
January 15, 2019

Performance Audit
Recommendations and
Corrective Actions for Audit:
15-7

**WORKER
MISCLASSIFICATION**

Action Needed to Better Detect
and Prevent Worker
Misclassification

Dated: August 31, 2015

Overview

The State Auditor's Office (SAO) makes recommendations designed to improve the operations of state government. For our work to produce benefits, auditees or the General Assembly must implement these recommendations, although we cannot require them to do so. Nevertheless, a measure of the quality and persuasiveness of our performance audits is the extent to which these recommendations are accepted and acted upon. The greater the number of recommendations that are implemented, the more benefit will be derived from our audit work.

In 2010, the SAO began to follow-up on the recommendations issued in our performance audits. Experience has shown that it takes time for some recommendations to be implemented. For this reason, we perform our follow-up activities one and three years after the calendar year in which the audit report is issued. Our annual performance reports summarize whether we are meeting our recommendation implementation targets.

<http://auditor.vermont.gov/about-us/strategic-plans-and-performance-reports>

This report addresses the requirements of Act 155 (2012) to post the results of our recommendation follow-up work on our website. The report does not include follow-up on recommendations issued as part of the state's financial statement audit and the federally mandated Single Audit, which are performed by a contractor. However, our current contract for this work requires the contractor to provide the results of its recommendation follow-up.

Audit Number & Name	Rec #	Recommendation	Follow-Up Date	Status	Review Comments
15-7 Worker Misclassification - Action Needed to Better Detect and Prevent Worker Misclassification	VDOL-1	Schedule Misclassification Task Force meetings and ensure that all of the required actions are addressed.	2016	Partially Implemented	<p>The Vermont Department of Labor (VDOL) provided meeting minutes that indicated the Misclassification Task Force met five times from September 2015 through May 2016 to discuss combating the practice of employee misclassification. For example, our review of meeting minutes confirmed the task force (1) met with stakeholders to review existing statutes and solicit input for proposed legislative changes; (2) worked on the new Bulletin 3.5 for contracting services; and (3) developed an ad campaign, funded by a \$750,000 United States Department of Labor (USDOL) grant to educate Vermonters about misclassification. The legislative draft related to misclassification was introduced by VDOL during the 2015 legislative session, but was not adopted. The most recent task force meeting held on May 25, 2016 included a discussion related to upcoming priorities, i.e., outreach, joint enforcement, more guidance for employers, and reviews of attachments in state contracts. The task force continues to work with agencies, departments, businesses, and other stakeholders to reduce employee misclassification, enforce timely penalties, and other charges mandated by Executive Order No. 08-12. VDOL did not address the required task force actions to examine and evaluate the existing misclassification enforcement by agencies and departments.</p>
			2018	Implemented	<p>VDOL reports holding Task Force meetings on 9/19/16, 1/20/17, and 8/10/17. During the 8/10/17 meeting the Task Force examined how misclassification impacts their agency or department and there was some discussion about enforcement by agencies and departments that are part of the Task Force.</p>
	VDOL-2	Expediently update the Unemployment Insurance (UI) rules related to misclassification to cover all penalties allowable by statute.	2016	Not Implemented	<p>VDOL reported UI Employment Board rules have not been filed with the Interagency Committee on Administrative Rules (ICAR). The rules are being finalized and VDOL will provide a copy to our office when filed and approved by ICAR. Copies of the draft rules could not be provided, therefore, this recommendation is not considered implemented.</p>
			2018	Partially Implemented	<p>VDOL reports that the UI Division has drafted rules that are awaiting the Commissioner's approval and provided a copy of the draft.</p>
	VDOL-3	Expediently update Workers' Compensation (WC) rules related to misclassification to cover all penalties allowable by statute.	2016	Not Implemented	<p>VDOL provided a draft copy of proposed rule #45 for workers' compensation penalties and reported it has been filed and approved by ICAR. However, we could not find evidence from either the ICAR or the Legislative Committee on Administrative Rules (LCAR) website to support the approval. It appears these draft rules were available at the time of the audit in 2015 and the department has not finalized and approved the rules.</p>
			2018	Implemented	<p>VDOL updated their workers' compensation rules related to misclassification which became effective 2/13/17 and reports that those rules have been used for all cases arising after that date.</p>

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15-7 Worker Misclassification - Action Needed to Better Detect and Prevent Worker Misclassification	VDOL-4	Implement the use of the billing and accounts receivable modules in VISION for WC penalty receivables.	2016	Implemented	VDOL reported that penalty agreements and payments have been entered into VISION. VDOL provided supporting examples from VISION which showed a billing statement and report for the A/R activity related to WC penalties which corroborates implementation.
	No further follow-up is required because the recommendation was implemented.				
	VDOL-5	Increase the percentage of UI audits that are conducted based upon targeted audit selection criteria.	2016	Implemented	VDOL reported they use fraud tips to better target potential misclassification and have added target industries per region, such as building and trade, transportation and trucking, landscaping, and hotel and restaurants to their audit selection criteria. VDOL provided examples of their 3rd and 4th quarter 2016 audit selection criteria which shows they are targeting their audits based on region, industry, and fraud tips.
	No further follow-up is required because the recommendation was implemented.				
	VDOL-6	Develop written procedures on how UI field audit performance data should be entered into the CATS 53 screen.	2016	Implemented	VDOL provided a copy of the written procedures used since August 2016 for entering UI field audit performance data into the employer contribution tax system (CATS) 53 system. We reviewed the procedures and noted that this entry is now being performed by field audit staff instead of VDOL's central office staff. VDOL believes this will help eliminate data entry errors.
	No further follow-up is required because the recommendation was implemented.				
	VDOL-7	Expediently implement documented supervisory review of the manual data entry of UI performance audit results into CATS.	2016	Implemented	The UI field audit performance data entry procedures include supervisory reviews by the Chief Field Auditor Supervisor. If errors are noted, the supervisor will notate and initial with red ink and return the documentation to the field auditor. The final completed audit with a validation signature is sent to the Employer Services Administrator and the supervisor makes a notation on the audit reference index that the audit passed the review for accuracy.
	No further follow-up is required because the recommendation was implemented.				
	VDOL-8	Revise the UI audit 53 report or develop another mechanism to reflect the final audit results that are to be manually entered into CATS.	2016	Implemented	VDOL now requires field audit staff to perform the function of data entry of completed audits into the CATS operating system.
	No further follow-up is required because the recommendation was implemented.				
	VDOL-9	Categorize and report the results of UI assignments based upon the nature of the work performed, not the source of the assignment. Specifically, if the procedures performed as a result of follow up on complaints and referrals are equivalent to the procedures established for audits in the federal guidance, categorize this work as an audit assignment.	2016	Implemented	VDOL reported that it has started to assign select misclassification fraud tips and referred compliance issue cases from other State Agencies as audits rather than assigning them as fraud assignments. VDOL continues to work with field audit staff on recognizing when a field assignment should be converted to a audit assignment. As of December 2016, VDOL provided us with a list of audits contained in their audit selection report and it appears to contain audits that were performed based on tips and complaints.
	No further follow-up is required because the recommendation was implemented.				

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			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016. Because two years have passed without finalization of the WC case management standards, we consider this recommendation to be not implemented.
	VDOL-11	Ensure that all active cases are recorded in the WC investigations database, review the accuracy of the case data and make corrections as needed.	2016	Partially Implemented	VDOL provided a draft copy of the department's WC standards for WC investigations which states that all complaints, referrals, and all activities involving investigations must be entered into the database by the investigator. Other than communicating that all active cases must be recorded in the investigators database, no other measures were taken to ensure all cases are recorded.
			2018	Partially Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016. In 2016, VDOL provided a draft copy of the department's workers' compensation standards for workers' compensation investigations which states that all complaints, referrals, and all activities involving investigations must be entered into the database by the investigator. Other than communicating that all active cases must be recorded in the investigators database, no other measures were taken to ensure all cases are recorded.
	VDOL-12	Ensure WC utilizes the complaint and referral log system developed by UI.	2016	Not Implemented	VDOL reported they are working with the UI Division and IT to determine if the WC division can utilize the complaint and referral log system developed by UI. According to VDOL, the UI complaint and referral log system does not fit the needs of the Workers' Compensation and Safety Division's needs. VDOL did not provide any documentation to support these discussions.
			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.
	VDOL-13	Develop reporting functions for the WC database, including an aging schedule of outstanding cases, length of investigations, and status of key investigation activities.	2016	Not Implemented	VDOL reported that it is working with the UI division and IT, but did not provide any documentation to demonstrate the nature and status of the work that has occurred.
			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.

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			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.
	VDOL-15	Define which fields should be completed and develop a process to ensure that all required fields contain the requisite data.	2016	Not Implemented	VDOL reported the workers' compensation division is working on this as part of their case management protocol. However, VDOL did not provide any documentation to support these discussions.
			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.
	VDOL-16	Implement validation rules and other functions in the WC database that allow for standardized data entry.	2016	Not Implemented	VDOL reported the workers' compensation division is working with IT to change the database to allow for standardized data entry. However, VDOL did not provide any documentation to support these discussions. Validation rules have not been implemented.
			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.
	VDOL-17	Add fields for case assignment priority, issuance of multiple stop-work orders, and number of misclassified workers identified.	2016	Not Implemented	VDOL reported they are working with IT to add these fields to the database. We asked VDOL for evidence of the progress made but VDOL did not provide any supporting documentation. The fields have not been added to the database.
			2018	Not Implemented	VDOL has not reported any additional corrective actions taken since the last time the SAO followed-up in 2016.
	BGS-1	Amend the self-reporting form to require bidders to provide information regarding any of the contractor's past violations, convictions, or suspensions related to employee misclassification.	2016	Not Implemented	The Department of Buildings and General Services (BGS) revised the self-reporting form by changing the title from "Workers' Compensation" to "Worker Classification." However the body of the form has not been revised and still specifies that bidders are required to provide classification violations related to WC. The form should state that bidders are required to self-report violations relative to employee misclassification which can also include violations related to UI. Otherwise, there is a risk that a bidder would limit self-reporting only to WC and not to employee misclassification, including UI.
			2018	Not Implemented	BGS reported that the Worker Classification Compliance Requirement, Subcontractor Reporting Form fully complies with 2009, No.54, § 32(a)(2). However, the new form still specifies that bidders are required to provide classification violations related to WC. The form should state that bidders are required to self-report violations relative to employee misclassification which can also include violations related to UI. Otherwise, there is a risk that a bidder would limit self-reporting to classification violations for WC and not include classification violations for UI.

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			2018	Not Implemented	BGS reported that this recommendation was not implemented.
	BGS-3	Modify procedures to ensure the subcontractors' WC insurance information is obtained during the course of the project for those subcontractors added subsequent to contract execution.	2016	Partially Implemented	BGS amended attachment C of the state's contract template to require contractors to provide subcontractor WC information for contracts greater than \$250K. BGS provided a revised subcontractor reporting form which states that contractors must submit the form prior to contract execution and provide an update as additional subcontractors are hired. In lieu of written procedures, BGS Office of Purchasing & Contracting (OPC) plans on having a mandatory meeting with project managers (PMs) in October 2016 to convey expectations that PMs are to assist with contractor's compliance in this area. Although BGS has designed a new form and added language to the contracts that require contractors and subcontractors to report WC information. BGS has not provided any evidence that they have procedures and are checking to make sure subcontractors WC insurance has been provided.
			2018	Partially Implemented	BGS amended the Worker Classification Compliance Requirement Subcontractor Reporting Form which now states that contractors must submit the form prior to contract execution and provide an update as additional subcontractors are hired. OPC reports that they collaborate with PMs as needed to ensure compliance with this requirement. However, there are no written procedures regarding ensuring that subcontractors' WC insurance information is obtained during the course of a project for those subcontractors added subsequent to the contract execution.

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			2018	Implemented	BGS updated their Contract Tracking System to record the date that they received the Worker Classification Compliance Requirement Subcontractor Reporting Form.
	BGS-5	Ensure that all requisite documentation is obtained on a timely basis.	2016	Implemented	BGS updated the bidding instructions and bid proposal form which now requires contractors to provide worker classification and subcontractors' WC coverage prior to contract execution.
			No further follow-up is required because the recommendation was implemented.		
	AOT-1	Amend the self-reporting form to require bidders to provide information regarding any of the contractor's past violations, convictions, or suspensions related to employee	2016	Implemented	AOT provided a copy of the self-reporting form, amended on December 30, 2015, which requires bidders to provide information on past violations related to worker misclassifications. In addition, AOT has created two new forms to be used for verifying contractors and subcontractors WC coverage.
			No further follow-up is required because the recommendation was implemented.		
	AOT-2	Work with VDOL, DFR, and BGS to clarify and document each organization's role with regard to verification of information reported in the self-reporting and subcontractor reporting forms.	2016	Partially Implemented	In February 2016, AOT began sending a weekly list of bidders to VDOL requesting notification of any AOT bidder with record of current or past violations related to unemployment insurance or workers compensation. Feedback from VDOL indicated they appreciated VTrans' proactive approach in verifying this information. In addition, AOT amended the subcontractor reporting form on December 16, 2015 which requires its prime contractors to collect evidence of workers' compensation coverage from all subcontractors.
			2018	Partially Implemented	AOT has not taken any additional corrective actions since our last follow-up in 2016. AOT reports that they continue to send a list of bidders to VDOL weekly but did not provide evidence that VDOL responds to these requests. In addition, there has been no documentation of each organization's role with regard to verification of information in the self-reporting and subcontractor reporting forms.

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15-7 Worker Misclassification - Action Needed to Better Detect and Prevent Worker Misclassification	AOT-3	Provide additional training for employees to ensure the procedures are followed.	2016	Not Implemented	AOT has not implemented our recommendation. However, in July 2016, AOT implemented a semiannual protocol to audit the prime contractors' tracking of sub-contractors WC insurance coverage. The results of the next semi-annual audit will be used as an agency-wide training aid and integrated into the worker classification and insurance training during annual training schedules. No training was provided as recommended.
			2018	Implemented	AOT reports that their employees whose work touches upon the misclassification issue, both dealing with prime contractors and approving subcontractors, are regularly reminded of the importance of verifying workers compensation insurance. Employees in the construction section, contract administration, civil rights, and the audit section regularly communicate about insurance renewals and collecting evidence of compliance. AOT now performs semi-annual audits regarding workers' compensation insurance and reports that their audits have proven to be an effective communication/education tool with AOT employees as well as contractors. AOT reports that they circulate the audit results to the appropriate staff.
	AOT-4	Update procedures for non-construction contracts to incorporate the Act 54 revisions and forms.	2016	Not Implemented	AOT has begun working on a new manual for non-construction contracts which will include updated procedures to incorporate the Act 54 revisions and forms. AOT expects to have a working draft available for input by February 1, 2017.
			2018	Implemented	During 2018 AOT issued new manuals for both construction and non-construction contracts that incorporated the Act 54 revisions and forms regarding Workers' Compensation insurance. Additionally, AOT prepared an insurance requirement paper to provide to those with contracts and grants that were not in those two major categories.