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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. In an effort to give unions access to new potential members and reverse declines in union density, DC union lobbyists and their allies in government have spent the last several years attacking legitimate independent contractor arrangements. One of their most egregious efforts is the Protecting the Right to Organize Act, which would force independent contractors into a traditional "employee" role, jeopardizing their flexibility and autonomy over their work. Democrats on the NLRB and in state legislatures have also pushed for such drastic policy changes. Independent workers need Congress, the NLRB, and the administration to continue to fight back against these unwarranted attacks.

PROTECTING THE RIGHT TO ORGANIZE ACT

On May 2, Democrats in Congress introduced the Protecting the Right to Organize (PRO) Act (H.R. 2474, S. 1306). Included among the myriad drastic labor policies within the bill is a provision making it very difficult for a worker to operate as an independent contractor. The PRO Act imports into the National Labor Relations Act (NLRA) the "ABC test" used to determine whether a worker is an employee or independent contractor.

If the ABC test becomes part of the NLRA, many workers will lose their status as independent contractors as well as the freedom and flexibility that comes with such status, such as the ability to determine their own hours, what work they choose to do, and how they perform that work. Many workers choose independent work because of the flexibility and autonomy it offers, especially workers in the gig economy. The ABC test could also result in consumers losing the ability to meet on-demand needs through the hiring of workers through gig economy platforms, damaging the American economy as a whole.

California is already trying to impose the ABC test statewide, but their failed efforts should serve as a warning to legislators against the PRO Act. On April 30, 2018, the California Supreme Court imposed the ABC test statewide in a case called *Dynamex*. The test has been so difficult to implement that the legislature and governor were forced to pass a new law (Assembly Bill 5) exempting numerous professions, businesses, and service providers as well as the construction industry generally.

NLRB WORKS TO UNDO ATTACKS ON INDEPENDENT CONTRACTOR STATUS

The PRO Act is not the only effort by Democrats to attack independent contractor status. During the Obama administration the National Labor Relations Board (NLRB) also tried to reduce opportunities for independent workers. Thankfully, the current board has taken steps to restore balance to the law, taking an approach that both protects workers and allows for independent contractors to operate.

In December 2017, the NLRB's 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 NLRA, calling into question the legitimacy of many longstanding independent contractor relationships. Robb not only rescinded the Griffin memo but issued his own memo, Memorandum GC 18-02, instructing Regional Offices to

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submit for review to the NLRB's Division of Advice all cases involving "significant legal issues." The memo specifically identified for review 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 its position in its *SuperShuttle DFW, Inc* decision. In the case the Board found the franchisees' "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, "severely [limited] the significance of a worker's entrepreneurial opportunity for economic gain."

Finally, on August 29, 2019, the Board issued its decision in *Velox Express*, a case that provided President Trump's Board with its first opportunity to rule on General Counsel Griffin's theories on misclassification. In the case 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 the worker was in fact an employee and adopted the policy established by the Griffin memo. The Board reversed course, however, making it clear that misclassification of employees does not alone violate the NLRA, and employers only violate the act when they intentionally misclassify workers in order to subvert employees' rights under the Act. CDW filed a brief in the case on April 20, 2018.

LITIGATION ON INDEPENDENT CONTRACTOR STATUS STILL PENDING

While we are encouraged by the General Counsel and Board's actions, CDW continues to litigate the issue. 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 allow them to collude on prices, violating antitrust law. On May 11, 2018, a three-judge panel of the Ninth Circuit Court of Appeals unanimously sided with the Chamber and ruled that Seattle's ordinance is unlawful and 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; the case will now proceed before the US District Court for the Western District of Washington. CDW filed a brief in the case on November 3, 2017.

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 autonomy are protected.