

115TH CONGRESS
2D SESSION

H. R. 6189

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 HOUSE OF REPRESENTATIVES

JUNE 21, 2018

Mr. TAKANO introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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.

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 “Payroll Fraud Preven-
5 tion Act of 2018”.

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

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

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

7 “(1) has been engaged, in the course of the
8 trade or business of the person, for the performance
9 of labor or services; and

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

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

13 “(1) an employee of the employer; or

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

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

19 “(B)(i) with respect to whom the person is
20 required to file an information return under
21 section 6041A(a) of the Internal Revenue Code
22 of 1986; or

23 “(ii) who is providing labor or services to
24 the person through an entity that is a trust, es-
25 tate, partnership, association, company, or cor-
26 poration (as such terms are used in section

1 7701(a)(1) of the Internal Revenue Code of
2 1986) if—

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

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

8 “(III) the person would be required to
9 file an information return for the entity
10 under section 6041A(a) of the Internal
11 Revenue Code of 1986 if the entity were
12 an individual.”.

13 (b) CLASSIFICATION AS EMPLOYEES.—Section 11(c)
14 of the Fair Labor Standards Act of 1938 (29 U.S.C.
15 211(c)) is amended—

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

19 “(c) RECORDKEEPING; CLASSIFICATION; NOTICE.—

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

23 (2) by adding at the end the following:

24 “(2) CLASSIFICATION.—Every person (includ-
25 ing every employer and enterprise), who employs any

1 employee engaged in commerce or in the production
2 of goods for commerce or engages any non-employee
3 engaged in commerce or in the production of goods
4 for commerce, shall accurately classify each covered
5 individual as an employee or a non-employee (as the
6 case may be).

7 “(3) NOTICE.—

8 “(A) IN GENERAL.—Every person subject
9 to any provision of this Act or of any order
10 issued under this Act shall provide the notice
11 described in subparagraph (C) to each employee
12 of the person and each individual classified by
13 the person as a non-employee under paragraph
14 (2) and maintain a copy of such notice as a re-
15 quired record under paragraph (1).

16 “(B) TIMING OF NOTICE.—

17 “(i) IN GENERAL.—The notice de-
18 scribed in subparagraph (A) shall be pro-
19 vided, at a minimum, to each covered indi-
20 vidual not later than 6 months after the
21 date of enactment of the Payroll Fraud
22 Prevention Act of 2018, and thereafter—

23 “(I) for each new employee, upon
24 employment; and

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

4 “(ii) CHANGE IN STATUS.—Each per-
5 son required to provide a notice under sub-
6 paragraph (A) to a covered individual shall
7 also provide such notice to such individual
8 upon changing the status of such indi-
9 vidual as an employee or a non-employee.

10 “(C) CONTENTS OF NOTICE.—The notice
11 required under this paragraph shall be in writ-
12 ing and shall—

13 “(i) inform the covered individual of
14 the classification of such individual, by the
15 person submitting the notice, as an em-
16 ployee or a non-employee;

17 “(ii) include a statement directing
18 such individual to the Department of
19 Labor website established under section 3
20 of the Payroll Fraud Prevention Act of
21 2018, for the purpose of providing further
22 information about the legal rights of an
23 employee;

1 “(iii) include the address and tele-
2 phone number for the applicable local of-
3 fice of the Department of Labor; and

4 “(iv) include for each covered indi-
5 vidual classified as a non-employee by the
6 person providing the notice, the following
7 statement: ‘Your rights to wage, hour, and
8 other labor protections depend upon your
9 proper classification as an employee or a
10 non-employee. If you have any questions or
11 concerns about how you have been classi-
12 fied or suspect that you may have been
13 misclassified, contact the U.S. Department
14 of Labor.’.

15 “(D) PRESUMPTION.—

16 “(i) IN GENERAL.—For purposes of
17 this Act and the regulations or orders
18 issued under this Act, a covered individual
19 to whom a person is required to provide a
20 notice under subparagraph (A) shall be
21 presumed to be an employee of the person
22 if the person has not provided the indi-
23 vidual with such notice within the time re-
24 quired under subparagraph (B).

1 “(ii) REBUTTAL.—The presumption
2 under clause (i) shall be rebutted only
3 through the presentation of clear and con-
4 vincing evidence that a covered individual
5 described in such subparagraph is not an
6 employee of the person.”.

7 (c) SPECIAL PROHIBITED ACTS.—Section 15(a) of
8 the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a))
9 is amended—

10 (1) by striking paragraph (3) and inserting the
11 following:

12 “(3) to discharge or in any other manner dis-
13 criminate against any covered individual (including
14 an employee) because such individual has—

15 “(A) opposed any practice, filed any peti-
16 tion or complaint, or instituted or caused to be
17 instituted any proceeding—

18 “(i) under or related to this Act (in-
19 cluding concerning the status of a covered
20 individual as an employee or a non-em-
21 ployee for purposes of this Act); or

22 “(ii) concerning the status of a cov-
23 ered individual as an employee or a non-
24 employee for employment tax purposes

1 within the meaning of subtitle C of the In-
2 ternal Revenue Code of 1986;

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

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

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

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

10 “(6) to wrongly classify an employee of the per-
11 son as a non-employee in accordance with section
12 11(c)(2).”.

13 (d) SPECIAL PENALTY FOR CERTAIN
14 MISCLASSIFICATION, RECORDKEEPING, AND NOTICE VIO-
15 LATIONS.—Section 16 of the Fair Labor Standards Act
16 of 1938 (29 U.S.C. 216) is amended—

17 (1) in subsection (b)—

18 (A) in the sixth sentence, by striking “any
19 employee” each place the term occurs and in-
20 serting “any covered individual”;

21 (B) in the fourth sentence—

22 (i) by striking “employees” and in-
23 serting “covered individual”; and

1 (ii) by striking “he gives his consent”
2 and inserting “such covered individual con-
3 sents”;

4 (C) in the third sentence—

5 (i) by striking “either of the preceding
6 sentences” and inserting “any of the pre-
7 ceding sentences”;

8 (ii) by striking “one or more employ-
9 ees” and inserting “one or more covered
10 individuals”; and

11 (iii) by striking “in behalf of himself
12 or themselves and other employees” and
13 inserting “on behalf of such covered indi-
14 vidual or individuals and other covered in-
15 dividuals”; and

16 (D) by inserting after the first sentence
17 the following: “Such liquidated damages are
18 doubled (subject to section 11 of the Portal-to-
19 Portal Act of 1947 (29 U.S.C. 260)) where, in
20 addition to violating the provisions of section 6
21 or 7, the employer has violated the provisions of
22 section 15(a)(6) with respect to such employee
23 or employees.”; and

24 (2) in subsection (e), by striking paragraph (2)
25 and inserting the following:

1 “(2) Any person who violates section 6, 7,
2 11(c), or 15(a)(6) shall be subject to a civil penalty,
3 for each employee or other individual who was the
4 subject of such a violation, in an amount—

5 “(A) not to exceed \$1,100; or

6 “(B) in the case of a person who has re-
7 peatedly or willfully committed such violation,
8 not to exceed \$5,000.”.

9 **SEC. 3. EMPLOYEE RIGHTS WEBSITE.**

10 Not later than 180 days after the date of enactment
11 of this Act, the Secretary of Labor shall establish a single
12 webpage on the Department of Labor website that sum-
13 marizes in plain language the rights of employees and non-
14 employees under the Fair Labor Standards Act of 1938
15 (29 U.S.C. 201 et seq.), including the rights described in
16 the amendments made by section 2.

17 **SEC. 4. MISCLASSIFICATION OF EMPLOYEES FOR UNEM-**
18 **PLOYMENT COMPENSATION PURPOSES.**

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

21 (1) in paragraph (11)(B), by striking the period
22 and inserting “; and”;

23 (2) in paragraph (12), by striking the period
24 and inserting “; and”; and

1 (3) by adding after paragraph (12) the fol-
2 lowing:

3 “(13)(A) Such auditing and investigative proce-
4 dures as may be necessary to identify employers that
5 have not registered under the State law or that are
6 paying unreported wages, where these actions or
7 omissions by the employers have the effect of exclud-
8 ing employees from unemployment compensation
9 coverage.

10 “(B) The making of quarterly reports to the
11 Secretary of Labor (in such form as the Secretary
12 of Labor may require) describing the results of the
13 procedures under subparagraph (A).

14 “(14) The establishment of administrative pen-
15 alties for misclassifying employees, or paying unre-
16 ported wages to employees without proper record-
17 keeping, for unemployment compensation pur-
18 poses.”.

19 (b) REVIEW OF AUDITING PROGRAMS.—The Sec-
20 retary of Labor shall include, in the Department of La-
21 bor’s system for measuring the performance of States in
22 conducting unemployment compensation tax audits, a spe-
23 cific measure of the effectiveness of States in identifying
24 the underreporting of wages and the underpayment of un-
25 employment compensation contributions (including the ef-

1 fectiveness of States in identifying instances of such
2 underreporting or underpayments despite the absence of
3 canceled checks, original time sheets, or other similar doc-
4 umentation).

5 (c) EFFECTIVE DATE.—

6 (1) IN GENERAL.—Except as provided in para-
7 graph (2), the amendments made by subsection (a)
8 shall take effect 12 months after the date of enact-
9 ment of this Act.

10 (2) EXCEPTION.—If the Secretary of Labor
11 finds that legislation is necessary for the unemploy-
12 ment compensation law of a State to comply with
13 the amendments made by subsection (a), such
14 amendments shall not apply with respect to such law
15 until the later of—

16 (A) the day after the close of the first reg-
17 ular session of the legislature of such State that
18 begins after the date of enactment of this Act;

19 or

20 (B) 12 months after the date of enactment
21 of this Act.

22 (d) DEFINITION OF STATE.—For purposes of this
23 section, the term “State” has the meaning given the term
24 in section 3306(j) of the Internal Revenue Code of 1986.

1 **SEC. 5. DEPARTMENT OF LABOR COORDINATION, REFER-**
2 **RAL, AND REGULATIONS.**

3 (a) COORDINATION AND REFERRAL.—Notwith-
4 standing any other provision of law, any office, adminis-
5 tration, or division of the Department of Labor that, while
6 in the performance of its official duties, obtains informa-
7 tion regarding the misclassification by a person subject to
8 the provisions of the Fair Labor Standards Act of 1938
9 (29 U.S.C. 201 et seq.), or any order issued under such
10 Act of any individual regarding whether such individual
11 is an employee or a non-employee engaged in the perform-
12 ance of labor or services for purposes of section 6 or 7
13 of such Act (29 U.S.C. 206, 207), or in records required
14 under section 11(c) of such Act (29 U.S.C. 211(c)), shall
15 report such information to the Wage and Hour Division
16 of the Department of Labor. The Wage and Hour Division
17 may report such information to the Internal Revenue
18 Service as the Wage and Hour Division considers appro-
19 priate.

20 (b) REGULATIONS.—The Secretary of Labor shall
21 promulgate regulations to carry out this Act and the
22 amendments made by this Act.

23 **SEC. 6. TARGETED AUDITS.**

24 The audits of employers subject to the Fair Labor
25 Standards Act of 1938 (29 U.S.C. 201 et seq.) that are
26 conducted by the Wage and Hour Division of the Depart-

1 ment of Labor shall include certain industries with fre-
2 quent incidence of misclassifying employees as non-em-
3 ployees, as determined by the Secretary of Labor.

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