



## CONGRESS WANTS TO LEVEL THE PLAYING FIELD?

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Well, we haven't had a chance to chat about what is going on in Congress lately, mostly because nothing was going on for labor and employment enthusiasts like us. Instead, members of Congress have been busy with stuff like picking at the other side of the aisle, health care reform and campaigning. So, just when you think all we are going to have to worry about for the next couple of months is the incessant political ads during the football game, along come Senator Kerry and Representative McDermott. The Senator introduced S. 3786 and the Congressman simultaneously introduced HR. 6128. Both bills are entitled the Fair Playing Field Act of 2010 and they both seek to do the exact same thing: amend the Internal Revenue Code of 1986 to allow the Secretary of the Treasury to "provide guidance allowing workers and businesses to clearly understand the proper federal tax classification of workers and to provide relief allowing an orderly transition to new rules designed to increase certainty and uniformity of treatment." What? Let me try that again. The bills are designed to make more workers employees and less workers independent contractors.

According to Senator Kerry, the bills "will ensure workers are afforded protections already in the law, such as workers' compensation, Social Security, Medicare, payment of overtime, unemployment compensation, and the minimum wage. It will also ensure employers who play by the rules are not forced to compete against those businesses that don't." I like this new trend of claiming that what the Congress is really trying to do is make things fair not only for employees but for "businesses that play by the rules." So how does the



bill close this “loophole” as Senator Kerry terms it? Well, let’s ask Senator Kerry.

“The Fair Playing Field Act of 2010 ends the moratorium on IRS guidance addressing the worker classification issue. The legislation requires the Secretary of Treasury to issue prospective guidance clarifying the employment status of individuals for Federal employment tax purposes. The effective date for the provision of authority to issue guidance is the date of enactment.”

In addition to closing this “loophole,” the bill will require employers who use independent contractors to provide “a written statement to such independent contractor notifying such independent contractor of the Federal tax obligations of an independent contractor, the labor and employment law protections that do not apply to independent contractors, and the right of such independent contractor to seek a status determination from the Internal Revenue Service.”

As many of us already know, the IRS and the Department of Labor are already cracking down on what they call “employee misclassification.” So what is this bill really about? How about cash? Don’t believe me? Let’s ask Senator Kerry: “Federal and State revenue is lost when businesses misclassify their workers as independent contractors. A study estimated that, between 1996 and 2004, \$34.7 billion of Federal tax revenues went uncollected due to the misclassification of workers and the tax loopholes that allow it.”

Now, you are probably saying, “Wait! I use independent contractors all the time. What do I do?” And when you are asking yourself that question, there is one thing I want you to be really careful about. A cottage industry has sprung up among consultants who will tell you that, for a price, they will come in and look at all of your independent contractors and provide you with a nice report about who is properly classified and who is not. Before you go ahead and hire them,



remember this: that report, done by that consultant, will be discoverable if you get sued. That's right, you will have paid a consultant a lot of money to produce what is in essence a plaintiff's expert report. It won't take long for the court or a jury to read that report and decide that you are breaking the law and you knew you were doing it. Oh, by the way, it won't do you any good to have your HR department do the report themselves, it will still be discoverable. So what should you do? You call us (your lawyers) and let us help. In the meantime, we will keep an eye on this bill.