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Legislative Update

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BY WES BEARDEN, NCISS INVESTIGATIONS LEGISLATIVE CHAIR

The PRO Act is a PRO Problem

We are almost half-way through a very active year at NCISS. Several bills impacting our profession have been filed in multiple state legislatures. Many of these bills seek to restrict access to much needed data including public record information, driver's license data and even basic criminal records. Our most serious access issue appeared in Texas in multiple individual bills designed to prohibit the sale of public records, namely driver's license information. Assisting the Texas Association of Licensed Investigators, NCISS and TALI successfully amended the bill to secure an exemption for private investigators. Although many more threats exist, we are happy to celebrate this victory.

Congress has been as busy as the State legislatures. Although it appears that the anticipated federal Data Privacy Bill has been delayed, Congress has found no respite in its other activities. Recently, the US house passed the Protecting the Right to Organize Act. A com-

panion Senate bill has been filed and is pending before the Senate Committee on Health, Education, Labor and Pensions.

The bill alters parts of the National Labor Relations Act with the goal of encouraging and supporting organized labor. The bill is supported by labor unions who want to capitalize on the recent democratic victories in the last election.

Of particular concern is the alteration of the definition of an independent contractor. The current independent contractor rule provided by the IRS has been the control test. This has been critical when engaging an individual as an independent contractor as opposed to an employer – employee relationship. Many investigators, especially surveillance investigators, hire each other in an independent contractor status when sub-contracting work. That would likely be prohibited with the new rules.

Congress in its new definition is considering adopting the recently adopted Assembly Bill 5 from the State of California. That rule, also known as the ABC test, would only allow you or your business to hire independent contractors if the following three criteria are met:

1. The worker is free from the control and

direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

2. The worker performs work that is outside the usual course of the hiring entity's business; **and**

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If adopted, this would prohibit hiring an individual as a 1099 contractor in most circumstances for investigative activity. Although aimed at requiring transport companies such as Uber and Lyft to create employment relationships, several other professions including freelance writers, mall Santas, hairdressers, real estate brokers, truck drivers, investigators and many, many others would face dire consequences. In short, it would require many of us to hire direct W2 employees.

Currently, it appears that proponents lack the votes needed to progress it out of the Senate committee. But, that vote count could change with the current talk of abolishing the filibuster. This situation is ever changing and one that we are monitoring. Unlike the California bill, Congress has yet to amend the definition to exclude certain professions. NCISS is monitoring that situation to determine if and when carve-outs to the legislation would begin.

Please take a few minutes to monitor the situation and familiarize yourself with this legislation and the committee it is in front of. If your Senator is on the Senate Committee on Health, Education, Labor and Pension, please let us know.

NCISS looks forward to its upcoming annual Hit-the-Hill Conference in the fall of this year. This year's Hit-the-Hill will be even more critical given the above legislation. I hope that you will consider attending. See you there!

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