

# SUNSET REVIEW: EVALUATION OF THE DIVISION OF LABOR AND INDUSTRY AND ASSOCIATED BOARDS AND COUNCILS



DEPARTMENT OF LEGISLATIVE SERVICES OCTOBER 2012

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# **Sunset Review: Evaluation of the Division of Labor and Industry and Associated Boards and Councils**

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**Department of Legislative Services  
Office of Policy Analysis  
Annapolis, Maryland**

**October 2012**

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**DEPARTMENT OF LEGISLATIVE SERVICES**  
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**MARYLAND GENERAL ASSEMBLY**

**Warren G. Deschenaux**  
Director

October 31, 2012

The Honorable Thomas V. Mike Miller, Jr.  
The Honorable Michael E. Busch  
Honorable Members of the General Assembly

Ladies and Gentlemen:

The Department of Legislative Services (DLS) has completed its evaluation of the Division of Labor and Industry (DLI) and associated boards and commissions as required by the Maryland Program Evaluation Act. This evaluation process is more commonly known as “sunset review” because the agencies subject to evaluation are usually subject to termination; typically, legislative action must be taken to reauthorize them. This report was prepared to assist the committees designated to review the commission – the Senate Finance Committee and the House Economic Matters Committee – in making their recommendations to the full General Assembly. The division and the associated boards and commissions are all scheduled to terminate on July 1, 2014.

DLS has determined that most of DLI’s activities represent core functions of State government, namely protecting the health and safety of the workforce and enforcing employment standards and compensation requirements. Therefore, DLS recommends that DLI should not be subject to periodic termination under the Act because termination of these functions jeopardizes public health and safety. However, DLI should remain subject to periodic evaluation under the Act. DLS further recommends that the associated boards and commissions, specifically the Maryland Apprenticeship and Training Council, Maryland Occupational Safety and Health Advisory Board, Amusement Ride Safety Advisory Board, and Board of Boiler Rules, should remain subject to termination as they more closely resemble most other entities subject to termination under the Act in both structure and responsibilities. The Advisory Council on Prevailing Wage Rates is recommended for termination due to its prolonged inactivity.

As the evaluation shows, since the early 1990s, DLI has been asked to implement and enforce an increasing number of employment-related statutes without a commensurate increase in staff. The one exception is the Workplace Fraud Act, which resulted in the establishment of a new special-funded unit to enforce the law. Otherwise, DLI actively enforces only a limited number of the statutes under its jurisdiction, most notably those that do not have a federal counterpart. Other statutes are subject to more passive, or reactive, enforcement that responds to



The Honorable Thomas V. Mike Miller, Jr.

The Honorable Michael E. Busch

October 31, 2012

Page 2

formal written complaints by employees or consumers, which are rare. DLS offers a total of 13 recommendations designed to maximize the effectiveness of DLI's enforcement activities in this limited resource environment. In addition to repealing the termination of DLI and extending the termination dates of four associated boards and commission by 10 years to July 1, 2024, the recommendations (1) standardize DLI's statutory authority to enforce State employment laws; (2) improve the tracking and reporting of its enforcement activity; and (3) terminate the largely inactive Advisory Council on Prevailing Wage Rates. Draft legislation to implement the recommended statutory changes is included as an appendix to the report.

We would like to acknowledge the cooperation and assistance provided by the division, its staff, and officials from the Department of Labor, Licensing, and Regulation throughout the review process. The division was provided a draft copy of the report for factual review and comment prior to its publication; its written comments are included as an appendix to this report. Additional comments and corrections provided by the division were incorporated into the final report, so the final text may not reflect references in DLI's written response.

Sincerely,

Warren G. Deschenaux  
Director

WGD/MCR/mlm

# Contents

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<b>Executive Summary .....</b>	<b>vii</b>
<b>Chapter 1. Introduction .....</b>	<b>1</b>
Sunset Review Process .....	1
The Division of Labor and Industry.....	2
Research Activities .....	5
Report Organization.....	5
<b>Chapter 2. Employment Standards and Classification .....</b>	<b>7</b>
Many New Laws Have Been Enacted .....	9
Most State Labor Laws Are Not Actively Enforced by ESS.....	14
ESS Enforcement Focuses on the Wage Payment and Collection Law .....	19
<b>Chapter 3. Worker Classification.....</b>	<b>25</b>
Worker Classification Protection Unit.....	25
Workplace Fraud Addressed in 2009 through Legislative and Administrative Methods .....	25
Early Issues with Implementation Lead to Legislative and Administrative Changes .....	30
Issues Remain Despite Legislative and Administrative Changes .....	32
<b>Chapter 4. Miscellaneous Findings .....</b>	<b>37</b>
Advisory Council on Prevailing Wage Rates Should Be Repealed.....	37
Board of Boiler Rules Should Be Maintained within DLI .....	38
Termination Dates Should Be Maintained for Boards.....	40
<b>Appendix 1. Follow-up Report from the Board of Boiler Rules and Board of Stationary Engineers .....</b>	<b>41</b>
<b>Appendix 2. Follow-up Report from the Division of Labor and Industry .....</b>	<b>47</b>
<b>Appendix 3. Draft Legislation.....</b>	<b>59</b>
<b>Appendix 4. Written Comments of the Division of Labor and Industry and Associated Boards and Councils .....</b>	<b>93</b>



## Executive Summary

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Pursuant to the Maryland Program Evaluation Act, the Department of Legislative Services (DLS) has evaluated the Department of Labor, Licensing, and Regulation's (DLLR) Division of Labor and Industry (DLI) and associated boards and commissions, which are all scheduled to terminate July 1, 2014. DLS finds that DLI serves several critical core functions of State government, namely protecting the health and safety of the workforce and enforcing employment standards and compensation requirements. Therefore, DLI should be exempt from termination under the Act but should remain subject to periodic evaluation. The associated boards and commissions should retain their statutory termination dates. All entities evaluated should take steps to improve the implementation and enforcement of existing statutes

DLI has worked diligently to implement an increasing number of statutory mandates without a corresponding increase in staff. As a result, active enforcement by DLI is reserved for selected statutes that do not have federal counterparts, with other statutes subject to more passive, or responsive, enforcement. To maximize the division's effectiveness, DLS makes the following recommendations based on its findings.

Ten years ago, the General Assembly largely terminated DLI regulation of traditional employment agencies but maintained some consumer protections and required the remaining employment agencies to submit a penal bond to the commissioner. There are currently 43 registered bonds in Maryland and, according to DLI, there have been no complaints against employment agencies

since DLI's regulatory role was mostly repealed 10 years ago.

**Recommendation 1: Deregulating the State's role regarding employment agencies should be completed by eliminating the penal bond requirement in Title 9 of the Business Regulation Article, as the amount of the bond is *de minimus* and no claims have been made. But, since at least 43 employment agencies still exist, the remaining consumer protections in Title 9 should be maintained.**

Statute requires the Commissioner of Labor and Industry to enforce several labor laws in the Labor and Employment Article. Other labor laws contained in the article are silent as to whether the commissioner has any authority to enforce compliance with the laws. Despite the fact that the commissioner may not have authority to enforce compliance with several of these laws, most of the laws specifically authorize employees to bring an action if they believe their employer has violated any of these laws.

**Recommendation 2: To make State labor laws more consistent, statute should be amended to give the commissioner the authorization to investigate all labor laws enacted in Title 3 of the Labor and Employment Article with the understanding that, absent additional personnel and resources, most of these laws will not be actively enforced by DLI.**

**Recommendation 3: If the General Assembly chooses not to act on Recommendation 1, Section 3-103 of the Labor and Employment Article, which grants the commissioner investigative**

**authority on various labor laws, should be amended to reflect that the commissioner was given the authority to investigate complaints under provisions of the Job Applicant Fairness Act.**

Due to limited resources and because many State labor laws have federal counterparts, the State's policy has been to refer most inquiries to the federal government. In addition, the relatively low number of phone inquiries and paucity of written complaints indicates that the limited State and federal response to wage and hour concerns may be warranted. Regarding the other laws that authorize the commissioner to investigate compliance and that fall under DLI's purview, it has been and remains difficult to determine whether employers are complying with these laws.

**Recommendation 4: The commissioner should alter DLI's phone tally system to determine the subject of all calls received, which may allow the division to better determine the need for additional resources to address employee/employer problems.**

Chapter 151 of 2010 establishes an administrative procedure for resolving wage complaints involving \$3,000 or less whereby the Commissioner of Labor and Industry, or a designee, may issue a "wage order" requiring the employer to pay the claim if strong evidence exists indicating that an employer owes back wages to an employee. Prior to the authority granted by Chapter 151, the only recourse available to the commissioner for employers who did not voluntarily resolve a complaint was to refer the case to the Office of the Attorney General (OAG) for civil prosecution. The lack of an administrative remedy increased the backlog on unresolved wage payment and collection complaints and further delayed the resolution of a large number of cases that awaited adjudication.

Preliminary data show that the authority to issue wage orders has had a modest direct effect on the complaint backlog. In fiscal 2012, the first full year in which the commissioner exercised the authority to issue wage orders, ESS issued 89 wage orders. Based on data provided by ESS and confirmed by OAG, only 63 cases were referred to OAG in fiscal 2012, compared with more than 400 in each of the preceding three years. In addition, the average wages recovered for each closed case has doubled in four years, from about \$367 in fiscal 2009 to \$743 in fiscal 2012. However, more time is needed to determine whether the authority to issue wage orders will have a lasting effect on the complaint backlog.

**Recommendation 5: By October 31, 2013, DLI should submit a follow-up report to the appropriate committees of the General Assembly on the continued use and effectiveness of wage orders. The report should detail (1) the number of wage orders issued in each fiscal year; (2) the number forwarded to CCU for collection; (3) the number for which payment is ultimately collected; and (4) the total backlog in wage payment and collection cases. To the extent feasible, the report should explain the reason(s) for any substantial increase or decrease in the backlog compared with backlogs from prior years.**

Statute requires the Commissioner of Labor and Industry to prepare an annual report for the Secretary of Labor, Licensing, and Regulation on the annual activity of the Worker Classification Protection Unit. To date, the commissioner has not completed the mandated annual reports for the Secretary. During the evaluation, the unit initially referred inquiries about its annual data to the annual report required for the Joint Enforcement Task Force on Workplace Fraud – a report to which the unit contributes. However, the task force's report does not meet the more extensive statutory reporting requirements. Moreover, certain reporting

requirements are inconsistent with enforcement provisions.

**Recommendation 6: The Commissioner of Labor and Industry should comply with statutory reporting requirements related to the Workplace Fraud Act and prepare his own annual report for the Secretary of Labor, Licensing, and Regulation. This reporting requirement may be satisfied in conjunction with existing reporting by the commissioner to the Secretary as long as it complies with the statutory requirements regarding the content of the report. Statute should be amended to align reporting requirements with enforcement provisions and to include the General Assembly as a recipient of the report, in addition to the Secretary.**

The software used by the unit to track its activity (number of cases, fines assessed, duration of cases) and support its workflow was originally developed in-house as a cost-containment measure, but it still contains numerous bugs and flaws, and the software was not designed to meet all of the unit's needs. For much of the review process, the unit advised that its software was not functioning and that, therefore, it was unable to provide activity data requested by DLS.

**Recommendation 7: The unit should continue ongoing efforts to develop and implement an interim data-management system to track relevant data. By December 31, 2013, the unit should report to the General Assembly on the progress in its development of a long-term data management system. By December 31, 2014, the unit should have a fully developed and implemented data-management system that is capable of generating reports on historical data by fiscal year, generating form letters to employers who are the subject of investigations, and performing any other function deemed necessary by the commissioner.**

Given that the unit plans to conduct on-site investigations into worker misclassification, it is unclear if the current composition of the unit is ideal. The unit advises that it is difficult to "reach" workers, for two reasons. First, many job sites require multiple hours of travel to and from the location to conduct site visits. Second, the unit is experiencing a language barrier, as many workers in the construction and landscaping trades do not speak English and no fraud investigators are bilingual.

**Recommendation 8: DLI should assess the current complement of staff for the unit in light of the unit's new implementation strategy and experience in enforcement of the Act and address unmet needs when filling any vacancies that occur.**

The Act requires an employer to provide written notice to any exempt person or independent contractor of their status and the impact of their status. Regulations require the notice to be posted in the employer's office and at each work site. If the notice is not posted at each work site where the employer has workers who are exempt persons or independent contractors, the employer is in violation of the Act. However, statute only allows the unit to assess penalties for worker misclassification.

**Recommendation 9: Statute should be amended to authorize the Commissioner of Labor and Industry to assess a penalty for noncompliance with the Act's notification requirements to workers who are exempt persons or independent contractors.**

The unit continues to experience growing pains due to setbacks encountered in its initial implementation phase, managerial turnover, and software issues. With the effective date of July 1, 2012, for both a new implementation strategy and the most recent legislative changes to the Workplace Fraud Act, it is clear that the unit has made a "hard reset." Therefore, only three months of data exist to

reflect these changes, which is insufficient for a full assessment of their effectiveness.

**Recommendation 10:** By December 31, 2014, the Commissioner of Labor and Industry should report to the Governor and General Assembly on the status of the unit as required by the uncodified language in Chapter 188 of 2009. The report should (1) summarize the level of activity under the unit's new implementation strategy and assess the effectiveness of the unit's strategy and its outreach program; (2) explain the difference between initial estimates of citations and penalties and those experienced in practice, including the relatively few citations issued for worker misclassification; and (3) include the development status of the unit's long-term data management system and the system's ability to support the unit. Further, the report should evaluate, at a minimum, (1) the unit's annual data reports and their consistency with other agency audits of worker misclassification; (2) the unit's staffing composition relative to its implementation strategy; and (3) the unit's role in the larger context of the task force.

The six-member Advisory Council on Prevailing Wage Rates was established in 1969 and, pursuant to the Maryland Code, is supposed to advise and submit recommendations to the Commissioner of Labor and Industry on the commissioner's functions related to prevailing wage rate calculations. This evaluation has determined that the council has been largely dormant for at least 20 years; recent efforts to restart the council have resulted in a failure to produce a quorum at two of its three most recent meetings.

**Recommendation 11:** Statute should be amended to repeal the Advisory Council on Prevailing Wage Rates and delegate its duties to the Prevailing Wage Unit, which

**has been performing the functions for which the advisory council was created.**

Maryland's system of boiler regulation is split between two divisions of DLLR: (1) the Division of Occupational and Professional Licensing (O&P), which houses the State Board of Stationary Engineers; and (2) DLI, which houses the Boiler Inspection Unit (BIU) and the Board of Boiler Rules. The State Board of Stationary Engineers has regulatory jurisdiction over all of the State's stationary engineers, who operate and maintain steam and power generators, heating plants, boilers, pressure valves, and other systems. BIU oversees the inspection of boilers and pressure vessels and investigates any boiler and pressure vessel accidents. The Board of Boiler Rules recommends regulations for boilers and pressure vessels.

After reviewing the functions of the two regulatory boards dealing with boiler safety and the steps being taken to better coordinate their efforts, DLS has determined that there is no need to merge the two boards. The statutory authority for the State Board of Stationary Engineers requires it to meet at least twice annually with the Board of Boiler Rules to coordinate their activities, but no corresponding requirement exists in statute for the Board of Boiler Rules. All indications are that the boards did not consistently coordinate their meetings or activities until 2011, but that efforts at coordination have increased and are producing positive results. Nevertheless, for the sake of consistency in their respective statutes, DLS makes the following recommendation.

**Recommendation 12:** Statute should be amended to require the Board of Boiler Rules to meet at least twice annually with the State Board of Stationary Engineers to coordinate their activities and share members' expertise.

Most of DLI's activities involve core functions of State government: protecting

public health and safety and enforcing employment standards and compensation requirements. For instance, the Maryland Occupational Safety and Health program and the Safety Inspection program both perform vital public safety functions, and the need for the services they provide shows no signs of diminishing. In the case of the Prevailing Wage Unit and the Employment Standards Service Unit, the General Assembly has determined that the functions they perform are sufficiently important as to warrant a mandated minimum appropriation to maintain their activity. Based on these determinations, DLS sees no justification for subjecting DLI to periodic termination under the Act.

**should be amended to extend its termination date by 10 years, to July 1, 2024.**

At the same time, the Maryland Apprenticeship and Training Council, Maryland Occupational Safety and Health Advisory Board, Amusement Ride Safety Advisory Board, and Board of Boiler Rules resemble most of the other entities currently subject to termination under the Act. As regulatory or advisory bodies, they each have uncompensated members who are appointed to the entities for limited periods of time. Given the turnover in membership and the potential evolution of their roles and functions, there is no reason to exempt them from future termination. The Advisory Council on Prevailing Wage Rates is the fifth such entity under the purview of DLI, but it is recommended for repeal; if the recommendation is not adopted, the council should also retain a future termination date.

**Recommendation 13: Statute should be amended to repeal the termination date for the Division of Labor and Industry; however, DLI should remain subject to periodic evaluation under the Maryland Program Evaluation Act, with the next evaluation date set for July 1, 2023. Statute should be amended to continue the four associated boards and councils referenced above and to extend their termination dates by 10 years to July 1, 2024. If the Advisory Council on Prevailing Wage Rates is not repealed, statute**





# Chapter 1. Introduction

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## Sunset Review Process

This evaluation was undertaken under the auspices of the Maryland Program Evaluation Act (§ 8-401 *et seq.* of the State Government Article), which establishes a process better known as “sunset review” because most of the agencies subject to review are also subject to termination. Since 1978, the Department of Legislative Services (DLS) has evaluated about 70 State entities according to a rotating statutory schedule as part of sunset review. The review process traditionally begins with a preliminary evaluation conducted on behalf of the Legislative Policy Committee (LPC). Based on the preliminary evaluation, LPC decides whether to waive an agency from further (or full) evaluation. If waived, legislation to reauthorize the agency typically is enacted. Otherwise a full evaluation typically is undertaken the following year.

The Division of Labor and Industry (DLI) and its associated advisory boards and councils last underwent a full evaluation in 2002. Based on findings and recommendations in that evaluation, Chapter 316 of 2003 extended most of the termination dates applicable to DLI and its associated boards, councils, and programs to July 1, 2014.

DLS conducted a preliminary evaluation of DLI and associated boards and councils during the 2011 interim that examined the following units and programs within DLI, including entities that are separately subject to sunset evaluations but operate under DLI’s supervision. Those marked with an asterisk are separately authorized in statute to undergo an evaluation:

- Division of Labor and Industry (general administration);
- Apprenticeship and Training, including the Maryland Apprenticeship and Training Council\*;
- Employment Standards and Classification (ESC);
- Prevailing Wage Enforcement, including the Advisory Council on Prevailing Wage Rates\*;
- Occupational Safety and Health Program, including the Maryland Occupational Safety and Health Advisory Board\*;
- Safety Inspection, including the Amusement Ride Safety Advisory Board\*;
- Board of Boiler Rules\*.

Based on the preliminary evaluation’s findings, LPC approved the following recommendations for the 2012 interim:

- a full evaluation of ESC and the Advisory Council on Prevailing Wage Rates;
- follow-up reports on selected activities;

- defer decision on whether to waive the Board of Boiler Rules until submission of the required follow-up report; and
- waive from full evaluation and extend termination dates of all other units/programs and advisory boards included in the preliminary evaluation.

## **The Division of Labor and Industry**

### **Historical Structure**

The General Assembly established the Bureau of Industrial Statistics and Information – the forerunner of today’s DLI – in 1884 in response to the increased demands of the labor force during the Industrial Revolution. The bureau’s primary function was to collect statistics and information on the needs and abuses that existed in the various industries of the State. In 1916, the State Board of Labor and Statistics replaced the bureau. The main tasks of the board’s three commissioners were to (1) collect statistics on labor, agriculture, mineral products, transportation, and commerce; (2) operate free employment agencies; (3) investigate causes of unemployment; and (4) appoint boards of arbitration, as well as a deputy to arbitrate and settle labor disputes.

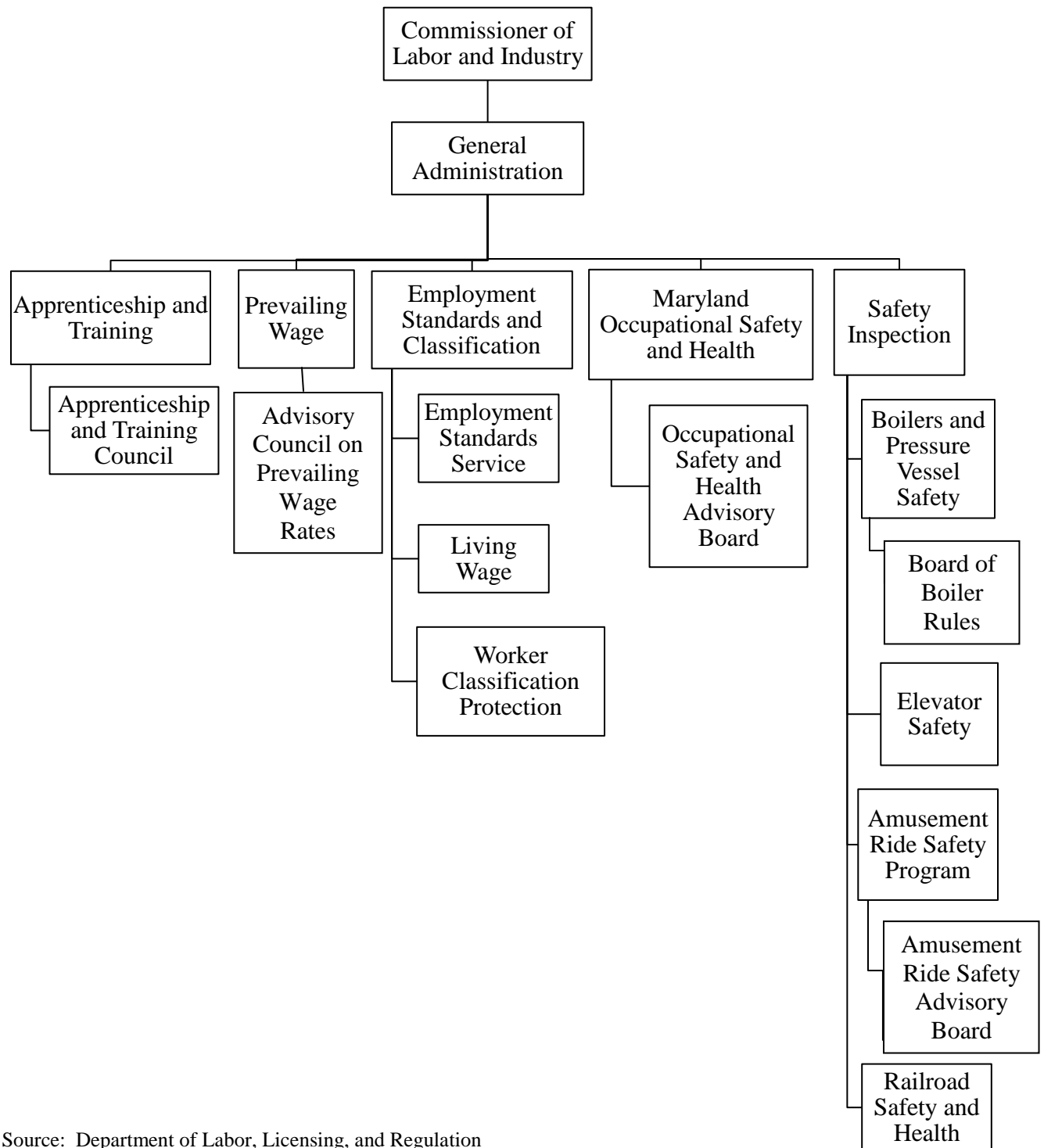
The duties of the three-person board were transferred to a single Commissioner of Labor and Statistics in 1922. In 1945, the administrative functions were transferred to the Department of Labor and Industry. Accordingly, the title of the agency’s administrator became the Commissioner of Labor and Industry. When the department was reorganized in 1970, Labor and Industry became a division within the Department of Licensing and Regulation, which is now the Department of Labor, Licensing, and Regulation (DLLR).

### **Current Organizational Structure**

DLI is charged with protecting and promoting the health, safety, and employment rights of Maryland residents. Among its responsibilities, DLI administers State laws addressing employment issues such as wage payment; employment of minors; occupational safety and health; worker classification; labor contractors; and safety inspection of amusement rides, boilers and pressure vessels, elevators and escalators, and railroads.

DLI consists of eight budgeted programs: (1) General Administration; (2) Apprenticeship and Training; (3) Employment Standards and Classification; (4) the Worker Classification Protection Unit; (5) the Prevailing Wage and Living Wage Unit; (6) Maryland Occupational Safety and Health (MOSH); (7) Safety Inspection; and (8) Railroad Safety and Health. **Exhibit 1.1** depicts the organizational structure of DLI and its programs as well as associated advisory boards and councils. DLI’s budgeted programs as well as the Board of Boiler Rules are described briefly in **Exhibit 1.2**, and the remainder of this report is organized around these programs. Some of the budgeted programs are actually subunits of other programs.

**Exhibit 1.1**  
**Division of Labor and Industry Organizational Structure**



Source: Department of Labor, Licensing, and Regulation

## Exhibit 1.2

### Programs within the Division of Labor and Industry

<b>General Administration:</b>	Major activities include program planning, development, implementation, evaluation, and design; adoption of regulations for DLI's programs; planning and management of the division's financial resources; and management of the issuance of work permits for minors throughout the State.
<b>Apprenticeship and Training:</b>	Promotes industry sponsorship of occupational training for the skilled trades and crafts and registers, certifies, and monitors skilled, craft, trade, and technical apprenticeship programs statewide.
<b>Employment Standards and Classification:</b>	Assists Maryland workers in resolving wage disputes and collecting wages owed to employees. The program also serves as a clearinghouse on many issues concerning employment in the State.
<b><i>Worker Classification Protection:</i></b>	Investigates cases of employee misclassification in the landscaping and construction industries in the State and levies fines against habitual offenders.
<b><i>Living Wage:</i></b>	Enforces wage rates for workers employed on State-funded service contracts through review of payroll records.
<b>Prevailing Wage:</b>	Determines and enforces wage rates for workers employed on State-funded public works projects through jurisdictional surveys, review of payroll records, and work site monitoring.
<b>Maryland Occupational Safety and Health:</b>	Administers the State's occupational safety and health laws – equivalent to the federal Occupational Safety and Health Act.
<b>Safety Inspection:</b>	Regulates the inspection of amusement rides and attractions, elevators, escalators, dumbwaiters, moving walks, wheelchair lifts, and boilers and pressure vessels.
<b><i>Railroad Safety and Health:</i></b>	Monitors the safety practices of railroad companies in the State by inspecting railroad tracks and equipment and reviewing operating practices. Supplements the national inspection program established under the Federal Railroad Administration.
<b><i>Board of Boiler Rules:</i></b>	Formulates definitions, rules, and regulations for the safe construction, use, installation, maintenance, repair, and inspection of boilers and pressure vessels for sale or use in Maryland.

Source: Department of Labor, Licensing, and Regulation

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## Research Activities

This evaluation focuses exclusively on the programs or entities within DLI that were identified for further evaluation in the preliminary evaluation, specifically the Employment Standards and Classification program and the Advisory Council on Prevailing Wage Rates. It also includes final recommendations for entities in cases where such recommendations were deferred pending the receipt of a follow-up report, specifically the Board of Boiler Rules. For a more complete discussion of DLI and its various components, the preliminary evaluation of DLI is available at <http://dls.state.md.us/content.aspx?page=104>.

In conducting this evaluation, DLS staff completed the following activities:

- interviewed the deputy commissioner as well as senior program managers and staff within ESC;
- interviewed the District director of the Wage and Hour Division in the U.S. Department of Labor's Baltimore District office;
- reviewed fiscal and performance data collected by DLI, including reports that are publicly available and those that are maintained internally;
- interviewed the program manager and staff within the Worker Classification Protection Unit;
- reviewed annual reports from the Division of Unemployment Insurance and the Joint Enforcement Task Force on Workplace Fraud;
- accompanied a fraud investigator with the Worker Classification Protection Unit on a field investigation;
- interviewed the lead attorney within the Office of the Attorney General's unit in DLLR;
- interviewed the chair of the Advisory Council on Prevailing Wage Rates; and
- reviewed follow-up reports submitted by DLI in response to LPC-approved recommendations.

## Report Organization

This chapter has provided an overview of the evaluation process and of DLI's organization and function. **Chapter 2** addresses issues related to enforcement activities within ESC, except for worker classification, that were identified in the preliminary evaluation. **Chapter 3** examines issues related to worker classification enforcement. **Chapter 4** covers the Advisory Council on Prevailing Wage Rates as well as other issues that were deferred to the full evaluation pending the receipt of follow-up reports, including the status of the Board of Boiler Rules and whether the termination dates for DLI and associated entities should be repealed. DLS findings and recommendations can be found throughout the report. DLI's follow-up reports are included as **Appendices 1 and 2**. Draft legislation to implement the recommendations is included as **Appendix 3**. DLI has reviewed a draft of this evaluation, and DLLR's written

comments on its behalf are contained in **Appendix 4**. Appropriate factual corrections and clarifications have been made throughout the document. Therefore, references in those comments may not reflect this published version of the report.

## Chapter 2. Employment Standards and Classification

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The Employment Standards and Classification (ESC) program now comprises the Employment Standards Service (ESS) Unit, the Worker Classification Protection Unit, and the Living Wage Unit. The program's three units and associated program staff are managed and coordinated by a program manager. **Exhibit 2.1** details the organizational structure of the program.

This structure has only recently been adopted. In November 2011, just as the preliminary evaluation was published, ESC underwent a reorganization that was prompted by staff turnover elsewhere in the Division of Labor and Industry (DLI). The then-director of Apprenticeship and Training left the Department of Labor, Licensing, and Regulation (DLLR) for another job in State government. The commissioner assigned the then-manager of the Prevailing and Living Wage Unit to manage Apprenticeship and Training. However, due to his expertise in administering that unit, the commissioner opted to remove the unit entirely from ESC and elevate it to program status, with the previous manager serving as program manager (along with his new responsibility as director of Apprenticeship and Training). Responsibility for enforcement of the State's living wage statute, which involves more contracts but has fewer investigators assigned than enforcement of the prevailing wage statute, remained within ESC.

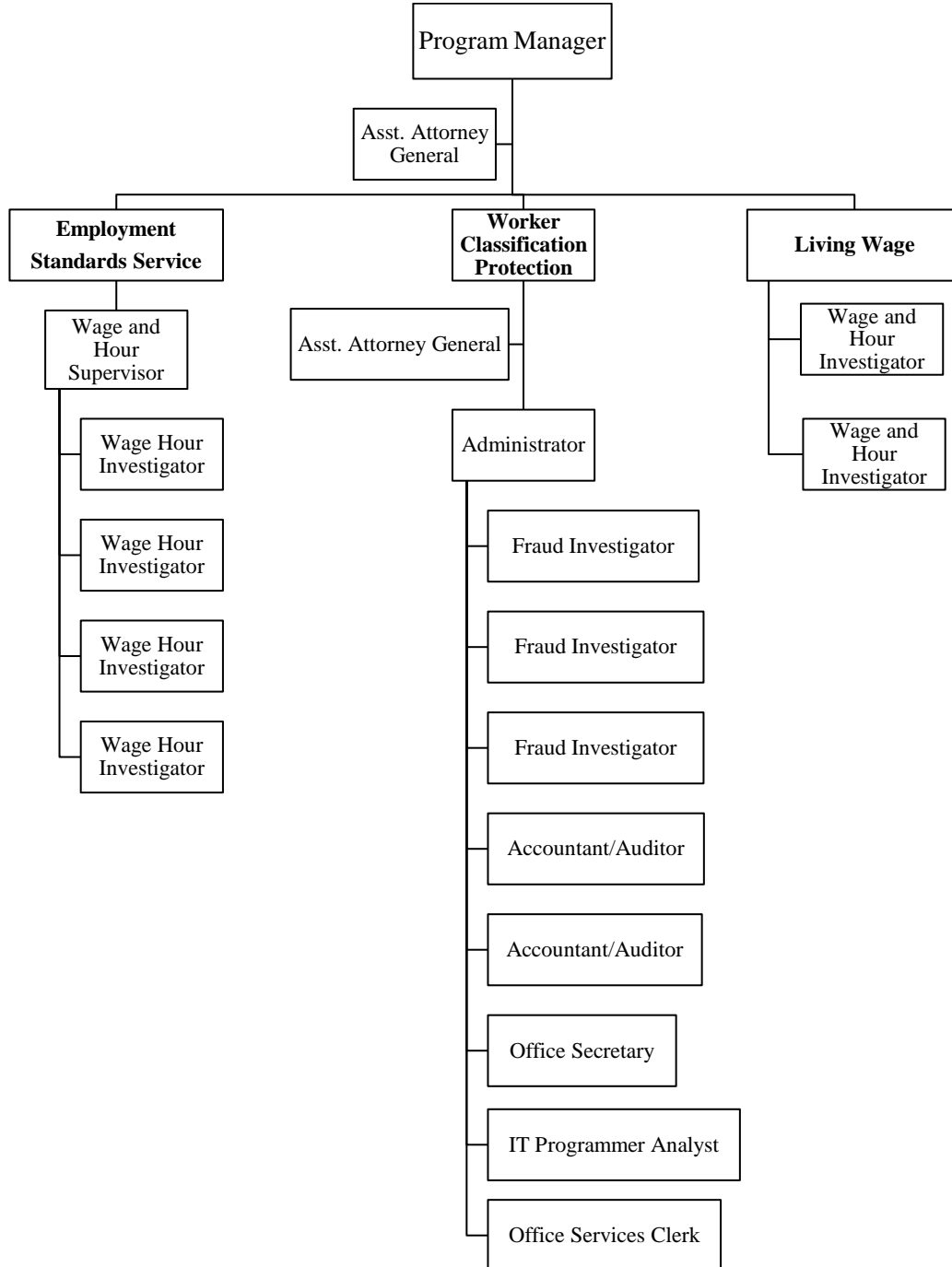
Currently, the ESC program has responsibility for enforcing the State's various labor laws as well as the State's Living Wage Law and Workplace Fraud Act – laws intended to protect employees and prospective employees in the State. **Exhibit 2.2** displays the laws that are enforced by the program or that fall under its jurisdiction. However, the preliminary evaluation noted ESC's policy of not actively enforcing many State labor laws, despite statutory authorization to do so, and recommended that this evaluation further explore its lack of enforcement. Specifically, this evaluation was tasked with:

- examining whether the lack of enforcement is consistent with legislative intent, whether State enforcement of some laws might be more effective than federal enforcement, and the extent to which the lack of enforcement is due to limited staffing; and
- reviewing the interplay between federal and State wage and hour provisions to determine if employers may be subject to a confusing or conflicting set of requirements.

This chapter addresses those particular issues; this chapter also addresses issues specifically relating to ESC enforcement of the Wage Payment and Collection Law, which is the responsibility of the ESS unit.



### Exhibit 2.1 Employment Standards and Classification Organizational Chart



Note: Reflects only filled positions as of June 30, 2012.

Source: Department of Labor, Licensing, and Regulation

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## Exhibit 2.2

### Jurisdiction of the Employment Standards and Classification Program

#### Labor and Employment Article

##### Title 3 – Employment Standards and Conditions

Employment of Minors	Subtitle 2
Equal Pay for Equal Work	Subtitle 3
Wages and Hours	Subtitle 4
Wage Payment and Collection	Subtitle 5
Medical Questions	§ 3-701
Lie Detector Tests	§ 3-702
Healthy Retail Employees Act	§ 3-710
Job Applicant Fairness Act	§ 3-711
Workplace Fraud	Subtitle 9
Farm Labor Contractors	Title 7

#### State Finance and Procurement Article

Living Wage Law	Title 18
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#### Business Regulation Article

Employment Agencies	Title 9
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Source: Laws of Maryland

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### Many New Laws Have Been Enacted

Since the last full evaluation of DLI in 2002, a substantial number of laws have been enacted in areas enforced or overseen by the program. **Exhibit 2.3** includes the legislative changes affecting the program since 2002. Most of these statutory changes are minor and do not significantly affect the program's workload. However, several new laws require the program to implement new enforcement mechanisms and respond to additional complaints from employees.

### Exhibit 2.3 Legislative Changes Since 2002

<u>Year</u>	<u>Chapter</u>	<u>Change</u>
2003	316	Extends the termination date applicable to various programs and boards housed within DLI to July 1, 2014. Corrects references to funding sources for several programs. Repeals the Commissioner of Labor and Industry's authority to regulate employment agencies. (Certain provisions regulating practices of employment agencies are maintained.)
2005	573	Authorizes employers to credit an employee's wages to a debit card or card account.
2006	2	Requires employers to pay the greater of the federal minimum wage or a wage that equals a rate of \$6.15 per hour to employees subject to federal or State minimum wage requirements. Alters the tip credit that employers can apply against the direct wages paid to employees classified as tipped employees.
	458	Prohibits an employer from printing an employee's Social Security number on the employee's paycheck, an attachment to a paycheck, direct deposit notice, or other similar document.
2008	114	Requires an employer to keep a record of the racial classification and gender of employees. Requires the Commissioner of Labor and Industry to study pay disparity issues and report findings to the General Assembly by October 1, 2013.
	434, 435	Authorize the Commissioner of Labor and Industry to initiate an investigation or investigate a complaint that an employment agency has failed to submit a penal bond and establish civil penalties for noncompliance.
2009	188	Establishes, for the purpose of enforcement only, a presumption that work performed by an individual paid by an employer creates an employer-employee relationship, subject to specified exceptions. Prohibits construction companies and landscaping businesses from failing to properly classify an individual as an employee, and establishes investigation procedures and penalties for noncompliance.
2010	99, 100	Clarify that the definition of a wage, as it relates to the State's Wage Payment and Collection Law, includes overtime pay.
	151	Establishes an administrative procedure for resolving wage complaints involving \$3,000 or less whereby the Commissioner of Labor and Industry may issue an order requiring the employer to pay the claim.

<u>Year</u>	<u>Chapter</u>	<u>Change</u>
	612, 613	Require employers that operate certain retail establishments to offer nonworking shift breaks to their employees. Apply to retail businesses in the State that employ 50 or more retail employees during each work day for 20 or more weeks in the preceding or current year; do not apply to wholesale establishments, restaurants, or units of State, county, or municipal governments.
2011	28, 29	Prohibit an employer from using an individual's credit report or credit history as a basis to deny employment to an applicant for hire, discharge an employee, or determine compensation or the terms of employment. Establish certain exemptions whereby an employer may request and use the credit report or credit history of an applicant or employee when making employment decisions.
	118	Amends the Wage Payment and Collection Law by specifying that an agreement between an employer and an employee to work for a pay rate that is less than the wage required by law is void and therefore nonbinding.
	324	Authorizes a county or municipal corporation to pay the wages of an employee by direct deposit and allows a county or municipality, with some exceptions, to require an employee to receive wages in this manner as a condition of employment.
	494, 495	Specify that an employer may not take adverse action against an employee who files a complaint against the employer for a violation of the State's Wage and Hour Law.
2012	233, 234	Prohibit an employer, including the State and local governments, from requesting or requiring an applicant for employment or an employee, to disclose a user name, password, or other means of accessing a personal email account or Internet service.
	207	Exempts specified employers from the presumption under the Workplace Fraud Act that an employer-employee relationship exists between the employer and an individual doing work for the employer if the employer presents specified documentation. Establishes procedures and timetables for enforcement activities and resolution of disputes under the Act.

Source: Laws of Maryland

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Not all of the statutory changes made to Title 3 of the Labor and Employment Article, however, are equal. The laws listed in Exhibit 2.2 authorize the commissioner to enforce those laws. Many other laws contained in Title 3 of the Labor and Employment Article are silent as to whether the commissioner has any authority to enforce compliance with the laws. **Exhibit 2.4** lists some of the significant laws of the Labor and Employment Article and whether the

**Exhibit 2.4**  
**State Labor Laws, Enforcement, and Other Remedies**

<u>State Law</u>	<u>Investigations by Commissioner</u>	<u>Administrative Remedies</u>	<u>Legal Remedies</u>	<u>Criminal Penalties</u>
Wage and Hour	Yes	None	Employee may file an action; employee may assign the claim to the commissioner.	Yes
Wage Payment and Collection	Yes	For complaints less than \$3,000, an administrative procedure exists for the commissioner to collect wages due.	Employee may bring an action, and/or the commissioner may bring an action with the consent of the employee. Remedies include three times the wages owed and counsel fees and court costs.	Yes
Employment of Minors	Yes	None	None specified	Yes
Farm Labor Contractors	Yes	Law establishes a regulatory framework for licensing farm labor contractors.	None specified	Yes
Lie Detector Test	Yes, with a written complaint	None	Commissioner may ask the Attorney General to bring an action or bring an action for a violation of law, for injunctive relief, damages, or other relief.	Yes
Equal Pay for Equal Work	No	Commissioner may supervise the payment of an owed wage and promulgate regulations.	Commissioner may bring an action for injunctive relief and damages.	Yes
Wholesale Sales Representatives	No	None	Individual may bring an action to recover up to three times the amount of commissions due after the termination of a contract. Counsel fees and court costs are also recoverable.	No

<u>State Law</u>	<u>Investigations by Commissioner</u>	<u>Administrative Remedies</u>	<u>Legal Remedies</u>	<u>Criminal Penalties</u>
Day of Rest – Retail and Wholesale Establishments	No	None	Affected employee forced to work on a “day of rest” may bring an action, and may recover three times the regular rate of pay for each hour worked by the employee.	Yes
Healthy Retail Employee Act	Yes, with a written complaint	Upon receiving a complaint and after an investigation, commissioner may assess a civil penalty on the employer.	Upon an employer’s failure to comply with an order from the commissioner, the commissioner may file an action. The employee may also file an action and may be entitled to three times the employee’s hourly wage, attorney’s fees, and court costs.	No
Job Applicant Fairness Act*	Yes, with a written complaint	Upon receiving a complaint and after an investigation, the commissioner may assess a civil penalty on the employer.	Upon an employer’s failure to comply with an order from the commissioner, the commissioner may file an action. The employee may also file an action.	No
User Password and Privacy Protection	No	None	None specified	No
Adoption Leave	No	None	None specified	No
Leave for Illness of Immediate Family	No	None	None specified	No
Civil Air Patrol Leave	No	None	An employee may bring an action to enforce the law.	No

\*Although the Job Applicant Fairness Act grants the commissioner authority to enforce its provisions, Section 3-103 of Labor and Employment, which specifies the sections of law subject to enforcement by the commissioner, omits the Act from the commissioner’s authority. This is likely a legislative oversight and is later recommended for correction.

Source: Laws of Maryland

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commissioner has enforcement authority as well as other remedies available to employees. Despite the fact that the commissioner may not have authority to enforce compliance with several of the laws in Title 3, most of these laws specifically authorize employees to bring an action if they believe their employer has violated any of these laws. Even without specific statutory authorization, employees may always take their employers to court for a violation of public policy or laws. The Workplace Fraud Act is not listed in Exhibit 2.4, but it does grant the commissioner explicit authority to enforce the law. The Workplace Fraud Act is described in Chapter 3.

## **Most State Labor Laws Are Not Actively Enforced by ESS**

The Employment Standards Service Unit was created in 1965 to enforce the State's Minimum Wage Law. Over the years, the unit was tasked with enforcing various other State labor laws, and its staffing expanded accordingly. By fiscal 1991, it had a regular staff of 34 positions, but funding for the unit was eliminated as a cost-containment measure in response to a statewide fiscal crisis. The unit was reestablished in fiscal 1994, but only with six positions. Although the commissioner and, by delegation, the ESS unit were still tasked with enforcing many of the labor laws in Exhibit 2.4, in reality the unit's limited staffing enabled it to actively focus enforcement efforts on the State's Wage Payment and Collection Law. Because many State labor laws have federal counterparts, the State's policy has been to refer most inquiries to the federal government except for those having to do with the Wage Payment and Collection Law, which has no federal counterpart. DLI staff advises that, if the ESS unit receives a written complaint regarding a wage and hour violation, staff conducts an investigation to recover any wages due to an employee. In addition, ESS unit staff counsels complainants that other rights may be available under federal law. The unit's activities with respect to wage payment and collection are discussed later in this chapter. The following are overviews of the State labor laws that authorize the commissioner to enforce compliance.

### **Wage and Hour Matters Stay with the U.S. Department of Labor**

The Maryland Wage and Hour Law, enacted in 1965, is the State complement to provisions of the federal Fair Labor Standards Act (FLSA) of 1938. State law sets minimum compensation and overtime standards for specific employees working for certain types of businesses. Under the Maryland Wage and Hour Law, employers are generally required to pay each employee at least \$7.25 per hour (the current federal minimum wage). Maryland has exemptions to its wage and hour law for various types of workers. The federal law contains similar exemptions. The exemptions generally concern employment in the retail and hospitality sector and agricultural employment. **Exhibit 2.5** compares the provisions of the State Wage and Hour Law and FLSA.

### Exhibit 2.5

## State Wage and Hour and FLSA Provisions

<u>Provision</u>	<u>State Wage and Hour Law</u>	<u>FLSA</u>
Exclusions	Administrative, executive, professional Sales employees Children and seniors who work no more than 20 or 25 hours per week, respectively Certain educators and nonprofit employees Family employees Smaller retail or restaurant establishments Farm employees	Farm employees Legislative employees and elected officials Volunteers Other similar exclusions, plus many others
Powers of the Regulatory Entity	Ascertain wages paid in the State Investigate violations and, with concurrence of Attorney General, issue subpoena	Ascertain wages paid and collect data, may use State agencies for the above purpose, and may reimburse the State for its use of personnel
Wages	Pay a minimum wage that is the higher of either the federal wage or specified State wage Exemptions for certain individuals with disabilities, if certified by the federal government Requires payment of overtime at 1.5 times the hourly rate, with certain exceptions, based on a 40-hour workweek	Pay a minimum wage of \$7.25 per hour, with certain exceptions Requires payment of overtime at 1.5 times the hourly rate, with certain exceptions, based on a 40-hour workweek
Tipped Employees	May not get paid less than 50% of the minimum wage	Wage may be adjusted to allow for tips received by a tipped employee, but the total may not be less than the minimum wage
Overtime Prohibitions	With certain exceptions, nurses may not be required to work more than their regularly scheduled hours	Applies to any person working in an institution that cares for the sick, etc.
Enforcement	Employer required to keep three years worth of wage information Regulatory entity may inspect wage records Aggrieved person may file a complaint with the court of jurisdiction Employee may file an action Regulatory entity may take assignment of the claim	DOL Secretary authorized to supervise unpaid minimum wages or overtime compensation DOL Secretary may bring an action

DOL = U.S. Department of Labor

Source: Maryland State Laws and the Federal Fair Labor Standards Act



The Maryland Wage and Hour Law authorizes the Commissioner of Labor and Industry to investigate complaints about minimum wage payments and overtime compensation and to review wage records to enforce compliance with the law. Since the budget reductions of 1991, DLI has not exercised this authority. Because the State and federal laws are similar, Maryland relies on the federal government to enforce the law by referring complainants to the Wage and Hour Division in the U.S. Department of Labor (DOL). There was a period of time, however, when the State minimum wage was higher than the federal minimum wage. Thus, from February 2006 through July 2008, DLI would have had an obligation to investigate minimum wage complaints from employees working at a Maryland workplace. In 2007, there was one claim, but the case was closed because the individual failed to respond to the unit as part of its investigation. Generally, data provided by the unit showed that, in fiscal 2011 and 2012, the unit received 43,525 phone inquiries. Of that amount, 1,417, about 3%, were identifiable wage and hour phone inquiries, which were all referred to DOL.

In 2002, the Department of Legislative Services (DLS) reported that DOL “does not track the number of referrals or complaint outcomes resulting from DOL investigations on behalf of Maryland workers, nor does DOL track from which state a complaint originates.” DOL confirmed that the same practice is true today. In addition, DOL rarely responds to complaints regarding only minimum wage matters. By contrast, significant overtime complaints are more likely to prompt a DOL investigation and/or enforcement action because they may be associated with worker misclassification.

### **Employment of Minors – Permit System Used to Monitor Compliance**

Maryland’s laws regarding employment of minors, originally enacted in 1886 and substantially amended in 1977, limit the types of occupations, the number of hours, and the periods of the day during which youths aged 14 through 17 may work. Statute also regulates the employment of children of all ages who work as models, performers, or entertainers. Statute allows minors to engage in safe occupations that might offer beneficial experiences while barring them from jobs that might negatively impact their education or their physical, mental, or moral welfare. Employers must have a valid work permit prior to allowing a minor to work, which specifies the type of work to be performed by the minor.

State law establishes a permit system to regulate the employment of minors to make the system accessible to young job seekers. The Employment of Minors Law authorizes work permits to be issued by the commissioner or, in accordance with the requirement of the commissioner, by a county superintendent of schools or a designee of the superintendent. Historically, these individuals have been guidance counselors at the school that the minor attends, but in some jurisdictions, nonacademic lower-level employees have been assigned the task of permit issuance. The commissioner now requires that all permit-issuing authorities complete an application, wherein the credentials of the person are reviewed. In March 2008 the commissioner implemented an online permit process and has since sought guidance from stakeholders concerning greater efficiency and effectiveness of the process.

Parents of minors of any age desiring to work as models, performers, and entertainers, however, must obtain a special permit issued only by the Commissioner of Labor and Industry so that DLI can better monitor the employment activities of young children and teenagers in these types of businesses. For calendar 2011, DLI issued 42,087 work permits, which is an increase from the 39,900 permits issued in the calendar 2010.

As with the Wage and Hour Law, in 1991 the unit ended active enforcement of the provisions related to employment of minors. It maintained the permit system, however, to enable employers and minors to comply with the laws. In addition, the federal child labor law requires that the permit system be administered by the states. Due to cost-containment measures, the commissioner's office administers the permit system and handles complaints through correspondence with the employer. Through this process, DLI informs the employer about any alleged violations or the potential penalties that could be levied against an employer who continues to violate the Employment of Minors Law. The commissioner has attempted to move selected cases of violations to the court of appropriate jurisdiction. DOL staff also relates that every investigation conducted by DOL includes a child labor component. In addition, federal penalties for violations of the child labor laws are more stringent than State penalties.

### **Deregulating Employment Agencies Still Provides Limited Consumer Protection**

Ten years ago, DLS recommended that the regulation of traditional employment agencies should be terminated but that some consumer protections should be maintained. The basis for the recommendation was that the employment agency industry has changed significantly since the General Assembly passed the Maryland Employment Agency Act of 1916. In the past, agencies, under a contractual arrangement with a job seeker, identified vacant jobs and referred workers to interviews, typically for those seeking entry-level employment as bookkeepers, typists, or stenographers. Nearly all traditional types of employment agencies have disappeared, and over the years, job seekers have had less of a need to locate employment opportunities through fee-based services because of other options, such as the Internet.

The General Assembly adopted the DLS recommendation, and as authorized by Title 9 of the Business Regulation Article, employment agencies are only required to submit a penal bond in the amount of \$7,000 to the Commissioner of Labor and Industry. The commissioner may take action if there is a determination that a bond has not been submitted. The most recent numbers indicate that there are 43 registered bonds in Maryland. DLI advises that most of the agencies submitting bonds operate in the entertainment industry by serving as booking agents for bands, seeking theater performances for actors, and arranging contracts for models. In addition, DLI reports that there have been no complaints, or actions taken, regarding the remaining employment agencies or concerning that collection of the penal bond requirement. **Therefore, DLS makes the following recommendation.**

**Recommendation 1: Deregulating the State's role regarding employment agencies should be completed by eliminating the penal bond requirement in Title 9 of the Business Regulation Article as the amount of the bond is *de minimus* and no claims have been made. But, since at least 43 employment agencies still exist, the remaining consumer protection in Title 9 should be maintained.**

### **Division Issues Few Farm Labor Contractor Licenses**

Title 7 of the Labor and Employment Article, enacted in 1982, establishes a regulatory system designed to protect migrant farm workers. A farm labor contractor is an individual who, for money or other consideration, recruits, hires, employs, or transports migrant or seasonal agricultural workers, or offers housing to migrant agricultural workers. A farm labor contractor must obtain a license before performing any farm labor contracting activity in Maryland. Between calendar 2006 and 2011, the number of farm labor contractor licenses issued by DLI decreased from nine to six. Due to resource constraints, DLI cannot ensure that all contractors operate with a license, nor can it ensure that all licensees comply with the applicable laws. Under Title 7, the Commissioner of Labor and Industry has the authority to investigate, administer oaths, depose witnesses, and issue subpoenas to enforce the law.

### **The Added Burden of Recently Enacted Labor Laws**

Until 2009, the number of labor laws that authorized the commissioner to investigate compliance had been relatively stable. In 2009, the Workplace Fraud Act was enacted, which is discussed in the following chapter. In 2010 and 2011, laws were enacted that established shift break requirements for employers who operate specified retail establishments and that prohibited employers from using a credit report or credit history as a basis to deny employment to an applicant for hire, discharge an employee, or determine compensation or the terms of employment, respectively. Both of these laws have no federal equivalent. In order to enforce these new laws, DLS estimated that DLI would require additional staff and resources, which it never received. As a result, there has been only minimal enforcement of these statutes. Unit staff reported having received phone inquiries regarding shift break requirements, but their phone system is not set up to tally the actual number of calls. The phone system is able, however, to tally phone inquiries concerning the Job Applicant Fairness Act. Since October 2011, the unit has received 11 phone calls and responded to 2 complaints related to that statute.

### **History Repeats Itself**

The fact that State and federal labor laws are largely similar has, given limited State resources, driven the State's policy regarding enforcement of the State's Wage and Hour Law, Employment of Minors Law, and Farm Labor Contractors Law. The relatively low number of phone inquiries and paucity of written complaints indicates that the limited State and federal response to wage and hour concerns may be warranted. Historically, DOL has taken child labor matters very seriously, and federal sanctions are severe. To acquire a license to operate as a farm

labor contractor in Maryland the contractor must show a valid federal license, so the policy of referring these complaints to DOL appears warranted.

Regarding the other laws that authorize the commissioner to investigate compliance and that fall under the unit's purview, it has been and remains difficult to determine whether employers are complying with these laws. Aggrieved employees are not without options, however; many of the laws of Title 3 of the Labor and Employment Article explicitly authorize an employee to go to court, and employers are often explicitly prohibited from violating these laws. Regardless, from the State end, without a significant increase in funding and staff for the unit, enforcement will continue to be virtually nonexistent. **Therefore, DLS makes the following recommendations.**

**Recommendation 2: To make State labor laws more consistent, statute should be amended to give the commissioner the authorization to investigate all labor laws enacted in Title 3 of the Labor and Employment Article with the understanding that, absent additional personnel and resources, most of these laws will not be actively enforced by DLI.**

**Recommendation 3: If the General Assembly chooses not to act on Recommendation 2, Section 3-103 of the Labor and Employment Article, which grants the commissioner investigative authority on various labor laws, should be amended to reflect that the commissioner was given the authority to investigate complaints under provisions of the Job Applicant Fairness Act.**

**Recommendation 4: The commissioner should alter DLI's phone tally system to determine the subject of all calls received, which may allow the division to better determine the need for additional resources to address employee/employer problems.**

## **ESS Enforcement Focuses on the Wage Payment and Collection Law**

For the reasons given in the previous section, ESS is limited in its ability to enforce State labor laws, but it does actively enforce the State's Wage Payment and Collection Law, which requires employers to:

- pay workers the wage promised to them;
- establish regular paydays;
- pay wages when they are due;
- pay employees in a specified manner;
- pay employees at least once every two weeks, with exceptions;
- furnish employees with a statement of gross earnings;
- advise employees of their rate of pay and designated payday; and
- pay employees all wages due on termination of employment.

Based on the findings of the preliminary evaluation, several issues related to ESS's performance of this function were identified for further study, specifically to:

- analyze the unit's staffing trends in regards to the experience of current investigative staff and recent or expected turnover;
- determine whether any internal reorganization may be possible so that the unit may obtain much needed administrative support;
- explain why the unit's expenditures were below the mandated level of \$315,000 in fiscal 2007 and 2009; and
- gauge the effectiveness of wage orders in resolving Wage Payment and Collection cases.

### **Strategic Enforcement Has Reduced Backlog and Maintained Collection of Wages**

Due to the limited resources available, enforcement of the Wage Payment and Collection Law relies exclusively on written complaints from workers who claim that their employer has not complied with a provision of the law. There is no proactive enforcement of the wage payment statute. **Exhibit 2.6** shows enforcement activity related to the Wage Payment and Collection Law for fiscal 2009 through 2012.

The exhibit depicts several new developments in the unit's enforcement activity that have enabled it to dramatically reduce its backlog of open cases. First, beginning in fiscal 2012, the unit began screening incoming complaints for sufficiency and jurisdiction. Under this procedure, if new complaints deal with issues that are outside the unit's authority, or do not include sufficient information to pursue an investigation, the complaint is returned to the complainant before it is logged. Therefore, while the number of claims received in fiscal 2012 is comparable to those of preceding years, the number of cases actually pursued by the unit is substantially less because 554 complaints were returned to the complainant with no formal action taken. This change in procedure largely accounts for the dramatic decrease in the unit's backlog of open cases because invalid complaints are being disposed of quickly rather than remaining open as they await formal action by an investigator.

Another factor that has contributed somewhat to the diminishing backlog is the authority to issue wage orders in specified cases. As noted in the preliminary evaluation, Chapter 151 of 2010 establishes an administrative procedure for resolving wage complaints involving \$3,000 or less whereby the Commissioner of Labor and Industry, or a designee, may issue a "wage order" requiring the employer to pay the claim if strong evidence exists indicating that an employer owes back wages to an employee. The wage order includes a requirement that the employer pay 5% annual interest calculated from the date when wages were to be paid. Prior to the authority granted by Chapter 151, the only recourse available to the commissioner for employers who did not voluntarily resolve a complaint was to refer the case to the Office of the Attorney General

(OAG) for civil prosecution. The lack of an administrative remedy increased the backlog and further delayed the resolution of a large number of cases that awaited adjudication.

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**Exhibit 2.6**  
**Wage Payment and Collection Activities**  
**Fiscal 2009-2012**

	<u><b>FY 2009</b></u>	<u><b>FY 2010</b></u>	<u><b>FY 2011</b></u>	<u><b>FY 2012</b></u>
<b><u>Claims Activity</u></b>				
Claims Received	1,691	1,458	1,339	1,441
Claims Returned	NA	NA	NA	554
Cases Closed*	1,436	1,432	1,635	940
Cases Closed < 90 days	885	731	903	674
Backlog	511	538	240	187
<b><u>Wage Payment Activity</u></b>				
# Claims Wages Recovered	NA	539	624	465
Claims Referred to OAG	491	437	438	63
Wage Orders Issued	NA	NA	NA	89
Wage Orders to CCU	NA	NA	NA	72
Total Wages Collected	\$526,804	\$745,739	\$884,189	\$697,921

\*Cases closed may include open cases from prior years and, therefore, may exceed the number of new complaints received in a given year.

CCU: Central Collection Unit

OAG: Office of the Attorney General

Source: Department of Labor, Licensing, and Regulation

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Exhibit 2.6 shows that the authority to issue wage orders has had a modest direct effect on the backlog, but more time is needed before a more thorough assessment of the program can be made. In fiscal 2012, the first full year in which the commissioner exercised the authority to issue wage orders, ESS issued 89 wage orders. Absent the authority to issue wage orders, these cases would otherwise have been referred to OAG for prosecution. Based on anecdotal evidence, DLI initially reported that as many as 60% of employers remit owed wages shortly after receiving an order. However, a closer accounting of actual cases reveals that 72 of the 89 wage orders (81%) issued in fiscal 2012 were referred to the State's Central Collection Unit (CCU) for collection due to nonpayment. This discrepancy may be explained by a pattern observed by OAG, which advises that the wage orders may be having a more indirect effect on

case resolutions. With the prospect of having to pay 5% annual interest on unpaid wages, more employers may be choosing to pay restitution before receiving a wage order. Moreover, CCU is authorized to charge a collection fee of 17% for each collection, which may provide further incentive for employers to pay restitution before being issued a wage order. If a wage order is issued, CCU can employ a range of collection strategies, including wage garnishment, likely enabling it to resolve open cases faster than OAG.

The combination of more complaints being returned and the use of wage orders has dramatically reduced the number of cases forwarded to OAG for prosecution. Based on data provided by ESS and confirmed by OAG, only 63 cases were referred to OAG in fiscal 2012, compared with more than 400 in each of the preceding three years. In addition, the average wages recovered for each closed case has doubled in four years, from about \$367 in fiscal 2009 to \$743 in fiscal 2012.

**Recommendation 5:** By October 31, 2013, DLI should submit a follow-up report to the appropriate committees of the General Assembly on the continued use and effectiveness of wage orders. The report should detail (1) the number of wage orders issued in each fiscal year; (2) the number forwarded to CCU for collection; (3) the number for which payment is ultimately collected; and (4) the total backlog in wage payment and collection cases. To the extent feasible, the report should explain the reason(s) for any substantial increase or decrease in the backlog compared with backlogs from prior years.

### **ESS Finances Have Stabilized with Mandated Funding**

As noted in the preliminary evaluation, the State's fiscal crisis in the early 1990s resulted in funding for the unit being eliminated in fiscal 1991. When funding was restored in fiscal 1994, total staffing in the unit dropped from 34 to 6 positions, resulting in the curtailment of enforcement activity discussed earlier in this chapter.

The unit's funding and staffing levels remained relatively constant for about 12 years after funding was restored in 1994. However, the Governor's budget, as submitted, eliminated funding for the unit for fiscal 2006. In response, the General Assembly restored funding by redirecting money from DLLR's Division of Racing, and Chapter 444 of 2005 mandated an annual appropriation of at least \$315,000 for the unit beginning in fiscal 2007. **Exhibit 2.7** displays the unit's fiscal history and staffing levels from fiscal 2007, when funding for the unit's activities was first mandated, through fiscal 2012.

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**Exhibit 2.7**  
**Fiscal Summary for the Employment Standards Service Unit**  
**Fiscal 2007-2012**

	<u><b>FY 2007</b></u>	<u><b>FY 2008</b></u>	<u><b>FY 2009</b></u>	<u><b>FY 2010</b></u>	<u><b>FY 2011</b></u>	<u><b>FY 2012</b></u>
Expenditures	\$258,999	\$417,921	\$301,350	\$322,424	\$371,052	\$442,025
Authorized Positions	6.0	6.0	6.0	5.0	5.0	6.0

Source: Department of Labor, Licensing, and Regulation

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**Staff Turnover Remains a Concern and Continues to Limit Enforcement**

Although an annual appropriation of \$315,000 is required by Chapter 444, the unit's actual expenditures were below that level in fiscal 2007 and 2009; this was due primarily to staff vacancies. Although the unit's budget has authorized five or six positions in each year, one or more of those positions has frequently been vacant, resulting in reduced expenditures for staff. For instance, the increase in expenditures from fiscal 2011 to 2012 reflects the filling of two vacant investigator positions in the middle of fiscal 2011, with those employees working a full year in fiscal 2012. Of the four wage and hour investigators in the unit, the most senior has just five years of experience; two have three years, and the fourth has two years. The most recent turnover has been in the unit manager's position, which became vacant in July 2012, the third time it has been vacant in four years. Thus, expenditures for fiscal 2013 may decline somewhat, but they likely will not fall below the mandated level of appropriation (assuming the position is filled shortly). The increase from five to six authorized positions in fiscal 2012 reflects the addition of a contractual position to provide administrative support, an issue identified in the preliminary evaluation. However, the contractual position has remained vacant pending a decision by the commissioner regarding the most effective use of the new position.





## **Chapter 3. Worker Classification**

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### **Worker Classification Protection Unit**

The Worker Classification Protection Unit (formerly the Workplace Fraud Unit) began its operations in September 2010 but was not fully staffed until February 2011. As shown earlier in Exhibit 2.1, the unit has 11 full-time staff members, including an assistant Attorney General, 3 fraud investigators, and 2 auditors who are certified public accountants. The unit has encountered significant challenges in its first two years of existence – managerial turnover, legislative changes, and malfunctioning software – to name a few. However, the unit is actively attempting to address areas of concern and improve overall performance. As of July 2012, under its new leadership, the unit has shifted its implementation strategy, as discussed in further detail below, corresponding with the effective date of the most recent legislative changes.

### **Workplace Fraud Addressed in 2009 through Legislative and Administrative Methods**

The prevalence of employee misclassification, or workplace fraud, was well documented across a variety of industries and states, including Maryland, prior to the legislative and administrative measures taken in 2009 by the Governor and the General Assembly. A 2000 study by the U.S. Department of Labor found that, in general, between 10% and 30% of audited employers misclassified workers. That same study also looked directly at data supplied by the Maryland Division of Unemployment Insurance (UI) and found that the highest level of misclassification in Maryland was in the services sector, followed by construction, retail, and manufacturing.

Further, as shown below in **Exhibit 3.1**, over the three-year period from 2006 through 2008, UI conducted random and targeted audits of approximately 9,150 employers registered with the division to determine whether employees were correctly classified. Results of these audits indicated that the rate of misclassification may have been as high as 20% to 25%. A total of 2,276 employers were found to have misclassified a total of 17,615 workers.

**Exhibit 3.1**  
**Audits Conducted by the Division of Unemployment Insurance**

	<u><b>2006</b></u>	<u><b>2007</b></u>	<u><b>2008</b></u>
Contributing Employers	137,037	139,103	140,334
Number Audited	2,875	2,988	3,293
Violations (all types)	1,179	979	1,269
Misclassifications (employers)	800	627	849
Workers Affected	6,477	4,090	7,048

Source: Department of Labor, Licensing, and Regulation

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**Worker Misclassification Has Negative Consequences for Employees, Industry, and Government**

When a company hires an employee, it is responsible for paying half of that employee's Social Security and Medicare taxes, as well as premiums for workers' compensation and unemployment insurance coverage. Employers also typically withhold federal, State, and local income taxes. An employee is responsible for half of his or her Social Security and Medicare taxes, as well as any State and federal income tax in excess of the amounts withheld by the employer. By contrast, an independent contractor pays all of his or her Social Security and Medicare taxes and has no income taxes withheld but is still responsible for paying them in full.

Individuals misclassified as independent contractors (rather than employees) may not be subject to labor and wage protections, may not receive workers' compensation or unemployment insurance benefits, and may not pay an appropriate level of taxes to the State or the federal government. Moreover, companies that misclassify employees maintain a lower overhead and have a competitive advantage with respect to those that abide by the law in the treatment of their workers.

**The Workplace Fraud Act of 2009 Necessitated Creation of Additional Unit**

Chapter 188 of 2009 – “The Workplace Fraud Act” – established a rebuttable presumption that work performed by an individual paid by an employer creates an employer-employee relationship. The Act applies to three areas of State government: the Division of Labor and Industry (DLI), workers' compensation, and unemployment insurance.

Under the Act, an employer misclassifies an individual when an employer-employee relationship exists but the employer designates the individual as an independent contractor. Chapter 188 and subsequent regulations establish criteria for what constitutes an

employer-employee relationship and when it is appropriate to classify an individual as an independent contractor. Despite the Act being enforced through multiple State entities, only one set of penalties may be assessed against an employer who violates the Act.

This section primarily focuses on the DLI portion of the Act and thus the division's Worker Classification Protection Unit; however, it is important to consider that the unit functions in the full context of both the Act and the concurrently established Joint Enforcement Task Force on Workplace Fraud. Further, the DLI portion of the Act applies only to the construction and landscaping industries, while the rest of the Act applies to all industries.

The Act gives the Commissioner of Labor and Industry broad authority to enforce its provisions and establishes penalties for covered employers (*i.e.*, those in the construction and landscaping industries) that misclassify employees as independent contractors. The Act distinguishes between an employer that *improperly* misclassifies an employee and an employer that *knowingly* misclassifies an employee, and penalties are imposed for an employer that is guilty of knowingly misclassifying an employee.

As mentioned above, for purposes of enforcement of the Act, work performed by an individual and paid for by an employer is presumed to create an employer-employee relationship – subject to four exclusions. The burden of proof is on the employer in rebutting the presumption. Unit staff determines whether or not an employer has properly classified workers based upon this presumption, which applies unless (1) the worker is an “exempt person”; (2) the “ABC test” is satisfied; (3) the employer contracts with another business in order to outsource the employer's normal work; or (4) there is a legitimate and documented contractual relationship supplemented with required notices. An “exempt person” means an individual who:

- works in a personal capacity and employs no individuals other than his or her immediate family;
- works free from direction and control;
- provides necessary equipment and tools;
- operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities;
- exercises complete control over the management and operations of the business; and
- works continuously for multiple entities at the individual's sole discretion.

The ABC test incorporated in the Act has three components, all of which must be met satisfy the test and thus establish that an individual is an independent contractor:

- A. the individual is free from control and direction over his or her performance both in fact and under the contract;

- B. the individual customarily is engaged in an independent business or occupation; and
- C. the work performed is outside the usual course of business, or outside the place of business, of the person for whom work is performed.

An employer found to have improperly misclassified an employee must, within 45 days, pay restitution to any employee not properly classified and come into compliance with all applicable labor laws. An employer is subject to a civil penalty of up to \$1,000 for each employee not in compliance, but the Commissioner of Labor and Industry cannot penalize employers that conform to applicable labor laws within 45 days.

For a knowing violation, an employer is subject to a civil penalty of up to \$5,000 per misclassified employee, regardless of whether the employer enters into compliance within 45 days. Penalties can be doubled for employers that have previously violated the Act's provisions. An employer found to have knowingly misclassified employees on three or more occasions may be assessed an administrative penalty of up to \$20,000 for each misclassified employee.

### **The Joint Enforcement Task Force on Workplace Fraud Includes the Commissioner of Labor and Industry**

After the passage – but before enactment – of the Workplace Fraud Act, the Governor, in recognition of the importance of interagency cooperation and information sharing, established the Joint Enforcement Task Force on Workplace Fraud through Executive Order No. 01.01.2009.09. The task force was charged with the primary function of facilitating coordination and collaboration among member agencies in addressing workplace fraud. The task force consists of the Department of Labor, Licensing, and Regulation (DLLR), including the Commissioner of Labor and Industry and the Assistant Secretary for the Division of Unemployment Insurance, the Attorney General, the Comptroller, the Workers' Compensation Commission (WCC,) and the Maryland Insurance Administration. The task force continues to function, with the Secretary of Labor, Licensing, and Regulation serving as the task force chair. The executive order included an annual reporting requirement for the task force, which it has satisfied each year. The December 2011 report indicates that, since 2009, each member agency had accomplished the following:

- DLI opened 660 investigations, of which 12 companies had been issued citations;
- UI completed 76 “workplace fraud audits” and identified 3,178 misclassified workers and over \$17 million in unreported wages;
- the Comptroller completed seven joint audits with the task force which resulted in \$394,000 assessed for withholding taxes;
- the Maryland Insurance Administration conducted a survey of the eight largest licensed workers' compensation carriers in Maryland to determine if the insurance plans on file detailed specific procedures for detecting and preventing premium insurance fraud; and

- WCC focused on education and outreach to help bring employers into compliance before a violation is reported or found.

In addition to workplace fraud audits, which include joint audits with the task force, referrals from task force member agencies, and complaints from the public, UI performs a combination of random and data-driven targeted audits as part of a mandate from the U.S. Department of Labor. The division is 100% federally funded and conducted 2,086 employer audits in 2011. Of that total, 1,519 were targeted to specific industries identified as high risk for employee misclassification. Of the targeted audits, 52 were Workplace Fraud Audits. The unit is on pace for similar levels in 2012. Through June, the division conducted 986 total audits, 806 of which were targeted. The division estimates that it has hired five additional auditors as a result of the Workplace Fraud Act – all of which are federally funded positions.

### **Workplace Fraud Unit and Task Force Have Separate Reporting Requirements**

During the evaluation, the unit initially referred inquiries about its annual data to the annual report required for the Joint Enforcement Task Force on Workplace Fraud; however, the task force's report does not meet the unit's statutory reporting requirements, which are more extensive than those required of the task force. Statute requires the commissioner to prepare an annual report for the Secretary of Labor, Licensing, and Regulation that must include:

- the number and nature of complaints received;
- the number of investigations conducted;
- the number of citations issued;
- the number of informal resolutions of the citations;
- the number of orders of the commissioner reviewed by the Secretary and whether they were affirmed or overturned; and
- the number of requests for judicial review of administrative orders and whether the orders were affirmed or overturned.

The report must also include the number of final administrative orders, with a description that must include whether the alleged violation was found and whether the order affirmed or overturned a proposed decision of the Office of Administrative Hearings. DLI advises that some of the required items in the report are inconsistent with the enforcement provisions of the Workplace Fraud Act.

In contrast, the task force must report annually to the Governor and must describe the record and accomplishments of the participating agencies of the task force, including (1) the amounts of wages, premiums, taxes, and other payments or penalties collected; and (2) the number of employers cited for legal violations related to workplace fraud and the approximate

number of employees affected. To date, the commissioner has not completed the mandated annual reports for the Secretary. The unit intends to prepare one annual report that contains all of the information necessary for both the statutory annual reporting requirement and the task force's annual report.

**Recommendation 6: The Commissioner of Labor and Industry should comply with statutory reporting requirements and prepare an independent annual report for the Secretary of Labor, Licensing, and Regulation. This reporting requirement may be satisfied in conjunction with existing reporting by the commissioner to the secretary as long as it complies with statutory requirements regarding the content of the report. Statute should be amended to align reporting requirements with enforcement provisions and to include the General Assembly as a recipient of the report, in addition to the Secretary of Labor, Licensing, and Regulation.**

## **Early Issues with Implementation Lead to Legislative and Administrative Changes**

The first implementation phase of the Act proved challenging for the unit. Since its inception, the unit has experienced frequent management turnover, with four different managers (both acting and official) during its two years of existence. The current program administrator – the second of two official managers – started in April 2012. A compounding effect throughout the process, discussed later in this chapter, is the unit's lack of a functional software system to support its workflow. Concurrent with the high managerial turnover rate and insufficient software support was an implementation strategy that consisted largely of auditing prevailing wage records and sending letters to employers suspected of workplace fraud. This method led to multiple concerns in industry and the General Assembly, including the employer-employee relationship presumption, employer document submission deadlines, and the timing of case resolutions.

### **2012 Legislative Changes to the Workplace Fraud Act**

As mentioned above, the unit primarily implemented the Act by auditing prevailing wage records and sending letters to employers requesting proof of their workers' independent contractor status. The tone of the letters combined with a short time period within which to comply (15 days) resulted in a negative industry response to the unit's enforcement methods. One case in particular served as the tipping point for industry concerns and prompted legislative action.

*On December 21, 2010, the unit performed a site visit and interviewed workers of a flooring company that had worked on a number of State-funded prevailing wage projects. Subsequent to the site visit, the unit conducted an audit of the company's certified payroll records for prevailing wage projects the company worked on between October 2009 and April 2011.*

*In May 2011, the unit issued a Citation and Notification of Potential Penalty, which alleged that the company failed to properly classify 56 individuals as employees during the audited time period. The notification letter required documentation be provided to demonstrate that any and all individuals who the company engaged as independent contractor(s) or “1099” workers were properly classified by submitting all records relevant to their independent contractor status. Acceptable documentation cited in the letter included independent contractor agreements, a description of the work performed, proof of liability insurance or workers’ compensation coverage, proof of professional licenses or registrations, and wage or payment records. The company was given 15 days to comply, as specified in statute, subject to a \$500 per day fine for each day the records were late.*

*Two weeks later the company formally notified the commissioner that it contested the citation and requested a hearing before the Office of Administrative Hearings. Nearly a year later, on April 30, 2012, the unit and the company agreed to a settlement in which the commissioner agreed to rescind the citation in its entirety. However, as part of the settlement, the company agreed to keep and maintain the necessary documentation for independent contractors it engages starting on July 1, 2012. It also agreed to provide the required written notice to all individuals of their status as independent contractors or exempt persons. Specifically, the individuals cited as the company’s employees were ultimately determined to be:*

- *employees of other business entities (35);*
- *business entities that were, in themselves, employers of other employees (11); or*
- *in substantial compliance with the requirements of the Workplace Fraud Act (10).*

Prompted by a number of the issues illustrated in the above case, the General Assembly amended the Workplace Fraud Act during the 2012 session. Specifically, Chapter 207 of 2012 establishes that, for the purpose of enforcing the Act, the presumption that an employer-employee relationship exists does not apply if an employer produces for inspection:

- a written contract between the employer and a business entity that describes the nature of the work and the remuneration to be paid and includes an acknowledgement by the business entity of its responsibilities under the Act;
- a signed affidavit indicating that the business entity is an independent contractor who performs work for other employers;
- a certificate of status of the business entity that is issued by the State Department of Assessments and Taxation and indicates the entity is in good standing; and
- proof that the business entity holds all required occupational licenses for the work to be performed.

In addition, the employer must provide each individual classified as an independent contractor with the required notice of classification as an independent contractor and the implications of the classification. Otherwise, Chapter 207 leaves intact the law’s provisions regarding the employee relationship presumption and provisions concerning individuals exempt (generally sole proprietors) from the presumption.



Chapter 207 also alters various provisions relating to the audit process and enforcement, to provide employers with a more definitive timeframe and greater flexibility to comply with information requests from the unit. Copies of records may satisfy the requirement to produce records, and an employer now has up to 30 days, rather than 15 days, to comply with a request to copy or inspect records, unless the commissioner and the employer agree to an extension of time. Within 90 days of receiving all requested records, the commissioner must either issue a citation or close the investigation. If the employer requests a hearing on the citation, the hearing must be held within 90 days of the request, unless the employer waives that right.

### **New Implementation Strategy Began in July 2012**

The unit has shifted its implementation strategy as of July 2012, corresponding with the effective date of the legislative changes discussed above. The unit will focus on site visits that interview workers and employers to fully investigate the working relationship and assess compliance based upon all relevant factors. This represents a change from the prior practice of automatic citations for violation of a single technical requirement. Additionally, the unit intends to define a case by a snapshot (the workers at a particular work site on a particular date), with the intent to avoid cases involving potentially hundreds of workers over a more extended time period. This differs from the previous method in which the unit would investigate an employer's entire business practice over a specific time period – often approximately one year. Further, the unit now intends to primarily investigate complaints generated within the industry rather than conduct random audits of employers in conjunction with the Prevailing Wage Unit or UI.

Further, the unit has adopted an aggressive outreach program which involves giving presentations to affected trade associations, maintaining a revised website with information regarding how noncompliance is determined and how to come into compliance, and plans to include information in the mailings of other DLLR divisions. The unit also intends to provide additional informational brochures and/or written information to other programs, union halls, career centers, and vocational schools.

### **Issues Remain Despite Legislative and Administrative Changes**

#### **Special Funding Enables Staffing and Enforcement, but Citations and Penalties Lower than Anticipated**

Although the unit is a subprogram of the general funded Employment Standards and Classification program, the unit utilizes special funds from the State's WCC to cover its expenditures, as required by law. The commission funds its adjudicatory operations by levying an assessment on workers' compensation insurers in the State. However, funds generated from the commission's assessment are also used to support various worker or public safety and health programs, such as DLI's Safety Inspection and Maryland Occupational Safety and Health programs.

As shown below in **Exhibit 3.2**, the unit's special fund expenditures were \$587,662 in fiscal 2011, its first year of activity. The unit's expenditures increased to \$757,414 in fiscal 2012, largely due to annualization of staff salaries (most unit staff were not employed at the beginning of fiscal 2011). The unit has no authority or mechanism to collect revenues independently. Penalty revenue associated with workplace fraud citations is deposited into the State's general fund.

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**Exhibit 3.2**  
**Special Fund Expenditures and Positions**  
**Worker Classification Protection Unit**

	<u><b>FY 2011</b></u>	<u><b>FY 2012</b></u>
Expenditures	\$587,662	\$757,414
Authorized Regular Positions	10	11

Source: Department of Labor, Licensing, and Regulation

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As shown below in **Exhibit 3.3**, the unit reports that it completed 193 investigations from referrals or complaints in fiscal 2011 and 387 in fiscal 2012. Similarly, the unit initiated 304 random audits in fiscal 2011 and 68 in fiscal 2012, but it only closed 19 of those cases in fiscal 2011. The majority of random audit cases (274) were closed in fiscal 2012. The unit reports that it issued 12 citations and assessed \$33,200 in penalties in fiscal 2011, and it issued one citation in fiscal 2012 while levying no penalties. The average age of closed cases was 142 days and 106 days in fiscal 2011 and 2012, respectively. The unit has not assessed any late fees for failure to submit required documentation. For context, according to the task force's 2011 annual report, during that same period UI completed 76 workplace fraud audits, which identified 3,178 misclassified workers.

These levels of citations and penalties are significantly lower than anticipated prior to the passage of the Act. In the fiscal estimate for Chapter 188 of 2009, DLLR advised that it anticipated approximately \$335,250 in penalties in the first full year of the unit's operation, assuming 95% of employers move into compliance before penalties are assessed. Similarly, the fiscal and policy note estimated general fund revenue increases from civil penalties of up to \$300,000 in fiscal 2011, declining over future years as compliance increases in conjunction with outreach and education. While the unit only has three fraud investigators (DLLR estimated anticipated revenue based on five investigators), observed levels are still far below anticipated levels of citations and penalty revenue.

**Exhibit 3.3**  
**Investigation Activity**  
**Worker Classification Protection Unit**

	<b><u>FY 2011</u></b>	<b><u>FY 2012</u></b>
Completed Referral or Complaint Investigations	193	387
Random Audits Opened	304	274
Random Audits Closed	19	274
Citations Issued*	12	1
Workers Encompassed in Citations	41	14
Penalties Assessed	\$33,200	\$0
Penalties Collected	\$0	\$6,000
Average Age of Closed Cases	142 Days	106 Days

\*Does not include the citation issued for 56 alleged misclassifications as discussed above, as that citation was eventually rescinded in its entirety.

Source: Department of Labor, Licensing, and Regulation

**Software to Track Unit Activity Incomplete and Unreliable**

The software used by the unit to track its activity (number of cases, fines assessed, duration of cases) and support its workflow was originally developed in-house as a cost-containment measure. However, the employee who developed the software recently retired. The software still contains numerous bugs and flaws, and the software was not designed to meet all of the unit's needs. For example, querying information from certain time periods is not possible, and the software cannot generate form letters. For much of the review process, the unit advised that its software was not functioning and that, therefore, it was unable to provide activity data requested by the Department of Legislative Services (DLS). The unit continues to struggle with the software, but it was eventually able to report basic data as requested, as shown above in Exhibit 3.3.

The unit has an IT programmer analyst whose duties include maintaining the unit's website, providing technical assistance to constituents, and serving as the unit's first point of contact for the fraud hotline. However, the position's job duties do not include full-scale software development. A system with the necessary depth and features required for capturing, tracking, and correlating data in addition to generating form letters, calculating fines, and tracking deadlines requires professional programming development. The unit indicates that DLLR's Office of Information Technology should be able to start on this project in March 2013.

**Recommendation 7:** The unit should continue ongoing efforts to develop and implement an interim data-management system to track relevant data. By December 31, 2013, the unit should report to the General Assembly on the progress in its development of a long-term data management system. By December 31, 2014, the unit should have a fully developed and implemented data-management system that is capable of generating reports on historical data by fiscal year, generating form letters to employers who are the subject of investigations, and performing any other function deemed necessary by the commissioner.

#### **Staff Resources May Not Align with Needs**

Given that the unit plans to conduct on-site investigations into worker misclassification, it is unclear if the current composition of the unit – only 3 fraud investigators out of 11 positions – is ideal. The unit advises that it is difficult to “reach” workers, for two reasons. First, as the fraud investigators are based out of Baltimore City, many job sites require multiple hours of travel to and from the location to conduct site visits. Many large job sites require multiple investigators, so one large job site located in Western Maryland could require all three investigators for an entire day. Second, the unit is experiencing a language barrier in its attempts to gather information from employees, as many workers in the construction and landscaping trades do not speak English and no fraud investigators are bilingual.

**Recommendation 8:** DLI should assess the current complement of staff for the unit in light of the unit’s new implementation strategy and experience in enforcement of the Act and address unmet needs when filling any vacancies that occur.

#### **Industry Generating Relatively Few Complaints in First Quarter of New Implementation Strategy**

The unit has three months of operating data under its new implementation strategy – from July through September 2012. In that time, the unit has generated 13 leads through industry complaints. In comparison, the remainder of the unit’s activity has been generated through 4 agency referrals, 9 random permit audits, and 56 “windfalls.” Windfalls are discovered by the unit’s investigators in the ordinary course of their travels in performance of their compliance reviews. Through September 2012, no citations have been issued for any of these investigations, though the unit indicates that some are likely forthcoming.

#### **Additional Authority May Be Needed to Enforce Violations Other than Worker Misclassification**

The Act requires an employer to provide written notice to any exempt person or independent contractor of their status and the impact of their status. Regulations require the notice to be posted in the employer’s office and at each work site. If the notice is not posted at each work site where the employer has workers who are exempt persons or independent contractors, the employer is in violation of the Act. However, statute only allows the unit to

assess penalties for worker misclassification – not violations such as the above example. Division staff indicates that a penalty for violations of the Act other than worker misclassification could help to encourage compliance.

**Recommendation 9: Statute should be amended to authorize the Commissioner of Labor and Industry to assess a penalty for noncompliance with the Act’s notification requirements to workers who are exempt persons or independent contractors.**

### **Governor and General Assembly Should Be Updated on Unit’s Progress in Two Years**

The unit continues to experience growing pains due to setbacks encountered in its initial implementation phase, managerial turnover, and software issues. With the effective date of July 1, 2012, for both a new implementation strategy and the most recent legislative changes to the Workplace Fraud Act, it is clear that the unit has made a “hard reset.” Therefore, only three months of data exist to reflect these changes, which is insufficient for a full assessment of their effectiveness.

Uncodified language in Chapter 188 of 2009 requires that the commissioner report to the Governor and General Assembly on the commissioner’s investigations of complaints of violations of the Act and the outcomes of those investigations, including any recommendations by the commissioner to improve the administration and enforcement of the Act, as well as any other information that the commissioner determines relevant. No deadline is set for the report, and the commissioner has not yet reported to the Governor and General Assembly. Accordingly, DLS recommends that the commissioner report as required by Chapter 188 of 2009 after sufficient time has passed to allow for a reasonable attempt at the implementation of recent administrative and legislative changes.

**Recommendation 10: By December 31, 2014, the Commissioner of Labor and Industry should report to the Governor and General Assembly on the status of the unit as required by the uncodified language in Chapter 188 of 2009. The report should (1) summarize the level of activity under the unit’s new implementation strategy and assess the effectiveness of the unit’s strategy and its outreach program; (2) explain the difference between initial estimates of citations and penalties and those experienced in practice, including the relatively few citations issued for worker misclassification; (3) include the development status of the unit’s long-term data management system and the system’s ability to support the unit. Further, the report should evaluate, at a minimum, (1) the unit’s annual data reports and their consistency with other agency audits of worker misclassification; (2) the unit’s staffing composition relative to its implementation strategy; and (3) the unit’s role in the larger context of the task force.**

## **Chapter 4. Miscellaneous Findings**

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### **Advisory Council on Prevailing Wage Rates Should Be Repealed**

The 2011 preliminary evaluation recommended that the Advisory Council on Prevailing Wage Rates be included in this full evaluation to determine whether it should be repealed, as was recommended in the 2002 sunset evaluation, and whether its functions should be reassigned to the Prevailing Wage Unit (now program). The rationale for potentially repealing the advisory council is that it has been largely dormant for almost 20 years.

The six-member Advisory Council on Prevailing Wage Rates was established in 1969 and, pursuant to the Maryland Code, is supposed to advise and submit recommendations to the Commissioner of Labor and Industry on the commissioner's functions related to prevailing wage rate calculations.

In 2001, the Department of Legislative Services (DLS) performed a preliminary sunset evaluation and indicated that the advisory council may not be necessary. The evaluation indicated that the advisory council had not met since 1997 at the time of the review and that its functions appeared disjointed from its purpose. DLS opined that the advisory council acted largely in a lobbying capacity and that its functions may be more appropriately handled by the Division of Labor and Industry (DLI), more specifically, the Prevailing Wage Unit. Accordingly, a full evaluation was conducted in 2002. The evaluation concluded:

Ten years ago, the last sunset evaluation of the council found that it met infrequently. The council has recently continued that pattern, with the last two meetings failing to generate the quorum necessary to approve meeting minutes from 1999.

Consequently, termination of the advisory council was recommended in 2002; however, this recommendation was not implemented. The advisory council has again continued its pattern of not meeting and not performing any discernible function. At the time the preliminary evaluation was completed, only two meetings had been held in the previous 10 years – both of them fairly recently. One meeting was held in May 2010, and this meeting had a quorum. The other meeting, held in May 2011, did not have a quorum. As a result, the minutes of the May 2010 meeting could not be approved. Nothing substantive was accomplished at either of these meetings.

Following the completion of the 2011 preliminary evaluation, the advisory council held another meeting in April 2012. DLI staff indicated that the council had new membership, which enabled it to meet after prolonged inactivity, but it did not achieve a quorum for that meeting either. As late as September 2012, minutes from the April meeting were not available. The chair advises that the meeting consisted of briefings by DLI staff regarding prevailing wage enforcement activity, followed by a question and answer period.

As an advisory body, the council plays no direct role in establishing prevailing wage rates or adjudicating challenges to those rates. Those functions are delegated to the commissioner. Rather, the council serves a largely symbolic function of providing a forum for both labor unions and the construction industry to provide input to the commissioner with respect to the implantation and enforcement of the prevailing wage statute. The commissioner advises, however, that in the absence of regular council meetings, he receives informal input from both industry and labor representatives that has proven valuable. Such input would still be available to the commissioner in the absence of a council. Given that the council provides no tangible function and has not been able to consistently hold meetings during which a quorum is present for more than 20 years, DLS recommends that the council be terminated.

**Recommendation 11: Statute should be amended to repeal the Advisory Council on Prevailing Wage Rates and delegate its duties to the Prevailing Wage unit, which has been performing the functions for which the advisory council was created.**

### **Board of Boiler Rules Should Be Maintained within DLI**

Maryland's system of boiler regulation is split between two divisions of the Department of Labor, Licensing, and Regulation (DLLR): (1) the Division of Occupational and Professional Licensing (O&P), which houses the State Board of Stationary Engineers; and (2) DLI, which houses the Boiler Inspection Unit (BIU) and the Board of Boiler Rules. The State Board of Stationary Engineers has regulatory jurisdiction over all of the State's stationary engineers, who operate and maintain steam and power generators, heating plants, boilers, pressure valves, and other systems. BIU oversees the inspection of boilers and pressure vessels and investigates any boiler and pressure vessel accidents. The Board of Boiler Rules recommends regulations for boilers and pressure vessels.

The 2011 preliminary evaluation of DLI and its associated boards concluded that the Board of Boiler Rules serves an important role in protecting the citizens of Maryland from unsafe boilers and pressure vessels and, therefore, recommended that it be renewed. However, the evaluation also found several deficiencies in the board's operation and recommended that the board, in conjunction with the State Board of Stationary Engineers, do the following:

- enhance efforts to fill vacant seats on both boards;
- meet regularly with a quorum necessary to conduct official business; and
- hold joint meetings between the two boards, including joint meetings to consider ways to boost board membership and improve the State's regulatory structure.

The evaluation also requested that, by October 1, 2012, the three entities report to DLS on the following developments between the date of the preliminary evaluation and the delivery of the required report to DLS:

- the frequency with which the State Board of Stationary Engineers and the Board of Boiler Rules have been able to meet independently with a quorum necessary to conduct official business;
- the frequency with which the two boards have met together to coordinate enforcement of boiler safety; and
- steps taken by the Board of Boiler Rules to update the State's boiler and pressure vessel safety regulations.

DLS received the joint follow-up report, which is attached as **Appendix 1**. The report addresses each of the issues required by the preliminary evaluation, with the exception of the number of independent meetings of the Board of Boiler Rules. Through further contact with DLI, DLS has established that the Board of Boiler Rules has met twice following the release of the preliminary evaluation, including once with the State Board of Stationary Engineers.<sup>1</sup>

The preliminary evaluation noted that the State's current framework for regulating boiler safety divides authority and expertise not only between two boards, but two different divisions within DLLR. The statutory authority for the State Board of Stationary Engineers requires it to meet at least twice annually with the Board of Boiler Rules to coordinate their activities, but no corresponding requirement exists in statute for the Board of Boiler Rules. All indications are that the boards did not consistently coordinate their meetings or activities until 2011, but that efforts at coordination have increased.

For this evaluation, DLS consulted with both O&P and DLI on the possibility of merging the two boards into one board. The rationale for merging the two boards would be to (1) increase the likelihood of filling all the positions on a merged board; and (2) locate all of DLLR's expertise on boiler safety in a single board. Both boards have struggled to fill all their vacancies, and presumably a merged board would be able to draw from both pools to fill its positions. Also, a merged board could facilitate the coordination of safety regulations with licensing of boiler operators.

However, neither division views a merger as providing significant long-term advantages over the current arrangement. From a fiscal perspective, the Board of Boiler Rules has no revenue-generating activities and requires only minimal expenditures to maintain its operations (primarily expense reimbursements), so there are no fiscal efficiencies to be gained from a merger. From an operational perspective, O&P has no experience or expertise in safety regulation, and DLI has no experience or expertise with professional licensing, so it is likely that even a merged board would rely on each division's respective strengths to carry out its functions. With both boards exerting greater effort to coordinate their activities, including having one member serve on both boards, DLS recommends against merging the two boards. For the

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<sup>1</sup> The follow-up report references two meetings between the two boards, but the first meeting occurred in August 2011, prior to the release of the preliminary evaluation. Therefore, only one joint meeting has occurred since its release.



sake of consistency in their respective statutes, however, DLS makes the following recommendation.

**Recommendation 12: Statute should be amended to require the Board of Boiler Rules to meet at least twice annually with the State Board of Stationary Engineers to coordinate their activities and share members' expertise.**

### **Termination Dates Should Be Maintained for Boards**

DLS believes there are compelling reasons to exempt DLI from future termination. Most of the programs it carries out involve core functions of State government: protecting public health and safety and enforcing employment standards and compensation requirements. For instance, the Maryland Occupational Safety and Health program and the Safety Inspection programs both perform vital public safety functions, and the need for the services they provide shows no signs of diminishing. In the case of the Prevailing Wage Unit and the Employment Standards Service Unit, the General Assembly has determined that the functions they perform are sufficiently important as to warrant a mandated minimum appropriation to maintain their activity. Last, federal support for apprenticeship and training programs is contingent on the work of the Maryland Apprenticeship and Training Program, so termination of that program within DLI would result in the loss of federal funds for apprenticeship and job training. Although not completely unique, it is unusual for a standing budgeted division in a cabinet department to have a termination date, which only enhances the rationale for exempting DLI from termination.

At the same time, the five associated boards and councils included in the preliminary evaluation resemble most of the other entities currently subject to termination. As regulatory or advisory bodies, they each have uncompensated members who are appointed to the entities for limited periods of time. Given the turnover in membership and the potential evolution of their roles and functions, there is no reason to exempt them from future termination. These include the (1) Maryland Apprenticeship and Training Council; (2) the Maryland Occupational Safety and Health Advisory Board; (3) the Amusement Ride Safety Advisory Board; and (4) the Board of Boiler Rules. The Advisory Council on Prevailing Wage Rates is the fifth such entity, but it is recommended for repeal; if the recommendation is not adopted, the council should also retain a future termination date.

**Recommendation 13: Statute should be amended to repeal the termination date for the Division of Labor and Industry and its associated programs; however, DLI and those programs should remain subject to periodic evaluation under the Maryland Program Evaluation Act, with the next evaluation date set for July 1, 2023. Statute should be amended to continue the four associated boards and councils referenced above and to extend their termination dates by 10 years to July 1, 2024. If the Advisory Council on Prevailing Wage Rates is not repealed, statute should be amended to extend its termination date by 10 years, to July 1, 2024.**

## **Appendix 1. Follow-up Report from the Board of Boiler Rules and Board of Stationary Engineers**

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October 1, 2012

Mr. Warren G. Deschenaux, Director  
Office of Policy Analysis  
Department of Legislative Services  
90 State Circle  
Annapolis, MD 21401

Dear Mr. Deschenaux:

I herewith transmit, on behalf of the Department of Labor, Licensing and Regulation and the State Board of Stationary Engineers, the follow up report specified by the Department of Legislative Services in the 2011 *Preliminary Evaluation of the State Board of Stationary Engineers* published in December 2011.

Should you or your staff have follow-up questions or concerns regarding the report, please do not hesitate to contact me directly. I can be reached by telephone at (410) 230-6225 or by e-mail at [mvorgetts@dllr.state.md.us](mailto:mvorgetts@dllr.state.md.us).

Sincerely,



Michael Vorgetts, Deputy Commissioner

cc: Scott R. Jensen, Interim Secretary  
Harry Loleas, Commissioner  
Harold Norris, Chair  
Steven Smitson, Assistant Commissioner  
Jill Porter, Legislative Director  
Laura McCarty, Senior Manager  
Michael Rubenstein, Principal Policy Analyst

**FOLLOW-UP REPORT TO THE MARYLAND GENERAL ASSEMBLY,  
DEPARTMENT OF LEGISLATIVE SERVICES**

The 2011 preliminary evaluations of the Division of Labor and Industry and the State Board of Stationary Engineers conducted by the Department of Legislative Services (DLS) specifies that the State Board of Boiler Rules, in conjunction with the State Board of Stationary Engineers and the Department of Labor, Licensing and Regulation (DLLR) to submit a follow-up report to DLS by October 1, 2012, to address several issues identified in the evaluation report. Specifically, the report required the Boards and DLLR to provide the following information:

1. the frequency with which the Boards have been able to meet independently with a quorum necessary to conduct official business;
2. the frequency with which the two boards have met together to coordinate enforcement of boiler safety;
3. the extent to which the anticipated increase in the volume of complaints handled by the State Board of Stationary Engineers has been realized and whether the complaint volume has resulted in increased expenditures for the board;
4. final fiscal 2012 revenues and expenditures for the State Board of Stationary Engineers, fiscal 2012 licensing totals by grade, and projected revenues, expenditures, and licensing numbers for fiscal 2013; and
5. steps taken by the Board of Boiler Rules to update the State's boiler and pressure vessel safety regulations.

DLLR and the Boards have submitted the following comments regarding the issues raised in the 2011 sunset evaluation.

**1. Frequency of board meetings to conduct official business.**

With the exception of one month in 2011, the State Board of Stationary Engineers held a meeting every month since the publication of the 2011 preliminary evaluation. The Board continues to have several vacancies which undermines its effectiveness. Nonetheless, the current membership is committed to providing effective industry regulation.

**2. Frequency of board meetings to coordinate enforcement.**

The boards have met twice over the last 15 months to coordinate enforcement. In addition, one individual serves on both boards and the Deputy Boiler Inspector or his designee regularly attends board meetings, which improves communication between the boards.

The Board generates an annual revenue surplus that is credited to the State's general fund. The large general fund subsidy results from the Board having no full-time dedicated staff. Until three years ago, an executive director responsible for a total of four boards oversaw and assisted with Board operations. This position became vacant in February 2009 and remained vacant until it was eliminated as part of cost containment measures later that year. The Board also lost an administrative aide position, which accounts for the sharp direct and indirect cost decrease between fiscal 2011 and 2012. The Board now shares an administrative aide who is assigned to the State Board of Master Electricians.

*Growth in Licensees or Revenues Not Expected Within Next Two Years*

**Exhibit 2** displays the total number of new and renewal licenses issued by the Board in fiscal 2011 and 2012 and the estimated number of licenses that will be issued in fiscal 2013 and 2014.

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**Exhibit 2**  
**Licensing History and Expectations**  
**Fiscal 2011 - 2014**

		<b><u>FY 2011</u></b>	<b><u>FY 2012</u></b>	<b><u>FY 2013</u></b>	<b><u>FY 2014</u></b>
<b>Grade 1</b>	New	23	22	25	25
	Renewal	1,572	1,788	1,600	1,800
<b>Grade 2</b>	New	17	17	20	20
	Renewal	498	597	510	600
<b>Grade 3</b>	New	39	35	40	40
	Renewal	324	562	300	575
<b>Grade 4</b>	New	85	79	75	75
	Renewal	105	259	100	250
<b>Grade 5</b>	New	29	21	20	20
	Renewal	7	15	10	20
<b>Total</b>	<b>New</b>	<b>193</b>	<b>174</b>	<b>180</b>	<b>180</b>
	<b>Renewal</b>	<b>2,506</b>	<b>3,221</b>	<b>2,520</b>	<b>3,245</b>
<b>Total</b>		<b>2,699</b>	<b>3,395</b>	<b>2,700</b>	<b>3,425</b>

Source: Department of Labor, Licensing and Regulation

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Based on prior year experience and industry trends, the Board does not anticipate any significant increase in the number of licenses issued in the fiscal 2013 through 2014 cycle. As a result, Board revenues in fiscal 2013 and 2014 are expected to be in line with the previous two-year cycle. Costs are also not expected to increase significantly.

**Exhibit 3** displays the projected Board finances in fiscal 2013 and 2014.

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**Exhibit 3**  
**Projected Board Finances**  
**Fiscal 2013 - 2014**

	<u>Revenue</u>	<u>Direct Costs</u>	<u>Indirect Costs</u>	<u>Legal Costs</u>	<u>Actual Costs</u>	<u>Surplus/Gap</u>
<b>2013</b>	\$180,725	\$34,760	\$19	\$14,081	\$34,760	\$145,965
<b>2014</b>	\$217,575	35,455	19	14,363	35,455	182,120
<b>Total</b>	<b>\$398,300</b>	<b>\$70,215</b>	<b>\$38</b>	<b>\$28,444</b>	<b>\$70,215</b>	<b>\$328,085</b>

Source: Department of Labor, Licensing and Regulation

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**5. Steps to upgrade the State's boiler and pressure vessel safety regulations.**

The Board of Boiler Rules actively considers adoption of new rules and ensures that safety rules established are consistent with national consensus standards such as the standardized American Society of Mechanical Engineers (ASME) construction code. This ensures that boiler products that are part of interstate commerce system that are brought into Maryland meet the ASME standardized code. When the Board of Boiler Rules adopts new rules, and considers exceptions, that sometimes deviate from national consensus, it is only to be responsive to local compelling conditions.

## **Appendix 2. Follow-up Report from the Division of Labor and Industry**

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October 19, 2012

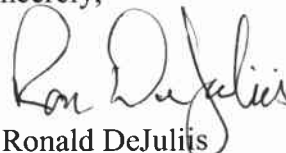
Mr. Michael C. Rubenstein  
Principal Policy Analyst  
Department of Legislative Services  
226 Legislative Services Building  
Annapolis, MD 21401

Dear Mr. Rubenstein:

In response to the Report issued by the Department of Legislative Services (DLS), "Preliminary Evaluation of the Division of Labor and Industry and Associated Boards and Councils", I wanted to thank you for the professionalism and thoroughness of the staff that was assigned to conduct the analysis and prepare the report. Since the report was issued we have seriously taken the recommendations under consideration and, working with staff, I have implemented many of your recommendations.

Enclosed you will find a report as requested that is responsive to your inquiries and recommendations. We sincerely appreciate the efforts of DLS in helping to identify our strengths, and challenges, and future reporting needs of the Legislative bodies of the Maryland General Assembly. If you have any questions or concerns about this report, please contact me or Deputy Commissioner, Craig D. Lowry.

Sincerely,



J. Ronald DeJuliis  
Commissioner of Labor and Industry

Enclosure

**Department of Labor, Licensing and Regulation**

**Division of Labor and Industry**

**Response to Preliminary Evaluation**

**to the**

**2011 Preliminary Sunset Evaluation**

**of the**

**Division of Labor and Industry**

**and Associated Boards and Councils**

## AUDIT REPORT RESPONSE:

### General Administration

DLS recommends that DLLR submit a follow-up report to DLS by October 1, 2012, providing an update and further explanation on the assessment of indirect costs on the Division's programs, including (1) how much each program has been assessed annually in indirect costs between fiscal 2007 and 2012; (2) the methodology used by the Division to determine each program's indirect cost allocation; and (3) how Departmental and Divisional indirect costs are determined and allocated.

### DLLR Follow-up Response:

DLLR annually submits an indirect cost plan for approval to the US Department of Labor (USDOL) in accordance with OMB Circular A-87. The plan allows for a systematic allocation of overhead and administrative costs across programs.

Breakdown of Indirect Costs Assessed by Program for the Division of Labor and Industry						Breakdown of Indirect Costs Assessed by Program for the Division of Labor and Industry					
	SPECIAL						FEDERAL				
	FY07	FY08	FY09	FY10	FY11		FY07	FY08	FY09	FY10	FY11
MOSH	503,951.81	477,563.24	402,738.50	402,293.71	329,036.20		615,207.19	601,835.76	503,014.50	505,417.29	480,921.80
SAFETY INSPECTION	486,141.80	441,203.12	582,163.58	503,520.55	495,556.42		-	-	-	-	-
WORKPLACE FRAUD	-	-	-	10,712.74	59,214.23		-	-	-	-	-
RAILROAD SAFETY	51,089.74	50,366.85	40,611.17	31,268.71	36,650.40		-	-	-	-	-
TOTAL COSTS	1,041,183.35	969,133.21	1,025,513.25	947,795.71	920,457.25		615,207.19	601,835.76	503,014.50	505,417.29	480,921.80

#### Special Note: INDIRECT COST RATE

A Indirect cost rate proposal is submitted to the U.S. Dept of Labor for approval. The indirect cost rate is the ratio of indirect costs to direct personnel services and personnel benefits. The cost rate is applied to the total of the direct personnel services and personnel benefits of each Federal grant not to the total direct costs.

DLLR is approved to apply the plan rates at departmental and divisional levels which are very distinct from each other. The Department rate is a ratio of the indirect cost pool to the direct salaries and fringe benefits. The indirect cost pool is composed of the following programs:

P00A0101aa10	Executive Direction
P00A0102	Program Analysis and Audit
P00A0108	Office of Fair Practices
P00B0103	Office of Budget and Fiscal Services
P00B0104	Office of General Services
P00B0106	Office of Human Resources

The Department's indirect cost rate does not include the Division's administrative and overhead personnel.

The Division's indirect cost allocation is based on direct hours paid by the Divisional personnel by program and fund. An indirect rate is, therefore, applied against the Division's "indirect cost pool" of administrative personnel's actual hours paid. The allocation is driven by the time distribution system of the Federal Accounting Reporting System (FARS) based on the input of the FARS timesheet submitted by Division personnel.

The indirect costs are derived from personnel services and benefits, not non-personnel or operating costs of the Division. The statement that the amount of indirect costs charged to the Division's programs is a percentage of the total direct costs is incorrect. Therefore, if personnel salaries remain stagnant, the changes in operating costs as a direct cost do not have an effect on the indirect cost rate. The indirect cost varies in accordance to the fund mix of all salaries of the indirect cost plan for that year. The drop in the indirect cost rate on federal programs in FY 2009 is a result of the \$20 million general fund transfer of Adult and Correctional Education to DLLR. The allocation of indirect costs shifted from federal funds to non-federal funds.

### **Apprenticeship**

DLS recommended that DLLR submit a follow-up report to DLS by October 1, 2012, which addresses:

- The status of the backlog of program compliance reviews and strategies for reducing the backlog; and
- The implementation, income stream, and expenditures of the State Apprenticeship Training Fund.

### **DLLR Follow-up Response:**

Between January of 2011 and September of 2012, the backlog of Apprenticeship Program reviews were reduced from 102 to 44. In January of 2011, all apprenticeship programs with active apprentices indicated were listed in order of their last review date, with the ones with the oldest review dates placed at the top of the list. All programs on that list were then contacted to

determine whether they were still in operation. Those found to no longer be in operation were deregistered as defunct. Those still in operation were targeted for reviews, with those with the oldest review dates scheduled first. The Apprenticeship Navigators were trained to perform reviews of apprenticeship programs with four (4) or fewer apprentices and then temporarily assigned to review programs in that category giving the Apprenticeship and Training Representatives more time to concentrate on programs with five (5) or more apprentices that have Affirmative Action requirements. All reviews are logged when reviews have been completed and the list updated every two (2) months coinciding with Maryland Apprenticeship and Training Council meetings where the reviews of programs with five (5) or more apprentices are presented to the Council for the Council's acceptance. The Apprenticeship and Training Representatives are then given the updated list of programs to be reviewed in the upcoming two-month period indicated.

With regard to the implementation, income stream, and expenditures of the State Apprenticeship Training Fund, DLLR has worked through the major obstacles related to implementation impact with stakeholders. After performing several outreach sessions and publishing notice of intent to adopt regulations, DLLR has retooled several key components to increase success in launching this important initiative. Following the anticipated implementation in January 2013, all contracts meeting the prevailing wage criteria will be subject to this law. All new contracts and projects will be required to have the language requiring all subcontractors to participate in an apprenticeship program, or pay into the fund, which becomes the revenue stream as identified in this question. Regulations have been published and repropose following some modifications after review of comments from stakeholders. Generally speaking, once the construction phase begins and craft workers accumulate work hours, some contractors will pay into the Fund, thereby creating the funding stream.

### **Prevailing and Living Wage**

DLLR should submit a report to DLS by October 1, 2012, providing information related to the tracking of employee complaints.

### **DLLR Follow-up Response:**

DLLR has an internal tracking mechanism for tracking information related to all complaints and now has the ability to differentiate between employee complaints and other general complaints concerning potential wage and classification violations. As an example, the unit reports that forty complaints were filed by employees from January, 2012 through September, 2012.

### **MOSH**

DLS recommended that DLLR submit a follow-up report to DLS by October 1, 2012, providing an update on:

- The extent of MOSH oversight of public-sector workplaces in the State and an analysis of how additional safety regulations or MOSH enforcement mechanisms may improve the

safety of public-sector workers, particularly public safety personnel; and

- Any decreases in federal funding for MOSH activities and how any such funding cuts (1) affect MOSH's worker safety functions; and (2) increase MOSH's reliance on special funding from WCC.

#### **DLLR Follow-up Response:**

MOSH oversight of the public sector in the State of Maryland is comprehensive, excluding federal workplaces. All local, county, and State employees in Maryland are covered under the Maryland Occupational Safety and Health Act. As a result, they are afforded the same safety and health protections as those workers in the private sector. This is accomplished through unannounced visits, issuance of citations, required abatement dates, employer access to free Consultation and free educational seminars. One difference, however, between the private and public sector is we do not assess or collect penalties from public sector employers. Overall, public sector employees are afforded the same level of protection and rights as private sector employees and this is one of the requirements of Maryland having a state-plan program. Some state government operations afford no protection to their public sector workers, certainly an action that negatively impacts approximately half of the country.

MOSH has recently been working with federal OSHA to assist them in their efforts to broaden public sector coverage and share "lessons learned" as they begin to work on addressing lack of public sector coverage in other states. A mechanism that would be beneficial to MOSH in addressing public sector safety and health would be a state maintained list of worksites to include site location information, NAICS coding, and employment data to better target our resources across the State. To date, this list does not exist. We have engaged Towson University with one-time only funding that MOSH was recently awarded to create a public sector site list. Any assistance in accomplishing this project or maintaining it would be very beneficial not only for our agency, but to the rest of the State, as well.

We have also been researching other states' approaches and have found one state with a program that requires all state facilities to report their Log 300 Occupational Injuries and Illnesses data to the state safety and health agency on a yearly basis. This allows the state OSHA program to know every location and focus on facilities that have high injury and illness rates. As we have just begun our research, we have not yet had a chance to test the applicability of this within Maryland, but this might be a possibility in the future.

Lastly, the Maryland Workers' Compensation Commission has approached the MOSH agency offering us a unique opportunity that would allow us electronic access to the Workers' Compensation First Report of Injury and Illness database. We are currently working out the technical logistics of designing a flexible query-based application that would provide MOSH with a potentially powerful surveillance tool for ensuring the safety and health of both Maryland's private and public sector employees.

As of this time, MOSH has not received any federal funding cuts. If MOSH did receive federal cuts we would have to rely further on special funding from WCC to maintain basic

operations. MOSH was able to achieve an increase in federal funding several times over the past few years by applying for and being awarded one-time only funding with corresponding match, lessening the increased reliance on WCC, if only temporary. This federal funding was from other state plan states that were not able to meet their federal match.

### **Safety Inspection**

DLS recommends that DLLR submit a follow-up report to DLS by October 1, 2012, providing an update on:

- Tracking the specific revenues and expenditures associated with each of the four safety inspection units;
- The process and outcomes of monitoring authorized third-party elevator inspectors and boiler and pressure vessel special inspectors;
- Elevator and boiler and pressure vessel safety inspection workload and backlog trends;
- Ongoing and planned efforts to ensure the safe operation of inflatable amusement attractions in the State, including public education and enforcement strategies; and
- Clarifying the statutory authority to use WCC special funds for the Elevator and Boiler and Pressure Vessel Safety Inspection Programs.

### **DLLR Follow-up Response:**

DLLR just completed the preparation of the FY2014 budget request for the programs within the Division and during that process explored the mechanisms that would be necessary to break out program expenditures where there is sharing of so many resources. As an example, Amusement Ride Inspectors conduct routine hoist and lift inspections (elevators), and Boiler Inspectors inspect pressure vessels and piping systems of pneumatically operated amusement rides. In contrast, we recognize that Railroad Inspectors inspect the track of non-railroad company touring trains (amusements), but this only counts for a fraction of the unit's total time. DLLR intends to further explore this issue and believes it is necessary to conduct a formalized analysis.

The monitoring of third party inspections is an activity that is performed by State inspectors on a random basis. The Chief Elevator Inspector and Chief Boiler Inspector have been given a goal of conducting monitoring of at least 10% of the total inspections conducted by these outside entities. Although management's focus has been to deploy resources towards reduction of the overdue population, it is recognized by the Chiefs that monitoring of inspection activity is an essential element of program integrity. The Commissioner has developed a matrix for reporting inspection monitoring activity to ensure this element remains on track.

Several challenges have been identified during the monitoring inspection process that have caused the respective safety chief to contact the representative that employs the third-party inspector and request a mitigation and resolution to the identified issue. The majority of the outcomes have been supportive of the success associated with the move to third party inspection activity from a safety and sustainability standpoint.



DLLR monitors the inspection performance and trends associated with the unit through the StateStat matrix. Although the workloads of each of the four inspection units are different, the basic information about inspection activity and productivity are captured and measured against performance trends. The full matrix is available online under DLLR's website. DLLR continues to drive performance to levels that have substantially eliminated a more than 20% backlog of inspections that had lasted for more than two decades.

With changes related to the proliferation of amusement attractions that are inflatable, DLLR and the Amusement Ride Safety Advisory Board found it necessary to have a dialogue regarding their associated hazards. The analysis by professionals from the business community and safety professionals was that the operation of inflatable attractions influence the majority of the incidents that result in serious injury and the hazards associated with their set-up very few. Recognizing that DLLR inspectors conduct inspections prior to operation of the inflatable attraction, and have limited resources to look at amusements during operation, legislation was passed to limit pre-operational inspections to larger inflatable attractions. This action will provide additional resource time to devote to operational inspection, public education and compliance outreach. Since the passage of the legislation, DLLR inspectors have been reaching out to the industry and business owners communicating the importance of proper set-up and operation of inflatable attractions. New regulations have been approved by the Amusement Ride Safety Advisory Board and submitted for final approval. The new regulations give specific guidelines for the set-up and operation of inflatable attractions. Although not scheduled, DLLR expects to conduct three outreach sessions before the close of the first quarter 2013. The sessions will discuss the hazards related to inflatables and review the new regulations and procedures related to compliance.

As a result of previous Sunset evaluations, discussions have involved the funding issue for the Safety Inspection Unit and the lack of statutory authorization. After the Division's 2002 Sunset and during the 2003 Session of the General Assembly, legislation was proposed which addressed the lack of statutory authority to address the funding of the Boiler Program. Unfortunately, that language was stricken from the bill – Chapter 651, Laws of 2003. We are open to suggestions and request guidance concerning this apparent ambiguity, considering that funding of the Board of Boiler Rules by the WCC dates back to the late 1930's.

### **Board of Boiler Rules**

DLS recommends that DLLR submit a follow-up report to DLS by October 1, 2012, providing an update on:

- The frequency with which the State Board of Stationary Engineers and the Board of Boiler Rules have been able to meet independently with a quorum necessary to conduct official business;
- The frequency with which the two boards have met together to coordinate enforcement of boiler safety; and
- Steps taken by the Board of Boiler Rules to update the State's boiler and pressure vessel safety regulations.

**DLLR Follow-up Response:**

The Board of Boiler Rules and the Board of Stationary Engineers met independently and together having a quorum necessary to conduct business on two occasions in the past year; that being, once on February 21, 2012 and again on September 11, 2012. Additionally, the Division of Labor and Industry in concert with DLS's formal recommendation plans to schedule at least two meetings annually with these boards. Coordination discussions have already taken place with the Division of Occupational and Professional Licensing to allow for this action.

The Commissioner of Labor and Industry has struggled with ensuring that the design code related to the construction of boilers and pressure vessels is adopted in a timely manner. This is influenced largely by national consensus standards that are utilized by industry globally and the need for Maryland to review regulatory changes to determine the impact locally. The Board of Boiler Rules has attempted to adopt these standards using the as amended provision under incorporation by reference rather than utilizing the laborious process of reviewing each independent change. The Commissioner recognizes the challenges and delays associated with this process and just recently directed the Board of Boiler Rules to move forward in the adoption of these standards irrespective of the task load involved.



## **Appendix 3. Draft Legislation**

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Bill No.: \_\_\_\_\_

Requested: \_\_\_\_\_

Committee: \_\_\_\_\_

Drafted by: Chilson

Typed by: Gail

Stored – 11/01/12

Proofread by \_\_\_\_\_

Checked by \_\_\_\_\_

By: **The Speaker (By Request – Department of Legislative Services)**

A BILL ENTITLED

1 AN ACT concerning

2 **Division of Labor and Industry and Associated Boards and Councils – Sunset**  
3 **Extension and Program Evaluation**

4 FOR the purpose of continuing the State Amusement Ride Safety Advisory Board, the  
5 Occupational Safety and Health Advisory Board, the Apprenticeship and  
6 Training Council, and the Board of Boiler Rules in accordance with the  
7 provisions of the Maryland Program Evaluation Act (Sunset Law) by extending  
8 to a certain date the termination provisions relating to the statutory and  
9 regulatory authority of the boards and council; altering certain termination  
10 provisions to apply only to certain boards and a certain council; repealing the  
11 termination provision for the Division of Labor and Industry; repealing a  
12 certain termination provision that applies to the regulation of the employment  
13 of minors and wages and hours; requiring that an evaluation be made of the  
14 Division of Labor and Industry on or before a certain date; repealing the  
15 Advisory Council on Prevailing Wage Rates; repealing the requirement that  
16 certain employment agencies submit to the Commissioner of Labor and  
17 Industry a certain penal bond and related provisions of law; requiring the  
18 Prevailing Wage Unit to advise and submit recommendations to the  
19 Commissioner regarding the Commissioner's functions under certain provisions  
20 of law; authorizing the Commissioner to ask certain units of State and local  
21 governments to provide certain information to the Prevailing Wage Unit;  
22 authorizing the Commissioner to conduct, under certain circumstances, an

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



investigation regarding whether certain provisions of law have been violated; authorizing the Commissioner to take certain actions regarding the violation of certain provisions of law; authorizing the Attorney General to take certain actions under certain provisions of this Act; authorizing the Commissioner to assess a certain civil fine for a violation of a certain provision of law; altering a certain reporting requirement; requiring the Board of Boiler Rules to meet with and consult the State Board of Stationary Engineers at least a certain number of times a year; requiring the Division to submit a certain report to certain committees of the General Assembly on or before a certain date; requiring the Workplace Fraud Unit to submit a certain report to the General Assembly on or before a certain date; requiring the Commissioner to submit a certain report to the Governor and the General Assembly on or before a certain date; repealing a certain definition; and generally relating to the Division of Labor and Industry and associated boards and councils.

BY adding to

Article – Business Regulation

Section 3–315

Annotated Code of Maryland

(2010 Replacement Volume and 2012 Supplement)

BY repealing

Article – Business Regulation

Section 3–601; 9–201 and 9–202 and the Subtitle “Subtitle 2. Administration and Enforcement”; and 9–301

Annotated Code of Maryland

(2010 Replacement Volume and 2012 Supplement)

BY repealing and reenacting, with amendments,

Article – Business Regulation

Section 9–101

Annotated Code of Maryland

(2010 Replacement Volume and 2012 Supplement)

BY repealing and reenacting, with amendments,

Article – Labor and Employment

Section 2–107(f), 3–103, 3–704, 3–712, 3–801, 3–802, 3–914, 3–920, and 11–402

Annotated Code of Maryland

- 1 (2008 Replacement Volume and 2012 Supplement)
- 2 BY repealing
- 3 Article – Labor and Employment
- 4 Section 2–109, 3–706, and 5–607
- 5 Annotated Code of Maryland
- 6 (2008 Replacement Volume and 2012 Supplement)
- 7 BY adding to
- 8 Article – Labor and Employment
- 9 Section 3–306.1, 3–608, 3–1008, and 5–306
- 10 Annotated Code of Maryland
- 11 (2008 Replacement Volume and 2012 Supplement)
- 12 BY repealing and reenacting, with amendments,
- 13 Article – Public Safety
- 14 Section 12–904 and 12–919
- 15 Annotated Code of Maryland
- 16 (2011 Replacement Volume and 2012 Supplement)
- 17 BY repealing
- 18 Article – State Finance and Procurement
- 19 Section 17–203
- 20 Annotated Code of Maryland
- 21 (2009 Replacement Volume and 2012 Supplement)
- 22 BY repealing and reenacting, with amendments,
- 23 Article – State Government
- 24 Section 8–403(b)(2), (3), (9), (33), and (42)
- 25 Annotated Code of Maryland
- 26 (2009 Replacement Volume and 2012 Supplement)
- 27 BY repealing
- 28 Article – State Government
- 29 Section 8–403(b)(55)
- 30 Annotated Code of Maryland
- 31 (2009 Replacement Volume and 2012 Supplement)



BY renumbering

Article – State Government

Section 8–403(b)(56) through (69), respectively

to be Section 8–403(b)(55) through (68), respectively

Annotated Code of Maryland

(2009 Replacement Volume and 2012 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
MARYLAND, That the Laws of Maryland read as follows:

**Article – Business Regulation**

**3–315.**

**SUBJECT TO THE EVALUATION AND REESTABLISHMENT PROVISIONS OF  
THE MARYLAND PROGRAM EVALUATION ACT, §§ 3–301 AND 3–303 THROUGH  
3–311 OF THIS SUBTITLE SHALL TERMINATE ON JULY 1, 2024.**

[3–601.

Subject to the evaluation and reestablishment provisions of the Maryland  
Program Evaluation Act, this title and all regulations adopted under this title shall  
terminate on July 1, 2014.]

9–101.

(a) In this title the following words have the meanings indicated.

(b) “Client” means an individual who seeks employment through an  
employment agency.

(c) [“Commissioner” means the Commissioner of Labor and Industry.

(d)] (1) “Employment agency” means a person who, for a fee:

(i) obtains, offers to obtain, or attempts to obtain:

1. an employee for a person who seeks an employee; or



2. participates directly or indirectly in the recruitment or supply of an individual who resides outside of the continental United States for employment in the continental United States.

(2) “Employment agency” does not include a person who merely:

(i) conducts a business that directly employs individuals to provide part-time or temporary services to another person;

(ii) as a lawyer, directly obtains an immigrant visa for an individual;

(iii) conducts a business that:

1. receives a fee that is paid wholly by an employer;

2. does not collect money from an individual seeking employment; and

3. does not require an individual seeking employment to make a contract; or

(iv) operates a nursing referral service agency that is licensed under Title 19, Subtitle 4B of the Health – General Article.

**[Subtitle 2. Administration and Enforcement.]**

**[9–201.**

The Commissioner may delegate any power or duty of the Commissioner under this title.]

**[9–202.**

The Commissioner shall pay all money collected under this title into the General Fund of the State.]

[9–301.

(a) An employment agency shall submit to the Commissioner a penal bond.

(b) The bond shall:

(1) run to the State;

(2) be in the amount of \$7,000;

(3) be signed by an individual authorized to do so by the employment agency as principal and by a surety company authorized to do business in the State as surety; and

(4) be conditioned that the employment agency will comply with this title and will pay to any person all damages caused by deceit, fraud, misrepresentation, or misstatement of the employment agency or an agent or employee of the employment agency.

(c) To ensure that each employment agency submits the penal bond in accordance with this section, the Commissioner may initiate an investigation or investigate a complaint that an employment agency has failed to submit a penal bond.

(d) If, after investigation, the Commissioner finds that an employment agency has failed to submit a penal bond as required by this section, the Commissioner shall give written notice that directs the employment agency, within 15 days after receipt of the notice:

(1) to submit the required bond; or

(2) to show written cause why the employment agency is not required to comply with this section.

(e) (1) If the employment agency complies with the requirement to submit a bond or otherwise submits a timely response, the Commissioner may:

(i) terminate proceedings against the employment agency; or

(ii) schedule a hearing and, by certified mail, give the employment agency written notice of the date, place, and time of the hearing.

(2) If the employment agency fails to comply with a lawful order of the Commissioner or fails to submit a timely response, the Commissioner may impose a civil penalty of not less than \$500 and not more than \$1,000 for each failure to comply with the order or failure to submit a timely report.

(f) If after a hearing, the Commissioner finds that the employment agency has violated the provisions of this section, the Commissioner may impose a civil penalty of not less than \$500 and not more than \$1,000 for each violation of this section.]

## Article – Labor and Employment

2–107.

(f) (1) There is a Prevailing Wage Unit in the Division.

(2) Under the direction of the Commissioner, the Prevailing Wage Unit shall administer and enforce Title 17, Subtitle 2 of the State Finance and Procurement Article.

**(3) (I) THE PREVAILING WAGE UNIT SHALL ADVISE AND SUBMIT RECOMMENDATIONS TO THE COMMISSIONER ON THE COMMISSIONER’S FUNCTIONS UNDER TITLE 17, SUBTITLE 2 OF THE STATE FINANCE AND PROCUREMENT ARTICLE.**

**(II) THE COMMISSIONER MAY ASK OTHER UNITS OF THE STATE GOVERNMENT OR UNITS OF LOCAL GOVERNMENTS TO PROVIDE STATISTICAL DATA, REPORTS, AND OTHER INFORMATION TO HELP THE PREVAILING WAGE UNIT CARRY OUT ITS DUTIES.**

[2–109.

Subject to the evaluation and reestablishment provisions of the Maryland Program Evaluation Act, this title shall terminate and be of no effect after July 1, 2014.]

3–103.

(a) **[The] EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, THE**  
 Commissioner may conduct an investigation **[under Subtitle 2 of] TO DETERMINE**  
**WHETHER A PROVISION OF this title[,] HAS BEEN VIOLATED** on the Commissioner’s  
 own initiative or may require a written complaint.

(b) The Commissioner may conduct an investigation under Subtitle **[4] 3** of  
 this title, on the Commissioner’s own initiative or on receipt of a written complaint **OF**  
**AN EMPLOYEE.**

(c) The Commissioner may conduct an investigation to determine whether  
 Subtitle 5 of this title has been violated on receipt of a written complaint of an  
 employee.

**(D) THE COMMISSIONER MAY CONDUCT AN INVESTIGATION TO**  
**DETERMINE WHETHER SUBTITLE 6 OF THIS TITLE HAS BEEN VIOLATED ON**  
**RECEIPT OF A WRITTEN COMPLAINT OF A SALES REPRESENTATIVE.**

**[(d)] (E)** (1) The Commissioner may investigate whether § 3–701 of this  
 title has been violated on receipt of a written complaint of an applicant for  
 employment.

(2) The Commissioner may investigate whether § 3–702 of this title  
 has been violated on receipt of a written complaint of an applicant for employment or  
 an employee.

**(3) THE COMMISSIONER MAY INVESTIGATE WHETHER § 3–704 OF**  
**THIS TITLE HAS BEEN VIOLATED ON RECEIPT OF A WRITTEN COMPLAINT OF AN**  
**EMPLOYEE.**

**[(3)] (4)** The Commissioner may investigate whether § 3–710 of this  
 title has been violated on receipt of a written complaint of an employee as provided in  
 § 3–710(d)(1) of this title.

1           **(5) THE COMMISSIONER MAY INVESTIGATE WHETHER § 3-711 OF**  
2 **THIS TITLE HAS BEEN VIOLATED ON RECEIPT OF A WRITTEN COMPLAINT OF AN**  
3 **EMPLOYEE AS PROVIDED IN § 3-711(D)(1) OF THIS TITLE.**

4           **(6) THE COMMISSIONER MAY INVESTIGATE WHETHER § 3-712 OF**  
5 **THIS TITLE HAS BEEN VIOLATED ON RECEIPT OF A WRITTEN COMPLAINT OF AN**  
6 **EMPLOYEE OR APPLICANT.**

7           **(F) (1) THE COMMISSIONER MAY INVESTIGATE WHETHER § 3-801 OF**  
8 **THIS TITLE HAS BEEN VIOLATED ON RECEIPT OF A WRITTEN COMPLAINT OF AN**  
9 **EMPLOYEE.**

10           **(2) THE COMMISSIONER MAY INVESTIGATE WHETHER § 3-802 OF**  
11 **THIS TITLE HAS BEEN VIOLATED ON RECEIPT OF A WRITTEN COMPLAINT OF AN**  
12 **EMPLOYEE.**

13           **[(e)] (G)** The Commissioner may investigate whether Subtitle 9 of this title  
14 has been violated:

15           (1) on the Commissioner's own initiative;

16           (2) on receipt of a written complaint signed by the person submitting  
17 the complaint; or

18           (3) on referral from another unit of State government.

19           **(H) THE COMMISSIONER MAY CONDUCT AN INVESTIGATION TO**  
20 **DETERMINE WHETHER SUBTITLE 10 OF THIS TITLE HAS BEEN VIOLATED ON**  
21 **RECEIPT OF A WRITTEN COMPLAINT OF AN EMPLOYEE.**

22 **3-306.1.**

23           **(A) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SUBTITLE**  
24 **HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

25           **(1) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION**  
26 **INFORMALLY BY MEDIATION; OR**

1                   **(2) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON**  
2 **BEHALF OF THE APPLICANT OR EMPLOYEE.**

3                   **(B) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS**  
4 **SECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR**  
5 **INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

6 **3-608.**

7                   **(A) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SUBTITLE**  
8 **HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

9                   **(1) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION**  
10 **INFORMALLY BY MEDIATION; OR**

11                   **(2) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON**  
12 **BEHALF OF THE APPLICANT OR EMPLOYEE.**

13                   **(B) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS**  
14 **SECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR**  
15 **INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

16 **3-704.**

17                   (a)    (1)    In this section the following words have the meanings indicated.

18                               (2)    “Managerial employee” means an employee who:

19                                       (i)    is not covered by a collective bargaining agreement;

20                                       (ii)   as primary duty of the employee, manages an enterprise or a  
21 unit of the enterprise that customarily is considered a department or subdivision of  
22 the enterprise;

23                                       (iii) customarily and regularly supervises at least 2 other  
24 employees in the enterprise or unit;



1 (iv) customarily and regularly exercises discretionary powers;  
2 and

3 (v) may hire or fire another employee or makes  
4 recommendations that affect the hiring, advancement, firing, or any other change in  
5 status of another employee.

6 (3) "Part-time employee" means an employee who is employed for a  
7 workweek of less than 25 hours.

8 (4) "Professional employee" means an employee whose primary duty is  
9 to work in a field that requires advanced knowledge that customarily is acquired by a  
10 prolonged course of specialized instruction and study.

11 (b) (1) This subsection does not apply during an emergency that a federal,  
12 State, or local governmental authority declares.

13 (2) An employee in a retail establishment may choose, as a day of rest,  
14 Sunday or the sabbath of the employee unless:

15 (i) outside Wicomico County, the employee is a managerial  
16 employee, professional employee, or part-time employee; and

17 (ii) in Wicomico County, the employee is a managerial employee  
18 or professional employee.

19 (3) An employee who chooses a day of rest:

20 (i) shall give written notice to the employer; and

21 (ii) during the course of employment, may change the day of rest  
22 by giving written notice of the change to the employer at least 30 days before its  
23 effective date.

24 (c) (1) This subsection does not apply to a managerial employee or  
25 professional employee or, outside Wicomico County, a part-time employee.

(2) If an employer compels an employee to work on the day of rest that the employee chooses under subsection (b) of this section, the employee is entitled to bring an action against the employer to recover 3 times the regular rate of pay of the employee for each hour the employee works on that day.

(d) This section may not be applied to abridge any right that a collective bargaining agreement grants to a part-time employee or other employee.

(e) This section does not affect the laws that relate to:

(1) the sale of alcoholic beverages on Sunday; or

(2) service of process on Sunday.

(f) An employer may not:

(1) discharge, discipline, discriminate against, or otherwise penalize an employee who chooses a day of rest; or

(2) require an applicant for employment who seeks a workweek of at least 25 hours to answer any question to identify the day that the applicant chooses as a day of rest.

**(G) (1) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SECTION HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

**(I) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION INFORMALLY BY MEDIATION; OR**

**(II) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON BEHALF OF THE APPLICANT OR EMPLOYEE.**

**(2) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS SUBSECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

**[(g)] (H) (1)** This subsection does not apply to an agent or supervisory employee of an employer who violates any provision of this section if the employer

1 authorizes, directs, or otherwise causes the agent or supervisory employee to violate  
2 the provision.

3 (2) Outside Wicomico County, an employer who violates any provision  
4 of this section is guilty of a misdemeanor and on conviction is subject to a fine of not  
5 less than \$250 or more than \$500.

6 (3) In Wicomico County, a person who violates any provision of this  
7 section is guilty of a misdemeanor and on conviction, for each employee who is caused,  
8 directed, permitted, or authorized to work:

9 (i) for a first conviction, is subject to a fine not exceeding \$500;  
10 and

11 (ii) for a second conviction, is subject to a fine not exceeding  
12 \$1,000.

13 **[(h)] (I)** In Wicomico County, the State's Attorney may file a complaint to  
14 enjoin a violation of this section.

15 **[3–706.**

16 Subject to the evaluation and reestablishment provisions of the Maryland  
17 Program Evaluation Act, Subtitles 2 and 4 of this title shall terminate and be of no  
18 effect after July 1, 2014.]

19 3–712.

20 (a) (1) In this section the following words have the meanings indicated.

21 (2) “Applicant” means an applicant for employment.

22 (3) (i) “Electronic communications device” means any device that  
23 uses electronic signals to create, transmit, and receive information.

24 (ii) “Electronic communications device” includes computers,  
25 telephones, personal digital assistants, and other similar devices.

1 (4) (i) “Employer” means:

2 1. a person engaged in a business, an industry, a  
3 profession, a trade, or other enterprise in the State; or

4 2. a unit of State or local government.

5 (ii) “Employer” includes an agent, a representative, and a  
6 designee of the employer.

7 (b) (1) Subject to paragraph (2) of this subsection, an employer may not  
8 request or require that an employee or applicant disclose any user name, password, or  
9 other means for accessing a personal account or service through an electronic  
10 communications device.

11 (2) An employer may require an employee to disclose any user name,  
12 password, or other means for accessing nonpersonal accounts or services that provide  
13 access to the employer’s internal computer or information systems.

14 (c) An employer may not:

15 (1) discharge, discipline, or otherwise penalize or threaten to  
16 discharge, discipline, or otherwise penalize an employee for an employee’s refusal to  
17 disclose any information specified in subsection (b)(1) of this section; or

18 (2) fail or refuse to hire any applicant as a result of the applicant’s  
19 refusal to disclose any information specified in subsection (b)(1) of this section.

20 (d) An employee may not download unauthorized employer proprietary  
21 information or financial data to an employee’s personal Web site, an Internet Web site,  
22 a Web-based account, or a similar account.

23 (e) This section does not prevent an employer:

24 (1) based on the receipt of information about the use of a personal Web  
25 site, Internet Web site, Web-based account, or similar account by an employee for  
26 business purposes, from conducting an investigation for the purpose of ensuring  
27 compliance with applicable securities or financial law, or regulatory requirements; or

(2) based on the receipt of information about the unauthorized downloading of an employer’s proprietary information or financial data to a personal Web site, Internet Web site, Web-based account, or similar account by an employee, from investigating an employee’s actions under subsection (d) of this section.

**(F) (1) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SECTION HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

**(I) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION INFORMALLY BY MEDIATION; OR**

**(II) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON BEHALF OF THE APPLICANT OR EMPLOYEE.**

**(2) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS SUBSECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

3–801.

(a) (1) In this section, “employer” means a person engaged in a business, industry, profession, trade, or other enterprise in the State.

(2) “Employer” includes:

(i) a unit of State or local government that employs individuals who are not subject to the provisions of Title 9, Subtitle 5 of the State Personnel and Pensions Article; and

(ii) a person who acts directly or indirectly in the interest of another employer with an employee.

(b) This section applies to an employer who provides leave with pay to an employee following the birth of the employee’s child.

(c) An employer who provides leave with pay to an employee following the birth of the employee's child shall provide the same leave with pay to an employee when a child is placed with the employee for adoption.

**(D) (1) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SECTION HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

**(I) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION INFORMALLY BY MEDIATION; OR**

**(II) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON BEHALF OF THE APPLICANT OR EMPLOYEE.**

**(2) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS SUBSECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

3-802.

(a) (1) In this section the following words have the meanings indicated.

(2) "Child" means an adopted, biological, or foster child, a stepchild, or a legal ward who is:

(i) under the age of 18 years; or

(ii) at least 18 years old and incapable of self-care due to a mental or physical disability.

(3) (i) "Employer" means a person that is engaged in a business, industry, profession, trade, or other enterprise in the State.

(ii) "Employer" includes a person who acts directly or indirectly in the interest of another employer with an employee.

(4) "Immediate family" means a child, spouse, or parent.

1                   (5)   (i)   “Leave with pay” means paid time away from work that is  
2 earned and available to an employee:

- 3                               1.    based on hours worked; or
- 4                               2.    as an annual grant of a fixed number of hours or days  
5 of leave for performance of service.

6                   (ii)   “Leave with pay” includes sick leave, vacation time, paid  
7 time off, and compensatory time.

8                   (iii)   “Leave with pay” does not include:

- 9                               1.    a benefit provided under an employee welfare benefit  
10 plan subject to the federal Employee Retirement Income Security Act of 1974;
- 11                              2.    an insurance benefit, including benefits from an  
12 employer’s self-insured plan;
- 13                              3.    workers’ compensation;
- 14                              4.    unemployment compensation;
- 15                              5.    a disability benefit; or
- 16                              6.    a similar benefit.

17                   (6)   “Parent” means an adoptive, biological, or foster parent, a  
18 stepparent, a legal guardian, or a person standing in loco parentis.

19           (b)   (1)   This section applies to an employee who is primarily employed in  
20 the State.

21                   (2)   This section applies to an employer that:

22                           (i)   provides leave with pay under the terms of a collective  
23 bargaining agreement or an employment policy; and

1 (ii) employs 15 or more employees for each working day in each  
2 of 20 or more calendar weeks in the current or preceding calendar year.

3 (c) The purpose of this section is to allow an employee of an employer to use  
4 leave with pay to care for an immediate family member who is ill under the same  
5 conditions and policy rules that would apply if the employee took leave for the  
6 employee's own illness.

7 (d) An employee of an employer may use leave with pay for the illness of the  
8 employee's immediate family.

9 (e) (1) An employee of an employer:

10 (i) may only use leave with pay under this section that has  
11 been earned; and

12 (ii) who earns more than one type of leave with pay may elect  
13 the type and amount of leave with pay to be used under this section.

14 (2) Except as provided in paragraph (3) of this subsection, an  
15 employee of an employer who uses leave under this section shall comply with the  
16 terms of a collective bargaining agreement or employment policy.

17 (3) If the terms of a collective bargaining agreement with an employer  
18 or an employment policy of an employer provide a leave with pay benefit that is equal  
19 to or greater than the benefit provided under this section, the collective bargaining  
20 agreement or employment policy prevails.

21 (f) An employer may not discharge, demote, suspend, discipline, or otherwise  
22 discriminate against an employee or threaten to take any of these actions against an  
23 employee because the employee:

24 (1) has taken leave authorized under this section;

25 (2) has opposed a practice made unlawful by this section; or

26 (3) has made a charge, testified, assisted, or participated in an  
27 investigation, proceeding, or hearing under this section.



(g) This section does not:

(1) extend the maximum period of leave an employee has under the federal Family and Medical Leave Act of 1993; or

(2) limit the period of leave to which an employee is entitled under the federal Family and Medical Leave Act of 1993.

**(H) (1) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SECTION HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

**(I) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION INFORMALLY BY MEDIATION; OR**

**(II) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON BEHALF OF THE APPLICANT OR EMPLOYEE.**

**(2) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS SUBSECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

3–914.

(a) An employer shall keep, for at least 3 years, in or about its place of business, records of the employer containing the following information:

(1) the name, address, occupation, and classification of each employee or independent contractor;

(2) the rate of pay of each employee or method of payment for the independent contractor;

(3) the amount that is paid each pay period to each employee or, if applicable, independent contractor;

(4) the hours that each employee or independent contractor works each day and each workweek;

1           (5)    for all individuals who are not classified as employees, evidence  
2 that each individual is an exempt person or an independent contractor or its employee;  
3 and

4           (6)    other information that the Commissioner requires, by regulation,  
5 as necessary to enforce this subtitle.

6           (b)    An employer shall provide each individual classified as an independent  
7 contractor or exempt person with written notice of the classification of the individual  
8 at the time the individual is hired.

9           (c)    The written notice shall:

10           (1)   include an explanation of the implications of the individual's  
11 classification as an independent contractor or exempt person rather than as an  
12 employee; and

13           (2)   be provided in English and Spanish.

14           (d)   The Commissioner shall adopt regulations establishing the specific  
15 requirements for the contents and form of the notice.

16           **(E) IF AN EMPLOYER FAILS TO PROVIDE NOTICE UNDER SUBSECTION**  
17 **(B) OF THIS SECTION, THE COMMISSIONER MAY ASSESS A CIVIL PENALTY OF**  
18 **NOT MORE THAN \$100 FOR EACH DAY THAT THE EMPLOYER FAILS TO PROVIDE**  
19 **NOTICE.**

20   3-920.

21           (a)    The Commissioner shall prepare an annual report for the Secretary **AND,**  
22 **IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, THE**  
23 **GENERAL ASSEMBLY** on the administration and enforcement of this subtitle, that  
24 shall include:

25           (1)    the number and nature of complaints received;

26           (2)    the number of investigations conducted;

1 (3) the number of citations issued;

2 (4) the number of informal resolutions of the citations;

3 (5) the number of [final administrative orders, with a description, that  
4 shall include:

5 (i) whether the alleged violation was found; and

6 (ii) whether the order affirmed or overturned a proposed  
7 decision of the Office of Administrative Hearings;] **CITATIONS APPEALED TO THE  
8 OFFICE OF ADMINISTRATIVE HEARINGS AND THE OUTCOMES OF THOSE  
9 HEARINGS;**

10 (6) [the number of orders of the Commissioner reviewed by the  
11 Secretary and whether they were affirmed or overturned; and

12 (7)] the number of requests for judicial review of [administrative]  
13 **FINAL** orders and whether the orders were affirmed or overturned[.]; **AND**

14 **(7) THE NUMBER OF CIVIL PENALTIES ASSESSED, THE TOTAL  
15 DOLLAR AMOUNT OF THOSE PENALTIES, AND THE TOTAL DOLLAR AMOUNT  
16 COLLECTED.**

17 (b) The Commissioner's report shall be a public record.

18 **3-1008.**

19 **(A) WHENEVER THE COMMISSIONER DETERMINES THAT THIS SUBTITLE  
20 HAS BEEN VIOLATED, THE COMMISSIONER MAY:**

21 **(1) TRY TO RESOLVE ANY ISSUE INVOLVED IN THE VIOLATION  
22 INFORMALLY BY MEDIATION; OR**

23 **(2) ASK THE ATTORNEY GENERAL TO BRING AN ACTION ON  
24 BEHALF OF THE APPLICANT OR EMPLOYEE.**

**(B) THE ATTORNEY GENERAL MAY BRING AN ACTION UNDER THIS SECTION IN THE COUNTY WHERE THE VIOLATION ALLEGEDLY OCCURRED FOR INJUNCTIVE RELIEF, DAMAGES, OR OTHER RELIEF.**

**5-306.**

**SUBJECT TO THE EVALUATION AND REESTABLISHMENT PROVISIONS OF THE MARYLAND PROGRAM EVALUATION ACT, THIS PART I OF THIS SUBTITLE SHALL TERMINATE ON JULY 1, 2024.**

[5–607.

Subject to the evaluation and reestablishment provisions of the Maryland Program Evaluation Act, this title shall terminate and be of no effect after July 1, 2014.]

11-402.

Subject to the evaluation and reestablishment provisions of the Maryland Program Evaluation Act, [provisions of this subtitle creating the Apprenticeship and Training Council and related to the regulation of apprentices and trainees are of no effect after] **§§ 11-403 THROUGH 11-405 OF THIS SUBTITLE SHALL TERMINATE ON July 1, [2014] 2024.**

## Article – Public Safety

12-904.

(a) There is a Board of Boiler Rules in the Division of Labor and Industry in the Department of Labor, Licensing, and Regulation.

(b) (1) The Board consists of the following 10 members:

(i) as an ex officio member, the Commissioner; and

(ii) nine members appointed by the Governor with the advice of the Secretary and with the advice and consent of the Senate.

1                   (2)     Of the nine appointed members of the Board:

2                               (i)     one shall be a representative of owners and users of power  
3     boilers;

4                               (ii)    one shall be a representative of owners of agricultural,  
5     model, or historical steam engine equipment;

6                               (iii)   one shall be a representative of owners and users of pressure  
7     vessels;

8                               (iv)    one shall be a representative of manufacturers or  
9     assemblers of boilers or pressure vessels;

10                              (v)     one shall be a representative of an insurer authorized to  
11     insure boilers or pressure vessels;

12                              (vi)    one shall be a mechanical engineer on the faculty of a  
13     recognized engineering college in the State;

14                              (vii)   one shall be a stationary engineer;

15                              (viii)  one shall be a professional engineer with boiler or pressure  
16     vessel experience; and

17                              (ix)    one shall be a consumer member.

18               (c)     (1)     The consumer member of the Board:

19                              (i)     shall be a member of the public;

20                              (ii)    may not be a licensee or otherwise be subject to regulation  
21     by the Board;

22                              (iii)   may not be required to meet the qualifications for the  
23     professional members of the Board; and

(iv) may not, within 1 year before appointment, have had a financial interest in or have received compensation from a person regulated by the Board.

(2) While a member of the Board, the consumer member may not:

(i) have a financial interest in or receive compensation from a person regulated by the Board; or

(ii) grade any examination given by or for the Board.

(d) (1) The term of an appointed member is 4 years.

(2) The terms of the appointed members are staggered as required by the terms provided for members of the Board on October 1, 2003.

(3) At the end of a term, a member continues to serve until a successor is appointed and qualifies.

(4) A member who is appointed after a term has begun serves only for the rest of the term and until a successor is appointed and qualifies.

(e) The Board shall elect a chairman from among its members.

(f) The Commissioner may not vote.

(g) (1) The Commissioner may not receive additional compensation as a member of the Board.

(2) An appointed member of the Board:

(i) may not receive a salary as a member of the Board; but

(ii) is entitled to:

1. compensation in accordance with the State budget;

and

2. reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

**(H) THE BOARD SHALL MEET WITH AND CONSULT THE STATE BOARD OF STATIONARY ENGINEERS AS NECESSARY BUT NOT LESS THAN TWO TIMES EACH YEAR.**

**[(h)] (I)** The exercise or performance of the powers, authority, duties, and functions of the Board under this subtitle is subject to the power and authority of the Secretary.

12–919.

[The provisions of this subtitle creating the Board and relating to the regulation of boilers or pressure vessels and any regulations adopted under this subtitle are of no effect and may not be enforced after] **SUBJECT TO THE EVALUATION AND REESTABLISHMENT PROVISIONS OF THE MARYLAND PROGRAM EVALUATION ACT, § 12–904 OF THIS SUBTITLE SHALL TERMINATE ON July 1, [2014] 2024.**

## **Article – State Finance and Procurement**

[17–203.

(a) In this section, “Advisory Council” means the Advisory Council on Prevailing Wage Rates.

(b) There is an Advisory Council on Prevailing Wage Rates in the Division of Labor and Industry.

(c) The Advisory Council consists of the following 6 members:

(1) 2 individuals from management in the building and construction industry;

(2) 2 individuals from labor in the building and construction industry;  
and

(3) 2 individuals from the general public.

1           (d)   (1)   The Governor shall appoint each member with the advice of the  
2 Secretary of Labor, Licensing, and Regulation and with the advice and consent of the  
3 Senate.

4                   (2)   The 2 members from management shall be selected from a list  
5 submitted by management organizations in the building and construction industry.

6                   (3)   The 2 members from labor shall be selected from a list submitted  
7 by labor organizations in the building and construction industry.

8           (e)   Before taking office, each appointee to the Advisory Council shall take the  
9 oath required by Article I, § 9 of the Maryland Constitution.

10          (f)   (1)   From among the Advisory Council members, the Governor shall  
11 appoint a chairman.

12                   (2)   The chairman of the Advisory Council:

13                           (i)   shall serve for 1 year from the day of appointment; and

14                           (ii)   is not eligible for reappointment as chairman for the  
15 following year.

16          (g)   (1)   The term of a member is 3 years.

17                   (2)   The terms of members are staggered as required by the terms  
18 provided for members of the Advisory Council on October 1, 1988.

19                   (3)   At the end of a term, a member continues to serve until a successor  
20 is appointed and qualifies.

21                   (4)   If a vacancy occurs, the Governor shall appoint a new member with  
22 the advice of the Secretary of Labor, Licensing, and Regulation.

23                   (5)   A member who is appointed after a term has begun serves only for  
24 the rest of the term and until a successor is appointed and qualifies.



(h) The Governor may remove a member for incompetence or misconduct.

(i) (1) The Advisory Council shall advise and submit recommendations to the Commissioner on the Commissioner's functions under this subtitle.

(2) The Commissioner may ask other units of the State government or units of local governments to provide statistical data, reports, and other information to help the Advisory Council to carry out its duties.

(j) The Advisory Council shall meet at least twice a year and on other days the Commissioner requests, at the times and places that it determines.

(k) Each member of the Advisory Council is entitled to:

(1) compensation in accordance with the State budget; and

(2) reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(l) Subject to the evaluation and reestablishment provisions of the Maryland Program Evaluation Act, this section shall terminate and be of no effect after July 1, 2014.]

## Article – State Government

8–403.

(b) Except as otherwise provided in subsection (a) of this section, on or before the evaluation date for the following governmental activities or units, an evaluation shall be made of the following governmental activities or units and the statutes and regulations that relate to the governmental activities or units:

(2) Amusement Ride Safety, State Advisory Board (§ 3–303 of the Business Regulation Article: July 1, [2013] **2023**);

(3) Apprenticeship and Training Council (§ 11–403 of the Labor and Employment Article: July 1, [2013] **2023**);

1                   (9)     Boiler Rules, Board of (§ 12–904 of the Public Safety Article: July  
2     1, [2013] **2023**);

3                   (33)    Labor and Industry, Division of (Title 2 of the Labor and  
4     Employment Article: July 1, [2013] **2023**) **AND RELATED PROGRAMS**;

5                   (42)    Occupational Safety and Health Advisory Board (§ 5–302 of the  
6     Labor and Employment Article: July 1, [2013] **2023**);

7                   [(55)   Prevailing Wage Rates, Advisory Council on (§ 17–203 of the State  
8     Finance and Procurement Article: July 1, 2013);]

9                   SECTION 2. AND BE IT FURTHER ENACTED, That Section(s) 8–403(b)(56)  
10    through (69), respectively, of Article – State Government of the Annotated Code of  
11    Maryland be renumbered to be Section(s) 8–403(b)(55) through (68), respectively.

12                  SECTION 3. AND BE IT FURTHER ENACTED, That:

13                  (a)     On or before October 31, 2013, the Division of Labor and Industry shall  
14    submit a report to the Senate Finance Committee and the House Economic Matters  
15    Committee, in accordance with § 2–1246 of the State Government Article, on the  
16    continued use and effectiveness of wage orders.

17                  (b)     The report submitted under subsection (a) of this section shall, for each of  
18    the immediately preceding 3 fiscal years, include:

19                         (1)     the number of wage orders issued by the Division;

20                         (2)     the number of wage orders forwarded to the Central Collection  
21    Unit for collection;

22                         (3)     the number of wage orders forwarded to the Central Collection  
23    Unit for which payment is collected;

24                         (4)     the number of wage orders forwarded to the Central Collection  
25    Unit for which payment has not been collected; and

(5) to the extent feasible, the reasons for any substantial increase or decrease in the backlog of wage orders that remain unpaid from a previous fiscal year.

SECTION 4. AND BE IT FURTHER ENACTED, That, on or before December 31, 2013, the Workplace Fraud Unit shall submit a report to the General Assembly, in accordance with § 2–1246 of the State Government Article, on the progress of the development of a long–term data management system.

SECTION 5. AND BE IT FURTHER ENACTED, That:

(a) On or before December 31, 2014, the Commissioner of Labor and Industry shall submit a report to the Governor and, in accordance with § 2–1246 of the State Government Article, the General Assembly on the status of the Workplace Fraud Unit as required by Chapter 188, § 3 of the Acts of 2009.

(b) The report submitted under subsection (a) of this section shall:

(1) summarize the level of activity under the Unit’s new implementation strategy and assess the effectiveness of the Unit’s strategy and its outreach program;

(2) explain the difference between initial estimates of citations and penalties and those experienced in practice, including the relatively few citations issued for worker misclassification;

(3) include the development status of the Unit’s long–term data management system and the system’s ability to support the Unit; and

(4) at a minimum, evaluate:

(i) the Unit’s annual data reports and the consistency between those reports and other agency audits of worker misclassification;

(ii) the Unit’s staffing composition relative to its implementation strategy; and

(iii) the Unit’s role in the larger context of the Task Force on Workplace Fraud established by Executive Order No. 01.01.2009.09.

1           SECTION 6. AND BE IT FURTHER ENACTED, That this Act shall take effect  
2   July 1, 2013.



## **Appendix 4. Written Comments of the Division of Labor and Industry and Associated Boards and Councils**

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October 25, 2012


Mr. Michael C. Rubenstein  
Principal Policy Analyst  
Department of Legislative Services  
226 Legislative Services Building  
Annapolis, MD 21401

Dear Mr. Rubenstein:

Upon review of the recommendations submitted by DLS regarding "Evaluation of the Division of Labor and Industry and Associated Boards and Councils," attached please find our comments and suggestions for your review and consideration.

If you should have questions or concerns, please contact either myself or Deputy Commissioner, Craig D. Lowry.

Sincerely,



J. Ronald DeJuljis  
Commissioner of Labor and Industry

Attachment



## **CHAPTER 2. Employment Standards & Classification**

**Recommendation 1: Deregulating the State's role regarding employment agencies should be completed by eliminating the penal bond requirement in Title 9 of the Business Regulation Article, as the amount of the bond is *de minimus* and no claims have been made. But, since at least 43 employment agencies still exist, the remaining consumer protections in Title 9 should be maintained.**

**Response:** The Division of Labor and Industry concurs with the recommendation, and offers the following comments.

The Commissioner has observed a tremendous shift in the employment agency industry wherein their major function historically has been to place people into short or long-term positions for a fee, typically charged to the employment seeker. In the late twentieth century, the industry was impacted by the boom in technology that created such employment networks as Monster.com and Careerbuilder.com, just to name a few. In addition, the government's intervention into unemployment and welfare reduction, portability of individual employment skills, and the growing need for licensed professionals has created an open market for job seekers and employers. Many of the existing agencies are employment brokers for independent contractors and executive professionals who are seeking high caliber employment or candidates. The Commissioner believes that this recommendation will be embraced by the industry and will not have any negative impact on the protected community.

**Recommendation 2: To make State labor laws more consistent, statute should be amended to give the commissioner the authorization to investigate all labor laws enacted in Title 3 of the Labor and Employment Article with the understanding that, absent additional personnel and resources, most of these laws will not be actively enforced by DLI.**

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

The Commissioner has always been receptive to any formal complaints filed with his office related to wages or employment standards. These complaints are investigated with vigor to ensure that employees are provided with the protection the law requires. In order to achieve a higher level of compliance at all employment sectors, and promote a uniform and level playing field for businesses, the Commissioner would welcome the ability to be more pro-active when conducting investigations. Allowing all laws under Title 3 to provide for uniform authority to perform compliance reviews on the motion of the Commissioner would be an acceptable measure to help garner greater voluntary compliance.

**Recommendation 3: If the General Assembly chooses not to act on Recommendation 2, Section 3-103 of the Labor and Employment Article, which grants the commissioner investigative authority on various labor laws, should be amended to reflect that the commissioner was given the authority to investigate complaints under provisions of the Job Applicant Fairness Act.**

**Response:** The Division of Labor and Industry concurs with the recommendation.

**Recommendation 4: The commissioner should alter DLI's phone tally system to determine the subject of all calls received, which may allow the division to better determine the need for additional resources to address employee/employer problems.**

**Response:** The Division of Labor and Industry concurs with the recommendation, and offers the following comments.

While ESS has already begun the process of tracking the subject of all calls received, the unit will enhance it further to cover all employer and employee issues as they relate to Title 3. This appears to be a logical extension to better define the inquiries received by ESS.

**Recommendation 5: By October 31, 2013, DLI should submit a follow-up report to the appropriate committees of the General Assembly on the continued use and effectiveness of wage orders. The report should detail (1) the number of wage orders issued in each fiscal year; (2) the number forwarded to CCU for collection; (3) the number for which payment is ultimately collected; and (4) the total backlog in wage payment and collection cases. To the extent feasible, the report should explain the reason(s) for any substantial increase or decrease in the backlog compared with backlogs from prior years.**

The Division of Labor and Industry concurs with the recommendation, and offers the following comments.

The detailed report will be ready on October of 2013 for FY2013. ESS is currently tracking the effectiveness and efficiency of wage orders. The information being tracked includes: 1) the number of wage orders issued in each fiscal year; 2) the number forwarded to CCU for collection; 3) the number for which payment is ultimately collected; and, 4) the number pending collections. At present, ESS does not have a backlog of wage payment and collection cases. However, we do maintain a report on the number of open cases under investigation on a monthly basis.

## CHAPTER 3. Worker Classification

**Recommendation 6: The Commissioner of Labor and Industry should comply with statutory reporting requirements and prepare his own annual report for the Secretary of Labor, Licensing, and Regulation. This reporting requirement may be satisfied in conjunction with existing reporting by the commissioner to the Secretary as long as it complies with statutory requirements regarding the content of the report. Statute should be amended to align reporting requirements with enforcement provisions and include the General Assembly as a recipient of the report, in addition to the Secretary.**

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

The recent strategic shift regarding enforcement of the Workplace Fraud Act incorporated a change in the unit's operational policies, public outreach, investigative tactics, and a re-branding of the unit's identity. While the Act is officially the Workplace Fraud Act, the new leadership was of the opinion that Workplace Fraud was not an accurate or sufficient description of the unit's purpose and that it had hostile and misleading implications. Therefore, the Commissioner modified the name of the unit to the Worker Classification Protection Unit (WPCU). The new name more accurately describes the unit's focus while also communicating the underlying purpose of protecting workers from being misclassified and protecting work providers from being undercut by competitors engaged in misclassification.

The WCPU and the Division of Labor and Industry *have* provided timely metrics and other information for the Management For Results (MFR), Sunset reviews, StateStat and Task Force reports. The Commissioner has initiated a plan to provide one combined set of fiscal year metrics that will satisfy all reporting requirements (Commissioner's Report, MFR, StateStat, Sunset, and Task Force); and intends to prepare and include the information in an independent report that will be provided to the DLLR Secretary and the General Assembly.

Included in the itemized list of metrics, the Commissioner is required to report annually to the Secretary "the number of orders of the [C]ommissioner reviewed by the Secretary and whether they were affirmed or overturned..." It is correct that this is a required metric; however, the answer will always be "zero." This is because for Workplace Fraud, a notice of citation becomes a final order either 1) 15 days after it is delivered to the work provider in question; or 2) upon order of an administrative law judge. There is no review by the Secretary. The only form of review available for a final order is judicial review by the applicable circuit court. [See WFA sec. 3-906 and State Government Article 10-222.] Likewise, the requirement to report on "whether the [final administrative] order affirmed or overturned a proposed decision of the Office of Administrative Hearings" is also non-sensical. The order of the ALJ (OAH) is a final order, not a proposed order. It cannot be administratively reviewed or overturned. In essence, these reporting requirements are irrelevant.

**Recommendation 7: The unit should continue ongoing efforts to develop and implement an interim data-management system to track relevant data. By December 31, 2013, the unit should report to the General assembly on the progress in its development of a long-term data-management system. By December 31, 2014, the unit should have a fully developed and implemented data-management system that is capable of generating reports on historical data by fiscal year, generating form letters to employers who are the subject of investigations, and performing any other function deemed necessary by the commissioner.**

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

While WCPU has already begun the process of compiling the information that programmers will need in order to develop a new data-management system, there are aspects of this project that are beyond the control of WCPU or the Commissioner of Labor and Industry. These aspects are time and funding. We have considered the DLS recommendation and have targets on delivery prior to December 31, 2014.

**Recommendation 8: DLI should assess the current complement of staff for the unit in light of the unit's new implementation strategy and experience in enforcement of the Act and address unmet needs when filling vacancies that occur.**

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

Labor and Industry anticipates that once WCPU's reputation is established, the construction and landscaping industries will take significant strides toward self-compliance and regulation. The Commissioner recognizes the need to continue to press on outreach opportunities. Having staff to plan and coordinate such events is critical. The Unit needs to develop, procure, and distribute a Spanish-language brochure and consider filling staff vacancies with multi-lingual talent. This having been identified, we realize the need to take a much closer look at staffing for the WCPU.

**Recommendation 9: Statute should be amended to authorize the Commissioner of Labor and Industry to assess a penalty for noncompliance with the Act's notification requirements to workers who are exempt persons or independent contractors.**

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

The Commissioner agrees that compliance with the posting requirements should be subject to first instance sanctions, however, the penalty should be a fixed nominal amount with escalating scale for subsequent violations.

Failure to properly post the notice – while not in itself tantamount to misclassification - should be considered evidence of misclassification. Subsequent citations for failure to properly post the notice should be considered evidence of knowing misclassification.

**Recommendation 10:** By December 31, 2014, the Commissioner of Labor and Industry should report to the governor and General Assembly on the status of the unit as required by the uncodified language in Chapter 188 of 2009. The report should (1) summarize the level of activity under the unit's new implementation strategy and assess the effectiveness of the unit's strategy and its outreach program; (2) explain the difference between initial estimates of citations and penalties and those experienced in practice, including the relatively few citations issued for worker misclassification; (3) include the development status of the unit's long-term data management system and the system's ability to support the unit. Further, the report should evaluate, at a minimum, (1) the unit's annual data reports and their consistency and other agency audits of worker misclassification; (2) the unit's staffing composition relative to its implementation strategy; and (3) the unit's role in the larger context of the task force.

**Response:** The Division of Labor and Industry concurs with the recommendation, subject to the following comments.

The Division of Labor and Industry routinely monitors the activities of all operational units to ensure they are meeting intended goals and function with continued success. Performance is evaluated monthly by the Commissioner, Secretary and Office of the Governor through the StateStat process using selected measures. Program Managers monitor performance in real time. Within two years of the passage of the Workplace Fraud Act, the Commissioner's focus was developing a budget, staffing the unit and developing operational procedures to elicit the appropriate legislative outcomes. The intensity of the audits related to employment documentation, and the nebulous operational characteristics of Independent Contractors, was not first envisioned as the Commissioner developed implementation strategy for this law. The outcomes that are currently being measured appear to be good indicators of performance, although the Commissioner will continue to gauge all aspects of performance to convey an accurate picture.

## CHAPTER 4. Miscellaneous Findings

**Recommendation 11:** Statute should be amended to repeal the Advisory Council on Prevailing Wage Rates and delegates its duties to the Prevailing Wage Unit, which has been performing the functions for which the advisory council was created.

**Response:** The Division of Labor and Industry does not concur with this sunset recommendation, per the following comments.

Maryland enjoys a long history of leadership and success in the social-economic adjustment of wages in the public contract construction arena. The leadership not only comes from the General Assembly, but the Governor and those citizens who have provided input to the Commissioner about prevailing wage operations and compliance. Although the Advisory Council on Prevailing Wage Rates does not meet regularly, and has limited responsibility by statute, the advice and feedback they offer to the Commissioner throughout the contracting year is invaluable. Today, they offer the value of public transparency for the General Assembly and Administration relative to operations within the process of administering this important law. The Council is a composite of partners in the process of ensuring that the State's procurement process is fair and does not create instability among contractors and their wage rates.

**Recommendation 12:** Statute should be amended to require the Board of Boiler Rules to meet at least twice annually with the State Board of Stationary Engineers to coordinate their activities and share members' expertise.

**Response:** The Division of Labor and Industry concurs in part with this recommendation, per the following comments.

The Board of Boiler Rules and the Board of Stationary Engineers met independently and on two occasions together. On the two occasions they met together, they had a quorum necessary to conduct business; once on February 21, 2012 and again on September 11, 2012, but not much business to discuss. The coordination action of these two meetings occurred as a result of the statutory requirement in the Business Occupations and Professions Article for the Stationary Engineers Board recommended by DLS. Additionally, the two Boards share members and there is no prohibition of attendance of meetings as an interested party. The Chief Boiler Inspector is an Ex-Official member of the Stationary Engineers Board, and the Boiler Board has one Member that is required by statute to be a Stationary Engineer. The Commissioner of Labor and Industry recognizes the purpose in recommending two joint meetings, but with the two Boards having coordinating members, and limited joint business, the Commissioner believes it appropriate to mandate only one annual meeting for the two Boards. This would allow the staff of both Boards to plan an effective annual meeting and schedule other joint meetings that may be necessary. The Division of Labor and Industry has already had coordination discussions with the Division of Occupational and Professional Licensing to allow for coordination of future meetings of the Boards.



**Recommendation 13:** Statute should be amended to repeal the termination date for the Division of Labor and Industry; however, DLI should remain subject to periodic evaluation under the Maryland Program Evaluation Act, with the next evaluation date set for July 1, 2023. Statute should be amended to continue the four associated boards and councils referenced above and to extend their termination dates by 10 years to July 1, 2024. If the Advisory Council on Prevailing Wage Rates is not repealed, statute should be amended to extend its termination date by 10 years to July 1, 2024.

**Response:** The Division of Labor and Industry concurs with the recommendation.