S. 1549

To amend the Internal Revenue Code of 1986 to provide a safe harbor for determinations of worker classification, to require increased reporting, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 13, 2017

Mr. THUNE 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 determinations of worker classification, to require increased reporting, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE.

This Act may be cited as the “New Economy Works to Guarantee Independence and Growth Act of 2017” or the “NEW GIG Act of 2017”.


SEC. 2. DETERMINATION OF WORKER CLASSIFICATION.

(a) IN GENERAL.—Chapter 79 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

"SEC. 7706. DETERMINATION OF WORKER CLASSIFICATION.

"(a) IN GENERAL.—For purposes of this title (and notwithstanding any provision of this title not contained in this section to the contrary), if the requirements of subsections (b), (c), and (d) are met with respect to any service performed by a service provider, then with respect to such service—

"(1) the service provider shall not be treated as an employee,

"(2) the service recipient shall not be treated as an employer,

"(3) any payor shall not be treated as an employer, and

"(4) the compensation paid or received for such service shall not be treated as paid or received with respect to employment.

"(b) GENERAL SERVICE PROVIDER REQUIREMENTS.—

"(1) IN GENERAL.—The requirements of this subsection are met with respect to any service if the service provider either—
“(A) meets the requirements of paragraph (2) with respect to such service, or

“(B) in the case of a service provider engaged in the trade or business of selling (or soliciting the sale of) goods or services, meets the requirements of paragraph (3) with respect to such service.

“(2) GENERAL REQUIREMENTS.—

“(A) IN GENERAL.—The requirements of this paragraph are met with respect to any service if the service provider, in connection with performing the service—

“(i) incurs expenses—

“(I) which are deductible under section 162, and

“(II) a significant portion of which are not reimbursed,

“(ii) agrees to perform the service for a particular amount of time, to achieve a specific result, or to complete a specific task, and

“(iii) satisfies not less than one of the factors described in subparagraph (B).

“(B) FACTORS.—The factors described in this subparagraph are the following:
“(i) The service provider has a significant investment in assets or training which are applicable to the service performed.

“(ii) The service provider is not required to perform services exclusively for the service recipient or payor.

“(iii) The service provider has not been treated as an employee by the service recipient or payor during the 1-year period ending with the date of the commencement of services under the contract described in subsection (d).

“(iv) The service provider is not compensated on a basis which is tied primarily to the number of hours actually worked.

“(3) ALTERNATIVE REQUIREMENTS WITH RESPECT TO SALES PERSONS.—In the case of a service provider engaged in the trade or business of selling (or soliciting the sale of) goods or services, the requirements of this paragraph are met with respect to any service provided in the ordinary course of such trade or business if—

“(A) the service provider is compensated primarily on a commission basis, and
“(B) substantially all the compensation for such service is directly related to sales of goods or services rather than to the number of hours worked.

“(c) PLACE OF BUSINESS OR OWN EQUIPMENT REQUIREMENT.—The requirement of this subsection is met with respect to any service if the service provider—

“(1) has a principal place of business,

“(2) does not provide the service primarily in the service recipient’s place of business,

“(3) pays a fair market rent for use of the service recipient’s place of business, or

“(4) provides the service primarily using equipment supplied by the service provider.

“(d) WRITTEN CONTRACT REQUIREMENT.—The requirements of this subsection are met with respect to any service if such service is performed pursuant to a written contract between the service provider and the service recipient (or payor) which meets the following requirements:

“(1) The contract includes each of the following:

“(A) The service provider’s name, taxpayer identification number, and address.

“(B) A statement that the service provider will not be treated as an employee with respect
to the services provided pursuant to the contract for purposes of this title.

“(C) A statement that the service recipient (or the payor) will withhold upon and report to the Internal Revenue Service the compensation payable pursuant to the contract consistent with the requirements of this title.

“(D) A statement that the service provider is responsible for payment of Federal, State, and local taxes, including self-employment taxes, on compensation payable pursuant to the contract.

“(E) A statement that the contract is intended to be considered a contract described in this subsection.

“(2) The term of the contract does not exceed 2 years. The preceding sentence shall not prevent one or more subsequent written renewals of the contract from satisfying the requirements of this subsection if the term of each such renewal does not exceed 2 years and if the information required under paragraph (1)(A) is updated in connection with each such renewal.

“(3) The contract (or renewal) is signed (which may include signatures in electronic form) by both
the service recipient (or payor) and the service provider not later than the date on which the aggregate payments made by the service recipient (or payor) to the service provider exceeds $1,000 for the year covered by the contract (or renewal).

“(e) Reporting Requirements.—

“(1) In general.—For purposes of making any determination with respect to the liability of a service recipient or payor for any tax during any taxable year with respect to a service provider, the application of this section shall be conditioned on either the service recipient or the payor satisfying the reporting requirements applicable to such service recipient or payor under section 6041(a), 6041A(a), or 6050W with respect to such service provider for such period.

“(2) Reasonable cause.—For purposes of paragraph (1), such reporting requirements shall be treated as met if the failure to satisfy such requirements is due to reasonable cause and not willful neglect.

“(f) Exception for services provided by owner.—This section shall not apply with respect to any service provided by a service provider to a service recipient if the service provider owns any interest in the service re-
cient or any payor with respect to the service provided.
The preceding sentence shall not apply in the case of a
service recipient the stock of which is regularly traded on
an established securities market.

“(g) EXCEPTION FOR PERSONAL SERVICES.—

“(1) IN GENERAL.—This section shall not apply
with respect to any service provided for the personal
purposes of the service recipient.

“(2) LIMITATION.—Paragraph (1) shall not
apply in the case of any services provided to a serv-
vice recipient who is not the payor.

“(h) LIMITATION ON RECLASSIFICATION BY SEC-
RETARY.—For purposes of this title—

“(1) EFFECT OF RECLASSIFICATION ON SERV-
ICE RECIPIENTS AND PAYORS.—A determination by
the Secretary that a service recipient or a payor
should have treated a service provider as an em-
ployee shall be effective with respect to the service
recipient or payor no earlier than the notice date
if—

“(A) the service recipient or the payor en-
tered into a written contract with the service
provider which meets the requirements of sub-
section (d),
“(B) the service recipient or the payor satisfied the applicable reporting requirements of section 6041(a), 6041A(a), or 6050W for all relevant taxable years with respect to the service provider,

“(C) the service recipient or the payor collected and paid over all applicable taxes imposed under subtitle C for all relevant taxable years with respect to the service provider, and

“(D) the service recipient or the payor demonstrates a reasonable basis for having determined that the service provider should not be treated as an employee under this section and that such determination was made in good faith.

“(2) EFFECT OF RECLASSIFICATION ON SERVICE PROVIDERS.—A determination by the Secretary that a service provider should have been treated as an employee shall be effective with respect to the service provider no earlier than the notice date if—

“(A) the service provider entered into a written contract with the service recipient or payor which meets the requirements of subsection (d),
“(B) the service provider satisfied the applicable reporting requirements of sections 6012(a) and 6017 for all relevant taxable years with respect to the service recipient or payor, and

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

“(3) NOTICE DATE.—For purposes of this subsection, the term ‘notice date’ means the 30th day after the earliest of—

“(A) the date on which the first letter of proposed deficiency which allows the service provider, the service recipient, or the payor an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent,

“(B) the date on which a deficiency notice under section 6212 is sent, or

“(C) the date on which a notice of determination under section 7436(b)(2) is sent.

“(4) REASONABLE CAUSE EXCEPTION.—The requirements of paragraphs (1)(B) and (2)(B) shall be
treated as met if the failure to satisfy such require-
ments is due to reasonable cause and not willful ne-
glect.

“(5) NO RESTRICTION ON ADMINISTRATIVE OR
JUDICIAL REVIEW.—Nothing in this subsection shall
be construed as limiting any provision of law which
provides an opportunity for administrative or judi-
cial review of a determination by the Secretary.

“(i) RULE OF CONSTRUCTION.—Nothing in this sec-
tion shall be construed as—

“(1) limiting the ability or right of a service
provider, service recipient, or payor to apply any
other provision of this title, section 530 of the Rev-
ene Act of 1978, or any common law rules for de-
termining whether an individual is an employee, or

“(2) establishing a prerequisite for the applica-
tion of any provision of law described in paragraph
(1).

“(j) DEFINITIONS.—For purposes of this section—

“(1) SERVICE PROVIDER.—

“(A) IN GENERAL.—The term ‘service pro-
vider’ means any qualified person who performs
service for another person.

“(B) QUALIFIED PERSON.—The term
‘qualified person’ means—
“(i) any natural person, or

“(ii) any entity if any of the services referred to in subparagraph (A) are performed by one or more natural persons who directly own interests in such entity.

“(2) SERVICE RECIPIENT.—The term ‘service recipient’ means the person for whom the service provider performs such service.

“(3) PAYOR.—The term ‘payor’ means—

“(A) any person, including the service recipient, who pays the service provider for performing such service, or

“(B) any third party settlement organization, as defined in section 6050W(b)(3).

“(k) REGULATIONS.—Notwithstanding section 530(d) of the Revenue Act of 1978, the Secretary shall issue such regulations as the Secretary determines are necessary to carry out the purposes of this section.”.

(b) WITHHOLDING BY PAYOR IN CASE OF CERTAIN PERSONS CLASSIFIED AS NOT EMPLOYEES.—Section 3402 of the Internal Revenue Code of 1986 is amended by redesignating subsection (s) as subsection (t) and inserting after subsection (r) the following new subsection:
“(s) Extension of Withholding to Payments to Certain Persons Classified as Not Employees.—

“(1) In General.—For purposes of this chapter and so much of subtitle F as relates to this chapter, compensation paid pursuant to a contract described in section 7706(d) shall be treated as if it were a payment of wages by an employer to an employee.

“(2) Amount Withheld.—Except as otherwise provided under subsection (i), the amount to be deducted and withheld pursuant to paragraph (1) with respect to compensation paid pursuant to any such contract during any calendar year shall be an amount equal to 5 percent of so much of the amount of such compensation as does not exceed $20,000.”.

(c) Direct Sellers of Promotional Products.—Subsection (b) of section 3508 is amended—

(1) in paragraph (2)(A)—

(A) in clause (ii), by striking “or” at the end;

(B) in clause (iii), by adding “or” at the end; and

(C) by inserting after clause (iii) the following new clause:
“(iv) is engaged in the trade or business of selling, or soliciting the sale of, promotional products from other than a permanent retail establishment,”;

(2) by redesignating paragraph (3) as paragraph (4); and

(3) by inserting after paragraph (2) the following new paragraph:

“(3) PROMOTIONAL PRODUCT.—For purposes of paragraph (2)(A)(iv), the term ‘promotional product’ means a tangible item with permanently marked promotional words, symbols, or art of the purchaser.”.

(d) REPORTING.—

(1) INFORMATION AT SOURCE.—Section 6041 of the Internal Revenue Code of 1986 is amended—

(A) in subsection (a)—

(i) in the heading, by striking “$600” and inserting “$1,000”; and

(ii) by striking “$600 or more in any taxable year” and inserting “$1,000 or more in any taxable year”; and

(B) by adding at the end the following new subsection:
“(h) Special Rules for Certain Persons Classified as Not Employees.—

“(1) In general.—In the case of any service recipient or payor required to make a return under subsection (a) with respect to compensation to which section 7706(a) applies—

“(A) such return shall include—

“(i) the aggregate amount of such compensation paid to each person whose name is required to be included on such return,

“(ii) the aggregate amount deducted and withheld under section 3402(s) with respect to such compensation, and

“(iii) an indication of whether a copy of the contract described in section 7706(d) is on file with the service recipient or payor, and

“(B) the statement required to be furnished under subsection (d) shall include the information described in subparagraph (A) with respect to the service provider to whom such statement is furnished.

“(2) Definitions.—Terms used in this subsection which are also used in section 7706 shall
have the same meaning as when used in such sec-
tion.”.

(2) Returns regarding payments of remu-
neration for services and direct sales.—Sec-
tion 6041A of such Code is amended—

(A) in paragraph (2) of subsection (a), by
striking “$600” and inserting “$1,000”; and

(B) by adding at the end the following new
subsection:

“(g) Special Rules for Certain Persons Class-
sified as Not Employees.—Rules similar to the rules
of subsection (h) of section 6041 shall apply for purposes
of this section.”.

(3) Returns relating to payments made
in settlement of payment card and third
party network transactions.—Section 6050W
of such Code is amended—

(A) in subsection (d), by amending para-
graph (3) to read as follows:

“(3) Third party network.—

“(A) In general.—The term ‘third party
payment network’ means any agreement or ar-
rangement—

“(i) which involves the establishment
of accounts with a central organization or
marketplace platform by a substantial
number of persons who—

“(I) are unrelated to such organi-
zation or platform,

“(II) provide goods or services,
and

“(III) have agreed to settle
transactions for the provision of such
goods or services pursuant to such
agreement or arrangement,

“(ii) which provides for standards and
mechanisms for settling such transactions,
and

“(iii) which guarantees persons pro-
viding goods or services pursuant to such
agreement or arrangement that such per-
sons will be paid for providing such goods
or services.

“(B) EXCEPTION.—The term ‘third party
payment network’ shall not include any agree-
ment or arrangement which provides for the
issuance of payment cards.

“(C) MARKETPLACE PLATFORM.—For pur-
poses of subparagraph (A), the term ‘market-
place platform’ means any person who—
“(i) operates a digital website or mobile application that facilitates the provision of goods or services by providers to recipients,

“(ii) enters into an agreement with each provider stating that such provider will not be treated as an employee with respect to such goods or services,

“(iii) provides standards and mechanisms for settling such facilitated transactions, and

“(iv) guarantees each provider of goods or services pursuant to such agreement that the provider will be paid for such facilitated transaction.”;

(B) by amending subsection (e) to read as follows:

“(e) Exception for De Minimis Payments by Third Party Settlement Organizations.—

“(1) In general.—A third party settlement organization shall be required to report any information under subsection (a) with respect to third party network transactions of any participating payee only if the amount which would otherwise be reported
under subsection (a)(2) with respect to such trans-
actions exceeds $1,000.

“(2) Election to report.—Notwithstanding
paragraph (1), a third party settlement organization
may elect to report any information under sub-
section (a) with respect to third party network
transactions of any participating payee for which the
amount reported under subsection (a)(2) with re-
spect to such transactions is equal to or less than
$1,000.”; and

(C) in subsection (f)—

(i) in paragraph (1), by striking
“and” at the end;

(ii) in paragraph (2), by striking the
period at the end and inserting “, and”;
and

(iii) by inserting after paragraph (2)
the following new paragraph:

“(3) the amount, if any, withheld pursuant to
section 3402(s).”.

(e) Proceedings for Determination of Employment Status.—Paragraph (1) of section 7436(b) of the
Internal Revenue Code of 1986 is amended to read as fol-
lows:
“(1) **PETITIONER.**—A pleading may be filed under this section only by—

“(A) the person for whom the services are performed, or

“(B) any service provider (as defined in section 7706(j)(1)) which the Secretary has determined should have been treated as an employee.”.

(f) **CLERICAL AMENDMENT.**—The table of sections for chapter 79 of the Internal Revenue Code of 1986 is amended by adding at the end the following new item:

“Sec. 7706. Determination of worker classification.”.

(g) **EFFECTIVE DATE.**—The amendments made by this section shall apply to services performed after December 31, 2017 (and to payments made for such services after such date).