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TASK FORCE ON EMPLOYEE MISCLASSIFICATION 2022 ANNUAL REPORT

NRS 607.219 Task Force on Employee Misclassification: Duties; annual report. The Task Force on Employee Misclassification created by [NRS 607.218](#) shall:

1. Evaluate the policies and practices of the Labor Commissioner, Division of Industrial Relations of the Department of Business and Industry, Employment Security Division of the Department of Employment, Training and Rehabilitation, Department of Taxation and Attorney General relating to employee misclassification.
2. Evaluate any existing fines, penalties or other disciplinary action relating to employee misclassification that are authorized to be imposed by a state agency.
3. Develop recommendations for policies, practices or proposed legislation to reduce the occurrence of employee misclassification.
4. On or before July 1, 2020, and on or before July 1 of each subsequent year, submit a written report to the Director of the Legislative Counsel Bureau for submission to the Legislative Commission. The report must include, without limitation, a summary of the work of the Task Force and recommendations for legislation concerning employee misclassification.

I. CREATION AND APPOINTMENT OF TASK FORCE

The Task Force on Employee Misclassification (Task Force) was created through the passage of Senate Bill (SB) 493 during the 80th Regular Session of the Nevada Legislature (2019). The statutory provisions governing the Task Force are set forth in Nevada Revised Statutes (NRS) sections 607.218 through 607.2195. (Attached as Appendix A) There are currently 8 members on the Task Force and the Labor Commissioner supports the Task Force. (Attached as Appendix B)

II. MEETINGS AND SUBCOMMITTEES OF TASK FORCE

The Task Force is only required to meet twice each fiscal year. At the first meeting the Task Force shall elect a Chair and Vice Chair. The Task Force has authority to create Subcommittees pursuant to NRS section 607.2195. The Task Force elected a Chair and Vice Chair, met three times during this fiscal year, and created the following Subcommittees:

AGENCY REVIEW AND POLICY SUBCOMMITTEE LEGISLATIVE AND INDUSTRY SUBCOMMITTEE

2021-2022 Meeting Dates:

Regular Meetings: October 18, 2021; February 22, 2022; and May 9, 2022

Subcommittee Meeting(s): February 22, 2022

III. TASK FORCE ACTIVITIES AND PRESENTATIONS

The Task Force continued to review the current laws and regulations governing misclassification and independent contractors and heard presentation(s) from the Nevada Labor Commissioner www.labor.nv.gov and the Employment Security Division of the Nevada Department of Employment, Training, and Rehabilitation www.detr.nv.gov.

STATE UPDATES

Myers v. Reno Cab Company, Inc. 137 Nev., Advanced Opinion 36 (2021)

The Supreme Court of Nevada issued a ruling on the “Economic Realities Test.” (Attached as Appendix C)

Economic Realities Test

If, as a matter of economic reality, a worker is dependent on the business to which she or he renders service, and is not in business for herself or himself, thus, not subject to the Minimum Wage Act’s (MWA) express exceptions, the worker is constitutionally entitled to be paid a minimum hourly wage for that service; this is true no matter the worker’s status under the MWA or any other statute.

The Office of the Labor Commissioner posted updated guidance on misclassification and independent contractors.

<https://labor.nv.gov/uploadedFiles/labornvgov/content/Employer/Tips%20to%20Avoid%20Misclassification.pdf>

<https://labor.nv.gov/uploadedFiles/labornvgov/content/Employer/Independent%20Contractor%20-%20Information%20Sheet.pdf>

FEDERAL UPDATES

President Trump Administration Regulation on Independent Contractors

Economic Reality Test – Two Core Factors

An individual is an employee if as a matter of economic reality, the individual is economically depending on that employer for work.

1. *The nature and degree of control over the work.*
2. *The workers opportunity for profit or loss.*








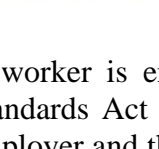

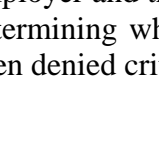




On January 6, 2021, the Department of Labor (Department) announced a rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act (FLSA). The rule was published in the Federal Register on January 7, 2021. It was initially scheduled to take effect on March 8, 2021. See [86 FR 1168](https://www.federalregister.gov/documents/2021/01/07/2021-01-07-independent-contractor-rule) (Independent Contractor Rule).

On February 5, 2021, the Department published a proposal to delay the Independent Contractor Rule’s effective date until May 7, 2021, 60 days after the original effective date. See [86 FR 8326](#). On March 4, 2021, after considering approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the Independent Contractor Rule to May 7, 2021, as proposed. See [86 FR 12535](#).

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the Independent Contractor Rule. See [86 FR 14027](#). On May 5, 2021, after reviewing approximately 1,000 comments submitted in response to the NPRM, the Department announced a final rule withdrawing the Independent Contractor Rule. This withdrawal took effect immediately upon the final rule’s publication in the Federal Register on May 6, 2021.

On March 14, 2022 a district court in the Eastern District of Texas vacated the Department’s Delay Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, [86 FR 12535](#) (Mar. 4, 2021), and the Withdrawal Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, [86 FR 24303](#) (May 6, 2021). The district court further stated that the Independent Contractor Rule, Independent Contractor Status Under the Fair Labor Standards Act, [86 FR 1168](#) (Jan. 7, 2021), became effective as of March 8, 2021, the rule’s original effective date, and remains in effect. (Source U.S. Department of Labor)

Misclassification of Employees as Independent Contractors

 EMPLOYEE	OR	INDEPENDENT CONTRACTOR
 Working for someone else’s business		Running their own business
 Paid hourly, salary, or by piece rate		Paid upon completion of project
 Uses employer’s materials, tools and equipment		Provides own materials, tools and equipment
 Typically works for one employer		Works with multiple clients
 Continuing relationship with the employer		Temporary relationship until project completed
 Employer decides when and how the work will be performed		Decides when and how they will perform the work
Employer assigns the work to be performed		Decides what work they will do

A worker is entitled to minimum wage and overtime pay protections under the Fair Labor Standards Act (FLSA) when there is an employment relationship between the worker and an employer and there is coverage under the FLSA. The Wage and Hour Division is responsible for determining whether an employee has been misclassified as an independent contractor and has been denied critical benefits and labor standards protections.

IV. UPDATES ON LEGISLATION PASSED DURING THE 81ST REGULAR SESSION OF THE NEVADA LEGISLATURE (2021)

Assembly Bill (AB) 227 – Requires contractors to utilize and employ workers who are employees under the direction and control of the contractor and defines what an “employee” is under the direction and control of the contractor.

<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7666/Text>

Status – Lawsuit initiated in 2021 seeking to enjoin AB 227 from taking effect. The matter is pending a decision by a District Court Judge.

Assembly Bill (AB) 459 - Effective July 1, 2021, AB 459 amends certain provisions of Nevada Revised Statutes (NRS) section 610 and transfers the responsibility and accountability for the Nevada State Apprenticeship Council (NSAC), State Apprenticeship Director, and registered apprenticeship programs in the State of Nevada to the Office of the Labor Commissioner (OLC).

<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8135/Text#>

Status – Implemented. 5,821 Active Apprentices – 72 Registered Apprenticeship Programs

Senate Bill (SB) 55 – Moves the licensure of “employee leasing companies” to the Nevada Labor Commissioner and changes the definition and name of “employee leasing companies” to “professional employer organizations.” Authority for administrative penalties up to \$5,000.00.

<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7237/Text>

Status – Implemented. A professional employer organization (PEO) is: (a) A company which, pursuant to a written or oral agreement intended by the parties to create an ongoing relationship, provides labor compliance services for a fee including, but not limited to, the management of human resources, employee benefits, payroll and workers' compensation; or (b) A company which, pursuant to a written or oral agreement intended by the parties to create an ongoing relationship, places any of the regular, full-time employees of a client company on its payroll and, for a fee, leases them to the client company.

There are currently 173 professional employer organizations (PEOs) now licensed by the Office of the Labor Commissioner.

The Office of the Labor Commissioner also licenses private employment agencies (PEAs) “temporary employment agencies” pursuant to NRS section 611 and NAC section 611. Individuals who work for a PEA are employees of the PEA. There are currently 125 PEAs licensed by the Office of the Labor Commissioner.

Senate Bill 340 – Establishes the Home Care Employment Standards Board and authorizes the Labor Commissioner to investigate the wages and working conditions of home health care workers. <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7977/Overview>

Status – The Home Care Employment Standards Board has met multiple times and is continuing to discuss any potential recommendations relating to the wages and working conditions of home health care workers. This could include a recommendation that home health care workers are presumed to be “employees.”

V. RECOMMENDATIONS FROM THE TASK FORCE

The employment picture in the State of Nevada and across the country continues to improve. However, the unemployment rate in the State of Nevada remains high at around 5 %. (Attached as Appendix D)

Independent contractors and licensing in various professions and trades will continue to be an essential element of the economy and provides options for individuals who may not want to seek a traditional “employee/employer relationship.”

Workforce training and career pathways through registered apprenticeship programs or other programs that provide wage progression and an “earn why you learn” environment can serve as a model for employees wanting to enter various fields and industries. These types of programs can eliminate the potential for misclassification and provide training that could result in an occupational certificate and/or license and a long-term career.

At both the state and federal level, elections will occur in 2022, and the Nevada Legislature will convene again in 2023. The following recommendations could be considered going forward.

RECOMMENDATIONS:

- Statutes and/or regulations that prohibit the sharing of investigative information relating to misclassification between agencies should be reviewed for potential changes. (NRS sections 360, 607, 612, 616A, and 624, etc.)
- Possible “employee presumptions” could be created in statute for certain industries, employee groups, etc., like what was done in construction through Senate Bill 493 (2019).
- Possible “sunset” of Task Force on Employee Misclassification and creation of working group/investigative group consisting of members of the Labor Commissioner, Nevada State Contractor’s Board, Nevada Department of Taxation, Nevada Division of Industrial Relations, Department of Employment, Training, and Rehabilitation, Office of the Attorney General, and trade and industry organizations that could meet regularly to share information on misclassification cases.
- The penalties and/or administrative fines for misclassification under the Office of the Labor Commissioner could be increased to \$5,000.00 or more per violation.
- Allow the Office of the Labor Commissioner to retain administrative penalties and investigative costs to fund additional positions. (NRS 338, 607, 608, 609, 611, 613, & 616B)
- A “standard” definition for misclassification could be included in the various NRS provisions governing the agencies listed in NRS section 607.219 similar to the definition of “misclassification” enforced by the Labor Commissioner in NRS section 607.216.
- Continue to allow and promote the use of independent contractors in various trades, professions, and industries based proper licensure (as necessary) in accordance with the applicable NRS and Nevada Administrative Code (NAC) sections, and in compliance with the provisions of NRS section 608.0155 and Nevada Administrative Code (NAC) section 608.155 under the jurisdiction of the Nevada Labor Commissioner.
- Continue to monitor any new proposed regulations/rules on independent contractors that may be issued by the United States Department of Labor.

APPENDIX “A”

NRS 607.216 “Employee misclassification” defined. As used in [NRS 607.216](#) to [607.2195](#), inclusive, unless the context otherwise requires, “employee misclassification” means the practice by an employer of improperly classifying employees as independent contractors to avoid any legal obligation under state labor, employment and tax laws, including, without limitation, the laws governing minimum wage, overtime, unemployment insurance, workers’ compensation insurance, temporary disability insurance, wage payment and payroll taxes.

(Added to NRS by [2019, 3157](#))

NRS 607.217 Communication of information relating to employee misclassification among Labor Commissioner, certain state agencies and the Attorney General. The offices of the Labor Commissioner, Division of Industrial Relations of the Department of Business and Industry, Employment Security Division of the Department of Employment, Training and Rehabilitation, Department of Taxation and Attorney General:

1. Shall communicate between their respective offices information relating to suspected employee misclassification which is received in the performance of their official duties and which is not otherwise declared by law to be confidential.

2. May communicate between their respective offices information relating to employee misclassification which is received in the performance of their official duties and which is otherwise declared by law to be confidential, if the confidentiality of the information is otherwise maintained under the terms and conditions required by law.

(Added to NRS by [2019, 3157](#))

NRS 607.218 Task Force on Employee Misclassification: Creation; appointment, qualifications and terms of members; vacancies; meetings; Chair and Vice Chair; quorum; compensation; administrative support.

1. The Task Force on Employee Misclassification is hereby created.

2. The Governor shall appoint to serve on the Task Force:

(a) One person who represents an employer located in this State that employs more than 500 full-time or part-time employees.

(b) One person who represents an employer located in this State that employs 500 or fewer full-time or part-time employees.

(c) One person who is an independent contractor in this State.

(d) Two persons who represent organized labor in this State.

(e) One person who represents a trade or business association in this State.

(f) One person who represents a governmental agency that administers laws governing employee misclassification.

3. The Governor may appoint up to two additional members to serve on the Task Force as the Governor deems appropriate.

4. After the initial terms, the members of the Task Force serve a term of 2 years and until their respective successors are appointed. A member may be reappointed in the same manner as the original appointments.

5. Any vacancy occurring in the membership of the Task Force must be filled in the same manner as the original appointment not later than 30 days after the vacancy occurs.

6. The Task Force shall meet at least twice each fiscal year and may meet at such additional times as deemed necessary by the Chair.

7. At the first meeting of each fiscal year, the Task Force shall elect from its members a Chair and a Vice Chair.

8. A majority of the members of the Task Force constitutes a quorum for the transaction of business, and a majority of those members present at any meeting is sufficient for any official action taken by the Task Force.

9. The Task Force shall comply with the provisions of [chapter 241](#) of NRS, and all meetings of the Task Force must be conducted in accordance with that chapter.

10. Members of the Task Force serve without compensation.

11. The Labor Commissioner shall provide the personnel, facilities, equipment and supplies required by the Task Force to carry out its duties.

(Added to NRS by [2019, 3157](#))

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3. Develop recommendations for policies, practices or proposed legislation to reduce the occurrence of employee misclassification.
4. On or before July 1, 2020, and on or before July 1 of each subsequent year, submit a written report to the Director of the Legislative Counsel Bureau for submission to the Legislative Commission. The report must include, without limitation, a summary of the work of the Task Force and recommendations for legislation concerning employee misclassification.

(Added to NRS by [2019, 3158](#))

NRS 607.2195 Task Force on Employee Misclassification: Authority to appoint subcommittee.

1. The Task Force on Employee Misclassification created by [NRS 607.218](#) may create a subcommittee to the Task Force for any purpose that is consistent with [NRS 607.216](#) to [607.2195](#), inclusive.
2. The Task Force shall appoint the members of the subcommittee and designate one of the members of the subcommittee as chair of the subcommittee. The chair of the subcommittee must be a member of the Task Force.
3. The subcommittee shall meet at the times and places specified by a call of the chair of the subcommittee. A majority of the members of the subcommittee constitutes a quorum, and a quorum may exercise any power or authority conferred on the subcommittee.

(Added to NRS by [2019, 3158](#))

APPENDIX “B”

**Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
TASK FORCE ON EMPLOYEE MISCLASSIFICATION**

<i>MEMBER</i>	<i>TERM DATES</i>
Employer + 500 employess NRS 607.218(2)(a)	10/01/20 – 9/30/22
Employer – 500 employees NRS 607.218(2)(b)	10/01/20 – 9/30/22
Independent Contractor NRS 607.218(2)(c)	10/01/20 – 9/30/22
Government Agency NRS 607.218(2)(f)	10/01/20 – 9/30/22
Organized Labor NRS 607.218(2)(d)	10/01/20 – 9/30/22
Organized Labor NRS 607.218(2)(d)	10/01/20 – 9/30/22
Trade or Business Association NRS 607.218(2)(e)	10/01/20 – 9/30/22
Governor Appointment NRS 607.218(3)	07/01/20 – 06/30/22

APPENDIX “C”

<https://law.justia.com/cases/nevada/supreme-court/2021/80448.html>

APPENDIX “D”

“Nevada workers left their jobs at a significantly higher rate than the rest of the country in 2021 as the Silver State posted the highest quit rate in the nation, a report found.

Nevada tied with Alaska for its average monthly quit rate of 3.8%, according to [an analysis by Chamberofcommerce.org](#). The report looked at data from the Bureau of Labor Statistics’ JOLTS or Job Openings and Labor Turnover Survey.”
(Source Reno Gazette Journal – January 31, 2022)

IN CASE YOU MISSED IT: State Policy Reports Ranks Nevada’s Economy First in The Nation - CARSON CITY, NV - April 04, 2022

In the first quarter of 2022, Nevada maintained State Policy Reports’ standing as the best economy in the country. State Policy Report ranks states based on their most recent performance in three key measures of economic vitality – personal income growth, employment growth and population growth.

Just 19 states exceed the national economic performance in this update. Nevada beat out Texas and Florida. Nevada is by far the leading state in employment change, beating out Hawaii and California. Nevada’s employment increased 9.7 percent over the past year compared to the national average of 4.7 percent.

Nevada’s personal income grew by 10.2 percent, slightly behind Florida and Texas at 10.3 percent. Nevada’s annual population growth is at 1 percent compared to the national average of 0.12 percent. Idaho led the nation at 2.9 percent. Nevada’s unemployment rate is still high at 5.1 percent compared to the national average of 3.8 percent. State Policy Reports is published by [Federal Funds Information for States](#).

<https://nevadaworkforce.com/docs/Labor-Market-Overview/Current Sub-State Release.pdf>