INSTITUTE FOR THE AMERICAN WORKER

Statement of
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Before the
House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions

"Protecting Workers and Small Businesses from Biden's Attack on Worker Free Choice and Economic Growth"

December 13, 2023

Introduction

Good morning. My name is F. Vincent Vernuccio. I'm President of the Institute for the American Worker. I4AW is a 501(c)3 nonprofit organization focused on empowering workers. We educate on the benefits of freedom, innovation, and collaboration between workers and job creators. We also educate on policy solutions to remove roadblocks to worker freedom. More information can be found on www.i4aw.org, a one-stop shop for the best resources labor policy debates facing our country.

I'm here to support the commonsense policies that will empower workers to rise and thrive in the 21st Century. I'm grateful that the majority of the Committee on Education and the Workforce shares this vision. Like the Committee's leadership, I believe that now is the time to give workers the freedom and flexibility that lead to bigger paychecks, better jobs, and stronger families and communities.

The American worker is at a crossroads. The modern economy is defined by unprecedented opportunity, innovation, and dynamism. Workers have a historic chance to shape and share in society's progress. Yet instead of empowering workers, many policymakers in Congress and the White House want to stifle worker freedom and flexibility. They're pushing for one-size-fits-all mandates and restrictions that will gut workers' rights and force workers into unions, whether they want it or not. Workers and their families can't afford this unfair and heavy-handed campaign, which will limit their opportunities, hold back wage growth, destroy jobs, and make American less competitive.

These anti-worker efforts have been in the making for some time. Many were first proposed or enacted under the Obama administration. According to a Coalition for a Democratic Workplace and Littler's Workplace Policy Institute study, the Obama National Labor Relations Board (NLRB) overturned a combined 4,559 years of precedent in labor law, applying burdensome mandates to job creators while restricting worker freedom in significant and unprecedented ways.[1]

Thankfully, many of these policies were rescinded by the last administration, restoring the traditional understanding of labor law while enacting new protections for workers. Yet some in Congress want to double down or even worsen the Obama-era approach, especially through the so-called *Protecting the Right to Organize Act*.[2] Despite its name, the *PRO Act* would leave workers with fewer protections of their rights. While that legislation has stalled, the Biden administration is enacting many of its policies via regulation. Workers are already suffering the consequences, and worse harm is on the way.

In the face of these threats, Congress has an opportunity to stand with workers. Specifically, Congress can do two things. First, lawmakers can preserve the best of the status quo, ensuring that tried-and-true

[1] Lotito, M., Baskin, M., & Parry, M. (2016). Was the Obama NLRB the Most Partisan Board in History? The Obama NLRB Upended 4,559 Years of Precedent. Coalition for a Democratic Workplace and Littler's Workplace Policy Institute By Counsel for Coalition for a Democratic Workplace. https://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf

[2] Text - H.R.20 - 118th Congress (2023-2024): *Richard L. Trumka Protecting the Right to Organize Act of 2023*. (2023, February 28). https://www.congress.gov/bill/118th-congress/house-bill/20/text; see also "BACKGROUNDER: *Protecting the Right to Organize Act*." n.d. Institute for the American Worker. https://i4aw.org/resources/protecting-the-right-to-organize-act/

worker protections are maintained. Second, lawmakers can make modest yet crucial reforms that empower workers with more freedom and flexibility.

I will discuss four such policies today. They include the *Employee Rights Act*[3], the *Save Local Business Act*[4], the *Modern Worker Empowerment Act*[5], and the *Small Businesses Before Bureaucrats Act*.[6] All four pieces of legislation enact simple and narrow reforms, yet the benefits to workers would still be substantial. Now is the time to empower workers to make the most of the 21st Century – for their sake and that of our country.

A Long-Term Vision for Labor Unions

The current campaign to force workers into unions is a direct response to plummeting union membership rates. The percentage of union members in the workforce hit its lowest level on record in 2022 – 10.1%, down from a third of the workforce in the 1950s.[7] While recent polling has shown that the public approves of the idea of unions, the same polls show that almost 60 percent of workers are "not interested at all" in joining a union, while only 11 percent are "extremely interested."[8]

The numbers should spark soul-searching among labor unions. Union leaders should ask why their membership numbers cannot keep up with the growing economy and what they can do to attract workers. Instead, they're asking the government to use its vast power to compel more workers into unions, often against their will and without regard to their rights.

The legislation I'm here to talk about would protect workers from this assault. They contain specific reforms that are tailored to the most urgent threats and challenges facing workers. Yet more broadly, the *National Labor Relation Act* is essentially a government-granted crutch for labor unions. It gives unions a legally granted monopoly over worker representation and the ability to force employers to negotiate with them.[9]

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[3] Text - H.R.2700 - 118th Congress (2023-2024): *Employee Rights Act*. (2023, April 28). https://www.congress.gov/bill/118th-congress/house-bill/2700/text; see also *Employee Rights Act Backgrounder*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/resources/employee-rights-act-backgrounder/

[4] H.R.2826 - 118th Congress (2023-2024): *Save Local Business Act*. (2023, April 25). https://www.congress.gov/bill/118th-congress/house-bill/2826; see also *Save Local Business Act*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/resources/save-local-business-act/

[5] H.R.5513 - 118th Congress (2023-2024): *To amend the Fair Labor Standards Act of 1938 and the National Labor Relations Act to clarify the standard for determining whether an individual is an employee, and for other purposes*. (2023, September 14). https://www.congress.gov/bill/118th-congress/house-bill/5513; see also *Modern Worker Empowerment Act*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/resources/modern-worker-empowerment-act/

[6] H.R.3400 - 118th Congress (2023-2024): *Small Businesses before Bureaucrats Act*. (2023, May 17). https://www.congress.gov/bill/118th-congress/house-bill/3400; see also *Small Businesses Before Bureaucrats Backgrounder*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/resources/small-businesses-before-bureaucrats-backgrounder/

[7] U.S. Bureau of Labor Statistics. (2022, January 20). *Union Members Summary*. Bls.gov. https://www.bls.gov/news.release/union2.nr0.htm

[8] McCarthy, J. (2022, August 30). *U.S. approval of labor unions at highest point since 1965*. Gallup. https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx

[9] Vernuccio, F. V. (n.d.). *Exclusive vs. Focused: Members-only Agreements*. Mackinac Center. https://www.mackinac.org/20702

This approach fails workers. It mires the vast majority of unions members in one-size-fits-all collective bargaining agreements that limit individual workers' ability to succeed in the dynamic modern economy. For instance, the current restrictive union model holds back workers' earning potential. As Rachel Greszler of the Heritage Foundation recently wrote, "non-union wages increased by 24% over the past five years," while "union wages rose by less than 17%."[10]

Some unions have tried to overcome these issues with more flexible approaches. For instance, sports and entertainment unions allow for personalized contracts that guarantee pay and benefit floors but allow the employee to negotiate for greater compensation. Unfortunately, the NLRA gives most unions little-to-no incentive to better serve workers, although the reforms discussed today would help.

Even former AFL-CIO President Richard Trumka, for whom the *PRO Act* is posthumously named, remarked that "labor law needs to be modernized." He said reforms are necessary so "that workers and employers actually can come together… to start working in a global economy." [11]While I disagree with Mr. Trumka on the proposed solutions, I share his view that labor law is out of date and needs modernization. Specifically, labor law needs to empower workers, instead of taking power and rights away from them.

Jack Lessenberry, a commentator on Michigan Public Radio commented almost a decade ago "A lot of union leadership seems to have figured out what to do in 1936. If 1936 ever comes back, they're ready. But it's not coming back, and they have to come up with a new model."[12]

Unions need to modernize and move toward voluntary representation. Unions should not control workers against their will or stifle their voices and choices, nor should the government prop them up with one-sided policies. Hopefully the modest policies we discuss today will pave the way for larger labor-law reforms that end union compulsion and coercion while enacting unprecedented worker freedom and flexibility.

The Secret Ballot

The bedrock of worker freedom is the secret ballot. In the same way that Americans vote privately in all political elections, workers should be free to vote privately on unionization. Without a secret ballot, workers could be subject to intimidation and harassment, harming their ability to vote their conscience while giving unions unfair control over their workplace and future.

Unfortunately, the secret ballot is under assault. The Biden administration has effectively gutted secret-ballot elections in unionization campaigns by instituting backdoor card check. The NLRB instituted this policy in the 2023 *Cemex Construction Materials Pacific, LLC* case. A similar policy is also in the *PRO Act*.

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[10] Greszler, R. (n.d.). *What Big Labor Doesn't Want You to Know This Labor Day*. The Heritage Foundation. Retrieved October 13, 2023, from https://www.heritage.org/jobs-and-labor/commentary/what-big-labor-doesnt-want-you-know-labor-day

[11] *Future of Unions in America, Labor Leaders | C-SPAN.org*. (n.d.). Www.c-Span.org. Retrieved October 13, 2023, from https://www.c-span.org/video/?298902-2/future-unions-america-labor-leaders

[12] Vernuccio, F. V. (n.d.). *Unionization for the 21st Century: Solutions for an ailing labor movement*. Mackinac Center. https://www.mackinac.org/20699

Federal law currently allows card check, in which unions pressure workers to sign cards in support of unionization. Unions can intimidate, harass, and publicly pressure workers to sign the cards. The union then presents the cards to an employer, demanding the right to represent workers. However, employers can request a secret-ballot election to verify that a majority of workers support unionization, free from union intimidation.

Previously, if an employer was found to have committed an unfair labor practice in the election, the Board would usually hold a second secret-ballot election. But no longer. The NLRB can now throw out the first election results. Instead of holding a second secret-ballot election, the NLRB will instead recognize the original card check, giving the union control over workers. This change in policy fundamentally ignores workers' wishes. Unions would tell them that signing a card would still let them have a secret-ballot election, yet the union would then pull the rug out from under workers if the election doesn't go the union's way.

The message couldn't be clearer: If workers vote the way unions want, the election stands. If they don't, the election will be ruled invalid and workers will be unionized anyway. Backdoor card check also encourages unions to file dubious accusations against employers in every unionization election.

Both formal card check and backdoor card check are fundamentally anti-worker. There are countless stories of unions intimidating workers into signing cards. Consider these examples from a study I wrote for the Mackinac Institute for Public Policy:

> [O]n the day before the election, a bargaining unit employee approached another employee and solicited her to sign a union authorization card. The card solicitor allegedly stated that the employee had better sign a card because if she did not, the Union would come and get her children and it would also slash her car tires…
>
> Former United Steelworkers union organizer Ricardo Torres testified about how his union wanted him to use intimidation tactics to obtain signed cards. Torres told the committee he quit his job with the union after a senior Steelworkers union official asked him to "threaten migrant workers by telling them they would be reported to federal immigration officials if they refused to sign check-off cards during a Tennessee organizing drive." He noted that "this was the last in a long list of abuses I had observed as a union organizer."
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> Torres described other such tactics: Visits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union. In most cases, constant pressure at work and home was enough to make workers break and at least stop talking against the union—neutralizing them, so to speak.
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> In a secret ballot election, threats of violence, intimidation and harassment have little effect. As noted previously, workers can simply sign the authorization card to get rid of the harasser, then vote their conscience while no one is looking and without fear of retribution for making the "wrong" choice. Employees may take advantage of the secret ballot's protections in this way quite regularly, as it is not uncommon for unions to receives fewer "yes" votes than received signed cards.

> Former UNITE HERE organizer Jennifer Jason echoed Torres's account, telling the Committee, "I was taught to manipulate workers just to get a majority on the cards. I learned that promises made by organizers at the worker's house had little to do with how the union actually functions as a service organization."
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> She noted that the start of a card check campaign was often called a "blitz," as teams of organizers went "directly to the homes of workers to get cards signed," as a type of "surprise attack on the workers." After participating in these blitzes, Jason testified that she "began to realize that the number of signed cards had less to do with support for the union and more to do with how effective an organizer was at doing their job." This is why, she explained, in a secret ballot election the final vote in favor of a union "is always significantly less than the number of cards actually collected."[13]

Federal courts have long recognized that secret-ballot elections are superior to card check at gauging workers' true wishes. Consider the following from a recent study by the Coalition for a Democratic Workplace:

> The Supreme Court and United States Courts of Appeal have… confirmed the primacy of secret ballot elections. In NLRB v. Gissel Packing Co., Inc., the Supreme Court addressed whether and when employers were required to recognize a union based on the presentation of signed authorization cards. The Court stated that cards were "admittedly inferior to the election process," and "[w]e would be closing our eyes to obvious difficulties if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers."
>
> In Linden Lumber v. NLRB, the Supreme Court reiterated that an employer does not violate the Act by refusing to accept cards and insisting on a secret ballot election to determine the true wishes of employees. The Court stated, "the policy of encouraging secret elections… is favored," and "the election process had acknowledged superiority in ascertaining whether a union has majority support…"[14]

Labor unions go to great lengths to avoid secret-ballot elections and organize workers based solely on card check. They launch so-called "corporate campaigns," with the intention of shaming employers into agreeing to "neutrality agreements." Under such agreements, employers forfeit their First Amendment right to talk about unionization while promising not to hold a secret-ballot election. They also give unions the personal information of their employees, including home addresses. Corporate campaigns and neutrality agreements show little respect for workers' wishes, and in many cases, unions target workers themselves.

My study with the Mackinac Center for Public Policy has documented this phenomenon:

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[13] Vernuccio, F. V. (n.d.). *Intimidation*. Mackinac Center. Retrieved October 13, 2023, from https://www.mackinac.org/26958

[14] "How Neutrality and Card Check Agreements Harm the American Worker." n.d. Coalition for a Democratic Workplace. Retrieved October 13, 2023, from https://i4aw.org/resources/protecting-the-right-to-organize-act/ https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf

> If an employer resists, unions often employ what is known as a "corporate campaign," a sustained and wide-ranging assault on a company's reputation that can border on blackmail and extortion.
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> The U.S. Court of Appeals for the District of Columbia Circuit defined corporate campaigns as: "[A] wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public."…
>
> In 2011, the SEIU "Contract Campaign Manual" was revealed during the discovery process in a lawsuit. A catering company, Sodexo, had sued the union for racketeering and extortion during its corporate campaign against the company. The manual contains a chapter titled "Pressuring the Employer," which recommends using corporate campaigns to "damage an employer's public image and ties with community leaders and organizations" and to jeopardize "relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds."…
>
> David Bego, president and CEO of Executive Management Services, Inc., told the House Subcommittee on Health, Education, Labor and Pensions how the SEIU ravaged his company through a corporate campaign. Bego would not capitulate to the SEIU's demands for a neutrality agreement, which included handing over his employees' personal information and agreeing to a card check authorization of the union. According to Bego's testimony, an SEIU organizer told him, "Mr. Bego, we enjoy conversation but embrace confrontation. If you do not execute this neutrality agreement, we will begin to target you, your employees and your customers."[15]

The Coalition for a Democratic Workplace has accurately summed up the faulty logic that unions use to justify neutrality agreements: "Unions argue that neutrality agreements are beneficial to employees, because they determine whether a majority of employees desire union representation more expeditiously than a secret ballot election. This argument falsely presumes that the interests of employees and unions are one and the same."[16] As workers can attest, their interests frequently differ from union demands.

Workers deserve better than to be harassed, intimidated, and compelled into unionization against their will. That's why the *Employee Rights Act* (ERA) is so important. The ERA would give private-sector workers under the *National Labor Relations Act* the right to a secret-ballot election in every unionization campaign – no exceptions. That means no card check and no backdoor card check.

The *Employee Rights Act* would ensure that workers can make their voices heard without the threat of labor union intimidation or harassment. In the same way that the secret ballot is the gold standard for all

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[15] Vernuccio, F. V. (n.d.). *Corporate Campaigns*. Mackinac Center. Retrieved October 13, 2023, from https://www.mackinac.org/26960

[16] "How Neutrality and Card Check Agreements Harm the American Worker." n.d. Coalition for a Democratic Workplace. Retrieved October 13, 2023, from https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf

political elections in America, it should be the gold standard for all unionization elections. Both common sense and worker freedom demand it.

Worker Privacy

Workers deserve to have their privacy and personal information protected. It's a matter of saving them from union intimidation and harassment, especially at their homes.

Unfortunately, workers have no such protection during union organizing. The NLRB has interpreted federal law to require that employers provide unions not only with workers' schedules and work contact information, but also their home address, email, and home and cell phone numbers. That's bad for worker privacy, but the situation could get even worse. The *PRO Act* doesn't include any limitations on how unions can use workers' personal information nor give the NLRB the authority to protect worker privacy. That would open the door to even greater harassment of workers, far beyond unionization campaigns.

Additionally, the Biden administration's Department of Labor has proposed a regulation that would force employers to give labor unions the personal information of agricultural workers, including their addresses in their home country and messaging applications such as WhatsApp. Unions could request this information annually, leading to ongoing harassment and intimidation.[17] While these workers would not be affected by the reforms discussed today, their predicament still deserves attention. It shows the lengths to which the Biden administration is going to give unions contact information at the expense of worker privacy. It may also signify a coming threat to the entire workforce.

Unions have a long track record of using workers' personal information to harass and intimidate workers, especially in the context of card-check campaigns. Consider this example from my study for the Mackinac Center for Public Policy:

> Mike Ivey… testified that the UAW obtained personal information on all of his company's employees. "It wasn't enough that employees were being harassed at work, but now they are receiving phone calls at home," he said. "The union's organizers refuse to take 'no' for an answer. Some employees have had five or more harassing visits from these union organizers. The only way, it seems, to stop the badgering and pressure is to sign the card."

Unions are also known to use workers' personal information against them if they exercise their right to leave a union. According to the National Right To Work Legal Foundation:

> One November day in 2007, 33 AT&T workers in central North Carolina found out that their Social Security numbers and other private information had been posted for the world to see – exposing them to identity theft and credit fraud…
>
> All the employees whose names and personal information were posted had exercised their freedom under North Carolina's Right to Work law to resign from membership in a labor union – the Communications Workers of America, or CWA – and cease paying union dues…

[17] Improving Protections for Workers in Temporary Agricultural Employment in the United States, Fed. Reg. 63750-63832 (Sept. 15, 2023) (proposed rulemaking). https://www.federalregister.gov/documents/2023/09/15/2023-19852/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states

> After the workers exercised their Right to Work, CWA union official Judy Brown emailed a spreadsheet that contained the employees' personal data (including their Social Security numbers) to other CWA officials with instructions to "forward this information to your affected locals." CWA Local 3602 union president John Glenn posted the spreadsheet on a public bulletin board. Other CWA union officials likely disseminated the information through email and other means.
>
> A resulting National Labor Relations Board, or NLRB, investigation affirmed that the employees' personal information was posted, but the board's general counsel refused to prosecute the union.[18]

Workers should have their privacy protected. That's why workers need the *Employee Rights Act*. The ERA would give workers the freedom to choose what personal information unions receive. It would also penalize unions for using workers' personal information for anything other than representation. Workers shouldn't have to fear harassment and intimidation, especially at home. The ERA gives workers and their families the commonsense privacy and protection they deserve.

Political Protections

Workers shouldn't be forced to fund politicians and advocacy campaigns they don't wish to support. Unfortunately, federal labor law allows unions to spend workers' dues money on politics without their consent.

From 2010 to 2018, private unions spent a stunning $1.6 billion on politics and partisan causes, according to the Center for Union Facts.[19] Workers may strongly disagree with their unions' politics, yet they typically find it hard to opt out. Unions have deliberately made the opt-out process difficult to understand and navigate. They don't want workers to withdraw funding of union politics.

Last year, a union shop steward in Pennsylvania named Curtis Coates grew so upset with his union's politicking that he tried to resign his union position and quit his union membership. The union failed to answer his requests for months, while continuing to deduct dues from his paycheck. Thankfully, the NLRB stopped the dues deductions from Mr. Coates' paycheck. The NLRB also required the union to post a notice at his workplace, telling his co-workers that it "will not fail and refuse to honor your request to resign your union membership."[20]

The *Employee Rights Act* would protect workers' wishes. Under the ERA, workers would be able to opt into union political spending, instead of the current system of opting out. For those who don't opt in, unions could only use their dues on collective bargaining and contract administration. Additionally,

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[18] *Court exempts union bosses from laws against identity theft*. (2012, October 27). Washington Examiner. https://www.washingtonexaminer.com/court-exempts-union-bosses-from-laws-against-identity-theft?goback=.gde_3012900_member_179636795#.UI7EL2c1WAg

[19] *How Labor Unions Finance Their Political Agenda: 2010-2018*. (n.d.). Center for Union Facts. Retrieved October 13, 2023, from https://employeerightsact.com/wp-content/uploads/2019/08/2010-2018_ERA_HowLaborUnionsFinanceTheirPolAgenda-3.pdf

[20] *Northern PA Metal Worker Prevails in Federal Case Charging CWA Union with Illegal Dues Deductions*. (2023, March 3) National Right to Work Legal Defense Foundation. https://www.nrtw.org/news/curtis-coates-cwa-settlement-03032023/

workers who choose to support union political spending would have to opt in annually, ensuring ongoing protection. Workers should opt-in to political spending based on their own wishes, not opt-out when a union lets them. That's common sense.

Independent Contracting

Independent contracting, less formally known as freelancing, is a popular arrangement with tens of millions of workers. More than 73 million Americans freelanced in 2022.[21] This arrangement empowers workers to scale their hours up and down based on their personal situations. If workers need to take time off to help with a sick spouse or parent, independent contracting enables them to do so. Similarly, if a worker wants to make some extra money to buy a present for their child, independent contracting makes it possible.

Unfortunately, independent contracting is endangered by legislation and regulation. Unions want to end independent contracting because independent contractors are difficult to unionize. The *PRO Act* would make it significantly harder for people to classify individuals as independent contractors. In its 2023 *Atlanta Opera* case, the NLRB made it more difficult for individuals to work as independent contractors under the NLRA.[22] The Department of Labor (DOL) has proposed a separate rule that would reclassify many independent contractors as employees.

The NLRB and DOL policies introduce conflicting definitions that are likely to shift between presidential administrations, leading to less clarity and stability for workers and employers. Despite their differences, these policies have one thing in common: They jeopardize independent contractors, preventing workers from making the choices that are best for them and their families. Restricting independent contracting is profoundly anti-worker.

The *PRO Act* and the Biden administration are trying to nationalize some version of California's so-called "ABC Test." The test encompasses Absence of Control, Business of the Worker, and the Usual Course of Business.[23]

A recent study from the Mercatus Center at George Mason University provides what may be the first empirical assessment of the effects of California's AB5 law. The paper finds that "self-employment and overall employment decreased post-AB5 [but that there is] no evidence that traditional employment increased…" The paper shows that "AB5 did not simply alter the composition of the workforce as intended by lawmakers, with more workers becoming employees and fewer workers as independent contractors. Instead, [it] suggest that AB5 is associated with a significant decline in self-employment and overall employment."[24]

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[21] *How Many Freelancers Are There in 2023? (U.S. & World) - The Small Business Blog*. (n.d.). Thesmallbusinessblog.net. Retrieved October 13, 2023, from https://thesmallbusinessblog.net/how-many-freelancers-are-there/

[22] *Board Modifies Independent Contractor Standard under National Labor Relations Act*. (n.d.). National Labor Relations Board. Retrieved October 13, 2023, from https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor

[23] *Independent Contracting- DOL*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/regulation-watch/independent-contracting-proposed-rule/

[24] Liya Palagashvili, Paola Suarez, Christopher Kaiser, and Vitor Melo. *Assessing the Impact of Worker Reclassification: Employment Outcomes Post California's AB5*. Mercatus Working Paper (forthcoming). Summary of study available here: "Employment Outcomes Post California's AB5," Labor Market Matters:

The *PRO Act* enacts the ABC test in whole. Both the NLRB and DOL have said they can't fully implement the ABC test.[25] Yet their proposed rules would still result in the same type of harm to workers who want to work for themselves.

The NLRB's *The Atlanta Opera* decision returns to the FedEx II standard, which was issued in 2014 yet rejected twice by federal courts. It uses a vague multi-factor test riddled with uncertainty. The previous test, known as *SuperShuttle*, relied on an entrepreneurial factor of whether the individual has opportunity for profit or loss and control of the work.

As my organization has explained, the DOL rule would:

- De-emphasiz[e] a focus on the core factors of "nature and degree of control over the work" and the "worker's opportunity for profit and loss" established in the 2021 DOL rule, which provided clarity on the most important economic reality factors.

- Elevat[e] consideration of certain factors such as investment and initiative as well as consideration of how work performed by independent contractors (ICs) may be "central or important" to a business they provide services for. Determining whether certain work is central or important to a business leaves considerable leeway for DOL to impose its own interpretations in unpredictable fashion.

- The new DOL rule would also emphasize new factors and perspectives in evaluating control by a business, including around price-setting, scheduling, and "the ability to work for others," again expanding subjective, unpredictable interpretations by DOL.

- Perhaps most concerning, the rule would give DOL the ability to make employment determinations based on theoretical control, "not limiting control to control that is actually exerted." Such a broad interpretation would have a chilling effect on self-employment, putting conceivably all independent contracting work in jeopardy.[26]

Whether it's the NLRB, the DOL, or the *PRO Act*, unions are putting their demands above workers' wishes. A staggering 77% of independent contractors who use app-based platforms prefer this arrangement. That include 76% of white, 73% of Hispanic, and 72% of Black app-based earners.[27] They prefer the freedom and flexibility that independent contracting allows. Additionally, most of the jobs that would remain independent contractors are white-collar jobs. That means middle-class and low-income workers would suffer the most if independent contracting is limited by government policy.

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https://liyapalagashvili.substack.com/p/employment-outcomes-post-californias?r=1fnn0&utm_campaign=post&utm_medium=web

[25] *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, Fed. Reg. 62218-62275 (Oct. 13, 2022) (proposed rulemaking). https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act

[26] *Independent Contracting- DOL*. (n.d.). Institute for the American Worker. https://i4aw.org/regulation-watch/independent-contracting-proposed-rule/

[27] Temple, Y. (2023, April 28). *Survey Finds App-Based Work Crucial to Mitigate Inflation; Majority Prefer to Remain Independent*. Flex. https://www.flexassociation.org/post/release-new-survey

The Institute for the American Worker has talked to many workers who prefer independent contracting and were harmed by California's law.[28] These stories were collected before numerous exemptions to the law were passed, based on growing recognition that the ABC Test did tremendous damage to workers and families. [29] Neither the *PRO Act* nor *Atlanta Opera* contain these exemptions.

My organization has spoken to many workers who can attest to the value of independent contracting.

We spoke with Shelby Givan:

> Shelby Givan was a full-time teacher until she became pregnant with her first child in 2019. In order to spend more time at home with her son, she elected to begin job sharing at her local elementary school, splitting responsibility with another educator. She also began working as a freelance educator to supplement her income. The contract role – a virtual learning opportunity that was based overseas – allowed her to work early in the morning before her son woke up, enabling her to spend most days fully devoted to being a full-time, stay-at-home mother. But the passage of Assembly Bill changed that. Shelby, along with many of her California-based friends who also worked as freelance educators, was notified that she was no longer legally allowed to work.
>
> Shelby's family was faced with several decisions, including her potentially having to return to full-time work and leave her son in someone else's care, a decision that she felt was being made for her.
>
> "It's like the government is trying to tell me that they know what's best for me and for my family more than I do," Shelby said. "They took away my right to work and my right to make decisions about my own life. It's impacting my ability to be the mother that I want to be and forcing me to take time away from my family, and for me, that's personal."
>
> So personal, in fact, that it led Shelby and her family to relocate out of California. The family is moving to Idaho, where Shelby can freely work as she sees fit, including becoming an independent contractor once more.[30]

Margarita Reyes also shared her story:

> Margarita Reyes is an actor and content and film producer in California. She primarily works in the indie film industry, with low-budget filmmakers that do not have the budget to hire every employee as a full-time worker. So Margarita, along with hundreds of other actors and producers, often works as an independent contractor for filmmakers. Freelancing afforded

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[28] *Stories Archive*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/stories/

[29] *Bill Text - AB-2257 Worker classification: employees and independent contractors: occupations: professional services.* (n.d.). Leginfo.legislature.ca.gov. Retrieved October 13, 2023, from https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2257

[30] *Shelby Givan, Teacher and Mother*. (n.d.). Institute for the American Worker. Retrieved October 13, 2023, from https://i4aw.org/stories/story-lorem-title-1/

Margarita an income and the flexibility to pursue her passion as she saw fit – until Assembly Bill 5 [California's ABC Test].

Margarita says that the indie film industry has been decimated by AB5, including the actors, writers, directors, and producers that work within it. She has not signed a film contract since January 1, 2020. She has since tried to find acting work that hasn't been impacted by AB5, but her options have been even more limited since the COVID-19 crisis took its hold in the state.

Margarita knows the value of independent contracting more than most people: Freelancing had empowered her to provide for her family while raising her daughter as a single mother. Despite the impact that AB5 has had on her personally, she is more worried for the single parents, young mothers, and seniors who rely on contracting to survive. Freelancing sustained Margarita and her daughter when they needed the income most. She worries for those who have lost their ability to provide for their families as a result of AB5.

For the sake of workers like Shelby and Margarita and tens of millions of others, independent contracting deserves full protection under federal law. The *Employee Rights Act* and the *Modern Worker Empowerment Act* would protect the ability of workers to choose what model of employment works best for them.

The ERA simply amends the *Fair Labor Standards Act* (FLSA) to determine independent contractors by using the usual common law rules. The MWEA creates a test to determine if the individual's work is under the control of a company and if the individual has the opportunity and risks inherent in entrepreneurship. Either commonsense policy would protect independent franchising and ensure that workers can continue to decide what's best for them and their families.

Franchising and the Joint-Employer Standard

Franchising is essential to workers' success. It provides job opportunities while giving workers an easier chance to start their own small business. More than 775,000 franchises currently operate in the U.S., employing more than 8.2 million workers.[31] Women and minorities own a disproportionate share of franchises, compared to non-franchise businesses.[32] This proven business model needs to be protected for the sake of workers and entrepreneurs.

Unfortunately, the franchise model is at risk of being destroyed. On October 26, 2023, the Biden NLRB finalized a rule to change the "joint employer standard" on franchised and other businesses.[33] The NLRB reinstated and expanded a rule from 2015, which was repealed in 2017.[34] The Obama-era NLRB's 2015

[31] *Franchise Economy*. (2020). Franchise Economy. https://franchiseeconomy.com/
[32] Haller, M. (2022, August 21). Opinion | Big Labor Eats Small Business in California. *Wall Street Journal*. https://www.wsj.com/articles/big-labor-eats-small-business-in-california-fast-act-counter-service-union-minimum-wage-franchise-entrepreneurs-newsom-11661107715
[33] Board Issues Final Rule on Joint-Employer Status | *NLRB* | *Public Website*. (2023). Nlrb.gov. https://www.nlrb.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status
[34] *NLRB Overrules Browning-Ferris Industries and Reinstates Prior Joint-Employer Standard | NLRB | Public Website*. (2012). Nlrb.gov. https://www.nlrb.gov/news-outreach/news-story/nlrb-overrules-browning-ferris-industries-and-reinstates-prior-joint

decision overturned 30 years of precedent.[35] Under the Obama and Biden proposed joint-employer standard, a larger business that owns a franchise's brand would be liable for the smaller franchise's workers and operations, even when the larger business exerts no actual control.

This policy defies common sense. The previous standard required a larger business to exert control in order to be a joint employer, reflecting the reality of the franchise business model. So why is the Biden administration pursuing this policy? Because the previous standard made it harder for unions to organize franchises.

The new standard flips the script, paving the way to unionization while ignoring the nature of the franchise business model. In response, larger companies will take over small franchise businesses while offering few to no franchise opportunities going forward. This policy will lead to less entrepreneurship and fewer jobs for workers. As such, the joint-employer standard is anti-worker.

The NLRB rule also affects contractors and subcontractors. Take, for example, rural hospitals. Since 2005, nearly 200 rural hospitals have closed or converted to provide fewer services.[36] They operate on tight budgets and can have difficulties with staffing but are still vital for their communities. They often rely on contractors and subcontractors for jobs such as janitorial services to nurses, technicians, and doctors. The joint employer standard increases the liability potential of these workers, making it harder for rural hospitals to hire them. That could lead to a further loss of services. The health care crisis facing rural communities would only get worse.

Workers need franchising and sub-contracting. The *Employee Rights Act* and the *Save Local Business Act* would help protect job creators and their employees. Both bills would ensure that a larger business is only a joint employer if it "directly, actually, and immediately" exercises control over a smaller business's employment decisions.[37] This commonsense reform would ensure that franchising and sub-contracting continue to provide employment and entrepreneurship opportunities to millions of workers.

Small Businesses and Tribal Sovereignty

Small businesses are the engine of the American economy. They create nearly two-thirds of net new jobs.[38] Yet because they're small, they're far less able to absorb the cost of federal labor regulations. That's why the NLRA allowed the NLRB to exempt small businesses.

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[35] Lotito, M., Baskin, M., & Parry, M. (2016). *Was the Obama NLRB the Most Partisan Board in History? The Obama NLRB Upended 4,559 Years of Precedent. Coalition for a Democratic Workplace and Littler's Workplace Policy Institute By Counsel for Coalition for a Democratic Workplace.* https://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf

[36] *Detroit Free Press*. (n.d.). Www.freep.com. Retrieved October 13, 2023, from https://www.freep.com/story/news/local/michigan/2023/10/12/michigan-rural-health-care-hospitals-lakeview-kelsey/70975948007/

[37] Text - H.R.2700 - 118th Congress (2023-2024): *Employee Rights Act*. (2023, April 28). https://www.congress.gov/bill/118th-congress/house-bill/2700/text

[38] U.S. Chamber of Commerce. (2023, April 10). *The State of Small Business in America*. Www.uschamber.com. https://www.uschamber.com/small-business/state-of-small-business-now

Unfortunately, the NLRB's financial thresholds have not changed since 1958. They now cover countless small businesses that were never supposed to be included under the law's purview. For instance, retailers are regulated at $500,000 in revenue, a small sum for that kind of business. Non-retail companies are regulated with revenue as low as $50,000.

If these thresholds were adjusted for inflation, retailers would be regulated at just over $5 million in revenue and non-retailers at just over $500,000. Since that hasn't happened, these small job creators must now deal with substantial regulatory and labor burdens that were only intended to apply to large- and medium-sized businesses.

Workers need small businesses to be saved from over-regulation. The *Small Businesses Before Bureaucrats Act* protects local job creators and the millions of workers they employ. It increases those thresholds 10-fold, effectively matching inflation over the past 65 years.

Similarly, the *Employee Rights Act,* by including the *Tribal Labor Sovereignty Act,* exempts tribal owned businesses on tribal land from the *National Labor Relations Act*.
These simple modernizations will lead to a new era of job creation at small businesses, benefiting workers and their families.

Conclusion

Workers are looking to Congress for commonsense leadership. They need protection from short-sighted policies such as the *PRO Act* and the one-sided mandates coming from the Biden administration. These policies are already hurting workers and families, yet the worst is yet to come. Congress can defend workers with modest reforms that protect the best of current labor law while enacting simple yet powerful new protections of workers' rights. These policies would ensure that workers have the freedom and flexibility they need to succeed and lift up their families.

Labor unions will oppose these reforms, but workers' interests should come first. Workers deserve to work collaboratively with their employers while making voluntary decisions about unionization, free from intimidation and harassment. Workers should never be coerced into unionization or suffer the loss of their freedom and opportunities in the workplace. Unions should not be unfairly propped up by one-size-fits-all mandates and government policies. Over the long run, unions should move toward voluntary organizations that convince workers to join based on the value they provide.

The stakes could not be higher. If Congress doesn't act, tens of millions of workers will suffer from forced unionization and heavy-handed policies that stifle their ability to rise and thrive. Congress can empower workers with the freedom and flexibility that have been proven to lead to bigger paychecks, better jobs, and a brighter future. The America worker is at a crossroads. Now is the time to give workers the power to go in the direction that's best for them, their families, and our entire country.