



Meeting Minutes: Attorney General’s Advisory Task Force on Worker Misclassification

Meeting Date and Time: October 25th, 2023, 10am – Noon

Minutes Prepared By: Abdulaziz Mohamed

Location: Minnesota State Capitol, Conference Room 123 and Microsoft Teams

Attendance

Members Present

Rod Adams
Representative Emma Greenman
Commissioner Nicole Blissenbach
Octavio Chung Bustamante
Daniel Getschel
Melissa Hysing
Burt Johnson
Briana Kemp
Senator Clare Omou Verbaten
Deputy Commissioner Evan Rowe
Aaron Sojourner
Brittany VanDerBill
Kim Vu-Dinh
Brian Elliot (Ex-Officio)
Jonathan Moller (Ex-Officio)

Members Absent

Amir Malik
Jonathan Weinhagen

Attorney General’s Office (AGO) Staff Members Present

Attorney General Keith Ellison
Carin Mrotz
Abdulaziz Mohamed
Marco Hernandez
Jerome Rankine

Department of Revenue Staff Members Present

Jack Schultz
Cathy Kippola

Agenda Items



1. Call to order and roll call

Co-chair Rod Adams calls the meeting to order at 10:13 am. A quorum was present.

2. Approval of meeting agenda

A motion was made by Representative Greenman to approve the agenda as presented. A vote was taken, and the motion passed unanimously.

3. Approval of September 13th minutes

A motion was made by Representative Greenman and seconded by Commissioner Nicole Blissenbach to approve the September 13th minutes. A vote was taken, and the motion passed unanimously.

4. Brief remarks from Attorney General Keith Ellison

Attorney General Keith Ellison expressed gratitude for everyone's presence, emphasizing the significance of ongoing economic justice work during challenging times. He highlighted the task force's importance, noting widespread interest in its activities, thanked the legislature for providing ongoing funding, and underscored the education aspect of empowering counties with criminal authority in wage matters. Attorney General Keith Ellison concluded by affirming the potential positive impact of the task force's efforts in putting deserved earnings into people's pockets.

5. Current Minnesota statutes regarding worker misclassification presentation

Assistant Attorney General Jonathan Moller presented on behalf of the Attorney General's Office. The presentation included the following:

- Overview of the history of employer-employee relationship
- Minnesota state statutes
 - a. 5200.0221 Independent Contractor
 - b. 5224.0330 Control of Method and Manner of Performance
 - c. 5224.0340 Independent Contractor or Employee
- AGO Enforcement
 - a. Minnesota Statute 181.1721
 - b. Minnesota Statute 8.31

The committee members asked questions to Jonathan Moller and engaged in a discussion as follows:

- Brittany VanDerBill asked whether the reference to the US DOL 9 factor test pertains to the proposed rule from 2022 or the current rule. Jonathan Moller



responded that the test is a Supreme Court-developed standard related to the classification of independent contractors.

- Brian Elliot asked if there's an update on the DOL proposed rule on misclassification. Jonathan Moller answered that he's not sure.

6. Department of Labor and Industry Presentation

Commissioner Nicole Blissenbach presented on behalf of the Department of Labor and Industry. The presentation featured the following:

- Violations of Minnesota Statutes 181.722 (general).
- Violations of Minnesota Statutes 181.723 (construction).
- Wage theft resulting from misclassification.
- Failure to maintain appropriated workers' compensation coverage.

The task force members asked questions to Commissioner Nicole Blissenbach and engaged in a discussion as follows:

- Burt Johnson asked if the application of a different test creates complication and inefficiency internally. Commissioner Blissenbach acknowledged the complexity of the department's role as a resource for stakeholders dealing with employer obligations and employee rights. There's difficulty in enforcing every violation due to the reliance on voluntary compliance, and the resulting confusion stemming from intricate rules and statutes complicates their work for the department.
- Burt Johnson also asked about the prevalence of misclassification, particularly in certain industries, inquiries about the various violations association with misclassification, and the effectiveness of existing tools in combating misclassification in industries where it's widespread. Commissioner Blissenbach identified wage and hour violations as the most common issues related to misclassification, emphasizing that it extends beyond formal misclassification as an independent contractor. She notes instances where employers pay in cash without formal contracts, leading to unrecorded hours and a lack of acknowledgment of employees' rights. Commissioner Blissenbach highlighted the direct damages to individuals in terms of minimum wage and overtime violations, as well as the potential impact on workers' compensation and healthcare expenses, placing a burden on either the individual or the state.
- Representative Greenman raises a question regarding the potential impacts of misclassification, asking whether there is evidence that it exacerbates economic inequality, seeking insight into the broader social and economic implications of misclassification practices. Commissioner Blissenbach explains that the department focuses on recovering damages related to wage and hour violations due to their penalty authority in the area, emphasizing the importance of voluntary compliance and the ability to deter conduct through significant penalties and publicizing their enforcement actions.



- Aaron Sojourner expressed interest in understanding the enforcement strategies and processes related to misclassification, seeking insights into how information is handled when a complaint is received, questioning whether it is shared with entities like the Attorney General’s Office and EEOC. Aaron also inquired about the coordinating and potential improvements in information sharing across various enforcement agencies dealing with misclassification violations. Commissioner Blissenbach acknowledged the potential for improved information sharing across agencies regarding misclassification but notes that existing laws may hinder such collaboration. Despite making referrals to criminal enforcement entities in cases of potential criminal wage theft, she emphasizes the opportunity for enhanced systems and cooperation among agencies.
- Kim Vu-Dinh asked about how the task force can make sure that the communication continues. Commissioner Blissenbach provided a general overview of the special comp fund, explaining that it handles claims where employers lack workers’ compensation insurance, noting that claims come through various channels, namely employees, medical providers, or cases where the employer lacks insurance.
- Brittany VanDerBill sought information about the existence of a process to increase awareness among misclassified workers regarding their protections under work compensation and how this awareness-raising initiative is implemented. Commissioner Blissenbach describes the department’s efforts to disseminate information through public engagement, the department’s website, and collaboration with medical facilities. However, she acknowledged the challenges when employers fail to display required workplace notices, limiting communication with misclassified workers and hindering their awareness of applicable laws, necessitating improvement in comprehensive awareness and engagement.

7. Department of Employment and Economic Development Presentation

Deputy Commissioner Evan Rowe presented on behalf of the Department of Employment and Economic Development. The presentation included the following:

- A brief introduction on Unemployment Insurance
- Federal law and program responsibilities
- Minnesota law and program responsibilities
- Audits

The task force members asked questions to Deputy Commissioner Evan Rowe and engaged in a discussion as follows:

- Burt Johnson inquired about the strategic initiation of audits and whether they are industry-specific, particularly focusing on industries where misclassification is more common and where complaints may come from business competitors rather than workers. He also asked about potential limitations on the department’s ability to target specific industries for audits, referencing federal regulations. Deputy



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Commissioner Rowe explained that most audits conducted by the department are random, with the primary goal being overall tax integrity. Deputy Commissioner Rowe acknowledged a potential correlation between industry competition and misclassification complaints, although specific data isn't readily available.

- Commissioner Blissenbach highlighted the difficulty in enforcing laws against bad actors who intentionally evade the system, pointing out the challenges of detection and enforcement when there are no records. She noted the broader impact on wage and hour enforcement, emphasizing the absence of standard records that typically facilitate investigations. There's a need to address the challenges in enforcing protections.
- Referencing the 2007 OLA Audit, Representative Greenman raised a question about the impact of misclassification on the unemployment insurance trust and the distribution of risk among businesses within the system designed to support those laid off through no fault of their own. Deputy Commissioner Rowe expressed uncertainty about the impact of misclassification on the unemployment trust, noting that the federal Department of Labor may have been occupied with pandemic-related matters, making it challenging to assess the attention given to this specific issue.
- Kim Vu-Dinh asked if the Department of Labor and Industry and the Department of Employment and Economic development can refer items to the Attorney General's Office. Deputy Commissioner Rowe indicated that when a situation appears to have criminal implications, they refer the matter to the relevant County Attorney. Commissioner Blissenbach noted that after issuing compliance order, contested case hearings are handled with representation from the Attorney General's Office. Additionally, she notes that matters with criminal implications are referred out, as the department lacks criminal investigative authority.
- Brittany VanDerBill inquired about the role of choice in investigations when both parties opt for an independent contractor relationship. Deputy Commissioner Rowe answered that, in investigations, the determination of employment status is based on legal tests rather than choice, and misclassification individuals might not always be dissatisfied with their status. The preference for independent contractor status may stem from reasons like avoiding certain taxes, although it comes with risks and impacts on social safety net programs.
- Brittany VanDerBill followed up seeking clarification on whether "paid under the table" refers to receiving cash payments not reported or if it includes situations where individuals receive a 1099 as independent contractors. Deputy Commissioner Rowe expressed uncertainty about providing a breakdown of situations where individuals are paid under the table or receive a 1099, suggesting that both scenarios may occur to varying degrees.
- Melissa Hysing questioned the administration of the gig unemployment program during the pandemic, seeking insights into the data collected and auditing mechanisms employed by the agency to detect instances of misclassification among self-employed independent contractors and gig workers. Deputy Commissioner



Rowe answered that he doesn't have anything on that subject with him today but would certainly investigate it.

- Aaron Sojourner asked about the challenge of detecting misclassification in cases where there is a blend of legitimate independent contracting and illegitimate misclassification. He seeks to understand if the department has considered opportunities to audit or address such cases to improve detection. Deputy Commissioner Rowe acknowledged the current practice of departments during audits and investigations, noting that the suggestion of a more proactive or prospective posture is a policy question. Any shift in approach would require policy considerations and potential legislative action.

8. Department of Revenue Presentation

Jack Schultz and Cathy Kippola presented on behalf of the Department of Revenue. The presentation included the following:

- Minnesota Statutes
 - 290.92 (Defines wages, employee, employer)
 - 290.01 (Defines Internal Revenue Code)
 - 289A.31 (Explains tax liability and no employee credit for taxes paid)
- Case Law, Rulings
- Common Law Rules
- What Happens After Discovery
- Education
- Barriers of Enforcement

The task force members asked questions to Jack Schultz, Cathy Kippola, and Daniel Getschel and engaged in a discussion as follows:

- Brittany VanDerBill asked if the choice of the independent contractor is considered, especially in cases involving potential gray areas like behavioral control by the employer. Agreeing with Deputy Commissioner Rowe's previous comment, Jack Schultz emphasized that choice isn't considered but rather dependent on the identified facts and circumstances.
- When conducting audits, Daniel Getschel noted that individuals within a misclassified group may have different preferences regarding their employment classification. Additionally, he mentioned the challenge of fear of retaliation among workers, making it a consistent barrier for departments to address misclassification concerns.
- Burt Johnson validated challenge of worker trust due to fear of retaliation. He inquired about the data points used by the department to assess the cost of misclassification to the public and asked about collaboration between different departments in audits and investigations. Daniel Getschel agreed that there is opportunity for collaboration between departments and that, currently, there's internal cooperation within the department, working with divisions and a criminal



unit. The department faces resource limitations and relies on available information, often sources through tips.

- Kim Vu-Dinh asked what messaging and outreach looks like by the department. Daniel Getschel explained that the department has outreach and communication personnel that engages with communities where voluntary compliance is challenges. They conduct outreach, presentations, and education aimed at guiding businesses towards proper practices.
- Aaron Sojourner inquired about the scale of worker misclassification investigations and audits, expressing interest in hearing specific numbers. He emphasized the need for information on the resources available and the volume of leads, considering the large economy and workforce in Minnesota. Daniel Getschel shared that the department conducts approximately 100 to 150 audits per year, with 80 to 85% of these cases being worker misclassification audits.

9. Questions and Discussion

- Representative Greenman suggests the need for data and proposes that the task force collaboratively formulate research questions, involving government, federal partners, and academic resources to address inquiries arising from the discussion. She underscores the importance of understanding the policy choices involved in allocating resources for audits, recognizing that the task force is still in the early stages of information gathering.
- In the upcoming meetings, the task force plans to hear from workers, small businesses, freelancers, and employers to gain insights into the scope of misclassification across industries. The focus will be on understanding the firsthand experiences and challenges in the field, gathering diverse perspectives and insights to inform the task force members' discussions and recommendations.

10. Adjournment

A motion was made by Co-chair Rod Adams to adjourn the meeting; a vote was taken and passed unanimously. The meeting was adjourned at 12:11 pm.