

111TH CONGRESS  
1ST SESSION

# S. 2882

To amend the Internal Revenue Code of 1986 to modify the rules relating to the treatment of individuals as independent contractors or employees, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 15, 2009

Mr. KERRY (for himself, Mr. DURBIN, Mr. HARKIN, Mr. SCHUMER, Mr. MENENDEZ, Mr. BROWN, and Mr. KIRK) introduced the following bill; which was read twice and referred to the Committee on Finance

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## A BILL

To amend the Internal Revenue Code of 1986 to modify the rules relating to the treatment of individuals as independent contractors or employees, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Taxpayer Responsi-  
5 bility, Accountability, and Consistency Act of 2009”.

1 **SEC. 2. EXPANSION OF INFORMATION REPORTING RE-**  
2 **QUIREMENTS.**

3 (a) **IN GENERAL.**—Section 6041 of the Internal Rev-  
4 enue Code of 1986 is amended by adding at the end the  
5 following new subsections:

6 “(h) **APPLICATION TO CORPORATIONS.**—Notwith-  
7 standing any regulation prescribed by the Secretary before  
8 the date of the enactment of this subsection, for purposes  
9 of this section the term ‘person’ includes any corporation  
10 that is not an organization exempt from tax under section  
11 501(a).

12 “(i) **REGULATIONS.**—The Secretary may prescribe  
13 such regulations and other guidance as may be appro-  
14 priate or necessary to carry out the purposes of this sec-  
15 tion, including rules to prevent duplicative reporting of  
16 transactions.”.

17 (b) **PAYMENTS FOR PROPERTY AND OTHER GROSS**  
18 **PROCEEDS.**—Subsection (a) of section 6041 of the Inter-  
19 nal Revenue Code of 1986 is amended—

20 (1) by inserting “amounts in consideration for  
21 property,” after “wages,”

22 (2) by inserting “gross proceeds,” after “emolu-  
23 ments, or other”, and

24 (3) by inserting “gross proceeds,” after “setting  
25 forth the amount of such”.

1 (c) EFFECTIVE DATE.—The amendments made by  
 2 this section shall apply to payments made after December  
 3 31, 2011.

4 **SEC. 3. DETERMINATION OF ELIGIBILITY FOR SAFE HAR-**  
 5 **BOR TREATMENT OF INDIVIDUALS AS NON-**  
 6 **EMPLOYEES FOR PURPOSES OF EMPLOY-**  
 7 **MENT TAXES.**

8 (a) IN GENERAL.—Chapter 25 of the Internal Rev-  
 9 enue Code of 1986 (relating to general provisions relating  
 10 to employment taxes) is amended by adding at the end  
 11 the following new section:

12 **“SEC. 3511. SAFE HARBOR.**

13 **“(a) TERMINATION OF CERTAIN EMPLOYMENT TAX**  
 14 **LIABILITY.—**

15 **“(1) IN GENERAL.—If—**

16 **“(A) for purposes of employment taxes, the**  
 17 **taxpayer did not treat an individual as an em-**  
 18 **ployee for any period, and**

19 **“(B) in the case of periods after December**  
 20 **31, 1978, all Federal tax returns (including in-**  
 21 **formation returns) required to be filed by the**  
 22 **taxpayer with respect to such individual for**  
 23 **such period are filed on a basis consistent with**  
 24 **the taxpayer’s treatment of such individual as**  
 25 **not being an employee,**

1 then, for purposes of applying such taxes for such  
2 period with respect to the taxpayer, the individual  
3 shall be deemed not to be an employee unless the  
4 taxpayer had no reasonable basis for not treating  
5 such individual as an employee. This paragraph shall  
6 not apply with respect to an individual for any peri-  
7 ods beginning after the date of notice of a deter-  
8 mination that such individual should be treated as  
9 an employee of the taxpayer.

10 “(2) STATUTORY STANDARDS FOR SATISFYING  
11 THE REQUIREMENTS OF PARAGRAPH (1).—For pur-  
12 poses of paragraph (1), a taxpayer shall be treated  
13 as having a reasonable basis for not treating an indi-  
14 vidual as an employee only if—

15 “(A) the taxpayer’s treatment of such indi-  
16 vidual was in reasonable reliance on—

17 “(i) a written determination issued to  
18 the taxpayer addressing the employment  
19 status of such individual or another indi-  
20 vidual holding a substantially similar posi-  
21 tion with the taxpayer, or

22 “(ii) a concluded examination (for em-  
23 ployment tax purposes) of whether such in-  
24 dividual (or another individual holding a  
25 substantially similar position) should be

1 treated as an employee of the taxpayer,  
2 with respect to which there was no deter-  
3 mination that such individual (or another  
4 individual holding a substantially similar  
5 position) should be treated as an employee,  
6 and

7 “(B) the taxpayer (or a predecessor) has  
8 not treated any other individual holding a sub-  
9 stantially similar position as an employee for  
10 purposes of employment taxes for any period  
11 beginning after December 31, 1977.

12 “(b) DEFINITIONS.—For purposes of this section—

13 “(1) EMPLOYMENT TAX.—The term ‘employ-  
14 ment tax’ means any tax imposed by this subtitle.

15 “(2) EMPLOYMENT STATUS.—The term ‘em-  
16 ployment status’ means the status of an individual,  
17 under the usual common law rules applicable in de-  
18 termining the employer-employee relationship, as an  
19 employee or as an independent contractor (or other  
20 individual who is not an employee).

21 “(c) SPECIAL RULES FOR APPLICATION OF SEC-  
22 TION.—

23 “(1) NOTICE OF AVAILABILITY OF SECTION.—

24 An officer or employee of the Internal Revenue Serv-  
25 ice shall, before or at the commencement of any ex-

1 amination relating to the employment status of one  
2 or more individuals who perform services for the tax-  
3 payer, provide the taxpayer with a written notice of  
4 the provisions of this section.

5 “(2) RULES RELATING TO STATUTORY STAND-  
6 ARDS.—For purposes of subsection (a)(2), with re-  
7 spect to any period beginning after the date of the  
8 enactment of this paragraph, a taxpayer may not  
9 rely on an examination commenced, or a written de-  
10 termination issued, if—

11 “(A) the controlling facts and cir-  
12 cumstances that formed the basis of a deter-  
13 mination of employment status have changed or  
14 were misrepresented by the taxpayer, or

15 “(B) the Secretary subsequently issues  
16 contrary guidance relating to the determination  
17 of employment status that has bearing on the  
18 facts and circumstances that formed the basis  
19 of a determination of employment status.

20 “(3) SUBSTANTIALLY SIMILAR POSITION.—For  
21 purposes of this section, the determination as to  
22 whether an individual holds a position substantially  
23 similar to a position held by another individual shall  
24 be made by the Secretary in a manner consistent  
25 with the Fair Labor Standards Act of 1938.

1       “(d) BURDEN OF PROOF.—A taxpayer must establish  
2 entitlement to relief under this section by a preponderance  
3 of the evidence.

4       “(e) PETITIONS FOR REVIEW OF STATUS.—

5           “(1) IN GENERAL.—Under procedures estab-  
6 lished by the Secretary not later than 1 year after  
7 the date of the enactment of this section, any indi-  
8 vidual who performs services for a taxpayer may pe-  
9 tition (either personally or through a designated rep-  
10 resentative or attorney) for a determination of the  
11 individual’s status for employment tax purposes.

12           “(2) ADMINISTRATIVE PROCEDURES.—The pro-  
13 cedures established under paragraph (1) shall pro-  
14 vide for—

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

21           “(B) an administrative appeal of any de-  
22 termination that an individual is not an em-  
23 ployee of the taxpayer.

24           “(3) DUTY TO SEEK SERVICE PROVIDER INFOR-  
25 MATION.—In the case of a request by a taxpayer for

1 a determination of an individual's status for employ-  
2 ment tax purposes, the Secretary shall, to the extent  
3 practicable—

4 “(A) seek to obtain from such individual  
5 information relating to the individual's perform-  
6 ance of services for the taxpayer, and

7 “(B) provide written notice to the indi-  
8 vidual detailing any written determination of  
9 the individual's status for employment tax pur-  
10 poses.

11 “(f) RESULTS OF MISCLASSIFICATION DETERMINA-  
12 TIONS.—In any case in which the Secretary determines  
13 that a taxpayer has misclassified an individual as not an  
14 employee for employment tax purposes, the Secretary shall  
15 inform the Secretary of Labor about such misclassification  
16 and notify the individual of any eligibility for the refund  
17 of self-employment taxes under chapter 2.

18 “(g) REGULATIONS.—The Secretary shall, not later  
19 than 1 year after the date of the enactment of this section,  
20 prescribe such regulations as may be necessary and appro-  
21 priate to carry out the purposes of this section.”

22 (b) CONFORMING AMENDMENTS.—

23 (1) Paragraph (2) of section 7436(a) of such  
24 Code is amendment by striking “section 530 of the  
25 Revenue Act of 1978” and inserting “section 3511”.

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

“Sec. 3511. Safe harbor.”.

4           (c) **TERMINATION OF SECTION 530 OF THE REV-**  
5 **ENUE ACT OF 1978.**—Section 530 of the Revenue Act of  
6 1978 shall not apply to services rendered more than 1 year  
7 after the date of the enactment of this Act.

8           (d) **EFFECTIVE DATE.**—The amendments made by  
9 this section shall apply to services rendered more than 1  
10 year after the date of the enactment of this Act.

11 **SEC. 4. ANNUAL REPORTS ON WORKER**  
12 **MISCLASSIFICATION.**

13           The Secretary of the Treasury shall issue an annual  
14 report on worker misclassification. Such report shall in-  
15 clude the following:

16           (1) Information on the number and type of en-  
17 forcement actions against, and examinations of, em-  
18 ployers who have misclassified workers.

19           (2) Relief obtained as a result of such actions  
20 against, and examinations of, employers who have  
21 misclassified workers.

22           (3) An overall estimate of the number of em-  
23 ployers misclassifying workers, the number of work-  
24 ers affected, and the industries involved.

1           (4) The impact of such misclassification on the  
2 Federal tax system.

3           (5) Information on the outcomes of the peti-  
4 tions filed under section 3511(e) of the Internal  
5 Revenue Code of 1986.

6 **SEC. 5. INCREASE IN INFORMATION RETURN PENALTIES.**

7           (a) FAILURE TO FILE CORRECT INFORMATION RE-  
8 TURNS.—

9           (1) IN GENERAL.—Section 6721(a)(1) of the  
10 Internal Revenue Code of 1986 is amended—

11                   (A) by striking “\$50” and inserting  
12 “\$250”, and

13                   (B) by striking “\$250,000” and inserting  
14 “\$3,000,000”.

15           (2) REDUCTION WHERE CORRECTION IN SPECI-  
16 FIED PERIOD.—

17                   (A) CORRECTION WITHIN 30 DAYS.—Sec-  
18 tion 6721(b)(1) of such Code is amended—

19                           (i) by striking “\$15” and inserting  
20 “\$50”,

21                           (ii) by striking “\$50” and inserting  
22 “\$250”, and

23                           (iii) by striking “\$75,000” and insert-  
24 ing “\$500,000”.

1 (B) FAILURES CORRECTED ON OR BEFORE  
2 AUGUST 1.—Section 6721(b)(2) of such Code is  
3 amended—

4 (i) by striking “\$30” and inserting  
5 “\$100”,

6 (ii) by striking “\$50” and inserting  
7 “\$250”, and

8 (iii) by striking “\$150,000” and in-  
9 serting “\$1,500,000”.

10 (3) LOWER LIMITATION FOR PERSONS WITH  
11 GROSS RECEIPTS OF NOT MORE THAN \$5,000,000.—  
12 Section 6721(d)(1) of such Code is amended—

13 (A) in subparagraph (A)—

14 (i) by striking “\$100,000” and insert-  
15 ing “\$1,000,000”, and

16 (ii) by striking “\$250,000” and in-  
17 serting “\$3,000,000”,

18 (B) in subparagraph (B)—

19 (i) by striking “\$25,000” and insert-  
20 ing “\$175,000”, and

21 (ii) by striking “\$75,000” and insert-  
22 ing “\$500,000”, and

23 (C) in subparagraph (C)—

24 (i) by striking “\$50,000” and insert-  
25 ing “\$500,000”, and

1 (ii) by striking “\$150,000” and in-  
2 serting “\$1,500,000”.

3 (4) PENALTY IN CASE OF INTENTIONAL DIS-  
4 REGARD.—Section 6721(e) of such Code is amend-  
5 ed—

6 (A) by striking “\$100” in paragraph (2)  
7 and inserting “\$500”, and

8 (B) by striking “\$250,000” in paragraph  
9 (3)(A) and inserting “\$3,000,000”.

10 (b) FAILURE TO FURNISH CORRECT PAYEE STATE-  
11 MENTS.—

12 (1) IN GENERAL.—Section 6722(a) of such  
13 Code is amended—

14 (A) by striking “\$50” and inserting  
15 “\$250”, and

16 (B) by striking “\$100,000” and inserting  
17 “\$1,000,000”.

18 (2) PENALTY IN CASE OF INTENTIONAL DIS-  
19 REGARD.—Section 6722(c) of such Code is amend-  
20 ed—

21 (A) by striking “\$100” in paragraph (1)  
22 and inserting “\$500”, and

23 (B) by striking “\$100,000” in paragraph  
24 (2)(A) and inserting “\$1,000,000”.

1 (c) FAILURE TO COMPLY WITH OTHER INFORMA-  
2 TION REPORTING REQUIREMENTS.—Section 6723 of such  
3 Code is amended—

4 (1) by striking “\$50” and inserting “\$250”,  
5 and

6 (2) by striking “\$100,000” and inserting  
7 “\$1,000,000”.

8 (d) EFFECTIVE DATE.—The amendments made by  
9 this section shall apply with respect to information returns  
10 required to be filed after December 31, 2009.

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