

106TH CONGRESS
1ST SESSION

S. 344

To amend the Internal Revenue Code of 1986 to provide a safe harbor
for determining that certain individuals are not employees.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 1999

Mr. BOND (for himself, Mr. NICKLES, Ms. SNOWE, Mr. COVERDELL, Mr.
BENNETT, and Mr. COCHRAN) 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 provide
a safe harbor for determining that certain individuals
are not employees.

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 Simplification and Relief Act of 1999”.

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

3 (a) IN GENERAL.—Chapter 25 (relating to general
 4 provisions relating to employment taxes) is amended by
 5 adding after section 3510 the following new section:

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

8 “(a) SAFE HARBOR.—

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

14 “(A) the service provider shall not be
 15 treated as an employee,

16 “(B) the service recipient shall not be
 17 treated as an employer,

18 “(C) the payor shall not be treated as an
 19 employer, and

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

23 “(2) AVAILABILITY OF SAFE HARBOR NOT TO
 24 LIMIT APPLICATION OF OTHER LAWS.—Nothing in
 25 this section shall be construed—

1 “(A) as limiting the ability of a service
 2 provider, service recipient, or payor to apply
 3 other provisions of this title, section 530 of the
 4 Revenue Act of 1978, or the common law in de-
 5 termining whether an individual is not an em-
 6 ployee, or

7 “(B) as a prerequisite for the application
 8 of any provision of law described in subpara-
 9 graph (A).

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

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

16 “(2) agrees to perform services for a particular
 17 amount of time or to complete a specific result or
 18 task, and

19 “(3) either—

20 “(A) incurs unreimbursed expenses which
 21 are ordinary and necessary to the service pro-
 22 vider’s industry and which represent an amount
 23 equal to at least 2 percent of the service provid-
 24 er’s adjusted gross income attributable to serv-

1 ices performed pursuant to 1 or more contracts
 2 described in subsection (d), or

3 “(B) has a significant investment in assets.

4 “(c) ADDITIONAL SERVICE PROVIDER REQUIRE-
 5 MENTS WITH REGARD TO OTHERS.—For the purposes of
 6 subsection (a), the requirements of this subsection are met
 7 if the service provider—

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

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

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

13 “(4) operates primarily from equipment not
 14 supplied by the service recipient.

15 “(d) WRITTEN DOCUMENT REQUIREMENTS.—For
 16 purposes of subsection (a), the requirements of this sub-
 17 section are met if the services performed by the service
 18 provider are performed pursuant to a written contract be-
 19 tween such service provider and the service recipient, or
 20 the payor, and such contract provides that the service pro-
 21 vider will not be treated as an employee with respect to
 22 such services for Federal tax purposes and that the service
 23 provider is responsible for the provider’s own Federal,
 24 State, and local income taxes, including self-employment
 25 taxes and any other taxes.

1 “(e) BUSINESS STRUCTURE AND BENEFITS RE-
 2 QUIREMENTS.—For purposes of subsection (a), the re-
 3 quirements of this subsection are met if the service
 4 provider—

5 “(1) conducts business as a properly constituted
 6 corporation or limited liability company under appli-
 7 cable State laws, and

8 “(2) does not receive from the service recipient
 9 or payor any benefits that are provided to employees
 10 of the service recipient.

11 “(f) SPECIAL RULES.—For purposes of this
 12 section—

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

23 “(2) CORPORATION AND LIMITED LIABILITY
 24 COMPANY SERVICE PROVIDERS.—

1 “(A) RETURNS REQUIRED.—If, for any
 2 taxable year, any corporation or limited liability
 3 company fails to file all Federal income and
 4 employment tax returns required under this
 5 title, unless the failure is due to reasonable
 6 cause and not willful neglect, subsection (e)
 7 shall not apply to such corporation or limited li-
 8 ability company.

9 “(B) RELIANCE BY SERVICE RECIPIENT OR
 10 PAYOR.—If a service recipient or a payor—

11 “(i) obtains a written statement from
 12 a service provider which states that the
 13 service provider is a properly constituted
 14 corporation or limited liability company,
 15 provides the State (or in the case of a for-
 16 eign entity, the country), and year of, in-
 17 corporation or formation, provides a mail-
 18 ing address, and includes the service pro-
 19 vider’s employer identification number, and

20 “(ii) makes all payments attributable
 21 to services performed pursuant to 1 or
 22 more contracts described in subsection (d)
 23 to such corporation or limited liability com-
 24 pany,

1 then the requirements of subsection (e)(1) shall
 2 be deemed to have been satisfied.

3 “(C) AVAILABILITY OF SAFE HARBOR.—

4 “(i) IN GENERAL.—For purposes of
 5 this section, unless otherwise established to
 6 the satisfaction of the Secretary, the num-
 7 ber of covered workers which are not treat-
 8 ed as employees by reason of subsection (e)
 9 for any calendar year shall not exceed the
 10 threshold number for the calendar year.

11 “(ii) THRESHOLD NUMBER.—For pur-
 12 poses of this paragraph, the term ‘thresh-
 13 old number’ means, for any calendar year,
 14 the greater of (I) 10 covered workers, or
 15 (II) a number equal to 3 percent of cov-
 16 ered workers.

17 “(iii) COVERED WORKER.—For pur-
 18 poses of this paragraph, the term ‘covered
 19 worker’ means an individual for whom the
 20 service recipient or payor paid employment
 21 taxes under subtitle C in all 4 quarters of
 22 the preceding calendar year.

23 “(3) BURDEN OF PROOF.—For purposes of
 24 subsection (a), if—

1 “(A) a service provider, service recipient,
 2 or payor establishes a prima facie case that it
 3 was reasonable not to treat a service provider
 4 as an employee for purposes of this section, and

5 “(B) the service provider, service recipient,
 6 or payor has fully cooperated with reasonable
 7 requests from the Secretary or his delegate,
 8 then the burden of proof with respect to such treat-
 9 ment shall be on the Secretary.

10 “(4) RELATED ENTITIES.—If the service pro-
 11 vider is performing services through an entity owned
 12 in whole or in part by such service provider, the ref-
 13 erences to service provider in subsections (b)
 14 through (e) shall include such entity if the written
 15 contract referred to in subsection (d) is with such
 16 entity.

17 “(g) DETERMINATIONS BY THE SECRETARY.—For
 18 purposes of this title—

19 “(1) IN GENERAL.—

20 “(A) DETERMINATIONS WITH RESPECT TO
 21 A SERVICE RECIPIENT OR A PAYOR.—A deter-
 22 mination by the Secretary that a service recipi-
 23 ent or a payor should have treated a service
 24 provider as an employee shall be effective no
 25 earlier than the notice date if—

1 “(i) the service recipient or the payor
 2 entered into a written contract satisfying
 3 the requirements of subsection (d),

4 “(ii) the service recipient or the payor
 5 satisfied the applicable reporting require-
 6 ments of section 6041(a) or 6041A(a) for
 7 all taxable years covered by the contract
 8 described in clause (i), and

9 “(iii) the service recipient or the payor
 10 demonstrates a reasonable basis for deter-
 11 mining that the service provider is not an
 12 employee and that such determination was
 13 made in good faith.

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

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

22 “(ii) the service provider satisfied the
 23 applicable reporting requirements of sec-
 24 tions 6012(a) and 6017 for all taxable

1 years covered by the contract described in
2 clause (i), and

3 “(iii) the service provider dem-
4 onstrates a reasonable basis for determin-
5 ing that the service provider is not an em-
6 ployee and that such determination was
7 made in good faith.

8 “(C) REASONABLE CAUSE EXCEPTION.—

9 The requirements of subparagraph (A)(ii) or
10 (B)(ii) shall be treated as being met if the fail-
11 ure to satisfy the applicable reporting require-
12 ments is due to reasonable cause and not willful
13 neglect.

14 “(2) CONSTRUCTION.—Nothing in this sub-
15 section shall be construed as limiting any provision
16 of law that provides an opportunity for administra-
17 tive or judicial review of a determination by the Sec-
18 retary.

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

22 “(A) the date on which the first letter of
23 proposed deficiency that allows the service pro-
24 vider, the service recipient, or the payor an op-
25 portunity for administrative review in the Inter-

1 nal Revenue Service Office of Appeals is sent,
2 or

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

5 “(h) DEFINITIONS.—For the purposes of this
6 section—

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

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

14 “(3) PAYOR.—Except as provided in paragraph
15 (4), the term ‘payor’ means the person who pays the
16 service provider for the performance of such service
17 in the event that the service recipient does not pay
18 the service provider.

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

22 “(A) in the case of a corporation, the total
23 combined voting power of stock in the corpora-
24 tion, or

1 “(B) in the case of an entity other than a
2 corporation, the profits or beneficial interests in
3 the entity.

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

8 “(6) PRINCIPAL PLACE OF BUSINESS.—For
9 purposes of subsection (c), the term ‘principal place
10 of business’ has the same meaning as under section
11 280A(c)(1) (as in effect for taxable years beginning
12 after December 31, 1998).

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 contract
17 with terms similar to those offered to unrelated per-
18 sons for facilities of similar type and quality.”

19 (b) REPEAL OF SECTION 530(d) OF THE REVENUE
20 ACT OF 1978.—Section 530(d) of the Revenue Act of
21 1978 (as added by section 1706 of the Tax Reform Act
22 of 1986) is repealed.

23 (c) CLERICAL AMENDMENT.—The table of sections
24 for chapter 25 of the Internal Revenue Code of 1986 is
25 amended by adding at the end the following new item:

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

1 (d) EFFECTIVE DATES.—

2 (1) IN GENERAL.—The amendments made by
3 this section shall apply to services performed after
4 the date of the enactment of this Act.

5 (2) DETERMINATIONS BY THE SECRETARY.—
6 Section 3511(g) of the Internal Revenue Code of
7 1986 (as added by subsection (a)) shall apply to de-
8 terminations after the date of the enactment of this
9 Act.

10 (3) SECTION 531(d).—The amendment made by
11 subsection (b) shall apply to periods ending after the
12 date of the enactment of this Act.

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