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Labor and Industrial Relations

Misclassified Worker Investigation Procedures

October 2010
Report No. 2010-122



auditor.mo.gov



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YELLOW SHEET

Findings in the audit of the Department of Labor and Industrial Relations, Misclassified Worker Investigation Procedures

Identification of Misclassified Workers Opportunities exist for the Missouri Department of Labor and Industrial Relations (DOLIR) to improve the process of identifying and investigating misclassified workers. According to United States Department of Labor (USDOL) data, the DOLIR ranks among the lowest in the nation at identifying misclassified workers.

A worker is considered "misclassified" when an employer improperly classifies a worker as an independent contractor rather than an employee. Misclassified workers negatively impact state government through lost income taxes, lost unemployment taxes, and lost workers' compensation taxes. Because employers who misclassify workers do not pay into the unemployment or workers' compensation pools, compliant employers must pay a higher portion of the costs for these coverages than they otherwise would.

The DOLIR ranks 50th of 51 state labor agencies (includes the District of Columbia) in the nation in misclassified worker audit effectiveness, according to USDOL data from calendar years 2005 to 2009. From 1998 until 2010, the DES did not use a targeted, risk-based, approach to select employers to audit. Despite the USDOL encouraging a 10 percent random audit selection, the Division of Employment Security (DES) used 100 percent random audit over that timeframe. As a result, industries that historically have shown higher instances of misclassification have not received increased audit coverage. The DES does not perform follow-up audits of employers that misclassify workers.

The statutory definition of an "employee" in Missouri is more subjective than the majority of other states, resulting in less efficient reviews and more confusion among employers. In addition, the DOLIR does not adequately utilize Form 1099 data from the Internal Revenue Service (IRS) to identify misclassified workers. A federal audit of state unemployment insurance audit techniques stated the most powerful tool for identifying misclassified workers and searching for hidden wages is the use of IRS Form 1099 data. Finally, the DES has not utilized the ability to penalize employers for intentionally misclassifying workers. State law allows the division to penalize an employer 25 percent of the amount the state has been defrauded in the event "fraud or evasion on the part of any employer is discovered by the division."

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Misclassified Worker Investigation Procedures

Table of Contents

State Auditor's Report	2
------------------------	---

Introduction	
Background	4
Scope and Methodology.....	6

Management Advisory Report - State Auditor's Findings	Identification of Misclassified Workers	7
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Appendix	National Audit Effectiveness Statistics and Rankings	12
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Missouri State Auditor

Honorable Jeremiah W. (Jay) Nixon, Governor
and
Members of the General Assembly
and
Lawrence G. Rebman, Director
Department of Labor and Industrial Relations
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To determine whether employers properly classify workers and remit appropriate employer taxes, we audited the Department of Labor and Industrial Relations' (DOLIR), Misclassified Worker Investigation Procedures. The scope of our audit included, but was not necessarily limited to, the fiscal year ended June 30, 2010. The objectives of our audit were to:

1. Evaluate the DOLIR's processes for identifying and investigating misclassified workers.
2. Evaluate the impact of misclassified workers on employees, employers and government.
3. Evaluate the economy and efficiency of certain management practices and operations, including audit selection methods.

Our audit noted Missouri ranks among the lowest states in the nation at identifying misclassified workers. This low performance is primarily a result of the lack of a targeted audit selection process. By continuing to refine its audit selection process, implementing follow-up audits of significant offenders, and developing its systems to more effectively utilize IRS data, the DOLIR can significantly improve its effectiveness in identifying misclassified workers. In addition, a statutory change to redefine the definition of an employee for the purposes of unemployment and workers' compensation coverage can help the DOLIR to more efficiently and effectively determine a worker's status, enforce existing penalty provisions, and reduce instances of intentional misclassification of employees. Collectively these changes should help reduce the number of misclassified employees, increase revenues to the state as well as the Unemployment Compensation Trust Fund and the workers' compensation system, and improve the overall employment services function of the State.

We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides such a basis.



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Misclassified Worker Investigation Procedures

Introduction

Background

The Department of Labor and Industrial Relations (DOLIR) is responsible for assessing and collecting employment taxes from Missouri employers, regulating wages and wage rates, and administering the Unemployment Insurance program and the Workers' Compensation program. The DOLIR is made up of the Labor and Industrial Relations Commission; a Department Director; and five divisions including the Division of Employment Security (DES), the Division of Workers' Compensation, the Division of Labor Standards, the State Board of Mediation, and the Missouri Human Rights Commission. The DOLIR employs about 950 workers statewide.

The DES is responsible for the day-to-day operations of Missouri's unemployment insurance program. These responsibilities include collecting unemployment contributions paid by Missouri employers and paying unemployment benefits to eligible individuals. Contributory employers¹ must submit quarterly contribution and wage reports that include each employee's wages. The division's Contributions Section ensures employers are properly classifying workers, reporting workers' wages, and paying the correct tax contributions on wages. Correct reporting helps to ensure the prompt payment of unemployment benefits to insured workers during periods of unemployment and to ensure employers are paying required amounts into the Unemployment Compensation Trust Fund.

Classification of workers

A worker is considered "misclassified" when an employer improperly classifies a worker as an independent contractor rather than an employee. Responsible employers may misclassify workers unintentionally because they are unclear or confused about what constitutes employment. However, some employers may intentionally misclassify workers to significantly reduce labor costs and related employment taxes. Overall, the U.S. Department of Labor (USDOL) estimates 30 percent of companies nationwide misclassify workers. The construction industry is particularly prone to misclassification abuse. Studies conducted by the U.S. General Accounting Office (GAO) and for the USDOL show the construction industry has the highest percentage of independent contractors (22 percent) and the highest incidence of misclassification.

USDOL requirements

The USDOL Tax Performance Systems Manual states Tax Performance System audits should be performed on at least 2 percent of contributory employers in the state annually. Missouri had approximately 134,900 contributory employers as of December 31, 2009. In addition, USDOL guidance encourages 10 percent of the audits be selected randomly.

¹ Contributory employers are employers who are liable to pay unemployment insurance taxes as defined by Section 288.032, RSMo.



Misclassified Worker Investigation Procedures Introduction

Impacts of misclassified workers

The GAO² estimates the financial impact to the federal government as a result of misclassified workers to be \$1.6 billion annually. The misclassification of workers can have adverse effects on the worker, compliant employers, and the state and federal government. Workers classified as independent contractors do not receive unemployment insurance benefits if laid off or workers' compensation if injured on the job, and they rarely receive health insurance or other fringe benefits. Independent contractors are also required to withhold and report taxes at a higher self-employed tax rate. Federal and state laws benefiting employees such as legislation on wages, health and safety, and leave acts do not cover independent contractors.

Employers who misclassify workers as independent contractors have an unfair cost advantage over employers who properly classify workers. Employers that misclassify workers as independent contractors can achieve substantial savings by not paying unemployment taxes, workers' compensation insurance, and social security withholdings; are not subject to overtime or minimum wage requirements; and do not include workers in company benefit plans. Because employers who misclassify workers do not pay into the unemployment or workers' compensation pools, compliant employers must pay a higher portion of the costs for these coverages than they otherwise would.

Misclassified workers negatively impact state government through lost income taxes, lost unemployment taxes, and lost workers' compensation taxes. The federal government also loses income taxes, unemployment taxes, and other payroll taxes such as social security and Medicare. Independent contractors are less likely to report all income and therefore pay less taxes. The IRS reports that employees accurately report 99 percent of their wages, while self-employed individuals accurately report only 43 percent of their income. Based on DOLIR estimates, misclassification of workers results in the underreporting of approximately \$423 million in taxable wages and costs the Unemployment Compensation Trust Fund approximately \$10 million in contributions annually. In addition, the misclassification of workers results in the estimated underpayment of \$21.5 million in workers' compensation premiums, and costs the Workers' Compensation Fund approximately \$215,000 annually and the Second Injury Fund approximately \$646,000 annually, according to DOLIR estimates.

² Government Accountability Office: *Employee Misclassification; Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*. Report No. 09-717, August 2009.



Misclassified Worker Investigation Procedures Introduction

Scope and Methodology

To evaluate the DOLIR processes for identifying and investigating misclassified workers in Missouri, we interviewed officials at the DOLIR, DES, and Division of Workers' Compensation. We also interviewed state labor officials in Indiana, New Jersey, New Mexico and Illinois.

To evaluate the effectiveness of identifying misclassified workers by the DOLIR, we obtained and analyzed monthly audit result reports performed by DES field auditors. We also analyzed where Missouri ranked among other states in identifying misclassified workers by reviewing audit performance reports completed by the USDOL for calendar years 2005 through 2009. We reviewed audit reports or other documents related to some of the top performing states such as Indiana, Illinois, Idaho, and New Jersey to identify any practices that could potentially be implemented in Missouri to improve effectiveness.

We reviewed audit reports issued by the USDOL and the GAO for recommendations that may benefit Missouri. We also considered recommendations made by the USDOL through training programs provided to state labor officials.

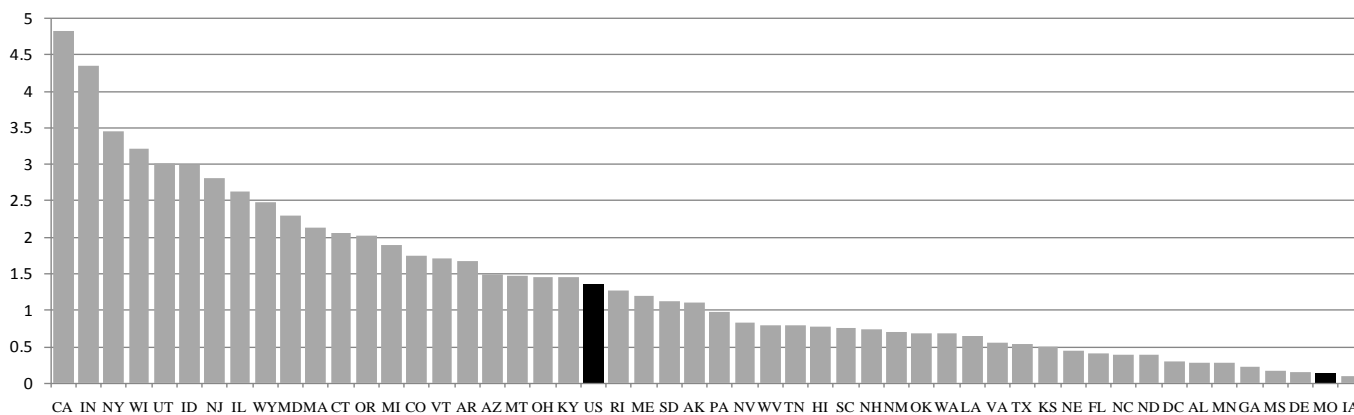
Misclassified Worker Investigation Procedures Management Advisory Report State Auditor's Findings

Identification of Misclassified Workers

Opportunities exist for the Missouri Department of Labor and Industrial Relations (DOLIR) to improve the process of identifying and investigating misclassified workers. According to United States Department of Labor (USDOL) data, the DOLIR ranks among the lowest in the nation at identifying misclassified workers. Causes for Missouri's low performance include (1) the need for a better method to select employers to audit, (2) not performing follow-up audits, (3) state law not clearly defining employee versus independent contractor, (4) not fully utilizing Form 1099 data, and (5) not enforcing penalties against employers who intentionally misclassify employees.

Audit effectiveness

The DOLIR ranks 50th of 51 state labor agencies (includes the District of Columbia) in the nation in misclassified worker audit effectiveness, according to USDOL data from calendar years 2005 to 2009. Over that timeframe, the DOLIR identified an average of .14 misclassified workers per audit conducted, while the national average over the same time frame was 1.36 misclassified workers per audit. See the Appendix for detailed audit effectiveness data. The following graph shows the average number of misclassified workers identified per audit conducted for 2005 through 2009, by state.



The DOLIR audit effectiveness dropped to .07 misclassified workers identified per audit during 2007 and 2008, ranking last in the nation for those years. According to discussions with DOLIR officials, this decline in performance was a result of a reduction in staffing of the Contributions Field Section from 88 auditors to 23 auditors. In addition, travel restrictions implemented during 2007 and 2008 prohibited field staff from conducting in-person, non-audit investigations. The administration increased staffing in 2009, to 48 auditors, resulting in a slight increase in the number of misclassified workers identified through audits.

An increase in audit effectiveness would result in significant increases in unemployment contributions and taxable wages. According to our analysis



Misclassified Worker Investigation Procedures Management Advisory Report - State Auditor's Finding

based on data from the DOLIR and the USDOL, if Missouri were to improve audit effectiveness to match the national average of 1.36 misclassified workers identified per audit, taxable wages reported would increase an estimated \$38 million annually, and contributions to the Unemployment Compensation Trust Fund would increase by an estimated \$800,000 annually. These increases would also result in annual estimated increases in contributions to the Workers' Compensation Fund of \$19,500 and to the Second Injury Fund of \$58,600.

Audit selection

From 1998 until 2010, the DES did not use a targeted, risk-based, approach to select employers to audit. Despite the USDOL encouraging a 10 percent random audit selection, the Division of Employment Security (DES) used 100 percent random audit over that timeframe. As a result, industries that historically have shown higher instances of misclassification have not received increased audit coverage. The use of a targeted, risk-based, selection process has been shown to be a more effective means of audit selection. Eight of the top ten performing states utilize targeted audit selection methods. In addition, a federal audit³ of state unemployment insurance audit techniques concluded unemployment insurance audits should be "selectively targeted to maximize the discovery of improper employer reporting." According to Idaho officials, based on audits conducted from 2004 to 2008, targeted audits took 1.6 times longer to perform than random audits, but discovered six times the number of misclassified employees per audit.

In January 2010, the DES began using targeted audit selections and reduced the percentage of random audits to 25 percent. As a result of audit inquiries, the DES reduced the percentage of randomly selected audits down to the USDOL encouraged level of 10 percent. Currently targeted audits are selected from three pools including high risk, high error, and non-compliant. According to DOLIR data, targeted audits have identified .53 misclassified workers per audit in 2010, which is 3.5 times more than the per audit average identified via random selection from 2005 to 2009. The DES is in the process of evaluating and refining targeted audit selection criteria. By continuing to refine the audit selection process the DOLIR can significantly improve its effectiveness in identifying misclassified workers.

Follow-up audits

The DES does not perform follow-up audits of employers that misclassify workers. Discussions with officials from Indiana, which was among the most effective states in terms of identifying misclassified employees according to USDOL data, indicated they conduct follow-up audits of

³ USDOL, Office of Inspector General Audit: Adopting Best Practices Can Improve Identification of Noncompliant Employers For State UI Field Audits. Report No. 03-99-006-03-315.



Misclassified Worker Investigation Procedures Management Advisory Report - State Auditor's Finding

employers if it appears issues have not been resolved. Indiana judgmentally selects the most significant cases based on the dollar amount of wages underreported and the number of misclassified workers identified during previous audits. Indiana follow-up audits consist of a review of wage history reports of employers to determine if employees are properly reported and issues found during a previous audit have been resolved. According to a federal audit report³, conducting follow-up audits is a cost-effective method of ensuring corrective action is taken by employers found to have misclassified workers. The report also indicates states that perform follow-up audits found previously audited employers continue to improperly classify employees as independent contractors. By performing follow-up audits, the DOLIR can determine whether non-compliant employers continue to misclassify workers.

Misclassification definition

The statutory definition of an "employee" in Missouri is more subjective than the majority of other states, resulting in less efficient reviews and more confusion among employers. State law⁴ currently requires the use of the IRS 20-factor test to define workers as employees or independent contractors. However, the 20-factor test is very subjective because multiple factors must be weighed, some factors may not be used, and relevant factors can differ with each situation, making it more difficult for employers and the DES to determine if a worker is an employee or independent contractor. According to a study⁵ done for the USDOL, Missouri is only one of four states that use the 20-factor test. The USDOL recommends the use of the "ABC" test to make classification determinations. The ABC test includes only 3 factors, and is much less subjective than the 20-factor test. The majority of other states, including eight of the top ten performing states, utilize a version of the ABC test.

A "best practices" presentation⁶ by Indiana labor officials noted the importance of having a state law that clearly defines an employee versus an independent contractor. A clear definition helped unemployment insurance auditors more definitively identify misclassified employees and resulted in more efficient and definitive audits.

Form 1099 data

The DOLIR does not adequately utilize Form 1099 data from the Internal Revenue Service (IRS) to identify misclassified workers. A federal audit³ of state unemployment insurance audit techniques stated the most powerful tool for identifying misclassified workers and searching for hidden wages is the use of IRS Form 1099 data. Four of the top five states in identifying

⁴ Section 288.034, RSMo.

⁵ Planmatics Inc.: Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, February 2000.

⁶ Indiana Workforce Development: 2009 National Unemployment Insurance Tax Conference



Misclassified Worker Investigation Procedures Management Advisory Report - State Auditor's Finding

misclassified employees during unemployment insurance audits use Form 1099 information to target audits and assist with misclassified employee investigations.

The DES pursued legislative changes in 2009 and 2010 which would have required Form 1099 data to be reported to the DES. However, no legislative changes were enacted by the legislature. In addition, the DES began steps to develop a computer program in 2009 that would allow Form 1099 data received from the IRS to be more effectively utilized, but has yet to make such a system operational. Better use of Form 1099 data will allow the DOLIR to more effectively identify misclassified workers.

Penalties

The DES has not utilized the ability to penalize employers for intentionally misclassifying workers. Section 288.160.4, RSMo, allows the division to penalize an employer 25 percent of the amount the state has been defrauded in the event "fraud or evasion on the part of any employer is discovered by the division." DES officials stated they have not reported fraud on any employer for misclassifying workers until recently because they bear the burden of proof that the misclassification of the worker was intentional. DES policy in the past was to accept employers' justification for classifying employees as independent contractors, since employers typically state they misunderstood the law and the definition of an employee. Some other states, including New York, Maryland, New Jersey, Colorado, and Wisconsin have the ability to assess penalties without a finding of fraud.

A modification in state law to allow penalties for misclassification without a finding of fraud, or at a minimum, a change in policy to make more fraud determinations against employers found to be intentionally misclassifying workers, would deter more employers from knowingly misclassifying workers.

Recommendations

The DOLIR:

1. Monitor targeted audit results and adjust audit selection strategies as necessary to maximize the effectiveness of audits performed.
2. Establish procedures to perform follow-up audits on employers with significant noncompliance issues.
3. Continue efforts to allow for more effective use of Form 1099 data.
4. Work with the General Assembly to modify state law to simplify the definition of employees and independent contractors.
5. Work with the General Assembly to establish criteria to help determine when employer fraud has occurred, and/or provide the authority to assess penalties without a finding of fraud.



Misclassified Worker Investigation Procedures
Management Advisory Report - State Auditor's Finding

Auditee's Response

1. *The DOLIR and the DES agree with the auditor's recommendation. In an attempt to audit employers with highest levels of discrepancy, all audit results are monitored and new industry codes are chosen to be included in the audit selection programming. When the DES implemented targeted audits, it identified 50 industry codes to be included in the audit selection programming. That number has since grown to almost 100 different industry codes. The DES will continue to monitor audit results looking for the most productive split between random audits and targeted audits.*
2. *The DOLIR and the DES agree with the auditor's recommendation. The DES will establish a follow-up procedure on audited employers that had significant noncompliance issues.*
3. *The DOLIR and the DES agree with the auditor's recommendation. The DES recently applied for a USDOL grant to develop a Misclassified Workers Detection System (MWDS) that will contain multiple selection criteria to identify employers or employing units who are most likely to have misclassified workers. The goal is to develop two databases: one that contains specifically IRS 1099 data and a second containing information from 12 data fields currently in the DES legacy computer system. The MWDS will be used to target employers for audit.*
4. *The DOLIR and the DES agree with the auditor's recommendation. The DOLIR and the DES stand ready to provide information and work with Missouri's General Assembly to modify the test used in chapter 288, RSMo, to determine the employment status of workers.*
5. *The DOLIR and the DES agree with the auditor's recommendation. The DOLIR and the DES stand ready to provide information and work with Missouri's General Assembly to create a statute that would more clearly define employer fraud as it pertains to misclassified workers and allow the DES to assess penalties without a finding of fraud.*

Misclassified Worker Investigation Procedures

Appendix

National Audit Effectiveness Statistics and Rankings

The following table shows the number of misclassified workers identified per audit and national rank, by state, for audits conducted from calendar year 2005 through 2009.

Misclassified Workers Identified per Audit

State	2009		2008		2007		2006		2005		Average	
	Data	Rank	Data	Rank	Data	Rank	Data	Rank	Data	Rank	Data	Rank
California	2.30	13	3.18	6	4.54	4	5.08	2	8.99	1	4.82	1
Indiana	3.16	6	3.83	3	4.96	3	5.34	1	4.48	2	4.35	2
New York	6.56	1	6.55	1	1.45	17	1.43	21	1.29	19	3.46	3
Wisconsin	4.09	2	3.31	4	4.03	5	2.73	6	1.87	12	3.21	4
Utah	3.89	4	5.34	2	2.30	9	2.35	9	1.23	20	3.02	5
Idaho	1.23	22	2.62	9	5.57	1	3.48	3	2.03	10	2.98	6
New Jersey	2.98	8	2.79	7	2.77	7	2.69	7	2.77	3	2.80	7
Illinois	2.45	12	3.30	5	2.92	6	2.89	5	1.57	14	2.63	8
Wyoming	0.45	42	2.71	8	5.35	2	1.58	19	2.27	7	2.47	9
Maryland	3.65	5	2.14	10	1.37	20	2.25	11	2.03	11	2.29	10
Massachusetts	2.58	10	1.88	13	2.00	11	1.73	17	2.47	4	2.13	11
Connecticut	2.08	15	2.04	11	1.88	12	2.04	13	2.30	6	2.06	12
Oregon	1.88	17	1.83	14	2.00	10	2.26	10	2.18	8	2.03	13
Michigan	2.00	16	1.89	12	2.40	8	1.70	18	1.51	15	1.90	14
Colorado	2.59	9	1.83	15	1.53	15	1.34	22	1.44	17	1.75	15
Vermont	2.46	11	1.58	16	1.24	22	1.16	26	2.08	9	1.70	16
Arkansas	3.96	3	0.31	45	1.40	18	1.15	27	1.59	13	1.68	17
Arizona	2.10	14	1.14	19	1.31	21	1.79	15	1.16	21	1.50	18
Montana	1.87	18	1.57	17	1.62	14	1.23	25	1.12	22	1.48	19
Ohio	0.87	26	1.25	18	1.64	13	2.59	8	0.93	24	1.45	20
Kentucky	1.03	23	1.09	20	0.88	27	3.14	4	1.10	23	1.45	21
US Average	1.48		1.33		1.38		1.37		1.23		1.34	
Rhode Island	0.88	25	0.88	25	1.03	24	1.23	24	2.32	5	1.27	22
Maine	0.73	28	0.74	28	0.93	26	2.08	12	1.47	16	1.19	23
South Dakota	0.62	36	0.89	23	0.85	29	1.98	14	1.33	18	1.13	24
Alaska	1.70	19	0.92	22	1.49	16	0.86	30	0.54	35	1.10	25
Pennsylvania	3.10	7	0.88	24	0.45	39	0.41	39	0.06	48	0.98	26
Nevada	0.63	33	0.48	36	0.95	25	1.52	20	0.57	33	0.83	27
West Virginia	0.71	30	0.75	27	0.76	30	0.88	28	0.84	25	0.79	28
Tennessee	1.23	21	0.72	30	0.62	34	0.56	35	0.80	27	0.79	29
Hawaii	0.38	44	0.31	44	0.86	28	1.76	16	0.55	34	0.77	30
South Carolina	0.78	27	0.81	26	0.73	31	0.72	31	0.78	28	0.76	31
New Hampshire	1.40	20	0.62	31	0.50	37	0.57	33	0.62	30	0.74	32
New Mexico	0.60	37	0.59	32	0.72	32	1.24	23	0.40	40	0.71	33
Oklahoma	0.63	34	0.42	38	1.03	23	0.55	36	0.81	26	0.69	34
Washington	0.90	24	0.93	21	1.39	19	0.10	49	0.10	47	0.68	35
Louisiana	0.47	40	0.52	34	0.64	33	0.88	29	0.73	29	0.65	36
Virginia	0.45	43	0.74	29	0.53	35	0.57	32	0.54	36	0.56	37
Texas	0.65	31	0.48	35	0.52	36	0.57	34	0.46	37	0.54	38



Misclassified Worker Investigation Procedures
 Appendix
 National Audit Effectiveness Statistics and Rankings

State	2009		2008		2007		2006		2005		Average	
	Data	Rank	Data	Rank	Data	Rank	Data	Rank	Data	Rank	Data	Rank
Kansas	0.56	38	0.56	33	0.49	38	0.34	41	0.58	32	0.51	39
Nebraska	0.73	29	0.39	40	0.34	42	0.30	43	0.44	39	0.44	40
Florida	0.46	41	0.38	41	0.40	40	0.38	40	0.45	38	0.41	41
North Carolina	0.64	32	0.45	37	0.28	44	0.34	42	0.28	42	0.40	42
North Dakota	0.52	39	0.41	39	0.22	45	0.54	37	0.29	41	0.39	43
District of Columbia	0.62	35	0.16	49	0.17	46	0.46	38	0.10	46	0.30	44
Alabama	0.33	46	0.29	46	0.32	43	0.27	44	0.18	43	0.28	45
Minnesota	0.21	48	0.21	48	0.15	48	0.20	47	0.61	31	0.27	46
Georgia	0.30	47	0.22	47	0.34	41	0.20	46	0.12	45	0.23	47
Mississippi	0.35	45	0.32	42	0.10	50	0.09	51	0.04	51	0.18	48
Delaware	0.18	49	0.31	43	0.13	49	0.13	48	0.04	50	0.16	49
Missouri	0.17	50	0.07	51	0.07	51	0.26	45	0.15	44	0.14	50
Iowa	0.11	51	0.11	50	0.16	47	0.09	50	0.05	49	0.10	51

Source: Various United States Department of Labor reports accessed at www.workforcsecurity.doleta.gov.