



## 1 G. Misclassification of employees as independent contractors.

2 (1)(a) ~~Written warning. If the administrator determines, after investigation,~~  
3 ~~that an employer, or any officer, agent, superintendent, foreman, or employee of the~~  
4 ~~employer, failed to properly classify an individual as an employee in accordance~~  
5 ~~with this Chapter, and failed to pay contributions required by this Chapter, but the~~  
6 ~~failure was not knowing or willful, the employer shall be issued a written warning~~  
7 ~~as evidence that the employer has been cited for a first offense of misclassification.~~  
8 ~~Such warning shall constitute a determination that any workers identified therein are~~  
9 ~~employees, and all resulting contributions, interest and penalties shall be due, and~~  
10 ~~shall be appealable as provided in this Section. However, no administrative penalties~~  
11 ~~shall be due.~~

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

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

27 (c) Thereafter, any ~~such~~ failure by an employer to properly classify an  
28 individual as an employee and pay contributions due shall be subject to an  
29 administrative penalty of ~~not more than five hundred dollars per each such~~  
30 ~~individual.~~ **two thousand five hundred dollars for each individual misclassified.**





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

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

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

9           **(6) The individual or entity has the right to accept or decline requests for**  
10           **services by or through the contracting party and is able to perform services for**  
11           **or through other parties or can accept work from and perform work for other**  
12           **businesses and individuals besides the contracting party even if the individual**  
13           **voluntarily chooses not to exercise this right or is temporarily restricted from**  
14           **doing so.**

15           **(7) The contracting party does not direct or oversee the performance,**  
16           **methods, or processes the individual or entity uses to perform services.**

17           **(8) The contracting party has the right to impose quality standards or a**  
18           **deadline for completion of services performed, or both, but the individual or**  
19           **entity determines the days worked and the time periods of work.**

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

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

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

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

1           and compensation.

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

7           §1772. The Fresh Start Proper Worker Classification Initiative

8                   A. The Fresh Start Proper Worker Classification Initiative is optional  
9           and provides taxpayers with an opportunity to voluntarily reclassify their  
10          workers as employees for future tax periods. To participate, a taxpayer shall  
11          meet all the eligibility requirements, apply to participate in the Fresh Start  
12          Proper Worker Classification Initiative, produce a certificate of proof of  
13          workers' compensation coverage for all employees, and enter into a closing  
14          agreement with the Louisiana Workforce Commission and the Department of  
15          Revenue.

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

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

30                  D. Eligible taxpayers who wish to participate in the Fresh Start Proper

1 Worker Classification Initiative shall submit an application for participation in  
2 the program using the application for Fresh Start Proper Worker Classification  
3 Initiative, to the Department of Revenue. The Department of Revenue shall  
4 contact the taxpayer or authorized representative to complete the process once  
5 it has reviewed the application and verified the taxpayer's eligibility. Taxpayers  
6 whose application have been accepted enter into a joint closing agreement with  
7 the Department of Revenue and Louisiana Workforce Commission whereby the  
8 taxpayer confirms the agreement to treat the class or classes of workers  
9 identified in the application as employees beginning on the date on which the  
10 taxpayer receives notice from the Department of Revenue that the taxpayer's  
11 application has been accepted.

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

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

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

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

24 (4) For the purposes of Paragraphs (1) and (2) of this Subsection, a  
25 taxpayer that is a member of an affiliated group within the meaning of Section  
26 1504(a) of the Internal Revenue Code if any member of the affiliated group is  
27 under an employment, withholding, or unemployment tax audit.

28 §1773. The Louisiana Voluntary Disclosure Program

29 A.(1) The Louisiana Voluntary Disclosure Program is established as a  
30 process of reporting undisclosed liabilities for withholding taxes administered

1 by the Department of Revenue and unemployment taxes administered by the  
2 Louisiana Workforce Commission that would have been due for workers who  
3 were not classified as employees. The Voluntary Disclosure Program authorizes  
4 taxpayers to anonymously enter into agreements and voluntarily pay taxes with  
5 no penalty.

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

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

11 (1) "Applicant" means any association, corporation, estate, firm,  
12 individual, joint venture, limited liability company, partnership, receiver,  
13 syndicate, trust, or any other entity, combination, or group that submits or  
14 arranges through a representative for the submission of an application to  
15 request a voluntary disclosure agreement for a tax administered by the  
16 department. If the application is submitted through a representative, anonymity  
17 of the applicant can be maintained until the voluntary disclosure agreement is  
18 executed by the taxpayer and the secretary.

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

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

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



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

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

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

12           (a) Has been contacted by the department concerning a liability  
13           regarding a tax for which a voluntary disclosure agreement is requested,  
14           including but not limited to a potential liability or contact for the purpose of  
15           performing an audit of the taxpayer's records.

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

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

25           (9) "Undisclosed liability" means an unemployment tax or withholding  
26           tax liability that became due during the look-back period and which has not  
27           been determined, assessed, or otherwise identified by or known to the  
28           department at the time of disclosure and which would likely not be discovered  
29           through normal administrative activities. The undisclosed liability shall exceed  
30           five hundred dollars during the look-back period to qualify for consideration

1 of a voluntary disclosure agreement. For purposes of unemployment tax, an  
2 undisclosed liability shall be determined based on the applicant's existing  
3 experience rating, or if there is no existing experience rating, then pursuant to  
4 R.S. 23:1535. The secretary of the department may conduct an audit of the  
5 applicant's records to confirm the amount of the undisclosed liability.

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

9 §1774. Voluntary Disclosure Agreements; withholding tax

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

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

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

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

27 B. All tax due for the look-back period, which shall exclude any tax that  
28 was reported on an individual income tax return filed by any worker in the class  
29 or classes of workers identified in the application as verified by the Department  
30 of Revenue, shall be paid within sixty calendar days of the secretary's signing

1 date of the voluntary disclosure agreement or within any extension of time  
2 authorized by the secretary beyond sixty calendar days of the signing date. All  
3 schedules or returns required by the secretary to show the amount of tax due  
4 shall be included with this payment.

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

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

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

18 §1775. Voluntary Disclosure Agreements; unemployment taxes

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

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

29 (3) After the signed agreement is received from the applicant, the  
30 secretary or his authorized representative shall sign the agreement and return

1 a copy of the agreement which has been signed by both parties to the applicant.

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

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

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

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

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

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

26 §1776. Safe harbor

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

30 A. Reporting consistency. The putative employer timely filed all required

1 federal tax and information returns for independent contractors who were paid  
2 six hundred dollars or more, such as Form 1099-MISC/1099-NEC. Relief is not  
3 available for any worker for whom the employer did not file the required  
4 information return.

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

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

10 (1) Reliance on a court case or Internal Revenue Service ruling.

11 (2) The putative employer was previously audited and the Internal  
12 Revenue Service considered employment taxes but did not reclassify the  
13 workers.

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

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

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

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

21 §1777. Reporting to the Department of Revenue by service recipients

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

29 B. The Department of Revenue may utilize data analytic discovery  
30 procedures to identify potential cases of misclassification with the return data

1           required to be filed pursuant to this Section.

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

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

DIGEST

SB Engrossed

2021 Regular Session

Luneau

Present law provides a schedule of penalties imposed by the Louisiana Workforce Commission (LWC) for the misclassification of employees as independent contractors.

- (1) A written warning for the first violation.
- (2) \$250 for the first violation after the written warning is issued.
- (3) \$500 for the second violation after the written warning.
- (4) Up to \$1,000 for each subsequent violation and up to 90 days imprisonment.

Proposed law changes the penalty structure, eliminates the written warning, and removes the possibility of imprisonment.

- (1) \$500 for the first violation, which is waived if the employer properly classifies the employee and pays any tax due within 60 days of the citation.
- (2) Up to \$1,000 for the second violation.
- (3) \$2,500 for each subsequent violation.

Proposed law directs the penalties associated with worker misclassification to be deposited into the UI Trust Fund.

Proposed law provides for the determination of which workers are properly classified as independent contractors by establishing a rebuttable presumption that workers who meet seven of the 12 criteria in proposed law are independent contractors.

- (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.

Proposed law authorizes contracting parties to rely on this 12-step test for purposes of establishing an employment or independent contractor relationship.

Proposed law creates the optional Fresh Start Proper Worker Classification Initiative to provide taxpayers with an opportunity to voluntarily reclassify their workers as employees for future tax periods.

Proposed law provides that to be eligible a taxpayer must have consistently treated the workers as nonemployees for the previous three years and must have filed all required forms with the IRS with respect to those workers consistent with nonemployee treatment.

Proposed law allows eligible taxpayers who participate in the Initiative to prospectively treat classes of workers as employees for future tax periods and not be liable for any withholding tax, unemployment tax, interest or penalties with respect to any workers before the date on which the taxpayer is accepted for participation in the program.

Proposed law requires taxpayers who want to participate in the Fresh Start Proper Worker Classification Initiative to apply with the Dept. of Revenue (DOR).

Proposed law provides that the DOR will review the application for eligibility and contact the taxpayer once a determination has been made.

Proposed law provides that taxpayers accepted for the program will enter into a joint agreement with LWC and DOR in which the taxpayer agrees to classify the workers as employees from the acceptance date.

Proposed law does not allow taxpayers who are contesting the classification of workers in

court or taxpayers under audit for worker classification by the IRS, U.S. Dept. of Labor, or a state agency to participate in the program.

Proposed law provides that a taxpayer is considered to be under audit for purposes of the Fresh Start Proper Worker Classification Initiative if a member of their affiliated group is under audit.

Proposed law does not allow taxpayers who have withheld state income taxes from their workers but who have not remitted the tax to DOR to participate in the program.

Proposed law creates the Louisiana Voluntary Disclosure Program (VDA Program) for the voluntary and anonymous reporting of undisclosed liabilities for withholding taxes administered by the DOR and unemployment taxes administered by LWC.

Proposed law requires employers to provide proof that the employees are covered by workers' compensation to participate in the VDA Program.

Proposed law provides for definitions applicable to the VDA Program, including a definition of "look-back period" that must include the current calendar year up to the date of registration with the department and the one immediately preceding calendar year.

Proposed law requires the waiver of any delinquent penalty after all tax and interest due for the look-back period have been paid by the VDA Program applicant whose application has been accepted, unless the tax disclosed was collected but not remitted.

Proposed law does not allow applicants who have been contacted by the DOR or LWC concerning a liability regarding a tax for which a voluntary disclosure agreement is requested.

Proposed law provides a safe harbor from unemployment and withholding taxes for putative employers who have consistently and timely filed all required federal tax and information returns for their workers as independent contractors, always treated the particular classification of worker as an independent contractor, and had a reasonable basis for not treating the class of workers as an employee.

Proposed law provides that the safe harbor does not apply if the putative employer treated any similar worker as an employee.

Proposed law requires a service recipient who files or is required to file a Form 1099-NEC for independent contractors they use to file a copy of the federal return with the DOR on or before Feb. 28 each year and further provides that the DOR may use data analytics to determine if any of the service providers included in the reports were misclassified.

Effective January 1, 2022.

(Amends R.S. 23:1711(G)(1); adds R.S. 23:1472(15.1) and 1771-1777)