NATIONAL EMPLOYMENT LAW PROJECT

TESTIMONY

Testimony of Laura Padin
National Employment Law Project

Support for *Labor and Employment – Employment Standards and Conditions – Definition of Employer* (HB 299)

Hearing before the Maryland House Economic Matters Committee

February 1, 2022

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The National Employment Law Project (NELP) is a national nonprofit advocacy organization that for more than 50 years has sought to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs. We partner with federal, state, and local lawmakers and local community-based groups on a wide range of workforce issues, including areas such as unemployment insurance, wage and hour enforcement, minimum wage, and workplace protections for excluded and underpaid workers. NELP's work includes a focus on combatting violations by employers using subcontractors and corporate misclassification of employees as independent contractors. **NELP supports HB 299, which follows national best practices to promote uniformity and clarity in Maryland's wage laws, particularly the Maryland Wage Payment and Collection Law (MWPCL).**

Wage theft is devastating for underpaid workers—especially in "fissured" workplaces where corporations use subcontractors or staffing agencies. In fissured jobs where companies hire their workers via temporary and staffing or other subcontracting firms, it is often difficult to obtain a meaningful remedy for workers whose rights have been violated. As an expert's recent U.S. Congressional testimony explained,, "[e]ven when labor services contractors and other middlemen companies have been caught committing flagrant violations of federal workplace statutes—and statistics compiled by the Department of Labor and state labor agencies demonstrate a stunningly high frequency of those violations – they are often judgment-proof or unable to pay a significant backpay award or other money judgment."[1] Thinly-capitalized contractors can declare bankruptcy and the owners of the company can simply incorporate under another name to continue the business. Meanwhile the host company—the company for whose benefit the work is performed and who directly or indirectly controls the workers' wages and working conditions—can simply cancel its labor services contract at the first sign of a problematic lawsuit and select a competitor contractor[2].

HB299 does not create a new test or standard—rather, it conforms to a Fair Labor Standards Act (FLSA) standard that Maryland courts already apply and that has existed for more than 70 years. Since at least 1947, the U.S. Supreme Court has recognized that a group of workers may have more than one employer on a particular job, and that in such instances both employers are responsible for any violations of the child labor, minimum wage, and overtime provisions of the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The FLSA contemplates that more than one employer can and *should* be held responsible for its provisions when a company decides to outsource all or a portion of its workforce to staffing companies or other subcontractors. Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Id.* The purpose of

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[1] Testimony of Michael Rubin, Partner of Altshuler Berzon LLP, before the Subcommittee on Health, Employment, Labor and Pensions and the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives, Regarding H.R. 3441, the Save Local Business Act, Sept. 13, 2017.

[2] National Employment Law Project, "Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work," (May 2014), *available at*: https://s27147.pcdn.co/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf

its broad definitions was to eliminate substandard labor conditions by expanding accountability for violations, to include businesses that insert contractors between themselves and their laborers. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring)[3]. Such "joint employment" can exist where an employer contracts with a staffing or temp agency or other subcontractor to bring in labor to work at the company. The standard does not deem all employers to be joint employers; the standard is a practical one that looks to the "economic realities" of the situation. Maryland courts have applied this standard under the MWPCL since the published, precedential decision of *Campusano v. Lusitano Const. LLC,* 208 Md. App. 29, 38 (2012); *Salinas v. Commercial Interiors, Inc*., 848 F. 3d 125, 136 (4th Cir. 2017). Accordingly, HB299 does not expand liability or create a test that employers are unfamiliar with. Rather, it simply ensures that all courts apply the MWPCL in the same way—by using a standard already applicable to the FLSA and the Maryland Wage and Hour Law.

The clarity and accountability that HB299 would bring is especially important given that outsourced work is a pervasive part of the economy today. In many fast-growing industries, including warehouse and logistics, janitorial, hospitality, waste management, and manufacturing – outsourcing has become deeply entrenched and the number of workers employed by temporary staffing agencies has increased dramatically.[4] Workers in these positions generally face lower wages, fewer benefits, more hazardous work, and less job security.[5] By inserting temporary and staffing agencies and other types of subcontractors between themselves and workers, contracting companies can degrade work conditions and more successfully avoid liability for violations of workplace laws even as they benefit from and have the right to control the work itself. Because each level of a subcontracted structure requires a financial return for its work, the further down the subcontracted entity is, the slimmer the remaining profit margins. At the same time, the further down on a subcontracted structure an entity is, labor typically represents a larger share of overall costs—and one of the only costs in direct control by those entities. This creates incentives to cut corners, leading to violations of wage laws. Maryland's laws must ensure that outsourcing employers are not incentivized to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create.

For these reasons, NELP supports HB 299 and urges a FAVORABLE report.

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[3] Bruce Goldstein et al, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983 (1998) (noting that subcontracted garment sweatshops were among the ills the FLSA intended to address via its broad definitions of employment.)

[4] *See* National Employment Law Project, Federal Comments on RIN-1235-AA26, Joint Employer Status under the Fair Labor Standards Act (June 2019) (citing data), https://s27147.pcdn.co/wp-content/uploads/Comments-USDOL-Joint-Employer-Status-FLSA.pdf

[5] *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, available at https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/. For example, full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements. They also experience large benefit penalties relative to their counterparts in standard work arrangements. Over 50 percent of workers in standard arrangements receive an employer-provided health insurance benefit, compared to only 12.8 percent of temporary and staffing help agency workers.