

111TH CONGRESS  
2D SESSION

# S. 3786

To amend the Internal Revenue Code of 1986 to permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 15, 2010

Mr. KERRY (for himself, Mr. BROWN of Ohio, Mrs. MURRAY, Mr. FRANKEN, Mr. AKAKA, Mr. SCHUMER, Mr. LEAHY, Mrs. GILLIBRAND, and Mr. MENENDEZ) introduced the following bill; which was read twice and referred to the Committee on Finance

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## A BILL

To amend the Internal Revenue Code of 1986 to permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications.

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

3 **SECTION 1. SHORT TITLE; FINDINGS; PURPOSES.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Fair Playing Field Act of 2010”.

1 (b) FINDINGS.—Congress makes the following find-  
2 ings:

3 (1) In 1978, Congress was concerned that lack  
4 of clarity as to the proper classification of some  
5 workers, increased IRS enforcement activity, and  
6 retroactive application by IRS of interpretations that  
7 were arguably new had caused hardships for some  
8 small businesses and other taxpayers and confusion  
9 as to the applicable rules.

10 (2) To allow time to develop a comprehensive  
11 approach to the problem, Congress enacted section  
12 530 of the Revenue Act of 1978 as an interim meas-  
13 ure protecting taxpayers from liability for  
14 misclassification if the taxpayer has a reasonable  
15 basis for classifying a worker as an independent con-  
16 tractor and meets certain other conditions. In addi-  
17 tion, the Act prohibited the Secretary of the Treas-  
18 ury from publishing regulations or revenue rulings  
19 on workers' employment tax status pending the ex-  
20 pected near-term enactment of clarifying legislation.

21 (3) During the ensuing 32 years, Congress  
22 made section 530 of the Revenue Act of 1978 per-  
23 manent, however, changes in working relationships  
24 and the continued prohibition on new guidance have

1 increased the uncertainty as to the proper classifica-  
2 tion of workers.

3 (4) Many workers are properly classified as  
4 independent contractors. In other instances, workers  
5 who are employees are being treated as independent  
6 contractors. Such misclassification for tax purposes  
7 contributes to inequities in the competitive positions  
8 of businesses and to the Federal and State tax gap,  
9 and may also result in misclassification for other  
10 purposes, such as denial of unemployment benefits,  
11 workplace health and safety protections, and retire-  
12 ment or other benefits or protections available to  
13 employees.

14 (5) Workers, businesses, and other taxpayers  
15 will benefit from clear guidance regarding employ-  
16 ment tax status. In the interest of fairness and in  
17 view of many service recipients' reliance on current  
18 section 530, such guidance should apply only pro-  
19 spectively.

20 (c) PURPOSES.—The purposes of this Act are to per-  
21 mit the Secretary of the Treasury to provide guidance al-  
22 lowing workers and businesses to clearly understand the  
23 proper federal tax classification of workers and to provide  
24 relief allowing an orderly transition to new rules designed  
25 to increase certainty and uniformity of treatment.

1 **SEC. 2. AUTHORITY TO ISSUE GUIDANCE CLARIFYING EM-**  
2 **PLOYMENT STATUS FOR PURPOSES OF EM-**  
3 **PLOYMENT TAXES.**

4 (a) IN GENERAL.—Chapter 25 of the Internal Rev-  
5 enue Code of 1986 is amended by adding at the end the  
6 following new section:

7 **“SEC. 3511. AUTHORITY TO ISSUE GUIDANCE CLARIFYING**  
8 **EMPLOYMENT STATUS.**

9 “(a) IN GENERAL.—The Secretary shall issue such  
10 regulations or other guidance as the Secretary determines  
11 to be necessary or appropriate to clarify the proper em-  
12 ployment status of individuals for purposes of any tax im-  
13 posed by this subtitle.

14 “(b) PROHIBITION ON RETROACTIVE ASSESS-  
15 MENTS.—

16 “(1) IN GENERAL.—If—

17 “(A) for purposes of any tax imposed by  
18 this subtitle, the taxpayer did not treat an indi-  
19 vidual as an employee for any period before the  
20 reclassification date with respect to such indi-  
21 vidual, and

22 “(B) in the case of periods after December  
23 31, 1978, and before such reclassification date,  
24 all Federal tax returns (including information  
25 returns) required to be filed by the taxpayer  
26 with respect to such individual for such period

1           are filed on a basis consistent with the tax-  
2           payer’s treatment of such individual as not  
3           being an employee,  
4           then, for purposes of applying such taxes for periods  
5           before such reclassification date with respect to the  
6           taxpayer, the individual shall be deemed not to be an  
7           employee unless the taxpayer had no reasonable  
8           basis for not treating such individual as an em-  
9           ployee.

10           “(2) STATUTORY STANDARDS PROVIDING ONE  
11           METHOD OF SATISFYING THE REQUIREMENTS OF  
12           PARAGRAPH (1).—For purposes of paragraph (1), a  
13           taxpayer shall in any case be treated as having a  
14           reasonable basis for not treating an individual as an  
15           employee for a period if the taxpayer’s treatment of  
16           such individual for such period was in reasonable re-  
17           liance on any of the following:

18                   “(A) Judicial precedent, published rulings,  
19                   technical advice with respect to the taxpayer, or  
20                   a letter ruling to the taxpayer.

21                   “(B) A past Internal Revenue Service  
22                   audit of the taxpayer in which there was no as-  
23                   sessment attributable to the treatment (for pur-  
24                   poses of any tax imposed by this subtitle) of the

1 individuals holding positions substantially simi-  
2 lar to the position held by such individual.

3 “(C) Long-standing recognized practice of  
4 a significant segment of the industry in which  
5 such individual was engaged.

6 “(3) CONSISTENCY REQUIRED IN THE CASE OF  
7 PRIOR TAX TREATMENT.—Paragraph (1) shall not  
8 apply with respect to the treatment of any individual  
9 (hereafter in this paragraph referred to as the re-  
10 classified individual) for purposes of any tax im-  
11 posed by this subtitle for any period ending after  
12 December 31, 1978, if the taxpayer (or a prede-  
13 cessor) has treated any individual holding a substan-  
14 tially similar position as an employee for purposes of  
15 any tax imposed by this subtitle for any period be-  
16 ginning after December 31, 1977, and ending before  
17 the reclassification date with respect to such reclas-  
18 sified individual.

19 “(c) DEFINITIONS.—For purposes of this section—

20 “(1) RECLASSIFICATION DATE.—

21 “(A) IN GENERAL.—The term ‘reclassifica-  
22 tion date’ means, with respect to any individual,  
23 the earlier of—

24 “(i) the first day of the first calendar  
25 quarter beginning more than 180 days

1 after the date of an employee classification  
2 determination with respect to such indi-  
3 vidual, or

4 “(ii) the effective date of the first ap-  
5 plicable final regulation issued by the Sec-  
6 retary under subsection (a) with respect to  
7 such individual (or, if later, the first day of  
8 the first calendar quarter beginning more  
9 than 180 days after such regulation is  
10 issued).

11 “(B) EMPLOYEE CLASSIFICATION DETER-  
12 MINATION.—The term ‘employee classification  
13 determination’ means, with respect to any indi-  
14 vidual, a determination by the Secretary, in  
15 connection with an audit of the taxpayer which  
16 is described in section 7436 and which com-  
17 mences after the date which is 1 year after the  
18 date of the enactment of this section, that a  
19 class of individuals holding positions with such  
20 taxpayer which are substantially similar to the  
21 position held by such individual are employees.

22 “(C) FIRST APPLICABLE FINAL REGULA-  
23 TION.—The term ‘first applicable final regula-  
24 tion’ means, with respect to any individual, the  
25 first final regulation (or other guidance of gen-

1           eral applicability) which sets forth the factors  
2           for determining the employment status of a  
3           class of individuals holding positions substan-  
4           tially similar to the position held by such indi-  
5           vidual.

6           “(2) EMPLOYMENT STATUS.—The term ‘em-  
7           ployment status’ means the status of an individual,  
8           under the usual common law rules applicable in de-  
9           termining the employer-employee relationship, as an  
10          employee or as an independent contractor (or other  
11          individual who is not an employee).

12          “(d) CONTINUATION OF CERTAIN SPECIAL RULES  
13          APPLICABLE UNDER THE REVENUE ACT OF 1978.—

14                 “(1) EXCEPTION FOR CERTAIN SKILLED WORK-  
15                 ERS.—Subsection (b) shall not apply in the case of  
16                 an individual who, pursuant to an arrangement be-  
17                 tween the taxpayer and another person, provides  
18                 services for such other person as an engineer, de-  
19                 signer, drafter, computer programmer, systems ana-  
20                 lyst, or other similarly skilled worker engaged in a  
21                 similar line of work.

22                 “(2) NOTICE OF AVAILABILITY OF SECTION.—  
23                 An officer or employee of the Internal Revenue Serv-  
24                 ice shall, before or at the commencement of any  
25                 audit inquiry relating to the employment status of

1 one or more individuals who perform services for the  
2 taxpayer, provide the taxpayer with a written notice  
3 of the provisions of this section.

4 “(3) RULES RELATING TO STATUTORY STAND-  
5 ARDS.—For purposes of subsection (b)(2)—

6 “(A) a taxpayer may not rely on an audit  
7 commenced after December 31, 1996, for pur-  
8 poses of subparagraph (B) thereof unless such  
9 audit included an examination for purposes of  
10 any tax imposed by this subtitle whether the in-  
11 dividual involved (or any individual holding a  
12 position substantially similar to the position  
13 held by the individual involved) should be treat-  
14 ed as an employee of the taxpayer,

15 “(B) in no event shall the significant seg-  
16 ment requirement of subparagraph (C) thereof  
17 be construed to require a reasonable showing of  
18 the practice of more than 25 percent of the in-  
19 dustry (determined by not taking into account  
20 the taxpayer), and

21 “(C) in applying the long-standing recog-  
22 nized practice requirement of subparagraph (C)  
23 thereof—

1           “(i) such requirement shall not be  
2           construed as requiring the practice to have  
3           continued for more than 10 years, and

4           “(ii) a practice shall not fail to be  
5           treated as long-standing merely because  
6           such practice began after 1978.

7           “(4) AVAILABILITY OF SAFE HARBORS.—Noth-  
8           ing in this section shall be construed to provide that  
9           subsection (b) only applies where the individual in-  
10          volved is otherwise an employee of the taxpayer.

11          “(5) BURDEN OF PROOF.—

12           “(A) IN GENERAL.—If—

13           “(i) a taxpayer establishes a prima  
14           facie case that it was reasonable not to  
15           treat an individual as an employee for pur-  
16           poses of subsection (b), and

17           “(ii) the taxpayer has fully cooperated  
18           with reasonable requests from the Sec-  
19           retary,

20          then the burden of proof with respect to such  
21          treatment shall be on the Secretary.

22           “(B) EXCEPTION FOR OTHER REASONABLE  
23           BASIS.—In the case of any issue involving  
24           whether the taxpayer had a reasonable basis  
25           not to treat an individual as an employee for

1 purposes of subsection (b), subparagraph (A)  
2 shall only apply for purposes of determining  
3 whether the taxpayer meets the requirements of  
4 subparagraph (A), (B), or (C) of subsection  
5 (b)(2).

6 “(6) PRESERVATION OF PRIOR PERIOD SAFE  
7 HARBOR.—If—

8 “(A) an individual would (but for the  
9 treatment referred to in subparagraph (B)) be  
10 deemed not to be an employee of the taxpayer  
11 under subsection (b) for any prior period, and

12 “(B) such individual is treated by the tax-  
13 payer as an employee for purposes of the taxes  
14 imposed by this subtitle for any subsequent pe-  
15 riod,

16 then, for purposes of applying such taxes for such  
17 prior period with respect to the taxpayer, the indi-  
18 vidual shall be deemed not to be an employee.

19 “(7) SUBSTANTIALLY SIMILAR POSITION.—For  
20 purposes of subsection (b) and this subsection, the  
21 determination as to whether an individual holds a  
22 position substantially similar to a position held by  
23 another individual shall include consideration of the  
24 relationship between the taxpayer and such individ-  
25 uals.

1           “(8) TREATMENT OF TEST ROOM SUPERVISORS  
2           AND PROCTORS WHO ASSIST IN THE ADMINISTRA-  
3           TION OF COLLEGE ENTRANCE AND PLACEMENT  
4           EXAMS.—

5           “(A) IN GENERAL.—In the case of an indi-  
6           vidual described in subparagraph (B) who is  
7           providing services as a test proctor or room su-  
8           pervisor by assisting in the administration of  
9           college entrance or placement examinations,  
10          subsection (b) shall be applied to such services  
11          performed after December 31, 2006 (and remu-  
12          neration paid for such services) without regard  
13          to paragraph (3) thereof.

14          “(B) APPLICABILITY.—An individual is de-  
15          scribed in this subparagraph if the individual—

16                 “(i) is providing the services described  
17                 in subsection (b) to an organization de-  
18                 scribed in section 501(c) and exempt from  
19                 tax under section 501(a), and

20                 “(ii) is not otherwise treated as an  
21                 employee of such organization for purposes  
22                 of this subtitle.

23          “(e) STATEMENTS TO INDEPENDENT CONTRAC-  
24          TORS.—

1           “(1) IN GENERAL.—Each person who contracts  
2 for the services of an independent contractor on a  
3 regular and ongoing basis, within the scope of such  
4 person’s trade or business, shall provide a written  
5 statement to such independent contractor notifying  
6 such independent contractor of the Federal tax obli-  
7 gations of an independent contractor, the labor and  
8 employment law protections that do not apply to  
9 independent contractors, and the right of such inde-  
10 pendent contractor to seek a status determination  
11 from the Internal Revenue Service.

12           “(2) INDEPENDENT CONTRACTOR.—For pur-  
13 poses of this subsection, the term ‘independent con-  
14 tractor’ means any individual who is not treated as  
15 an employee by the person receiving the services re-  
16 ferred to in paragraph (1).

17           “(3) TIMING OF STATEMENT.—Except as other-  
18 wise provided by the Secretary, the statement re-  
19 quired under paragraph (1) shall be provided within  
20 a reasonable period of entering into the contract re-  
21 ferred to in paragraph (1).

22           “(4) DEVELOPMENT OF MODEL STATEMENT.—  
23 The Secretary shall develop model materials for pro-  
24 viding the statement required under paragraph  
25 (1).”.

1 (b) REDUCED PENALTY NOT APPLICABLE IN CASES  
2 OF NONCOMPLIANCE WITH GUIDANCE WITHOUT REA-  
3 SONABLE BASIS.—Subsection (c) of section 3509 of such  
4 Code is amended—

5 (1) by striking “if such liability” and inserting  
6 “if—

7 “(1) such liability”, and

8 (2) by striking the period at the end and insert-  
9 ing “, or

10 “(2) such liability relates to an individual who  
11 is treated as an employee under regulations or other  
12 guidance issued by the Secretary under section  
13 3511(a) and the taxpayer lacks a reasonable basis  
14 for treating the individual as other than an em-  
15 ployee.

16 In the case of a taxpayer which has received a final written  
17 determination from the Internal Revenue Service holding  
18 that the individual referred to in paragraph (2) (or an-  
19 other individual who holds a position with the taxpayer  
20 substantially similar to the position held by such indi-  
21 vidual) is an employee, such taxpayer shall be treated for  
22 purposes of paragraph (2) as lacking a reasonable basis  
23 for treating such individual as other than an employee  
24 with respect to periods beginning on and after the first  
25 day of the first calendar quarter beginning more than 180

1 days after the date of such written determination unless  
 2 the taxpayer establishes by clear and convincing evidence  
 3 that the taxpayer has a reasonable basis for such treat-  
 4 ment.”.

5 (c) CONFORMING AMENDMENTS.—

6 (1) Paragraph (2) of section 6724(d) of such  
 7 Code is amended by striking “or” at the end of sub-  
 8 paragraph (GG), by striking the period at the end  
 9 of subparagraph (HH) and inserting “, or”, and by  
 10 inserting after subparagraph (HH) the following  
 11 new subparagraph:

12 “(II) section 3511(e) (relating to state-  
 13 ments to independent contractors).”.

14 (2) Paragraph (2) of section 7436(a) of such  
 15 Code is amended by striking “subsection (a) of sec-  
 16 tion 530 of the Revenue Act of 1978” and inserting  
 17 “section 3511(b)”.

18 (3) The table of sections for chapter 25 of such  
 19 Code is amended by adding at the end the following  
 20 new item:

“Sec. 3511. Authority to issue guidance clarifying employment status.”.

21 (d) TERMINATION OF SECTION 530 OF THE REV-  
 22 ENUE ACT OF 1978.—The Revenue Act of 1978 is amend-  
 23 ed by striking section 530.

24 (e) REPORTS ON WORKER MISCLASSIFICATION.—Be-  
 25 ginning with the first fiscal year beginning after the date

1 the first regulation or other guidance is issued for public  
2 comment under section 3511(a) of the Internal Revenue  
3 Code of 1986 (as added by this section):

4           (1) A report each fiscal year on worker classi-  
5           fication which shall include the total number of ex-  
6           aminations of employers initiated because of sus-  
7           pected worker classification issues, the total number  
8           of examinations that included determinations on  
9           worker classification issues, the amount of additional  
10          tax liabilities associated with worker classification  
11          enforcement actions, the number of workers reclassi-  
12          fied as a result of these actions, the number of re-  
13          quests for Determination of Worker Status (Form  
14          SS-8), and technical guidance on how to understand  
15          the data provided in the report.

16          (2) A report each fiscal year in which new sta-  
17          tistically valid data is compiled and interpreted on  
18          worker classification, prepared on the basis of infor-  
19          mation gathered during an Employment Tax Study  
20          conducted by the National Research Program (NRP)  
21          of the Internal Revenue Service. Such report shall  
22          provide statistical estimates of the number of em-  
23          ployers misclassifying workers, the number of work-  
24          ers misclassified, the industries involved, data inter-  
25          pretations and conclusions, and a description of the

1 impact of improper worker classification on the em-  
2 ployment tax gap.

3 (f) EFFECTIVE DATES.—

4 (1) DELAYED EFFECTIVE DATE OF REGULA-  
5 TIONS AND GUIDANCE.—Any regulation or other  
6 guidance issued under section 3511(a) of the Inter-  
7 nal Revenue Code of 1986, as added by this section,  
8 shall not apply to services rendered before the date  
9 which is 1 year after the date of the enactment of  
10 this Act.

11 (2) AUTHORITY TO ISSUE REGULATIONS AND  
12 GUIDANCE IMMEDIATELY.—So much of the amend-  
13 ment made by subsection (d) as relates to subsection  
14 (b) of section 530 of the Revenue Act of 1978 shall  
15 take effect on the date of the enactment of this Act.

16 (3) DELAYED TERMINATION OF REMAINDER OF  
17 SECTION 530 OF THE REVENUE ACT OF 1978.—Ex-  
18 cept as provided in paragraph (2), the amendments  
19 made by subsections (c)(1) and (d) shall apply to  
20 services rendered on or after the date which is 1  
21 year after the date of the enactment of this Act.

○