Testimony of Glenn Spencer,
Senior Vice President of Employment Policy at the U.S. Chamber of Commerce

United States Senate
Committee on the Budget
Should Taxpayer Dollars Go to Companies that Violate Labor Laws
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Chairman Sanders, Ranking Member Graham, and Members of the Committee, I appreciate the opportunity to speak to you today.

The U.S. Chamber of Commerce directly represents 300,000 businesses and represents approximately 3 million more through our federation partners. These businesses take seriously their obligations to follow all laws, including those involving labor and employment matters. These businesses devote considerable time, talent, and resources towards achieving compliance.

The unfortunate truth, however, is that some laws are less than clear and can be extremely complex. The same applies to regulations implementing those laws. In addition these laws and regulations sometimes overlap, and there are additional laws and regulations at the state level.

Take, for example, independent contracting. There are multiple standards just at the federal level. The IRS uses a multi-factor test focusing around three elements of control.[1] The Department of Labor uses a different multi-factor test focused on economic realities.[2] The National Labor Relations Board uses a common-law test with an emphasis on entrepreneurial opportunity.[3] In addition, there are state tests, and some states use different tests for Wage and Hour, Workers' Compensation, and unemployment insurance. The result is a confusing patchwork of laws and regulations that can be challenging to understand.

This type of complexity, which occurs across numerous areas, is why we see so much litigation around labor and employment issues. Two people can look at the same factual situation and draw two different conclusions about whether a particular workplace policy is compliant. This is why it's important not to jump to conculusions about whether a company has actually violated the law. Upon further review by agency officials or a court, allegations can be found to be without merit.

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[1] "Independent Contractor (Self-Employed) or Employee?, IRS website at https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.
[2] "Misclassification of Employees as Independent Contractors," Wage and Hour Division website at https://www.dol.gov/agencies/whd/flsa/misclassification. Note that due to a ruling by the Eastern District of Texas, the Trump administration IC test is now in effect.
[3] https://news.bloomberglaw.com/daily-labor-report/companies-using-contract-labor-get-boost-from-new-nlrb-test-1

All of this leads to the question of whether an additional penalty structure for contractors, up to and including debarment, is an appropriate policy. As a general matter, Congress has concluded that it is not. Statutes like the National Labor Relations Act, for example, articulate a specific penalty structure that does not include restrictions on contracting, or debarment.[4] Moreover, Congress has declined to pass numerous proposals to amend the penalties in the NLRA, including labor law reform legislation in 1978,[5] the Employee Free Choice Act from 2003-2010,[6] and most recently the Protecting the Right to Organize Act.[7]

Where Congress has affirmatively spoken on the question of contracting and additional penalties beyond those in underlying statutes, it has rejected that concept. In 2017, Congress used the Congressional Review Act to overturn the so-called Fair Pay and Safe Workplaces regulation, which sought, in part, to require contractors to report violations of federal labor and employment laws — as well as equivalent state laws — to their contracting agencies with the ultimate threat of the loss of federal contracts as a penalty.[8]

While there are undoubtedly many reasons Congress has chosen this course of action, one factor might be that while many businesses participate in federal contracting—by some estimates as many as 25 percent of employers—these businesses specialize in different services.[9] Preventing a company from participating in federal contracting would limit the ability of the federal government to seek out the most efficient and effective provider of a particular service. In some cases, that service might no longer be available at all. For example, some national defense products are produced by just one lead supplier, an issue of particular salience as we look at our policy in Ukraine.

Administrations of both parties have often used the federal contracting process to impose policies that they could not get through Congress. For example, the Biden administration used Executive Order 14026 to require contractors to pay a minimum wage of $15 an hour. The Trump administration attempted to use Executive Order 13950 to block contractors from certain types of diversity training. The Obama administration used Executive Order 13706 to require contractors to provide paid leave. And the Bush administration used Executive Order 13201 to require contractors to post notices about union rights.

Without commenting on the wisdom of any of these policies, the unifying theme is that these were issues that did not receive Congressional approval. The justification claimed was the authority of the Federal Property and Administrative Services Act (the Act).

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[4] https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act
[5] S. 2467, 95th Congress.
[6] "One Bridge Too Far: Why the Employee Free Choice Act Has, And Should, Fail (sic), Richard A. Epstein, U of Chicago Law and Economics, Olin Working Paper No 528, 12/17/10.
[7] "Democrats Can't Pass the PRO Act, so it's Buried In the Reconciliation Bill, *The Hill*, 10/9/21.
[8] H.J. Res. 37, 115th Congress.
[9] Economic Policy Institute, 1/30/17.

But, courts are starting to question the limits of the Act with cases in numerous courts of appeals.[10] So as the committee contemplates the question of restrictions on contracting or debarment as an enhanced penalty, it should be mindful of these limits.

One additional challenge confronts the idea of imposing such enhanced penalties via regulation. And that is the very CRA resolution that was passed in 2017. Under the CRA, a rule that is struck down "may not be reissued in substantially the same form…"[11] This is a significant barrier.

In conclusion, Congress has enacted numerous labor and employment statutes. Each of those statutes contains specific penalty provisions. If the consensus in Congress is to change those penalty structures, Congress is free to do so. However, attempts to do so administratively with relation to federal contracting are likely to run into the barrier of the CRA, and may also face greater scrutiny by the courts.

Again, thank you for the opportunity to speak to the Committee today.

[10] Currently in the fifth, sixth, eighth, ninth, and 11th circuits.
[11] 5 U.S. Code, Chapter 8.