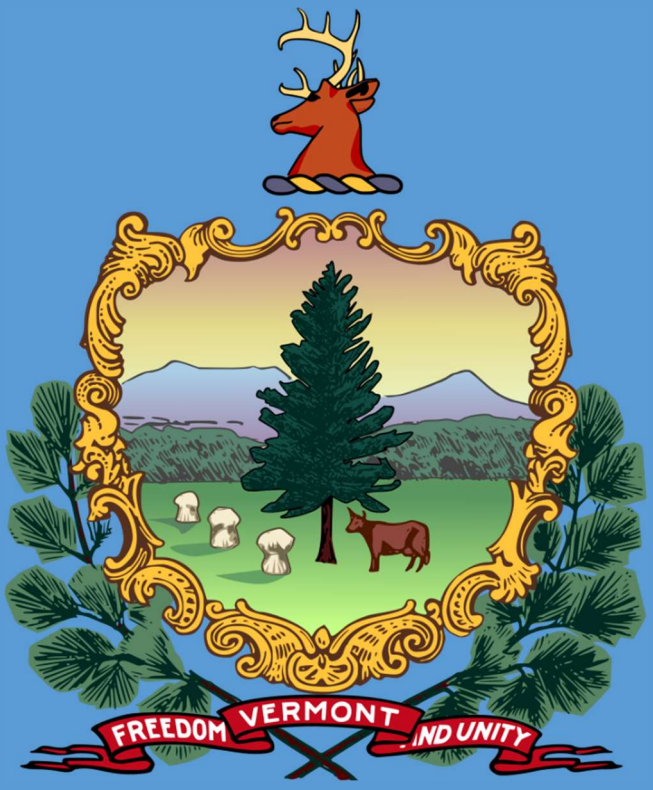
REPORT ON THE STATUS OF MISCLASSIFIED EMPLOYEES IN THE VERMONT WORKFORCE



PREPARED BY THE VERMONT OFFICE OF THE ATTORNEY GENERAL, THE VERMONT DEPARTMENT OF LABOR AND THE MISCLASSIFICATION TASK FORCE

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Executive Summary

The Vermont legislature created an Employee Misclassification Task Force in 2020. Its purpose is to "coordinate efforts to combat misclassification of workers and to ensure enforcement of all related laws and regulations."[1] In addition, the Task Force is required to submit a report to the legislature "regarding ways to improve the effectiveness and efficiency of the system of joint enforcement by the Commissioner of Labor and the Attorney General of the laws related to employee misclassification . . ."[2], including but not limited to examination of:

> (1) Potential legislative changes to address shortcomings or difficulties identified by the Task Force in relation to the system of joint enforcement;
> (2) potential legislative changes to enable either the Commissioner of Labor or the Attorney General to seek the full, combined range of penalties and remedies that are currently available to them through joint enforcement;
> (3) whether to expand the joint enforcement of the laws related to employee misclassification to include additional agencies or departments of the State and potential legislative changes to accomplish such an expansion;
> (4) the possibility of creating a private right of action to enforce the provisions of 21 V.S.A. chapter 5, subchapters 2 and 3, and 21 V.S.A. chapters 9 and 17 that relate to employee misclassification; and
> (5) the possibility of creating a private attorneys general act modeled on California law for the enforcement of the provisions of 21 V.S.A. chapter 5, subchapters 2 and 3, and 21 V.S.A. chapters 9 and 17 that relate to employee misclassification.[3]

This report provides context, data, and recommendations. It also provides an overview of employee misclassification and actions taken by the Vermont Department of Labor to combat misclassification.

[1] 3 V.S.A. § 2222d.
[2] *Id.*
[3] *Id.*

I. OVERVIEW OF EMPLOYEE MISCLASSIFICATION

Employee or worker misclassification is when a business intentionally or by an inadvertent error classifies a worker as an independent contractor instead of an employee.[4] Misclassification allows the employer to avoid paying taxes on the worker's wages, paying for worker's compensation or unemployment insurance, and complying with minimum wage and overtime laws.[5] Misclassification has a variety of negative consequences. It may distort the competitive bidding process in some industries ; it may deprive state and federal governments of some tax revenue; and it denies to workers the protections of wage and hour laws, unemployment insurance.[6] In Vermont the term is often also used when an employer fails to provide workers' compensation insurance coverage for its workers, whether it classifies them as employees, independent contractors or employees of an uninsured sub-contractor performing work in the nature of the general contractors business.[7]

Historically, Courts looked to the common law control test based on an agency theory to determine whether a worker is an "employee" or "independent contractor" for purposes of establishing the nature of the employer-employee relationship.[8] As the law has evolved, however, some jurisdictions, including Vermont, now impose different statutory frameworks to use when determining whether a worker is an employee. For purposes of unemployment insurance tax liability, the so-called "ABC test" is used.[9] The workers' compensation act utilizes the "right to

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[4] Worker Misclassification, National Conference of State Legislatures, https://www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx (last visited July 9, 2021).
[5] *Id.*
[6] *Id.*
[7] See, e.g. 21 VSA §601(3) and 21 VSA §692. But note exceptions to who is considered an employee in 21 VSA §601(14).
[8] Jennifer Pinsof, A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy, 22 MICH. TELECOMM. & TECH. L. REV. ___ (2016), at 347-348. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1220&context=mttlr
[9] "Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that (i) such individual has been and will continue to be

control" and the "nature of the business" test when making a determination as to the liability to pay compensation to injured workers and carry insurance coverage for that purpose.[10] While Vermont's wage-hour statute specifically references the "ABC" test for the subchapter dealing with the payment of wages, other subchapters (e.g. minimum wage subchapter) still reference the common law "suffer or permit to work" for remuneration test.[11]

Misclassification is a national concern. It is particularly prevalent in labor-intensive, low-wage industries,[12] but more recently, has also posed issues in the "gig" economy. National studies, audits, and unemployment insurance data estimate that 10–30% of employers nationwide may misclassify workers.[13] The Misclassification Task Force heard testimony from labor advocates suggesting that employee misclassification affects approximately 10-14% of Vermont workers. The Department of Labor cannot confirm that estimate but points out that often an employer, possibly through ignorance, may properly classify the bulk of its workforce but misclassify one or two individual workers.

As of 2016, 35 states define and prohibit employee misclassification.[14] Last year 28 states including Vermont had formal or informal employee misclassification task forces.[15] Most were created by executive order or legislative action.[16]

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free from control or direction over the performance of such services, both under his contract of service and in fact; (ii) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (iii) such individual is customarily engaged in an independently established trade, occupation, profession or business." See Vt. Stat. Ann. 21, § 1301(6)(B)..

[10] See footnote 7, supra.

[11] See 21 VSA §341(1) and (2); *but cf.* 21 VSA §301(1) and (2); and 21 VSA §383(2) and (3).

[12] Public Task Forces Take on Employee Misclassification: Best Practices, National Employment Law Project, at 1, http://stage.nelp.org/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification.pdf (last visited July 9, 2021) [hereinafter NELP Report].

[13] *Id.* at 3.

[14] The Misclassification of Employees as Independent Contractors, Department for Professional Employees, AFL-CIO, at 7, https://static1.squarespace.com/static/5d10ef48024ce300010f0f0c/t/5d1bb81a7c15100001d76dd8/1562097690744/ Misclassification+of+Employees+2016+Format+Update.pdf (last visited July 9, 2021).

[15] NELP Report, at 4.

[16] *Id.*

All U.S. states and territories also have Memoranda of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division.[17] The MOUs "provide for data sharing, referrals, coordinated enforcement, joint outreach and compliance assistance" between the federal and state Departments of Labor.[18] Vermont's MOU became effective on August 13, 2015, and was renewed on December 14, 2018.[19] It is likely to be renewed for an additional three year term at expiration of the current term.[20]

II. MISCLASSIFICATION IN COMMON INDUSTRIES

Certain types of industries may be more prone to misclassification of the workforce than others. For example, "those that use unskilled labor, minimal capital investment requirements, and seasonal business cycles."[21] This could pose challenges for workers and employers in the construction trades, real estate, retail, tourism, and other industries. This risk of misclassification may also extent to the burgeoning "GIG" economy and new trends involving the rise of remote working conditions. However, the Department of Labor's Workers' Compensation Division receives complaints alleging failure to carry Workers' Compensation Insurance from all types of industries and employment sectors, including restaurants, lodging establishments, and transportation in addition to construction, and manufacturing. The complaints typically involve small employers with 20 or fewer employees.

A. MISCLASSIFICATION AND THE "GIG" ECONOMY

[17] State Enforcement and Outreach Coordination, U.S. Department of Labor, Wage and Hour Division, https://www.dol.gov/agencies/whd/about/state-coordination (last visited July 9, 2021).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Evaluation Report: Misclassification of Employees as Independent Contractors, Office of the Legislative Auditor, State of Minnesota, at xi (2007). Available at: https://www.auditor.leg.state.mn.us/ped/pedrep/missclass.pdf (last viewed Oct. 20, 2021).

Traditionally employee misclassification has taken place against a backdrop of lower wage service workers (retail or service workers) or perhaps higher hourly wage jobs with fluid work forces (construction and/or other trades). While still a relatively small part of the overall Vermont economy, one area to keep an eye on is the "gig" economy. The gig economy "refers to a labor market characterized by short-term contracts or freelance work as opposed to permanent jobs in a traditional employer-employee relationship."[22] It is a fluid work force that may work for multiple entities, and which is largely centered on independence, flexibility and non-traditional, and increasingly, remote workplaces. This could include everyone from software developers, marketing and communications professionals, transportation professionals (drivers), and many others. The ability to work from home, and in particular the need to do so (exacerbated by the COVID-19 pandemic) and whether that ultimately impacts the Vermont workforce in ways that have implications for misclassification remain to be seen and should be monitored.

Some commentators argue that gig economy workers should presumptively be treated as "employees" in the absence of specific common law or statutory reforms.[23] The Vermont Department of Labor has already determined that, for unemployment insurance purposes, drivers for transportation network companies such as Uber and Lyft are independent contractors, not employees. Whether transportation network companies are required to maintain workers' compensation coverage for their drivers is an issue that has not yet been finally resolved in Vermont. At least one transportation network company maintains WC coverage in Vermont, and it is not clear what presence the other company has in Vermont

[22] https://www.americanbar.org/content/dam/aba/events/labor_law/2019/annual-conference/papers/evolving-labor-issues-in-gig-economy.pdf
[23] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1220&context=mttlr

However, it would be important for Vermont lawmakers to gain a better understanding of potential impacts on employers and employees in this emerging sector and what that could mean for balancing commerce and economic growth with worker protections and benefits.

B. THE RISE OF REMOTE WORKING CONDITIONS

One area to monitor is the post-pandemic working landscape. Anecdotally, Vermont received an influx of new Vermonters from other states as remote work became more practical, feasible, and desirable as a result of the COVID-19 pandemic. And, the State of Vermont has promoted recruitment efforts to attract relocation to the State of Vermont. It remains to be seen whether there may be larger implications for the Vermont workforce and employers who may have their principal places of business in other jurisdictions, but who may also have Vermonters working for them in some capacity. It will be important to consider whether remote work becomes the norm in other sectors, including the gig economy and what impact, if any, that may have on employee misclassification. However, this is a developing situation, and it remains to be seen whether remote work is a transitory or permanent part of the new Vermont working landscape and whether, or if, there are serious implications for misclassification in this area.

III. DATA COLLECTION AND REPORTING

The Vermont Attorney General and the Department of Labor are required to provide lawmakers certain data relating to the status of misclassified workers in Vermont. The Task Force is also required to produce a report and recommendations. Rather than creating two separate documents, and to encourage efficiency, communication and coordination among executive agencies, that information is included below:

(i) Number of Complaints Received (in relation to violations of 21 V.S.A. chapter 5, subchapters 2 and 3, and 21 V.S.A. chapters 9 and 17 that involved employee misclassification);

a. Act 85 of the 2020 legislative session was signed into law on February 20, 2020. Immediately after passage, the COVID-19 pandemic disrupted the entire unemployment insurance system. From March 2020 through June 2021, the Department's misclassification auditing team was reassigned to assist with UI claims processing. While the team continued to investigate misclassification, as evidenced by the data provided below, the team was focused primarily on assisting claims being processed. It is important to note that the UI investigation of misclassification is not complaint driven. The Department is primarily enforcing proper classification through standard business processes such as quarterly employer audits and claims assignments. As can be expected, the Department did not receive any "complaints" during the course of the pandemic period. In addition, due to the pandemic disruptions, the information provided below is not indicative of a normal investigative cycle.

(ii) Number and Percentage of Complaints Received Referred to the other Entity;

a. The AGO received five (5) referrals from the VDOL in the last fiscal year to which it has responded. The AGO issued civil subpoenas in each of those matters, and in three of them requested and received court orders to compel compliance with those subpoenas. So far one of these referrals has been resolved with a confirmation of misclassification, fines, and penalties, while the other matters are pending resolution in either civil penalties for failure to cooperate with the state's investigation or for a final determination of misclassification.
b. The AGO made no referrals to the VDOL because it received no specific complaints of misclassification directly from the public – likely a function of complainants continuing to seek out the VDOL as the primary point of contact in such matters.

(iii) the number of investigations initiated;

a. The Department continues to investigate cases of misclassification based on our historical business processes. During calendar year 2020 and throughout most of 2021, the Department's enforcement staff were primarily reassigned to assisting with claims processing. In that effort, staff assisted in the review of tens of thousands of UI claims to ensure that individuals were eligible for the proper UI program during the pandemic. The Department further investigated approximately 600 individual claims for misclassification review and completed 298 misclassification cases between 1/1/20 – 11/29/21. Most of the cases investigated were the result of unemployment claims being filed with no wages reported in the UI system to establish

monetary eligibility. Other sources of misclassification cases include referrals from the Workers' Compensation Division, verification audits completed by the UI Division, and tips received by the Department.

(iv) the average number of days between the receipt of a complaint, the start of an investigation, and the completion of an investigation;

a. As mentioned above, the Department has reviewed and found no instances of customer complaints during this period, most likely due to the pandemic disruptions. The Department continues to enforce misclassification through our normal business processes, which are primarily driven by audits and individual claim investigations.

(v) the number and percentage of investigations that resulted in, for the Office of the Attorney General, the imposition of a civil penalty, an assurance of discontinuance, or the imposition of injunctive relief, and, for the Department of Labor, the imposition of a penalty;

a. As referenced above, of the five referrals made to the Attorney General, four are in enforcement process; one resulted in imposition of fines and penalties. 100% of the completed 298 cases were assessed misclassification penalties by the Department of Labor.

(vi) the number and percentage of investigations that resulted in a determination that the employer had engaged in employee misclassification;

a. At this time, the Department can only provide information on cases where we identified misclassification due to an investigation. The Department did not maintain information on the number of cases that were investigated that did not result in misclassification as the primary focus over the course of the pandemic was to ensure that claims were being processed in the appropriate programs. The Department reengaged the auditing team to their full-time enforcement duties in the third quarter of 2021.

(vii) the number of investigations that resulted in the imposition of debarment pursuant to 21 V.S.A. §§ 692, 708, or 1314a;

a. Debarment was imposed on 190 employers in 2020 and 2021. 63 employer's debarment determination is currently pending an appeal. Debarment was imposed on 65% of the completed misclassification cases.

(viii) the number of investigations related to employers who had previously violated the provisions of 21 V.S.A. chapter 5, subchapter 2 or 3, or 21 V.S.A. chapter 9 or 17.

a. Zero percent of the cases investigated had previous misclassification violations.

IV. STAKEHOLDER INPUT

The Misclassification Task Force held two public hearings in August, 2021 to obtain input from Stakeholders.[24] Participants included members of both the business and labor community as well as interested members of the public. Testimony elicited from public hearings provides a menu of possible options available to lawmakers wishing to further address misclassification of Vermont workers.[25] The Stakeholders suggestions include:

- Extension of Memoranda among agencies to continue coordination of information sharing and enforcement;
- Continued meetings of the Misclassification Task Force;
- Regular reporting by agencies/departments and/or the Task Force on data and policy issues related to misclassification;
- Education and outreach to employers and workers so they better understand their rights and responsibilities relating to employee misclassification;
- Enactment of a private right of action for enforcement of Vermont labor law related to misclassification;
- Enactment of a Private Attorneys General Act (PAGA);
- Reform of the "ABC" Test to make compliance easier for employers;
- Presumptive classification of transportation workers (drivers) in the "gig" economy as "employees".

Policy determinations as to the relative efficacy of the above are the province of lawmakers. The Task Force has no evidence to suggest that any one of the above would necessarily serve as a

[24] Public hearings of the Task Force may be found here: https://www.youtube.com/watch?v=rwi9CYDB6PA; https://www.youtube.com/watch?v=GZeQq6bYDIA

[25] One member of the public testified as to his personal experience and expressly indicated that internal procedures and enforcement should reflect best practices and outcomes, but that he was not advocating for a change in statute or rule.

cure-all with respect to the issue that may be affecting approximately 10-14% of Vermont workers.

V. RECOMMENDATIONS

Act 85 requires the Task Force to offer recommendations for legislative action to improve the effectiveness of the provisions of 21 V.S.A. §§ 346, 387, 712, and 1379.With respect to the specific questions the legislature has directed this body to consider, the Task Force issues the following responses below:

(1) Potential legislative changes to address shortcomings or difficulties identified by the Task Force in relation to the system of joint enforcement;
    a. It is premature to consider legislative changes to the new system of joint enforcement. VDOL and the AGO are currently engaged in enforcing a handful of legacy matters and will learn from this experience. Depending on these and future matters the agencies will report back to lawmakers if appropriate.
(2) Potential legislative changes to enable either the Commissioner of Labor or the Attorney General to seek the full, combined range of penalties and remedies that are currently available to them through joint enforcement;
    a. See (1)(a) above. The AGO is confident in its ability to pursue the full, combined range of penalties or remedies available to it through enforcement actions should the appropriate case arise.
(3) Whether to expand the joint enforcement of the laws related to employee misclassification to include additional agencies or departments of the State and potential legislative changes to accomplish such an expansion;
    a. The Task Force will continue to meet and share information; the VDOL, the AGO, DFR, and Tax all have information sharing MOUs available to them. The Task Force believes these agreements to be sufficient at this time.
(4) The possibility of creating a private right of action to enforce the provisions of 21 V.S.A. chapter 5, subchapters 2 and 3, and 21 V.S.A. chapters 9 and 17 that relate to employee misclassification;
    a. Some states have recently passed private rights of action in misclassification matters to augment enforcement of misclassification matters. For example, Virginia recently issued its own report with recommendations, including a

private right of action.[26] The Virginia legislature subsequently passed this provision into law, along with protection from retaliation. A private right of action current exists in Vermont for misclassification cases involving payment of wages. In Vermont, misclassification cases involving payment of wages, minimum wage, and overtime) are already subject to a private right of action. See 21 V.S.A. §§ 347 and 395. It is noted that provisions do not permit private counsel to seek the penalties that are otherwise available to the AGO.

And,

(5) the possibility of creating a private attorneys general act modeled on California law for the enforcement of the provisions of 21 V.S.A. chapter 5, subchapters 2 and 3, and 21 V.S.A. chapters 9 and 17 that relate to employee misclassification.
    a. California's PAGA may be a compelling legal option in jurisdictions where mandatory arbitration clauses and restraints on workers' ability to join class action lawsuits are commonly in play. While the State does not waive its power to enforce the law, a PAGA action essentially allows workers to initiate an action to enforce with notice to the State. The State can then elect to enforce or allow a complaint to proceed. California's PAGA has been in effect since 2004, and it continues to play out in the courts in its scope and efficacy. However, California is a vastly different market than Vermont with large employers and various sectors that may require different remedies than Vermont. No law is a panacea and PAGA does not necessarily substitute state enforcement for private enforcement. It is potentially another tool in the toolbox. However, in the absence of evidence illustrating the scope of mandatory arbitration clauses and/or class action waivers affecting large numbers of Vermont workers lawmakers may wish to better understand those facts if they can be gathered before implementing a new law.

Conclusion

The Task Force is new. The enforcement mechanisms associated with Act 85 are new. The Task Force does see the efficacy of ongoing information sharing and collaboration with respect to enforcement, and therefore, recommends its continuation. It also agrees that education

[26] https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

and outreach to employers and workers is essential. Therefore, the Task Force recommends a common sense, light touch regulatory approach for now: allow more time for Act 85 to work; continue collaboration amongst the agencies; extend information sharing agreements among agencies; continue collaboration amongst the agencies with respect to enforcement; assist policy makers in providing updated information; and provide education and outreach to employers and employees and help establish a culture of compliance that treats both workers and employers with dignity and respect.

Appendix A: Department of Labor Misclassification and Enforcement Statistics Since 2019

Workers Compensation

Since January 2019, the Workers Compensation Division has issued Administrative Citations and Penalties to 39 businesses for failure to maintain Workers' Compensation Insurance. In all of these cases the business has obtained workers' Compensation coverage or ceased doing business.

Seven (7) businesses have been debarred, including one for a 1-year period and one for a 2-year period. The other debarments are for a matter of months.

The Workers' Compensation Division has collected penalties totaling:

2019: $51,721.57
2020: $94,509.00
2021 (to date): $48,338.08

Note: In several other administrative Citation cases the business has entered into payment plans to pay off the penalty.

Additionally, from January 2019 to present the Workers Compensation Division received 337 Complaints alleging an employer lacked insurance coverage. Of those complaints 226 were closed after it was determined that worker's compensation coverage was, in fact, in place.

Investigations were commenced in the 111 remaining complaints. Stop work orders were issued in 15 of those complaints. In addition to the data previously submitted 5 cases are pending the issuance of administrative citations and debarment.

Appendix B: Notice to Employers

Act 85 requires the Vermont Attorney General and the Vermont Department of Labor to host and disseminate notice to employers of Attorney General's enforcement authority, criteria for misclassification, and how to report and/or filed complaints of misclassification. The Vermont Attorney General and the VDOL created and posted the following notice to Vermont employers. Additionally, the VDOL emailed the notice to employers. Finally, the Vermont Secretary of State assisted by posting the notice to its Corporations Division webpage:

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NOTICE: ATTENTION VERMONT EMPLOYERS

The Commissioner of Labor and the Attorney General advise you that the Attorney General has been granted investigation and enforcement authority in relation to complaints of employee misclassification pursuant to the provisions of 21 V.S.A. §§ 346, 387, 712, and 1379.

Employee misclassification is the practice of identifying workers as independent contractors or consultants, rather than employees when the opposite is true. When misclassification occurs, employers do not pay otherwise required unemployment and other payroll taxes for those workers and do not provide workers compensation coverage or unemployment benefits to those workers. That creates unfair advantage over competing businesses who properly classify their workers as employees. In addition, states and the federal government lose uncollected tax revenue because of the practice, and workers lose certain protections available to them through labor laws.

Requirements of proper employee classification may be found here:
https://labor.vermont.gov/document/who-employee-vs-independent-contractor

Background information on reporting misclassification or fraud:
https://labor.vermont.gov/sites/labor/files/doc_library/Fraud.pdf

To file a complaint regarding employee misclassification, go to:
https://labor.vermont.gov/form/report-ui-fraud

For more information about employee misclassification, go to:
https://labor.vermont.gov/workers'-compensation/misclassification

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Last updated September, 2021

Appendix C: Prior Task Forces and Reports

On September 8, 2012, then-Governor Peter Shumlin signed Executive Order No. 08-12, establishing the Governor's Task Force on Employee Misclassification. That task force was made up of several of the Departments and Agencies that are members of the current one but did not include the Vermont Attorney General's Office. It was chaired by the Vermont Commissioner of Labor and held several lengthy meetings, hearing from a variety of private sector stakeholders in addition to representatives of State Government. Private stakeholders actively participated, including representatives of organized labor, the Association of General Contractors, Homebuilders, manufacturers, and representatives of the insurance industry. In 2016 the Taskforce submitted a report.

This report discussed the Department of Labor's role in combating misclassification and includes the minutes of every Misclassification Task Force meeting that occurred in 2015.[27] It describes the department's unemployment insurance and workers' compensation programs and explains how those programs conduct audits and investigations.[28] It also summarizes the results of the department's 2015 audits and investigations.[29]

The Task force report made recommendations on improvements that could decrease incidents of misclassification and enhance enforcement, focusing public education and proposed changes to the statutes governing unemployment insurance and workers' compensation.[30] Some key provisions of the proposal included: creating a presumption that a worker is an employee and

[27] Vermont Department of Labor, Report on Misclassification Enforcement and Activities of the Misclassification TaskForce(Jan.15,2016), https://legislature.vermont.gov/Documents/2016/WorkGroups/House%20Commerce/Reports%20and%20Resources/W~Department%20of%20Labor~Report%20on%20Misclassification%20Enforcement%20and%20Activities%20of%20the%20Misclassification%20Task%20Force~2-23-2016.pdf [hereinafter 2016 DOL Report].
[28] *Id.* at 1–2.
[29] *Id.*
[30] *Id.* at 6–7.

not an independent contractor;[31] reforming part "B" of the "ABC" test[32] to consider whether a sole proprietor, partnership, or single member LLC operated a distinct and separate business;[33] and strengthening enforcement provisions to help the department identify violations and enforce compliance.[34] Unfortunately, despite considerable discussion at the Legislature, none of the proposed statutory amendments were enacted.

Based in part on the Task Force recommendations to improve public education and outreach, the Department of Labor secured a federal grant to create a media campaign to inform the public and employers about the importance of properly classifying workers as employees.[35] The campaign utilized television, radio, social media, printed materials and information published on the Department of Labor website. The campaign ran from December 2015 through February 2016.[36] An example of the television, radio and social media spots can be found here. Although the Department received generally good feedback on this outreach effort, one employer group complained that it was to heavy handed.

The report addressed improvements suggested in a 2015 Auditor Report.[37] It stated that the Department of Labor "is working diligently to address those areas of concern and improve its internal processes. As a result of Task Force recommendations, changes were made to state contracting documents to strengthen requirements that entities contracting with the State or

[31] *Id.* at 7.
[32] The ABC Test is used to determine whether a worker is an employee or an independent contractor. The name comes from the test's three interlocking parts—A, B, and C. The test creates a presumption that a worker is an employee unless the employer can prove three elements: (A) that the worker's work was done outside the direction and control of the employer; (B) that the work was performed outside of the usual course of the employer's business; and (C) that the work was done by someone who has their own, independent business doing that kind of work. Economic Policy Institute, *Misclassification, the ABC test, and employee status* (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.
[33] 2016 DOL Report, at 7.
[34] *Id.*
[35] *Id.* at 7.
[36] *Id.*
[37] *Id.* at 8.

receiving grants from the State were properly classifying workers. In addition, VDOL continues to work cooperatively with other state agencies to achieve the goals identified in the Governor's Executive Order."[38]

The 2015 Auditor Report had 17 recommendations for the Department of Labor.[39] By 2018, 11 out of 17 were partially or fully implemented.[40] The remaining recommendations were either not practical given the IT infrastructure existing in the different Department of Labor programs or were based on a misunderstanding of the particular provisions of the various statutory definitions in state law. For example, The Workers' Compensation & Safety Division and the Unemployment Insurance Division did try to create a unified audit and enforcement database. However, this proved unworkable after it became apparent that the systems could not track and provide the information and data needed by the workers' compensation enforcement investigators and the UI auditors. In lieu of a unified database, the Department increased internal coordination, collaboration, and access to each division's information.

The Department of Buildings and General Services partially or fully implemented four out of five of the Auditor recommendations.[41] The Department of Building and General Services disagreed with the fifth recommendation because it believes the "self-reporting" form complies with the statutory requirements.

The Agency of Transportation fully or partially complied with the four recommendations suggested by Auditor.[42] The Agency revamped its pre-approval bid process by regularly (at times weekly) sending the names of entities seeking pre-approval to the Department

[38] *Id.*
[39] 2015 Auditor Report, at 42–44; *see* Table 1 above.
[40] *Id.*
[41] Auditor Report Follow-Up, at 7–8.
[42] 2015 Auditor Report, at 46; *see* Table 3 above.

of Labor and the Tax department to confirm that the entities had workers' compensation coverage and were in good standing with Tax and the Unemployment division.

The Legislative Council 2019 Debarment Report

In 2018, the Vermont General Assembly directed the Office of Legislative Counsel to prepare a report on the use of debarment in the employee misclassification context.[43] Among other things, the report provided a background on debarment in Vermont, highlighted actions taken by the State to ensure it does not contract with employers who misclassify, identified barriers to using debarment to combat misclassification, and suggested changes to make debarment a more effective tool in combating misclassification.[44]

Four sections of the Vermont Statutes Annotated (V.S.A.) provide for debarment as a penalty for violating workers' compensation or unemployment insurance laws.[45] Two of those sections are found in 21 V.S.A. chapter 9, governing workers' compensation; one is found in 8 V.S.A. § 3661, governing workers' compensation insurance; and one is found in 21 V.S.A. chapter 17, governing unemployment insurance.[46]

The State has a variety of mechanisms to avoid contracting with employers who misclassify workers.[47] The Departments of Labor, Financial Regulation, Finance and Management Policy, and Buildings and General Services all have mechanisms to prevent contracting with employers who misclassify.[48] While some of these mechanisms include debarment, most are proactive in that they *prevent* the State from contracting with an employer who misclassifies, rather

[43] Damien J. Leonard, Vermont Office of Legislative Counsel, 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 (Feb. 15, 2019), https://legislature.vermont.gov/assets/Legislative-Reports/Final-2019_Debarment_Report.pdf [hereinafter 2019 Debarment Report].
[44] *Id.*
[45] *Id.* at 2.
[46] *Id.*
[47] *Id.* at 6.
[48] *Id.* at 6–9.

than debarring the employer later on when the misclassification comes to light. The 2019 Debarment Report did contain some erroneous or misleading information, for example, when it asserted that "the State has not yet debarred an employer for misclassification . . ."[49] this was incorrect. The Workers' Compensation Division had debarred employers issued a Stop Work Order almost from the creation of the misclassification programed. In order to issue a debarment, Workers Compensation must have issued an employer a stop work order and consulted with Buildings and General Services and Transportation when establishing the length of the debarment period.[50] When an employer has served its debarment period, its name must be removed from the debarment list, so when the debarment list was reviewed for the report, no names employers were currently serving a debarment period.

The report identified several obstacles to using debarment to combat misclassification: failure to adopt necessary rules; inability to perform employer audits under the worker's compensation law; lack of workers' compensation investigatory staff; workers' compensation laws not being focused on misclassification; the fact that currently debarred employers are unlikely to contract with the state; and the fact that the Governor's misclassification task force (discussed in section II above) has been relatively inactive.[51] The Department of Labor disagreed with several of the Report findings and testified at length about the bases for disagreement.

The report suggested potential changes that could enhance debarment's effectiveness in combating misclassification.[52] These changes include: enhancing workers' compensation's

[49] *Id.*
[50] *See, e.g.*, 21 V.S.A. §§ 692, 708, and 1314a, requiring the Commissioner of Labor 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; 8 V.S.A. § 3661, requiring the Commissioner of Finance and Management 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.
[51] 2019 Debarment Report, at 11–16.
[52] *Id.* at 20.

investigatory powers; requiring proof of workers' compensation before a business can obtain a license; amending debarment provisions to focus on misclassification; and adopting enforcement penalties for misclassification.[53] Instead of enacting these recommendations, the Legislature created this Task Force, and added the Attorney General's Office as the lead participant. It directed the Department of Labor and the Attorney General's Office to collaborate, enter a Memorandum of Understanding setting out a process for sharing information and referring complaints to one and other. The Department and the Attorney General's Office have implemented these statutory provisions.

[53] *Id.* at 20–22.

Appendix D: Other Examples of State Reports on Employee Misclassification

A. Virginia

Virginia's Joint Legislative Audit and Review Commission and the Governor's Office issued misclassification reports in 2012[54] and 2019.[55] The two build on one another and show an ongoing commitment to addressing this issue. The earlier report recommended establishment of a task force similar to this body to educate the public about misclassification and its consequences, and to formulate solutions; (2) amending the Code of Virginia to outlaw misclassification and impose financial penalties for it; and (3) amending the Code of Virginia to authorize termination of state contracts with employers who misclassify.[56] Like Vermont, several state agencies are involved in misclassification issues: the Virginia Employment Commission, Virginia Department of Labor and Industry, Virginia Workers' Compensation Commission, and Virginia Department of Taxation.[57] The latter report recommended ongoing communication and reporting functions, and importantly recommended (and lawmakers subsequently passed) a private right of action, along with protection from retaliation for workers who pursue legal remedies.[58]

B. Georgia

Georgia's Senate Research Office prepared a report on misclassification in 2015.[59] The report was brief and discussed some of the same items already addressed elsewhere in this

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[54] Review of Employee Misclassification in Virginia, Report No. 427 (June 2012), https://www.dpor.virginia.gov/sites/default/files/Virginia%20Fine%20Housing/JLARC_Employee%20Misclassification%20Report%20(2012).pdf.

[55] Report for Executive Order 38 (EO38) From the Inter-Agency Taskforce on Misclassification and Payroll Fraud. Available at: https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

[56] *Id.* at 49.

[57] *Id.* at 10–11.

[58] Report for Executive Order 38 (EO38) From the Inter-Agency Taskforce on Misclassification and Payroll Fraud, at 6.

[59] Georgia Senate Research Office, The Final Report of the Senate Subcommittee on Employee Misclassification (2015), https://www.senate.ga.gov/sro/Documents/StudyCommRpts/EmployeeMisclassificationFinalReport.pdf.

memorandum. About a third of the report focused on how workers are classified. In Georgia, worker classification is based on three factors, none of which is dispositive: (1) behavioral control, i.e., whether the employer directs or controls how the worker does the work; (2) financial control, i.e., whether the employer directs or controls the business aspect of the work; and (3) the relationship of the parties, i.e., how the parties perceive the relationship and whether any benefits (insurance, pension, paid leave) are involved.[60] The report also explores common law tests and federal guidelines for determining a worker's classification.[61]

The report then examines the effects of misclassification on several states throughout the country. This section includes a reference to a 2008–2009 report issued by the Vermont Workers' Compensation Task Force, which found that 10–14% of Vermont employers misclassified their workers.[62]

Lastly, the report issued a series of recommendations: (1) codify the common law factors that determine whether a worker is an independent contractor; (2) increase funding for the state's Department of Labor to enable it to conduct more thorough audits; (3) establish a commission to investigate misclassification in the state; and (4) allocate more resources to investigate unlicensed contractors.[63]

C. New Hampshire

On December 1, 2010, the New Hampshire Misclassification Task Force issued its fourth and final report, concluding the work it had started two years prior.[64] The report opened with three recommendations. First, it recommended that the state continue to maintain, enhance,

[60] *Id.* at 2–3.
[61] *Id.* at 3–5.
[62] *Id.* at 9.
[63] *Id.* at 10.
[64] New Hampshire Misclassification Task Force, Final Report of the Task Force to Study Misclassification (Dec. 1, 2010), https://www.nh.gov/nhworkers/documents/final_rpt_mtf.pdf.

and publicize its misclassification website, which can be found here.[65] The site provides the public with information on misclassification and allows users to report employers suspected of misclassifying workers. Second, it recommended that the state's Department of Labor, under certain conditions, be granted authority to issue stop-work orders for employers who misclassify workers.[66] And third, it recommended that the state's Department of Labor fraud fund continue to be appropriated and used to fund misclassification investigations.[67] The remainder of the report consisted of commentary from task force members, summaries of past task force meetings, and appendices.

[65] *Id.* at 8.
[66] *Id.*
[67] *Id.* at 9.

Appendix E: Treatises

A. UPenn Law Article on Misclassification Statutes

This 2015 paper surveys state laws on misclassification.[68] It analyzes shared and distinct features and discusses their strengths and weaknesses.[69] The paper concludes that the most common independent contractor definition—the ABC test[70]—is also the most effective when crafting legislation to combat misclassification.[71]

The paper's survey of state laws on misclassification concludes that definitions of employment and independent contracting are "at the heart of the matter."[72] A lack of clear definitions hurts both employers and employees. Employers will be confused and will struggle to comply with misclassification laws; employees will be unaware of misclassification and thus will not report violations.[73] Most states use the ABC test (or a modified version of it) to distinguish independent contractors from employees.[74]

While the ABC test is the dominant approach to misclassification definitions, there is no dominant approach to misclassification enforcement and penalties.[75] States use a variety of enforcement and penalty mechanisms, including civil penalties, criminal liability, stop-work orders, private rights of action, and successor liability.[76] It is difficult to identify which

[68] Anna Deknatel and Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. Soc. Change 53 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=jlasc [hereinafter *ABC on the Books*].
[69] *Id.*
[70] Discussed in footnote 59 above.
[71] *ABC on the Books*, at 53.
[72] *Id.* at 64.
[73] *Id.*
[74] *Id.* at 65.
[75] *Id.* at 74.
[76] *Id.*

mechanism(s) are most effective because there are few public records documenting enforcement actions, and because agency reports usually lack sufficient contextual information.[77]

The paper concludes by emphasizing that the ABC test is the favored model for misclassification laws.[78] It advises states to fashion laws based on this test.[79] It also notes that, while changes to the test may sometimes be okay, states should avoid such changes if possible because they narrow a court's ability to infuse the test into common law interpretation, and because too much variety across the states hampers the adoption of a uniform standard.[80]

B. Vermont Law Review Article on Preventing Misclassification

This 2014 paper proposes actions that the State of Vermont can take to help identify and curb misclassification.[81] It surveys actions taken by the state and federal governments, and then recommends two main ways of curbing misclassification: increasing enforcement, and easing compliance.[82]

Regarding increased enforcement, the paper references actions taken by the State, some of which are discussed in section II of this memorandum. These include additional funding for workers' compensation investigators, the creation by the Vermont Department of Labor of an online misclassification reporting system (perhaps similar to the New Hampshire misclassification website discussed in section III.C above), and the Vermont Agency of Administration's efforts to coordinate misclassification detection efforts across state agencies.[83]

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[77] *Id.* at 75.
[78] *Id.* at 101.
[79] *Id.*
[80] *Id.*
[81] Adam H. Miller, *Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve a National Problem*, 39 Vermont L.R. 207 (2014), https://lawreview.vermontlaw.edu/wp-content/uploads/2011/09/39-09_Miller.pdf.
[82] *Id.* at 228–39.
[83] *Id.* at 229.

Vermont has been reluctant to expand enforcement efforts beyond these methods because of diminishing returns.[84] The paper suggests the State could alleviate this problem by improving its information-sharing protocols with the federal and other state governments.[85] In particular, it notes that Vermont has yet to enter into information-sharing agreements with the U.S. Department of Labor, IRS, or other states.[86] But this is outdated because, as discussed in section I above, Vermont entered an information-sharing agreement with the U.S. Department of Labor in August 2015. That agreement expires in December of this year, so if the State wants to continue implementing the Vermont Law Review paper's recommendations, it should ensure that agreement is renewed. The paper also mentions information-sharing agreements between Vermont and neighboring states.[87] This approach has not yet been adopted, but given that many states have already issued detailed reports about misclassification (see section III above), it is unlikely that such agreements would lead to new revelations.

Regarding easing compliance, the paper notes that the Vermont Department of Labor's website includes plain English explanations of the tests used to determine whether someone is an employee or an independent contractor.[88] The paper recommends that these explanations be expanded to other agencies as well, and incorporated in such a way as to explain how each agency's role intersects with the misclassification issue.[89] There is room for improvement on this front. Nearly every search result from googling "vermont.gov" and "misclassification" links back to the Vermont Department of Labor website; other state agencies are nowhere to be found.

[84] *Id.*
[85] *Id.* at 229–30.
[86] *Id.* at 230.
[87] *Id.*
[88] *Id.* at 231.
[89] *Id.*

The other problem with compliance is the plethora of tests used to determine a worker's status. As of 2014, Vermont employers and employees had to assess six different tests to try and answer that question.[90] To solve this problem, the paper recommends consolidating tests rather than eliminating them.[91] Ideally, there would be one single test applied to all misclassification laws at both the federal and state levels. But this would present practical concerns in areas like preemption and federalism. While Vermont has no control over the federal government's approach to misclassification, it can at least simplify compliance with state law by using one uniform test, rather than six. The ABC test would be a good option, as that is already the most favored and would bring the state in line with the recommendations in the UPenn article discussed above.

C. Vermont Legislative Research Service Report

This brief report provides an overview of some employment issues in Vermont and includes a small section on misclassification.[92] It defines misclassification and explains that Vermont's current approach to determining a worker's status is a two-part test: first, the right-to-control prong asks a series of questions to determine the extent to which the employer controls the worker.[93] If that prong proves inconclusive, the test moves on to the nature-of-the-work prong. This prong asks whether the job the worker completed could have been done by another employee at the company who is covered by workers' compensation.[94] This two-part test is a modified version of the ABC test[95] that only incorporates parts "A" and "B." This test is also used in Vermont's neighboring states of New Hampshire, New York, and Maine.[96] The report goes on to

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[90] *Id.*
[91] *Id.*
[92] Vermont Legislative Research Service, *A Modern Work Force*, https://www.uvm.edu/sites/default/files/Department-of-Political-Science/vlrs/EconomicIssues/Modern_Workforce.pdf [hereinafter *A Modern Work Force*].
[93] *Id.* at 6.
[94] *Id.*
[95] Discussed in footnote 59 above.
[96] *A Modern Work Force*, at 6.

highlight some of the consequences of misclassification: employers who misclassify gain an unfair advantage; state governments are shorted significant revenue; and workers are denied the protections of employment laws.[97]

[97] *Id.*