

107TH CONGRESS
1ST SESSION

S. 837

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

MAY 7, 2001

Mr. BOND 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 Con-
5 tractor Determination Act of 2001”.

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

8 (a) IN GENERAL.—Chapter 25 of the Internal Rev-
9 enue 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 provisions of this title, section 530 of the

1 Revenue Act of 1978, or the common law in de-
2 termining whether an individual is not an em-
3 ployee, 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) agrees to perform services for a particular
14 amount of time or to complete a specific result or
15 task, and

16 “(3) either—

17 “(A) has a significant investment in assets,
18 or

19 “(B) incurs unreimbursed expenses which
20 are ordinary and necessary to the service pro-
21 vider’s industry and which represent an amount
22 equal to at least 2 percent of the service pro-
23 vider’s gross income attributable to services
24 performed pursuant to 1 or more contracts de-
25 scribed in subsection (d).

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

5 “(1) has a principal place of business,
6 “(2) does not primarily provide the service at a
7 single service recipient’s facilities,
8 “(3) pays a fair market rent for use of the serv-
9 ice recipient’s facilities, or
10 “(4) operates primarily from equipment sup-
11 plied by the service provider.

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

23 “(e) BUSINESS STRUCTURE AND BENEFITS RE-
24 QUIREMENTS.—For purposes of subsection (a), the re-

1 requirements of this subsection are met if the service
2 provider—

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

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

9 “(f) SPECIAL RULES.—For purposes of this
10 section—

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

21 “(2) CORPORATION AND LIMITED LIABILITY
22 COMPANY SERVICE PROVIDERS.—

23 “(A) RETURNS REQUIRED.—If, for any
24 taxable year, any corporation or limited liability
25 company fails to file all Federal income and

1 employment tax returns required under this
2 title, unless the failure is due to reasonable
3 cause and not willful neglect, subsection (e)
4 shall not apply to such corporation or limited
5 liability company.

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

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

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

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

24 “(C) AVAILABILITY OF SAFE HARBOR.—

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

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

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

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

22 “(A) a service provider, service recipient,
23 or payor establishes a prima facie case that it
24 was reasonable not to treat a service provider
25 as an employee for purposes of this section, and

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

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

13 “(g) DETERMINATIONS BY THE SECRETARY.—For
14 purposes of this title—

15 “(1) IN GENERAL.—

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

22 “(i) the service recipient or the payor
23 entered into a written contract satisfying
24 the requirements of subsection (d),

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

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

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

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

19 “(ii) the service provider satisfied the
20 applicable reporting requirements of sec-
21 tions 6012(a) and 6017 for all taxable
22 years covered by the contract described in
23 clause (i), and

24 “(iii) the service provider dem-
25 onstrates a reasonable basis for deter-

1 mining that the service provider is not an
2 employee and that such determination was
3 made in good faith.

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

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

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

1 “(h) DEFINITIONS.—For the purposes of this
2 section—

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

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

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

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

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

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

24 “(5) IN CONNECTION WITH PERFORMING THE
25 SERVICE.—The term ‘in connection with performing

1 the service' means in connection or related to the op-
2 eration of the service provider's trade or business.

3 “(6) PRINCIPAL PLACE OF BUSINESS.—For
4 purposes of subsection (c), the term ‘principal place
5 of business’ has the same meaning as under section
6 280A(c)(1).

7 “(7) FAIR MARKET RENT.—The term ‘fair mar-
8 ket rent’ means a periodic, fixed minimum rental fee
9 which is based on the fair rental value of the facili-
10 ties and is established pursuant to a written contract
11 with terms similar to those offered to unrelated per-
12 sons for facilities of similar type and quality.”.

13 (b) REPEAL OF SECTION 530(d) OF THE REVENUE
14 ACT OF 1978.—Section 530(d) of the Revenue Act of
15 1978 (as added by section 1706 of the Tax Reform Act
16 of 1986) is repealed.

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

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

20 (d) EFFECTIVE DATES.—

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

6 (3) SECTION 530(d).—The amendment made by
7 subsection (b) shall apply to periods ending after the
8 date of the enactment of this Act.

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