



March 10, 2021

Briefing to Louisiana Misclassification Task Force



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Who is NELP?



POLICY BRIEF | AUGUST 2020

Public Task Forces Take on Employee Misclassification: Best Practices



POLICY BRIEF | OCTOBER 2020

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

Who does misclassification affect?



Costs to the Government:

NATIONAL

2009 USGAO report: **cost \$2.72 billion** in 2006.

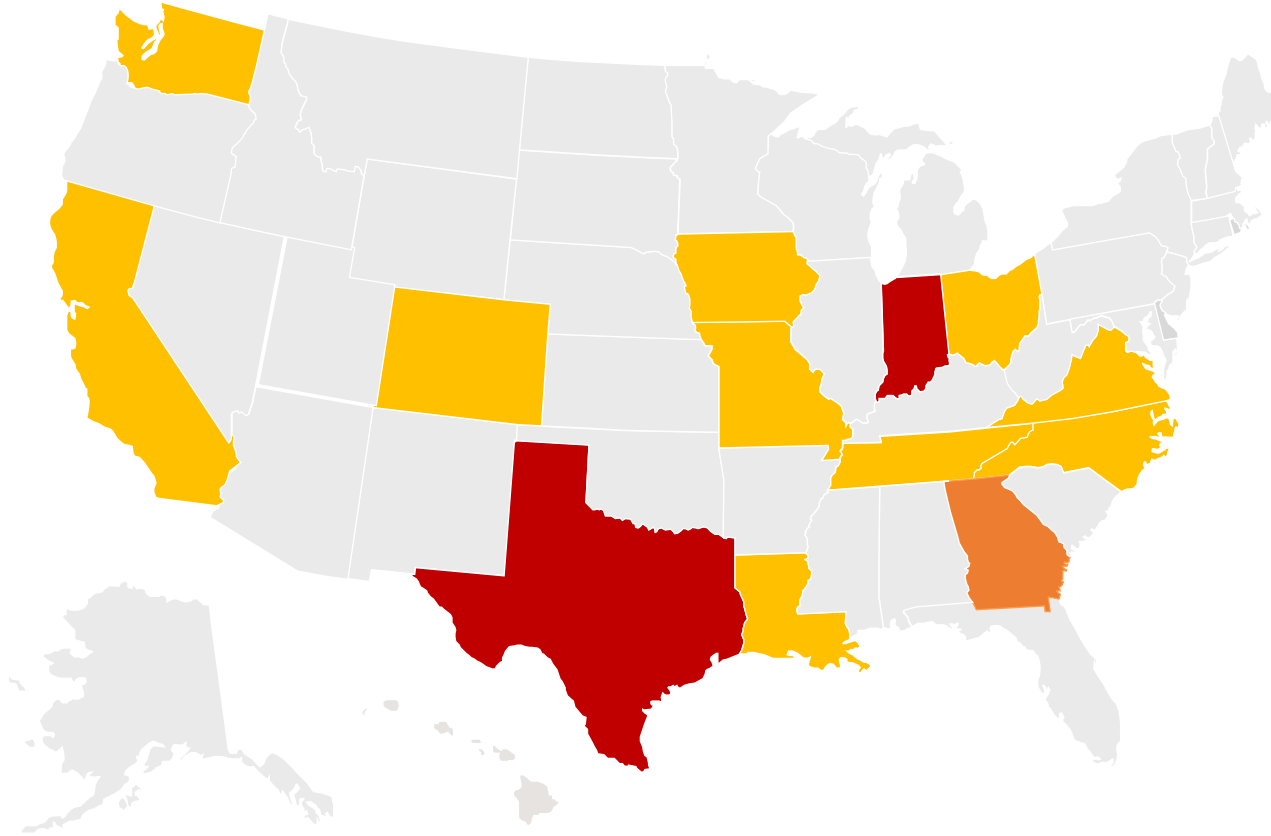
2000 report to USDOL: found **10 – 30%** of employers misclassify some employees.

Cost to the UI trust fund: **\$198 million per year.**

Costs to Public coffers and Other Businesses in Lost Revenue (selected states)

WA
80%
audited
firms
misclassify

CA
90%
misclassify



CO 2018 - \$167 mil lost in income tax,
\$755K UI premiums

GA 2015 - Senate study estimates avg 2.8
K workers misclassified

IN 2010 - \$147.5 mil lost income taxes

IA 2016 - \$16.4 mil unreported wages

LA 2015 - \$50 mil unreported taxable
wages, \$1.5 mil UI taxes

MO 2016 - \$2.1 mil taxes due

NC 2017-18 - \$1.7 mil UI taxes

OH 2015 - \$2.6 mil UI taxes

TN 2017 - \$3 mil workers comp taxes

TX – Austin 2012 - \$2.3 mil UI taxes due

VA 2018 - \$28 mil unpaid taxes

- **Task Force/audits**
- **Legislative Committee/Attorney General study**
- **Academic study**

Passing on costs to other businesses



*This kind of work...is in direct competition with my HVAC company... I can assure you, **you can't ...pay workers' comp, pay Medicare match, pay Social Security match, and health insurance match**, and do all the things that I do with what you're doing.*

- North Carolina State Senator

Best Practices – 1 Task Forces

TASK FORCES BY STATE			
State	Source of Task Force	MOU with USDOL?	Most recent report
California	Cal. Unemp. Ins. Code § 329, AB 1464, Ch 21, p. 628 (2012)	yes	Department of Industrial Relations, Labor Enforcement Task Force Report to Legislature , March 2019.
Colorado	Hickenlooper EO B 2018 003	yes	Colorado Department of Labor and Employment, Task Force Report Pursuant to Executive Order B 108-3 , November 30, 2018.
Connecticut	CT Gen Stat § 31-57h (2008)	yes	State of Connecticut, Auditor's Report Dept of Labor 2011-2012 .
Illinois	SB0161 (Pub. Act 101-0527)	yes	Report must be submitted no later than December 1, 2020.
Indiana	Senate Bill 23 (2010), Ind Code 22-2-15-2		Indiana Department of Labor Report to Pension Management Oversight Commission on Employee Misclassification , September 29, 2010.
Iowa	Culver EO No. 8 (2008)		Iowa Misclassification Task Force 2nd Report , December 30, 2010.
Louisiana	Internal effort, not a TF		Press Release, LOUISIANA DEP'T OF REVENUE, Dept. of Revenue sues three businesses in statewide crackdown on payroll tax fraud , January 30, 2018. State of Louisiana, Annual Tax Collection Report 2017-2018 .
Maryland	O'Malley EO 01.01.09	yes	Maryland Department of Labor, Licensing and Regulation, the MD Joint Enforcement Task Force on Workplace Fraud , February 12, 2019.
Maine	Baldacci EO 23 FY08/09	yes	Maine Department of Labor, Annual Report of the Joint Enforcement on Employee Misclassification , February 25, 2010.
Massachusetts	Patrick EO 499, Mass. Gen. Laws Chapter 23 § 25	yes	Council on the Underground Economy 2017 Annual Report
Michigan	Granholt EO 2008-1		No reports. Newly re-established Payroll Fraud Enforcement Unit in AG's office.
Minnesota	Minn. Stat. 181.723	yes	

Montana	Bullock EO 4-2019	yes	Montana Department of Labor and Industry, Task Force on Wage Integrity and Misclassification in the Construction Industry.
Nebraska	LB 563 (2010)		Nebraska Employee Classification Act Annual Report, July 1, 2011–June 30, 2012.
New Hampshire	SB 500 (2008), Lynch EO 2010-3	yes	Eighth Report of the Joint Agency Task Force on Employee Misclassification Enforcement, September 1, 2018.
New Jersey	Murphy EO 25 (2018)	yes	Report of Gov. Murphy’s Task Force on Employee Misclassification, July 2019.
New York	Spitzer EO 17	yes	Annual Report of the Joint Enforcement Task Force on Employee Misclassification to Hon. Andrew Cuomo, Governor State of New York, February 1, 2015.
Nevada	SB 493 (2019)	yes	Bulletin No. 11-07, Employee Misclassification, Legislative Counsel Bureau, January 2011.
North Carolina	Perdue EO 125 (2012) SB 407 (2017)	yes	North Carolina Industrial Commission 2018 Annual Report, for FY 2017-2018.
Ohio			Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio, 2009.
Oregon	HB 2815 (2009)	yes	Interagency Compliance Network Report to the Oregon Legislature, March 2019.
Pennsylvania	HB 716 (2019)(pending as of August 2020))	yes	
Rhode Island	SB 3099/HB 7907B (2008); Art 8 FY 15 State Budget		Underground Economy on Employee Misclassification Task Force Annual Report 2018.
Tennessee	TN Code 50-6-919	yes	Annual Report of Employer Coverage Compliance, Bureau of Workers’ Compensation, February 1, 2019. (Although the law requiring the report sunsetted in 2014, the Bureau of Workers’ Compensation has continued reporting.)
Utah	U.C.A. §14-46-201 et.seq.		State of Utah Labor Commission, Results of Regulator and Law Enforcement Efforts, and the Status of Sharing Information by Member Agencies.

Best Practices – cont’d

Best Practices – Increased penalties for misclassification; increased public enforcement

✓ Increased penalties:

New Jersey	\$1000 per misclassified worker
Virginia	\$5000 per misclassified worker

✓ AG workers rights bureaus:

CA, DC, PA, IL, MA, MI, MN, NJ, NY and VA

BEWARE New/Old Definitions: Why Should the Contract not Govern?

Independent Contractor Contract

I agree that I am an independent contractor.

I agree that I will not receive unemployment compensation or workers compensation;

I agree to pay all taxes associated with my work; my employer will not pay Social Security or take withholding;

I agree to provide all of my own supplies and tools to do the job;

I agree that I can work off-

premises, but my employer will allow me to work on its premises;

I agree that my employer has allowed me to have a second job;

I agree that my employer has allowed me to hire helpers;

I agree to get whatever license I need to do the work;

I can control my time, but (I have to work Mon-Sat from 10 until 10).

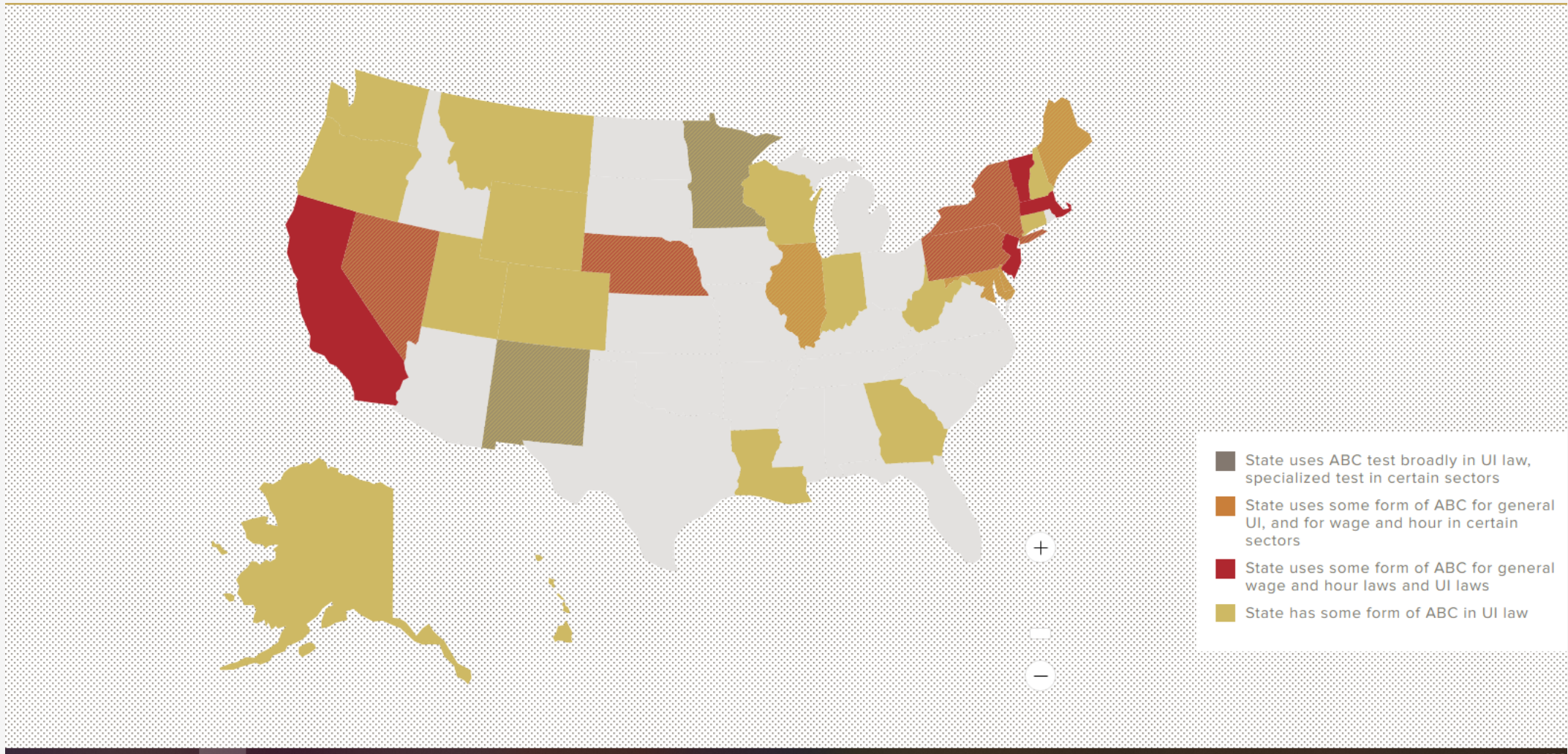
Sign here: _____



Employment statutes were meant to “upset the freedom of contract.”

-Judge Learned Hand

BEWARE: How would a new definition align with other states?



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How would a new definition align with other states and federal law?

Existing Definitions



FUTA: IRS definition

CONFORMITY ISSUES

FLSA: Suffer or permit (also most state wage and hour laws):

“The broadest definition ever included in a single statute.”

BEWARE:

How would a new definition align with other states and federal law?

What is the Biden Administration considering?



As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.

-Biden policy document

- ✓ Just issued a new rule on who is an employee under FLSA.
- ✓ Withdrew DOL opinion letter finding platform workers to be independent contractors.
- ✓ Withdrew NLRB GC opinion that Uber drivers are independent contractors.

What is pending in Congress?

- ✓ PRO Act uses ABC test
- ✓ BEHEARD protects all workers against discrimination

Recommendations

1. Continue the Task Force, fold in interagency work
2. Address penalties for first time offenders