Report Pursuant to 2018 Acts and Resolves No. 148, Sec. 8 Regarding the Use of Debarment in Relation to Vermont's Statutes Prohibiting Employee Misclassification

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I. Introduction and Authority

This report was prepared in response to 2018 Acts and Resolves No. 148, Sec. 8, in which the General Assembly directed the Office of Legislative Council to prepare and submit a written report on the use of debarment in relation to the laws against employee misclassification. Specifically, the General Assembly charged the Office of Legislative Council with the following duties:

> (1) Summarize Vermont's laws, rules, and procedures related to debarment, including the violations that can trigger a debarment proceeding.
> (2) Describe the use of Vermont's debarment procedures and why they have not been used more frequently to date.
> (3) Identify any obstacles that prevent or hinder the use of Vermont's debarment procedures.
> (4) Summarize the actions taken by the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services to utilize debarment to ensure that the State is not contracting with employers that misclassify employees in violation of Vermont law.
> (5) Identify other states that utilize debarment as a means of enforcing the laws against employee misclassification and summarize the manner and frequency of debarment proceedings in those states.
> (6) Summarize specific characteristics of other states' laws, rules, and procedures related to debarment that have been identified as either enhancing or limiting their effectiveness in enforcing those states' laws against employee misclassification.
> (7) Summarize any legislative, regulatory, or administrative changes that are identified by the Agency of Administration, Agency of Transportation, Department of Labor, Department of Financial Regulation, or Department of Buildings and General Services as necessary to make debarment a more effective tool for reducing the occurrence of and enforcing the laws against employee misclassification.

Act 148 also directed the Office of Legislative Council to consult with the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services during the preparation of this report. As a result, this report is based on a review of the Vermont statutes and administrative rules, as well as information from conversations and e-mails with staff at the Agencies of Administration and of Transportation, and the Departments of Buildings and General Services, of Financial Regulation, and of Labor.[1]

It is important to note that although this report is based in part on information provided by staff from Executive Branch agencies and departments, it is not intended to represent the official position of the Governor or his Administration in relation to the issues of debarment and employee misclassification. In addition, this report is not intended to advocate for any specific

[1] The Office of Legislative Council would like to thank the following individuals for their invaluable help in preparing this report: Dirk Anderson, Steve Monahan, and Jessica Vintinner from the Department of Labor; Deb Damore from the Department of Buildings and General Services; Kevin Gaffney, Pat Murray, and Jill Rickard from the Department of Financial Regulation; Sue Zeller and Brad Ferland from the Agency of Administration; and Cathy Hilgendorf and Michelle Anderson from the Agency of Transportation.

legislative or policy approach, but rather to present information that the General Assembly may draw on if it decides to take legislative action in relation to either debarment or employee misclassification.

For purposes of this report, and for consistency with the 2009 Report of the Workers' Compensation Employee Classification, Coding, and Fraud Enforcement Task Force,[2] "employee misclassification" means classifying a worker as an independent contractor when the worker otherwise meets the criteria of an employee under Vermont workers' compensation law or unemployment insurance laws. Employee misclassification may result from ignorance or confusion about the legal requirements but also may be a result of intentional fraud by an employer in an attempt to lower workers' compensation premiums and other employment expenses.[3]

II. Vermont's Debarment Laws and Procedures

A. Background

There are four sections of the Vermont Statutes Annotated (V.S.A.) that specifically provide for debarment as a penalty for a violation of certain provisions of Vermont's workers' compensation or unemployment insurance laws. Of those sections, two are found in 21 V.S.A. chapter 9, which governs workers' compensation, one is found in 8 V.S.A. § 3661, which relates to workers' compensation insurance, and one is found in 21 V.S.A. chapter 17, which governs Vermont unemployment insurance program.

The four debarment provisions were added by 2010 Acts and Resolves No. 142, which also included several other provisions related to reducing employee misclassification.[4] Other significant features of that Act included amended penalties in the V.S.A.; the addition of anti-retaliation protections for workers that report misclassification related to workers' compensation; the creation of an online employee misclassification reporting system;[5] a requirement that the Secretary of Administration ensure that the State does not contract with employers who are on the State's debarment list, which is published on the BGS website;[6] and a requirement that the Secretary of Administration ensure coordination between State agencies in relation to enforcing the laws prohibiting employee misclassification. Importantly, of the four debarment provisions added by that Act, only one specifically relates to employee misclassification.

Vermont's statutes also provide monetary penalties for employee misclassification, as well as a criminal penalty for workers' compensation fraud[7] and for failure to obtain workers'

[2] *See* Appendix 2.
[3] It must be noted that working as an independent contractor is a legitimate alternative to being an employee and use of independent contractors is a legal means of doing business.
[4] The text of 2010 Act 142 is available at https://legislature.vermont.gov/Documents/2010/Docs/ACTS/ACT142/ACT142%20As%20Enacted.pdf.
[5] The text of the report is available at https://uipublic.labor.vermont.gov/Misclassification/EmployerReport.aspx.
[6] The list is available at https://bgs.vermont.gov/purchasing-contracting/debarment.
[7] 13 V.S.A. § 2024.

compensation.[8] However, this report is limited to an examination of the four debarment provisions discussed in the following sections.

B. WORKERS' COMPENSATION

Vermont law requires all employers to have workers' compensation coverage for their employees. Workers' compensation is a no-fault insurance system that provides various benefits to employees who suffer work-related injuries or occupational disease. The benefits include wage replacement, medical treatment, and vocational rehabilitation. Workers' compensation benefits are set by law, ensuring that injured or sick employees receive medical benefits and compensation for work-related injuries while preventing employers and employees from having to pursue costly and unpredictable lawsuits to determine liability for those injuries.

Vermont's workers' compensation law provides a variety of penalties for failure to comply with the law, including administrative penalties, debarment, and even a criminal penalty for a person "who knowingly and with intent to defraud makes a false statement or representation for the purpose of obtaining, affecting, or denying any benefit or payment under the provisions of [the workers' compensation law]."[9]

8 V.S.A. § 3661

8 V.S.A. § 3661 provides enforcement authority to the Commissioner of Financial Regulation when he or she "believes that an insurer or an officer or agent thereof, or any other person, has violated the law, an administrative rule of the Department, or an order of the Commissioner relating to insurance, or has not complied with its requirements."[10] Subsection (c), which specifically relates to workers' compensation insurance, provides:

> "An employer who makes a false statement or representation that results in a lower workers' compensation premium, after notice and opportunity for hearing before the Commissioner, may be assessed an administrative penalty of not more than $20,000.00 in addition to any other appropriate penalty. In addition, an employer found to have violated this section is prohibited from contracting, directly or indirectly, with the State or any of its subdivisions for up to three years following the date the employer was found to have made a false statement or misrepresentation, as determined by the Commissioner in consultation with the Commissioner of Buildings and General Services or the Secretary of Transportation, as appropriate. Either the Secretary or the Commissioner, as appropriate, shall be consulted in any appeal relating to prohibiting the employer from contracting with the State or its subdivisions."

It is worth noting that subsection 3661(c) does not specifically mention employee misclassification. While employee misclassification would be "a false statement or representation that results in a lower workers' compensation premium," there are other actions that could also potentially violate that provision.

[8] 13 V.S.A. § 2025.
[9] 13 V.S.A. § 2024.
[10] 8 V.S.A. § 3661(a).

21 V.S.A. § 692

21 V.S.A. § 692 establishes penalties for the failure to provide workers' compensation insurance for employees. It also provides the Commissioner of Labor with the authority to issue a stop-work order to any employer that fails to secure workers' compensation insurance after an investigation by the Commissioner, as well as additional penalties for an employer that subsequently violates a stop-work order. With respect to debarment, subsection (b) provides in pertinent part:

> "An employer against whom a stop-work order has been issued is prohibited from contracting, directly or indirectly, with the State or any of its subdivisions for a period of up to three years following the date of the issuance of the stop-work order, as determined by the Commissioner in consultation with the Commissioner of Buildings and General Services or the Secretary of Transportation, as appropriate. Either the Secretary or the Commissioner, as appropriate, shall be consulted in any contest of the prohibition of the employer from contracting with the State or its subdivisions."

In other words, an employer can only be debarred under this section after a stop-work order has been issued against it. Because a stop-work order is only issued if the employer fails to provide workers' compensation insurance after an investigation determines that it is required to do so, an employer can avoid both the stop-work order and debarment simply by obtaining the required insurance at the conclusion of the Department's investigation.

It is also worth emphasizing that the stop-work order and debarment penalties are related to the employer's failure to provide workers' compensation insurance, and not to whether it has misclassified the uninsured employees.[11] All five of the currently debarred employers were cited under this provision.

21 V.S.A. § 708

21 V.S.A. § 708 establishes penalties for a person who intentionally makes a false statement or representation to obtain a benefit or payment pursuant to the provisions of the workers' compensation law. With respect to employers who have violated the section, it also provides a debarment penalty:

> "[A]n employer found to have violated this section is prohibited from contracting, directly or indirectly, with the State or any of its subdivisions for up to three years following the date the employer was found to have made a false statement or misrepresentation of a material fact, as determined by the Commissioner in consultation with the Commissioner of Buildings and General Services or the Secretary of Transportation, as appropriate. Either the Secretary or the Commissioner, as appropriate, shall be consulted in any contest

[11] It should be noted that some employers may not realize that they are out of compliance with the requirement to provide workers' compensation. A relatively common problem in some industries where employers hire numerous independent contractors to perform work is that many sole proprietors will obtain a workers' compensation policy known as an "if any" policy. An uninformed employer might believe that this means those subcontractors are covered by workers' compensation insurance. However, an "if only" policy only provides coverage to the sole proprietor if a workers' compensation claim is made against him or her and not if he or she is injured. The employer is still required to provide insurance for that sole proprietor and could potentially be liable if he or she suffers an injury while working for the employer.

> relating to the prohibition of the employer from contracting with the State or its subdivisions."

As with the other debarment provisions related to workers' compensation, section 708 does not specifically relate to misclassification. While employee misclassification would be "a false statement or representation, for the purpose of obtaining [a] benefit or payment under the provisions of this chapter," there are other actions that could also potentially violate this provision.

Workers' Compensation Rule 45

Workers' Compensation Rule 45, entitled "Rules for Administrative Citations and Penalties, Stop Work Orders and Debarment" was amended effective February 13, 2017.[12] Of particular importance for this report, the rule includes provisions related to referral to the Department of Financial Regulation of employers believed to have made a willful false statement in order to reduce their workers' compensation premiums;[13] debarment of employers who willfully make a false statement or representation in order to obtain a benefit under the law, including lower workers' compensation premiums;[14] and debarment of employers who are issued a stop-work order for failure to provide workers' compensation insurance.[15] The rule provides for a one-year debarment for an initial violation, two years for a second violation that occurs within three years of the first, and three years for a third or subsequent violation that occurs within three years of the most recent violation.[16] The Commissioner may reduce the length of the penalty based on specific mitigating factors set forth in the rules.[17]

C. UNEMPLOYMENT INSURANCE

21 V.S.A. § 1314a

21 V.S.A. § 1314a requires employers to file with the Commissioner of Labor quarterly wage reports for all employees and, upon request by the Commissioner, separation reports for former employees who have filed a claim for unemployment compensation. Subsection 1314a(f) provides penalties for failure to file required reports and for the misclassification of employees. With respect to employee misclassification, subdivision (f)(1)(B) provides that an employer who fails to:

> "Properly classify an individual regarding the status of employment is subject to a penalty of not more than $5,000.00 for each improperly classified employee. In addition, an employer found to have violated this section is prohibited from contracting, directly or indirectly, with the State or any of its subdivisions for up to three years following the date the employer was found to have failed to properly classify, as determined by the Commissioner in consultation with the Commissioner of Buildings and General Services

[12] *See* Appendix 4 for the full text of the rule.
[13] 24-010-005 Vt. Code Rules § 45.5300.
[14] 24-010-005 Vt. Code Rules § 45.5400.
[15] 24-010-005 Vt. Code Rules § 45.5580.
[16] 24-010-005 Vt. Code Rules §§ 45.5440–45.5460 and 45.5590–45.5596.
[17] 24-010-005 Vt. Code Rules §§ 45.5160 and 45.5520.

> or the Secretary of Transportation, as appropriate. Either the Secretary or the Commissioner, as appropriate, shall be consulted in any appeal relating to prohibiting the employer from contracting with the State or its subdivisions."

Unlike the debarment provisions in the workers' compensation laws, this penalty is specifically for employee misclassification and does not relate to any other potential violations. However, as will be discussed in more detail in Part IV of this report, this penalty has never been utilized by the Department of Labor since it was enacted in 2010.

III. Actions Taken to Ensure the State Is Not Contracting with Employers That Have Misclassified Employees

The State utilizes a variety of mechanisms to ensure that it does not contract with employers that have been found to misclassify employees. Although the State has not yet debarred an employer for misclassification, the State has taken steps to avoid contracting with employers who have engaged in misclassification by adopting contracting standards and policies, improving coordination between agencies and departments, and engaging in outreach with employers.

A. Debarment Proceedings

Department of Labor

As discussed above, the Department of Labor has debarment authority in relation to Vermont's unemployment insurance and workers' compensation laws. However, the Department has only utilized that authority in relation to the workers' compensation law.

The Department noted that it issued four debarments between 2015 and 2016 before a challenge to its authority led the Department to propose an amendment to Workers' Compensation Rule 45. The amended rule, which took effect on February 23, 2017, allowed the Department to begin instituting debarment proceedings again. The Department issued its first three debarments under the amended rule and 21 V.S.A. § 692 (failure to provide workers' compensation insurance) in April and two more pursuant to the same provision in November.[18] In the context of this report, it is important to note that the employers were debarred for failure to obtain workers' compensation insurance and not for misclassifying their employees.

In contrast, the Department has never utilized its authority to issue penalties or debarments related to employee misclassification under the unemployment insurance law. The Department is currently working to adopt new rules that would allow it to do so. The proposed rule amendments were filed on February 12, 2019.[19] As discussed in Part IV, had the necessary rules been adopted during the more than eight years since 21 V.S.A. § 1314a(f)(1)(B) took effect, a significant number of employers could have faced potential debarment.

[18] *See* Administrative Citations in Appendix 3.
[19] *See* Appendix 6 for a copy of the Department of Labor's proposed rule amendment.

Department of Financial Regulation

While the Department of Financial Regulation also has authority to debar employers who make "a false statement or representation that results in a lower workers' compensation premium," the Department has never utilized this authority. According to the Department, the lack of debarments pursuant to 8 V.S.A. § 3661 is because it has not received any referrals from the Department of Labor or any complaints of a violation that could have resulted in a debarment under section 3661. The Department explained that this is likely due, at least in part, to the regular audits performed by workers' compensation insurers, which identify instances of misclassification or miscoding without the Department's involvement.

The insurers' regular audits are necessary because workers' compensation insurance premiums are based on an employer's estimated annual payroll. In other words, when an employer purchases a policy, it provides an estimate of the number and type of employees and the amount of payroll. To ensure that the premium amount is accurate, the insurer will often perform an audit, which might be as simple as a review of payroll records to determine whether the employer has accurately reported the number and classification of employees, or for certain employers (depending on the employer's industry, size, and experience) the audit could include a site visit to ensure that the policy accurately reflects the number of employees and their job classification. Thus, an employer who has a particularly busy year could find itself owing additional premium at the end of the year because it had to hire extra employees to meet the increased demand. Similarly, an insurance company might have to credit back excess premium to an employer whose payroll was lower than expected.

While premium adjustments are a relatively common result of an audit, in the majority of cases, they are not the result of intentional employee misclassification. Even in instances that may be the result of intentional misclassification or miscoding, the issue can usually be settled between the insurer and the employer without the Department of Financial Regulation being made aware of it.

An additional reason the Department of Financial Regulation provided for why it has not had to utilize its debarment authority is that misclassification that is not caught during an audit is most likely to be discovered during the adjudication of a disputed workers' compensation claim, which is done by the Department of Labor. Under that scenario, the employer could be debarred for failure to provide workers' compensation insurance pursuant to 21 V.S.A. § 692, which would make a referral to the Department of Financial Regulation unnecessary.

B. BULLETIN 3.5 AND BULLETIN 5

Bulletin 3.5 and Bulletin 5 set forth the requirements for contracting with and receiving grant funds from the State, respectively. Pursuant to both Bulletin 3.5 and Bulletin 5, the Agency of Administration requires entities to certify that they have not been debarred by either the State or federal government.

Bulletin 3.5 establishes standards for State contracting and procurement including contractor compliance with the laws regarding proper employee classification and coding. In

particular, Bulletin 3.5 provides that Requests for Proposals (RFPs) for contracts for services, as well as for all State construction and transportation projects with a total project cost exceeding $250,000, "must include language mandating the bidders comply with provisions and requirements of" 2009 Acts and Resolves No. 54, Sec. 32[20] related to (1) self-reporting of "information relating to past violations, convictions, suspensions, and any other information related to past performance and likely compliance with proper coding and classification of employees" and (2) subcontractor reporting requirements.[21] More specifically, the subcontractor reporting requirements require each bidder to identify all proposed subcontractors and subcontractors' subcontractors, as well as their respective workers' compensation insurance carriers.[22]

Bulletin 5 establishes standards for grant issuance and monitoring. Like Bulletin 3.5, it prohibits entities that have been debarred by the federal government from receiving new grant awards from the State and requires certification that an entity is not currently debarred by either the State or federal government.[23]

In addition to the requirements of Bulletin 3.5 and Bulletin 5, all State programs that receive federal funds are subject to federal audit requirements and must be audited every three years for compliance with federal requirements, including federal debarment rules that require review of the federal debarment lists before a grant or contract is awarded.[24]

The experience of the Department of Buildings and General Services and the Agency of Administration indicates that most State contractors are familiar with the State contracting requirements and the requirements for receiving grants or contracts that are supported by federal funds. This may be due, at least in part, to the fact that employers contracting with the State tend to be relatively large and sophisticated and, therefore, more aware of the laws and rules that they must comply with.

C. Department of Finance and Management Policy

The Department of Finance and Management has adopted a policy that prohibits the State of Vermont from entering into contracts with entities that are listed on the State's debarment website or from making purchases over $25,000.00 or entering into grants or contractual agreements with

[20] The text of 2009 Acts and Resolves No. 54 is available at: https://legislature.vermont.gov/Documents/2010/Docs/ACTS/ACT054/ACT054%20As%20Enacted.pdf.
[21] Agency of Administration Bulletin No. 3.5: Procurement and Contracting Procedures, Revised December 12, 2018, p. 24, *available at*: https://aoa.vermont.gov/sites/aoa/files/Bulletins/3point5/Bulletin_3.5_FINAL_12-12-18%20with%20updated%20AA-14%20links.pdf; *see also* 2009 Acts and Resolves No. 54, Sec. 32, *available at*: https://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT054/ACT054%20As%20Enacted.pdf.
[22] *See* Department of Buildings and General Services Certificate of Compliance Form, p. 1, *available at*: https://bgs.vermont.gov/sites/bgs/files/files/purchasing-contracting/contracts/Certificate%20of%20Compliance%205_16_17.pdf.
[23] Agency of Administration Bulletin No. 5: Policy for Grant Issuance and Monitoring, pp. 13, 22, and Appendix IV, *available at*: https://aoa.vermont.gov/sites/aoa/files/Bulletins/Bulletin_5_eff12-26-14.pdf.
[24] The annual federal Single Audit reports are available at: https://auditor.vermont.gov/reports/audit/single.

entities that have been suspended or debarred by the federal government.[25] The Policy requires all contracts that are subject to Bulletin 3.5 or Bulletin 5 to contain the following provision:

> Certification Regarding Debarment: Party certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, neither Party nor Party's principals (officers, directors, owners, or partners) are presently debarred, suspended, proposed for debarment, declared ineligible or excluded from participation in federal programs, or programs supported in whole or in part by federal funds.
>
> Party further certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, Party is not presently debarred, suspended, nor named on the State's debarment list at: http://www.bgs.vermont.gov/purchasing-contracting/debarment.

D. DEPARTMENT OF BUILDINGS AND GENERAL SERVICES WEBSITE

Pursuant to 29 V.S.A. § 161(f) "[t]he Agency of Administration shall maintain a current list of employers that have been prohibited from contracting with the State or any of its subdivisions, and the Agencies of Administration and of Transportation shall publish that list on their websites." The Department of Buildings and General Services has been designated by the Agency of Administration to maintain the State debarment list on its behalf. Until January 8, 2019, despite five employers having been debarred during 2018, the Department's website stated that "[t]here are currently no employers that have been debarred."[26] Upon being made aware of this issue on January 7, the Department immediately contacted the Department of Labor and determined that there had been a communication issue that prevented it from receiving notice when proposed debarments became final. The website was updated within 24 hours and steps have been taken to ensure that the Department of Buildings and General Services will receive a copy of all final debarment orders going forward.

Because there were no employers on the State debarment list until January 8, the Agency of Transportation did not publish the list or include a link to it on its website. However, now that the debarment list has been updated, the Agency of Transportation has added a link to it from its Contract Administration webpage.[27]

E. COORDINATION BETWEEN STATE AGENCIES AND DEPARTMENTS

Consultation prior to Debarment:

Pursuant to 21 V.S.A. §§ 692, 708, and 1314a, the Commissioner of Labor is required to consult with either "the Commissioner of Buildings and General Services or the Secretary of Transportation, as appropriate" when determining for how long to debar an employer. Likewise,

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[25] *See* Department of Finance and Management, Suspension and Debarment Policy & Procedures, revised April 19, 2017, *available at*: https://finance.vermont.gov/sites/finance/files/documents/Pol_Proc/Fin_Mgt_Policies/FIN-Policy_1_Suspension_Debarment.pdf.

[26] The Department of Buildings and General Services' Debarment List is available at: http://www.bgs.vermont.gov/purchasing-contracting/debarment.

[27] The Agency of Transportation link to Department of Buildings and General Services' Debarment List available at: https://vtrans.vermont.gov/contract-admin/resources/services.

under 8 V.S.A. § 3661, the Commissioner of Finance and Management is also required to consult with either "the Commissioner of Buildings and General Services or the Secretary of Transportation, as appropriate" when determining for how long to debar an employer. These consultations have occurred when the Department of Labor has debarred employers. As noted above, the Department of Finance and Management has not yet had any debarment proceedings, and therefore it has not needed to engage in the required consultations.

Agency of Transportation and Department of Labor:

Prior to contracting with a company to perform work, the Agency of Transportation contacts the Department of Labor directly to determine if the employer has a workers' compensation policy in place and whether the employer has been debarred. The Agency established this additional verification step in August 2015 to ensure that it was complying with its obligations pursuant to 2009 Acts and Resolves, No. 54.[28] The process involves a weekly e-mail sent to the Department of Labor that contains a list of bidders, which the Agency asks the Department to review within 48 hours for any employers who may be debarred; lack workers' compensation; or have a past violation, conviction, or suspension. No response from the Department within 48 hours is presumed to indicate that no bidders on the list are currently debarred; lack workers' compensation; or have a past violation, conviction, or suspension.

This verification procedure is in addition to the Agency consulting the debarment list on the Department of Buildings and General Services' website, the Secretary of State's corporations database, and the federal System for Award Management Registration, Renewal & Migration. The Agency also performs these checks when it is processing amendments to contracts or grants.

Department of Labor, Department of Financial Regulation, and Department of Forests, Parks and Recreation:

The Departments of Labor, of Financial Regulation, and of Forests, Parks and Recreation have been working to improve safety and workers' compensation participation in Vermont's forest products industry. Their collaboration has resulted in the combination of certain class codes to reduce premiums and expand risk pools, a collaboration with the State of Maine to improve training and safety in Vermont's logging industry, and other efforts to increase workers compensation participation by employers in Vermont's forest products industries, which should reduce premiums and volatility in the marketplace.[29] It is hoped that this collaboration will not only reduce the costs for employers in Vermont's forest products industry but also minimize some of the incentives for employers to engage in misclassification or miscoding in order to avoid high workers' compensation insurance premiums.

F. OUTREACH

[28] The text of 2009 Acts and Resolves No. 54 is available at: https://legislature.vermont.gov/Documents/2010/Docs/ACTS/ACT054/ACT054%20As%20Enacted.pdf.

[29] This collaboration grew out of a report on Workers' Compensation Rates for Certain High Risk Occupations that was prepared by the Department of Financial Regulation for the General Assembly in 2018. The report is available at: https://legislature.vermont.gov/assets/Legislative-Reports/Jan-15-Workers-Comp-Report-Submitted.pdf.

The Agency of Transportation, the Department of Labor, and the Department of Buildings and General Services all engage in ongoing outreach and education efforts intended to help reduce instances of employee misclassification. The Agency of Transportation's Office of Civil Rights visits job sites to conduct education and outreach regarding the various legal requirements that contractors and subcontractors must comply with. The Department of Labor's website provides information regarding proper employee classification[30] and the Department produced a public service announcement regarding employee misclassification that aired in 2016.[31] Finally, the Department of Buildings and General Services partners with the Procurement Technical Assistance Center, or PTAC, at the Agency of Commerce and Community Develop to do outreach regarding the process and requirements for contracting with the State.[32]

IV. Obstacles to the Use of Debarment in Relation to Employee Misclassification

There are several significant obstacles that have prevented greater utilization of Vermont's debarment procedures as a tool for combatting employee misclassification. Foremost among these is the failure of the Department of Labor to adopt rules necessary to carry out debarments pursuant to the workers' compensation law until February 2017 and its failure to do so at all in relation to the unemployment insurance law. Additional obstacles include the Department of Labor's inability to perform employer audits under the workers' compensation law; difficulties in hiring and retaining workers' compensation investigators; the fact that, except for 21 V.S.A. § 1314a, the statutes that provide for debarment are not specifically focused on employee misclassification; the limited deterrent effect of debarment penalties issued against employers that are unlikely to contract with the State; and the relative inactivity of the Governor's Task Force on Employee Misclassification in recent years.

A. Failure to Adopt Necessary Rules

Perhaps the most significant reason that more debarments have not been issued to date is that the Department of Labor either did not adopt the necessary rules or failed to do so until recently. As mentioned above, the Department adopted the necessary amendments to Workers' Compensation Rule 45 in February 2017. Since then it has issued five debarments for failure to obtain workers' compensation insurance. The Department began an effort to adopt the amendments to Rule 45 in 2014 but was unable to meet the deadline for completing the rulemaking process at that time. During 2015 and 2016, the Department issued four debarments before a challenge to its authority resulted in the Department pursuing the amendments to Rule 45 that were ultimately adopted in early 2017. It is not clear if any additional debarments could have been issued if the amendments to Rule 45 that were proposed in 2014 had been adopted at that time.

While the Department has been working for several years to amend the Employment Security Board Rules so that it can begin to issue the monetary penalties and debarments provided

[30] *See, e.g.*, Misclassification: Who is an Employee vs. an Independent Contractor?, *available at*: http://labor.vermont.gov/workers-compensation/misclassification/.
[31] Available at: https://www.youtube.com/watch?v=ct3aAYmnlzs.
[32] The Agency of Commerce and Community Development's Procurement Technical Assistance Center's website is available at: https://accd.vermont.gov/economic-development/programs/ptac.

for in 21 V.S.A. § 1314a,[33] it has not yet adopted the necessary amendments. The proposed rule was recently approved by the Employment Security Board and was filed on February 12, 2019 to begin the administrative rulemaking process.

Between the beginning of January 2016 and the end of September 2018, the Department identified 1,272 instances of employee misclassification, including 684 instances during 2017 and the first nine months of 2018. Those instances of employee misclassification could have resulted in significant penalties and the debarment of as many as 65 employers in 2017 and 53 employers in 2018.[34] However, because the Department has not adopted the necessary rules, it was only able to pursue the unpaid unemployment insurance contributions plus interest.

Without any changes to the underlying statutes, the adoption of the necessary rules will likely result in a significant number of employers being debarred for employee misclassification under the unemployment insurance laws. However, with respect to workers' compensation, recent experience has shown that while the Department has debarred employers for failure to provide workers' compensation insurance, it has not identified or penalized employers that are misclassifying employees.

B. INABILITY TO PERFORM EMPLOYER AUDITS UNDER WORKERS' COMPENSATION LAW

The lack of debarments for employee misclassification under the workers' compensation law indicates that either employee misclassification is relatively rare in relation to workers' compensation or that the Department may require additional and better tools to identify employee misclassification that is occurring. Enforcement of the workers' compensation laws is complaint driven, and the Department of Labor lacks the authority to perform employer audits. Because of this, the Department's enforcement efforts are reactive rather than being proactively focused on identifying and eliminating employee misclassification and failures to provide insurance.

In contrast, the unemployment insurance law permits the Department to perform audits to determine if an employer is complying with its legal obligations.[35] From January 2016 through the third quarter of 2018, the Department's unemployment insurance program conducted 1,047 audits and identified 1,272 instances of employee misclassification, a rate of 1.2 instances of employee misclassification identified for each audit the Department performed.

In addition to providing the ability to perform audits, requiring that a portion of those audits be targeted based on factors that indicate an increased potential for violations could help enhance the detection of employee misclassification that may be occurring. As noted in the State Auditor's 2015 Report on Worker Misclassification, the U.S. Department of Labor Office of the Inspector General has found that states that use targeted audit selection criteria are "more effective at detecting noncompliance with unemployment insurance tax laws than states that

[33] *See* Report of the Vermont State Auditor, Worker Misclassification: Action Needed to Better Detect and Prevent Worker Misclassification; Appendix 5; at pp. 15 and 58.

[34] While the 684 instances of misclassification identified by the Department during 2017 and 2018 could have resulted in up to $3,420,000.00 in penalties under section 1314a, the amount of penalties would likely have been significantly lower with many employers likely subject to lesser penalties for a first offense and other mitigating factors.

[35] *See* 21 V.S.A. §§ 1314 and 1320.

selected employers at random."[36] That report goes on to note that "the U.S. DOL encourages states to maintain field audit selection criteria that target employers based upon a greater potential risk of noncompliance [with unemployment insurance laws], such as high employee turnover, sudden growth or decrease in employment, type of industry, location (geography) of employers, prior reporting history, or results of prior audits."[37] While these comments from the Auditor's report were focused on the unemployment insurance program, it is fair to conclude that targeted workers' compensation audits of specific employers or industries would also be more likely to detect noncompliance.

In short, the workers' compensation laws currently only permit that program to employ a reactive, complaint-driven enforcement model that often requires potentially confrontational work-site visits. In contrast, the unemployment insurance program employs a more proactive audit model in which the investigators can request and review information submitted by an employer and then may conduct a follow up site visit if necessary. The Director of Workers' Compensation and Safety for the Department of Labor suggested that updating the workers' compensation law to permit the Department to conduct audits could result in better identification of employee misclassification and earlier identification of employers that have not obtained insurance for their employees. In addition, adopting such changes could make the difficult job of the workers' compensation investigators somewhat easier by reducing the confrontational nature of their work. Finally, requiring a significant portion of those audits to be targeted based on certain risk factors could further improve the identification of employee misclassification and other violations of the workers' compensation laws.

C. Lack of Workers' Compensation Investigatory Staff

The Department of Labor's enforcement efforts in relation to the workers' compensation laws are also hampered by the difficulty it has had in keeping all of its investigator positions filled. While the Department is authorized to employ up to five workers' compensation fraud investigators, only three of the five positions are currently filled. The Commissioner's response to the State Auditor's 2015 report described a variety of obstacles that the Department had encountered in relation to keeping those positions filled, including leave for medical conditions and work-related injuries, the death of an investigator from a medical condition, an investigator who was separated during his or her probationary period, and another temporary investigator who left for a permanent position with another employer.[38] Changing the investigatory model as discussed above and taking other steps to reduce turnover among the Department's workers' compensation investigators could result in increased identification of violations, including employee misclassification, and, possibly, increased use of the debarment penalties provided.

D. Workers' Compensation Laws Are Not Focused on Misclassification

[36] Appendix 5, at p. 17.
[37] *Id.*, at p. 18. A 2016 follow-up by the State Auditor's Office noted that the Department had increased the percentage of unemployment insurance audits that were targeted and had begun using fraud tips, as well as targeting based on region and industry.
[38] *Id.*, at p. 61.

The debarment provisions in Vermont's workers' compensation law are not specifically focused on employee misclassification but instead cover a broad range of violations that include employee misclassification. Neither the Department of Labor nor the Department of Financial Regulation has debarred a single employer for employee misclassification under the provisions prohibiting false statements or representations. Instead, the five debarments that have been issued all relate to employers who failed to provide insurance coverage for their employees.

Depending on the policy outcome that it wishes to achieve, the General Assembly may wish to consider examining the possibility of amending the debarment provisions in the workers' compensation laws to more specifically focus on employee misclassification.

E. Currently Debarred Employers Are Unlikely to Contract with the State

While not an obstacle to the use of debarment, the penalty has little impact on employers that are unlikely to do business with the State, which likely decreases the debarment penalty's ability to deter employee misclassification. According to the Department of Labor, in many cases, the employers who face potential debarment are smaller employers that are unlikely to contract with the State or employers in industries in which the State is unlikely to contract for services. This is born out by the current debarment list, which includes a rental property management service, a taxi company, a transportation logistics company, and two local restaurants. Because these employers are unlikely to contract with the State, debarment is essentially a symbolic punishment that likely has far less of a deterrent effect than the monetary penalties that were levied against them.

According to the Agency of Administration and the Department of Buildings and General Services, most companies that are large enough to bid on State contracts are familiar with State contracting requirements and able to ensure compliance with those requirements. The General Assembly may wish to consider whether debarment is an effective deterrent as well as whether the statutes can be tailored so that debarment more effectively targets employers that are likely to contract with the State.

F. Governor's Task Force Has Been Relatively Inactive

The Governor's Task Force on Employee Misclassification has not met since August 10, 2017. According to the State Auditor's 2015 report, the Task Force met three times between its creation in 2012 and July of 2015. Since then, the Task Force met an additional seven times before its most recent meeting in 2017.

Created by Executive Order 08-12, the Task Force is charged with the following tasks:

- Examine and evaluate existing misclassification enforcement by agencies and departments.
- Develop and implement a campaign to educate and inform employers, workers, and the public about misclassification.
- Coordinate review of existing law and other methods to improve monitoring and enforcement of misclassification.

- Review and establish reasonable mechanisms to accept complaints and reports of noncompliance.
- Review templates for state contracts and grants and monitor systems to ensure compliance by contractors and grant recipients.
- Identify barriers to information sharing and recommend statutory changes where necessary.
- Work collaboratively with businesses, labor, and other interested stakeholders in the effort to reduce employee misclassification.
- 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.
- Engage in other activities as deemed necessary and appropriate by the Task Force, as permitted by law.

While the Task Force has not met recently, it has been relatively successful during the past several years in carrying out some of the tasks it was charged with. Notably, the Task Force has:

- coordinated with the Vermont Department of Labor to use grant money from the U.S. Department of Labor to create an education and outreach campaign that ran public service ads on television and radio in 2015 and 2016;
- reviewed and made several legislative proposals, although none of the proposals was enacted by the General Assembly;
- worked with the Vermont Department of Labor to establish an employee misclassification complaint portal on its website;
- worked with the Agency of Administration to revise Bulletin 3.5 to ensure compliance with the workers' compensation and unemployment insurance laws;
- worked to increase information sharing between State agencies and Departments; and
- worked with employers, labor groups, and other stakeholders to carry out its work.

Given its past successes, it is possible that additional meetings of the Task Force could produce further positive results. However, it is worth noting that the Task Force is not specifically charged with enforcing the laws against employee misclassification.[39] Instead, its role is to improve coordination between the Executive Branch agencies and departments and to ensure that they "are engaged in timely enforcement" of those laws.

In addition, the Department asserts that it has been able to accomplish more during the past two years by identifying agencies and departments, like the Agency of Transportation and

[39] This contrasts somewhat with well-known task forces from other states. For example, New York's Joint Enforcement Task Force on Employee Misclassification, which has since become part of the Joint Task Force on Employee Misclassification and Worker Exploitation, was also tasked with "pool[ing], focus[ing] and target[ing] investigative and enforcement resources" and "identifying significant cases of employee misclassification which should be investigated jointly, and to form joint enforcement teams to utilize the collective investigative and enforcement capabilities of the Task Force members." N.Y. Executive Order No. 17, 9 NYCRR 6.17. Similarly, Massachusetts' Council on the Underground Economy has the authority to "identify those industries and sectors where the underground economy and employee misclassification are most prevalent and target council members' investigative and enforcement resources against those sectors, including through the formation of joint investigative and enforcement teams." 2014 Mass. Acts ch. 144.

Department of Liquor and Lottery, that have a particular interest in the issue of employee misclassification and working with them to address a specific issue or problem. In the past two years, the Department has met with the Department of Forests, Parks and Recreation to discuss misclassification in industries related to Vermont's working lands; worked with the Agency of Human Services to discuss and resolve misclassification issues in the Agency; discussed issues related to the classification of apprentices and the payment of prevailing wages with the Department of Buildings and General Services; and worked with the Department of Financial Regulation to produce documents clarifying issues related to the classification of LLCs. In addition, the Department continues to meet and communicate regularly with the Agency of Transportation and the Department of Liquor and Lottery to ensure that employees are being properly classified and that contractors and licensees have workers' compensation insurance and have not been debarred. Outside State government, the Department has, as part of an effort to address seasonal workforce issues, met separately with fuel dealers and the Associated General Contractors to discuss employee leasing laws and employee classification and potential liability related to those issues. The Department believes that this approach is more effective than convening the Task Force because it does not suffer from the logistical and scheduling challenges presented by the large membership of the Task Force, and the work is focused on issues that are of direct concern to each of the agencies, departments, and industry groups that the Department has worked with.

The General Assembly may wish to examine whether the Task Force is an effective long-term tool for reducing employee misclassification or if the more issue-specific approach employed by the Department in the past two years may be more effective at accomplishing that goal. If the General Assembly believes that the Task Force should continue to be utilized, it may wish to consider whether the Task Force should be codified in statute, and if so, whether it should be required to meet a minimum number of times per year and whether it should be given specific tasks or oversight authority aimed at reducing employee misclassification or improving the enforcement of the laws against misclassification. If the General Assembly determines that the Department's more issue-specific approach would be more effective at reducing employee misclassification, it may wish to identify specific issues that it would like the Department to address, and the stakeholders that it would like the Department to work with.

V. Other States That Utilize Debarment to Enforce Laws Prohibiting Misclassification

The federal government and several states utilize debarment as a penalty for violations of certain employment and procurement laws. In recent years, some states have made headlines by ramping up enforcement efforts related to employee misclassification statutes that include debarment as a potential penalty for violators. Due to time and resource limitations, this report does not include an exhaustive survey of State debarment laws or of recent efforts to increase utilization of debarment as a penalty in relation to employee misclassification. Instead, this report provides a brief overview of the laws in three states and the District of Columbia that utilize debarment in relation to employee misclassification.

In addition, due to a lack of information found while researching this subject, this report is unable to address the General Assembly's charge to "[s]ummarize specific characteristics of other states' laws, rules, and procedures related to debarment that have been identified as either

enhancing or limiting their effectiveness in enforcing those states' laws against employee misclassification." While some news reports describe significant penalties that have been levied,[40] and some state's debarment lists have hundreds, or even thousands, of employers on them,[41] the author was unable to find any analysis of whether the penalties and debarments have resulted in a decrease in employee misclassification. This is a subject that the General Assembly may wish to consider studying further in the future.

A. ILLINOIS

Illinois' Employee Classification Act,[42] which applies to employers who are construction contractors or subcontractors, establishes monetary penalties for failing to properly classify employees or retaliating against an employee who reports misclassification or cooperate with an investigation or proceeding under the Act.[43] When an employer commits a second or subsequent violation of the act within five years of a previous violation, the employer is debarred from contracting with the state for four years from the date the last violation was committed.[44, 45] Debarred employers are listed on the Department of Labor's website.[46] In addition, the Act requires the Department of Labor, the Department of Employment Security, the Department of Revenue, and the Illinois Workers' Compensation Commission to cooperate by sharing information regarding suspected employee misclassification and, in the event that a violation is found, requires the Department of Labor to "notify the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission who shall be obliged to" investigate the relevant employer under the laws within their respective jurisdictions.[47]

Illinois' Prevailing Wage Act also provides for the debarment of employers who violate the prevailing wage laws for public contracts.[48] Contractors and subcontractors who on two separate occasions within a five-year period violate the provision of the Act can be debarred for four years from the date on which they are added to a list maintained by the Commissioner of Labor.[49]

B. MASSACHUSETTS

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[40] *See, e.g.*, Ryan Grochowski Jones; *How New York and Illinois Curb a Key Labor Violation While Other States Fall Short*; ProPublica.org; Sept. 4, 2014; https://www.propublica.org/article/how-new-york-andillinois-curb-a-labor-violation-while-others-fall-short.

[41] *See, e.g.*, Massachusetts Dept. of Industrial Accidents Debarment List, https://www.mass.gov/service-details/debarment-list-businesses-ineligible-to-bid-on-state-or-muncipally-funded-contracts. (Unfortunately, this list does not specify whether the employers were debarred for a failure to provide workers' compensation insurance or for employee misclassification.)

[42] 820 I.L.C.S. 185/1–185/999.

[43] *See* 820 I.L.C.S. 185/10 and 185/20.

[44] 820 I.L.C.S. 185/42.

[45] The Illinois Procurement Code also provides for the debarment of contractors or subcontractors and is subject to applicable provisions of the Employee Classification Act. *See* 30 I.L.C.S. 500/50–65 & 500/50–70.

[46] Id.

[47] 820 I.L.C.S. 185/75.

[48] 820 I.L.C.S. 130/0.01–130/12.

[49] 820 I.L.C.S. 130/11a.

Massachusetts law provides a broad range of violations for which an employer can be debarred, including "any state or federal law regulating hours of labor, prevailing wages, minimum wages, overtime pay, equal pay, child labor, or worker's compensation."[50] With respect to employee misclassification, an employer can be liable for civil and criminal penalties, as well as possible debarment, if it misclassifies an employee, and in doing so violates a provision of the Commonwealth's wage and hour laws, minimum wage and overtime laws, the law requiring employers to keep true and accurate employee payroll records, provisions requiring employers to pay withholding taxes on employee wages, and provisions of the workers' compensation law related to knowing employee misclassification.[51] The debarment periods for a violation are up to six months for a first violation, up to three years for a subsequent violation, and up to five years for a willful violation.[52] In addition, an employer who violates conditions imposed by a citation for misclassification or an order requiring a bond to rectify the misclassification and ensure compliance with the law is debarred for one year, and an employer that receives three citations within a three-year period is debarred for two years.[53]

Massachusetts' workers' compensation law specifically provides that "an employer who fails to provide for insurance or self-insurance as required by this chapter or knowingly misclassifies employees, to avoid higher premium rates, will be immediately debarred from bidding or participating in any state or municipal funded contracts for a period of three years…"[54] In addition, any employer who knowingly misclassifies an employee can also be subject to imprisonment for up to five years or a fine of not less than $1,000.00 nor more than $10,000.00, or both.[55]

C. NEW YORK

New York State law provides for debarment for employee misclassification pursuant to its workers' compensation law, the Construction Industry Fair Play Act, and the Commercial Goods Transportation Industry Fair Play Act. In addition, employers can also be debarred for violations of the articles governing public work and prevailing wage for building service employees.

The Construction Industry Fair Play Act, which was enacted in 2010 to reduce the occurrence of employee misclassification in the construction industry,[56] creates a presumption that an individual working in the construction industry is an employee unless he or she is a separate business entity that can satisfy 12 criteria establishing its independence or an independent contractor who satisfies the so-called ABC test.[57, 58] An employer that is determined

[50] M.G.L. ch. 29, § 29F.
[51] M.G.L. ch. 149, § 148B(d).
[52] M.G.L. ch. 149, § 27C(a)(3).
[53] M.G.L. ch. 149, § 27C(b)(3).
[54] M.G.L. ch. 152, § 25C.
[55] M.G.L. ch. 152, § 14.
[56] *See* NY Labor Law § 861-a.
[57] The ABC test provides that an individual is an independent contractor if "(a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue."
[58] NY Labor Law § 861-c.

to have willfully misclassified employees is subject to a civil penalty of up to $2,500.00 for a first violation and up to $5,000.00 for each subsequent violation within a five-year period.[59] In addition, the employer may be convicted of a misdemeanor punishable by imprisonment or a fine, as well as debarment for up to one year for a first violation and up to five years for a subsequent violation.[60]

The Commercial Goods Transportation Industry Fair Play Act, which was enacted in 2013, creates a presumption that an individual working in commercial goods transportation is an employee unless he or she is a separate business entity that can satisfy 12 criteria establishing its independence or an independent contractor who satisfies the ABC test.[61] An employer that is determined to have willfully misclassified employees is subject to a civil penalty of up to $2,500.00 for a first violation and up to $5,000.00 for each subsequent violation within a five-year period.[62] In addition, the employer may be convicted of a misdemeanor punishable by imprisonment or a fine, as well as debarment for up to one year for a first violation and up to five years for a subsequent violation.[63]

New York's Workers' Compensation Law also provides for debarment of employers that fail to properly classify their employees. While the statute does not mention misclassification specifically, an employer can be subject to criminal penalties and debarment for failing to secure workers' compensation for its employees[64] or for failing to keep an accurate record of the number of employees or amount of payroll, which could include employee misclassification.[65] An employer that violates those provisions will be subject to debarment for a period of up to one year if convicted of a misdemeanor or up to five years if convicted of a felony.[66] In addition, an employer can be debarred for failing to pay compensation that is due or for discriminating against employees for filing a previous workers' compensation claim or for being an injured veteran.[67]

D. WASHINGTON, D.C.

The District of Columbia provides for debarment due to employee misclassification in the construction services industry.[68] An employer who commits more than two violations within a two-year period is given a choice between "being assessed an administrative penalty of $20,000 for each employee that was not properly classified, or be[ing] debarred for 5 years."[69] "If an employer is debarred …, the employer shall be subject to a civil penalty of not less than $5,000, and not more than $10,000, for each employee that was not properly classified, and may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws

[59] NY Labor Law § 861-e(3).
[60] NY Labor Law § 861-e(4) and (7).
[61] NY Labor Law § 862-b.
[62] NY Labor Law § 862-d(3).
[63] NY Labor Law § 862-d(4) and (7).
[64] NY Workers' Compensation Law § 52.
[65] NY Workers' Compensation Law § 131.
[66] NY Workers' Compensation Law § 141-b.
[67] NY Workers' Compensation Law §§ 26, 125, and 125-a.
[68] D.C. Code Ann. §§ 32–1331.01–32–1331.15.
[69] D.C. Code Ann. § 32–1331.07(e). Each employee who is misclassified is considered a separate violation. D.C. Code Ann. § 32–1331.07(a).

and regulations."[70] When the employer "is or has engaged in work on a project funded by District funds", it may be debarred if it has more than two employee misclassification violations within a two-year period.[71]

The District of Columbia also provides for debarment under its procurement laws.[72] The Chief Procurement Officer, after reasonable notice and opportunity to be heard, can debar an employer for up to five years if he or she determines that there has been a violation of the District's laws against employee misclassification and workplace fraud.[73] The Chief Procurement Officer can avoid debarring an employer if he or she "makes a finding in writing that it would be contrary to the best interests of the District to do so or the present responsibility of the person is such that a debarment would not be warranted."[74] Debarment pursuant to this section applies to any affiliate of the employer, unless otherwise indicated.[75] If an employer is debarred twice, the debarment is considered permanent.[76] However, after 10 years, the employer "may be eligible for reinstatement if the …[Chief Procurement Officer] provides written notification to the Chairman of the Council that the person's business practices have been reformed."[77]

VI. Potential Changes to Make Debarment a More Effective Tool for Reducing Employee Misclassification in Vermont

A. Potential Legislative Changes

Enhance Workers' Compensation Investigatory Powers

The Department of Labor may be able to better identify employee misclassification and failures to provide workers' compensation insurance if its investigatory powers are enhanced. Currently, the Department's authority to conduct investigations in relation to the workers' compensation law is provided pursuant to 21 V.S.A. §§ 603 and 690. The existing powers are primarily complaint driven and only come into play if there is a dispute before the Department or a person submits a request for the Department to obtain proof of compliance from an employer.

> 21 V.S.A. § 603(a) provides that:
>
> So far as it is necessary in his or her examinations and investigations and in the determination of matters within his or her jurisdiction, the Commissioner shall have power to subpoena witnesses, administer oaths, and to demand the production of books, papers, records, and documents for his or her examination.

21 V.S.A. § 690(a) requires employers to file a certification of its workers' compensation insurance policy with the Commissioner, and 21 V.S.A. § 690(b) gives the Commissioner

[70] D.C. Code Ann. § 32–1331.07(e)(2).
[71] D.C. Code Ann. § 32–1331.11.
[72] D.C. Code Ann. §§ 2–351.01–2–362.02.
[73] D.C. Code Ann. § 2–359.07. *See also* D.C. Code Ann. §§ 32–1331.01–32–1331.15.
[74] D.C. Code Ann. § 2–359.07(a)(1)(A).
[75] D.C. Code Ann. § 2–359.07(h)(2).
[76] D.C. Code Ann. § 2–359.07(k).
[77] *Id.*

authority to request certification of insurance from an employer.[78] In addition, 21 V.S.A. § 663b(a) provides authority for the Commissioner to order insurers to investigate "specific allegations of claimant fraud."

In summary, the existing law provides authority for the Commissioner to request or subpoena materials in the context of a hearing, to request proof of insurance from employers, and to direct insurers to investigate allegations of fraud. The law does not provide authority for the Department to perform random or targeted audits of employers on its own initiative or to require specific deadlines for compliance with a request from the Department. By amending the V.S.A. to provide the Department with authority to perform audits and investigations on its own initiative, potential misclassification or failure to obtain insurance could be detected sooner and addressed more proactively.

More specifically, the Director of Workers' Compensation and Safety indicated that a structure similar to the investigatory powers provided under 21 V.S.A. §§ 1314 and 1314a, which provide the Commissioner with authority to require employers to submit information "as the Commissioner deems reasonably necessary for the effective administration of" the unemployment insurance laws, would provide the Department with the ability to more effectively identify misclassification or failures to provide workers' compensation insurance. Providing specific timelines for employers to provide the requested information and penalties for failure to comply with a request would further enhance the effectiveness of such a change.[79] In addition, providing

[78] "(b)(1) In addition to any other authority provided to the Commissioner pursuant to this chapter, the Commissioner may issue a written request to an employer subject to the provisions of this chapter to provide a workers' compensation compliance statement on a form provided by the Commissioner. For the purposes of this subsection, an employer includes subcontractors and independent contractors. The form shall require all the following information sorted by job site:

(A) The number of employees employed during the entire current workers' compensation policy term or the previous year if no policy was in effect or partially in effect prior to the request and the effective dates of the term of any policies in effect.

(B) The total number of hours for which compensation was paid.

(C) A list of all subcontractors and 1099 workers and their function on the job site for the period in question.

(D) The name of the workers' compensation insurance carrier, the policy number, and the agent, if any.

(E) As an attachment, the insurance policy declaration pages, including how much payroll the policy is covering and a designation of the hours that provide the basis of the appropriate National Council on Compensation Insurance classification code.

(2) Any employer who fails to comply with this subsection or falsifies information on the compliance statement may be assessed an administrative penalty of not more than $5,000.00 for each week during which the noncompliance or falsification occurred and any costs and attorney's fees required to enforce this subsection. The Commissioner may also seek injunctive relief in Washington Superior Court.

(3) A compliance statement shall be a public record, and the Commissioner shall provide a copy of a compliance statement to any person on request. An insurance company provided with a compliance statement may investigate the information in the statement. Based on evidence that an employer is not in compliance with this chapter, the Commissioner shall request a compliance statement or an amended compliance statement from the employer, investigate further, and take appropriate enforcement action.

(4) In the event the Commissioner receives a request for an employer to provide a compliance statement but finds no evidence of noncompliance with this chapter, the Commissioner shall provide timely notification of the findings to the requesting party."

[79] Workers' Compensation Rule 45.7100 already provides that an employer shall comply with a request pursuant to 21 V.S.A. § 690(b) within 30 days unless good cause for an extension is shown.

specific penalties for employers that fail to cooperate with the Department's investigations or to provide requested information would further strengthen the Department's ability to identify and prevent misclassification. Penalties could include monetary fines, similar to the penalty for noncompliance with request for a workers' compensation certificate under 21 V.S.A. § 690(b)(2).[80]

Require Proof of Workers' Compensation for Licensing

While requiring proof of workers' compensation for an employer to obtain a business license might not increase the number of debarments, it could increase compliance with the workers' compensation law. The Department of Liquor and Lottery has begun working with the Department of Labor to revise its licensing procedures to require proof of workers' compensation insurance. Broader application of such a requirement to Vermont's other licensing requirements could increase the number of employers that obtain coverage for their employees. The potential loss or suspension of a license for failure to provide workers' compensation could also help to reduce instances of employee misclassification.

Consider Amending Debarment Provisions to Focus on Employee Misclassification

If the General Assembly specifically wants to utilize debarment as a punishment for employee misclassification, it may wish to examine amending the debarment provisions under the workers' compensation law to focus more closely on employee misclassification instead of the current law's broad focus on fraudulent activity more generally. Moreover, if the General Assembly wishes to allow the Department of Labor to utilize debarment more frequently for violations of the workers' compensation law, it may wish to consider amending 21 V.S.A. § 692 to require debarment for any failure to provide workers' compensation insurance rather than only in those few instances where a stop-work order is issued.

B. POTENTIAL REGULATORY CHANGES

The most significant change for purposes of increasing the number of debarments related to employee misclassification is probably the adoption of rules necessary for the Department of Labor to enforce the penalties for misclassifying an employee under the unemployment insurance law. Due to the lack of necessary rules, neither the monetary penalty nor the debarment provision of 21 V.S.A. § 1314a have been employed since they were enacted in 2010. The adoption of these rules would likely result in the State debarring dozens of additional employers for employee misclassification during the next few years. With that in mind, the General Assembly may wish to encourage the Department of Labor and the Employment Security Board to ensure that the proposed amendments to the Employment Security Board's rules are adopted as quickly as possible.

[80] If the General Assembly elects to examine the possibility of granting the Department enhanced investigatory powers, it may wish to hear testimony from stakeholders regarding recent legislative proposals to amend 21 V.S.A. §§ 603 and 1307 to provide authority for the Department to inspect places of business or employment as necessary to ensure compliance with the workers' compensation and unemployment insurance laws. Those proposals were part of House bills related to the issue of employee classification during the past two biennia, which were discussed in committee but did not reach the floor for a vote. The author did not discuss them with the Executive Branch staff interviewed for this report.

Appendix 1: 2018 Acts and Resolves No. 148, Sec. 8

Sec. 8. DEBARMENT; OFFICE OF LEGISLATIVE COUNCIL; REPORT

(a) On or before January 15, 2019, the Office of Legislative Council shall submit to the Senate Committee on Economic Development, Housing and General Affairs and the House Committee on Commerce and Economic Development a written report on the use of debarment in relation to the laws against employee misclassification. In particular, the report shall:

(1) summarize Vermont's laws, rules, and procedures related to debarment, including the violations that can trigger a debarment proceeding;

(2) describe the use of Vermont's debarment procedures and why they have not been used more frequently to date;

(3) identify any obstacles that prevent or hinder the use of Vermont's debarment procedures;

(4) summarize the actions taken by the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services to utilize debarment to ensure that the State is not contracting with employers that misclassify employees in violation of Vermont law;

(5) identify other states that utilize debarment as a means of enforcing the laws against employee misclassification and summarize the manner and frequency of debarment proceedings in those states;

(6) summarize specific characteristics of other states' laws, rules, and procedures related to debarment that have been identified as either enhancing or limiting their effectiveness in enforcing those states' laws against employee misclassification; and

(7) summarize any legislative, regulatory, or administrative changes that are identified by the Agency of Administration, Agency of Transportation, Department of Labor, Department of Financial Regulation, or Department of Buildings and General Services as necessary to make debarment a more effective tool for reducing the occurrence of and enforcing the laws against employee misclassification.

(b) In preparing the report, the Office of Legislative Council shall consult with the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services.

(c) The Secretaries of Administration and of Transportation and the Commissioners of Labor, of Financial Regulation, and of Buildings and General Services shall, upon request, promptly provide the Office of Legislative Council with any pertinent information related to debarment procedures and the use of debarment as a means of enforcing Vermont's laws against employee misclassification.

Appendix 2: 2009 Report of the Workers' Compensation Employee Classification, Coding, and Fraud Enforcement Task Force

Final Report

of the

Workers' Compensation Employee Classification, Coding, and Fraud Enforcement Task Force

November 16, 2009

Prepared by:

Maria Royle, Esq.
Legislative Council
State House, Montpelier, VT 05602
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VT LEG 250539.1

Part I. Statutory Authority and Responsibilities of the Workers' Compensation Task Force

The Workers' Compensation Employee Classification, Coding, and Fraud Enforcement Task Force (task force) was created by the general assembly in 2008 (Act 208) to investigate and analyze misclassification and miscoding of employees, including occurrences of fraud in the Vermont workers' compensation program, and to offer recommendations to the general assembly. (See Appendix #1.)

The ten task force members include representatives of the general assembly, the administration, labor, management, insurance, and the attorney general's office. Pursuant to its charge, the task force presents its final report.

Part II. Summary of Task Force Activities

The task force met 15 times and took testimony from a variety of individuals and organizations representing a broad spectrum of perspectives and interests. (See Appendix #2.) Topics addressed by the task force included:

- Inter- and intra-departmental coordination and investigation
- The scope of misclassification and miscoding in Vermont
- Penalties and enforcement, including enforcement efforts in other states
- State and federal unemployment tax avoidance (SUTA and FUTA)
- State-administered reporting hotline
- State contracts and "responsible contractor" guidelines
- Definitions of "employee" and "independent contractor"
- Public outreach and education
- Workers' compensation insurance carriers and their audit procedures
- Systemic regulatory reform options garnered from other states, such as precertification programs
- Effectiveness of existing compliance statements
- Status of legitimate independent contractors
- The Insurance Fraud Bureau of Massachusetts
- Drafts of the NCOIL model law on misclassification

A list of reports received by the task force is attached. (See Appendix #3.)

Part III. Summary of Task Force Recommendations

A. Recommendations Related to Act 54 and Ongoing Work of the Task Force

(1) The task force recommends that VDOL and BISHCA continue to provide the relevant standing committees of jurisdiction regular updates and status reports regarding the implementation of Act 54 workers' compensation requirements and the enforcement of Vermont labor standards more generally. Such information should include the number and outcome of departmental audits and investigations, as well as a detailed description of the efforts of the three new fraud investigators.

(2) In addition, although the Legislature charged the task force with meeting only until a final report was filed, there was consensus among members that work remains to be done. As a result, the members agreed to meet informally in order to maintain and encourage ongoing cooperation, coordination, and focus on the serious problem of misclassification and miscoding.

B. Recommendation on Public Education and Outreach

The task force unanimously endorses implementation of a public education and outreach campaign which, as an executive branch initiative, does not require legislative action.

C. Recommendation on Enforcement

The task force emphatically supports the enactment of greater enforcement tools. However, due to insufficient time, the task force was unable to fully review the schedule of proposed penalties put forth by VDOL and BISHCA to determine their adequacy and, therefore, recommends that this work be done by the relevant standing committees of jurisdiction.

D. Recommendation Regarding "Common Definitions"

Unable to reach consensus on the common definition question, the task force recommends that the relevant standing committees of jurisdiction consider taking up development of common definitions of "employee" and "independent contractor" to be used in the workers' compensation and unemployment insurance programs. As a starting point for discussion purposes, the task force recommends consideration of a Vermont bill based on the original NCOIL 8-point test.

E. Recommendation Related to an Insurance Fraud Bureau

The task force recommends that the relevant standing committees of jurisdiction consider the creation of a special task force designed specifically to solicit broad-based input from insurers and law enforcement on the development of an insurance fraud bureau similar to the Massachusetts model. The task force also recommends that consideration be given to the establishment of a regional multi-state insurance fraud bureau.

F. Recommendation on Topics for Legislative Consideration

The task force recommends that the relevant standing committees of jurisdiction consider taking up for review several topics not addressed by the task force due to lack of time.

G. Recommendations Related to Ongoing Efforts of VDOL and BISHCA

(1) The task force recommends that VDOL and BISHCA report back to the relevant legislative committees of jurisdiction regarding their findings with respect to the financial costs of misclassification and miscoding, as that information becomes available, and that the departments continue to provide regular updates on the status and outcome of investigations and audits. The updates should include current methods of detecting misclassification and fraud and should highlight any new, potential methods not previously explored or discussed by the task force or the legislative committees.

(2) The task force recommends that VDOL and BISHCA continue to work cooperatively and collaboratively with the Legislature and other state agencies and departments, and that the departments maintain a high priority focus on the problem of worker misclassification and miscoding.

Part IV. Task Force Findings and Recommendations

Vermont law requires all employers to have workers' compensation coverage for their employees. Workers' compensation is a statutorily mandated no-fault insurance system that provides various benefits to an employee who suffers a work-related injury or occupational disease. The benefits include wage replacement, medical treatment, and vocational rehabilitation. Workers' compensation benefits are limited by law, but the program assures that injured or sick employees receive basic remedies for work injuries while avoiding costly negligence suits.

For purposes of this report, "*misclassification*" means classifying a worker as an independent contractor when the worker otherwise meets the criteria of an employee under Vermont workers' compensation law or unemployment insurance laws; and *"miscoding"* means incorrect job coding of an employee for the purposes of calculating the employer's workers' compensation premium. Misclassification and miscoding may result from ignorance or confusion about the legal requirements, but also may be intentional fraud by an employer in an attempt to lower workers' compensation premiums and other employment expenses in order to lower the cost of doing business.

Working as an independent contractor is a legitimate alternative to being an employee, and use of independent contractors is a legal means of doing business. These business relationships and opportunities should remain viable and strong options in Vermont.

In Vermont and nationally, there appears to be an ongoing problem caused by those employers that attempt to avoid or minimize workers' compensation premiums and avoid paying unemployment insurance taxes by treating workers as independent contractors rather than employees in contravention of legal requirements or by incorrectly coding employees in the workers' compensation job classification system.

The compelling testimony provided to the task force affirmed the principal finding in the report issued by the Vermont Department of Labor in 2007 pursuant to Act 57; namely, that misclassification of workers in Vermont's workers' compensation system is a problem. (This

finding is consistent with the insurance industry's perspective, as detailed by BISHCA in the same report.) The Department of Labor estimates that between 10 and 14 percent of Vermont employers misclassify their employees.

Employee status engenders very different obligations and rights under the workers' compensation law and the unemployment law than does independent-contractor status. Misclassification, in particular, has important implications for employers, workers, and governments. For example, workers' compensation and unemployment insurance programs, occupational safety and health laws, and labor standards (such as wage and hour laws) generally apply to employees but may not apply to independent contractors. In addition, employers are legally required to pay certain payroll taxes and withhold state and federal income taxes from wages paid to employees, but need not do so when paying independent contractors.

Audits and reports prepared in other states suggest that revenue losses due to misclassification and miscoding may be significant. Such losses may take the form of uncollected fees and taxes which limit the availability of funding for essential government services, such as unemployment insurance.

Misclassification and miscoding undermine the basis of fair competition among businesses and put law-abiding employers at a disadvantage when bidding on contracts. When employers fail to make lawful contributions, employees may lose benefits provided by the workers' compensation laws and unemployment insurance laws. When violations are not adequately penalized, it discourages employers from continuing to comply with the law.

A. Implementation and Oversight of Act 54 Workers' Compensation Requirements

Based in large part on the preliminary recommendations contained in the task force's progress report dated April 21, 2009, the Vermont General Assembly enacted several provisions in the 2009 session to address misclassification and miscoding in Vermont. Those measures were contained in Act 54 (see Appendix #4), and can be summarized as follows:

- Amendment to 21 V.S.A. § 1314 to improve information sharing among divisions within the Department of Labor.
- Requirement that the Department of Labor refer suspected misclassification or miscoding to BISHCA.
- Establishment of "responsible employer" guidelines that apply to state contracts valued at more than $250,000.00, with oversight by the Agencies of Administration and of Transportation.
- Requirement that businesses found to have violated classification requirements be prohibited or restricted from bidding on future state contracts for a period of time.
- A $15,000.00 increase in the BISHCA penalty applicable to false statements or representations that result in a lower workers' compensation premium.
- Changes to compliance statements to improve their effectiveness.
- Four additional fraud investigators within the Department of Labor.

As part of its work over the 2009 legislative interim, the task force regularly received status reports on the implementation of the above-referenced Act 54 requirements. A summary of findings related to those requirements follows.

Increased Information Sharing

Sec. 69a of Act 54 amended the applicable provision of the unemployment insurance (UI) program to allow the sharing of UI records with the workers' compensation division. Investigative and legal staff within the workers' compensation division have obtained the necessary security clearance and are receiving training on database utilization, and the divisions have been actively sharing information in the course of open investigations. Sec. 79 of Act 54 requires VDOL to refer alleged workers' compensation violations to BISHCA for the commissioner's consideration of enforcement. A working draft for a protocol for such referrals has been established, and joint training for VDOL misclassification investigators and BISHCA miscoding investigators is planned. (See Appendix #5.)

Responsible Employer Guidelines

Sec. 32(a) of Act 54 requires the Agencies of Administration and of Transportation to establish procedures assuring that state contracting procedures and contracts are designed to minimize misclassification and miscoding on projects with a total project cost greater than $250,000.00. Primarily, the procedures relate to the disclosure of information pertaining to employees, subcontractors, and payroll. The agencies have incorporated procedures into the contracting process to meet these new requirements. (See Appendix #6.)

Restrictions on State-Contract Bidding

Sec. 32(b) of Act 54 requires the Agencies of Administration and of Transportation to adopt a rule or procedure prohibiting or restricting contractors that violate classification requirements from bidding on future state contracts for a period of time that corresponds with the seriousness of the violation. Presently, a proposed rule has been prefiled with the interagency committee on administrative rules as required under section 837 of Title 3. A copy of the proposed rule is attached. (See Appendix #7.)

Davis-Bacon Wages

Sec. 32(c) of Act 54 requires the Agencies of Administration and of Transportation to comply with Davis-Bacon wages on ARRA-funded state contracts. The subsection further specifies that, in the event that Davis-Bacon wages in any county have not been updated in the previous three years, the minimum state-required wage for a state contract shall be that of the Vermont county that has most recently updated its Davis-Bacon wages.

With respect to this provision, the Office of the Vermont Attorney General issued two opinions. On August 5, 2009, the office concluded that the Vermont Legislature may set wages for ARRA projects that are higher than those set by the U.S. Department of Labor. (See Appendix #8.) On September 11, 2009, the office released a memorandum concluding that there are no legal or practical constraints to full implementation of the enhanced wage formula in Sec. 32(c). (See Appendix #9.) Accordingly, this section has been implemented.

Increased BISHCA Administrative Penalty and Removal of "Willful" Requirement
Sec. 78 of Act 54 raised BISHCA's administrative penalty for false representations resulting in a lower workers' compensation premium from $5,000.00 to $20,000.00 and, in addition, removed the requirement that such representations be made "willfully." To date, no enforcement actions have been taken under the new law.

Expanded Compliance Statements
Sec. 80 of Act 54 amended the existing law which pertains to workers' compensation compliance statements. In particular, the law was expanded to apply to all employers and not just contractors doing nonresidential work. In addition, and among other things, the statements now require disclosure of all subcontractors and 1099 workers and an attachment stating how much payroll the policy is covering. A copy of the revised compliance form is attached. (See Appendix #10.)

Additional Fraud Investigators
Sec. 106 of Act 54 authorized VDOL to hire four, limited service fraud investigators. Due to recent funding reductions, the number was reduced to three. To date, two of the three positions have been filled. One is located in Burlington and one in Montpelier. The new investigators have received specific training and are working closely with UI auditors. Additional training with BISHCA staff is planned. The department is in the process of recruiting for the third position which will be located in Rutland.

Recommendations
(1) The task force recommends that VDOL and BISHCA continue to provide the relevant standing committees of jurisdiction regular updates and status reports regarding the implementation of Act 54 workers' compensation requirements and the enforcement of Vermont labor standards more generally. Such information should include the number and outcome of departmental audits and investigations, as well as a detailed description of the efforts of the three new fraud investigators.

(2) In addition, although the Legislature charged the task force with meeting only until a final report was filed, there was consensus among members that work remains to be done. As a result, the members agreed to meet informally in order to maintain and encourage ongoing cooperation, coordination, and focus on the serious problem of misclassification and miscoding.

B. Public Education and Outreach Program

Since its formation, the task force has been cognizant of the need for greater public outreach in terms of educating employers, employees, and independent contractors about their rights and responsibilities under the law. A high priority recommendation in the progress report was to improve and expand publication of government telephone numbers for making complaints about alleged violations of the law.

In October 2009, VDOL and BISHCA developed a new proposal for a public relations campaign to inform the business community, generally, of labor standards related to misclassification and

miscoding. Significantly, the program will not require an additional appropriation of state funds but will be funded with existing state resources. The departments intend to involve other state agencies, labor organizations, and business groups with disseminating information, be it through downloadable information sheets and posters, articles in newsletters and general media, or press releases. The goal of the program is to develop clear guidelines and examples and provide that information through free outlets.

In addition, the departments intend to conduct a minimum of four regional employer seminars to provide information about proper classification and recent statutory changes and to answer questions. Unemployment field audit staff will provide technical assistance on site for employers who request it. A tip line for reports of alleged misclassification will be created and publicized.

The public outreach campaign will commence at the end of the 2010 legislative session. Benchmarks will include increased business registration on the Secretary of State's web site. A more detailed description of the program can be found in Appendix #11.

Recommendation
The task force unanimously endorses implementation of a public education and outreach campaign which, as an executive branch initiative, does not require legislative action.

C. Penalties

Upon the recommendation of BISHCA, the General Assembly in 2009 increased the BISHCA administrative penalty for workers' compensation misclassification and miscoding to $20,000.00 per violation.

Over the subsequent legislative interim, the task force continued to look at penalties. There was general agreement that, in many instances, existing penalties and enforcement tools could be enhanced to have a greater deterrent value. There was discussion of replacing VDOL's flat penalty with a penalty that corresponds directly with the monetary value of the contract under which the misclassification occurred. This would ensure that the penalty fits the benefit illegally obtained, without being either too draconian or too inconsequential.

In addition, VDOL and BISHCA proposed to the task force a schedule of increased penalties, such as a $20,000.00 administrative penalty for false representations and strengthened enforcement mechanisms, such as a greater use of stop-work orders. The proposal also included amending the criminal penalty for workers' compensation fraud to apply to all benefits illegally obtained and not just those that fall within the workers' compensation program. (See Appendix #12.)

Recommendation
The task force emphatically supports the enactment of greater enforcement tools. However, due to insufficient time, the task force was unable to fully review the schedule of proposed penalties

put forth by VDOL and BISHCA to determine their adequacy and, therefore, recommends that this work be done by the relevant standing committees of jurisdiction.

D. Common Definitions of "Employee" and "Independent Contractor"

The task force did not reach consensus about the benefit of developing universal definitions for "employee" and "independent contractor" to be used throughout all state programs, such as workers' compensation, tax, wage and hour, and unemployment insurance.

Some task force members adamantly believe that common definitions are essential to minimize confusion and encourage compliance with labor standards. Under existing law, there are at least five definitions of these terms. Greater uniformity, it is contended, will improve consistency, enforcement, and prosecution for violations.

Some members, however, expressed concern about focusing on developing common definitions rather than on increased enforcement of existing laws. They argued that a definitional fix may have the effect of diluting current standards used to determine employee or independent contractor status. There is a substantial body of Vermont case law regarding the definition of "employee" which, for the most part, articulates nuanced differences pertaining to business relationships. The primary focus of the decisions is who controls the work. Long-standing case law suggests that people who fail to pay their legally required employer expenses do so, not because of confusion, but because of a conscious intention to avoid paying those expenses in order to gain a competitive advantage.

The task force heard from the National Conference of Insurance Legislators (NCOIL) regarding the NCOIL model law on misclassification. However, as explained by Executive Director Susan Nolan, the model law currently under consideration has been narrowed to apply only to the construction industry and defers to the several states with respect to definitions of "employee" and "independent contractor." An earlier version of the model law, however, proposed definitions of these terms. Commissioner Moulton Powden and Deputy Commissioner Bertrand suggested to the task force that this earlier version and its 8-point test be adopted in Vermont.

Recommendation

Unable to reach consensus on the common definition question, the task force recommends that the relevant standing committees of jurisdiction consider taking up development of common definitions of "employee" and "independent contractor" to be used in all applicable Vermont programs. As a starting point for discussion purposes, the task force recommends consideration of a Vermont bill based on the original NCOIL 8-point test that is applicable to Vermont's workers' compensation and unemployment insurance programs. (See Appendix #13.)

E. Insurance Fraud Bureau

On September 9, 2009, the task force received testimony from Daniel J. Johnston, Executive Director of the Insurance Fraud Bureau of Massachusetts. The bureau is a quasi-governmental

agency created by the Massachusetts legislature in 1990. (See Appendix #14.) Prompted by the private insurance industry, the bureau was established to coordinate and integrate insurance industry and government efforts to investigate and prosecute insurance fraud. It is wholly funded by the insurance industry through an assessment on two insurance industry associations: namely, the Automobile Insurers Bureau of Massachusetts and the Workers' Compensation Rating and Inspection Bureau of Massachusetts. The bureau investigates fraud in all lines of insurance, but primary attention is given to automobile and workers' compensation insurance claims because, as explained by Mr. Johnston, these are the areas that most significantly affect insurance costs for consumers.

The mission of the bureau is the detection, prevention, and investigation of insurance fraud by:

- Informing the public of the bureau's activities and soliciting public assistance and cooperation in detecting and preventing fraudulent insurance claims.
- Uncovering insurance fraud by gathering information from insurance companies, law enforcement agencies, and the general public.
- Assisting law enforcement officers in preparing cases for criminal prosecution.

In 2003, following a staged accident that resulted in the death of a grandmother in the City of Lawrence, the bureau, the Lawrence Police Department and the Essex County District Attorney partnered in the creation of a joint task force to attack the problem of fraud in that city. This task force, later to be named A Community Insurance Fraud Initiative (CIFI) has, as of June 23, 2009, charged 369 people with insurance fraud, has seen convictions involving chiropractors, attorneys, runners (i.e., persons paid to find clients or patients to participate in insurance fraud), and average citizens, and has dramatically dropped the insurance claim level in the city. As reported by Mr. Johnston, the Lawrence success was so dramatic that beginning in 2004, the CIFI task force was replicated in 12 other communities across Massachusetts.

As underscored by Mr. Johnston, fraudulent insurance claims result in economic loss to every consumer. Prevention and investigation of insurance fraud, accordingly, can result in increased economic benefits to every citizen. CIFI task force efforts have reduced claims by hundreds of millions of dollars.

Recommendation

The task force recommends that the relevant standing committees of jurisdiction consider the creation of a special task force designed specifically to solicit broad-based input from insurers and law enforcement on the development of an insurance fraud bureau similar to the Massachusetts model. The task force also recommends that consideration be given to the establishment of a regional multi-state insurance fraud bureau.

F. Other Topics for Legislative Consideration

There were several subjects the task force did not have time to review. Those topics include:

- A state-administered certification program enabling annual registration for independent contractors.
- An expansion of state-contract review by the Agency of Administration to include VDOL and BISHCA to ensure potential state contractors are in good standing with those departments.
- Officer and director liability for fines and penalties incurred by a business.
- A provision making successor businesses liable for fines and penalties, such as the UI model.
- An extension of conspiracy liability that would apply to persons who knowingly contract with an employer who intends to misclassify.
- Private suits by businesses that lose bids to competitors due to misclassification or other labor law violations.
- A requirement that all businesses have workers' compensation.
- A requirement that all businesses seeking to do business in Vermont register with the Secretary of State and submit proof of insurance, including workers' compensation and unemployment.
- Regulatory tools that would support uncovering misclassification and miscoding, such as, a requirement that insurance companies report to BISHCA when an employer audit results in an annual premium adjustment of 20 percent or more.

Recommendation
The task force takes no position on the above-referenced topics. The task force recommends that the relevant standing committees of jurisdiction consider taking them up for review.

G. Ongoing Efforts by VDOL and BISHCA

With the cooperation and assistance of dedicated staff at VDOL and BISHCA, over the last couple of years, the task force has been able to more fully appreciate the financial costs of misclassification and miscoding. In particular, the task force benefited from the receipt of reports detailing the number and outcome of audits and investigations. (See Appendix #15 and Appendix #16.)

All parties agree, however, that VDOL and BISHCA should continue to evaluate the cost effectiveness of current methods of uncovering misclassification and fraud and should continue to explore and evaluate methods used by other states designed to combat misclassification and fraud as it impacts unreported wages, the evasion of payroll taxes, and Unemployment Insurance Trust Fund lost revenues. A summary of VDOL deliverables can be found in Appendix #17.

Recommendations
(1) The task force recommends that VDOL and BISHCA report back to the relevant legislative committees of jurisdiction regarding their findings with respect to the financial costs of

misclassification and miscoding, as that information becomes available, and that the departments continue to provide regular updates on the status and outcome of investigations and audits.

(2) The task force recommends that VDOL and BISHCA continue to work cooperatively and collaboratively with the Legislature and other state agencies and departments, and that the departments maintain a high priority focus on the problem of worker misclassification and miscoding.

H. Workers' Compensation White Paper

The National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions (IAIABC) formed a joint working group to study workers' compensation. That group released a paper describing and comparing the various approaches jurisdictions have taken to address the problems caused by misclassification. The task force believes the paper is a valuable resource and has attached a copy of the paper to this report. (See Appendix #18.)

Appendix 3: 2018 Workers' Compensation Administrative Citations Resulting in Debarment

VERMONT

Vermont Department of Labor
5 Green Mountain Drive
P.O. Box 488
Montpelier, VT 05601-0488
http://www.labor.state.vt.us

phone: 802-828-4000
fax: 802-828-4022
tdd: 802-828-4203

STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division,	Petitioner	)
v.		) Docket No. 16-18WCPen
Entertainment Unlimited, LLC d.b.a. Pizza Putt,	Respondent	)

ADMINISTRATIVE CITATION AND PENALTY

The Workers' Compensation and Safety Division of the Department of Labor ("Petitioner"), after investigation, finds that Entertainment Unlimited, LLC d.b.a. Pizza Putt, a domestic limited liability corporation located at 1205 Airport Pkwy, South Burlington, VT, 05403 violated 21 VSA § 687 by failing to secure workers' compensation insurance coverage for its employees between July 11, 2016 and July 31, 2017, inclusive.

This allegation is based on the following:

1. Respondent is an employer as that term is defined in 21 VSA § 601(3).

2. Respondent has employees, as that term is defined in 21 VSA § 601(14).

3. Review of the Vermont Secretary of State's business database on July 13, 2017 found that Respondent, Entertainment Unlimited, LLC d.b.a. Pizza Putt was an active Vermont business showing a registration date of November 18, 2004.

4. Review of the National Council on Compensation Insurance (NCCI) Proof of Coverage database on July 13, 2017 showed workers' compensation insurance policy #TWC3516384 was cancelled on July 11, 2016 for non-payment of premium.

5. Respondent obtained workers' compensation insurance coverage effective August 1, 2017.

6. Respondent's business is classified as 72 Accommodation and Food Service, using the North American Industry Classification System (NAICS). Pursuant to Workers' Compensation

Rule 45.5513, the penalty is $50 for each day without insurance. Respondent had employees and was without insurance for 386 days.

7. 21 VSA §687 of the Vermont Statutes provides that employers shall secure compensation for their employees with a carrier authorized to transact the business of workers' compensation in Vermont.

8. 21 VSA §692(a) of the Vermont Statutes provides that an employer failing to comply with the provisions of 21 VSA §687 be assessed an administrative penalty of not more than $100.00 a day for the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

9. Based upon investigation and review of the evidence in this matter, it is alleged that Respondent violated the requirements of 21 VSA §687 for 386 days between July 11, 2016 and July 31, 2017, inclusive. The maximum permissible penalty for this violation is $57,550.

10. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5530, violation of 21 VSA §687 by inadvertence or excusable neglect, coupled with the employer's prompt correction of the violation, may be considered in determining the amount of the penalty to be assessed. This rule does not apply.

11. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5540, if the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained the penalty may be reduced accordingly. Premium avoidance for the uncovered period is approximately $11,446, which does not include various administrative fees. Not Applicable. There is only a difference of $134.00 between the proposed penalty and the estimated premium avoidance. In fact, the premium avoidance with the administrative fees that all policies have, which can be approximately $200 plus dollars would be less than the proposed penalty.

12. Pursuant to Vermont Workers' Compensation and Occupational Disease rule 45.5550, the small size and non-hazardous nature of the employment may be considered in determining the amount of the penalty to be assessed. The business is a Vermont small size business and the nature of the work is not inherently hazardous. This rule may apply.

13. Vermont statutes require that an employer be prohibited from contracting with the State if a Stop Work Order is issued. 21 V.S.A. §692. A Stop Work Order was issued in this case. The debarment period pursuant to Workers' Compensation Rule 45.5400 is one year.

14. Written notice was provided to the Secretary of Transportation and the Commissioner of Buildings and General Services and neither objected to the debarment period.

15. Respondent is prohibited from contracting with the State from the date of this citation for one year.

16. After consideration of any mitigating factors, the penalty proposed for this violation shall be $19,300.

PENALTY DUE; RIGHT TO CONTEST

The proposed monetary penalty of $19,300 for the above-listed violations is final and due to the Vermont Department of Labor within 20 calendar days of receipt of this citation **unless** the division receives Respondent's written notice of contest and request for a hearing.

A notice of contest and request for hearing may be mailed within the 20-day time period to:

Office of Legal Counsel
Vermont Department of Labor
P.O. Box 488
Montpelier, Vermont 05601-0488

Dated in Montpelier, Vermont this 20th day of April, 2018.

/s/ Stephen Monahan, Director
Workers' Compensation and Safety Division

RIGHT TO A HEARING

Vermont Workers' Compensation and Occupational Disease Rule 45.0000 Section 4 addresses the right to a hearing concerning administrative citations and penalties. A copy of Rule 45 is enclosed.

VERMONT

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tdd: 802-828-4203

STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner	)	
	)	Docket No. 21-18WCPen
v.	)	
Winds Transportation, INC. Respondent	)	

ADMINISTRATIVE CITATION AND PENALTY

The Workers' Compensation and Safety Division of the Department of Labor ("Petitioner"), after investigation, finds that Winds Transportation, INC. a domestic profit corporation located at 177 Ave. C, Williston, VT. 05495 violated 21 VSA § 687 by failing to secure workers' compensation insurance coverage for its employees between June 6, 2017 and December 4, 2017, inclusive.

This allegation is based on the following:

1. Respondent is an employer as that term is defined in 21 VSA § 601(3).

2. Respondent has employees, as that term is defined in 21 VSA § 601(14).

3. Review of the Vermont Secretary of State's business database on November 29, 2017 found that Respondent, Winds Transportation, INC. is an active Vermont business showing a registration date of August 28, 2014.

4. Review of the National Council on Compensation Insurance (NCCI) Proof of Coverage database on November 29, 2017 did not show any past or present workers' compensation coverage for this business.

5. Respondent obtained workers' compensation insurance coverage effective December 5, 2017.

6. Respondent's business is classified as 48 Transportation and Warehousing, using the North American Industry Classification System (NAICS). Pursuant to Workers' Compensation

Rule 45.5513, the penalty is $50.00 for each day without insurance. Respondent had employees and was without insurance for 182 days.

7. 21 VSA §687 of the Vermont Statutes provides that employers shall secure compensation for their employees with a carrier authorized to transact the business of workers' compensation in Vermont.

8. 21 VSA §692(a) of the Vermont Statutes provides that an employer failing to comply with the provisions of 21 VSA §687 be assessed an administrative penalty of not more than $100.00 a day for the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

9. Based upon investigation and review of the evidence in this matter, it is alleged that Respondent violated the requirements of 21 VSA §687 for 182 days between June 6, 2017 and December 5, 2017, inclusive. The maximum permissible penalty for this violation is $26,950.

10. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5530, violation of 21 VSA §687 by inadvertence or excusable neglect, coupled with the employer's prompt correction of the violation, may be considered in determining the amount of the penalty to be assessed. This rule does not apply.

11. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5540, if the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained the penalty may be reduced accordingly. This rule does not apply.

12. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5550, the small size and non-hazardous nature of the employment may be considered in determining the amount of the penalty to be assessed. This rule does not apply.

13. Vermont statutes require that an employer be prohibited from contracting with the State if a Stop Work Order is issued. 21 V.S.A. §692. A Stop Work Order was issued in this case. The debarment period pursuant to Workers' Compensation Rule 45.5400 is one year.

14. Written notice was provided to the Secretary of Transportation and the Commissioner of Buildings and General Services and neither objected to the debarment period.

15. Respondent is prohibited from contracting with the State from the date of this citation for one year.

16. After consideration of any mitigating factors, the penalty proposed for this violation shall be $18,200.

PENALTY DUE; RIGHT TO CONTEST

The proposed monetary penalty of $18,200 for the above-listed violations is final and due to the Vermont Department of Labor within 20 calendar days of receipt of this citation unless the division receives Respondent's written notice of contest and request for a hearing.

A notice of contest and request for hearing may be mailed within the 20-day time period to:

Office of Legal Counsel
Vermont Department of Labor,
P.O. Box 488
Montpelier, Vermont 05601-0488

Dated in Montpelier, Vermont this 20th day of APRIL, 2018.

J. Stephen Monahan, Director
Workers' Compensation and Safety Division

RIGHT TO A HEARING

Vermont Workers' Compensation and Occupational Disease Rule 45.0000 Section 4 addresses the right to a hearing concerning administrative citations and penalties. A copy of Rule 45 is enclosed.

VERMONT

Vermont Department of Labor
5 Green Mountain Drive
P.O. Box 488
Montpelier, VT 05601-0488
http://www.labor.state.vt.us

phone: 802-828-4000
fax: 802-828-4022
tdd: 802-828-4203

STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner	)	
	)	Docket No. 19-18WCPen
v.	)	
	)	
Simply Love Life, LLC	)	
Respondent	)	

ADMINISTRATIVE CITATION AND PENALTY

The Workers' Compensation and Safety Division of the Department of Labor ("Petitioner"), after investigation, finds that Simply Love Life, LLC, a Limited Liability Company located at 30 Main Street, Brattleboro, VT., violated 21 VSA § 687 by failing to secure workers' compensation insurance coverage for its employees between,

April 16, 2015 through May 26, 2015 inclusive (41 days).
July 09, 2015 through July 28, 2015 inclusive (20 days).
September 26,2015 through March 18, 2016 inclusive (175 days).
November 29, 2016 through February 17, 2017 inclusive (81 days).
July 22, 2017 through October 25, 2017 inclusive (96 days).

This allegation is based on the following:

1. Respondent is an employer as that term is defined in 21 VSA § 601(3).

2. Respondent has employees, as that term is defined in 21 VSA § 601(14).

3. Review of the Vermont Secretary of State's business database in October 19, 2017 found that Respondent, Simply Love Life, LLC was an active Vermont business showing a registration date of August 15, 2012.

4. Review of the National Council on Compensation Insurance (NCCI) Proof of Coverage database on October 19, 2017 did not show any workers' compensation coverage for this business during

April 16, 2015 through May 26, 2015 inclusive (41 days).
July 09, 2015 through July 28, 2015 inclusive (20 days).

September 26,2015 through March 18, 2016 inclusive (175 days).
November 29, 2016 through February 17, 2017 inclusive (81 days).
July 22, 2017 through October 25, 2017 inclusive (96 days).

5. Respondent obtained workers' compensation insurance coverage effective October 26, 2017.

6. Respondent's business is classified as Sector 72 - Accommodation and Food Services using the North American Industry Classification System (NAICS). Pursuant to Workers' Compensation Rule 45.5513, the penalty is $50.00 for each day without insurance. Respondent had employees and was without insurance for 413 days.

7. 21 VSA §687 of the Vermont Statutes provides that employers shall secure compensation for their employees with a carrier authorized to transact the business of workers' compensation in Vermont.

8. 21 VSA §692(a) of the Vermont Statutes provides that an employer failing to comply with the provisions of 21 VSA §687 be assessed an administrative penalty of not more than $100.00 a day for the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

9. Based upon investigation and review of the evidence in this matter, it is alleged that Respondent violated the requirements of 21 VSA §687 for 413 days between
April 16, 2015 through May 26, 2015 inclusive (41 days).
July 09, 2015 through July 28, 2015 inclusive (20 days).
September 26,2015 through March 18, 2016 inclusive (175 days).
November 29, 2016 through February 17, 2017 inclusive (81 days).
July 22, 2017 through October 25, 2017 inclusive (96 days).
The maximum permissible penalty for this violation is $61,600.00.

10. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5530, violation of 21 VSA §687 by inadvertence or excusable neglect, coupled with the employer's prompt correction of the violation, may be considered in determining the amount of the penalty to be assessed. Simply Love life. LLC was issued an Administrative Citation, Docket number 05-15 WCPen with a Penalty amount of $2,000 that has gone unpaid. Not applicable.

11. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5540, if the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained the penalty may be reduced accordingly. Maybe applicable, however this is the second citation and the business has made no attempts to pay the previous citation issued to them in 2015.

12. Pursuant to Vermont Workers' Compensation and Occupational Disease rule 45.5550, the small size and non-hazardous nature of the employment may be considered in determining the amount of the penalty to be assessed. Not applicable.

13. Vermont statutes require that an employer be prohibited from contracting with the State if

a Stop Work Order is issued. 21 V.S.A. §692. A Stop Work Order was issued in this case. The debarment period pursuant to Workers' Compensation Rule 45.5400 is one year.

14. Written notice was provided to the Secretary of Transportation and the Commissioner of Buildings and General Services and neither objected to the debarment period.

15. Respondent is prohibited from contracting with the State from the date of this citation for one year.

16. If a second violation occurs within three years of the initial violation, the per day penalty ($50) shall be doubled ($100) and the debarment period shall be two years. After consideration of any mitigating factors, the penalty proposed for this violation shall be $41,300.00.

PENALTY DUE; RIGHT TO CONTEST

The proposed monetary penalty of $41,300.00 for the above-listed violations is final and due to the Vermont Department of Labor within 20 calendar days of receipt of this citation **unless** the division receives Respondent's written notice of contest and request for a hearing.

A notice of contest and request for hearing may be mailed within the 20-day time period to:

Office of Legal Counsel
Vermont Department of Labor,
P.O. Box 488
Montpelier, Vermont 05601-0488

Dated in Montpelier, Vermont this 20th day of APRIL, 2018.

J. Stephen Monahan, Director
Workers' Compensation and Safety Division

RIGHT TO A HEARING

Vermont Workers' Compensation and Occupational Disease Rule 45.0000 Section 4 addresses the right to a hearing concerning administrative citations and penalties. A copy of Rule 45 is enclosed.

VERMONT

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5 Green Mountain Drive
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phone: 802-828-4000
fax: 802 828-4022
tdd: 802 828-4203

STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner	)	
	)	Docket No. 26-18 WCPen
v.	)	
Dunwright Taxi, LLC	)	
Respondent	)	

ADMINISTRATIVE CITATION AND PENALTY

The Workers' Compensation and Safety Division of the Department of Labor ("Petitioner"), after investigation, finds that Dunwright Taxi, LLC, a domestic limited liability corporation located at 175 Pearl St. Essex Jct, VT. 05452 violated 21 VSA § 687 by failing to secure workers' compensation insurance coverage for its employees between October 17, 2016 and March 1, 2018, inclusive.

This allegation is based on the following:

1. Respondent is an employer as that term is defined in 21 VSA § 601(3).

2. Respondent has employees, as that term is defined in 21 VSA § 601(14).

3. Review of the Vermont Secretary of State's business database on February 22, 2018 found that Respondent, Dunwright Taxi, LLC was an active Vermont business showing a registration date of May 17, 2011.

4. Review of the National Council on Compensation Insurance (NCCI) Proof of Coverage database on February 22, 2017 showed Workers' Compensation insurance policy # 6S60UB4877P66A15 was cancelled on October 17, 2016 for non-renewal.

5. Respondent obtained Workers' Compensation insurance coverage effective March 2, 2018.

6. Respondent's business is classified as 48 Transportation, using the North American Industry Classification System (NAICS). Pursuant to Workers' Compensation Rule 45.5513, the

penalty is $50 for each day without insurance. Respondent had employees and was without insurance for 501 days.

7. 21 VSA §687 of the Vermont Statutes provides that employers shall secure compensation for their employees with a carrier authorized to transact the business of Workers' Compensation in Vermont.

8. 21 VSA §692(a) of the Vermont Statutes provides that an employer failing to comply with the provisions of 21 VSA §687 be assessed an administrative penalty of not more than $100.00 a day for the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

9. Based upon investigation and review of the evidence in this matter, it is alleged that Respondent violated the requirements of 21 VSA §687 for 501 days between October 17, 2016 and March 2, 2018, inclusive. The maximum permissible penalty for this violation is $74,800.

10. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5530, violation of 21 VSA §687 by inadvertence or excusable neglect, coupled with the employer's prompt correction of the violation, may be considered in determining the amount of the penalty to be assessed. This rule does not apply. This was neither inadvertent nor promptly corrected. The employer did not renew his prior Workers' Compensation policy and an employee was injured during the uncovered time which the employer did not report via a form 1. The injury was reported by the employee to the carrier. A Stop Work Order was served on the business and remained effective for 5 days.

11. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5540, if the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained the penalty may be reduced accordingly. This rule does not apply. The penalty amount is $25,150.00; the premium avoidance is $16,876.00, which does not include administrative costs which are part of all policies; the maximum allowable penalty is $74,800.00. The penalty significantly lower than the maximum and only about 50 % above the premium avoidance.

12. Pursuant to Vermont Workers' Compensation and Occupational Disease rule 45.5550, the small size and non-hazardous nature of the employment may be considered in determining the amount of the penalty to be assessed. This rule does not apply. This business is listed as a hazardous by NAICS.

13. Vermont statutes require that an employer be prohibited from contracting with the State if a Stop Work Order is issued. 21 V.S.A. §692. A Stop Work Order was issued in this case. The debarment period pursuant to Workers' Compensation Rule 45.5400 is:
45.5440 initial violation is one year.

14. Written notice was provided to the Secretary of Transportation and the Commissioner of Buildings and General Services and neither objected to the debarment period.

15. Respondent is prohibited from contracting with the State from the date of this citation for:

one year.

16. Pursuant to Vermont Workers' Compensation and Occupational Disease rule 45.6635, the employer is assessed a penalty of $100.00 for failing to file the first report of injury.

17. After consideration of any mitigating factors, the penalty proposed for this violation shall be $25,150.

PENALTY DUE; RIGHT TO CONTEST

The proposed monetary penalty of $25,150 for the above-listed violations is final and due to the Vermont Department of Labor within 20 calendar days of receipt of this citation **unless** the division receives Respondent's written notice of contest and request for a hearing.

A notice of contest and request for hearing may be mailed within the 20-day time period to:

Office of Legal Counsel
Vermont Department of Labor,
P.O. Box 488
Montpelier, Vermont 05601-0488

Dated in Montpelier, Vermont this 16th day of November, 2018.

J. Stephen Monahan, Director
Workers' Compensation and Safety Division

RIGHT TO A HEARING

Vermont Workers' Compensation and Occupational Disease Rule 45.0000 Section 4 addresses the right to a hearing concerning administrative citations and penalties. A copy of Rule 45 is enclosed.

VERMONT

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tdd: 802-828-4203

STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner	)	
	)	Docket No. 28-18WCPen
v.	)	
Lorenzo de Coninck dba LTD & Sons Property Maintenance Respondent	)	

ADMINISTRATIVE CITATION AND PENALTY

The Workers' Compensation and Safety Division of the Department of Labor ("Petitioner"), after investigation, finds that Lorenzo de Coninck dba LTD & Sons Property Maintenance, located at 367 Old Route 8, Jamaica, Vermont violated 21 VSA 687 by failing to secure workers' compensation insurance coverage for its employees between

12/03/2015 through 06/12/2016 inclusive (193 days)
11/08/2016 through 06/29/2017 inclusive (234 days)
12/12/2017 through 04/19/2018 inclusive (129 days)

This allegation is based on the following:

1. Respondent is an employer as that term is defined in 21 VSA §601(3).

2. Respondent has employees, as that term is defined in 21 VSA §601(14)

3. Review of the Vermont Secretary of State's business database on 02-15-2018 found that Respondent, Lorenzo de Coninck dba LTD & Sons Property Maintenance was an active Vermont business showing a registration date of 10-07-2013.

4. Review of the National Council on Compensation Insurance (NCCI) Proof of Coverage database on 02-15-2018 did not show any current workers' compensation coverage for this business.

5. Respondent obtained workers' compensation insurance coverage effective 04-20-2018.

6. Respondent's business is classified as Rule 45 Sector 53 (Real Estate and Rental Leasing) using the North American Industry Classification System (NAICS). Pursuant to Workers' Compensation Rule 45.5511, the penalty is $30.00 for each day without insurance. This is a second violation which makes the penalty amount $60.00 for each day without insurance. Respondent had employees and was without insurance for 556 days.

7. Title 21 §687 of the Vermont Statutes provides that employers shall secure compensation for their employees with a carrier authorized to transact the business of workers' compensation in Vermont.

8. Title 21 §692(a) of the Vermont Statutes provides that an employer failing to comply with the provisions of 21 VSA §687 be assessed an administrative penalty of not more than $100.00 a day for the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

9. Based upon investigation and review of the evidence in this matter, it is alleged that Respondent violated the requirements of 21 VSA §687 for 556 days between.

12/03/2015 through 06/12/2016 inclusive (193 days)
11/08/2016 through 06/29/2017 inclusive (234 days)
12/12/2017 through 04/19/2018 inclusive (129 days)

The maximum permissible penalty for this violation is $83,050.

10. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5530, violation of 21 VSA §687 by inadvertence or excusable neglect, coupled with the employer's prompt correction of the violation, may be considered in determining the amount of the penalty to be assessed. *Not applicable*
It should be noted that this is the second violation Lorenzo de Corninck was issued an Administrative Citation, Docket 03-15 WCPen with a penalty amount of $60,000 reduced to $6,000, due 05-15-2017 and workers compensation compliance is maintained. As of this date only $1000 has been collected. In his sworn statement he explains why he did not have workers' compensation insurance.

12/03/15 to 06/12/16 I don't know why.
11/08/16 to 06/29/17 I owed money.
12/12/17 to 4/20/18 I didn't make a payment on time.

11. Pursuant to Vermont Workers' Compensation and Occupational Disease Rule 45.5540, if the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained the penalty may be reduced accordingly. *Is applicable.*

Maximum Penalty	*$83,050*
Premium Avoidance	*$839.54*
Penalty Amount	*$33,360*

12. Pursuant to Vermont Workers' Compensation and Occupational Disease rule 45.5550, the small size and non hazardous nature of the employment may be considered in determining the amount of the penalty to be assessed. *Is applicable. Under Vermont Dept of Labor rule 45.5500, NAICS industry Sector has been assessed at the amount of $30/day (45.5511).*

13. Vermont statutes require that an employer be prohibited from contracting with the State if a Stop Work Order is issued. 21 V.S.A. §692. A Stop Work Order was issued in this case. The debarment period pursuant to Workers' Compensation Rule 45.5400 is:
45.5450 second violation occurring within three years of the previous violation is two years .

14. Written notice was provided to the Secretary of Transportation and the Commissioner of Buildings and General Services and neither objected to the debarment period.

15. Respondent is prohibited from contracting with the State from the date of this citation for: Two years.

16. After consideration of any mitigating factors, the penalty proposed for this violation shall be $33,360

PENALTY DUE; RIGHT TO CONTEST

The proposed monetary penalty of $33,360 for the above-listed violations is final and due to the Vermont Department of Labor within 20 calendar days of receipt of this citation **unless** the division receives Respondent's written notice of contest and request for a hearing.

A notice of contest and request for hearing may be mailed within the 20-day time period to:

Office of Legal Counsel
Vermont Department of Labor,
P.O. Box 488
Montpelier, Vermont 05601-0488

Dated in Montpelier, Vermont this 18th day of November, 2018.

J. Stephen Monahan, Director
Workers' Compensation and Safety Division

RIGHT TO A HEARING

Vermont Workers' Compensation and Occupational Disease Rule 45.0000 Section 4 addresses the right to a hearing concerning administrative citations and penalties. A copy of Rule 45 is enclosed.

Appendix 4: Workers' Compensation Rule 45

Rules for Administrative Citations and Penalties, Stop Work Orders and Debarment.

45.1000. Scope of Rules.

These rules establish the procedure for issuing administrative citations, conducting hearings on citations and penalties, and assessing penalties.

The Commissioner, after notice and an opportunity for a hearing, may assess an administrative penalty against any person who violates the Workers' Compensation statute or any rule adopted pursuant to it, or any order issued by the Commissioner or the Workers' Compensation Division.

45.2000. Authority to Adopt Rules.

45.2100. These rules are adopted pursuant to 21 V.S.A. §§ 602, 603, 604, 663b, 688, 689, 690(b), 692, 702, 704, 705, and 708. (Employer liability and Workers' Compensation);

45.2200. 8 V.S.A. §§ 4793(c) and 4803. (Licensing requirements); and

45.2300. 3 V.S.A. §§ 809-815. (Administrative Procedure).

45.3000. Issuance of Administrative Citations.

45.3100. The Director of the Workers' Compensation and Safety Division may issue an administrative citation to any person, including an employee, employer, attorney, medical provider, insurer or a representative of the insurer, if the Director determines after an investigation that the person has:

45.3110. Refused or neglected to comply with the provisions of the Workers' Compensation Act (21 V.S.A. Chapter 9);

45.3120. Refused or neglected to comply with the rules promulgated pursuant to the Act;

45.3130. Refused or neglected to file in a complete and timely fashion any reports required by the Act or the rules, or when ordered to do so by the Commissioner;

45.3140. Refused or neglected to comply with any interim or final order issued by the Commissioner or his or her representative; or

45.3150. Willfully made a false statement or representation for the purpose of obtaining any benefit or payment for either himself or herself or any other person.

45.3200. Service of Citation.

The administrative citation shall be served on the person by certified mail or personal service. Each citation shall be in writing and shall specifically describe the nature of the violation and include a citation to the specific statute, rule, or order alleged to have been violated. The citation shall also state the amount of the administrative penalty imposed, the debarment period if applicable, and the process for requesting a hearing.

45.3300. Response.

The person served with an administrative citation shall have 20 days from the date of service to notify the Director in writing of his or her intent to contest the administrative citation and penalty. If the person does not file a notice contesting the citation, the citation and penalty shall be deemed a final order of the Commissioner.

45.3400. Enforcement Authority Not Limited

Administrative citations and penalties issued under these rules shall not limit the authority of the Commissioner to issue orders or seek injunctive relief and penalties through the court, or to take any other appropriate enforcement action authorized by law.

45.3500. Investigations And Determinations Under 21 VSA § 663b.

45.3510. If an allegation of claimant fraud is submitted to the Department, a determination shall be made as to whether further investigation is warranted. If warranted, the Commissioner shall order the Workers' Compensation insurer to investigate the specific allegations of fraud and submit a written report to the Department.

45.3520. The report submitted to the Department shall contain:

45.3521. A description of all action taken to investigate the allegations;

45.3522. The names and contact information of all persons interviewed, along with a copy of any statements taken;

45.3523. Copies of any photographs, videos, or other recordings taken as part of the investigation; the reports of any investigators hired as part of the investigation; and,

45.3524. The insurer's opinion as to whether fraudulent activity has occurred.

45.3525. The insurer shall provide the Department with a status report on its investigation every 30 days, until a final report is submitted.

45.3526. The investigation and report shall be in addition to any actions related to adjusting the claim.

45.3530. Upon receipt of the insurer's report the Commissioner shall determine whether it is complete, or whether additional information is necessary. Once a completed report is received, the Commissioner shall provide the claimant with an opportunity to respond in person or in writing within 30 days.

45.3540. After providing the claimant an opportunity to respond, the Commissioner shall make a determination as to whether fraud has occurred, and may assess penalties and order reimbursement as appropriate.

45.4000. Administrative Citation and Penalty Hearing.

45.4100. A person contesting a citation and penalty issued pursuant to Rule 45.3000 shall be entitled to a hearing before the Commissioner within 60 days of filing the notice to contest. The 60-day time frame may be extended by the Commissioner if the person makes a written request for additional time to prepare for the hearing.

45.4200. Hearing Notice.

The hearing notice shall include the following:

45.4210. A statement of the time, place, and nature of the hearing;

45.4220. A statement of the legal authority and jurisdiction under which the hearing is to be held;

45.4230. A reference to the specific statute, rule, or order involved in the hearing; and

45.4240. A short and plain statement of the matters at issue.

45.4300. The Commissioner shall appoint a hearing officer to hear the evidence, prepare findings, and issue a decision. The procedures set forth in 3 V.S.A. §§ 809-813, and § 815 shall apply to all hearings conducted under these rules.

45.4400. The person may appear at the hearing with counsel, present evidence, and examine and cross-examine witnesses.

45.4500. Evidence shall be admitted at the hearing as provided in 3 V.S.A. § 810.

45.4600. The hearing officer may compel by subpoena the attendance and testimony of witnesses and the production of books and records in accordance with 21 V.S.A. § 603(a), and 3 V.S.A. §§ 809a and 809b.

45.4700. Nothing in this section shall prohibit the informal disposition of a citation by stipulation, agreed settlement, consent order, or default. An informal disposition of the citation may proceed using clear and simple documentation without complete adherence to the requirements of this section.

45.5000. Administrative Penalties.

45.5100. False Statement or Representation.

45.5110. A person who willfully makes a false statement or representation for the purpose of obtaining any benefit or payment either for himself or herself or another person shall be assessed an administrative penalty of not more than $20,000.00, in accordance with 21 V.S.A. § 708.

45.5120. Except as provided in 45.5160-45.5190, the Commissioner shall not reduce a penalty imposed under rule 45.5110 if:

45.5130. The false statement or representation was made to establish the compensability of the claim; or

45.5140. The false statement or representation involved falsifying medical records; or

45.5150. The false statement or representation was sworn testimony.

45.5160. Penalty Reduction Factors.

The Commissioner may reduce the penalty if the person demonstrates:

45.5170. That the person has repaid or entered into an agreement to repay the benefits or amounts received as a result of the false statement or representation; and

45.5180. The benefit or payment gained was less than the amount of the penalty; or

45.5190. The person has agreed to forfeit any claim for additional Workers' Compensation benefits based on the alleged workplace injury.

45.5200. Forfeiture of Benefits.

45.5210. An employee who willfully makes a false statement or representation of material fact for the purpose of obtaining a Workers' Compensation benefit shall forfeit all or a portion of his or her right to benefits based on the alleged workplace injury.

45.5220. Partial Forfeiture of Benefits.

45.5230. In the Commissioner's discretion, an employee may forfeit only a portion of his or her Workers' Compensation benefits if:

45.5240. The employee has repaid the benefits or entered into an agreement to repay the benefits received as a result of the false statement or representation; or

45.5250. The benefit or payment to be gained was less than $1,000.00; or

45.5260. The benefit or payment to be gained was limited to one portion of the Workers' Compensation benefit to which the employee was entitled. In this instance, the benefits owed the employee that were not received as a result of the false statement or representation shall not be forfeit.

45.5300. Referral to Department of Financial Regulation.

Whenever the Commissioner has reason to believe that an employer has willfully made a false statement or representation for the purpose of obtaining a lower Workers' Compensation premium, written notice and any supporting documentation shall be provided to the Commissioner of Financial Regulation along with a request to investigate and take any appropriate action on the matter.

45.5400. Debarment; False Statement or Representation.

45.5410. In addition to the penalties listed in rule 45.5110 above, the Commissioner shall prohibit an employer who willfully makes a false statement or representation for the purpose of deriving any benefit, including a lower insurance premium, from contracting, directly or indirectly, with the State or any of its subdivisions, for up to three years.

45.5420. Any prohibition from contracting with the State shall be made only after consultation with the Commissioner of Buildings and General Services or the Secretary of Transportation, or other agencies as appropriate. When the Commissioner believes that debarment is appropriate, the Commissioner shall provide written notice and supporting documentation to the Commissioner of Buildings and General Services or the Secretary of Transportation or other Agency or Department head as appropriate. The debarment shall be ordered if no objection is raised by the Department or Agency consulted within five business days of receiving notice of the proposed debarment. If an objection is raised, the Commissioner shall consider it, but in his or her discretion may order the debarment nevertheless.

45.5430. An administrative determination shall be issued to advise the employer of the debarment period and his or her appeal rights.

45.5440. An initial violation shall subject the employer to a debarment period of one year.

45.5450. A second violation occurring within three years of the previous violation shall subject the employer to a debarment period of two years.

45.5460. A third or subsequent violation occurring within three years of the most recent violation shall subject the employer to a debarment period of three years.

45.5470. The Commissioner may reduce the period of debarment if the employer demonstrates that the non-compliance was the result of a good faith misunderstanding of the law's requirements, excusable neglect, or other mitigating factor.

45.5500. Administrative Penalty; Failure to Insure.

45.5510. An employer that fails to comply with the requirements of 21 V.S.A. § 687 (maintaining workers' compensation insurance or self-insurance as required by law) shall be assessed an administrative penalty of not more than $100.00 per day for the first seven days that the employer neglected to secure coverage and not more than $150.00 for every day thereafter. An employer shall ensure that any subcontractor it has hired for a particular job is in compliance with 21 V.S.A. § 687.

The per day penalty shall be based on the annual-***North American Classification System (NAICS)*** for the employer. ***NAICS groupings for Industry Sector*** may be found in the appendix to this rule.

45.5511. For employers with ***NAICS Industry Sectors 11, 51, 52, 53, 54, 55, 61, 71, 92***, the penalty shall be $30 per

day for each day without insurance for an initial violation. If a second violation occurs within three years of the initial violation, the per day penalty shall be doubled. If a third violation occurs within three years of the initial violation the penalty shall be assessed at the full statutory rate.

45.5512. For employers with ***NAICS Industry Sectors 31, 32, 33, 42, 44, 45, 62*** the penalty shall be $40 per day for each day without insurance for an initial violation. If a second violation occurs within three years of the initial violation, the per day penalty shall be doubled. If a third violation occurs within three years of the initial violation the penalty shall be assessed at the full statutory rate.

45.5513. For employers with ***NAICS Industry Sectors 21, 22, 23, 48, 49, 56, 72, 81*** the penalty shall be $50 per day for each day without insurance for an initial violation. If a second violation occurs within three years of the initial violation, the per day penalty shall be doubled. If a third violation occurs within three years of the initial violation the penalty shall be assessed at the full statutory rate.

45.5520. Penalty Reduction Factors.

The Commissioner may reduce the penalty assessed under section 45.5500 if the employer demonstrates:

45.5530. That the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected;

45.5540. That the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained; or

45.5550. That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.

45.5560. Failure to Insure; Stop-Work Order.

45.5570. If an employer fails to comply with the requirements of 21 V.S.A. § 687 after investigation by the Commissioner, the Commissioner shall issue an emergency stop-work order to the employer. Additionally, an employer that fails to secure Workers' Compensation coverage after being ordered in writing to do so by the Commissioner shall be assessed an administrative penalty of up to $250.00 for every day the employer fails to obtain coverage after being ordered to do so, and may also be assessed an administrative penalty of up to $250.00 per employee for every day that the employer has failed to secure the ordered Workers' Compensation coverage.

45.5571. The stop-work order shall clearly state the name of the employer, the penalties for violating the order, the process for having the order rescinded, and the method to appeal the order.

45.5572. A stop-work order may be appealed pursuant to VRCP 75.

45.5580. Debarment; Violation of Stop-Work Order.

45.5590. In addition to the penalties listed in Rule 45.5570 above, the Commissioner shall prohibit an employer that has been issued a stop-work order pursuant to 21 V.S.A. § 692(b) from contracting, directly or indirectly, with the State or any of its subdivisions, for up to three years.

45.5591. Prior to issuing any debarment penalty, the Commissioner shall consult with the Commissioner of Buildings and General Services and the Secretary of Transportation, or other agencies as appropriate. The consultation may occur informally provided that a written or electronic record of that consultation naming the employer involved, a description of the violation(s), the proposed debarment period, and any response received from the Commissioner of Buildings and General Services or the Secretary of Transportation is maintained. The debarment shall be ordered if no objection is raised by the Department or Agency consulted within five business days of receiving notice of the proposed debarment. If an objection is raised, the Commissioner shall consider it, but in his or her discretion may order the debarment nevertheless.

45.5592. An administrative determination shall be issued to advise the employer of the debarment period and the employer's appeal rights.

45.5593. In establishing a debarment period under this section, the Commissioner may consider any relevant mitigating factors, including the employer's good faith or excusable neglect, or the impact of debarment on public health and safety.

45.5594. An initial violation shall result in a debarment period of one year, prior to consideration of any mitigating factors.

45.5595. A second violation occurring within three years from the previous violation shall result in a debarment period of two years, prior to consideration of any mitigating factors.

45.5596. A third or subsequent violation occurring within three years from the most recent violation shall result in a debarment period of three years, prior to consideration of any mitigating factors.

45.5597. Notwithstanding any mitigating factors, the debarment period shall not be less than the period during which the employer was in violation of 21 V.S.A. § 687.

45.6600. Other Penalties.

45.6610. Non-compliance with an interim or final order.

Any person, including an employer or Workers' Compensation insurance carrier who fails to comply with an interim or final order of the Commissioner shall be assessed a penalty of $500.00. An additional penalty of $100.00 per day shall be assessed for each day the person fails to comply after the date set for compliance. The total penalty shall not exceed $5,000.00. The Commissioner may reduce the penalty if the person demonstrates that non-compliance was the result of excusable neglect.

45.6620. A self-insured employer or Workers' Compensation insurance carrier that fails to ensure that any of its agents or subcontractors complies with the Workers' Compensation statute or rules, or with an interim or final order of the Department, shall be assessed a penalty of $500.00 for a first offense. A first offense shall be defined as one instance of failing to comply with the statute, rule, or order in one claim. The employer or a Workers' Compensation insurance carrier shall be assessed an additional penalty of $500.00 for each additional instance of failing to comply but shall not be assessed a penalty in excess of $5,000.00. In addition, the agent or subcontractor of an employer or insurer who refuses or neglects to comply shall be assessed a penalty of $50.00 for each instance of refusing or neglecting to comply with the Act, but shall not be assessed a penalty in excess of $5,000.00.

45.6630. Penalty; Failure to Submit Forms or Reports; Technical Violations

45.6635. An employer that fails to submit a First Report of Injury (Form 1) within 72 hours of receiving notice or knowledge of a claimed work-related injury causing an absence of one day or more, or necessitating medical attendance, shall be assessed a penalty of $100.00 for each violation.

45.6640 An employer that fails to provide an employee with a copy of the First Report of Injury (Form 1) promptly, after filing it with the Department, shall be assessed a penalty of $50.00 for each violation.

45.6650. Any person, including an employer or Workers' Compensation insurance carrier who fails to submit any form required by the Workers' Compensation statute or rules to be filed with the Department shall be assessed a penalty of $100.00 for each violation.

45.6660. An employer or insurance carrier that fails to comply with 21 V.S.A. § 640a shall be assessed a penalty of $500.00.

45.6670. An employer or Workers' Compensation insurance carrier that fails to file any interim or final report required by 21 V.S.A. §§ 701, 702, or 703 shall be assessed a penalty of $100.00 for each violation.

45.6680. An employer or Workers' Compensation insurance carrier that fails to file any statistical report requested by the Commissioner or his or her designee pursuant to 21 V.S.A. § 704 shall be assessed a penalty of $1,000.00.

45.6690. The penalty for any administrative or technical violation not otherwise noted in this section shall be $500.00.

45.7000. Violations of 21 VSA § 690(b)

45.7100. The Commissioner may issue a written request directing an employer to provide a Workers' Compensation Compliance Statement. Upon receipt of a request the employer shall provide all information required by 21 VSA § 690(b) within thirty days of receiving the request. An employer may request additional time in which to respond, and if good cause is demonstrated, the Commissioner may grant additional time to respond.

45.7200. An employer that fails to comply with a request for a compliance statement within thirty days, or if an extension is granted, by the extension date may be subject to a penalty of up to $5000.00 a week until compliance occurs.

45.72100. The penalty for a first offense shall be $1000.00 for the first week of non-compliance and shall increase $500.00 for each subsequent week up to a maximum of $5000.00 per week. The penalty for subsequent failures to comply with a request for a compliance statement shall be $5000.00 per week

45.72200. Penalty Reduction Factors

The Commissioner may reduce the penalty assessed under this section if the employer demonstrates:

That the failure to provide a compliance statement was inadvertent or the result of excusable neglect and was promptly corrected; or,

The assessed penalty is out of proportion with the small size of the employer.

Falsifying Compliance Statement

45.7300. An employer that falsifies information on a compliance statement shall be subject to an administrative penalty of $5000.00 for each week that the falsification occurred.

45.8000. Severability

In the event any part or provision of these rules is held invalid, the invalidity shall not affect the remainder of the rules that can be given effect without the invalid provision, and to this end these rules are severable.

45.9000. Effective Date:

These Rules are effective February 13, 2017

Appendix 5: Report of the Vermont State Auditor

Worker Misclassification: Action Needed to Better Detect and Prevent Worker Misclassification

Report of the Vermont State Auditor

August 31, 2015

WORKER MISCLASSIFICATION

Action Needed to Better Detect and Prevent Worker Misclassification

Douglas R. Hoffer
Vermont State Auditor
Rpt. No. 15-07

Mission Statement

The mission of the Auditor's Office is to hold state government accountable. This means ensuring that taxpayer funds are used effectively and efficiently, and that we foster the prevention of waste, fraud, and abuse.

Douglas R. Hoffer
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

August 31, 2015

Addressees (see last page of letter)

Dear Colleagues,

Vermont workers who are misclassified as independent contractors do not receive protections and benefits to which they are entitled. Furthermore, these workers must pay the social security and Medicare tax that is normally paid by employers. Employers that misclassify have an unfair business advantage against those employers that abide by the law, because the employers that misclassify do not pay for workers' compensation insurance, unemployment taxes, or the employers' share of the social security and Medicare taxes.

In recent years, the Vermont General Assembly has 1) increased both the amounts and types of penalties that may be assessed against employers that misclassify their workers; 2) enacted new requirements for state contracting procedures to assure that they will minimize misclassification of workers as independent contractors; and 3) authorized increased resources to investigate worker misclassification. In 2012, the Governor created a Task Force charged with combating worker misclassification.

Because of this emphasis on deterring worker misclassification, we decided to 1) assess the actions that the Vermont Department of Labor (VDOL) has taken to detect and address possible worker misclassification and 2) assess whether the Department of Buildings and General Services (BGS) and the Agency of Transportation (AOT) have implemented required state contracting procedures designed to minimize worker misclassification by companies that contract with the State.

VDOL has taken steps to address worker misclassification. For example, VDOL is developing an education and outreach campaign on worker misclassification, and the department has worked with business and labor groups to propose statutory changes to existing law.

Although the department was charged with leading the Governor's Task Force on Employee Misclassification, it did not convene any meetings from June 2013 to July 2015. Further, the 2012 executive order that created the task force specified that agencies and departments should engage in timely enforcement, but VDOL has failed to enforce unemployment insurance penalties for worker misclassification, which have been statutorily required since 2010, and some workers' compensation penalties as well. VDOL attributed the lack of enforcement to a need to establish additional

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administrative rules for the statutory penalty provisions related to worker misclassification, but the department has yet to accomplish this after five years.

Our audit found that VDOL's Unemployment Insurance (UI) division lacks reliable performance data for its field audit program, and the Workers' Compensation (WC) division's primary system for recording investigation case data has limited functionality and contains data anomalies and duplicate case information. These issues have limited VDOL's ability to measure the impact its UI field audit and WC investigation programs have had on detecting misclassification. The UI data was flawed as a result of data entry errors, a lack of supervisory review of the data input, and the absence of documented procedures for compiling the field audit data. The WC problems occurred for a variety of reasons, including a lack of documented procedures for entering information in its database system.

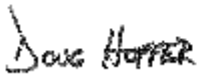
Further, the WC division records show 30 investigations first started in 2011 have not been completed, and 134 cases categorized as active are assigned to investigators no longer employed by VDOL. The lack of follow through on these cases occurred because WC has not developed protocols for case reassignment and case management practices, such as standards for maximum caseloads per investigator and timely case completion.

BGS and AOT have developed procedures and forms designed to meet statutorily required contracting procedures, but gaps remain. Neither entity consistently applied the procedures they had developed to all contracts over $250,000 as required, nor validated information that was reported by state contractors regarding worker classification violations within the past 12 months and subcontractors to be used on a project. Consequently, BGS and AOT risk contracting with businesses that violated state employment laws in the previous 12 months or are currently misclassifying workers, leaving workers on state projects without the coverage they are entitled to by law.

This report contains a variety of recommendations to improve the actions taken by VDOL, BGS, and AOT to address worker misclassification. In commenting on a draft of this report, BGS and AOT outlined various actions they planned to undertake in response to the recommendations. Some of VDOL's comments on the draft report were inconsistent or in conflict with our findings and did not address most of the recommendations. Reprints of the comments of all three are included in appendices to this report and our evaluation of VDOL's comments are included in the reprint of the VDOL comments.

I would like to thank the management and staff at VDOL, BGS, and AOT for their professionalism and cooperation during the course of the audit.

Sincerely,



Doug Hoffer
Vermont State Auditor

ADDRESSEES

The Honorable Shap Smith
Speaker of the House of Representatives

The Honorable John Campbell
President Pro Tempore of the Senate

The Honorable Peter Shumlin
Governor

Ms. Annie Noonan
Commissioner
Vermont Department of Labor

Mr. Michael Obuchowski
Commissioner
Vermont Department of Buildings and General Services

Ms. Sue Minter
Secretary
Vermont Agency of Transportation

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Introduction

Worker misclassification[1] arises when an employer improperly classifies an employee as an independent contractor versus an employee. In Vermont and nationally, there appears to be an ongoing problem caused by those employers that attempt to avoid or minimize workers' compensation premiums and avoid paying unemployment insurance taxes by treating employees as independent contractors rather than employees. As a result, misclassified workers do not receive the protections and benefits to which they are entitled, and in addition they must pay the social security and Medicare taxes normally paid by the employer.

Meanwhile, employers have incentive to misclassify their workers to reduce the costs of workers' compensation insurance, state and federal unemployment taxes, and the employer's share of the social security and Medicare taxes. This creates an unfair business advantage, allowing businesses that misclassify to avoid these costs and undercut employers that do abide by the law.

In recent years, the Vermont General Assembly has 1) increased both the amounts and types of penalties that may be assessed against employers that misclassify their workers; 2) enacted new requirements for state contracting procedures to assure that they will minimize misclassification of workers as independent contractors; and 3) authorized increased resources to investigate worker misclassification.

On September 8, 2012, Governor Shumlin signed Executive Order No. 08-12, establishing the Governor's Task Force on Employee Misclassification. This task force was charged with combating worker misclassification in Vermont and reporting its findings to the Governor on January 15 of each year.

Because of the emphasis placed on deterring worker misclassification by the General Assembly and the Governor, we decided to 1) assess the actions that the Vermont Department of Labor (VDOL) has taken to detect and address possible worker misclassification, including the extent that the VDOL collaborates internally as well as externally with other state and federal

[1] Worker misclassification is also referred to as employee misclassification. While we have chosen to use the term worker misclassification for purposes of consistency in the report, there will be times that the term employee misclassification is used, such as when using the actual title of a specific task force.

agencies, and 2) assess whether the Department of Buildings and General Services (BGS) and the Agency of Transportation (AOT) have implemented required competitive bidding and contract oversight procedures designed to minimize worker misclassification by companies that contract with the State.

Appendix I contains the detail on our scope and methodology. Appendix II contains a list of abbreviations used in this report.

Highlights: Report of the Vermont State Auditor

Worker Misclassification: Action Needed to Better Detect and Prevent Worker Misclassification

(August 2015, Rpt. No. 15-07)

Why We Did this Audit	Because the Governor and the General Assembly have placed emphasis on deterring worker misclassification, the State Auditor's Office (SAO) decided to review state programs that have a role in addressing worker misclassification. Specifically, we decided to 1) assess the actions that VDOL has taken to detect and address possible worker misclassification, including the extent that the VDOL collaborates internally as well as externally with other state and federal agencies, and 2) assess whether BGS and AOT have implemented required competitive bidding and contract oversight procedures designed to minimize worker misclassification by companies that contract with the State. This report's first objective is organized by three major groupings pertaining to 1) VDOL, 2) VDOL's unemployment insurance (UI) program, and 3) VDOL's workers' compensation (WC) program.
Objective 1 Finding - VDOL	VDOL has addressed some of the actions in the charge to the task force on worker misclassification established by executive order in 2012, including developing an outreach campaign. However, the department did not convene task force meetings from June 2013 to July 2015 and there was limited information regarding what, if any, actions resulted from a task force meeting in 2012 and one in 2013. It's not clear why VDOL did not schedule any task force meetings for two years, as additional work remains, such as evaluating existing misclassification enforcement by agencies and departments. Further, the executive order specified that agencies and departments should engage in timely enforcement, but VDOL has failed to enforce unemployment insurance penalties for worker misclassification, which have been required by statute since 2010, and some workers' compensation penalties as well. VDOL indicated that they have not enforced all misclassification penalties because the department has not established the rules[2] for UI and WC to enforce these penalties. Massachusetts and New York have convened tasks forces to address worker misclassification and have reported better agency cooperation, more efficient use of resources, and significant monetary recoveries. Scheduling additional meetings to address the other required task force actions may improve prevention and detection of worker misclassification.

[2] A rule is an agency statement of general applicability which implements, interprets, or prescribes law or policy.

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(August 2015, Rpt. No. 15-07)

Objective 1 Finding – UI	UI field audits identify worker misclassification, but improvements to audit selection could increase detection. Federal guidance encourages states to utilize audit selection criteria that suggest noncompliance (i.e., targeted selection criteria), but UI selected 71 percent of its 2014 audits on a random basis. According to the U.S. Department of Labor Office of the Inspector General (U.S. DOL OIG),[3] those states that used targeted audit selection criteria rather than simply selecting employers at random were the most effective at detecting noncompliance with UI tax laws. UI and SAO identified errors in the field audit performance data reported to the U.S. DOL for calendar year 2014, including errors in number of audits conducted and number of misclassified employees. These errors occurred for a variety of reasons, including data entry errors, lack of supervisory verification of data input, and lack of documented procedures for compiling field audit data for the performance reports. The extent of the impact of all of these errors has not been determined by UI, but UI has contacted the U.S. DOL to request how to report the errors once the full impact has been determined. Without reliable data UI cannot evaluate the performance of the field audit activity. Further, management relied on inaccurate performance data to make decisions about the field audit program, increasing the risk that incorrect decisions were made.
Objective 1 Finding – WC	WC records show 30 investigations first started in 2011 have not been completed, and 134 cases categorized as active are assigned to investigators no longer employed by VDOL. These problems occurred because WC has not developed protocols for case reassignment and case management practices, such as standards for maximum caseloads per investigator and timely case completion. Additionally, the primary database used by WC to record summary case investigation data has limited functionality, contains data anomalies and duplicate case information, and is missing data for a substantial number of records. The combination of these circumstances has hampered management's ability to monitor investigation status and to ensure that all investigations are completed and, when warranted, penalties enforced. Further, management's ability to measure the program's effectiveness is limited.

[3] U.S. Department of Labor- Office of the Inspector General Report No. 03-99-006-03-315, *Adopting Best Practices Can Improve Identification of Noncompliant Employers for State UI Field Audits*.

Highlights: Report of the Vermont State Auditor

Worker Misclassification: Action Needed to Better Detect and Prevent Worker Misclassification

(August 2015, Rpt. No. 15-07)

Objective 2 Finding	As required by Act 54 (2009) Section 32(a), BGS and AOT implemented some procedures to minimize instances of worker misclassification on state projects with costs greater than $250,000. These procedures included use of 1) a self-reporting form for contractors to identify any worker classification violations within the past 12 months and 2) a subcontractor reporting form for identifying subcontractors to be used on a project and their workers' compensation insurance carriers. However, neither BGS nor AOT validated the information provided by contractors. The state's internal control guide for managers identifies verification as a common control activity for determining the completeness, accuracy, and validity of information. AOT and BGS indicated their belief that VDOL was responsible for providing information to them about entities that have had previous violations. In particular, BGS indicated that a 2012 Memorandum of Understanding (MOU) among VDOL, Department of Financial Regulation (DFR), AOT, and BGS only requires BGS to collect the forms. However, the MOU does not mention these forms. BGS has concerns about its authority to request VDOL information and AOT stated concern about the efficiency of accessing VDOL information. Since the 2012 MOU did not address validating information provided in the forms, and AOT and BGS believe it is VDOL's responsibility to provide this information to them, clarification and agreement among VDOL, DFR, AOT, and BGS regarding this is warranted. In addition, BGS and AOT did not implement procedures for all projects greater than $250,000. For example, BGS obtained the contractor self-reporting form only for competitively bid projects, explaining that the self-reporting form is generally obtained during the competitive bidding process and those projects that aren't competitively bid do not follow the bidding processes. AOT did not obtain either form for personal services contracts because procedures for non-construction projects had not been updated to incorporate the Act 54 revisions and forms. Regardless, the information collected via these forms is required for all projects greater than $250,000. Failing to obtain the required information and lacking a process to verify the information that is obtained, the State is at risk of contracting with vendors that have violated employment law and is missing opportunities to prevent instances of worker misclassification on state projects.

Highlights: Report of the Vermont State Auditor

Worker Misclassification: Action Needed to Better Detect and Prevent Worker Misclassification

(August 2015, Rpt. No. 15-07)

What We Recommend	We make various recommendations to VDOL, including: 1) schedule Misclassification Task Force meetings and ensure that all of the required actions are addressed, 2) increase the use of targeted selection criteria for UI audits, 3) develop procedures for better data reliability and case management, and 4) develop the administrative rules necessary to assess all misclassification penalties authorized by the General Assembly. We make several recommendations to BGS and AOT, primarily to 1) amend the self-reporting form to require bidders to provide all information regarding any of the contractor's past violations, convictions, or suspensions related to employee misclassification, 2) consistently apply their procedures to all types of contracts, and 3) work with VDOL and DFR to validate information provided by the contractor as it relates to worker classification violations and subcontractor's workers' compensation insurance coverage.

Background

Worker Misclassification

In general, worker misclassification occurs when an employer improperly classifies a worker as an independent contractor instead of an employee.[4] According to the Workers' Compensation Employee Classification, Coding and Fraud Enforcement Task Force, employment status creates very different obligations and rights under workers' compensation and unemployment insurance law than does the status of independent contractor.[5] The task force noted that workers' compensation and unemployment insurance programs, occupational safety and health laws, and labor standards generally apply to employees but may not apply to independent contractors. In addition, employers are legally required to pay certain payroll taxes and withhold state and federal income taxes from wages paid to employees, but need not do so when paying independent contractors. (See Appendix III for additional information on the effect of misclassification on employees and the financial advantages to employers that misclassify employees).

Misclassification of workers is a violation of state law. Several state agencies have a role in addressing misclassification. However, two programs administered by VDOL, Unemployment Insurance (UI)[6] and Workers' Compensation (WC), have significant responsibility for detecting and addressing misclassification and have statutory authority to issue administrative penalties to employers who misclassify workers. In addition, the Department of Buildings and General Services (BGS) and the Agency of Transportation (AOT) were required to develop new state contracting procedures to minimize the incidents of misclassification of workers as independent contractors.

[4] An employer is a legal entity that is required by law to furnish unemployment insurance coverage and/or workers' compensation insurance to one or more individuals.

[5] Final Report of the Workers' Compensation Employee Classification, Coding and Fraud Enforcement Task Force, dated November 16, 2009.

[6] Unemployment insurance is also referred to as unemployment compensation. For the purpose of consistency within our report, we have chosen to utilize only the term unemployment insurance.

Unemployment Insurance Program

Vermont's unemployment insurance law was enacted in 1936 and was fully operative by 1938. The primary objective of unemployment insurance is to alleviate the hardship of lost wages for employees who become involuntarily unemployed and who are willing to accept suitable jobs that are available. Generally for UI, an employee is defined as someone who is compensated for work by an employer unless the employer can demonstrate that A) the individual is free from control or direction over the performance of their services both in the contract and in fact, B) the services are provided outside the usual course of business or the services are outside of all the places of business of the enterprise for which the service is performed, and C) the individual is customarily engaged in an independently established trade or business.[7]

The unemployment insurance program is a federal-state partnership and is managed by Vermont with oversight from the United States Department of Labor (U.S. DOL) Employment and Training Administration. VDOL administers the unemployment insurance program and is responsible for assigning employer tax rates.

Costs of the UI program are borne entirely by the employers. Employers pay two taxes for unemployment insurance. One tax is paid to VDOL and is used solely for the payment of benefits. The second tax is paid to the U.S. Treasury and is used to pay for the cost of administering the program, to make loans to replenish state trust funds, and to pay for the federal share of the cost of any extended benefits program that may be in effect.

VDOL has a UI field audit[8] section that consists of ten UI field auditors and one audit chief. Field auditors perform a number of functions related to the UI program. These functions include examining employment records for the purpose of establishing an employer's unemployment and health care contribution liability, conducting compliance audits, collecting unreturned unemployment insurance forms, and investigating allegations of fraudulent or inappropriate unemployment claims. The compliance audits verify the status of individuals as employees and the designation of payments as wages to insure proper payment of unemployment taxes. 21 V.S.A. §1314a provides the authority for VDOL to impose penalties on those employers that have been found to misclassify their employees. Appendix IV of this report

[7] UI refers to this as the "ABC" test in its Employer Information Manual.

[8] A field audit is a systematic examination of a subject employer's books and records, using generally accepted auditing standards and procedures, covering a specified period of time during which the employer is liable for reporting under the law.

contains the details on penalties VDOL may assess against those employers that do not properly classify their employees in accordance with UI's definition of employee.

Workers' Compensation Program

Vermont law requires employers to have workers' compensation coverage for their employees. Workers' compensation is a statutorily mandated no-fault insurance system that provides various benefits to an employee who suffers a work-related injury or occupational disease. The benefits include wage replacement, medical treatment, and vocational rehabilitation. Workers' compensation benefits are limited by law, but the program assures that injured or sick employees receive basic remedies for work injuries while avoiding costly negligence suits. Employers purchase this insurance policy from insurance carriers who determine the employers' premiums. VDOL does not set the rates for these premiums. Generally, under Workers' Compensation rules, an employee is defined as someone who is compensated for work by an employer unless the employer can demonstrate that the hired person performed a job that was not similar or in connection with the employer's business and the employer has no direction or control over the hired person's work.

The primary role of VDOL's Workers' Compensation Program is to adjudicate disputes between injured employees and the employer's insurance company. The program is also charged with enforcing Vermont's workers' compensation laws, including penalizing employees who commit claimant fraud and penalizing employers who fail to purchase workers' compensation insurance.

The Workers' Compensation Administration Fund was created to provide the funds necessary to administer the program. The fund consists of contributions from employers, based on the Workers' Compensation Assessment Rate. Beginning July 1, 2015, the rate for employers is 1.45 percent of the employers' premiums for workers' compensation insurance and 1 percent of workers' compensation losses during the preceding calendar year for those employers that self-insure.

The division's Workers' Compensation Investigations' Program consists of four investigators and one chief investigator. These investigators pursue fraud and misclassification, issue stop-work orders against employers that do not have workers' compensation insurance coverage for their employees, and make administrative penalty recommendations to enforce compliance with the law. 21 V.S.A. Chapter 9 provides the authority for VDOL to impose penalties on those employers that have been found to misclassify their employees. Appendix IV of this report contains the details on penalties

VDOL may assess against those employers that do not properly classify their employees in accordance with WC's definition of employee.

Required Procedures for State Contracting

BGS and AOT administer various contracts for construction and non-construction services. Among the various types of contracts are:

- Construction – A construction contract involves construction, improvement, repair and maintenance of state buildings, highways, bridges, and airports. Examples are asbestos abatement at the Waterbury State office complex, bridge repair, or parking lot improvements at the Chittenden Regional Correctional Facility.

- Personal Service – BGS's personal services contracts involve contracting for various services such as software development. AOT's personal service contracts are primarily focused on retainer-style contracts that engage contractors for an unknown number of unspecified projects requiring a certain discipline, such as consulting engineering or construction inspection services. The projects stipulate a maximum limiting amount.

- Maintenance Rental Agreement – Maintenance rental agreements are annual contracts to accomplish scheduled roadway and bridge preventive maintenance, preservation and repair projects. The instrument is a non-determinate location/non-determinate quantity type contract in which contractors provide rates for various locations throughout the state where they are interested in working. Once a work project is developed, contractor selection is then based on the lowest rates, experience, and availability of contractors for the particular location.

- Aviation Contract – Aviation contracts may be construction or personal service contracts that are administered through the aviation division. They may be awarded through AOT's contract administration for construction projects, through the use of a consultant if specialized knowledge is required, or by using the Federal Aviation Administration if a federal grant is obtained for the project.

In 2009 the legislature enacted Act 54 Section 32(a) which required the Agency of Administration (AoA)—who identified BGS as its designee—and AOT to establish procedures to assure that state contracting procedures and contracts were designed to minimize the incidents of misclassification by state contractors on projects with a total project cost of more than $250,000. The Act required the contractors to provide, at a minimum, all the following:

1) Detailed information to be included with the project bid on any violations by the contractor related to classification of employees.

2) A list of subcontractors[9] on the job and by whom those subcontractors are insured for workers' compensation purposes.

3) For construction and transportation projects over $250,000, a payroll process by which during every pay period the contractor collects from the subcontractors or independent contractors a list of all workers who were on the jobsite during the pay period, the work performed by those workers on the jobsite, and a daily census of the jobsite.

In 2011, Act 50 required that, as a part of the payroll process, the contractor would confirm that its subcontractors have the appropriate workers' compensation coverage for all workers at the job site.

[9] "Subcontractor" also means entities hired by the subcontractor as their own subcontractors but does not include entities that provide supplies only and no labor to the overall contract or project.

Objective 1 VDOL: Some Steps Taken to Address Misclassification, but Programs Not Enforcing All Penalties

A 2012 executive order[10] required VDOL to lead a multi-agency task force charged with combating the practice of employee misclassification, and stated that Vermont's laws regarding misclassification must be aggressively enforced in a coordinated, timely and consistent manner by all agencies and departments. The task force met three times subsequent to the issuance of the executive order, but the third meeting held July 15, 2015, was the first meeting in two years. Information regarding outcomes of meetings held in 2012 and 2013 was limited and required annual reports of findings were not provided to the Governor. While the task force did not meet for two years, VDOL took actions relative to its own operations that addressed some of the task force objectives, including development of an outreach campaign. It's not clear why the task force did not meet in the two years prior to July 2015, but additional required work remains, such as examining and evaluating existing misclassification enforcement by agencies and departments. Massachusetts and New York have convened tasks forces to address worker misclassification and have reported better agency cooperation, more efficient use of resources, and significant monetary recoveries. VDOL indicated that it has taken steps to schedule two additional meetings in 2015.

The executive order also specified that agencies and departments should engage in timely enforcement, but VDOL has failed to enforce unemployment insurance penalties for worker misclassification, which have been statutorily required since 2010, and some workers' compensation penalties as well. VDOL indicated that they have not enforced all misclassification penalties because the department has not established necessary rules for UI and WC to enforce these penalties. Scheduling additional meetings to address the other required task force actions may improve prevention and detection of worker misclassification.

VDOL Took Some Steps to Address Actions Required by Executive Order, but No Misclassification Task Force Meetings Occurred from 2013 to 2015

One task force charge was to develop and implement a campaign to educate and inform employers, workers, and the general public about misclassification. To meet this objective, UI plans to develop and implement

[10] Executive Order No. 08-12, [Governor's Task Force on Employee Misclassification, signed September 8, 2012].

a media campaign for education and outreach regarding worker misclassification. The purpose of the campaign is to inform and educate Vermont employers and the workforce on adverse impacts and potential sanctions for illegal actions relating to misclassification. It also has the goal of helping with prevention, detection and reporting of misclassification. The department received federal funding for education and outreach and recently contracted with a vendor to move ahead with the campaign.

The task force is comprised of nine members: the commissioners of VDOL, Financial Regulation, BGS, Tax, and Liquor Control, and the secretaries of the agencies of Administration, Transportation, Commerce, and Human Services. They were charged with a number of tasks, including identifying barriers to information sharing and recommending statutory changes when necessary. Some instances of information sharing were in place prior to the issuance of the executive order and others have developed subsequently. For example, UI and the Department of Taxes (DOT) have had a memorandum of understanding (MOU) in place since 2007 that allows for information to be shared between these departments. Specifically, two data files are shared, one that shows businesses registered at DOT but not at VDOL, and another that identifies wage reporting discrepancies between what was reported to VDOL and DOT.

Coordination also occurred with the Department of Liquor Control (DLC) and the Secretary of State's Office (SOS). Beginning in 2011, on a monthly basis, DLC sends a list of newly licensed businesses to the WC division, which reviews the list, confirms that workers' compensation insurance has been obtained, and if not, opens an investigation. In addition, since 2011 VDOL has been involved in the development of BIZ Portal with SOS and DOT. The portal is designed to offer a one-stop sign-up process integrating the requirements of multiple agencies in a single application process. For example, new businesses may use BIZ Portal to register with the SOS, DOT, and VDOL, if applicable. According to the Director of UI, phase II of the development of BIZ Portal will provide an alert notice to VDOL if an employer registers with SOS and DOT but has not completed the process with VDOL in the portal. According to the Director of the WC division, VDOL also coordinates with the Secretary of State's Office to ensure that amusement ride operators have WC insurance.

In addition to coordinating and sharing information with state entities, VDOL has an MOU with the Internal Revenue Service (IRS) to facilitate information sharing and other collaboration. Through this MOU, UI receives 1099 data and uses this information to help select businesses to audit.

The task force was also charged with working collaboratively with business and labor. In 2011, VDOL coordinated a work group, comprised of

representatives of labor, business, VDOL staff, and legislators for the purpose of establishing a common definition of an independent contractor for workers' compensation and unemployment statutes. The work group agreed to a process that would allow an individual to apply for certification as an independent contractor by a panel of peers, with approval by the commissioner of VDOL. House bill 762 was introduced in 2012 and contained a process for sole contractors to apply to VDOL for authorization to operate independently and without the benefits of workers' compensation and unemployment insurance. This bill was passed by the House, but not the Senate. Legislation was introduced during the 2015 legislative session to establish a common definition of independent contractor (H.378) and to create an authorized sole contractor program under VDOL (H.335). Both bills were referred to the committee on Commerce and Economic Development, but no further action was taken.

The task force met in 2012 and 2013, but VDOL did not have evidence to demonstrate whether task force members or designees attended the meetings and had limited information regarding the outcomes of the 2012 and 2013 meetings. The task force was required to provide an annual report of findings to the Governor, but these reports were not produced. It's not clear why VDOL did not convene the task force for two years, but the department held a task force meeting July 15, 2015 and indicated it has plans to hold two additional meetings in 2015.

Actions required of the task force remain unaddressed, including 1) an examination and evaluation of existing misclassification enforcement by agencies and departments, and 2) a coordinated review of existing law and other methods to improve monitoring and enforcement of misclassification. According to the 2015 annual report of the New York (NY) task force,[11] coordinated enforcement and data sharing between agencies allowed for sharing of resources and made their work more efficient. In particular, the NY task force conducts enforcement sweeps, which involve a coordinated visit and inspection of a worksite by members of the task force.[12] All sweep cases that identified misclassification are referred to the NY Department of Taxation and Finance for assessment of state income tax owed. Further, the

[11] New York Department of Labor, Annual Report of the Joint Enforcement Task Force on Employee Misclassification.

[12] Sweep teams include members from the Department of Labor Unemployment Insurance and Labor Standards Division, Department of Labor's Office of Special Investigations, Workers Compensation Board Bureau of Compliance, Workers Compensation Board Office of the Fraud Inspector General. Sweeps involving public work construction projects and some private construction jobs include the Bureau of Public Works.

2014 annual report of Massachusetts' task force[13] states that agencies recovered about $20 million in wage restitution, state taxes, unemployment taxes, fines, and penalties as a result of the cooperative efforts of the task force and that this represented monies above and beyond what the member agencies collected through ordinary enforcement efforts. Based on these recent reports, a coordinated evaluation by the task force of existing misclassification enforcement, existing law, and other methods to improve monitoring and enforcement of misclassification could yield positive results for preventing and detecting worker misclassification. This could have the added benefit of increasing revenues.

VDOL UI and WC Programs Not Enforcing and Collecting All Penalties

UI has had authority to impose penalties, and in some cases debarment,[14] for worker misclassification violations since 2010. With regard to WC, new penalty provisions for worker misclassification violations, including debarment, were added to statute in 2007, 2009, 2010 and 2011.[15] However, neither program has enforced the debarment penalties nor has UI enforced monetary penalties.

According to a spreadsheet maintained by the UI Field Audit Chief, potential penalties of $263,335 were reported to employers in 2014, but not assessed.[16] In reviewing WC's monetary penalties for 2012 to 2014, we found that some penalties were imposed in 2012, but the department was unable to determine whether all 2012 penalties were collected and no penalties were assessed in 2013.[17] In 2014, WC issued 25 citations with $122,210 penalties assessed.

VDOL indicated that they have not enforced all misclassification penalties because the department has not established all of the necessary rules for UI and the WC rules have not been updated since 2001. In particular, VDOL believes that UI needs an appeals process for misclassification penalties and the debarment rules need to be more specific regarding the time period for debarment. WC does not have rules to assess compliance statement penalties

[13] Commonwealth of Massachusetts, Joint Enforcement Task Force 2014 Annual Report.

[14] Debarment is a prohibition from contracting with the State or any of its subdivisions for up to three years following the date the employer was found to have misclassified.

[15] Act 57 (2007), increased penalty amounts, Act 54 (2009), introduced debarment penalties, Act 142 (2010), changed statute to include debarment penalties and increased monetary penalties, and Act 50 (2011), clarified the monetary penalty amount that may be assessed against an employer for the first seven days the employer failed to secure WC insurance.

[16] SAO did not test the reliability of this data.

[17] Appendix IV contains administrative penalties that VDOL may assess against employers for misclassification violations under unemployment insurance and workers' compensation statutes.

or to debar employers that misclassify. The statutes requiring penalties and debarment under unemployment insurance law were effective in 2010 and the legislative changes made to the workers' compensation statutes occurred between 2007 and 2011. Since that time, VDOL has not addressed the gaps in the rules that it believes exist.

In 2014, VDOL initiated the process to update WC rule 45 (penalties) but did not meet the deadlines established for the rulemaking process. The administrative rulemaking process involves a series of filings, hearings, and review, with attendant deadlines. An agency has eight months from the date of initial filing with the Office of Secretary of State to adopt a rule, unless extended by the legislative committee that approves the rule. VDOL will need to start the process again and resubmit the rules proposal.

VDOL has not only failed to enforce all required penalties, the department does not know the collection status of $16,200 in workers' compensation penalty receivables for two penalty citations issued in 2012. The department lacks a consistent record-keeping process, and WC has not established a centralized method to account for citation penalty receivables. WC left it up to the individual staff attorney that was involved in the penalty citation process to determine how to track penalty citations and collections. This resulted in a lack of record history when staff attorneys left VDOL employment, and as a result, VDOL was not able to provide evidence that these penalties were collected.

The Department of Finance and Management's best practices for accounts receivable[18] include:

- Written procedures for all accounts receivable and collection activities, which address how bills shall be prepared, how the receivables shall be recorded, how payments shall be recorded, how adjustments to receivables shall be handled, and how account delinquencies shall be followed-up on.
- Billings that are generated and sent to customers at least monthly with payment terms indicated on the bill.

No written guidance has been established for workers' compensation citation penalty receivable accounting. The staff attorney, who was new to this position in 2014, established a Microsoft Excel® spreadsheet to track the actual payments received. However, this spreadsheet was not designed to

[18] Vermont Department of Finance and Management, *Internal Control - Best Practices #4, Accounts Receivable.*.

maintain detailed employer payment history (e.g., check date, check number, etc.), and billing statements have not been generated and sent to employers.

The State's accounting system, VISION, has an accounts receivable module and billing module which can produce billing statements and provide an accounting for the penalty receivables. The SAO spoke with the VDOL Finance Director, who plans to review the use of VISION as the accounting system to record and bill workers' compensation citation penalties with his staff and the WC staff.

Objective 1 UI: Changes to Audit Selection Criteria Could Increase Detection and Unreliable Performance Data Hampers Assessment of Impact

UI field audits[19] identify worker misclassification, but improvements could increase detection. For example, UI selected 71 percent of its 2014 audits on a random basis, despite a United States Department of Labor Office of the Inspector General (U.S. DOL OIG)[20] report that found those states that used targeted audit selection criteria were more effective at detecting noncompliance with unemployment insurance tax laws than states that selected employers at random.

The UI division also had difficulty measuring performance. UI identified errors in the field audit performance data reported to the U.S. DOL for calendar year 2014, and our office found additional errors in the number of misclassified workers reported. Errors identified by UI and SAO occurred for a variety of reasons, including data entry errors, lack of supervisory verification of data input, and lack of documented procedures for compiling field audit data for the performance reports. Lacking reliable performance data, UI does not know the impact its program has had on detecting misclassification, and management has relied on flawed performance data in its decision making about the field audit program which increases the risk that incorrect decisions were made.

[19] The U.S. DOL defines a field audit as a systematic examination of an employer's books and records, using generally accepted auditing standards and procedures covering a specific time during which the employer is liable for reporting under the law, or is found to be liable as a result of the audit.

[20] U.S. Department of Labor- Office of the Inspector General Report No. 03-99-006-03-315, *Adopting Best Practices Can Improve Identification of Noncompliant Employers for State UI Field Audits*.

Increased Use of Targeted Selection Could Improve Detection

UI relies primarily on a random selection process to determine which businesses to audit, with the exception of judgmentally selecting some employers based upon 1099 data that is provided to VDOL by the Internal Revenue Service (IRS). Federal guidance[21] encourages states to utilize audit selection criteria that indicate noncompliance (e.g., targeted selection criteria).

According to UI records, approximately 87 percent of 2013 field audits were based on a random selection methodology. The remaining 13 percent of the field audits in 2013 were targeted audits based upon 1099 data UI received from the IRS. In 2014, VDOL reported that they had begun to utilize federal 1099 data to increase the number of judgmentally selected audit assignments. According to UI records, about 29 percent of the 2014 field audits were assigned using 1099 data to perform targeted audits, while the remaining 71 percent of audits assigned were still based on a random selection methodology.

Federal guidance and UI's Field Audit Manual state that random field audits should account for at least 10 percent of the field audits assigned. Neither manual indicates that the random selection process should be the primary criteria for selecting field audits. In contrast, the U.S. DOL encourages states to maintain field audit selection criteria that target employers based upon a greater potential risk of noncompliance, such as high employee turnover, sudden growth or decrease in employment, type of industry, location (geography) of employers, prior reporting history, or results of prior audits.[22]

In fact, the U.S. DOL OIG found that the states with the top performing field audit programs were those states where management focused primarily on achieving the highest results possible per audit hour by designing ways to select employers for field audit that had the highest likelihood of noncompliance, rather than simply selecting employers at random.[23]

UI's own Field Audit Manual states that audits can be generated from sources such as an employer report showing obvious errors in reported wages, a filed unemployment claim that indicates possible missing or incorrect wage reporting, and substantiated tips or correspondence from other sources.

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[21] U.S. DOL's Employment Security Manual, *Appendix E, Field Audits*.

[22] U.S. DOL's Employment Security Manual, *Appendix E, Field Audits*.

[23] U.S. Department of Labor- Office of the Inspector General Report No. 03-99-006-03-315, Adopting Best Practices Can Improve Identification of Noncompliant Employers for State UI Field Audits.

The OIG findings and UI and U.S. DOL field audit selection guidance provide a basis for increased use of targeted audit selection techniques, which could result in improved detection of noncompliance and worker misclassification in field audits.

Unreliable Performance Data Hampers Assessment of Impact of UI Enforcement Program

Field audits are a significant enforcement tool for VDOL, but the data compiled on the number of field audits conducted and misclassified workers detected by field audits is unreliable. UI identified various errors in the field audit performance data reported to the U.S. DOL during calendar year 2014. Further, SAO identified that the number of misclassified workers reported to the U.S. DOL did not match misclassification information maintained by UI's field audit division. Errors identified by UI and SAO occurred for a variety of reasons, including data entry errors, lack of supervisory verification of data input, and lack of documented procedures for compiling field audit data for the performance reports. VDOL also found that the computer program query used to pull performance information counted the same audits in multiple quarters. The extent of the impact of all of these errors has not been determined. UI has informed the U.S. DOL that there were errors with the information they provided to the U.S. DOL for 2014, and UI has requested guidance on how to report the corrections.

In addition to errors in the data, UI did not count follow ups on complaints from the public or referrals from other state entities as field audits, even though the procedures used were the same as for field audits. As a result, the output of this work is not included in field audit performance data. Lacking reliable performance data, UI division cannot assess the impact its program has had on detecting misclassification. Further, management has relied on inaccurate performance data to make decisions about the field audit program, which increases the risk that improper decisions could be made. Reliable data is necessary for UI to evaluate the performance of their field audit activity and to determine whether they are meeting program objectives and federal performance standards.

Performance Data Reporting

The U.S. DOL has established performance measures to evaluate the effectiveness of a state's field audit activity. Quarterly, UI reports basic field audit information to the U.S. DOL, such as the number of audits completed, the total wages audited by the state pre-audit and post-audit, and the number of misclassified employees identified during these audits. This information is submitted in the ETA 581 report. Both VDOL and the federal government utilize the information contained in this report for performance monitoring. U.S. DOL established a minimum level of achievement for field audits,

which is measured based upon the performance data reported via the ETA 581. In the FY2014 annual State Quality Service Plan provided to the U.S. DOL, VDOL reported revamping its audit selection strategies to focus on the effective audit measure criteria.

UI utilizes the CATS system[24] to compile field audit performance data and uses this data to monitor performance results and capture information for federal reporting. Auditors mail their audit files to the central office, and information contained in the files is then manually entered into the CATS system using the CATS 53 screen. Figure 1 shows the various fields in the CATS 53 screen that are used to input field audit performance data.[25]

Figure 1: CATS 53 Screen

```
53                FIELD ASSIGNMENT COMPLETION                        MM/DD/Y
ASSIGN NO: XX XXXXX  EMP NO: XXX XXXX  XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  HH.MM.S
                                       XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
      COMPLETION DATE: XX XX XX

                     AUDIT RESULTS

           FIRST QTR: X XX
            LAST QTR: X XX
       # QTRS AUDITED: XX
         AUDIT HOURS: XXXXX                          ESTB DATE: XX/XX/XX
       EMPLOYER SIZE: X                              CHNG DATE: XX/XX/XX

              YR: XX            : XX              : XX              : XX
  GROSS PAYROLL: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
TOT WAGE UNDER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
TAX WAGE UNDER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
 CONTRIB UNDER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
 TOT WAGE OVER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
 TAX WAGE OVER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
  CONTRIB OVER: XXXXXXXXXXXX  : XXXXXXXXXXXX   : XXXXXXXXXXXX  : XXXXXXXXXXXX
# NEW EMPLOYEE: XXXXX          : XXXXX          : XXXXX          : XXXXX
```

Currently the number of identified misclassified employees[26] is entered into the system based upon a C35 report[27] and audit notes. Payroll data is manually entered into CATS based upon a separate audit report contained in the audit files, called the audit 53 report.

[24] CATS is the Employer Contribution Tax System.

[25] This screen is not used to establish employer liabilities. The information on this screen is for field audit performance measurement only.

[26] The "# NEW EMPLOYEE" fields are the fields in which the central office records the number of employees who were found to be misclassified during the field audit.

[27] The C35 report is a wage record analysis used to show any wage discrepancies and is not limited to only displaying misclassified employees.

Misclassification Errors

UI reported to the U.S. DOL that field audits completed in 2014 identified 1,553 misclassified employees. However, the misclassification data maintained by the UI Chief Field Auditor shows 1,339 misclassified employees identified in audits completed during calendar year 2014.[28]

The number of misclassified workers is clearly stated on two reports utilized by field auditors, a field audit questionnaire and a separate misclassification report, which only reports on misclassified workers. Both are included in the audit file that is mailed to the central office. In addition, the auditors maintain a spreadsheet to record the total number of misclassified workers identified during each assignment, which is provided to the UI Chief Field Auditor on a quarterly basis.

However, the central office does not utilize any of these audit records to input the number of misclassified employees into CATS. Rather, the central office uses the C35 report in the audit files that also includes employees who were not misclassified but were found to have wage discrepancies between the employer's payroll records and the wage records the State received from the employer. Therefore, there is a risk that employees that were not actually misclassified were included in the misclassification count.

For example, the SAO reviewed an audit record that covered two years and found that the UI auditor identified two workers who were misclassified in both years. The UI auditor also identified other employees whose wages were underreported each year in that audit record. The central office input the number of misclassified workers into their system, using the C35 report that included both the misclassified workers and the workers with underreported wages. Therefore, instead of recording two misclassified workers, the central office recorded four misclassified workers for the audit. Additionally, because the audit covered two years, the central office input four misclassified workers each year. The report run by UI to identify the number of misclassified workers found during field audits totals the number of misclassified workers entered for each year.[29] Therefore, while this field audit identified only two misclassified workers, UI reported eight misclassified workers in their report to the U.S. DOL for this audit.

[28] The SAO did not perform procedures to validate the accuracy of this number. However, the SAO did remove duplicate information contained in the original spreadsheets.

[29] The number of misclassified workers reported in the CATS 53 screen is only for those that are identified during field audits. UI may identify misclassified workers during other assignments but because they are not field audits that information is not input into the CATS 53 screen.

As shown in Figure 1, the CATS screen does not have a single field to record the total number of misclassified employees identified during a field audit. Instead, CATS has fields to record the number of misclassified workers (# NEW EMPLOYEE field) identified each calendar year audited.

In another example, the SAO found an audit that identified a total of seven misclassified workers over a four-year period. Some workers were misclassified over multiple years while others were misclassified for a single year. When the central office input the number of misclassified workers found for each calendar year, they input seven misclassified workers for year one, seven for year two, and did not enter anything for year three or four. Therefore, this audit would have been erroneously reported to the U.S. DOL as having identified 14 misclassified instead of the actual seven misclassified workers identified.

UI has not documented procedures on how to enter the data into the CATS 53 screen and never established documented procedures for ongoing supervisory monitoring of the accuracy of data entry.

Wage Data Input Errors

As a result of a data entry review requested by the Director of UI during the course of our audit, UI identified 233 discrepancies between payroll data in CATS and the audit files for 59 field audits conducted in 2014. Table 1 summarizes what UI reported to the U.S. DOL in 2014 and the net changes UI made to various CATS 53 fields after discovering the data input errors.

Table 1: Data Entry Errors Identified by UI[30]

CATS 53 Field	Total Reported to the U.S. DOL on ETA 581	Net Changes Made By UI	Net Changes as a Percent of Total (Changes/Originally Reported)
Gross Payroll	$598,539,360	$6,933,595	1%
Total Wages Underreported	$10,670,260	$665,114	6%
Taxable Wages Underreported	$8,633,306	$1,264,741	15%
Contributions Underreported	$513,194	$40,786	8%
Total Wages Over Reported	$487,848	$101,822	21%
Taxable Wages Over Reported	$512,277	$1,009,886	197%
Contributions Over Reported	$17,099	$22,267	130%

According to UI, these errors were a result of manual data entry errors where the information input into the CATS 53 screen did not match the information in the audit 53 reports (source record for wage data in the audit file). Auditors mail in audit 53 reports that are used by the central office to input wage information into the CATS 53 screen. UI acknowledged that they did not have documented procedures on how to enter the data or a process in place to adequately monitor the manual data input, including a lack of supervisory review. According to the Employer Service Chief, she will perform supervisory reviews in the future, where she will compare the data entered in the CATS 53 screen to the data reported on the audit 53 reports.

Discrepancies between the audit files and data entered into the CATS system also occurred when the audit 53 report did not reflect the final conclusion of the audit. For example, field auditors sometimes make manual adjustments or complete supplemental schedules, and these changes were not always reflected in the audit 53 report. It appears the data entry process designed by UI did not anticipate that final audit results would be documented outside the audit 53 report. Further, UI has not established procedures to ensure that the

[30] Errors within individual audit files may have been either an understatement or overstatement of what should have been reported to the U.S. DOL. Overall the net effect for all errors in all categories was an increase in the amount that should have been reported to the U.S. DOL for that category.

audit 53 report reflects the actual final audit results. While the audit 53 report does not affect employer's liability, it does affect the reliability of performance data that is reported to the U.S. DOL and used by management to monitor the performance of the program.

Errors from Double Counting Audits

VDOL identified 19 records from 2013 audit assignments and at least 5 audit assignments from 2014 that were likely reported on more than one ETA 581 report, which would erroneously inflate performance results. Audits were being double counted in more than one ETA 581 because the extract for the report was programmed to pull data using a date field that changed anytime a change was made to the audit record in the CATS 53 screen. UI program management believed that the extract was based upon the audit completion date, which remains the same despite changes to audit records in CATS, so they were unaware of the problem until it was uncovered in the course of this audit. There may have been other audit assignments in 2014 reported on more than one ETA 581 report. However, every time an audit record is changed the field is overwritten and an audit trail is not maintained, so VDOL could not determine whether other assignments had been reported on multiple ETA 581 reports. VDOL Information Technology (IT) reported that they have written a code that will utilize the audit completion date to pull data for future ETA 581 reporting purposes.

According to the Director of IT, the IT division has created a program that captures the assignment numbers of each audit included in an ETA 581 report. This will allow VDOL to perform queries in the future to determine if an audit assignment was included in more than one ETA 581 report. Additionally, if an audit needs to have a correction or change made to it, the new program is intended to allow VDOL to accurately identify which ETA 581 report will require an amendment.

The process of loading audit results into the CATS system is highly manual. Manual processes are susceptible to error and this risk has been heightened by a lack of documented procedures, inconsistent documentation of results in the audit files, and a lack of supervisory review. UI is part of a multistate project consortium[31] established to procure a more accurate and fully integrated unemployment insurance tax and benefit system. The consortium has issued an RFP for a system that includes a module for agency staff to conduct employer audits. The RFP calls for the new system to be installed and in production in each of the consortium states no later than March 31, 2019. Therefore, changes are still needed in the near term in order to prevent

[31] The other member states in this consortium are Maryland and West Virginia.

further duplication and inaccuracies in the audit results reported to management and the federal government.

Assignments Not Counted as Audits for Federal Reporting

The Employer Security Manual, a federal guide for the UI program, establishes certain criteria for work to be considered an audit.[32] According to the UI management, assignments resulting from complaints and referrals have not been reported as field audits by UI, even if the work involved the same steps as an audit. For example, the SAO identified one assignment where UI audited two years of an employer's payroll, identified nine misclassified employees, and assessed unemployment taxes and interest against the employer. However, because UI does not categorize assignments resulting from complaints or referrals as field audits, this work was not considered an audit by the UI program and was not captured in field audit performance data. As a result, UI has possibly underreported their audit results by excluding these results.

Objective 1 WC: WC Has Limited Ability to Measure Results

According to WC records, 30 investigation cases started in 2011 have not been completed and 134 cases categorized as active are assigned to investigators no longer employed by VDOL.[33] We also found that some cases were closed due to the age of the investigations. The lack of follow through on these cases occurred because WC has not developed protocols for case reassignment and case management practices, such as standards for maximum caseloads per investigator and timely case completion. Additionally, WC uses two systems to record summary investigation case data, and the primary database has limited functionality, contains data anomalies and duplicate case information, and is missing data for a substantial number of records. The combination of these factors has hampered management's ability to monitor investigation status and ensure that all investigations are completed. Further, management's ability to measure the program's effectiveness is limited.

[32] See Appendix V for US DOL minimum requirements for field audits.

[33] We cite statistics as of January 23, 2015 from this system, but as reported elsewhere, we have concerns about the reliability of this data.

No Standards for Maximum Caseload, Timely Completion, Case Reassignment, and Prioritization

At the time of our audit, the WC Investigations' Program had only one workers' compensation investigator, along with the WC Investigations' Program Chief, performing investigations. The WC investigation database showed 73 investigations assigned to this single investigator.[34] Some of these investigations date back to the beginning of 2011. These case records had no data in the Date Investigation Complete field,[35] the Cited field,[36] or the File Closed field,[37] so it appeared all were ongoing cases. In addition, the investigator had four other cases assigned in the CATS database, previously used to record investigation case data, which had not been completed nor transferred into the WC investigation database currently used by VDOL. In addition to the 77 investigations assigned to the one investigator, there are 134 investigations categorized as active assigned to investigators no longer employed by VDOL.

The Director of the Workers' Compensation and Safety Division indicated that follow-up on complaints and referrals is prioritized by risk to the uninsured employee (e.g., a roofer has a higher risk of injury than an accountant). However, SAO identified five open investigation records[38] in the WC investigations database that contained references to an injured worker and the cases are assigned to investigators that no longer work for VDOL.

In addition, data in the WC investigations database show five cases assigned to former investigators have stop work orders (SWO)[39] that are still active.

[34] These 73 cases include both claimant fraud and employer liability investigations. WC claimant fraud is outside the scope of this audit. The SAO only counted cases assigned to this investigator since 2011.

[35] The Date Investigation Complete field records the date that the investigator completes their casework and requests a review of their findings.

[36] The Cited field is used to record whether an employer has been cited after the investigation is completed.

[37] The File Closed field is used to record the date that the entire case file was closed.

[38] Two of these investigations involve two separate employers but were the result of the same individual's injury.

[39] These are orders by the Commissioner of VDOL to stop work until the business provides evidence that workers' compensation insurance was obtained.

Since these cases are assigned to former investigators, it appears there is no active monitoring of the status of these cases.[40]

WC has closed at least five cases due to the age of the investigations. However, according to records, 30 investigation cases started in 2011 have not been completed. The Director of the Workers' Compensation and Safety Division reported that WC plans to close all of the cases in the WC investigation database that have been active for more than three years. During this process, they will review the insurance status of each employer. If the employer does not have workers' compensation insurance, a new investigation will be opened to determine whether that employer should currently be carrying workers' compensation insurance.

These issues may have resulted from WC's failure to establish standards for the number of misclassification cases investigators are expected to conduct, the timeframe for completion of these cases, and how cases will be re-assigned due to staff changes. In addition, WC lacks a written protocol for case prioritization, and the WC investigations database does not contain a field to record prioritization. Therefore, the database cannot generate any kind of report pertaining to case priority.

OIG standards[41] for investigative organizations indicate that all investigations should be conducted in a timely manner, especially given the impact investigations have on the lives of individuals and activities of organizations. The OIG also states that case assignments should be based on resource considerations, geographical dispersion, level of experience of personnel, and current workloads. According to the OIG, investigative organizations should establish written investigative policies and procedures via a handbook, manual, directives, or similar mechanisms that are revised regularly.

Without these standards, there is a risk that investigators may have more cases assigned than they can realistically perform in a timely fashion, causing lengthier investigations and introducing the risk that cases won't be completed. Without a mechanism to convey case priority and monitor high priority cases, risk is increased that investigation cases that WC judges to have a higher priority will not be addressed in a timely fashion.

[40] Due to the unreliability of the WC investigation database, it is possible that these SWOs have been rescinded but were never recorded as rescinded.

[41] Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Investigations*, November 15, 2011.

Multiple Record-Keeping Systems

According to the WC Investigations' Program Chief, her primary source for case information is the WC investigations database, an Access® database.[42] However, some cases are not in the WC database because from July 2013 to March 2014 WC utilized the Unemployment Insurance program's CATS system to record investigation information. During that time, WC stopped recording most of their case information in the WC investigations database. Based on records in the WC investigations database and the CATS system, there are 225 active investigation cases. Of the 225 cases, 24 are in CATS. According to the WC Chief, not all active cases were transferred to the WC database because of limited resources to perform the administrative work necessary to transfer all the case data. Maintaining case data in multiple systems makes it more difficult for WC to monitor the status of all its cases and increases the risk that some investigations will not be completed.

Generally, a single record-keeping system supports an easier and more efficient reporting of case history. Furthermore, the Law Enforcement Information Technology Standards Council (LEITSC)[43] notes that one of the general requirements for records management systems (RMS) is that they are a single database.

In addition to investigation case data residing in multiple systems, WC does not have a central repository to record all complaints and referrals. The results of preliminary research performed by the WC Investigations' Program Chief of complaints from the public and referrals from other government organizations may or may not be recorded in the WC investigations database. If preliminary research of a complaint or referral results in a case assigned to an investigator, the case is recorded in the WC investigations database. However, claims that are deemed unsubstantiated are recorded in a Microsoft Excel® spreadsheet.

The Council of the Inspectors General on Integrity and Efficiency (CIGIE) and three other professional organizations[44], all promote having systems that will log each complaint, track each complaint to resolution, and allow for retrieval of all complaint data.

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[42] Access® is a Microsoft® database application for Windows®.

[43] The U.S. Department of Justice funded the creation of the LEITSC in 2002 and continues to promote the RMS standards on its website.

[44] The American Institute of Certified Public Accountants (AICPA), the Institute of Internal Auditors (IIA), and the Association of Certified Fraud Examiners (ACFE).

Lacking a single system to track the status and disposition of complaints and referrals, management has no assurance that every complaint or referral is acted upon accordingly. VDOL's UI division has designed a system to log and track complaints and referrals that will soon become fully operational. Once it is fully operational, VDOL plans to integrate WC into this system. This should provide a central repository of all complaints and referrals received by WC.

Database Shortcomings

WC uses a Microsoft Access® database as their case management system for all workers' compensation investigations.[45] However, the WC Investigations database has limited reporting functionality, contains data anomalies and duplicates, and is missing data for a substantial number of records. It is therefore limited in its usefulness as a case management system and lacks reliable data.

Limited reporting functionality

The database consists of a single table that contains 65 data fields. All users, from the investigator to the staff attorney, have access to and utilize this database. In addition, they all use the same form[46] to input data into the single table. However, while WC created fields for users to enter data into, there is no field to report the number of misclassified workers identified during an investigation,[47] and WC never created on-going report capabilities for the various users. For example, the database has not been configured to provide information such as an aging schedule of outstanding cases, length of investigations, and status of key investigative activities, such as stop-work orders. As a result, although the database contains case history information for individual investigations, with the exception of the number of misclassified workers, the database is very limited in its ability to provide information to support case management or to measure the impact of enforcement.

The Council of the Inspectors General on Integrity and Efficiency state that management should have certain information available to perform its responsibilities, measure its accomplishments, and respond to requests by

[45] Workers' compensation investigations include fraudulent workers' compensation claims and worker misclassification investigations.

[46] A form is a Microsoft Access® database object that is used for entering, displaying, or editing the data in fields.

[47] The number of misclassified workers is documented in written citations, but this information is not collected and totaled in the WC investigation database.

appropriate external customers.[48] Without the basic case management reporting functionality, WC is unable to effectively monitor case status and program performance.

Duplicate Records

The WC investigations database also contained duplicate investigation records. The SAO identified 13 sets of duplicate case entries in the WC investigation database for cases received after January 1, 2011. One set of the duplicate records resulted in a misstatement of penalties assessed. The first case record had an incorrect penalty amount recorded in the database. The second case record was a duplicate of the first record, but contained the correct penalty amount. This instance of duplicate records resulted in the WC investigation database showing $5,900 more in assessed penalties in calendar year 2014 than what the WC Division originally assessed on the citations.

Duplicate records can be attributed to three main causes. First, the WC Investigations' Program had a decentralized system for entering case assignments into the investigation database. Because both investigators and supervisory personnel could enter assignments into the database, there was a possibility that multiple personnel were entering data for the same case. They have reportedly stopped this practice and now use a centralized system where the Program Chief inputs all assignments into the database. Second, WC lacks documented procedures on how to maintain the database, including procedures on how case reassignments should be performed. Sometimes a case was input into the system as new instead of documenting the reassignment in the original case record, which resulted in duplicate cases. Lastly, the database lacks sufficient data fields to record more than one stop-work order per case. Occasionally, an employer may receive a second SWO if they continue to work without proper insurance coverage after the first SWO was issued and rescinded. However, because there are no documented procedures on how to input data into the database and because the database lacks sufficient fields to record more than one SWO, the WC Investigations' Program was inputting a duplicate case in order to record the second SWO.

Duplicate cases create unreliable data in the database resulting in inaccurate management reports. Additionally, database users may have incomplete case information because they are unaware that information for a case is stored in two separate records.

[48] Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Investigations*, dated November 15, 2011.

Missing Data, Logic Anomalies and Errors

The workers' compensation investigations database is missing data in various record fields for a substantial number of records, which would be useful for management reporting and analysis. See Table 2 for records missing useful data.

Table 2: Records Missing Useful Data

Field	# of Records without Data After 1/1/2012	Purpose	Usefulness
Source	2	Records the source of the referral or complaint.	Allows for trend and pattern analysis and follow-up with the originator if necessary.
Date Assigned	1	Date that the investigation was assigned to the investigator.	Allows for monitoring of timely case completion.
Subject of Investigation	11	Employer, claimant, etc.	Allows for trend and pattern analysis.
NAICS (for investigations of employers only)	189	North American Industry Classification System (NAICS) used by federal and state agencies to classify businesses by industry for the purpose of collecting, analyzing, and publishing statistical data.	Allows for trend and pattern analysis.
FEIN (for investigations of employers only)	31	Federal Employer Identification Number (FEIN) is used by other state programs (e.g., DOT, UI, etc.).	Allows for efficient and accurate information sharing between state entities.
Cited (Y/N) (for closed cases only)	5	Field indicates whether the investigation resulted in a citation.	Allows for pattern and trend analysis.

As shown in Table 2, the WC Investigations' Program has not recorded employer NAICS codes for a considerable number of investigations, even though that information would allow management to analyze investigation data by industry type. Without this analysis, WC is unable to determine accurately if there are specific industries with higher incidence of misclassified workers.

Furthermore, the WC investigation database contains data and logic anomalies because it lacks validation rules that restrict or inform a user when they are trying to enter information that does not meet the criteria for that field. These anomalies also affect the reliability of the data and management's ability to produce accurate and complete reports.

For example, the "File Closed" field has no rules that restrict how a user is to enter data into that field. Some records in the database contain various date formats such as 1/1/15, 1/1/2015 or 1-1-15. Other records contain text such as "yes" or "paid in full" in this field. The various ways information can be input into this field does not allow for consistent querying of this field.

In addition to a lack of format restrictions, the database has no validation rules that restrict illogical entries. The first step in any investigation is the receipt of a lead or referral for an investigation. Therefore, the date assigned should never be prior to the date received. However, the WC investigation database does not contain any validation rules that restrict a user from entering a "Date Assigned" date that was prior to a "Date Received" date. The SAO identified ten case records that had a "Date Assigned" date that was prior to the "Date Received" date. Five of these records were for cases received after 1/1/2012.

The database also contained erroneous data because data terms were not defined. For example, according to the WC Director, the field "Cash Collected" is for recording the citation amount collected, but this field was used differently by two staff attorneys. One staff attorney used the field to enter the total cash collected from employers on penalties assessed. A second attorney used the field to record the final assessment amount issued against an employer after an appeals process, even if that amount was not actually collected.[49] This inconsistency resulted in VDOL reporting to the legislature in January 2015 that about $64,000 in penalties was collected,[50] when the actual amount collected was about $26,000.

VDOL management has indicated that a request-for-proposal has been developed for a new workers' compensation information system and that it will include a case management system. The State's IT strategic plan for 2015 to 2019 indicates that VDOL is in the initiating phase of a project to

[49] During the employer appeals process for some cases, the penalty assessment amounts may change from what was assessed on the original citation.

[50] *Workers Compensation Fraud Study and Report* memorandum to the House Committee on Commerce and Economic Development; Senate Economic Development, Housing and General Affairs, January 15, 2015

update the WC system. However, VDOL did not provide evidence that this project will include an investigations case management system.

Other Matters

During the course of the audit, SAO identified an internal control weakness unrelated to the objectives for this audit that warranted being brought to the attention of VDOL management. The UI auditors attempt to collect, and often receive, unemployment insurance tax and interest payments from the employers before sending their audit files to the central office. The U.S. DOL Employment Security Manual encourages payment collection by field auditors. While this may be efficient, it also presents a fraud risk.

UI auditors have the ability to calculate unemployment insurance tax and interest owed, and then collect the monies for that tax and interest all before the State has even processed the assessment into their UI employer database. Because the UI auditor is performing all of this prior to VDOL receiving the auditor's audit file, the auditor has both a custodial role and a recording role. These are incompatible roles from an internal control perspective, and by not segregating these duties, UI invites the opportunity for fraud to go undetected. For example, a UI auditor has the ability to create two separate audit records. A record can go to the central office that shows no audit finding and a second record could be provided to the employer that shows the employer owes an unemployment insurance tax liability. The auditor could then collect the employer's payment that the central office was never anticipating.

This risk has been increased as a result of UI's practice of including the calculation of misclassification penalties in the audit files, even though VDOL has stated that UI may not enforce these penalties without additional rules. Nevertheless, UI auditors have been informing employers about the potential that they could be assessed a penalty for misclassification.[51]

There is a risk of fraud associated with this practice because the UI auditors collect unemployment insurance tax payments and interest from employers. The statement provided to employers showing potential misclassification penalties could appear to an employer as an actual penalty statement, and a UI auditor could collect payment from an employer without knowledge of central office. UI has reported that they stopped the practice of showing

[51] It is unclear at this time whether the UI auditors inform the employers verbally only or if they provide the employers with a misclassification penalty statement. While the audit files contain a misclassification penalty report, UI reported that they know that at least some of their auditors are not providing these documents to the employers.

potential misclassification penalties to employers once our office brought this risk to their attention.

Objective 2: Procedures Designed to Minimize Worker Misclassification on State Projects Were Incomplete and Not Consistently Followed

As required by Act 54 (2009) Section 32(a), BGS and AOT revised the State's contracting procedures to minimize instances of worker misclassification on state projects with costs greater than $250,000. These procedures included requiring contractors to complete a self-reporting form to identify worker misclassification violations and a subcontractor reporting form listing subcontractors and their workers' compensation insurance carriers. However, BGS and AOT did not validate the information provided by contractors on either of the forms, and they had not implemented the procedures for all projects that exceeded the threshold by fiscal year 2014. For example, BGS obtained contractor self-reporting forms only for competitively bid projects and did not obtain workers' compensation insurance information on subcontractors added subsequent to contract inception. AOT did not apply the procedures to non-construction projects such as personal service or aviation contracts. Consequently, the State has missed opportunities to detect instances of worker misclassification and has been at risk of using contractors or subcontractors that misclassify workers.

Procedures Address Act 54 Requirements, but Gaps Remain

In response to the Act 54 requirements, BGS revised several of its documents and the State's contracting procedures. It also developed forms to be completed by bidders and contractors to meet the requirements. AOT modeled its procedures and forms after those developed by BGS and incorporated them into its contracting and oversight procedures. See Table 3 for the requirements of Act 54 Section 32(a) and the forms and processes adopted by BGS and AOT.

Table 3: Act 54 (2009) Requirements and BGS/AOT Procedures

Provision	Requirement	Form	Process
Section 32 (a)(1)	Details of any of the contractor's past violations, convictions, or suspensions, particularly as related to employee misclassification. This information is to be included with the project bid.	**Self-Reporting form** – Requires a bidder to self-report any violations, convictions, suspensions and any other information related to past performance relative to classification for workers' compensation in the past 12 months[c] and to certify that the company/individual is in compliance with the requirements detailed in Act 54.	BGS obtains the self-reporting form during the bid process for contracts that are competitively bid. AOT obtains the form as part of a contractor prequalification process for construction contracts and during the bidding process for some non-construction contracts.
Section 32 (a)(2)	A list of all subcontractors[a] on the job (and their subcontractors), and the subcontractors' workers' compensation insurance carriers.	**Subcontractor Reporting form** – Requires the contractor to provide the requisite information prior to commencement of work.	BGS and AOT require the form after contract approval but prior to commencement of work.[d] AOT requires this information for all subcontractors added during the course of a project.
Section 32 (a)(3)	A process implemented by the contractor who is to produce a list of all workers each pay period and the work that was performed, including confirmation that the subcontractors carry the appropriate workers' compensation coverage for all workers at the job site. The list is to be provided to VDOL and DFR upon request.[b] This provision applies only to construction and transportation projects over $250,000.	**Attachment D**: Additional Terms and Conditions (used for either construction renovation or new construction) – Incorporates the language of Act 54 Section 32(a)(3).	BGS and AOT include attachment D in construction contracts.

[a] According to AOT's Standard Specifications for Contractors, "subcontractor" means an individual or legal entity to whom the primary contractor sublets part of the work. This provision of Act 54 includes entities hired by the subcontractor as their own subcontractor but does not include entities that provide supplies only and no labor to the overall contract or project.

[b] Amended by Act 50(2011) section 6.

[c] According to a memo from the Secretary of AOA, in the absence of specificity in Act 54, AOA elected 12 months as the timeline for a bidder to self-report information on any violations that had occurred.

[d] According to BGS's Purchasing and Contract Administration Director, subsequent to our audit fieldwork BGS planned to change its process to require the form prior to contract approval.

Although the agencies adopted some procedures to meet the requirements of Act 54, gaps were identified in the course of this audit. First, the self-reporting form specifies that bidders are required to provide information of past violations, convictions, or suspensions relative to classification for workers' compensation, but this is not consistent with the Act 54 requirement. Act 54 required contractors to provide details, at the time of the bid, of any of the contractor's past violations, convictions, or suspensions related to employee misclassification, which can include classification violations related to unemployment insurance as well. The self-reporting form is part of the request for proposal (RFP) package used to solicit bids on state projects, and the instructions contained in the RFP address self-reporting and require bidders to provide detailed information of past violations, convictions, or suspensions related to employee misclassification. However, because the self-reporting form is not consistent with the instructions, there is risk that a bidder would limit self-reporting to misclassification relative only to workers' compensation.

In addition, neither BGS nor AOT validate the accuracy of the self-reporting by bidders and neither verifies that subcontractors have the workers' compensation insurance coverage as listed on the subcontractor reporting form. The State's internal control guide for managers[52] identifies verification as a common control activity for determining the completeness, accuracy, and validity of information. Lacking processes to validate the information reported on the forms, BGS and AOT risk contracting with businesses that violated state employment laws in the previous 12 months or are currently misclassifying workers, which is the risk that Act 54 sought to minimize.

According to BGS's Purchasing and Contract Administration (PCA) director, BGS does not have the authority, expertise or manpower to investigate representations made on the forms and it is beyond the scope of BGS to do more than collect the data provided by the contractor and make it available to VDOL and the Department of Financial Regulation (DFR) upon request. The director referenced a 2012 Memorandum of Understanding (MOU) among VDOL, DFR, AOT, and BGS as the source for her explanation, indicating that the MOU only requires BGS to collect the forms. However, there is no mention in the MOU of these forms, whether for collection or validation.

AOT's contract administration group also noted that the primary contractor has the responsibility to administer the contract and to ensure that subcontractors have workers' compensation insurance. BGS indicated a

[52] "Internal Control Standards, A Guide for Managers." Department of Finance and Management, State of Vermont.

similar perspective. We agree that AOT's and BGS's standard construction contract terms specify that contractors must require subcontractors to maintain workers' compensation coverage, but this does not absolve AOT and BGS from the responsibility of verifying information on the subcontractor reporting forms.

Both BGS and AOT believe that it is VDOL's responsibility to reach out to BGS and AOT with information about entities that have had worker classification violations or lack the appropriate insurance coverage. AOT's deputy secretary stated a concern that accessing data from VDOL to timely verify information on the self-reporting form would be challenging. BGS's general counsel expressed concern over whether BGS has the authority to request the information from VDOL. Since the 2012 MOU did not address validation of the information provided in the self-reporting form and the subcontractor reporting form, and AOT and BGS believe it is VDOL's responsibility to provide this information to them, clarification and agreement among VDOL, DFR, AOT, and BGS regarding this issue is warranted.

BGS also lacked a mechanism to ensure that the subcontractor information is updated throughout a project. For example, one contract that we tested[53] had workers' compensation insurance information for six subcontractors, but seven were actually used on the job. The project manager said that because he was familiar with all of the subcontractors from their work on other BGS projects, he assumed that they carried the requisite insurance. The project manager stated that if he had been unfamiliar with a subcontractor, he would have checked BGS's online contract tracking database to see if the entity was listed as having an executed contract. If the entity was listed he would make the same assumption about the insurance.

According to the PCA director, BGS does not approve subcontractors but only retains the right to object to a proposed subcontractor if there is a reasonable objection to the entity and, as a result, the subcontractor reporting form is not obtained when subcontractors are added during the course of a project. She stated that the contractor informs the project manager when subcontractors are added but does not seek approval. Further, BGS project managers indicated that they rely on the contractors to obtain the requisite insurance information from the subcontractors and to inform the PCA.

The standard state contract attachment C includes a clause that requires contractors to obtain written approval from the State before subcontractors are added to a project. Without a mechanism to ensure that subcontractors are

[53] For BGS, we tested seven of 31 contracts with costs over $250,000 entered into in FY2014.

reported and approved throughout the life of the contract, there is risk that not all subcontractors have the requisite workers' compensation insurance and workers on a State project may not have the coverage they are entitled to by law.

BGS Did Not Follow Contracting Procedures for All Projects

The department obtained the contractor self-reporting form for six of the seven projects reviewed by our office, but did not obtain this information for the one project that was not competitively bid. Moreover, for two contracts BGS did not receive subcontractor insurance information until after the projects started.

Specifically, BGS neglected to obtain the self-reporting form for a $340,000 sole-source contract.[54] According to BGS's PCA director, the form is generally obtained as part of the bidding process. As a result, BGS does not receive this form or other analogous certification if the contract is not competitively bid. However, Act 54 made no distinction between competitively and non-competitively awarded contracts with regard to the requirement for contractors to report past violations related to employee misclassification for all projects greater than $250,000.

In addition, BGS did not receive the subcontractor reporting forms until after commencement of work for two contracts that we reviewed that utilized subcontractors. One of the contracts we tested had at least 78 different subcontractors, but the workers' compensation insurance information was not collected until 18 months after the project started. PCA required the primary contractor to submit the subcontractor reporting form subsequent to contract execution but prior to the commencement of work. Prior to our audit fieldwork, PCA reviewed its contract files and found that it was not routinely receiving the form. It then pursued obtaining the missing forms from the contractors. Its review has led to BGS re-evaluating its process to require the subcontractor reporting form prior to contract execution.

AOT Procedures Are Inconsistently Applied

AOT incorporated revisions and forms modeled on BGS's contracts process reporting into its contracting and oversight procedures for construction

[54] According to Bulletin 3.5, the state's contract procedures guide, sole source contracts are the result of negotiating with a single contractor without competitive bidding.

contracts and Maintenance Rental Agreements (MRA),[55] but it was unable to produce some of the forms on four of fourteen construction contracts and MRAs tested.

AOT did not update its procedures for non-construction contracts to incorporate the Act 54 revisions and forms, resulting in the exclusion of the required forms from all of the four personal service contracts tested and the self-reporting form from the aviation contract tested.

Construction Contracts and Maintenance Rental Agreements

AOT was unable to provide documentation that it had followed its procedures for obtaining the contractor self-reporting form on two of ten construction contracts tested. AOT generally obtains the self-reporting form as part of an annual prequalification process for contractors that desire to bid on any construction projects.

AOT's contract documents on one of the four MRAs also did not include the self-reporting form, which is submitted by contractors as part of the MRA bidding process.

Although AOT approves subcontractors and the approval process includes receiving specific documentation including a complete subcontractor reporting form, it did not obtain workers' compensation insurance information for two subcontracts on one of the contracts we tested. Moreover, the form listing all of the subcontractors was received five months past the start date of the contract. As AOT has documented procedures that specify when and what type of information is required to be collected, this appears to have been an oversight for this project. Once we brought it to the attention of the Resident Engineer,[56] she obtained current insurance information on the subcontractor. However, additional training for employees to ensure the procedures are followed may mitigate instances of failing to obtain information as required.

[55] MRAs are annual contracts to accomplish scheduled roadway and bridge preventive maintenance, preservation, and repair projects. The instrument is a non-determinate location/non-determinate quantity type contract. In general, contractors provide rates for various locations throughout the state where they are interested in working. Once a work project is developed, contractor selection is then based on the lowest rates, experience, and availability of contractors for the particular location.

[56] A Resident Engineer is a duly authorized representative of the agency who is responsible for engineering supervision of one or more specific projects.

Non-Construction Contracts

AOT did not collect information required by Act 54 (2009) for any of the four personal service contracts tested and did not obtain all required information for the aviation contract tested.

According to Contract Administration, AOT does not require personal service contractors to report workers' classification violations or to provide information about subcontractor's workers' compensation insurance, even though these requirements are for all state projects greater than $250,000.

In response to the requirement that contractors implement a payroll process that includes confirmation that all workers at the job site are covered by appropriate workers' compensation insurance, AOT pointed to its contracting procedures, which include a standard provision to be included in its contracts requiring the prime contractor to verify that insurance coverages are met for its subcontractors and that a list of payments to subcontractors must be submitted to AOT monthly. Each of the four personal service contracts tested included this provision. However, the form provided by AOT for contractors to submit subcontractor payment data did not address the workers' compensation insurance coverage.

Based on an AOT list of contracts over $250,000 active in fiscal year 2014, personal service contracts comprised more than a third. According to AOT's Contract Administration group, personal service contracts often do not use subcontractors, as the nature of the work often relies heavily upon the technical expertise of contracting individuals. However, one of the four personal service contracts tested by our office used five subcontractors, and no information was collected about whether they carried workers' compensation insurance.

AOT uses procedures for its non-construction contracts[57] that were last updated in December 2008, preceding Act 54.[58] According to AOT's Audit Chief, the document is expected to be fully reviewed and updated by Contract Administration in the near future.

By omitting the requisite forms and requirements from its procedures for contracting for personal services, AOT is missing an opportunity to prevent potential worker misclassification on state projects.

[57] "Procedures for Selecting Contractors And Specifications For Contractor Services, Including Customary State Contract Provisions", revised December 29, 2008

[58] In 2011, four additional clauses were added that are unrelated to workers' compensation.

The aviation contract that we tested contained a general provision requiring the prime contractor to have payroll records available. The provision did not contain language that required confirmation that subcontractors have the appropriate workers' compensation coverage for all workers at the job site.

According to the assistant director of Policy, Planning and Intermodal Development, AOT should have received the self-reporting form as part of the bid process for the aviation contract. However, AOT was unable to produce a copy of the certification.

The State's internal control guidance lists documentation as a tool to 1) help identify, prevent or reduce risk and, 2) provide a history that shows justification for subsequent actions and decisions. Without adequate documentation, it is difficult to determine if AOT complied with statute or followed its own procedures.

Conclusions

Recent actions taken by VDOL include some that were required of a task force established by executive order in 2012, such as developing an education and outreach campaign regarding worker misclassification. Although the department was charged with leading the task force, it did not convene any meetings from June 2013 to July 2015. Further, the 2012 executive order specified that agencies and departments should engage in timely enforcement, but VDOL has failed to enforce unemployment insurance penalties for worker misclassification, which have been statutorily required since 2010, and some workers' compensation penalties as well.

Although VDOL has taken some actions related to the task force requirements, its UI division lacks reliable performance data, and the WC division's primary system for recording summary investigation case data has limited functionality and contains data anomalies and duplicate case information. These issues have limited VDOL's ability to measure the impact of the divisions' efforts to detect and address misclassification and resulted in management having to rely on flawed data in its decision making.

UI's calendar year 2014 field audit performance data had multiple errors. This data was flawed as a result of data entry errors, a lack of supervisory review of the data input, and no documented procedures for compiling the field audit data. WC uses two systems to record summary investigation case data, and the primary database has limited functionality, contains data anomalies and duplicate case information, and is missing data for a substantial number of records. These problems occurred for a variety of reasons, including a lack of documented procedures for entering data in the

system. According to WC records, more than half of the investigation cases that were open as of January 2015 were assigned to investigators no longer employed by WC. The lack of follow through on these cases occurred because WC has not developed protocols for case reassignment and case management practices, such as standards for maximum caseloads per investigator and timely case completion.

Continued meetings of the task force to address the other required actions could improve prevention and detection of worker misclassification. Addressing UI's and WC's data reliability issues will enable VDOL to assess the impact these divisions are having on detecting worker misclassification.

BGS and AOT are missing opportunities to detect and prevent worker misclassification. Although both organizations developed procedures and forms designed to meet the requirements of Act 54 (2009), gaps remain, such as the lack of a process to validate information collected from the State's contractors. Additionally, neither agency consistently applied the procedures they had developed to all of their contracts. Consequently, BGS and AOT risk contracting with businesses that violated state employment laws in the previous 12 months or are currently misclassifying workers, leaving workers on state projects without the coverage they are entitled to by law.

Recommendations

We recommend that the Commissioner of Labor direct VDOL staff to:

Table 4: Recommendations and Related Issues

Recommendation	Report Page	Issue
1. Schedule Misclassification Task Force meetings and ensure that all of the required actions are addressed.	12, 14	VDOL did not convene the Misclassification Task Force for two years from 2013 and 2015.
2. Expeditiously update the unemployment insurance rules related to misclassification to cover all penalties allowable by statute.	15-16	VDOL has failed to enforce unemployment insurance penalties for worker misclassification that have been required by statute since 2010.
3. Expeditiously update workers' compensation rules related to misclassification to cover all penalties allowable by statute.	15-16	VDOL has failed to enforce workers' compensation penalties related to compliance statement violations and has not been debarring employers that misclassify.
4. Implement the use of the billing and accounts receivable modules in VISION for WC penalty receivables.	16-17	VDOL lacks a consistent and centralized record-keeping process for penalty receivables that can provide detailed payment history for WC citation penalties.

Recommendation	Report Page	Issue
5. Increase the percentage of UI audits that are conducted based upon targeted audit selection criteria.	17-19	The majority of UI's audits are randomly selected, whereas, according to the U.S. DOL OIG, states that use targeted audit selection criteria rather than simply selecting employers at random were the most effective at detecting noncompliance with unemployment insurance tax laws.
6. Develop written procedures on how UI field audit performance data should be entered into the CATS 53 screen.	21-24	UI has significant data entry errors in the CATS 53 screen and does not have documented procedures on how to enter data into the CATS 53 screen, which has led to inaccurate performance data.
7. Expeditiously implement documented supervisory review of the manual data entry of UI performance audit results into CATS.	21-24	Lack of supervisory reviews of the data entry into the CATS 53 screen contributed to the inaccuracies of the data.
8. Revise the UI audit 53 report or develop another mechanism to reflect the final audit results that are to be manually entered into CATS.	22-24	The audit 53 report, which is used to enter data in the CATS 53 screen, did not always reflect final audit results when auditors made manual changes or submitted supplemental schedules.
9. Categorize and report the results of UI assignments based upon the nature of the work performed, not the source of the assignment. Specifically, if the procedures performed as a result of follow up on complaints and referrals are equivalent to the procedures established for audits in the federal guidance, categorize this work as an audit assignment.	25	Auditor assignments resulting from complaints or referrals have not been considered field audits. The results of those assignments have not been captured in the field audit performance data even when it appears the auditors performed the work that is involved in a field audit.
10. Develop standards for WC case management that include caseload standards for investigators, timeliness of case completion and protocols for case reassignment.	26-27	Some open investigations date back to 2011, and there are many open investigations that are assigned to former investigators that no longer work for VDOL.
11. Ensure that all active cases are recorded in the WC investigations database, review the accuracy of the case data and make corrections as needed.	28	There are 24 open investigations in a database that is no longer used by WC and were never transferred into the current investigation database used by WC.
12. Ensure WC utilizes the complaint and referral log system developed by UI.	28	WC does not have a central repository to record all complaints and referrals.
13. Develop reporting functions for the WC database, including an aging schedule of outstanding cases, length of investigations, and status of key investigation activities.	29-30	WC never created on-going report capabilities in the investigation database that they utilize as their case management system.

Recommendation	Report Page	Issue
14. Develop a data dictionary or other document that defines each data field for consistent data entry in all fields in the WC investigations database.	30-33	The WC investigation database contained errors because users did not have instructions on the specific information that should be entered into each field.
15. Define which fields should be completed and develop a process to ensure that all required fields contain the requisite data.	31-32	The WC investigations database is missing data in various record fields for a substantial number of records, which would be useful for management reporting and analysis.
16. Implement validation rules and other functions in the WC database that allow for standardized data entry.	31-32	The WC investigation database does not contain any validation rules, which facilitate the input of data in a consistent format, or other functions that restrict illogical entries.
17. Add fields for case assignment priority, issuance of multiple stop-work orders, and number of misclassified workers identified.	30	The database contained duplicate case records because it did not allow users to input multiple SWOs for a single case file and does not allow users to input case priority and the number of misclassified workers identified during an investigation.

We recommend that the Commissioner of Buildings and General Services direct the Director of Purchasing and Contracting to:

Table 5: Recommendations and Related Issues

Recommendation	Report Page	Issue
1. Amend the self-reporting form to require bidders to provide information regarding any of the contractor's past violations, convictions, or suspensions related to employee misclassification.	36	The self-reporting form specifies that bidders are required to provide information of past violations, convictions, or suspensions relative to classification for workers' compensation, but this is not consistent with the Act 54 requirement. Act 54 required contractors to provide details, at the time of the bid, of any of the contractor's past violations, convictions, or suspensions related to employee misclassification, which can include employee classification violations related to unemployment insurance as well.
2. Work with VDOL, DFR, and AOT to clarify and document each organization's role with regard to verification of information reported in the self-reporting and subcontractor reporting forms.	36	BGS does not verify information on the self-reporting form related to worker's classification violations or the information on the subcontractor reporting form.
3. Modify procedures to ensure the subcontractors' workers' compensation insurance information is obtained during the course of the project for those subcontractors added subsequent to contract execution.	37	BGS's procedures do not include a mechanism that would ensure it obtains the requisite insurance information before the subcontractor begins work.
4. Utilize the procedures designed to meet the requirements of Act 54 Section 32(a) (1)-(3) for projects that are not competitively bid.	38	BGS does not obtain the self-reporting form from contractors with sole-sourced contracts.
5. Ensure that all requisite documentation is obtained on a timely basis.	38	BGS did not receive the subcontractor reporting form until after commencement of work for two contracts reviewed by SAO that utilized subcontractors.

We recommend that the Secretary of the Agency of Transportation direct staff to:

Table 6: Recommendations and Related Issues

Recommendation	Report Page	Issue
1. Amend the self-reporting form to require bidders to provide information regarding any of the contractor's past violations, convictions, or suspensions related to employee misclassification.	36	The self-reporting form specifies that bidders are required to provide information of past violations, convictions, or suspensions relative to classification for workers' compensation, but this is not consistent with the Act 54 requirement. Act 54 required contractors to provide details, at the time of the bid, of any of the contractor's past violations, convictions, or suspensions related to employee misclassification, which can include employee classification violations related to unemployment insurance as well.
2. Work with VDOL, DFR, and BGS to clarify and document each organization's role with regard to verification of information reported in the self-reporting and subcontractor reporting forms.	36	AOT does not verify information on the self-reporting form related to worker's classification violations or the information on the subcontractor reporting form.
3. Provide additional training for employees to ensure the procedures are followed.	39	AOT was unable to provide documentation that it had followed its procedures for obtaining a self-reporting form on three of fourteen construction contracts and Maintenance Rental agreements reviewed. Without adequate documentation, it is difficult to determine if AOT complied with statute or followed its own procedures.
4. Update procedures for non-construction contracts to incorporate the Act 54 revisions and forms.	40	AOT excluded required forms for all of the four personal service contracts tested and some forms for the aviation contract tested. AOT has not updated its procedures for non-construction contracts to incorporate the Act 54 revisions and forms, thereby missing opportunities to detect instances of worker misclassification.

Management's Comments

The Commissioner of VDOL provided written comments on a draft of this report on August 6, 2015. The comments are reprinted in Appendix VI of this report along with our evaluation. The Commissioner of BGS provided written comments on a draft of this report on August 6, 2015, which is reprinted in Appendix VII of this report. The Director of Finance and Administration for AOT provided written comments on a draft of this report on August 4, 2015, which is reprinted in Appendix VIII of this report.

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In accordance with 32 V.S.A. §163, we are also providing copies of this report to the commissioner of the Department of Finance and Management and the Department of Libraries. In addition, the report will be made available at no charge on the state auditor's website, http://auditor.vermont.gov/.

Appendix 6: Proposed Amendments to the Employment Security Board Rules

Rules of the
VERMONT EMPLOYMENT SECURITY BOARD
Effective _____

The Department of Labor, created by ~~Section 212 of Title 3 of the Vermont Statutes Annotated~~ 3 V.S.A. § 212, consists of the Commissioner of Labor, the Workforce Development Division, Labor Market Information Division, Workers' Compensation and Safety Division, and the Unemployment Insurance and Wages Division. The Commissioner of the Vermont Department of Labor chairs the Vermont Employment Security Board.

The Vermont Employment Security Board, a board of three members appointed by the Governor with the advice and consent of the ~~senate~~ Senate, hears and decides all matters appealed to it under the unemployment ~~compensation~~ insurance law. The Board also adopts, amends, suspends, or rescinds such rules and regulations as it considers necessary and consistent with the unemployment ~~compensation~~ insurance law.

Information about the Employment Security Board may be obtained by any person upon request at the central office of the Department of Labor, Commissioner's office, either by personal appearance or by written communication.

RULE 1. PETITION FOR DECLARATORY RULING, AMENDMENT OF RULES

A. Procedure

1. Any interested person may petition the Vermont Employment Security Board, Department of Labor, for a declaratory ruling as to the applicability of any provision of ~~Chapter 17, of Title 21 of the Vermont Statutes Annotated~~ 21 V.S.A. Chapter 17 or of any rule or order of the Vermont Employment Security Board.

   The petition must contain sufficient facts from which it can be determined that a real question exists concerning the applicability of any provision of said law or of any rule or order of the Vermont Employment Security Board to the petitioner and that a declaratory ruling by the Board would resolve the question. The Board shall consider the petition and within a reasonable time shall:

   (a) Issue a declaratory ruling; ~~or~~

   (b) Notify the petitioner that no declaratory ruling is to be issued; or

(c) Set a reasonable time and place for hearing argument upon the matter and give reasonable notification to the petitioner, and any other person or persons named as a party to the proceedings, of the time and place for such hearing and of the issue involved.

2. If a hearing as provided in (1) (c) above is conducted, the Board shall within a reasonable time:

(a) Issue a declaratory ruling; or

(b) Notify the petitioner that no declaratory ruling is to be issued.

B. Parties

When a declaratory ruling is sought, all persons shall be made parties who have ~~or claim any~~ declared an interest ~~which~~ that would be affected by the declaration, and no declaratory ruling shall prejudice the rights of persons not parties to the proceeding.

C. Amendment

In addition to seeking a declaratory ruling, any individual may request that the Rules of the Employment Security Board be amended. The Board, in consultation with the ~~commissioner~~ Commissioner, shall consider and act on such request consistent with the requirements of the Vermont Administrative Procedures Act, as set forth in 3 V.S.A. ~~Sections~~ §§ 817-849. The Board may also initiate rulemaking in response to a petition of 25 or more persons in accordance with 3 V.S.A. Section 831(c).

RULE 2. DEFINITIONS [Definitions rearranged into alphabetical order]

Except where the context clearly requires otherwise, the definitions in ~~Chapter 17 of Title 21 of the Vermont Statutes Annotated, and section 801 of Title 3 of the Vermont Statutes Annotated,~~ 21 V.S.A. Chapter 17 and 3 V.S.A. § 801 shall apply to the terms used in these rules.

A. "Additional claim" means an application for determination of eligibility for benefits which certifies to the beginning date of a period of unemployment falling within a benefit year previously established, for which a continued claim or claims may be filed, and which follows a period of employment ~~which~~ that occurred subsequent to the date of filing the last new, transitional, additional, reopened, or continued claim.

B. "Administrative law judge." or "ALJ", means the appellate hearing officer

identified by 21 V.S.A. Section § 1348 as the appeals referee.

C. "Business day" means Monday through Friday, excluding state and federal holidays.

D. "Claim for benefits" means a new, transitional, additional, reopened, or continued claim.

E. "Claimant" means an individual who has filed a claim for benefits with the Unemployment Insurance Claims Center.

F. "Commissioner" means the Commissioner of Labor or his or her authorized representative.

G. "Continued claim" means an application for benefits ~~which~~ that certifies to the completion of a week of total or partial unemployment.

H. "Domestic service" means services of a household nature in or about a private home. In general, services of a household nature include services performed by a cook, food server, butler, housekeeper, child care provider, janitor, launderer, caretaker, gardener, groom, chauffeur ~~and~~, or personal care attendant. Service of a household nature does not include such services as private secretary, tutor, or librarian even though performed in the employer's private home.

I. "Employing unit" is, in addition to the definition in 21 V.S.A. § 1301(4), the entity that benefits by the employees' services and provides the business purpose for which the employees work.

J. "Employment office" means any office ~~maintained by~~ of the Vermont Department of Labor, also known as a career resource center, regional office, or American Job Center.

K. "Fraud" is the conduct described in 21 V.S.A. ~~Section~~ § 1347(e); the intentional misrepresentation or failure to disclose a material fact, with respect to the person's claim for benefits, whether or not benefits are paid.

L. "Full time" work means 35 or more hours of work in a week.

M. "Holiday" means the day or days recognized by the State as legal holidays as enumerated in 1 V.S.A. § 371(a).

N. "Interested parties" – Interested parties shall include the claimant, the claimant's last separating potentially liable employer, and in the case of an appeal under Rules ~~21, 22~~ or 23 or 24, the affected employer and the Unemployment Insurance and Wages Division.

O. "New claim" means an application for the establishment of a benefit year, a determination of eligibility for benefits, and a determination of a weekly benefit amount.

P. "Registration for work" means that an individual has provided the Department his or her name, usual occupation, correct mailing address, and such other information as required by the Commissioner and has declared his or her availability for suitable work. The registration for work shall continue in effect for as long as the individual continues to report in intervals of one week, unless otherwise directed. The registration for work will terminate on the date the claimant fails to:

1. report at an employment office as directed; ~~or~~

2. complete required application(s) designed to facilitate job referrals as directed; or

3. contact the Unemployment Insurance Claims Center or other Departmental unit as directed; or

4. register for work through Vermont Job Link or other employment service as directed by the Commissioner;

unless good cause is shown for such failure to act as directed in subsections 1, 2, ~~and~~ 3, and 4 above, on the date he or she again becomes attached to a regular employer or on the date he or she notifies the Unemployment Insurance Claims Center of his or her unavailability for work.

Q. "Reopened claim" means an application for determination of eligibility for benefits and which certifies to the beginning date of a period of unemployment falling within a benefit year previously established for which a continued claim or claims may be filed, and which follows a break in the claim series previously established due to illness or disability, disqualification, unavailability, or failure to report for any reason other than re-employment.

R. "Transitional claim" means an application for determination of continued eligibility for benefits ~~which~~ that initiates the establishment of a new benefit year without interruption in the payment of benefits.

S. "Wages" shall have the same meaning as in 21 V.S.A. § 1301(12).

T. "Wages paid" includes both wages actually received by the worker and wages constructively paid. Wages are constructively paid when they are ~~1) credited to the account of or set apart for a worker without any substantial restriction as to~~

~~the time or manner of payment or condition upon which payment is to be made; 2) made available so that they may be drawn upon by the worker at any time; or 3) brought within the worker's own control and disposition or legally due,~~ although ~~not then actually reduced to possession~~ immediately available to the worker upon demand.

U. "Week" shall mean the seven consecutive days commencing at ~~12:01~~ 12:00 A.M. Sunday and ending ~~12:00 midnight~~ 11:59 P.M. the following Saturday.

V. "Work search" means a bona fide attempt to find work by making at least three valid job contacts during any week for which the claimant files a claim for benefits. The work search requirement may be waived in the following circumstances:

1. The claimant is a member of a union that requires its members to seek work through an internal hiring hall to not lose good standing or membership;

2. The claimant is working reduced hours in accordance with a Short Time Compensation Program approved pursuant to the terms of 21 V.S.A. §§ 1451 – 1459; or

3. The claimant has a return to work date within a timeframe specified by the Commissioner.

RULE 3. POSTING AND FURNISHING NOTICES

Every employer, as that term is defined by 21 V.S.A. § 1301(5), (including every employing unit which has, with the approval of the Commissioner, become an employer by election under the provisions of unemployment ~~compensation~~ insurance law) shall post and maintain printed notices to its workers in a conspicuous location in the workplace informing them that it is liable for contributions under the law. Such notice provided by the Department shall be posted pursuant to ~~V.S.A. 21, Section~~ 21 V.S.A. § 1346. ~~No such notice shall be posted or maintained by any person or employing unit to whom an unemployment compensation account number has not been assigned by the Commissioner or who has ceased to be an employer.~~

RULE 4. RECORDS

A. Each employing unit shall maintain and preserve for four years accounts and records with respect to workers engaged in subject employment and non-subject

employment which shall show:

1. For each pay period:

   (a) The date and total amount of remuneration paid for subject employment;

   (b) The date and total amount of remuneration paid for non-subject employment;

   (c) The beginning and ending dates of each pay period; and

   (d) The beginning and ending dates of such subject employment and such non-subject employment.

2. For each worker:

   (a) Name, address, and social security account number;

   (b) Place of employment, including the physical location at which the work is performed;

   (c) Hourly rate of pay or salary amount and the frequency of payment;

   (d) Date on which worker was hired, or returned to work after a temporary layoff, and date separated from work and reason therefor;

   (e) The actual days worker performed services in employment each week and the actual number of hours worker performed services in employment each day;

   (f) Total remuneration paid in each quarter;

   (g) Worker's remuneration paid for each pay period showing separately:

      i. Money payments (excluding special remuneration.);

      ii. Special remuneration of all kinds showing separately:

         (A) Money payments;

         (B) ~~Reasonable~~ Specific detail of, and reasonable cash value of payments in any medium other than money;

ard

(C) ~~The nature of such special remuneration; and~~

~~(D)~~ The period or periods during which the services were performed for which the special remuneration was paid.

iii. The reasonable cash value of remuneration paid by the employing unit in any medium other than cash, i.e., lodging, room and board, etc.);

iv. The amount of gratuities received from persons other than his or her employing unit and reported by the worker to his or her employing unit.

v. Amount paid worker as allowances or reimbursements for traveling or other business expenses, dates of payment, and the amounts of such expenditures actually incurred and accounted for by worker;

(h) Whether the worker is working on a full-time or part-time basis.

B.3. Each For each worker working partial or reduced hours, each employing unit shall keep its payroll records in such form that it will be possible for an inspection thereof to determine with respect to each worker in its employ who may be eligible for partial benefits:

(a) Wages earned for any week of employment;

(b) Whether any week was in fact a week of less than full time work as defined in Rule 2~~(D)~~ (L);

(c) Time lost not worked, if any, by each worker and reason therefor.

C.B. An employing unit having its principal place of business outside of Vermont shall maintain payroll records, in accordance with Rule 4.A. of these Rules, in this state State with respect to wages paid to employees who perform some service in this State, provided, however, that an out-of-state employing unit may, with the approval of the Commissioner, maintain such payroll records outside of the State upon its agreement that it will, when requested to do so, furnish the Commissioner with a true and correct copy of such payroll records within 10 days or some other time period as may be specified by the Commissioner upon a showing of hardship.

D.C. Each employing unit shall make available upon request the following records and documents, to enable proper assessment of covered employment under the applicable ~~U. C.~~ unemployment insurance laws and the associated tax liabilities:

1. Check stubs and cancelled checks for all payments;

2. Cash receipts and disbursement records;

3. Payroll journal and time cards;

4. General journal and general ledger;

5. Copies of tax reports filed with all federal and state agencies; and

6. Copies of IRS forms W-2, W-3, and 1099.

D. Each employing unit shall make available upon request a valid workers' compensation policy, if one is required by 21 V.S.A. Chapter 9.

RULE 5. IDENTIFICATION OF WORKERS

A. Each employer shall ~~ascertain~~ obtain and confidentially maintain the social security number of each worker performing services for it in employment.

B. If such worker does not have a social security number, the employer shall request the worker to produce a receipt issued by an office of the Social Security Administration indicating that the worker has filed an application for a number. The receipt shall be retained by the worker.

C. Each employer shall report a worker's social security number in making any report required by the Commissioner with respect to such worker. If the worker has no such number, but has produced a receipt indicating that he or she has filed an application for one, the employer shall, in making a report required by the Commissioner with respect to such worker, report the date of issue of the receipt, its termination date, the address of the issuing office, and the name and address of the worker exactly as shown in the receipt.

RULE 6. WAGE REPORTS AND CONTRIBUTIONS

A. An employer shall, not later than the last day of the month following the close of each calendar quarter, file with the Commissioner on forms approved by the Commissioner a wage and contribution report with respect to such calendar quarter setting forth wages paid during such calendar quarter for employment to

individuals in its employ.

B. Contributions are required of employers quarterly, and shall become due and payable on or before the last day of the month ~~next~~ following the quarter for which such contributions have accrued, unless ~~the employer has been approved for alternate payments as provided in Rule 31~~ some other due date is specified by statute.

C. The first contribution payment of any employing unit that becomes an employer within any calendar quarter of any calendar year shall become due and payable on or before the last day of the month ~~next~~ following the close of the quarter in which it became a subject employer.

D. The first contribution payment of any employing unit ~~which~~ that elects to become an employer shall, upon written approval of such election by the Commissioner, become due and payable on or before the last day of the month next following the close of the calendar quarter ~~which~~ that includes the effective date of such election. Such first payment shall include contributions with respect to all wages for services ~~covered by such election~~ paid on or after the effective date of becoming an employer and up to and including the last day of such calendar quarter.

E. The Commissioner may advance the due date of an employer's report and contribution to such a date as is deemed advisable upon ~~finding, with respect to a particular employer, that the collection of contributions which have accrued during any completed or quarterly period may be jeopardized by delay~~ reasonable belief that an employer may be unwilling or unable to pay such contribution.

F. ~~Whenever the Commissioner has, in writing, advised an employing unit that it has been determined not to be an employer or that services performed for it do not constitute employment, and a legal obligation on the part of such unit to pay contributions is thereafter established~~ Despite a prior written determination by the Commissioner of an employing unit's contribution rate or that an employing unit is not liable for contributions, accrued contributions shall become due and interest shall accrue thereon fifteen days after such employing unit is informed of its liability or corrected contribution rate.

G. When the regular payment day for a contribution falls on a weekend or legal holiday such contributions shall be due and payable on the first ~~regular~~ business day ~~next following~~ thereafter.

H. Payment of contributions received through the mail shall be deemed to have been made and received on the date shown by the postmark. Payment made by electronic fund transfer (EFT) shall be deemed to have been paid on the

executed date or the advance date selected, ~~not to exceed the due date for such~~ quarter. Payments made and received after the due date will be considered delinquent and subject to interest accrual.

I. The Commissioner ~~may, where practical,~~ shall require employing units ~~with 25 or more employees~~ to file all required reports and pay amounts due associated with such filing, through electronic means approved by the Commissioner. Upon a showing of hardship, the Commissioner may waive the electronic filing requirement.

J. In the event that an assessment of contributions made pursuant to 21 V.S.A. § 1330 or an administrative determination made pursuant to 21 V.S.A. § 1337a changes the amount of wages attributable to an employer in a prior rate year, such employer shall not be entitled to a recomputation of its experience rating for such prior rate year.

K. In the event an employer fails to comply with the reporting requirements of 21 V.S.A. §§ 1314a or 1322 or this Rule 6., or if such report when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient report within 30 days after which the Commissioner requires the same by written notice, the Commissioner shall determine the amount of contribution due from such employer and the amount of wages paid by such employer on the basis of such information as may be available.

L. Payments received with a timely wage and contribution report shall be applied to the UI contributions due for that quarter, notwithstanding any outstanding amounts due by the respective employer. Untimely payments (payments received outside of the time period prescribed by 21 V.S.A. § 1314a(b)) or payments received for delinquent amounts shall be applied to the oldest quarter debt in the following order: contribution, interest, penalty, and fee and shall proceed to subsequent outstanding quarters, applying payments in the same manner.

RULE 7. TERMINATION OF ELECTION OF REIMBURSEMENT

A. The Commissioner may, in accordance with 21 V.S.A. § 1321(c)(2)(F), either decline to approve an election of reimbursement or terminate an employer's election of reimbursement when he or she finds that doing so would be in the best interest of the unemployment insurance trust fund.

B. When the Commissioner terminates an election of reimbursement, the Commissioner shall notify the employer of such termination no later than 30 days prior to the beginning of the calendar quarter in which such termination will become effective.

RULE ~~7.~~ 8. CASH VALUE OF CERTAIN REMUNERATION

A. Each employing unit required to report wages and pay contributions thereon under 21 V.S.A. Chapter 17 ~~of Title 21 of the Vermont Statues Annotated~~, where such wages include remuneration paid in any medium other than cash (excepting board and/or lodging), shall estimate and determine such remuneration at the fair market value thereof at the time such remuneration became payable.

B. The cash value of board and/or lodging payable as part or all of the wages for personal services of individuals in employment by any employer shall be reported and contributions paid thereon. Where the cash value of such board and/or lodging is agreed upon in a contract of hire, the amount so agreed upon shall be deemed to be the cash value of such payment.

In the absence of such an agreement the cash value of such lodging shall be the fair market rents (FMR), as published by the US Department of Housing and Urban Development, for the county in which the job resides. In the absence of an agreement the cash value of the board shall be based on the current rate established under the "Thrifty Food Plan" by the USDA Food and Nutrition Service.

RULE ~~8.~~9. EMPLOYERS' WAGE RECORDS AND SEPARATION DATA

A. Every employing unit~~, for each week in which any employee shall have worked less than his or her normal customary full time hours~~, shall furnish to such ~~individual~~ its employees, at ~~his or her~~ the employee's request, or at the request of the Commissioner, a written statement of the amount of wages earned and hours worked in such any week.

B. Each employer shall, within 24 hours after the worker is separated from his its service ~~(permanently or for an indefinite period or for an expected duration of seven or more days)~~ for a permanent, limited, or indefinite period of time, notify the worker ~~of the location of the notice posted in accordance with Rule 3~~ that such worker may be eligible for unemployment benefits through the Vermont Department of Labor.

C. If the Commissioner finds that the failure of any individual to file a claim for partial benefits was due to a failure on the part of the employer to furnish the individual with information advising him or her of his or her right to file a claim for unemployment benefits, or to coercion or intimidation exercised by the employer to prevent the prompt filing of such claim, or to the failure by the Commissioner to discharge his or her responsibilities promptly in connection with such partial

unemployment, the Commissioner shall extend the period during which such claim may be filed to a date that he or she finds reasonable under the circumstances which shall not be more than two weeks after the individual has received such written statement; nor less than one week after any of the above specified causes for failure to file a claim has been removed.

~~C.~~D. The term "mass separation" means a separation from employment (permanently ~~or for an indefinite period or for an expected duration of seven or more days~~) for a permanent, limited, or indefinite period of time, at or about the same time, and for the same reason, 1) of 20 or more percent of the total number of workers employed in an establishment, 2) of 50 or more percent of the total number of workers employed in any division or department of an establishment, or 3) notwithstanding either of the foregoing, of 25 10 or more workers employed in a single establishment. In such cases an employer shall file with the Commissioner and the Department of Labor's Unemployment Insurance Claims Center, a notice of such mass separation. Such notice shall be filed not later than 24 hours after such separation. Upon request by the Commissioner, such employer shall furnish to the Commissioner pertinent information necessary to establish "mass separation" unemployment claims. Such information will include but is not limited to the following: individual names, social security numbers, mailing addresses, and any separation pay of the affected workers.

D.E. In case of total unemployment due to strike, lockout, or other labor dispute, the employer shall, within 24 hours, file with the Commissioner and the Department of Labor's Unemployment Insurance Claims Center, in lieu of mass separation notice, a notice setting forth the existence of such dispute and the number of workers affected. Upon request by the Commissioner, such employer shall furnish to the Commissioner the names, social security numbers, mailing addresses, and any separation pay of the workers ordinarily attached to the department or the establishment where unemployment is caused by strike, lockout, or other labor dispute.

~~E. If the Commissioner finds that the failure of any individual to file a claim for partial benefits was due to a failure on the part of the employer to furnish the individual with information advising him or her of his or her right to file a claim for unemployment benefits, or to coercion or intimidation exercised by the employer to prevent the prompt filing of such claim, or to the failure by the Commissioner to discharge his or her responsibilities promptly in connection with such partial unemployment, the Commissioner shall extend the period during which such claim may be filed to a date which shall not be more than two weeks after the individual has received such written statement; nor less than one week after any of the above specified causes for failure to file a claim has been removed.~~

RULE ~~9.~~10. SEPARATION REPORTS

A. When an individual files a new claim, he or she shall furnish to the Commissioner all information the Commissioner requires concerning his or her prior employment. The Commissioner, when necessary, shall request employment, separation, and wage information from the claimant's base period employer or employers on a form designed for that purpose. Every such employer shall furnish to the Commissioner employment, separation, and wage information necessary for the determination of the claimant's entitlement to benefits within 10 days of the date such written or verbal request is made of the employer by the Commissioner.

B. When an individual files an additional claim, the Commissioner shall request employment and separation information from his or her last employer or employers, on a form designated for that purpose. When required, the employer, or employers, shall furnish to the Commissioner the information within 10 days of the date such written or verbal request is made of the employer by the Commissioner.

C. If an employer fails to respond within 10 days of the date the Commissioner makes a written or verbal request for employment, separation, and/or wage information with respect to a claimant, or if such response is incomplete or inadequate, the Commissioner shall determine the benefit rights of the claimant upon such information as is available.

1. A determination shall be final with respect to a non-complying employer as to any charges against ~~his~~ the employer's experience-rating record for benefits paid to the claimant before the week following the receipt of ~~his~~ the employer's reply.

2. ~~and his~~ The employer's experience-rating record shall not be relieved of those charges ~~unless the amount of benefits is recovered from the~~ claimant or unless the Commissioner determines that the failure to comply was due to an unavoidable ~~accident or mistake~~ circumstances.

3. Any required responses to separation reports received after the tenth day from the date of the mailing or personal delivery of the request for such information will subject the employer to a penalty as prescribed under Section 1314 of Title 21 of the Vermont Statutes Annotated 21 V.S.A. § 1314.

RULE ~~10.~~11. CLAIMS FOR BENEFITS

A. An individual seeking to claim benefits for a week of total or partial

unemployment shall contact, by telephone or other approved method, the Unemployment Insurance Claims Center to file a new, additional or reopened claim for benefits. The effective date established for a new, additional, or re-opened claim for benefits will be the Sunday immediately preceding the date the claim is filed. The effective date for a transitional claim filed within 13 days of the prior claim expiring will be equal to the day following the benefit year ending date of the expired claim. Such effective date shall also be used for purposes of establishing the claimant's maximum weekly benefit amount. Once a an initial claim for benefits is filed, it ~~cannot~~ may only be withdrawn if the Commissioner, in his or her discretion, determines that doing so is in the best interests of justice and due process. No initial claim may be withdrawn once a weekly claim for benefits has been filed.

B. An individual's first week of total or partial unemployment following a separation from his or her employment shall begin on the first day of the week in which the individual files a new, additional, or re-opened claim for benefits.

C. The Commissioner may, as a condition of eligibility and/or continued eligibility for benefits, require that a totally or partially unemployed worker:

1. Provide documentation sufficient to establish the worker's identity~~, and~~;

2. Within 10 days of opening or reopening a claim, register with Vermont Job Link or other work search service as directed by the Commissioner;

3. Participate in reemployment services as ordered, and;

4. Participate in work search activities as directed;

5. Provide the name, ~~and~~ telephone number, address, contact person, method of contact, and name of job applied for of all employers the worker contacted when searching for work during any week in which benefits are claimed.;

6. Provide timely responses to any Departmental requests for information;

7. Keep the Department informed of any change in mailing address, telephone number, or other contact method; and

8. Reside and be physically located within the United States or Canada, as further defined by Rule 13.

D. In order to establish eligibility for benefits for weeks of total or partial unemployment, during a continuous period of total or partial unemployment, the

claimant shall, except for good cause, file a continued claim for benefits within six days of the week ending date being filed.

1. The Commissioner, for reasons found to constitute good cause for a claimant's failure to file a weekly claim for unemployment benefits, may accept a continued claim for benefits for such claimant, effective as of the time specified, if such continued claim for benefits is filed at the first available opportunity but within thirteen 13 days of the last day of the week being filed.

2. A claimant who becomes ill or disabled, after filing a claim for benefits, may continue his or her claim by ~~mail,~~ internet, or by telephone other approved method or through a designated representative, provided such continued claim is filed at the first available opportunity but not later than ~~thirty~~ 30 days of the last day of the week being filed and provided satisfactory evidence of such illness or disability is produced.

3. The times specified in subsections 1. and 2. above may be extended if the Commissioner, in his or her discretion, determines that doing so is in the best interests of justice and due process.

E. A continued claim for benefits shall be made on either a form provided by the ~~department by mail, by telephone,~~ Department via the internet, or by other approved method, setting forth: 1) that the claimant continues his or her claim for benefits; 2) that the claimant was totally or partially unemployed; 3) that during the period for which the claimant files a claim he or she performed no work or earned no wages except as ~~indicated~~ reported; 4) that the claimant is able to work and available for work; 5) that the claimant has looked for work as directed~~.~~; and 6) such other information as is required by the Commissioner

F. If a weekly claim is determined to have been fraudulently filed pursuant to 21 V.S.A. § 1347(c) and (e), such weekly claim will be subject to a 15% penalty. Such weekly claim will also be subject to the imposition of a penalty week, regardless of whether the claim resulted in the payment of a benefit or not.

RULE ~~11~~12. BENEFITS DUE DECEASED CLAIMANTS

Upon the death of any claimant who had filed for benefits, and in the event it is found by the Commissioner that the benefits have accrued and are due and payable to such claimant and remain wholly or partially unpaid at the time of such claimant's death, or in the event there have been issued and unpaid one or more benefit checks, such benefits shall, upon application to the Department, be paid to the duly qualified administrator or executor of the estate of the deceased claimant. If it is shown to the satisfaction of the Commissioner that there is no executor, and no administrator has been appointed, and,

in all probability no administrator will be appointed. payment of such benefits may be made to the surviving spouse or next of kin of the deceased claimant upon application for receipt of such benefits, due regard being given to the following order of preference:

1. the surviving spouse or civil union partner
2. children
3. parents
4. brothers and sisters
5. other relatives, consistent with 14 V.S.A. § 314.

The Commissioner, however, is not bound to follow such order of preference if the same shall appear inequitable.

Any person, other than the duly qualified administrator or executor of the estate of a deceased claimant, claiming benefits which that are due and payable to such claimant shall make written application for such benefits, which application may be supported by an affidavit setting forth the relationship of the person claiming such benefits to the deceased claimant. Said affidavit shall also set forth that said claimant died intestate, and that no administrator or executor has been appointed, and that there is no estate for administration.

Payment made in accordance with the requirements of this rule shall, for all purposes, be deemed to have been made to the person or persons entitled thereto and shall fully discharge the fund from liability for such benefits.

RULE ~~12~~ 13. INTERSTATE BENEFIT PAYMENTS

A. The following rule shall govern the Commissioner of Labor, ~~in his or her~~ administrative to ensure cooperation with other ~~States~~ states adopting a similar regulation for the payment of benefits to interstate claimants.

B. Definitions:

1. "Interstate Benefit Payment Plan" means the plan approved by the National Association of State Workforce Agencies or successor organization under which benefits shall be payable to unemployed individuals absent from the ~~State (or States)~~ state or states in which benefit credits have been accumulated.

2. "Interstate claimant" means an individual who ~~claims benefits under the unemployment insurance law of~~ one or more liable ~~States through the facilities of an agent State. The term "interstate claimant" shall not include any individual who customarily commutes from a residence to an agent State to work in a liable State unless the Commissioner of Labor finds that~~

of relevant facts pertaining to each claimant's failure to register for work or report for reemployment assistance.

~~G.~~H. Appellate Procedure

1. The agent State Vermont shall afford all reasonable cooperation in the taking of evidence and the holding of hearings in connection with appealed interstate benefit claims.

2. With respect to the time limits imposed by the law of a liable State upon the filing of an appeal in connection with a disputed benefit claim, an appeal made by an interstate claimant shall be deemed to have been made and communicated to the liable State on the date when it is received by any qualified officer of the agent State Vermont Department of Labor.

3. The liable state shall conduct hearings in connection with appealed interstate benefit claims. The liable state may contact Vermont for assistance in special circumstances.

~~H.~~I. Extension of Interstate Benefit Payments to Include Claims taken in and for Canada.

This rule shall apply in all provisions to claims taken in and for Canada.

RULE ~~13~~ 14. BENEFIT APPEAL RULES PERTAINING TO ADMINISTRATIVE LAW JUDGE (ALJ)

A. Filing of Appeal:

1. Method of Filing:

A party appealing a benefit determination must file ~~with an ALJ employed by the Commissioner~~ a written notice of appeal with the Unemployment Insurance Appeals Unit of the Department. The appeal may be submitted: 1) by U.S. mail to the Department of Labor; 2) by e-mail ~~or other electronic method approved by the Commissioner~~; 3) by facsimile; or 4) in person at any office of the Department of Labor; or 5) other method approved by the Commissioner.

B. 2. Time of Filing:

The notice of appeal must be filed within thirty (30) 30 calendar days from the date of the benefit determination.

C. 3. Form of Appeal:

Appropriate forms of for filing such appeals shall be prescribed by the Board Department and may be obtained from the central office of the Department, ~~or~~ at any ~~employment~~ office of the Vermont Department of Labor, or at http://labor.vermont.gov.

Use of a prescribed form is not mandatory to initiate an appeal. Any written notice that ~~sufficiently~~ clearly identifies the appellant and contains a current telephone number, mailing address, and other information requested by the Commissioner, and that may be construed as an appeal, filed within the prescribed period, shall be deemed to initiate an appeal and will constitute an appeal from such determination.

B. Execution of Appeal by Authorized Agent:

~~With the exception of appeals filed by e-mail or other electronic method approved by the Commissioner, the notice of appeal shall be signed by the party appealing or his or her authorized agent.~~ If a notice of appeal is ~~sig~~ned filed by an appellant's authorized agent, the name, mailing address, and telephone number of the appellant shall be set forth in the appeal document followed by the signature ~~or~~ and name of the authorized agent.

C. Multiple Appeal:

If an appeal from a benefit determination involves more than one claimant on the same issue, the appeal may be filed by the individual claimants or on their behalf by an authorized representative who shall, together with the appeal, submit a list containing the names, and addresses and identifying information required by subsection A. 3. above of all claimants, who are parties to the appeal.

D. Notice of Appeal:

A copy of the notice of appeal shall be mailed by the ~~ALJ~~ Unemployment Insurance Appeals Unit of the Vermont Department of Labor to the other interested parties to the determination ~~which~~ that is being appealed in accordance with subsection F. below.

E. Proceedings in the Case of Late Filing of Appeal:

If it ~~appears to~~ is determined by the ALJ that the appeal was not filed within the time allowed by law, an order may be entered reciting the essential facts which that establish the failure to file the appeal within the time allowed and dismissing the appeal. A copy of such order shall be mailed to each of the interested

parties. Any party objecting to the order may, within ten (10) days after the date of the mailing of the order, request that the order be reconsidered and that the matter be set down for hearing on ~~both~~ the timeliness of the appeal. ~~and the merits, in which event, such matter shall be scheduled for hearing on both issues.~~ If the appeal is found to be timely, a hearing on the merits shall be scheduled.

F. Notice of Hearing:

Hearing on the appeal shall be held by telephone. If the ALJ determines that an in – person appearance is required to ensure a fair hearing, he or she the ALJ may arrange for a party or parties to appear in person. Denial of an in-person hearing request by an ALJ may be appealed to the Commissioner in writing within five days of the denial. The decision of the Commissioner shall be final.

Notice of hearing shall be mailed to all interested parties at least six days before the date of hearing.

The notice of hearing shall give the docket number of the case, address of the claimant(s) and employer(s) involved, the date and time of the hearing, and the issues to be considered on the appeal.

G. Special Notice Required:

Whenever an appeal involves the questions as to whether the services were performed by the claimant in employment or for an employer, the ALJ shall give notice of such issue ~~and the pendency of the appeal~~ to the employing unit concerned, as well as to all interested parties. and ~~such employing unit shall thenceforth be an interested party to such appeal~~ that employing unit shall be given an opportunity to participate in the appeal.

H. Non-Participation of Parties, Continuances:

If a party fails to participate in a hearing before the ALJ, the ALJ shall nevertheless proceed with the hearing; the. The ALJ shall review the file and record and question any party- and other witnesses who may be present.

The ALJ, at his or her discretion, may continue or reopen a hearing for good cause-, ~~and shall use his or her best judgement as to when a continuance or reopening of a hearing shall be granted.~~ Notice of time and, date, and place (where applicable) of the reconvening of the hearing shall be given by the ALJ to the parties or their representatives. If neither party participates in the hearing, then the ALJ shall make a decision based on the information contained in the record.

I. Hearing Before ALJ:

1. All hearings before an ALJ shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. All issues relevant to the appeal shall be considered and passed upon. The interested parties may present such evidence as may be pertinent. The ALJ may examine or cross-examine all parties and witnesses.

2. All parties and witnesses shall testify under oath or affirmation. Hearsay evidence shall be allowed; however, any objection to hearsay evidence shall be noted by the ALJ and addressed in the ALJ's written decision. Notes or recordings taken by the claims adjudicator or customer service representative shall also be allowed into evidence, subject to the same hearsay objection, and if objected to shall be addressed in the ALJ's written decision.

3. The parties and their representatives will be provided with any relevant documentary evidence prior to the hearing. They may examine or cross-examine any other party and ~~the~~ witnesses, and explain or rebut any evidence.

4. The ALJ may take such additional evidence as is deemed necessary, provided that where additional evidence is so taken, the parties shall be given an opportunity of examining, cross-examining, and refuting such evidence. An opportunity to present argument shall be afforded the parties, which argument shall be made a part of the record.

5. Where a party is not represented by counsel or other agent the ALJ shall advise said party of his or her rights, aid the party in examining and cross-examining witnesses, and give the party every assistance compatible with the impartial discharge of the ALJ's duties.

6. Following the conclusion of a hearing, the ALJ shall without undue delay, render and issue a decision. The decision shall be in writing and shall be signed by the ALJ. It shall set forth the findings of fact with respect to the appeal, the reasons for the decision, and the decision. A copy of the decision shall be mailed or delivered to each party to the appeal, including the Vermont Department of Labor Unemployment Insurance and Wages Division.

7. All testimony produced at the hearing shall be recorded by the ALJ but need not be transcribed, unless the decision is appealed to the Employment Security Board. No participant in the appeal hearing is permitted to record the proceedings. The Commissioner may review audio recordings of hearings at any time.

J. Recusal of Administrative Law Judge ~~("ALJ")~~ from Participation in Hearing:

No ALJ shall participate in the hearing or disposition of any appeal in which he or she has an interest in the outcome of the proceedings, or has had any direct participation in the determination appealed from, ~~or~~ has any other interest or prejudice that will impair a fair and impartial hearing, or will give the appearance of bias. No ALJ shall participate in a hearing involving a relative, friend, or neighbor.

Challenges to the interest or prejudice of an ALJ: 1) may be presented to the Commissioner, in writing, at any time prior to the hearing or the date of final decision of the ALJ; 2) may be presented to the Employment Security Board in accordance with the pre-hearing filing requirements, and shall become a part of the record of such hearing.

Notice of any action on a challenge to interest or prejudice herein provided shall be given to all interested parties,

In the event the challenge is made prior to the hearing and is not heard immediately or is referred to the Board, the hearing of the appeal shall be continued until the disposal of such challenge.

The ALJ shall cause all parties to be notified of the new date set for such hearing by mailing a notice of continued hearing to all parties to the appeal at least six days before the date set for the new hearing.

RULE ~~14~~ 15. BENEFIT APPEAL RULES PERTAINING TO THE BOARD

A. Appeal from Decision of the ALJ:

1. Method of Filing: A party appealing from a benefit decision of the ALJ shall, within 30 calendar days of the date of the decision, file an appeal with the Board at the Department of Labor. The appeal may be submitted: 1) by U.S. mail to the Department of Labor; 2) by e-mail ~~or other electronic method approved by the Commissioner~~; 3) by facsimile, or, 4) in person at any office of the Department of Labor; or 5) by other method approved by the Commissioner.

2. Form of Appeal: Any written notice that ~~sufficiently~~ clearly and legibly identifies the appellant, and contains a telephone number at which the appellant can be reached, mailing address, or other information requested by the Commissioner, and that may be construed as an appeal, filed as above prescribed and within the prescribed period, shall be deemed to

initiate an appeal from such decision.

3. Execution of Appeal by Authorized Agent: ~~With the exception of appeals filed by e-mail or other electronic method approved by the Commissioner, the notice of appeal shall be signed by the party appealing or his or her authorized agent.~~ If a notice of appeal is signed by the authorized agent ~~of the appellant~~ filed by an appellant's authorized agent, the name, mailing address, and telephone number of the appellant shall be set forth in the appeal document followed by the signature and name of the authorized agent.

4. Acknowledgment of Appeal: A written acknowledgment of the notice of appeal shall be mailed by the Clerk of the Board to the parties interested in the decision which that is being appealed.

5. Multiple Appeal: In the event of an appeal from a decision of the ALJ involving more than one claimant on the same issue, the appeal may be filed by the individual claimants or on their behalf by an authorized representative who shall, together with the appeal, submit a list containing the names, ~~and addresses~~ and identifying information required by subsection A. 2. above of all claimants, who are parties to the appeal.

B. Notice and Place of Hearing Before the Employment Security Board

Upon the scheduling of any hearing before the Board, notice specifying the time and place of hearing shall be mailed at least ~~ten (10)~~ 10 days before the date of the hearing, to all interested parties to the appeal. Hearings before the Board shall be held at Montpelier, Vermont or at such other place as the Board may designate. The Board may continue a hearing to a later date upon request of a party, if the Board finds good cause for such continuance~~.~~ and if the Board finds that a continuance will not unduly prejudice the non-requesting party. Upon request, and for good cause shown, the Board may allow a party to appear by phone.

C. Hearing on Appeal to Board:

Except as otherwise provided by this rule all appeals to the Board shall be heard upon evidence in the record made before the ALJ.

In the hearing of an appeal on the record by the Board, parties may present oral and written argument ~~or both~~. Parties are encouraged to submit any written argument to the Board at least 24 hours in advance of the hearing. No written argument will be accepted later than the close of the hearing.

The Board may direct remand the matter to the ALJ to take additional evidence

necessary for the proper disposition of the appeal. Such evidence shall be taken by the ALJ in the manner prescribed for the conduct of hearings or appeals before him or her. Upon completion of the taking of such additional evidence, the ALJ shall, at the Board's direction, either issue a new decision, or return the complete record involved in the appeal to the Board for its decision thereon.

D. Decision of the Board:

Following the conclusion of a hearing on an appeal, the Board shall, within a reasonable time, announce issue its decision with respect to the appeal. The decision shall be in writing and shall be signed by the members of the Board who heard the appeal. It shall set forth the findings of fact of the Board, its conclusions thereon, its ruling of law, and its decision.

If a decision of the Board is not unanimous the decision of the majority shall control. The minority may file a dissent setting forth the reasons for failure to agree with the majority. Copies of any decision of the Board shall be promptly mailed or delivered to all interested parties.

Within 30 days of the Board's issuance of any order, a party may move the Board to reopen and reconsider that order. Such motions shall be granted only upon a showing of plain error, fraud, or newly discovered evidence.

F. ~~Disqualification~~ Recusal of a Board Member:

A member of the Board shall voluntarily ~~disqualify~~ recuse himself or herself and withdraw from any proceeding in which he or she cannot ~~afford a fair and impartial hearing or consideration~~ render an impartial decision or in which he or she has an interest. Any party to a proceeding may request the ~~disqualification~~ recusal of a member of the Board by filing an affidavit with the Clerk of the Board stating with particularity the grounds upon which it is claimed that a fair and impartial hearing or consideration cannot be or has not been accorded or that a member of the Board has or had an interest in the proceeding. Such affidavit shall be filed no later than 24 hours prior to the hearing. The issue raised by the request shall be determined by the other members of the Board.

Any action taken on a ~~challenge to the interest~~ request for recusal shall be made part of the record of the proceedings and notice thereof given the ~~challenging~~ party parties.

F. Initiation of Review by the Board on a Motion of Commissioner:

~~Upon the initiation by the Commissioner, on his or her own motion, of a review by the Board of a decision of the ALJ of a benefit determination as provided in 21 V.S.A., Section 1349, the Board shall allow the parties an opportunity to be heard~~

~~before it within ten (10) days notice thereof to all parties interested.~~ Upon motion made by the Commissioner a review may be initiated by the Board of a decision of the ALJ or of a benefit determination. The Board shall make its findings of fact and conclusions based on the record. In the Board's discretion, the interested parties shall be given an opportunity to be heard, after proper notice as set forth in subsection B above.

RULE ~~15~~ 16. WITNESS FEES AND MILEAGE

~~Upon affidavit of a witness, stating the number of days he has attended and the amount of mileage to which he is entitled~~ In the event a witness is subpoenaed pursuant to 21 V.S.A. § 1352 and appears in person, the ALJ or the Chair of the Board before whom the witness was called to testify~~,~~ shall certify as to the attendance of the witness and the amount of the witness fees to which he or she is entitled. Fees paid a witness shall be in accordance with 21 V.S.A. § 1352. Subpoenas will issue on request of a party only if, in the opinion of the ALJ or Chair of the Board, the testimony of the subpoenaed witness is likely to be relevant to a material fact at issue on appeal.

No witness fees or mileage shall be allowed a witness appearing at any hearing who has not been subpoenaed.

RULE ~~16~~ 17. CONSOLIDATIONS

When the same or substantially similar evidence is relevant and material to the matters in issue in claims by more than one individual ~~the same time and place for considering each claim may be fixed, hearings thereon are jointly conducted, a single record of the proceedings made and evidence introduced with respect to one proceeding considered as introduced in the others~~ such claims may be consolidated and heard at the same time, provided that in the judgment of the Board or the ALJ before whom the hearing is held, such consolidation would not be prejudicial to any party.

RULE ~~17~~ 18. STIPULATIONS

The parties to an appeal, with the consent of the ALJ, or the Board~~, as the case may be,~~ may stipulate in writing, or for the record at the hearing, as to the admitted facts. The ALJ or the Board~~, as the case may be,~~ may dispense with the taking of evidence and the hearing of testimony and decide the claim on the basis of such stipulated admitted facts or may take such further evidence as is deemed necessary to determine the matter

RULE ~~18~~ 19. NOTICE OF BENEFIT DECISIONS AND APPEAL RIGHTS

Each notice by a representative of the Commissioner, an ALJ, or the Board~~, which is required to be furnished~~ of a determination or decision on a claim for benefits shall, in addition to stating the determination or decision and the reasons therefor, include a notice specifying the parties' appeal rights. The notice of appeal rights shall state clearly the place and manner for filing an appeal from the determination or decision and the period within which the appeal may be taken.

RULE ~~19~~ 20. INVESTIGATIONS

Whenever in the course of an appeal, it develops that investigation, inquiry, payroll audit, or other examination is necessary to aid in the determination of the case, the ALJ or the Board may request such investigation, inquiry, payroll audit, or other examination to be made through the Unemployment Insurance and Wages Division. Hearings on appeal shall be continued or adjourned pending receipt of the report of such investigation, inquiry, audit, or examination. The right to be informed of and to inspect and rebut such reports and to conduct cross examination as to such evidence is preserved to all interested parties to the appeal.

RULE ~~20~~ 21. WITHDRAWAL OF APPEALS

An appeal may be withdrawn, in writing, by an appellant ~~provided, however, that the withdrawal of an appeal, whether by stipulation or otherwise, shall always be within the discretion of the ALJ or the Board before whom the appeal is pending~~ at any time prior to the issuance of a decision.

RULE ~~21~~ 22. TRANSCRIPT FURNISHING

Upon ~~request~~ appeal from a decision of the ALJ or the Board,~~any~~ all interested party parties to an appeal ~~from the decision of the ALJ or the Board~~ shall be furnished, without charge, with a copy of the transcript of the proceedings held before the ALJ or the Board. ~~Under no circumstances will a copy of the audio recording be provided to either party.~~ A party may, within the time frame allowed by Rule ~~14. C.~~ 15. A., ~~make arrangements to listen to the audio recording at the central office of the Vermont Department of Labor~~ request an audio recording of the hearing.

RULE ~~22~~ 23. PROCEDURE ON ASSESSMENT APPEALS

The Commissioner, upon receipt of a petition for hearing on assessment of contributions against an employer, shall refer the appeal to an ALJ who shall set the

same for hearing and notify the petitioner and other interested parties by first class mail of the time and place of such hearing at least ten 10 days prior to the date set.

Except as herein otherwise provided and except as provided in 21 V.S.A. ~~Sections~~ §§ 1331 and 1332, the procedure set forth in Rules 13 14 through 19 22 relating to benefit appeals shall be substantially followed whenever pertinent and applicable in the hearing and disposition of assessment appeals.

RULE ~~23~~ 24. PROCEDURE ON APPEAL FROM ADMINISTRATION DETERMINATIONS

~~The Commissioner upon~~ Upon receipt of an employing unit's petition for a hearing on an administrative determination affecting its rate of contributions, its right to adjustments or refund of contributions paid, its coverage as an employer, or its termination of coverage, the Commissioner shall refer the appeal to an ALJ who shall set the same for hearing and notify the petitioner and other interested parties by first class mail of the time and place of such hearing at least ten 10 days prior to the date set.

Except as herein otherwise provided and except as provided in 21 V.S.A., ~~Section~~ § 1337a, the procedures set forth in Rules ~~13~~ 14 through ~~19~~ 22 relating to benefit appeals shall be substantially followed whenever pertinent and applicable in the hearing and disposition of appeals from such administrative determinations.

RULE ~~24~~ 25. DISCLOSURE OF INFORMATION

A. Information from unemployment insurance records may only be made available ~~to any public officer or public agency of this or any other state or federal government~~ as provided for in 21 V.S.A. §1314 or other applicable law. Prior to any release of information the agency seeking the information shall agree to a memorandum of understanding that will, at a minimum, include:

1. The purpose for which the request is made;

2. The specific information needed;

3. The names and position of all officials who will have access to the information;

4. Methods and timing of the requests for information including the format used, and the period of time needed to furnish the requested information, and the names and positions of all officials authorized to request the information;

5. Provisions for determining appropriate reimbursement for the costs incurred in providing information, including developmental costs associated with furnishing data to the requesting agencies and monitoring safeguards to protect the information;

6. A description of the safeguards used to ensure the information obtained from the Department will be protected against unauthorized access or disclosure.; and

~~B.~~ 7. Reports The requirement that any reports and/or publications utilizing confidential data from the Department will be provided to the Commissioner for review and comment prior to release to the general public.

~~C~~ B. Information collected under contract or agreement with the US Bureau of Labor Statistics, including employer name, address, operational description, and employment data, is subject to the confidentiality requirements of federal law. The Commissioner may authorize the sharing of employer specific information with other state agencies as permitted by 21 V.S.A. § 1314 or other applicable law provided it has been successfully screened ~~by~~ for confidentiality using US Bureau of Labor Statistics ~~supplied software~~ approved methodology. Information that does not pass the confidentiality criteria of the US Bureau of Labor Statistics ~~cannot~~ shall not be released to anyone. The Commissioner will decide the feasibility of supplying such information based on the staff time available and the current workload of the Department.

RULE ~~25~~ 26. APPROVAL OF TRAINING COURSE OR PROGRAM AND ~~ADDITIONAL TRAINING BENEFITS~~

A. This Rule shall govern the administration of Training Course or Program requests as they relate to the approval of training requirements set forth in 21 V.S.A. Section 1343(a)(3) § 1343(b)

B. Definitions:

1. An otherwise eligible claimant, for the purposes of 21 V.S.A. ~~Section~~ § 1343(b), is a person who meets the requirements set forth in Section § 1343 except for the requirements of subsection (a) (3) relating to the availability and active search for work.

2. "Training course or program" as used in this rule means

(a) Occupational or technical training that upon successful completion leads to a recognized certificate, or associate degree, or skills or

competencies needed for a specific job or jobs, or an occupation or occupational group as recognized by employers and determined prior to training. Basic education courses, however, which are necessary as a prerequisite for skill training, may also be approved.

i. Except during periods when the Extended Benefit Program is triggered "on" in accordance with 21 V.S.A. ~~Section~~ § 1421, the term "training" does not include programs of instruction in a secondary school, where the individual is enrolled as a regular full-time student, intended to lead toward a secondary school diploma.

(b) Training conducted by an agency, educational institution, or employing unit ~~which~~ that has been approved by the Vermont Department Agency of Education to conduct training programs. Provided, however, that any agency, educational institution, or employing unit which that is not subject to regulation and approval by the ~~Department~~ Agency of Education may be approved by the Commissioner.

(c) Training directed to a high demand occupation.

(d) The Commissioner shall also consider if the training course or program is being:

i. Offered by an employing unit that is other than the employing unit training workers for positions in its own establishments; or

ii. Funded under the Workforce Investment Innovation & Opportunity Act.

3. Declining Occupation: A declining occupation is one whose total number, as measured by the Occupational Employment Statistics (OES), has declined over the last two surveys and is projected to continue to decline.

4. High Demand Occupation: A high demand occupation is one that is projected by the Department of Labor to have higher than average openings statewide than all occupations or have a higher-than average growth rate.

C. Approval of Training Course or Program

1. A training course or program may be approved for an individual when the Commissioner determines, as a primary requisite, that:

(a) The individual was indefinitely separated from a declining occupation or has been involuntarily and indefinitely separated from employment as a result of permanent reduction of operations at the individual's place of employment; ~~and~~;

(b) The individual is unemployed and is unable to obtain employment through core and intensive services and has been determined by workforce development division Workforce Development Division staff to be in need of training services and has the skills and qualifications to successfully complete the selected training program; and

(c) Suitable work in the individual's usual occupation does not exist or the demand for such is substantially diminished. Usual occupation shall mean the type of work for which the individual has current skills and which is most reasonably related to the individual's work experience and qualifications.

2. A training course or program may otherwise be approved for an individual who does not meet the above requirements if the Commissioner finds that:

(a) the training is funded under a WIOA program;

(b) the training is in a high demand occupation;

(c) the individual is unlikely to obtain other suitable employment based on his or her current skill levels; or

(d) the training will result in substantial enhancement of marketable skills and earing potential.

D. Method of Making Application for Approval – Any claimant who desires approval of training shall make a written application to the Commissioner setting out the following:

1. The individual's most recent employer, his or her occupation with such employer, reason he or she is no longer employed by the employer and the last date worked for the employer;

2. The nature of the training or retraining course he or she is attending or intends to attend;

3. The name of the training facility or of the employing unit providing the training or retraining;

4. The beginning and ending date of the training or retraining course; and

5. The type of jobs for which the claimant will qualify at completion of such training.

F. Individuals receiving unemployment benefits shall, upon request, provide the ~~unemployment insurance division~~ Unemployment Insurance Division with evidence of satisfactory progress in the training program.

F. Denial of training course or program approval for a claimant by the Commissioner shall be final. However, any claimant who disagrees with a denied approval may request within 30 days of such denial a review by the Commissioner.

RULE ~~26~~ 27. ADDITIONAL TRAINING BENEFITS

A. This rule shall govern the administration of Additional Training Benefits (ATB) provided under 21 V.S.A. Section § 1471.

B. Definitions:

1. ATB: Additional training benefits (ATB) consist of up to 26 weeks of benefits available to an individual who has exhausted all benefits available under 21 V.S.A. § 1340 (regular benefits) and any other federally funded unemployment compensation or trade act benefits and is enrolled in and making satisfactory progress in an approved training course or program.

2. Approved Training Program. For the purposes of ATB an approved training program consists of one that:

   (a) Is funded through the Workforce ~~Investment Act of 1998~~ Innovation Opportunity Act, or

   (b) Is approved by the Commissioner or the Commissioner's designee; and

   (c) Is preparing a UI claimant for entry into a high-demand occupation.

3. Declining Occupation: A declining occupation is one whose total number, as measured by the Occupational Employment Statistics (OES), has declined over the last two surveys and is projected to continue to decline.

4. High Demand Occupation: A high demand occupation is one that is

projected by the Department of Labor to have higher than average openings statewide than all occupations or have a higher-than-average growth rate.

C. Payment of Additional Training Benefits

1. ATB will be granted to an individual who:

(a) Was separated from a declining occupation, or who was involuntarily and indefinitely separated from employment as the result of a permanent reduction in operations at the individual's place of employment.

(b) Filed an initial claim for ATB no later than the end of the initial benefit year or within three months following the exhaustion of all other benefit entitlements, whichever is later.

(c) Prior to the end of his or her last benefit year, was enrolled and making satisfactory progress in a training course or program.

(d) Is not receiving a similar stipend or other allowance for non-training related expenses.

2. ATB will be paid at the same rate as the maximum weekly benefit amount determined on the claimant's most recent eligible benefit year for up to 26 weeks for week(s) claimed within one year of establishing the initial ATB claim.

D. Employer Experience Rating:

The experience rating of employers who have paid base-period wages in the most recent eligible year will be charged for ATB at the same percentage ~~associated with the payment of regular benefits in the applicable year~~ as they were during the claimant's regular eligibility period. The liability to experience rated and reimbursable employers for benefit charges associated with ATB will be treated and handled the same as charges associated ~~to~~ with an unemployment payment made under the regular state unemployment insurance program. Employers subject to be charged for a share of ATB will be notified in writing of the ATB initial claim and their percentage of liability.

E. Relationship to Other Rules:

Rules, procedures, policies, and statutes associated with an unemployment insurance payment made under the regular unemployment compensation insurance program shall apply to ATB recipients.

~~this exclusion would create undue hardship on such claimants in specified~~ areas. files an interstate claim for benefits under the unemployment insurance law of a liable state from another state, through the facilities of an agent state, or directly with the liable state. The term "interstate claimant" shall not include any individual who customarily commutes across state lines from a residence in one state to work in a liable state, unless the Commissioner finds that this exclusion would create undue hardship on such claimants in specified areas.

3. "State" includes the ~~Commonwealth of Puerto Rico, the District of Columbia and the Territory of the U.S. Virgin~~ Islands. District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

4. "Agent State" means any ~~State in which an individual files a claim for benefits from another State~~ state from or through which an individual files an interstate claim for benefits against another state.

5. "Liable State" means any State stale against which an individual files, from or through another ~~State~~ state, a an interstate claim for benefits.

6. "Benefits" means the compensation payable to an individual, with respect to his or her unemployment, under the unemployment insurance law of any ~~State~~ state.

7. "Week of unemployment" includes any week of unemployment as defined in the law of the liable ~~State~~ state from which benefits with respect to such week are claimed.

C. Registration for work.

1. ~~Each~~ When Vermont acts as the agent for an interstate claimant, such interstate claimant shall be registered for work ~~through any employment office in the agent State~~ when and as required by the law, ~~regulations, and procedures of the agent~~ State with the Vermont Department of Labor in accordance with Rule 2. O. Such registration shall be accepted as meeting the registration requirements of the liable ~~State~~ state.

2. The Commissioner may require interstate claimants to provide evidence that they have registered for work in the labor market area in which they reside.

D. Benefit Rights of Interstate Claimants

If a claimant files a claim against ~~any State~~ Vermont, and it is determined by ~~such State~~ Vermont that the claimant has available benefit credits in such State

Vermont, then claims shall be filed only ~~against such State~~ as long as benefit credits are available in that ~~State~~. Thereafter, the claimant may file claims against any other ~~State~~ state in which there are available benefit credits. For the purposes of this rule, benefit credits shall be deemed to be unavailable whenever benefits have been exhausted, terminated, or postponed for an indefinite period or for the entire period in which benefits would otherwise be payable~~, or whenever benefits are affected by the application of a seasonal restriction~~.

E. Eligibility Review

Interstate claimants for whom Vermont is the liable state shall meet the requirements outlined in Rule 11. C. 1. – 8. The Commissioner may require interstate claimants to provide evidence of meeting such criteria to remain eligible for benefits.

~~E.~~F. Claims for Benefits

1. Claims for benefits ~~shall be filed by interstate claimants on uniform interstate claim forms and in accordance with uniform procedures developed pursuant to the Interstate Benefit Payment Plan. Claims shall be filed in accordance with the type of week in use in the agent State. Any adjustments required to fit the type of week used by the liable State shall be made by the liable State on the basis of consecutive claims filed~~ or for a waiting period filed by an interstate claimant directly with the liable state shall be filed in accordance with the liable state's procedures.

2. ~~Claims shall be filed in accordance with agent State regulations~~ With respect to weeks of unemployment during which an individual is attached to his regular employer, the liable state shall accept as timely any claim which is filed through the agent state within the time limit applicable to such claims under the law of the agent state.

F.C. Determination of Claims

1. ~~The agent State~~ Vermont shall, in connection with each claim filed by an interstate claimant, ~~ascertain and report~~ identify to the liable State state in question ~~such facts relating to the~~ any potential issue relating to the claimant's availab lity for work and eligibility for benefits as are readily determinable in and by the agent State.

2. ~~The agent State's~~ Vermont's responsibility and authority in connection with the determination of interstate claims shall be limited to ~~investigation and reporting of relevant facts. The agent State shall not refuse to take an interstate claim~~ the identification of potential issues identified in connection with initial claims or weekly claims filed through Vermont and the reporting

RULE 27 28. PENALTY WEEKS

As prescribed under 21 V.S.A. Section § 1347, claimants who have been found to commit fraud in filing claims for benefits, who have not been prosecuted under the provisions of 21 V.S.A. §§ 1368 or 1373, shall be assessed one penalty week for each week such fraud was committed, provided that the claimant has not been found to commit fraud within the past three calendar years. Claimants found to have committed fraud within the past three calendar years, and who have committed fraud again, will be assessed two weeks for each week such fraud was committed. Claimants will not be assessed more than 26 penalty weeks in any one benefit year. Any claimant who is found otherwise eligible for benefits within three years of after penalty weeks being have been assessed will have each week of benefit entitlement applied against his or her penalty week balance. The monetary value of each claim applied against the penalty week balance will be deducted from the maximum benefit amount in the benefit year such claim is filed.

RULE 28 29. CLAIMANTS WITH DISABILITIES

A claimant with a disability who is utilizing the assistance of any state agency, including but not necessarily limited to the Division of Vocational Rehabilitation, may be relieved from the requirement to actively seek employment during the period in which the agency is working with the claimant and/or on his or her behalf to help the claimant prepare for and secure new employment. The claimant must remain able to work and available for suitable work if offered, in order to continue receiving weekly benefits. The approval of the Manager of the Unemployment Insurance Claims Center is required in such cases.

RULE 29 30. COST SHIFTING OF AN EMPLOYER'S EXPERIENCE RATING

A. The following rule shall govern the administration of Vermont's State Unemployment Tax Avoidance (SUTA) system, as required under V.S.A. 21, Section 21 V.S.A. § 1325(d).

B. Process

1. On a daily basis, any new employer accounts being established will be cross matched against the existing employer data base to detect potential common ownership. The SUTA Dumping detection system, which will also pick up the potential transfer of employees where there may not be common ownership, will be run on a quarterly basis. Both of these systems will be the Department's main source of detecting potential SUTA

dumping situations, which may have occurred within the past 12 completed calendar quarters, from the date of detection.

2. When an employer transfers all or any portion thereof of its trade or business to another employer, where at the time of the transfer there is substantial common ownership, management, or control of the two employers, the employment experience rating attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred.

C. Definitions

1. ~~"Trade or business" includes the employer's workforce and does not require an acquisition or sale.~~ "Trade or business" ~~also~~ includes reorganizations or restructuring where the only significant difference is that all or any portion of the employees are being paid or reported by a different entity. "Trade or business" also includes the employer's workforce and does not require an acquisition or sale.

2. "Substantial common ownership, management, or control" is defined simply as common ownership, management, or control, which could include one manager that exercises pervasive control as the chief executive officer of both companies.

RULE 30 31. PENALTIES FOR EMPLOYEE MISCLASSIFICATION AND FALSE STATEMENT

A. This Rule shall govern the assessment of penalties for employee misclassification and false statements as provided for by 21 V.S.A. §1314a (f)(1)(B) and 21 V.S.A. § 1369. This Rule shall also govern the period of time an employer is prohibited from contracting, directly or indirectly, with the ~~state~~ State or any of its subdivisions as a result of employee misclassification. Any such penalties shall be in addition to any assessment for unpaid contributions and interest payments owed pursuant to 21 V.S.A. § 1329 and § 1330.

1. In assessing a misclassification penalty, the Commissioner shall adhere to the following guidelines:

(a) An initial violation shall subject the employer to a penalty of $100.00 $500.00 for each improperly classified employee, or a ~~penalty equal to 100% of the unpaid unemployment insurance contributions owed the department as a result of the improper classification, whichever amount is greater, not to exceed $5,000.00 per employee~~.

(b) A second violation within a period of ~~three~~ six years of the previous violation shall subject the employer to a penalty of $500.00 $1,000.00 for each improperly classified employee~~, or a penalty equal to 500% of the unpaid unemployment insurance contributions owed the department as a result of the improper classification, whichever amount is greater, not to exceed $5,000.00 per employee~~.

(c) A third or subsequent violation within a period of ~~three~~ 10 years of the most recent violation may subject the employer to a penalty of $5,000.00 for each improperly classified employee.

In assessing a penalty under this section, the Commissioner shall consider any relevant mitigating factors, including but not limited to, good faith or excusable neglect, and the Commissioner may modify or reduce the penalty accordingly. An administrative determination shall be issued to advise the employer of the penalty and the employer's appeal rights.

2. In addition to the penalties listed in subsection 1, above, the Commissioner shall prohibit an employer found to be in violation of 21 V.S.A. § 1314a(f)(1)(B) from contracting, directly or indirectly, with the ~~state~~ State or any of its subdivisions, for up to three years.

(a) Any prohibition from contracting with the ~~state~~ State shall only be made following consultation with the Commissioner of Buildings and General Services, ~~or~~ the Secretary of Transportation, or other agencies as appropriate.

(b) An administrative determination shall be issued to advise the employer of the debarment period and the employer's appeal rights.

3. In establishing a debarment period under this section, the Commissioner ~~may consider any relevant mitigating factors, including but not limited to, good faith, excusable neglect, or public health and safety~~ shall adhere to the following guidelines:

(a) An initial violation shall subject the employer to a debarment period of up to one year.

(b) A second violation within a period of three six years of the previous violation shall subject the employer to a debarment period of up to two years.

(c) A third or subsequent violation within a period of three 10 years of the most recent violation shall subject the employer to a debarment period of up to three years.

(d) The debarment period may be reduced in the interests of public health and safety or if the employer demonstrates that the non-compliance was the result of a good faith misunderstanding of the law's requirements, excusable neglect, or other specific mitigating factors.

4. Penalties and debarment periods imposed pursuant to this Rule may be appealed in the same manner as appeals from assessment of contributions, in accordance with Rule 23 of these Rules and with 21 V.S.A. §§ 1331 and 1332. Whenever possible, appeals of penalties and debarment periods shall be heard in conjunction with appeals of any associated assessment of contributions.

B. Violation of 21 V.S.A. § 1369, making a material false statement or representation, either on one's own behalf or on behalf of another.

1. An initial violation shall subject the person to a penalty of $2,500.00.

2. A second or subsequent violation within a period of three years shall subject the person to a penalty of $5,000.00.

~~RULE 31. ALTERNATE METHOD OF PAYING EMPLOYER CONTRIBUTIONS~~

~~Upon the base of contributions required by subsection (b) of 21 V.S.A. Section 1321 becoming greater than $15,000.00, an eligible employer may elect to pay the first quarter contribution in installments within a calendar year. If an employer misses a payment, the entire contribution amount shall become immediately due, and the employer shall also pay any penalties and interest that the department prescribes.~~

~~A. An employer will be eligible to pay their first quarter contribution in installments only if all of the following criteria are met:~~

~~1. The employer has paid all contributions due the department in a timely manner for the previous three calendar years;~~

~~2. The employer has incurred 50 percent or more of its tax liability in the first quarter of the preceding calendar year;~~

~~3. The employer's tax liability in the first quarter of the requesting year~~

~~is projected to be at least 50 percent greater than in the first quarter of the preceding year;~~

~~4. The employer applies for the installment payment option by February 30; and~~

~~5. The employer files and pays all quarterly reports online.~~

~~B. An eligible employer who participates in the installment payment option shall pay 50 percent of their first quarter liability by April 30. The remaining 50 percent may be spread out over the remaining 8 months, to result in payment in full by December 31. Interest on the remaining balance will accrue monthly at a rate set by the commissioner on January 1 of each year. The interest rate shall be equal to the federal unemployment trust fund borrowing rate, as established by 42 USCA § 1322(b)(4).~~