

Worker Misclassification Bill Re-Introduced in U.S. Senate

By Jessica Summers

Congress is once again taking aim at addressing the misclassification of independent contractors. On November 12, Senator Bob Casey (D-PA) introduced the Payroll Fraud and Prevention Act (PFPA) of 2013 (S. 1687). The bill is essentially identical to one bearing the same name that was introduced in 2011, but on which no action was taken. The reintroduction of this bill should serve as a reminder to employers to review worker classifications for current employees and contractors and to carefully consider classifications and hiring policies for new hires.

If passed as introduced, the PFPA would have significant implications for all employers, regardless of whether they regularly use independent contractors. Under the PFPA, any employer engaged in commerce would be required to provide all their workers with classification notices within six months of the bill's passage, and thereafter, to new hires or reclassified employees. The content of these notices is proscribed by the PFPA and would include the employee's classification, information about the employee's rights and directions to a Department of Labor (DOL) website established under the PFPA to provide employees with additional information.

For employers that do utilize independent contractors, the PFPA contains heavy penalties for misclassification, including instances of unintentional misclassification. Under the PFPA, employers would face a fine of \$1,100 per misclassified worker for a first time unintentional misclassification, and a fine of \$5,000 per misclassified worker for repeat or intentional misclassification. The PFPA also provides for triple damages for intentional violations of wage and hour, minimum wage and notice requirements. The prospect of penalties for unintentional misclassifications is concerning for many employers who work with independent contractors, particularly in light of the fact that classifying workers is often a fact-specific endeavor where there may be limited guidance and multiple applicable tests for worker classification (e.g., Maryland's ABC test and the IRS test as discussed here).

The PFPA would also authorize the DOL to take additional enforcement actions including undertaking targeted audits of certain industries in which worker misclassification is prevalent, reporting of misclassification information to the IRS, and imposing additional penalties on employers who misclassify employees for unemployment compensation purposes.

Regardless of whether this bill ultimately becomes law, it should serve as an important reminder to employers that worker classification is a hot issue that should not be ignored. As we have previously reported, many states, including Virginia and Maryland, have enacted or introduced legislation or administrative programs to address and penalize worker misclassification. Employers who use, or are considering hiring, independent contractors would be well advised to take this opportunity to review their worker classifications and address any improper classification.

For more information about classifying workers and rectifying misclassification, Paley Rothman's two-part webinar on independent contractors may be viewed for free on our website.