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Kerry Files Bill Aimed at Misclassification of Workers [12/17/09]

By Michael Whiteley, Eastern Bureau Chief

U.S. Sen. John Kerry, D-Mass., and six co-sponsors filed legislation Tuesday aimed at closing what they call a "loophole" in the Internal Revenue Service (IRS) codes that has allowed employers to misclassify workers as independent contractors without challenge.

Kerry said the bill amends a "safe harbor" provision of the IRS codes that exempts some small employers from meeting the IRS test for identifying independent contractors. He said the Revenue Act of 1978 allows some employers to treat workers as independent contractors "regardless of the workers' actual status."

The designation spares employers from paying unemployment taxes and overtime. It also removes an employer's responsibility for making Social Security and Medicare deductions and exempts them from providing workers' compensation coverage under most state statutes.

The bill had not been assigned a number by late Wednesday, but its sponsors have dubbed it the "Taxpayer Responsibility, Accountability and Consistency Act of 2009." Among the co-sponsors are Senate Health, Education Labor and Pensions Committee Chairman Tom Harkin, D-Iowa, and Senate Rules Committee Chairman Chuck Schumer, D-N.Y.

The legislation comes on the heels of approval by the National Conference of Insurance Legislators (NCOIL) of a model state law focused on the construction industry and based on a set of criteria that must be met for classifying workers as independent contractors.

The Kerry bill focuses on beefing up what employers are required to tell the IRS. And it requires the U.S. Treasury Department to make annual reports to Congress on misclassification.

"This is about leveling the playing field and ensuring that America's workers receive the protections and pay they deserve," Kerry said in a statement. "We cannot continue to reward businesses who refuse to play by the rules."

The bill would bar employers from classifying individuals as independent contractors if they have designated someone in a "substantially similar position" as an employee.

It leaves the definition of "similarly situated position" to the Treasury secretary, along with the responsibility for promulgating rules.

The bill requires employers to get written approval from the IRS before classifying someone as an independent contractor.

The bill requires businesses that pay any amount greater than $600 during the year to corporate providers of property and services to file an information report with each provider and the IRS on its use of independent contractors.

It requires the Treasury secretary to report instances of misclassification to the U.S. Labor Secretary for further action.

And it requires the Treasury Department to include its annual report to Congress:

- The number and type of enforcement actions against and examination of employers who misclassify workers.
- The relief obtained from enforcement actions.
- An overall estimate of the number of employers who misclassify workers, the number of workers affected and the industries involved.

The changes would apply to IRS returns required to be filed after this Dec. 31.

Teamsters General President Jim Hoffa said Wednesday the union strongly supports the bill.

"Misclassification hurts responsible employers who pay their taxes, provide health insurance and respect their workers' right to join a union," Hoffa said. "It lets unscrupulous employers cheat workers out of benefits they're entitled to."

The Teamsters said the rate of misclassification in Kerry's home state reached 13.4% between 2001 and 2003 -- up from 8.4% between 1995 and 1997.

Estimates put the federal government's tax losses from misclassification at $34.7 million between 1996 and 2004.

It was also in Kerry's home state last year that a Peabody, Mass., painting company pleaded guilty to failing to maintain workers' compensation insurance based on allegations from Attorney General Martha Coakley that it systematically misclassified workers as independent contractors.

The case came to light after the company, Olympic Painting and Roofing, was spotted by reporters repainting the mansion of former governor and presidential candidate Mitt Romney.

Kerry's bill is here: http://www.workcompcentral.com/pdf/2009/misc/KerryBill.pdf.