Testimony of Alexander J. Passantino, Esq.

Before the
United States House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections

Hearing on
"Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy"

September 26, 2019

Chair Adams, Ranking Member Byrne, and Members of the Subcommittee:

Thank you for the opportunity to speak with you today regarding the important issue of independent contractor status in today's workplace.

I am a partner in the Washington, DC office of Seyfarth Shaw LLP, where my practice focuses on helping employers comply with the Fair Labor Standards Act (FLSA), the Service Contract Act, the Davis-Bacon and Related Acts, and state laws related to the payment of minimum or prevailing wages and overtime. The majority of my practice is providing advice and counsel to employers on independent contractor status, overtime exemptions, and other pay practices. I also represent employers during wage-hour investigations by the Department and state enforcement agencies.

I have been working on wage and hour issues since entering private practice in the Fall of 1997. In 2005, I left private practice and joined the leadership team of the U.S. Department of Labor's Wage & Hour Division (WHD). In 2006, I was appointed Deputy Administrator of WHD and, in 2007, I became the Acting Administrator. President George W. Bush nominated me to serve as the Administrator in March 2008. I left WHD in 2009 and returned to private practice.

Despite my representation of many employers attempting to comply with the FLSA's obligations, my testimony today is solely my own.

In my testimony today, I will be discussing the proposed Payroll Fraud Prevention Act of 2019 (PFPA), and how that Act is likely to impact businesses—whether they be large, multi-state employers or small businesses, educational employers, or non-profits. The PFPA creates enormous administrative burdens on employers and businesses across the country. Lawful businesses will be forced to engage in a series of box-checking exercises that will benefit few, if any, workers. Unlawful businesses are not likely to change their behavior in any meaningful way, and, thus, few, if any workers will benefit. In reality, the largest beneficiaries are likely to be attorneys--both plaintiffs' attorneys bringing suit and defense attorneys representing

businesses in counseling and litigation--as well as the companies that will build the systems required to generate the millions of forms that will be required under the PFPA.

Below, I discuss the provisions of the PFPA.

Definition of "Covered Individual" [Section 2(a)]

The PFPA creates a new defined term: "covered individual," which is defined as ". . . an individual providing labor or services for remuneration [for such employer]." Most notably, under the PFPA, every covered individual must be provided with the notice described below. The breadth of this requirement is shocking. Without further limitations on this definition, based on something such as the nature of the relationship, the amounts expended on the remuneration, or the existence of another entity required to provide the notice, PFPA notices would need to be provided to:

- Employees;
- Independent contractors;
- Staffing company employees;
- Employees of a subcontractor;
- Employees of vendors, such as cleaning services or HVAC repair services;
- Taxi drivers who transport company executives from the airport to the office;
- An individual who delivers a catered lunch to an office meeting; and
- Every other individual who does virtually anything for any amount of pay for an employer.

The incredible breadth of the definition's coverage makes it effectively impossible to achieve compliance. Instead, it will almost certainly force businesses to decide to forego compliance with the PFPA--at least in part--based on the relative severity of the risks associated with that non-compliance. It seems odd to create a new legislative requirement that will be ignored in a wide range of circumstances, but that is precisely what this definition does.

On the other hand, the PFPA definition of "covered individual" would not include volunteers, interns, student-learners, and others who are not provided with remuneration for their work.

Classification & Notice Requirement [Section 2(b)]

Section 2(b) of the PFPA would revise Section 11(c) of the FLSA to require classification of employees as employees. It also would require notice to be provided to every covered individual. That notice would need to identify (1) the classification of that covered individual [employee is the only identified classification in the PFPA]; (2) the web address established by

the Department of Labor; (3) the address and telephone number for the "applicable local office of the Department of Labor"; and (4) for non-employee covered individuals, a statement regarding proper classification and a direction to contact the Department of Labor. The notice must be provided within six months of the effective date of the PFPA, and, after that time, on the first date of employment or provision of services or labor.

With respect to the timing of the notice, it is important to note that the Department of Labor has 180 days after enactment to create the website noted in (2) above. A compliant notice--which must include a statement directing must be issued within six months of enactment. With hundreds of millions of individually-tailored notices required to be issued within a maximum of 184 days, it is possible that businesses will have four days to properly prepare notices. This is a recipe for failure and the time frame for business compliance should be established based on the Department of Labor's successful completion of its obligation to set up the website.

With respect to the requirement to provide the address and telephone number of the "applicable local office of the Department of Labor," this, too is a recipe for non-compliance. There are hundreds of Department of Labor offices. WHD has eight district and area offices in California alone. This does not include field stations (usually located in more remote locations, and without on-site management). Eight district and area offices of WHD cover the state of Texas; one of those offices is in Albuquerque, New Mexico. If the goal of this requirement is to create a "gotcha" trap for those providing the notice, then the current draft would appear to be among the more effective ways to achieve that goal. If, however, the goal of the requirement is to direct covered individuals to a resource through which they might contact WHD, the directing them to WHD's toll-free number -- 1-866-4-USWAGE -- would be a better option.

Finally, regarding the requirement that the covered individual be advised of his or her "classification," the only classification identified in the PFPA is "employee." Given the consequences of improper notification (discussed below), it is imperative that the PFPA make clear whether the classification is binary (*i.e.*, employee or non-employee) or whether there are other classifications available.

Consequences, Part 1: Presumption [Section 2(b)]

The first consequence of (a) failing to provide the notice; (b) failing to provide the notice in a timely manner; or (c) failing to provide the proper notice is a presumption -- rebuttable only by clear and convincing evidence -- that the covered individual is an employee. As suggested above, this will result in businesses deciding whether to ignore the notice requirements based on whether the presumption of employee status is rebuttable.

Take, for example, a pizza delivery driver who delivers pizza to a company luncheon and who, in addition to his hourly compensation from the pizza delivery company, is provided with a cash tip by the company providing the luncheon. The pizza delivery driver would appear to fall under the definition of "covered individual." If that is the case, the business would need to decide whether to provide the pizza delivery driver with the required notice or whether to accept the risk that the driver claims employee status at some time in the future. In many cases, the business would decide not to provide the notice. It is important to note, however, that the decision would

not be made on a conclusion that the delivery driver was not a covered individual, nor would it be based on a conclusion that the notice was not required. Instead, it would be an assessment that (1) the law required the notice to be provided to this individual, but (2) the consequences for failing to do so were not troubling.

Or, take the more difficult case of a business using a subcontractor. What obligations does the business have with respect to the employees of the subcontractor? It would appear that the business must also provide notice to the subcontractor's employees who are performing work for the business. Under the currently-drafted PFPA, the notice would need to be provided on the very day on which the work begins; failure to provide that notice on that day would mean a presumption of employment, even if joint employment was not an issue. In many circumstances, the business would not even know who the individual worker was. Under the PFPA, however, failing to provide the required notice would mean a heightened standard -- clear and convincing evidence -- to establish that the business was not an employer.

Consequences, Part 2: Liquidated Damages and Civil Money Penalties [Section 2(d)]

Perhaps the most significant consequences associated with the PFPA are the enhanced liquidated damages and civil money penalties. Liquidated damages are doubled when minimum wage or overtime violations are accompanied by a failure to properly classify a covered individual as an employee. It is unclear whether defenses to liquidated damages generally are available under this provision, and whether those defenses are available as to each component independently (*i.e.*, the liquidated damages and/or the doubling of the liquidated damages). It also is unclear what constitutes a "violation" of section 11(c)(2). If an employer classifies an employee as an employee, but fails to provide notice, is that a "violation"? What is sufficient to qualify as "classification" such that the enhanced penalty would not apply?

Civil money penalties would be fundamentally changed. Far from simply triggering enhanced penalties for violations associated with classification issues, the PFPA eliminates the repeated or willful standard for the assessment of civil money penalties. Under the PFPA, any violation of the FLSA's minimum wage or overtime requirements would be subject to civil money penalties of up to $1,100, and the existing repeated or willful violations would see their civil money penalties raised from $1,100 to $5,000. This is a significant and unprecedented change to the FLSA's penalty structure.

In reviewing the PFPA, there are a few additional issues that should be addressed. First, for the overwhelming number of workers, the PFPA will have no practical impact whatsoever. Employers of employees will spend millions of dollars creating and sending millions of notices, with the only extra information being provided to the employee being a new web address and an address and phone number of a WHD office. This hardly seems like an effective use of those dollars. At the other extreme, those employers who wholly disregard their obligations under the FLSA are not likely to change their ways and take on a rigorous administrative process to ensure the proper notifications.

Instead, the PFPA is likely to most dramatically impact a small number of workers who are performing services in highly-flexible and cutting-edge models. At a time when many businesses and workers are seeking flexibility in their working relationships, in an effort to participate more fully in the global economy, the PFPA would instead dramatically limit that flexibility, forcing businesses to make decisions that would place large numbers of employees under a regulatory scheme that was last updated in the 1960s and is fraught with uncertainty (*i.e.*, the FLSA's "hours worked" standards). This result is bad for employees and employers alike; rather the focus should be on developing a legislative solution that protects innovation and flexibility while protecting those most in need of protection.

Second, it seems misguided to create a legislative scheme that forces businesses to choose between (1) strict compliance and millions of dollars of wholly unnecessary paperwork and analysis (*i.e.*, providing timely notices to pizza delivery drivers); and (2) non-compliance based on an assessment that such non-compliance carries with it a minimal level of consequence. The legislation should be crafted to ensure an effective path to its end goal. If providing notice to pizza delivery drivers is not what was intended, that should be addressed in the definitions or express requirements/exclusions, not left to the risk tolerance/assessment of the businesses that must comply.

Third, to avoid the "gotcha" possibilities of the PFPA, the notice and classification requirements should be as clear as possible. As noted above, as currently drafted, the PFPA is ambiguous in a number of places, which can result in costly litigation in the future.

Finally, the PFPA cannot be considered in a vacuum. The FLSA's regulatory scheme was developed for the workplace of a different century. The regulations use as examples messengers working the crossword puzzle, firemen playing checkers, and telephone operators with switchboards in their homes. Most of the cases cited in these regulations are from the 1940s and 1950s. To say that the workplace has changed significantly since that time is an understatement. Many of the workers most likely to perform work subject to the PFPA are precisely the types of workers that demonstrate just how significant that change has been.

Thank you for the opportunity to share my thoughts on the PFPA.