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

SB Engrossed DIGEST Luneau
2021 Regular Session

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)