National Employment Lawyers Association

September 15, 2015

The Honorable Tim Walberg
Chairman, Committee on Education and Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member, Committee on Education and Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

SENT VIA EMAIL

Dear Chairman Walberg and Ranking Member Scott:

On behalf of the National Employment Lawyers Association ("NELA"), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our opposition to the passage of H.R. 3495, the Direct Seller and Real Estate Agent Harmonization Act ("H.R. 3495" or "the Act").

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, wage and hour, and civil rights disputes. Our mission is to empower workers' rights attorneys through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts, and written numerous comments on relevant Notices of Proposed Rulemaking and letters to Congressional committees. Our members represent thousands of clients in every circuit in the nation in labor standards and civil rights litigation, including extensive litigation under the Fair Labor Standards Act ("FLSA"). This experience means we are well-positioned to assess the Act and its impact.

NELA opposes the Act's exclusion of "direct sellers" and "qualified real estate agents," as defined in the Internal Revenue Code ("IRC"), from the FLSA's definition of "employee." Section 3508 is a tax classification mechanism, and by its terms it applies "for purposes of this title," *i.e.*, the IRC, and is not a standard for determining who is protected by the FLSA. Importing a tax status into the FLSA would substitute form (contract labels and commission-style remuneration) for function (economic dependence and the realities of control, permanence, and integration), contrary to the FLSA's text, structure, and remedial purpose.[1]

[1] 26 U.S.C. §3508(a) ("For purposes of this title…"); cf. 29 U.S.C. §203(e), (g) ("employ" includes "to suffer or permit to work").

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I. WHY A TAX-CODE CATEGORY CANNOT DEFINE FLSA 'EMPLOYEE' STATUS

A. Employee Status under the FLSA is Defined Broadly to Accomplish the Remedial Purposes of the Act, and Interpreted Fact-Intensively by Courts under the Economic Realities Test

The Act proposes to amend the FLSA by stipulating that "[t]he term 'employee' [under the FLSA] does not include any direct seller or qualified real estate agent (as such terms are defined in section 3508(b) of the Internal Revenue Code of 1986)."[2]

Tax policy is intended to collect revenue, not to police workplace wage protections. Section 3508's criteria, commission and/or output-based pay plus a written contract disclaiming employee status, were crafted to guide tax withholding and information-reporting obligations. They do not evaluate whether workers are economically dependent, the degree of control exerted over their work, the permanence of the relationship, or whether the work is integral to the business—core considerations under the FLSA's economic realities framework. Using §3508 to decide who is an "employee" under the FLSA would therefore allow form documents to override the statute's substantive protective test.

Generally, the FLSA defines an "employee" as "any individual employed by an employer."[3] It defines an "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee."[4] And, it provides that the term "'[e]mploy' includes to suffer or permit to work."[5]

The U.S. Supreme Court has rightly noted that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."[6] It has also noted that "the term 'employee' under the FLSA [has] been given 'the broadest definition that has ever been included in any one act.'"[7] Finally, of greatest significance for H.R. 3495, the Supreme Court has noted that "in determining who are 'employees' under [the FLSA], *common law employee categories or employer-employee classifications under other statutes are not of controlling significance*. [The FLSA] contains its own definitions, comprehensive enough to require its

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[2] Text - H.R.3495 - 119th Congress (2025-2026): Direct Seller and Real Estate Agent Harmonization Act, H.R.3495, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/3495/text.
[3] 29 U.S.C. § 203(e).
[4] 29 U.S.C. § 203(d).
[5] 29 U.S.C. § 203(g).
[6] *United States* v. *Rosenwasser,* 323 U.S. 360, 362 (1945).
[7] *Id.* at 363 n.3 (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 S. Ct. 1344, 1350, 117 L. Ed. 2d 581 (1992) ("[the FLSA definition of 'employee' status] stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.").

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application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category"[8] (emphasis added).

This broad statutory definition governs how courts determine whether a worker is an employee or an independent contractor, under the FLSA's "economic realities" test. "It is well recognized that under the FLSA the statutory definitions regarding employment are broad and comprehensive in order to accomplish the remedial purposes of the Act. Courts, therefore, have not considered the common law concepts of 'employee' and 'independent contractor' to define the limits of the Act's coverage. We are seeking, instead, to determine 'economic reality.' For purposes of social welfare legislation, such as the FLSA, 'employees are those who as a matter of economic reality are dependent upon the business to which they render service."[9]

The economic realities test is a fact-sensitive one, under which courts consider the totality of the circumstances of an employee's relation to their employer. Some of the criteria courts consider include: (1) the nature and degree of the employer's control as to the manner in which the work is to be performed, (2) the employee's opportunity for profit or loss depending upon his or her managerial skill, (3) the employee's investment in required equipment or materials, (4) whether the service rendered requires a special skill, (5) the degree of permanency of the working relationship, and (6) the extent to which the service rendered is an integral part of the employer's business.[10] No one criterion is by itself dispositive or controlling.[11]

For the workers impacted by H.R. 3495, this nuanced and sophisticated framework would be abandoned. The Act's amendment of § 3(e) of the FLSA to exclude from the FLSA's definition of "employee" anyone who meets the definitions of a "direct seller" or "qualified real estate agent" under § 3508(b) of the Internal Revenue Code would unjustifiably jettison the tried-and-tested framework of the economic realities test for such workers.

B. The Act's Exclusion of Direct Sellers and Qualified Real Estate Agents Risks Getting the Reality of Employee Status Wrong

Under H.R. 3495, the threshold question would collapse into three tax-derived criteria; job title, commission/output-based pay, and a written contract disclaiming employee status for tax purposes.[12] That is a withholding test, not a worker protection test. It would prevent courts from weighing the full set of economic realities factors—control, investment, skill, permanence, and integration—that determine whether individuals are employees entitled to the FLSA's minimum wage, overtime, recordkeeping, antiretaliation, equal pay, and youth labor protections.

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[8] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).
[9] *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (1987) (quoting *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299 (5th Cir. 1975)).
[10] *Id.* at 1535.
[11] *Id.* at 1534.
[12] 26 U.S.C. § 3508(b)(1), (2).

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Such an approach would grossly oversimplify the determination of these workers' employee status. As will be shown below, depriving courts of the ability to consider such crucial real-world dimensions of the employee-employer relationship as the worker's opportunity to control the manner of performance of their work, the permanency and duration of the working relationship, and the other considerations assessed under the economic realities test, makes the approach contemplated by the Act far too blunt an instrument to adequately evaluate the relationship between such workers and their employers.

II. AMENDING THE FLSA'S DEFINITION OF "EMPLOYEE" IN THE MANNER PROPOSED BY THE ACT WOULD RESULT IN MISCLASSIFICATION OF DIRECT SELLERS AND QUALIFIED REAL ESTATE AGENTS

A. The Act Would Misclassify Direct Sellers and Qualified Real Estate Agents

Many direct sellers and real estate salespeople operate under form independent contractor agreements while actually working under conditions that reflect employee status. In litigation across these sectors, workers have alleged detailed control over hours, methods, locations, marketing, and exclusivity—classic indicators of employee status under the FLSA's economic realities test—even where they are paid on commission.

H.R. 3495 would tell courts to disregard those facts and to treat contract labels and commission-style remuneration, the touchstones of §3508, as dispositive. That approach invites misclassification by papering relationships to conform to tax status, rather than evaluating the realities of how work is organized and controlled. For example, while large numbers of direct sellers and qualified real estate agents are operating as ostensible independent contractors, many are not.[13] And whether or not a given direct seller or qualified real estate agent is *formally operating* as an independent contractor, the economic realities of the relationship between a direct seller or real estate agent and their employer might plainly contradict the notion that the worker is an independent contractor.

This happens all too often in a variety of industries. For example, in a class action lawsuit brought against the Mary Kay cosmetics company by a group of Beauty Consultants responsible for selling Mary Kay cosmetic products, the consultants alleged that Mary Kay misclassified them as independent contractors in spite of exercising extensive control and direction over the manner of performance of their work.[14] The plaintiffs alleged that Mary Kay required them to purchase designated minimum amounts of Mary Kay products directly from Mary Kay, regardless of whether they had customers to purchase the products, or face termination.[15] Plaintiffs also alleged

[13] National Association of Realtors, *NAR Issue Brief: Real Estate Professionals Classification as Independent Contractors* (Jan. 10, 2024), available at https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors (approximately 13% of the over 1.5 million real estate agent members of the National Association of Realtors are not operating as independent contractors; this 13% figure does not include real estate agents *operating* as independent contractors who may be misclassified).

[14] *Collins v. Mary Kay, Inc.*, 2015 WL 5695844, Compl. ¶ 13 (D.N.J.).

[15] *Id.* at Compl. ¶ 16.

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that Mary Kay regularly required non-negotiable payments, under threat of termination, from its Beauty Consultants for marketing materials such as pamphlets, leaflets, postcards, and catalogs, while at the same time prohibiting plaintiffs from forming and selecting their own marketing schemes.[16]

And in the real estate industry, this kind of misclassification happens as well. In a lawsuit brought by real estate agents of the Coldwell Banker Residential Brokerage Company that settled for $4.5 million, the real estate agents alleged that Coldwell Banker "willfully misclassified" them as independent contractors while exerting significant control over their work, including by requiring them to work at a designated physical location and precluding them from working for other brokerages.[17]

Analyzing such employee-employer relations between direct sellers or real estate agents under the economic realities test of the FLSA allows courts to consider the degree of control exercised by an employer over the manner of performance of workers' job duties. The framework proposed by the Act would not, which would facilitate misclassification in these industries. In addition, the harm is concrete and immediate. Workers who fall into §3508 categories would lose federal minimum wage and overtime rights, recordkeeping protections that make enforcement possible, antiretaliation coverage under 29 U.S.C. §215(a)(3), and youth labor safeguards, regardless of the reality of their dependence on the hiring entity.

B. Such Misclassification Harms Workers and Public Finances

Employment status or lack thereof determines workers' access to the protections of the FLSA. When an employer-employee relationship exists and the employee is performing covered work, the employee must be paid the federal minimum wage and receive overtime pay at a rate of at least one-and-one-half times their regular rate of pay for hours worked over 40 in a workweek.[18] Employers are also bound by the retaliation protections of the FLSA regarding employees, and must comply with the FLSA's recordkeeping requirements and child labor provisions.[19] Being deprived of these rights imposes steep costs on workers: a typical construction worker loses as much as $19,527 per year in income and job benefits to misclassification, and a typical truck driver loses as much as $21,532 per year in income and benefits.[20]

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[16] *Id.* at Compl. ¶ 17.

[17] *Real Estate Independent Contractor Lawsuits, Explained*, *Inman* (Jan. 18, 2016), available at https://www.inman.com/2016/01/18/real-estate-independent-contractor-lawsuits-explained/?utm_source=chatgpt.com.

[18] Wage & Hour Division of the U.S. Department of Labor, *Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)* (March 2024), available at https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship#:~:text=Work%20that%20is%20sporadic%20or,work%20relationship%20indicates%20employee%20status.

[19] *Id.*

[20] Adewale A. Maye, Daniel Perez, and Margaret Poydock, *Misclassifying workers as independent contractors is costly for workers and states*, Economic Policy Institute (Jan. 22, 2025), available at https://www.epi.org/publication/misclassifying-workers-2025-update/.

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Protections for individual employees are not all that is at stake in the employee-independent contractor determination. "[R]elevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled."[21]

Passing H.R. 3495 would open the door to similarly simplistic tax-based frameworks for determining employee status in other industries, with all the potential for misclassification and its attendant ills of lost worker protections and lost government tax revenue that are raised in the direct seller and real estate agent contexts.

CONCLUSION

Employee status under the FLSA is defined more broadly than in perhaps any other federal statute, to effectuate its remedial purposes. It is also interpreted by courts in a nuanced, rigorous and fact-sensitive manner using the economic realities test. H.R. 3495 would do away with these sensible approaches to employee status for direct sellers and qualified real estate agents, in favor of an over-simplistic contract-driven analysis. This approach would poorly serve such workers, result in their misclassification as independent contractors, and open the floodgates to further tax classification-based determinations of employee status in other industries. Adopting such an approach here would be particularly unwise given the evidence of widespread misclassification in many industries, leading to millions of workers losing the wages and benefits to which they are entitled.

For these reasons, we oppose H.R. 3495, and support the alternative of preserving the well-established status quo under the FLSA's broad definition of employee status and the economic realities test.

Sincerely,

Karen Maoki
Interim Executive Director
National Employment Lawyers Association

[21] *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 913 (2018).

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