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First Steps for the Trump Administration: Unleash America's Labor Force

Free Market Reforms to Get Americans Back to Work

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During the Obama administration the Department of Labor (DOL) and National Labor Relations Board (NLRB) failed to live up to their stated missions—to improve the prospects of wage earners and represent the public in labor disputes. Instead, the agencies have erected numerous roadblocks that have discouraged employers from hiring, harmed worker career prospects, and sided with labor unions over the public good.

According to recent research by the National Association of Manufacturers, the aggregate costs of labor regulations in the last year was $80 billion. The rules resulted in more than 400 million paperwork hours and could cause more than 150,000 American workers to lose their jobs.

It must be a priority to reverse course from Obama administration employment policies that aimed to direct the private behavior of workers and employers by limiting how individuals can work and companies operate. Labor agencies in the new administration should create a framework to promote workplace dynamism by allowing individuals the leeway they need to negotiate their own contract terms and allow job creators the flexibility to innovate. The following policies can help to create that framework.

Recommendations

Rescind the Department of Labor's Administrator's Interpretation on Joint Employment and Independent Contractors. In 2016, the Department of Labor's Wage and Hour Division (WHD) issued an Administrator's Interpretation (AI) establishing new guidelines that departed from the agency's clear rules for determining joint employment—when one company is held liable for the labor violations of another under the Fair Labor Standards Act (FLSA).

The new joint employment test relies on seven fuzzy "economic realities" factors that provide less certainty for employers than the previous test, which cites three specific scenarios where businesses are likely to be considered co-employers. According to former DOL Wage and Hour Administrator Tammy McCutchen, the WHD's new economic

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realities test is not "grounded in statutory or regulatory language and is noticeably absent from the DOL's own regulations on joint employment."

The Administrator's Interpretation's stated goal is to expand the likelihood of finding joint employment as a mechanism to punish larger companies for labor violations of smaller companies with which they contract. This will discourage employers from outsourcing non-core business functions like accounting, human resources, or janitorial services, and prompt them to bring those in-house instead to account for higher labor costs. That means businesses will be able to devote less time and resources to their core functions. The end result will be fewer jobs created and fewer opportunities for entrepreneurs.

Another DOL Administrator's Interpretation discourages certain economic activity among individual workers. A 2015 Wage and Hour Division AI set new guidelines on what makes a worker an employee or independent contractor under the FLSA. The guidance expands an already extensive definition of employee. It does not completely eliminate independent contracting from the workforce but greatly reduces the opportunities contracting provides.

Attempting to eliminate a form of work is poor policy at any time, but especially when many new contracting opportunities are being created and individuals desire the benefits of self-employment, such as the ability to set one's own hours. In addition, many industries rely on contractors, such as for example, residential builders and retailers that need to scale up their labor force during busy seasons.

Such policy changes are not an interpretation of existing regulation or statute, but new policy that should be required to go through the rulemaking process. An Administrator's Interpretation, like other forms of guidance documents, constitutes non-binding policy that does not go through the notice-and-comment rulemaking process of the Administrative Procedure Act. Implementing substantive policy changes by guidance document is inherently unfair because affected businesses and individuals are given no advance notice of the changed rules of the game. The Trump administration should rescind such policy immediately.

Protect and Promote the Sharing Economy. The "sharing economy" is characterized by platform apps like Uber, Airbnb, and Handy, which open opportunities for people who have made capital investments in things like cars, homes, or skills to create businesses around them. In effect, they help people create wealth by transforming consumption goods into capital goods.

The extra wealth these businesses are creating is helping to revitalize areas like South Dallas, helping ex-offenders get back on their feet in honest work, keeping people off welfare rolls, and even reducing drunk driving incidents. Yet the sharing economy is under threat from over-zealous regulators at all levels. At the federal level, the main threat is from labor regulators who want to see these independent businessmen turned into employees of the platform app company under worker classification rules. This will kill off many of the opportunities presented by the sharing economy, and be especially hard on these new

entrepreneurs, who overwhelmingly want to be their own boss. The new Labor Secretary should:

- Issue new guidance on worker classification, as outlined above, designed to protect independent businessmen and women; and
- Appoint an advocate for sharing economy workers and employers within the Department.

The biggest threat to the sharing economy at the federal level is currently the guidance on independent contracts discussed above. Furthermore, there exists no office within government dedicated to promoting the benefits of the sharing economy. However, the Federal Trade Commission has reported on the issue, with the Commission recommending that regulators allow competition and innovation to flourish.

Rein in Activism by the National Labor Relations Board. During the past eight years, the NLRB has overturned numerous longstanding legal precedent, over 4,000 years according to new research from the Littler Mendelson Workplace Policy Institute. The impact of the Board's upheaval of settled policy has created an atmosphere of immense uncertainty and a system tilted in labor unions favor over workers and employers. The Trump administration needs to select members that will restore the NLRB's purpose to what Congress intended, to represent the public interest in labor disputes. The chosen members need to reinstate the recent overturned precedents in cases where they can, and create an understandable legal framework that promotes economic growth and worker freedom.

Immediately upon taking office, the Trump administration will need to fill two vacant Board member positions. The current General Counsel term ends in late 2017. The three current Board members' terms end in 2017, 2018, and 2019.

Reverse the Department of Labor's New Overtime Rule. On November 22, 2016, the U.S. District Court for the Eastern District of Texas issued a nationwide injunction on the Department of Labor's overtime rule in response to a lawsuit brought by 21 state attorneys general. The judge determined that the DOL overreached its rulemaking authority by raising the salary threshold so steeply, from about $23,000 to $47,000, more than double the current threshold. The regulation was intended to go into effect on December 1, 2016.

Both employers and workers would be harmed if the rule goes into effect. Workers would lose flexible work arrangements, demotion from salary to hourly and forced to track their hours. Non-profits, universities, and state and local governments operate on thin budgets and do not have the ability to raise prices on consumers to counteract higher labor costs of the rule. This could lead to higher college tuition, strain state and local governments' ability to provide public services, and hinder nonprofits' ability to fulfill their missions.

On December 1, the Department of Labor appealed the Eastern Texas District's injunction to the Fifth Circuit, and asked for an expedited hearing. If the Fifth Circuit were to overrule the District court, then the rule would go into effect. However, if a decision is not issued prior to the Trump administration taking control, the DOL may drop the lawsuit against the overtime regulation.

Another avenue to strike down the rule is through a Congressional Review Act challenge or legislation. As a last resort, President-elect Trump could direct the Secretary of Labor to propose new overtime rules that place the overtime salary threshold at a reasonable level, but this would likely take one year to become final.

For Further Reading

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