

112TH CONGRESS  
2D SESSION

# S. 2145

To amend the Internal Revenue Code of 1986 to permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications.

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## IN THE SENATE OF THE UNITED STATES

MARCH 1, 2012

Mr. KERRY (for himself, Mrs. MURRAY, Mr. AKAKA, Mr. LEAHY, Mr. FRANKEN, Mr. BLUMENTHAL, Mr. BROWN of Ohio, Mrs. BOXER, and Mr. DURBIN) 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 permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications.

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; FINDINGS; PURPOSES.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Fair Playing Field Act of 2012”.

1 (b) FINDINGS.—Congress makes the following find-  
2 ings:

3 (1) In 1978, Congress was concerned that lack  
4 of clarity as to the proper classification of some  
5 workers, increased IRS enforcement activity, and  
6 retroactive application by IRS of interpretations that  
7 were arguably new had caused hardships for some  
8 small businesses and other taxpayers and confusion  
9 as to the applicable rules.

10 (2) To allow time to develop a comprehensive  
11 approach to the problem, Congress enacted section  
12 530 of the Revenue Act of 1978 as an interim meas-  
13 ure protecting taxpayers from liability for  
14 misclassification if the taxpayer has a reasonable  
15 basis for classifying a worker as an independent con-  
16 tractor and meets certain other conditions. In addi-  
17 tion, the Act prohibited the Secretary of the Treas-  
18 ury from publishing regulations or revenue rulings  
19 on workers' employment tax status pending the ex-  
20 pected near-term enactment of clarifying legislation.

21 (3) During the ensuing 33 years, Congress  
22 made section 530 of the Revenue Act of 1978 per-  
23 manent, however, changes in working relationships  
24 and the continued prohibition on new guidance have

1 increased the uncertainty as to the proper classifica-  
2 tion of workers.

3 (4) Many workers are properly classified as  
4 independent contractors. In other instances, workers  
5 who are employees are being treated as independent  
6 contractors. Such misclassification for tax purposes  
7 contributes to inequities in the competitive positions  
8 of businesses and to the Federal and State tax gap,  
9 and may also result in misclassification for other  
10 purposes, such as denial of unemployment benefits,  
11 workplace health and safety protections, and retire-  
12 ment or other benefits or protections available to  
13 employees.

14 (5) Workers, businesses, and other taxpayers  
15 will benefit from clear guidance regarding employ-  
16 ment tax status. In the interest of fairness and in  
17 view of many service recipients' reliance on current  
18 section 530, such guidance should apply only pro-  
19 spectively.

20 (c) PURPOSES.—The purposes of this Act are to per-  
21 mit the Secretary of the Treasury to provide guidance al-  
22 lowing workers and businesses to clearly understand the  
23 proper federal tax classification of workers and to provide  
24 relief allowing an orderly transition to new rules designed  
25 to increase certainty and uniformity of treatment.

1 **SEC. 2. AUTHORITY TO ISSUE GUIDANCE CLARIFYING EM-**  
 2 **PLOYMENT STATUS FOR PURPOSES OF EM-**  
 3 **PLOYMENT TAXES.**

4 (a) IN GENERAL.—Chapter 25 of the Internal Rev-  
 5 enue Code of 1986 is amended by adding at the end the  
 6 following new section:

7 **“SEC. 3511. AUTHORITY TO ISSUE GUIDANCE CLARIFYING**  
 8 **EMPLOYMENT STATUS.**

9 “(a) IN GENERAL.—The Secretary shall issue such  
 10 regulations or other guidance as the Secretary determines  
 11 to be necessary or appropriate to clarify the proper em-  
 12 ployment status of individuals for purposes of any tax im-  
 13 posed by this subtitle.

14 “(b) PROHIBITION ON RETROACTIVE ASSESS-  
 15 MENTS.—

16 “(1) IN GENERAL.—If—

17 “(A) for purposes of any tax imposed by  
 18 this subtitle, the taxpayer did not treat an indi-  
 19 vidual as an employee for any period before the  
 20 reclassification date with respect to such indi-  
 21 vidual, and

22 “(B) in the case of periods after December  
 23 31, 1978, and before such reclassification date,  
 24 all Federal tax returns (including information  
 25 returns) required to be filed by the taxpayer  
 26 with respect to such individual for such period

1           are filed on a basis consistent with the tax-  
2           payer's treatment of such individual as not  
3           being an employee,  
4       then, for purposes of applying such taxes for periods  
5       before such reclassification date with respect to the  
6       taxpayer, the individual shall be deemed not to be an  
7       employee unless the taxpayer had no reasonable  
8       basis for not treating such individual as an em-  
9       ployee.

10           “(2) STATUTORY STANDARDS PROVIDING ONE  
11       METHOD OF SATISFYING THE REQUIREMENTS OF  
12       PARAGRAPH (1).—For purposes of paragraph (1), a  
13       taxpayer shall in any case be treated as having a  
14       reasonable basis for not treating an individual as an  
15       employee for a period if the taxpayer's treatment of  
16       such individual for such period was in reasonable re-  
17       liance on any of the following:

18           “(A) Judicial precedent, published rulings,  
19       technical advice with respect to the taxpayer, or  
20       a letter ruling to the taxpayer.

21           “(B) A past Internal Revenue Service  
22       audit of the taxpayer in which there was no as-  
23       sessment attributable to the treatment (for pur-  
24       poses of any tax imposed by this subtitle) of the

1 individuals holding positions substantially simi-  
 2 lar to the position held by such individual.

3 “(C) Long-standing recognized practice of  
 4 a significant segment of the industry in which  
 5 such individual was engaged.

6 “(3) CONSISTENCY REQUIRED IN THE CASE OF  
 7 PRIOR TAX TREATMENT.—Paragraph (1) shall not  
 8 apply with respect to the treatment of any individual  
 9 (hereafter in this paragraph referred to as the re-  
 10 classified individual) for purposes of any tax im-  
 11 posed by this subtitle for any period ending after  
 12 December 31, 1978, if the taxpayer (or a prede-  
 13 cessor) has treated any individual holding a substan-  
 14 tially similar position as an employee for purposes of  
 15 any tax imposed by this subtitle for any period be-  
 16 ginning after December 31, 1977, and ending before  
 17 the reclassification date with respect to such reclas-  
 18 sified individual.

19 “(c) DEFINITIONS.—For purposes of this section—

20 “(1) RECLASSIFICATION DATE.—

21 “(A) IN GENERAL.—The term ‘reclassifica-  
 22 tion date’ means, with respect to any individual,  
 23 the earlier of—

24 “(i) the first day of the first calendar  
 25 quarter beginning more than 180 days

1 after the date of an employee classification  
2 determination with respect to such indi-  
3 vidual, or

4 “(ii) the effective date of the first ap-  
5 plicable final regulation issued by the Sec-  
6 retary under subsection (a) with respect to  
7 such individual (or, if later, the first day of  
8 the first calendar quarter beginning more  
9 than 180 days after such regulation is  
10 issued).

11 “(B) EMPLOYEE CLASSIFICATION DETER-  
12 MINATION.—The term ‘employee classification  
13 determination’ means, with respect to any indi-  
14 vidual, a determination by the Secretary, in  
15 connection with an audit of the taxpayer which  
16 is described in section 7436 and which com-  
17 mences after the date which is 1 year after the  
18 date of the enactment of this section, that a  
19 class of individuals holding positions with such  
20 taxpayer which are substantially similar to the  
21 position held by such individual are employees.

22 “(C) FIRST APPLICABLE FINAL REGULA-  
23 TION.—The term ‘first applicable final regula-  
24 tion’ means, with respect to any individual, the  
25 first final regulation (or other guidance of gen-

eral applicability) which sets forth the factors for determining the employment status of a class of individuals holding positions substantially similar to the position held by such individual.

“(2) EMPLOYMENT STATUS.—The term ‘employment status’ means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

“(d) CONTINUATION OF CERTAIN SPECIAL RULES.—

“(1) EXCEPTION FOR CERTAIN SKILLED WORKERS.—Subsection (b) shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

“(2) NOTICE OF AVAILABILITY OF SECTION.—

An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the



1 taxpayer, provide the taxpayer with a written notice  
 2 of the provisions of this section.

3 “(3) RULES RELATING TO STATUTORY STAND-  
 4 ARDS.—For purposes of subsection (b)(2)—

5 “(A) a taxpayer may not rely on an audit  
 6 commenced after December 31, 1996, for pur-  
 7 poses of subparagraph (B) thereof unless such  
 8 audit included an examination for purposes of  
 9 any tax imposed by this subtitle whether the in-  
 10 dividual involved (or any individual holding a  
 11 position substantially similar to the position  
 12 held by the individual involved) should be treat-  
 13 ed as an employee of the taxpayer,

14 “(B) in no event shall the significant seg-  
 15 ment requirement of subparagraph (C) thereof  
 16 be construed to require a reasonable showing of  
 17 the practice of more than 25 percent of the in-  
 18 dustry (determined by not taking into account  
 19 the taxpayer), and

20 “(C) in applying the long-standing recog-  
 21 nized practice requirement of subparagraph (C)  
 22 thereof—

23 “(i) such requirement shall not be  
 24 construed as requiring the practice to have  
 25 continued for more than 10 years, and

1           “(ii) a practice shall not fail to be  
2           treated as long-standing merely because  
3           such practice began after 1978.

4           “(4) AVAILABILITY OF SAFE HARBORS.—Noth-  
5           ing in this section shall be construed to provide that  
6           subsection (b) only applies where the individual in-  
7           volved is otherwise an employee of the taxpayer.

8           “(5) BURDEN OF PROOF.—

9           “(A) IN GENERAL.—If—

10           “(i) a taxpayer establishes a prima  
11           facie case that it was reasonable not to  
12           treat an individual as an employee for pur-  
13           poses of subsection (b), and

14           “(ii) the taxpayer has fully cooperated  
15           with reasonable requests from the Sec-  
16           retary,

17           then the burden of proof with respect to such  
18           treatment shall be on the Secretary.

19           “(B) EXCEPTION FOR OTHER REASONABLE  
20           BASIS.—In the case of any issue involving  
21           whether the taxpayer had a reasonable basis  
22           not to treat an individual as an employee for  
23           purposes of subsection (b), subparagraph (A)  
24           shall only apply for purposes of determining  
25           whether the taxpayer meets the requirements of

1           subparagraph (A), (B), or (C) of subsection  
2           (b)(2).

3           “(6) PRESERVATION OF PRIOR PERIOD SAFE  
4       HARBOR.—If—

5                 “(A) an individual would (but for the  
6           treatment referred to in subparagraph (B)) be  
7           deemed not to be an employee of the taxpayer  
8           under subsection (b) for any prior period, and

9                 “(B) such individual is treated by the tax-  
10          payer as an employee for purposes of the taxes  
11          imposed by this subtitle for any subsequent pe-  
12          riod,

13       then, for purposes of applying such taxes for such  
14       prior period with respect to the taxpayer, the indi-  
15       vidual shall be deemed not to be an employee.

16                 “(7) SUBSTANTIALLY SIMILAR POSITION.—For  
17       purposes of subsection (b) and this subsection, the  
18       determination as to whether an individual holds a  
19       position substantially similar to a position held by  
20       another individual shall include consideration of the  
21       relationship between the taxpayer and such individ-  
22       uals.

23                 “(8) TREATMENT OF TEST ROOM SUPERVISORS  
24       AND PROCTORS WHO ASSIST IN THE ADMINISTRA-

1       TION OF COLLEGE ENTRANCE AND PLACEMENT  
2       EXAMS.—

3               “(A) IN GENERAL.—In the case of an indi-  
4       vidual described in subparagraph (B) who is  
5       providing services as a test proctor or room su-  
6       pervisor by assisting in the administration of  
7       college entrance or placement examinations,  
8       subsection (b) shall be applied to such services  
9       performed after December 31, 2006 (and remu-  
10      neration paid for such services) without regard  
11      to paragraph (3) thereof.

12              “(B) APPLICABILITY.—An individual is de-  
13      scribed in this subparagraph if the individual—

14              “(i) is providing the services described  
15              in subsection (b) to an organization de-  
16              scribed in section 501(c) and exempt from  
17              tax under section 501(a), and

18              “(ii) is not otherwise treated as an  
19              employee of such organization for purposes  
20              of this subtitle.

21              “(9) TREATMENT OF SECURITIES BROKER  
22      DEALERS.—In determining for purposes of this title  
23      whether a registered representative of a securities  
24      broker-dealer is an employee (as defined in section  
25      3121(d)), no weight shall be given to instructions

1 from the service recipient which are imposed only in  
2 compliance with investor protection standards im-  
3 posed by the Federal Government, any State govern-  
4 ment, or a governing body pursuant to a delegation  
5 by a Federal or State agency.

6 “(e) STATEMENTS TO INDEPENDENT CONTRAC-  
7 TORS.—

8 “(1) IN GENERAL.—Each person who contracts  
9 for the services of an independent contractor on a  
10 regular and ongoing basis, within the scope of such  
11 person’s trade or business, shall provide a written  
12 statement to such independent contractor notifying  
13 such independent contractor of the Federal tax obli-  
14 gations of an independent contractor, the labor and  
15 employment law protections that do not apply to  
16 independent contractors, and the right of such inde-  
17 pendent contractor to seek a status determination  
18 from the Internal Revenue Service.

19 “(2) INDEPENDENT CONTRACTOR.—For pur-  
20 poses of this subsection, the term ‘independent con-  
21 tractor’ means any individual who is not treated as  
22 an employee by the person receiving the services re-  
23 ferred to in paragraph (1).

24 “(3) TIMING OF STATEMENT.—Except as other-  
25 wise provided by the Secretary, the statement re-

1       quired under paragraph (1) shall be provided within  
 2       a reasonable period of entering into the contract re-  
 3       ferred to in paragraph (1).

4               “(4) DEVELOPMENT OF MODEL STATEMENT.—  
 5       The Secretary shall develop model materials for pro-  
 6       viding the statement required under paragraph  
 7       (1).”.

8       (b) REDUCED PENALTY NOT APPLICABLE IN CASES  
 9       OF NONCOMPLIANCE WITH GUIDANCE WITHOUT REA-  
 10      SONABLE BASIS.—Subsection (c) of section 3509 of the  
 11      Internal Revenue Code of 1986 is amended—

12              (1) by striking “if such liability” and inserting  
 13      “if—

14              “(1) such liability”, and

15              (2) by striking the period at the end and insert-  
 16      ing “, or

17              “(2) such liability relates to an individual who  
 18      is treated as an employee under regulations or other  
 19      guidance issued by the Secretary under section  
 20      3511(a) and the taxpayer lacks a reasonable basis  
 21      for treating the individual as other than an em-  
 22      ployee.

23      In the case of a taxpayer which has received a final written  
 24      determination from the Internal Revenue Service holding  
 25      that the individual referred to in paragraph (2) (or an-

1 other individual who holds a position with the taxpayer  
 2 substantially similar to the position held by such indi-  
 3 vidual) is an employee, such taxpayer shall be treated for  
 4 purposes of paragraph (2) as lacking a reasonable basis  
 5 for treating such individual as other than an employee  
 6 with respect to periods beginning on and after the first  
 7 day of the first calendar quarter beginning more than 180  
 8 days after the date of such written determination unless  
 9 the taxpayer establishes by clear and convincing evidence  
 10 that the taxpayer has a reasonable basis for such treat-  
 11 ment.”.

12 (c) CONFORMING AMENDMENTS.—

13 (1) Paragraph (2) of section 6724(d) of the In-  
 14 ternal Revenue Code of 1986 is amended by striking  
 15 “or” at the end of subparagraph (GG), by striking  
 16 the period at the end of subparagraph (HH) and in-  
 17 serting “, or”, and by inserting after subparagraph  
 18 (HH) the following new subparagraph:

19 “(II) section 3511(e) (relating to state-  
 20 ments to independent contractors).”.

21 (2) Paragraph (2) of section 7436(a) of such  
 22 Code is amended by striking “subsection (a) of sec-  
 23 tion 530 of the Revenue Act of 1978” and inserting  
 24 “section 3511(b)”.

1           (3) The table of sections for chapter 25 of such  
 2           Code is amended by adding at the end the following  
 3           new item:

“Sec. 3511. Authority to issue guidance clarifying employment status.”.

4           (d) TERMINATION OF SECTION 530 OF THE REV-  
 5           ENUE ACT OF 1978.—The Revenue Act of 1978 is amend-  
 6           ed by striking section 530.

7           (e) REPORTS ON WORKER MISCLASSIFICATION.—Be-  
 8           ginning with the first fiscal year beginning after the date  
 9           the first regulation or other guidance is issued for public  
 10          comment under section 3511(a) of the Internal Revenue  
 11          Code of 1986 (as added by this section):

12           (1) A report each fiscal year on worker classi-  
 13          fication which shall include the total number of ex-  
 14          aminations of employers initiated because of sus-  
 15          pected worker classification issues, the total number  
 16          of examinations that included determinations on  
 17          worker classification issues, the amount of additional  
 18          tax liabilities associated with worker classification  
 19          enforcement actions, the number of workers reclassi-  
 20          fied as a result of these actions, the number of re-  
 21          quests for Determination of Worker Status (Form  
 22          SS-8), and technical guidance on how to understand  
 23          the data provided in the report.

24           (2) A report each fiscal year in which new sta-  
 25          tistically valid data is compiled and interpreted on



1 worker classification, prepared on the basis of infor-  
2 mation gathered during an Employment Tax Study  
3 conducted by the National Research Program (NRP)  
4 of the Internal Revenue Service. Such report shall  
5 provide statistical estimates of the number of em-  
6 ployers misclassifying workers, the number of work-  
7 ers misclassified, the industries involved, data inter-  
8 pretations and conclusions, and a description of the  
9 impact of improper worker classification on the em-  
10 ployment tax gap.

11 (f) EFFECTIVE DATES.—

12 (1) DELAYED EFFECTIVE DATE OF REGULA-  
13 TIONS AND GUIDANCE.—Except as provided in para-  
14 graph (2), any regulation or other guidance issued  
15 under section 3511(a) of the Internal Revenue Code  
16 of 1986, as added by this section, shall not apply to  
17 services rendered before the date which is 1 year  
18 after the date of the enactment of this Act.

19 (2) TREATMENT OF SECURITIES BROKER DEAL-  
20 ERS.—Paragraph (9) of section 3511(d) of the In-  
21 ternal Revenue Code of 1986, as added by this sec-  
22 tion, shall apply to services performed after Decem-  
23 ber 31, 1997.

24 (3) AUTHORITY TO ISSUE REGULATIONS AND  
25 GUIDANCE IMMEDIATELY.—So much of the amend-

1       ment made by subsection (d) as relates to subsection  
2       (b) of section 530 of the Revenue Act of 1978 shall  
3       take effect on the date of the enactment of this Act.

4               (4) DELAYED TERMINATION OF REMAINDER OF  
5       SECTION 530 OF THE REVENUE ACT OF 1978.—Ex-  
6       cept as provided in paragraph (3), the amendments  
7       made by subsections (c)(1) and (d) shall apply to  
8       services rendered on or after the date which is 1  
9       year after the date of the enactment of this Act.

○