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.

IN THE SENATE OF THE UNITED STATES
SEPTEMBER 15, 2010

Mr. KERRY (for himself, Mr. BROWN of Ohio, Mrs. MURRAY, Mr. FRANKEN, Mr. AKAKA, Mr. SCHUMER, Mr. LEAHY, Mrs. GILLIBRAND, and Mr. MENENDEZ) 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 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 Representatives of the United States of America in Congress assembled,

2 SECTION 1. SHORT TITLE; FINDINGS; PURPOSES.

3 (a) Short Title.—This Act may be cited as the “Fair Playing Field Act of 2010”.

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

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

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

(3) During the ensuing 32 years, Congress
made section 530 of the Revenue Act of 1978 per-
manent, however, changes in working relationships
and the continued prohibition on new guidance have
increased the uncertainty as to the proper classification of workers.

(4) Many workers are properly classified as independent contractors. In other instances, workers who are employees are being treated as independent contractors. Such misclassification for tax purposes contributes to inequities in the competitive positions of businesses and to the Federal and State tax gap, and may also result in misclassification for other purposes, such as denial of unemployment benefits, workplace health and safety protections, and retirement or other benefits or protections available to employees.

(5) Workers, businesses, and other taxpayers will benefit from clear guidance regarding employment tax status. In the interest of fairness and in view of many service recipients' reliance on current section 530, such guidance should apply only prospectively.

(c) PURPOSES.—The purposes of this Act are to permit the Secretary of the Treasury to provide guidance allowing workers and businesses to clearly understand the proper federal tax classification of workers and to provide relief allowing an orderly transition to new rules designed to increase certainty and uniformity of treatment.
SEC. 2. AUTHORITY TO ISSUE GUIDANCE CLARIFYING EMPLOYMENT STATUS FOR PURPOSES OF EMPLOYMENT TAXES.

(a) In general.—Chapter 25 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

“SEC. 3511. AUTHORITY TO ISSUE GUIDANCE CLARIFYING EMPLOYMENT STATUS.

“(a) In general.—The Secretary shall issue such regulations or other guidance as the Secretary determines to be necessary or appropriate to clarify the proper employment status of individuals for purposes of any tax imposed by this subtitle.

“(b) Prohibition on Retroactive Assessments.—

“(1) In general.—If—

“(A) for purposes of any tax imposed by this subtitle, the taxpayer did not treat an individual as an employee for any period before the reclassification date with respect to such individual, and

“(B) in the case of periods after December 31, 1978, and before such reclassification date, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period
are filed on a basis consistent with the taxpayer’s treatment of such individual as not being an employee,
then, for purposes of applying such taxes for periods before such reclassification date with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

“(2) Statutory standards providing one method of satisfying the requirements of paragraph (1).—For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer’s treatment of such individual for such period was in reasonable reliance on any of the following:

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

“(B) A past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for purposes of any tax imposed by this subtitle) of the
individuals holding positions substantially similar to the position held by such individual.

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

“(3) Consistency required in the case of prior tax treatment.—Paragraph (1) shall not apply with respect to the treatment of any individual (hereafter in this paragraph referred to as the reclassified individual) for purposes of any tax imposed by this subtitle for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of any tax imposed by this subtitle for any period beginning after December 31, 1977, and ending before the reclassification date with respect to such reclassified individual.

“(c) Definitions.—For purposes of this section—

“(1) Reclassification date.—

“(A) In general.—The term ‘reclassification date’ means, with respect to any individual, the earlier of—

“(i) the first day of the first calendar quarter beginning more than 180 days
after the date of an employee classification
determination with respect to such indi-
vidual, or
“(ii) the effective date of the first ap-
pllicable final regulation issued by the Sec-
retary under subsection (a) with respect to
such individual (or, if later, the first day of
the first calendar quarter beginning more
than 180 days after such regulation is
issued).
“(B) EMPLOYEE CLASSIFICATION DETER-
MINATION.—The term ‘employee classification
determination’ means, with respect to any indi-
vidual, a determination by the Secretary, in
connection with an audit of the taxpayer which
is described in section 7436 and which com-
mences after the date which is 1 year after the
date of the enactment of this section, that a
class of individuals holding positions with such
taxpayer which are substantially similar to the
position held by such individual are employees.
“(C) FIRST APPLICABLE FINAL REGULA-
tion.—The term ‘first applicable final regula-
tion’ means, with respect to any individual, the
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 Applicable Under the Revenue Act of 1978.—

“(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 taxpayer, provide the taxpayer with a written notice of the provisions of this section.

“(3) Rules relating to statutory standards.—For purposes of subsection (b)(2)—

“(A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for purposes of any tax imposed by this subtitle whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer,

“(B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and

“(C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof—
“(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

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

“(4) Availability of Safe Harbors.—Nothing in this section shall be construed to provide that subsection (b) only applies where the individual involved is otherwise an employee of the taxpayer.

“(5) Burden of Proof.—

“(A) In General.—If—

“(i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of subsection (b), and

“(ii) the taxpayer has fully cooperated with reasonable requests from the Secretary,

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

“(B) Exception for Other Reasonable Basis.—In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for
purposes of subsection (b), subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (b)(2).

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

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

“(B) such individual is treated by the taxpayer as an employee for purposes of the taxes imposed by this subtitle for any subsequent period,

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

“(7) SUBSTANTIALLY SIMILAR POSITION.—For purposes of subsection (b) and this subsection, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.
“(8) Treatment of test room supervisors and proctors who assist in the administration of college entrance and placement exams.—

“(A) In general.—In the case of an individual described in subparagraph (B) who is providing services as a test proctor or room supervisor by assisting in the administration of college entrance or placement examinations, subsection (b) shall be applied to such services performed after December 31, 2006 (and remuneration paid for such services) without regard to paragraph (3) thereof.

“(B) Applicability.—An individual is described in this subparagraph if the individual—

“(i) is providing the services described in subsection (b) to an organization described in section 501(c) and exempt from tax under section 501(a), and

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

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

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

“(3) TIMING OF STATEMENT.—Except as other-
wise provided by the Secretary, the statement re-
quired under paragraph (1) shall be provided within
a reasonable period of entering into the contract re-
ferred to in paragraph (1).

“(4) DEVELOPMENT OF MODEL STATEMENT.—
The Secretary shall develop model materials for pro-
viding the statement required under paragraph
(1).”.
(b) Reduced Penalty Not Applicable in Cases of Noncompliance With Guidance Without Reasonable Basis.—Subsection (c) of section 3509 of such Code is amended—

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

“(1) such liability”, and

(2) by striking the period at the end and inserting “, or

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

In the case of a taxpayer which has received a final written determination from the Internal Revenue Service holding that the individual referred to in paragraph (2) (or another individual who holds a position with the taxpayer substantially similar to the position held by such individual) is an employee, such taxpayer shall be treated for purposes of paragraph (2) as lacking a reasonable basis for treating such individual as other than an employee with respect to periods beginning on and after the first day of the first calendar quarter beginning more than 180
days after the date of such written determination unless
the taxpayer establishes by clear and convincing evidence
that the taxpayer has a reasonable basis for such treat-
ment.”.

(c) CONFORMING AMENDMENTS.—

(1) Paragraph (2) of section 6724(d) of such
Code is amended by striking “or” at the end of sub-
paragraph (GG), by striking the period at the end
of subparagraph (HH) and inserting “, or”, and by
inserting after subparagraph (HH) the following
new subparagraph:

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

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

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

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

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

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

(1) A report each fiscal year on worker classification which shall include the total number of examinations of employers initiated because of suspected worker classification issues, the total number of examinations that included determinations on worker classification issues, the amount of additional tax liabilities associated with worker classification enforcement actions, the number of workers reclassified as a result of these actions, the number of requests for Determination of Worker Status (Form SS–8), and technical guidance on how to understand the data provided in the report.

(2) A report each fiscal year in which new statistically valid data is compiled and interpreted on worker classification, prepared on the basis of information gathered during an Employment Tax Study conducted by the National Research Program (NRP) of the Internal Revenue Service. Such report shall provide statistical estimates of the number of employers misclassifying workers, the number of workers misclassified, the industries involved, data interpretations and conclusions, and a description of the
impact of improper worker classification on the employment tax gap.

(f) Effective Dates.—

(1) Delayed Effective Date of Regulations and Guidance.—Any regulation or other guidance issued under section 3511(a) of the Internal Revenue Code of 1986, as added by this section, shall not apply to services rendered before the date which is 1 year after the date of the enactment of this Act.

(2) Authority to Issue Regulations and Guidance Immediately.—So much of the amendment made by subsection (d) as relates to subsection (b) of section 530 of the Revenue Act of 1978 shall take effect on the date of the enactment of this Act.

(3) Delayed Termination of Remainder of Section 530 of the Revenue Act of 1978.—Except as provided in paragraph (2), the amendments made by subsections (c)(1) and (d) shall apply to services rendered on or after the date which is 1 year after the date of the enactment of this Act.