

110TH CONGRESS
2D SESSION

H. R. 6111

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-PORTER, 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

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

4 **SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EM-**
5 **PLOYEES.**

6 (a) RECORD-KEEPING AND NOTICE REQUIRE-
7 MENTS.—Section 11(c) of the Fair Labor Standards Act
8 of 1938 (29 U.S.C. 211(c)) is amended—

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

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

14 (3) by striking “maintained by him” and insert-
15 ing “, (B) the individuals who are not employees of
16 the employer (within the meaning of section 3(g))
17 but with whom the employer, in the course of the
18 trade or business in which the employer is engaged,
19 has engaged for the performance of labor or services,
20 and of the remuneration and hours relating to the
21 performance of labor or services by such individuals,
22 and (C) the notices required under paragraph (3),”;
23 and

24 (4) by inserting at the end the following:

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

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

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

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

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

22 “(i) inform the individual of the employer’s
23 classification of the individual as an employee or a
24 non-employee under paragraph (2);

1 “(ii) include a statement directing such indi-
2 vidual to a Department of Labor website established
3 for the purpose of providing further information
4 about the rights of employees under the law;

5 “(iii) include the address and telephone number
6 for the applicable local office of the Federal Depart-
7 ment of Labor;

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

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

19 (b) SPECIAL PROHIBITED ACT.—Section 15(a) of
20 such Act is amended by adding at the end the following:

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

23 (c) SPECIAL PENALTY FOR CERTAIN RECORD-KEEP-
24 ING AND NOTICE VIOLATIONS.—Section 16 of the Fair

1 Labor Standards Act of 1938 (29 U.S.C. 216) is amend-
2 ed—

3 (1) in subsection (b)—

4 (A) in the third sentence, by striking “ei-
5 ther of the preceding sentences” and inserting
6 “any of the preceding sentences”; and

7 (B) by inserting after the first sentence
8 the following: “Such liquidated damages are
9 doubled (subject to section 11 of the Portal-to-
10 Portal Pay Act of 1947 (29 U.S.C. 260))
11 where, in addition to violating the provisions of
12 section 6 or 7, the employer has violated the
13 provisions of section 15(a)(6) with respect to
14 such employee or employees.”; and

15 (2) in subsection (e), after the first sentence in
16 the matter preceding paragraph (1), by inserting the
17 following: “Any person who repeatedly or willfully
18 violates section 15(a)(6) shall be subject to a civil
19 penalty of not to exceed \$10,000 for each such viola-
20 tion.”.

21 (d) EMPLOYEE RIGHTS WEBSITE.—Not later than
22 90 days after the date of enactment of this Act, the Sec-
23 retary of Labor shall establish, for purposes of section
24 11(c)(3)(C)(ii) of the Fair Labor Standards Act of 1938
25 (as added by this Act), a single web page on the Depart-

1 ment of Labor website that summarizes in plain language
2 the rights of employees under the Fair Labor Standards
3 Act and other Federal laws. Such web page shall contain
4 appropriate links to additional information on the Depart-
5 ment of Labor website or other Federal agency websites,
6 including wage and hour complaint forms, along with a
7 statement explaining that employees may have additional
8 or greater rights under State or local laws and how em-
9 ployees may obtain additional information about their
10 rights under State or local laws. Such web page shall be
11 made available in English and any other languages which
12 the Secretary determines to be prevalent among individ-
13 uals likely to access the web page. The Secretary shall co-
14 ordinate with other relevant Federal agencies in order to
15 provide similar information (or a link to the Department
16 of Labor web page required by this subsection) on the
17 websites of such other agencies.

18 **SEC. 3. MISCLASSIFICATION OF EMPLOYEES FOR UNEM-**
19 **PLOYMENT COMPENSATION PURPOSES.**

20 (a) IN GENERAL.—Section 303(a) of the Social Secu-
21 rity Act (42 U.S.C. 503(a)) is amended—

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

24 (2) by adding after paragraph (10) the fol-
25 lowing:

1 “(11)(A) Such auditing and investigative pro-
2 grams as may be necessary to identify employers
3 that have not registered under the State law or that
4 are paying unreported compensation, where these ac-
5 tions or omissions by the employers have the effect
6 of excluding employees from unemployment com-
7 pensation coverage; and

8 “(B) The making of quarterly reports to the
9 Secretary of Labor (in such form as the Secretary
10 of Labor may require) describing the results of pro-
11 grams under subparagraph (A); and

12 “(12) The establishment of administrative pen-
13 alties for misclassifying employees, or paying unre-
14 ported compensation to employees without proper
15 record keeping, for unemployment compensation
16 purposes.”.

17 (b) REVIEW OF AUDITING PROGRAMS.—The Sec-
18 retary of Labor shall include, in the Department of La-
19 bor’s system for measuring States’ performance in con-
20 ducting unemployment compensation tax audits, a specific
21 measure of their effectiveness in identifying the under-re-
22 porting of wages and the underpayment of unemployment
23 compensation tax contributions (including their effective-
24 ness in identifying instances of such under-reporting or

1 underpayments despite the absence of cancelled checks,
2 original time sheets, or other similar documentation).

3 (c) EFFECTIVE DATE.—

4 (1) IN GENERAL.—Except as provided in para-
5 graph (2), the amendments made by subsection (a)
6 shall take effect 12 months after the date of the en-
7 actment of this Act.

8 (2) EXCEPTION.—If the Secretary of Labor
9 finds that legislation is necessary in order for the
10 unemployment compensation law of a State to com-
11 ply with the amendments made by subsection (a),
12 such amendments shall not apply with respect to
13 such law until the later of—

14 (A) the day after the close of the first ses-
15 sion of the legislature of such State which be-
16 gins after the date of the enactment of this Act;
17 or

18 (B) 12 months after the date of the enact-
19 ment of this Act.

20 (d) DEFINITIONS.—For purposes of this section—

21 (1) the term “State” has the meaning given
22 such term by section 3306(j) of the Internal Rev-
23 enue Code of 1986 (26 U.S.C. 3306(j)); and

1 (2) the term “session”, as used with respect to
2 a State legislature, means a regular, special, budget,
3 or other session of such legislature.

4 **SEC. 4. DEPARTMENT OF LABOR COORDINATION AND RE-**
5 **FERRAL.**

6 Notwithstanding any other provision of law, any of-
7 fice, administration, or division of the Department of
8 Labor that, while in the performance of its official duties,
9 obtains information regarding the misclassification by an
10 employer of any individual regarding whether such indi-
11 vidual is an employee or a non-employee contracted for
12 the performance of services for purposes of section 6 or
13 7 of the Fair Labor Standards Act or in records required
14 under section 11(c) of such Act, shall report such informa-
15 tion to the Employment Standards Administration of the
16 Department. The Employment Standards Administration
17 may report such information to the Internal Revenue
18 Service as the Administration considers appropriate.

19 **SEC. 5. TARGETED AUDITS.**

20 The Secretary of Labor shall ensure that at least 25
21 percent of the audits of employers subject to the Fair
22 Labor Standards Act that are conducted by the Wage and
23 Hour Division of the Department of Labor are focused
24 on potential violations of the record-keeping requirements
25 of section 11(c) of such Act (29 U.S.C. 211(c)) (as amend-

1 ed by this Act). Such Division shall focus such audits on
2 employers in industries with frequent incidence of
3 misclassifying employees as non-employees, as determined
4 by the Secretary.

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