To amend the Fair Labor Standards Act to require employers to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for employers who misclassify employees as non-employees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 2008

Mr. ANDREWS (for himself, Ms. WOOLSEY, Mr. MICHAUD, Mr. GEORGE MILLER of California, Ms. SHEA-PORTEER, Mr. DAVIS of Illinois, Mr. McDERMOTT, Mr. HOLT, Mr. KILDEE, Mr. HARE, Mr. PAYNE, Mr. GRIJALVA, Mr. WU, Ms. CLARKE, Mr. TIERNEY, Ms. LINDA T. SÁNCHEZ of California, Mr. SARBANES, Mrs. McCARTHY of New York, Mr. BISHOP of New York, Mr. LOEBSACK, Mr. SCOTT of Virginia, Mr. KUCINICH, Ms. HIRONO, and Mr. HINOJOSA) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

A BILL

To amend the Fair Labor Standards Act to require employers to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for employers who misclassify employees as non-employees, and for other purposes.

Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the “Employee Misclassification Prevention Act”.

SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EMPLOYEES.

(a) Record-Keeping and Notice Requirements.—Section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) is amended—

(1) by striking “Every employer” and inserting “(1) Every employer’’;

(2) by striking “the persons employed by him” and inserting “(A) the persons employed by such employer’’;

(3) by striking “maintained by him” and inserting “, (B) the individuals who are not employees of the employer (within the meaning of section 3(g)) but with whom the employer, in the course of the trade or business in which the employer is engaged, has engaged for the performance of labor or services, and of the remuneration and hours relating to the performance of labor or services by such individuals, and (C) the notices required under paragraph (3),’’;

and

(4) by inserting at the end the following:

“(2) All records under this subsection shall contain an accurate classification of the status of each individual

”
described in paragraph (1) as either an employee of the employer (within the meaning of section 3(g)) or a non-employee engaged by the employer for the performance of labor or services.

“(3)(A) Every employer subject to any provision of this Act or any order issued under this Act shall provide the notice described in subparagraph (C) to each employee of the employer and each individual classified under paragraph (2) as a non-employee engaged by the employer for the performance of labor or services.

“(B) Such notice shall be provided, at minimum, not later than 6 months after the date of enactment of the Employee Misclassification Prevention Act, and thereafter for new employees, upon employment, and for non-employees engaged for the performance of labor or services, upon commencement of the services subject to such contract. Every employer shall also provide such notice to any individual upon changing such individual’s status as an employee or non-employee under paragraph (2).

“(C) The notice required under this paragraph shall be in writing and shall—

“(i) inform the individual of the employer’s classification of the individual as an employee or a non-employee under paragraph (2);
“(ii) include a statement directing such individual to a Department of Labor website established for the purpose of providing further information about the rights of employees under the law;

“(iii) include the address and telephone number for the applicable local office of the Federal Department of Labor;

“(iv) include for those individuals classified by the employer as a non-employee under paragraph (2), the following statement: ‘Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor.’; and

“(v) include such additional information as the Secretary shall prescribe by regulation.”.

(b) Special Prohibited Act.—Section 15(a) of such Act is amended by adding at the end the following:

“(6) to fail to accurately classify an individual in accordance with section 11(e).”.

(e) Special Penalty for Certain Record-Keeping and Notice Violations.—Section 16 of the Fair
Labor Standards Act of 1938 (29 U.S.C. 216) is amend-
ed—
(1) in subsection (b)—
   (A) in the third sentence, by striking “ei-
ther of the preceding sentences” and inserting
“any of the preceding sentences”; and
   (B) by inserting after the first sentence
   the following: “Such liquidated damages are
doubled (subject to section 11 of the Portal-to-
where, in addition to violating the provisions of
section 6 or 7, the employer has violated the
provisions of section 15(a)(6) with respect to
such employee or employees.”; and
   (2) in subsection (e), after the first sentence in
the matter preceding paragraph (1), by inserting the
following: “Any person who repeatedly or willfully
violates section 15(a)(6) shall be subject to a civil
penalty of not to exceed $10,000 for each such viola-
tion.”.
(d) Employee Rights Website.—Not later than
90 days after the date of enactment of this Act, the Sec-
retary of Labor shall establish, for purposes of section
(as added by this Act), a single web page on the Depart-
ment of Labor website that summarizes in plain language the rights of employees under the Fair Labor Standards Act and other Federal laws. Such web page shall contain appropriate links to additional information on the Department of Labor website or other Federal agency websites, including wage and hour complaint forms, along with a statement explaining that employees may have additional or greater rights under State or local laws and how employees may obtain additional information about their rights under State or local laws. Such web page shall be made available in English and any other languages which the Secretary determines to be prevalent among individuals likely to access the web page. The Secretary shall coordinate with other relevant Federal agencies in order to provide similar information (or a link to the Department of Labor web page required by this subsection) on the websites of such other agencies.

SEC. 3. MISCLASSIFICATION OF EMPLOYEES FOR UNEMPLOYMENT COMPENSATION PURPOSES.

(a) In general.—Section 303(a) of the Social Security Act (42 U.S.C. 503(a)) is amended—

(1) in paragraph (10), by striking the period and inserting “; and”; and

(2) by adding after paragraph (10) the following:
“(11)(A) Such auditing and investigative programs as may be necessary to identify employers that have not registered under the State law or that are paying unreported compensation, where these actions or omissions by the employers have the effect of excluding employees from unemployment compensation coverage; and

“(B) The making of quarterly reports to the Secretary of Labor (in such form as the Secretary of Labor may require) describing the results of programs under subparagraph (A); and

“(12) The establishment of administrative penalties for misclassifying employees, or paying unreported compensation to employees without proper record keeping, for unemployment compensation purposes.”.

(b) REVIEW OF AUDITING PROGRAMS.—The Secretary of Labor shall include, in the Department of Labor’s system for measuring States’ performance in conducting unemployment compensation tax audits, a specific measure of their effectiveness in identifying the under-reporting of wages and the underpayment of unemployment compensation tax contributions (including their effectiveness in identifying instances of such under-reporting or
underpayments despite the absence of cancelled checks, original time sheets, or other similar documentation).

(c) Effective Date.—

(1) In general.—Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect 12 months after the date of the enactment of this Act.

(2) Exception.—If the Secretary of Labor finds that legislation is necessary in order for the unemployment compensation law of a State to comply with the amendments made by subsection (a), such amendments shall not apply with respect to such law until the later of—

(A) the day after the close of the first session of the legislature of such State which begins after the date of the enactment of this Act; or

(B) 12 months after the date of the enactment of this Act.

(d) Definitions.—For purposes of this section—

(1) the term “State” has the meaning given such term by section 3306(j) of the Internal Revenue Code of 1986 (26 U.S.C. 3306(j)); and
(2) the term “session”, as used with respect to a State legislature, means a regular, special, budget, or other session of such legislature.

4 SEC. 4. DEPARTMENT OF LABOR COORDINATION AND REFERRAL.

Notwithstanding any other provision of law, any office, administration, or division of the Department of Labor that, while in the performance of its official duties, obtains information regarding the misclassification by an employer of any individual regarding whether such individual is an employee or a non-employee contracted for the performance of services for purposes of section 6 or 7 of the Fair Labor Standards Act or in records required under section 11(c) of such Act, shall report such information to the Employment Standards Administration of the Department. The Employment Standards Administration may report such information to the Internal Revenue Service as the Administration considers appropriate.

5 SEC. 5. TARGETED AUDITS.

The Secretary of Labor shall ensure that at least 25 percent of the audits of employers subject to the Fair Labor Standards Act that are conducted by the Wage and Hour Division of the Department of Labor are focused on potential violations of the record-keeping requirements of section 11(c) of such Act (29 U.S.C. 211(c)) (as amend-
ed by this Act). Such Division shall focus such audits on employers in industries with frequent incidence of misclassifying employees as non-employees, as determined by the Secretary.