Labor *and* Employment

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A Pro-Growth Agenda for the 117th 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. Ensuring individual worker freedom is especially important as new business models and industries emerge. Workers' most valuable asset is their own labor and they must be allowed to market and profit from it.

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. Worse, many seem intent on bending new business models to those old rules. 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 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—an over 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 significant 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 to 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 requires that an employee must earn more than the salary threshold and primarily perform "bona fide executive, administrative, or professional" activity to fall within wage and hour

exempt status. However, determining 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. 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 create confusion and uncertainty that present challenges to employers' ability to comply with the law.

Expert: Sean Higgins

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HARMONIZE THE DEFINITION OF "EMPLOYEE" ACROSS GOVERNMENT

Determining the proper legal classification for an individual worker is not a simple task. A major reason for that difficulty is a patchwork of federal and state laws that define the terms "employee" and "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 and the Fair Labor Standards Act.

This patchwork of laws and tests creates uncertainties for employers, independent contractors, and their clients. It increases the odds of companies 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 while simultaneously misclassifying that same worker under state law or another federal law.

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 owed 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. The Labor Department has issued a rulemaking on the matter, but that does not obviate the need for Congress to codify clear rules that harmonize the definition of "employee" across federal statutes.

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 Fair Labor Standards Act in line with other 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 over $100,000. In addition, satisfaction among independent workers is high.

Contrary to popular belief, contingent workers can earn as much, or more, than full-time employees, according to a survey commissioned by Upwork, a freelance work-referral firm, and the Freelancers Union. A 2017 study by the American Action Forum and the Aspen Institute found that independent contractors greatly contributed to the economic recovery. The report found: "Between 2010 and 2014, independent contractors grew 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 in independent contract work. Unfortunately, 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: Sean Higgins, 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. It 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 today's workplace practices into account.

For example, the FLSA demands that an employee must earn more than 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—it is more difficult than in the past to clearly define employees as either management or rank-and-file workers.

Another area where 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 most broad and far-reaching definitions of "employee" under U.S. law.

Congress should:

- Pass legislation to enable individuals who prefer the flexibility that comes from contractor status to choose that form of work instead of 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.
- An employee is classified as an independent contractor when he or she meets the FLSA's employee test.

Overwhelmingly, workers choose to take independent contractor positions because they value independence instead of 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, such as building contractors, 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 they will be unable to afford during the winter.

During the past five years, investigations by the Labor Department's Wage and Hour Division resulted in $1.4 billion in back wages. Certainly, there are some bad actors who will attempt to short workers on pay, but the DOL's Depression-era wage and hour laws defining who is an employee do not match up with the modern workplace and often lead to penalties based on technicalities. In January, the Labor Department announced a final rule to update the Fair Labor Standards Act's rules for determining whether a worker is an employee or a contractor. Congress should codify the department's updates.

Expert: Sean Higgins

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PROVIDE EMPLOYEES FREEDOM TO CHOOSE AMONG DIFFERENT TYPES OF COMPENSATION

The Fair Labor Standards Act determines how employers may compensate employees. For every hour per week worked over 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 over 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 some individuals' unique needs and circumstances. Individuals with children or 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 chooses a particular job over another. A 2017 Gallup poll of office workers found that 54 percent would change jobs to have "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 evaluating a new job opportunity. Similarly, an Ernst & Young survey found that millennials would change jobs and location to work at an employer that offers "flexibility and [the ability to] better manage work and family life."

The Working Families Flexibility Act of 2020 (H.R. 5656, 116th Congress) sought to amend the FLSA to allow, but 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 overtime hours worked. In addition, if an employee does not use all the comp time he or she has accrued, it can be cashed out 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 par with federal employees who have had the option of accruing comp time since 1985.

Expert: Sean Higgins

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REFORM THE NATIONAL LABOR RELATIONS ACT AND 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 organize and workers' right to refrain from doing so. The Act outlines "unfair labor practices," which are activities employers and unions are prohibited from undertaking vis-à-vis one another. The Act created the National Labor Relations Board, an independent agency now comprising five members, in charge of enforcing the NLRA and overseeing union representation 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 of the board's members have a predisposition to favor one side or the other. With nearly all board members having a bias, the NLRB has been unable to act in an impartial manner, as it was created to do.

Congress should:

- Pass legislation to strip the National Labor Relations Board of its adjudication and rulemaking authority in order to avoid uncertainty surrounding national labor policy.
- Short of stripping the NLRB of its decision-making authority, pass legislation to add a sixth member. That modification would greatly reduce constant change in NLRB 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 want to retain a union as their bargaining representative.
  - Prohibit unions from penalizing workers who wish to decertify.
  - Protect workers and employers from union violence.

The NLRB is composed of five members, traditionally two Democrats, two Republicans, and a chair from the president's party, who determines the partisan balance. As a result, NLRB 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 Republican holds the presidency. Worse, even though changes in precedent are made in partisan fashion, federal courts routinely give judicial deference to the NLRB on the basis of the board members' "expertise." Constantly changing NLRB policy creates immense uncertainty for all stakeholders—employees, employers, and unions.

The National Labor Relations Act sets the rules for union representation elections and unfair labor practices. However, much of the Act is outdated and needs reform. The Employee Rights Act (H.R. 1855, 116th Congress), a comprehensive reform measure introduced in the past two sessions of Congress, would go a long way toward protecting workers' freedom to choose 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 would ensure that workers are able to participate in union elections anonymously, thus reducing 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, 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 votes in private and free from coercion. Card check involves union organizers asking individual workers to sign authorization cards that function 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.

Employers must agree to card-check elections in place of NLRB-supervised secret-ballot elections, which incentivizes unions to use a strategy known as a "corporate

campaign" to pressure 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 representative.

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.

Workers should have every right to organize and unions have every right to try to attract workers to join. However, there must be some limits on the kinds of activities that are allowed toward that goal. One such restriction should be outlawing union violence. Unfortunately, in its 1973 decision in *U.S. v. Enmons*, 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.

Expert: Sean Higgins

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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" from when a company has "direct control" over employees at another company to "indirect control." The Department of Labor quickly adopted the same definition. That change exposed tens of thousands of businesses across the United States to increased costs and liability if they merely did business with a company that violated workplace laws. The underlying motive of both agencies' actions was to make union organizing easier. In early 2020, both the NLRB and DOL issued new rules that restored the earlier "direct control" standard, but the Biden administration has pledged to re-include "indirect control." The Protecting the Right to Organize Act of 2019 (H.R. 2474) would also allow the "indirect control" standard."

Congress should:

- Pass legislation along the lines of the Save Local Business Act (H.R. 3441, 115th Congress), which would have codified 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, normally the larger one, exercises *direct* and *immediate* control over a smaller 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 imposed on employers, the NLRB's new joint employer standard put a wide swath of proven, established business models at risk, including franchising, contracting out a business' noncore functions, and using temporary staffing agencies. Those industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses.

Expert: Sean Higgins

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ENABLE VOLUNTARY UNION MEMBERSHIP

A foundation of current private- and public-sector labor relations law conflicts with individuals' right to freedom of association. It is possible, under the National Labor Relations Act and the 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 in an election, not a majority of votes from all employees in a workplace. In some states, employees must pay fees to a union for representation they may not want. Congress should amend federal labor relations law so that unions only represent 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 membership in a union is voluntary and unions only represent workers who voluntarily join and pay dues.

The NLRA restricts a worker's freedom to choose how he or she is 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 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 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.

The Civil Service Reform Act of 1978, which governs labor relations in the federal government, also grants unions the privilege to act as workers' exclusive representative. Section 7111 of the Act grants a labor union 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, employees should be free to choose whether they want to work under a collective-bargaining agreement, receive union services, and pay dues.

Unions complain that the duty of exclusive representation can create a "free rider" problem for them, since nonmembers can get the economic benefits derived from collective bargaining without having to pay dues. That is a fair criticism. Unions should not be obligated to provide representation for nonmembers, so long as those nonmembers are not prohibited from representing their own interests before their employer.

Expert: Sean Higgins

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REIN IN STATE OCCUPATIONAL LICENSING LAWS

Laws and regulations that require workers to be licensed to practice certain occupations have proliferated in recent decades. In 1950, only about 5 percent of jobs required workers to have some form of license. By 2017, that share had risen to more than 25 percent. Initially, most forms of licensing involved professions like medicine, in which safety could be an issue. However, in the name of consumer protection, licensing requirements have proliferated in fields, such as cosmetology, where no clear need exists for such requirements. Such regulations effectively protect established practitioners from new competition. The cost and complexity of licensing hurt Americans looking for employment, especially lower-income workers. Many people are also prevented from moving to another state because many licenses do not carry over from one jurisdiction to another.

A 2015 Brookings Institution study found that there were "far more cases" in which licensing reduced employment than where it improved the quality and safety of services. The restrictions have resulted in 2.8 million fewer jobs nationally and raised consumer costs by $203 billion annually, Brookings found.

Congress should:

- Consider proposals to use authority under the Commerce Clause of the Constitution to reform licensing requirements, such as by allowing licenses to be portable across states.

Expert: Sean Higgins

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REFORM THE CARES ACT'S "LABOR NEUTRALITY" PROVISION

Buried in the $2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act is a section that says that to qualify for a loan or loan guarantee from the Treasury Department, a business must "remain neutral in any union organizing effort for the term of the loan." In the context of labor organizing, "remain neutral" refers to management agreeing not to interfere with a union's bid to represent its workers. However, the term has no strict legal definition, which means unions can sue employers for any perceived non-neutral activity and put their CARES Act loans in jeopardy.

It is hard to see what purpose that provision serves in helping businesses survive the COVID-19 pandemic, especially since the neutrality requirement exists for the term of the loan. It is an invitation for unions to file lawsuits against businesses they are trying to organize, many of which are struggling to survive.

Moreover, avoiding burdening businesses with more regulations, and removing some existing overly burdensome ones, make for a sounder economic stimulus strategy than spending even more taxpayer dollars on fiscal stimulus, further increasing the already bloated federal debt.

Congress should:

- Amend the CARES Act to eliminate the "remain neutral" provision.

Expert: Sean Higgins

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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 a practice known as union official time, which allows federal employees to take paid time off from their government duties to conduct union business. Official time represents a massive taxpayer-funded subsidy to federal employee unions. In fiscal year 2016, official time cost $176 million, with federal employees spending 3.6 million hours conducting union business, according to recent data from the Office of Personnel Management. Official time is a misuse of taxpayer funds and should be eliminated. Federal employees should exclusively perform the activities they are hired to perform.

Congress should:

- Pass legislation to amend section 7131 of Title 5 of the Civil Service Reform Act to eliminate the use of official time by federal employees.
- At a minimum, pass legislation that requires federal agencies to monitor, record, and publish the cost, hours, and activity performed on official time.

In 2018, President Trump issued Executive Order 13837, which directs federal agencies to significantly curtail union official time. The order also directs agencies to carefully monitor official time to prevent unlawful uses and improves agency reporting requirements to enhance public disclosure of this union subsidy. However, those gains will be short-lived if Congress does not pass legislation codifying limits on the use of official time.

The Civil Service Reform Act of 1978 grants official time to federal employee unions during collective-bargaining negotiations and grievance procedures. Otherwise, official time is only permitted 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 solicitation of membership, elections of labor organization officials, dues collection, collective bargaining, filing of grievances, lobbying, or any activity previously permitted under official time—shall be performed while off duty.

Several Government Accountability Office reports have found that federal employees use official time without authorization, public employers are unaware of what activity federal employees engage in on official time, and the cost and hours of official time use are unknown because of poor accounting practices.

Expert: Sean Higgins

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