COMPETITIVE ENTERPRISE INSTITUTE

OnPOINT

**October 27, 2016** **No. 221**

# Congress Can Protect Workers Using the Power of the Purse

## Appropriations Process Offers Opportunity to Halt Burdensome Labor Regulations that Threaten Job Growth and Worker Freedom

*By Trey Kovacs and John Berlau* *

In 2016 to date, the Obama administration has burdened the American public with nearly $100 billion in regulatory costs, with another $38.2 billion on the way in the form of proposed rules.[1] And that is on top of nearly $1.9 trillion in estimated annual regulatory costs. The torrent of regulatory action has created immense uncertainty and now hinders economic growth.[2] Unfortunately, Congress has been unable to pass legislation either to temper agency overreach or reverse onerous regulation.

Given this reality, the appropriations process provides Congress an opportunity to attach policy riders that can stop the implementation or enforcement of burdensome regulations. Through appropriations, Congress determines every year how to spend tax dollars already collected and borrowed. And given that it is must-pass legislation, an appropriations bill provides Congress a strong vehicle to overturn harmful regulation via policy riders.

Congress should use the appropriations process to pare back the regulatory push of the two primary federal labor agencies—the Department of Labor (DOL) and National Labor Relations Board (NLRB). Both agencies have issued rules that threaten worker flexibility and opportunity, as well as business formation, with serious implications for long-term economic growth.

The administration has sought to use the regulatory process to impose policies that Congress had rejected. This regulatory bombardment began when Congress declined to pass the misnamed Employee Free Choice Act (EFCA), which would have effectively ended secret ballots in union organizing elections by allowing unions to organize workplaces through a procedure known as card check. Organizers collect signatures out in the open, which exposes workers to pressure and intimidation from unions.

In its early days, the Obama administration made enactment of EFCA a major goal, because the legislation was a top policy priority of the President's union supporters. With large majorities in both houses, EFCA's prospects looked good, but the bill failed to make it to the Senate floor on a narrow cloture vote.[3] Since that legislative failure, the administration has turned to the regulatory process, with the federal labor agencies proposing numerous rules intended to ease union organizing, by raising the cost of non-union labor, expanding the number of employees unions may organize, and facilitating

* *Trey Kovacs is a policy analyst at the Competitive Enterprise Institute (CEI). John Berlau is a senior fellow at CEI.*

union organizers' access to employee contact information. These efforts clearly run contrary to congressional intent.

To counter the administration's aggressive overreach, Congress should consider defunding the following policies that restrict worker choice and economic growth.

**NLRB Ambush Election Rule.** The National Labor Relations Board, in April 2015, finalized a rule that alters the way union representation elections are conducted.[4] The regulation, known as the "ambush election" rule, threatens workers' ability to thoughtfully contemplate a decision that impacts their privacy and nearly every aspect of their work lives.

The rule drastically reduces the time frame between the filing of a petition and the date on which a representation election is held. That would leave workers with little time to educate themselves on the pros and cons of union representation. Prior to the rule change, organizing elections normally would be held within 42 days, giving workers ample time to contemplate their decision. Under ambush elections, some elections have been conducted in as few as nine days.[5]

Unions often claim employers have too much control over the union election process and can delay when elections are conducted. The union-funded advocacy group Jobs with Justice says that under the previous rules, employers could delay elections, sometimes for years, by pursuing needless litigation.[6] While there are cases where long delays may occur, the vast majority of union elections take place in a timely manner. Narrower changes to election rules that would reduce frivolous pre-election challenges would be more sensible than completely overhauling a system that generally worked.

The rule also puts all private sector workers' privacy at risk. When a union petitions to organize a workforce, employers are compelled to provide employees' contact information to union organizers, including personal phone numbers, email addresses, home addresses, and work schedules, without any opportunity for workers to opt out of having their information released to union organizers, who will be able to contact workers outside the workplace.

Forcing the release of employees' personal information is also likely to expose workers to much higher risk of identity theft.[7] Even the NLRB General Counsel's guidance memo on the ambush election rule acknowledges that worker privacy is threatened and that the information could be sold to telemarketers or given to political campaigns, while the lists could also be used to "harass, coerce, or rob employees."[8]

**NLRB Joint Employer Rule.** In the 2015 case, *Browning-Ferris v NLRB*, the National Labor Relations Board overturned decades-old precedent that held a joint employer relationship existed only when one company exercised *direct* and *immediate* control over another company's workforce. Under the previous standard, a company that contracts with a temporary staffing firm to fill certain positions had to share or codetermine matters like hiring, firing, discipline, and supervision of the temp employees in order to establish a joint employer relationship. The NLRB's new rule instituted an extremely broad and vague

definition under which companies may be held liable for labor violations committed by other employers with whom they contract, even if they only exercise *indirect* control or have the *potential* to control another firm's workers, but do not exercise that power.[9] Currently, a joint employer relationship may be found when one company contracts with another and merely supplies them with scheduling and hiring software, but does not direct the separate entity on who to hire or when workers are scheduled.

The decision is inherently ambiguous because of the way the NLRB sets new policies. Unlike most agencies, the NLRB does not publish forward-looking rules that explain how new policies apply to various businesses. Instead, the agency establishes acts through adjudication, much as a court would, which applies new policies retroactively to individual businesses. Policy making by adjudication is inherently unfair because affected businesses and individuals are given no advance notice of the changed rules of the game.

Such adjudication is also firm-specific, meaning it deals only with the facts and circumstances presented by the individual business involved in the case. Other similarly situated firms must then deduce whether the policy does or does not apply to them—and if it does apply, how. The majority decision in *Browning-Ferris* expressly noted that it did not address all the potential circumstances when joint employer status could be established.[10] This has created immense uncertainty for employers in how to engage in business-to-business relationships while avoiding joint employer liability.

In the year since the policy change, the NLRB has done little to clear up the uncertainty surrounding its decision. It has failed to issue clarifying guidance that explains what kind of business relationships trigger a joint employer status, and has only issued one other decision that used the new *Browning-Ferris* standard.[11] Nevertheless, many thousands of other businesses may well be covered under the same standard, without knowing how or why.

Such uncertainty is untenable when tens of thousands of business relationships are impacted by the joint employer standard. An analysis from FRANdata, a data provider to the franchise industry, projected that at least 40,000 small businesses in over 75,000 locations would be put at risk from the NLRB's new joint employer rule.[12]

Businesses and workers have already seen negative consequences from the vague and broad joint employer standard. It has forced the hand of employers when it comes to how they assist franchisees or other employers with whom they contract. As recently reported, the NLRB's *Browning-Ferris* decision has driven several franchisors to alter relationships with franchisees by pulling back on assistance and delaying expansion plans. For example, a printing business in Washington State has put expansion on hold, over concerns that its franchisor could be declared a joint employer. "I could lose my ability to control my business," Chuck Stempler, owner of seven printing stores that operate under the AlphaGraphics brand franchise, told *The Wall Street Journal* last August. [13]

The rule will also affect employees of temporary staffing firms who appreciate the flexibility temp work affords. Workers attempting to change career paths, and those who face unexpected unemployment, for example, often take advantage of the work opportunities

temporary staffing agencies offer. And many temporary worker placements can lead to a permanent job.[14] With the greater likelihood that an employer that uses a temporary staffing agency will absorb joint employer liability, many could seek other options to fill staffing needs. Instead of using a temporary staffing agency to handle peak seasons when they have a short-term need for more personnel, employers may assign their current staff longer hours instead. If employers are labeled as joint employers with temporary staffing agencies, it reduces the cost efficiency of a short-term workforce. The most likely result is a reduction in the use of temp agencies, which will reduce jobs and harm worker opportunity.

**DOL Fiduciary Rule.** Perhaps the costliest Department of Labor regulation with the widest-ranging impact on the economy is one for which the DOL reached way beyond its jurisdiction, claiming authority over thousands of financial firms.

Stretching the limited role Congress granted to the Department over "fiduciaries" of traditional pension plans in the 1974 Employee Retirement Income Security Act, the DOL redefined "fiduciary" to give the Labor Department power over a broad swath of financial service professionals who service not just defined-benefit pensions, but 401(k)s and individual retirement accounts as well.[15] In other words, an entire industry already heavily regulated by the Securities and Exchange Commission and other financial regulators will now also be subject to DOL oversight.

The rule, slated to go into effect in early 2017, mandates that brokers, insurance agents, and others designated as "fiduciaries" under the rule, act in these savers' "best interest"—as defined by Labor Department bureaucrats.

When it first proposed the rule last year, the Labor Department claimed that individuals cannot "prudently manage retirement assets on their own," and that they "generally cannot distinguish good advice, or even good investment results, from bad."[16] Yet the DOL never explained why government bureaucrats—who have had their share of investing failures such as the Solyndra "green energy" boondoggle—are such inherently wiser investors than private citizens that they should be able to limit ordinary savers' choices.[17]

The rule will also carries a hefty price tag. According to DOL's own conservative estimate, it will cost $31.5 billion over 10 years. That makes it the most expensive rule—proposed or final—of 2016, according to the American Action Forum.[18]

Under the rule, savers with moderate or low incomes will lose access to personalized financial advice, a worry shared by many Democratic Members of Congress, who called for changes to the rule when it was proposed. Specifically, they expressed concern that poor and minority savers would lose access to financial service professionals due to the costs imposed by the rule, because brokers would have to charge investors much more.[19] The DOL rule would create a presumption against brokers taking third-party commissions from mutual funds they sell to savers. As a result, investors who currently pay only a small commission on the execution of an order may have to pay a much larger fee based on a percentage of their assets. And since some portfolios are too small to justify the cost of even a management fee, brokers will simply stop servicing them.

A June 2013 study by the Cass Business School at City University London found, under similar rules in Great Britain, brokers had largely stopped serving savers with portfolios below £150,000 ($240,000), because the savers' fees alone—sans third-party commissions—would not pay for servicing the accounts.[20] Center-left economists Robert Litan and Hal Singer estimate that a similar "guidance gap" created by the DOL's fiduciary rule could cost middle-class savers $80 billion over ten years in lost savings.[21]

Congress should exercise its power of the purse to prevent—or at least delay—the rule from going into effect. It will be costly and restrict access to credit. Moreover, it may run afoul of both the Constitution and laws such as the Administrative Procedure Act, as alleged in the five separate lawsuits that have been filed to challenge the rule.[22]

**DOL Overtime Rule.** In May 2016, the Department of Labor significantly altered its definition of which employees are eligible for overtime. It greatly increased the number of salaried workers who qualify for overtime pay, raising the salary threshold from $23,660 to $47,476.[23] That amount will rise every three years to match the 40th percentile of salaried employees in the lowest income region of the country, normally the Southeast.

This 100 percent increase in the threshold is unprecedented in the near-80-year history of the Fair Labor Standards Act (FLSA).[24] The DOL estimate pegs the rule's administrative costs alone at slightly under $600 million in the first year and an estimated paperwork burden of 1.2 million hours.[25]

Though touted as a mechanism to increase wages, employers have a number of options to keep labor costs relatively constant. However, these options may result in negative consequences for workers. Wage cuts will make up for 80 percent of overtime costs, according to U.S. Bureau of Labor Statistics economist Anthony Barkume.[26] Employers could choose to demote many salaried workers on a management track to hourly status, which could mean a loss of benefits like paid leave and flexible schedules. Employers could even prohibit overtime and hire more part-time workers.

Reclassifying workers to hourly status and limiting longer hours may hinder workers' future prospects. Many junior mangers work long hours in hopes of long term benefits such as advancing and accumulating professional skills. Ambitious employees may lose one way to prove their worth—a willingness, or even eagerness, to work over 40 hours per week. According to the DOL, around 5 million individuals will be affected by the regulation and an estimated $1.3 billion could be distributed to those workers in the first year after implementation. While this seems like a substantial sum, spread out among 5 million individuals, it averages out to a wage increase of only $260 a year per worker.[27] And this would only be true if employers do not shift work hours to avoid paying overtime wages.

The overtime regulation raises costs on business and is unlikely to give many workers a raise, but other entities are negatively impacted as well. Many universities and non-profits are ill-equipped to handle the added costs.

For example, an assistant vice provost of the University of Kansas testified in June 2016 that the university had 354 employees who were then exempt but will become overtime-eligible under the new rule. If they were to comply with the rule by raising salaries to the new threshold, it would cost $2.9 million. Keeping salaries for these employees the same but paying them overtime wages as non-exempt employees would cost an estimated $2.3 million.[28] The University of Tennessee stands to incur $9.5 million in additional costs from the wage mandate, which amounts to a 2.2 percent tuition hike for all students.[29] El pagnier K. Hudson, an assistant vice president of human resources at Florida International University, told InsideHigherEd.com that over 6,500 of the university's employees would be affected, and raising their salaries to the new threshold would cost about $62 million.[30]

Nancy Duncan, Vice President of Human Resources for Operation Smile—an international charity that provides medical surgeries for children with cleft lips, cleft palates, and other facial deformities—testified before Congress on the impact of the overtime rule on its ability to provide surgeries to those in need. Duncan said the rule will increase costs by $1 million annually, which will reduce the number of surgeries her organization can offer by 4,200 each year.[31] Even the left-leaning advocacy organization U.S. Public Interest Research Group (U.S. PIRG) released a statement saying the overtime rule would harm it and other cause-oriented organizations by increasing staffing costs, which would force non-profits to hire fewer employees and strictly monitor their hours.[32]

The overtime rule will also harm startup firms. At many startups, employees agree to receive low pay during the firm's early days, but collect equity in the firm as part of their compensation packages. The DOL rule, as proposed, does not take equity into account when calculating whether an employee meets the salary threshold exemption. A recent Mercatus Center study estimates the new rule could impose at least $317 million on tech startups in legal fees to comply with the rule.[33] Startup firms are ill-equipped to deal with new overtime costs. Many cannot afford to increase salaries above the exemption level. Startups provide equity to compensate for low salaries to give employees added incentive to increase productivity and work long hours, because the firm's success is their own. Naturally, such exorbitant costs will have significant negative effects on small business formation.

**Conclusion.** The appropriations process provides Congress with an opportunity to stop new, overreaching regulations from the Department of Labor and National Labor Relations Board. These rules would impose huge costs and much uncertainty on employers, and deter job creation and business expansion.

Congress should attach policy riders to the appropriations bills for the Departments of Labor, Health and Human Services, and Education, and related agencies to defund the ambush election rule, joint employer standard, fiduciary rule, and overtime rule. Doing so will relieve American businesses of billions in costs and millions of hours of added paperwork burden. Without action to stop these harmful regulations, worker opportunity and business expansion are at risk.

The charge of the Department of Labor and National Labor Relations Board is to protect and advance the opportunity of all workers. Under the Obama administration, however, these agencies have acted to advance the interests of organized labor. Congress alone possesses the power of the purse. It should use that power to lighten the regulatory toll on workers and the economy.

## Notes

[1] Sam Batkins, "Approaching $100 Billion," American Action Forum, August 29, 2016, https://www.americanactionforum.org/week-in-regulation/approaching-100-billion-2/.
[2] Wayne Crews, *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, May 3, 2016, https://cei.org/10KC2016.
[3] Sam Stein, "Specter Will Vote against Employee Free Choice Act," Huffington Post, April 24, 2009, http://www.huffingtonpost.com/2009/03/24/specter-to-oppose-cloture_n_178571.html.
[4] National Labor Relations Board, Representation—Case Procedures, Final, 80 Federal Register 19199, https://www.federalregister.gov/articles/2015/04/10/2015-08159/representation-case-procedures.
[5] Trey Kovacs "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.
[6] "The Facts on the New NLRB Union Election Rule," Jobs with Justice, December 12, 2014, http://www.jwj.org/the-facts-on-the-new-nlrb-union-election-rule.
[7] William Messenger, Testimony to the U.S. House of Representatives Committee on Education and Workforce, "Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule," March 2, 2014, http://edworkforce.house.gov/uploadedfiles/william_l._messenger_testimony.pdf.
[8] Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015, NLRB Memorandum GC 15-06, https://www.scribd.com/doc/271654351/GC-15-06-GuidanceMemorandum-on-Representation-Case-Procedure-Changes-Effective-April-14-2015-PDF-10.
[9] *Browning-Ferris Industries of California, Inc. and FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350, International Brotherhood of Teamsters*, Case 32-RC-109684 (2015), https://www.nlrb.gov/case/32-RC-109684.
[10] Ibid.
[11] *Retro Environmental, Inc. and Green JobWorks, LLC*, Case 05-RC-153468 (2016), https://www.nlrb.gov/case/05-RC-153468.
[12] Andrea Wells, "New Look in Franchise Liability," *Insurance Journal,* January 11, 2016, http://www.insurancejournal.com/magazines/coverstory/2016/01/11/394052.htm.
[13] Melanie Trottman, "Some Small-Business Owners Trim Expansion Plans, Cite New Labor Law," *Wall Street Journal*, August 5, 2016, http://www.wsj.com/articles/some-small-business-owners-trim-expansion-plans-cite-new-labor-law-1470389403.
[14] "Staffing Industry Statistics," American Staffing Association, Accessed June 24, 2016, https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffingindustry-statistics/.
[15] John Berlau, "The Department of Labor's Fiduciary Rule for Dummies (But Not the Dummies They Think We Are)," *Web Memo* No. 35, Competitive Enterprise Institute, March 2, 2016, https://cei.org/content/department-labor%E2%80%99s-fiduciary-rule-dummies-not-dummies-they-think-we-are.
[16] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Federal Register 21,928, 21,932 (Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509, 2510).
[17] Geoffrey Norman, "Picking Losers," Weekly Standard, March 28, 2013, http://www.weeklystandard.com/picking-losers/article/712096.
[18] Sam Batkins, Dan Goldbeck and Meghan Milloy, "The Fiduciary Rule Is Final—Now What," American Action Forum, April 7, 2016, https://www.americanactionforum.org/research/fiduciary-rule-final-now/.
[19] Nick Thornton, "Over Half of House Democrats Call for Changes in DOL Fiduciary Rule," BenefitsPro, September 24, 2015, http://www.benefitspro.com/2015/09/24/over-half-of-house-democrats-call-for-changes-in-d?slreturn=1454941863.

[20] Andrew Clare, Stephen Thomas, Omal Walgama, and Christina Makris, "The Impact of the RDR on the UK Market for Financial Advice," Cass Business School, City University London, June 2013, https://www.cass.city.ac.uk/__data/assets/pdf_file/0016/202336/The-impact-of-RDR-Cass-version.pdf.

[21] Robert Litan and Hal Singer, "Good Intentions Gone Wrong: The Yet to Be Recognized Costs of the Department Of Labor's Proposed Fiduciary Rule," Report prepared by Economists Incorporated for the U.S. Department of Labor, July 2015, p. 6, http://www.dol.gov/ebsa/pdf/1210-AB32-2-00517.pdf.

[22] Jacklyn Wille, "Labor Department Faces Five Lawsuits over Fiduciary Rule, Bloomberg BNA, June 10, 2016, http://www.bna.com/labor-department-faces-n57982073912/.

[23] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 FR 32391 (2016), https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and.

[24] Tammy McCutchen, Testimony of the U.S. Chamber of Commerce before the House Education and the Workforce Committee's Subcommittee on Workforce Protections on the DOL's overtime rule, July 23, 2015, p. 7, chart on previous changes to the salary test related to the overtime rule, http://edworkforce.house.gov/uploadedfiles/mccutchen_testimony.pdf.

[25] *Retro Environmental, Inc. and Green JobWorks, LLC*,.

[26] Anthony Barkume, "The Structure of Labor Costs with Overtime Work in US Jobs," Industrial and Labor Relations Review, Vol. 64, No. 1 (October 2010), http://ilr.sagepub.com/content/64/1/128.abstract.

[27] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 FR 32391.

[28] Testimony of Michael Rounds, Associate Vice Provost for Human Resources Management at the University of Kansas, before the United States House of Representatives Committee on Education and the Workforce, June 9, 2016, http://edworkforce.house.gov/uploadedfiles/testimony_rounds.pdf.

[29] Tiffany Haverly, "Roe Statement on Obama Administration's Overtime Rule," Office of Representative Phil Roe (R-Tenn.), May 18, 2016, http://roe.house.gov/news/documentsingle.aspx?DocumentID=398028.

[30] Ellen Wexler, "Overtime Woes," Inside Higher Ed, February 25, 2016, https://www.insidehighered.com/news/2016/02/25/what-does-department-labors-overtime-rule-mean-higher-education.

[31] Testimony of Nancy Duncan, Associate Vice President of Human Resources at Operation Smile, before the Committee on Small Business and Entrepreneurship, May 11, 2016, http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=998E48E6-BFD4-47D4-B80F-3D92AEC23A74.

[32] Andre Delattre, "Statement on the Overtime Rule," U.S. PIRG, May 18, 2016, http://www.uspirg.org/news/usp/statement-overtime-rule.

[33] Donald J. Boudreaux and Liya Palagashvili, "An Economic Analysis of Overtime Pay Regulations," Mercatus Center, April 4, 2016, https://ppe.mercatus.org/publication/economic-analysis-overtime-pay-regulations.