COALITION FOR A
DEMOCRATIC WORKPLACE

Independent Contractor Status Under Threat

Independent contractor status provides workers with immense autonomy. Since these workers are not employees, the NLRA does not apply to their relationships with businesses, so in an effort to reverse declines in union density, DC union lobbyists 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, who departed drastically from past policy when he 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 unwarranted attacks on independent contractor status and the workers who rely on it.

NLRB Works to Undo Attacks on Independent Contractor Status

In December 2017, the National Labor Relations Board's (NLRB) General Counsel Peter Robb rescinded an August 2016 Advice Memorandum issued by his predecessor, Richard Griffin, in which Griffin took an overly expansive view of who is an employee under the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 right to act collectively.

Additionally, 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 involved the argument that the misclassification of employees as independent contractors is a violation of the NLRA.

Furthermore, on January 25, 2019, the NLRB clarified the application of the test it uses to evaluate independent contractor status in its *SuperShuttle DFW, Inc* decision. In the case the Board found "the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain." The decision overruled the Board's prior 2014 decision in *FedEx Home Delivery*, which, the Board explained, "modified the applicable test for determining independent-contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain."

Litigation on Independent Contractor Status Still Pending

While we are encouraged by General Counsel Robb's actions and the *SuperShuttle DFW, Inc.* decision, CDW continues to litigate this issue. *Velox Express*, which is currently pending before the Board, deals with an employee who claims 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 established by the Griffin memo. The case was appealed to

the NLRB, providing President Trump's Board with its first opportunity to rule on the General Counsel's theory. CDW filed a brief in the case on April 20, 2018.

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, and that permitting drivers to collectively bargain over pay would in effect allow them to collude on prices, violating antitrust law. On May 11, 2018, a three-judge panel of the Ninth Circuit Court of Appeals, in a unanimous opinion, sided with the Chamber and ruled that Seattle's ordinance is unlawful as it violates antitrust laws. The court also ruled, however, that Seattle's ordinance was not preempted by the NLRA. On September 14, 2018, the Ninth Circuit rejected Seattle's request for review by the full appellate court, so the case will now proceed before the US District Court for the Western District of Washington. CDW filed a brief in this case on November 3, 2017.

CALIFORNIA STRUGGLES TO IMPLEMENT NEW, DRASTIC WORKER CLASSIFICATION TEST:

The state of California has also been working to make it more difficult for workers to qualify as independent contractors under the state's wage laws. On April 30, 2018, the CA Supreme Court issued its ruling in *Dynamex,* imposing the "ABC test" to determine worker classification. The ABC test presumes a worker is an employee and places the burden on the employer entity to prove the worker is in fact an independent contractor. The ABC test has been so difficult to implement that the state senate's committee with jurisdiction has been working on a legislative fix for implementation. The bill, A.B. 5, has been amended and altered numerous times, and the committee is still trying to rework the bill to address the complications, including adding numerous exceptions for specific professions and businesses, service providers, professional service providers, and the construction industry generally.

CDW will continue to fight against unwarranted attacks on independent contractor status and the workers who rely on it. The NLRB, Congress, and the administration should continue to support these workers as well and ensure their status, and therefore their autonomy, are protected.