

2021 Regular Session

HOUSE BILL NO. 705 (Substitute for House Bill No. 151 by Representative Riser)

BY REPRESENTATIVE RISER

UNEMPLOYMENT COMP: Provides relative to the misclassification of employees and a criteria for the classification of employees

1 AN ACT

2 To amend and reenact R.S. 23:1711(G)(1) and to enact R.S. 23:1711.1, relative to
3 unemployment compensation; to provide for the classification of employees; to
4 increase the administrative penalties for the misclassification of employees; to
5 provide relative to the failure to pay contributions; to provide criteria for classifying
6 employees as independent contractors; to provide for applicability; and to provide
7 for related matters.

8 Be it enacted by the Legislature of Louisiana:

9 Section 1. R.S. 23:1711(G)(1) is hereby amended and reenacted and R.S. 23:1711.1
10 is hereby enacted to read as follows:

11 §1711. False statements or representations; failure to file reports or maintain
12 records; duties of officers and agents; presumptive proof; penalties

13 * * *

14 G. Misclassification of employees as independent contractors.

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

1 ~~Such warning shall constitute a determination that any workers identified therein are~~
2 ~~employees, and all resulting contributions, interest and penalties shall be due, and~~
3 ~~shall be appealable as provided in this Section. However, no administrative penalties~~
4 ~~shall be due.~~

5 ~~(b)~~ Administrative penalties. If the administrator determines, after
6 investigation, that an employer, or any officer, agent, superintendent, foreman, or
7 employee of the employer, ~~after June 30, 2013, and subsequent to the issuance of a~~
8 ~~written warning,~~ failed to properly classify an individual as an employee and failed
9 to pay contributions in accordance with this Chapter, then, in addition to any
10 contributions, interest, and penalties otherwise due, the administrator may assess an
11 administrative penalty of ~~not more than two hundred fifty~~ five hundred dollars per
12 each such individual. If the employer becomes compliant within sixty days of the
13 citation, the penalty shall be waived.

14 (b) After the first offense, the administrator shall assess an administrative
15 penalty of one thousand dollars per individual misclassified.

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

23 ~~(c) If, after an employer has been issued a written warning and is~~
24 ~~subsequently found, on two or more separate occasions, to have failed to properly~~
25 ~~classify an individual as an employee, the employer may also be subject to an~~
26 ~~additional fine of not less than one hundred dollars nor more than one thousand~~
27 ~~dollars, or imprisoned for not less than thirty days nor more than ninety days, or~~
28 ~~both. For the purpose of this Subsection, each employee so misclassified shall~~
29 ~~constitute a separate offense.~~

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

11 (e) All administrative penalties assessed pursuant to this Section shall be
 12 deposited into the state's unemployment trust fund.

13 * * *

14 §1711.1. Classification of employee as independent contractor

15 A.(1) For the purpose of this Section, an independent contractor means any
 16 person or organization including a sole proprietor, partnership, limited liability
 17 company, corporation, or other entity that undertakes orally or in writing, to perform
 18 services for or in connection with another party in a manner consistent with the
 19 requirements of this Chapter.

20 (2) There shall be a rebuttable presumption of an independent contractor
 21 relationship with the contracting party for whom the independent contractor performs
 22 work, if an individual or entity meets at least seven of the following criteria:

23 (a) The individual or entity operates an independent business that provides
 24 services for or in connection with the contracting party.

25 (b) The individual or entity represents the provided services as self-
 26 employment available to others, including through the use of a platform application
 27 to obtain work opportunities or as a lead generation service.

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

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

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

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

12 (g) The contracting party does not direct or oversee the performance,
13 methods, or processes the individual or entity uses to perform services.

14 (h) The contracting party has the right to impose quality standards or a
15 deadline for completion of services performed, or both, but the individual or entity
16 determines the days worked and the time periods of work.

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

19 (j) The individual or entity is paid a fixed or contract rate for the work
20 performed and the contracting party does not pay the individual or entity a salary or
21 wages based on an hourly rate.

22 (k) The individual or entity is responsible for the majority of expenses
23 incurred in performing the services, unless the expenses are reimbursed under an
24 express provision of a written contract between the parties or the expenses
25 reimbursed are commonly reimbursed under industry practice.

26 (l) The individual or entity can use assistants as deemed proper for the
27 performance of the work and is directly responsible for supervision and
28 compensation.

1 (3) Obtainment of an independent contractor certification from the state is
2 optional and is not required to establish independent contractor status.

3 (4) Any contracting party or independent contractor may rely on the
4 provisions of this Section for the purpose of establishing an employment or
5 independent contractor relationship.

6 B. The provisions of this Section shall not apply to any motor carrier who
7 pursuant to a contract with an owner operator as defined in R.S. 23:1021(10)
8 undertakes the performance of services as a motor carrier.

9 Section 2. The legislature finds and declares the following:

10 (A) It is in the best interests of workers, businesses, and government entities to have
11 a clear and certain criteria in identifying an independent contractor relationship as compared
12 to an employment relationship.

13 (B) This criteria will reduce unnecessary and costly litigation, as well as confusion
14 in the workforce industry, amongst agencies, and within the court systems.

15 (C) To this end, this Act is to ensure that employees will be properly classified as
16 such and afforded the legal protections and obligations that apply to that status while
17 workers who desire to be independent contractors know the criteria for that designation.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 705 Engrossed

2021 Regular Session

Riser

Abstract: Provides for the misclassification of employees and a criteria for classifying employees.

Present law provides that if, after an investigation, the administrator determines that an employer, or any officer, agent, superintendent, foreman, or employee of the employer, failed to properly classify an individual as an employee and failed to pay contributions and that failure was not knowingly or willfully, the employer will be issued a written warning. Present law further provides that the written warning shall constitute as evidence that the employer has been cited for a first offense for misclassification.

Proposed law repeals present law.

Present law provides that the administrator may assess an administrative penalty of not more than \$250 per each employer who has misclassified an employee and failed to pay contributions.

Proposed law changes the administrative penalty amount from \$250 to \$500.

Proposed law provides that after the first offense, the administrator shall assess an administrative penalty of \$1,000 per each individual who is misclassified.

Present law provides that an employer who fails to properly classify an individual as an employee and pay contributions, shall be subject to an administrative penalty of not more than \$500.

Proposed law changes the administrative penalty amount from \$500 to \$2,500.

Present law provides that after an employer has been issued a written warning and is subsequently found on two or more separate occasions to have still misclassified an employee, the employer may also be subject to an additional fine of not less than \$100 and nor more than \$1,000, or be imprisoned for not less than 30 days nor more than 90 days, or both.

Proposed law repeals present law.

Proposed law provides that all administrative penalties assessed pursuant to proposed law shall be deposited into the state's unemployment trust fund.

Proposed law provides that for the purposes of proposed law, an independent contractor means any person or organization, including a sole proprietor, partnership, limited liability company, corporation, or other entity that undertakes orally or in writing, to perform services for or in connection with another party in a manner consistent with the requirements of proposed law.

Proposed law provides that if an individual or entity meets at least seven of twelve criteria listed in proposed law, there shall be a rebuttable presumption of an independent contractor relationship with the contracting party for whom the independent contractor performs work.

Proposed law provides that obtainment of an independent contractor certification from the state is optional and is not required to establish independent contractor status. Proposed law further provides that any contracting party or independent contractor may rely on the provisions of proposed law to establish an employment or independent contractor relationship.

Proposed law provides that proposed law shall not apply to any motor carrier who pursuant to a contract with an owner operator as defined in present law undertakes the performance of services as a motor carrier.

(Amends R.S. 23:1711(G)(1); Adds R.S. 23:1711.1)