

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.

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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

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## 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.

4 “(C) REASONABLE CAUSE EXCEPTION.—  
5 The requirements of subparagraph (A)(ii) or  
6 (B)(ii) shall be treated as being met if the fail-  
7 ure to satisfy the applicable reporting require-  
8 ments is due to reasonable cause and not willful  
9 neglect.

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

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

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.

1           (2) DETERMINATIONS BY THE SECRETARY.—  
2       Section 3511(g) of the Internal Revenue Code of  
3       1986 (as added by subsection (a)) shall apply to de-  
4       terminations after the date of the enactment of this  
5       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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