S. 2044

To provide procedures for the proper classification of employees and independent contractors, and for other purposes.

IN THE SENATE OF THE UNITED STATES

September 12, 2007

Mr. Obama (for himself, Mr. Durbin, Mr. Kennedy, and Mrs. Murray) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To provide procedures for the proper classification of employees and independent contractors, 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 “Independent Contractor Proper Classification Act of 2007”.

SEC. 2. REFORMATION OF SAFE HARBOR TO CLOSE ITS USE AS A TAX LOOPHOLE.

(a) ALLOWANCE OF PROSPECTIVE RECLASSIFICATIONS.—
(1) IN GENERAL.—Section 530(a) of the Revenue Act of 1978, as amended by section 269(c)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, is amended by adding at the end the following new paragraph:

“(5) ALLOWANCE OF RECLASSIFICATIONS.—Paragraph (1) shall not apply with respect to the treatment by a taxpayer of any individual for employment tax purposes for any period beginning after a determination by the Secretary of the Treasury that the individual should be treated as an employee of the taxpayer.”

(2) EFFECTIVE DATE.—The amendment made by this subsection shall apply to determinations made after the date of the enactment of this Act.

(b) ELIMINATION OF BAN ON IRS ISSUING REGULATIONS OR REVENUE RULINGS ON EMPLOYEE/INDEPENDENT CONTRACTOR STATUS.—

(1) IN GENERAL.—Section 530 of the Revenue Act of 1978, as amended by section 269(c)(2) of the Tax Equity and Fiscal Responsibility Act of 1982, section 1706(a) of the Tax Reform Act of 1986, section 1122(a) of the Small Business Job Protection Act of 1996, and section 864(a) of the Pension Protection Act of 2006, is amended by striking sub-
section (b) and by redesignating subsections (c), (d), (e), and (f) as subsections (b), (c), (d), and (e), respectively.

(2) Effective date.—The amendments made by this subsection shall take effect on the date of the enactment of this Act.

(c) Elimination of Ability of Employers To Rely on Industry Practice as a Basis for Claiming Safe Harbor.—

(1) In general.—Section 530(a)(2) of the Revenue Act of 1978 is amended—

(A) by striking the semicolon at the end of subparagraph (A) and inserting “; or”,

(B) by striking the semicolon at the end of subparagraph (B) and inserting a period, and

(C) by striking subparagraph (C).

(2) Conforming amendments.—

(A) Section 530(d)(2) of the Revenue Act of 1978, as redesignated by subsection (b)(1), is amended—

(i) by striking the comma at the end of subparagraph (A) and inserting a period,

(ii) by striking subparagraphs (B) and (C), and
(iii) by striking “subsection (a)(2)” in the matter preceding subparagraph (A) and all that follows through “a taxpayer” and inserting “subsection (a)(2), a taxpayer”.

(B) Section 530(d)(4)(B) of such Act (as so redesignated) is amended by striking “sub-paragraph (A), (B), or (C)” and inserting “sub-paragraph (A) or (B)”.

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to periods beginning after the date which is 60 days after the date of the enactment of this Act.

SEC. 3. REVIEW OF CLASSIFICATION STATUS.

(a) IN GENERAL.—Section 530 of the Revenue Act of 1978, as amended by section 2(b)(1), is amended by adding at the end the following new subsections:

“(f) Petitions for Review of Status.—

“(1) IN GENERAL.—Under procedures estab-
lished by the Secretary of the Treasury not later than 90 days after the date of the enactment of this subsection, any individual who performs services for a taxpayer may petition (either personally or through a designated representative or attorney) for
a determination of the individual’s status for employment tax purposes.

“(2) ADMINISTRATIVE PROCEDURES.—The procedures established under paragraph (1) shall provide for—

“(A) a determination of status not later than 90 days after the filing of the petition with respect to employment in any industry (such as the construction industry) in which employment is transient, casual, or seasonal,

“(B) an administrative appeal of any determination that an individual is not an employee of the taxpayer,

“(C) the award of expenses, including expert witness fees and reasonable attorneys’ fees for the individual against the taxpayer in any case in which the individual achieves reclassification, and

“(D) the assessment of such expenses against the taxpayer by the Secretary of the Treasury on behalf of such individual.

“(3) PROHIBITION AGAINST RETALIATION.—

“(A) IN GENERAL.—No taxpayer may discharge an individual, refuse to contract with an individual, or otherwise discriminate against an
individual with respect to compensation, terms, conditions, or privileges of the services provided by the individual because the individual (or any designated representative or attorney on behalf of such individual) filed a petition under paragraph (1).

“(B) ENFORCEMENT ACTION.—An individual who alleges discharge or other discrimination by any taxpayer in violation of subparagraph (A) may seek relief under the procedures and remedies established under section 42121 of title 49, United States Code.

“(C) RIGHTS RETAINED BY INDIVIDUAL.—Nothing in this paragraph shall be deemed to diminish the rights, privileges, or remedies of any individual under any Federal or State law, or under any collective bargaining agreement.

“(g) RESULTS OF MISCLASSIFICATION DETERMINATIONS.—In any case in which the Secretary of the Treasury determines that a taxpayer has misclassified an individual as not an employee for employment tax purposes, the Secretary of the Treasury shall—

“(1) if necessary, perform an employment tax audit of such taxpayer,
“(2) inform the Department of Labor about such misclassification,

“(3) notify the individual of any eligibility for the refund of self-employment taxes under chapter 2 of the Internal Revenue Code of 1986, and

“(4) apply the provisions of section 3509 of the Internal Revenue Code of 1986 and direct the taxpayer to take affirmative action to abate the violation.”.

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 4. COORDINATION, ENFORCEMENT, AND COMPLIANCE.

(a) ANNUAL REPORTS.—The Secretary of the Treasury and the Secretary of Labor shall each issue annual reports on worker misclassification, including—

(1) information on the number and type of enforcement actions against, and audits of, employers who have misclassified workers,

(2) relief obtained as a result of such actions against, and audits of, employers who have misclassified workers,
(3) an overall estimate of the number of employers misclassifying workers, the number of workers affected, and the industries involved,

(4) the impact of such misclassification on the Federal tax system, and

(5) the aggregate number of worker misclassification cases with respect to which each Secretary has provided information to the other Secretary and the outcome of actions taken, if any, by each Secretary in each worker misclassification case with respect to which the Secretary has received such information.

As part of the annual report, the Secretary of the Treasury shall include information on the outcomes of the petitions filed under section 530(f) of the Revenue Act of 1978 and the Secretary of Labor shall include information on the outcomes of the complaints and actions described in subsection (b)(1)(A) and the investigations required in subsection (b)(1)(B).

(b) Enforcement Activities.—

(1) Department of Labor.—

(A) Wage and Hour Enforcement.— The Secretary of Labor shall identify and track complaints and enforcement actions involving misclassification of independent contractors for
the purposes of the laws enforced by the Wage
and Hour Division of the Department of Labor.

(B) INVESTIGATIONS OF INDUSTRIES WITH
worker misclassifications.—The Secretary
of Labor shall conduct investigations of indus-
tries in which worker misclassification is
present as determined by information (other
than return information (as defined in section
6103(b)(2)) received from the Secretary of the
Treasury and any other relevant information,
including reports from other Federal agencies
and State workforce, labor, and revenue agen-
cies.

(2) AUTHORIZATION OF APPROPRIATIONS.—
There is authorized such sums as are necessary for
the Department of the Treasury and the Depart-
ment of Labor to carry out the purposes of the pro-
visions of, and amendments made by, this Act.

(3) INFORMATION SHARING.—The Secretary of
the Treasury and the Secretary of Labor shall ex-
change information on worker misclassification cases
and shall provide such information with relevant
State agencies. Upon receipt of such information,
the Secretary of the Treasury and the Secretary of
Labor shall determine whether further investigation is warranted in each case.

SEC. 5. NOTICE TO EMPLOYEES AND INDEPENDENT CONTRACTORS AND MAINTENANCE OF INFORMATION REGARDING INDEPENDENT CONTRACTORS.

(a) NOTICE OF RIGHT TO CHALLENGE CLASSIFICATION.—The Secretary of Labor shall provide for the placement of information on any poster required under the Fair Labor Standards Act informing workers of their right to seek a status determination from the Internal Revenue Service.

(b) EMPLOYER NOTICES TO INDEPENDENT CONTRACTORS.—Each employer shall notify any individual who is hired by the employer as an independent contractor within the scope of the employer’s trade or business, at the time of hire, of the Federal tax obligations of an independent contractor, the labor and employment law protections that do not apply to independent contractors, and the right of such independent contractor to seek a status determination from the Internal Revenue Service. The Secretary of the Treasury and the Secretary of Labor shall develop model materials for providing such notice.

(c) MAINTENANCE OF INFORMATION REGARDING INDEPENDENT CONTRACTORS.—Each employer shall
maintain for 3 years a list of the independent contractors
retained by the employer, including name, address, Social
Security number and Federal tax identification number,
and shall make the records available for inspection during
investigations.