Testimony of Tom Buchanan to Vermont Legislature
General, Housing & Military Affairs Committee
Mach 22, 2016

Thank you for inviting me to testify today about H.867. My name is Tom Buchanan, and I live in Londonderry, Vermont. I'm speaking as an individual, and am not affiliated with any lobbying group or relevant-topic organization.

I first learned about H.867 yesterday morning in an article in VTDigger, and then sent each committee member an email with a brief overview of my employment experience and my concerns with this bill. I've tried to flesh that out in this written testimony. I'd like to assume you have the basics, at least from yesterday's email, and dispense with reading this testimony out loud (although it should of course be entered into the official record). I'll be happy to expand on any of the points raised, or answer any of your questions from my perspective as a Vermont worker who will be affected by H.867.

My Background

I started my career in the mid 1970's as a freelance newspaper photographer while still in high school, a position we would probably now classify as an Independent Contractor (IC). In the early 1980's I was hired as a staff photographer for three newspapers in upstate New York, staying at each for two years. Two of those newspapers made use of local IC photographers to enhance coverage, and specifically to avoid hiring additional employees. At one of those papers management eliminated a full time photographer position and shifted some of the workload to remaining staff, and the rest to newly hired freelancers/independent contractors.

While working as an employee of one of those papers I began freelancing as a photographer for Connecticut based World Wrestling Entertainment (then known as WWF, now known as WWE). I moved from an IC position to a full time WWE employee in 1987, and eventually become Chief of Photography with responsibility for hiring staff and independent contractors. WWE often had employees and IC's working alongside each other while doing essentially the same tasks. We hired some IC's who worked almost exclusively for WWE, and others

who did just a one-day job in a distant market. From my standpoint as a departmental manager, the primary difference was that IC's offered us more flexibility, while employees offered greater stability. There were obvious financial and liability differences as well, but I was guided mostly by operational concerns. When I left WWE in 2001 my position was initially advertised and offered at about half the salary, and then eliminated, with the workload shifted to remaining staff and IC's, and to outside licensees.

While I was still working for WWE I became one of the nation's top rated skydiving instructors, and was commissioned to write a book about the sport for McGraw-Hill. The book, "JUMP! Skydiving Made Fun and Easy" was published in 2003 and includes nine pages about dropzone employment. I spent many years as a part time skydiving instructor at a busy New York dropzone, which categorized almost everybody as an independent contractor and developed quite a few unusual ways to skirt employment law. The primary benefit of using IC's, from the operators standpoint, was that the employer would not be responsible for workers compensation or liable for injured IC's. I knew several skydiving instructors who found themselves seriously injured and without any financial protection, and then required financial assistance from the State of New York. I left that position in about 2006.

I moved to Vermont in 2002 and spent six winter seasons working as a snowboard instructor at Stratton Mountain Resort, and have worked through the last seven seasons as a ski and snowboard instructor at Okemo Mountain Resort. Both jobs, like most of the thousand-plus instructor jobs in the Vermont ski industry, have been treated as seasonal employment. Ski instructors are often hired as full or part-time employees, but paid on a per activity basis, with many hours that would typically be considered work-time remaining uncompensated. The job often feels like a hybrid of regular employment and independent contracting.

In 2006 I was hired as a fly fishing instructor by Orvis, in Manchester, Vermont. I was initially hired as an independent contractor working alongside employees who were doing essentially the same job. In about 2010 I was given the option of becoming an employee. I elected to remain as an independent contractor, but in the spring/summer of 2015 the company moved its IC instructors to an employment

position. I was told the change was mandatory, and was related to a routine state audit. As I evaluated the options in the early years of my Orvis relationship, I recognized that a worker may find benefits in an IC position, such as an easier time deducting expenses and mileage, or insulation from the daily grind of corporate overhead. Direct employment offers the worker a bit more security, and reduces FICA/self-employment taxes. Employers likewise find some legitimate benefits in each option. In hindsight, I should have voluntarily moved from the IC position to employment when it was first offered, but I initially underestimated the benefits of the change, and especially underestimated the beneficial tax implications. I assumed that I was covered by both Workers Compensation and Unemployment Compensation even while working as an IC.

I know my varied employment history is a lot to wrap your head around, but in summary, I've worked as an independent contractor and an employee in multiple states and multiple industries, and I've hired and supervised both employees and independent contractors.

Concerns with H.867

H.867 is a meaty proposal with lots of detail in its 27 pages, all of which will impact many more pages of statute, and then indirectly impact many thousands of pages of historically relevant case law. It's simply not possible for a private citizen like me to connect all the dots and identify all the potential effects of this draft legislation.

There is a lot of gray space separating employees and independent contractors, and I know it is difficult to develop policies that will work for all positions in all industries. H.867 makes an effort to bring consistency to the issue, but in some places it appears to skew in favor of employers, and hurts workers.

Of particular note are the changes in definitions of "employment" (page 10 of 27, line 9) and "independent contractor" (page 8 of 27, line 17), which may be favorable to classification of workers as IC's. The definition of an independent contractor and employment lack a few important conditions, most notably language that would classify a worker as an employee if s/he performs work

closely related to the employers business or to the responsibilities of other employees, or works on the employers job site. The bill also includes language that exempts a "sole proprietor." This type of language was used when I was a skydiving instructor as the basis for coercing workers to incorporate and form their own businesses, thus allowing the operator to claim those workers as independent contractors. Under H.867 it is far too easy for an employer to use this type of loophole.

The definition of employment should include language that covers anybody operating within the usual course of the business. Language to this effect should be included in the definition/exclusions to independent contractor and employee. Specific language already exists under unemployment compensation, Title 21, §1301 (6)(B)(ii), and for some reason it has been struck in H.867 (see page 10 of 27, line 15). This kind of language is especially relevant to me given that in my jobs as a photographer and a fly fishing instructor both employees and IC's worked side by side doing essentially the same tasks.

H.867 offers language that would qualify a worker as an IC if a number of conditions are met, including "(iv) holds itself out as a business for itself; and (xi) offers its services to the general public…" (see page 9 of 27, line 3). These conditions are fine as a starting point, but they should be further qualified to require that the IC actually conducts an independent business and that no more than some small percentage of that businesses actual work should be from any single client (i.e. 30%). This issue is important because the proposed language might allow a company to hire a person as an IC for full-time or nearly full-time hours, and not leave enough remaining time for the individual to actually serve the public as a separate business, or the employer might discourage the IC from actually working for other clients. Essentially, the proposed language might encourage a employer to require a person to masquerade as an IC, when in fact that's not the case.

One of the especially glaring trouble spots is an unnecessary and inappropriate change to Title 21 §601(14)(B), which eliminates "a referee or official" from classification as an employee. This section uses language that could logically be extended to the thousands of Vermont ski instructors who are engaged in amateur

sports and routinely paid on a per event basis (page 3 of 27, line 11). I understand the original exemption was first created many years ago as 'the company softball team rule' and intended to protect an employer if an employee was injured in an uncompensated company sponsored recreational activity. By extending the exemption to participants who are paid to engage in the amateur sport, and writing this example into the draft, the language becomes too broad and has potential for being misapplied. I have no doubt that manty ski businesses would love to reclassify their ski instructors and coaches, who are already engaged in amateur sports and often paid per event, as independent contractors. While this exemption alone might not make that change possible, it certainly lays the foundation for the development of relevant case law. And at the very least, this provision reads like a handout to a special interest group and should be reevaluated in that context.

I also have a concern about the formation of the Employee Classification Task Force, which is almost exclusively composed of Executive Branch appointees (page 11 of 27, line 18). This construction could be used as a power tool by a future Governor intent on favoring employers at the expense of Vermont workers (or perhaps by a Governor intent on disfavoring employers). The Task Force should be drawn from a more diverse pool, including representation from various sectors of the Vermont workforce with significant representation by organized labor, and should not be controlled by any single branch of government.

In general, there is no reason that a designated IC should surrender access to unemployment compensation or workers compensation that is currently provided, nor should this access be reduced or limited through changes being contemplated by the legislature. Many IC's have access to both workers compensation and unemployment compensation provided by the employing company right now, but H.867 has the potential to strip these protections away from some workers and/or require IC's to purchase their own Workers Compensation policy (page 9 of 27, line 7).

The legislature needs to take a very close look at existing case law to see how the current statutes have been applied, and carefully identify the protections that workers would lose under the draft language of H.867.

It is really important to remember that in an employment relationship individual workers are often at a distinct disadvantage, and the employer generally has greater knowledge and power to force compliance with its desires.

Conclusion

The classification of workers as employees or independent contractors (or even as sole proprietors) is a big and thorny issue with lots of gray space. I doubt the legislature will ever be able to eliminate all the gray, but it should endeavor to provide protection for workers and maximum access to unemployment compensation and workers compensation. Both of these programs promote stability in the workplace, and support the state economy.

I applaud the legislature for trying to streamline the definition of employees and independent contractors throughout statute, but H.867 may do more harm than good.