Bill Would Dramatically Expand
Definitions of 'Employee' and 'Joint Employer'
For Purposes of NLRA

The terms "employee" and "joint employer" for purposes of the National Labor Relations Act of 1935 ("NLRA") would be given new – and more expansive – definitions by the *Workplace Democracy Act*, introduced in the Senate and House of Representatives on May 9, 2018, as S. 2810 and H.R. 5728, respectively. The lead sponsors of the bill are Senator Bernie Sanders (I-VT) and Representative Mark Pocan (D-WI), but many other Democrat Members joined as initial cosponsors.[1] The bill has no Republican cosponsors.

The principal effect of the bill's proposed new definition of "employee" would be to expand coverage under the NLRA to *independent contractors* who either (i) provide a type of service that is within the "usual course of business" of the client company, or (ii) cannot demonstrate that they are customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed (which typically requires that the individual provide services for multiple clients or provide evidence of the types of "old economy" marketing efforts that "new economy" independent contractors seldom use, such as *Yellow Page* advertisements and business cards).

Another effect of the proposed new definition would be to exacerbate the current patchwork of different definitions of the term "employee" for purposes of federal statutes, by increasing the number of different tests to four. This would add to the uncertainty that legitimate independent contractors and their clients currently face in seeking to structure business relationships that satisfy all applicable tests, and would further impede efforts by government agencies to work collaboratively to ensure proper worker classification.

Bill Would Adopt an "ABC" Test to Define "Employee"

The proposed change to the definition of "employee" for purposes of the NLRA would result in large numbers of individuals who currently qualify as independent contractors (which means they are exempt from the NLRA), being deemed employees and thereby covered by the NLRA. The newly covered individuals would be subject to unionization, as only employees can join a union.

[1] The additional initial cosponsors of the bill are: Senators Kristen Gillibrand (D-NY), Elizabeth Warren (D-MA), Sherrod Brown (D-OH), Tammy Baldwin (D-WI), Sheldon Whitehouse (D-RI), Kamala Harris (D-CA), Jeff Merkley (D-OR), Edward Markey (D-MA), Cory Booker (D-NJ), Ron Wyden (D-OR), Patrick Leahy (D-VT), Chris Van Hollen (D-MD); and Representatives Rosa DeLauro (D-CT), Donald Norcross (D-NJ), Brendan Boyle (D-PA), Mark Takano (D-CA), Marcy Kaptur (D-OH), Barbara Lee (D-CA), Mark DeSaulnier (D-CA), Keith Ellison (D-MN), Janice Schakowsky (D-IL), Bonnie Watson Coleman (D-NJ), Debbie Wasserman Schultz (D-FL), Bobby Scott (D-VA), Katherine Clark (D-MA), Adriano Espaillat (D-NY), Ro Khanna (D-CA), Jamie Raskin (D-MD). Numerous Democrat Members have subsequently agreed to cosponsor the bill; four in the Senate and thirty-one in House of Representatives.

The NLRA currently defines the term "employee" under a "common law" test,[2] which is the predominant test used to define the term for purposes of federal statutes. The *Workplace Democracy Act* would amend the NLRA to define the term with a three-part test commonly known as an "ABC" test. The bill would accomplish this by adding at the end of the definition of "employee," at 29 U.S.C. § 152(3), the following:

> An individual performing any service shall be considered an employee . . . and not an independent contractor, unless –
>
> > (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
> >
> > (B) the service is performed outside the usual course of the business of the employer; and
> >
> > (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

If the proposed new definition of "employee" were to become law, it would represent the first time an "ABC" test was enacted to define the term for purposes of a federal statute. The most prevalent use of an "ABC" test at this time is for purposes of state unemployment.

The "A" factor of an "ABC" test is essentially the common-law test. Thus, an "ABC" test treats as an employee not only an individual who is deemed an employee under the common-law test, but also any individual who qualifies as an *independent contractor* under the common-law test but does not also satisfy two additional "B" and "C" criteria. An "ABC" test, in substance, is less an objective "test" for determining worker status than a policy decision that is heavily weighted in favor of classifying individuals as "employees." The proposed test is substantially the same as the "ABC" test recently adopted by the Supreme Court of California in *Dynamex Operations W. v. Superior L.A. Cty.*, 2018 Cal. LEXIS 3152 (Apr. 30, 2018). (A summary of the *Dynamex* decision is available here.)

The proposed new test also would increase – to four – the number of different tests used to define the term "employee" for purposes of different federal statutes and thereby exacerbate the uncertainty and inconsistency that currently exists in determining an individual's status as an employee or independent contractor. This patchwork of different tests for defining the same term in different contexts has long hindered the ability of legitimate independent contractors and their clients to structure their business relationships with certainty. It also has impeded the ability of government agencies to work collaboratively to ensure proper worker classification, as a determination of an individual's status for purposes of one statute by one agency is seldom indicative of that individual's status under a different statute administered by a different agency.

[2] *See* 29 U.S.C. § 152(3); *NLRB v. United Ins. Co*., 390 U.S. 254, 256 (1968) ("[T]here is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.").

Bill Would Adopt an "Indirect Control" Standard to Define "Joint Employer"

The *Workplace Democracy Act* would also broaden the definition for the term "joint employer" for purposes of the NLRA. A practical consequence of this proposed change is that a client company could find itself being a co-defendant in any labor disputes involving its vendors.

The bill would accomplish this change by adding at the end of the NLRA a new section 20, stating:

> (a) IN GENERAL.—A joint employer shall be jointly and severally liable under this Act for any violations of this Act involving one or more employees supplied by another employer to perform labor within the joint employer's usual course of business.
>
> (b) JOINT EMPLOYER.—An employer shall be considered a joint employer of employees of another employer for purposes of this Act, if such employer possesses, reserves, or exercises enough direct or indirect control over such employees' essential terms and conditions of employment to permit meaningful collective bargaining between the employer and such employees."

The proposed new definition of "joint employer" would codify what is commonly referred to as the "indirect control" standard, which the National Labor Relations Board applied in its controversial decision in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

Other Amendments

The bill would make other amendments to the NLRA, the Labor Management Relations Act of 1947, and Labor-Management Reporting and Disclosure Act of 1959, which, according to press releases by Senator Sanders[3] and Representative Pocan,[4] are intended to make it easier for workers to join unions.

* * *

If you have any questions or would like to discuss the foregoing, please let us know, at info@iecoalition.org.

[3] Senator Sander's press release is available at https://www.sanders.senate.gov/newsroom/press-releases/sanders-pocan-introduce-legislation-to-strengthen-workers-rights.

[4] Representative Pocan's press release is available at https://pocan.house.gov/media-center/press-releases/pocan-and-sanders-lead-democrats-in-introducing-workplace-democracy-act.