

Testimony of Kevin Shivers, State Director, NFIB

Before the House Labor Relations Committee

April 23, 2008 -- Folsom, PA

On behalf of the small-business members of the National Federation of Independent Business, I want to thank you for inviting me to express the reasons why NFIB members oppose House Bill 2400.

In Pennsylvania, as in the nation as a whole, small firms lead the way in employment and job creation. Nearly 98 percent of all businesses in Pennsylvania employ fewer than 100 workers. These small businesses create almost 70 percent of the net new jobs in the state. In addition to providing a livelihood for their own families, small-business owners provide more than half of all wage-and-salary jobs in Pennsylvania.

Research shows about one-in-four individuals who start a small-business previously were unemployed or not in the labor force. About 37-percent started their business because they just wanted to make a decent living. Another 28-percent wanted to supplement their family income. Less than 5-percent started their business while waiting to find a better job.

The critical point is that many small-business owners simply don't want to work for someone else. The state Legislature should be especially careful it doesn't enact a law that impedes the ability of these individuals to start and run their small companies.

The legislation starts with the premise that everyone is an employee and then requires the business owner to prove otherwise. But HB 2400 ignores the fundamental right of every Pennsylvanian to achieve the American Dream without having to work for someone else just to earn it.

Our members certainly get frustrated when they compete with unscrupulous businesses that purposely misclassify workers to keep business costs low. But they are equally frustrated when government prohibits them from deducting their healthcare costs in similar fashion as larger companies. Small-business owners also get frustrated when state government enacts contracting rules that favor large multi-national corporations.

The consequence of enacting HB 2400 is that it will make it virtually impossible for many legitimate micro-businesses from being able to do business in Pennsylvania. It also will force law-abiding small-business owners into court to prove their relationships with legitimate independent contractors still are appropriate.

HB 2400 lacks clear definitions for contractors, independent contractors and employers. The three-point, or A-B-C-test, included in Section 4 is virtually impossible to meet and appears to conflict with federal IRS tests to determine independent contractor status and common law established through decades of agency rulings and court decisions.

The bill fails to define critical terms like "control." The definition of 'control' is the key to the entire independent-contractor debate. Without a definition, the term ultimately will be defined by state bureaucrats and the courts. That means small-business owners will be forced to spend hours with lawyers and judges rather than managing their small companies and creating jobs.

There are a myriad small-business owners whose only commodity is their skill or labor. Some of them perform their service using the equipment, materials, and facilities owned or operated by their clients. Take for instance those small-business owners who treat children with autism. These professionals contract with local school districts, learning centers and private and parochial schools to provide treatment services in the classroom - using materials provided by the facility, such as the blackboard, chalk, clay, books, toys, audio-visual equipment, etc. Under HB 2400, the school districts would be forced to treat these individuals - or vendors - as employees. As a result, one small vendor told us that costs to the schools for these treatments and services would jump 25-percent.

These types of business-to-business relationships occur in every industry. Many doctors use transcriptionists to re-type patient records so they can focus on patient care. Hospitals contract with skilled nursing companies to provide nursing services. Many attorneys contract with courier services to transport documents to-and-from the courthouse. Some school districts contract with bus companies to transport students to-and-from school. Drapery installers contract with professional seamstresses to hem and sew drapes. Many companies contract with IT professionals to set-up new and reconfigure existing telecommunications networks. Virtually every company at one point and time has contracted with an advertising firm to develop websites and materials to promote their business.

These business activities occur every day and provide family-sustaining jobs for those who perform these skills or services. At a minimum, HB 2400 would call many of these business relationships into question. Certainly some of these micro businesses and small employers would be forced out of business altogether.

Small-business owners need definitions that are clear and consistent with federal law otherwise small business owners will face costly legal bills defending legitimate business relationships in court.

HB 2400 provides no process for employers to seek guidance from state Labor Department as to whether an individual is properly classified as an independent contractor or an employee. Business owners who are interested in making a good-faith effort to comply with the law should be able to seek and receive timely guidance from department about their business relationships. The bill also should provide safe harbor if the department determines that a contractor has a legitimate business relationship with independent contractors.

HB 2400 leaves small businesses in the dark as to complaints, investigations and the hearing process. Businesses have a right to be notified when a complaint is filed against them and to be made aware of the process, procedures and timelines for investigations, hearings, adjudication and appeals. In the current bill, the department isn't even required to provide written notification to a business when it has concluded its investigation and finds no violation has occurred.

HB 2400 provides no procedure for businesses that are successful on appeal to recover costs. Businesses that are successful on appeal should be allowed to recover overpayments in taxes, workers' compensation premiums or benefits. Likewise, a business that pays taxes, workers' compensation premiums and benefits to an individual while seeking guidance from the department about that individual's proper classification should be able to recover those overpayments if the department determines the individual indeed is an independent contractor.

Finally, the legislation includes harsh criminal and civil penalties for small-business owners who make a good-faith effort to comply with the law. These penalties are too severe and are inconsistent with existing penalties for violations of the unemployment or workers' compensation laws. Further, these small-business owners would be under constant threat of costly litigation and harassment by competitors, unions and plaintiffs lawyers looking to make a quick dollar.

On behalf of our membership, I thank you for your consideration of NFIB's position. We stand ready to assist you on this or any other issue affecting the men and women who own, operate or work in Pennsylvania small businesses. Thank you.

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