

[DISCUSSION DRAFT]

MAY 2, 2012

112TH CONGRESS  
2D SESSION

**H. R.** \_\_\_\_\_

To amend the Internal Revenue Code of 1986 to provide standards for determining employment status, and for other purposes.

---

IN THE HOUSE OF REPRESENTATIVES

Mr. PAULSEN introduced the following bill; which was referred to the Committee on \_\_\_\_\_

---

**A BILL**

To amend the Internal Revenue Code of 1986 to provide standards for determining employment status, 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 “Independent Con-  
5 tractor Tax Fairness and Simplification Act of 2012”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

1 (1) Independent contractors play a vital role in  
2 our economy.

3 (2) Independent contractors embrace the entre-  
4 preneurial spirit of our country and are free to seek  
5 economic opportunities that best fit their needs.

6 (3) Many small businesses start as an inde-  
7 pendent contractor and grow creating jobs for other  
8 individuals.

9 (4) The proper classification of individuals as  
10 employees and independent contractors is a signifi-  
11 cant responsibility for businesses.

12 (5) The rules and guidelines for determining  
13 whether an individual is an independent contractor  
14 or an employee lack clarity and consistency.

15 (6) It is in the best interests of taxpayers, the  
16 Federal Government and the business community to  
17 have fair and objective rules for determining who is  
18 an independent contractor and who is an employee.

19 **SEC. 3. STANDARDS FOR DETERMINING EMPLOYMENT STA-**  
20 **TUS.**

21 (a) **IN GENERAL.**—Chapter 25 of the Internal Rev-  
22 enue Code of 1986 (general provisions relating to employ-  
23 ment taxes) is amended by adding after section 3510 the  
24 following new sections:

1 **“SEC. 3511. CONTROVERSIES INVOLVING WHETHER INDI-**  
2 **VIDUALS ARE EMPLOYEES FOR PURPOSES OF**  
3 **THE EMPLOYMENT TAXES.**

4 “(a) **TERMINATION OF CERTAIN EMPLOYMENT TAX**  
5 **LIABILITY.—**

6 “(1) **IN GENERAL.—If—**

7 “(A) for purposes of employment taxes, the  
8 taxpayer did not treat an individual as an em-  
9 ployee for any period, and

10 “(B) in the case of periods after December  
11 31, 1978, all returns (including information re-  
12 turns) required to be filed by the taxpayer with  
13 respect to such individual for such period are  
14 filed on a basis consistent with the taxpayer’s  
15 treatment of such individual as not being an  
16 employee,

17 then, for purposes of applying such taxes for such  
18 period with respect to the taxpayer, the individual  
19 shall be deemed not to be an employee unless the  
20 taxpayer had no reasonable basis for not treating  
21 such individual as an employee.

22 “(2) **STATUTORY STANDARDS PROVIDING ONE**  
23 **METHOD OF SATISFYING THE REQUIREMENTS OF**  
24 **PARAGRAPH (1).—For purposes of paragraph (1), a**  
25 **taxpayer shall in any case be treated as having a**  
26 **reasonable basis for not treating an individual as an**

1 employee for a period if the taxpayer's treatment of  
2 such individual for such period was in reasonable re-  
3 liance on any of the following:

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

7 “(B) a past Internal Revenue Service audit  
8 of the taxpayer in which there was no assess-  
9 ment attributable to the treatment (for employ-  
10 ment tax purposes) of the individuals holding  
11 positions substantially similar to the position  
12 held by this individual, or

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

16 “(3) CONSISTENCY REQUIRED IN THE CASE OF  
17 PRIOR TAX TREATMENT.—Paragraph (1) shall not  
18 apply with respect to the treatment of any individual  
19 for employment tax purposes for any period ending  
20 after December 31, 2012, if the taxpayer (or a pred-  
21 ecessor) has treated any individual holding a sub-  
22 stantially similar position as an employee for pur-  
23 poses of the employment taxes for any period begin-  
24 ning after December 31, 2011.

1           “(4) REFUND OR CREDIT OF OVERPAYMENT.—

2           If refund or credit of any overpayment of an employ-  
3           ment tax resulting from the application of paragraph  
4           (1) is not barred on the date of the enactment of  
5           this section by any law or rule of law, the period for  
6           filing a claim for refund or credit of such overpay-  
7           ment (to the extent attributable to the application of  
8           paragraph (1)) shall not expire before the date 1  
9           year after the date of the enactment of this section.

10          “(b) PROHIBITION AGAINST REGULATIONS AND  
11          RULINGS ON EMPLOYMENT STATUS.—Except for pur-  
12          poses of providing Revenue Rulings with respect to section  
13          3512, no regulation or Revenue Ruling shall be published  
14          on or after the date of the enactment of this section by  
15          the Department of the Treasury (including the Internal  
16          Revenue Service) with respect to the employment status  
17          of any individual for purposes of the employment taxes.  
18          【Note: subtitle C contains the temporary payroll tax re-  
19          duction provisions which, if extended, would be covered by  
20          this prohibition. Correct policy?】

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

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

24                  “(2) EMPLOYMENT STATUS.—The term ‘em-  
25                  ployment status’ means the status of an individual,

1 under the usual common law rules applicable in de-  
2 termining the employer-employee relationship, as an  
3 employee or as an independent contractor (or other  
4 individual who is not an employee).

5 “(d) EXCEPTION.—This section shall not apply in the  
6 case of an individual who, pursuant to an arrangement  
7 between the taxpayer and another person, provides serv-  
8 ices for such other person as an engineer, designer, draft-  
9 er, computer programmer, systems analyst, or other simi-  
10 larly skilled worker engaged in a similar line of work.

11 “(e) SPECIAL RULES FOR APPLICATION OF SEC-  
12 TION.—

13 “(1) NOTICE OF AVAILABILITY OF SECTION.—  
14 An officer or employee of the Internal Revenue Serv-  
15 ice shall, before or at the commencement of any  
16 audit inquiry relating to the employment status of  
17 one or more individuals who perform services for the  
18 taxpayer, provide the taxpayer with a written notice  
19 of the provisions of this section.

20 “(2) RULES RELATING TO STATUTORY STAND-  
21 ARDS.—For purposes of subsection (a)(2)—

22 “(A) a taxpayer may not rely on an audit  
23 commenced after December 31, 1996, for pur-  
24 poses of subparagraph (B) thereof unless such  
25 audit included an examination for employment

1 tax purposes of whether the individual involved  
2 (or any individual holding a position substan-  
3 tially similar to the position held by the indi-  
4 vidual involved) should be treated as an em-  
5 ployee of the taxpayer,

6 “(B) in no event shall the significant seg-  
7 ment requirement of subparagraph (C) thereof  
8 be construed to require a reasonable showing of  
9 the practice of more than 25 percent of the in-  
10 dustry (determined by not taking into account  
11 the taxpayer), and

12 “(C) in applying the long-standing recog-  
13 nized practice requirement of subparagraph (C)  
14 thereof—

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

18 “(ii) a practice shall not fail to be  
19 treated as long-standing merely because  
20 such practice began after 1978.

21 “(3) AVAILABILITY OF SAFE HARBORS.—Noth-  
22 ing in this section shall be construed to provide that  
23 subsection (a) only applies where the individual in-  
24 volved is otherwise an employee of the taxpayer.

25 “(4) BURDEN OF PROOF.—

1 “(A) IN GENERAL.—If—

2 “(i) a taxpayer establishes a prima  
3 facie case that it was reasonable not to  
4 treat an individual as an employee for pur-  
5 poses of this section, and

6 “(ii) the taxpayer has fully cooperated  
7 with reasonable requests from the Sec-  
8 retary of the Treasury or his delegate,  
9 then the burden of proof with respect to such  
10 treatment shall be on the Secretary.

11 “(B) EXCEPTION FOR OTHER REASONABLE  
12 BASIS.—In the case of any issue involving  
13 whether the taxpayer had a reasonable basis  
14 not to treat an individual as an employee for  
15 purposes of this section, subparagraph (A) shall  
16 only apply for purposes of determining whether  
17 the taxpayer meets the requirements of sub-  
18 paragraph (A), (B), or (C) of subsection (a)(2).

19 “(5) PRESERVATION OF PRIOR PERIOD SAFE  
20 HARBOR.—If—

21 “(A) an individual would (but for the  
22 treatment referred to in subparagraph (B)) be  
23 deemed not to be an employee of the taxpayer  
24 under subsection (a) for any prior period, and

1           “(B) such individual is treated by the tax-  
2           payer as an employee for employment tax pur-  
3           poses for any subsequent period,  
4           then, for purposes of applying such taxes for such  
5           prior period with respect to the taxpayer, the indi-  
6           vidual shall be deemed not to be an employee.

7           “(6) SUBSTANTIALLY SIMILAR POSITION.—For  
8           purposes of this section, the determination as to  
9           whether an individual holds a position substantially  
10          similar to a position held by another individual shall  
11          include consideration of the relationship between the  
12          taxpayer and such individuals.

13   **“SEC. 3512. SAFE HARBOR STANDARDS FOR DETERMINING**  
14          **EMPLOYMENT STATUS.**

15          “(a) GENERAL RULE.—For purposes of this title, if  
16          the requirements of subsection (c) are met with respect  
17          to any service performed by any service provider, then with  
18          respect to such service—

19                 “(1) the service provider shall not be treated as  
20                 an employee,

21                 “(2) the service recipient shall not be treated as  
22                 an employer,

23                 “(3) the payor shall not be treated as an em-  
24                 ployer, and

1           “(4) compensation paid or received for such  
2           service shall not be treated as paid or received with  
3           respect to employment.

4           “(b) STATUTORY EMPLOYEES.—Nothing in this sec-  
5           tion shall supersede the categories of employees described  
6           in section 3121(d)(3).

7           “(c) REQUIREMENTS.—

8           “(1) IN GENERAL.—The requirements of this  
9           subsection are met if the requirements of para-  
10          graphs (2) and (3) are met.

11          “(2) INVESTMENT OR INCOME FLUCTUATION.—  
12          A service provider meets the requirements of this  
13          paragraph if the service provider—

14                 “(A) incurs significant financial responsi-  
15                 bility for providing and maintaining the nec-  
16                 essary equipment and facilities to perform the  
17                 work outlined in their qualified agreement, and

18                 “(B) either—

19                         “(i) incurs unreimbursed expenses, or

20                         “(ii) risks income fluctuations because  
21                         the remuneration with respect to such  
22                         service is directly related to sales or other  
23                         output rather than solely to the number of  
24                         hours actually worked or expenses in-  
25                         curred.

1           “(3) CONTROL OF TIME WORKED AND PER-  
2           FORMANCE OF SERVICES.—A service provider meets  
3           the requirements of this paragraph if the service  
4           provider—

5                   “(A) is compensated upon factors related  
6                   to the work performed, such as a percentage of  
7                   revenue or scheduled rates, and not solely on  
8                   the basis of hours or time expended, and

9                   “(B) substantially controls the means and  
10                  manner of performing the services, in conform-  
11                  ance with regulatory requirements, the speci-  
12                  fications of the service recipient or payor and  
13                  any additional requirements specified in the  
14                  qualified agreement.

15           “(d) DEFINITIONS.—For the purposes of this sec-  
16           tion—

17                   “(1) SERVICE PROVIDER.—The term ‘service  
18                   provider’ means any individual or entity that per-  
19                   forms service for another company under a qualified  
20                   agreement.

21                   “(2) SERVICE RECIPIENT.—The term ‘service  
22                   recipient’ means the person or entity for whom the  
23                   service provider performs such service.

24                   “(3) PAYOR.—The term ‘payor’ means the per-  
25                   son or entity that pays the service provider for the

1 performance of such service in the event that the  
2 service recipients do not pay the service provider.

3 “(4) EXCEPTIONS.—The terms ‘service recipi-  
4 ent’ and ‘payor’ do not include any entity which is  
5 owned in whole or in part by the service provider.

6 “(5) QUALIFIED AGREEMENT.—The term  
7 ‘qualified agreement’ means a written contract be-  
8 tween a service provider and the service recipient for  
9 whom the services are performed or the payor that  
10 provides that the service provider—

11 “(A) will not be treated as an employee  
12 with respect to such services for the purpose of  
13 this title, and

14 “(B) has been informed of the Federal tax  
15 obligations resulting from such treatment.”.

16 (f) CONFORMING AMENDMENTS.—

17 (1) Section 530 of the Revenue Act of 1978 is  
18 hereby repealed.

19 (2) The table of sections for chapter 25 of such  
20 Code is amended by adding at the end the following  
21 new items:

“Sec. 3511. Controversies involving whether individuals are employees for pur-  
poses of the employment taxes.

“Sec. 3512. Safe harbor standards for determining employment status.”.

22 (g) EFFECTIVE DATES.—

23 (1) IN GENERAL.—Except as provided in para-  
24 graph (2), the amendments made by this Act shall

1 take effect beginning on the first day of the first cal-  
2 endar year beginning after the date of enactment of  
3 this Act.

4 (2) REPEAL OF SECTION 530.—The amendment  
5 made by subsection (f) shall apply to periods in cal-  
6 endar years beginning after the date of enactment of  
7 this Act.