

# SENATE RESOLUTION 22 MISCLASSIFICATION OF EMPLOYEES TASK FORCE

## Minutes of March 3, 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 2:04 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. Darrick Lee (LWC); designee for Sheral Kellar
  5. Tom Cole (Legislative Auditor)
  6. Dawn Starns (NFIB)
  7. Caroline Lafourcade (LSBA)
  8. Tom Crowley (NPRC)
  9. Jim Patterson (LABI)
  10. Gary Warren (LA AFL-CIO)
  
- III. **Approval of Meeting Minutes from February 10, 2021 and February 24, 2021 Meeting**
  - After review of the minutes, a motion was made by Mr. Lagarde to approve the meeting minutes from the February 10, 2021 meeting, and was seconded by Ms. Gerchow. The minutes were unanimously approved without corrections.
  - After review of the minutes, a motion was made by Ms. Starns to approve the meeting minutes from the February 24, 2021 meeting, and was seconded by Ms. Gerchow. The minutes were unanimously approved without corrections.
  
- IV. **Discussion of Member Recommendations**
  - A. **Voluntary Disclosure/Fresh Start Program for Existing Businesses (Caroline Lafourcade)**
    - Chairman Morris opened the meeting with Ms. Lafourcade's presentation on safe harbors and programs to encourage compliance.

- Ms. Lafourcade 's presentation provided information on the State's current VDA program as well as an overview of the current provisions for safe harbor and other penalty relief programs for worker misclassification at the federal level. A copy of the presentation will be provided on the task force's webpage. Discussed were:
  - 1. Voluntary Disclosure Agreement (VDA) – Louisiana Withholding Tax**
    - This relief is available by the LDR currently and is only available to those with no prior withholding tax returns.
    - Withholding tax and interest must be paid. Penalties are waived if accepted for the look-back period in question. For taxes collected but not remitted, the lookback period includes the current calendar year up to the date of registration with the Department of Revenue and the three immediately preceding calendar years.
  - 2. Safe Harbors & Relief Available at the Federal Level**
    - **IRC 3402(d) Relief** – Provides relief from a portion of the employment taxes if an employer is audited and found to have treated employees as independent contractors. The employer must not have deducted and withheld income taxes and failed to report them to the IRS. The employer is relieved of the portion of taxes paid by the person(s) the IRS determines to be employees who have filed their returns and paid the taxes. Forms are completed by both the employer and employees to confirm such.
    - **IRC 3509(b) and (c) Relief** – Provides relief in the form of tax rates, but only for employers who fail to deduct and withhold with respect to any employee by reason of the employer treating the person as a non-employee/independent contractor. Relief is available under Section 3509 in situations where the employer cannot obtain Section 2402(d) relief. Relief is also available where Section 530 relief is not available.
    - **Section 530 Safe Harbor – IRS Publication 1976** – If the putative employer meets three requirements, it will not owe employment taxes for workers. The requirements include reporting consistency, substantive consistency, and reasonable basis. An explanation of the requirements are included in the presentation posted on the webpage.
    - **Voluntary Classification Settlement Program (VCSP)** – A company applies for VCSP on a prospective basis. The company cannot be under examination by the IRS, DOL or any state agency. Partial relief from federal employment taxes, no penalties or interest are due if relief is granted per an agreement to prospectively treat a class of workers as employees. Payment is ten percent of the employment taxes for the compensation paid in the most recently closed tax year and after acceptance into the program by the IRS, and entry into the closing agreement.
  - 3. Proposed Safe Harbors or Relief Provisions by LDR and LWC**
    - A safe harbor similar to Section 530? A Voluntary Compliance Program similar to the IRS VCSP? Relief in the form of tax rates, similar to IRS 3509?

- Chairman Morris opened discussion with comments from the members. Mr. Lagarde commented that it would be a good idea to view the federal programs offered and have a similar type program on the State level to keep consistency for businesses seeking relief.
- Mr. Crowley inquired as to the consideration of the workers who would have been covered for unemployment, prior to relief being granted and now being considered as employees, for unemployment benefits. Mr. Crowley suggested this be considered when making a decision. Ms. Lafourcade and Mr. Morris agreed that this should and will be considered.
- Mr. Morris asked if Ms. Lafourcade had any crossover issues when having tried to resolve matters with the IRS and U.S. Dept. of Labor (DOL)? Ms. Lafourcade answered she has not seen any crossover there. Mr. Crowley also commented, having worked for DOL, that there was not much if any crossover there. This can be looked into further.
- Chairman Morris discussed next steps on this recommendation and asked Ms. Lafourcade to take the lead on drafting a proposal for consideration by members. Ms. Lafourcade accepted and requested assistance from members. Mr. Lagarde and Mr. Patterson offered to help with the drafting. Mr. Morris also stated that LDR would be available to assist. Mr. Morris envisions the proposal being an opportunity to resolve unemployment and tax issues together. Mr. Lagarde added that the program should be favorable and easy to follow so as to make it desirable for companies to come forward to get into compliance.
- Mr. Lee posed a question as to the recommended proposal substituting the current warning letter issued by Unemployment Insurance, or being in addition to the letter, as the warning letter serves as a defacto safe harbor for UI tax audits. Ms. Lafourcade asked about the businesses that may have not received a warning letter? The proposed safe harbor provision would necessarily negate the need for a warning letter to be issued if the employer self reports. Mr. Lee inquired as to the lookback period for this provision. Ms. Lafourcade responded the federal government asks for ten percent of what the employment tax liability would have been for the prior year. It would be prospective from there since prior years would be resolved if relief provisions are granted.
- Further discussion on this topic will be had in future meetings of the task force.

#### **B. Twelve Factor Test for Independent Contractors**

- Mr. Patterson will work to have a draft proposal of the twelve factor test submitted to members for review prior to the next meeting of the task force.

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

- Chairman Morris began discussion referencing a comment given by Mr. Patterson at a prior meeting of the task force, that fees and collections from audits done will be applied to the Unemployment Trust Fund. Mr. Morris inquired as to which agency would handle the penalties/fees imposed from

misclassification as they would be different from any taxes which may be owed and administered by the LDR or LWC.

- Mr. Morris will be in contact with LWC and will revisit this discussion at the next meeting of the task force.
- Ms. Zucker asked whether fees for submission of the certification would be submitted by the person(s) applying. Mr. Patterson confirmed that this is the thought.

#### **D. Verification of Independent Contractor Status by Regulatory Agencies**

- Chairman Morris addressed this topic of discussion asking for ideas of how to best equip both LDR and LWC with tools to address the bad actors who will be non-compliant regardless of procedures put in place. LDR requests the submission of the 1099 information that is sent to the IRS when filing withholding taxes also be sent to LDR at the same time. Currently, LDR receives 1099 information from the IRS about 18 months after the tax year, but the data is restricted, so it will be helpful to receive the information when submitted to the IRS. Mr. Patterson supports the concept of getting the info sooner than later. Mr. Patterson expressed alignment of the idea but also concerns with regard to the demands that will be imposed on the LDR and suggests a procedure to allow for business to make a determination on getting the information to LDR.
- Mr. Lagarde also expressed concerns of how the information would be submitted as well and if it will be as simple as the push of a button. To gain a little more understanding he inquired as to the information LDR would be looking to obtain from the 1099s. Mr. Lagarde is open to the idea but the specifics will need to be ironed out. Mr. Lagarde also suggests that the data could be gathered from contractors when requesting or renewing of certification.
- Secretary Robinson joined the conversation to clarify that the gathering of 1099 information goes beyond just contractors. It will be for all employees who earn income in Louisiana to report their withholdings. Ms. Robinson is looking into implementing this into the current system upgrade for the Department so as to make the gathering of information as easy as possible.
- Mr. Morris will provide a more concrete proposal at the next meeting of the task force. Mr. Crowley asked members to also consider that most 1099 forms are submitted by payroll processing companies. Mr. Crowley will submit recommendations at the next meeting as well.

#### **V. Other Business**

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

#### **VI. Public Comment**

- There was no public comment.

**VII. Adjournment**

- A motion to adjourn the meeting was made by Mr. Patterson and seconded by Mr. Crowley. The meeting was adjourned at approximately 3:44 PM.