IN THE HOUSE OF REPRESENTATIVES
MAY 8, 2014
Mr. COURTNEY (for himself, Mr. PAYNE, Mr. GEORGE MILLER of California, Mr. TIERNEY, and Mr. BISHOP of New York) introduced the following bill; which was referred to the Committee on Education and the Workforce, 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 of 1938 to ensure that employees are not misclassified as non-employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This Act may be cited as the “Payroll Fraud Prevention Act of 2014”.
SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EMPLOYEES.

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

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

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

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

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

“(1) an employee of the employer; or

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

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

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

“(ii) who is providing labor or services to the person through an entity that is a trust, estate, partnership, association, company, or corporation (as such terms are used in section
7701(a)(1) of the Internal Revenue Code of 1986) if—

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

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

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

(b) Classification as Employees.—Section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) is amended—

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

“(c) Recordkeeping; Classification; Notice.—

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

(2) by adding at the end the following:

“(2) Classification.—
“(A) IN GENERAL.—Every person (including every employer and enterprise), who employs any employee engaged in commerce or in the production of goods for commerce or engages any non-employee engaged in commerce or in the production of goods for commerce, shall—

“(i) accurately classify each covered individual as an employee or a non-employee (as the case may be);

“(ii) provide, to each covered individual, a written notice that—

“(I) informs the covered individual of the classification of such individual, by the person submitting the notice, as an employee or a non-employee;

“(II) includes a statement directing such individual to the Department of Labor website established under section 3 of the Payroll Fraud Prevention Act of 2014, or other appropriate resources, for the purpose of providing further information about the legal rights of an employee;
“(III) includes the address and telephone number for the applicable local office of the Department of Labor; and

“(IV) includes for each covered individual classified as a non-employee by the person providing the notice, the following statement: ‘Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or a 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

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

“(B) TIMING OF NOTICE.—

“(i) IN GENERAL.—The notice described in subparagraph (A)(ii) shall be provided, at a minimum, to each covered individual not later than 6 months after the date of enactment of the Payroll Fraud Prevention Act of 2014, and thereafter—
“(I) for each new employee, upon employment; and

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

“(ii) CHANGE IN STATUS.—Each person required to provide a notice under subparagraph (A)(ii) to a covered individual shall also provide such notice to such individual upon changing the status of such individual as an employee or a non-employee.

“(C) PRESUMPTION.—

“(i) IN GENERAL.—For purposes of this Act and the regulations or orders issued under this Act, a covered individual to whom a person is required to provide a notice under subparagraph (A)(ii) shall be presumed to be an employee of the person if the person has not provided the individual with such notice within the time required under subparagraph (B).

“(ii) REBUTTAL.—The presumption under clause (i) shall be rebutted only through the presentation of clear and convincing evidence that a covered individual
described in such subparagraph is not an
employee of the person.”.

(c) SPECIAL PROHIBITED ACTS.—Section 15(a) of
is amended—

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

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

“(A) opposed any practice, filed any peti-
tion or complaint, or instituted or caused to be
instituted any proceeding—

“(i) under or related to this Act (in-
cluding concerning the status of a covered
individual as an employee or a non-em-
ployee for purposes of this Act); or

“(ii) concerning the status of a cov-
ered individual as an employee or a non-
employee for employment tax purposes
within the meaning of subtitle C of the In-
ternal Revenue Code of 1986;

“(B) testified or is about to testify in any
proceeding described in subparagraph (A); or
“(C) served, or is about to serve, on an industry committee;”;

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

(3) by adding at the end the following:

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

(d) Special Penalty for Certain Misclassification, Recordkeeping, and Notice Violations.—Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended—

(1) in subsection (b)—

(A) in the sixth sentence, by striking “any employee” each place the term occurs and inserting “any covered individual”;

(B) in the fourth sentence—

(i) by striking “employees” and inserting “covered individual”; and

(ii) by striking “he gives his consent” and inserting “such covered individual consents”;

(C) in the third sentence—
(i) by striking “either of the preceding sentences” and inserting “any of the preceding sentences”;

(ii) by striking “one or more employees” and inserting “one or more covered individuals”; and

(iii) by striking “in behalf of himself or themselves and other employees” and inserting “on behalf of such covered individual or individuals and other covered individuals”; and

(D) by inserting after the first sentence the following: “Such liquidated damages are doubled (subject to section 11 of the Portal-to-Portal Act of 1947 (29 U.S.C. 260)) 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), by striking paragraph (2) and inserting the following:

“(2) Any person who violates section 6, 7, 11(e), or 15(a)(6) shall be subject to a civil penalty, for each employee or other individual who was the subject of such a violation, in an amount—
“(A) not to exceed $1,100; or
“(B) in the case of a person who has repeatedly
or willfully committed such violation, not to exceed
$5,000.”.

SEC. 3. EMPLOYEE RIGHTS WEBSITE.

Not later than 180 days after the date of enactment
of this Act, the Secretary of Labor shall establish a single
webpage on the Department of Labor website that sum-
marizes in plain language the rights of employees and non-
employees under the Fair Labor Standards Act of 1938
(29 U.S.C. 201 et seq.), including the rights described in
the amendments made by section 2.

SEC. 4. MISCLASSIFICATION OF EMPLOYEES FOR UNEMP-
PLOYMENT COMPENSATION PURPOSES.

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

(1) in paragraph (11)(B), by striking the period
and inserting “; and”;

(2) in paragraph (12), by striking the period
and inserting “; and”; and

(3) by adding after paragraph (12) the fol-
lowing:

“(13)(A) Such auditing and investigative proce-
dures as may be necessary to identify employers that
have not registered under the State law or that are
paying unreported wages, 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 the procedures under subparagraph (A); and

“(14) the establishment of administrative penalties for misclassifying employees, or paying unreported wages 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 the performance of States in conducting unemployment compensation tax audits, a specific measure of the effectiveness of States in identifying the underreporting of wages and the underpayment of unemployment compensation contributions (including the effectiveness of States in identifying instances of such underreporting 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 enactment of this Act.

(2) Exception.—If the Secretary of Labor finds that legislation is necessary 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 regular session of the legislature of such State that begins after the date of enactment of this Act; or

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

(d) Definition of State.—For purposes of this section, the term “State” has the meaning given the term in section 3306(j) of the Internal Revenue Code of 1986.

SEC. 5. DEPARTMENT OF LABOR COORDINATION, REFERRAL, AND REGULATIONS.

(a) 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 informa-
tion regarding the misclassification by a person subject to
the provisions of the Fair Labor Standards Act of 1938
(29 U.S.C. 201 et seq.), or any order issued under such
Act of any individual regarding whether such individual
is an employee or a non-employee engaged in the perform-
ance of labor or services for purposes of section 6 or 7
of such Act (29 U.S.C. 206, 207), or in records required
under section 11(c) of such Act (29 U.S.C. 211(c)), shall
report such information to the Wage and Hour Division
of the Department of Labor. The Wage and Hour Division
may report such information to the Internal Revenue
Service as the Wage and Hour Division considers appro-
priate.

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

SEC. 6. TARGETED AUDITS.

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