

2021 Regular Session

SENATE BILL NO. 92

BY SENATOR LUNEAU

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

REVENUE DEPARTMENT. Provides for uniform definitions of independent contractor and employee, and for penalties for the misclassification of employees. (2/3 - CA7s2.1(A)) (1/1/22)

1 AN ACT

2 To amend and reenact R.S. 47:111(A)(10) and (E), 113, and 114(F)(2) and (3) and to enact

3 R.S. 23:1472(9) and (12)(H)(XXIII) and R.S. 47:111(F), 113.1, and 114(F)(4),

4 relative to classification of employees; to provide for definitions and exceptions to

5 defined terms; to provide relative to classification of certain types of employment;

6 to provide relative to liability imposed on employers who fail to withhold tax due to

7 misclassification of employees; to increase the penalties for failing to file required

8 reports; to provide penalties for the misclassification of employees; to provide for

9 effectiveness; and to provide for related matters.

10 Be it enacted by the Legislature of Louisiana:

11 Section 1. R.S. 23:1472(9) and (12)(H)(XXIII) are hereby enacted to read as
12 follows:

13 §1472. Definitions

14 As used in this Chapter, the following terms shall have the meanings ascribed
15 to them in this Section, unless the context clearly indicates otherwise:

16 * * *

17 **(9) "Employee" means an individual who performs services for an**

1 employer where there exists a right by the employer to control what work the
2 employee does or how the employee performs his job or where the employer
3 provides the tools and supplies to the employee for the performance of the job.

4 * * *

5 (12)A. "Employment" means, subject to the other provisions of this
6 Subsection, any services including service in interstate commerce, performed for
7 wages or under any contract of hire, written or oral, express or implied;

8 * * *

9 H. The term "employment" shall not include:

10 * * *

11 XXIII. Service performed by an individual engaged in an independent
12 trade, business, or profession in which he offers his services to the general
13 public with the authority to control what will be done and how it will be done.

14 * * *

15 Section 2. R.S. 47:111(A)(10) and (E), 113, and 114(F)(2) and (3) are hereby
16 amended and reenacted and R.S. 47:111(F), 113.1, and 114(F)(4) are hereby enacted to read
17 as follows:

18 §111. Definitions

19 A. Wages. For purposes of this Subpart the term "wages" means all
20 remuneration (other than fees paid to a public official) for services performed by an
21 employee for his employer, including the cash value of all remuneration paid in any
22 medium other than cash; except that such term shall not include remuneration paid:

23 * * *

24 (10) which is not considered taxable by the Internal Revenue Code of ~~1954~~
25 1986 as amended.

26 * * *

27 E. Misclassified employee. For purposes of this Subpart the term
28 "misclassified employee" means an individual who is an employee, as defined
29 in R.S. 23:1472(9), receiving wages from an employer, but from whom no tax

1 was deducted or withheld as required by R.S. 47:112 due to the employer's
2 failure to properly classify the individual as an employee.

3 F. Number of withholding exemptions and withholding credits for
4 dependents claimed. For purposes of this Subpart, the term "number of withholding
5 exemptions and withholding credits for dependents claimed" means the number of
6 withholding exemptions and withholding credits for dependents claimed in a
7 withholding exemption certificate in effect under R.S. 47:112(F), except that if no
8 such certificate is in effect, the number of withholding exemptions and withholding
9 credits for dependents claimed shall be considered to be zero.

10 * * *

11 §113. Liability of employer

12 A. An employer shall be liable for the payment to the ~~collector~~ secretary of
13 the amounts required to be withheld under R.S. 47:112, and an employer who has
14 withheld and paid such amounts to the ~~collector~~ secretary shall not otherwise be
15 liable to any person for the amounts of any such payments. Any sums withheld in
16 accordance with the provisions of this Sub-part shall be deemed to be held in trust
17 for the ~~collector~~ secretary.

18 B. Upon failure of an employer to pay as provided in R.S. 47:114 any
19 amounts withheld or required to be withheld under this Chapter, he shall become
20 personally liable for any such tax. The tax, interest, penalties, and attorney fees shall
21 be payable as provided generally in the Subtitle, and the amount thereof may be
22 determined, computed and collected by any method generally provided for in this
23 Subtitle.

24 C. Notwithstanding any provision in this Subtitle to the contrary the
25 liability due by an employer under Subsections A or B of this Section who fails
26 to withhold the amounts required to be withheld pursuant to R.S. 47:112 from
27 a misclassified employee, shall be calculated by applying the highest Louisiana
28 individual income tax rate to the total wages paid to the misclassified employee
29 during the period. The total wage component of this calculation may be reduced

1 by any portion of the wages that have been reported by the misclassified
2 employee on a properly filed Louisiana individual income tax return and the
3 resulting tax liability paid as of the date of assessment against the employer.

4 §113.1. Liability of contractor

5 A. Beginning January 1, 2022, a contractor who knew or had reason to
6 know that amounts paid to its subcontractor included labor costs of
7 misclassified employees shall be subject to a penalty equal to twenty-five
8 percent of the amounts due by the subcontractor under R.S. 47:113(C). This
9 penalty may be enforced in the same manner provided by law for the collection
10 of a tax.

11 B. In addition to the secretary's authority to impose a penalty pursuant
12 to this Section, in the event of subsequent offenses by a contractor under this
13 Section, the secretary may order the State Licensing Board for Contractors to
14 immediately suspend the contractor's license.

15 §114. Returns and payment of tax

16 * * *

17 F. Penalty provision. * * *

18 (2) The penalty described in this Subsection shall be ~~twenty~~-five dollars for
19 each quarterly return, annual return, or receipt required to be furnished under R.S.
20 47:112(L). The total penalty imposed pursuant to this Subsection shall not exceed
21 ~~thirty~~-seven thousand five hundred dollars for each annual period. This penalty shall
22 be an obligation to be collected and accounted for in the same manner as if it were
23 part of the tax due and can be enforced either in a separate action or in the same
24 action for the collection of the tax.

25 (3) Beginning January 1, 2022, if the failure to submit quarterly returns,
26 annual returns, and receipts required to be furnished under 47:112(L) or the
27 failure to remit the amount required to be withheld is due to the
28 misclassification of an employee, a specific penalty equal to twenty-five percent
29 of the amount due under R.S. 47:113(C) shall be imposed. This penalty shall be

1 **an obligation to be collected and accounted for in the same manner as if it were**
 2 **part of the tax due, and can be enforced either in a separate action or in the**
 3 **same action for the collection of the tax.**

4 **(4)(a)** If the failure to timely submit the annual return is attributable, not to
 5 the negligence of the taxpayer, but to other causes set forth in written form and
 6 considered reasonable by the secretary, the secretary may remit or waive payments
 7 of the whole or any part of the specific penalty provided for such failure. ~~Until~~
 8 ~~December 31, 2015, in any case where the penalty exceeds twenty-five thousand~~
 9 ~~dollars, it can be waived by the secretary only after approval by the Board of Tax~~
 10 ~~Appeals.~~ Notwithstanding the provisions of R.S. 47:1508, ~~beginning January 1,~~
 11 ~~2016,~~ waivers of all penalties exceeding twenty-five thousand dollars shall be subject
 12 to oversight by the House Committee on Ways and Means and the Senate Committee
 13 on Revenue and Fiscal Affairs.

14 **(b) A complete record of penalty remittances and waivers pursuant to**
 15 **this Paragraph shall be kept by the secretary, and notwithstanding the**
 16 **provisions of R.S. 47:1508 and 1508.1, these remittances and waivers shall be**
 17 **published in the department's annual report.** This provision shall not apply to any
 18 penalty the secretary remits or waives in accordance with rules and regulations
 19 promulgated pursuant to the Administrative Procedure Act regarding the remittance
 20 or waiver of penalties under the department's voluntary disclosure program.

21 * * *

22 Section 2. This Act shall become effective on January 1, 2022.

The original instrument and the following digest, which constitutes no part
 of the legislative instrument, were prepared by Leonore Heavey.

DIGEST

SB 92 Original 2021 Regular Session Luneau

Present law provides relative to the La. Employment Security Law and defines certain terms.

Proposed law defines "employee" as an individual who performs services for an employer where there exists a right by the employer to control what work the employee does or how the employee performs his job or where the employer provides the tools and supplies to the employee for the performance of the job.

Present law defines the term "employment" and provides for exceptions.

Proposed law retains present law definition of "employment" adds an additional exception to the definition of "employment" for an individual engaged in an independent trade, business, or profession in which he offers his services to the general public with the authority to control what will be done and how it will be done.

Present law provides for withholding of state income taxes on wages paid for services performed by an employee for his employer.

Proposed law defines "misclassified employee" an employee from whom no tax was deducted or withheld as required by present law due to the employer's failure to properly classify the individual as an employee.

Proposed law provides for a penalty for employers who fail to withhold the amounts required to be withheld due to the misclassification of an employee. The penalty is determined by multiplying the highest Louisiana individual income tax rate (currently 6%) by the total wages paid to the misclassified employee during the period. However, the penalty may be reduced if the misclassified employee paid Louisiana income tax on these wages.

Proposed law provides for a penalty for contractors who knew or had reason to know that amounts paid to its subcontractor included labor costs of misclassified employees equal to 25% of the penalty for employers who fail to withhold the amounts required to be withheld due to the misclassification of an employee.

Present law requires every employer who withholds taxes to file a quarterly withholding return and an annual reconciliation report for all employees for whom taxes are withheld and provides for a \$5 per return penalty for late returns or reports with an overall annual maximum penalty of \$7,500.

Proposed law retains present law reporting requirements and increases the late filing penalty from \$5 to \$25 for each late return, report, or receipt and increases the annual maximum penalty from \$7,500 to \$37,500.

Proposed law provides a specific penalty for nonfiling of withholding returns, reports, and receipts or failure to remit withholding where the failure to file or remit is due to the misclassification of an employee. The penalty is equal to 25% of the amount of withholding tax that should have been remitted.

Effective January 1, 2022.

(Amends R.S. 47:111(A)(10) and (E), 113, and 114(F)(2) and (3); adds R.S. 47:111(F), 113.1, and 114(F)(4) and R.S. 23:1472(9) and (12)(H)(XXIII))