COALITION FOR A
DEMOCRATIC WORKPLACE

Independent Contractor Status Under Threat

Over the past several years Democrats in Congress and at the NLRB have tried to make drastic changes to labor policy in an effort to provide unions with more potential members and increase their dues revenue streams. One of their most egregious efforts centers around independent contractor status. House Democrats have passed the PRO 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 attacks.

PROTECTING THE RIGHT TO ORGANIZE ACT:

In February 2020, House Democrats passed the Protecting the Right to Organize (PRO) Act, H.R. 2447 (Senate companion, S. 1306). 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.

State legislatures are also 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 a new law (Assembly Bill 5) exempting numerous 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.

TRUMP-ERA NLRB IS WORKING TO PROTECT INDEPENDENT WORK:

The Obama-era National Labor Relations Board (NLRB) also tried to force drastic policy changes on independent workers, but fortunately, the NLRB under President Trump has taken steps to restore balance to the law. In 2017, 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. In the case the Board found the franchisees in question maintained "significant entrepreneurial opportunity for economic gain," making them independent contractors. The decision overruled the Board's 2014 *FedEx Home Delivery* decision, which the Board argued severely undervalued the significance of a worker's entrepreneurial opportunity for economic gain when considering classification.

Finally, 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 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 NLRA when they intentionally misclassify workers in order to subvert employees' rights. CDW filed a brief in the case in April 2018.

OUR VIGILANCE MUST CONTINUE:

While CDW is encouraged by the actions of both the General Counsel and the Board, the employer community must remain vigilant on the issue. 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.