

# Labor and employment



## 8

Employers are struggling to fill open positions and supply chains are still fragile. Federal employment policy needs to adapt to new economic realities rather than forcing emerging industries to conform to outdated laws.

The supply chain crises in recent years highlight the damage to the broader economy when flexibility and adaptability are lost. Shortages of truckers caused by federal regulations and antiquated ports resulted in freight backlogs that have rippled throughout the economy and allowed unions to hold the economy for ransom.

Meanwhile, workers across the economy are opting for new work models such as gig economy jobs and contract work. It's time to focus on policies that protect individual workers and maximize their ability to sell their labor on an open market. To facilitate this new reality, 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; and
- Place the ports and their workers under the Railway Labor Act instead of the National Labor Relations Act.

**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. 2700, S. 1201, 118th 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.

The bill 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.

It would clarify when a business can be considered a joint employer with another business. 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 wanted 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.

Finally, the Employee Rights Act would codify workers' rights under the Supreme Court's ruling in *Communications Workers of America v. Beck*, preventing their union dues from being used to subsidize political activity and speech the workers oppose. The Union Members Right to Know Act would also guarantee this right.

**Ports under Railway Labor Act:** October's strike at east coast and Gulf of Mexico ports by the International Longshoremen's Association (ILA) threatened to bring the economy to a halt. The National Labor Relations Act (NLRA) gives the White House the authority to order a mandatory 80-day cool-down period to hold off such strikes but cannot prevent a walkout from eventually happening. Given the ports' importance to interstate commerce, Congress should place them under the Railway Labor Act (RLA) instead of the NLRA.

The RLA, which covers the rail and airline industries, gives the White House and Congress the power to resolve strikes by forcing binding contracts on both sides. This will encourage management and the unions to resolve future negotiations quickly to prevent federal intervention.

**Experts:** Sean Higgins, Iain Murray

**For further reading:**

Sean Higgins, testimony before Senate Health, Education, Labor and pensions Committee, Nov. 14, 2023, <https://www.help.senate.gov/imo/media/doc/a700be36-df10-7e25-faa8-b9a5b29ac93d/Sean%20Higgins%20testimony.pdf>

Sean Higgins, “The real issue in the port strike: Automation,” Competitive Enterprise Institute, Oct. 2024, <https://cei.org/blog/the-real-issue-in-the-port-strike-automation/>

Sean Higgins, “The Biden Administration Is Working Overtime to Make Work Less Flexible,” National Review, May 3, 2024, <https://www.nationalreview.com/2024/05/the-biden-administration-is-working-overtime-to-make-work-less-flexible/>

Sean Higgins, “The Forgotten History of the Wagner Act,” Competitive Enterprise Institute, June 2023, <https://cei.org/studies/the-forgotten-history-of-the-wagner-act/>