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Sent via email

Re: Letter urging non-support for Vermont Bill H. 867

To whom it may concern:

I am writing on behalf of the National Employment Law Project (NELP) to urge you to vote *against* H. 867, legislation recently introduced that would weaken the test for determining whether a worker is a covered “employee” for purposes of Vermont’s Unemployment Insurance (UI) and workers compensation laws. *This bill is bad policy because it would almost completely undermine decades of a well-established and strong safety net for Vermont workers by making it easier for employers to misclassify their employees and evade unemployment and workers compensation insurance.*

NELP is a national non-profit organization that promotes policies to improve economic security for low-wage and unemployed workers. At NELP, we have seen many workers being forced to sign contracts saying they are “independent contractors” as a condition of getting a job; we see employers changing employees into independent contractors, individual franchisees, LLC’s or other non-employee labels to cut costs, and we see workers being paid off the books completely, with no reporting or withholding of the basic payroll taxes or insurance.¹ This happens with alarming frequency in construction, janitorial, home care, delivery and transportation jobs, to name a few.

The misclassification of employees as independent contractors is eroding job conditions in our economy’s growth sectors, jeopardizing our nation’s economic recovery, draining federal and state coffers of much-needed revenues, and hurting workers, who lose out on critical labor and employment protections including workers compensation, unemployment insurance, fair pay, and health and safety safeguards.

Misclassification abuses have taken a heavy toll on our national economy and on Vermont, but H. 867 would exacerbate conditions by making it easier for employers to game the UI and workers compensation systems, thereby denying workers these critical supports, and encourage employers to dodge

¹ See for example, Catherine Ruckelshaus, et al, [Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work](http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-for-Labor-Standards-in-Outsourced-Work-Report.pdf) (May 2014), available at <http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

other employer obligations, including responsibility for employer-side payroll taxes that support the state government.

H. 867 would undercut the purposes of the Vermont unemployment insurance (UI) and workers compensation systems, which the state's workers need now more than ever.

The UI system is designed to keep workers economically secure and encourage their re-entry into the workforce, to provide involuntarily-unemployed workers with temporary income replacement while they look for work, and to stabilize the economy by maintaining consumer spending during an economic downturn. UI boosts the economy by providing "counter-cyclical" economic growth in downturns. It also alleviates economic hardship by preventing workers from slipping into poverty. And, it helps employers and workers preserve skills and enhance productivity, because income provided by unemployment checks gives workers needed breathing room to search for a good job that matches their experience and skills, and enables employers to retain experienced workers during layoffs. This result benefits society as a whole; by encouraging workers to stay in the professions they have trained for, rather than having to shift from field to field out of short-term necessity, unemployment insurance helps insure that important occupations are not depleted of their experienced workers whenever periods of unemployment strike.

In addition, medical bills and lost time from a work related injury can be an enormous burden on workers and their families.² Losing a family member to a work-related death can have devastating consequence to a family's financial security. That is why the American worker's compensation system was created at the turn of the last century. The basic principle – often called the Grand Bargain - is that employers assume responsibility for providing insurance that pays out certain benefits for workers injured on the job without regard to fault, and in return are protected from personal injury or other liability for workplace injuries or illnesses. With a few exceptions, worker's compensation is financed by employers either through purchased insurance from private insurers or a state insurance fund.³

Because worker's compensation is a social insurance program, universal coverage of employees is an important prerequisite to its success. Over 129 million workers in the country are covered by worker's compensation. Workers in dangerous jobs including construction, janitorial, home care, and transportation are and must be covered by worker's compensation.

Vermont has already acknowledged that misclassification is an important and growing problem; the chart and information in the costs report compiled by NELP

² Occupational Safety and Health Administration, United States Department of Labor, Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, June 2015, <http://www.dol.gov/oshareport/20150304-inequality.pdf>.

³ National Academy of Social Insurance, Workers' Compensation: Benefits, Coverage, and Costs, 2013, https://www.nasi.org/sites/default/files/research/NASI_Work_Comp_Year_2015.pdf

shows that as many as 15% of Vermont employers are misclassifying their employees, costing the state millions of dollars in uncollected tax and payroll revenues.⁴ State governments suffer hefty loss of revenues due to independent contractor misclassification in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.³ By making it easier for employers to label workers as exempt independent contractors, Vermont will encourage employers to dodge their tax obligations and other responsibilities for their employee, with devastating effects.

Like the majority of states, Vermont's existing unemployment insurance law creates a presumption of employment status in most circumstances in which workers provide services for the benefit of employing entities, and has broad coverage of workers.

This presumption can be overcome only if the company can show three things: (a) the individual is free from control and direction in the performance of services, both under contract and in fact, (b) the service is outside the usual course of business for which such service is performed, and (c) the individual is customarily engaged in an independently established trade, occupation or business. A majority of the states use some version of this straightforward and objective test for UI.⁵ The remedial purpose of this test is to provide broad coverage of workers under Vermont's UI law so that they are eligible for partial income replacement in the event they lose jobs through no fault of their own.

Vermont's existing workers compensation law is similarly set up to cover most workers, and this bill would import in easy-to-manipulate factors that employers can impose to evade coverage.

H 867 would gut the current Vermont UI and workers compensation tests for employee status, and permit employers to manipulate job titles and relationships to evade coverage.

Under the proposed test, for example, an employer could use the existence of a contract stating that the worker is an independent contractor to prove the worker is an independent contractor under the law. We have seen that any employer wanting to misclassify its employees could simply require workers to sign such an agreement as a condition of getting a job.

Several other proposed factors are not relevant to many types of low-wage jobs.

⁴ See, National Employment Law Project, Independent Contractor Misclassification Costs Report (2015), available at:

<http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.

⁵ US Department of Labor, Employment and Training Administration, *Comparison of State Unemployment Laws*, available at

<http://www.oui.doleta.gov/unemploy/pdf/uilawcompar/2014/coverage.pdf>

For example, whether a company treats a worker as an employee for purposes of income taxation is completely within the purview and control of the employer, and would be easy for the employer to manipulate to its advantage.

H. 867 would thus undermine the overall purposes of the unemployment insurance and workers compensation systems by removing critical income support from many workers and would reward employers that seek to evade these laws.

The U.S. Department of Labor has prioritized combating independent contractor misclassification, and has signed Memoranda of Understanding with over half of the states, including Vermont, pledging coordinated enforcement and robust application of labor, tax and safety net protections for all workers. H. 867 would undermine these important efforts.

The US Department of Labor's summer 2015 Administrator's Interpretation on independent contractor misclassification noted the increasing problems of employer evasions by calling workers independent contractors, and the corresponding lack of worker protections, and concluded by saying that most workers are covered by our labor protection laws.⁶

And finally, Independent contractor misclassification subjects responsible businesses to unfair competition, as they struggle to place competitive bids against companies that illegally depress employee compensation.

For those reasons, we urge the Legislature to reject H. 867.

Sincerely,

/s/ Catherine Ruckelshaus

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⁶ See, USDOL Administrator's Interpretation on Independent Contractor misclassification, available at http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.

Closing,
Signature