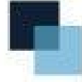


COALITION FOR A
DEMOCRATIC WORKPLACE

Independent Contractor Status under Threat

Over the past decade Democrats in Congress and on the NLRB have tried to limit Americans' ability to work independently. Now, Congressional Democrats are pursuing the PRO Act, which would force independent contractors into a traditional "employee" role, jeopardizing their flexibility and autonomy over their work. The Department of Labor also issued a Notice of Proposed Rulemaking on this topic. Democrats on the NLRB and in state legislatures are also striving for such drastic policies. Independent workers need Republicans in Congress and on the NLRB to continue to fight back against these attacks.

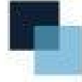
Efforts by Congress and the NLRB to Limit Independent Work

Congressional Democrats are pushing for passage of the Protecting the Right to Organize (PRO) Act (H.R. 20, S. 567). Included among the myriad drastic labor policies within the bill is a provision making it significantly more difficult for a worker to operate as an independent contractor. The bill does this by imposing the "ABC test," used to determine if a worker is an employee or independent contractor, into the National Labor Relations Act (NLRA), applying it nationwide.

If the ABC test becomes part of the NLRA, many workers will lose their status as independent contractors and 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. This is at odds with what independent contractors actually want; many of them choose independent work because of the flexibility and autonomy it offers, especially workers in the gig economy.

The Department of Labor (DOL) is also in the process of changing its employee classification standard. In October 2022, the DOL issued a proposed rule which would broaden the scope of the "economic realities test" used to classify workers under the Fair Labor Standards Act (FLSA). Broadening the test's scope will likely assert economic dependency between workers and their employers more frequently, thus favoring classification of workers as employees. This would impact independent contractors in the same way that the PRO Act would.

The NLRB has also changed its employee classification standard. On June 13, 2023, the Board issued its decision in *The Atlanta Opera,* narrowing the standard to make it extremely difficult for a worker to qualify as an independent contractor. The decision overturns the Trump- era *SuperShuttle* decision (which focused the analysis on "entrepreneurial opportunity for economic gain") and reverts back to the Obama-era standard established in *FedEx Home Delivery* (2014), which severely undervalued the significance of entrepreneurial opportunity when considering classification. CDW filed an amicus brief in the case in February 2022. Importantly, the *FedEx Home Delivery* standard has been explicitly rejected by the DC Circuit twice.



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Even state legislatures and localities are threatening independent contractor status. In April 2018, the California Supreme Court issued its *Dynamex* decision applying the ABC test statewide, but the test has been so difficult to implement that the legislature and governor were forced to pass several laws exempting over one hundred professions, businesses, and service providers as well as the construction industry generally. California's failed efforts to impose the ABC test should serve as a warning to legislators against the PRO Act.

In 2015, the city of Seattle enacted an ordinance that would allow for-hire drivers classified as independent contractors, like those driving for rideshare companies, to unionize and collectively bargain. The Chamber of Commerce filed suit, arguing the ordinance was preempted by federal labor law. They also contended that Congress did not give independent contractors the right to organize or collectively bargain under the NLRA, and permitting drivers to collectively bargain over pay would allow them to collude on prices, violating antitrust law. CDW filed a brief in support of the Chamber in November 2017. In May 2018, the Ninth Circuit Court of Appeals unanimously sided with the Chamber, ruling that the ordinance was unlawful and violated antitrust laws.

Trump-Era NLRB Protected Independent Work

The Obama-era NLRB also tried to force drastic policy changes on independent workers, but the NLRB under President Trump took steps to restore balance to the law. In 2017, then-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 NLRA, calling into question the legitimacy of many longstanding independent contractor relationships. Robb also issued a new memo, Memorandum GC 18-02, instructing Regional Offices to submit for review to the NLRB's Division of Advice all cases involving "significant legal issues," specifically including cases that claimed the misclassification of employees as independent contractors is a violation of the NLRA.

In January 2019, the NLRB further clarified its position in its *SuperShuttle DFW, Inc* decision as described above. In August 2019, the Board issued its decision in *Velox Express*. The presiding Administrative Law Judge had ruled, without any substantive analysis, that the worker in question was an employee and adopted the policy established in the Griffin memo. The Board, however, reversed course, 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. CDW filed a brief in the case in April 2018.

Finally, the Department of Labor (DOL) issued a Final Rule in January 2021 on independent contractor status under federal wage and hour law, providing employers with much needed

clarity on the issue. The Biden administration tried to rescind the Final Rule, but in March 2022, a District Court in Texas ruled the Biden administration's move violated federal law and was "arbitrary and capricious." The court, therefore, vacated the Withdrawal Rule, reinstating the Trump-era Final Rule.

Our Vigilance Must Continue

The employer community must remain vigilant on the issue as states and the Biden administration continue their attacks on independent work. CDW will continue to fight for workers who rely on their independent status.