

**S. R. 22 WORKER MISCLASSIFICATION
TASK FORCE MEETING
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Gordon Arata
MONTGOMERY BARNETT

Worker Misclassification: Safe Harbors and Programs to Encourage Compliance

Caroline D. Lafourcade

Board Certified Tax Law Specialist by the Louisiana Board of Legal Specialization

clafourcade@gamb.com

S.R. 22 Misclassification of Employees Task Force Objective

- Senate Resolution 22 of the 2020 Second Extraordinary Session created a task force to study and make recommendations for changes to Louisiana state laws in an effort to . . . minimize employee misclassification in Louisiana.
- Accordingly, this Task Force should consider the State's provision of a Safe Harbor or other penalty relief programs to be made available to employers who are faced with worker misclassification.
- Such Safe Harbors and penalty relief programs have been available for worker reclassification at the federal level for years and effectively facilitate voluntary compliance.

Voluntary Disclosure Agreement (VDA) – Louisiana Withholding Tax

- Relief only available if no prior withholding tax returns filed
- Must pay withholding tax and interest – penalties waived if accepted for the look-back period
- Except for taxes collected and not remitted, the look-back period includes the current calendar year up to the date of registration with the Department of Revenue and the three (3) immediately preceding calendar years

Safe Harbors & Relief Available at the Federal Level

1. IRC §3402(d) Relief
2. IRC §3509 Relief
3. Section 530 Relief
4. Voluntary Classification Settlement Program

IRC Sec. 3402(d) Relief

- Section 3402(d) provides relief from a portion of the employment taxes in the event an employer is audited and treated some employees as independent contractors.
- To be eligible, the employer must not have deducted and withheld the income taxes and failed to report them to the IRS.
- The employer will be relieved of the portion of taxes paid by the persons the IRS determines to be employees who have filed their returns and paid the taxes. The employer has to complete form 4670 and have each of the “employees” the employer claims filed and paid their income and self employment tax complete a form 4669.

IRC Sec. 3509(b) and (c) Relief

One time opportunity to correct tax treatment of misclassified employees

Provides relief in the form of tax rates, but only for employers who fail to deduct and withhold with respect to any employee by reason of the employer treating the person as a non-employee/independent contractor.

- Relief is available under Section 3509 in those situations that the employer cannot obtain Section 3402(d) relief as in those situations where the employees cannot be found or refuse to cooperate.
- Section 3509 relief is also available where Section 530 relief is not available.
- See Internal Revenue Manual, Part 4, Chapter 23, Section 8, “Determining the Employment Tax Liability”.
- This is mandatory by an internal revenue agent performing an audit
- Provides rates as follows:
 - If 1099’s were issued to workers:
 - The income tax withholding rate is computed at the rate of 1.5%

IRC Sec. 3509(b) and (c) Relief

One time opportunity to correct tax treatment of misclassified employees

The employer's FICA liability is computed at the rate of 20% of the employee's share plus the entire employer's share

If 1099's were not issued to workers:

- The income tax rate becomes 3%
- The FICA rate is the employer's share plus 40% of the employee's share

Section 530 Safe Harbor – IRS Publication 1976

If the putative employer meets three requirements, it will not owe employment taxes for workers.

1. Reporting Consistency

- The employer timely filed all required federal tax and information returns
- Ex. Form 1099-MISC for independent contractors who were paid \$600 or more
- Relief is not available for any worker for whom you did not file the required information return

Section 530 Safe Harbor – IRS Publication 1976 (cont'd)

If the putative employer meets three requirements, it will not owe employment taxes for workers.

2. Substantive Consistency

- The employer (and any predecessor) always treated the worker as an independent contractor
- If any similar worker was treated as an employee, relief is not available

Section 530 Safe Harbor – IRS Publication 1976 (cont'd)

If the putative employer meets three requirements, it will not owe employment taxes for workers.

3. Reasonable Basis

- The company had to have a reasonable basis for not treating the worker as an employee
- Reliance on a court case or IRS ruling
- The company was previously audited and the IRS considered employment taxes but did not reclassify the workers
- Independent contractor treatment is common in your industry
- Reliance on legal advice or advice on an accountant

See IRS Publication 1976, Section 530 Employment Tax Relief Requirements for more information.

Voluntary Classification Settlement Program (VCSP)

IRS Form 8952, Application for Voluntary Classification Settlement Program (VCSP)

- The company applies for VCSP on a prospective basis
- The company cannot be under examination by the IRS, DOL, or any state agency
- Agreement to prospectively treat a class of workers as employees
 - **Partial relief from federal employment taxes, no penalties or interest if relief granted**
- The VCSP payment is 10% of the employment taxes for the compensation paid in the most recently closed tax year
- Payment is not made when application filed, but after acceptance into the program by IRS and upon entry into closing agreement

What Sort of Safe Harbors or Relief Might the Louisiana Department of Revenue or Louisiana Workforce Commission Provide?

- A Safe Harbor similar to Section 530?
- An Voluntary Compliance Program Similar to the IRS Voluntary Classification Program (VCSP)?
- Relief in the form of tax rates, similar to IRC §3509?

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Questions?

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