

112TH CONGRESS
1ST SESSION

S. 770

To amend the Fair Labor Standards Act of 1938 to ensure that employees are not misclassified as non-employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 8, 2011

Mr. BROWN of Ohio (for himself, Mr. HARKIN, and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act of 1938 to ensure that employees are not misclassified 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Payroll Fraud Preven-
5 tion Act”.

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

3 (a) DEFINITIONS.—Section 3 of the Fair Labor
4 Standards Act of 1938 (29 U.S.C. 203) is amended by
5 adding at the end the following:

6 “(z) ‘Non-employee’ means an individual who—

7 “(1) a person has engaged, in the course of the
8 person’s trade or business, for the performance of
9 labor or services; and

10 “(2) is not an employee of the person.

11 “(aa) ‘Covered individual’ when used with respect to
12 an employer or other person means—

13 “(1) an employee of the employer; or

14 “(2) a non-employee of the person (including a
15 person who is an employer)—

16 “(A) whom the person has engaged, in the
17 course of the person’s trade or business, for the
18 performance of labor or services; and

19 “(B)(i) with respect to whom the person is
20 required to file an information return under
21 section 6041A(a) of the Internal Revenue Code
22 of 1986; or

23 “(ii) who is providing labor or services to
24 the person through an entity that is a trust, es-
25 tate, partnership, association, company, or cor-
26 poration (as such terms are used in section

1 7701(a)(1) of the Internal Revenue Code of
2 1986) if—

3 “(I) such individual has an ownership
4 interest in the entity;

5 “(II) creation or maintenance of such
6 entity is a condition for the provision of
7 such labor or services to the person; and

8 “(III) the person would be required to
9 file an information return for the entity
10 under section 6041A(a) of the Internal
11 Revenue Code of 1986 if the entity were
12 an individual.”.

13 (b) CLASSIFICATION AS EMPLOYEES.—Section 11(c)
14 of the Fair Labor Standards Act of 1938 (29 U.S.C.
15 211(c)) is amended—

16 (1) by striking “(c) Every employer subject to
17 any provision of this Act or of any order issued
18 under this Act” and inserting the following:

19 “(c) RECORDKEEPING; CLASSIFICATION; NOTICE.—

20 “(1) RECORDKEEPING.—Every person subject
21 to any provision of this Act or of any order issued
22 under this Act”; and

23 (2) by adding at the end the following:

24 “(2) CLASSIFICATION.—

1 “(A) IN GENERAL.—Every person (includ-
2 ing every employer and enterprise), who em-
3 ploys any employee engaged in commerce or in
4 the production of goods for commerce or en-
5 gages any non-employee engaged in commerce
6 or in the production of goods for commerce,
7 shall—

8 “(i) accurately classify all covered in-
9 dividuals as employees or non-employees
10 (as the case may be);

11 “(ii) provide, to each covered indi-
12 vidual, a written notice that—

13 “(I) informs the covered indi-
14 vidual of the individual’s classifica-
15 tion, by the person submitting the no-
16 tice, as an employee or a non-em-
17 ployee;

18 “(II) includes a statement direct-
19 ing such individual to the Department
20 of Labor Web site established under
21 section 3 of the Payroll Fraud Pre-
22 vention Act, or other appropriate re-
23 sources, for the purpose of providing
24 further information about the rights
25 of employees under the law;

1 “(III) includes the address and
2 telephone number for the applicable
3 local office of the Department of
4 Labor; and

5 “(IV) includes for each covered
6 individual classified as a non-employee
7 by the person providing the notice, the
8 following statement: ‘Your rights to
9 wage, hour, and other labor protec-
10 tions depend upon your proper classi-
11 fication as an employee or non-em-
12 ployee. If you have any questions or
13 concerns about how you have been
14 classified or suspect that you may
15 have been misclassified, contact the
16 U.S. Department of Labor.’; and

17 “(iii) maintain a copy of such notice
18 as a required record under paragraph (1).

19 “(B) TIMING OF NOTICE.—

20 “(i) IN GENERAL.—The notice de-
21 scribed in subparagraph (A)(ii) shall be
22 provided, at a minimum, not later than 6
23 months after the date of enactment of the
24 Payroll Fraud Prevention Act, and there-
25 after—

1 “(I) for new employees, upon em-
2 ployment; and

3 “(II) for new non-employees,
4 upon commencement of the labor or
5 services provided by the non-employee.

6 “(ii) CHANGE IN STATUS.—Each per-
7 son required to provide a notice under sub-
8 paragraph (A)(ii) to a covered individual
9 shall also provide such notice to such indi-
10 vidual upon changing such individual’s sta-
11 tus as an employee or non-employee.

12 “(C) PRESUMPTION.—

13 “(i) IN GENERAL.—For purposes of
14 this Act and the regulations or orders
15 issued under this Act, a covered individual
16 to whom a person is required to provide a
17 notice under subparagraph (A)(ii) shall be
18 presumed to be an employee of the person
19 if the person has not provided the indi-
20 vidual with such notice within the time re-
21 quired under subparagraph (B).

22 “(ii) REBUTTAL.—The presumption
23 under clause (i) shall be rebutted only
24 through the presentation of clear and con-
25 vincing evidence that a covered individual

1 described in such subparagraph is not an
2 employee of the person.”.

3 (c) SPECIAL PROHIBITED ACTS.—Section 15(a) of
4 the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a))
5 is amended—

6 (1) by striking paragraph (3) and inserting the
7 following:

8 “(3) to discharge or in any other manner dis-
9 criminate against any covered individual (including
10 an employee) because such individual has—

11 “(A) opposed any practice, or filed any pe-
12 tition or complaint or instituted or caused to be
13 instituted any proceeding—

14 “(i) under or related to this Act (in-
15 cluding concerning a covered individual’s
16 status as an employee or non-employee for
17 purposes of this Act); or

18 “(ii) concerning a covered individual’s
19 status as an employee or non-employee for
20 employment tax purposes within the mean-
21 ing of subtitle C of the Internal Revenue
22 Code of 1986; or

23 “(B) testified or is about to testify in any
24 proceeding described in subparagraph (A); or

1 “(C) served, or is about to serve, on an in-
2 dustry committee;”;

3 (2) in paragraph (5), by striking the period at
4 the end and inserting “; and”; and

5 (3) by adding at the end the following:

6 “(6) to wrongly classify an employee of the per-
7 son as a non-employee in accordance with section
8 11(c)(2).”.

9 (d) SPECIAL PENALTY FOR CERTAIN
10 MISCLASSIFICATION, RECORDKEEPING, AND NOTICE VIO-
11 LATIONS.—Section 16 of the Fair Labor Standards Act
12 of 1938 (29 U.S.C. 216) is amended—

13 (1) in subsection (b)—

14 (A) in the sixth sentence, by striking “any
15 employee” each place the term occurs and in-
16 serting “any covered individual”;

17 (B) in the fourth sentence, by striking
18 “employee” and inserting “covered individual”;

19 (C) in the third sentence—

20 (i) by striking “either of the preceding
21 sentences” and inserting “any of the pre-
22 ceding sentences”;

23 (ii) by striking “one or more employ-
24 ees” and inserting “one or more covered
25 individuals”; and

1 (iii) by striking “other employees”
2 and inserting “other covered individuals”;
3 and

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

12 (2) in subsection (e), by striking paragraph (2)
13 and inserting the following:

14 “(2) Any person who violates section 6, 7, 11(c), or
15 15(a)(6) shall be subject to a civil penalty, for each em-
16 ployee or other individual who was the subject of such a
17 violation, in an amount—

18 “(A) not to exceed \$1,100; or

19 “(B) in the case of a person who has repeatedly
20 or willfully committed such violation, not to exceed
21 \$5,000.”.

22 **SEC. 3. EMPLOYEE RIGHTS WEB SITE.**

23 Not later than 180 days after the date of enactment
24 of this Act, the Secretary of Labor shall establish, a single
25 Web page on the Department of Labor Web site that sum-

1 marizes in plain language the rights of employees and non-
2 employees under the Fair Labor Standards Act of 1938,
3 including the rights described in the amendments made
4 by section 2.

5 **SEC. 4. MISCLASSIFICATION OF EMPLOYEES FOR UNEM-**
6 **PLOYMENT COMPENSATION PURPOSES.**

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

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

11 (2) by adding after paragraph (10) the fol-
12 lowing:

13 “(11)(A) Such auditing and investigative proce-
14 dures as may be necessary to identify employers that
15 have not registered under the State law or that are
16 paying unreported wages, where these actions or
17 omissions by the employers have the effect of exclud-
18 ing employees from unemployment compensation
19 coverage; and

20 “(B) the making of quarterly reports to the
21 Secretary of Labor (in such form as the Secretary
22 of Labor may require) describing the results of the
23 procedures under subparagraph (A); and

24 “(12) the establishment of administrative pen-
25 alties for misclassifying employees, or paying unre-

1 reported wages to employees without proper record-
2 keeping, for unemployment compensation pur-
3 poses.”.

4 (b) REVIEW OF AUDITING PROGRAMS.—The Sec-
5 retary of Labor shall include, in the Department of La-
6 bor’s system for measuring States’ performance in con-
7 ducting unemployment compensation tax audits, a specific
8 measure of their effectiveness in identifying the under-
9 reporting of wages and the underpayment of unemploy-
10 ment compensation contributions (including their effec-
11 tiveness in identifying instances of such underreporting or
12 underpayments despite the absence of cancelled checks,
13 original time sheets, or other similar documentation).

14 (c) EFFECTIVE DATE.—

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

19 (2) EXCEPTION.—If the Secretary of Labor
20 finds that legislation is necessary in order for the
21 unemployment compensation law of a State to com-
22 ply with the amendments made by subsection (a),
23 such amendments shall not apply with respect to
24 such law until the later of—

1 (A) the day after the close of the first reg-
2 ular session of the legislature of such State
3 which begins after the date of the enactment of
4 this Act; or

5 (B) 12 months after the date of the enact-
6 ment of this Act.

7 (d) DEFINITION OF STATE.—For purposes of this
8 section, the term “State” has the meaning given such
9 term by section 3306(j) of the Internal Revenue Code of
10 1986.

11 **SEC. 5. DEPARTMENT OF LABOR COORDINATION, REFER-**
12 **RAL, AND REGULATIONS.**

13 (a) COORDINATION AND REFERRAL.—Notwith-
14 standing any other provision of law, any office, adminis-
15 tration, or division of the Department of Labor that, while
16 in the performance of its official duties, obtains informa-
17 tion regarding the misclassification by a person subject to
18 the provisions of the Fair Labor Standards Act of 1938
19 (29 U.S.C. 201 et seq.), or any order issued under such
20 Act of any individual regarding whether such individual
21 is an employee or a non-employee engaged for the per-
22 formance of labor or services for purposes of section 6 or
23 7 of such Act (29 U.S.C. 206, 207), or in records required
24 under section 11(c) of such Act (29 U.S.C. 211(c)), shall
25 report such information to the Wage and Hour Division

1 of the Department. The Wage and Hour Division may re-
2 port such information to the Internal Revenue Service as
3 the Division considers appropriate.

4 (b) REGULATIONS.—The Secretary of Labor shall
5 promulgate regulations to carry out this Act and the
6 amendments made by this Act.

7 **SEC. 6. TARGETED AUDITS.**

8 The audits of employers subject to the Fair Labor
9 Standards Act of 1938 (29 U.S.C. 201 et seq.) that are
10 conducted by the Wage and Hour Division of the Depart-
11 ment of Labor shall include certain industries with fre-
12 quent incidence of misclassifying employees as non-em-
13 ployees, as determined by the Secretary of Labor.

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