

Labor and Employment

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 this atmosphere, which affords them the freedom to adapt to changing market conditions.

Despite this success, obsolete New Deal–era labor laws and regulations are becoming a drag on the economy. 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 However, rather than adapt to the changing economy, regulators are doubling down on enforcement of outdated national labor policy in a transparent effort to prop up labor unions, major political donors to Democrats.

The National Labor Relations Board (NLRB) and the Department of Labor (DOL) are the key federal labor regulators. Recent regulatory efforts by those agencies have sought to restrict flexible work arrangements and well-established business-to-business relationships, while giving favorable treatment to labor unions in order to aid their organizing efforts. Members of Congress must resist efforts to politicize regulation, adjudication, and legislation in labor relations. The threats are quite real for franchising, temporary staffing, independent contracting and subcontracting, interning, volunteering, supplying, and outsourcing.

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-time 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 on the conditions 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 Section 213 of the FLSA.

Recently, the Secretary of Labor has used that power in an expansive and overreaching manner. For example, in 2016, the Department of Labor (DOL) dramatically raised the salary threshold for an employee to be exempt from overtime pay from \$23,660 to \$47,476—an increase of over 100 percent. As former DOL Wage and Hour Division Administrator Tammy McCutchen pointed out in congressional testimony, such an increase is out of line with historical raises of the salary threshold. Such massive changes to the rules of the game burden employers with massive costs and create new compliance issues.

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 requires that an employee must earn more than the above-stated salary threshold and primarily perform “bona fide executive, administrative, or professional” activity to fall within the wage and hour exempt status. However, determining

Congress should:

- ◆ Reclaim authority over changes to Fair Labor Standards Act that affect millions of workers. Legislation should require that any proposed DOL regulatory change to an exemption from wage and hour requirements has to pass both houses of Congress before the rule is finalized.
- ◆ 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.

whether an employee meets the requirement of “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. The FLSA was created in 1938 and needs modernization. With an ever-changing regulatory landscape, this Depression-era wage and hour statute’s requirements are ill-suited to govern today’s modern workplace, and create confusion and uncertainty that present challenges to employers’ ability to comply with the law.

Expert: Trey Kovacs

For Further Reading

Tammy D. McCutchen, Testimony on “An Examination of the Administration’s Overtime Rule and the Rising Costs of Doing Business” before the Senate Committee on Small Business and Entrepreneurship, May 11, 2016, http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=88A0B32E-6A2E-4707-AA5B-F48D65097419.