

---

**SENATE COMMITTEE AMENDMENTS**

2021 Regular Session

Substitute for Original Senate Bill No. 92 by Senator Luneau as proposed by Senate Committee on Revenue and Fiscal Affairs.

---

**This document reflects the content of a substitute bill but is not in a bill form; page numbers in this document DO NOT correspond to page numbers in the substitute bill itself.**

To amend and reenact R.S. 23:1711(G)(1) and to enact R.S. 23:1472(15.1) and Part XIII of Chapter 1 to be comprised of R.S. 23:1771 through 1777, relative to employee misclassification; to provide with respect to administrative penalties; to provide relative to the failure to pay contributions; to provide for definitions; to provide factors to be used to identify an independent contractor; to facilitate voluntary resolution of worker classification issues; to enact the Fresh Start Proper Worker Classification Initiative and the Louisiana Voluntary Disclosure Program; to require the Louisiana Workforce Commission to promulgate rules; to provide for the disposition of penalties; to provide a safe harbor; to provide for an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 23:1711(G)(1) is hereby amended and R.S. 23:1472(15.1) and Part XIII of Chapter 1 to be comprised of R.S. 23:1771 through 1777 are hereby enacted to read as follows:

§1711. False statements or representations; failure to file reports or maintain records; duties of officers and agents; presumptive proof; penalties

\* \* \*

G. Misclassification of employees as independent contractors.

~~(1)(a) Written warning. If the administrator determines, after investigation, that an employer, or any officer, agent, superintendent, foreman, or employee of the employer, failed to properly classify an individual as an employee in accordance with this Chapter, and failed to pay contributions required by this Chapter, but the failure was not knowing or willful, the employer shall be issued a written warning as evidence that the employer has been cited for a first offense of misclassification. Such warning shall constitute a determination that any workers identified therein are~~

~~employees, and all resulting contributions, interest and penalties shall be due, and shall be appealable as provided in this Section. However, no administrative penalties shall be due.~~

(b) Administrative penalties. If the administrator determines, after investigation, that an employer, or any officer, agent, superintendent, foreman, or employee of the employer, ~~after June 30, 2013, and subsequent to the issuance of a written warning,~~ failed to properly classify an individual as an employee and failed to pay contributions in accordance with this Chapter, then, in addition to any contributions, interest, and penalties otherwise due, the administrator may assess an administrative penalty of ~~not more than two hundred fifty dollars per each such individual~~ **five hundred dollars for each individual who was misclassified. If the employer properly classifies the employee and remits the resulting contributions and interest within sixty day of the issuance of the citation, the penalty shall be waived.**

**(b) Upon the second failure by an employer to properly classify an individual as an employee and pay contributions due, the administrator shall assess an administrative penalty of not more that one thousand dollars for each individual misclassified.**

(c) Thereafter, any ~~such~~ failure by an employer to properly classify an individual as an employee and pay contributions due shall be subject to an administrative penalty of ~~not more than five hundred dollars per each such individual.~~ **two thousand five hundred dollars for each individual misclassified.** ~~In determining the amount of the administrative penalty imposed, the administrator shall consider factors including previous violations by the employer, the seriousness of the violation, the good faith of the employer, and the size of the employer's business.~~

~~(c) If, after an employer has been issued a written warning and is subsequently found, on two or more separate occasions, to have failed to properly classify an individual as an employee, the employer may also be subject to an additional fine of not less than one hundred dollars nor more than one thousand~~

dollars, or imprisoned for not less than thirty days nor more than ninety days, or both.

**(d)** For the purpose of this Subsection, each employee so misclassified shall constitute a separate offense.

~~(d)~~**(e)** No such determination shall be final or effective, and no resulting administrative penalty shall be assessed, unless the administrator first provides the employer with written notification by certified mail of the determination, including the amount of the proposed contributions, interest, and penalties determined to be due and of the opportunity to request a fair hearing **before the appeals tribunal**, of which a record shall be made within thirty days of the mailing of such notice. The hearing request may be made by mail, as evidenced by the official postmarked date, or by otherwise timely delivering such appeal. If the employer does not request a hearing within the thirty-day period the determination shall become final and effective, and the contributions, interest, and penalties due shall be assessed.

**(f) The administrative penalties assessed and collected pursuant to the provisions of this Subsection shall be deposited into the Unemployment Trust Fund.**

\* \* \*

§1472. Definitions

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

\* \* \*

**(15.1) "Independent contractor" has the same meaning as provided in R.S. 23:1772.**

\* \* \*

**PART XIII. FRESH START PROPER WORKER CLASSIFICATION**

**INITIATIVE AND VOLUNTARY DISCLOSURE PROGRAM**

**§1771. Criteria for classification of an independent contractor**

**A. The legislature finds that it is in the best interests of workers, businesses, and government to have clear, objective and certain criteria identifying an independent contractor relationship as compared to an**

employment relationship. These criteria will reduce unnecessary and costly litigation, confusion in the workforce marketplace, among agencies, and within the courts. Therefore, the following provisions are enacted to ensure that employees are properly classified as such and afforded the legal protections and obligations that apply to that status while workers who desire to be independent contractors understand the criteria for that designation.

B. For the purposes of this Part and Title 47 of the Louisiana Revised Statutes of 1950, as amended, an independent contractor is any person or organization including a sole proprietor, partnership, limited liability company, corporation, or other entity that undertakes orally or in writing, the performance of services for or in connection with another party in a manner consistent with the requirements of this Part. When an individual or entity meets at least seven of the following criteria there shall be a rebuttable presumption of an independent contractor relationship with the contracting party for whom the independent contractor performs services. The criteria are as follows:

(1) The individual or entity operates an independent business through which he provides services for or in connection with the contracting party.

(2) The individual or entity represents his services as self-employment available to others, including through the use of an application platform to obtain work opportunities or as a lead generation service.

(3) The individual or entity accepts responsibility for all tax liability associated with payments received from or through the contracting party.

(4) The individual or entity is responsible for obtaining and maintaining any required registration, licenses, or other authorization necessary for the legal performance of the services rendered by him as the contractor.

(5) The individual or entity is not insured under the contracting party's health insurance or workers' compensation insurance coverages and is not covered for unemployment insurance benefits.

(6) The individual or entity has the right to accept or decline requests for services by or through the contracting party and 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 even if the individual voluntarily chooses not to exercise this right or is temporarily restricted from doing so.

(7) The contracting party does not direct or oversee the performance, methods, or processes the individual or entity 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 or entity determines the days worked and the time periods of work.

(9) The individual or entity furnishes the major tools or items of equipment needed to perform the work.

(10) The individual or entity is paid a fixed or contract rate for the work he performs and the contracting party does not pay the individual or entity a salary or wages based on an hourly rate.

(11) The individual or entity is responsible for the majority of expenses he incurs in performing the services, unless the expenses are reimbursed under an express provision of a written contract between the parties or the expenses reimbursed are commonly reimbursed under industry practice.

(12) The individual or entity can use assistants as he deems proper for the performance of the work and is directly responsible for their supervision and compensation.

C. Obtaining an independent contractor certification from the state is optional and is not required to establish independent contractor status. Any contracting party or independent contractor may rely on the provisions of this Section for the purpose of establishing an employment or independent contractor relationship.

§ 1772. The Fresh Start Proper Worker Classification Initiative

A. The Fresh Start Proper Worker Classification Initiative is optional and provides taxpayers with an opportunity to voluntarily reclassify their workers as employees for future tax periods. To participate, a taxpayer shall meet all the eligibility requirements, apply to participate in the Fresh Start

Proper Worker Classification Initiative, produce a certificate of proof of workers' compensation coverage for all employees, and enter into a closing agreement with the Louisiana Workforce Commission and the Department of Revenue.

B. The Fresh Start Proper Worker Classification Initiative applies to taxpayers that are currently treating their workers as independent contractors or other nonemployees and want to prospectively treat the workers as employees. To be eligible, a taxpayer shall have consistently treated the workers for the previous three years as nonemployees, and shall have filed all required Forms 1099-NECs with the Internal Revenue Service with respect to those workers, consistent with the nonemployee treatment.

C. An eligible taxpayer who participates in the Fresh Start Proper Worker Classification Initiative agrees to prospectively treat the class or classes of workers identified in the application as employees for future tax periods and is not liable for any withholding tax, unemployment tax, interest or penalties with respect to any amounts paid to any workers before the date on which the taxpayer is accepted for participation in the Fresh Start Proper Worker Classification Initiative.

D. Eligible taxpayers who wish to participate in the Fresh Start Proper Worker Classification Initiative shall submit an application for participation in the program using the application for Fresh Start Proper Worker Classification Initiative, to the Department of Revenue. The Department of Revenue shall contact the taxpayer or authorized representative to complete the process once it has reviewed the application and verified the taxpayer's eligibility. Taxpayers whose application has been accepted enter into a joint closing agreement with the Department of Revenue and Louisiana Workforce Commission whereby the taxpayer confirms the agreement to treat the class or classes of workers identified in the application as employees beginning on the date on which the taxpayer receives notice from the Department of Revenue that the taxpayer's application has been accepted.

E. The following employers shall not be eligible to participate in the program:

(1) Employers who are currently under audit concerning the classification of the classes of workers by the Internal Revenue Service, the United States Department of Labor, or by a state government entity.

(2) Employers who are contesting in court the classification of the class or classes of workers from a previous audit by the Internal Revenue Service, the United States Department of Labor, the Department of Revenue, or the Louisiana Workforce Commission.

(3) Employers who have withheld Louisiana state income taxes from the amounts paid to any worker, and who have not remitted the tax to the Louisiana Department of Revenue.

(4) For the purposes of Paragraphs (1) and (2) of this Subsection, a taxpayer that is a member of an affiliated group within the meaning of Section 1504(a) of the Internal Revenue Code if any member of the affiliated group is under a employment, withholding, or unemployment tax audit.

§ 1773. The Louisiana Voluntary Disclosure Program

A. (1) The Louisiana Voluntary Disclosure Program is established as a process of reporting undisclosed liabilities for withholding taxes administered by the Department of Revenue and unemployment taxes administered by the Louisiana Workforce Commission that would have been due for workers who were not classified as employees. The Voluntary Disclosure Program authorizes taxpayers to anonymously enter into agreements and voluntarily pay taxes with no penalty.

(2) In order to be admitted to the program, an employer shall obtain and produce a certificate proving he has obtained workers' compensation coverage for his employees.

B. Definitions. For purposes of this Part, the following terms shall have the following meanings:

(1) "Applicant" means any association, corporation, estate, firm, individual, joint venture, limited liability company, partnership, receiver,

syndicate, trust, or any other entity, combination, or group that submits or arranges through a representative for the submission of an application to request a voluntary disclosure agreement for a tax administered by the department. If the application is submitted through a representative, anonymity of the applicant can be maintained until the voluntary disclosure agreement is executed by the taxpayer and the secretary.

(2) "Application" means a completed application to request voluntary disclosure agreement and all supplemental information including, but not limited to, cover letters, schedules, reports, and any other documents that provide evidence of the applicant's qualification for a voluntary disclosure agreement. Supplemental information requested by the department and timely provided by the applicant shall be considered part of the application.

(3) "Application date" means the date a fully completed application requesting a voluntary disclosure agreement is received by the department. Supplemental information requested by the department and timely provided by the applicant shall not extend or delay the application date.

(4) "Delinquent penalty" means any specific penalty imposed as a result of the failure of the taxpayer to timely make any required return or payment.

(5) "Department" means the Louisiana Workforce Commission or the Department of Revenue.

(6) "Look-back period" means a period for which a qualified applicant agrees to disclose and pay the tax and interest due. The look-back period shall include the current calendar year up to the date of registration with the department and the one immediately preceding calendar year. For discontinued, acquired, or merged entities, the look-back period shall include undisclosed liabilities in the last calendar year in which the qualified applicant had nexus within this state and the one immediately preceding calendar year.

(7) "Non-qualified applicant" includes any taxpayer who has either of the following conditions:

(a) Has been contacted by the department concerning a liability regarding a tax for which a voluntary disclosure agreement is requested,



including but not limited to a potential liability or contact for the purpose of performing an audit of the taxpayer's records.

(b) Is affiliated with another entity that has been contacted by the department for the purpose of performing an audit of the affiliated entity's records. A non-qualified applicant under this Subparagraph may become a qualified applicant after the audit of the affiliated entity has been completed, provided the applicant is not disqualified under Subparagraph (a) of this Paragraph.

(8) "Qualified applicant" means any taxpayer, other than a non-qualified applicant, subject to the reporting and payment of unemployment or withholding tax imposed by the state of Louisiana.

(9) "Undisclosed liability" means an unemployment tax or withholding tax liability that became due during the look-back period and which has not been determined, assessed, or otherwise identified by or known to the department at the time of disclosure and which would likely not be discovered through normal administrative activities. The undisclosed liability shall exceed five hundred dollars during the look-back period to qualify for consideration of a voluntary disclosure agreement. For purposes of unemployment tax, an undisclosed liability shall be determined based on the applicant's existing experience rating, or if there is no existing experience rating, then pursuant to R.S. 23:1535. The secretary of the department may conduct an audit of the applicant's records to confirm the amount of the undisclosed liability.

C. The Louisiana Workforce Commission, in consultation with the Department of Revenue shall promulgate rules and regulations necessary for the administration of the Voluntary Disclosure Program.

§ 1774. Voluntary Disclosure Agreements; withholding tax

A. (1) After the secretary of the Department of Revenue has reviewed the application and determined from the information included that the applicant qualifies for a voluntary disclosure agreement, the secretary shall send a copy of the agreement to the applicant or the applicant's representative for signature.

(2) The applicant or applicant's representative, acting under the authority of a power of attorney, shall sign the agreement and return it to the secretary within thirty calendar days of the postmark or e-mail date, or within any extension of time authorized by the secretary beyond thirty calendar days from the postmark or e-mail date.

(3) After the signed agreement is received from the applicant, the secretary or her authorized representative shall sign the agreement and return a copy of the agreement which has been signed by both parties to the applicant.

(4) After all tax and interest due for the look-back period have been paid, the delinquent penalties shall be waived, unless the tax disclosed was collected but not remitted. Where the tax was collected but not remitted, the secretary may consider waiving payment of the whole or any part of the delinquent penalties on a case-by-case basis.

B. All tax due for the look-back period, which shall exclude any tax that was reported on an individual income tax return filed by any worker in the class or classes of workers identified in the application as verified by the Department of Revenue, shall be paid within sixty calendar days of the secretary's signing date of the voluntary disclosure agreement or within any extension of time authorized by the secretary beyond sixty calendar days of the signing date. All schedules or returns required by the secretary to show the amount of tax due shall be included with this payment.

C. The secretary shall compute the interest due for the tax disclosed by the applicant and send a schedule by mail or email to the applicant or his representative showing the amount of tax, interest, and delinquent penalty due. The applicant shall submit payment of the full amount of the interest not remitted or waived within thirty calendar days from the postmark or e-mail date of the schedule or, if applicable, within any extension of time granted by the secretary. If payment of the full amount due has not been received timely, the secretary may void the agreement.

D. The terms of the voluntary disclosure agreement shall be valid, binding, and enforceable by and against all parties, including their transferees, successors, and assignees.

E. The secretary may void a voluntary disclosure agreement if the applicant fails to comply with any of the conditions outlined in the agreement.

§1775. Voluntary Disclosure Agreements; unemployment taxes

A. (1) After the secretary of the Louisiana Workforce Commission has reviewed the application and determined from the information included therein that the applicant qualifies for a voluntary disclosure agreement, the secretary shall send a copy of the agreement to the applicant or the applicant's representative for signature.

(2) The applicant or applicant's representative, acting under the authority of a power of attorney, shall sign the agreement and return it to the secretary within thirty calendar days of the postmark or e-mail date, or within any extension of time authorized by the secretary beyond thirty calendar days from the postmark or e-mail date.

(3) After the signed agreement is received from the applicant, the secretary or his authorized representative shall sign the agreement and return a copy of the agreement which has been signed by both parties to the applicant.

(4) The secretary shall credit the account of all workers identified by the applicant in the application for unemployment benefits with respect to the look-back period.

B. After all unemployment tax and interest due for the look-back period have been paid, the delinquent penalties shall be waived.

C.(1) All unemployment tax due for the look-back period shall be paid within sixty calendar days of the secretary's signing date of the voluntary disclosure agreement or within any extension of time authorized by the secretary beyond sixty calendar days of the signing date. All schedules or returns required by the secretary to show the amount of tax due shall be included with this payment.

(2) The secretary shall compute the interest due for the tax disclosed by the applicant and send a schedule by mail or email to the applicant or his representative showing the amount of tax and interest due. The applicant shall submit payment of the full amount of the interest within thirty calendar days from the postmark or e-mail date of the schedule or, if applicable, within any extension of time granted by the secretary. If payment of the full amount due has not been received at the expiration of such time, the secretary may void the agreement.

D. The terms of the voluntary disclosure agreement shall be valid, binding, and enforceable by and against all parties, including their transferees, successors, and assignees.

E. The secretary may void the voluntary disclosure agreement if the applicant fails to comply with any of the conditions outlined in the agreement.

§1776. Safe harbor

Any putative employer meeting the following three requirements shall not owe withholding or unemployment taxes for the workers to whom these requirements apply:

A. Reporting consistency. The putative employer timely filed all required federal tax and information returns for independent contractors who were paid six hundred dollars or more, such as Form 1099-MISC/1099-NEC. Relief is not available for any worker for whom the employer did not file the required information return.

B. Substantive consistency. The putative employer and any predecessor always treated the worker as an independent contractor, however if any similar worker was treated as an employee, relief is not available.

C. Reasonable basis. The putative employer had a reasonable basis for not treating the worker as an employee including any of the following:

- (1) Reliance on a court case or Internal Revenue Service ruling.
- (2) The putative employer was previously audited and the Internal Revenue Service considered employment taxes but did not reclassify the workers.

(3) Independent contractor treatment is common in the putative employer's industry for workers providing similar services.

(4) The putative employer and any predecessor always treated the worker as an independent contractor.

(5) Reliance on legal advice or advice on an accountant.

(6) Notwithstanding any contrary provision of this Paragraph, if any similar worker was treated as an employee, relief is not available.

§ 1777. Reporting to the Department of Revenue by service recipients

A. Any service recipient who files or is required to file a Form 1099-NEC with the Internal Revenue Service for services performed in Louisiana shall file a copy of the return with the Department of Revenue. The return copy shall be filed on or before the 28th day of February of each year for the preceding calendar year beginning February 28, 2022. The secretary may grant extensions up to thirty days, to file the report, and to waive the reporting requirement upon a showing that the requirement creates an undue hardship.

B. The Department of Revenue may utilize data analytic discovery procedures to identify potential cases of misclassification with the return data required to be filed pursuant to this Section.

Section 2. This Act shall become effective on January 1, 2022; if vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on January 1, 2022, or on the day following such approval by the legislature, whichever is later.