Executive Branch Overreach in Labor Regulation

Diana Furchtgott-Roth
Senior Fellow and Director, Economics21
Manhattan Institute for Policy Research

The Regulation and Rule of Law Initiative
Hoover Institution
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Table of Contents

Glossary

ACA: Affordable Care Act

ADEA: Age Discrimination Employment Act

CEA: Council of Economic Advisers

EEOC: Equal Employment Opportunity Commission

ERISA: Employee Retirement Income Security Act of 1974

FINRA: Financial Industry Regulatory Authority

FLSA: Fair Labor Standards Act

GAO: Government Accountability Office

GDP: Gross Domestic Product

HIPAA: Health Insurance Portability Accountability Act

IRA: Individual Retirement Account

LMRDA: Labor-Management Reporting and Disclosure Act of 1959

NLRB: National Labor Relations Board

SEC: Securities and Exchange Commission

SEIC: Service Employees International Union

TDU: Teamsters for a Democratic Union

I. Introduction and Summary

There is no better example of executive branch overreach than in the agencies that regulate relations between employers and workers. Some types of regulation are under the auspices of one agency, but labor regulation is handled by at least three federal agencies and a significant number of state and local agencies. Labor regulations pose a wealth of litigation opportunities, because employers have to satisfy the Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission—as well as state agencies in their business locations. Sometimes regulations in these different bodies are contradictory, making it impossible for employers to stay within the law.

Examples to be discussed below include an expansion of a form with 180 data points to one with 3,360 data points under the Paperwork Reduction Act, and a ban on firms' confidential advice on unionization from attorneys. These rules, and many others, were put in place during the administration of President Obama. Some are in the process of being rescinded or revised, but others remain in place, stifling productivity, wages and economic growth. It is important that efforts to roll back burdensome regulations follow administrative procedures carefully based on strong evidence to ensure that revisions will not be overruled by courts, and to make it difficult for over-reaching rules to be reintroduced in the future.

A series of court decisions in 2016 indicated that the Obama administration exceeded its legal boundaries as three judges blocked rules from taking effect. Within a six-month period, courts blocked the Labor Department's persuader rule, forbidding companies from getting confidential advice on labor issues; halted federal contracting rules that would have limited employers with alleged violations of labor laws from bidding on federal contracts; and put a stop on the expanded overtime rule.

President Obama's Secretary of Labor Thomas Perez and Wage and Hour Administrator David Weil were the architects of many rules. One justification came from Weil's book, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014.)[1] Weil, who served as Administrator between 2014 and 2017, argued that America needed to go back to 1950s laws in order to make sure workers had an adequate standard of living, even though the standard of living in 2016 is far higher than in 1955. However, although well-intentioned, in many cases the rules put in place went beyond the scope of existing law.

Weil suggested that businesses are purposely misclassifying employees to allow employers to reduce wages, benefits, and protections, thereby lowering labor costs.[2] But

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[1] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

[2] David Weil and Laura Fortman, "Misclassification and Home Care Workers," U.S. Department of Labor Blog, (February 25, 2016), https://blog.dol.gov/2016/02/25/misclassification-and-home- care-workers/

Weil provided no empirical evidence to support his allegation of intentional misclassification. The complexity and ambiguity of the classification rules suggest that misclassification, if it occurs, may be primarily unintentional. Millions of workers drive for Uber, perform jobs on TaskRabbit, and cook for EatWith. Such companies offer opportunities unavailable elsewhere. Though the Department of Labor does not refer directly to the platform economy in its critiques of the new model of work, it often cites court cases and commentaries that attack companies that use the new technology.

Furthermore, the number of independent contractors is declining as a share of employment. In the new Contingent Worker Supplement released by the Bureau of Labor Statistics in June 2018, the broadest measure of independent contractors in 2017 was 10.6 million independent contractors, representing 6.9 percent of total employment, smaller than the 7.4 percent in 2005.[3] Weil's concern about an increasing "gig" economy where more choose alternative work arrangements is misplaced. He was attempting to upend labor market regulations to address circumstances that have not occurred.

Workers for companies based on the platform economy are independent contractors and cannot be organized under the NLRA. Some rules put in place during the Obama administration were explicitly designed to protect workers from the supposed dangers of these new jobs. Secretary Perez explained that many platform economy jobs present a false choice between protecting workers and encouraging innovation.[4] He claimed that preventing the misclassification of employees as independent contractors can ensure minimum wage, overtime, and safety protections. The resounding principle behind his actions is that "A fair day's work deserves a fair day's pay."

Platform economy jobs are attractive to some because they allow individuals to monetize pockets of time that would otherwise be wasted. With an unemployment rate at 3.8 percent in May 2018, and 6.7 million unfilled vacancies, practically anyone who wants a full-time job can find one. Some prefer the flexibility of being an independent contractor.

The Equal Employment Opportunity Commission expanded the EEO-1 form from about 180 points on a spreadsheet to 3,360—using the Paperwork Reduction Act as a vehicle. The form's expansion would not have achieved its stated purpose, which was to make it easier to find firms that discriminated against minorities and women. The EEOC also tried to prevent companies from recruiting on college campuses, because this supposedly discriminated against older people.

[3] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements Summary, June 7, 2018, https://www.bls.gov/news.release/conemp.nr0.htm

[4] Jared Benoff, "Secretary Perez Answers Your Questions on Employee Misclassification," U.S. Department of Labor Blog, (July 28, 2015), https://blog.dol.gov/2015/07/28/secretary-perez- answers-your-questions-on-employee-misclassification/

Table 1. Summary of Regulatory Overreach

	Exceeding statutory authority	Lack of evidence to show regulation addresses market failure or policy problem	Failure to consider undesirable effects on productivity, employment or competitiveness	Failure to consider less costly or intrusive alternatives	Failure to demonstrate benefits commensurate with costs
Persuader Rule	X	X	X	X	X
Fiduciary Rule	X		X		
Overtime Rule		X	X	X	X
Fair Pay and Safe Workplaces Executive Order	X	X	X	X	X
Independent Contractor Administrative Interpretation		X	X	X	X
Joint Employer Administrative Interpretation		X	X	X	X
Expansion of the EEO-1 Form		X	X	X	X
Prohibition of Campus Recruitment	X	X	X	X	X
Joint Employer		X	X	X	X
Election Rule Change		X	X	X	X
Micro-Unions	X	X	X	X	X

The errors that contributed to the overly-burdensome regulatory results include exceeding statutory authority; lack of credible evidence to show that the regulation addresses a genuine market failure or policy problem; failure to consider undesirable effects on productivity, employment or competitiveness, especially with respect to effects on small businesses (e.g., franchisees and independent contractors); failure to consider less costly or intrusive alternatives; and failure to demonstrate benefits commensurate with costs.

These problems are summarized in Table 1. All the regulations discussed are characterized by a failure to consider undesirable effects on productivity, employment, or competitiveness. Most of the other regulations discussed have multiple characteristics.

This paper is divided into four further sections. The next three sections analyze regulations issued by the Labor Department, the Equal Employment Opportunity Commission, and the National Labor Relations Board respectively. A final section presents conclusions.

II. Regulations and Guidance Issued by the U.S. Department of Labor

1. Persuader Rule

The Labor Department's June 2011 proposal to require businesses to report any contact with advisors on union-related issues, called the "persuader rule," was derived from the Labor-Management Reporting and Disclosure Act of 1959, Senate Bill 1555. The law put in place reporting requirements for unions, employers, and consultants, in order to make the unionization process more transparent.

The persuader rule exceeded statutory authority. No evidence was provided to show that the regulation addressed a market failure or policy problem. The Department understated the costs, and did not consider undesirable effects on the economy. Since no market failure or policy problem was identified, there was no consideration of other alternatives. Neither was there a demonstration that the benefits were commensurate with the costs.

The 1959 Act required businesses to report the names of consultants who speak directly to firms' employees. Firms were not, and have never been, required to report the names of attorneys who did not speak to the firm's employees. Section 203(c) of the Act states that "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer…" In addition, the Report of the Senate Committee on Labor and Public Welfare on the Act (S. 1555) stated, "The committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations and do not engage in activities of the types listed in section 103(b) [now 203(b)]."[5]

Section 203(c) was a clarification, added in the form of an amendment by Senator Barry Goldwater, a Republican from Arizona. Massachusetts Senator John F. Kennedy questioned the necessity of adding the amendment. On the floor, he said, "There is no doubt in my mind that the bill which was originally drafted by lawyers adequately protected them. Therefore, I do not feel that the amendment offered by the Senator from Arizona is wholly necessary. But in order that there may be no question about it I will accept the amendment."[6] The Goldwater/Kennedy agreement which led to the exemption in Section 203 (c) was not particularly controversial at the time, since no one ever envisioned the reporting being applied to lawyers in the practice of law.

In 1989, Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr., wrote, "...a usual indication than an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject."

This is what the Department sought to change in 2011. Despite overwhelming evidence, the Labor Department argued that regulations needed to be changed so that all consultants have to be reported to the Department. The reason given by the Department was that "the distinction between activities properly characterized as 'advice' and those that go beyond 'advice' has not been made clear," especially when the employer relays material written by an advisor directly to his employees.

A change in the new interpretation would have had a substantial effect on the cost of doing business in America. Employers would have had to study the new rule to determine if they needed to fill in the forms. Many firms would have needed to file, whether or not their employees were considering joining a union, because they receive advice on a regular basis.

Despite the increase in rulings from the National Labor Relations Board, the Department calculated that the entire burden of the rule would be $826,000 annually, based on the number of firms who would be expected to complete the form, and the time it would take these firms to complete it.[7]

To arrive at this cost, the Department assumed that it would receive forms from only 3,414 employer firms (Form 10) and 2,601 advising firms (Form 20) because the

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[5] S.Rep. No.187 on S.1555, 86th Cong., 1st Sess., 40 (1959), U.S. Code Cong. & Adm. News, p. 2356.
[6] (Cong.Rec. 5889-5890, daily ed. April 23, 1959).
[7] Federal Register, Vol. 76, No. 119, (June 21, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf p. 36204.

Department estimated that only these firms would have to file. Employers would spend two hours per year completing their Form 10, and advisors would spend one hour completing their Form 20. The Department did not provide a cost estimate for firms completing the required Form 21, although instructions for the form estimated the reporting burden to be 35 minutes per response.[8]

By any standard, the Department's cost estimate was too low. The estimated number of employers, 3,414, represented less than 1 percent of the number of establishments of enterprises with 50 or more employees. To put the Department's number in perspective, there were a total of 5.9 million firms, comprised of 7.7 million establishments, in the United States in 2015, the latest year available for these data. Of these, 4 million were establishments of enterprises with 5 or more employees, 1.9 million were establishments of enterprises with 50 or more employees, and 1.3 million establishments were part of enterprises that had more than 500 employees.[9]

The total number of advising firms estimated by the Department, 2,601, is far below the number of human resource consulting establishments, 7820, and labor law firms' establishments, namely 41,971.[10]

The Department should have examined what the cost would be if all potentially-affected employers and advisers were to file. This would have provided an honest assessment of the potential effect of the proposed rule. I calculated paperwork costs for Form 10, Form 20, and Form 21 potential filers, and estimated that the total burden for the first year would be between $7.5 billion and $10.6 billion. The subsequent annual costs amount to between $4.3 billion and $6.5 billion.[11]

This would bring the cost of the proposed rule well over the $100 million level that requires the agency to perform a cost-benefit analysis. The Department calculated no benefits from the proposed rule. Nor did it take into account negative indirect effects of the proposed rule. These include firms making errors and poor decisions because they

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[8] Office of Labor-Management Standards, U.S. Department of Labor, "Instructions for Form LM-21 Receipts and Disbursements Report," http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-21_Instructions.htm.

[9]U.S. Census Bureau, Statistics of U.S. Businesses, 2015 Annual Data, Detailed Employment less than 500 Employees, (2017) https://www2.census.gov/programs-surveys/susb/tables/2015/us_state_naicssector_small_emplsize_2015.xlsx

[10] U.S. Census Bureau, Statistics of U.S. Businesses, 2015 Annual Data *U.S., all industries*, Number of Establishments NAICS 541612, (2017) https://www2.census.gov/programs-surveys/susb/tables/2015/us_6digitnaics_2015.xlsx and Martindale-Hubbell*, Law firm search,* https://www.martindale.com/search/attorneys-law-firms-articles/?term=Labor%20and%20Employment

[11] Diana Furchtgott-Roth, "The High Costs of Proposed New Labor-Law Regulations," Manhattan Institute (2016) https://www.manhattan-institute.org/sites/default/files/ib_21_0.pdf

do not ask for advice. Some advisory firms may leave the advisory business, some may lose business, and some may close.

Thus, the proposed rule would have had the dual consequences that economic activity in the market for legal counsel would have contracted for all labor related issues, not merely union elections, and that employers would have been more likely to behave in an illegal manner, unintentionally infringe on workers' rights, and incur costs for litigation. The lack of legal advice services provided would have resulted in much more costly interactions for all involved.

The rule was the subject of four different court cases, costing millions of dollars. On June 27, 2016, Texas Senior U.S. District Judge Sam R. Cummings prevented the Labor Department from enforcing the persuader rule because it "effectively eliminated" employers' ability to seek confidential legal advice, which is clearly permitted under the Labor Management Reporting and Disclosure Act. In November 2016, Judge Cummings permanently blocked the rule. The Trump administration did not appeal Judge Cummings's ruling. Comments were sought by the Trump Department of Labor as to whether the rule should be rescinded. Businesses, employers, and workers who might be affected responded. The filing period has closed and we await a final decision by the Department of Labor.

2. Fiduciary Rule

Another overreach of power is the Labor Department's attempt to regulate small brokerages and insurance agents. The final ruling of the "fiduciary rule," as it is known, was issued in June 2016. It was supposed to be phased in on April 10, 2017, but has been repeatedly delayed—to June 2017, and then January 2018[12] , and now to July, 2019.[13] On March 15, 2018, the Fifth Circuit Court of Appeals vacated the fiduciary rule. [14] The Department failed to consider the negative effects of promulgating the rule, and the rule exceeded statutory authority. Judge Edith Jones, writing for the majority, stated, "Expanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II."[15] Further, "The DOL interpretation, in sum, attempts to rewrite the law that is the sole source of its authority. This it cannot do."[16]

The Labor Department does not have the authority to change the duties of insurance and stock brokers, which are generally under the purview of the SEC. Eugene Scalia,

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[12] Federal Register, Vol. 81, No. 68, (April 8, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-04-08/pdf/2016-07924.pdf p. 20946.

[13] Federal Register, Vol. 81, No. 228, (November 29, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-11-29/pdf/2017-25760.pdf p. 56545

[14] *U.S. Chamber of Commerce of the United States of America et al. v. Acosta*, Fifth Circuit Decision, No. 17-10238, March 15, 2018, http://www.investmentnews.com/assets/docs/CI114691315.PDF

[15] Ibid., page 13.

[16] Ibid, page 20.

former solicitor of the Labor Department, has described the rule as "an extraordinary example of disregard for limitations imposed by Congress and the Constitution."[17] The Department has no authority to regulate Individual Retirement Accounts, he argues, but only authority to deregulate. In order to facilitate the rule change, the Department broadened the definition of a fiduciary, including all insurers and brokers, and then laid out conditions under which these individuals could get commissions. The Department's Fiduciary Rule also gave individuals a private right to sue, something that only Congress is allowed to do, according to a 2001 Supreme Court decision.[18] In addition, the fiduciary rule restricted arbitration, contrary to the provisions of the Federal Arbitration Act.

The series of delays in implementing the provisions of the Fiduciary Rule shows that the Department is grappling with these issues. Although one of President Trump's first acts was to call for a review of the rule, the Department needs to make sure that all rollbacks of rules passed under the Obama administration meet legal criteria. If not, parties could sue and companies would be liable for penalties for noncompliance.

Under the Employee Retirement Income Security Act of 1974 (ERISA), the definition of fiduciary is a person that engages in specified plan activities, including giving investment advice for some fee or compensation, monetary or otherwise.

This rule is supposed to discourage investors and purchasers of life insurance away from commission-based products and towards products that have an up-front fee. This is because the Department believes that commission-based products encourage financial representatives to overcharge consumers. However, some people cannot afford up-front fees and prefer to pay on commission, and few complaints have been received about the current system.

The alleged rationale for the rule is a report by the Council of Economic Advisers. Based on academic studies, CEA suggests that savers receiving commission-based advice earn returns that are approximately 1 percentage point lower each year, adding up to a loss of $17 billion a year. Yet the CEA staff did not analyze actual investor data, and the report's authors state that "such analysis is subject to uncertainty."[19]

The proposed regulation would outlaw the commission-based approach for advisor compensation unless the advisor and the investor enter into a special "Best Interests Contract." This exemption would require a contract with lengthy disclosures of commissions, speculative projections of future fees and costs for mutual fund securities,

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[17] See, for example, Eugene Scalia, "Godzilla (the Fiduciary Rule) Ate the Rule of Law," Wall Street Journal, (May 31, 2017), https://www.wsj.com/articles/godzilla-the-fiduciary-rule-ate-the-rule-of-law-1496269113?mg=prod/accounts-wsj

[18] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

[19] Council of Economic Advisers, "The Effect of Conflicted Investment Advice on Retirement Savings," (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf

and greater exposure of the advisor to lawsuits by investors who are unhappy about their portfolios' returns.

This new exemption "would provide conditional relief for common compensation… that an advisor and the advisor's employment firm might receive in connection with investment advice to retail retirement investors."[20]

This exemption requires financial institutions to acknowledge, for itself and its advisors, its fiduciary status. If the financial institution is providing advice for a non-ERISA protected plan or an IRA investor, the institution must set up an enforceable contract so that IRA investors can ensure that the institution honors the client's best interest. This rule used to only apply to advisors who gave ongoing advice and charged a fee for their service, but the rule expanded to include anyone that gave recommendations or solicitations for retirement plans.

The rule broadens the definition of "investment advice fiduciary," which elevates any financial professional that works with retirement plans or gives plan advice to the level of fiduciary, binding them to legal and ethical standards. The rule is expected to affect brokers and insurance agents, who work on commission, the most. Before the rule, "financial salespersons," which include brokers, insurance agents, and planners, were only required to meet the "suitability" standard, which meant that investment recommendations for retirement plans must meet the client's needs and objectives. With the new rule, the financial salespersons would now be legally obligated to put the client's best interest first.

The new rule could potentially eliminate the commission structures that are used throughout the industry. The brokers, registered investment advisers, and life insurance agents targeted by the Department are already regulated by other entities, such as the Securities and Exchange Commission, FINRA, and state regulatory bodies.

Particularly troubling is the effect of the new rule on life insurance products. Even though the Labor Department states that 31 percent of IRAs include some investments in annuities, it did not calculate the costs of the rule on people who purchase those products. Under the new rule, carriers and insurance marketing organizations that sell fixed rate annuities and fixed indexed annuities (whose return varies with markets) would be regulated by the Labor Department as well as by their state regulators. These would all face a loss of revenues as insurance sales shrink due to regulation.

Currently many investors who purchase open IRA accounts or roll over old 401(k) retirement savings accounts rely on banks, stockbrokers, or other financial professionals. These advisors are popular because they require no up-front fee for their services, but are compensated by commissions on the securities they sell to the investor.

[20] "DOL Fiduciary rule Explained as of August 31, 2017," *Investopedia*, (August 31, 2016), https://www.investopedia.com/updates/dol-fiduciary-rule/

Wealthier clients can use fee-based advisors who charge the client a flat fee for advice, usually 1 percent or 1.5 percent of the total account, regardless of what securities are chosen. Small savers may not be able to afford the up-front fees that fee-based, non-commission insurance carriers and advisers will charge. The result will be that many of those most in need of advice will go without.

The retirement financing landscape has changed since 1978, when employer-provided defined-benefit pension plans accounted for nearly 70 percent of all retirement assets.[21] These plans provide a guaranteed income stream in retirement for the life of the retiree. Now firms have gradually opted for defined-contribution plans, where they match a certain amount of employee contributions and let their employees direct their own retirement portfolios, within limits. By the end of 2016, 401(k) plans, common defined-contribution plans, and IRAs accounted for 59 percent of all retirement assets.[22] As defined-contributions accounts have grown in popularity, the last 40 years have witnessed the advent of index mutual funds, discount brokerage, exchange-traded funds, and life insurance products.

While it is easy to assume that lower returns in retirement portfolios might be due to self-interested financial advisors, this is not always the case. Lower returns could be due to advisors' recommendations for a more conservative portfolio, one that places a greater share of the assets in low-performing but less volatile Treasury bills or bonds. Returns are positively correlated with risk and variance, and some people prefer lower returns and less risk, especially as they approach retirement.

Three suits were filed. One, filed by the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, and the Financial Services Roundtable in the U.S. District Court for the Northern District of Texas in June 2016 argued that the Obama administration was not authorized to fast-track the legislation. Additionally, the plaintiffs argued that the Department of Labor is overstepping its jurisdiction by including IRAs in the rule. A second case was filed by the National Association of Insurance and Financial Advisors and the American Council of Life Insurers, and a third was filed by the Indexed Annuity Leadership Council. All were combined into the case in Dallas heard by the Fifth Circuit, which resulted in the rule being vacated.

Congress has unsuccessfully attempted to repeal the rule. The most recent spending bill in the House contained a provision to remove the fiduciary rule by saying that "[it]

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[21] Council of Economic Advisers, "The Effect of Conflicted Investment Advice on Retirement Savings," (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf
[22] Investment Company Institute, "2017 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry," (2017).

shall have no force or effect." The bill passed the House but not the Senate.[23] Other attempts included the repeal of the fiduciary rule in the Financial Choice Act, which passed the House but has not yet passed the Senate. Another bill that has been introduced to repeal the rule is the Affordable Retirement Advice for Savers Act, which would amend the Employee Retirement Income Security Act (1974) and the Internal Revenue Code (1986), but no action has taken place since.[24]

3. Overtime Rule

The Labor Department's new overtime rule,[25] released on May 18, 2016, would have harmed the economy and the American worker in three different ways. Fortunately, it was halted before it could go into effect as scheduled on December 1, 2016.

The rule was derived from the original Fair Labor Standards Act of 1938. In March 2014, President Obama requested that the Department of Labor update the overtime protections.[26] In an interview with the Huffington Post in March 2015, the President said, ""What we've seen is, increasingly, companies skirting basic overtime laws, calling somebody a manager when they're stocking groceries and getting paid $30,000 a year. Those folks are being cheated."[27]

The updated rule required employers to pay white collar workers overtime if they earned less than $47,476 annually, instead of less than $23,660, the case at present. (Manual workers generally have to be paid overtime at all earnings levels.) The effect would have been (1) to raise costs to employers, discouraging employment; (2) to prohibit flexible time for employees; and (3) to stunt American productivity and economic growth.

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[23] Interior and Environment, Agriculture and Rural Development, Commerce, Justice, Science, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, State and Foreign Operations, Transportation, Housing and Urban Development, Defense, Military Construction and Veterans Affairs, Legislative Branch, and Energy and Water Development Appropriations Act, 2018, H.R. 3354, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/3354?q=%7B%22search%22%3A%5B%22hr3354%22%5D%7D&r=1

[24] Victoria Bruno, "Recent Developments on DOL Fiduciary Rule," *The National Law Review*, (August 22, 2017), https://www.natlawreview.com/article/recent-developments-dol-fiduciary-rule

[25] Wage and Hour Division, U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf

[26] Office of the Press Secretary, The White House, "FACT SHEET: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections," (2014), https://obamawhitehouse.archives.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr

[27] President Barak Obama, interview by Dave Jamieson, *Huffington Post*, (March 21, 2015), https://www.huffingtonpost.com/2015/03/21/obama-overtime-pay_n_6911808.html

The Department has the authority to alter the wage and salary level at which white collar workers have to be paid overtime. However, most people thought that the increase was excessive. The Department failed to consider undesirable effects on employment, especially of low-skill workers, and did not show that benefits were commensurate with costs.

After the Department of Labor issued the rule, 21 states filed one suit,[28] and over 50 business groups, led by the U.S. Chamber of Commerce, filed a separate suit.[29] On November 22, 2016, Texas Federal District Court Judge Mazzant III, an appointee of President Obama, granted an emergency nationwide injunction against the Labor Department's overtime rule. The Department was not allowed to implement or enforce the rule.

In his opinion Judge Mazzant called the overtime rule "unlawful" and "contrary to the statute and Congress's intent." He wrote that "this significant increase to the salary level creates essentially a de facto salary-only test…. Congress did not intend salary to categorically exclude an employee with EAP [Executive, Administrative, and Professional] duties from the exemption."

The plaintiffs had questioned the legality of the automatic indexing of the $47,476 level that was planned for every three years. Judge Mazzant stated, "Because the Final Rule is unlawful, the Court concludes the Department also lacks the authority to implement the automatic updating mechanism."[30]

Consider Charlie, an analyst at a consulting firm, who earns a salary of $45,000 a year. Now, if he works late one night he can come in later the following day, or take extra time off. He can duck out of the office to attend his child's kindergarten concert. He can come home for dinner and catch up with his work in the evenings.

The proposed Labor Department's update to the overtime rule would have changed this. Along with others who make under $47,476 annually, Charlie would have been required to keep track of his hours by clocking in and out. Because of the need to track hours, telecommuting would have been difficult. Flexibility to attend to personal considerations would likely be curtailed due to his hourly worker status.

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[28] *State of Nevada et al. v. United States Department of Labor et al.*, No. 4:16-CV-00731, (E.D. Tex) https://www.texasattorneygeneral.gov/files/epress/Complaint_-_Filed.pdf?cachebuster%3A0=&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

[29] *Plano Chamber, TAB, U.S. Chamber, et al. V. U.S. Department of Labor,* No. 4:16-CV-00732, (E.D. Tex) http://www.chamberlitigation.com/sites/default/files/cases/files/16161616/Complaint%20--%20Plano%20Chamber%2C%20TAB%2C%20U.S.%20Chamber%2C%20et%20al.%20v.%20U.S.%20Department%20of%20Labor%20%28Eastern%20District%20of%20Texas%29.pdf

[30]

Charlie would not have necessarily earned more than what he is making now. Either Charlie's employer would make sure he never works more than 40 hours in a week, or his rate of base pay would be lowered to make up for the extra hours worked.

The Labor Department's proposed salary test meant only that Charlie would have been "protected" with the right to time-and-a-half pay rate for any hours worked over 40 per week. For those who never work over 40 hours, it is an empty benefit. Most workers affected never get the chance to work over 40 hours per week. The Labor Department estimated that about 4.2 million workers would qualify for overtime in 2017.

Bureau of Labor Statistics economist Anthony Barkume showed that employers lower base pay if they have to pay overtime.[31] Jared Bernstein, former chief economist to Vice President Joe Biden, concluded that there would be no job losses because employers would just reduce wages in reaction to the rule. He writes, "So, an employer who views a new worker as worth $10/hr … and expects her to work 10 hours of [overtime] per week, would offer her a base wage … of $9.09."[32] Employees have to work overtime to stay even with their previous earnings, because their base pay is lower."

The Obama Labor Department touted the overtime rule as a device to raise the incomes of workers, but its own analysis calculated only $1.2 billion annual increase in wages of affected workers. The real effect of the rule would have been to add significant administrative costs.

One cost was familiarization, the initial time and effort that each employer must expend to understand the requirements and assess what needs to be done.

A second cost was the initial wage classification adjustment costs. Firms needed to identify each employee affected by the higher salary test, to decide for each case whether to raise their salary to the new threshold or to convert the status to non-exempt hourly. In the case of conversions there would have been a further effort to determine what base hourly rate to establish and what usual hours requirement and policies to set for assignment and approval of overtime hours.

A third expense was management costs. Workers converted from salaried to hourly status would have required additional management supervision time for checking time records and for approval of overtime hours.

The administrative costs of the new rule could have totaled $18.9 billion the first year – over 15 times greater than the $1.2 billion of increased wages that the administration estimates will be received by workers. In subsequent years, the ongoing management

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[31] Anthony Barkume,"The Structure of Labor Costs with Overtime Work in U.S. Jobs," *ILR Review*, (October 2010), http://www.jstor.org/stable/20789058?seq=1#page_scan_tab_contents

[32] Jared Bernstein and Ross Eisenbrey, "New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Insitute, (March 13, 2014), http://www.epi.org/publication/inflation-adjusted-salary-test-bring-needed/

supervision costs imposed by the rule could have totaled around $3.4 billion each year, almost three times the $1.2 billion of wage gains generated.

Judge Mazzant's decision was a rebuke to the Obama administration. Litigation was costly to businesses and workers. It cost companies billions of dollars to alter business plans to accommodate anticipated labor regulations rather than investing in their businesses and innovation, as well as the direct legal costs of challenging the various rules coming out of the Labor Department. Businesses fearful of punishing regulations hire fewer workers, innovate less, invest less, and offer goods and services to the American public at higher prices.

President Obama's overtime rule was an example of rulemaking run amok. President Trump is now reconsidering what to do with the rule. Options include leaving the threshold where it is now, at $23,660, or raising it to some higher level, but less than $47,476. One problem with raising it is that Judge Mazzant stated that a salary-only level does not comply with congressional intent. The decision has not yet been announced, as new rulemaking to address the issues cited by the Judge and commentators is underway.

4. Fair Pay and Safe Workplaces Executive Order

The Fair Pay and Safe Workplaces Executive Order[33] was supposed to take effect on October 25, 2016. Executive Order 13673, issued on July 31, 2014, and made final with regulations announced in August, 2016,[34] stated that if a company or one of its subcontractors had allegations of violations of federal labor and employment laws, then it could lose its federal contracts or the opportunity to bid on others.

The day before the rule was set to go into effect, on October 24, 2016, U.S. District Court Judge Marcia Crone of Texas issued a preliminary injunction against the Executive Order.[35] She stated the Executive Order was arbitrary and capricious, exceeded the authority of the agencies, and conflicted with other labor laws.[36] The Supreme Court overturned similar action in 1986 (Wisconsin Department of Industry v. Gould).[37] In addition, the rule infringed companies' First Amendment rights and due process, because it obligated firms to disclose accusations of violations before they are settled.

[33] Office of the Press Secretary, The White House, "Executive Order 13673 – Fair Pay and Safe Workplaces," (2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces

[34] Federal Register, Vol. 81, No. 165, (August 25, 2016), https://www.federalregister.gov/documents/2016/08/25/2016-19676/federal-acquisition-regulation-fair-pay-and-safe-workplaces p.58562

[35] Associated Builders and Contractors of Southeast Texas et al. vs. Anne Rung, Memorandum and Order Granting Preliminary Injunction, Civil Action No. 1:16-CV-425, United States District Court, Eastern District of Texas, October 24, 2016.

[36] Ibid., page 16.

[37]

Judge Crone stated, “It defies reason that Congress gave explicit instructions to suspend or debar government contractors who violate these government-specific labor laws only after a full hearing and final decision, but intended to leave the door open to government agencies to disqualify contractors from individual contract awards without any of these procedural protections.”

A major problem with Executive Order 13673 was that firms could be tarred before allegations are proved, with no chance to defend themselves. They would have been pressured to settle accusations in order to retain the right to have contracts with the federal government. There was no attempt at a cost-benefit analysis, and the Department failed to consider undesirable effects on productivity. Neither was any evidence provided that showed a market failure or policy problem.

President Obama stated that he put the order in place “to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.” Such laws include the Fair Labor Standards Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, and the National Labor Relations Act.

The 50,000 federal contractors and their uncounted subcontractors would have been required to follow the law, but the executive order was an open invitation to extortion and blackmail. It gave government agencies such as the National Labor Relations Board and the Occupational Safety and Health Administration the opportunity to influence the selection of contractors.

If contractors were considered to have “serious,” “repeated,” or “willful” violations, they would have lost the opportunity to bid on contracts, or lost contracts if they had them. This was a loose standard, with possibilities for cronyism. For those with the right friends, violations may have been considered less serious.

If the rule had not been blocked by Judge Crone, firms with contracts of more than $50 million would have been required to disclose allegations of their violations over the past year to the Labor Department. On October 25, 2017, all firms with contracts worth $500,000 or more, and potential subcontractors, would have been required to report allegations of their violations over the past two years (rising to three years in October 2018), and update this information every 6 months during the life of the contract.

The executive order would have put pressure on firms to settle alleged violations, because a firm could receive or keep a contract if it promised to reach an agreement in the future with the complaining agency. Dozens of federal offices, ranging from the Equal Employment Opportunity Commission to the Occupational Health and Safety Administration, would have had input into whether firms received federal contracts.

A firm such as IBM, which has multiple subcontractors, would have to keep track of their records to ensure that their actions did not result in IBM's disqualification.

The AFL-CIO called for this executive order in its 2008 recommendations to the Obama-Biden Transition Project.[38] It proposed the creation of a "government-wide database, searchable by employer through a common identifier, of violations of federal law in actions brought against employers by administrative agencies." Coincidentally, or not, even before the final regulations were issued, the National Labor Relations Board announced the creation of such a database on July 1, 2016, in a memo from Associate General Counsel Anne Purcell.[39] As well as labor complaints, the NLRB now collects data[40] on firms' ID numbers and contractor status.

Unions that want to organize workplaces recognize that they could have new powers over employers by accusing them of unfair labor practices. Teamsters for a Democratic Union,[41] an organization trying to rebuild the Teamsters, stated on August 22, 2016 that "the Executive Order gives unions unprecedented new leverage against companies and institutions that contract with the federal government."[42] TDU proposed that union officials say, "Unless you settle this strike within the next few days, and the union withdraws its charges, you are likely to be marked as a "repeat labor law offender," one of the highest categories of wrongdoing under the President's Order."

In March 2017, President Trump signed legislation under the Congressional Review Act rolling back the rule.[43] Under the provisions of the Congressional Review Act, a future administration cannot reinstate it through regulation.

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[38] Office of Management and Budget, "Turn Around America: AFL-CIO Recommendations for the Obama Administration," Obama-Biden Transition Project, (2008), http://op.bna.com/env.nsf/r?Open=rdae-9wyrwu

[39] Office of the General Counsel, Divisions of Operations-Management, "Collecting Data in Connection with Fair Pay and Safe Workplaces Executive Order" OM 16-23, (2016), https://www.nlrb.gov/reports-guidance/operations-management-memos

[40] National Labor Relations Board, "Business Identification Number Form" Form NLRB-5554, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/NLRB%205554_7-16_public.pdf

[41] Teamsters for a Democratic Union, "Who We Are," http://www.tdu.org/who_we_are

[42] Teamsters for a Democratic Union, "Obama "Blacklisting" Rule—New Leverage for Unions?" (August 22, 2016), http://www.tdu.org/obama_blacklisting_rule_new_leverage_for_unions

[43] *Disapproving the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation*, H.R. Res. 37, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-joint-resolution/37

5. Independent Contractor Administrative Interpretation

On July 15, 2015, the Department of Labor issued an Administrator's Interpretation which concluded that most workers are employees rather than independent contractors. It proposed a revised "economic realities test" for employee/contractor status, which favored employee status rather than contractors under the Fair Labor Standards Act. These guidelines, which became effective in July 2015, attempt to make it more difficult for employers to hire independent contractors. In June 2017, the Trump administration announced it would be withdrawing this interpretation.

The Department had the statutory authority to issue this Administrator's Interpretation. However, the Interpretation did not show a policy problem; it did not consider effects of competitiveness among different workplaces and the economy as a whole; it did not consider less costly alternatives; and there was no cost benefit analysis.

The "economic realities test" consisted of six parts:

"(i) the extent to which the work performed is an integral part of the employer's business, (ii) the worker's opportunity for profit or loss, (iii) the nature and extent of the worker's investment in his or her business, (iv) whether the work performed requires special skill and initiative, (v) the permanency of the relationship, and (vi) the degree of control exercised or retained by the employer."[44]

The Labor Department tied itself up in knots with these new guidelines. The Administrator's Interpretation opened by stating that "misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States," but offered no statistical evidence for the claim. Nowhere did the Department appear to be concerned with the reverse scenario—independent contractors being misclassified as employees. In fact, the number of independent contractors is declining as a share of employment, according to data issued by the Bureau of Labor Statistics in June, 2018. Independent contractors represented 6.9 percent of total employment, down from 7.4 percent in 2005.[45]

Then, the Department listed factors to help courts make the distinction between "whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor)." But this was a false distinction, because it is possible to be both in business for yourself and economically dependent on your clients.

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[44] Wage and Hour Division, U.S. Department of Labor "Administrator's Interpretation No. 2015-1," (2015), https://www.blr.com/html_email/AI2015-1.pdf

[45] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements Summary, June 7, 2018, https://www.bls.gov/news.release/conemp.nr0.htm

Lawyers, landscaping firms, defense contractors, even some economists, all examples of independent contractors, are in business for themselves but they are economically dependent on their clients for business.

The new guidelines added another layer of regulations to potential enforcement actions. Different government agencies have different criteria for whether workers are independent contractors or employees. The Labor Department has a six-pronged test, the Internal Revenue Service has a 20-factor test, and antidiscrimination laws have their own common law test. In addition, states have their own criteria for unemployment, workers compensation, wage and hour rules, and state taxes. It is practically impossible for small businesses, which rarely have legal departments, to stay out of trouble.

The Administrator's Interpretation, effective in July 2015, [46] was followed by a decision on August 27, 2015, by the National Labor Relations Board. It ruled that employees of Leadpoint Business Services were joint employees of Browning Ferris Industries of California, a recycling plant that subcontracted some of its operations to Leadpoint. Similar to the guidelines from the Labor Department, but having the force of law, the NLRB decision affected whether employees of one entity, such as a franchisor, are simultaneously employees of a second company such as a franchise. The implications of joint employment status are significant, giving rise to joint liability and bargaining obligations with unions.

In a memo to employees dated December 1, 2017, the new National Labor Relations Board general counsel, Peter Robb, cited *Browning Ferris* as one of the "examples of Board decisions that might support issuance of complaint, but where we also might want to provide the Board with an alternative analysis…"

What President Obama's Labor Department and NLRB failed to note is that subcontractors have come about as the most efficient way of providing particular services. Independent contractors can move from one employer to another at will, or work for multiple employers at one time.

As former Wage and Hour Administrator David Weil stated on the Labor Department website,

"In recent years, the employment relationship between workers and businesses receiving the benefit of their labor has fissured apart as companies have contracted out or otherwise shed activities to be performed by other businesses. Often those secondary companies deepen the fissures, breaking those activities apart and shifting work even

[46] Ibid.

further out from the primary business…. We need to change behaviors within entire industries, as opposed to achieving compliance one employer at a time."[47]

The Labor Department rulings and the National Labor Relations Board decisions were part of a concerted effort "to change behaviors within entire industries," as Weil wrote. But it is difficult to move America back to the 19th and mid-20th centuries when people worked for one employer for most of their lives and independent contractors were less common. The sharing economy, with Uber and Airbnb, was unimaginable.

The Labor Department was trying to stem the growth of independent contractors, the largest source of job growth in the United States, according to the American Staffing Association. The Department wanted companies to hire individuals as employees rather than as independent contractors. Although these people would get benefits as employees, their cash wages would decline.

According to the latest Employment Cost Index data published by the Labor Department, benefits make up 30 percent of compensation costs and wages and salaries the remaining 70 percent.[48] If independent contractors were reclassified as employees, their cash wage would decline and they would receive benefits such as health insurance, vacation, pension contributions, and sick leave.

An individual earning $50,000 as an independent contractor might get paid approximately $35,000, plus fringe benefits, as an employee. As an independent contractor he would owe the employer's share of Social Security and Medicare, $3,750, as well as the employee's share, the same amount. Some individuals might value these benefits, but many others prefer to get more cash and to buy the benefits themselves. Alternatively, some might get benefits through another working family member, and so cash might be preferred.

When firms contract out work to independent contractors who are individuals, the firm does not have to pay payroll taxes, unemployment compensation, or workers' compensation. Payroll taxes are paid by self-employed individuals, but the self-employed do not have to pay unemployment insurance and workers' compensation—although they have to pay these for their employees.

The new Labor Department guidance would have reduced workplace flexibility, especially important to women and millennials who want the freedom to work flexible hours in locations of their own choosing.

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[47] David Weil, "The Fissured Workplace," U.S. Department of Labor Blog, (October 17, 2014), http://blog.dol.gov/2014/10/17/the-fissured-workplace/

[48] Bureau of Labor Statistics, U.S. Department of Labor, "Employment Cost Index," (2018), https://www.bls.gov/news.release/pdf/eci.pdf

The Obama administration wanted to require employers to hire workers as employees because they preferred to have workers in an employer-employee relationship rather than in a contractor relationship. Forcing people into an employer-employee relationship gives the government more control over the workforce and more work to do—enforcing its regulations that apply to employees.

The new guidelines would have had the largest effect on those firms who contract out some tasks—such as payroll, or janitorial services—to avoid reaching the 50-person limit at which the Affordable Care Act penalties still apply. Under the Family and Medical Leave Act, employers are required to give 12 weeks of unpaid leave annually to employees for maternity and paternity care, as well as for chronic illness. Independent contractors do not have to receive this leave. Nor do they have to receive any other kind of leave.

When workers are employees, rather than independent contractors, it is easier to force them to join unions against their will. The Supreme Court has just heard *Janus vs. American Federation of State, County, and Municipal Employees, Council 31*, et al. The question is whether Mr. Janus has the right to opt out of paying agency fees to the union. More employees broaden the potential pool of union members, with higher potential revenue from dues.

One result of the new 21st century economy is that the proportion of wage and salary workers who belong to unions declined from 20 percent in 1983 to 11 percent in 2017.[49] With its decisions, the Labor Department and NLRB tried to make it easier for unions to organize firms. Unions are not permitted to organize independent contractors and it is easier for unions to organize joint employers. To avoid slowing economic growth, Congress should place a clear definition of an employer and a subcontractor in the law and reverse the NLRB's decision. [50]

The courts, when deciding whether workers were independent contractors or employees, historically focused on workers' control over their own time and hours, but the Administrator's Interpretation focused more on the entrepreneurial aspects. The new interpretation argued that workers' ability to make profit and loss decisions are relevant. Additionally, an individual's investment must be substantial compared to that of the employer in order for workers to be considered independent contractors.

[49] Bureau of Labor Statistics, Union Members Summary, January 19, 2018, https://www.bls.gov/news.release/union2.nr0.htm.

[50] The U.S. House of Representatives has passed the Save Local Business Act, but the Senate has not yet acted.

6. Joint Employer Administrative Interpretation

The Wage and Hour Administrator's Interpretation on independent contractors was followed in 2016 by an Administrator's Interpretation on joint employers. The Fact Sheet stated, "Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, to the employee for compliance with a statute."[51]

Just as with the Independent Contractor Administrative Interpretation, the Department has every right to issue the Joint Employer Interpretation. But that does not mean that the benefits justify the costs. The Interpretation had major undesirable effects on employment and competitiveness, with franchise business being particularly adversely affected.

The employment relation could be horizontal or vertical, according to the Administrator's Interpretation. In a horizontal relationship, "the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other."[52]

In a vertical relationship, "the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer."[53]

These principles are derived from the Browning Ferris decision mentioned in the previous section, when the National Labor Relations Board ruled that employees of Leadpoint Business Services were joint employees of Browning Ferris Industries of California. The NLRB decided that since Browning Ferris had the authority to control Leadpoint's employees, it was a joint employer.[54]

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[51] Wage and Hour Division, U.S. Department of Labor, "Administrator's Interpretation No. 2016-1," (Jan. 20, 2016), https://web.archive.org/web/20160122233447/https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf

[52] Ibid.

[53] Ibid.

[54] National Labor Relations Board, "Decisions of the National Labor Relations Board: Browning-Ferris Industries Newby Island Recyclery," (August 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries

The Trump Administration rescinded the Administrator's Interpretation. The new general counsel of the NLRB, Peter Robb, indicated that he "might want to provide the Board with an alternative analysis" to *Browning Ferris*.

This guidance would have expanded the numbers of "joint employers" in America. Employees of franchised businesses such as McDonald's would be classified as employees of the parent company. Millions of franchises would be told that they are joint employers with parent companies such as Jiffy Lube, Dunkin Donuts, or H & R Block. Employees of subcontractors, such as office cleaners, would be classified as employees of the company that hires the contractor.

The National Labor Relations Board spent millions of dollars stating that the parent company, McDonald's, was the joint employer of McDonald's fast food franchises.

On July 29, 2014, the former General Counsel of the National Labor Relations Board, Richard Griffin, stated that complaints against McDonald's franchisees would also be considered complaints against McDonald's, USA. This means that if an employee were to charge his boss with an unfair labor practice, such as withholding pay or being forced to work too many hours, McDonald's, USA would have also been responsible.

Until now, the NLRB has defined employers as those who control workers' "essential terms of employment," meaning hiring, wage rates, firing, and job description. But the NLRB was looking to change that, and the new authorization was an integral part of the new employment landscape.

The rationale was clear. On June 26, 2014, General Counsel Griffin stated in an amicus brief in *Browning-Ferris*, that "the Board should abandon its existing joint-employer standard *because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining*." (italics added)

Griffin was seeking a new standard that will promote unionization at McDonald's. David Moberg, senior editor for the labor publication *In These Times,* wrote in July 2014, "If the ruling stands, workers will have stronger legal grounds for pressuring McDonald's to remain neutral—and, in turn, keep franchisees neutral—on allowing workers to decide on a large scale whether they want a union."[55]

Unions want "neutrality agreements" because it makes the workforce easier to organize. When employers sign neutrality agreements, they are not in practice remaining neutral in the workers' choice of whether to be represented by a union. They assist in the unionization process, as was the case with the failed campaign for union representation at a Volkswagen plant in Tennessee in February, 2014.

[55] David Moberg, "NLRB's New Ruling Could Mean Great Things for Fast-Food Workers," *In These Times*, (July 30, 2014), http://inthesetimes.com/working/entry/17015/fight_for_15_convention_nlrb

Neutrality agreements include a variety of common characteristics. The company agrees not to say anything against the union, and allows union officials to lecture workers on company time about the advantages of joining a union. It gives the union access to company premises to distribute information union authorization cards, as well as employees' home addresses and phone numbers so union officials can visit workers at home. The company agrees to recognize that a certain number of authorization cards are collected, rather than holding a secret ballot election.

This neutrality agreement was Griffin's goal for his joint employer status announcement. Unless McDonald's allowed its franchises to be unionized, it would have had to defend itself against a stream of unfair labor practice claims.

Between November 2012 and July 2014, the NLRB found merit in 43 claims out of 181 claims brought to the Board. There are over 14,000 McDonald's locations in the United States, 12,500 of them franchise locations. The 43 claims that were found to have merit represent three tenths of one percent of all U.S. McDonald's locations.

Union membership is declining, and with it the dues that fund salaries of the union officials and the contributions that unions make to political parties, the vast majority to Democrats. In the 2012 election cycle, the Service Employees International Union gave $25 million and the United Food and Commercial Workers International gave $11 million dollars to Democrats and nothing to Republicans. Both stand to profit from the new flow of dues if McDonald's is unionized.

McDonald's has two characteristics that made it ideal as a target. Its outlets cannot move overseas, and employees have high turnover. Most people leave within three or four months. Initiation fees to join a union can range from $50 to $100. The union gets not only a stream of dues, about 2 percent of paychecks, but also a stream of initiation fees. If McDonald's was organized, unions could get at least $155 a year per employee.[56]

A decision by the Board that franchisors were joint employers could take several years to play out in the courts, with years of uncertainty. If at the end of that process franchisors are ruled joint employers, the entire franchise model would have to change, to the detriment of those who want to run their own businesses.

Members of Congress have introduced legislation to address the problem of the definition of an employee. One bill, the Save Local Business Act, was introduced by

[56] Michael Harris, "An Employee Retention Strategy Designed to Increase Tenure and Profitability in the Fast Food Industry," University of Phoenix, (Dec. 2010), https://pqdtopen.proquest.com/doc/860122562.html?FMT=AI

Representative Bradley Byrne (R-AL).[57] This bill would amend the NLRA and FLSA to define an employee. Specifically,

"A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment (including hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, and administering employee discipline)."[58]

The Harmonization of Coverage Act of 2017, H.R. 3825, introduced by Representatives Diane Black (R-TN) and Elise Stefanik (R-NY) on September 25, 2017,[59] would achieve a similar goal by harmonizing the definition of "employee" across all federal laws by using the "common-law" test and incorporating this definition into the Fair Labor Standards Act. Three Supreme Court decisions have adopted the common-law definition in cases where clarification was needed.[60]

III. Regulations and Guidance Issued by the Equal Employment Opportunity Commission

The Department of Labor is not alone in its abuses of power in labor regulation. Other blatant abuses have come from an independent agency, the Equal Employment Opportunity Commission. This section discusses two examples—the expansion of an obscure form from 180 entries to 3,360 entries under the Paperwork Reduction Act and the prohibition of recruitment of students on campus because this discriminated against older students.

1. Expansion of the EEO-1 Form

Feminists have been calling for passage of the Paycheck Fairness Act since it was first proposed in 1997. The bill, originally sponsored by Representative Rosa DeLauro (D-CT) and Senator Barbara Mikulski (D-MD), and now by Representative Rosa DeLauro (D-CT) and Senator Patty Murray (D-WA), would require the EEOC to collect compensation data from firms on all their employees by sex, race, and national origin of employees. It would insert the government into every business's employment decisions.

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57 *Save Local Business Act of 2017*, H.R. 3441, 115th Cong. (2017)

58 Ibid.

59 *Harmonization of Coverage Act of 2017*, H.R. 3825, 115th Cong. (2017) passed by the House of Representatives has not been acted upon by the Senate.

60 *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co v. Darden*, 503 U.S. 318 (1992); and *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

The bill did not even pass during the 111th Congress, during the period 2009 to 2010, when Democrats had the presidency and both chambers of Congress. In 2015, at the end of his presidency, President Obama did an end-run around Congress by tasking the EEOC[61] with collecting data on workers' pay, beginning in 2017. Unbelievable as though it may sound, the administration used the Paperwork Reduction Act, meant to reduce and limit individuals' paperwork burden, to expand an existing Equal Employment Opportunity Commission form[62] called the EEO-1 form.

The EEOC likely believed that a formal Notice of Proposed Rule Making would have generated so many negative comments that the expansion of the form would have failed. Hence the Paperwork Reduction Act was manipulated to require employers to complete a form[63] with 3,360 data points instead of one with 180 data points.[64] In addition, the reporting requirement was changed from the firm to the establishment, so if a firm had multiple establishments, it would have had to fill out one form for each establishment with more than 50 employees. Ten establishments could mean 33,600 data points.

The EEOC had the right to expand the EEO-1 form, but the form would not have solved the fundamental issue of the differences in wages between men and women. No effort was made to show that benefits were commensurate with costs, and the EEOC did not publish a less costly alternative.

The compliance date for the form was January 1, 2018, but the Office of Information and Regulatory Analysis at the Office of Management and Budget put a stay[65] on the form and said her Department would review it. Reasonable people will hope that the new EEOC does not start on another form. Unfortunately, as a condition of confirmation, Senator Patty Murray (D-WA) extracted a promise from two Republicans nominated to the Commission that they would examine the issue.

The object of the form was to make it easier to evaluate discrimination. To that end, companies with more than 100 workers would have been required to report employees by gender, race, and ethnicity in 12 different pay bands, 14 gender/race/ethnicity

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[61] The Office of the Press Secretary, The White House, "FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act," (2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly

[62] Federal Register, Vol. 81, No. 20, (February 1, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf p. 5113

[63] Ibid.

[64] EEO-1 Joint Reporting Committee: U.S. Equal Employment Opportunity Commission, Office of Federal Contract Compliance Programs, "Employer Information Report EEO-1," https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2-2.pdf

[65] Office of Management and Budget, "EEO-1 Form, Review and Stay," (2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf

groups, and 10 occupational categories, as well as hours worked per employee. This was especially costly because now employers do not have to keep track of hours worked for workers on salary.

Companies with between 50 and 99 workers would retain the current form, and those with fewer than 50 would be exempt. Along with the Affordable Care Act and the Family and Medical Leave Act, this would have given firms yet another reason not to grow.

The EEOC stated that completing the form would have taken 8 hours the first year and 3.2 hours in subsequent years. This is low. On that basis, the agency estimated that the annual burden for compliance would be $25 million a year after an initial $27 million implementation cost. In contrast, the U.S. Chamber of Commerce estimated the cost would be $427 million a year.

Further, the EEOC assumed that 60,886 firms will file, when the number of firms with 100 or more workers was 106,639[66] in 2014, the latest data available. These firms had 1.6 million establishments,[67] and many would have to complete forms.

The EEOC does not address the security of firms' data, and data from federal contractors is available through a Freedom of Information Act Request.

At the end of 2017, the EEOC faced a backlog of 61,621 cases, a decline of 16 percent from the 2016 level of 73,500 cases.[68] According to Acting Chair Victoria Lipnic, this is the lowest number in over a decade. [69]

If expanded reporting would help clear the backlog, perhaps the form would be worthwhile. But this effort would further slow the EEOC, and the new data would not help judge discrimination.

The EEOC's proposed measure of wages, W-2 forms, could not prove discrimination because they do not show education, experience, and risk involved in the job, factors that can lead to earnings differentials. W-2 earnings include overtime pay, tuition reimbursements, and benefits. Workers might have higher W-2 income due to overtime or tuition reimbursements, not discrimination. The National Research Council, in a

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[66] U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Business and Nonemployer Statistics, "Private Firms, Establishments, Employment, Annual Payroll and Receipts by Firm Size, 1988-2014," https://www.sba.gov/sites/default/files/advocacy/static_us_14.xls
[67] Ibid.
[68] U.S. Equal Employment Opportunity Commission, "Performance and Accountability Report: Fiscal Year 2017," (2017), https://www.eeoc.gov/eeoc/plan/2017par.cfm
[69] Ibid.

report on compensation published in 2012,[70] recommended using base pay as measured by the Labor Department's Occupational Employment Survey, which would avoid these extraneous payments.

Ironically, the proposed 12 broad wage bands that employers would use to report earnings could disguise discrimination. If two equally-qualified people were in the $39,000-to-$50,000 band, one earning $40,000 and the other $50,000, discrimination could be present. Fitting into a pay band doesn't ensure lack of discrimination. Occupational categories are similarly broad. One category, "professionals," includes[71] artists, computer programmers, librarians, physicians and surgeons, and teachers. Medical schools that employ female librarians and male doctors can await an avalanche of lawsuits and investigations.

And that's the real story. In the EEOC's hearings on March 16, 2016, proponents of the new form emphasized the targeting opportunities it will bring. Lisa Maatz of the American Association of University Women stated, "Equally important, the new compensation data will strengthen the EEOC's ability to investigate allegations of pay discrimination and better enforce existing law."[72]

Similarly, in an April 2017 letter, the National Women's Law Center and other proponents of the new form emphasized the targeting opportunities it will bring. The letter states, "The revised EEO-1 Report will provide the EEOC with a critical tool for focusing investigatory resources to identify pay discrimination. It will allow the EEOC to see which employers have racial, ethnic, or gender pay gaps that differ significantly from the pay patterns from other employers in their industry and region."[73]

Even without meaningful data, the EEOC would have used the forms to do so-called "random" checks on firms they did not like, and accuse them of underpaying women, just as the IRS does "random" audits. The EEOC or the Labor Department might also decide that they have to regulate wages for some female occupations.

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[70] National Research Council, *Collecting Compensation from Employers* (Washington, D.C.: The National Academies Press, 2012), https://www.nap.edu/catalog/13496/collecting-compensation-data-from-employers

[71] EEO-1 Joint Reporting Committee: U.S. Equal Employment Opportunity Commission, Office of Federal Contract Compliance Programs, "EEO-1 Instruction Booklet," (2006), https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm

[72] U.S. Equal Employment Opportunity Commission, "Written Testimony of Lisa M. Maatz, Vice President of Government Relations at American Association of University Women," (2016), https://www.eeoc.gov/eeoc/meetings/3-16-16/maatz.cfm

[73] National Women's Law Center, "Re: Opposition to Reopening Review of the Equal Employment Opportunity Commission's Employment Information (EEO-1) Report (OMB Control Number 3046-0007)," (2017), https://nwlc.org/wp-content/uploads/2017/04/OMB-Letter-Revised-4.12.17-Final.pdf

When the administration decides to collect countless thousands of new data points, it has a purpose in mind. It does not take much imagination to connect all of the dots to see the federal government's plans.

2. Prohibition of Campus Recruitment

The Equal Employment Opportunity Commission has exceeded the bounds of the Age Discrimination in Employment Act by arguing that the Act may prohibit hiring and recruiting practices that are not intentionally discriminatory, but that have an unintentional "disparate impact" on older workers. This includes campus recruiting. [74] The EEOC argues that campus recruiting may violate the Age Discrimination in Employment Act if (1) an employer intentionally discriminates against students who are over age 40; and (2) on-campus recruiting may have an unintentional disparate impact on older workers because students are almost always under age 40. The second part—about disparate impact—is especially problematic, because the EEOC would subject on-campus recruiting to the risk of class-action lawsuits and the vagaries of government investigations and litigation.

The EEOC is investigating several companies for campus recruiting—even though the agency itself recruits on campuses. Numerous courts have concluded that campus recruiting is permissible under the law.[75] A Seventh Circuit Court 2-1 panel decision sided with EEOC, but the full court is considering whether to vacate the decision.

The Age Discrimination in Employment Act (ADEA) states:

> It shall be unlawful for an employer… to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[76]

However, although it is clearly illegal to discriminate against employees on the basis of age, nowhere does the ADEA state that discriminating against applicants on the basis of age is illegal. The EEOC's interpretation of ADEA has been denied and refuted by the court system in cases such as *Villarreal v. R.J. Reynolds Tobacco Co*.[77] According to the explicit language in the ADEA, disparate-impact claims are only for employees, not those applying to be employees.[78]

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[74] Diana Furchtgott-Roth & Gregory Jacob, "College Campus Job Recruiting and Age Discrimination," Regulatory Transparency Project, (Sept. 6, 2017), https://regproject.org/wp-content/uploads/RTP-Labor-Employment-Working-Group-Paper-Campus-Recruiting.pdf
[75] Ibid.
[76] ADEA, 29 U.S.C. § 623(a)(2)
[77] *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (en banc)
[78] U.S. Equal Employment Opportunity Commission, "The Age Discrimination in Employment Act of 1967, " (1967), https://www.eeoc.gov/laws/statutes/adea.cfm

Much of the confusion surrounding this issue results from similar language in the Title VII legislation that deals with applications for employment.[79] When determining whether the ADEA covers "applicants for employment," the courts have looked to the textual differences between the ADEA and Title VII. In *Smith v. City of Jackson*, the Supreme Court did not look at applicants for employment, but the plurality of judges believed that the language in Title VII may suggest that Congress intended age and classes to be protected differently.[80] They also highlighted that textual differences in the writing of Title VII were important. A concurring opinion by Justice O'Connor noted that the language in the ADEA suggests that its protections are solely for employees.[81]

Later cases further differentiated textual differences and language between the ADEA and Title VII. In *Villarreal*, Judge Pryor emphasized the language of "or otherwise adversely affects his status as an employee."[82] This phrase indicated that the ADEA applied to a subset of individuals, i.e. those with the status of an employee. He noted that the phrase "applicants for employment" was added to Title VII at a time when Congress could have added this phrase to ADEA, but it specifically chose not to.[83]

Additional circuit court cases have agreed with these conclusions. More specifically, *Ellis v. United Airlines, Inc*., 73 F.3d 999 (10th Cir. 1996) came to the conclusion that Title VII "expressly" applied to applicants whereas ADEA did not.[84]

The EEOC has attempted to gain *Chevron* deference for its assertions, but the courts have disagreed with them. Nevertheless, these investigations, as well as litigation, are continuing. It is the height of hypocrisy for the EEOC to advertise programs specifically designed for graduate students, and yet investigate companies for doing the same.

IV. Decisions by the National Labor Relations Board

1. Joint Employer

On August 27, 2015, the National Labor Relations Board ruled that employees of Leadpoint Business Services were joint employees of Browning Ferris Industries of California, a recycling plant that subcontracted some of its operations to Leadpoint. The NLRB decided that since Browning Ferris had the authority to control Leadpoint's employees, it was a joint employer.[85]

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[79] Title VII, 42 U.S.C. §2000e-2(a)(2)
[80] *Smith v. City of Jackson*, 544 U.S. 228 (2005)
[81] Ibid.
[82] *Villarreal v. R.J. Reynolds Tobacco Co*., 839 F.3d 958 (11th Cir. 2016) (en banc)
[83] Ibid.
[84] *Ellis v. United Airlines, Inc*., 73 F.3d 999 (10th Cir. 1996)
[85] National Labor Relations Board, "Decisions of the National Labor Relations Board: Browning-Ferris Industries Newby Island Recyclery," (August 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries

Before this decision, if a firm did not exercise *actual* authority over the employees of its subcontractors then it was not counted as an employer. The new standard promulgated by the NLRB is that if a firm just *possesses* the authority to control its subcontractor's employees—even if it does not *exercise* this authority—then it is a joint employer. The NLRB announced on May 10, 2018, in the Spring Regulatory Agenda the intention of engaging in rulemaking to address the issue of joint employment.[86]

Even assuming the current NLRB adopts a "new" joint employment standard, a new Board under a future Democratic president would be likely to reinstate the Obama Board's joint employer doctrine. This would dramatically expand the numbers of "joint employers" in America. Employees of franchised business such as Burger King would be classified as employees of the parent company. Millions of franchises would be told that they are joint employers with parent companies such as Jiffy Lube, Dunkin Donuts, or H & R Block. Employees of subcontractors, such as office cleaners, would be classified as employees of the company that hires the contractor. Contractors may find that the company that is employing them has morphed into a boss.

This would make it easier for unions to organize workplaces. When workers are independent contractors, it is not possible for an employer to sign a "neutrality agreement" that requires them to become members of a union. When they are employed by a multitude of individual franchises, the union has to go to each employer to get that same neutrality agreement.

As discussed above, independent contractors have shrunk as a share of employment. In 2017 independent contractors represented 6.9 percent of total employment, a decline from 7.4 percent in 2005.[87]

The NLRB notes, disapprovingly, that "the diversity of workplace arrangements in today's economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily…"

What the NLRB fails to note is that franchises and subcontractors have come about as the most efficient way of providing particular services. Franchises make it easier for people to start their own businesses, and independent contractors can move from one employer to another at will, or work for multiple employers at one time.

Unions are particularly interested in the fast food industry because of its rapid turnover. On average three people per year occupy one slot at a fast food restaurant. People come for a short period of time, such as the summer, then leave. Someone else might start in the fall. If each of these three people had to join a union, the union would

[86] See Spring Regulatory Agenda…
[87] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements Summary, June 7, 2018, https://www.bls.gov/news.release/conemp.nr0.htm

get three sets of initiation fees per year. With fees at about $50 per person, that is $150 annually.

In July 2014, then-NLRB General Counsel Richard Griffin stated that McDonald's USA was a joint employer of workers who were employed by McDonald's franchised restaurants,[88] and he brought charges in December 2014. [89] Unlike the process with a faster election schedule, discussed below, Griffin did not issue a notice of proposed rulemaking and comment now under consideration by today's NLRB.

When I called the NLRB to see whether I could see the "Advice Memorandum," the document that lays out the reason for the change, I was told by a spokesman that "the memorandum is not available publicly because it is part of the litigation process." The spokesman also told me that the arguments in the Advice Memorandum—but not the document itself—would be available when the case goes before the administrative regional judges sometime in 2015. McDonald's USA and the franchises were also unable to view the Advice Memorandum.[90] The NLRB's behavior of changing the law in secret and not providing the charged company with the Advice Memo is similar to the secret Star Chamber proceeding of the Stuart monarchs in 17th century England.[91]

The case was heard in March 2016. Judge Lauren Esposito[92], an Administrative Law Judge employed by the NLRB, accused McDonald's USA of being a joint employer of workers employed by individual McDonald's restaurants in a trial in New York City.[93] Workers at 86 McDonald's restaurants complained that they were unfairly disciplined in retaliation for communicating with unions, including facing threats, fewer work hours, and job loss. Although the charges could have been settled with the franchises

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[88] Office of Public Affairs, National Labor Relations Board, "NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer," (2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds

[89] Office of Public Affairs, National Labor Relations Board, "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," (2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

[90] Conversation with Stephanie Cotilla Eitzen, Field Attorney, National Labor Relations Board, Region 5, (March, 20 2018).

[91] Gardiner, Samuel Rawson, *Reports of Cases in the Courts of Star Chamber and High Commission* Palala Press (February 15, 2018).

[92] National Labor Relations Board, "Lauren Esposito," https://www.nlrb.gov/who-we-are/division-judges/division-judges-directory/lauren-esposito

[93] Office of Public Affairs, National Labor Relations Board, "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," (2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

for under $100,000, the NLRB chose to sue the parent company, a suit that is costing millions of dollars.[94]

Before Browning Ferris, the answer to the question of who employs workers has always been obvious. The person who hired them, sets their hours, and pays them, is the boss. For millions of people employed by a franchise, the franchise has been their employer.

Workers complained that they were unfairly disciplined in retaliation for communicating with unions, including facing threats, fewer work hours, and job loss. The NLRB stated in charges filed in November 2014 that 86 of the 291 charges filed had merit.[95] This number represents about half of one percent of all U.S. McDonald's 14,000 locations. It is on this basis that the entire franchise business might be dismantled.

Current NLRB General Counsel Peter Robb filed a motion to stay the proceedings in December, 2017,[96] and Judge Esposito granted a two-month stay on January, 2018.[97] Robb stated that he is seeking a settlement that "will result in prompt remedial relief for the alleged discriminates and other employees affected by the alleged violations," and conserve "significant resources for all parties involved."[98] Such a settlement has been reached but is before the Judge for approval. The SEIU objects to the settlement and is likely to appeal any approval of it to the NLRB as the case continues month after month and year after year.

Unions stand to gain from a finding that McDonald's is a joint employer. Unions want McDonald's USA to encourage unionization at its franchises. Employees would have to pay dues and initiation fees, and employers would be under pressure to pay higher wages. No matter that this would encourage automation and lower employment, as has been the case in Europe.

The SEIU, which has been organizing strikes outside fast food restaurants, wants McDonald's USA to sign a "neutrality agreement," an Orwellian term that means the opposite of neutral. This is an arrangement between employers and unions that make the workforce easier to organize.

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[94] National Labor Relations Board, "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," (2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

[95] National Labor Relations Board, "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," (2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

[96] National Labor Relations Board, "Order Granting General Counsel's Motion to Stay Proceedings," (2018), http://apps.nlrb.gov/link/document.aspx/09031d45826947b3

[97] Ibid.

[98] Ibid.

The joint employer lawsuits are not limited to the federal government. In May 2016 former New York Attorney General Eric Schneiderman announced that he was suing Domino's Pizza because he believes that 10 Domino's franchise pizza stores in New York underpaid their workers.[99] He alleges that the national company Domino's is the joint employer of the workers employed by the franchises, and so they are responsible for the underpayment.[100]

The franchises supposedly paid lower than minimum wages; did not pay the required overtime; abused the tip credit; and did not reimburse employees for the use of their cars and bicycles while delivering the pizza. The suit is brought not against the restaurants that supposedly committed the offenses, but against the parent company.

The former Attorney General's press release claims that the parent company Domino's knew that the payroll reports generated by the company's computer system were flawed, leading to underpayment.[101] Furthermore, according to the suit, "the company played a role in the hiring, firing, and discipline of workers; pushed an anti-union position on franchisees; and closely monitored employee job performance through onsite and electronic reviews. "[102]

It is possible that these allegations are true. But blaming the parent company, rather than the franchise, will harm American franchised business.

New York State law holds that a company is a joint employer of a franchise business if it either has control, or has authority to control, employees of a franchise in a variety of ways. Since the nature of a franchisor is that it sets certain standards, including dress of employees and the look of the store, practically all franchised businesses will be potential targets of the Attorney General.

Millions of franchises such as Jiffy Lube, Dunkin Donuts, or H & R Block are at risk of being told that they are joint employers with parent companies. What Mr. Schneiderman and the Board fail to note is that franchises are the most efficient way of providing some services. Franchises make it easier for people to start their own businesses, and independent contractors can move from one employer to another at will, or work for multiple employers at one time. The franchise model has dramatically expanded the number of small businesses in America.

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[99] *The People of the State of New York v. Domino's Pizza Inc*. (2016), https://www.ag.ny.gov/sites/default/files/domino_petition.pdf
[100] Ibid.
[101] Eric Schneiderman, "A.G. Schneiderman Announces Lawsuit Seeking To Hold Domino's And Its Franchisees Liable For Systemic Wage Theft," (2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable
[102] *The People of the State of New York v. Domino's Pizza Inc*. (2016), https://www.ag.ny.gov/sites/default/files/domino_petition.pdf

2. Election Rule Change

New union election rules, known as "ambush election" or "quickie election" rules, were announced by the Board in December, 2014,[103] and came into effect on April 14, 2015.[104] These rules were based on amendments to the Representation-Case Procedures proposed in 2014. Even though the House of Representatives passed legislation to negate the union election rule, similar to Senate legislation that passed in March, 2015, President Obama vetoed the legislation.[105]

These rules reduced the time leading up to union representation elections, which are held to see whether employees want unions to represent them through collective bargaining. Organized labor believes that more employees will vote for the union if the election is held sooner, because employers will have less time to present the disadvantages of union membership to employees.

The NLRB has the statutory authority to pass the rule change, but there is no indication that the regulation addresses a market failure or policy problem. The NLRB did not consider less costly or intrusive alternatives, or undesirable effects on employment or productivity. Neither did the agency perform a cost-benefit analysis.

Under the new rules, regional NLRB directors must set a pre-election hearing eight days after an employer has received a petition for union representation, and the election must be held "at the earliest date practicable" afterwards. This could be anywhere from 13 to 22 days after the initial petition, compared to about 37 days at present.

Speeding up the election is problematic because it takes time to work out the size of the bargaining unit, or which employees are eligible to vote for the union. In a large plant, some workers may have a common interest in being represented by one union, and some by another. Truck drivers might want to belong to the Teamsters and welders to the Ironworkers. The number and type of workers who vote on representation can affect the final results. Under the new rule, only after the election would there be a hearing to decide what is the appropriate bargaining unit for the election for union representation.

Postponing the decision on voter eligibility can make it easier for the union to win the election. Consider the case where all employees in a retail store cast a vote, but only a minority wants union representation. Under normal circumstances, the union would lose. But if the bargaining unit is redefined after the vote to include only those sections

[103] National Labor Relations Board, "Comparison of Current/ New NLRB Representation-Case Procedures," https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3317/Comparisontable.pdf
[104] National Labor Relations Board, "Representative Case Rules Effective April 14, 2015," (April 14, 2015), https://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015
[105] H.J. Res. 29/ S.J. Res. 8, Sess. Of 2015 (U.S. 2015), https://www.congress.gov/bill/114th-congress/senate-joint-resolution/8?q=%7B%22search%22%3A%5B%22S.J.+Res.+8%22%5D%7D&r=1

of the workforce that voted for the union, such as cosmetics workers at Macy's, or shoe salesmen at Bergdorf Goodman, the union wins. That is the advantage to the union of the new system of "vote first, decide later" on who is eligible in a post-election hearing.

Former Republican Board members Philip Miscimarra and Harry Johnson III, writing in a dissent from the rule, stated "When people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them."[106] They described the Final Rule "the Mount Everest of regulations: Massive in scale and unforgiving in its effect."

In the opinion of the dissenting members, the goal of the new rules is to make union elections occur as quickly as possible. Given 90 percent of elections occur within 56 days of petition-filing, the rules to speed up the procedure are unnecessary. In addition, the rules create more problems than they solve. For example, the new procedures create an "election now, hearing later" situation. Having the hearing prior to the election can be beneficial because the hearing addresses questions of voter eligibility and unit inclusion. If the election occurs first, it is possible that a hearing to challenge these issues may never occur.

With potentially only 13 days between notification and the union election, employers have little chance to set up meetings to present their case to workers. Unions, by filing a petition, will have already provided workers with the so-called advantages of joining a union. Employees deserve equal time to hear the other side so that they can make well-informed decisions. The potential disadvantages of joining a union include the mandatory payment of dues and initiation fees, the need to give up merit bonuses (the pay structure is set by the union), and forced membership in a pension plan that might be in poor financial shape. The rushed schedule limits employers' presentations at a time when workers need to know the facts.

With declining union membership, the Obama-led NLRB wanted to do everything in its administrative power to tilt the playing field towards unionization—even if it goes against decades of precedent. Congress has been pressed by organized labor for many years to give unions greater leverage for gaining new members, but it declined to take action. The Employee Free Choice Act, which would have taken away the right of workers to a secret ballot in union elections, did not pass even when Democrats controlled both legislative chambers. The NLRB took matters into its own hands.

Proponents believe the new amendments create a fairer and quicker process by which employees can receive representation for bargaining. By increasing the amount of available information about employees, such as phone numbers and email addresses,

[106] Philip Miscimarra & Harry Johnson III, "Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III," (2014), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3317/finalruledissent.pdf

those in favor of the new procedures argue that the probability an employee will be aware of the arguments in favor of representation will increase, making the process more transparent. In the past, employers had seven days to disclose employee information, but the Board maintains that it will expedite the representation process by shortening the timeframe to two business days.

Expediting the Representation-Case Procedure also shortens the amount of time that employees have to understand all the relevant issues regarding bargaining. This may lead to them to vote in favor or against representation without being properly informed. Quick elections also infringe on the protected speech of the unions, employees, and employers.

As well as a speeded-up election, under the ambush election rule, employers have to turn over personal information about employees to the union, a gross violation of privacy. The new procedure rules[107] require employers to release employee information, such as full names, home and cell phone numbers, email addresses, work locations, shifts, and job classifications, to those petitioning for representation within two business days of the Decision and Direction of Election or approval of Election Agreement. By approving the new procedure, the NLRB overturned years of prior precedent including *Excelsior Underwear Inc*., 156 NLRB 1236 (1966) and *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 767 (1969). Employers must allow the union to use company email to communicate with workers. This can be confusing to employees because work emails are usually sent out with the approval of the employer.

The amount of information released about the employees is excessive and goes beyond the need to reach a particular individual. It is unnecessary to have employers disclose both an employee's home and cell phone number in addition to any available email addresses. Employees have the right to keep this information private.

These rules are now under reconsideration by the Board pursuant to a Request for Information which resulted in numerous comments being filed. The current Board is expected to announce its conclusions in 2018.

3. Micro-Unions

In 2014 the NLRB approved the use of "micro-unions," small groups of workers who want to belong to a union, even if the entire workforce does not choose to do so. In a

[107] Federal Register, Vol. 79, No. 240, (December 15, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-12-15/pdf/2014-28777.pdf

decision on Macy's cosmetics workers,[108] the Board allowed unions to organize any small group of employees, as long as they had "a community of interest."

The process began in October 2012, when a petition was signed by Local 1445, United Food and Commercial Workers Union to represent a bargaining unit of 41 full-time and regular part-time cosmetic and fragrance employees of a Massachusetts Macy's branch. In the past, certain fractions of larger organizations, such as in the case *Specialty Healthcare & Rehabilitation Center of Mobile,*[109] have been allowed to petition for unit bargaining rights. The fractions were permitted because they were deemed to be a readily identifiable group sharing a "community of interest."

This rule exceeds the statutory authority of the NLRB. In addition, there was no attempt to show that the regulation addressed a market failure or policy problem, and undesirable effects on productivity, employment or competitiveness were not considered. There was no consideration of less costly alternatives, and no demonstration that the benefits were commensurate with the costs.

In the case of the Macy's cosmetic and fragrance workers, the union argued that the department shared a community of interest, distinct from that of other workers in different departments at Macy's.[110] In November 2012, Acting Regional Director of the First Region of the National Labor Relations Board Ronald Cohen agreed with the union and directed for an election.[111] His decision was later supported by the National Labor Relations Board (NLRB) in June 2014 by a 3-1 majority.[112]

Philipp Miscimarra, in a dissent,[113] stated that he did not believe that a bargaining unit limited to the salespeople of the cosmetic and fragrance department was appropriate because the decision ignored the similarities between these employees and employees in other departments; it ignored the differences within cosmetics and fragrance employees; and it would create instability for bargaining relationships.

The union had previously argued that cosmetics workers were distinct from workers in other departments because they were evaluated differently, had separate work locations, and did not interchange between other departments. However, this argument disregards many similarities, such as employee benefits, timeclock system and breakroom usage, and expected department overlap. Additionally, employees are evaluated using the same "sales scorecard" across all departments.

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[108] *Macy's*, 361 NLRB No 4 (2014) enf'd 824 F. 3d 557 (5th Cir. 2016)

[109] *Specialty Healthcare & Rehabilitation Center Of Mobile*, 357 NLRB No. 83 (2011)

[110] Brief on Review for Petitioner, Local 1445, United Food and Commercial Workers Union, *Macy's Inc. and Local 1445, United Food and Commercial Workers Union*, Case 01-RC-091163 (2012)

[111] Decision and Direction of Election, *Macy's Inc. and Local 1445, United Food and Commercial Workers Union*, Case 01-RC-091163 (2012)

[112] *Macy's Inc. and Local 1445, United Food and Commercial Workers Union*, 361 NLRB No. 163 (2014)

[113] Ibid.

Differences within the cosmetics and fragrance department suggest that all the employees do not share a community of interest. Such differences within the department include work location, proximity to other departments, attire, compensation, and on-site "vendor" relationships. Within the cosmetics and fragrance department, attire, compensation, and on-site "vendor" relationships are often determined by the specific product, such as Chanel. However, the variability in these factors is not unique to the cosmetics department. Sales assistants who sell products from Polo, Levis, and other departments often have differences in these categories as well.

Finally, the use of the *Specialty Healthcare* case to justify micro-unions is inappropriate regarding the retail industry. In *Specialty Healthcare*, the NLRB acknowledged that the standards in the case were not intended to go against the standards governing other industries. Regarding bargaining units in the retail industry, the standard has been consistent across time, permitting bargaining units to be separated by selling and non-selling groups. In Macy's Inc., the bargaining unit is not being differentiated based on selling and non-selling, rather it is being distinguished by department.

Since the ruling by the NLRB, Macy's has taken the case to the U.S. Court of Appeals. In November 2016, the Fifth Circuit Court, consisting of Judge Benavides, Judge Dennis, and Judge Costa, denied Macy's petition for review and cross-application for enforcement of the NLRB order.[114] In December 2016, Judge James L. Dennis denied Macy's request for recall and stay of the mandate.[115] *Specialty Healthcare* was reversed by *PCC Structurals, Inc.*

IV. Conclusion

The Trump administration has begun to roll back some of the regulatory abuses of power that were taking place during the Obama administration. Nevertheless, although some harmful regulations have been repealed or are in the process of being repealed, it is important to analyze these abuses of power so these regulations are not reinstated when another president is elected. The Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission have the potential to wield vast amounts of power over individual businesses. Congress needs to place limits on what these agencies are doing.

Congress repealed some costly regulations, such as the blacklisting rule, through the Congressional Review Act, so that they could not be reimposed under a future administration. Although some cannot be repealed using the Congressional Review Act, Congress should repeal or clarify them using other means.

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[114] *Macy's, Incorporated v. National Labor Relations Board*, U.S. 5th Cir. (2016)
[115] Ibid.

As mentioned above, the Harmonization of Coverage Act of 2017 would harmonize the definition of "employee" across all federal laws. [116] This law sounds so trivial that reasonable people would think that it was not necessary. But it solves the very real problem that there are over 10 different definitions of the work "employee" for different federal and state statutes. The Labor Department, the Internal Revenue Service, and the National Labor Relations Board are just three agencies that have different definitions of employees. Employers who follow rules set out by one federal department could be violating those of another department. If an employer treats a worker as an independent contractor when he is by the rules an employee, the employer is subject to substantial penalties.

The rationale for much labor regulation is the decades-old fight between those who want union leadership to have a stronger position in the workplace and those who want workers to be able to have more choice about whether to organize. Many labor regulations have their roots in this basic division. Unions were major contributors to some politicians' campaign coffers, and these politicians want to reward the contributors.

To prevent a repeat of executive branch overreach, Congress has to reassert its authority and act to define basic terms. This is the only way to stop election winners from rewarding their contributors.

[116] *Harmonization of Coverage Act of 2017*, H.R. 3825, 115th Cong. (2017)