Questions for the Record from
REPRESENTATIVE ROBERT C. "BOBBY" SCOTT

Workforce Protections Subcommittee Hearing: "Biden's War on Independent Contractors" April 19, 2023 10:15 a.m.

Representative Robert C. "Bobby" Scott (D-VA)

Questions for Laura Padin

1. The hearing established clearly that the Biden administration has no plan to adopt the ABC test—and, in fact, has no authority to adopt the ABC test—in its implementation of the *Fair Labor Standards Act*. Since, however, the ABC test was such a significant topic of the hearing, I look to your expertise on the subject to clarify some of the comments made about it by other witnesses during the hearing.
    a) California's Assembly Bill 5 implemented the ABC test for that state's employment laws by statute. My Republican colleagues presented AB 5 in this hearing as though it is the exemplar of the ABC test. To what extent is that legislative enactment and its rollout representative of the experience of other jurisdictions' adoption of the ABC test, and to what extent is it different? How so?

In 2019, California adopted AB5, codifying that state's Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.[i] In *Dynamex*, California's high court held that the "simpler, more structured" ABC test applied to questions of whether a worker was a covered employee or an independent contractor under California law.[ii] The California legislature then codified that holding in AB5, where it enacted the ABC test with initial exemptions for certain occupations, including, for example, licensed insurance and real estate agents, registered securities brokers, individuals providing professional services under contract.[iii]

To be clear: the ABC test is *neither* novel nor unorthodox. As the *Dynamex* court noted, many jurisdictions had already adopted the test by the time of its decision.[iv] Indeed, the ABC test has been on the books for decades, as state policymakers recognized the extreme harms that independent contractor misclassification caused not only to their constituents, but to law-abiding businesses that found it difficult to compete as well as public programs funded by payroll taxes that cheating businesses avoided. Some states have had ABC on the books since the 1930s, while others, like Massachusetts adopted the ABC test for its employment laws in 2004.[v] Given its history, the ABC test is, or should be for those following the law, well established and very familiar. In other states, it was enacted largely without fanfare, and to my knowledge there is no shortage of independent contractors in the 20 or so other states using the ABC test in their unemployment insurance or wage-and-hour laws.

The California experience has not been representative of other states with respect to the adoption of the ABC test. First, big-monied, digital app-based corporations such as Uber, Lyft, DoorDash, Postmates and Instacart led a fevered and well publicized backlash against AB5, spending well over $200 million on a ballot initiative campaign to roll back AB5 with respect to app-based drivers and delivery workers.[vi] The influence of the big money advertising to promote a scare campaign and a generalized atmosphere of fear among workers, legitimate independent contractors who run their own businesses, and businesses engaged in legitimate contracting is difficult to underestimate.

Relatedly, California's economy is larger than many countries, with a GDP of roughly $3.3

trillion dollars.[vii] As a result, developments in that state necessarily garner attention and publicity. It is worth noting, however, that California's economy has not apparently suffered after the enactment of AB 5;
to the contrary, headlines suggest it is poised to overtake Germany in gross domestic product.[viii]

Second, California also adopted a host of exemptions to AB5, to moderate the impact of the ABC test in light of concerns that true independent contractors would be erroneously deemed employees. As a result, workers in several industries —freelance writers, graphic designers, artists, translators,
musicians, certain web designers or photographers, and others— are exempt from the ABC test as long as certain indicia of economic independence are satisfied.[ix] Other states have long relied on the ABC test in their wage-and-hour and unemployment insurance laws without major controversy and have not enacted exemptions to the extent that California has.[x]

b) One of the witnesses posed a series of questions about the ABC test: "How can a musician perform at a music venue? How can a comedian tell jokes at a comedy club?" Does the ABC test necessarily prevent musicians from holding concerts or comics from performing standup in states that have adopted that test?

No. Fundamentally, the ABC test *does not prevent any work*, and musicians, comedians and others regularly perform in states across the country, including states that use the ABC test. Massachusetts, to name just one example, uses an ABC test in its employment laws.[xi] My very brief internet search suggests that both stand up comedy and musicians are alive and well, and performing regularly in that state.[xii] More importantly, there are no reported or public cases of any enforcement of these laws challenging the employment or business relationships in these sectors.

2. We heard statements in the hearing suggesting that it is "impossible" for a true independent contractor not to become an employee under apparently any test other than the Trump administration's rule.

This is —in the most generous terms— a gross exaggeration, readily belied by the facts but consistent with the false narrative that there is a war being waged against independent contractors. True independent contractors that run their own businesses play an important role in the economy, and as I explained in my written testimony, NELP fully supports their right and ability to do so. Legitimate independent contractors existed well prior to the Trump Administration's independent contractor rule, and they have continued to exist even in states that have chosen the ABC test. If it were "impossible" to be an independent contractor under anything other than the Trump Administration's rule, there would have been no such contractors until 2021 when that rule took effect. Far from making it newly possible to be an independent contractor, the Trump Administration rule greenlighted misclassification of employees as independent contractors in low-paid labor - intensive sectors where labor violations persist, like construction, home care, janitorial, and others. It was contrary to both the text of the *Fair Labor Standards Act* and decades of precedent interpreting it as NELP explained in comments opposing that rule.

a) Is it impossible to tell the difference between true independent contracts and employees under the economic realities test of the FLSA?

No. The Supreme Court and federal appellate courts, as well as employers and workers, have been

doing it for decades. The economic realities test analysis, developed through decades of case law, weighs certain factors to determine whether a worker is running their own business or dependent on finding work in the business of another.[xiii] It is the analysis that the current Department of Labor has proposed adopting via interpretive rulemaking, and it is well established and understood.

b) Based on what you know about the 20 states that have adopted the ABC test, is it impossible to tell the difference in those states?

No. As courts have noted, the ABC test is a simpler way to distinguish an independent contractor from an employee and yields more predictable results.[xiv] The ABC tests presumes that a worker is an employee unless the hiring entity can satisfy the three prongs of the test. If the conditions are satisfied, the individual is an independent contractor.

3. Your statement argues that a solution to misclassification would be to make it a "stand- alon[e] violation with significant penalties."
   a) Please elaborate on the need to make misclassification itself a violation of FLSA.

The FLSA generally sets a national floor on wages, establishes an overtime premium, and prohibits child labor. It only applies to covered employees and not independent contractors, but misclassification of employees as independent contractors is not itself a violation of the FLSA. This means that a worker who has been misclassified as an independent contractor can only establish a violation of the FLSA if she also establishes a violation of its minimum wage, overtime wage or child labor provisions.

Yet misclassification *enables* FLSA violations because workers who are misclassified are frequently denied minimum wages or overtime. Indeed, unscrupulous employers will intentionally misclassify a worker to avoid paying FLSA-mandated overtime or minimum wages. Misclassified workers who are denied wages due under the FLSA must first show that they are covered employees (and that they are improperly classified as independent contractors by their employer), and then prove the FLSA violation, e.g.: that they are owed overtime or minimum wages. Proving lost wages, once employee status is shown, can present yet another challenge because misclassifying businesses also typically do not maintain employee records required by the FLSA. In other words, misclassification creates hurdles for employees seeking to enforce their rights under the FLSA.

Given the close relationship between misclassification and FLSA violations, the statute should be amended to make misclassification itself a statutory violation, subject to damages and penalties like any other FLSA violation. Penalties for misclassification and damages paid to workers would deter other FLSA violations. Such penalties should be significant and automatic; they should send a message that misclassification itself causes harm, and they should change the cost-benefit calculus of businesses that are tempted to cheat. Congress should consider passing legislation such as the Employee Misclassification Act.[xv]

   b) Are there states that make misclassification a violation of their wage and hour laws?

Yes, some states have made misclassification a violation of their wage laws, and others have enacted standalone laws targeting misclassification in certain industries. Massachusetts, for example, enacted an ABC test for its employment laws in 2004, and provided for additional penalties for misclassification that results in a violation of the state's wage laws.[xvi] Illinois enacted the "Employee Classification Act," which makes misclassification in construction a violation of the law and entitles a worker to sue for any wages denied or lost as a result, plus an equal amount in liquidated damages.[xvii]

Maine makes misclassification of an employee as an independent contractor a stand-alone violation, subject to civil penalties.[xviii] Both Delaware and Maryland have enacted a "Workplace Fraud Act," which uses an ABC test in certain industries and provides a cause of action for lost wages and civil penalties.[xix]

Other clarifications

Thank you for the opportunity to answer the questions you raised. I also feel compelled to correct the record regarding assertions made in a May 4, 2023 letter from the Committee on Education and the Workforce to Acting Secretary Su.

- The letter states that Acting Secretary Su cannot "ignore the law as written." I agree, but she is not ignoring the law. The FLSA expansively defines "employ" to include "to suffer or permit to work," 29 U.S.C. § 203(g), and "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). As the Supreme Court has noted, "A broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The Supreme Court "has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction, recognizing that broad coverage is essential to accomplish the [Act's] goal " *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (internal quotation and citation omitted). As such, the Trump Administration independent contractor rule—which impermissibly narrowed the definition of employee and the scope of the FLSA—ignores the law as written and well-settled Supreme Court jurisprudence interpreting the FLSA.

- The letter cites testimony by Ms. Tammy McCutchen, who claims that the Department of Labor "is providing erroneous information and misleading the public" regarding the fact that the Trump Administration independent contractor regulations continue to be in effect. This is not true. In "Fact Sheet 13: Employment Relationship under the Fair Labor Standards Act (FLSA)", the Department of Labor's website clearly states: "On March 14, 2022 a district court in the Eastern District of Texas vacated the Department's Delay Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 FR 12535 (Mar. 4, 2021), and the Withdrawal Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 FR 24303 (May 6, 2021). **The district court further stated that the Independent Contractor Rule, Independent Contractor Status Under the Fair Labor Standards Act, 86 FR 1168 (Jan. 7, 2021), became effective as of March 8, 2021, the rule's original effective date, and remains in effect**." (emphasis added).

    - The letter cites Ms. McCutchen's testimony that "Fact Sheet 13 and its list of seven factors . . . is not the current law and has not been for over two years." This is also not true. Fact Sheet 13 references Supreme Court precedent, which has and remains the law for decades.

[i] 416 P.3d 1 (2018).
[ii] *Id.* at 35.
[iii] *See* A.B.5, 2019-20, Assemb., Reg Sess. (Cal. 2019).
[iv] *Dynamex*, 416 P.3d at 34 and n. 23. *See also* Anna Deknatel and Lauren Hoff-Downing, *ABC on the Books and in the COURTS: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J. L. & Soc. Change 53 (2015); Lynn Rhinehart, Celine McNicholas, *et al.*, ECONOMIC POLICY INST., *Misclassification, the ABC Test, and employee status*, 7 (June 16, 2021) (noting that more than 20 states use ABC test in their unemployment insurance or wage-and-hour laws), https://files.epi.org/uploads/229045.pdf.
[v] Deknatel and Hoff-Downing, *ABC on the Books*, 18 U. Pa. J. L. & Soc. Change at 65 and n. 66.
[vi] Caroline O'Donovan *Uber and Lyft Spent Hundreds of Millions to Win Their Fight Over Workers' Rights. It Worked.*, BUZZFEED NEWS, Nov, 21, 2020.
[vii] Matthew A. Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG, Oct., 24, 2022, https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany- as-world-s-no-4-economy.
[viii] *Id.*
[ix] *See, e.g.*, Cal. Labor Code §§ 2776-2784 (detailing exemptions from ABC test for *inter alia*, certain: business service providers operating under a contract; service providers such as consultants, interpreters, tutors and others who connect with clients via a referral agency; professionals such as freelance writers, graphic designers, grant writer, photographers and others providing services as a business entity or sole proprietor; workers involved in creating, marketing, promoting, or distributing sound recordings or musical compositions; construction subcontractors; data aggregators; licensed professionals such as doctors, dentists, securities brokers).
[x] Lynn Rhinehart, Celine McNicholas, *et al.*, ECONOMIC POLICY INST., *Misclassification, the ABC Test, and employee status*, 7 (June 16, 2021) (noting that more than 20 states use ABC test in their unemployment insurance or wage-and-hour laws), https://files.epi.org/uploads/229045.pdf.
[xi] Mass. Gen. Laws. c.149, §148B(a)(1)-(3); *see also* Office of the Attorney General's Independent Contractor Overview, *available at* https://www.mass.gov/service-details/independent-contractors.
[xii] *See*, *e.g.*, *Boston Theater*: *An Independent Guide to the Best Shows in Boston* (listing upcoming comedy shows), *available at* https://www.boston-theater.com/index_comedy.php.
[xiii] *See, e.g., Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("[W]e focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.").
[xiv] *See Dynamex,* 416 P.3d at 40-41 (noting advantages of a simpler test); *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 465 (2015) (noting need for case specific test that will yield more predictable results).
[xv] Employer Misclassification Prevention Act. H.R. 3178, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/3178/text?s=1&r=70.
[xvi] Ma. Gen. Law ch. 149, § 148B (declaring failure to properly classify an individual as an employee according to ABC test and in so doing failing to comply with wage laws punishable by criminal and civil remedies).
[xvii] 820 Ill. Comp. Stat. Ann. 185/10 and 185/60.
[xviii] Me. Rev. Stat. tit. 26, § 591-A ("An employer that intentionally or knowingly misclassifies an employee as an independent contractor commits a civil violation for which a fine of not less than $2,000 and not more than $10,000 per violation may be adjudged.").
[xix] *See* De. Code Ann., tit. 19 § 3501 et seq.; Md. Code Ann., Lab & Empl. § 3-901 et seq. (These laws cover industries found to have high rates of misclassification, such as construction and landscaping).