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Technical Advisory

TA 311

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Subject: “Employee” vs. “Independent Contractor” – The Clear, the Unclear, and a Helpful Tool

Background: Determining whether a worker is an employee or independent contractor is usually clear and obvious. Other times, however, it can be rather unclear, depending on numerous circumstances. And occasionally, a few employers will purposely misclassify workers as independent contractors, simply to game the system for their own advantage. Employers frequently ask their agents about this issue, but since the question of employment status is more of a legal question than an insurance question, E&O experts advise agents to avoid giving legal advice. However, the Louisiana Workforce Commission recently developed a very helpful online tool for employers to use in resolving the employee vs. independent contractor conundrum. Details on the LWC tool are discussed below. But first, it would be important to review current Louisiana statutes which address employee vs. independent contractor.

Main Points: Louisiana statutes provide considerable guidance on the issue, with these three statutes resolving the majority of questions on employment status:

23:1035 Employees covered.

A. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his own trade, business, or occupation, or in the course of his employer's trade, business, or occupation, except that the bona fide president, vice president, secretary, or treasurer of a corporation who owns not less than ten percent of the stock therein, or a partner with respect to a partnership employing him, or a member of a limited liability company as defined in R.S. 12:1301(A)(13) who owns not less than a ten percent membership interest therein, or a sole proprietor with respect to such sole proprietorship may by written agreement with his insurer or group self-insurance fund elect not to be covered by the provisions of this Chapter. Such election shall not be limited, but shall apply to all trades, businesses, or occupations conducted by said corporation, partnership, limited liability company, or sole proprietorship. Such an election shall be binding upon the employing corporation, partnership, limited liability company, and sole proprietor and the surviving spouse, relatives, personal representative, heirs, or dependents of the officer, partner, member, or sole proprietor so electing. No salary or compensation received by any

such bona fide corporate officer, partner, member, or sole proprietor so electing shall be used in computing the premium rate for workers' compensation insurance.

23: 1044. Presumption of employee status

A person rendering service for another in any trades, businesses or occupations covered by this Chapter is presumed to be an employee under this Chapter.

Every executive officer elected or appointed and empowered in accordance with the charter and by-laws of a corporation, other than a charitable, religious, educational or other non-profit corporation or an official of the state or other political subdivision thereof or of any incorporated public board or commission, shall be an employee of such corporation under this Chapter.

23:1021. Terms defined

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

(7) "Independent contractor" means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and are expressly excluded from the provisions of this Chapter unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of this Chapter. The operation of a truck tractor or truck tractor trailer, including fueling, driving, connecting and disconnecting electrical lines and air hoses, hooking and unhooking trailers, and vehicle inspections are not manual labor within the meaning of this Chapter.

Comment: A reasonable reading of these three statutes would conclude that any person hired by an employer should be considered to be an employee, unless there is sufficient evidence to support independent contractor status (or the worker is otherwise exempt by statute, such as domestic employees, realtors, etc.)

Beyond the issues of determining employment status, as provided in these three statutes, other statutes impose penalties for noncompliance in providing required worker's compensation coverage, or misrepresenting the proper classification of workers.

23: 1172. Criminal penalties

A. Any employer who willfully fails to provide security for compensation required by R.S. 23:1168 shall be subject to a fine of up to two hundred fifty dollars per day that the employer willfully failed to provide security for compensation or imprisonment with or without hard labor for not more than one year, or both such fine and imprisonment. All fines collected shall be deposited in the Office of Workers' Compensation Administrative Fund established in R.S. 23:1291.1(E).

B. Evidence of two prior penalties assessed by the Louisiana Workforce Commission pursuant to R.S. 23:1170 and 1171 in any given three-year period shall constitute a prima facie case of a willful violation.

23: 1172.1. Willful misrepresentation by employer; aid or abet; criminal penalties; civil immunity

A. It shall be unlawful for any employer in writing to willfully misrepresent to any person that he has provided or provides security for compensation as required by R.S. 23:1168.

B. It shall be unlawful for any person, whether present or absent, directly or indirectly, to aid and abet an employer, or directly or indirectly counsel an employer to willfully misrepresent that the employer has provided or provides security for compensation as required by R.S. 23:1168.

C. Whoever violates any provision of this Section shall be imprisoned, with or without hard labor, for not less than one year nor more than ten years, or fined up to two hundred fifty dollars per day that the employer willfully failed to provide security for compensation, or both. All fines collected shall be deposited in the Office of Workers' Compensation Administrative Fund established in R.S. 23:1291.1(E).

23: 1172.2. Unlawful practices

A. It shall be unlawful for any person to knowingly make any false, fraudulent, or misleading oral or written statement, or to knowingly omit or conceal material information for the purpose of obtaining workers' compensation coverage, or for the purpose of avoiding, delaying, or diminishing the amount of payment of any workers' compensation premiums.

B. It shall be unlawful for any person to knowingly misrepresent or conceal payroll, classification of workers, or information regarding any employer's loss history which would be material to the computation and application of an experience rating modification factor for the purpose of avoiding or diminishing the amount of payment of any workers' compensation premiums.

C. It shall be unlawful for any person, whether present or absent, directly or indirectly, to aid and abet any other person, or directly or indirectly counsel any other person, to engage in conduct in violation of this Section.

D. Whoever violates any provision of this Section shall be imprisoned, with or without hard labor, for not less than one year nor more than ten years, or fined up to two hundred fifty dollars per day that such person's violation of any provision of this Section resulted in failure to properly provide security for compensation, or both. All fines collected shall be deposited in the Office of Workers' Compensation Administrative Fund established in R.S. 23:1291.1(E).

The Louisiana Workforce Commission (LWC) recently announced a helpful tool which is designed to assist both employer and worker in distinguishing between an employee and independent contractor. Here is a description from a recent LWC press release:

The Louisiana Workforce Commission has added to the agency web site an online tool that helps employers and workers recognize and avoid employee misclassification.

The tool is a 21-question assessment that takes about 5 minutes and gives employers and workers instant feedback on whether a worker should be classified as an employee or an independent contractor. The distinction is crucial because workers classified as employees may be eligible for benefits if they're laid off or hurt on the job.

Misclassification is the illegal practice of classifying employees as independent contractors to avoid paying unemployment insurance taxes and workers' compensation premiums. Misclassification can be disastrous for workers who don't realize they're ineligible for unemployment or workers' compensation benefits.

"This new tool allows employers and workers to quickly and easily check for the correct classification status," LWC Executive Director Curt Eysink said. "It should discourage employers from misclassifying their employees because workers can now easily check."

Comment: The questionnaire can be filled out at the LWC website, and does not require any identifying information from the participant, who can be either an employer, or a worker. Here is the link: [click here](#).

Interestingly, the LWC questionnaire categorizes the questions into the same categories which are used by the IRS: Behavior, Financial, and Type of Relationship. For example, here is a link to a page on the IRS website, which provides information on employee vs independent contractor status: [click here](#). Note, however, that classifications for worker's compensation coverage and IRS tax issues are independent of each other. This is particularly important, given that a common misunderstanding among some employers is that providing a worker with a Form 1099, vs. W-2, "proves" that the worker is an independent contractor.

Comment: The introduction to the questionnaire on the LWC website makes reference to a "new law" regarding worker classification, which took effect July 1, 2013. However, that law (Act 786 [SB 472]) only applies to Unemployment Compensation, and not Worker's Compensation. The new law provides additional penalties for misclassifying workers eligible for Unemployment Compensation. The statutes cited above in this Technical Advisory apply to Worker's Compensation, which has its own penalties for noncompliance or misclassification. In Louisiana Statutes, Title 23 – Labor and Worker's Compensation, has 15 Chapters, with Chapter 10 dealing with Worker's Compensation, while Chapter 11 deals with Unemployment Compensation. The new law referenced at the beginning of the LWC questionnaire applies only to Chapter 11 Unemployment Compensation. However, LWC advises that the questionnaire is useful for determining employment status as it relates to both Worker's Compensation as well as Unemployment Compensation.

Necessary Action: Circulate this Technical Advisory to all appropriate agency personnel. Also, the agency should also recommend the LWC questionnaire to any insureds who are seeking guidance on determining who is an employee or independent contractor.

Please note that this Technical Advisory is intended to be educational and is not legal advice upon which you should rely. Please seek any legal opinion you may need from a qualified attorney.