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.

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 2013”.
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 2013, 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 2013, 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 the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)) is amended—

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

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

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

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

“(ii) concerning the status of a covered individual as an employee or a non-employee for employment tax purposes within the meaning of subtitle C of the Internal 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 summarizes 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 UNEMPLOYMENT COMPENSATION PURPOSES.

(a) IN GENERAL.—Section 303(a) of the Social Security 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 following:

“(13)(A) Such auditing and investigative procedures 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 exclud-
ing 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 pen-
alties for misclassifying employees, or paying unre-
ported wages to employees without proper record-
keeping, for unemployment compensation pur-
poses.”.

(b) Review of Auditing Programs.—The Sec-
retary of Labor shall include, in the Department of La-
bor’s system for measuring the performance of States in
conducting unemployment compensation tax audits, a spe-
cific measure of the effectiveness of States in identifying
the underreporting of wages and the underpayment of un-
employment compensation contributions (including the ef-
fectiveness of States in identifying instances of such
underreporting or underpayments despite the absence of
cancelled checks, original time sheets, or other similar doc-
umentation).

(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
carried out by the Wage and Hour Division of the Depart-
ment of Labor shall include certain industries with fre-
quency of misclassifying employees as non-em-
ployees, as determined by the Secretary of Labor.