

113TH CONGRESS
1ST SESSION

S. 1687

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

NOVEMBER 12, 2013

Mr. CASEY (for himself, Mr. BROWN, Mr. HARKIN, and Mr. FRANKEN) 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 of 2013”.

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 trade or business of the person, for the performance
9 of 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 trade or business of the person,
18 for the 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 was an
12 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 each covered
9 individual as an employee or a non-em-
10 ployee (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 classification of such in-
15 dividual, by the person submitting the
16 notice, 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 website established under
21 section 3 of the Payroll Fraud Pre-
22 vention Act of 2013, or other appro-
23 priate resources, for the purpose of
24 providing further information about
25 the legal rights of an employee;

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 a 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, to each covered
23 individual not later than 6 months after
24 the date of enactment of the Payroll Fraud
25 Prevention Act of 2013, and thereafter—

1 “(I) for each new employee, upon
2 employment; and

3 “(II) for each new non-employee,
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 the status of such in-
11 dividual as an employee or a 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, filed any peti-
12 tion or complaint, or instituted or caused to be
13 instituted any proceeding—

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

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

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—

18 (i) by striking “employees” and in-
19 serting “covered individual”; and

20 (ii) by striking “he gives his consent”
21 and inserting “such covered individual con-
22 sents”;

23 (C) in the third sentence—

1 (i) by striking “either of the preceding
2 sentences” and inserting “any of the pre-
3 ceding sentences”;

4 (ii) by striking “one or more employ-
5 ees” and inserting “one or more covered
6 individuals”; and

7 (iii) by striking “in behalf of himself
8 or themselves and other employees” and
9 inserting “on behalf of such covered indi-
10 vidual or individuals and other covered in-
11 dividuals”; and

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

20 (2) in subsection (e), by striking paragraph (2)
21 and inserting the following:

22 “(2) Any person who violates section 6, 7, 11(c), or
23 15(a)(6) shall be subject to a civil penalty, for each em-
24 ployee or other individual who was the subject of such a
25 violation, in an amount—

1 paying unreported wages, where these actions or
2 omissions by the employers have the effect of exclud-
3 ing employees from unemployment compensation
4 coverage; and

5 “(B) the making of quarterly reports to the
6 Secretary of Labor (in such form as the Secretary
7 of Labor may require) describing the results of the
8 procedures under subparagraph (A); and

9 “(14) the establishment of administrative pen-
10 alties for misclassifying employees, or paying unre-
11 ported wages to employees without proper record-
12 keeping, for unemployment compensation pur-
13 poses.”.

14 (b) REVIEW OF AUDITING PROGRAMS.—The Sec-
15 retary of Labor shall include, in the Department of La-
16 bor’s system for measuring the performance of States in
17 conducting unemployment compensation tax audits, a spe-
18 cific measure of the effectiveness of States in identifying
19 the underreporting of wages and the underpayment of un-
20 employment compensation contributions (including the ef-
21 fectiveness of States in identifying instances of such
22 underreporting or underpayments despite the absence of
23 cancelled checks, original time sheets, or other similar doc-
24 umentation).

25 (c) EFFECTIVE DATE.—

1 tion regarding the misclassification by a person subject to
2 the provisions of the Fair Labor Standards Act of 1938
3 (29 U.S.C. 201 et seq.), or any order issued under such
4 Act of any individual regarding whether such individual
5 is an employee or a non-employee engaged in the perform-
6 ance of labor or services for purposes of section 6 or 7
7 of such Act (29 U.S.C. 206, 207), or in records required
8 under section 11(c) of such Act (29 U.S.C. 211(c)), shall
9 report such information to the Wage and Hour Division
10 of the Department of Labor. The Wage and Hour Division
11 may report such information to the Internal Revenue
12 Service as the Wage and Hour Division considers appro-
13 priate.

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

17 **SEC. 6. TARGETED AUDITS.**

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

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