



TESTIMONY OF WOMEN BUSINESS OWNER'S NETWORK of VERMONT

Before the House Committee on Commerce and Economic Development

On Independent Contractor legislation

March 15, 2017

Women Business Owner's Network (WBON) of Vermont encourages ownership of businesses by women, supports women-owned businesses, and works to promote a climate conducive to entrepreneurship in Vermont. We feel we have a unique perspective on this issue, as our membership includes owners of companies who use independent contractors in their normal course of business, as well as sole proprietors who contract with other firms to provide products and services.

We greatly appreciate the opportunity to share our views on the independent contractor issue generally, as well as to discuss specific legislation presently before the committee. However, our remarks are focused solely on the definitional sections of each bill, as we do not at this time have a position on the other provisions in the legislation.

As mentioned previously, due to the diversity of our membership, WBON views the subject of misclassification of employees from both the independent contractor and the employer perspectives. WBON feels that it's essential to protect independent contractors from exploitation, and at the same time preserve the ability of those who choose to be their own boss to succeed in the marketplace. We are also mindful of the plight of small employers, so important to the state's economy, who may not



need, and cannot afford, to hire full-time employees for work that is project-driven, sporadic in nature, or outside the scope of its core business.

The majority of WBON members are sole proprietors. Many prefer to control their own destinies by offering their products and services in a project-based manner, maintaining a flexible work schedule — especially those with children or elders to care for — or conforming to the norms of their particular industry — here we’re thinking high tech. The recent federal and state administrative directives on employee misclassification have in some cases had a chilling effect on their ability to obtain work, as employers are wary of taking on an independent contractor because of the uncertainty that surrounds the classification issue.

Small businesses struggling to grow, on the other hand, may find it a cost-necessity to contract out ancillary tasks, such as payroll processing, HR assistance, or tasks that are performed sporadically. At the same time, many small business employers are placed at a disadvantage by the “nature of work” restriction when competing with firms that hire workers as ‘independent contractors’, thereby saving the 20-30% benefit costs of hiring an employee.

One of our members, Marketing Partners, Inc., is an established small business employer who provides well-paying jobs in addition to benefits that include 100% employer-paid health insurance, life insurance, dental insurance, paid sick leave and disability insurance, plus a 401(k) matching plan, a profit-sharing plan, a cafeteria/flex spending plan, a wellness program covering health club memberships and other long-term preventive lifestyle measures, and an annual professional



development allowance. Marketing Partners has experienced multiple facets of the current employee-independent contractor definition problem:

- **Wanted to hire Vermont sole proprietors as part-time employees, only to learn they want to (or need to for tax or spouse benefit reasons) maintain their status as independents;**
- **Declined to collaborate with Vermont sole proprietors to pursue large, short-term contracts because the ‘nature of work’ requirement would have triggered employee status;**
- **Lost cost-based government contracts to firms who can underbid because they only use independent contractors and do not have to pay workers compensation, unemployment insurance, or other employee benefits.**
- **Been subjected to a random audit by the Vt DOL, which although no problems were identified, took hours to prepare for and respond to — hours that could have been better spent on revenue-producing client work.**

Another member, who employs 25 well-paid Vermonters, does business across the country on a project basis. Projects may last for six months, a year, sometimes two or three. Some tasks that employees perform within the company’s geographical reach need to be performed on the other coast, down South or in the Mid-West. These tasks involve very few hours of work, and are required irregularly. This firm cannot afford to hire full-time employees in every region of the country in which they have projects at any particular time. Nor can they afford to send Vermont-based employees, incurring airline, hotel and other travel expenses, to perform work that is essentially ministerial.

Our message to you today is that Vermont needs an employee classification statute that is clearly stated and balances the needs of independent contractors and employers alike. The definitional



sections of each of the three bills before the committee are a great improvement upon the current law. Our advice is to fashion the language as closely as possible to the USDOL's Administrator's Interpretation No. 2015-1 as published in 2015. It is simple and clear. There is established case law. It allows for consideration of many factors in making a classification determination. The document quotes the opinion of a district court in determining economic dependence:

“These factors are to be considered and weighed against one another in each situation, but there is no mechanical formula for using them to arrive at a correct result. Rather, the factors are simply a tool to assist in understanding individual cases, with the ultimate goal of deciding whether it is economically realistic to view a relationship as one of employment or not.”

There is established case law on the subject, which means the State of Vermont, its employers and sole proprietors will not need to “reinvent the wheel.” Deviating from the language in that document adds an element of uncertainty on how courts might rule when determinations are contested.

In closing, WBON is extremely grateful to the committee for wading deeply into this complicated and controversial issue. Please do not hesitate to call on us for any assistance we can provide.

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