

DETECTION AND PREVENTION OF WORKER
MISCLASSIFICATION

LOUISIANA WORKFORCE COMMISSION



PERFORMANCE AUDIT SERVICES
ISSUED JUNE 20, 2019

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LOUISIANA LEGISLATIVE AUDITOR
DARYL G. PURPERA, CPA, CFE

June 20, 2019

The Honorable John A. Alario, Jr.,
President of the Senate
The Honorable Taylor F. Barras
Speaker of the House of Representatives

Dear Senator Alario and Representative Barras:

This report provides the results of our performance audit of the Louisiana Workforce Commission (LWC) and its processes to detect and prevent worker misclassification. Worker misclassification occurs when an employer improperly classifies a worker as an independent contractor instead of an employee.

Improperly classifying workers can result in nonpayment of state and federal unemployment taxes, income taxes, and payroll taxes; loss of worker protections under occupational health and safety laws; less access to workers' compensation insurance coverage; and unfair competitive advantages for companies.

The cost to the state can be significant. For example, from calendar years 2014 through 2018, LWC conducted 3,042 audits that identified employers that misclassified workers and failed to pay the state nearly \$3 million in unemployment taxes. Based on the wages associated with these unpaid unemployment taxes, we estimated the state potentially did not receive approximately \$9 million in state income taxes. In addition, because misclassified workers typically do not have workers' compensation insurance, the state ultimately pays for their care if they are injured on the job. During fiscal year 2018, the Louisiana Department of Health's (LDH) Medicaid program paid more than \$1 billion for uncompensated care, which includes care for misclassified workers injured on the job.

Our audit of LWC found that while the agency has met federal criteria requiring it to audit 1 percent of employers and 1 percent of total employee wages each year, it could improve the way in which it selects employers to review by determining which audits identified the highest number of misclassified workers and focusing on industries with the highest risk of worker misclassification.

LWC also could strengthen its audit selection process by using data from other state agencies to compare to its quarterly wage information from employers. For instance, we

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analyzed contractor payroll and time sheet data from LDH and the Department of Transportation and Development and identified 383 employers that did not report wages to LWC for as many as 22,850 workers, meaning those employees may have been misclassified.

In addition, Louisiana is the only state that requires warning letters to be sent to employers the first time they are found to have misclassified workers. As a result, LWC must spend time conducting follow-up audits in order to impose applicable penalties. Other states impose penalties for first-time offenses. Louisiana's penalties also are lower than other states, and LWC does not assess penalties on employers that are noncompliant with audits.

We found as well that Louisiana law does not hold contractors liable for the misclassification of workers hired by labor brokers. That means contractors have no responsibility to ensure these workers are properly classified, increases the risk of worker misclassification, and makes it more difficult for LWC to deter the practice.

This report contains our findings, conclusions, and recommendations. Appendix A contains LWC's response to this report. I hope this report will benefit you in your legislative decision-making process.

We would like to express our appreciation to the management and staff of LWC for their assistance during this audit.

Respectfully submitted,



Daryl G. Purpera, CPA, CFE
Legislative Auditor

DGP/aa

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Louisiana Legislative Auditor

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Detection and Prevention of Worker Misclassification Louisiana Workforce Commission

June 2019

Audit Control # 40180017

Introduction

We evaluated whether the Louisiana Workforce Commission (LWC) has developed effective processes to detect and prevent worker misclassification. Worker misclassification occurs when an employer improperly classifies a worker as an independent contractor instead of an employee. Improperly classifying workers can result in the following:

Worker misclassification involves the misclassification of employees as independent contractors by employers in order to gain a competitive advantage through reduced labor costs.

- Nonpayment of state and federal unemployment taxes, income taxes, and payroll taxes that employers are required to withhold or pay for employees but not for independent contractors;
- Workers losing the protection of occupational health and safety laws, such as the Fair Labor Standards Act, that apply to employees but not independent contractors;
- Reduced access to workers' compensation insurance coverage for workplace injuries that employers are required to provide for employees but not independent contractors; and
- Companies that classify their workers correctly are at a competitive disadvantage because of substantially higher labor costs resulting from paying all required taxes and providing workers' compensation coverage.

Louisiana law¹ establishes a three-pronged test for assessing whether services performed by an individual are considered to be employment. Services must be regarded as employment unless it can be shown that:

- (1) Such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact;

¹ R.S. 23:1472(E)

- (2) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

Worker misclassification is a longstanding problem affecting numerous industries nationwide. A United States Department of Labor (USDOL) study completed in 2000 found that 10% to 30% of audited employers misclassified their workers. Industries typically cited as being at high risk of worker misclassification include construction, transportation, and home health care. Worker misclassification also results in a significant loss of tax revenue. For example, in 2013, the United States Treasury Department estimated that preventing worker misclassification would generate \$8.32 billion in federal revenue over 10 years.

Federal law² requires states to meet certain performance criteria specified in USDOL's Effective Audit Measures³ in the administration of its unemployment insurance tax programs. These performance criteria include the requirement to audit at least 1% of all employers⁴ and record the number of misclassified workers identified each year as part of these audits. In addition, Louisiana law⁵ allows LWC to impose penalties for worker misclassification. Since LWC is mandated to perform audits by USDOL that seek, in part, to identify misclassified workers and since it has sole authority to impose penalties for worker misclassification, LWC is the primary entity responsible for detecting worker misclassification in Louisiana. LWC's activities to prevent and detect misclassification include the following:

- **Audits** – LWC conducts audits to assess whether employers are in compliance with the state's unemployment insurance tax laws. Although the focus of the audits is compliance, auditors also investigate possible worker misclassification since it impacts the amount of unemployment tax that employers owe. The audits are performed by LWC unemployment insurance tax agents who perform on-site visits, conduct interviews of employer management and workers, and review employer records.
- **Penalties** – LWC imposes fines and interest on employers for non-payment of unemployment insurance taxes. In 2012, Louisiana passed additional legislation that fined employers for each instance of worker misclassification in addition to fines and interest owed for non-payment of unemployment insurance.
- **Education/Outreach Efforts** – LWC employs two staff who are responsible for educating employers in the state on their obligations to pay unemployment tax for all employees. LWC accomplishes this through in-person presentations to various employer groups and has placed an increased emphasis on worker misclassification in these presentations in recent years.

² 42 U.S. Code §503; 20 Code of Federal Regulations (C.F.R) §602.11

³ [USDOL Unemployment Insurance Program Letter No. 03-11](#)

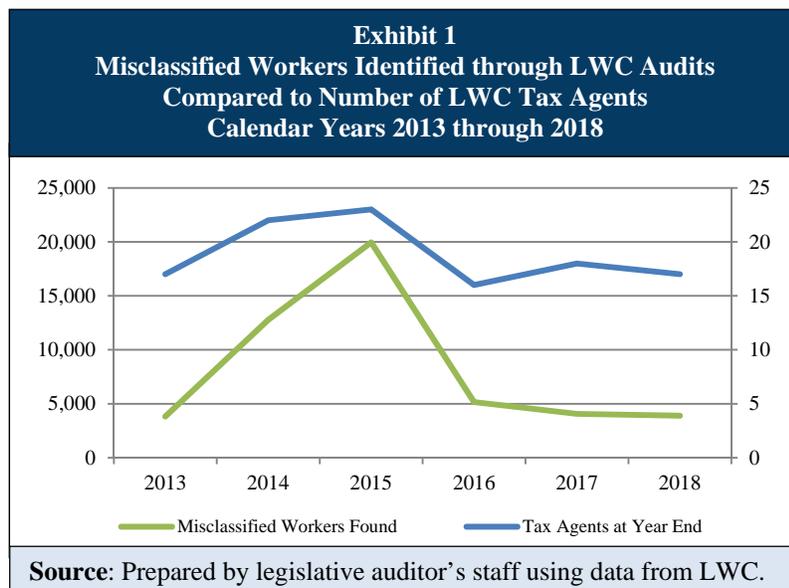
⁴ Employers that are required by USDOL to pay unemployment tax contributions on behalf of employees.

⁵ R.S. 23:1711(G)

LWC collaborates with several state and federal agencies to combat worker misclassification in Louisiana through sharing of audit results, fraud tips, and referrals, including the Louisiana Department of Revenue (LDR) and USDOL. This cooperation was formalized through the creation of the GAME ON (Government Against Misclassified Employees Operational Network) Task Force⁶ in 2017.

According to USDOL data, Louisiana ranked second nationally in the number of misclassified workers identified per field audit (average of 8.9 workers) and ninth nationally in total misclassified workers identified during field audits (45,853) completed during calendar years 2014 through 2018.⁷ During calendar years 2014 through 2018, LWC conducted 3,042 audits that identified employers that misclassified workers and failed to pay the state \$2,959,865 in unemployment taxes. Based on the wages associated with these unpaid unemployment taxes, we estimated that the state potentially did not receive approximately \$8,948,497⁸ in state income taxes. In addition, because misclassified workers typically do not have workers' compensation insurance, the state ultimately pays for the care of these injured workers. During fiscal year 2018, the Louisiana Department of Health's (LDH) Medicaid program paid more than \$1 billion for uncompensated care, which includes care for misclassified workers injured on the job.⁹

Although Louisiana has been one of the higher performing states in identifying misclassified workers, the number of misclassified workers identified by LWC audits has declined significantly since 2015 because of staff turnover, as shown in Exhibit 1.



⁶ The task force includes LWC's Office of Unemployment Insurance Administration, LWC's Office of Workers' Compensation Administration, LDR, and USDOL's Wage and Hour Division.

⁷ The study included 50 states, Puerto Rico, and the District of Columbia.

⁸ According to R.S. 47:32(A), state income tax rates are 2% for annual income under \$12,500, 4% for income over \$12,500, and 6% for income over \$50,000. We applied a 2% income tax rate to the total unreported wages identified in LWC audits to obtain a conservative estimate of potential state income taxes that may not have been paid.

⁹ [Louisiana Medicaid Program, Bureau of Health Services Financing, Year End Financial Report for State Fiscal Year 2017/2018.](#)

The objective of this performance audit was to:

Evaluate LWC's processes to detect and prevent worker misclassification by employers.

The issues we identified are summarized on the next page and discussed in further detail throughout the remainder of the report. Appendix A contains LWC's response to this report, and Appendix B details our scope and methodology. Appendix C contains information on other states' penalties for misclassified workers and related legal citations.

Objective: To evaluate LWC's processes to detect and prevent worker misclassification by employers.

While LWC's audit performance during calendar years 2014 through 2018 ranked high nationally, we identified some areas where it can improve its detection and prevention of misclassified workers. Specifically, we identified the following issues:

- **Since calendar year 2012, LWC has met federal audit criteria that require it to audit 1% of employers and 1% of total employee wages each year. However, LWC could strengthen how it selects employers to audit by determining which audits identified the highest number of misclassified workers.** This analysis would enable LWC to focus its audit efforts on industries with the highest risk of worker misclassification. For example, we found that audits initiated based on tips and referrals, as well as audits of construction companies, generated the highest number of misclassified workers.
- **LWC could further strengthen its audit selection process by using data from other state agencies to compare to its quarterly wage data from employers.** For example, we analyzed LDH's and the Department of Transportation and Development's (DOTD) contractor payroll and time sheet data and identified 383 employers that did not report employee wages to LWC for as many as 22,850 workers as required by law, thus potentially misclassifying workers.
- **LWC's enforcement process is not effective at deterring employers from misclassifying their workers. Louisiana is the only state that mandates LWC to send warning letters to employers that misclassify workers on their first offense as opposed to assessing penalties. This requires LWC to use its limited resources to conduct follow-up audits in order to impose applicable penalties.** If LWC could impose penalties for first-time offenses, we estimated it could have assessed approximately \$3.3 million in penalties for the 13,106 misclassified workers it identified during calendar years 2016 to 2018.
- **Louisiana law does not impose liability on contractors for misclassification of workers hired by labor brokers.** As a result, contractors have no responsibility to ensure that workers provided by labor brokers are properly classified, which increases the risk of worker misclassification and makes it more difficult for LWC to deter worker misclassification.

These issues are discussed in more detail throughout the remainder of the report, along with recommendations to strengthen LWC's processes to detect and prevent worker misclassification.

Since calendar year 2012, LWC met federal audit criteria that require it to audit 1% percent of employers and 1% of total employee wages each year. However, LWC could strengthen how it selects employers to audit by determining which audits identified the highest number of misclassified workers. This analysis would enable LWC to focus its audit efforts on industries with the highest risk of worker misclassification. For example, we found that audits initiated based on tips and referrals, as well as audits of construction companies, generated the highest number of misclassified workers.

USDOL's Effective Audit Measures is a performance monitoring system that requires state unemployment insurance field audits to meet certain requirements. These requirements include conducting audits that cover 1% of employers and 1% of total employee wages each year. Since calendar year 2012, LWC has consistently met these federal audit measures. Within USDOL's requirements, LWC has flexibility in selecting the employers it audits; however, LWC's audit selection process is informal and lacks a documented methodology. According to LWC, it selects audits primarily through an analysis of wage data reported by employers¹⁰ and income data for independent contractors reported on federal 1099 forms.¹¹ This analysis seeks to identify unusual patterns in the data that suggest worker misclassification, such as independent contractors whose income does not fluctuate from year to year. LWC also relies on other sources for its audits such as fraud tips, referrals from state and federal agencies, and blocked unemployment insurance claims.¹²

Analyzing past audit performance based on the sources LWC used to select each audit could help LWC focus on the sources that identified the most misclassified workers. To meet USDOL's mandate that states audit at least 1% of eligible employers annually, LWC audits approximately 1,000 employers each year. LWC tracks these audit assignments using Excel spreadsheets that document the employer, selection source used, audit initiation and completion dates, and any auditor comments. LWC then reports audit performance data to USDOL that includes the number of misclassified workers and amount of unpaid unemployment insurance tax identified by each audit. However, LWC does not systematically analyze the information it tracks to determine which audit selection sources are the most effective in identifying misclassified workers.

¹⁰ LWC uses field audit query software to search wage data reported by employers. The software can also search wage data by industry code. According to LWC, its wage data may not be 100% complete as not all employers report all required wages.

¹¹ Form 1099 is used to report income to the Internal Revenue Service for independent contractors.

¹² Blocked claims refer to unemployment insurance claims made by an employee who is blocked from receiving unemployment benefits because the employer failed to report wages and pay unemployment insurance taxes for the employee.

We analyzed LWC’s audit performance data to determine the number of misclassified workers identified by each audit selection source. Exhibit 2 shows the results of our analysis for audits completed during calendar years 2016 through 2018, ranked in order of audit results.

Exhibit 2 LWC Audits and Results by Selection Source Calendar Years 2016 through 2018				
Audit Selection Source	Number of Completed Audits	Percent of Total Audits	Number of Misclassified Workers Identified	Misclassified Workers Identified Per Audit
Fraud Tips/Agency Referrals	66	2.3%	2,346	35.6
Follow-up Audits	10	0.4	127	12.7
Independent Contractor Form 1099s	1,561	54.0	8,081	5.2
Employer Reported Wage Data	1,214	42.0	1,306	1.1
Blocked Claims	0	0	0	0
Unknown*	38	1.3	502	13.2
Total	2,889	100.0%	12,362	4.3

*No selection source documented by LWC.
Source: Prepared by legislative auditor’s staff using unaudited data from LWC and USDOL.

As shown in Exhibit 2, audits based on fraud tips and agency referrals are LWC’s most effective selection source, having found an average of 35.6 misclassified workers per audit despite this source accounting for only 2.3% of all audits.¹³ The success of these audits highlights the importance of this selection source and the need for LWC to continue to prioritize audits based on tips and referrals. Follow-up audits, LWC’s next most effective selection source, refer to audits of employers previously found to have misclassified workers. These audits found an average of 12.7 misclassified workers per audit, yet this source only accounted for 0.4% of all audits. By contrast, audits selected through an analysis of employer reported wage data, which accounted for 42.0% of all audits, found an average of only one misclassified worker per audit. According to LWC management, audits selected using wage data are based less on worker misclassification risk than on the need to meet federal mandates on the number of employers audited.

Using industry classification data could help LWC target audits on industries with the highest risk of worker misclassification. USDOL’s Employment Security Manual encourages states to maintain audit selection criteria that include type of industry.¹⁴ Additionally, best practices for state unemployment insurance audits¹⁵ recommend selecting a significant percentage of employers to audit based on North American Industry Classification System (NAICS)¹⁶ codes that identify employers with the highest probability for noncompliance with state unemployment insurance program requirements. While LWC’s wage database contains employers’ NAICS codes, it does not use these codes to analyze past audit performance

¹³ According to LWC, it conducts a preliminary review of all tips/referrals and audits those that it deems have a high probability of worker misclassification.

¹⁴ USDOL [Employment Security Manual, Appendix E, Field Audits, Section 3679 R-1/99](#)

¹⁵ [USDOL Office of Inspector General Final Report, Adopting Best Practices Can Improve Identification of Noncompliant Employers for State UI Field Audits, March 1999, page 2.](#)

¹⁶ NAICS is a widely-used standard that allows for comparability of businesses among North American countries by assigning standard numeric codes to different industries.

data to determine worker misclassification risk in different industries. As a result, LWC is not able to focus its audits on industries where it has historically found the highest number of misclassified workers.

We analyzed LWC’s audit performance data by NAICS code for the 2,948 audits completed during calendar years 2016 through 2018 and found that these audits corresponded with NAICS codes for 20 industries. Exhibit 3 shows the number of audits that LWC conducted according to the industry code and the results of those audits during calendar years 2016 through 2018, ranked in order of audit results.

Exhibit 3 LWC Audits and Results by Industry Calendar Years 2016 through 2018					
NAICS Code	Industry	Number of Completed Audits	Percentage Completed Audits	Number of Misclassified Workers Identified	Misclassified Workers Identified Per Audit
23	Construction	453	15.4%	5,493	12.1
71	Arts, Entertainment, and Recreation	35	1.2%	403	11.5
21	Mining, Quarrying, and Oil and Gas Extraction	26	0.9%	275	10.6
56	Administrative and Support and Waste Management and Remediation Services	207	7.1%	1,945	9.4
61	Education Services	22	0.7%	128	5.8
51	Information	18	0.6%	99	5.5
11	Agriculture, Forestry, Fishing and Hunting	29	1.0%	145	5.0
81	Other Services	268	9.1%	1012	3.8
72	Accommodation and Food Services	137	4.7%	500	3.6
48-49	Transportation and Warehousing	53	1.8%	191	3.6
53	Real Estate, Rental and Leasing	99	3.4%	350	3.5
55	Management of Companies and Enterprises	12	0.4%	29	2.4
62	Health Care and Social Assistance	339	11.6%	679	2.0
44-45	Retail Trade	425	14.5%	841	2.0
31-33	Manufacturing	198	6.7%	305	1.5
42	Wholesale Trade	228	7.8%	310	1.4
54	Professional, Scientific, and Technical Services	235	8.0%	279	1.2
52	Finance and Insurance	134	4.6%	81	0.6
22	Utilities	11	0.4%	3	0.3
92	Public Administration	5	0.2%	0	0.0
	Unknown	14	0.5%	38	2.7
	Total	2,948	100.0%	13,106	4.4

Source: Prepared by legislative auditor’s staff using data from LWC and NAICS.

As shown in Exhibit 3, since LWC identified a significantly higher number of misclassified workers in audits of certain industry sectors, it should focus its future audit efforts accordingly. For example, audits in the construction sector identified an average of more than 12 misclassified workers per audit, while audits in the finance/insurance sector identified an average of less than one misclassified worker per audit. Additionally, 425 audits were performed in the retail trade sector during this period, even though audits in this sector only identified an average

of two misclassified workers. If LWC were to use NAICS codes to analyze its audit results, it could focus future audits on industries shown to have a higher risk of misclassified workers.

Recommendation 1: LWC should require staff to track the number of misclassified workers identified during each audit by the audit selection source and the employer's NAICS code, and use this data as part of its audit selection process.

Summary of Management's Response: LWC agrees with this recommendation and stated that its current automated audit selection tools already allow for choosing audits using NAICS codes as a determining factor. However, it is critical for LWC's unemployment insurance tax audit program to pass the national "Effective Audit Measure" each year as prescribed by the USDOL. See Appendix A for LWC's full response.

LWC could further strengthen its audit selection process by using data from other state agencies to compare to its quarterly wage data from employers. For example, we analyzed LDH and DOTD contractor payroll and time sheet data and identified 383 employers that did not report employee wages to LWC for as many as 22,850 workers as required by law, thus potentially misclassifying workers.

Employers in Louisiana are required by law to report wage data quarterly to LWC for all employees.¹⁷ Failure to report employee wages is a possible indicator of worker misclassification because employers misclassify workers as independent contractors in an effort to avoid paying mandated unemployment insurance tax and other taxes for employees. Therefore, audits of employers that did not report wage data to LWC may identify more instances of worker misclassification and unpaid unemployment insurance tax. LWC could use data maintained by other state agencies to match against this wage data to identify employers that fail to report wages for employees as required by state law. For example, LWC could obtain data from DOTD and LDH since these agencies contract with construction and home healthcare companies, industries cited by a USDOL-contracted study as being at high risk of worker misclassification.¹⁸

LWC could use certified payroll data from DOTD to identify potential instances of worker misclassification. DOTD contracts with companies that work on road projects in the state that are financed with federal funds and are, therefore, subject to the Davis-Bacon Act.¹⁹ The Davis-Bacon Act requires that contractors and subcontractors working on federally funded or assisted contracts in excess of \$2,000 must maintain payroll records for all covered workers,

¹⁷ R.S. 23:1531(A) requires quarterly wage reporting to LWC, and LWC policy requires the wage data to include employee name, Social Security number (SSN), and wages paid.

¹⁸ [Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, February 2000 by Planmatics, Inc. for the U.S. Department of Labor, Employment and Training Administration, p.41- 44](#)

¹⁹ 29 C.F.R. §5.5

report these records to the contracting agency weekly, and certify the accuracy of these records.²⁰ Construction workers typically work under the supervision of a contractor or subcontractor and should normally be classified as employees; however, they are frequently misclassified as independent contractors. In January 2017, DOTD began collecting certified time sheets from contractors subject to the Davis-Bacon Act in an electronic format that includes worker name, hourly wage rate, gross pay, and deductions.²¹

We obtained certified payroll records from DOTD for calendar year 2017 and found that DOTD contracted with 45 employers that paid a total of 1,623 workers. We compared this data to LWC’s wage data to identify workers that were not reported to LWC and potentially misclassified, as shown in Exhibit 4.²²

Exhibit 4 Analysis of DOTD Certified Payroll Data Calendar Year 2017				
	Number of Contractors	Number of Total Workers	Number of Workers Not Reported to LWC	Percent of Total Workers not Reported to LWC
Contractors that Reported All Workers to LWC	27	814	0	
Contractors that Failed to Report Any Workers to LWC	7	321	321	
Contractors that Failed to Report Some but Not All Workers to LWC*	11	488	237	
Total	45	1623	558	34.4%
*Contractors classified as not having reported wages to LWC include contractors that failed to report wages for one or more employees in at least one quarter during calendar year 2017.				
Source: Prepared by legislative auditor’s staff using DOTD’s certified payroll data and LWC’s quarterly labor data.				

According to our analysis, 18 DOTD contractors potentially failed to report wages for one or more of their workers in calendar year 2017. According to DOTD’s certified payroll records, contractors withheld the mandated employee portion of FICA taxes²³ from these paychecks, indicating an employer-employee relationship that requires wages to be reported to LWC. We estimated that the wages not reported to LWC for these workers resulted in the state not receiving approximately \$14,095²⁴ in unemployment insurance taxes and \$72,216 in state

²⁰ USDOL created an optional standard time sheet that contractors can use to report this data (Form WH 347).

²¹ DOTD collected certified time sheets from contractors subject to the Davis-Bacon Act prior to January 2017; however, these time sheets were in paper format.

²² The Davis-Bacon Act does not require contractors to submit full SSNs in their weekly transmittals; instead, it requires a unique identifying number for each employee. The certified payroll maintained by DOTD uses the last four digits of the employee’s SSN as the identifying number. We utilized both the employee’s last name and partial SSN to ensure that employees are not counted more than once. However, we could not account for those records with incorrect or partial SSNs or misspelled last names that may exist in the data. Therefore, records noted as not reported to LWC could be overstated due to data entry errors by the contractors.

²³ The Federal Insurance Contributions Act (FICA), 26 U.S. Code §3101, mandates a payroll tax on the paychecks of employees, as well as contributions from employers, to fund the Social Security and Medicare programs.

²⁴ The Employment and Training Administration with the USDOL maintains comparative data on state unemployment insurance rates. Based on this data, Louisiana had an average rate of 0.33% of total wages in 2017 (the latest data for which data was available). We applied this rate to the total wages not reported to LWC by these employers to estimate the amount of unpaid unemployment insurance taxes. See https://oui.doleta.gov/unemploy/avg_employ.asp.

income taxes in calendar year 2017. In addition to this fiscal impact, employers typically fail to provide workers’ compensation coverage for employees that are misclassified as independent contractors. Without workers’ compensation coverage, the health and safety of employees is at risk and Louisiana’s insurance rates could be affected by the cost of medical care for uninsured worker injuries.

LWC could also use time sheet data on Medicaid providers that contract with LDH to perform home and community based services. LDH collects time sheet data from healthcare providers that employ direct service workers (DSWs) and are paid by Medicaid. DSWs are unlicensed workers that provide personal care, daily living, and other services to persons with disabilities or the elderly through direct contact with the person receiving services. DSWs typically work under the supervision of provider management and should normally be classified as employees; however, according to a USDOL-contracted study,²⁵ they are frequently misclassified as independent contractors.

We obtained LDH time sheet data from fiscal year 2017 and found that LDH contracted with 369 healthcare providers that paid a total of 54,663 DSWs.²⁶ We compared this data to LWC’s wage data to identify workers that were not reported to LWC, indicating they may be misclassified, as shown in Exhibit 5.²⁷

Exhibit 5				
Analysis of LDH’s Contract Provider Time Sheet Data				
Fiscal Year 2017				
	Number of Providers	Number of Total Workers	Number of Workers Not Reported to LWC	Percent of Workers Not Reported to LWC
Providers that Reported All Employees to LWC	4	105	0	
Providers that Failed to Report Any Employees to LWC	64	7,988	7,988	
Providers that Reported Some but Not All Employees to LWC*	301	46,570	14,304	
Total	369	54,663	22,292	40.8%
*Providers classified as not having reported wages to LWC include providers that failed to report wages for one or more employees in at least one quarter during fiscal year 2017.				
Source: Prepared by legislative auditor’s staff using LDH’s DSW payroll data and LWC’s quarterly labor data.				

²⁵ [Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, February 2000 by Planmatics, Inc. for the U.S. Department of Labor, Employment and Training Administration, p.44-47](#)

²⁶ The time sheet data did not include wages so we could not estimate the unemployment and income taxes that were not paid.

²⁷ Although both LWC’s quarterly wage data and LDH’s DSW payroll data contain full SSNs of workers, there may be incorrect SSNs in the data. Therefore, records noted as not reported to LWC may be overstated if the SSN is incorrect.

According to our analysis, 365 LDH-contracted healthcare providers failed to report wages to LWC for one or more DSWs in fiscal year 2017. Because LDH regulations require its contracted Medicaid providers to supervise DSWs through in-person supervisory visits, annual performance evaluations, and the provision of formal training, for example, the DSWs should be considered employees instead of independent contractors.²⁸

Louisiana’s New Hires data could also help LWC identify employees whose wages have not been reported to LWC as required by law. Employers in Louisiana are required to report information concerning their newly hired employees to the Louisiana Directory of New Hires maintained by the Louisiana Department of Children and Family Services (DCFS). DCFS then forwards this data to the U.S. Department of Health and Human Services, Office of Child Support Enforcement’s National Directory of New Hires, where it is used to assist states in locating noncustodial parents and enforcing child support orders. Federal policy allows other uses for the data including verifying program eligibility and preventing fraud.

LWC entered into yearly agreements with the U.S. Department of Health and Human Services, Office of Child Support Enforcement starting in 2011 to utilize the New Hires data. Currently, LWC has limited its use of the New Hires data to ensuring that claimants are eligible for unemployment compensation. However, LWC could also use this data to match against its quarterly wage data for these same employers to identify employees whose wages have not been reported to LWC as required by law. These instances indicate a higher risk of misclassification and would allow LWC to better target its selection of audits.

Recommendation 2: LWC should identify and incorporate payroll and time sheet data from state agencies into its audit selection process so that this data may be matched against LWC’s quarterly wage data to identify employers that fail to report wages and thus may be misclassifying employees.

Summary of Management’s Response: LWC agrees with this recommendation and stated that it will endeavor to expand its scope of inclusive agencies and seek to establish similar data sharing agreements with LDH and DOTD, as well as utilize contractor payroll data in its audit selection process. See Appendix A for LWC’s full response.

Recommendation 3: LWC should incorporate New Hires data into its audit selection process so that it may be matched against LWC’s quarterly wage data to identify employers that fail to report new hires to LWC and thus may be misclassifying workers.

Summary of Management’s Response: LWC agrees with this recommendation and stated that it will study the efficacy of using New Hire data as an audit selection tool. LWC recently polled 20 other states to determine if they were using this data in their tax audit selection process, and 18 of the 20 states responded that they do not use New Hire data in their audit selection process. See Appendix A for LWC’s full response.

²⁸ Louisiana Administrative Code. Title 48, Part I, §5055

LWC’s enforcement process is not effective at deterring employers from misclassifying their workers. Louisiana is the only state that mandates LWC to send warning letters to employers that misclassify workers on their first offense as opposed to assessing penalties. This requires LWC to use its limited resources to conduct follow-up audits in order to impose applicable penalties. If LWC could impose penalties for first-time offenses, we estimated it could have assessed approximately \$3.3 million in penalties for the 13,106 misclassified workers it identified during calendar years 2016 to 2018.

Prior to 2012, Louisiana law did not include specific penalties for worker misclassification; however, it allowed LWC to assess penalties and interest on employers that failed to pay unemployment insurance taxes. During the 2012 Regular Session, the Louisiana Legislature established penalties for employers that misclassify workers.²⁹ These penalties are outlined below.

- First offense – Employer shall be issued a warning letter.
- Second offense – Employer may be assessed a penalty of up to \$250 per individual found to be misclassified.
- Third and all subsequent offenses – Employer may be subject to a penalty up to \$500 per individual found to be misclassified.
- After third offense – Employer may be subject to additional fines of between \$100 and \$1,000, or imprisoned for 30-90 days, or both.
- Employers determined to have willfully misclassified workers are prohibited from contracting, directly or indirectly, with any state agency or political subdivision of the state for a period of three years.

In addition, Louisiana passed legislation during the 2014 Regular Legislative Session imposing a penalty of \$5,000 on employers that refuse to allow an audit of their records or make the necessary records available for audit.³⁰ However, we found that state law and LWC’s enforcement process are not effective at deterring businesses from misclassifying their employees, as discussed in the following sections.

²⁹ R.S. 23:1711(G)

³⁰ R.S. 23:1660(C)

Louisiana is the only state that mandates warning letters as opposed to penalizing on the first offense of worker misclassification.³¹ As stated previously, state law does not allow LWC to impose penalties until it sends a warning letter to an employer for their first offense of worker misclassification. Louisiana is the only state out of 24 states with statutory worker misclassification penalties that mandates warning letters to be sent on the first offense. The mandate of a warning letter means that LWC must conduct follow-up audits of the same employer before being able to impose penalties.

LWC's follow-up process starts with conducting a preliminary "desk audit" one year after the completion of the initial audit that identified worker misclassification. If the desk audit determines that the employer has not yet reported wages to LWC for the misclassified workers identified in the initial audit, staff are required to conduct a more comprehensive follow-up audit of the employer. Although LWC is authorized by law to penalize the employer up to \$250 for each instance of worker misclassification identified in the follow-up audit, records indicate that as of January 2019 LWC has only conducted 10 follow-up audits that identified six employers that misclassified 127 workers, resulting in penalties totaling \$21,250.

Having to spend limited audit resources on multiple audits of the same employer is inefficient and reduces overall audit coverage, especially considering LWC has gone from 23 auditors in 2015 to 17 in 2018, a decrease of 26%. In addition, the requirement to send a warning letter weakens the deterrent effect of penalties for misclassifying workers. If LWC was not required to send warning letters for a first offense, we calculated that it could have imposed penalties up to \$250 for each of the 13,106 misclassified workers identified during calendar years 2016 through 2018, for a total of approximately \$3,276,500. During the 2016 Regular Legislative Session, LWC proposed legislation that would have amended state law to eliminate the warning letter requirement and increase initial worker misclassification penalties up to \$5,000.³² However, this legislation failed to pass.

When state law does allow Louisiana to impose penalties for worker misclassification, these penalties are significantly lower than 22 of the other 23 states. Texas is the only state with a lower maximum initial penalty than Louisiana; however, Texas is authorized to penalize employers on first offenses instead of sending a warning letter. In addition, Louisiana has the lowest maximum penalty amount in the nation for subsequent worker misclassifications at \$1,500 per individual; other states range between \$1,500 and \$50,000. Exhibit 6 shows the number of states categorized by maximum first offense penalty amount and maximum subsequent offense penalty, and Appendix C contains the specific states and related legal citations.

³¹ The original draft of Senate Bill 472 did not require LWC to send warning letters and imposed penalties up to \$10,000 per misclassified worker and \$25,000 per audit [Act 786 of the 2012 Legislative Session, R.S. 23:1711(G)].

³² House Bill 665 of the 2016 Regular Legislative Session

Exhibit 6 Maximum First Offense and Subsequent Penalties for Misclassified Workers			
Maximum First Offense Penalty	Number of States	Maximum Subsequent Offense Penalty	Number of States
\$500 or Under*	4	\$2,500 or Under	3
\$501 - \$1,000	2	\$2,501 - \$5,000	4
\$1,001 - \$2,500	2	\$5,001 - \$15,000	0
\$2,501 - \$5,000	7	\$15,001 - \$20,000	2
\$5,001 - \$10,000	2	\$20,001 - \$25,000	2
Over \$10,001	2	Over \$25,001	1
Variable**	5	Variable	2
		N/A***	10
Total	24		24

*Louisiana’s penalties fall within this penalty range with a warning letter for first offense and a maximum of \$1,500 for subsequent penalties (see green highlights).
 **Some states do not have set penalties but penalize worker misclassification through variable penalties, such as a multiple of the workers compensation insurance that should have been paid if the worker was properly classified.
 ***Ten states do not specify additional penalties for subsequent offenses.
Source: Prepared by legislative auditor’s staff using Westlaw.

We found that LWC has also not assessed penalties on employers that did not comply with audit-related requirements and requests. Louisiana law also allows LWC to impose a penalty of \$5,000 on employers that do not allow an audit of their records or make necessary records available for audit. According to LWC records, it has only imposed this penalty on one employer since the authority was granted in law in 2014. Although LWC does not specifically track employers that fail to comply with audit requests, it tracks audit assignments, including the beginning and ending dates of audits. According to this data, LWC selected 3,593 employers for audit between calendar years 2016 and 2018; however, 531 (14.8%) of these 3,593 selected audits were not completed for various reasons including companies moving out of state or going out of business. Based on information provided by LWC, we determined that 69 of these audits were not completed due to employers not cooperating with LWC. Had LWC assessed the \$5,000 penalty on these 69 employers, it could have potentially collected \$345,000.

Recommendation 4: LWC should continue to work with the legislature to determine whether the mandatory warning letter for first offense worker misclassification is an effective deterrent to worker misclassification and whether it contributes to an inefficient audit process.

Summary of Management’s Response: LWC agrees with this recommendation and stated that it will continue to work with the legislature regarding consideration of more punitive measures to deter worker misclassification beyond a warning letter for first offense. See Appendix A for LWC’s full response.

Recommendation 5: LWC should develop policies and procedures to ensure that it consistently conducts follow-up audits as needed and penalizes employers that are found to have misclassified workers on subsequent audits, as required by law.

Summary of Management's Response: LWC agrees with this recommendation and stated that policies and procedures are already in place regarding follow-up audits and associated penalties. However, LWC agrees that improving consistency regarding follow-up audits and imposing employer penalties where warranted would improve its efficiencies. To this end, innovative processes have been developed within new LWC audit software. See Appendix A for LWC's full response.

Recommendation 6: LWC should continue to work with the legislature to determine whether the penalties established in Louisiana law for worker misclassification should be strengthened. Stronger fines may increase the deterrent effect of the penalties.

Summary of Management's Response: LWC agrees with this recommendation and stated that it will continue to work with the legislature to determine an appropriate degree in regard to penalties for worker misclassification violations. In addition, LWC's Office of Unemployment Insurance Administration (OUIA) partners with LWC's Office of Workers' Compensation Administration (OWCA) as part of its GAME ON Initiative to discover and penalize worker misclassification violators. OWCA has statutory authority to impose both civil and criminal penalties for failure to properly classify workers. As a result of OUIA collaborating with OWCA through GAME ON audits, LWC has the potential to impose significant penalties against misclassification violators. See Appendix A for LWC's full response.

Recommendation 7: LWC should develop policies and procedures to ensure that it consistently penalizes employers that do not comply with audit requests.

Summary of Management's Response: LWC agrees with this recommendation and stated that this issue has already been identified and is expected to be rectified through new LWC audit software. LWC will continue its efforts to ensure that all legal and statutory methods are utilized upon discovering employee misclassification. See Appendix A for LWC's full response.

Matter for Legislative Consideration: The legislature may wish to consider amending R.S. 23:1711(G) to remove the mandate that LWC must send a warning letter to employers for first offense worker misclassifications, and instead allow LWC to impose penalties for first-time offenses.

Louisiana law does not impose liability on contractors for misclassification of workers hired by labor brokers. As a result, contractors have no responsibility to ensure that workers provided by labor brokers are properly classified, which increases the risk of worker misclassification and makes it more difficult for LWC to deter worker misclassification.

Contractors in the construction industry often rely on “labor brokers” that hire workers and then subcontract or “assign” the workers to employers in construction and other sectors. Contractors typically exercise supervision over these workers. According to the three-pronged test outlined earlier on pages 1-2 of this report, these workers should be classified as employees because they are subject to the control and direction of the contractor that employs them. However, they are often improperly classified as independent contractors.

LWC audits contractors through interviews, examination of records, and site visits and determines whether workers were properly classified through the application of Louisiana’s three-pronged test for independent contractor status. During the audit, if LWC determines that misclassified workers were hired through labor brokers, LWC must schedule a subsequent audit of the labor broker itself in order to send a warning letter or impose any penalties for misclassified workers provided to the contractor. However, according to LWC, labor brokers often dissolve their companies and incorporate under new names after being audited to avoid being penalized by LWC for any subsequent worker misclassification offenses. Because Louisiana law does not impose liability on the contractors that use labor brokers that misclassify workers, LWC is unable to hold anyone accountable for these instances of worker misclassification.

If LWC had the legal authority to impose liability on contractors for their labor brokers that misclassify workers, it could better ensure accountability for worker misclassification, ensure the state receives all related unemployment and income tax payments, and ensure that workers’ compensation coverage is provided for all employees. California, for example, adopted a law in January 2015 where employers that contract with labor brokers assume liability for payment of wages and the failure to obtain valid workers’ compensation coverage for workers hired by labor brokers.³³ Since contractors that acquire workers from labor brokers benefit from reduced labor costs, it may be appropriate for those contractors to assume some of the liability when a determination has been made that these workers have been

Contractors that acquire workers from labor brokers that misclassify employees are able to significantly reduce their labor costs. For example, a contractor that hires an employee at a wage of \$20 per hour may incur a total payroll burden of over \$25 per hour when including employment taxes and workers’ compensation insurance. **That same contractor would only pay the \$20 per hour for a worker obtained from a labor broker that misclassifies the employee as an independent contractor.**

Source: Based on data from *Informing the Debate, The Social and Economic Costs of Employee Misclassification in Michigan*, The Institute for Public Policy and Social Research, Michigan State University, 2009.

³³ Section 2810.3 of the California Labor Code

misclassified by the labor broker and LWC is unable to locate the labor broker to remedy the misclassification. Contractors that do not acquire workers through labor brokers that misclassify are at a disadvantage because they have to include labor costs when bidding on projects, and thus may not be as successful at winning bids.

Another option would be to extend LWC's current penalty structure for employers that are found to have misclassified employees to contractors. As previously mentioned on page 13 of this report, R.S. 23:1711(G) states that employers determined to have willfully misclassified workers are prohibited from contracting, directly or indirectly, with any state agency or political subdivision of the state for a period of three years. If LWC were able to apply this same prohibition to contractors that use labor brokers that misclassify employees, contractors may have more incentive to ensure that labor brokers properly classify any employees that are supplied to the contractor.

According to the Louisiana State Licensing Board for Contractors (LSLBC), the misclassification of workers is a problem at the federal and state level. In 2018, after LSLBC met with LWC and the GAME ON Task Force, LSLBC posted a LWC press release regarding the efforts of the Task Force and the impact and penalties for worker misclassification on its website for approximately five months. In addition, LSLBC emailed this press release to the approximately 24,000 licensed contractors in Louisiana, as well as to Associated Builders and Contractors, Associated General Contractors, and the Louisiana Home Builders Association encouraging them to forward the press release to all of their members. LSLBC stated that it would be willing to participate in a legislative study resolution and gather all key stakeholders to determine the most effective method for combatting the issue of worker misclassification.

Matter for Legislative Consideration: The legislature may wish to consider requesting a study be conducted to determine the most effective method for combatting the issue of worker misclassification.

APPENDIX A: MANAGEMENT'S RESPONSE



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John Bel Edwards, Governor
Ava Dejoie, Secretary

Office of the Secretary

June 13, 2019

Mr. Daryl G. Purpera, CPA, CFE
Louisiana Legislative Auditor
1600 North Third Street
Post Office Box 94397
Baton Rouge, Louisiana 70804-9397

Dear Mr. Purpera:

Thank you for conducting the Louisiana Legislative Auditor's Performance Audit of Louisiana Workforce Commission's (LWC) Detection and Prevention of Worker Misclassification processes. The response from Louisiana Workforce Commission is attached.

As indicated in the responses that follow, LWC is committed to the aggressive pursuit of worker misclassification. Unfortunately, the Unemployment Insurance base grant that funds these operations has been reduced by over 10% over the last few years. As a result, filling vacancies has become increasingly difficult due to constraints on the rate of pay we can offer for corresponding qualifications necessary for the position. However, in spite of these and other challenges, the LWC UI Tax program has been very successful.

As stated in your audit report, LWC is ranked #2 in the country for its audit program. At times, we have been ranked #1 as well, and we are considered the go-to state for best practices in the UI tax audit program. Through employer tax audits, we actively seek violators and impose penalties within the parameters permitted by law. Additionally, we work with other LWC units, such as the Office of Workers' Compensation, and partner with other state and federal agencies, such as the Louisiana Department of Revenue and the Internal Revenue Service, to aid in this mission.

Again, we appreciate the efforts of you and your staff and the opportunity to submit LWC's response. Should you have any questions or concerns, please feel free to contact me at your convenience.

Best regards,

A handwritten signature in blue ink that reads "Ava Dejoie".

Ava M. Dejoie
Secretary

Attachment

Recommendation 1: LWC should require staff to track the number of misclassified workers identified during each audit by the audit selection source and the employer's NAICS code, and use this data as part of its audit selection process.

We agree with this recommendation. Our current automated audit selection tools already allow for choosing audits using NAICS codes as a determining factor. However, we will continue to focus our attention on industries that potentially have the greatest number of misclassified workers. In addition to this data, we utilize tips, the LWC fraud website, and the IRS 1099 extract in our audit selection process. In reference to observations made in the Legislative Audit report, the LWC is aware that the construction industry (NAICS 23xxxx) typically generates the highest number of misclassified worker discoveries. This is consistent nationwide. However, it is critical for the LWC UI tax audit program to pass the national “Effective Audit Measure” each year as prescribed by the United States Department of Labor (USDOL).¹

Recommendation 2: LWC should identify and incorporate payroll and timesheet data from state agencies into its audit selection process so that it may be matched against LWC's quarterly wage data to identify employers that fail to report wages and thus may be misclassifying employees.

The LWC will endeavor to expand our scope of inclusive agencies and seek to establish similar data sharing agreements with LDH and DOTD, as well as utilize contractor payroll data in its audit selection process.

Recommendation 3: LWC should incorporate New Hire data into its audit selection process so that it may be matched against LWC's quarterly wage data to identify employers that fail to report new hires to LWC and thus may be misclassifying workers.

The LWC will study the efficacy of using NDNH data as an audit selection tool. The LWC recently polled 20 other states to determine if they were using this data in their tax audit selection process.² 18 of the 20 states responded that they do not use NDNH data in their audit selection process.

¹ 2019 Effective Audit Measure Factors:

1. Audit 1% of all contributory employers
2. Change 2% of total wages audited (rolling amount)
3. Audit 1% of total wages reported
4. Detect average of 1 misclassified worker per audit

² Questions asked in the poll were:

1. Does your state utilize New Hire data in your UI tax audit selection process?
2. If so, what level of efficacy has your state experienced in choosing audits leading to misclassified worker discoveries? We would appreciate any details on this efficacy including data and/or anecdotal information.
3. If your state uses this process and has found it to be effective, we would be interested in your processes if you would be willing to share them.

Recommendation 4: LWC should continue to work with the legislature to determine whether the mandatory warning letter for first offense worker misclassifications is an effective deterrent to worker misclassification and whether it contributes to an inefficient audit process.

The LWC will continue to work with the legislature regarding consideration of more punitive measures to deter worker misclassification beyond a warning letter for first offense. As recently as in the 2016 legislative session, the LWC monitored a bill to remove the letter of warning and increase the punitive penalties for subsequent offenses.³ The bill made it out of committee, however, it did not survive the House floor.⁴

Recommendation 5: LWC should develop policies and procedures to ensure that it consistently conducts follow-up audits as needed and penalizes employers that are found to have misclassified workers on subsequent audits, as required by law.

We agree with this recommendation. Policies and procedures are already in place regarding follow-up audits and associated penalties; however, we agree that improving consistency regarding follow-up audits and imposing employer penalties where warranted would improve our efficiencies. To this end, innovative processes have been developed within new LWC audit software.

Recommendation 6: LWC should continue to work with the legislature to determine whether the penalties established in Louisiana law for worker misclassification should be strengthened. Stronger fines may increase the deterrent effect of the penalties.

As stated in our response to Recommendation 4, the LWC will continue to work with the legislature to determine an appropriate degree of in regard to penalties for worker misclassification violations. As recently as in the 2016 legislative session, the LWC monitored a bill to remove the letter of warning and increase the punitive penalties for subsequent offenses.³ The bill made it out of committee, however, it did not survive the House floor.⁴

It bears noting that LWC's Office of Unemployment Insurance partners with the LWC'S Office of Workers' Compensation Administration (OWCA) as part of its GAME ON Initiative to discover and penalize worker misclassification violators (see Response to Recommendation 2). LWC's OWCA has statutory authority under La. R.S. 23:1169-1172 to impose both civil and criminal penalties for failure to properly classify workers. Civil penalties consist of \$250 per employee for first offense (up to \$10,000), and \$500 per employee for subsequent offenses, and may include injunctive action to cease business operations. Criminal penalties include a fine of \$250 per day for willful employer misconduct in not providing security, or up to 10 years imprisonment, or both. In May 2019, OWCA secured an agreement with the East Baton Rouge Parish District Attorney's Office to criminally prosecute those individuals and companies that commit Worker Compensation Fraud. Companies that perpetrate Worker's Compensation Fraud may also

³ House Bill No. 665, Representative Smith, HLS 16RS-1180

⁴ failed House final passage with vote of 33 yeas and 59 nays

commit Worker Misclassification and such companies will be prosecuted criminally. As a result of OUIA collaborating with OWCA through GAME ON audits, the LWC has the potential to impose significant penalties against misclassification violators.

Recommendation 7: LWC should develop policies and procedures to ensure that it consistently penalizes employers that do not comply with audit requests.

This issue has already been identified and is expected to be rectified through new LWC audit software. The LWC will continue its efforts to ensure that all legal and statutory methods are utilized upon discovering employee misclassification.

APPENDIX B: SCOPE AND METHODOLOGY

This report provides the results of our performance audit on the Louisiana Workforce Commission (LWC). We conducted this performance audit under the provisions of Title 24 of the Louisiana Revised Statutes of 1950, as amended. The audit generally covered the period of January 1, 2016 through December 31, 2018. Our audit objective was to:

Evaluate LWC's processes to detect and prevent worker misclassification.

We conducted this performance audit in accordance with generally-accepted *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide reasonable basis for our findings and conclusions based on our audit objective. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. To answer our objective, we reviewed internal controls relevant to the audit objective and performed the following audit steps:

- Researched and reviewed relevant Louisiana statutes and regulations relating to LWC's authority to audit employers and assess penalties for worker misclassification.
- Researched and reviewed federal law and United States Department of Labor (USDOL) regulations to identify relevant laws and policies governing how states manage their audit process and audit data they are required to compile and report.
- Assessed the strength of Louisiana's worker misclassification penalties by comparing them to worker misclassification penalties established by other states.
- Obtained audit outcome data reported to the USDOL's Wage and Labor Division by all states for calendar years 2014 through 2018. This data is generated from the effective audit measures and states are required to report this data yearly. We analyzed this data to determine how effective LWC's audits were at identifying misclassified workers compared to audits by other states.
- Obtained LWC data used to track audit outcomes and audit selection sources. We used this data to assess LWC's audit performance by audit selection source and by the employer industry.
 - We compared LWC's audit selection source data to audit outcome data generated by the Louisiana Office of Technological Services for calendar years 2016 through 2018. Using ACL software, we joined the data through the Employer ID data field common to both data sets. Since the outcome data includes misclassified workers identified in each audit, the

join enabled us to determine the average number of misclassified workers per audit completed.

- We compared the audit outcome data to North American Industry Classification System (NAICS) industry codes for the calendar years 2016 through 2018. The employer NAICS code is not included in LWC's outcome data but is included in LWC's employer reported wages. Using ACL software, we joined the audit outcome data to the employer reported wages through the Employer ID data field common to both data sets. Since the outcome data includes misclassified workers identified in each audit, the join enabled us to determine the average number of misclassified workers per audit completed in each of the different NAICS codes.
- Researched data sources that LWC could potentially use to improve its audit selection process, including Department of Transportation and Development's (DOTD) certified payroll data, Louisiana Department of Health's (LDH) time sheet data, and federal "New Hire" data. We analyzed LDH time sheet data and DOTD contractor payroll data to assess their utility in assisting LWC to better select its audits. (The federal New Hire data is governed by the terms of a data sharing agreement with the state and was not readily available for our analysis.)
- Compared DOTD certified payroll data to LWC's employer reported wage data for the calendar year 2017. The payroll data provided the employer name, worker name, and worker Social Security number (last four digits) for each pay period. Using ACL software, we matched these data fields to the corresponding data fields in LWC's employer reported wage data. This match enabled us to identify workers recorded in the payroll data that were not reported to LWC.
- Compared LDH time sheet data for direct service workers of LDH contract providers to LWC's employer reported wage data for fiscal year 2017. The time sheets provided the employer name, worker name, and full worker Social Security number for each pay period. Using ACL software, we matched these data fields to the corresponding data fields in LWC's employer reported wage data. This match enabled us to identify workers recorded on the time sheets that were not reported to LWC.
- Reviewed audit penalty data to determine how many administrative and noncompliance penalties LWC imposed since these penalties were established in Louisiana law in 2012 and 2014 respectively. Estimated the amount of administrative and noncompliance penalties not imposed on employers that were potentially subject to these penalties.

- Interviewed LWC staff and other stakeholders about possible measures to encourage employers to properly classify workers. Determined that requiring contractors to share liability for worker misclassification with subcontractors may encourage them to ensure that these workers are properly classified.
- Provided our results to LWC staff to review for accuracy and reasonableness.

APPENDIX C: OTHER STATES' PENALTIES FOR MISCLASSIFIED WORKERS

	State	First Offense	Subsequent Offenses	Legal Citation	Comments
1	Alaska	Variable	N/A	AK Statutes §23.30.250	Alaska treats misclassification as theft by deception. Civil penalties may include a penalty of up to three times the workers' compensation premium that would have been originally paid if the employee was properly classified.
2	California	\$5,000 - \$15,000	\$10,000 - \$25,000	CA Labor Code §226.8	For each violation
3	Colorado	Up to \$5,000	Up to \$25,000	CO Revised Statutes (R.S.) §8-72-114	For each misclassified employee
4	Connecticut	Variable	N/A	CT General Statutes (G.S.) §31-69a	Connecticut has a penalty of \$300 per day per individual for each violation and employers that knowingly misclassify are guilty of a felony.
5	Delaware	\$1,000 - \$5,000	\$20,000	DE Code 19 §3505	For each misclassified employee. Subsequent offense fine applies if employer misclassifies twice in a two-year period.
6	Florida	\$2,500 or \$5,000	N/A	FL Administrative Code Rule 69L-6.018	\$2,500 per misclassified employee for the first two misclassified employees per site; and \$5,000 per misclassified employee after the first two misclassified employees per site.
7	Illinois	Up to \$1,000	Up to \$2,000	IL Compiled Statutes 820 §185/40	Subsequent offense penalties apply to repeat violations found within a five year period.
8	Kansas	Variable	Variable	KS Statutes 44-766; 79-3228	First violations result in civil penalties contingent on income tax owed, and subsequent violations result in civil penalties and misdemeanor criminal conviction.

State		First Offense	Subsequent Offenses	Legal Citation	Comments
9	Louisiana	Warning Letter	Up to \$1,500	LA R.S. 23:1711	Penalty for second offense is up to \$250 per individual found to be misclassified; third and all subsequent offense is up to \$500 per individual found to be misclassified. After the third offense, the employer may be subject to additional fines of between \$100 and \$1,000, or imprisoned for 30-90 days, or both.
10	Maine	\$2,000 - \$10,000	N/A	ME R.S. 26 § 591-A	For each violation
11	Maryland	Up to \$5,000	Up to \$20,000	MD Labor and Employment Code §3-909	For each employee who was knowingly not properly classified. Penalty with prior violation is double the first offense penalty and penalty for three or more violations is up to \$20,000 for each employee.
12	Massachusetts	Up to \$25,000	Up to \$50,000	MA General Laws 149 §27C	Massachusetts has different penalties, including criminal, for willful and unwillful violators. First offenses punished with fine up to \$25,000 or up to one year in prison for willful violators; up to \$10,000 or up to six months in prison for unwillful violators. Subsequent offenses are punished at a maximum of \$50,000 for willful violations and/or up to two years in prison; up to \$25,000 and/or up to one year in prison for willful violations.
13	Missouri	Variable	N/A	MO Statutes 285.515	Missouri allows a court to determine that an employer has knowingly misclassified a worker. If a court determines that misclassification is knowingly, it shall enter a judgment in favor of the state and award penalties in the amount of \$50 per day per misclassified worker up to a maximum of \$50,000.
14	Nebraska	\$500	\$5,000	NE R.S. §48-2907	Per each misclassified individual
15	New Jersey	Up to \$2,500	Up to \$5,000	NJ Statutes 34:20-5	Per violation
16	New Mexico	Up to \$5,000	N/A	NM Statutes §60-13-3.1	New Mexico's penalty statute is specific to the construction industry and only applies to misclassification by contractors.

State		First Offense	Subsequent Offenses	Legal Citation	Comments
17	New York	Up to \$2,500 (civil) Up to \$25,000 (criminal)	Up to \$5,000 (civil) Up to \$50,000 (criminal)	NY Labor Law §861-e	New York has both civil and criminal penalties. Upon conviction, criminal penalties for first offense are prison for no more than 30 days or a maximum fine of \$25,000 and prison for no more than 60 days or a maximum fine of \$50,000 for subsequent offenses.
18	North Carolina	Variable		NC G.S. §143-788	North Carolina passed the Employee Fair Classification Act to organize reporting and information sharing of misclassification issues between state agencies. While the Act does not impose any classification penalties, the various independent agencies have their own individual penalty structures.
19	Pennsylvania	Up to \$1,000	Up to \$2,500	PA Statutes §933.6	Per violation
20	Rhode Island	\$1,500 - \$3,000	Up to \$5,000	RI General Laws §28-14-19.1	For each misclassified employee
21	Texas	\$200	N/A	TX Labor Code §213.008	For each misclassified individual
22	Utah	Up to \$10,000	N/A	UT Labor Code §34A-2-110; UT Criminal Code §76-3-203, 204, 301	Utah’s degrees of criminal offenses are dependent on the number of misclassified individuals. Criminal penalties range from fines up to \$2,500 and up to one year imprisonment for misdemeanors and fines up to \$10,000 and up to 15 years imprisonment for felonies.
23	Vermont	Up to \$5,000	N/A	VT Statutes §1314a	For each misclassified employee
24	Wisconsin	\$500	N/A	WI Statutes 108.221	Wisconsin’s penalties for employers engaged in the painting or drywall finishing of buildings or other structures that intentionally misclassify employees is \$500 for each employee who is misclassified, but not to exceed \$7,500 per incident.

Source: Prepared by legislative auditor’s staff using Westlaw.