



# Senate Bill 528:

## Bad for Workers, Bad for Business, Bad for West Virginia

*SB 528 threatens to strip West Virginia workers of the rights and protections that should come with a job.*

Work should provide working people with stability and safety, and the opportunity to contribute and connect with each other. It should be a place where we are treated fairly and with respect. Good jobs should enable us to provide for ourselves and our families, and to join together to ensure that our communities thrive in a just and inclusive economy.

To build a thriving West Virginia economy for all, the state needs laws that support fair competition among responsible businesses, good jobs that provide livable wages and benefits, and protections against discrimination, harassment, injury and unexpected job loss.

### Why Is SB 528 a Bad Idea?

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**What does SB 528 do?** SB 528 aims to lock a broad swath of West Virginia's workforce into "independent contractor" status, rather than "employee" status. As a result, West Virginia's workers are at risk of losing vital protections.

When West Virginia's workers are labeled as independent contractors, companies are no longer required to adhere to state wage-and-hour, anti-discrimination and harassment, and health and safety laws. This permits companies to further drive down costs by practicing wage theft, pay discrimination, and sacrificing worker safety—all with impunity, since workers will have no grounds for filing claims against those practices.

### The difference between an employee and an independent contractor.

Being an employee versus an independent contractor is a vital distinction that determines the rights and protections workers can expect under the law, how businesses compete fairly, and who pays for our baseline social programs. Independence as a concept is great; as a legal classification it translates to denial of basic workplace rights and protections.

- An employer pays into Social Security, contributing to an employee's secure retirement; 1099 workers finance their own retirement.
- An employee who is subject to sexual harassment on the job is protected by federal laws against discrimination; a contractor is not.
- An employee construction worker who is injured on the job has the right to workers' compensation; a non-employee is on her own.
- An employee who loses her job has the right to unemployment compensation; a contractor has no such right.

An independent contractor is someone who has made a significant investment in a business, has the power to set standards and prices for services, uses business acumen to make a profit and build a customer base, and takes the risk of loss. The vast majority of workers in

the United States are employees who are building the business of another. Their wages are set by another, they comply with standards set by another, and they can lose their job for any reason or no reason at all.

SB 528 upends the employee-employer relationship and allows businesses to unilaterally shift risk and costs onto workers.

**SB 528 would sanction misclassification, and impact WV workers across industries.** If enacted, SB 528 would allow employers in any industry to easily convert virtually any worker into an independent business, simply by presenting the worker with a take-it-or-leave-it contract that may not reflect the actual relationship between the parties. Workers in multiple industries, including delivery, transportation, construction, homecare, grooming, and retail—not only in the so-called “gig” economy—could be removed from basic labor protections like minimum wage, anti-discrimination protections, and the right to come together to negotiate with the boss for better pay and conditions.

### **How would SB 528 sanction misclassification?**

SB 528 would allow businesses to shed themselves of responsibilities towards their employees simply by presenting them with take-it-or-leave-it contracts that assigned certain responsibilities to the workers, whether or not the contract reflects the actual relationship. A contract which said, for example, that a worker

- is an independent contractor and not an employee;
- is not entitled to workers’ compensation, unemployment benefits;
- must bear their own expenses and pay all taxes associated with their work;

And in addition, if the worker were willing to be called a “sole proprietor” and had a small degree of control over their work and working hours; were allowed to get a second job and hire helpers, they would automatically be excluded from all state labor protections. Importantly, it would not matter whether a worker actually did hire helpers or held a second job. Nor would it matter that the business set the workers’ pay, could be disciplined or fired by the business.

**SB 528 robs the state of income.** Employee misclassification has large costs and consequences.<sup>1</sup> It can rob individual workers of their rights and benefits, it can create unfair market competition, it shifts costs from employers to workers, and it can reduce tax federal and state tax revenues. While some misclassification occurs in good faith, a large amount of it is deliberate as employers intentionally misclassify employees to avoid paying FICA taxes, workers’ compensation premiums, and unemployment insurance premiums, and stop efforts toward unionization. For example, at the end of 2018, 201 random audits in West Virginia revealed 242 misclassified workers.<sup>2</sup> Research suggests that between 10 to 30% of employers misclassify workers as independent contractors, costing state and federal governments billions in lost revenue.<sup>3</sup>

**SB 528 disadvantages responsible businesses.** When bad businesses cheat, law-abiding businesses pay the price. As more and more big businesses relabel their employees as independent contractors, responsible businesses that treat their workers fairly will be left behind. As a similar bill was being debated in Georgia, a state representative said, “The bill... has the potential to put thousands of service-providing small businesses in Georgia at a significant disadvantage to the handful of companies that have asked for this no-

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<sup>1</sup> John DeRoss Jr., “Misclassification of Employees as Independent Contractors in Indiana: A State Legislative Solution,” *Indiana Law Review* (Vol.50:673), pp. 673-695.

<sup>2</sup> [https://oui.doleta.gov/unemploy/pdf/UI\\_taxinfo/2018/MisclassifiedEmployees.pdf](https://oui.doleta.gov/unemploy/pdf/UI_taxinfo/2018/MisclassifiedEmployees.pdf)

<sup>3</sup> Catherine Ruckelshaus and Ceilidh Gao, “Independent Contractor Misclassification Imposes High Costs On Workers And Federal And State Treasuries,” National Employment Law Project, December 19, 2017 (Fact Sheet). <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>

accountability bill.”<sup>4</sup> The Georgia bill did not pass, nor did bills in Alabama, Colorado, or North Carolina.

### **Which other states have passed bills like SB 528?**

No other states have passed bills as drastic as the one being proposed in West Virginia. In fact, most states have expansive definitions of who is an employee for the purposes of their wage and hour, workers’ compensation and unemployment insurance laws.

### **What Should West Virginia Do Instead?**

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West Virginia can do right by workers, responsible businesses, and crucial social insurance programs. Mislabeling workers as independent contractors is a problem across the country, and many states have stepped up their efforts to restore and expand the rights of workers. These states understand that this practice has everything to do with the yawning gap between those at the top and the rest of us. West Virginia’s use of the ABC test to determine who is an “employee” versus a “independent contractor” helps cut down on employee misclassification, but the state could take additional steps to strengthened enforcement of their existing laws, with higher penalties for violators.

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<sup>4</sup> Rep. Sam Park comments on HB 789, Georgia House of Representatives, Feb. 14, 2018.