CONGRESSIONAL TESTIMONY

Should Taxpayer Dollars Go to Companies That Violate U.S. Labor Laws?

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Policymakers Should Not Restrict Competition for Federal Contracts

The question has been asked, "Should taxpayer dollars go to companies that violate U.S. labor laws?"

Americans' freedom and opportunity requires a well-functioning government, clearly defined laws, and consistent enforcement of the laws. Proper stewardship of taxpayers' dollars requires an efficient and effective use of federal funds, including a competitive and fair process for federal contracts.

The U.S. Department of Labor administers and enforces more than 180 federal laws covering thousands of pages of text, applied across 10 million U.S. workplaces. The consequences of violation can include fines, penalties, and prison sentences, and employers can violate laws knowingly or unknowingly.

Employers face a high chance of violating U.S. labor laws in any given year. Due to the complexity of labor laws (which not only include federal, but also state and local labor laws), employers can unknowingly violate labor laws by failing to post a required notice, posting a required notice in the wrong place, failing to provide sufficient accommodations for an individual, or alternatively, attempting to provide an employee with accommodations and asking for personal information that is prohibited under U.S. labor laws.

The U.S. justice system provides a process to address claims of labor law violations, to determine guilt or innocence, and to apply the appropriate penalties. If policymakers believe that certain violations of the law deserve greater penalties, they should seek to change the penalties instead of blacklisting employers from federal contracts.

One of the roles of the federal government is to provide taxpayers with efficient and effective government services. The current White House webpage for the Office of Federal Procurement Policy states:

"Today, more than ever, the government must ensure that it spends money wisely and eliminates waste and abuse of taxpayer dollars. With approximately one out of every ten dollars of Federal government spending going to contractors, it is imperative that contract actions result in the best value for the taxpayer."[1]

That includes, "promot[ing] economy, efficiency, and effectiveness in acquisition processes."

Administration use of the federal procurement process as a bully pulpit would deprive taxpayers of the lowest-cost, most effective providers of certain government functions. This could impose significant harms on Americans—most notably increased national security risks—by potentially banning the majority of companies currently providing health care, transportation, defense, and many other contracts from fulfilling federal contracts.

Unprecedented Labor Market

The COVID-19 pandemic—including the responses by policymakers, businesses, and individuals—invoked significant changes in the labor market. Misguided and prolonged bonus unemployment benefits and other welfare-without-work benefits kept people out of the labor force. Employers were forced to adapt technology and to adjust work in ways that kept operations going in the short term and created more efficient and flexible platforms for the future. Job losses and an increased need for autonomy and flexibility in light of school and childcare closures contributed to 12 percent of the workforce newly taking on independent work in 2020,[2] buoyed by safety precautions that increased the demand for contract-based services offered on gig-economy platforms.

Today's labor market is unlike any before in U.S. history, and it is undoubtedly a worker's market. Job openings just reached another record high of 11.5 million, which means there are nearly two jobs available for every unemployed worker.[3] Employers are struggling to get the workers they need.

A surge in workers quitting their jobs—including a new record of 4.5 million in March and a total of one in three workers quitting over the past year—has been another pandemic-related phenomenon.[4] Although quit rates will not remain this high for the long run, even the pre-pandemic rate of quits demonstrates the reality that the average worker today will change jobs a dozen or more times throughout

[1]The White House, Office of Management and Budget, "The Office of Federal Procurement Policy," https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#:~:text=Today%20more%20than%20ever%2C%20the,best%20value%20for%20the%20taxpayer. (accessed May 3, 2022).
[2]"Freelance Forward 2020," commissioned by Upwork, September 2020, https://assets-global.website-files.com/5ece60393f5cbb1b2f25ef60/5f6b9e29a8eb552423039a37_Upwork_FreelanceForward%20(1).pdf (accessed May 3, 2022).
[3]Economic news release, "Job Openings and Labor Turnover Survey," U.S. Bureau of Labor Statistics, May 3, 2022, https://www.bls.gov/news.release/jolts.nr0.htm (accessed May 3, 2022).
[4]Ibid.

his career, opposed to working for a single company throughout his lifetime.

In response to the labor shortage, employers have significantly increased wages and benefits. According to the National Federation of Independent Businesses, 49 percent of employers reporting raising compensation in March and another 28 percent plan to increase compensation over the next three months.

In response to workers' desire for greater flexibility—which was on the rise before COVID-19, and greatly accelerated by it—employers are expanding flexibility and family friendly policies, including a 64 percent increase in workers' access to paid family leave over the past five years.[5]

Strong wage gains (though they have been more than eroded by inflation) and more accommodating workplaces were a feature of the labor market in 2021, even as the percentage of union members has declined, including only 6.1 percent of private-sector workers.

One of the reasons why union membership is in decline is because unions have not adapted to the changing labor market and economy. As labor laws and a competitive global economy provide many of the advances and developments that unions remain stuck in their old ways. Unions thrive on adversarial relationships and strong-arm tactics, pitting employees against employers, and preferring the role of bully instead of benevolent mediator. This is counter to the amicable relationships that workers and employers desire, and it is counter to the mutual relationship that is fundamental to employers' and workers' success.

Unions also insist on rigid seniority-based pay scales and one-size-fits all schedules that do not reflect workers' desire to be paid according to their contributions, nor their desire for increasing flexibility and autonomy.

That does not mean that unions have no role today. But instead of trying to force workers into unions that do not provide value to them, unions should respond by providing services that workers want so that they will join voluntarily.

Proposed Policies Will Make the Labor Shortage, Inflation, and Workers' Frustrations Worse

A number of proposed policies, including the pro-union Protecting the Right to Organize (PRO) Act, would exacerbate existing labor market struggles, add to inflation, fail to meet workers' needs and desires, and ultimately lead to a smaller labor force and lower incomes.

The PRO Act attempts to recreate the workplace of yesteryear—a workplace dominated by unions, manufacturing, men, and decades-long jobs with a single company. In doing so, the PRO Act would erase decades' worth of labor market progress and opportunity—particularly for women—leaving workers with less autonomy, less flexibility, and fewer earnings opportunities.

Some of the rights that workers could lose under the PRO Act include their right to a secret-ballot union election, the privacy of their personal information, the option to join and pay dues to a union in 27 right-to-work states, the ability to be their own boss, and the ability to own their own franchise business.[6]

[5] News release, "Union Members—2021," U.S. Bureau of Labor Statistics, January 20, 2022, https://www.bls.gov/news.release/pdf/union2.pdf (accessed May 3, 2022).

[6] Rachel Greszler, "6 Ways a Union-Backed Bill Will Upend the Job Market," The Daily Signal, February 6, 2020, https://www.dailysignal.com/2020/02/05/6-ways-

The PRO Act's attack on independent workers would especially hurt women. According to FreshBooks' Women in the Independent Workforce Annual Report, women's share of self-employed work and small business ownership jumped from about 25 percent in 2012 to 34 percent in 2019.[7] The Census Bureau reports 1.1 million female-owned businesses and another 10.6 million self-employed.[8]

An additional 24 million women do freelance. These freelancers aren't just Uber drivers and parttime Instacart shoppers. These are yoga instructors, language interpreters, artists and musicians, product consultants, journalists and editors, and Etsy shop owners.

California's mini version of the PRO Act's independent contractor test—the state's AB5 law—has left many women chasing work.[9] Even with 100 exemptions—and counting—Monica Wyman has been unable to hire help for her floral business, including when she underwent cancer surgery.[10]

The overwhelming majority of women who moved from traditional employment to independent work say they have a better work-life balance (73 percent) and earn as much or more as when they were formally employed (68 percent). Moreover, most say that the greater flexibility and autonomy has resulted in less stress (59 percent) and better health (57 percent).[11] But the PRO Act would take away independent work options in order to push workers into jobs that can be more easily unionized.

In another attempt to increase unionization, the PRO Act also attacks the franchise business model, which includes 750,000 franchise establishments in the U.S.—everything from Dunkin' Donuts to Orangetheory Fitness. By making the parent companies of franchises legally liable for the employees hired by independent franchise owners, the PRO Act would upend a model without which 39 percent of female franchise owners say they would not have been able to own their businesses.[12]

Forcing unionization on workers could lead to further price hikes even as Americans are facing 40-year high inflation. Unions drive up employer costs by an estimated 30 percent and also reduce worker output.[13] The excessive unemployment insurance benefits that forced employers to increase workers' compensation is proof that higher costs for employers translate into higher prices for consumers.

a-union-backed-bill-will-upend-the-jobs-market/ (accessed May 3, 2022).

7 FreshBooks, "Women in the Independent Workforce—2nd Annual Report, 2019," https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019 (accessed May 3, 2022).

8 Andrew W. Haite, "Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018," U.S. Census Bureau, March 29, 2021, https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html (accessed May 4, 2022).

9 Independent Women's Forum, "Chasing Work," https://www.iwf.org/chasing-work/ (accessed May 3, 2022).

10 Independent Women's Forum, "Chasing Work: A Florists Business Survived Breast Cancer, But AB5 Might Kill It," YouTube, https://www.youtube.com/watch?v=zrit0Qt0070 (accessed May 3, 2022).

11 FreshBooks, "Women in the Independent Workforce—2nd Annual Report, 2019."

12 Raghav Patel, "IFA Publishes 'The Value of Franchising Report' from Oxford Economics," September 30, 2021, https://www.global-franchise.com/insight/ifa-publishes-the-value-of-franchising-report-from-oxford-economics (accessed May 3, 2022).

13 Projections, "The Cost of Unionization," https://projectionsinc.com/unionproof/the-cost-of-unionization-2/#:~:text=What%20is%20the%20cost%20of,30%25%20increase%20in%20operating%20expenses. (accessed May 3, 2022).

Moreover, unions' use of strikes to get what they want also contributes to shortages of goods and services—including children's education and individuals' health care.

Restricting job opportunities, driving up costs, and limiting the supply of goods and services will exacerbate Americans' greatest struggles. Moreover, enforcing rigid union workplace environments will restrict work and income opportunities, and prevent workers from achieving the flexibility and autonomy they increasingly desire or need.

Modernized Labor Policies to Promote More Work, More Income Opportunities

Even before the pandemic, growing numbers of workers had wanted greater flexibility and autonomy. That caused an increase in the number of individuals working independently—as self-employed, freelancers, gig-workers, or contractors. Worker desire for more flexibility and autonomy also led to a rise in more accommodating workplace policies and compensation packages.

The pandemic strengthened these trends. According to an annual Upwork Report, 59 million (36 percent of all workers) performed independent work in 2021, and another 59 million said they were likely to freelance in the future.[14]

Whether the result of necessity—such as caring for children or coping with a family member's health condition—or simply preference, independent work provides the autonomy and flexibility that many workers want and need in order to participate in the labor force. In fact, over half of independent workers—32 million—say that they are unable to work for a traditional employer because of personal circumstances, such as health issues or child care needs.[15]

Even as the labor market has undergone vast changes and will continue to evolve, today's labor laws have not been updated for nearly eight decades. To encourage a thriving and adaptable labor market that allows more people to earn incomes by producing good and offering services that are of value to others, policymakers should:

- **Protect flexible and autonomous independent work** by codifying in law the common-law definition of "employee" to be consistent with federal and state laws and Supreme Court decisions, based on the level of control an individual maintains over his or her work.
- **Protect the franchising pathway to entrepreneurship** by codifying in law the longstanding precedent, and practical reality, that an individual's employer is the one who hires, oversees, and pays her: the franchise owner.
- **Prioritize workers' choices in unionization** by simultaneously getting rid of forced unionization laws and "exclusive representation" laws (which require unions to represent non-union workers) so that workers do not have to pay for representation they do not want and unions do not have to use their resources representing workers who do not pay union dues.
- **End welfare-without-work subsidies** and re-orient the welfare system to promote work, independence, and autonomy.

[14]Dr. Adam Ozimek, "Freelance Forward Economists Report," Commissioned by Upwork, 2021, https://www.upwork.com/research/freelance-forward-2021#:~:text=Upwork%E2%80%99s%202021%20Freelance%20Forward%20survey%20confirms%20the%20finding,,the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b (accessed May 3, 2022).

[15]Ibid.

- **Eliminate higher education subsidies** that drive up college costs, promote impractical degrees, and contribute to dismal graduation rates.
- **Allow effective and efficient education alternatives,** such as Industry-Recognized Apprenticeship Programs (IRAPs).[16]
- **Remove barriers to work and flexibility,** such as by enacting the Working Families Flexibility Act, thereby removing an unintentional barrier to employer-provided childcare; [17] and by eliminating Social Security's retirement earnings test.

The Employee Rights Act—which includes some of these policies—would modernize labor laws in ways that prioritize workers' rights and choices.[18]

Summary

Regardless of its intents, central planning—whether by the federal government or by organized labor—is not the solution to today's labor market challenges.

If policymakers seek to increase the consequences for violating certain laws, they should do so through the legal process instead of by using federal contracts as a bully pulpit while subjecting taxpayers to higher costs and hampered government functions.

Government actions to restrict eligibility for government contracts would only be exacerbated by the anti-worker policies in the PRO Act.

Amid an unprecedented labor shortage and four-decade-high inflation, business owners, workers, and consumers are all struggling. The liberal labor agenda will add insult to injury by failing to recognize workers' rights and desires, imposing rigid workplaces, driving up costs, restricting growth, and impeding innovation.

Empowering workers through choices, increased autonomy, expanded opportunities, flexible work environments, and lower-cost educational alternatives would allow more people to gain the skills they need, for the jobs they want, in the employment arrangements that work best for them, while earning rising incomes that allow them to pay for what they need and pursue what they desire.

[16] U.S. Department of Labor, "Industry-Recognized Apprenticeship Program," https://www.apprenticeship.gov/employers/industry-recognized-apprenticeship-program (accessed May 3, 2022).

[17] Under the Fair Labor Standards Act (FLSA), employers who provide any kind of onsite childcare or childcare subsidies must include the value of those benefits in employees' "regular rate" of pay calculations. This complicates and increases costs when workers who receive hourly wages work overtime because, instead of just paying the worker 1.5 times the wage, employers also have to add on 1.5 times the hourly value of any childcare subsidy, even though those subsidies are usually fixed benefits. Policymakers should exclude childcare benefits from the "regular rate" of pay calculations, just as the law already excludes similar benefits, such as retirement contributions, and accident, health, and life insurance benefits. This would particularly benefit lower-income to middle-income workers who are more likely to receive hourly wages.

[18] Rachel Greszler, "The Pandemic Changed How We Work. It's Time for Labor Laws to Change, Too," The Daily Signal, March 22, 2022, https://www.dailysignal.com/2022/03/22/the-pandemic-changed-how-we-work-its-time-for-labor-laws-to-change-too/ (accessed May 3, 2022).

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