COALITION FOR A
DEMOCRATIC WORKPLACE

Independent Contractor Status Under Threat

Independent contractor status allows workers to determine their own hours, what work they choose to do, and how they want to perform that work, providing them with immense autonomy. Since these workers are not employees, the National Labor Relations Act does not apply to their relationships with businesses. In an effort to reverse declines in union density, labor bosses and their allies in government have attacked legitimate independent contractor arrangements. One of the most egregious of these attacks was launched by prior-NLRB General Counsel Richard Griffin. Griffin, departing drastically from past policy, issued an Advice Memorandum making it more complicated to hire and more difficult to qualify as an independent contractor. While the new General Counsel has taken steps to undo this disastrous policy change, the NLRB, Congress, and the administration need to continue to fight against the unwarranted attacks on independent contractor status and the workers who rely on them.

NLRB GENERAL COUNSEL MEMO ON INDEPENDENT CONTRACTOR STATUS:

On December 1, 2017, National Labor Relations Board (NLRB) General Counsel Peter Robb rescinded an August 2016 Advice Memorandum issued by his predecessor Richard Griffin, in which Griffin took an overly expansive view of who is an employee under the National Labor Relations Act (NLRA). In doing so, Griffin called into question the legitimacy of many independent contractor relationships. The Griffin memo also drastically deviated from the Board's longstanding position by claiming for the first time in the agency's 80-plus year history that the unintentional misclassification of workers was in and of itself a violation of the NLRA's Section 7 rights to act collectively.

Also on December 1, 2017, General Counsel Robb issued Memorandum GC 18-02 instructing Regional Offices to submit for review to the NLRB's Division of Advice all cases involving "significant legal issues." The memo specifically included cases that involve Griffin's argument in his August 2016 Advice Memorandum.

LITIGATION ON INDEPENDENT CONTRACTOR STILL PENDING:

While we should be encouraged by the General Counsel's action, litigation involving Griffin's position is still pending in the court system. CDW is involved in two cases of pressing concern: Velox Express and Chamber of Commerce v Seattle. In Velox Express, an employee claimed she was wrongfully discharged when she protested against her classification as an independent contractor. The presiding Administrative Law Judge ruled, without any substantive analysis, that she was in fact an employee and adopted the policy in the Griffin memo. The case was appealed to the NLRB and provides President Trump's Board with its first opportunity to rule on the General Counsel's theory.

In *Chamber of Commerce v Seattle*, the Chamber of Commerce filed suit against the city of Seattle over an ordinance that would allow for-hire drivers classified as independent contractors – like those driving for ridesharing companies – to unionize and collectively bargain. The Chamber challenged the ordinance on the grounds that it is preempted by federal labor law, explaining that Congress did not give independent contractors the right to

organize or collectively bargain under the NLRA. The court ruled in favor of Seattle, arguing that Congress' exclusion of independent contractors in the NLRA points not toward preemption but to an indifference that permits state regulation. The Chamber appealed the ruling to the Ninth Circuit Court of Appeals, which granted an injunction against the ordinance pending appeal.

CDW filed briefs in both of these cases; those documents can be found on the resources page of our website. CDW will continue to fight against unwarranted attacks on independent contractors and the employers who rely on them.