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Victims of Misclassification

By MARJORIE ELIZABETH WOOD

WASHINGTON — LAST month, a Michigan construction worker named Matt Anderson testified in a Senate hearing about being a victim of employee misclassification. Mr. Anderson said that his employer forced him, after six years as an employee, to switch to “independent contractor” status. Though the move stripped Mr. Anderson of basic employee rights and protections, he went along with the change, he said, because “my fellow workers and I had families to support and we saw how bad the economy was.”

Today, millions of American workers in a wide variety of sectors, from construction and trucking to I.T. and professional services, are victims of misclassification, a tactic employers use to avoid paying taxes and providing benefits that are guaranteed to employees, such as workers’ compensation, overtime pay, minimum wage and unemployment insurance.

In 2000, a United States Department of Labor study estimated that up to 30 percent of employers misclassify workers. This year, the Treasury Department’s inspector general concluded that the problem had worsened. Fifteen states have now teamed up with the Department of Labor and the Internal Revenue Service to reduce misclassification through information sharing and joint investigations.

By federal law, employee status is determined by the degree of an employer’s control over the manner and means of work, not any written agreement. As Mr. Anderson testified, though his employer changed his status from employee to independent contractor, the conditions of his work stayed the same.

The costs of misclassification are considerable. The Department of Labor estimates that the lost revenue for Social Security, Medicare, unemployment insurance and workers’ compensation is in the billions of dollars. States are also bearing the burden. A 2007 Cornell University study estimated that New York State’s unemployment insurance fund lost \$176 million annually to misclassification. Workers suffer financial losses as well. This past May, the Department of Labor recovered more than \$1 million in back wages and damages for misclassified employees of a Kentucky-based cable company.

What is to be done? To start, Congress should pass the Payroll Fraud Prevention Act of 2013, introduced by Senator Robert P. Casey Jr., Democrat of Pennsylvania, which would make employee misclassification a violation of the Fair Labor Standards Act. The bill would impose stiff penalties on offending employers.

But combating this abuse will require more than Senator Casey’s bill. Being denied their status as employees strips workers not only of basic employment protections but also of the collective bargaining rights that enabled workers to secure these protections in the first place. The 1938 Fair Labor Standards Act, which established modern employment law, resulted from decades of labor organizing. Without the

right to unionize, workers will lose hard-won protections. The right to bargain collectively should thus be guaranteed by adding it to Title VII of the Civil Rights Act of 1964.

As the widespread practice of misclassification suggests, employers today are engaged in organized tactics to disempower workers. Workers must therefore be empowered under the law to fight back.

Marjorie Elizabeth Wood is a historian and labor rights advocate.