

111TH CONGRESS  
1ST SESSION

# H. R. 3408

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 HOUSE OF REPRESENTATIVES

JULY 30, 2009

Mr. McDERMOTT (for himself, Mr. NEAL of Massachusetts, and Mr. TIERNEY) introduced the following bill; which was referred to the Committee on Ways and Means

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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. INFORMATION REPORTING FOR PAYMENTS TO COR-**  
2 **PORATIONS.**

3 (a) IN GENERAL.—Section 6041 of the Internal Rev-  
4 enue Code of 1986 (relating to information at source) is  
5 amended by adding at the end the following new sub-  
6 section:

7 “(h) PAYMENTS TO CORPORATIONS.—

8 “(1) IN GENERAL.—Notwithstanding any regu-  
9 lations prescribed by the Secretary before the date  
10 of the enactment of this subsection, subsection (a)  
11 shall apply to payments made to a corporation.

12 “(2) EXCEPTION.—Paragraph (1) shall not  
13 apply to payments made to a hospital or extended  
14 care facility described in section 501(c)(3) which is  
15 exempt from taxation under section 501(a) or to a  
16 hospital or extended care facility owned and oper-  
17 ated by the United States, a State, the District of  
18 Columbia, a possession of the United States, or a  
19 political subdivision, agency or instrumentality of  
20 any of the foregoing.”.

21 (b) EFFECTIVE DATE.—The amendment made by  
22 this section shall apply to payments made more than 1  
23 year after the date of the enactment of this Act.

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

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

9 **“SEC. 3511. SAFE HARBOR.**

10 **“(a) TERMINATION OF CERTAIN EMPLOYMENT TAX**  
11 **LIABILITY.—**

12 **“(1) IN GENERAL.—If—**

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

16 **“(B) in the case of periods after December**  
17 **31, 1978, all Federal tax returns (including in-**  
18 **formation returns) required to be filed by the**  
19 **taxpayer with respect to such individual for**  
20 **such period are filed on a basis consistent with**  
21 **the taxpayer’s treatment of such individual as**  
22 **not being an employee,**

23 **then, for purposes of applying such taxes for such**  
24 **period with respect to the taxpayer, the individual**  
25 **shall be deemed not to be an employee unless the**  
26 **taxpayer had no reasonable basis for not treating**

1 such individual as an employee. This paragraph shall  
2 not apply with respect to an individual for any peri-  
3 ods beginning after the date of notice of a deter-  
4 mination that such individual should be treated as  
5 an employee of the taxpayer.

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

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

13 “(i) a written determination issued to  
14 the taxpayer addressing the employment  
15 status of such individual or another indi-  
16 vidual holding a substantially similar posi-  
17 tion with the taxpayer, or

18 “(ii) a concluded examination (for em-  
19 ployment tax purposes) of whether such in-  
20 dividual (or another individual holding a  
21 substantially similar position) should be  
22 treated as an employee of the taxpayer,  
23 with respect to which there was no deter-  
24 mination that such individual (or another  
25 individual holding a substantially similar

1 position) should be treated as an employee,  
2 and

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

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

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

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

17 “(c) SPECIAL RULES FOR APPLICATION OF SEC-  
18 TION.—

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

20 An officer or employee of the Internal Revenue Serv-  
21 ice shall, before or at the commencement of any ex-  
22 amination relating to the employment status of one  
23 or more individuals who perform services for the tax-  
24 payer, provide the taxpayer with a written notice of  
25 the provisions of this section.

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

7                   “(A) the controlling facts and cir-  
8                   cumstances that formed the basis of a deter-  
9                   mination of employment status have changed or  
10                  were misrepresented by the taxpayer, or

11                   “(B) the Secretary subsequently issues  
12                   contrary guidance relating to the determination  
13                   of employment status that has bearing on the  
14                   facts and circumstances that formed the basis  
15                   of a determination of employment status.

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

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

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

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

8           “(2) ADMINISTRATIVE PROCEDURES.—The pro-  
9           cedures established under paragraph (1) shall pro-  
10          vide for—

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

17                   “(B) an administrative appeal of any de-  
18                   termination that an individual is not an em-  
19                   ployee of the taxpayer.

20           “(3) DUTY TO SEEK SERVICE PROVIDER INFOR-  
21           MATION.—In the case of a request by a taxpayer for  
22           a determination of an individual’s status for employ-  
23           ment tax purposes, the Secretary shall, to the extent  
24           practicable—

1           “(A) seek to obtain from such individual  
2 information relating to the individual’s perform-  
3 ance of services for the taxpayer, and

4           “(B) provide written notice to the indi-  
5 vidual detailing any written determination of  
6 the individual’s status for employment tax pur-  
7 poses.

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

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

19           (b) CONFORMING AMENDMENTS.—

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

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

“Sec. 3511. Safe harbor.”.



1 (c) TERMINATION OF SECTION 530 OF THE REV-  
2 ENUE ACT OF 1978.—Section 530 of the Revenue Act of  
3 1978 shall not apply to services rendered more than 1 year  
4 after the date of the enactment of this Act.

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

8 **SEC. 4. ANNUAL REPORTS ON WORKER**  
9 **MISCLASSIFICATION.**

10 The Secretary of the Treasury shall issue an annual  
11 report on worker misclassification. Such report shall in-  
12 clude the following:

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

16 (2) Relief obtained as a result of such actions  
17 against, and examinations of, employers who have  
18 misclassified workers.

19 (3) An overall estimate of the number of em-  
20 ployers misclassifying workers, the number of work-  
21 ers affected, and the industries involved.

22 (4) The impact of such misclassification on the  
23 Federal tax system.

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

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

5           (a) FAILURE TO FILE CORRECT INFORMATION RE-  
6           TURNS.—

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

9                   (A) by striking “\$50” and inserting  
10                   “\$250”, and

11                   (B) by striking “\$250,000” and inserting  
12                   “\$3,000,000”.

13           (2) REDUCTION WHERE CORRECTION IN SPECI-  
14           FIED PERIOD.—

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

17                           (i) by striking “\$15” and inserting  
18                           “\$50”,

19                           (ii) by striking “\$50” and inserting  
20                           “\$250”, and

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

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

1 (i) by striking “\$30” and inserting  
2 “\$100”,

3 (ii) by striking “\$50” and inserting  
4 “\$250”, and

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

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

10 (A) in subparagraph (A)—

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

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

15 (B) in subparagraph (B)—

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

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

20 (C) in subparagraph (C)—

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

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

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

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

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

8           (b) FAILURE TO FURNISH CORRECT PAYEE STATE-  
9 MENTS.—

10           (1) IN GENERAL.—Section 6722(a) of such  
11 Code is amended—

12           (A) by striking “\$50” and inserting  
13 “\$250”, and

14           (B) by striking “\$100,000” and inserting  
15 “\$1,000,000”.

16           (2) PENALTY IN CASE OF INTENTIONAL DIS-  
17 REGARD.—Section 6722(e) of such Code is amend-  
18 ed—

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

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

23           (c) FAILURE TO COMPLY WITH OTHER INFORMA-  
24 TION REPORTING REQUIREMENTS.—Section 6723 of such  
25 Code is amended—

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

3           (2) by striking “\$100,000” and inserting  
4           “\$1,000,000”.

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

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