

Labor and Employment

With employers struggling to fill open positions and supply chains still playing catchup, federal employment policy needs to adapt to new economic realities rather than try to force emerging industries to conform to outdated laws. The recent supply chain crisis shows the damage to the broader economy when that flexibility and adaptability is lost. Shortages of truckers caused by federal regulations and antiquated ports resulted in freight backlogs that have rippled throughout the economy. Meanwhile, workers across the economy are opting for new work models such as gig economy jobs and contract work. Congress should focus on policies that protect individual workers and maximize their ability to sell their labor on an open market.

Congress should:

- ◆ Amend the Fair Labor Standards Act (FLSA) to allow workers to register with the Department of Labor (DOL) as freelancers.
- ◆ Pass the Employee Rights Act.
- ◆ Oppose reclassification of contract workers as traditional employees.

Fair Labor Standards Act

The Fair Labor Standards Act currently does not have an official category for “self-employed.” Congress should add one and allow workers to register with the Department of Labor as a freelancers. This could be done electronically through the main DOL website. Workers would get a freelancer ID number to provide when applying for contract work. This would clarify their employment status, exempting them from the

FLSA's requirements, such as allowing the employer to set regular work hours. Workers would be assured the opportunity to do short-term contract work on their own time and schedule. The amendment would override state laws like California's AB5 but only in instances in which a worker affirmatively seeks freelancer status.

Employee Rights Act

The Employee Rights Act (H.R. 7194, S. 3889, 117th Congress) would amend the National Labor Relations Act and related laws to provide certainty that the unions directly represent workers by requiring secret ballot elections, actual majority support to gain recognition, and outlawing coercive actions by the unions during elections. It would do nothing to limit the power of unions when they represent the collective voice of workers. It would also require unions to get members' authorization to spend their dues money on non-representation activities, such as political spending and activism.

Reclassification of contract workers as traditional employees

The Biden administration has already attempted to roll back the prior administration's updated definition of an employer-employee relationship and has supported limiting contract work in general, arguing that the practice is abusive toward workers. Other regulatory and legislative efforts to force employers to treat workers as traditional employees, regardless of the nature of the work, ignore the changing nature of work and the growing desire of individuals to be able to work in a time and manner of their choosing.

The Biden administration has sought to reinstate an Obama-era policy expanding the definition of "joint employment." Joint employment refers to when a company is legally responsible for workplace violations at another business. Traditionally, this applies only when one business has "direct control" over some aspect of the second company's work, such as in the case of a contractor-subcontractor relationship. Direct control places responsibility for workplace conditions on those who are actually responsible. The Biden administration wants joint employer status to extend to cases in which a business has "indirect control" over another company, a vague standard that could theoretically allow regulators to sanction companies for violations in which they had no role. Congress should reject this and instead amend the National Labor Relations Act to codify the direct control standard.

For Further Reading

Sean Higgins, “With PRO Act, Congress Readies National Version of California’s AB5 Fiasco,” *Open Market*, Competitive Enterprise Institute, July 22, 2021, <https://cei.org/blog/with-pro-act-congress-readies-national-version-of-californias-ab5-fiasco/>.