

Approved Minutes of the
 Worker Classification Coordinated Enforcement Council
 May 17, 2011 – 9:00 a.m.
 Labor Commission, 160 East 300 South, Salt Lake City

Council Members Present: Alan Hennebold, Chair Deputy Commissioner, Utah Labor Commission
 Thad Levar Deputy Director, Utah Department of Commerce
 D’Arcy Dixon Pignanelli Commissioner, Utah State Tax Commission
 Bill Starks Director, Unemployment Insurance, Department of Workforce Services
 Phil Lott Assistant Attorney General, Utah Attorney General’s Office, non-voting member

Staff: Mary Gehman-Smith Supervisor, Support Staff, Department of Workforce Services

Visitors: A list of visitors is provided at the end of the minutes.

AGENDA	DISCUSSION	RECOMMENDATIONS/ACTION
1. Welcome	<p>Chair Hennebold called the meeting to order at 9:03 a.m.</p> <p>Chair Hennebold welcomed the members and visitors to the second meeting of the Council and noted there is a quorum present and notice of today’s meeting has been posted and published at the Public Notice website.</p>	
2. Approval of Minutes of April 25 Meeting	<p>All members have received and reviewed the April 25, 2011 Minutes. Commissioner Dixon recommended, for consistency, anyone addressing the Council for the first time, should be identified by their full name, title and organization he/she represents. This format should continue with subsequent minutes. She would also like to continue to note the handouts in the actions column.</p> <p>Chair Hennebold stated the Utah Labor Commission will house both the written and audio recording of the Minutes on their website.</p> <p>MOTION: Commissioner Dixon made a motion to approve the April 25, 2011 Minutes with the above revisions. The motion passed unanimously.</p>	

Worker Classification Coordinated Enforcement Council Meeting - May 17, 2011
 The Minutes were approved on May 31, 2011

<p>3. Discussion of Standards and Need to Close Meeting</p>	<p>Mr. Starks, Director, Unemployment Insurance, Department of Workforce Services, reported the following:</p> <ul style="list-style-type: none"> • DWS is authorized to discuss specific topics with the Labor Commission but would not be able to discuss in an open meeting; • He has reviewed Section 52-4-204 of the Open and Public Meetings Act but wants to ensure this law would allow the Council to close meetings. Section 52-4-205, <i>pending or imminent litigation</i>, would cite the closest provision; • DWS has not investigated criminal conduct in UI for years. A repeat offender could be labeled a criminal offender, and in this situation, the law would provide the Council to close the meeting. • DWS legal staff will be asked to review. • When the legislation was pending, a discussion took place regarding having a meeting after the meeting. Chair Hennebold wants to stay within the statute and avoid this approach; <p>Mr. Levar added actions taken during an unauthorized, closed meeting could be invalidated.</p> <p>Commissioner Dixon suggested:</p> <ul style="list-style-type: none"> • Personal information could be redacted or just the situation presented, similar to how the worker-owner LLC model was discussed during the 2010 summer legislative working group meetings without discussing the companies using the model. <p>Chair Hennebold doesn't care for this proposal as the agencies need to know who we are talking about and what the allegations are.</p> <p>No action was taken.</p>	<p>The open/closed meeting issue needs to be clarified. Mr. Lott will take the lead on closed meetings.</p>
---	--	---

4. Public Comment	The Chair noted there were no members of the public that wanted to address the Council.	
5. Introduction and Comments of Debra Mardanlou, IRS	<p>Chair Hennebold introduced Debra Mardanlou, Utah liaison, Internal Revenue Service. Ms. Mardanlou reported the following:</p> <ul style="list-style-type: none"> • Von Walsh is the Employment Tax Coordinator for Utah. The IRS has an MOU in place with DWS which authorizes day to day information. Side by side audits are also authorized, although none have taken place. However, this information could not be shared with anyone else. DWS doesn't re-disclose any information gained on an audit; • The IRS can share information with the Tax Commission, but they can't disclose to DWS and vice versa. When DWS shares audit information with the IRS, the IRS will send that individual a bill based on DWS' findings. If the individual appeals, the IRS will do a complete audit. • Mr. Levar and Chair Hennebold reported the Department of Commerce and the Labor Commission can report in one direction with the IRS. Chair Hennebold added there is tremendous potential for loss of tax revenues, as employers label their employees as non-employees, therefore their wages aren't taxed. • Mr. Lott asked for more detail regarding the MOUS with DWS and the Tax Commission, specifically the 1099 and SS8 (status determination on a worker). A portion of these are submitted electronically. They also send hardcopies of an actual examination report. The IRS has the same type of agreement with the Tax Commission. The Tax Commission has electronic access to every tax return filed with the IRS even appeals information. 	
6. U.S. Dept. of Labor	<p>Michael Yarman, Assistant District Director, U.S. Department of Labor (USDOL) reported the following:</p> <ul style="list-style-type: none"> • The USDOL has a general interest in the misclassification issues. If employers are misclassifying, it deprives employees of their FMLA rights, overtime and minimum 	

Worker Classification Coordinated Enforcement Council Meeting - May 17, 2011
The Minutes were approved on May 31, 2011

<p>7. Agency Education/ Outreach on worker misclassification</p>	<p>wage and gives them an unfair advantage against other employers;</p> <ul style="list-style-type: none"> • There is a preliminary proposal which will make it mandatory for an employer to either classify an employee as such or an independent contractor at the time they begin their employment. This will explain the rights to the employees up front. This proposal is not final. What it won't do is give the employer the right to label the employee as an independent contractor without reason. This proposal has not been posted for public comment and is not final; • MOUs are being finalized. Meanwhile, the USDOL is willing to share information if needed although it needs to be in writing; <p>Chair Hennebold distributed information regarding misclassification of workers;</p> <ul style="list-style-type: none"> • This could be posted on the website as early as next week. Action needs to be taken quickly to address the policy the legislature has identified; • He also distributed a screenshot from Iowa's website. If every agency posted the same type of document, there could be confusion. On the other hand, we aren't set up to do this collectively; • A mechanism to report misclassification needs to be in place. Phone numbers are preferred over an email address. 	<p>Attachment 1 Right to Know Under the Fair Labor Standards Act</p> <p>Attachment 2 Misclassification of Workers</p> <p>Attachment 3 Screenshot of Iowa's site</p> <p>This discussion was for information only. No action was taken.</p>
<p>8. Gathering Statistics regarding "the nature and extent of misclassification in the state" for the report</p>	<p>Commissioner Dixon distributed a handout addressing for the Tax Commission (TC), three of the four items that needed to be included in the report due to the Governor and the Legislature by November 30, 2011, these being: (1) the nature and extent of misclassification in Utah; (2) the results of regulatory efforts and law enforcement efforts; and (3) the status of sharing information with other agencies.</p> <p>The TC will look at tax compliance. The TC will take a random sample of the new State K-1s issued from LLCs to determine if those issued K-1s have filed tax returns. This will look at compliance with the payment of taxes, not proper classification.</p>	<p>Attachment 4 Tax Commission handout</p>

Worker Classification Coordinated Enforcement Council Meeting - May 17, 2011
The Minutes were approved on May 31, 2011

<p>9. Agency Presentations</p>	<p>Preliminary figures should be available around the first of November 2011.</p> <p>Commissioner Dixon thanked Mr. Lott for the reports on classification of workers from other states, and said from reviewing them she noted a table in the State of Maryland report titled “Differences between General Tax Responsibilities of Employees and Independent Contractor” She thought it was good summary and could possibly be updated specific to Utah and used in the November 2011 report.</p> <p>Mr. Lott opened a discussion regarding random sampling versus direct audit. He said his review of the other reports from the other states showed that random sampling like the Tax Commission was proposing to do is an effective statistical method. Random sampling will be easier to extrapolate. The group believes results of both methods need to be in the report.</p> <p>Mr. Levar added, as a result of S.B. 35, the Department of Commerce will begin receiving reports from unincorporated employers on July 1, 2011.³⁵</p> <p>Due to time, the agency presentations will be postponed until the next meeting.</p> <p>Next Meetings: The next meeting was scheduled for Tuesday, May 31, 2011 at 9:00 a.m. The Council will also meet on June 16, 2011.</p> <p>Motion: Commissioner Dixon made a motion to adjourn the meeting at 10:28 a.m.</p>	<p>Attachment 5 Table 1 from the State of Maryland 2010 report on Classification of Workers.</p>
--------------------------------	---	--

Visitors:

- Debra Mardanlou, Governmental Liaison, Internal Revenue Service*
- Michael Yarman, Assistant District Director, U.S. Department of Labor, Wage & Hour*
- Kris Springer, Chief of Contributions, DWS*
- Dan S. Jones, Bureau Manager, DOPL*
- Dan Rodriguez, Investigator, DOPL*
- Wayne Holman, Investigations Manager, DOPL*
- Gordon Sommers, Investigator, DOPL*
- Melanie Reif, Auditor, DOPL*
- Tonya Gallegos, Utah Labor Commission*
- Heather Gunnarson, Utah Labor Commission*

Worker Classification Coordinated Enforcement Council Meeting - May 17, 2011
The Minutes were approved on May 31, 2011

Michelle Yauman

DOL/WHD

RIN: 1235-AA04

Publication ID: Fall 2010

Title: Right To Know Under the Fair Labor Standards Act

Abstract: The Department of Labor proposes to update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed. The Department also proposes to clarify that the mandatory manual preparation of "homeworker" handbooks applies only to employers of employees performing homework in the restricted industries. The title of this proposed rule has changed to better reflect the purpose of this action.

Agency: Department of Labor(DOL)

Priority: Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Proposed Rule Stage

Major: Undetermined

Unfunded Mandates: No

CFR Citation: 29 CFR 516 (To search for a specific CFR, visit the [Code of Federal Regulations](#).)

Legal Authority: 29 USC 211(c)

Legal Deadline: None

Statement of Need: The recordkeeping regulation issued under the Fair Labor Standards Act (FLSA), 29 CFR part 516, specifies the scope and manner of records covered employers must keep that demonstrate compliance with minimum wage, overtime, and child labor requirements under the FLSA, or the records to be kept that confirm particular exemptions from some of the Act's requirements may apply. This proposal intends to update the recordkeeping requirements to foster more openness and transparency in demonstrating employers' compliance with applicable requirements to their workers, to better ensure compliance by regulated entities, and to assist in enforcement. In addition, the proposal intends to update the requirements for live-in domestic employees and, to clarify that the mandatory manual preparation of "homeworker" handbooks applies only to employers of employees performing homework in the restricted industries.

Summary of the Legal Basis: These regulations are authorized by section 11 of the Fair Labor Standards Act, 29 U.S.C. 211.

Alternatives: Alternatives will be developed in considering proposed revisions to the current recordkeeping requirements. The public will be invited to provide comments on the proposed revisions and possible alternatives.

Anticipated Costs and Benefits: The Department will prepare estimates of the anticipated costs and benefits associated with the proposed rule.

Risks: This action does not affect public health, safety, or the environment.

Timetable:

Action	Date	FR Cite
NPRM	04/00/2011	
Regulatory Flexibility Analysis Required: Undetermined		Government Levels Affected: Local, State, Tribal

Federalism: Undetermined

Included in the Regulatory Plan: Yes

RIN Data Printed in the FR: No

Related RINs: Previously reported as 1215-AB78

Agency Contact:
Montaniel Navarro

Fair Labor Standards Act Branch Chief, Division of Enforcement Policy
Department of Labor
Wage and Hour Division
200 Constitution Avenue NW., Room S-3502, FP Building,
Washington, DC 20210
Phone:202 693-0067
Fax:202 693-1387

Misclassification of Workers

What is worker misclassification?

Worker misclassification occurs when an employer improperly classifies an employee as an “independent contractor” or “member” of a Limited Liability Company (LLC) in order to evade the employer’s legal obligations to employees.

Who suffers when workers are misclassified?

- **Workers:** Workers improperly classified as “independent contractors” or “members” of LLCs may lose protections of federal and state laws such as workers’ compensation, unemployment insurance, payment of wages (including minimum wage and overtime), occupational safety and health, employment discrimination, and others.
- **Employers:** By misclassifying workers in order to avoid their legal obligations, unscrupulous employers undercut their responsible, law-abiding competitors. In other words, employers who misclassify enjoy an unfair competitive advantage against honest employers.
- **The General Public:** Worker misclassification leads to “cost shifting”—costs of workplace injuries or unemployment that should be paid by an employee’s employer are shifted to others. The result is higher costs for health care insurance, a drain on public assistance and charity, and loss of tax revenues.

How to report worker misclassification.

If you think an employer is misclassifying workers, please **call the Utah Labor Commission at 801-530-XXXX**. Commission staff will discuss your complaint with you and then take appropriate action to investigate the complaint.

Together with Utah’s Department of Commerce, Department of Workforce Services, Tax Commission and Attorney General’s Office, the Labor Commission is a member of the Worker Classification Coordinated Enforcement Council. The Labor Commission will also share your complaint with these other agencies for their action.

Iowa Workforce Development

Iowa's Employment Security Agency
Smart. Results.

IOWA.
WORKFORCE
DEVELOPMENT

www.iowaworkforce.org

[Frequently Asked Questions \(FAQs\)](#)

[Report Iowa Worker Misclassification](#)

[Contact Iowa's Worker Misclassification Unit](#)

[Misclassification Seminars](#)

[Misclassification Brochure](#)

[Misclassification Task Force](#)

[Misclassification Federal GAO Report](#)

[Iowa Unemployment Insurance Division](#)

[Contractor Registration](#)

[Iowa Labor Services Division](#)

[Iowa Workers' Compensation Division](#)

[Iowa Department Of](#)

Misclassification Of Iowa Workers

Misclassification of workers as "independent contractors" rather than "employees," is a growing problem in Iowa and across the nation. The federal Government Accountability Office reports that the underpayment of Social Security taxes, unemployment and income taxes in 2006, due to worker misclassification, totaled an estimated \$2.72 billion, nationally.

Iowa employers must report wages to Iowa Workforce Development's Unemployment Division and pay unemployment tax on wages paid to employees as required. Iowa employers must generally withhold state and federal income taxes, and withhold and pay Social Security and Medicare taxes. When employers misclassify workers:

- They avoid paying these taxes.
- They might avoid workers compensation coverage.
- They might fail to follow wage, contractor registration, or other employment and labor laws.
- They underbid honest, law-abiding businesses that pay all taxes owed.

Misclassification of workers threatens Iowa's economy, its businesses and its most important resource - it's workers.

The Iowa Legislature provided special funding for extra help to protect workers, law-abiding businesses, and taxpayers.



FAQ's

If you do not know if your workers are employees or independent contractors, visit our Frequently Asked Misclassification

Revenue



Questions.

Reporting Misclassification

If you believe that you, or someone you know, are intentionally misclassified to avoid tax payments, workers' compensation coverage, and other legal obligations, there is an easy way to report it. [Click here to](#)

[report misclassification.](#)

Contact Information:

For questions about misclassification:

- Call the Iowa Workforce Development Misclassification Unit at (515) 281-3191 or (800) JOB-IOWA (800-562-4692).
- Send an email to Misclassification@iwd.iowa.gov.
- Contact the [Iowa Department of Revenue](#).
- Write to the Misclassification Unit, Iowa Workforce Development, 1000 East Grand Avenue, Des Moines, IA 50319.

Penalties:

Intentional misclassification of workers is illegal. This practice constitutes tax and insurance evasion. Employers could pay significant penalties and fines. Under various Iowa laws, intentional misclassification of workers can result in penalties, ranging from monetary fines and interest for unpaid taxes, to criminal charges. Penalties are determined on the facts of each individual case.

- Failure to Pay Unemployment Taxes: Iowa Code 96.16, 96.16(2), 96.14(2)
- Failure to Pay Iowa Income Taxes: Iowa Code 422.16
- Failure to Provide Worker's Compensation Coverage: Iowa Code 87.14A, 86.13, 86.13A
- Failure to Pay Wages Owed: Iowa Code 91A.12
- Failure to Register as a Contractor: Iowa Code 91C.8

[Iowa Workforce Development Home Page](#)
[IowaWorks](#) | [IowaJobs](#) | [Youth For Iowa](#) | [Search](#)

IOWA
WORKFORCE
DEVELOPMENT

Division of Workforce Development

Iowa Workforce Development

1000 East Grand Avenue

Des Moines, Iowa 50319-0209

Telephone: (515) 281-5387 or (800) JOB-IOWA: (800) 562-4692

For Deaf and Hard Of Hearing, Use Relay 711

[Equal Opportunity Is The Law](#)

Copyright © - All Rights Reserved

For unemployment insurance claim questions, contact: UIClaimsHelp@iwd.iowa.gov

For general questions, contact: IWD.CustomerService@iwd.iowa.gov

For technical questions about our web sites, contact: IWD.Webmaster@iwd.iowa.gov

Please read our [Terms of Use](#) and [Privacy Statement](#).

Under SB 11 (1st Sub) *Worker Classification Coordinated Enforcement Council* sponsored by Sen. Karen Mayne (2011), this Enforcement Council is to report no later than November 30 to the Governor and the Business and Labor Interim Committee on (1) the nature and extent of misclassification in this state; (2) the results of regulatory and law enforcement efforts related to the council; (3) the status of sharing information by member agencies; and (4) recommended legislative changes, if any. The Tax Commission (TC) provides the following information:

(1) Nature and extent of misclassification in Utah. The TC will look at Tax Compliance.

The TC in implementing S.B. 23 (1st Sub) *Income Taxation of Pass-through Entities and Pass-through Entity Taxpayers* sponsored by Sen. Niederhauser (2009) will be requiring pass-through entities (Partnerships, S Corporations, Limited Liability Companies (LLCs)) to provide the TC a copy of a new State of Utah Schedule K-1 (Partner's Share of Utah Income, Deductions and Credits) and new State of Utah Schedule K (Partners' Distributive Share Items) for 2010 filings in 2011.

The LLCs organized as a worker/owner LLC model and addressed in 2nd Substitute SB 35 Construction Licensees Related Amendments (Mayne 2011) are taxed as partnerships and therefore would file a TC-65 tax return and complete and submit with the TC-65, a Utah Schedule K and K-1s for each partner; however, neither the TC-65 or Ks or K-1s require a Standard Industry Code (SIC). Although the Ks and K-1s cannot be narrowed to just those issued by the construction industry, the TC believes it can extract just the Limited Liability Companies (LLCs) and the associated Ks and K-1s (so that General Partnerships, Limited liability Partnerships and Limited Partnerships and other are not in the mix) and take a sample of these LLCs and evaluate the K-1s from a tax perspective. The TC will look to see if those issued K-1s have filed tax returns. This will not address proper classification, but payment of taxes.

(2) The Results of Regulatory Efforts. The TC hopes to have some aggregate information to share from examining a sample of the new State Ks and K-1s. The TC cannot share taxpayer specific information, only results in aggregate of ten or more. This aggregate information should be available sometime toward the end of October or first of November 2011.

(3) The Status of Sharing of Information. The TC does have restrictions on the sharing of data. In general, federal law prohibits the TC from sharing any data that is federal data or state data that has been matched against federal data. **In terms of receiving information, any non-compliance can be an audit lead.** The TC can use the information for an audit lead, but cannot share back any results specific to a taxpayer. The following information is currently being shared with the Auditing Division of the TC. From Department of Workforce Services (DWS), wages paid. This information is used to cross check on selected income taxpayers to determine if a return was filed with the TC on wages reported to Workforce Services. The TC does not match the files; it is used as a resource only. From Commerce, professional licensing and corporations' licensees, which are used to cross-check business/corporate tax filings. The TC does not match the files; it is used as a resource only.

The TC will be working with DWS to obtain information on misclassifications as determined by DWS's audits and compliance efforts. When the DWS audit staff discovers misclassified workers in conjunction with its audits and determines the worker was not issued a 1099, DWS could send the information to the TC Auditing Division. This could expand and leverage the TC's and DWS' enforcement actions. The TC Auditing Division would use the information to review payments of income taxes by the worker on payments received as well as to review the payment records of the employer to its other workers and employees.

Below is a summary of some of the data on a Schedule K and K-1 the TC will be examining:

Schedule K: The information on the Schedule K is an aggregate of the information reflected on each K-1. The Ks will have a line that indicates how many K-1s the entity is attaching to the return. A K-1 is issued to each partner by the LLC. The Ks will have the aggregate of the LLC's Partners' Distributive Share Items, which is what was paid out to the Partners (a worker/owner under the LLC model the Legislature addressed in 2nd Sub SB 35 (2011)). The Distributive Shares to LLC members can be ordinary business income, guaranteed payments, dividends or other income.

From the new State K-1s: A separate K-1 is issued to each member indicating the Partner's Share of Utah Income, Deductions and Credits. The K-1s include the same information on the Schedule K except that it applies specifically to each member and states the company's income distributed to that particular member. The K-1s include the name, address and telephone number of the person to which the K-1 is issued, the name of the entity issuing the K-1; the Employer Identification Number (EIN), Social Security Number (SSN) or Individual Tax Identification Number (ITIN) of the person to which the K-1 is issued, that person's percent of ownership in the entity and the amount of Utah ordinary business income, Utah guaranteed payments, Utah ordinary dividends and Utah other income. A partner under the worker/owner LLC model addressed in 2nd Sub SB35 (2011) could have income noted in any of those areas--Utah ordinary business income. Utah guaranteed payments, Utah ordinary dividends and Utah other income.

Definitions:

- % of ownership or the percentage of the entity owned by the member. This is important because the ownership agreement or % of ownership does not necessarily equate to the distributive share of the income. There could be an agreement that an owner has .00005 % ownership, but receives no profits, dividends, other income based on ownership.
- Utah Ordinary Business Income, i.e. the total Utah amount made by the company after tax deductions,
- Guaranteed payments, i.e. what a member of an LLC gets regardless of the profit or loss of the company

The K and K-1 forms can be viewed at <http://tax.utah.gov/forms/current/tc-65.pdf>

May 17, 2011
for Enforcement Council

Table 1: Differences between General Tax Responsibilities of Employees and Independent Contractors

Type of tax	Individuals classified as employees		Individuals classified as Independent contractors	
	Businesses' general responsibilities	Workers' general responsibilities	Businesses' general responsibilities	Workers' general responsibilities
Federal income tax ^a	Withhold tax from employees' pay	Pay full amounts owed, generally through withholding	Generally, none ^b	Pay full amounts owed, generally through estimated tax payments ^c
Social Security and Medicare taxes ^d	Withhold one half of taxes from employees' pay and pay other half	Pay half of total amounts owed, generally through withholding	None	Pay full amounts owed, generally through estimated tax payments ^e
Federal unemployment tax ^f	Pay full amount	None	None	None
State unemployment tax	Pay full amount, except in certain states ^g	None, except pay partial amount in certain states ^g	None	None

Source: GAO analysis.

Note: There are various exceptions to the general responsibilities included in this table.

^aMost states also require payment of state income taxes.

^bEmployers are generally required to withhold taxes at a rate of 28 percent from independent contractors who do not provide, or provide incorrect, taxpayer identification numbers (this practice is known as backup withholding).

^cFor estimated tax purposes, the year is divided into four payment periods.

^dThe overall tax rates for Social Security and Medicare for 2009 are 12.4 percent and 2.9 percent of income, respectively. Social Security taxes are to be paid for earnings up to the established wage base limit (\$106,800 for 2009).

^eEmployers generally are required to pay federal unemployment insurance on the first \$7,000 of employee pay at a rate of 6.2 percent, which can be offset by a credit of up to 5.4 percent for timely payment of state unemployment insurance taxes, resulting in an effective rate as low as 0.8 percent. The rate is set to decrease to 6.0 percent in 2010. 26 U.S.C. §§ 3301, 3302.

^fAccording to DOL, these states are Alaska, New Jersey, and Pennsylvania.