

NOTICE OF INTENT

Department of Revenue Policy Services Division

Voluntary Disclosure Agreements (LAC 61:III.2103)

Under the authority of R.S. 47:1502, 1511 and 1603(A), and in accordance with the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, gives notice that rulemaking procedures have been initiated to amend LAC 61:III.2103.

R.S. 47:1603(A) specifically authorizes the secretary to promulgate rules and regulations concerning the waiver of penalties, including but not limited to the establishment of a voluntary disclosure program. Act 406 of the 2022 Regular Session of the Louisiana Legislature directs the department to establish a voluntary disclosure program for reporting undisclosed withholding tax liabilities that would have been due for workers who were not classified as employees. LAC 61:III.2103 outlines the department's current voluntary disclosure program. The purpose of the amendments is to implement Act 406 and establish a specific program that allows employers who are registered for withholding tax but discover that they have been misclassifying one or more classes of workers as independent contractors to enter into a voluntary disclosure agreement for the undisclosed withholding tax associated with the misclassified workers.

The amendments set forth the conditions under which an applicant may qualify for a voluntary disclosure agreement specifically related to withholding taxes due for workers who were consistently treated as independent contractors or other non-employees by the taxpayer for the previous three years. The amendments also outline the process for entering into a voluntary disclosure agreement with the Department of Revenue, and the requirements that must be complied with for the Department of Revenue to remit or waive payment of the whole or any part of the penalties under a valid voluntary disclosure agreement. Finally, the amendments clarify that the look back period for collected-but-not-remitted taxes applies also to taxes that are withheld but not remitted.

Title 61 **REVENUE AND TAXATION** **Part III. Administrative and Miscellaneous Provisions** **Chapter 21. Interest and Penalties**

§2103. Voluntary Disclosure Agreements

A. Definitions. For purposes of this Section, the following terms have the meanings ascribed to them.

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Look-Back Period —a period for which a qualified applicant agrees to disclose and pay the tax and interest due. The look-back period shall be as follows.

a. ~~Except for taxes collected and not remitted as provided in subparagraphs b through e, the *look-back period* shall include the current calendar year up to the date of registration with the department and the three immediately preceding calendar years.~~

b. For taxes collected or withheld and not remitted, the look-back period shall include all periods in which tax was collected or withheld and not remitted. This look-back period shall not affect the look-back period described in Subparagraph a of this Paragraph for undisclosed liabilities unrelated to tax collected or withheld and not remitted.

c. For discontinued, acquired, or merged entities, the look-back period shall include undisclosed liabilities in the last calendar year in which the qualified applicant had nexus within this state and the three immediately preceding calendar years.

d. For withholding taxes associated with misclassified employees, the look-back period shall include the current calendar year up to the date of the application and the three immediately preceding calendar years. This look-back period shall not apply to any taxes actually withheld from an employee and not remitted.

e. The secretary and the applicant may agree to adjust a look-back period to include other years.

f. The look-back period(s) shall be established at the time the secretary or his authorized representative signs the voluntary disclosure agreement.

Misclassified employees – a class or classes of workers who were consistently treated as independent contractors or other non-employees by the taxpayer for the previous three years and for which the taxpayer filed all required IRS Forms 1099-NEC, 1099-MISC or equivalent form, consistent with the non-employee treatment.

Non-Qualified Applicant includes any taxpayer who:

a. ~~is registered with the department as of the application date but failed to file returns or underreported the amount due for a tax for which a voluntary disclosure agreement is requested;~~

b. ~~submitted returns, extensions, payments, or was registered more than 60 days prior to the application date for a tax for which a voluntary disclosure agreement is requested;~~

c. ~~has been contacted by the department concerning a liability regarding a tax for which a voluntary disclosure agreement is requested, including but not limited to a potential liability or contact for the purpose of performing an audit of the taxpayer's records; or~~

d. ~~is affiliated with another entity that has been contacted by the department for the purpose of performing an audit of the affiliated entity's records. A non-qualified *applicant* under this Subparagraph may become a qualified applicant after the audit of the affiliated entity has been completed, provided the applicant is not disqualified under the criteria listed in Subparagraphs a through c of this Paragraph.~~

Qualified Applicant—any taxpayer, other than a non-qualified applicant, subject to the reporting and payment of a tax imposed by the state of Louisiana that is not disqualified under Subsection B of this Section. Notwithstanding anything to the contrary, any applicant that entered into a

~~voluntary disclosure agreement with the department prior to July 1, 2014 shall be deemed a qualified applicant. Registration with the department for reporting and payment of any tax for which a voluntary disclosure agreement is not being requested will not disqualify a qualified applicant from entering into a voluntary disclosure agreement.~~

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Withholding tax—income tax that is required to be deducted or withheld by an employer from the wages paid to an employee in accordance with R.S. 47:112.

B. Disqualification. Any applicant who meets one or more of the criteria below shall be disqualified from entering into a voluntary disclosure agreement:

1. The applicant is registered with the department as of the application date but failed to file returns or underreported the amount due for a tax for which a voluntary disclosure agreement is requested.

a. Registration with the department for reporting and payment of any tax for which a voluntary disclosure agreement is not being requested will not disqualify a qualified applicant from entering into a voluntary disclosure agreement.

2. The applicant submitted returns, extensions, payments, or was registered with the department within three years of the application date for a tax for which a voluntary disclosure agreement is requested.

3. The applicant is requesting a voluntary disclosure agreement for withholding tax due for misclassified employees and:

a. the workers for which the agreement is requested do not qualify as misclassified employees; or

b. the applicant actually withheld taxes from wages paid to workers included in the class or classes for which a voluntary disclosure agreement request is being made; or

c. the applicant has not provided proof of worker's compensation coverage for all employees.

4. The applicant has been contacted by the department concerning a liability regarding a tax for which a voluntary disclosure agreement is requested, including but not limited to a potential liability or contact for the purpose of performing an audit of the taxpayer's records.

5. The applicant is affiliated with another entity that has been contacted by the department for the purpose of performing an audit of the affiliated entity's records. An applicant may become a qualified applicant after the audit of the affiliated entity has been completed, provided the applicant is not disqualified under any other criteria.

C. Acceptance of Offer to Enter into Voluntary Disclosure Agreement

1. After the secretary has reviewed the application and determined from the information included therein that the applicant qualifies for a voluntary disclosure agreement, the secretary shall send a copy of the agreement to the qualified applicant or the qualified applicant's representative for signature.

2. The qualified applicant or qualified applicant's representative, acting under the authority of a power of attorney, ~~must~~ shall sign the agreement and return it to the secretary within 30 calendar days of the postmark or e-mail date, or within any extension of time authorized by the secretary beyond 30 calendar days from the postmark or e-mail date.

3. After the signed agreement is received from the applicant, the secretary or his authorized representative ~~will~~ shall sign the agreement and return to the applicant a copy of the agreement which has been signed by both parties.

4. If the application was submitted to the Multistate Tax Commission, the applicant shall return signed agreements in accordance with policies established by the commission.

D.C. Waiver or Remittance of Payment of Penalty

1. After all tax and interest due for the look-back period have been paid, the delinquent penalties ~~will~~ shall be ~~remitted or~~ waived, unless the tax disclosed was collected or withheld but not remitted.

2. Where the tax was collected or withheld but not remitted, the secretary may consider waiving payment of the whole or any part of the delinquent penalties on a case-by-case basis.

E.D. Payment of Tax, Interest, and Penalty Due

1. All tax due for the look-back period must be paid within 60 calendar days of the secretary's signing date of the voluntary disclosure agreement or within any extension of time authorized by the secretary beyond 60 calendar days of the signing date. All schedules or returns required by the secretary to show the amount of tax due must be included with this payment.

2. For purposes of withholding tax due for misclassified employees, any wages timely reported on a Louisiana individual income tax return filed by any worker in the class or classes of workers identified in the application as verified by the Department of Revenue shall be excluded for purposes of calculating the liability due by the qualified applicant.

3. The secretary shall compute the interest and penalty due for the tax disclosed by the applicant and send a schedule by mail or email to the applicant or his representative showing the amount of tax, interest and ~~delinquent~~ penalty due. The applicant must submit payment of the full amount of the interest and any penalties not ~~remitted or~~ waived within 30 calendar days from the postmark or e-mail date of the schedule or, if applicable, within any extension of time granted by the secretary. If payment of the full amount due has not been received at the expiration of such time, the secretary may void the agreement.

F.E. The secretary may disclose tax information to the Multistate Tax Commission or any political subdivision of the state which has entered into an information exchange agreement with the department in order to coordinate the delivery and acceptance of applications for voluntary disclosure agreements. Any information so furnished shall be considered and held confidential and privileged by the Multistate Tax Commission or the political subdivision to the extent provided by R.S. 47:1508.

GF. The terms of the voluntary disclosure agreement shall be valid, binding, and enforceable by and against all parties, including their transferees, successors, and assignees.

HG. The secretary reserves the right to void the voluntary disclosure agreement if the applicant fails to comply with any of the conditions outlined in the agreement.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1502, R.S. 47:1511, R.S. 47:1580, and R.S. 47:1603.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services Division, LR 41:558 (March 2015), amended LR 49:

Family Impact Statement

The proposed Rule has no known or foreseeable impact on family as defined by R.S. 49:972(D) or on family formation, stability and autonomy. Specifically, the proposed rule has no known or foreseeable impact on:

1. The stability of the family.
2. The authority and rights of parents regarding the education and supervision of their children.
3. The functioning of the family.
4. Family earnings and family budget.
5. The behavior and personal responsibility of children.
6. The ability of the family or a local government to perform this function.

Poverty Impact Statement

The proposed Rule has no known impact on poverty as described in R.S. 49:973.

Small Business Analysis

The proposed Rule has no known or foreseeable measurable impact on small businesses as described in R.S. 49:974.5.

Provider Impact Statement

The proposed Rule has no known or foreseeable effect on:

1. The staffing levels requirements or qualifications required to provide the same level of service.
2. The total direct and indirect effect on the cost to the provider to provide the same level of service.
3. The overall effect on the ability of the provider to provide the same level of service.

Public Comments

All interested persons may submit written data, views, arguments or comments regarding this proposed rule to Brandea Averett, Attorney, Policy Services Division, Office of Legal Affairs, P.O. Box 44098, Baton Rouge, LA 70804-4098. Written comments will be accepted until 4:30 p.m., March 27, 2023.

Public Hearing

A public hearing will be held on March 28, 2023 at 2 PM in the LaBelle Room located on the 1st floor of the LaSalle Building, 617 North Third Street, Baton Rouge, Louisiana.

Kevin J. Richard, CPA
Secretary of Revenue

FISCAL AND ECONOMIC IMPACT STATEMENT
FOR ADMINISTRATIVE RULE

RULE TITLE: Voluntary Disclosure Agreements

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

The proposed rule will not result in material implementation costs or savings to state or local governmental units. To the extent the Department incurs additional costs, they will be absorbed in the existing budget.

The proposed rule implements a portion of Act 406 of the 2022 Regular Session by adding a voluntary disclosure program per R.S. 47:1576.3(H) specific to withholding due for misclassified employees. The additional program criteria allow certain employers who are registered for withholding tax but discover they have been misclassifying workers to enter into a voluntary disclosure agreement to pay the taxes due for the lookback period of three years and obtain relief for certain penalties and withholding tax due for any periods prior to the lookback period. The proposed rule also revises the general voluntary disclosure qualification as it relates to prior registration with the department.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

The proposed rule will have minimal direct impact on annual state or local revenue. The misclassified employees are expected to have paid the income tax due upon filing their individual income tax returns when classified as contracted workers and would continue to pay when classified as employees. To the extent the program is utilized, employers will be responsible for paying withholdings for the look back period if the classified employee failed to pay appropriate income tax during that time, which cannot be quantified. The state may also forego some penalties of an indeterminable amount that would be waived under the program. Impacts may also be tempered by the Fresh Start Proper Worker Classification Initiative authorized in Act 406 of the 2022 Regular Session, which is a temporary program effective during CY 2023 that waives similar withholding, penalty and interest obligations.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS, SMALL BUSINESSES, OR NON-GOVERNMENTAL GROUPS (Summary)

The proposed rule will have minimal direct economic impact on directly affected persons, small businesses, or non-governmental groups. Affected businesses are employers who have been consistently misclassifying employees as independent contractors and who will avoid penalties and withholding tax liabilities for periods outside the lookback period to the extent the program allows. Additional paperwork will be required for employers applying for relief through the voluntary disclosure program, but the costs are not expected to be material.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

The proposed rule does not affect competition or employment.

Kevin J. Richard, CPA
Secretary of Revenue

Alan Boxberger
Interim Fiscal Officer