COMPETITIVE ENTERPRISE INSTITUTE

OnPOINT

August 27, 2015 **No. 205**

Federal Labor Agencies Ambush American Economy

How the Department of Labor and National Labor Relations Board Support Big Labor, Not the American Worker

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As it enters its final stretch, the Obama administration has launched an unprecedented campaign to reward the president's union allies, using the regulatory process. The Department of Labor (DOL) and National Labor Relations Board (NLRB) are seeking to impose costly regulations that threaten to seriously disrupt workplaces around the nation and the greater economy. The real goal of these burdensome regulatory proposals is to make it easier for unions to organize workplaces. Job creation and worker freedom are at risk.

"I owe those unions," said President Obama in the book that helped launch his first campaign for president. "When their leaders call, I do my best to call them back right away."[1] Democrats, in general, owe organized labor, which consistently funds their campaigns. Thirteen of the top 25 all-time campaign contributors[2] are labor unions, with all 13 of those unions giving at least 93 percent political dollars to Democrats.[3]

This is happening in a time when some 6.5 million workers are seeking full-time employment but can only find part-time work and workplace participation rate is at a 38-year low of 62.6 percent.[4] Current agency overreach is partially responsible for the inability of the economy to recover.[5]

A major reason for the administration's pro-union regulatory push is its inability to get pro-union legislation through Congress. The misnamed Employee Free Choice Act (EFCA) would have effectively done away with secret ballots in union organizing elections by allowing unions to organize workplaces through a procedure known as card check, whereby union organizers collect signatures out in the open—thus exposing workers to pressure and intimidation.

Under current law, card check organizing requires the business owner's permission. EFCA would have ended that requirement, allowing unions to proceed with card check once they get a majority of employees to sign cards. Of course, this increases unions' incentives to pressure employees into signing, for as long as it takes to get to a majority. EFCA failed on a cloture vote.[6] EFCA's defeat was a major loss for organized labor, but union chiefs have not given up on gaining favorable policy changes, and they expect the Obama administration to deliver.

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Unions need new members not only to bolster membership, which has been falling for years, but to extend the life of pension plans, many of which are critically underfunded, with new union dues.[7] Given the critical status of many union pension plans and the administration's close ties to organized labor, the Department of Labor and National Labor Relations Board can be expected to aggressively persist in their pro-union regulatory push.

Congress can minimize the federal labor agencies' regulatory onslaught by withholding funding for activities that are harmful to a peaceful and productive workplace. Congress may not be able to override a Presidential veto or control specific agency actions, but Congress has sole authority to fund the government. Congress should seriously consider such an approach regarding the following policies coming out of NLRB and DOL.

Department of Labor's Proposed Overtime Rule. On June 30, 2015, the Department of Labor submitted a Notice of Proposed Rulemaking to significantly modify the exemptions in the Fair Labor Standards Act's overtime rules.[8] Under current rules, the FLSA requires overtime pay (time and a half pay) to all hourly employees who work over 40 hours per week. Salaried employees who perform executive, administrative, professional, and outside sales activities and who make more than $23,660 are exempt from overtime pay requirements.[9] Employers must track all hours worked by employees who fall within the overtime thresholds or risk penalty.

The DOL's proposed rule will dramatically alter who is eligible for overtime pay. Proposed requirements would extend mandatory overtime payments to salaried employees who earn $50,440 annually or less, from the current $23,660. It would even cover workers who perform mainly professional or managerial tasks. The change would force employers to adjust work schedules and reclassify workers, among other potential changes. Employer compliance obligations could increase due to employing more hourly and non-overtime exempt employees whose hours must be tracked to calculate overtime pay.

The Obama administration estimates that the proposed rule will affect the wages of nearly 5 million employees.[10] Secretary of Labor Thomas Perez estimates the overtime pay regulation could add as much as $1.3 billion to workers pay in just the first year.[11] On its face that sounds substantial, but spread out throughout the economy, that averages out to a wage increase of only $260 a year per worker.[12]

The administration's union allies have hailed the proposed regulation. "The minimum wage they can't do," said Bill Samuel, director of legislative affairs at the AFL-CIO. "This is probably the most significant step they can take to raise wages for millions of workers."[13] Yet, public reaction has been overwhelmingly negative. The rule may raise wages for some, but many employers have to shift some workers into part-time work or hire fewer of them.[14] Employers are pessimistic the rule will achieve its purported benefits. For instance, Don Fox, CEO of Firehouse Subs, is known for doing the right thing by his employees. He extended heath care coverage to all his employees a year before it was required. But the overtime rule could prove too much for him, as it might force him to convert some salaried employees to hourly wage workers or forbid salaried employees form working more than 40 a week. "What's a real shame is that I'm in a position of having to penalize someone because they're doing something they judge is best for their career," he said.[15]

Others who have analyzed the rule also reject the assertion that workers will receive a huge pay hike. Attorney Doug Hass, who represents private sector employers in a wide range of issues, notes, the DOL's estimation that workers will receive a pay hike is entirely dependent on the "assumption that employers will increase pay in response to the regulation or, at worst keep it the same … perhaps while spreading some of the additional overtime pay around to other workers."[16] Yet, the overtime mandate only applies to hours, not pay. Unlike increases in the minimum wage, the government cannot force employers to pay employees more via the overtime rule because employers can take steps to keep labor costs at relatively the same level, either by hiring fewer employees or cutting back hours.

One likely scenario is that employers will alter labor costs by lowering employee base pay, because the primary mechanism to defray costs is to reduce wages. A survey of the economic research shows that a majority of employers would lower base pay to control labor costs when faced with a narrowing of overtime exemptions.[17] U.S Bureau of Labor Statistics economist Anthony Barkume finds cutting wages would make up for 80 percent of overtime costs.[18]

Employers could also hire more part-time and low wage workers, limit workers' hours to under 40 a week to avoid overtime costs, or reduce fringe benefits and cut bonuses in order to raise base salaries above the new threshold of $54,440.[19]

Another option available to employers is to reclassify and change work duties of employees, thereby turning salaried, junior management workers into hourly employees.[20] Employers then would closely monitor and cap their employees' work hours. This amounts to a regulatory ban on aspiration for many ambitious employees.

Farewell flexible hours. Capping hours, reclassifying workers and employing more hourly workers will greatly restrict employers from offering flexible schedules, a benefit many professional employees value and have come accustomed to.

Former salaried workers will have to adjust to life as hourly workers with less flexible work schedules because employers must track hours worked whereas they previously did not—such as for example, when checking work-related email on a mobile device. Junior managers who are not reclassified as hourly workers and eligible for overtime will lose out on common perks offered today like telecommuting and compensation days.[21]

Some workers impacted by the rule will likely be forced into a rigid eight-hour workday where the employer demands them to report to the work site. This eliminates employees' ability to take time off to pick up a child from school or run errands at convenient times. Making strict schedules the norm could mean a large portion of the 16 to 25 million workers who telecommute at least once a month could lose this benefit.[22]

Another unintended consequence of the rule is that salaried employees who are reclassified as hourly workers will lose pay if they take off unscheduled work. For instance, an hourly worker who has to leave work to attend to an emergency while on the clock will lose pay for the time away from the office.

A recent survey shows that workers rank flexibility as a major priority, just below compensation.[23] Another survey, focusing on millennial workers, found that two-thirds of millennials would like to shift their work hours and 64 percent would like to occasionally work from home.[24] By forcing employers to monitor workers' hours and pay overtime to a wider range of workers, such flexible work arrangements will be reduced. Productivity will suffer, as research shows that flexible work schedules leads to greater productivity.[25] Even the White House Council of Economic Advisors reports that "by increasing productivity and job satisfaction, work flexibility is good for our economy at large."[26]

While it is a nice sound bite for the Obama administration that its overtime regulation will give millions of workers a raise, in truth, a more likely result is that pay will remain consistent but flexible schedules and junior management positions will vanish.

NLRB Ambush Election Rule. On April 14, 2015, the National Labor Relations Board implemented a new regulation for union representation elections that threatens workers' freedom of association and privacy, while hindering employers' protected speech on unionization prior to an election.[27] Under the new rule, the time frame between the filing of a petition and the date on which an election is conducted is reduced to as little as 14 days. The short time frame gives employees little time to educate themselves on the pros and cons of unionizing, and undermines employers' ability to respond to unionization campaigns.

The NLRB rule as constructed intends to limit the debate needed for workers to evaluate the benefits of union membership. The only message workers are likely to hear is from the union, which has been organizing for months in advance, often without the employer's knowledge. Naturally, unions tout the potential benefits of unionization, not any of the downsides. With a short time to respond before a representation election, employers will have a much harder time getting their message out.

Unions win more elections when workers have less time to contemplate whether to join a union. From 2004 to 2014, unions won only 60 percent of elections conducted in 36 to 42 days but won more than 86 percent of elections conducted in less than 21 days.[28] Since the rule has been in place, the median time for union elections has dropped from 38 days to 23 days.[29] At NLRB Regional Office 28 in Phoenix, the average has dropped to 18 days, with some elections conducted in as few as 13, 14, and 16 days. The NLRB New Jersey office even conducted one election in just nine days.[30] Unions have taken advantage of this shorter time frame. There was a 32 percent increase in union petitions during the first month the rule has been in effect,[31] with 280 petitions filed between April 14 and May 14, 2015.[32]

The ambush election rule also poses a serious threat to worker privacy. It compels employers to provide employees' contact information to union organizers, including personal cell phone numbers, email addresses and work schedules, without any opportunity for workers who do not want their personal data released to opt out. Releasing employee personal information would almost certainly expose workers to harassment, intimidation, and much higher risk of identity theft.[33] In fact, the NLRB General Counsel's guidance memo on the ambush election rule acknowledges the adverse impacts that could arise from distributing workers' private information: "selling the list to telemarketers, (2) providing it to a political campaign, or (3) using the list to harass, coerce, or rob employees."[34]

NLRB Aims At Redefining Joint Employer Standard. The Obama administration is seeking to redefine the concept of joint employment to give unions bigger corporate targets that are easier to organize. Rather than organize one franchise at a time, the National Labor Relations Board is trying to give unions the ability to drag the parent corporation to the bargaining table. The change would disrupt many kinds of beneficial business arrangements in addition to franchise businesses, including temp and staffing agencies and contractors.

It is much easier for unions to organize one large employer than hundreds or thousands of small businesses. Thus, making large franchise brands, like McDonald's, joint employers with their independently operated franchises gives unions the ability to unleash the union organizing strategy known as a corporate campaign—a coordinated effort comprising legal, political, and public relations attacks to wear down a company's resistance to unionization by threatening to sully its reputation with its suppliers, shareholders, and customers.

A group of NLRB cases involving three different businesses could radically redefine the current joint employer standard, which defines when an employee is considered jointly employed by two businesses and when a business is responsible for the labor practices of another business.[35] The potential transformation of the joint employer standard threatens the franchise model that has helped so many Americans start their own businesses. Currently, two businesses are deemed joint employers when they both exercise substantial, direct and immediate control over hiring, firing, disciplining, supervising, and directing workers.[36]

Now the NLRB is proposing to expand the definition of "joint employer" to include indirect control, unexercised potential control, and a fuzzy notion of "economic and industrial realities."[37] The broader joint employer standard would make many franchisors, contractors and staffing agencies liable for franchisees with the mindset of making these employers more easily organized.

The new standard would make determining whether an employee is jointly employed highly speculative and specific to the situation, especially under the NLRB's proposed economic realities standard, which takes into account a business' involvement in a wide array of criteria—including sales data, inventory and labor costs, projections of labor needs, employee work schedules, setting wages and wage reviews, the application and screening process, and even productivity—that give the NLRB a lot of wiggle room.[38]

Threat to franchising. Franchising helps drive job creation and economic growth. Franchise businesses have created jobs faster than other businesses from 2007 to 2014,[39] and have accounted for over 10 percent of new jobs created in 2013 and 2014.[40] Franchise operations make up 3 percent of U.S. Gross Domestic Product and $890 billion of economic output.[41]

Limiting franchising opportunities will diminish economic growth and harm economic opportunity for millions of Americans. Franchisees under the current joint employer standard can rely on the corporate franchisor for marketing, tested business methods, and use of its brand, but the franchisee operates the business and is liable for its day-to-day business practices, including hiring, work conditions, and employee supervision.[42] This allows individuals to start businesses in sectors that would otherwise require significant resources to address large scale marketing and regulatory costs. Small business spend 36 percent more for regulatory compliance than larger businesses, and franchises allow entrepreneurs to start businesses with limited out-of-pocket investment and reduced risk.[43]

Threat to contracting and outsourcing. Outsourcing of certain job functions is also under threat by the proposed change in the joint employer standard. At this writing, the NLRB is expected to rule in favor of the Teamsters against Browning-Ferris Industries (BFI), which operates a recycling plant in California that employs 60 individuals directly and contracts with Leadpoint, a temporary staffing agency, to fill 240 composter and sorting positions at the plant.[44]

In 2013, Teamsters Local 350 petitioned to be certified as the union representative of both BFI and Leadpoint employees, arguing that both BFI and Leadpoint jointly employed the workers. A NLRB Regional Office, relying on precedent, ruled that Leadpoint was the sole employer of the plant's composters and sorters. The Teamsters appealed. The case, now before the national NLRB, is expected to be decided in the coming weeks.[45]

The new proposed joint employer standard would make organizing much easier for unions. For example, three-fourths, or 180, of 240 Leadpoint workers support the Teamsters and vote to unionize. Under the new proposed joint employer standard, the Teamsters would not even need one vote from the employees directly employed by BFI to win representation over both workforces.

If unions are granted the privilege to organize two employers as one, or one business is forced to live by another business' collective bargaining agreement, companies like BFI or others that utilize temporary staff or outsource certain functions are likely to bring many jobs back in-house and scale back the hiring of subcontractors and temporary staff. This is a bad sign, given that the temporary workforce has been a bright spot for U.S. job growth—reaching an all-time high of over 2 percent of the total private-sector workforce in 2014 and employing 3.15 million workers per week.[46]

If the NLRB make final the new expanded definition of joint employer it will substantially and adversely impact American businesses—franchisers, contractors, suppliers, and temporary employment arrangements. Though, of course, the real goal of redefining the joint employer standard is to ease union organizing campaigns.

Ultimately, the potential changes in the joint employer standard would advantage a small group of special interests while endangering 770,000 franchise businesses and countless firms that use outsourcing which adds up to 8.5 million employees and temporary staff. American business today relies on independent operators or franchisees. This system is threatened by making the larger firm liable for the employment practices of entities it may not be able to control. The result will be fewer new businesses being created.

Conclusion. Organized labor is receiving the payback for its hefty political contributions to Democratic politicians. Major rules and decisions coming out of the Department of Labor and National Labor Relations Board would stack the deck in favor of union organizing. Having failed to make card check standard organizing by enactment of the misnamed Employee Free Choice Act, union leaders expect favorable policy changes from the Obama administration—which in turn is trying to delivery. Unions need organizing made easier to bolster sagging membership numbers and collect more union dues to prop up severely underfunded pensions.

The NLRB and DOL are charged with protecting and advancing the opportunity of workers. However, under the Obama administration, the agencies have failed to live up to those expectations. Congress, invested with the power of the purse, should use that power to end the assault on workers and the economy.

Notes

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hours per week through payment of overtime to workers earning between the current and proposed salary levels." Christine Mai-Duc, "Obama's new overtime rules: How they's work and who they'd affect," *Los Angeles Times*, June 30, 2015, http://www.latimes.com/business/la-fi-obama-overtime-rules-explainer-20150630-htmlstory.html.

[12] See note, 16.

[13] Marianne Levine, "Barack Obama poised to hike wages for millions," Politico, June 8, 2015, http://www.politico.com/story/2015/06/barack-obama-overtime-salary-levels-white-house-118688.html?hp=t1_r.

[14] Melanie Trottman and Eric Morath, "Labor Department Expected to Make Millions More Eligible for Overtime," *The Wall Street Journal,* June 29, 2015, http://www.wsj.com/articles/labor-department-expected-to-make-millions-more-eligible-for-overtime-1435626461.

[15] Lydia DePillis, "As labor advocates hail Obama's overtime plan, employers brace selves," *Washington Post,* June 30, 2015, http://www.washingtonpost.com/business/economy/as-labor-advocates-hail-obamas-overtime-plan-employers-brace-selves/2015/06/30/f0291bea-1f43-11e5-bf41-c23f5d3face1_story.html.

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