The Time Has Come for Congress to Finish its Work on
Harmonizing the Definition of "Employee"
We Urge You to Support H.R. 3825
The *Harmonization of Coverage Act of 2017*

At this time, courts and administrative agencies apply more than 10 different tests for defining the term "employee" for purposes of federal and state statutes. Different tests are applied (i) for purposes of different statutes, (ii) for purposes of different aspects of the same statute, and (iii) even for purposes of the same statute in different jurisdictions.

H.R. 3825, the *Harmonization of Coverage Act of 2017*, introduced on September 25, 2017, by Representatives Diane Black (R-TN) and Elise Stefanik (R-NY), would harmonize the definition of "employee" for purposes of federal statutes.

The current patchwork of different definitions for the term "employee" exposes a company to a risk of conflicting determinations on whether it has properly classified individuals as independent contractors; and it exposes such a company determined to have misclassified individuals to enormous financial liabilities. It also impedes the government's ability to ensure proper worker classification.

This uncertain and high-risk regulatory environment has a discriminatory impact on independent entrepreneurs relative to their larger competitors, because companies are fearful of doing business with them. This leads to fewer economic opportunities for independent entrepreneurs and results in companies having to obtain needed services in a less efficient manner – all of which diminishes economic growth.

A harmonized definition of "employee" would reduce these risks and liberate self-employed individuals to compete on a level playing field and maximize their earning potential. It also would facilitate the government's efforts to ensure proper worker classification through collaborative-enforcement agreements. Such collaborative enforcement efforts can never achieve their full potential so long as different test are used to determine an individual's status for purposes of different statutes.

The predominant definition for the term "employee" for purposes of federal statutes is the "common-law" test. This is due to certain statutes explicitly adopting the test and a trilogy of U.S. Supreme Court decisions adopting the test for purposes of federal statutes that do not define the term "employee," or define the term with a circular definition.[1] The common-law test is the *only* test through which harmonization can be accomplished.

The final action required to harmonize federal statutes is for Congress to amend the Fair Labor Standards Act ("FLSA") to define the term "employee" under the common-law test. Most courts define the term for purposes of the FLSA under an experimental test the U.S. Supreme Court adopted during the New Deal era, known as the "economic realities" test. The creation of this test led to the creation of yet another test used by some courts, called a "hybrid" test, which is a hybrid of an "economic realities" test and the "common-law" test. The "economic realities" test is also used for purposes of certain other statutes that adopt the same test followed by the FLSA. A harmonization of the FLSA should automatically harmonize these other statutes, and gradually eliminate the "hybrid" test.

While it is impossible to recover the lost entrepreneurship and artificially depressed economic growth that has occurred under the current patchwork of different tests for the term "employee," the sooner action is taken to harmonize this definition, the sooner these burdens can be lifted and our nation's independent entrepreneurs can once again be liberated to pursue their entrepreneurial dreams and the overall economy can begin growing at higher rates.

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[1] *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); and *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).