
Task Force on Wage Integrity and Misclassification in the Construction Industry

R E P O R T

Montana Department of Labor & Industry

Employment Relations Division and
Unemployment Insurance Division

Montana Department of Revenue

December 9, 2019



Montana Department of
LABOR & INDUSTRY



Montana Department of
REVENUE

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FOR IMMEDIATE RELEASE

Monday, April 15, 2019

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On Tax Day, Governor Bullock Creates Task Force to Ensure Montanans Receive Fair Pay

Task force aims to reduce and eliminate unlawful misclassification and payroll fraud in the construction industry

MONTANA – Governor Steve Bullock today issued an executive order creating the Task Force on Integrity in Wage Reporting and Employee Classification to help reduce and eliminate unlawful misclassification and payroll fraud and ensure Montanans receive fair pay.

“Fairness is a Montana value, and today we’re upholding that,” Governor Bullock said. “This order will ensure vulnerable workers receive the pay they’ve earned, combat fraud, and make sure the folks already following the rules have the tools they need to keep doing so.”

The Task Force is made up of representatives from organized labor, construction contractors, the Montana Department of Labor & Industry, and the Montana Department of Revenue. The Task Force will be chaired by Lt. Governor Mike Cooney. Task force members will identify illegal wage practices and tax fraud in the construction industry. Members will report quarterly on action to the Governor and make recommendations to strengthen compliance activities.

Payroll fraud occurs when employees don’t receive legally promised wages including overtime, not paying the minimum wage or not paying for all hours worked. It can also include paying workers under-the-table or misclassifying employees as independent contractors. Businesses that inadvertently or purposefully underpay workers go without paying their fair share of taxes. This fraud deprives workers of earned wages and burdens ratepayers in the workers’ compensation and unemployment systems by creating uninsured and underinsured claims.

“Construction is one of Montana’s fastest growing industries and provides good-paying jobs that benefit all Montanans,” Mario Martinez from the Pacific Northwest Regional Council of Carpenters said. **“I’m thankful for the Governor’s leadership in addressing the wage theft and payroll fraud that deprives workers who play by the rules of their lawful protections.”**

“Misclassification puts firms and workers at a competitive disadvantage by allowing bidders to undercut contract pricing that reflects true payroll costs,” David Smith, executive director of the Montana Contractor’s Association, said. **“We are thrilled to see a task force that will address this issue head-on and ensure lawful businesses remain competitive.”**

The construction sector is vital to Montana’s economic growth and stability. It is one of the largest in Montana. In 2018, there were 28,600 payroll workers working for 6,400 employing businesses, each earning an average annual salary of \$52,000. An additional 11,500 individuals registered with the Montana Department of Labor & Industry as independent contractors within the construction industry. Total 2018 payroll wages in this industry were approximately \$1.5 billion, with Gross Domestic Product of approximately \$2.9 billion. Employment growth in Montana’s construction industry is currently about 3 percent, faster than the economy as a whole.

A healthy construction sector is critical to continued economic growth, as the industry creates the infrastructure and housing needed by Montana's workers and businesses.

Members of the Task Force on Integrity in Wage Reporting and Employee Classification:

- Mike Cooney, Lieutenant Governor
- Galen Hollenbaugh, Commissioner, Montana Department of Labor & Industry
- Gene Walborn, Director, Montana Department of Revenue
- Mario Martinez, Pacific Northwest Regional Council of Carpenters
- Kim Rickard, Laborers' International Union of North America
- Jack McBroom, International Brotherhood of Electrical Workers
- Debora Poteet, Poteet Construction
- Doug Jackson, Jackson Contractor Group
- Bob Warren, Schellinger Construction

**STATE OF MONTANA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER No. 4-2019**

**EXECUTIVE ORDER CREATING AN ADVISORY COUNCIL ON INTEGRITY IN
WAGE REPORTING AND EMPLOYEE CLASSIFICATION IN THE CONSTRUCTION
INDUSTRY**

WHEREAS, the construction industry in Montana continues to grow and is a major contributor in Montana's diverse economy. Construction has added significant payroll employment growth over the last five years, adding 4,500 jobs for annual average growth of 3.4 percent;

WHEREAS, Montana has a high number of individuals working within the construction industry who are registered as independent contractors. In 2018, Montana averaged about 28,600 payroll workers in the construction industry. An additional 11,500 individuals working in construction are registered with the Department of Labor and Industry (Department) as independent contractors;

WHEREAS, nationally, there is much attention being placed on the appropriate classification and payment of workers and its impact on taxes, unemployment insurance, and workers' compensation insurance. The construction industry is particularly susceptible to having inappropriate working relationships amongst contactors, sub-contractors, and independent contractors;

WHEREAS, the Department currently has a compliance program focused on identifying misclassified employees and uninsured employers. The primary objectives have been to ensure construction site employees are either working under a workers' compensation policy or have an independent contractor exemption certificate;

WHEREAS, in May 2016, the Montana Legislative Audit Division conducted an audit on the Department's regulation of independent contractors. The overwhelming assessment of the audit was that the Department should better utilize internal data and data from other agencies to improve its methods for identifying misclassification;

WHEREAS, misclassified employees and inappropriate employer/employee relationships result in undue hardship to tax and insurance systems, law-abiding construction contractors and construction workers in Montana. Disingenuous employers and employees who do not report income and do not pay income tax or premiums on insurance or contributions for healthcare create an imbalance on the state's receipt of taxes as well as unfair competitive advantages for construction contracts; and

WHEREAS, there are many stakeholders who would hold a strong interest in ensuring appropriate classifications of employees exist. By working together, these stakeholders could create better systems and processes to produce a far more effective compliance program—one

that levels the playing field where more contractors are compliant, where appropriate tax structures are in place, where proper wage withholdings exist, and where effective social safety nets are established.

NOW, THEREFORE, I, STEVE BULLOCK, Governor of the State of Montana, pursuant to the authority vested in me under the Constitution and laws of the State of Montana, including § 2-15-122, MCA, do hereby create an Advisory Council which shall be called the Task Force on Integrity in Wage Reporting and Employee Classification in the Construction Industry (Task Force), as follows:

PURPOSE

The purpose of the Task Force is to coordinate state and industry resources to assist in identifying inappropriate employment relationships and to ensure proper tax withholdings, insurance contributions, and wage payments are occurring within the construction industry.

DUTIES

1. Review available data from all state agencies to identify appropriate means to uncover potential misclassification of employees. Provide recommendations on sharing data across agencies to assist in identifying noncompliance.
2. Define specific and appropriate strategies and performance measures for state agencies as it relates to payroll fraud and wage theft. Assist in developing processes and procedures for the compliance programs that already exist in state agencies to improve on the discovery of noncompliance.
3. Identify education and outreach opportunities for agency staff to leverage to improve awareness around the issues of wage theft and payroll fraud.
4. Propose policy and/or legislative solutions that may be considered by the Governor or in future legislative sessions.

COMPOSITION AND ORGANIZATION

1. The Task Force members shall be appointed by and serve at the pleasure of the Governor.
2. The Lieutenant Governor, or his or her designee, shall serve as the chair of the Task Force.
3. The Task Force shall be comprised of representatives from the following:
 - a. Lieutenant Governor, Chair
 - b. Commissioner, Department of Labor and Industry
 - c. Director, Department of Revenue
 - d. Three Representatives from the construction contractor community
 - e. Three Representatives from organized labor

4. The Task Force may establish subcommittees to assist in the execution of its duties. The subcommittees shall be given specific deliverables with definite timeframes.
5. The Task Force shall provide a quarterly report on action and activities to the Governor. The first report shall be presented on or before September 1, 2019.
6. The Task Force is attached to the Department of Labor and Industry for administrative purposes.

COMPENSATION

Task Force members eligible for reimbursement shall be reimbursed pursuant to § 2-15-122(5), MCA.

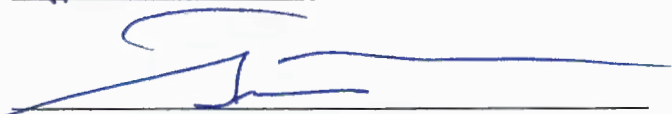
DURATION

The Task Force shall come into existence on April 15, 2019, and expire on or before June 30, 2020, unless rescinded or renewed by subsequent executive order.

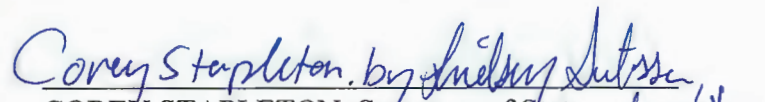
This Order is effective immediately.



GIVEN under my hand and the GREAT SEAL of
the State of Montana this 15 day of
April 2019.


STEVE BULLOCK, Governor

ATTEST:


COREY STAPLETON, Secretary of State *deputy*

Background

The nature of the employee-employer relationship has been evolving over time as skills needed to fill in-demand jobs in Montana's growing economy change. Appropriately classifying employees to fit the correct employment relationship is paramount to ensure legal protections and withholdings occur. It is incumbent upon regulatory bodies to evaluate the current conditions to determine what rules and laws should be implemented to provide the necessary protections for employers and employees and to ensure proper employment relationships exist.

Misclassifying workers is considered payroll fraud. Payroll fraud also occurs when employees don't receive legally promised wages including overtime, were not paid the minimum wage, or were not paid for all hours worked, and can also include paying workers under-the-table. Businesses that inadvertently or purposefully underpay workers go without paying their fair share of taxes. This fraud deprives workers of earned wages and burdens ratepayers in the workers' compensation and unemployment systems by creating uninsured and underinsured claims.

Misclassification can occur in a variety of industries across Montana. The Task Force on Wage Integrity and Misclassification is focused on the relationship between contractors and sub-contractors in the construction industry. Specifically, the focus is whether a contractor is appropriately classified as an Independent Contractor. Other examples of misclassification that can occur are if workers are classified into the correct labor category for the purposes of paying prevailing wage or if the executive/administrative/professional exemption is applied appropriately to exempt certain individuals from earning overtime.

The very definition of "Independent Contractor" suggests those acting in that capacity should function independently. Independent Contractors are individuals engaged in an independently established trade, occupation, profession or business. They also are free from control or direction over the performance of the service they render, by contract and in practice. This two-part test to independence is commonly referred to as the "AB Test".

There is an incentive for businesses to classify and hire workers as independent contractors. When a hiring agent engages independent contractors to perform work, they are relieved from paying insurance (workers' compensation, disability, unemployment), FICA (Medicare and Social Security), or additional benefits. Contractors also find working independently appealing. They can set their schedules and perform work free from direct oversight. In many instances, this type of working arrangement is entirely appropriate. When operating under the conditions of the above definition, the working relationship is considered legal. However, when either party abuses this system to gain competitive advantages against other legally constituted business, problems can ensue.

The feedback the Montana Department of Labor & Industry (DLI) receives related to the independent contractor program has increased and diversified in recent years. There have been calls to evaluate the current regulatory framework surrounding the employment relationship, particularly in the construction industry, and specifically regarding how contractors should be classified. There is additional evidence in field-based compliance activities that suggests greater scrutiny is needed.

DLI's Employment Relations Division (ERD) routinely receives wage claims alleging a hiring agent has failed to properly compensate the claimant for work performed to the benefit of the hiring agent. In these instances, the documentation to support each party's position include copies of paystubs, or cleared check, records of hours worked and documentation such as completed 1099 Forms.

Investigations into these wage claims generally focus on whether the worker has obtained an Independent Contractor Exemption Certificate (ICEC) and the working relationship between the involved parties. This includes applying the “AB test”, which determines whether the hiring agent is exerting control over the worker, and whether the worker is in an independent venture.

In many of these instances, ERD discovers that a hiring agent has hired a subcontractor on a time and material basis, but a closer look shows the relationship does not pass the AB test. In these cases, the employee is directed to which jobs to work on, what work to perform, and is paid an hourly rate for the work.

Most of the time in these cases, the employee is offered a higher hourly rate of pay if they obtain their ICEC rather than become an employee of the hiring agent. ERD has had citizens attempting to apply for their ICEC and provide staff at ERD with copies of Facebook, Craigslist, and newspaper advertisements where the hiring agent is offering two hourly rates, depending on whether the worker becomes an independent contractor or not.

Additionally, ERD will receive applications from applicants attempting to get an ICEC, with contracts supplied, as part of their supporting documentation of their independent venture, which are identical or very close to identical to other applicants working for the same hiring agent.

The same scenario can also have significant impacts on wage withholdings, tax receipts, and unemployment insurance receipts. The impacts will be discussed further in this report.

The Montana Department of Labor & Industry has been issuing Independent Contractor Exemption Certificates since 1984.

A certificate holder was conclusively presumed to be an independent contractor until 2003 when the Supreme Court issued its decision on *Wild vs. Fregein Construction*. The court concluded that an employer had an obligation to make an initial good faith inquiry to determine whether the worker met the control and independently established business tests before an employer could employ a worker as an independent contractor, thus throwing out the conclusive presumption of the existing ICEC.

In 2003, the legislature passed SB270, requiring the Department to establish a committee to study and make recommendations regarding the issues surrounding independent contractors. According to the 2003 annual report on Workers' Compensation, there were 29,638 active ICEC holders.

In 2004, the committee presented its recommendations which included the following:

- The exemption in the law should be maintained.
- The conclusive nature of the exemption should be restored.
- Additional screening, enforcement and audit authority was needed to ensure ICEC holders are bona fide independent contractors and are treated as such.
- Education should be provided to ICEC's, hiring agents, and employees on their rights and responsibilities.
- The cost of the ICEC should be increased to support enhanced enforcement and education.
- Penalties should be provided for violations.
- Objective standards should be developed to determine whether an applicant established a business.

In 2005, the new law became effective immediately upon signing. The new law restored the conclusive presumption of the ICEC. After the new law took effect, the number of ICEC holders dropped to 17,500 from an all-time high of 33,247.

In 2009, the legislature required the department to retain documents to reduce the burden on renewing applicants from having to provide documents each time.

In 2011, applicants were no longer required to submit business documents upon renewing, if the certified documents on file were still valid.

In 2011, Managers of a Manager Managed LLC, previously excluded from the requirement to obtain an ICEC were included in the definition of a person needing to obtain the ICEC. This was to close a loophole in which LLCs were popping people in and out of a manager role to avoid paying WC on them as employees.

There are now approximately 22,000 active ICEC's at any given time.

6% of incoming applications are denied. About 2% remain denied.

Overview of Additional Regulatory Oversight

ERD is one of the primary regulatory presences responsible for the enforcement of independent contractor laws. The Compliance & Investigations Bureau (CIB) of ERD is comprised of four sections each with the ability to focus on one or all the programs under the charge of ERD. These sections include Investigations, Audit, Inspections, and Dispute Resolution.

The Investigation Section focuses on responding to individual complaints through our investigative process. The complaints can be formal wage claims or an anonymous tip that a person has altered or falsified an Independent Contractor Exemption Certificate (ICEC).

The Audit Section looks at how a business entity operates in relation to its workers. The audits may be focused on one or two of ERD programs or all depending on the reason the audit is opened. For example, an audit may focus only on prevailing wage classifications, or may look at all wage and hour issues, along with verifying the entity is carrying required workers' compensation coverage on all employees.

The Inspection Section is a visual presence on the job site, generally construction jobs, to determine compliance with ICEC and Contractor Registration requirements. Additionally, this group is integral in gathering data on prevailing wage jobs for future audit follow-up and being the eyes and ears on the ground for any verification of actual activities and relationships for either the Investigation or Audit Sections on cases they are actively working.

The Dispute Resolution Section is a first attempt to resolve any disputes related to decisions and fines issued by the other sections at the lowest possible level. This group of mediators attempts to get the parties to agree on wages due to employees, penalties due to the department and settles issues to circumvent the need for a formal hearing or further collection activity.

Additionally, a Compliance Education position is attached to the bureau to focus the department's educational opportunities in the areas we are seeing the highest incidents of non-compliance.

INSPECTIONS UNIT

As stated, ERD has an inspections unit charged with field compliance. A recent review of this section for the period between April 2018 and March 2019 yielded the following information.

1. 1502 Site Visits
2. 1461 other visits (building permits, complaints, sweeps, office phone calls or questions, and referrals).
3. Approximately 10 prevailing wage site inspections completed.
4. Also, 170 citations were issued over a five-year period, half of those were waived.

The focus of the inspections group in the past has been to enforce 39-9-401, MCA which requires a Contractor Registration and 39-71-419, MCA which requires an individual to have an exemption certificate or carry worker compensation insurance. Anything outside of these parameters was not considered to be an issue with the inspections unit.

The current focus of the inspections section considers the above statutes and has expanded to attempt to determine when potential misclassification of workers is occurring for follow-up through an audit or an investigation.

Currently, an inspection is required to have a site visit with documentation of what was observed, if any employees were on-site, any professional licenses held, and any other impactful information.

Each Independent Contractor is interviewed to determine if there is control by the Hiring Agent and if they are an independently established business. The questions asked, come directly from ARM 24.35.302 and ARM 24.35.303.

Prevailing wage construction sites are visited every 3-5 weeks, based on stages of construction. When conducting these inspections, each trade available at the job site is interviewed with as minimal disruption to the work as possible. These inspections are then referred to the audit section, to determine if an audit of the entire prevailing wage job is warranted based on the inspection findings.

Since August of 2019 there have been 75 situations where citations were issued, or could have been issued, 44 of these situations were for expired IC/CR registrations, 22 for not having one, the rest were for suspended or working outside the scope of the IC exemption. Sixty-two referrals could have been written for employer-employee relationships.

Of these situations, 26 entities are currently not in compliance, 27 came into compliance within 45 days, and 22 came into compliance within 10 days.

UNEMPLOYMENT INSURANCE (UI)

For the state fiscal year (SFY) 2019, there were just over 514,000 employed workers in the workforce and approximately 42,700 employers registered with Unemployment Insurance (UI) in Montana. Total payroll reported to UI was \$19.6 billion with \$118 million in contributions (tax) collected. The average UI rate for 2019 was 1.12% and our taxable wage base is \$33,000.

A total of 54,015 UI Benefit Claims were filed in SFY19 with 24,439 individuals receiving over \$107 million in UI benefits. The weekly average benefit amount was \$384.

In late 2017, UI started receiving data from both the Department of Revenue (DOR) and the Employer Relations Division (ERD). UI has been able to use the shared information in our audit selection process, specifically the 1099 data shared by DOR. UI does not receive federal 1099 information. Crossmatches are performed using 1099 information and ICEC data to identify employers who have issued a significant number of 1099's and the recipient of the 1099 does not have an active ICEC.

In 2018, UI performed 120 audits based on the crossmatch information and 113 of those resulted in changes. We identified approximately \$7 million in additional wages and collected an additional \$74,000 in UI tax. There were 620 misclassified workers identified in these audits alone with an average of 5.16 identified per audit (2.5 times the average of all audits). Of the 120 audits, 34 were in the construction industry.

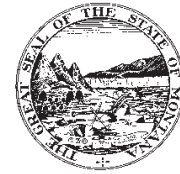
For 2019 year-to-date, UI has conducted 114 audits based on the 1099 information and identified 485 misclassified workers. Approximately \$4.6 million in additional wages were identified and \$50,000 in UI tax collected. Of the 114 audits, 46 were in the construction industry.

UI is still in the early stages of using the 1099 information provided by DOR for audit selection and continue to refine our crossmatch to improve results. This year UI is shooting for 20% of our selected audits to be based on 1099 information. In other states, closer to 50% of their audit leads are from 1099 data. In a recent presentation, Louisiana reported 70% of their total audit leads come from 1099 data.



Gene Walborn
Director

Montana Department of Revenue



Steve Bullock
Governor

Memorandum

To: Wage Integrity Task Force

From: Finn McMichael, Tax Policy and Research

Date: August 26, 2019

Subject: Underground Economy and Unreported Wages

A significant amount of wages and income are paid in cash or “under the table” and go unreported. This unreported income does not have taxes paid on it and is part of what is referred to as the underground economy. The magnitude of the underground economy was estimated to be approximately \$2 trillion in 2012 by economist, Edgar Feige. That equates to about 12% of GDP at the time and according to the IRS, accounted for a loss of up to \$500 billion in taxes due to unreported income. Another economist, Friedrich Schneider, estimated the size of the US underground economy in 2007, which he refers to as the shadow economy, to be 7.2% of GDP.

In 2007-2009, there was significant growth in currency in circulation in the US, but no increase in real GDP. This combination indicates an increase in the underground economy. Other signals indicating growth in the underground economy include a decline in the official U.S. labor force, and an increase in retail sales despite a relatively high unemployment rate.

The increase in underground economic activity between 2007 and 2012 occurred during and following the recession, as businesses cut costs and employees took actions to keep more of their wages. By paying employees in cash, employers avoid paying payroll taxes, unemployment insurance and workers compensation premiums. Not paying these taxes can add up to savings in payroll costs of over 20%. Schneider notes the compounding issue that this presents; as the underground economy grows, a higher tax burden is placed on the businesses in compliance, which increases the incentive for businesses to avoid taxes by operating under-the-table.

The estimates above for lost tax revenue due to the underground economy does not include the impacts of employees misclassified as independent contractors. The National Employment Law Project report estimates misclassification rates and related losses in unemployment insurance, workers' compensation and state tax revenue for 20 states (Montana is not included). It is noted that many of these are likely underestimates, because the audits to identify the misclassifications are unable to identify employers/employees operating in the underground economy.

Sources:

How Big Is the Underground Economy in America?

Matthew Johnston

www.investopedia.com/articles/markets/032916/how-big-underground-economy-america.asp

Independent contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries

National Employment Law Project (NELP)

www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf

New Underground Economy

Richard W. Rahn

www.cato.org/publications/commentary/new-underground-economy

The Shadow Economy and Work in the Shadow: What Do We (Not) Know?

Friedrich Schneider

ftp.iza.org/dp6423.pdf

The Underground Economy of Unreported Income

Stephen Fishman

www.nolo.com/legal-encyclopedia/the-underground-economy-unreported-income.html

The first Wage Integrity and Misclassification in the Construction Industry Task Force meeting was held on July 10, 2019. The topics addressed included an overview of the Executive Order 04-2019, and a history of the ICEC program. The findings of a May 2016 Performance Audit regarding Independent Contractors from the Legislative Audit Division was discussed. Additionally, the recent reorganization of ERD was highlighted. The potential impact of misclassified workers was explained from the perspectives of the Unemployment Insurance Division and the Department of Revenue.

The Task Force discussed the competitive advantage achieved by companies misclassifying employees as independent contractors. They further examined the implications on the Workers' Compensation system, taxes reported and collected, and Unemployment Insurance. The Task Force briefly reviewed the current Audit and Inspection practices. It was requested to review these practices in depth during the next meeting.

The second meeting occurred on September 4, 2019. The Department of Revenue gave a presentation addressing implications of the underground economy. A detailed explanation of the Compliance and Investigation Bureau, post-ERD reorganization, occurred, which included highlights of past practices and details of the current focus of both the Investigation and Audit section.

The Task Force discussed the need for data sharing among state agencies. They also considered the possibility of incorporating the perspectives of other industry members. They mentioned the possibility of making Workers' Compensation insurance a requirement for everyone, regardless of independent contractor status.

The Task Force reviewed the need to provide education for hiring agents and independent contractors, as well as the public. They addressed the options of incorporating technology to assist in this outreach and education. The Task Force also discussed the potential need to increase penalties for repeated noncompliance.

The third Task Force meeting was held on November 12, 2019. The Montana Builders Association and the Montana Contractors Association both gave presentations. They addressed the impacts of misclassified workers from their perspective.

The Task Force discussed potential ICEC process changes, including charging a fee for reinstatement of a suspended IC. The group also reviewed the option of having the ICEC reporting requirement mirror the Contractor Registration rule. This would increase consistency between the programs. This change would include a potential penalty if the certificate holders fails to update their contact information.

The Task Force then discussed possible education initiatives. These included educational outreach to hiring agents regarding verification of valid independent contractor status and operating within the scope of the ICEC. The Task Force also discussed the need for education of ICEC applicants and current certificate holders. These education areas would cover the clarification of related issues including: the ICEC waiver of Workers' Compensation insurance; the requirement to remain free from control and direction; and other business implications associated with self-employment.

The Task Force addressed the need for technology-based education. Specifically, a web-based dashboard providing essential data to the public including current statistics, trends, and links to other pertinent information. A user-friendly quick search for compliance verification was also discussed.

Lastly, a variety of system improvements that could be endorsed by the Task Force was presented. Details on these items can be found in the Recommendations for Improvement section of this report.

Recommendations for Improvement

ERD Education/Outreach Initiatives

A consistent theme throughout Task Force meetings was a desire to improve transparency and awareness around Independent Contractor behavior and activity. DLI agrees and is committed to providing additional resources focused on improving outreach on every party's legal obligations, and the ramifications of non-compliance. The focus of the enhanced outreach efforts will consist of the following:

- Focus on Hiring Agents
 - Responsibility to hire those with registrations
 - Only allow work listed on the registration certificate
- Applicants/Registered Certificate Holders
 - Waiver of WC
 - Responsibility to be free from control
- Establish a web-based dashboard addressing
 - Current statistics
 - Trends
 - A quick search for verification of compliance
 - Links to other pertinent information
- Creation of a tip or abuse line, where workers or employers can refer suspected abuse of ICEC's to the department for investigation.

Rule Changes

The rules should be crafted in a way that allows businesses and/or contractors to initially establish themselves easily. Subsequent reviews on the efficacy of an independent contractor's status should be considered with evidence of the previous period's activity. On renewal, applicants should be able to demonstrate how they operated independently through documentation.

- ARM 24.35.303 Upon first, and any subsequent renewal, require the additional documentation to substantiate that the applicant is/has been operating an independent business, with copies of:
 - Tax filings for the previous two years – Business income reflected or 1099's
 - Contracts – past, fulfilled.
 - Insurance/payroll records

To streamline inspections and minimize the impact on working individuals, field inspectors need to be able to quickly validate if inspected groups/individuals have an active ICEC or are covered under a workers' compensation policy. An independent contractor should be able to quickly produce a copy of their ICEC (similar to a plumber who is required to hold a copy of his or her

license on them) or an employed individual can direct the inspector to their employer to produce documentation of an active workers' compensation policy.

- ARM 24.33.131 Evidence of Compliance with Laws – To allow for efficiency in determining compliance during an inspection, require proof of Workers' Compensation Coverage (copy of policy declaration) or ICEC on job site/person.

Law Changes

Currently, hiring agents hold little responsibility when it comes to hiring or engaging appropriately classified contractors. 39-71-419 (2)(a), MCA disallows employers from forcibly requiring an independent contractor status to avoid workers' compensation obligations. It does not, however, penalize employers for knowingly hiring misclassified contractors.

- 39-9-301, MCA Business Practice – penalty. Add penalties for knowingly (homeowners exempt):
 - Hiring unregistered Independent Contractors.
 - Hiring Independent Contractors who are suspended, or have had their certificates revoked, or applications denied.
 - Hiring outside the scope listed on the registration.
 - Allowing the Independent Contractor to work outside the listed scope on registration.
 - Misclassifying an employee as an Independent Contractor.

Currently, penalties for non-compliance with 39-71-419 (3), MCA are up to \$1000 for each violation. The Task Force members recommended escalating the penalty structure for subsequent offenses while also providing relief from penalties for first-time non-compliance if the individual follows the corrective action within the required timeframe. Also, a contractor's ICEC may be suspended but 39-71-419(1)(b), MCA does not currently reflect it's a violation to work while suspended.

- Increase penalties in 39-71-419 (3), MCA up to \$5,000. This change in combination with a new rule to step out the penalties in the following manner:
 - 1st Offense \$1,000 - *** allow waiver if department directed education completed within a required time frame
 - 2nd Offense \$2,500
 - 3rd Offense \$5,000
 - Subsequent \$5,000 and revocation/suspension for a defined period)
- 39-71-419(1)(b) Indicates it is a violation to perform work when the ICEC has been revoked or an application denied – add to this that it is a violation when the ICEC has been suspended.

Wage Integrity and Misclassification in the Construction Industry Task Force Meeting

July 10, 2019

In Person:

Lt. Governor, Mike Cooney
Galen Hollenbaugh
Amber Carpenter
Shaunna Berglund
Gene Walborn
Misty Knight
Mario Martinez
Tracy Gonzalez
Vicki Dickinson proxy for Kim Rickard
Jim Wonnacott
Jack McBroom
Sean Lawler
Debra Poteet
Bill Wheeler
Doug Jackson
Robin Saylor
Bob Warren
Corena Benjamin
Mark Cadwallader
Scott Moothart
Eric Strauss
Darren Parson
Jim Larson
Sean White
Random Mark
Jeff Garden
Ed Caplis
Logan Jackson
Joel Worth
Jason Swant
Brandon Doug
James Woods

Attending via Skype:

Ann Buskovich
Plumbers & Pipefitters
2 parties as Guests

Welcome and Introductions - Lt. Governor, Mike Cooney called the meeting to order. All parties present introduced themselves. An explanation of the Task Force was given.

Rules of Order - Mark Cadwallader

Overview of Executive Order 4-2019 - Eric Strauss

ICEC History and Current Status - Tracy Gonzalez

Review of Legislative Audit and Divisional Reorganization - Eric Strauss

Potential Impact to Unemployment Insurance - Scott Moothart

Potential Impact to Department of Revenue - Ed Caplis

Discussion included Executive Order 4-2019, the purpose and scope pertaining to the formation of the Task Force and the potential impacts of misclassified workers in the construction industry.

Areas of potential impact included; worker's compensation, unemployment insurance, tax implications, and improper competitive advantage.

The Task Force also discussed past and current audit and inspection practices of ERD as well as approaches taken by other municipalities, and organizations regarding classification in the construction industry.

Next steps were discussed including the duties outlined in the Executive Order and potential points of discussion for the next meeting.

Next meeting date; to be determined

No public comment

Meeting adjourned

Wage Integrity and Misclassification in the Construction Industry Task Force Meeting

September 4, 2019

In Person:

Lt. Governor, Mike Cooney
Galen Hollenbaugh
Shaunna Berglund
Amber Carpenter
Gene Walborn
Misty Knight
Mario Martinez
Tracy Gonzalez
Kim Rickard
Jeff Garden
Jack McBroom
Rick Hamilton
Bob Warren
Bill Wheeler
Mark Cadwallader
David Smith
Eric Strauss
Greg Watts
Finn McMichael
Stephanie Horn
Random Mark
Steve Suezek
Joel Worth
Logan Jackson
Brandon Doug

Attending via Skype:

Ann Buskovick
Plumbers & Pipefitters
Michelle Carlson
Sarah Elledge
Scott Moothart
Randy Siemers
Jason Swant
Justin McEwen

Welcome and Introductions- Lt. Governor, Mike Cooney called the meeting to order. All parties present introduced themselves.

Review DOR Findings on Underground Economy and Unreported Wages- Finn McMichael

Review and approve Prior Meeting Minutes- Task Force

Details of Compliance and Investigation Section- Amber Carpenter

Details of Inspection Program- Jeff Garden

Details of Audit Program- Misty Knight

Discussion of Potential Changes- Eric Strauss and Amber Carpenter

Discussion included the underground economy and unreported wages, including misclassifications. The potential tax implications were addressed.

The meeting minutes from the July 10, 2019 meeting were reviewed and approved.

Details of the Compliance and Investigation Section were discussed including; past practices, current practices, and future goals. The discussion included potential ways to attain future goals.

Details of the Inspection and Audit programs were discussed.

Next steps were discussed including; exploring data sharing, potential recommendations for Task Force review, educational opportunities, and additional industry partners.

Next meeting date; to be determined

No public comment

Meeting adjourned

Wage Integrity and Misclassification in the Construction Industry Task Force Meeting

November 12, 2019

In Person:

Lt. Governor, Mike Cooney
Galen Hollenbaugh
Shaunna Berglund
Amber Carpenter
Gene Walborn
Misty Knight
Mario Martinez
Tracy Gonzalez
Vicki Dickinson proxy for Kim Rickard
Jeff Garden
Jack McBroom
Bob Warren
Deb Poteet
Mark Cadwallader
Bill Wheeler
Miles McCarvel
Random Mark
Steve Snezek
Bill Pierce
Lance Zanto
Jim Rickard
Bridger Mahlum
David Smith
Logan Jackson

Attending via Skype:

Jason Swant
Vickie Evans
Corena Benjamin
Eric Strauss
Scott Moothart
Ann Buskovick
Michelle Carlson

Welcome and Introductions - Lt. Governor, Mike Cooney called the meeting to order. All parties present introduced themselves.

Review and approve prior meeting minutes - Task Force

Montana Building Industry Association perspective - Bill Pierce

Montana Contractor Association perspective - David Smith

Recommendation of potential changes - Amber Carpenter

Discussion of potential changes - Task Force

The meeting minutes from the September 4, 2019 meeting were reviewed and approved.

Discussion included the perspective of two industry organizations, the Montana Building Industry Association, and the Montana Contractor Association. The discussion addressed industry

concerns with the current independent contractor relationship.

Potential recommendations for change were discussed. The included potential process changes. As well as potential Rule and Statute changes. The need for additional education for both independent contractors, as well as hiring agents.

Next meeting date; to be determined

No public comment

Meeting adjourned

