

**UNAPPROVED Minutes of the**  
**Worker Classification Coordinated Enforcement Council**  
 October 12, 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  
 Dolores Furniss Disclosure Officer, 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 ITEM	DISCUSSION
1. Welcome and approval of minutes	<p>Chair Hennebold called the meeting to order at 9:05 a.m.</p> <p>Chair Hennebold stated notice of today’s meeting has been published on the Public Notice Meeting website and the local media has been notified. He noted a quorum is present.</p> <p><b>MOTION:</b> Chair Hennebold made a motion to approve the Minutes from the September 21, 2011 meeting. Ms. Furniss seconded the motion and the motion passed unanimously.</p>
2. Public Comment	Chair Hennebold noted there were no members of the public wanting to address the Council.
3. Department of Labor	<p>Cynthia Watson, Regional Administrator, U.S. Department of Labor, Wage and Hour Division, and staff, are in Utah to celebrate the signing of the Partnership Agreement (MOU) signed on September 19, 2011 in Washington, D.C. (Attachment 1). She reported the following:</p> <ul style="list-style-type: none"> <li>• The Regional office is located in Dallas and covers 11 states of which Utah is one;</li> <li>• These MOUs are being implemented in many states and are not limited to misclassified workers;</li> <li>• The Wage and Hour Division enforces labor laws. Collectively, they cover 135M workers in the U.S., and even more establishments. They have 1000 investigators nationwide. Their compliance program focuses on the most vulnerable such as agricultural workers and young workers, and focus on employers that are layering their businesses with independent workers and distancing themselves. Misuse can save employers as much as 30% of</li> </ul>

<p>4. Work Session on Council Report</p>	<p>their costs;</p> <ul style="list-style-type: none"> <li>• The Salt Lake City District office serves Utah, Wyoming and Montana. Lee Ann Dunbar will be the point of contact in SLC. 16 staff work in Utah, four in Wyoming and four in Montana. Last year, 300 investigations were performed and found about \$2M in wages in the State of Utah. Various languages are spoken by the investigators. They have a relationship with the Mexican Consulate.</li> </ul> <p>Chair Hennebold stated as both State and Federal agencies have the same focus, to be effective as an Enforcement Council, there is a need to work together. The Department of Labor (DOL) has been authorized by the Justice Department, to send a few cases to the Solicitor's office in Denver. Commissioner Hayashi stated Unemployment Insurance doesn't have investigative resources but the DOL has investigators who do. Ms. Watson stated if the community knows the agencies are working together, they tend to talk among themselves. Publicizing the collaboration can be advantageous.</p> <p>Chair Hennebold suggested the Council choose a random employer, sample it, see where the process is, include Lee Ann Dunbar and have a dry run. Ms. Dunbar stated the information sharing, joint investigations, and referrals will help both the Federal and State agencies attack the problem. When Ms. Watson returns to Dallas, she plans to contact Nick Lapias and Joseph Juarez and set a meeting to coordinate.</p> <p>Mr. LeVar submitted a draft of the Council report due to the Legislature by October 17, 2011. He added the report will focus on the action taken by the Council versus the research that has been done.</p> <p>Ms. Furniss added she ran a report of all limited liability companies (LLCs) that have been filing K-1s. The report identified there were more than 11,000 employers. <b>Action Item: Ms. Furniss will provide a narrative report, a random sampling and an aggregate to Mr. LeVar by Thursday afternoon.</b></p> <p>Mr. Starks stated UI completes about 150 audits each year which is statistically valid. <b>Action Item: Mr. Starks will provide a summary. It doesn't need to be statistically valid but rather a random sampling. Mr. Starks will also provide a diagram showing a visual representation of the current information sharing pathways.</b></p> <p>Chair Hennebold is asking all the members to individually sign the report.</p> <p><b>The Final Report was provided to the Business and Labor Interim Committee on October 17, 2011 (Attachment 2).</b></p> <p>Mr. LeVar shared an email from David Pittman, Department of Homeland Security, regarding E-verify/driver's license verification. Mr. Pittman will be invited to present at the next meeting.</p>
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<p>5. Future Meetings</p>	<p>How can this group function best going forward? How often should meetings be held? Ms. Furniss will check to see if the Tax Commission can share information regarding 400 employers and their withholding tax.</p> <p>Chair Hennebold will locate a case that isn't full blown, contact this group and ask what kind of information they can share, and a case study will be completed involving the Department of Labor.</p> <p>The next meeting will be held on November 21, 2011 at 9:00 a.m.</p> <p>The meeting adjourned at 10:25 a.m.</p>
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**Visitors:**

Sherrie Hayashi, Utah Labor Commissioner  
 Cynthia Watson, Regional Administrator, U.S. Department of Labor  
 Lee Ann Dunbar, District Director, U.S. Department of Labor  
 Betty Campbell, Deputy Regional Administrator, U.S. Department of Labor  
 Joe Doolin, Assistant District Director, U.S. Department of Labor  
 Pamela Reed, Assistant District Director, U.S. Department of Labor  
 Elliot Morris, Staff Legal Counsel, Workers' Compensation Fund  
 Ron Dressler, Director, Industrial Accidents Division

**PARTNERSHIP AGREEMENT**  
**BETWEEN**  
**THE U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION**  
**AND**  
**UTAH LABOR COMMISSION**

This Agreement is made and entered into by and between The United States Department of Labor's Wage and Hour Division (hereinafter referred to as "WHD" or "Department") and the Utah Labor Commission (hereinafter referred to as "Commission"), together referred to as "the agencies" or "the parties".

With the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law, the parties agree to enter into this partnership.

THEREFORE, IT IS MUTUALLY AGREED THAT:

**Purpose**

The agencies recognize the value of establishing a collaborative relationship to promote compliance with laws of common concern among the regulated community in the State of Utah. The agencies are forming this partnership to more effectively and efficiently communicate and cooperate on areas of common interest, to share training materials, and to provide employers and employees with compliance assistance information towards the goal of protecting the wages, safety, and health of America's workforce and conducting joint investigations and sharing information as appropriate.

**Agency Responsibilities**

WHD is responsible for administering and enforcing a wide range of labor laws, including the Fair Labor Standards Act, the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, worker protections provided in several temporary visa programs, and the prevailing wage requirements of the Davis-Bacon and Related Acts and the Service Contract Act. Nothing in this agreement limits the WHD's enforcement of these and other statutes.

Likewise, Utah is responsible for administering and enforcing a wide variety of State labor laws, including the Utah Workers' Compensation Act, Payment of Wages Act, Employment of Minors Act, Antidiscrimination Act, and Occupational Safety and Health Act.

### Contacts

- The agencies will designate a contact person responsible for coordinating the partnership activities.
- The agencies will designate a representative to meet annually to review areas of mutual concern and the terms and conditions of the partnership.

### **Enforcement**

Where appropriate and to the extent allowable under law,

- The agencies may conduct joint investigations periodically in the State of Utah, if opportunity provides.
- The agencies will coordinate their respective enforcement activities and assist each other with enforcement.
- The agencies will make referrals of potential violations of each other's statutes.

### **Effect of Agreement**

- This agreement does not authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligations.
- By entering into this partnership, the agencies do not imply an endorsement or promotion by either party of the policies, programs, or services of the other.
- Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions.
- This agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or be binding upon the parties. This agreement is not intended to confer any right upon any private person or other third party.
- Nothing in this agreement will be interpreted as limiting, superseding, or otherwise affecting the parties' normal operations. This agreement also does not limit or restrict the parties from participating in similar activities or arrangement with other entities.
- This agreement will be executed in full compliance with the Privacy Act of 1974, the Utah Government Records Access and Management Act, and any other applicable federal and Utah state laws.

### **Exchange of Information**

- It is the policy of WHD to cooperate with other government agencies to the fullest extent possible under the law, subject to the general limitations that any such cooperation must be consistent with the WHD's own statutory obligations and enforcement efforts. It is WHD's view that an exchange of information in cases in which both entities are proceeding on basically the same matter is to our mutual benefit. There is a need for WHD to provide information to other law enforcement bodies without making a public disclosure.
- Exchange of such information pursuant to this agreement is not a public disclosure under the Freedom of Information Act, 5 U.S.C. 552.
- When confidential information is exchanged it shall be used and accessed only for the limited purposes of carrying out activities pursuant to this agreement as described herein. The information shall not be duplicated or redisclosed without the written authority of the other party.
- Confidential information means information that may be exempt from disclosure to the public or other unauthorized persons under state and federal statutes. Confidential information includes: the identities of persons who have given information to the parties in confidence or under circumstances in which confidentiality can be implied; any employee statements in WHD's enforcement files that were all obtained under these conditions; internal opinions and recommendations of federal or state personnel, including (but not limited to) investigators and supervisors; information or records covered by the attorney-client privilege and the attorney work-product privilege; personal information on living persons; individually identifiable health information; and confidential business information and trade secrets.
- In the event that there is a public proceeding, such as a trial, in which may be used or testimony of WHD's employees sought, the WHD requires that Utah notifies WHD.

Subject to the foregoing constraints:

- The agencies agree to exchange information on laws and regulations of common concern to the agencies, to the extent practicable.
- The agencies will establish a methodology for exchanging investigative leads, complaints, and referrals of possible violations, to the extent allowable by law and policy.
- The agencies will exchange information (statistical data) on incidence of violations in specific industries and geographic areas, if possible.

### **Resolution of Disagreements**

- Disputes arising under this Agreement will be resolved informally by discussions between Agency Points of Contact, or other officials designated by each agency.

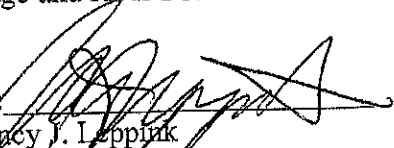
**Period of Agreement**


- This agreement becomes effective upon the signing of both parties, and will expire 3 years from the effective date. This agreement may be modified in writing by mutual consent of both agencies. The agreement may be cancelled by either party by giving thirty (30) days advance written notice prior to the date of termination. Renewal of the agreement may be accomplished by written agreement of the parties.

This agreement is executed as of the 19th day of September, 2011.

United States Department of Labor  
Wage and Hour Division

Utah Labor Commission

By:   
Nancy J. Leppik  
Deputy Administrator

By:   
Sherrie Hayashi  
Utah Labor Commissioner



**State of Utah**  
 GARY R HERBERT  
*Governor*  
 GREG BELL  
*Lieutenant Governor*

**Labor Commission**  
 SHERRIE HAYASHI  
*Commissioner*

October 17, 2011

Governor Gary R. Herbert  
 Senator John L. Valentine  
 Representative James A. Dunnigan

To Governor Herbert, Senator Valentine, Representative Dunnigan, and the members of the Business and Labor Interim Committee:

We are writing to provide the annual report from the Worker Classification Enforcement Council ("Council") pursuant to U.C.A. § 34-47-202, enacted earlier this year by S.B. 11. As background, S.B. 11 created within the Labor Commission the four member Council consisting of representatives from 1) the Labor Commission, 2) the Department of Commerce, 3) the Department of Workforce Services, and 4) the State Tax Commission. Nonmember Office of the Attorney General is assigned to work cooperatively with the Council. The Council is directed to meet at least quarterly to coordinate regulatory and law enforcement efforts related to employee misclassification.

Following the passage of S.B. 11, the Council held its first meeting in April 2011 and has met at least monthly since then. In just a short time since S.B. 11 was enacted we have been busy and achieved concrete results. Members of the public have been invited and have attended Council meetings. The Council has discussed various ways employees are misclassified and methods to estimate the extent of misclassification in Utah. The Council has received reports from member agencies on enforcement efforts, and has discussed the ability to, and the current restrictions on, sharing information between member agencies. Representatives from the Internal Revenue Service and the United States Department of Labor have also been invited to Council meetings and have made presentations regarding the federal government's efforts to address the misclassification of workers and the issue of restrictions on sharing information between federal and state agencies. The Council has also engaged in discussions with the Workers Compensation Fund.

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 Facsimile (801) 530-6390 • Toll Free (800) 530-5090 • [www.laborcommission.utah.gov](http://www.laborcommission.utah.gov)



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As outlined by U.C.A. § 34-47-202, this report will cover four areas: (1) the nature and extent of misclassification in Utah; (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.

### **The Nature and Extent of Misclassification in Utah**

Pursuant to other legislation passed earlier this year (S.B. 191), the Labor Commission has assumed the responsibility for issuing workers' compensation waivers. The Council anticipates being able to report in the future whether this change will make an impact on the number of waivers issued or will otherwise impact the market or reduce misclassification.

The Unemployment Insurance Division of the Department of Workforce Services completes both "random" and "targeted" audits of Utah employers. In the three and one-half year period between January 1, 2008 and June 30, 2011, the division completed 4,022 "random" audits, covering \$3.6 billion in total reported wages. The random audits identified \$25.4 million in total unreported wages to 7,380 workers who were misclassified as "independent contractors." The random audits revealed a variance of only 0.7% (.007).

During the same time period the division completed 598 "targeted" audits of Utah employers, covering \$541 million in total reported wages. Targeted audits, which primarily use IRS form 1099 information to identify potential unreported workers, yield different results. The targeted audits identified \$112 million in total unreported wages to 13,229 workers who were misclassified as "independent contractors." The targeted audits revealed a variance of almost 21% (.21).

The results of the random and targeted audits demonstrate that while the vast majority of registered Utah employers are reporting workers properly, a significant number of Utah employers are misclassifying their workers.

Department of Commerce employees met throughout 2011 with many industry groups attempting to identify construction companies engaged in a worker-owner model, which was identified by separate legislation (S.B. 35) as an area where the Department should focus. To date, approximately ten companies have been identified. Two allowed their business registrations and contractor licenses to expire; six companies are affiliated with common management and have a pending notice of agency action issued against them by the Department; and two companies are currently under investigation. Commerce employees hope that November's contractor renewal cycle will better identify the extent of the problem.

S.B. 35 requires detailed reporting from construction companies utilizing the worker-owner model. The Council had hoped those reports would provide useful data, but to date those businesses are viewing S.B. 35 differently from the Department of Commerce and have not yet provided the anticipated reports. It is likely that over the course of the next year the current administrative proceedings should clarify some of the disputed issues.

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In looking at the nature and extent of misclassification in Utah, the Tax Commission is looking at tax compliance. The LLCs organized as a worker/owner LLC model and addressed in S.B. 35 are taxed as partnerships and would have filed a TC-65 tax return and completed and submitted with the TC-65 a State of Utah Schedule K-1 (Partner's Share of Utah Income, Deductions and Credits) and a State of Utah Schedule K (Partners' Distributive Share Items) for 2010 filings submitted in 2011.

For the 2010 tax filing year the Tax Commission has extracted limited liability companies (LLCs) and the associated Utah Ks and K-1s and taken a random sample of these LLCs to evaluate the state K-1s from a tax perspective. There were 11,400 LLCs that filed a TC-65 in 2010; the Tax Commission has pulled a random sample of 201 of these LLCs. From these 201 LLCs, 701 state K-1s were filed and issued. Over the next several months the Tax Commission will be evaluating how many of those who were issued these 701 state K-1s have filed tax returns.<sup>1</sup>

While the Tax Commission cannot share taxpayer specific information (only results in aggregate of ten or more) the agency believes this review of tax compliance and the aggregate information from this random sample will assist the Council in its regulatory efforts. In terms of receiving information, any non-compliance can be an audit lead; the Tax Commission can use the information, but cannot share back any results specific to a taxpayer.

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<sup>1</sup> Below is a summary of data on the Utah Schedule K and K-1 the Tax Commission will examine from a random sample of 2010 state K-1s to see if those issued state K-1s have filed tax returns.

**Utah Schedule K:** The information on the Schedule K is an aggregate of the information reflected on each K-1. The Ks 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 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 S.B. 35). The distributive shares to LLC members can be ordinary business income, guaranteed payments, dividends, or other income.

**Utah Schedule K-1:** 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, Social Security Number or Individual Tax Identification Number of the person to whom 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 S.B. 35 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 State of Utah Schedules K and K-1 forms can be viewed at <http://tax.utah.gov/forms/current/tc-65.pdf>.

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### **The Results of Regulatory and Law Enforcement Efforts Related to the Council**

The Labor Commission identified one company misclassifying its employees as members with no workers' compensation coverage. The Commission's noncompliance penalty and reimbursement for injury totaled approximately \$40,000. The company paid \$17,000 and has gone out of business. The Commission has also initiated over 75 wage payment cases involving companies using an LLC structure to classify workers as owners; many of them have been closed due to the company going out of business.

Six affiliated companies with common management received a notice of agency action from the Department of Commerce. The notice was issued for a failure to comply with the statutory requirements from S.B. 35 for auditing and quarterly reporting. Among the items found in an initial review were:

- More than 25% of workforce had purported social security numbers that were either falsified, duplicated, or ITIN numbers.
- Nearly half of the owners had substantial judgments, tax liens, and child support liens. Of the remaining owners, Commerce employees found thousands of potential legal actions but were unable to confirm responsibility because of insufficient personal identifying information.
- More than half of the owners were found to potentially have some form of criminal history but Commerce employees were unable to confirm responsibility because of insufficient personal identifying information.

Commerce investigators have responded to numerous complaints and industry leads to determine misclassification violations. Those investigations have resulted in at least two other company evaluations. Investigators have found that when they visit a job site, workers often disappear and are working with other agencies to better coordinate investigations.

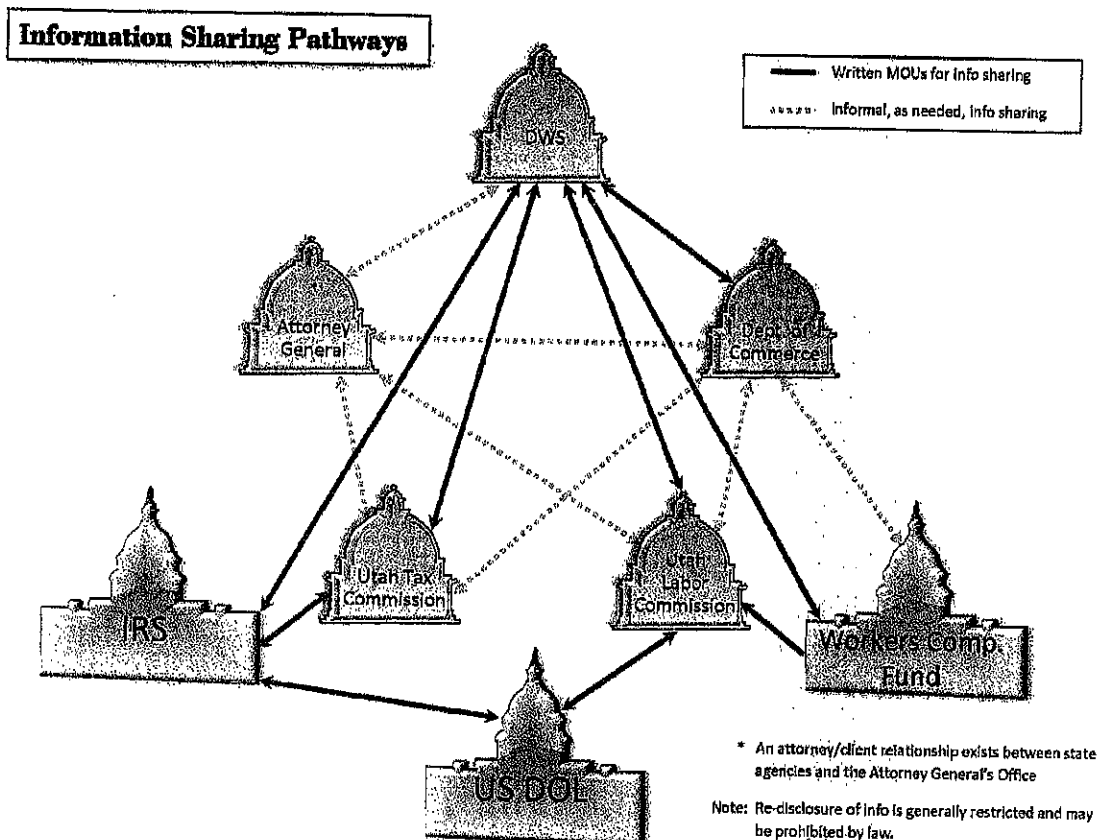
### **The Status of Sharing Information by Member Agencies**

After the 2011 Legislative Session, Commerce employees worked with Workforce Services employees to expand access to the Unemployment Insurance database. Commerce employees will now be able to more effectively coordinate investigations when contractors are violating unemployment insurance laws. Workforce Services employees have referred dozens of unemployment insurance cases to Commerce. Many have resulted in agency actions for both unemployment insurance violations and other financial responsibility violations.

Commerce investigators are now coordinating investigations of selected companies with the Labor Commission and Department of Workforce Services. The Department of Workforce Services is in the process of expanding their information sharing agreement with the Workers Compensation Fund to further leverage resources and help ensure compliance with applicable unemployment insurance and workers' compensation laws.

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The chart below gives a visual representation of the current information sharing pathways:



### Recommended Legislative Changes

The Council has discussed and recommends two legislative changes. The Council had previously discussed a third (eliminating unintended consequences from S.B. 35 regarding workers compensation insurance for LLC owners), but that change was already made by the Legislature in a recent Special Session. The remaining recommendations are:

1. Reduce quarterly reporting requirement for contractor companies with fewer than five owners who own less than 8%. Some companies provide to a family member or other key individual limited ownership while learning the business or purchasing it over time. The current reporting requirements seem onerous for those situations
2. Clarify the auditing authority of the Division of Occupational and Professional Licensing. The six companies with a current notice of agency action are making the legal argument that DOPL doesn't have the auditing authority DOPL believes SB 35 provided.

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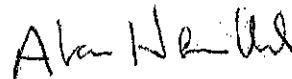
### Conclusion and Outlook for Future Action

The Council has been in existence for a short time, but we believe its results so far are real and have already made a difference in the marketplace. Looking at S.B. 11 and S.B. 35 in concert, it was clear to the Council that the Legislature wanted the construction trades to be an initial focus of the Council. The Council has focused its work in that area with good results so far.

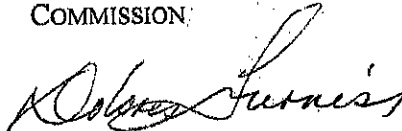
The Council has already begun to engage in joint targeted investigations, and will continue to explore joint criminal prosecution where circumstances warrant. The Council is hopeful some of the current, pending administrative cases will clarify the reporting and auditing requirements of S.B. 35 and provide the Council with more concrete data in the future. However, it is worth noting that S.B. 35 also appears to have had the effect of significantly reducing the use of worker owners in the construction trades, so it is still unclear how much data will become available.

The Council is looking forward to continuing to explore ways to gain further data from the Labor Commission's authority over insurance carriers and employers, and to find ways to initiate public outreach and education. Agendas and Minutes for all Council meetings are available on Utah's Public Notice Website. I look forward to continuing to report annual progress, and I am glad to provide any other requested information or answer any questions.

Sincerely,



ALAN HENNEBOLD  
CHAIR, WORKER CLASSIFICATION  
ENFORCEMENT COUNCIL  
DEPUTY COMMISSIONER, UTAH LABOR  
COMMISSION



DOLORES FURNISS  
DISCLOSURE OFFICER, UTAH STATE TAX  
COMMISSION



THAD LEVAR  
DEPUTY DIRECTOR, UTAH DEPARTMENT OF  
COMMERCE

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PHIL LOTT  
ASSISTANT ATTORNEY GENERAL



BILL STARKS  
UNEMPLOYMENT INSURANCE DIRECTOR,  
DEPARTMENT OF WORKFORCE SERVICES

cc: Senator Karen Mayne