

SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

Minutes of March 17, 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 2:05 PM 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. Robert Wooley (LWC)
 5. Darrick Lee (LWC); designee for Sheral Kellar
 6. Tom Cole (Temporary Legislative Auditor)
 7. Dawn Starns (NFIB)
 8. Caroline Lafourcade (LSBA)
 9. Tom Crowley (NPRC)
 10. Martha Pennington (American Payroll Association)
 11. Jim Patterson (LABI)
 12. Gary Warren (LA AFL-CIO)

- III. **Approval of Meeting Minutes from March 10, 2021 Meeting**
 - After review of the minutes, a motion was made by Mr. Patterson to approve the meeting minutes from the March 10, 2021 meeting, and was seconded by Mr. Lagarde. The minutes were unanimously approved without corrections.

- IV. **Discussion of Member Recommendations:**
 - A. **Fresh Start Proper Worked Classification Initiative and VDA Program**
 - Ms. Lafourcade began discussion with a document provided to members with regard to a safe harbor available to putative employers during audit, similar to Section 530 Relief at the federal level. A copy is available on the Task Force's website for viewing.
 - The putative employer would need to meet three requirements to be absolved of owing withholding or unemployment taxes for workers. The criteria include

Reporting Consistency, Substantive Consistency and Reasonable Basis. Each were reviewed. Mr. Morris suggested that language be added to prohibit employers who collected the tax but failed to remit them be excluded from participation. Ms. Lafourcade agreed to this suggestion.

- Next, Ms. Lafourcade provided members with a draft proposal for a Fresh Start Program which would provide relief from Louisiana withholding taxes and unemployment tax for eligible taxpayers that agree to prospectively treat workers as employees. This program is voluntary and is proposed for a one year period. The proposal also provides definitions, and requires the LDR and LWC to establish the program and its terms and conditions. The proposal covers eligibility, the application process, and ineligible employers. A copy of the proposal is also on the Task Force's website for viewing.
- During discussion Mr. Morris asked to include specific joint regulatory authority for both LDR and LWC. Mr. Morris also inquired as to the effective date of the twelve month term of the program, and suggested it be effective at the time applications would begin to be submitted not upon the date the legislation would take effect. The start date would be set at a later date. Ms. Lafourcade asked about the turnaround period for those applicants.
- Mr. Lee inquired as to the safe harbor and fresh start programs and how they might work together. Ms. Lafourcade stated that the safe harbor would apply to those under audit and the fresh start program would exclude any business under audit. The safe harbor is meant to apply to employers who are considering why they mislabeled employees. Fresh start would be for bad actors to come in and get into compliance. Mr. Lee expressed concern as to the individuals who may have been injured on the job and not been covered by worker's compensation had they been classified properly. During further discussion on this matter, worker's compensation would depend on whether the injured person is injured prior to or after the employer has entered into the safe harbor program. Ms. Starns added that those not under worker's compensation prior to the program won't qualify after the employer enters into the program as the program is prospective. Mr. Lee again stated he doesn't believe employers with misclassified workers, and who may have injured workers with an open claim, should be excluded from the fresh start program. Further eligibility and worker's compensation discussion was had by members. For the full discussion, please visit the website for the audio recording. Ms. Lafourcade proposed the employer show they have obtained worker's compensation insurance going forward before applying and being accepted into the fresh start program. Ms. Lee and Mr. Wooley believes that will help ease some of the concerns. Mr. Morris would like to add language to the legislation that states being accepted into the program would not restrict a person's right to being made whole.
- Mr. Morris asked about employers who may default after being accepted into the program. Ms. Lafourcade responded that this may be limited to the workers you reclassify and the class of workers. Ms. Lafourcade agrees there should be some

language included with regard to actions going forward by the employer and will take a look at some language to include in the proposal.

- Lastly, Ms. Lafourcade discussed the voluntary disclosure program proposal submitted to members. The concept of the program would be to provide a process of reporting undisclosed liabilities for withholding taxes administered by LDR, and unemployment taxes administered by LWC that would have been due for workers who were not classified as employees, and where taxpayers may anonymously enter into agreements and voluntarily pay such taxes with no penalty. A copy of the proposal will be available for viewing on the website.
- During discussion Ms. Lafourcade discussed the proposed details of the VDA programs for both the LDR and LWC to be administered separately. The lookback period would be twelve months beginning with the date of the application.
- Mr. Morris asked about filing a Notice of Intent by regulation to include the LDR portion of the proposal. Ms. Lafourcade asked if LDR will provide the proposed language as far as what there is authority for and go from there.
- Being that members were provided the proposal at the meeting today, there will likely need to be more research and discussion done by LDR and LWC prior to a decision or recommendation to be made by the task force.

B. Definition of Independent Contractor

- Mr. Patterson began discussion of the independent contractor definition and the concerns raised at the last meeting of the task force. In review of the U.S. DOL guidelines, the concerns raised do not appear to pose an issue to the definition and criteria proposed. No changes have been made to the proposal submitted by Mr. Patterson at this time.
- Mr. Wooley gave an update on contacting the U.S. DOL for guidance on the proposal submitted by Mr. Patterson. He has reached out to the DOL but has not received a response as of today's meeting.
- Chairman Morris would like to continue the work being done by the task force and the discussions being had by members on the new concerns and issues being raised. Mr. Morris will likely request an extension of the legislation to continue the work being done by the Commission to have effective legislation that will benefit all parties affected. Members expressed agreement to continue the work of the task force.
- Mr. Lee asked that any businesses that have questions and would like more information from the LWC on their processes to please reach out to him.

C. Penalties Applicable to Misclassification Occurrences

- This item will be revisited at the next meeting of the Commission due to time constraints.

D. Filing Requirements for Employers

- Mr. Morris provided a proposal to members for consideration relative to the submission of forms (1099-NEC) businesses would send to the LDR when filing their returns. A copy of the proposal is available on the Task Force's website.

- The proposal asks that a return copy shall be filed with the Secretary of LDR on or before the 28th day of February of each year for the preceding calendar year, with the first return being filed on or before February 28, 2022 for calendar year 2021.
- Mr. Morris hopes to have demos from software providers at the next meeting for members to review how the submission to the LDR would work.

V. Other Business

- Chairman Morris addressed the report that will be submitted to the Legislature to report the work of the Task Force. LDR staff has taken on starting a draft report from information gathered at previous meetings from stakeholder presentations, information reviewed from other States as well as information discussed by members of the task force. Mr. Morris will try to provide a draft report to members of the task force to review prior to the next meeting.

VI. Public Comment

- Erika Zucker of the Workplace Justice Project expressed agreement of the task force continuing their work, and added that an education piece would be beneficial for all to understand better the many issues surrounding misclassification from all perspectives. Mr. Lafourcade agreed and asked Mr. Lee to maybe provide some education on the mechanics of his line of work at LWC as it relates to misclassification.

VII. Adjournment

- A motion to adjourn the meeting was made by Mr. Patterson and seconded by Ms. Lafourcade. The meeting was adjourned at approximately 4:18 PM.