March 7, 2022

Honorable Patty Murray
Chair
Senate Committee on Health, Education, Labor, and Pensions
154 Russell Senate Office Building
Washington, DC 20510

Honorable Richard Burr
Ranking Member
Senate Committee on Health, Education, Labor, and Pensions
217 Russell Senate Office Building
Washington, DC 20510

Honorable
Chairman Bobby Scott
House Committee on Education and Labor
2328 Rayburn House Office Building
Washington, DC 20515

Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
2462 Rayburn House Office Building
Washington, DC 20515

Honorable Katherine Clark
Member of Congress
2448 Rayburn House Office Building
Washington, DC 20515

Re: BE HEARD in the Workplace Act

Dear Chair Murray, Ranking Member Burr, Chairman Scott, Ranking Member Foxx, and Representative Clark:

The Coalition to Promote Independent Entrepreneurs[1] writes to express concern with the provisions contained in section 301 of the *Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act* or the *BE HEARD in the Workplace Act*, S. 3219 and H.R. 5994, that would expand the protections offered to an employee under specified federal nondiscrimination laws "in the same manner and to the same extent" to an independent contractor.[2]

[1] The Coalition to Promote Independent Entrepreneurs, www.iecoalition.org, is dedicated to informing the public and elected representatives about the importance of an individual's right to work as a self-employed individual, and to defending an individual's right to contract in this capacity. Its members consist of associations, companies, and independent entrepreneurs.

[2] It is not as though independent contractors are denied any protection under federal law against discrimination. 42 U.S.C. §1981 prohibits racial discrimination in the making and enforcement of private contracts and it applies to independent contractors. E.g., *Brown v. J. Kaz, Inc.,* 581 F.3d 175, 181 (3d Cir. 2009) ("We ... agree with the decisions that hold that an independent contractor may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship."). But this provision was narrowly drafted to reflect a recognition by Congress of the practical difficulties and inequities of extending federal laws that were designed specifically to govern the employment relationship between an employer and its

The specific federal nondiscrimination laws the bill would amend to cover independent contractors include, among others, title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 (for violations with respect to that title) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), and section 6(d) of the Fair Labor Standards Act of 1938 (commonly known as the "Equal Pay Act of 1963") (29 U.S.C. 206(d)).

The proposal would eliminate the legal recognition accorded independent-contractor status for purposes of the enumerated federal nondiscrimination laws. It would accomplish this by treating individuals who offer their services as independent contractors the same as if they were employees. The Coalition submits that the proposal represents a radical policy change. It would legislate out of existence, for purposes of the affected laws, an individual's right to work as an independent entrepreneur. When independent contractors are treated the same under the law as employees, independent-contractor status becomes meaningless, as it is devoid of any legal significance. An individual's right to work as an independent entrepreneur no longer exists. The Coalition submits that before pursuing such a change, the Congress should first hold hearings and publicly debate the advisability of denying individuals the right of self-employment and the advisability of eliminating independent entrepreneurship from our nation's economy.

The proposal is also problematic in other respects. For example, a common feature of the specified nondiscrimination laws is that they can impose liability on an employer for a violation thereof. But importantly, the laws generally limit the zone of coverage to an employer's employees. The proposed expansion of coverage under these laws to independent contractors would completely jettison the nuanced policy on which the independent-contractor exception from such laws is premised, which is to eliminate "a principal's vicarious liability for torts committed by agents not truly employed in her business."[3] It follows that the bill would expose an employer to liability for acts or omissions which it has no meaningful ability to manage or control and that are outside the scope of its business. The Coalition respectfully submits that such an allocation of liability would be highly inequitable and is in want of a sound policy justification.

Finally, expanding coverage under federal nondiscrimination statutes to independent contractors would create severe problems of implementation. Just one example is evidenced by the Equal Pay Act. To prove a violation of the Equal Pay Act "a plaintiff must first establish a *prima facie* case of discrimination by showing: i) the employer pays different wages to employees of the opposite sex; ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and iii) the jobs are performed under similar working

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employees who work under the employer's control, to nonemployees who work independently and outside the employer's control.

[3] See, Paula J. Dalley, *All in A Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. Va. L. Rev. 517, 568 (2002) ("The doctrine of vicarious liability is one of many agency law doctrines intended to accomplish one of the principal goals of agency law: coordinating the risks and benefits of business enterprises. That basic principle informs both the independent contractor exception, which eliminates a principal's vicarious liability for torts committed by agents not truly employed in her business, and the scope of employment requirement, which limits vicarious liability to acts that foreseeably arise in the operation of the business. Courts generally agree that agency law principles should be applied to determine whether employers are vicariously liable for sexual harassment under Title VII or state law.

conditions."[4] In a case where employees of a company perform similar services under arguably similar working conditions as independent contractors whom the company also engages, it is not clear how the "wages" earned by the employees and the "wages" earned by the independent contractors could be meaningfully compared. Unlike employees, independent contractors typically are responsible for providing all tools, equipment, materials, and supplies and for all expenses associated with the performance of services for their clients. Comparing the "wages" of independent contractors, who bear such costs, with the "wages" of employees, who do not, would be challenging. A new methodology would need to be developed for conducting such a comparison, assuming that such a methodology is feasible.

For the foregoing reasons, the Coalition respectfully urges that the federal nondiscrimination laws not be expanded to cover independent contractors, as proposed in the *BE HEARD in the Workplace Act*.

Thank you very much for your consideration.

Very truly yours,

American Bakers Association
American Society of Travel Advisors
American Trucking Associations
Asian American Hotel Owners Association
Association of Language Companies
Competitive Enterprise Institute
Forest Resources Association
Independent Bakers Association
Insights Association
International Franchise Association
MBO Partners
MSPA Americas
National Association for the Self-Employed
Opportunity Solutions Project
Private Care Association
Small Business & Entrepreneurship Council

[4] *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).