

# SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

## Minutes of February 10, 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 3:32 PM by Chairman, Luke Morris.
  
- II. **Roll Call** - A quorum was established with eleven 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. Robert Wooley (LWC)
  5. Darrick Lee (LWC); designee for Sheral Kellar
  6. Daryl Purpera (Legislative Auditor)
  7. Dawn Starns (NFIB)
  8. Caroline Lafourcade (LSBA)
  9. Martha Pennington (APA)
  10. Tom Crowley (NPRC)
  11. Jim Patterson (LABI)
  12. Gary Warren (LA AFL-CIO)
  
- III. **Approval of Meeting Minutes from February 4, 2021 Meeting**
  - After review of the minutes, a motion was made by Mr. Patterson to approve the meeting minutes from the February 4, 2021 meeting, and was seconded by Mr. Lagarde. The minutes were unanimously approved without corrections.
  
- IV. **Discussion of Member Recommendations**
  - A. **Definition of Independent Contractor**
    - Chairman Morris opened discussion of the definition of independent contractor amongst members.
      1. **Twelve Factor Approach**
        - Mr. Patterson began the discussion stating that he had taken the comments and suggestions made at the last meeting back to the business group for discussion and consideration. Mr. Patterson particularly

discussed the merging items two and six that was discussed by Chairman Morris at the last meeting. Mr. Morris responded that the distinction can be seen with the two factors so there may not be a need to combine the two.

- Mr. Patterson also revisited the payment language addressed in factor #10 stating that it could be rephrased as regular salary or wages based on an hourly rate.
- Mr. Patterson then addressed language discussed in #12 with regard to use of assistance and stated maybe adding, “and is directly responsible for their supervision and compensation.”
- Mr. Patterson briefly spoke of the draft application for certification created by Chairman Morris and commented that the thoughts discussed regarding the direction of a definition were captured fairly well. Ms. Pennington commented that in previous meeting there was discussion of current independent contractors being able to continue their work with the rules already in place and asked if there would be any conflict with the proposed twelve factor certification if when the application is completed the individual would not be approved for certification. Mr. Patterson is continuing discussion with the business group on this but believes that those individuals would be able to continue working but reiterated that the list is not comprehensive or complete. The goal is to simplify understanding and not to be complicated or vague. Feedback so far has been positive. Mr. Lagarde expressed the similar comments regarding the business group wanting to have the definition be as clear as possible without making it difficult for existing contractors currently operating.
- Mr. Patterson then discussed the employee and employer relationship with regard to being an independent contractor. The business group is currently reviewing the manner in which other states are handling these matters. There are varying interpretations and all have a bit of wiggle room.
- Further discussion was had on the employee also having an independent contractor status while operating in the same line of work. This scenario needs to be discussed further by the task force.
- Mr. Morris addressed the factors and inquired as to maybe increasing the number to be met from seven to nine of the twelve. Mr. Patterson will bring back to the business group for discussion but would not be opposed to the idea as some factors may be directly related to others so they would likely increase anyway. Mr. Patterson expressed concern of leaving something out that should need to go into a factor. Mr. Lagarde is in agreement of increasing the number of factors being met or at least seventy-five percent being met to be certified.
- Chairman Morris then offered a question with regard to factor #4 with regard to adding language about reimbursement for expenses as well as tools. Mr. Patterson stated that while nothing would preclude that, the

independent contractor should be responsible and mindful of those expenses and maybe add that language into the contract rate. Mr. Lagarde also stated that this could likely be a negotiated arrangement in the contract but should not preclude the individual from being responsible for the expenses even though they may be reimbursable. Ms. Zucker commented the more categories created the more you could give the look of an employee. The contractor should bare the cost of expenses upfront due to the independent contractor status and that the language be included in the contract, but could cloud it. Mr. Morris stated that this may likely be best left to be included in the examples that will be listed in the guidance issued.

- Mr. Crowley offered advice that while the effort is admirable to work to develop a definition, the taskforce should consider that there will still be differences of opinion, and should also consider other taxes that extend beyond state borders that could be affected.

## **2. Independent Contractor Exemption Certificate Application**

- Mr. Morris presented a draft application to members for discussion. Mr. Morris stated that the idea is for this application to be submitted electronically to the administering agency and be made available in other languages. Mr. Morris also expressed the idea that a minimum number of “yes” answers be able to generate an approval of the certificate. Mr. Patterson agrees with the general idea and concept of the application but expressed concern that individuals may think they need to have a yes answer to all factors or only need nine to be approved. Still would like them to be honest. Mr. Patterson suggested maybe putting the notice and acknowledgement language before the factors so that one can determine if they’d like to continue with the submission of the application. Mr. Morris stated that the idea is it would make one think through the process not necessarily to encourage dishonesty. Mr. Patterson commented that the electronic submission idea is good, and also offered the suggestion of a portal for businesses to be able to obtain certificates of those already approved. Mr. Patterson wouldn’t object to the application being denied if the requisite number of factors aren’t met.
- Mr. Lagarde suggests the avenue of trades and professions be considered. Asked if maybe the application should be administered by the Secretary of State’s office via the GeauxBIZ portal or with the LDR. Mr. Lagarde expressed concern with the application being forced on employees or workers by businesses. Education materials could also be placed on the SOS website as an entry point for those seeking independent contractor status. Overall, the concept is consistent with the business community’s thinking of not wanting things to be overly burdensome to the average user.

- Mr. Wooley posed the question of how would one keep a business from bringing in employees and making them fill out the form. Mr. Morris stated this is definitely something to consider. Ms. Lafourcade suggested this could be a part of the auditing function of the administering agency. The agency will have the social security information and other identifying information which should make auditing easier. Mr. Lagarde suggested that certifications could be audited to determine who the contractor has been working with through target audits. Mr. Wooley asked about the number of auditors that would be needed and suggested hiring auditors and be paid by the person(s) being audited. Mr. Patterson is open to this idea. Ms. Lafourcade commented that once the law was changed in Montana it took some time for compliance to be seen once enforced. Ms. Lafourcade suggested using LWC and LDR auditors and if not, would anyone outside those agencies be able to audit better than the agencies could. Mr. Morris stated that discovery could grant an assurance for this type of program. Mr. Lagarde again suggested that when the contractor's certification comes up for renewal they list the companies they've contracted with over the last few years or since they've been certified. Ms. Lafourcade stated that the IRS has streamlined some forms to allow workers to be able to determine if they have been properly classified. Mr. Morris also stated that a Private Letter Ruling (PLR) can be requested from the Department. A question would be will businesses need to be registered with more than one agency. Ms. Zucker commented that she has previously reached out to the Department of Health (LDH) as far as misclassification audits as the legislative audit report states that not enough audits are happening.
- Mr. Morris suggested the ideas discussed today be considered, and discussion of this item be revisited at the next meeting of the task force.

**B. Misclassification Penalty Structure**

- Mr. Patterson revisited with the business group and has nothing new to offer as far as the penalty structure. If any new ideas or suggestions are discussed Mr. Patterson will consult with the business group. With no other comments or further discussion, Mr. Morris stated this item will be carried forward to future meetings.

**C. Educational Program and Resources to Businesses**

- Chairman Morris discussed providing a one hour course for businesses when registering with the Secretary of State's office. The information would cover the employee v. independent contractor relationship. It would also cover penalties. This information would also be available to other agencies and stakeholders.
- Ms. Pennington posed a question with regard to and from an immigration standpoint. Would there be a process to qualify or within the education aspect to ensure the individual is able to work in the U.S. Mr. Morris stated that the question had not come up but is a good point to address. This may be an option

to consider for the application as maybe a 13<sup>th</sup> factor. Mr. Lagarde thinks this could be verified on the application because of the SSN and other identifying information that will need to be given.

**D. Voluntary Disclosure/Fresh Start Program for Existing Businesses**

- Mr. Morris deferred this topic to the next meeting of the task force.

**V. Other Business**

- Chairman Morris is considering making a request to the author of the SR 22 legislation to obtain an extension of time for submitting the report to the Legislature by the March 1, 2021 due date to allow more discussion of the recommendations by members. Mr. Morris will discuss more in depth at the next meeting and take a vote of the members prior to submitting for approval.

**VI. Public Comment**

- There was no public comment.

**VII. Adjournment**

- A motion to adjourn the meeting was made by Mr. Patterson and seconded by Ms. Lafourcade. The meeting was adjourned at approximately 5:13 PM.