

# SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

## Minutes of March 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 2:03 PM by Chairman, Luke Morris.

**II. Roll Call** - A quorum was established with ten 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 3, 2021 Meeting**

- After review of the minutes, a motion was made by Mr. Patterson to approve the meeting minutes from the March 3, 2021 meeting, and was seconded by Mr. Crowley. The minutes were unanimously approved without corrections.

**\*\* Note:** Due to scheduling matters, the Chairman rescheduled the stakeholder presentation from the National Employment Law Project to follow discussion of member recommendations.

**IV. Discussion of Member Recommendations:**

- A. Twelve Factor Test of Independent Contractors
  - Mr. Patterson, working with various business sectors and their constituencies, submitted a draft proposal of the independent contractor definition to the task

force for consideration. A copy was provided to members and also to the public for viewing on the Task Force's website.

- The proposal offers a definition of independent contractor, and also covers the twelve factor criteria, discussed at prior meetings, of which an individual seeking certification would need to meet at least seven of the twelve factors.
- Mr. Lee posed a question to Mr. Patterson regarding the need of the twelve factors instead of using the ABC test as it appears to be easier to evaluate independent contractor status and would open up the State to more litigation. Mr. Patterson expressed concern that the ABC test is generally too broad and the business community feels this is a stronger and simpler approach to addressing misclassification.
- Mr. Lee also expressed concern as to the authority of LWC and the parameters of federal law as to whether this proposal follows the guidelines as to the administration of the UI program. The ABC test only has three factors and appears simpler. It also assumes the employee relationship and works backwards to identify independent contractor status. Mr. Patterson again stated that the information was gathered from other states definitions and criteria and operates within the federal guidelines and constraints. States use various tests. Mr. Patterson disagrees that the ABC test is simpler, and while it does only have three factors it is broader, less specific and not clear. This approach clearly delineates whether someone is an independent contractor and if they don't meet the criteria then they would be considered an employee. This would make it simpler to be in compliance and ensure any taxes due to the State are properly submitted and paid for those individuals deemed employees. This proposal is not to make an employee/employer relationship where there is none.
- Mr. Wooley expressed concern and asked for clarification of the last sentence in paragraph three of the proposal as it seems contradictory to the purpose of the proposal in general of meeting certain criteria. Mr. Patterson answered that if the individual met the seven criteria then they've met the rebuttable presumption, but if they don't, then it doesn't mean that an independent contractor status doesn't exist. Because they don't meet the criteria, doesn't mean that they are an employee. Mr. Patterson is open to adjusting the language to make clearer. Mr. Cole echoed Mr. Wooley's concerns of the language in paragraph three. Mr. Patterson will revisit with the business group to address Mr. Wooley's concerns.
- Mr. Morris revisited Mr. Lee's comments of the federal level conformity as far as the UI program and it's financing. Mr. Lee deferred the funding discussion to Mr. Wooley as he oversees the UI program at LWC. Mr. Wooley stated that the UI program is federally funded and LWC submits any changes or proposed language to the U.S. DOL to make sure it will be in conformity with their standards. Every year LWC sends proposed legislation to the DOL for approval of conformity prior to the legislative session. Mr. Morris asked if Mr. Wooley could reach out to the DOL Division of Legislation division to ask if they would review the proposal of the task force and provide input prior to the next meeting. Mr. Wooley will make contact, and Mr. Crowley also offered to be of help to contact DOL for input. Mr.

Crowley added that LWC should have a process to make independent determinations about independent contractors in addition to the twelve factor process.

- During public comment, Ms. Zucker inquired as to which state has implemented this type of criteria and if there have been any concerns raised. Ms. Zucker expressed that this proposal seems to work against the ABC test and works backwards to create a presumption that there is no employer/employee relationship. Mr. Patterson referred to Arizona as an example for Ms. Zucker to review.
- Mr. Morris concluded the discussion by stating that changes as well as a substitute proposals can be offered by any member of the task force for consideration to this topic. At the next meeting, amendments to the proposal as well as any new proposals will be considered if submitted. If not, Mr. Morris asked members to be ready to vote on the proposal as submitted by Mr. Patterson as time is of the essence to get recommendations to legislative leadership. Ms. Starns offered comments of her support of the proposal submitted by Mr. Patterson as a good faith effort of the business community to address the issues of misclassification concerns being voiced. Ms. Starns added that business is open to the concerns of Mr. Wooley and is willing to address and work through any issues to come to an agreement.

#### **B. Penalties Applicable to Misclassification Occurrences**

- Chairman Morris opened discussion of penalties for misclassification occurrences with the idea of a tiered penalty structure previously discussed. When misclassification occurs any first time penalties assessed would be considered for an automatic waiver of the misclassification penalties, outside of any taxes and fees due, if the employer resolves all tax matters with LDR and LWC and completes an educational course. Additional penalties assessed for further misclassification would increase based on the number of employees at issue.
- Mr. Patterson will be providing a proposal to members soon as to obtaining a waiver for the first time penalties. Ms. Lafourcade is also continuing to work on a proposal for other penalty provisions including a safe harbor period for businesses to come forward.
- Mr. Lee revisited his question posed at the last meeting regarding a safe harbor provision and it taking the place of the warning letter currently being issued. If this is the case, would consideration of a shorter safe harbor period be considered? Mr. Patterson answered yes, the warning letter would go away and a flat rate of \$500 would be assessed to the business. If the business gets their business in order as far as misclassification, then they would be considered for the waiver. Ms. Lafourcade added that the idea is to provide businesses a chance to get their operations in order by self-reporting the misclassification. The safe harbor period is open for discussion. Going forward, looking at the federal relief offered to have similar provisions on the

state level. Ms. Lafourcade will try to have a proposal for members by the next meeting.

- Mr. Morris discussed a concern of businesses on the second and third tiered penalty approaches with regard to businesses closing and forming a new business under a new name to avoid penalties and fees. Mr. Morris asked that this be considered and included in proposed language of penalties. Ms. Zucker expressed similar concerns and asked that the workers also be considered as far as unemployment insurance and worker's compensation benefits they would have received if they had been properly classified. Mr. Patterson will include those concerns in his discussions. Mr. Morris also mentioned work done in LA R.S. 47:1574.3.
- Mr. Morris asked that members be ready at the next meeting to submit new or amended proposals or be ready to vote on the proposals submitted today.

## **V. Stakeholder Presentations:**

### **A. National Employment Law Project (Rebecca Smith)**

- Rebecca Smith, Director of Work Structures for the National Employment Law Project Chairman supplied a PowerPoint presentation to the task force. The National Law Project is a program that advocates for workers' rights in various states. Ms. Smith conducted a review of task forces around the country to review best practices. Ms. Smith's presentation also discussed the costs of misclassification to the federal government and states. A copy of the presentation will be available on the task force's website.
- In discussing best practices, increased penalties and increased public enforcement on misclassification are becoming more common among states. Ms. Smith asked members to be aware when creating new definitions with regard to misclassification. Ms. Smith also addressed how changing or creating a new definition(s) would align with other states and federal laws and what is currently in place and being considered.
- Ms. Smith offered a couple of recommendations which included continuing the work of the task force and addressing penalties for first time offenders.
- During discussion Mr. Lee asked if Ms. Smith, in her research, was aware of any safe harbor provisions offered in other states. Ms. Smith replied Missouri offers some relief that may be viewed as a safe harbor but none across the board for other states.

## **VI. Other Business**

- There was no other business discussed by the task force.

## **VII. Public Comment**

- There was no public comment.

## **VIII. Adjournment**

- A motion to adjourn the meeting was made by Mr. Patterson and seconded by Mr. Wooley. The meeting was adjourned at approximately 3:56 PM.