

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE US DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION
AND
THE NORTH CAROLINA INDUSTRIAL COMMISSION, EMPLOYEE CLASSIFICATION
SECTION**

This Memorandum of Understanding (MOU) between the United States Department of Labor, Wage and Hour Division (hereinafter referred to as “WHD”) and the North Carolina Industrial Commission, Employee Classification Section (hereinafter referred to as the “Section”) sets forth the agreement, together collectively referred to the “the agencies” or “the parties” with respect to a joint initiative to improve compliance with laws and regulations administered by the WHD and the Section. This will be accomplished through enhanced information sharing and other collaboration. A joint WHD-Section team will lead this initiative.

Purpose

The sharing of information and collaboration between the parties will help reduce the incidence of misclassification of employees as independent contractors, help reduce the tax and benefits gap, and improve compliance with federal labor wage payment laws. Increased collaboration will also strengthen the relationship between WHD and the Section, enable both agencies to leverage existing resources and send a consistent message to employers about their duties to properly pay their employees and to pay employment taxes, workers compensation and unemployment benefits.

Specific objectives of this initiative include the following:

- Increase compliance with state employment and unemployment tax requirements
- Increase compliance with federal labor laws enforced by the DOL, including wage payment laws
- Reduce abusive employment/unemployment schemes
- Reduce worker misclassification
- Reduce questionable employment tax practices, workers compensation
- Work together to create educational and outreach materials and guidance for employers and workers

Agency Responsibilities

WHD is responsible for administering and enforcing a wide range of labor laws, including the Fair Labor Standards Act, the Family 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. DOL enters into this MOU under the authority provided by 29 U.S.C. § 211(b), which authorizes DOL to cooperate with State agencies charged with the administration of State labor laws. Nothing in this agreement limits the WHD's enforcement of these and other statutes.

On December 18, 2015, North Carolina Governor Pat McCrory signed Executive Order No. 83, establishing the Employee Classification Section within the North Carolina Industrial Commission. The Section has a mission to identify businesses and has ordered the Secretary of Revenue, the Chairman of the Industrial Commission and the Assistant Secretary of Commerce for the Division of Employment

Security to designate an employee of their respective agencies to serve as a Liaison to the Section. The Governor has invited the Commissioner of Labor and the Commissioner of Insurance to designate an employee of their respective agencies to serve as Liaison to the Section. The Section will collaborate with the WHD and other State agencies in order to determine if there has been violation of the respective agency operating statutes as a result of employee misclassification allegations.

Contacts

- WHD and the Section will designate a contact person or persons responsible for coordinating the partnership activities. The contact person will be responsible for coordinating the partnership activities. WHD and the Section will notify each other in the event of the separation or long-term absence of the contact person.
- WHD and the Section will also designate a representative to meet each quarter either in person, by teleconference, or other electronic means with their counterpart in the other agency to review areas of mutual concern and the terms and conditions of the partnership.

Joint Outreach

Where appropriate the parties to this agreement may coordinate state outreach activities relating to worker classification and other issues of mutual interest. These include, but are not limited to, joint state/federal press releases, joint messages to state stakeholder organizations, and other education/outreach efforts.

Duties and Responsibilities of the WHD-Section Team

The team is comprised of representatives from the WHD and the Section.

- The members of the team will meet on a regular basis to discuss issues of common concern, review MOU actions, and make recommendations for improvement in partnership activities. The team will monitor trends and developing issues.
- The team will create processes with all stakeholders in mind. Recommendations will focus on educating employers, promoting fairness and improved compliance, and creating a level playing field for law-abiding taxpayers and employers.

Duties and Responsibilities of WHD

- The WHD may refer to the Section, at WHD's discretion and consistent with applicable law, WHD investigation information and other data that WHD believes may raise employment tax compliance, workers compensation, unemployment, and wage payment issues related to misclassification.
- The WHD may share training materials and opportunities with the Section to the extent possible.
- The WHD may participate in joint outreach events with the Section to the extent possible.

Duties and Responsibilities of the Section

- The Section will, at its discretion and consistent with applicable state laws, share the referrals provided by the WHD with additional state agencies, to include: the North Carolina Industrial Commission – Fraud Investigations Section; the North Carolina Department of Labor; the North Carolina Department of Commerce - Division of Employment Security and the North Carolina Department of Revenue.
- The Section will provide annual reports to the WHD summarizing the results achieved by using WHD referrals. These reports will be provided only if the results can be compiled in a manner that protects return information, including taxpayer identities, in accordance with legal requirements.
- The Section will share training materials and opportunities with the WHD to the extent possible.
- The Section will participate in joint outreach events with the WHD to the extent possible.
- All public materials bearing the United States Department of Labor ("USDOL") or WHD name, logo, or seal must be approved in advance by USDOL. Any such materials that include the opinions, results, findings and/or interpretations of data arising from the results of activities carried out under the Agreement shall state that they are the responsibility of the party carrying out the activity and do not necessarily represent the opinions, interpretation, or policy of the other partner.
- The Section will annually provide the WHD with aggregate data relating to trends in misclassification.
- The Section will, at its discretion, provide WHD with information which may constitute evidence of a violation of any Federal law that the WHD enforces.

Disclosure, Safeguards and Recordkeeping Requirements

It is the policy of WHD to cooperate with state 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 statutory obligations and enforcement efforts. It is the WHD's view that an exchange of information in cases in which both entities are proceeding on related matters is to our mutual benefit. There is a need for the government to provide information to other law enforcement bodies without making a public disclosure.

Accordingly, the parties intend to pursue their common interests by exchanging information pursuant to this MOU without waiving any legal privileges or other legal protections against disclosure to any entities or persons that are not party to this MOU. Further:

- 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, the receiving party shall use and access it only for the limited purposes of carrying out activities pursuant to this Agreement as described herein.

- 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 enforcement files that were obtained under such conditions; internal opinions and recommendations of federal or state personnel, including (but not limited to) investigators and supervisors; information or records covered by, but not limited to, the attorney-client privilege and the protections against disclosure of attorney-work-product product and the deliberative process, investigative files, confidential informants, and confidentiality agreements and orders that may apply to shared information; personal information on living persons; individually identifiable health information, confidential business information and trade secrets, and any other information so labeled by the parties.
- Confidential Unemployment Compensation (UC) information, as defined in 20 CFR 603.2(b), means any unemployment compensation information, as defined in 20 CFR 603.2(j), required to be kept confidential under 20 CFR 603.4 or its successor law or regulation.
- 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 agency providing the information (hereinafter the “donor agency”) or a court order.
- In addition to the requirements above, Confidential Unemployment Compensation information may be exchanged only subject to the confidentiality requirements of 20 CFR 603.4 and any applicable state laws.
- In the event that there is a public proceeding, such as a trial, in which confidential information may be used or testimony of WHD’s employees sought, the WHD requires that the Section notify WHD. In the event that there is a public proceeding, such as a trial, in which confidential information may be used or testimony of the Section’s employees sought, the Section requires that WHD notify the Section.
- For information security purposes, information (including paper-based documents and electronic information such as emails and CDs) exchanged pursuant to this Agreement remains the responsibility of the donor agency while in transit. The agencies agree to establish a communication protocol for notifying each agency’s designated contact person when information is sent to or received from that agency, including information on the form of the transfer and the media type and quantity (when appropriate). An agency expecting to receive information will notify the donor agency if the information is not received as of the next business date following the agreed upon delivery date.
- For information security purposes, after an agency receives information from the donor agency, the donor agency retains no responsibility for any security incidents, inadvertent disclosure, or the physical and information technology safeguards in place for protecting that information by the agency that received it.
- However, in the event that the agency receiving the information experiences a security incident or disaster that results in the suspected or confirmed inadvertent disclosure of the data exchanged pursuant to this Agreement, the agency experiencing the incident or disaster will send formal written notification to the donor agency’s designated contact person within 3 days

after detection of the incident or disaster. The written notification will describe the security incident or disaster in detail including what data exchanged pursuant to this Agreement may have been inadvertently disclosed.

- In the event that there is a judicial proceeding brought by the employer after a Section examination based on information from a WHD referral, the Section will, when possible, notify WHD and provide WHD with a copy of the filed complaint or petition.

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 the incidence of violations in specific industries and geographic areas, if possible.
- Liability of the U.S. Government is governed by the Federal Torts Claims Act.

Transmittal Procedures

A. Transmissions from WHD to the Section:

- At its discretion, the WHD will send any information, data, and materials subject to this MOU to the Section at the following address:
North Carolina Industrial Commission
Employee Misclassification Section
4333 Mail Service Center
Raleigh, NC 27699
- The Document Transmittal and documents will be inserted in an envelope marked "TO BE OPENED BY ADDRESSEE ONLY" and inscribed with the name of the official designated to receive the information. The package will be hand delivered to the designated official or mailed via the United States Postal Service, Federal Express, United Parcel Service, or a federally accredited expedited mail delivery service, in a second envelope inscribed with the address of the designated official.

B. Transmissions from the Section to WHD:

- At its discretion, the Section will send any information, data, and materials subject to this MOU to the WHD designees.

Limitations

- This MOU does not confer any rights or benefits on any third party.

- The terms of this MOU are not intended to alter, amend, or rescind any current agreement or provision of federal law now in effect. Any provision of this MOU which conflicts with federal law will be null and void.
- 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 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.
- Nothing in this agreement will be interpreted as limiting, superseding, or otherwise affecting the parties' normal operations or decisions in carrying out its statutory and regulatory duties, or other current or future agreements between WHD or its component agencies and the Section. This agreement also does not limit or restrict the parties from participating in similar activities or arrangement with other entities.
- Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory or regulatory functions.
- This agreement will be executed in full compliance with the Privacy Act of 1974, the Freedom of Information Act, the Federal Records Act, the North Carolina Public Records Act, and any other applicable federal and state laws.

Amendment of MOU

This MOU may be amended by deletion or modification of any provisions, provided that such amendment is in writing and is signed by authorized representatives of the WHD and the Section.

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.

Evaluation of Data Exchange

WHD and the Section will review this MOU annually (or more frequently as necessary) to evaluate the existing data exchange, examine the continuing needs for a data exchange, to discuss the utility of categories of data heretofore exchanged, and determine whether the provisions of this agreement require amendment or revision. The method of review (conference call, meeting, email) will be jointly determined by the Section and the WHD designees.

Effective Date

The effective date of this MOU is the date it has been signed by all parties to the agreement.

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 cancellation. Renewal of the agreement may be accomplished by written agreement of the parties.

This agreement is effective as of the 31st day of August, 2016.

United States Department of Labor
Wage and Hour Division

By: 
David Weil
Administrator

By: 
Wayne Kotowski
Southeast Regional Administrator

By:  9/31/2016
Richard Blaylock
District Director
U.S. Department of Labor, Wage and Hour
Division

State of North Carolina
Industrial Commission
Employee Classification Section

By: 
Bradley L. Hicks
Director of Employee Classification
North Carolina Industrial Commission