

111<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 3254

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.

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## 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

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## 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.

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 “Employee Misclassifi-  
5 cation Prevention Act”.

1 **SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EM-**  
 2 **PLOYEES.**

3 (a) RECORDKEEPING AND NOTICE REQUIRE-  
 4 MENTS.—Section 11(c) of the Fair Labor Standards Act  
 5 of 1938 (29 U.S.C. 211(c)) is amended—

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

9 “(c) RECORDKEEPING AND NOTICE REQUIRE-  
 10 MENTS.—

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

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

16 “(A) each individual employed by such per-  
 17 son”;

18 (3) by striking “employment maintained by  
 19 him, and shall” and inserting the following: “em-  
 20 ployment;

21 “(B) subject to paragraph (2), each indi-  
 22 vidual—

23 “(i) who is not an employee within the  
 24 meaning given the term in section 3(e) (re-  
 25 ferred to in this subsection as a ‘non-em-  
 26 ployee’);

1 “(ii) whom the person has engaged, in  
2 the course of the person’s trade or busi-  
3 ness, for the performance of labor or serv-  
4 ices; and

5 “(iii)(I) with respect to whom the per-  
6 son is required to file an information re-  
7 turn under section 6041A(a) of the Inter-  
8 nal Revenue Code of 1986; or

9 “(II) who is providing labor or serv-  
10 ices to the person through an entity that  
11 is a trust, estate, partnership, association,  
12 company, or corporation (as such terms  
13 are used in section 7701(a)(1) of the In-  
14 ternal Revenue Code of 1986) if—

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

17 “(bb) creation or maintenance of  
18 such entity is a condition for the pro-  
19 vision of such labor or services to the  
20 person; and

21 “(cc) the person would be re-  
22 quired to file an information return  
23 for the entity under section 6041A(a)  
24 of the Internal Revenue Code of 1986  
25 if the entity were an individual; and

1           “(C) the remuneration and hours relating  
2           to the performance of labor or services by each  
3           individual described in subparagraph (B); and

4           “(D) the notices required under paragraph  
5           (5),  
6           and shall”; and

7           (4) by adding at the end the following:

8           “(2) RECORDKEEPING LIMITATION.—A person  
9           otherwise subject to the requirements of paragraph  
10          (1) shall have no responsibility for making, keeping,  
11          or preserving records, including the records de-  
12          scribed in such paragraph and paragraph (4), con-  
13          cerning the employees of any individual described in  
14          paragraph (1)(B) or the non-employees with whom  
15          such individual has engaged for the performance of  
16          labor or services for such person, unless such  
17          records are provided during the course of the trade  
18          or business to the person.

19          “(3) PRESUMPTION.—

20                 “(A) IN GENERAL.—For purposes of this  
21                 Act and the regulations or orders issued under  
22                 this Act, an individual who is employed, or who  
23                 is remunerated for the performance of labor or  
24                 services, by a person, shall be presumed to be  
25                 an employee of the person if—

1           “(i) the person has not made, kept,  
2           and preserved records in accordance with  
3           subparagraphs (B) and (C) of paragraph  
4           (1) regarding the individual; or

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

8           “(B) REBUTTAL.—The presumption under  
9           subparagraph (A) shall be rebutted only  
10          through the presentation of clear and con-  
11          vincing evidence that an individual described in  
12          such subparagraph is not an employee (within  
13          the meaning of section 3(e)) of the person.

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

21          “(5) NOTICE.—

22                 “(A) IN GENERAL.—Every person subject  
23                 to any provision of this Act or of any order  
24                 issued under this Act shall provide the notice  
25                 described in subparagraph (C) to each employee

1 of the person and each individual classified by  
2 the person as a non-employee under paragraph  
3 (1)(B).

4 “(B) TIMING OF NOTICE.—

5 “(i) IN GENERAL.—Such notice shall  
6 be provided, at a minimum, not later than  
7 6 months after the date of enactment of  
8 the Employee Misclassification Prevention  
9 Act, and thereafter—

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

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

16 “(ii) CHANGE IN STATUS.—Each per-  
17 son required to provide notice under sub-  
18 paragraph (A) to an individual shall also  
19 provide such notice to such individual upon  
20 changing such individual’s status as an  
21 employee or non-employee under paragraph  
22 (1).

23 “(C) CONTENTS OF NOTICE.—The notice  
24 required under this paragraph shall be in writ-  
25 ing and shall—

1           “(i) inform the individual of the indi-  
2           vidual’s classification, by the person sub-  
3           mitting the notice, as an employee or a  
4           non-employee under paragraph (1);

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

10          “(iii) include the address and tele-  
11          phone number for the applicable local of-  
12          fice of the United States Department of  
13          Labor;

14          “(iv) include for each individual classi-  
15          fied as a non-employee under paragraph  
16          (1)(B) by the person submitting the notice,  
17          the following statement: ‘Your rights to  
18          wage, hour, and other labor protections de-  
19          pend upon your proper classification as an  
20          employee or non-employee. If you have any  
21          questions or concerns about how you have  
22          been classified or suspect that you may  
23          have been misclassified, contact the U.S.  
24          Department of Labor.’; and

1                   “(v) include such additional informa-  
2                   tion as the Secretary shall prescribe by  
3                   regulation.”.

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

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

9           “(3) to discharge or in any other manner dis-  
10           criminate against any individual (including an em-  
11           ployee) because such individual has—

12                   “(A) opposed any practice, or filed a peti-  
13                   tion or complaint or instituted or caused to be  
14                   instituted any proceeding—

15                           “(i) under or related to this Act (in-  
16                           cluding concerning an individual’s status  
17                           as an employee or non-employee for pur-  
18                           poses of this Act); or

19                           “(ii) concerning an individual’s status  
20                           as an employee or non-employee for em-  
21                           ployment tax purposes within the meaning  
22                           of subtitle C of the Internal Revenue Code  
23                           of 1986;

24                           “(B) testified or is about to testify in any  
25                           proceeding described in subparagraph (A); or

1           “(C) served, or is about to serve, on an in-  
2           dustry committee;”;

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

5           (3) by adding at the end the following:

6           “(6) to fail to accurately classify an individual  
7           as an employee.”.

8           (c)       SPECIAL       PENALTY       FOR       CERTAIN  
9           MISCLASSIFICATION,   RECORDKEEPING,   AND   NOTICE  
10          VIOLATIONS.—Section 16 of the Fair Labor Standards  
11          Act of 1938 (29 U.S.C. 216) is amended—

12               (1) in subsection (b)—

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

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

19                   (C) in the third sentence—

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

23                           (ii) by striking “one or more employ-  
24                           ees” and inserting “one or more employees  
25                           or individuals”; and

1 (iii) by striking “other employees”  
2 and inserting “other employees or individ-  
3 uals, respectively,”; and

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

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

14 “(2) Any person who violates section 6, 7, 11(c), or  
15 15(a)(6) shall be subject to a civil penalty, for each em-  
16 ployee or other individual who was the subject of such a  
17 violation, in an amount—

18 “(A) not to exceed \$1,100; or

19 “(B) in the case of a person who has repeatedly  
20 or willfully committed such violation, not to exceed  
21 \$5,000.”.

22 (d) EMPLOYEE RIGHTS WEB SITE.—

23 (1) IN GENERAL.—Not later than 180 days  
24 after the date of enactment of this Act, the Sec-  
25 retary of Labor shall establish, for purposes of sec-

1 tion 11(c)(5)(C)(ii) of the Fair Labor Standards Act  
2 of 1938 (as added by this Act), a single web page  
3 on the Department of Labor Web site that summa-  
4 rizes in plain language the rights of employees as  
5 described in the amendments made by subsection (a)  
6 and other information considered appropriate by the  
7 Secretary, including appropriate links to additional  
8 information on the Department of Labor Web site or  
9 other Federal agency Web sites. In addition, such  
10 web page—

11 (A) shall include a statement explaining  
12 that employees may have additional or greater  
13 rights under State or local laws and how em-  
14 ployees may obtain additional information about  
15 their rights under State or local laws;

16 (B) shall be made available in English and  
17 any other languages that the Secretary deter-  
18 mines to be prevalent among individuals likely  
19 to access the web page; and

20 (C) may provide a link to permit individ-  
21 uals to file complaints online.

22 (2) COORDINATION WITH OTHER FEDERAL WEB  
23 SITES.—The Secretary shall coordinate with other  
24 relevant Federal agencies in order to provide infor-  
25 mation similar to the information described in para-

1 graph (1) (or a link to the Department of Labor web  
2 page required by this subsection) on the Web sites  
3 of such other agencies.

4 **SEC. 3. MISCLASSIFICATION OF EMPLOYEES FOR UNEM-**  
5 **PLOYMENT COMPENSATION PURPOSES.**

6 (a) IN GENERAL.—Section 303(a) of the Social Secu-  
7 rity Act (42 U.S.C. 503(a)) is amended—

8 (1) in paragraph (10), by striking the period  
9 and inserting “; and”; and

10 (2) by adding after paragraph (10) the fol-  
11 lowing:

12 “(11)(A) Such auditing and investigative proce-  
13 dures as may be necessary to identify employers that  
14 have not registered under the State law or that are  
15 paying unreported wages, where these actions or  
16 omissions by the employers have the effect of exclud-  
17 ing employees from unemployment compensation  
18 coverage; and

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

23 “(12) The establishment of administrative pen-  
24 alties for misclassifying employees, or paying unre-  
25 ported wages to employees without proper record-

1       keeping, for unemployment compensation pur-  
2       poses.”.

3       (b) REVIEW OF AUDITING PROGRAMS.—The Sec-  
4       retary of Labor shall include, in the Department of La-  
5       bor’s system for measuring States’ performance in con-  
6       ducting unemployment compensation tax audits, a specific  
7       measure of their effectiveness in identifying the under-  
8       reporting of wages and the underpayment of unemploy-  
9       ment compensation contributions (including their effec-  
10      tiveness in identifying instances of such underreporting or  
11      underpayments despite the absence of cancelled checks,  
12      original time sheets, or other similar documentation).

13      (c) EFFECTIVE DATE.—

14           (1) IN GENERAL.—Except as provided in para-  
15      graph (2), the amendments made by subsection (a)  
16      shall take effect 12 months after the date of the en-  
17      actment of this Act.

18           (2) EXCEPTION.—If the Secretary of Labor  
19      finds that legislation is necessary in order for the  
20      unemployment compensation law of a State to com-  
21      ply with the amendments made by subsection (a),  
22      such amendments shall not apply with respect to  
23      such law until the later of—

24           (A) the day after the close of the first reg-  
25      ular session of the legislature of such State

1           which begins after the date of the enactment of  
2           this Act; or

3                   (B) 12 months after the date of the enact-  
4           ment of this Act.

5           (d) DEFINITION OF STATE.—For purposes of this  
6 section, the term “State” has the meaning given such  
7 term by section 3306(j) of the Internal Revenue Code of  
8 1986.

9   **SEC. 4. DEPARTMENT OF LABOR COORDINATION, REFER-**  
10                   **RAL, AND REGULATIONS.**

11           (a) COORDINATION AND REFERRAL.—Notwith-  
12 standing any other provision of law, any office, adminis-  
13 tration, or division of the Department of Labor that, while  
14 in the performance of its official duties, obtains informa-  
15 tion regarding the misclassification by a person subject to  
16 the provisions of the Fair Labor Standards Act of 1938  
17 (29 U.S.C. 201 et seq.) or any order issued under such  
18 Act of any individual regarding whether such individual  
19 is an employee or a non-employee contracted for the per-  
20 formance of labor or services for purposes of section 6 or  
21 7 of such Act (29 U.S.C. 206, 207) or in records required  
22 under section 11(c) of such Act (29 U.S.C. 211(c)), shall  
23 report such information to the Wage and Hour Division  
24 of the Department. The Wage and Hour Division may re-

1 port such information to the Internal Revenue Service as  
2 the Division considers appropriate.

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

6 **SEC. 5. TARGETED AUDITS.**

7 The audits of employers subject to the Fair Labor  
8 Standards Act of 1938 (29 U.S.C. 201 et seq.) that are  
9 conducted by the Wage and Hour Division of the Depart-  
10 ment of Labor shall include certain industries with fre-  
11 quent incidence of misclassifying employees as non-em-  
12 ployees, as determined by the Secretary of Labor.

○