

# SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

## Minutes of February 4, 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 11:02 AM 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. Martha Pennington (APA)
  9. Tom Crowley (NPRC)
  10. Jim Patterson (LABI)
  11. Gary Warren (LA AFL-CIO)
  
- III. **Approval of Meeting Minutes from January 28, 2021 Meeting**
  - After review of the minutes, a motion was made by Mr. Patterson to approve the meeting minutes from the January 28, 2021 meeting, and was seconded by Mr. Lagarde. The minutes were unanimously approved without corrections.
  
- IV. **Discussion of Member Recommendations**
  - A. **Discussion of Definition of Independent Contractor**
    - Mr. Patterson discussed ideas and concepts being discussed with business and industry groups which included a list of recommendations being vetted, and are merely for discussion purposes at this time. Mr. Patterson began with discussion of a 12-factor test that would be used to determine whether a worker qualifies as an independent contractor. Mr. Patterson suggested that it is critical for the test to be easily understandable. Any individual that qualifies as an independent contractor prior to any change in the law, would maintain that classification. The

business group is also reviewing best practices of other states and tests being used. Mr. Patterson stated that Louisiana would likely be a hybrid test and independent contractors would need to meet seven of the twelve factors to qualify. Qualification would likely be done via an application form and the program would be overseen by the Dept. of Revenue. The 12 proposed factors were discussed in detail as follows:

1. The individual operates an independent business through which he provides services for or with a contracting party.
  - Chairman Morris asked for clarification that the independent contractor will need to meet seven of the twelve factors in order to be deemed an independent contractor and that government would bear the burden to show otherwise. Mr. Patterson confirmed. Mr. Morris then asked if independent business included having a LLC. Mr. Patterson answered this could include corporations and anyone who would have a federal employer identification number issued to them in their name. A question received in the chat from Ryland Maksoud asked whether this would include sole proprietorships. Mr. Patterson answered, yes.
2. The individual represents his or her services to be self-employment available to others, including through the use of a platform application as lead generation service or to obtain work opportunities.
3. The individual accepts responsibility for all tax liabilities associated with payments received from or through the contracting party.
4. The individual is responsible for obtaining and maintaining any required registrations, certifications, licenses or other authorization necessary for the legal performance of the services rendered by him as the contractor.
5. The individual is not insured under the contracting party's health insurance or worker's compensation coverage. This may be an area of concern. Will follow up at a later meeting. May require someone to sign off on the understanding that they would not be entitled to unemployment compensation as an employee.
6. The individual is able to perform services for or through other parties, or can accept work from and perform work for other businesses and individuals besides the contracting party, or both, even if the individual voluntarily chooses not to exercise his right or is temporarily restricted from doing so. This encompasses language used by another state.
  - Erika Zucker inquired as to which state Mr. Patterson referred to? Mr. Patterson will provide this information.
  - Mr. Morris asked about the restriction from doing so provision and if an example of this would be a provision in the contract between the contractor and business prohibiting the contractor from doing business outside their contract. Mr. Patterson confirmed. Mr. Morris also asked if there is any overlap of item two and six. Mr. Patterson answered that it would be a matter of how contractors identify themselves. He stated that

there may naturally be some overlap, but that is the purpose of requiring that a majority of the factors be met. Mr. Patterson indicated that overlap wasn't considered in the initial discussion, but he is willing to go back and take a look at these again to determine if they can be one in the same.

- A question was posed by Andrea Agee in the chat feature. Ms. Agee asked if the restriction on working for others is a contract provision. Mr. Patterson replied that it's not contemplated that it would be, but it could be written into a contract as such.
- 7. The contracting party does not direct or oversee the performance methods or processes the individual uses to perform services.
- 8. The contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the individual determines the days worked and the time periods of work.
- 9. The individual purchases the major tools or items of equipment needed to perform the work.
- 10. The individual is paid based on the work he is contracted to perform and the contracting party does not provide the individual with a salary or payment based on an hourly rate nor any minimum regular payment.
  - Mr. Morris suggested that it is not uncommon to pay an independent contractor based on an hourly rate and inquired whether the agreement to an hourly rate alone would disqualify the contractor from this factor. Mr. Patterson explained that in discussing this, his group considered salary to not be an hourly rate and that this can be discussed in more detail.
- 11. The individual is responsible for the majority of expenses he incurs to perform the services.
  - Ms. Zucker asked for an example. Mr. Patterson provided an example of someone who may need to travel and may require tools that aren't possessed but need to be purchased.
- 12. The individual may use such assistance as he deems proper to perform the work.
  - Mr. Morris asked for an example. Mr. Patterson responded, this would be a contractor hiring a subcontractor. It would demonstrate the autonomy of the contractor being able to do the things necessary to get the work done, including hiring others.
  - Ms. Zucker posed a question as to the assistance being requested by the contracting party. Mr. Patterson doesn't believe this will be an issue as long as the individual is responsible for the work, and they make the determination. Mr. Patterson will revisit this issue with the business group and bring back to the members.
- Mr. Patterson wrapped up discussion saying that the business and industry groups believe these factors will help in clearly determining independent contractors so that there isn't as much of an opportunity to inject interpretation into who is or isn't an employee. Reaching seven of the factors however, doesn't preclude an

agency from believing there is an employee relationship. This test is meant to shift the burden from the business to the individual providing the services.

- Mr. Morris asked if these factors would be codified in statute? And, considering the idea of an independent contractor registration and certification process, would these factors be merged into that concept such that the application could be submitted to certify an individual as an independent contractor? Mr. Patterson answered, yes. Another factor could be added to state that, if these factors are met, or it could be added to item number four with regard to obtaining or maintaining certifications. Mr. Patterson also stated that business would like to review more states regulations.
- Ms. Zucker commented that it is not acceptable for workers to opt-out of basic protections and that would violate federal labor laws. Mr. Patterson agrees but will further research the issue. The individual has to be able to meet the test of an independent contractor. If injured in the scope of their work they do have rights in tort for a remedy and worker's compensation is there to benefit the worker and employer if the employer doesn't want to be brought into a tort suit. Worker's Compensation will cover 100% of medical costs and also provide a stipend to cover lost wages. Ultimately, the individual working as an independent contractor is not without rights if he can demonstrate that the injury is precipitated by the business for which he was performing services. Mr. Patterson asked Ms. Zucker to send any information business may need to consider. Ms. Zucker expressed concern about workers' rights being impinged and the amount of litigation that could arise out of a complex standard and will have a need for more challenges and audits. Mr. Patterson compared the concept to the justice system where there is a presumption of innocence until proven guilty. When a business is informed of a violation they will be able to prove the individual submitted the form showing they met the qualification of being an independent contractor and it should be their responsibility to prove their contention. Ms. Zucker also added that a factor could be added to state that legal consultation has been obtained to identify independent contractors. Ms. Zucker also believes there would still be a gray area concerning those bringing their own equipment and having to maintain licenses and that if the standards are too broad it will create more issues. Mr. Patterson again stated that business is open for input and suggestions on how the wording could be better, but again stated that people should have the ability to be treated as they wish to be treated as far as the gig economy.
- Ms. Pennington inquired as to whether the form would be on the State's website and given to contractors who then give to the business or vice versa. Mr. Patterson responded that the intention is for the program to be administered by a division of a state agency and that the form would be completed by the individual and given to a business as certification of independent contractor status. If the business is then audited, it will have the certification form as proof that they've operated in good faith. Ms. Zucker asked if the form will apply to only one particular business and job. Mr. Patterson answered that it would likely apply to any work the contractor wishes to perform as long as the certification is good

for the period of time allowed. Ms. Zucker then posed a situation where a person could be both an employee and independent contractor, using a musician as an example. Mr. Patterson answered that the employee status would stand. Ms. Pennington added that employees typically fill out forms indicating employment. Mr. Patterson continued with the individual would choose to go out and do work for others. This does not mean that the independent contractor cannot be a full-time employee. Ms. Pennington asked if in the Montana registration process the contractor applies for a specific line of work or would the form be for multiple or other lines of work or job categories. Mr. Patterson answered that the form would not be specific to any types of trades but would be used to establish the person as an independent contractor and that they can provide any services they are able to. They would also be aware that they are relinquishing rights that an employee might have otherwise.

- Chairman Morris further discussed the form with the checklist of factors and agrees with the idea that the form would not come from the business to the contractor, but would be provided by the independent contractor to a business once certified by the administering agency. Mr. Morris then suggested that in the event these factors are codified, policy guidance should be issued by the administering agency providing examples for each of the factors to provide clarity. Mr. Patterson agreed with that idea.
- Mr. Morris would like to see the certification limited to a specific trade or skill that the contractor will be providing. Mr. Patterson replied that they would be open to discussing this further and even the option of having a form for different trades or scopes of work. Mr. Morris also stated that he would like to see this be a business-to-business relationship and not an individual hiring an independent contractor to do work, such as a homeowner hiring a carpenter to do repairs. Mr. Patterson agrees with this concept as well.
- Mr. Morris then inquired as to the existing presumption of employment under the labor statute that anyone performing work for another is an employee. He requested confirmation that if the individual meets seven of the twelve factors then the presumption would switch to independent contractor. Mr. Patterson confirmed that is the intended result.
- Ms. Pennington commented that the form, if stated correctly, will cause an individual to think through and also provide education to understand the idea of being an independent contractor or employee. Ms. Pennington again suggested that Louisiana require independent contractors to be reported on new hire reporting, and stated that some states do require independent contractors to be reported for reasons such as child support. Mr. Patterson will bring the idea back to the business group.
- Mr. Purpera asked Mr. Patterson if he could provide the list of factors discussed. Mr. Patterson replied not at this time as this was merely for discussion and he would like to incorporate the feedback received to further develop concepts and ideas, but will share once there is more alignment on the issues.

## **B. Discussion of Misclassification Penalty Approach**

- Mr. Patterson began the discussion on this item. At the suggestion of Chairman Morris, Mr. Patterson had discussions with the business community regarding a first violation penalty and the possibility of a waiver of penalty if brought into compliance. Mr. Patterson and the business community are willing to consider the first offense penalty if the option of a waiver is attached. Mr. Patterson offered ideas of how the penalties should be calculated. The first violation would be a flat \$500 penalty that must be waived if the tax obligations are made whole within sixty days. The second violation would incur a \$500 penalty for the first ten employees and \$1000 per employee after ten. This contemplates the smaller employers with the first ten employees at \$500. Consideration of a tier effect to the penalty could also be discussed. For the third and any subsequent violations, a fine of \$2500 for each misclassified worker, and/or employer may be subject to imprisonment of no more than 90 days when it is determined there is a pattern or practice. Lastly, Mr. Patterson asked that all penalties collected with regard to misclassification be deposited in the state's unemployment compensation trust fund.
- Mr. Morris asked, with regard to the first violation and waiver of penalty, for clarification of what "brought into compliance" would require. Mr. Patterson replied that the specifics have not been decided as of yet and that Ms. Lafourcade is working on this part of their proposal. He suggested that it could include interest, fines, back wages and any other obligations needed to bring one into compliance. Mr. Morris suggested that there also be an educational aspect added to this requirement for waiver. Mr. Patterson was not opposed to the idea. Mr. Morris then asked for clarification that there would be penalties specific to misclassification in addition to penalties for taxes. Mr. Patterson confirmed that fines outside of misclassification would still be due and doesn't contemplate those would be waived.
- Ms. Pennington made mention of the video shared by Mr. Warren at the January meeting and suggested that others watch the video. Ms. Pennington also stated that the education aspect could benefit from maybe a commercial to educate businesses and employees. Ms. Zucker also pledged support of educational ideas for compliance.
- Mr. Patterson will take all ideas discussed today back to the business group and hopes to have a more formalized proposal to submit at the next meeting for further discussions.

## **V. Other Business**

- No other business was discussed.

## **VI. Public Comment**

- None

## **VII. Adjournment**

- Prior to adjournment, Chairman Morris briefly discussed the expectations for the next meeting's agenda. The definition and penalty structure items will be carried over. Mr. Morris would also like to discuss the idea of the form in more depth and will provide an education proposal for discussion. The final item will be the project Ms. Lafourcade is currently working on with the idea of a fresh start type of program or sort of voluntary disclosure agreement program that will last for a finite amount of time where businesses can come and get their tax obligations in order.
- A motion to adjourn the meeting was made by Mr. Patterson and seconded by Ms. Gerchow. The meeting was adjourned at approximately 12:51 PM.