

SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

Minutes of January 28, 2021 Meeting

The Misclassification of Employees Task Force was established by Senate Resolution of the 2020 Second Extraordinary Legislative Session, within the Louisiana Department of Revenue (LDR), to study and make recommendations for changes to state laws in an effort to provide the necessary investigatory and enforcement tools to detect, investigate, and minimize employee misclassification in Louisiana.

- I. **Meeting Call to Order** - The meeting of the Misclassification of Employees Task Force was called to order at 10:02 AM by Chairman, Luke Morris.

- II. **Roll Call** - A quorum was established with twelve of the thirteen members in attendance. Members present were:
 1. Luke Morris, Chairman (LDR)
 2. Brandon Lagarde, Vice-Chairman (LCPA)
 3. Danell Gerchow (LDR); designee for Secretary Robinson
 4. Darrick Lee (LWC); designee for Sheral Kellar
 5. Daryl Purpera (Legislative Auditor)
 6. Dawn Starns (NFIB)
 7. Caroline Lafourcade (LSBA)
 8. Martha Pennington (APA)
 9. Tom Crowley (NPRC)
 10. Jim Patterson (LABI)
 11. Gary Warren (LA AFL-CIO)

- III. **Approval of Meeting Minutes from January 21, 2021 Meeting**
 - After review of the minutes, a motion was made by Ms. Lafourcade to approve the meeting minutes from the January 21, 2021 meeting, and was seconded by Ms. Pennington. The minutes were unanimously approved without corrections.

- IV. **Informational Presentations on Addressing Misclassification in Louisiana**
 - A. **Loyola Law Clinic Workplace Justice Project – Erika Zucker and Andrea Agee**
 - Ms. Zucker began with information about the work the Workplace Justice Project (WJP) does. The WJP represents workers within two percent of the poverty threshold and agrees with business that there is an inconsistency in how current laws are applied. There is a need for clear and consistent definitions and standards across agencies with regard to misclassification of employees. Ms. Zucker also stated that education on compliance and regular review and audit will drive compliance. Business/employers should be responsible for proper classification

and workers should not be able to “choose” to disqualify themselves from the protections of employment. Just as definitions should be clear and consistent, penalties should be an effective deterrent to misclassification.

- Ms. Agee proceeded with the presentation and covered the cost of misclassification. There has been a rise in misclassification in staffing agencies and in the home healthcare industry. Affected workers include those earning low wages, with little bargaining power and no legal representation. The multiple test to determine independent contractor status create confusion. There is a competitive disadvantage for those businesses that follow the law. Enforcement often requires an attorney which can be difficult for low income workers. Ms. Zucker referenced the Legislative Auditor report which estimates the State of Louisiana lost up to \$9 million in income taxes and \$3 million in unemployment taxes through misclassification between 2014-2018. Misclassified workers who are injured on the job also cost significant amounts for healthcare services, and also suffer lost wages from unpaid overtime, reduced wage rates, and tax penalties. Ms. Zucker went on to cover remedies and penalties for misclassification which currently don't offer restitution to misclassified workers. The WJP recommends clear policy standards, education and enforcement. Remedies must serve as a deterrent and make workers whole. This can include an increase in the number and frequency of audits; collaboration between agencies of one standard; and an increase in education across the board. Penalties can also include disqualification/disbarment from state contracting; presumption of employment for direct service workers and restitution to workers in addition to payment of taxes and state benefits.
- During discussion Chairman Morris asked about the frequency of misclassification cases the WJP receives. Ms. Agee answered that they receive cases often and are usually associated with overtime wages. Mr. Morris also asked about restitution mentioned by Ms. Zucker. Ms. Zucker answered that this will need to be worked out, and restated that workers will need to be made whole. While penalties can be assessed to employers, worker are left out. Mr. Morris then asked about an independent contractor registration program. Ms. Zucker replied that there is room for agreement or accord on this. Self-audit would be a plus and a program for those who have not had a previous violation(s). It was suggested agencies work together to look into. There were no further questions from members or the public.
- Ms. Zucker also shared a policy brief from the National Employment Law Project that will be posted to the task force's webpage for viewing.

B. Other Stakeholder Comments

- There were no other stakeholder comments.

V. Review Member Proposed Recommendations

- Chairman Morris stated that future meetings will focus on recommendations made from members to develop standards and to put other mechanisms in place.

Mr. Morris is considering independent contractor registration with a safe harbor provision.

- Mr. Patterson stated that a business and industry group has been meeting weekly to be ready to discuss their recommendations. Mr. Patterson then gave an update on previously shared recommendations. Those included the need for a definition, the ABC test not being the best judge and simplicity to make compliance easier. Mr. Patterson spoke of a check the box criteria, and examining other states laws. Education and outreach need to be better and no penalties for first time offenders, but open to penalties for repeat offenders. He offered a written warning be used to encourage employers to comply. Mr. Patterson reiterated that the gig economy needs to be accommodated and included in the definition. Ms. Zucker added that in looking at education it may be a good idea to look at bringing the Secretary of State (SOS) into the loop for employers to get information. Mr. Patterson agreed with this idea and also likes the idea of a certification process as he believes it will cover business as well as be an indication of good faith. Mr. Morris mentioned HR 44 from the 2020 second extraordinary session where the SOS, LDR, DOA and LED work together to provide registration information to new businesses when registering with the State.
- Mr. Purpera offered a comment to Jim with regard to penalties for first time offenders. Mr. Purpera stated that it was noticed that when warnings are given, there tends to be less compliance. Mr. Purpera, however, is in agreement with offering more training opportunities. Mr. Morris added that if there is a penalty on a first offense then maybe a waiver can be considered if the business comes into compliance, including paying taxes and employees, and completes training. Mr. Patterson stated the need for a clear definition and not agency interpretation as government interpretation tends to cut off other important input and the problem is not believed to be as widespread as is being reported. A comment in the chat feature from Wes Muller was offered as, “government needs to fix the problem because no one else will.”
- Mr. Morris again mentioned the idea of independent contractor registration and being in support of a VDA program that Ms. Lafourcade previously suggested at an earlier meeting.
- Going forward, Chairman Morris stated that future meetings will cover a breakdown of recommended issues and will be discussed issue by issue, with stakeholders and the public having the opportunity to make comments and provide feedback. Mr. Patterson was in agreement of the future meetings, and asked for prior notice of what issues will be discussed so as to get ideas and be prepared to discuss, to which Mr. Morris agreed.

VI. Other Business - Tasks

- No other business was discussed

VII. Public Comment

- None

VIII. Adjournment

- A motion to adjourn the meeting made by Mr. Purpera and seconded by Mr. Patterson. The meeting was adjourned at approximately 12:16 PM.