Testimony of Marc Freedman, U.S. Chamber of Commerce
Minnesota Attorney General's Advisory Task Force on Worker Misclassification

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Good afternoon. I'm Marc Freedman, Vice President for Workplace Policy at the U.S. Chamber of Commerce. Among the policy issues on which I work is the question of how to determine whether a worker should be classified as an employee or an independent contractor. I've been asked to provide some remarks about the broad landscape of approaches on this issue. My remarks will not address issues in the construction industry as those are beyond my direct experience. I appreciate the opportunity to appear before this task force as you consider which approach makes the most sense for Minnesota.

At the outset, I want to acknowledge that misclassification is a real problem. Like everyone else here, I have read and heard the stories where companies and employers have blatantly treated workers who should have been classified as employees as independent contractors. We do not favor an approach that provides cover for this egregious behavior.

At the same time, we should be able to agree that the independent contractor model, when used appropriately, with consent and agreement by both parties, benefits both parties. The hiring entity receives specific services provided and the independent contractor gains flexibility and the ability to serve multiple clients. This model has existed for decades and has been relatively uncontroversial.

The challenge before this task force, as I see it, is to recommend a policy that will allow for the legitimate use of independent contractors while providing clarity and certainty about what constitutes that legitimate use. Suggesting a policy that would effectively eliminate the use of independent contractors simply to achieve a bright line rule would not help; it would in essence "throw out the baby with the bath water."

The central question is what problem is the task force trying to solve? If the answer is the need to have better tools to target bad actors that leads to one set of proposals. If the answer is to restrict the use of independent contractors, including the reliance on that model by online platform companies, that leads to a different set of proposals. These two questions are not the same although they are sometimes conflated in an effort to camouflage the second approach.

Redefining who can be an independent contractor is not the same as strengthening the tools to go after misclassification. Instead it changes the rules of the road and converts those who would legitimately be independent contractors into employees, often against their will. I would compare this to speed limits: if the goal is to catch drivers going 80 miles per hour when

the speed limit is 65, you don't have to change the law to make 40 miles per hour the new speed limit. All that does is make drivers who were driving at 65 miles per hour now violators of the new speed limit.

The current Minnesota law, as described by the Minnesota Supreme Court and Minnesota regulations[1] is sensible and provides clear language to distinguish when someone is an independent contractor or an employee. Importantly, following the Minnesota Supreme Court, it highlights the issue of control over the work as the most important factor. While the widely touted "economic realities test" includes various other factors, courts have overwhelmingly cited the question of control over the work as the most important factor by courts.

Indeed, the U.S. Department of Labor issued such a regulation during the previous administration defining how to determine whether a worker was an independent contractor under the Fair Labor Standards Act. That regulation identified control over the work, along with the opportunity for profit or loss, as the most important criteria. This approach would have provided clarity for employers and those wanting to work as independent contractors. It was not, as some characterized it, a free pass for employers to misclassify workers as independent contractors that should be classified as employees.

Unfortunately, the current administration rescinded that regulation and replaced it with one that takes all six of the economic realities test factors as equal in weight and even adds a seventh factor for anything not otherwise covered.[2] This approach means employers will never know which factor or factors the DOL considers the most important until DOL tells them whether they got it right in their classification decision. In addition, each factor is weighted towards finding an employment relationship. The only time an employer can be sure their classification decision will not be second guessed is if they classify someone as an employee, which is clearly what the DOL wants to happen.

The other approach attracting much attention is the so called "ABC" test, typically as embodied by California's AB 5 law.[3] The ABC test is considered highly restrictive to the use of independent contractors, to the point of making their use virtually impossible. The unworkability of California's AB 5 can be seen by how many exemptions the California legislature had to enact immediately after AB 5, when the impact on so many legitimate independent contractors became clear. These included doctors, lawyers, hairdressers, journalists, musicians, writers, real estate appraisers, and landscape architects among others. California's law was driven by an unnecessary and ill-conceived intent to rein in the use of

[1] *See,* "Current Statutes Handout" distributed to the Task Force during October 25, 2023 meeting.
[2] *See,* 29 CFR Parts 780, 788, and 795.
[3] The ABC test requires *all three* criteria to be met for a worker to be classified as an independent contractor: A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. B. The person performs work that is outside the usual course of the hiring entity's business. C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

independent contractors in the online platform environment. Today it stands as a misguided policy that has been undercut by the many exemptions, and even by the voters of California who supported a referendum preserving the use of independent contractors in the online platform context.

AB 5 has resulted in an outcry of opposition from those independent contractors impacted by it. This task force has already heard and received submissions detailing many of these accounts. I am attaching as an appendix to this statement a collection of links to articles that further detail the negative impact AB 5 has had on independent contractors including causing them to lose their opportunities to do business and generate income.

California's AB 5 law has even failed to produce the expected results its supporters desired. By restricting the use of independent contractors, the expectation was that more workers would be reclassified as employees thereby providing them coverage under various California laws affecting wage and hour, workplace safety, workers' compensation, and unemployment insurance. But as this task force has already learned from the presentation by the researchers at the Mercatus Center at George Mason University, AB 5 has resulted in lower overall employment and no increase in W-2 employees. The reality is that severely restricting the use of independent contractors does not convert workers into employees, it forces those independent contractors to lose their businesses and opportunity for income.

Recommendations

The U.S. Chamber strongly encourages the task force to pursue policies that focus on preserving the use of the independent contractor model, not upending it through restrictive redefinitions as has been done through implementing the ABC test or the Department of Labor's current regulation. Minnesota's current law provides a strong framework for identifying misuse of the independent contractor model while at the same time providing the necessary flexibility for independent contractors to operate.

The report on Worker Misclassification from the Office of the Legislative Auditor identifies issues regarding collaboration between agencies where employment relationships are required to establish coverage. To the extent there are inconsistencies between laws, these should be homogenized under the current Minnesota structure as presented by the Minnesota Supreme Court and regulations.

Thank you for the opportunity to appear today. I am happy to respond to any questions.