S. 770

To amend the Fair Labor Standards Act of 1938 to ensure that employees are not misclassified as non-employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 8, 2011

Mr. BROWN of Ohio (for himself, Mr. HARKIN, and Mr. BLUMENTHAL) 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 ensure that employees are not misclassified 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 “Payroll Fraud Prevention Act”.

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SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EMPLOYEES.

(a) DEFINITIONS.—Section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203) is amended by adding at the end the following:

“(z) ‘Non-employee’ means an individual who—

“(1) a person has engaged, in the course of the person’s trade or business, for the performance of labor or services; and

“(2) is not an employee of the person.

“(aa) ‘Covered individual’ when used with respect to an employer or other person means—

“(1) an employee of the employer; or

“(2) a non-employee of the person (including a person who is an employer)—

“(A) whom the person has engaged, in the course of the person’s trade or business, for the performance of labor or services; and

“(B)(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—

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

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

“(III) 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.”.

(b) Classification as Employees.—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; Classification; Notice.—

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

(2) by adding at the end the following:

“(2) Classification.—
“(A) IN GENERAL.—Every person (including every employer and enterprise), who employs any employee engaged in commerce or in the production of goods for commerce or engages any non-employee engaged in commerce or in the production of goods for commerce, shall—

“(i) accurately classify all covered individuals as employees or non-employees (as the case may be);

“(ii) provide, to each covered individual, a written notice that—

“(I) informs the covered individual of the individual’s classification, by the person submitting the notice, as an employee or a non-employee;

“(II) includes a statement directing such individual to the Department of Labor Web site established under section 3 of the Payroll Fraud Prevention Act, or other appropriate resources, for the purpose of providing further information about the rights of employees under the law;
“(III) includes the address and telephone number for the applicable local office of the Department of Labor; and

“(IV) includes for each covered individual classified as a non-employee by the person providing 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

“(iii) maintain a copy of such notice as a required record under paragraph (1).

“(B) TIMING OF NOTICE.—

“(i) IN GENERAL.—The notice described in subparagraph (A)(ii) shall be provided, at a minimum, not later than 6 months after the date of enactment of the Payroll Fraud Prevention Act, and thereafter—
“(I) for new employees, upon employment; and

“(II) for new non-employees,
upon commencement of the labor or services provided by the non-employee.

“(ii) CHANGE IN STATUS.—Each person required to provide a notice under subparagraph (A)(ii) to a covered individual shall also provide such notice to such individual upon changing such individual’s status as an employee or non-employee.

“(C) PRESUMPTION.—

“(i) IN GENERAL.—For purposes of this Act and the regulations or orders issued under this Act, a covered individual to whom a person is required to provide a notice under subparagraph (A)(ii) shall be presumed to be an employee of the person if the person has not provided the individual with such notice within the time required under subparagraph (B).

“(ii) REBUTTAL.—The presumption under clause (i) shall be rebutted only through the presentation of clear and convincing evidence that a covered individual
described in such subparagraph is not an employee of the person.”.

(c) 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 covered individual (including an employee) because such individual has—

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

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

“(ii) concerning a covered 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; or

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

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

(3) by adding at the end the following:

“(6) to wrongly classify an employee of the per-
son as a non-employee in accordance with section 11(c)(2).”.

(d) Special Penalty for Certain Misclassification, Recordkeeping, and Notice Vio-
lations.—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 covered individual”;

(B) in the fourth sentence, by striking “employee” and inserting “covered individual”; 

(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 covered individuals”; and
(iii) by striking “other employees”
and inserting “other covered individuals”;
and
(D) by inserting after the first sentence
the following: “Such liquidated damages are
doubled (subject to section 11 of the Portal-to-
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 em-
ployee 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.”.

SEC. 3. EMPLOYEE RIGHTS WEB SITE.

Not later than 180 days after the date of enactment
of this Act, the Secretary of Labor shall establish, a single
Web page on the Department of Labor Web site that sum-
marizes in plain language the rights of employees and non-
employees under the Fair Labor Standards Act of 1938,
including the rights described in the amendments made
by section 2.

SEC. 4. MISCLASSIFICATION OF EMPLOYEES FOR UNEMP-
LOYMENT COMPENSATION PURPOSES.

(a) In General.—Section 303(a) of the Social Secu-
rity 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 fol-
lowing:

“(11)(A) Such auditing and investigative proce-
dures 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 exclud-
ing 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 pen-
alties for misclassifying employees, or paying unre-
ported wages to employees without proper record-
keeping, for unemployment compensation pur-
poses.”.

(b) Review of Auditing Programs.—The Sec-
retary of Labor shall include, in the Department of La-
bor’s system for measuring States’ performance in con-
ducting unemployment compensation tax audits, a specific
measure of their effectiveness in identifying the under-
reporting of wages and the underpayment of unemploy-
ment compensation contributions (including their effec-
tiveness 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 para-
graph (2), the amendments made by subsection (a)
shall take effect 12 months after the date of the en-
actment 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 com-
ply 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. 5. 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 engaged 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 report 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. 6. 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.