To amend the Fair Labor Standards Act of 1938 to require persons to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for persons who misclassify employees as non-employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 22, 2010

Mr. Brown of Ohio (for himself, Mr. Harkin, Mr. Durbin, Mrs. Murray, Mr. Casey, and Mr. Merkley) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act of 1938 to require persons to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for persons who misclassify employees as non-employees, 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 “Employee Misclassification Prevention Act”.
SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EMPLOYEES.

(a) RECORDKEEPING AND NOTICE REQUIREMENTS.—Section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) is amended—

(1) by striking “(c) Every employer subject to any provision of this Act or of any order issued under this Act” and inserting the following:

“(c) RECORDKEEPING AND NOTICE REQUIREMENTS.—

“(1) IN GENERAL.—Every person subject to any provision of this Act or of any order issued under this Act”;

(2) by striking “of the persons employed by him” and inserting the following: “of—

“(A) each individual employed by such person”;

(3) by striking “employment maintained by him, and shall” and inserting the following: “employment;

“(B) subject to paragraph (2), each individual—

“(i) who is not an employee within the meaning given the term in section 3(e) (referred to in this subsection as a ‘non-employee’);
“(ii) whom the person has engaged, in the course of the person’s trade or business, for the performance of labor or services; and

“(iii)(I) with respect to whom the person is required to file an information return under section 6041A(a) of the Internal Revenue Code of 1986; or

“(II) who is providing labor or services to the person through an entity that is a trust, estate, partnership, association, company, or corporation (as such terms are used in section 7701(a)(1) of the Internal Revenue Code of 1986) if—

“(aa) such individual has an ownership interest in the entity;

“(bb) creation or maintenance of such entity is a condition for the provision of such labor or services to the person; and

“(cc) the person would be required to file an information return for the entity under section 6041A(a) of the Internal Revenue Code of 1986 if the entity were an individual; and
“(C) the remuneration and hours relating
to the performance of labor or services by each
individual described in subparagraph (B); and
“(D) the notices required under paragraph
(5),
and shall”; and

(4) by adding at the end the following:
“(2) RECORDKEEPING LIMITATION.—A person
otherwise subject to the requirements of paragraph
(1) shall have no responsibility for making, keeping,
or preserving records, including the records de-
scribed in such paragraph and paragraph (4), con-
cerning the employees of any individual described in
paragraph (1)(B) or the non-employees with whom
such individual has engaged for the performance of
labor or services for such person, unless such
records are provided during the course of the trade
or business to the person.
“(3) PRESUMPTION.—
“(A) IN GENERAL.—For purposes of this
Act and the regulations or orders issued under
this Act, an individual who is employed, or who
is remunerated for the performance of labor or
services, by a person, shall be presumed to be
an employee of the person if—
“(i) the person has not made, kept, and preserved records in accordance with subparagraphs (B) and (C) of paragraph (1) regarding the individual; or

“(ii) the person has not provided the individual with the notice required under paragraph (5).

“(B) REBUTTAL.—The presumption under subparagraph (A) shall be rebutted only through the presentation of clear and convincing evidence that an individual described in such subparagraph is not an employee (within the meaning of section 3(e)) of the person.

“(4) ACCURATE CLASSIFICATION.—An accurate classification of the status of each individual described in paragraph (1) as either an employee (within the meaning of section 3(e)) of the person maintaining the records or a non-employee of such person shall be included within the records under this subsection.

“(5) NOTICE.—

“(A) IN GENERAL.—Every person subject to any provision of this Act or of any order issued under this Act shall provide the notice described in subparagraph (C) to each employee
of the person and each individual classified by
the person as a non-employee under paragraph
(1)(B).

“(B) TIMING OF NOTICE.—

“(i) IN GENERAL.—Such notice shall
be provided, at a minimum, not later than
6 months after the date of enactment of
the Employee Misclassification Prevention
Act, and thereafter—

“(I) for new employees, upon em-
ployment; and

“(II) for new non-employees who
are classified under paragraph (1)(B),
upon commencement of the labor or
services described in such paragraph.

“(ii) CHANGE IN STATUS.—Each per-
son required to provide notice under sub-
paragraph (A) to an individual shall also
provide such notice to such individual upon
changing such individual’s status as an
employee or non-employee under paragraph
(1).

“(C) CONTENTS OF NOTICE.—The notice
required under this paragraph shall be in writ-
ing and shall—
“(i) inform the individual of the individual’s classification, by the person submitting the notice, as an employee or a non-employee under paragraph (1);

“(ii) include a statement directing such individual to a Department of Labor Web site established for the purpose of providing further information about the rights of employees under the law;

“(iii) include the address and telephone number for the applicable local office of the United States Department of Labor;

“(iv) include for each individual classified as a non-employee under paragraph (1)(B) by the person submitting the notice, the following statement: ‘Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor.’; and
“(v) include such additional information as the Secretary shall prescribe by regulation.”.

(b) SPECIAL PROHIBITED ACTS.—Section 15(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)) is amended—

(1) by striking paragraph (3) and inserting the following:

“(3) to discharge or in any other manner discriminate against any individual (including an employee) because such individual has—

“(A) opposed any practice, or filed a petition or complaint or instituted or caused to be instituted any proceeding—

“(i) under or related to this Act (including concerning an individual’s status as an employee or non-employee for purposes of this Act); or

“(ii) concerning an individual’s status as an employee or non-employee for employment tax purposes within the meaning of subtitle C of the Internal Revenue Code of 1986;

“(B) testified or is about to testify in any proceeding described in subparagraph (A); or
“(C) served, or is about to serve, on an indus-
try committee;”;

(2) in paragraph (5), by striking the period at
the end and inserting “; and”;

(3) by adding at the end the following:
“(6) to fail to accurately classify an individual
as an employee.”.

(c) Special Penalty for Certain Misclassification, Recordkeeping, and Notice Violations.—Section 16 of the Fair Labor Standards
Act of 1938 (29 U.S.C. 216) is amended—

(1) in subsection (b)—

(A) in the sixth sentence, by striking “any
employee” each place the term occurs and in-
serting “any employee or individual”;

(B) in the fourth sentence, by striking
“employee” and inserting “employee or indi-
vidual”;

(C) in the third sentence—

(i) by striking “either of the preceding
sentences” and inserting “any of the pre-
ceding sentences”;

(ii) by striking “one or more employ-
es” and inserting “one or more employees
or individuals”; and
(iii) by striking “other employees” and inserting “other employees or individuals, respectively,”; and

(D) by inserting after the first sentence the following: “Such liquidated damages are doubled (subject to section 11 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 260)) where, in addition to violating the provisions of section 6 or 7, the employer has violated the provisions of section 15(a)(6) with respect to such employee or employees.”; and

(2) in subsection (e), by striking paragraph (2) and inserting the following:

“(2) Any person who violates section 6, 7, 11(e), or 15(a)(6) shall be subject to a civil penalty, for each employee or other individual who was the subject of such a violation, in an amount—

“(A) not to exceed $1,100; or

“(B) in the case of a person who has repeatedly or willfully committed such violation, not to exceed $5,000.”.

(d) EMPLOYEE RIGHTS WEB SITE.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Secretary of Labor shall establish, for purposes of sec-
tion 11(c)(5)(C)(ii) of the Fair Labor Standards Act of 1938 (as added by this Act), a single web page on the Department of Labor Web site that summarizes in plain language the rights of employees as described in the amendments made by subsection (a) and other information considered appropriate by the Secretary, including appropriate links to additional information on the Department of Labor Web site or other Federal agency Web sites. In addition, such web page—

(A) shall include a statement explaining that employees may have additional or greater rights under State or local laws and how employees may obtain additional information about their rights under State or local laws;

(B) shall be made available in English and any other languages that the Secretary determines to be prevalent among individuals likely to access the web page; and

(C) may provide a link to permit individuals to file complaints online.

(2) COORDINATION WITH OTHER FEDERAL WEB SITES.—The Secretary shall coordinate with other relevant Federal agencies in order to provide information similar to the information described in para-
graph (1) (or a link to the Department of Labor web page required by this subsection) on the Web sites of such other agencies.

SEC. 3. MISCLASSIFICATION OF EMPLOYEES FOR UNEMPLOYMENT COMPENSATION PURPOSES.

(a) IN GENERAL.—Section 303(a) of the Social Security Act (42 U.S.C. 503(a)) is amended—

(1) in paragraph (10), by striking the period and inserting ‘‘; and’’; and

(2) by adding after paragraph (10) the following:

‘‘(11)(A) Such auditing and investigative procedures as may be necessary to identify employers that have not registered under the State law or that are paying unreported wages, where these actions or omissions by the employers have the effect of excluding employees from unemployment compensation coverage; and

‘‘(B) The making of quarterly reports to the Secretary of Labor (in such form as the Secretary of Labor may require) describing the results of the procedures under subparagraph (A); and

‘‘(12) The establishment of administrative penalties for misclassifying employees, or paying unreported wages to employees without proper record-
keeping, for unemployment compensation purposes.”.

(b) Review of Auditing Programs.—The Secretary of Labor shall include, in the Department of Labor’s system for measuring States’ performance in conducting unemployment compensation tax audits, a specific measure of their effectiveness in identifying the underreporting of wages and the underpayment of unemployment compensation contributions (including their effectiveness in identifying instances of such underreporting or underpayments despite the absence of cancelled checks, original time sheets, or other similar documentation).

(c) Effective Date.—

(1) In general.—Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect 12 months after the date of the enactment of this Act.

(2) Exception.—If the Secretary of Labor finds that legislation is necessary in order for the unemployment compensation law of a State to comply with the amendments made by subsection (a), such amendments shall not apply with respect to such law until the later of—

(A) the day after the close of the first regular session of the legislature of such State
which begins after the date of the enactment of this Act; or

(B) 12 months after the date of the enactment of this Act.

(d) Definition of State.—For purposes of this section, the term “State” has the meaning given such term by section 3306(j) of the Internal Revenue Code of 1986.

SEC. 4. DEPARTMENT OF LABOR COORDINATION, REFERRAL, AND REGULATIONS.

(a) Coordination and Referral.—Notwithstanding any other provision of law, any office, administration, or division of the Department of Labor that, while in the performance of its official duties, obtains information regarding the misclassification by a person subject to the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) or any order issued under such Act of any individual regarding whether such individual is an employee or a non-employee contracted for the performance of labor or services for purposes of section 6 or 7 of such Act (29 U.S.C. 206, 207) or in records required under section 11(c) of such Act (29 U.S.C. 211(c)), shall report such information to the Wage and Hour Division of the Department. The Wage and Hour Division may re-
port such information to the Internal Revenue Service as the Division considers appropriate.

(b) REGULATIONS.—The Secretary of Labor shall promulgate regulations to carry out this Act and the amendments made by this Act.

SEC. 5. TARGETED AUDITS.

The audits of employers subject to the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) that are conducted by the Wage and Hour Division of the Department of Labor shall include certain industries with frequent incidence of misclassifying employees as non-employees, as determined by the Secretary of Labor.