

Testimony of David Mickenberg
On Behalf of Working Vermont and the Vermont Building and
Construction Trades Council
April 5, 2017

Thank you for the opportunity to testify on the important issue of worker misclassification and independent contractors. As I've stated previously, Working Vermont and the Vermont Building and Construction Trades Council have long held the view that Vermont could and should do a better job of protecting workers across our state. We appreciate that when it comes to this issue, there are a variety of competing interests and we respect those interests. In that vein, I'd like to briefly go through the sections of this draft that I think are particularly important when it comes to protecting the interests of workers.

1) **Section 1:**

I respect the committee's decisions in this section. My slight suggestion would be a reordering by moving number 4 to number 2 in the ordering or priorities, for emphasis worker protection is paramount to this bill.

2) **Section 2:**

- a. In Section F(ii) and H(ii) there are references to a written contract between an independent contractor and hiring entity. In those sections I would suggest inserting language to the effect that it will be impermissible to allow "arbitration clauses" be written into such contracts. Individuals that qualify under this bill as an independent contractor will waive their right to worker's compensation benefits from the hiring entity, and instead have the ability to bring a claim in tort. However, the use of arbitration clauses, clauses which prevent individuals from going to court and instead force them to arbitrate matters, undermines their right to bring a personal injury claim. Consequently, while we state that individuals will have a

right to bring a personal injury action, these clauses will nullify that right.

- b. Second, 31(A), the test for independent contractor. As we and others have stated, our current test under workers compensation and UI laws are the broadest and most protective of workers and for years were followed without incident or much complaint. However, we acknowledge the committee's desire to do something to allow more flexibility in the test and we respect that desire. We think that to the extent that the test tracks the FLSA standards it marks an acceptable middle ground and compromise. Tracking the FLSA test provides flexibility, by following a totality of the circumstances model; provides clarity given the years of case law related to the FLSA and allows for a common sense approach to enforcement. These positives break down if there are parts of the FLSA test that are excluded, particularly the integral part of the business test. The integral part of the business test, one among many factors to be examined, is important because if an individual is in fact doing work that is the primary work of another person's business, the FLSA guidance and case law tells us that it is less likely that that person is going to be truly in business for themselves and therefore economically independent. We think that without this, other parts of the test become less meaningful as they are more subject to possible manipulation or "papering of the file" meaning there is a paper trail which indicates independence when in fact such independence does not truly exist. Consequently, for the proposed test in this section to truly work it must contain all of the factors that allow for the determination of true economic independence.

3) **Sec. 4:**

We think the establishment of the interagency task force is important to this bill because it provides an avenue to efficiently coordinate state government's response to misclassification. Misclassification is an issue that impacts not just worker's

compensation and UI, but could touch the tax department; liquor control; AHS and other parts of state government. Having these folks talking and coordinating their enforcement efforts is key to reducing the instances of misclassification in Vermont. The only suggestion I would have is that you make the Attorney General the co-chair of the taskforce, given his role as Vermont's top enforcement and compliance official we think this would be helpful to the coordination of enforcement.

4) Sec. 5 and 6:

I comment on these sections only to the extent that it highlights the need to disallow the use of arbitration clauses in the contracts discussed in this law because by not doing so it could undermine your intent to allow individuals to bring an action in tort if they suffer a personal injury as an independent contractor.

5) Sec. 13:

In this section I would encourage the committee to return to the language contained in H. 223 related to disallowing employees from being coerced into becoming independent contractors. I think such language is an important protection for workers who may be subject to exploitation and abuse.

Other Sections:

I appreciate the committee's work on many of the other sections and think they are helpful at streamlining and improving the Department of Labor's work to administrate our laws in this area.

I would like to briefly comment on a few sections of bill that were removed in your previous discussions. First, in our view the inclusion of the private right of action was an important tool to help spread the enforcement demands related to reducing instances of misclassification. This has been proven to be the case in other states that employ private rights of action for individuals that have been misclassified. To be clear the action would be brought for the illegal misclassification, not for any underlying physical injury or employment termination. Furthermore,

the section on individual liability for officers and agents is again a tool that would have a prophylactic effect in reducing the instances of misclassification. I would encourage the committee to consider reinserting both of these sections.

Finally, on the enforcement side, I would strongly encourage the committee to look at language contained in S.73 that authorizes the Attorney General's office to have some concurrent enforcement powers related to misclassification. It authorizes the AG's office to enforce instances of misclassification under the consumer protection act. Allowing AG enforcement of misclassification laws is a model that's been effective in other states. We think this would help significantly reduce the instances of misclassification; relieve some burden on the DOL; and provide greater protection for workers. We urge you to examine this language and to incorporate it into this draft.