

Guidelines for the Classification of Workers

During the 2020 Session, the Virginia General Assembly enacted House Bill 1407 (2020 *Acts of Assembly*, Chapter 681) and Senate Bill 744 (2020 *Acts of Assembly*, Chapter 682), which sets forth the Virginia standard for classifying workers performing services for remuneration as employees or independent contractors. In addition, this legislation imposes civil penalties on employers that fail to properly classify an individual as an employee.

These guidelines are published by the Department of Taxation (“the Department”) to provide guidance to taxpayers regarding the classification of workers, as required by the second enactment clause of 2020 House Bill 1407 and 2020 Senate Bill 744. These guidelines are not rules or regulations subject to the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000 et seq.) and are being published in accordance with the requirement that the Tax Commissioner publish these guidelines pursuant to the second enactment clause of 2020 House Bill 1407 and 2020 Senate Bill 744, as well as the Tax Commissioner’s general authority to supervise the administration of the tax laws of the Commonwealth pursuant to *Va. Code* § 58.1-202. As necessary, additional information regarding these procedures will be published and posted on the Department’s website, www.tax.virginia.gov.

These guidelines represent the Department’s interpretation of the relevant laws. They do not constitute formal rulemaking and hence do not have the force and effect of law or regulation. In the event that the final determination of any court holds that any provision of these guidelines is contrary to law, taxpayers who follow these guidelines will be treated as relying on erroneous written advice for purposes of waiving penalty and interest under *Va. Code* §§ 58.1-105, 58.1-1835, and 58.1-1845.

Classification of Workers

If an individual performs services for an employer for remuneration, such individual is considered an employee of the party that pays such remuneration. To overcome this presumption, the individual worker or his or her employer is required to demonstrate that such individual is an independent contractor.

The applicable standard for making such a determination is Internal Revenue Service (“IRS”) guidance that is designed to help ascertain whether an individual is an employee or an independent contractor. To make a determination pursuant to such guidance, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered. Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties. For more information regarding this IRS guidance and how to apply it, see IRS Publication 15-A and IRS Topic No. 762 Independent Contractor vs. Employee.

Guidelines for the Classification of Workers

Civil Penalties for Misclassifying Employees

Any employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee and fails to pay taxes required to be paid with respect to an employee will be subject to monetary penalties. Such penalties are as follows:

- \$1,000 per misclassified individual for instances of misclassification that the Department finds during its first audit of an employer;
- \$2,500 per misclassified individual for instances of misclassification that the Department finds during its second audit of an employer; and
- \$5,000 per misclassified individual for instances of misclassification that the Department finds during its third audit of an employer and on any subsequent audits of such employer.

These monetary penalties apply to instances of worker misclassification that occur on or after January 1, 2021.

Debarment for Misclassifying Employees

If the Department determines during its first audit of an employer that such employer failed to properly classify an individual as an employee and fails to pay taxes required to be paid with respect to an employee, the Department is required to notify all public bodies and covered institutions of the name of the employer. If the Department finds instances of misclassification on subsequent audits, all public bodies and covered institutions are then prohibited from awarding a contract to such employer and to any firm, corporation, or partnership in which the employer has an interest in the following manner:

- For a period of 1 year from the date of the notice for offenses found during a second audit;
- For a period of 3 years from the date of the notice for offenses found during a third audit or any subsequent audits.

For purposes of applying such debarment provisions, “covered institution” means a public institution of higher education operating:

- Subject to a management agreement set forth in Article 4 (*Va. Code* § 23.1-1004 et seq.) of Chapter 10 of Title 23.1;
- Under a memorandum of understanding pursuant to *Va. Code* § 23.1-1004; or
- Under the pilot program authorized in the Appropriation Act.

These debarment provisions apply to instances of worker misclassification that occur on or after January 1, 2021. Any taxpayer subject to debarment may appeal such action as set forth in *Va. Code* § 58.1-1821 or *Va. Code* § 58.1-1825.

Guidelines for the Classification of Workers

Prohibited Actions by Employers

No employer is permitted to require or request that an individual enter into an agreement or sign documentation that results in misclassification of the individual as an independent contractor or otherwise does not accurately reflect the individual's relationship with the employer. In addition, it is unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights with respect to their classification as an employee or independent contractor.

Exchange of Information with Other State Agencies

Unless an exception applies, Virginia's law provides that the Tax Commissioner, commissioner of the revenue, treasurer, and their staff may not divulge any information acquired in the performance of their duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation. It is also unlawful for any person to disseminate any confidential tax document which he knows or has reason to know is a confidential tax document. Any person who violates these provisions is guilty of a Class 1 misdemeanor. See *Va. Code* § 58.1-3.

2020 House Bill 1407 and 2020 Senate Bill 744 include an exception to this general disclosure prohibition that allows the Department to work with certain state agencies to identify employers who fail to properly classify individuals as employees and to enforce the laws regarding the classification of workers. Such agencies include the Department of Labor and Industry, the Virginia Employment Commission, the Department of Small Business and Supplier Diversity, the Department of General Services, the Workers' Compensation Commission, and the Department of Professional and Occupational Regulation. See *Va. Code* § 58.1-3.4.

In addition, if any such agency has reason to believe that an employer has failed to properly classify individuals as employees, it is required to notify the Department. Except as otherwise provided by law, such agencies are required to share any information with the Department that may assist in enforcing the provisions of the law regarding the classification of workers.

Reporting Requirement

The Department is required to report annually to the Governor and the General Assembly information regarding compliance with and enforcement of these worker classification requirements. The Department's report is required to include information regarding the following:

- Number of investigated reports of worker misclassification;
- Findings of such reports;
- Amount of combined tax, interest, and fines collected;

Guidelines for the Classification of Workers

- Number of referrals to the Department of Labor and Industry, Virginia Employment Commission, Department of Small Business and Supplier Diversity, Virginia Workers' Compensation Commission, and Department of Professional and Occupational Regulation; and
- Number of notifications of failure to properly classify to all public bodies and institutions.

Additional Information

These guidelines are available online on the Virginia Regulatory Town Hall website, located at <https://townhall.virginia.gov>, and on the Guidance Documents section of the Department's website, located at <http://tax.virginia.gov/guidance-documents>. For additional information, please see the Department's website at <https://tax.virginia.gov/worker-misclassification> or contact the Department at misclassificationofworkers@tax.virginia.gov.

Approved:



Craig M. Burns
Tax Commissioner