AoA
Tracy Phillips, VDOL
Matt Hill, VDOL

**Commissioner Noonan – intro**

- In 2012 a large group constructed H. 762 and made it through the House
- There was a break on the issue in 2013
- 2014 it came to a head
- 2015 Homebuilders launch the “Stop the Audits” campaign
- Most stakeholders did not want to move on it
- At VDOL we asked ourselves, if Green Books didn’t exist, what would we do?

**Tracy Phillips** – Presentation on various aspects of Unemployment Insurance (UI)

- People often think they are in compliance and are in fact not, they may have been at one point, but for various reasons are, no longer
- Received Grant for education and outreach

**Commissioner Noonan** – Sometimes Businesses are compliant for years and then a spouse dies or bad advice from a professional (i.e. Insurance agent/Book Keeper)

**Frank Partsch** – often the IRS definition is more lax and people assume they are good since it is a federal definition

**Michael Duane** – an individual can’t sign a contract that can waive their rights

**Michael Obuchowski** – can any of the grant money be used for enforcement?

**Tracy Phillips** – No

**Michael Obuchowski** – Did anyone else from VT apply for the grant?

**Tracy Phillips** – Not to my knowledge

- We have 12 UI auditors
- Also collect funds for Health Connect and sometimes we are the bearer of bad news

**Commissioner Noonan** – there are also 4 Workers' Compensation auditors, mostly respond on complaints, 17 total staff doing audits

**Michael Obuchowski** – [For the outreach and education] who is the audience?

**Tracy Phillips** – Employers – are you classifying correctly/make sure you are classifying correctly  
Workers – There are long term implications for not being classified as employees

**Lucy Leriche** – It might be helpful to get a presentation on H. 762

- Where were agreements reached?
- There has been time to cool down and the bill could be helpful

**Commissioner Noonan** – We can pull the Misclass parts out to review

**Michael Duane** – How does the UI definition work with federal Law?

**Kevin Gaffney** – Maine has a measure, if you miss 1 or 2 definitions you could still be fine

**Michael Duane** – is there a pool for unpaid claims?

**Kevin Gaffney** – No, the insurance company can audit, to recoup

**Commissioner Noonan** – Liability will go up the chain for GCs and subs

**Kevin Gaffney** – Chatham decision throws a large blanket on statutory employer

**Commissioner Noonan** – The penalty and debarment piece has been on shaky legal ground