NATIONAL EMPLOYMENT LAW PROJECT

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Testimony of Daniel Ocampo

National Employment Law Project

In Support of Int. No. 617: Expanding Worker Coverage Under the Earned Safe and Sick Time Act

Hearing before the New York City Council

Committee on Civil Service and Labor
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My name is Daniel Ocampo, and I am a Legal Fellow with the National Employment Law Project (NELP), a national nonprofit with more than fifty years of experience advocating for the labor and employment rights of low-wage workers. NELP works across the country with organized groups of app-based workers and other workers in industries with high rates of misclassification, supporting campaigns at the local, state, and federal level.

We are delighted to testify today in strong support of Int. No. 617. By creating a presumption of employee status under New York City's Earned Safe and Sick Time Act for workers in most industries, this new law will combat misclassification, clarifying and extending urgently needed coverage for ridehail drivers, delivery workers, nail salon technicians, and many others, building momentum for similar clarification under state labor law.

Rampant misclassification in New York denies many workers access to basic labor protections.

Paid safe and sick leave are basic but indispensable protections for working people. For many low-wage workers, household budgets are already stretched so thin that having to take a day off without pay risks financial catastrophe.

Yet too many workers are left out of the city's paid safe and sick leave coverage. Because unscrupulous employers mislabel their workers as independent contractors rather than as employees, many businesses escape providing paid sick leave to workers who should be eligible, putting their health at risk—and undermining public health.

Misclassification is rampant in New York, affecting virtually every industry—app-based or not—in the state. According to a recent report by the New School's Center for New York City Affairs, an estimated 850,000 low-paid workers in the state may be improperly classified as "independent contractors, and thereby not protected by labor and employment laws."[1] Working full-time, they earn a median annual income of $20,000. One in four are on Medicaid, while one in five have no health insurance whatsoever.[2] This is not flexibility—it is economic insecurity.[3]

Among the misclassified workers who would be impacted by this legislation are the city's ridehail drivers and delivery workers—essential workers that have been fighting for basic labor standards and the right to a minimum wage in recent years. But passage of this bill would also be a huge victory for other misclassified workers in the city shut out of paid sick leave and other employment protections, like janitors, home care workers, nail salon technicians, landscapers, truckers, and more.

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[1] Lina Moe, James A. Parrott, & Jason Rochford, *The Magnitude of Low-Paid Gig and Independent Contractors in New York State*, New School Center for New York City Affairs (Feb. 2020), *available at* http://www.centernyc.org/s/Feb112020_GigReport.pdf.
[2] Id.
[3] Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What We Can Do to Stop It*, Nat'l Emp. L. Project (May 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.

These workers—disproportionately Black, brown, and immigrant workers—are critical to the city's infrastructure, work in hazardous conditions for long hours, and need better labor protections, including the paid leave provided for by City law.[4]

NELP strongly supports expanded coverage under the Earned Safe and Sick Time Act.

By applying a presumption of employment to most workers,[5] which can be overcome only by meeting the three prongs of the "ABC test," Int. No. 617 addresses this problem directly and straightforwardly. Hiring entities can overcome the presumption of employment—and therefore are not required to provide their workers with paid sick and safe leave—only if they can show that their workers: A) are free from control and direction in performing their job, both under contract and in fact; B) perform service outside the usual course of business for which the service is performed; and C) are customarily engaged in an independently established trade similar to the service at issue.

To be clear, section 190 of the New York Labor Law, as written, already covers a broad array of workers, including many workers labeled independent contractors by their employers.[6] But the adoption of the ABC test makes this clear to workers and undeniable to employers, ensuring that those entitled to earned sick and safe leave can actually access these benefits in practice.

Right now, these rights are under-enforced, and many workers legally entitled to paid leave never access it—or even know they can access it.[7] Establishing a presumption of employment shifts the burden from workers to employers, meaning that employers who wish to deny their labor force paid leave must affirmatively prove the contractor status of their workforce. Because this test is clear and easy to enforce, it will mean fewer workers are shut out of basic workplace protections.

The proposed private right of action and public education campaign are key to better enforcement of the expanded coverage under the Act.

NELP also strongly supports the related bills before the committee. Int No. 563 creates a private right of action, giving workers the power to seek judicial resolution when their employers are wrongfully classifying them as independent contractors and unlawfully denying them paid sick leave. And Int. No. 78 provides funding for a public education campaign to ensure workers across the city are properly informed

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[4] James Parrott & L.K. Moe, *For One in 10 New York Workers, 'Independent Contractor' Means Underpaid and Unprotected*, New School Center for New York City Affairs (Jun. 2022), *available at* http://www.centernyc.org/urban-matters-2/the-low-wages-of-misclassification-what-one-in-10-new-york-workers-face.

[5] The employment presumption and ABC test do *not* apply to professional service workers who are true independent contractors. The status of those workers is determined by a different legal test, laid out in the proposed legislation.

[6] N.Y. Lab. Law § 190(2)-(3). The statutory definitions of "employer" and "employee" in those sections are broad enough to cover many of the workers supporting Int. No. 617. But because of conflicting judicial decisions and chronic underenforcement, many of those workers are seeking a legislative clarification to definitively establish their right to paid sick and safe leave.

[7] Parrott & Moe, *supra* note 3, at 42-47.

about their rights under the Earned Sick and Safe Leave Act. Both bills are key in combatting chronic underenforcement of rights under the Act, and ensuring that expanded coverage as written materializes in practice for the workers in the city who need it most.

Expanding the city's paid safe and sick leave coverage, and bolstering enforcement, is a simple way to ensure more people have economic security when they need it most. NELP urges the City Council to pass Int. No's. 617, 563, and 78.