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1ST SESSION

S. 2252

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

NOVEMBER 5, 2015

Mr. BROWN (for himself, Mr. DURBIN, Mr. CARDIN, Mr. CASEY, Mr. FRANKEN, and Mr. SANDERS) 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 Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; FINDINGS; PURPOSES.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Fair Playing Field Act of 2015”.

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

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

8 (2) To allow time to develop a comprehensive
9 approach to the problem, Congress enacted section
10 530 of the Revenue Act of 1978 as an interim meas-
11 ure protecting taxpayers from liability for
12 misclassification if the taxpayer has a reasonable
13 basis for classifying a worker as an independent con-
14 tractor and meets certain other conditions. In addi-
15 tion, the Act prohibited the Secretary of the Treas-
16 ury from publishing regulations or revenue rulings
17 on workers' employment tax status pending the ex-
18 pected near-term enactment of clarifying legislation.

19 (3) During the ensuing 33 years, Congress
20 made section 530 of the Revenue Act of 1978 per-
21 manent; however, changes in working relationships
22 and the continued prohibition on new guidance have
23 increased the uncertainty as to the proper classifica-
24 tion of workers.

1 (4) Many workers are properly classified as
2 independent contractors. In other instances, workers
3 who are employees are being treated as independent
4 contractors. Such misclassification for tax purposes
5 contributes to inequities in the competitive positions
6 of businesses and to the Federal and State tax gap,
7 and may also result in misclassification for other
8 purposes, such as denial of unemployment benefits,
9 workplace health and safety protections, and retire-
10 ment or other benefits or protections available to
11 employees.

12 (5) Workers, businesses, and other taxpayers
13 will benefit from clear guidance regarding employ-
14 ment tax status. In the interest of fairness and in
15 view of many service recipients' reliance on current
16 section 530, such guidance should apply only pro-
17 spectively.

18 (c) PURPOSES.—The purposes of this Act are to per-
19 mit the Secretary of the Treasury to provide guidance al-
20 lowing workers and businesses to clearly understand the
21 proper Federal tax classification of workers and to provide
22 relief allowing an orderly transition to new rules designed
23 to increase certainty and uniformity of treatment.

1 **SEC. 2. AUTHORITY TO ISSUE GUIDANCE CLARIFYING EM-**
 2 **PLOYMENT STATUS FOR PURPOSES OF EM-**
 3 **PLOYMENT TAXES.**

4 (a) IN GENERAL.—Chapter 25 of the Internal Rev-
 5 enue Code of 1986 is amended by adding at the end the
 6 following new section:

7 **“SEC. 3512. AUTHORITY TO ISSUE GUIDANCE CLARIFYING**
 8 **EMPLOYMENT STATUS.**

9 “(a) IN GENERAL.—The Secretary shall issue such
 10 regulations or other guidance as the Secretary determines
 11 to be necessary or appropriate to clarify the proper em-
 12 ployment status of individuals for purposes of any tax im-
 13 posed by this subtitle.

14 “(b) PROHIBITION ON RETROACTIVE ASSESS-
 15 MENTS.—

16 “(1) IN GENERAL.—Except as provided in para-
 17 graph (2), if—

18 “(A) for purposes of any tax imposed by
 19 this subtitle, the taxpayer did not treat an indi-
 20 vidual as an employee for any period before the
 21 reclassification date with respect to such indi-
 22 vidual, and

23 “(B) in the case of periods after December
 24 31, 1978, and before such reclassification date,
 25 all Federal tax returns (including information
 26 returns) required to be filed by the taxpayer

1 with respect to such individual for such period
2 are filed on a basis consistent with the tax-
3 payer's treatment of such individual as not
4 being an employee,

5 then, for purposes of applying such taxes for such
6 period before such reclassification date with respect
7 to the taxpayer, the individual shall be deemed not
8 to be an employee unless the taxpayer had no rea-
9 sonable basis for not treating such individual as an
10 employee.

11 “(2) PROFESSIONAL SERVICES.—

12 “(A) IN GENERAL.—In the case of an indi-
13 vidual who performs professional services, if—

14 “(i) for purposes of any tax imposed
15 by this subtitle, the taxpayer did not treat
16 the individual as an employee for any pe-
17 riod, and

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

1 then, for purposes of applying such taxes for
 2 such period with respect to the taxpayer, the in-
 3 dividual shall be deemed not be an employee
 4 unless the taxpayer had no reasonable basis for
 5 not treating such individual as an employee.
 6 For purposes of this subparagraph, professional
 7 services means services performed in the fields
 8 of health, law, engineering, architecture, ac-
 9 counting, actuarial science, consulting, or finan-
 10 cial services.

11 “(B) APPLICATION TO FULL-TIME LIFE IN-
 12 SURANCE SALESMEN.—For purposes of this
 13 subtitle (with the exception of chapter 21), an
 14 individual shall not excluded from the applica-
 15 tion of subparagraph (A) due solely to treat-
 16 ment of such individual by the taxpayer as an
 17 employee, including for purposes of tax returns,
 18 to the extent required under section
 19 3121(d)(3)(B).

20 “(3) STATUTORY STANDARDS PROVIDING ONE
 21 METHOD OF SATISFYING THE REQUIREMENTS OF
 22 PARAGRAPHS (1) AND (2).—For purposes of para-
 23 graphs (1) and (2), a taxpayer shall in any case be
 24 treated as having a reasonable basis for not treating
 25 an individual as an employee for a period if the tax-

1 payer's treatment of such individual for such period
2 was in reasonable reliance on any of the following:

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

6 “(B) A past Internal Revenue Service
7 audit of the taxpayer in which there was no as-
8 sessment attributable to the treatment (for pur-
9 poses of any tax imposed by this subtitle) of the
10 individuals holding positions substantially simi-
11 lar to the position held by such individual.

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

15 “(4) CONSISTENCY REQUIRED IN THE CASE OF
16 PRIOR TAX TREATMENT.—Paragraph (1) shall not
17 apply with respect to the treatment of any individual
18 (hereafter in this paragraph referred to as the re-
19 classified individual) for purposes of any tax im-
20 posed by this subtitle for any period ending after
21 December 31, 1978, if the taxpayer (or a prede-
22 cessor) has treated any individual holding a substan-
23 tially similar position as an employee for purposes of
24 any tax imposed by this subtitle for any period be-
25 ginning after December 31, 1977, and ending before

1 the reclassification date with respect to such reclass-
 2 sified individual.

3 “(c) DEFINITIONS.—For purposes of this section—

4 “(1) RECLASSIFICATION DATE.—

5 “(A) IN GENERAL.—The term ‘reclassifica-
 6 tion date’ means, with respect to any individual,
 7 the earlier of—

8 “(i) the first day of the first calendar
 9 quarter beginning more than 180 days
 10 after the date of an employee classification
 11 determination with respect to such indi-
 12 vidual, or

13 “(ii) the effective date of the first ap-
 14 plicable final regulation issued by the Sec-
 15 retary under subsection (a) with respect to
 16 such individual (or, if later, the first day of
 17 the first calendar quarter beginning more
 18 than 180 days after such regulation is
 19 issued).

20 “(B) EMPLOYEE CLASSIFICATION DETER-
 21 MINATION.—The term ‘employee classification
 22 determination’ means, with respect to any indi-
 23 vidual, a determination by the Secretary, in
 24 connection with an audit of the taxpayer which
 25 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 REGULATION.—The term ‘first applicable final regulation’ means, with respect to any individual, the first final regulation (or other guidance of general 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.—

“(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

1 services for such other person as an engineer, de-
2 signer, drafter, computer programmer, systems ana-
3 lyst, or other similarly skilled worker engaged in a
4 similar line of work.

5 “(2) NOTICE OF AVAILABILITY OF SECTION.—

6 An officer or employee of the Internal Revenue Serv-
7 ice shall, before or at the commencement of any
8 audit inquiry relating to the employment status of
9 one or more individuals who perform services for the
10 taxpayer, provide the taxpayer with a written notice
11 of the provisions of this section.

12 “(3) RULES RELATING TO STATUTORY STAND-

13 ARDS.—For purposes of subsection (b)(3)—

14 “(A) a taxpayer may not rely on an audit
15 commenced after December 31, 1996, for pur-
16 poses of subparagraph (B) thereof unless such
17 audit included an examination for purposes of
18 any tax imposed by this subtitle whether the in-
19 dividual involved (or any individual holding a
20 position substantially similar to the position
21 held by the individual involved) should be treat-
22 ed as an employee of the taxpayer,

23 “(B) in no event shall the significant seg-
24 ment requirement of subparagraph (C) thereof
25 be construed to require a reasonable showing of

1 the practice of more than 25 percent of the in-
2 dustry (determined by not taking into account
3 the taxpayer), and

4 “(C) in applying the long-standing recog-
5 nized practice requirement of subparagraph (C)
6 thereof—

7 “(i) such requirement shall not be
8 construed as requiring the practice to have
9 continued for more than 10 years, and

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

13 “(4) AVAILABILITY OF SAFE HARBORS.—Noth-
14 ing in this section shall be construed to provide that
15 subsection (b) only applies where the individual in-
16 volved is otherwise an employee of the taxpayer.

17 “(5) BURDEN OF PROOF.—

18 “(A) IN GENERAL.—If—

19 “(i) a taxpayer establishes a prima
20 facie case that it was reasonable not to
21 treat an individual as an employee for pur-
22 poses of subsection (b), and

23 “(ii) the taxpayer has fully cooperated
24 with reasonable requests from the Sec-
25 retary,

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

3 “(B) EXCEPTION FOR OTHER REASONABLE
 4 BASIS.—In the case of any issue involving
 5 whether the taxpayer had a reasonable basis
 6 not to treat an individual as an employee for
 7 purposes of subsection (b), subparagraph (A)
 8 shall only apply for purposes of determining
 9 whether the taxpayer meets the requirements of
 10 subparagraph (A), (B), or (C) of subsection
 11 (b)(3).

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

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

18 “(B) such individual is treated by the tax-
 19 payer as an employee for purposes of the taxes
 20 imposed by this subtitle for any subsequent pe-
 21 riod,

22 then, for purposes of applying such taxes for such
 23 prior period with respect to the taxpayer, the indi-
 24 vidual shall be deemed not to be an employee.

1 “(7) SUBSTANTIALLY SIMILAR POSITION.—For
 2 purposes of subsection (b) and this subsection, the
 3 determination as to whether an individual holds a
 4 position substantially similar to a position held by
 5 another individual shall include consideration of the
 6 relationship between the taxpayer and such individ-
 7 uals.

8 “(8) TREATMENT OF TEST ROOM SUPERVISORS
 9 AND PROCTORS WHO ASSIST IN THE ADMINISTRA-
 10 TION OF COLLEGE ENTRANCE AND PLACEMENT
 11 EXAMS.—

12 “(A) IN GENERAL.—In the case of an indi-
 13 vidual described in subparagraph (B) who is
 14 providing services as a test proctor or room su-
 15 pervisor by assisting in the administration of
 16 college entrance or placement examinations,
 17 subsection (b) shall be applied to such services
 18 performed after December 31, 2006 (and remu-
 19 neration paid for such services), without regard
 20 to paragraph (4) thereof.

21 “(B) APPLICABILITY.—An individual is de-
 22 scribed in this subparagraph if the individual—

23 “(i) is providing the services described
 24 in subsection (b) to an organization de-

1 scribed in section 501(c) and exempt from
2 tax under section 501(a), and

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

6 “(9) TREATMENT OF SECURITIES BROKER
7 DEALERS.—In determining for purposes of this title
8 whether a registered representative of a securities
9 broker-dealer is an employee (as defined in section
10 3121(d)), no weight shall be given to instructions
11 from the service recipient which are imposed only in
12 compliance with investor protection standards im-
13 posed by the Federal Government, any State govern-
14 ment, or a governing body pursuant to a delegation
15 by a Federal or State agency.

16 “(e) STATEMENTS TO INDEPENDENT CONTRAC-
17 TORS.—

18 “(1) IN GENERAL.—Each person who contracts
19 for the services of an independent contractor on a
20 regular and ongoing basis, within the scope of such
21 person’s trade or business, shall provide a written
22 statement to such independent contractor notifying
23 such independent contractor of the Federal tax obli-
24 gations of an independent contractor, the labor and
25 employment law protections that do not apply to

1 independent contractors, and the right of such inde-
 2 pendent contractor to seek a status determination
 3 from the Internal Revenue Service.

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

9 “(3) TIMING OF STATEMENT.—Except as other-
 10 wise provided by the Secretary, the statement re-
 11 quired under paragraph (1) shall be provided within
 12 a reasonable period before or after entering into the
 13 arrangement for services referred to in paragraph
 14 (1).

15 “(4) DEVELOPMENT OF MODEL STATEMENT.—
 16 The Secretary shall develop model materials for pro-
 17 viding the statement required under paragraph
 18 (1).”.

19 (b) REDUCED PENALTY NOT APPLICABLE IN CASES
 20 OF NONCOMPLIANCE WITH GUIDANCE WITHOUT REA-
 21 SONABLE BASIS.—Subsection (c) of section 3509 of the
 22 Internal Revenue Code of 1986 is amended—

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

25 “(1) such liability”, and

1 (2) by striking the period at the end and insert-
2 ing “, or

3 “(2) such liability relates to an individual who
4 is treated as an employee under regulations or other
5 guidance issued by the Secretary under section
6 3512(a) and the taxpayer lacks a reasonable basis
7 for treating the individual as other than an em-
8 ployee.

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

23 (c) CONFORMING AMENDMENTS.—

24 (1) Paragraph (2) of section 6724(d) of the In-
25 ternal Revenue Code of 1986 is amended by striking

1 “or” at the end of subparagraph (GG), by striking
 2 the period at the end of subparagraph (HH) and in-
 3 serting “, or”, and by inserting after subparagraph
 4 (HH) the following new subparagraph:

5 “(II) section 3512(e) (relating to state-
 6 ments to independent contractors).”.

7 (2) Paragraph (2) of section 7436(a) of such
 8 Code is amended by striking “subsection (a) of sec-
 9 tion 530 of the Revenue Act of 1978” and inserting
 10 “section 3512(b)”.

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

“Sec. 3512. Authority to issue guidance clarifying employment status.”.

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

17 (e) REPORTS ON WORKER MISCLASSIFICATION.—Be-
 18 ginning with the first fiscal year beginning after the date
 19 the first regulation or other guidance is issued for public
 20 comment under section 3512(a) of the Internal Revenue
 21 Code of 1986 (as added by this section), the Commissioner
 22 of the Internal Revenue Service shall issue the following
 23 reports:

24 (1) A report each fiscal year on worker classi-
 25 fication which shall include the total number of ex-

1 aminations of employers initiated because of sus-
 2 pected worker classification issues, the total number
 3 of examinations that included determinations on
 4 worker classification issues, the amount of additional
 5 tax liabilities associated with worker classification
 6 enforcement actions, the number of workers reclassi-
 7 fied as a result of these actions, the number of re-
 8 quests for Determination of Worker Status (Form
 9 SS-8), and technical guidance on how to understand
 10 the data provided in the report.

11 (2) A report each fiscal year in which new sta-
 12 tistically valid data is compiled and interpreted on
 13 worker classification, prepared on the basis of infor-
 14 mation gathered during an Employment Tax Study
 15 conducted by the National Research Program (NRP)
 16 of the Internal Revenue Service. Such report shall
 17 provide statistical estimates of the number of em-
 18 ployers misclassifying workers, the number of work-
 19 ers misclassified, the industries involved, data inter-
 20 pretations and conclusions, and a description of the
 21 impact of improper worker classification on the em-
 22 ployment tax gap.

23 (f) TERMINATION OF SECTION 921 OF THE TAX-
 24 PAYER RELIEF ACT OF 1997.—The Taxpayer Relief Act
 25 of 1997 is amended by striking section 921.

1 (g) EFFECTIVE DATES.—

2 (1) DELAYED EFFECTIVE DATE OF REGULA-
3 TIONS AND GUIDANCE.—Any regulation or other
4 guidance issued under section 3512(a) of the Inter-
5 nal Revenue Code of 1986, as added by this section,
6 shall not apply to services rendered before the date
7 which is 1 year after the date of the enactment of
8 this Act.

9 (2) AUTHORITY TO ISSUE REGULATIONS AND
10 GUIDANCE IMMEDIATELY.—So much of the amend-
11 ment made by subsection (d) as relates to subsection
12 (b) of section 530 of the Revenue Act of 1978 shall
13 take effect on the date of the enactment of this Act.

14 (3) DELAYED TERMINATION OF REMAINDER OF
15 SECTION 530 OF THE REVENUE ACT OF 1978.—Ex-
16 cept as provided in paragraph (2), the amendment
17 made by subsection (d) shall apply to services ren-
18 dered on or after the date which is 1 year after the
19 date of the enactment of this Act.

20 (4) STATEMENTS TO INDEPENDENT CONTRAC-
21 TORS.—Subsection (e) of section 3512 of the Inter-
22 nal Revenue Code of 1986, as added by this section,
23 and the amendments made by subsection (c)(1) of
24 this section shall apply to arrangements for services
25 entered into after December 31, 2015.

1 (5) APPLICATION OF REDUCED PENALTY.—The
2 amendments made by subsection (b) shall apply to
3 any calendar year beginning after the date of the en-
4 actment of this Act.

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