

Regular Session, 2012

SENATE BILL NO. 472

BY SENATOR MURRAY

UNEMPLOYMENT COMP. Prohibits certain employees of staffing services from being classified as independent contractors. (2/3-CA 7s2.1(A)) (8/1/12)

1 AN ACT

2 To amend and reenact R.S. 23:1472(12)(E) and 1761(9) and to enact R.S.  
3 23:1472(12)(H)(XXII) and 1711(G), relative to unemployment compensation; to  
4 provide for employers' classification of workers; to provide for independent  
5 contractors; to provide for penalties; and to provide for related matters.

6 Be it enacted by the Legislature of Louisiana:

7 Section 1. R.S. 23:1472(12)(E) and 1761(9) are hereby amended and reenacted and  
8 R.S. 23:1472(12)(H)(XXII) and 1711(G) are hereby enacted to read as follows:

9 §1472. Definitions

10 \* \* \*

11 (12) \* \* \*

12 E. (a) Services performed by an individual for wages or under any contract  
13 of hire, written or oral, express or implied, shall be deemed to be employment  
14 subject to this Chapter unless and until it is shown to the satisfaction of the  
15 administrator that: ;

16 I. such individual has been and will continue to be free from any control or  
17 direction over the performance of such services both under his contract and in fact;

1 and

2 II. such service is either outside the usual course of the business for which  
3 such service is performed, or that such service is performed outside of all the places  
4 of business of the enterprise for which such service is performed; and

5 III. such individual is customarily engaged in an independently established  
6 trade, occupation, profession or business;

7 **(b) Services performed by an individual for a staffing service shall be**  
8 **deemed to be employment subject to this Chapter. "Staffing service" means**  
9 **any person or entity, other than a professional employer organization as defined**  
10 **by R.S. 23:1761(7), that supplies workers to a client to support or supplement**  
11 **the client's workforce, including, but not by way of limitation, temporary**  
12 **staffing services and leasing companies that supply workers to clients in work**  
13 **situations such as employee absences, temporary worker shortages, seasonal**  
14 **workloads, special assignments and projects, and other similar work situations.**

15 \* \* \*

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

17 \* \* \*

18 **XXII. The services performed by an individual who meets the definition**  
19 **of an owner-operator as is defined in R.S. 23:1021(10).**

20 \* \* \*

21 §1711. False statements or representations; failure to file reports or maintain  
22 records; duties of officers and agents; presumptive proof; penalties

23 \* \* \*

24 **G. Misclassification of employees as independent contractors**

25 **(1)(a) Written warning. If the administrator determines, after**  
26 **investigation, that an employer, or any officer, agent, superintendent, foreman,**  
27 **or employee of the employer, failed to properly classify an individual as an**  
28 **employee in accordance with this Chapter, and failed to pay contributions**  
29 **required by this Chapter, but the failure was not knowing or willful, the**

1 employer shall be issued a written warning as evidence that the employer has  
2 been cited for a first offense of misclassification. Such warning shall constitute  
3 a determination that any workers identified therein are employees, and all  
4 resulting contributions, interest and penalties shall be due, and shall be  
5 appealable as provided in this Section. However, no administrative penalties  
6 shall be due.

7 (b) Administrative penalties. If the administrator determines, after  
8 investigation, that an employer, or any officer, agent, superintendent, foreman,  
9 or employee of the employer, after June 30, 2013, and subsequent to the  
10 issuance of a written warning, failed to properly classify an individual as an  
11 employee and failed to pay contributions in accordance with this Chapter, then,  
12 in addition to any contributions, interest, and penalties otherwise due, an  
13 administrative penalty of not more than two hundred fifty dollars per each such  
14 individual. Thereafter, any such failure by an employer to properly classify an  
15 individual as an employee and pay contributions due shall be subject to a  
16 penalty of not more than five hundred dollars per each such individual. In  
17 determining the amount of the penalty imposed, the administrator shall  
18 consider factors including previous violations by the employer, the seriousness  
19 of the violation, the good faith of the employer, and the size of the employer's  
20 business.

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

28 (d) No such determination shall be final or effective, and no resulting  
29 administrative penalty shall be assessed, unless the administrator first provides

1 the employer with written notification by certified mail of the determination,  
2 including the amount of the proposed contributions, interest, and penalties  
3 determined to be due and of the opportunity to request a fair hearing, of which  
4 a record shall be made within ten days of the mailing of said notice. The  
5 hearing request may be made by mail, as evidenced by the official postmarked  
6 date, or by otherwise timely delivering such appeal. If the employer does not  
7 request a hearing within the ten-day period the determination shall become  
8 final and effective, and the contributions, interest, and penalties due shall be  
9 assessed.

10 (2) If a timely hearing request is made, the findings and conclusions of  
11 the hearing officer shall be appealable by judicial review as a final assessment  
12 in accordance with the provisions of R.S. 23:1728.

13 (3)(a) Upon a final determination that an employer or any officer, agent,  
14 superintendent, foreman, or employee of the employer knowingly or willfully  
15 failed to properly classify an individual as an employee in accordance with this  
16 Chapter and failed to pay required contributions, then, in addition to the  
17 penalties provided herein, the employer shall be prohibited from contracting,  
18 directly or indirectly, with any state agency or political subdivision of the state  
19 for a period of three years from the date upon which the determination becomes  
20 final.

21 (b) The division of administration shall maintain and place the employer  
22 on a list of such employers and make that list available to state agencies and  
23 political subdivisions of the state.

24 (4) Notice requirements. Every employer shall post in a prominent and  
25 accessible location at each of its business premises a poster provided by the  
26 administrator that describes the responsibilities of independent contractors to  
27 pay taxes as required by state and federal laws, the rights of employees to  
28 workers' compensation and unemployment benefits, protections against  
29 retaliation, and the penalties if the employer fails to properly classify an

1 individual as an employee. The notice shall also contain contact information for  
 2 individuals to file complaints or obtain information regarding employment  
 3 classification.

4 \* \* \*

5 §1761. Definitions

6 As used in this Chapter, the following terms shall have the meanings  
 7 hereinafter ascribed to them:

8 \* \* \*

9 (9) "Staffing service" means any person **or entity**, other than a professional  
 10 employer organization, that ~~hires its own employees and assigns them~~ supplies  
 11 workers to a client to support or supplement the client's workforce. It includes  
 12 temporary staffing services and leasing companies that supply employees to clients  
 13 in special work situations such as employee absences, temporary ~~skill~~ worker  
 14 shortages, seasonal workloads, and special assignments and projects, **and other**  
 15 similar work situations.

16 \* \* \*

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The original instrument was prepared by Carla S. Roberts. The following digest, which does not constitute a part of the legislative instrument, was prepared by Nancy Vicknair.

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#### DIGEST

Murray (SB 472)

Present law provides that services performed by an individual for wages or under any contract of hire, written or oral, express or implied, will be deemed to be employment, for the purposes of unemployment insurance, unless and until it is shown to the satisfaction of the administrator that all of the following are met:

1. Such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact.
2. Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed.
3. Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Proposed law retains present law but provides that services performed by an individual for a staffing service will be deemed to be employment for the purposes of unemployment insurance.

Proposed law defines "staffing service" as any person or entity that supplies workers to a client to support or supplement the client's workforce, including temporary staffing services and leasing companies that supply workers to clients in work situations such as employee absences, temporary worker shortages, seasonal workloads, special assignments and projects, and other similar work situations.

Proposed law provides that, if the administrator determines, after investigation, that an employer failed to properly classify an individual as an employee and failed to pay unemployment contributions but the failure was not knowing or willful, the employer will be issued a written warning as evidence that the employer has been cited for a first offense of misclassification. No administrative penalty shall be assessed.

Proposed law further provides that, if the administrator determines, after investigation, that an employer, or any officer, agent, superintendent, foreman, or employee of the employer, after 6/30/13 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 the law then an administrative penalty of up to \$250 per individual shall be assessed. Thereafter, any misclassification shall be subject to a penalty of up to \$500 per individual.

Proposed law provides that, in determining the amount of the penalty imposed, the administrator will 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.

Proposed law provides that, if, after an employer has been issued a written warning and 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 \$100 nor more than \$1,000, or imprisoned for not less than 30 days nor more than 90 days, or both.

Proposed law provides that, for the purpose of misclassification, each employee so misclassified will constitute a separate offense.

Proposed law provides that no determination will be final or effective, and no resulting administrative penalty will 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, of which a record will be made within 10 days of the mailing of the notice. If the employer does not request a hearing within the 10-day period, the determination will become final and effective, and the contributions, interest, and penalties due will be assessed.

Proposed law provides that if a timely hearing request is made, the findings and conclusions of the hearing officer will be appealable by judicial review as a final assessment.

Proposed law provides that upon a final determination that an employer knowingly or willfully failed to properly classify an individual as an employee and failed to pay unemployment, then the employer will be prohibited from contracting with any state agency or political subdivision of the state for a period of three years from the date upon which the determination becomes final.

Proposed law provides that the division of administration will maintain and place the employer on a list of such employers and make that list available to state agencies and political subdivisions of the state.

Proposed law provides that every employer will post in a prominent and accessible location at each of its business premises a poster provided by the administrator that describes the responsibilities of independent contractors to pay taxes as required by state and federal laws,

the rights of employees to workers' compensation and unemployment benefits, protections against retaliation, and the penalties if the employer fails to properly classify an individual as an employee.

Proposed law provides that the notice will also contain contact information for individuals to file complaints or obtain information regarding employment classification.

Proposed law exempts from the statutory requirements of unemployment misclassification owner operators. Proposed law defines owner operators as a person who provides trucking transportation services under written contract to a common carrier, contract carrier, or exempt haulers which transportation services include the lease of equipment or a driver to the common carrier, contract carrier, or exempt hauler.

Effective August 1, 2012

(Amends R.S. 23:1472(12)(E) and 1761(9); adds R.S. 23:1472(12)(H)(XXII) and 1711(G))

#### Summary of Amendments Adopted by Senate

##### Committee Amendments Proposed by Senate Committee on Labor and Industrial Relations to the original bill

1. Adds a requirement for the department to issue a warning letter to an employer who did not knowingly misclassify an employee.
2. Lowers penalty amounts and adds possible prison time.
3. Exempts owner-operators of trucking companies.

##### Senate Floor Amendments to engrossed bill

1. Legislative Bureau technical changes.