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Written Testimony submitted by Attorney Richard E. Hayber in Support of Proposed Bill No. 6343, and in favor of amending the statutory definition of employee to remove the remote worker loophole.

My name is Richard E. Hayber. I am a partner in the law firm of Hayber, McKenna & Dinsmore, LLC. We have offices in Hartford, New Haven and Springfield. We represent workers in claims for unpaid wages, including as a result of employers misclassifying workers as independent contractors. In this capacity, I have had a front row seat to witness the frequency with which corporations aggressively classify their workers as independent contractors in order to save on taxes, liability, wages and worker benefits. I testify today in support of a change to our ABC test – the legal defining line between employees and independent contractors.

I. The current law and why it is bad.

Employers must pay their employees minimum wages and over time pay. They may not make deductions from their pay without their written permission. They must pay into our Unemployment fund and provide workers compensation insurance. They must abide by all employee rights laws including the NLRA and state and federal anti-discrimination laws.

Employers don't like to abide by these laws because they cut into their profits and force them to treat employees fairly and with respect. So, employers frequently misclassify their employees as Independent Contractors.

Under current law, our courts use what is known as the ABC test to determine if an individual is an employee or an independent contractor. Employers must prove all three parts to classify a worker as an independent contractor. The A prong is the extent to which employers control the worker. The C prong is the extent to which the workers is independently established in his or her trade or occupation; typically this mean does the individual have their own business and provide similar services for other companies.

The B prong is the part we are discussing today. This prong includes a loophole that harms remote workers. It currently states:

The individual's service must be performed either

i. outside the usual course of business of the employer, or
ii. outside all the employer's places of business;

The first part simply means that the work needs to be different from the work of the company. For example, if my law-firm hired a painter, this part would be satisfied since my law-firm is not in the business of painting.

The second part is the problem. It gives corporations a second bite at the apple. It says that so long as the work is performed outside **all** of the employers' places of business, then the worker can be classified as an independent contractor. But this loophole ignores the present realities of our work force, a large portion of which work at home or on the road, such as Grubhub drivers. These workers clearly perform duties that go to the heart of the business. Take Grubhub for example – they exist to provide food delivery from local restaurants to customers. Grubhub drivers are performing work that is central to Grubhub's business. Employers simply should not be able to avoid treating remote workers as employees simply because they never set foot on the physical premises of the company.

This part of our ABC test is more than a hypothetical problem. In *Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act* … Conn. … (2016) the court held that "places of business" did not include the homes of the customers where technicians worked to repair home oil heating furnaces. The Department of Labor had ruled that these residences were places where Standard Oil conducted business but our Supreme Court interpreted the test narrowly and in favor of corporations. It rejected the employee friendly interpretation,

> *"because doing so would make it far more difficult for employers to satisfy part B of the test when they hire independent contractors to work at locations apart from their offices or physical plants."*

But this reasoning is plainly circular, since it assumes that the person is an independent contractor while at the same time applying a test to determine that status. Clearly, our Supreme Court made a choice to favor the corporate interests over the interests of our workers and our taxpayers who all benefit when employee status is retained. Today, this legislature should make its own choice to help the working class rather than the corporate / owner class.

This legislature today is experiencing a pandemic and an economic environment that shows why this loophole should be closed.

II. My proposed change and why it is good.

The change I propose is to simply eliminate part ii of the B prong – what I call the remote worker loophole. This change is simple and would bring us in line with other jurisdictions including our blue state sister to the north, Massachusetts. Their B prong only has part i. In Massachusetts, the fact that you don't work in a physical location owned and controlled by the corporation is simply not an issue in determining employee status.

This change would be a bright line and would be easy to follow. Employers and employees would know that you can be an employee and work from home or on the road. They would know that employers could not avoid their obligations simply by having their employees work remotely.

Employers could still use independent contractors, but only for work that its outside its usual course of business.

This rule change would also make it easier for courts to enforce our wage laws. The Standard Oil case illustrates the difficult courts sometimes face when laws aren't clear. That court examined legislative history, other jurisdictions, other laws and in the end simply made a policy decision. Of course, policy decisions should be made by the legislature – not the courts.

This rule change would protect gig workers from minimum wage violations. Presently, companies like Uber, Lyft, GrubHub and more can pay their drivers as little as they want – even less than the minimum wage – because our wage laws only apply to employees. This problem is not just hypothetical. Studies have show that the average Uber driver, when all costs are considered, earns less than the minimum wage. https://www.usatoday.com/story/news/nation-now/2018/03/02/uber-lyft-drivers-actually-earn-less-than-minimum-wage-mit-survey-suggests/389230002/

Finally, this rule change would help the taxpayers of the State of Connecticut. Taxpayers assume a greater obligation when employers don't pay their fair share. The Commonwealth of Massachusetts wrote extensively about these issues in 2008.

> *The need for proper classification of individuals in the workplace is of paramount importance to the Commonwealth. Entities that misclassify individuals are in many cases committing insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers' compensation benefits. In addition, misclassified individuals do not have*

access to employer-provided health care and may be paid reduced wages or cash as wage payments.

Similarly, entities that misclassify individuals deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes. In addition, as a result of misclassification, the Commonwealth often incurs additional costs, such as providing health care coverage for uninsured workers. Other potential costs for the Commonwealth include providing workers' compensation benefits paid by the Workers' Compensation Trust Fund, and unemployment assistance without employer contribution into the Division of Unemployment Assistance fund, among other indirect costs.

Finally, businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct competitive disadvantage when vying for the same work, customers or contracts as those businesses that do not play by the rules. Further, by paying the proper taxes and insurance premiums, businesses following the Law are, in effect, subsidizing those businesses that do not. Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth. The AGO expects businesses to contract only with businesses that properly classify their workers.

https://www.mass.gov/doc/attorney-generals-advisory-on-the-independent-contractor-law/download

For these reasons, I believe we should eliminate part ii of the B prong from the ABC test. This easy change will bring Connecticut in line with other states that care about their working class. It will also create a more prosperous economy in our state as workers will have more money to spend locally - thus growing our economy from the bottom up (as opposed to trickle down). Not making this change will continue our state's pattern of allowing corporations to control the economy and make profits at the expense of our working class and our tax-payers. The time is now to change course and do what a true blue state should do – protect its workers' ability to earn a fair and decent living.

Richard E. Hayber