

105TH CONGRESS
1ST SESSION

S. 473

To amend the Internal Revenue Code of 1986 to clarify the standards used for determining that certain individuals are not employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 19, 1997

Mr. BOND (for himself and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to clarify the standards used for determining that certain individuals are not 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 “Independent Contrac-
5 tor Tax Reform Act of 1997”.

6 **SEC. 2. SAFE HARBOR FOR DETERMINING THAT CERTAIN**
7 **INDIVIDUALS ARE NOT EMPLOYEES.**

8 (a) IN GENERAL.—Chapter 25 of the Internal Reve-
9 nue Code of 1986 (relating to general provisions relating

1 to employment taxes) is amended by adding after section
 2 3510 the following new section:

3 **“SEC. 3511. SAFE HARBOR FOR DETERMINING THAT CER-**
 4 **TAIN INDIVIDUALS ARE NOT EMPLOYEES.**

5 “(a) SAFE HARBOR.—

6 “(1) IN GENERAL.—For purposes of this title,
 7 if the requirements of subsections (b), (c), and (d),
 8 or the requirements of subsections (d) and (e), are
 9 met with respect to any service performed by any in-
 10 dividual, then with respect to such service—

11 “(A) the service provider shall not be
 12 treated as an employee,

13 “(B) the service recipient shall not be
 14 treated as an employer,

15 “(C) the payor shall not be treated as an
 16 employer, and

17 “(D) compensation paid or received for
 18 such service shall not be treated as paid or re-
 19 ceived with respect to employment.

20 “(2) AVAILABILITY OF SAFE HARBOR NOT TO
 21 LIMIT APPLICATION OF OTHER LAWS.—Nothing in
 22 this section shall be construed—

23 “(A) as limiting the ability of a service
 24 provider, service recipient, or payor to apply
 25 other applicable provisions of this title, section

1 530 of the Revenue Act of 1978, or the com-
 2 mon law in determining whether an individual
 3 is not an employee, or

4 “(B) as a prerequisite for the application
 5 of any provision of law described in subpara-
 6 graph (A).

7 “(b) SERVICE PROVIDER REQUIREMENTS WITH RE-
 8 GARD TO THE SERVICE RECIPIENT.—For purposes of sub-
 9 section (a), the requirements of this subsection are met
 10 if the service provider, in connection with performing the
 11 service—

12 “(1) has the ability to realize a profit or loss,

13 “(2) incurs unreimbursed expenses which are
 14 ordinary and necessary to the service provider’s in-
 15 dustry and which represent an amount at least equal
 16 to 2 percent of the service provider’s adjusted gross
 17 income attributable to services performed pursuant
 18 to 1 or more contracts described in subsection (d),
 19 and

20 “(3) agrees to perform services for a particular
 21 amount of time or to complete a specific result or
 22 task.

23 “(c) ADDITIONAL SERVICE PROVIDER REQUIRE-
 24 MENTS WITH REGARD TO OTHERS.—For the purposes of

1 subsection (a), the requirements of this subsection are met
 2 if the service provider—

3 “(1) has a principal place of business,

4 “(2) does not primarily provide the service at a
 5 single service recipient’s facilities,

6 “(3) pays a fair market rent for use of the serv-
 7 ice recipient’s facilities, or

8 “(4) operates primarily with equipment not
 9 supplied by the service recipient.

10 “(d) WRITTEN DOCUMENT REQUIREMENTS.—For
 11 purposes of subsection (a), the requirements of this sub-
 12 section are met if the services performed by the service
 13 provider are performed pursuant to a written contract be-
 14 tween such service provider and the service recipient, or
 15 the payor, and such contract provides that the service pro-
 16 vider will not be treated as an employee with respect to
 17 such services for Federal tax purposes.

18 “(e) BUSINESS STRUCTURE AND BENEFITS RE-
 19 QUIREMENT.—For purposes of subsection (a), the require-
 20 ments of this subsection are met if the service provider—

21 “(1) conducts business as a properly constituted
 22 corporation or limited liability company under appli-
 23 cable State laws, and

1 “(2) does not receive from the service recipient
2 or payor benefits that are provided to employees of
3 the service recipient.

4 “(f) SPECIAL RULES.—For purposes of this sec-
5 tion—

6 “(1) FAILURE TO MEET REPORTING REQUIRE-
7 MENTS.—If for any taxable year any service recipi-
8 ent or payor fails to meet the applicable reporting
9 requirements of section 6041(a) or 6041A(a) with
10 respect to a service provider, then, unless the failure
11 is due to reasonable cause and not willful neglect,
12 the safe harbor provided by this section for deter-
13 mining whether individuals are not employees shall
14 not apply to such service recipient or payor with re-
15 spect to that service provider.

16 “(2) BURDEN OF PROOF.—For purposes of
17 subsection (a), if—

18 “(A) a service provider, service recipient,
19 or payor establishes a prima facie case that it
20 was reasonable not to treat a service provider
21 as an employee for purposes of this section, and

22 “(B) the service provider, service recipient,
23 or payor has fully cooperated with reasonable
24 requests from the Secretary or his delegate,

1 then the burden of proof with respect to such treat-
 2 ment shall be on the Secretary.

3 “(3) RELATED ENTITIES.—If the service pro-
 4 vider is performing services through an entity owned
 5 in whole or in part by such service provider, the ref-
 6 erences to ‘service provider’ in subsections (b)
 7 through (e) may include such entity, provided that
 8 the written contract referred to in subsection (d) is
 9 with such entity.

10 “(g) DETERMINATIONS BY THE SECRETARY.—For
 11 purposes of this title—

12 “(1) IN GENERAL.—

13 “(A) DETERMINATIONS WITH RESPECT TO
 14 A SERVICE RECIPIENT OR A PAYOR.—A deter-
 15 mination by the Secretary that a service recipi-
 16 ent or a payor should have treated a service
 17 provider as an employee shall be effective no
 18 earlier than the notice date if—

19 “(i) the service recipient or the payor
 20 entered into a written contract satisfying
 21 the requirements of subsection (d),

22 “(ii) the service recipient or the payor
 23 satisfied the applicable reporting require-
 24 ments of section 6041(a) or 6041A(a) for

all taxable years covered by the agreement described in clause (i), and

“(iii) the service recipient or the payor demonstrates a reasonable basis for determining that the service provider is not an employee and that such determination was made in good faith.

“(B) DETERMINATIONS WITH RESPECT TO A SERVICE PROVIDER.—A determination by the Secretary that a service provider should have been treated as an employee shall be effective no earlier than the notice date if—

“(i) the service provider entered into a contract satisfying the requirements of subsection (d),

“(ii) the service provider satisfied the applicable reporting requirements of sections 6012(a) and 6017 for all taxable years covered by the agreement described in clause (i), and

“(iii) the service provider demonstrates a reasonable basis for determining that the service provider is not an employee and that such determination was made in good faith.

1 “(C) REASONABLE CAUSE EXCEPTION.—

2 The requirements of subparagraph (A)(ii) or
 3 (B)(ii) shall be treated as being met if the fail-
 4 ure to satisfy the applicable reporting require-
 5 ments is due to reasonable cause and not willful
 6 neglect.

7 “(2) CONSTRUCTION.—Nothing in this sub-
 8 section shall be construed as limiting any provision
 9 of law that provides an opportunity for administra-
 10 tive or judicial review of a determination by the Sec-
 11 retary.

12 “(3) NOTICE DATE.—For purposes of this sub-
 13 section, the notice date is the 30th day after the ear-
 14 lier of—

15 “(A) the date on which the first letter of
 16 proposed deficiency that allows the service pro-
 17 vider, the service recipient, or the payor an op-
 18 portunity for administrative review in the Inter-
 19 nal Revenue Service Office of Appeals is sent,
 20 or

21 “(B) the date on which the deficiency no-
 22 tice under section 6212 is sent.

23 “(h) DEFINITIONS.—For the purposes of this sec-
 24 tion—

1 “(1) SERVICE PROVIDER.—The term ‘service
2 provider’ means any individual who performs a serv-
3 ice for another person.

4 “(2) SERVICE RECIPIENT.—Except as provided
5 in paragraph (4), the term ‘service recipient’ means
6 the person for whom the service provider performs
7 such service.

8 “(3) PAYOR.—Except as provided in paragraph
9 (4), the term ‘payor’ means the person who pays the
10 service provider for the performance of such service
11 in the event that the service recipient does not pay
12 the service provider.

13 “(4) EXCEPTIONS.—The terms ‘service recipi-
14 ent’ and ‘payor’ do not include any entity in which
15 the service provider owns in excess of 5 percent of—

16 “(A) in the case of a corporation, the total
17 combined voting power of stock in the corpora-
18 tion, or

19 “(B) in the case of an entity other than a
20 corporation, the profits or beneficial interests in
21 the entity.

22 “(5) IN CONNECTION WITH PERFORMING THE
23 SERVICE.—The term ‘in connection with performing
24 the service’ means in connection or related to the op-
25 eration of the service provider’s trade or business.

1 “(6) PRINCIPAL PLACE OF BUSINESS.—For
 2 purposes of subsection (c), a home office shall in any
 3 case qualify as the principal place of business if—

4 “(A) the office is the location where the
 5 service provider’s essential administrative or
 6 management activities are conducted on a regu-
 7 lar and systematic (and not incidental) basis by
 8 the service provider, and

9 “(B) the office is necessary because the
 10 service provider has no other location for the
 11 performance of the essential administrative or
 12 management activities of the business.

13 “(7) FAIR MARKET RENT.—The term ‘fair mar-
 14 ket rent’ means a periodic, fixed minimum rental fee
 15 which is based on the fair rental value of the facili-
 16 ties and is established pursuant to a written agree-
 17 ment with terms similar to those offered to unre-
 18 lated persons for facilities of similar type and qual-
 19 ity.”

20 (b) CLARIFICATION OF RULES REGARDING EVI-
 21 DENCE OF CONTROL.—For purposes of determining
 22 whether an individual is an employee under the Internal
 23 Revenue Code of 1986 (26 U.S.C. 1 et seq.), compliance
 24 with statutory or regulatory standards shall not be treated
 25 as evidence of control.

1 (c) REPEAL OF SECTION 530(d) OF THE REVENUE
 2 ACT OF 1978.—Section 530(d) of the Revenue Act of
 3 1978 (as added by section 1706 of the Tax Reform Act
 4 of 1986) is repealed.

5 (d) CLERICAL AMENDMENT.—The table of sections
 6 for chapter 25 of such Code is amended by adding at the
 7 end the following new item:

“Sec. 3511. Safe harbor for determining that certain individuals
 are not employees.”

8 (e) EFFECTIVE DATES.—

9 (1) IN GENERAL.—The amendments made by,
 10 and the provisions of, this section shall apply to
 11 services performed after the date of enactment of
 12 this Act.

13 (2) DETERMINATIONS BY SECRETARY.—Section
 14 3511(g) of the Internal Revenue Code of 1986 (as
 15 added by subsection (a)) shall apply to determina-
 16 tions after the date of enactment of this Act.

17 (3) SECTION 530(d).—The amendment made by
 18 subsection (c) shall apply to periods ending after the
 19 date of enactment of this Act.

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