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A Pro-Growth Agenda for the 116th Congress

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Labor and Employment

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Increases in productivity, not artificial increases in labor prices, are the key to economic growth and rising wages. For most of its history, America has enjoyed strong economic growth, thanks to the flourishing of dynamic and flexible labor markets. Individuals and businesses in the United States have benefited greatly from the freedom to adapt to changing market conditions.

The old adversarial master–servant model of labor relations has little to offer the 21st-century workforce, which is characterized by horizontal corporate structures, significant job mobility, and instant, constant communications. However, obsolete New Deal–era labor laws and regulations have yet to adapt to a changing economy. Congress needs to revisit the whole of U.S. labor law—including the roles of the two key federal labor regulators, the National Labor Relations Board (NLRB) and the Department of Labor (DOL)—to free up the creative energies of the American labor force.

REFORM THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the primary law governing wage and hour mandates across the country, including full- and part-time private-sector workers and local, state, and federal employees. It sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. Through the FLSA, Congress delegated broad authority to the Secretary of Labor to issue regulations regarding conditions that employees must meet to achieve exempt status from the statute's wage and hour requirements, including for minimum wage and maximum hours. Those exemptions are displayed in the FLSA's Section 213.

The Labor Secretary can exercise broad authority to interfere with millions of private employer–employee relationships across the country. Overreach of that power was displayed under the Obama administration. For example, in 2016 the Department of Labor dramatically raised the salary threshold for employees to be exempt from overtime pay from $23,660 to $47,476—a more than 100 percent increase. As former Wage and Hour Administrator Tammy McCutchen pointed out in Congressional testimony, such an increase is out of line with historical raises in the salary threshold. Such massive changes to the rules of the game burden employers with massive costs and create new compliance issues.

Congress should:

- Reclaim authority over changes to the Fair Labor Standards Act that affect millions of workers. Legislation should require that when the Department of Labor proposes a regulatory change to an exemption from wage and hour requirements, it should have to pass both Houses of Congress with a simple majority before finalization of the rule.
- Pass legislation to clearly define the parameters of exempt workers in a way that enables employers to offer innovative compensation packages and allow for flexible schedules without fear of running afoul of the law under some technicality.

The FLSA was enacted in 1938 and needs modernization. In addition to the broad authority it gives to the Secretary of Labor, many of the FLSA's current definitions of employment categories are unclear and outdated. For example, the FLSA demands that an employee must earn more than the salary threshold and primarily perform "bona fide executive, administrative, or professional" activities to fall within wage and

hour exempt status. However, determining whether an employee meets the criteria to qualify as an "executive, administrative, or professional" employee has become increasingly difficult.

In today's economy, it is more difficult to clearly define employees as either management or rank-and-file workers. With an ever-changing regulatory landscape, the Depression-era wage and hour statute's requirements are ill suited to govern today's modern workplace, and they create confusion and uncertainty that presents challenges to employers' ability to comply with the law.

Expert: Trey Kovacs

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HARMONIZE THE DEFINITION OF EMPLOYEE ACROSS GOVERNMENT

Determining the proper legal classification for an individual is not a simple task. A major reason for the difficulty is a patchwork of federal and state laws that define the term *employee* and therefore *independent contractor* differently. Causing further confusion, courts and regulatory agencies approach the question of whether an individual is an employee or independent contractor inconsistently. More than 10 different tests are applied among federal agencies and courts for defining the term employee. For example, the test to determine independent contractor status is different under statutes governing the Internal Revenue Service from those governing the Fair Labor Standards Act.

This patchwork of laws and tests creates uncertainty for employers, independent contractors, and their clients. It increases the odds of a company misclassifying workers, which can result in severe consequences for employers. Statutes define the term *employee* differently and apply separate tests to determine an individual's status. Therefore, a company may properly classify a worker as an independent contractor under one federal statute yet misclassify that same worker under state law or another federal law. The FLSA uses the "economic realities" test to determine employee status, which conflicts with other statutes that use the "common law" definition.

Congress should:

- Pass legislation along the lines of the Harmonization of Coverage Act (H.R. 3825, 115th Congress), which would bring the definition of the term employee in the Federal Labor Standards Act in line with its definition in other statutes.

For example, the two primary labor and employment statutes—the National Labor Relations Act and the Fair Labor Standards Act—apply different tests to determine whether an individual is an employee or an independent contractor. The Fair Labor Standards Act uses the economic realities test, which determines a worker's status primarily based on the worker's level of economic dependence on an employer. In contrast, the common law test determines an individual's status based on how much control an employer exerts over a worker.

Misclassifying employees is a costly mistake that can result in back pay, tax consequences, and even criminal penalties. A company may seek to avoid exposure to such risks by refusing to hire independent contractors, which diminishes both economic opportunities for independent workers and cost savings for the company. Congress must bring certainty to independent work and businesses. To do so, it needs to harmonize the definition of *employee* across federal statutes.

Government policy should not discourage individuals from engaging in independent entrepreneurship, which provides significant contributions to the economy. Forty-two million Americans engage in some form of independent work to start businesses, earn income, improve skills, or take on passion projects, according to a 2018 survey by MBO Partners, a consulting firm that specializes in connecting businesses with independent workers. Of the total number of independent workers, 3.3 million earn more than $100,000. In addition, satisfaction among independent workers is high.

Contrary to popular belief, contingent workers can earn as much as or more than full-time employees, according to a survey commissioned by the freelance work-referral firm Upwork and the Freelancers Union. A 2017 study by the American Action Forum and Aspen Institute found that independent contractors contributed greatly to the economic recovery. The report found, "Between 2010 and 2014, independent contractors grew by 11.1 percent (2.1 million workers) and represented 29.2 percent of all jobs added during that time period." Work as an independent contractor also offers critical opportunity and earnings for the unemployed while they search for new work, according to a 2016 McKinsey Global Institute study.

Many individuals value the flexibility inherent to independent contract work. Unfortunately, the current laws and regulations incentivize employers to hire employees as opposed to independent contractors, even when the latter may be more efficient or cost effective.

Experts: Trey Kovacs, Iain Murray

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REFORM THE WORKER CLASSIFICATION PROCESS

The Fair Labor Standards Act is the primary law governing wage and hour mandates across the country, including full- and part-time private-sector workers and local, state, and federal employees. The FLSA sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. The definitions of whether an employee is exempt from FLSA minimum wage and maximum hour requirements are antiquated and complicated. They need to be modernized to take into account today's workplace practices.

For example, the FLSA demands that an employee must earn above a salary threshold, currently set at $23,660, and primarily perform "bona fide executive, administrative, or professional" activities to qualify for wage and hour exempt status. However, in today's economy—characterized by horizontal corporate structures, significant job mobility, and flexible work arrangements—clearly defining employees as either management or rank-and-file workers is more difficult than it has been in the past.

Another area in which the FLSA falls short is in clearly differentiating between employees and independent contractors. The FLSA uses a "suffer or permit to work" standard of employee, one of the broadest and most far-reaching definitions of employee under U.S. law.

Congress should:

- Pass legislation to streamline the definition of employee across federal statutes.
- Pass legislation to enable individuals who prefer the flexibility that comes from contractor status to choose that form of work instead of being pushed into an employment relationship.

Worker misclassification happens primarily in one of two ways:

- An employee is inappropriately labeled as exempt from minimum wage and maximum hour requirements; or
- An employee is classified as an independent contractor when he or she meets the FLSA's employee test.

Overwhelmingly, workers choose to work as independent contractors because they value independence in their lives over being directed by an employer. Yet current laws greatly reduce an individual's ability to undertake work as an independent contractor. Eliminating a form of work is poor policy at any time.

Temporary workers and independent contractors serve important business functions. Many businesses, as in the construction industry, have peak seasons when they need extra workers to complete projects for a short duration. For example, using independent contractors allows residential builders to scale up and perform more jobs during the summer, without having to take on permanent staff that it will not be able to afford during the winter.

During the past five years, investigations by the Labor Department's Wage and Hour Division resulted in $1.2 billion in back wages. Certainly, there are some bad actors who will try to short workers on pay, but the DOL's Depression-era wage and hour laws that define who is an employee do not match up with the modern workplace and often lead to penalties based on mere technicalities.

Expert: Trey Kovacs

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GIVE EMPLOYERS AND EMPLOYEES GREATER CHOICE OVER COMPENSATION

The Fair Labor Standards Act restricts how employers may compensate employees. For every hour per week worked in excess of 40 hours, employees are paid time-and-a-half their regular wage rate unless they fall under one of several exemptions outlined in the FLSA. Employers and employees are prohibited from voluntarily negotiating other forms of compensation for hours worked in excess of 40 per week other than time-and-a-half pay.

Many employees likely prefer receiving extra pay from working overtime. However, that should not foreclose other compensation options that fit the unique needs of some individuals. Individuals with children or who are caregivers to the elderly sometimes need extra time off work to take care of loved ones or tend to life's other demands and goals.

Congress should:

- Pass legislation to let employers offer their employees paid leave for working overtime instead of time-and-a-half wages.

Survey results show that flexible workplace rules rank highly on why a worker will choose one job over another. A 2017 Gallup poll of office workers found that 54 percent would change jobs to have access to "flexible work time." A survey conducted by Deloitte on millennials finds that when you take pay out of the equation, work–life balance and flexible work schedules stand out when people evaluate a new job opportunity. A Harris Poll survey commissioned by EY (formerly Ernst & Young) came to a similar conclusion; it found that millennials would change jobs and location to work for an employer that offers "flexibility and [to] better manage work and family life."

The Working Families Flexibility Act of 2017 (H.R. 1180, 115th Congress) would amend the FLSA to permit—not require—employers to offer employees the choice between compensatory ("comp") time and overtime pay. Both employer and employee would have to agree on the arrangement; employers could not coerce employees to accept the alternative compensation. Both overtime wages and comp

time would accrue at one-and-a-half times the number of overtime hours worked. In addition, if an employee does not use all of the comp time he or she has accrued, it may be cashed in at the end of the year.

Workers deserve greater choice in their employment terms. The Working Families Flexibility Act provides employees options on how they are compensated and greater workplace flexibility. Amending the FLSA to permit comp time puts private sector employees on an even level with federal employees who have had the option of accruing comp time since 1985.

Expert: Trey Kovacs

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REFORM THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Act (NLRA) is the primary federal statute that governs private-sector labor relations. It establishes the process that employees may use to either organize or refrain from doing so. The NLRA outlines "unfair labor practices," or activity that employers and unions are prohibited from undertaking. The Act created the National Labor Relations Board, an independent agency made up of five members, which is in charge of enforcing the NLRA and overseeing labor union elections.

In 1935, Congress established the National Labor Relations Board as a body made up solely of "three impartial Government members" to represent the public interest in labor disputes under the National Labor Relations Act. However, during the NLRB's 80 years in operation, almost all NLRB members have come from either a business or union background. That has meant that most Board members have a predisposition to favor one side or the other. With nearly all Board members having a bias, the NLRB has not been able to act in an impartial manner, as it was created to do.

The Board comprises five members, traditionally two Democrats, two Republicans, and a chair from the president's party, who determines the partisan balance. As a result, Board policy swings like a pendulum. The Board's case precedent flip-flops in favor of organized labor or management, depending on whether a Democrat or a Republican holds the presidency. Worse, even though changes in precedent are made in purely partisan fashion, federal courts routinely give judicial deference to the NLRB on the basis of the board members' supposed expertise. As a result, NLRB policy is constantly changing, creating immense uncertainty for all stakeholders—employees, employers, and unions.

Congress should:

- Pass legislation to strip the National Labor Relations Board of its adjudication and rulemaking authority to avoid uncertainty surrounding national labor policy.
- Short of stripping the Board of its decision-making authority, pass legislation to add a sixth member to the Board. Such a change would greatly reduce constant change in Board precedent and bring a greater level of stability to labor relations.

- Eliminate exclusive representation.
- Enact the Employee Rights Act to:
  - Protect secret ballots in union organizing elections;
  - Enable workers at unionized workplaces to periodically vote on whether they wish to retain a union as their bargaining representative;
  - Prohibit unions from penalizing workers who wish to decertify; and
  - Protect workers and employers from union violence.

The National Labor Relations Act sets the rules for union elections and unfair labor practices. However, much of the Act is outdated and needs reform. The Employee Rights Act (H.R. 2723, 115th Congress) would go a long way toward protecting workers' freedom of choice of whether to join a union and increasing union accountability.

The Employee Rights Act would:

- Amend the National Labor Relations Act to require all union elections to be conducted via secret ballot. That ensures that workers are able to participate in union elections anonymously, which reduces the opportunity for unions or employers to intimidate or coerce workers on their decision.
- Require a recertification election via secret ballot to take place when more than 50 percent of the collective bargaining unit has turned over since the previous election. A majority of workers, having never voted on union representation, have inherited the union that currently represents them.
- Impose penalties on labor unions that penalize workers who file for union decertification.

Currently, unions may organize a group of workers in two ways—by secret-ballot election or through a process known as "card check." A secret-ballot election allows workers to cast their ballots privately and free from coercion. Card-check takes the form of union organizers asking individual workers to sign a card that acts as their vote for the union. Pressured to sign, workers are deprived of time to hear the pros and cons of unionization and to reflect on whether they want to unionize, which leaves workers open to union intimidation tactics.

Because employers must agree to card-check elections in place of NLRB-supervised secret-ballot elections, unions are encouraged to use a strategy known as a "corporate campaign" to browbeat employers into agreeing to card-check organizing. Corporate campaigns are aggressive public relations campaigns designed to damage an employer's reputation until it accedes to union demands.

Decertification is an arduous and difficult process. Under the National Labor Relations Act, once a union wins representation over a group of workers, it remains those workers' representative in perpetuity unless the workers vote to decertify the union. That practice has led to a number of "inherited unions." Recent research by the Mackinac Center shows that only 7 percent of current union members actually voted for the union that represents them. That means that a vast majority of workers never had a voice in choosing their workplace representation.

Currently, many union constitutions contain provisions that punish workers who seek to decertify their union, including through steep fines and even termination of employment. Rightly, the NLRA makes it an unfair labor practice by an employer to interfere with workers' right to organize. The same should be true for unions that attempt to restrain workers' right to decertify an unwanted union.

Although workers should have the right to organize and unions should have the right to try to attract workers to join, there should be some limits on what kind of activities are allowed toward that goal. One such restriction should be outlawing union violence. Unfortunately, in its 1973 *U.S. v. Enmons* decision, the U.S. Supreme Court created a loophole that exempts violence committed by a union in the course of promoting union goals from prosecution under the Hobbs Act, a major federal anti-extortion law. Since 1975, the National Institute for Labor Relations Research has collected more than 9,000 accounts of union violence reported in the media. However, the study also estimates that 80 to 90 percent of union violence reported to police is not reported, which means that the number of actual incidents of union violence is probably much higher.

Expert: Trey Kovacs

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CLARIFY THE DEFINITION OF JOINT EMPLOYMENT

In August 2015, the National Labor Relations Board unilaterally changed the definition of joint employment in a way that could expose tens of thousands of businesses across the United States to increased costs and liability. The NLRB's action will hinder entrepreneurship, reduce job creation, expand employer liability, increase employment insurance costs, encourage lawsuits, and disrupt successful business models. The underlying motive of the NLRB's move is to ease union organizing.

Congress should:

- Pass the Save Local Business Act (H.R. 3441, 115th Congress), which codifies the traditional joint employer standard. It amends the National Labor Relations Act to clarify that a joint employer relationship is established when an employer exercises "actual, direct, and immediate" control over employees.

Traditionally, joint employer liability was established when one company, typically the larger one, exercises *direct* and *immediate* control over another company's employees. Under the new standard, a company may be held liable for labor violations by other employers with whom they contract, merely by exercising *indirect* control or possessing *unexercised potential* control over the other company's employees.

As a result of the increased liability it imposes on employers, the NLRB's new joint employer standard puts a wide swath of proven, established business models at risk, including franchising, contracting out of a business's non-core functions, and using temporary staffing agencies. Those industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses. The NLRB's new joint employer standard, by making larger firms liable for the employment practices of entities it may not be able to control, will result in reduced opportunities for entrepreneurs and fewer jobs.

Expert: Trey Kovacs

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ENABLE VOLUNTARY UNION MEMBERSHIP

A longstanding practice in both private and public sector labor law directly conflicts with an individual's right to freedom of association. It is possible under the National Labor Relations Act and Civil Service Reform Act of 1978 for a minority of workers to impose a union on the rest of their colleagues. A flaw in labor relations policy allows a union to be certified as the exclusive representative of a bargaining unit by receiving only a majority of votes cast in an election, not a majority of votes from all employees at a workplace. In some states, employees must pay fees to a union to finance such unwanted representation. Congress should amend federal labor relations law so that unions represent only workers who voluntarily join and pay dues.

Congress should:

- Pass legislation modeled after New Zealand's Employment Relations Act, which ensures that any association between a worker and a union is mutually voluntary. In New Zealand, all union membership is voluntary, and unions represent only workers who voluntarily join and pay dues.

The National Labor Relations Act restricts workers' freedom to choose how they are represented in the workplace. Section 9(a) of the NLRA imposes the principle of "exclusive representation" on workers and employers. When a union wins an election, it is certified as the exclusive representative of a bargaining unit at a workplace. That policy grants the union a monopoly over workers in the bargaining unit.

An exclusive representative union represents all workers in a bargaining unit. That means that the union represents workers who voted in its favor, workers who voted for another union, and workers who voted against any union representation. Laws that grant exclusive representation status to unions prohibit employers from negotiating work conditions directly with employees or with another employee representative. In states without right-to-work laws, nonunion workers must pay agency fees to cover the costs of such compulsory union representation.

Section 7111 of the Civil Service Reform Act of 1978, which governs labor relations in the federal government, grants labor unions exclusive representation status when a majority of employees voting in an election cast ballots in favor of a union.

Workers who do not want union representation should be free to independently negotiate their own terms and conditions of employment with their employer. Congress should enact legislation that frees workers from forced representation and dues. When a union represents a workplace, only union members should work under a collective bargaining agreement, receive union services, and pay voluntary dues.

Expert: Trey Kovacs

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END GOVERNMENT-SUBSIDIZED UNION ACTIVITY

Section 7131 of the Civil Service Reform Act of 1978, also known as the Federal Service Labor-Management Relations Statute, permits unions official time, which allows federal employees paid time off from their government duties to perform union business. The practice represents a massive taxpayer-funded subsidy to federal employee unions. In FY 2016, official time cost $176 million, with federal employees spending 3.6 million hours conducting union business, according to the latest estimate from the Office of Personnel Management. Official time is a misuse of taxpayer funds and should be eliminated. Federal employees should exclusively perform the activity they are hired to perform.

Congress should:

- Pass legislation that amends section 7131 of Title 5 of the Civil Service Reform Act to eliminate the use of official time by federal employees for union activities.
- At a minimum, pass legislation that requires federal agencies to monitor, record, and publish the cost, hours, and activity performed as part of union business during official time.

In 2018, President Trump issued Executive Order 13837, which directs federal agencies to significantly curtail union official time. The E.O. also directs agencies to carefully monitor official time to prevent unlawful uses and improves agency reporting. That is a positive development, but its gains will be short term if Congress does not pass legislation codifying restrictions of official time.

The Civil Service Reform Act of 1978 grants official time to federal employee unions for collective bargaining negotiations and grievance procedures. Otherwise, official time is permitted only if the activity is deemed by the public employer and union to be "reasonable, necessary, and in the public interest."

Any activities performed by an employee relating to the business of a labor organization—including the solicitation of membership, elections of labor organization officials, collection of dues, collective bargaining, grievances, lobbying, or any activity previously permitted under official time—should be performed during the time the employee is in non-duty status.

Several Government Accountability Office reports have found that federal employees use official time for union activities without authorization, public employers are not aware of what activity federal employees engage in on official time, and the costs and hours of official time use are unknown because of poor accounting practices.

Expert: Trey Kovacs

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