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Members of the Kentucky State Senate
Members of the Economic Development, Tourism and Labor Committee
700 Capital Avenue
Frankfurt, Kentucky 40601

Re: Opposition to H.B. 465: An Act Concerning Portable Benefits

Dear Members:

The National Employment Law Project (NELP) writes to express our concerns with, and opposition to, H.B. 465, a bill that would allow a 'public or private entity' to voluntarily contribute to a portable benefits fund as compensation for a 'self-employed worker.'

NELP is a 50-year-old non-profit, non-partisan research and advocacy organization specializing in employment policy. We partner with federal, state, and local lawmakers and local stakeholder groups on a wide range of workforce issues. Across the country, our staff is recognized as policy experts in areas such as unemployment insurance, wage and hour enforcement, minimum wage, and workplace protections for low-wage workers. NELP's work includes a focus on combatting misclassification of employees as independent contractors.

We oppose H.B. 465 because it would greenlight independent contractor misclassification to the detriment of Kentucky workers, law-abiding businesses, and state coffers. We first highlight the problem of independent contractor misclassification, then describe why H.B. 465 would exacerbate the problem.

Independent contractor misclassification degrades working conditions, hurts law-abiding businesses, and depletes government coffers.

Independent contractors run their own businesses and have the power to make investment decisions, set prices, and decide how and to whom to market themselves. Yet too many businesses mislabel their employees as independent contractors. Why? Because misclassifying employees as independent contractors helps the bottom line; this "payroll fraud" enables businesses to pocket up to 40% of payroll costs by avoiding employee-related taxes.ⁱ It also shifts business costs to workers and degrades working conditions. Misclassified employees lose minimum wage and overtime protections, workers' compensation coverage, unemployment insurance, and the right to form a union and bargain collectively. They are also doubly penalized tax-wise, losing access to refunds for low-income employees while gaining significant tax burdens as supposedly "self-employed" business owners.

Law-abiding businesses and government coffers suffer too. As the United States Treasury Inspector General found, the practice “plac[es] honest employers and businesses at a competitive disadvantage.”ⁱⁱ Cheating businesses pressure others to shed labor costs, creating a “race to the bottom” where following suit is necessary to remain competitive.ⁱⁱⁱ

State coffers also suffer as businesses avoid paying payroll taxes that fund social insurance programs. Conservative estimates suggest that the federal and state governments lose billions of dollars per year in unreported payroll taxes and unemployment insurance contributions.^{iv}

H.B. 465 Would Incentivize Independent Contractor Misclassification.

On first blush, H.B. 465 may sound enticing to some: why not let businesses voluntarily contribute to a portable benefits plan for the self-employed? But clarifying the problematic impact of this bill reveals why defeating it is in Kentucky’s best interests.

Vague definitions open the door to problems for Kentucky workers and government.

The bill creates a new, vaguely defined category of “self-employed worker”—a definition that raises more questions than it answers. It is unclear what workers will be deemed to “earn his or her living from an independent pursuit of economic activities, rather than from a separate company or individual.” Whether income is derived from “an *independent* pursuit” is subject to manipulation. Many businesses tout reliance on “independent contractors” but impose unilateral terms and conditions of work through take-it-or-leave-it contracts, such that those workers are not independent contractors nor engaged in “an independent pursuit.” This is true for workers such as last-mile delivery drivers for Amazon, and we at NELP have seen similar schemes with low-paid homecare workers, janitors, and truckers. With its vague definition and absence of enforcement, H.B. 465 will undeniably open the door to an increasing number of businesses claiming to work with this new category of ‘self-employed individuals,’ many of whom should be employees.

Relatedly, the definition sets up a false dichotomy in suggesting that the alternative to self-employment is working for “a separate company or individual.” Many employees work for several separate companies or individuals. The notion that an individual may be considered self-employed if they work for more than one company or person is antiquated and problematic.

H.B. 465 will harm employees entitled to guaranteed portable benefits and reduce employer contributions to Kentucky’s unemployment insurance fund, social security

Definitional issues are the tip of the iceberg, but they help shine a light on why H.B. 465 must be rejected. With its vague and overbroad definitions, H.B. 465 will sweep in “self-employed” individuals who are or should be considered employees.^v

As employees, workers already have a well-established system of portable benefits in the form of mandated social security and unemployment insurance. H.B. 465 threatens to replace or limit this system of mandatory portable benefits for employees with one based on *voluntary* benefit contributions (of any amount or no amount). Employees who are misclassified as ‘self-employed’ stand to lose a substantial percentage of the benefits to which they are entitled: for example, a home care employee loses between 19.8% and 30.5% of their total compensation (wages and benefits) when misclassified as an independent contractor.^{vi}

Employers aiming to evade mandatory payroll costs for social safety net programs and pad their bottom line will no doubt see H.B. 465 and its new “self-employed” worker category as an end run around those obligations:^{vii} classify workers as “self-employed,” and rather than contributing to well-established portable benefit programs for employees, you can contribute whatever amount you want (or nothing!) to the worker’s account.

H.B. 465 contains yet an additional, problematic incentive to misclassify employees. The bill prohibits any contributions to such a portable benefits plan from being considered evidence of an employee-employer relationship. Yet Kentucky’s unemployment insurance (UI) law looks to whether a worker receives benefits in the overall consideration of whether a worker is a covered employee. Stripping this consideration from the mix further increases the incentive to label an employee a “self-employed” worker at the expense of unemployment coverage for the worker and Kentucky’s UI trust fund. H.B. 465 will leave more Kentucky workers without an essential safety net all while fewer businesses contribute their fair share to established portable benefits programs.

In short, H.B. 465 would incentivize independent contractor and/or “self-employed” misclassification and encourage a bait and switch that replaces well-established and mandatory employee portable benefits with inferior and likely illusory benefits for more of Kentucky’s workers.

Thank you,

/s/

Sally Dworak-Fisher
Senior Staff Attorney

ⁱ Françoise Carré, *(In)Dependent Contractor*, ECON. POL’Y INST. at 5 (Jun. 8, 2015), <https://files.epi.org/pdf/87595.pdf>. See also *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. L. PROJECT at 5 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

ⁱⁱ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1 (2018-IC-R002: Feb. 20, 2018), <https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf>.

ⁱⁱⁱ See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 139-41 (2017).

^{iv} *Misclassification Huge Costs*, *supra* n. 1, at 2-3. See also Carré, *supra* n. 1, at 2.

^v NELP recognizes that Kentucky has a “Marketplace Contractor Law” deeming many app-based worker *not* employees of the applications they work for, KY Rev. Stat. § 336.137, but H.B. 465 would apply to a broader swath of vaguely defined ‘self-employed’ individuals regardless of whether they work through digital labor platforms.

^{vi} John Schmitt, Heidi Shierholz, et. al, *The Economic Costs of Worker Misclassification*, ECON. POL’Y INST. (Jan. 25, 2023) (Table 1), <https://www.epi.org/publication/cost-of-misclassification/>.

^{vii} As NELP has highlighted, businesses increasingly seek to cut payroll costs in a race to the bottom that degrades wages and conditions, hurts law abiding businesses, and state coffers. See, e.g., *Misclassification Huge Costs*, *supra* n. 1.