

# Labor Policy for COVID-19 and Beyond: Recommendations to Get Americans Back to Work

*Rachel Greszler*

## KEY TAKEAWAYS

In the wake of the coronavirus, America needs labor policies that will foster—not impede—work opportunities.

Closing off opportunities for non-traditional work, driving up labor costs, and restricting flexible work options will keep Americans out of work and delay recovery.

Policymakers should eliminate unnecessary regulations and licensing, repeal wage restrictions, encourage workplace flexibility, and enable affordable child care.

With one in four workers having filed for unemployment insurance benefits over the past three months, and with many businesses struggling to survive, America needs an environment that will foster, not impede, work opportunities for as many Americans as possible.

At a minimum, the COVID-19 pandemic has caused a temporary setback to what was an incredibly strong labor market. It has also resulted in permanent closures and will likely change the way that many companies and workers do business. The extent to which society and the labor market will recover depends, in part, on policymakers' responses. Unnecessarily prolonged closures and rigid restrictions, along with inhospitable labor policies, could lead to a permanent decay of incomes, opportunities, and innovation. More targeted responses that grant flexibility and provide welcoming work environments will help to spur

---

This paper, in its entirety, can be found at <http://report.heritage.org/bg3506>

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

recovery, opportunity, and growth across America's diverse labor market spanning 160 million workers and more than 30 million unique businesses.

So what are the appropriate responses, both as society emerges from temporary shutdowns to a changed environment, and as society continually adjusts to any number of changing circumstances in the future? Workers and employers alike need flexibility and open doors.

Policymakers should not close off opportunities for non-traditional work, drive up the costs of employment, take away the autonomy of employers to manage their businesses, or constrain the ability of individuals to pursue flexible work options. Instead, policymakers should foster environments that attract and enable work opportunities for all Americans, including eliminating unnecessary regulations and licensing requirements, respecting individuals' right to work, repealing wage restrictions that reduce jobs, ending restrictions that limit workplace flexibility, and enabling more accessible and affordable child care. State and federal policymakers should:

**Clarify and Harmonize the Government's Multiple Definitions of "Employee" Versus Contractor.** Different tests and rules to determine who is, and is not, an employee of a company make it needlessly difficult for employers and workers to differentiate between employees and contractors. This increases costs and decreases work flexibility for the growing number of independent contractors. If businesses can be held liable for the actions of contractors over whom they exercise little or no control, and if businesses can be required to provide employment-related benefits to workers who are only loosely attached to their operations, there will be fewer jobs for workers and fewer opportunities for entrepreneurs. Congress should clarify the test for independent contractor status under the Fair Labor Standards Act, the National Labor Relations Act, and the tax code based on the "common law" test that bases determinations on how much control an employer exerts over a worker.

**Repeal Work Restrictions, Such as California's Assembly Bill No. 5 (AB5).** Even prior to COVID-19, Californians were losing jobs and incomes left and right due to a misguided state law—AB5—that severely restricts job opportunities for independent contractors, temporary workers, freelancers, and gig-economy workers. By changing the definition of an employee (versus a contractor) to force most people (except those granted special exemptions) into traditional employment situations, the law has taken away many individuals' and families' livelihoods and autonomy to be their own bosses. Workers increasingly value the flexibility that freelancing (working independently) provides. A study of Uber drivers found that they valued the fully flexible work platform at 40 percent or more of their earnings.<sup>1</sup> It

## Contributors

**Austen Bannan** is Senior Policy Analyst in Employment Policy at Americans for Prosperity.

**Paul J. Larkin, Jr.**, is the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow in the Edwin Meese Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.

**Adam N. Michel, PhD**, is Senior Policy Analyst in the Grover M. Hermann Center, of the Institute for Economic Freedom, at The Heritage Foundation.

**F. Vincent Vernuccio** is Senior Fellow for the Mackinac Center's National Workers for Opportunity Initiative.

**Clint Woods** is Policy Fellow in Regulations at Americans for Prosperity.

also provides income opportunities that are otherwise not available, including for the 46 percent of freelancers who say they are unable to work for a traditional employer because of personal circumstances, such as health conditions and family situations.<sup>2</sup>

Flexibility and income opportunities will be especially important as businesses and workers emerge from the current shutdown and record-high unemployment. In fact, 76 percent of workers who do not freelance said that they would consider freelancing in a recession.<sup>3</sup> Yet, instead of reconsidering AB5 and its harmful implications amid COVID-19 (especially as gig-based services, such as Instacart, have become so valuable to people seeking to protect their health by limiting their exposure), California has doubled down on its efforts to crush the gig-economy by suing Uber and Lyft for allegedly violating AB5. If successful, the result will be fewer jobs and income opportunities for Californians, higher prices, and less-accessible goods and services. California should repeal AB5 (or at least temporarily suspend it), and states, such as New York, Illinois, Massachusetts, and Washington State, which are considering similar laws, should replace such job-killing pursuits with ones that would foster job creation and income opportunities.

**Not Implement the Protecting the Right to Organize (PRO) Act.** In February 2020, about a month before the COVID-19 pandemic hit the U.S., the House of Representatives passed a sweeping, union-led labor bill, one component of which was an amplified national version of California's AB5 law. The PRO Act would go much further in destroying livelihoods and opportunities, however. It would also take away essential freedoms, such as

workers' privacy and the right to a secret-ballot election, and it would upend the labor market by overturning the franchise business model, invalidating 27 states' right to work laws, and subjecting neutral businesses to union-led strikes, boycotts, and harassment by legalizing secondary boycotts.<sup>4</sup> The PRO Act would benefit union bosses at the expense of jobs, incomes, and opportunities for ordinary Americans. Implementing the PRO Act in the wake of COVID-19 would deliver a crushing blow to the labor market and economic recovery.

**Establish a Temporary Safe Harbor for Public Health Benefits for Contractors.** Amid COVID-19, some companies and platforms that work with contractors or gig-workers would like to provide those individuals with benefits aimed to improve the health and welfare of workers and the general public. Such benefits could include paid leave for ride-sharing drivers and Instacart shoppers who become sick with COVID-19 or who need to care for sick family members, or providing medical and cleaning supplies to workers. Under current law, providing those benefits risks triggering an employer–employee relationship that would include significant costs for businesses and deprive independent contractors of the flexibility and autonomy that they desire. Policymakers should provide a safe harbor, such as the Helping Gig Economy Workers of 2020 Act,<sup>5</sup> for companies that choose to provide health-related and safety-related benefits to independent contractors so that they can protect their workers and the public at a time of increased need for safety and flexibility.<sup>6</sup>

**Codify the Direct-Control Definition of a Joint Employer.** The U.S. Department of Labor (DOL) recently implemented a rule<sup>7</sup> that defines a joint employer as a company that exercises direct and immediate control over another company's employees.<sup>8</sup> Prior to this DOL rule that went into effect on April 27, 2020, the previous joint-employer standard under the Browning–Ferris definition (which treated companies that had only indirect control over workers as joint employers) was estimated to have cost franchise businesses as much as \$33.3 billion annually, reduced employment by 376,000 jobs, and caused a 93 percent spike in lawsuits against franchisees.<sup>9</sup> Congress should codify the recently established definition of a joint employer so that an entity is only liable for employees it controls directly. Not only is this the appropriate definition, but it would help America's roughly 4,000 franchise brands—including more than 750,000 individual franchise operations and their nearly 8 million workers—have a better chance of surviving COVID-19 and expanding in the future.

**Allow a Safe Harbor for Household Employees Who Choose to Be Contractors.** With schools closed through the end of the 2019–2020 school

year, many summer camps closed, many day care centers closed and potentially subject to reduced capacity when they reopen, and the possibility that many schools may not re-open fully in the fall, many families have found, or will find, themselves in need of hiring individuals to care for their children at home. Yet, hiring a “household employee,” as opposed to a contractor, can involve a burdensome and time-consuming process of complying with state and federal regulations and tax laws.

Currently, if an individual or family pays another individual more than \$2,200 per year (the equivalent of \$42 per week) for work performed in their home, they are required to pay, withhold, and submit certain taxes. This process requires registering as an employer with the state and federal government, hanging certain employee-rights notices in one’s home, and can include registering with, and submitting tax payments to, the state and federal unemployment insurance systems, state and federal income tax systems, and the Social Security Administration. In addition to the tax burden, compliance with all the different rules and taxes is both confusing and burdensome, and mistakes can lead to significant tax bills for both the household “employer” and “employee.” Under the current rules, a family could not even hire a babysitter at \$15 per hour for four weeks before exceeding the \$2,200 threshold and having to treat that individual as a legal employee.

Maids, for example, who provide services to 10 to 15 different households, not only have to report their incomes from each household separately when filing their taxes, they are also dependent on those households to track, report, and pay Social Security, Medicare, and unemployment-insurance taxes. Failure of one or more households to do so correctly could result in significant end-of-the-year tax bills for such workers.

Congress should create a safe harbor to allow individuals performing household work to choose to be treated as contractors instead of household employees, if they prefer such treatment. This choice would allow individuals to receive higher base pay as contractors because of the compliance and tax savings for the household they serve. While those households would have to report any income they pay to individuals that exceeds \$600 in a year, they would only have to provide a single document—a Form 1099-MISC—as opposed to registering with, meticulously tracking, reporting, and sending taxes to as many as five different government entities.

**Enable More Affordable, Accessible Child Care.** Even prior to COVID-19, American families faced significant shortages in child care availability, as well as excessive costs that prevented many families from

TEXT BOX 1

## Labor Policy for COVID-19 and Beyond: Fostering Work Opportunities for All Americans

- Federal and state policymakers should:
- Clarify and harmonize the government's multiple definitions of "employee" versus contractor.
  - Repeal work restrictions like California's AB5 law.
  - Not implement the PRO Act.
  - Establish a temporary safe harbor for public health benefits for contractors.
  - Codify the direct-control definition of a joint employer.
  - Allow a safe harbor for household employees who choose to be contractors.
  - Enable more affordable, accessible child care.
  - Allow alternative child care arrangements.
  - Roll back the Department of Labor's overtime rule.
  - Allow hourly workers to choose paid time off.
  - Repeal the Davis-Bacon Act.
  - Review and eliminate unnecessary occupational licensing requirements.
  - Eliminate CON laws.
  - Remove barriers to home-based businesses.
  - Treat pandemic-caused remote work as office work for tax purposes.
  - Create more flexibility for truck drivers under the HOS regulations.
  - Give workers the choice to join a union.
  - Give employers the freedom to raise unionized workers' pay.
  - Not eliminate jobs through artificially high minimum wages.

being able to afford formal child care. Meanwhile, most child care centers across the U.S. were forced to close down amid COVID-19 and they will likely face new regulations and safety procedures upon re-opening. Some of these new rules could further restrict the supply of child care. Moreover, some families may seek alternative child care arrangements based on health concerns or on their altered work situations.

Having access to safe and affordable child care is essential to many parents being able to return to work. Thus, state child care regulators should seek to provide health and safety guidance to child care providers, instead of instituting costly and excessive regulations related to COVID-19 concerns. Regulators should also evaluate their existing policies and remove those that drive up costs and restrict supply without significantly improving

child welfare. Some regulations—such as child-to-teacher ratios, space requirements, and general (as opposed to child-care-specific) education requirements—add significantly to costs, but the multitude of other small regulations—such as regulating the storage of food items, the timing and type of beverage distribution (including mandating that 1 percent or skim milk be served with each meal despite pediatrician recommendations for 2 percent milk), and requiring the provision of a nursing-mothers room<sup>10</sup>—all add to the costs and regulatory burden of opening and operating a child care facility. States could increase affordable child care options by scaling back regulations that drive up costs without significantly improving the safety and quality of child care.

**Allow Alternative Child Care Arrangements.** In many states, it is illegal to operate a child care facility without a license. This can include situations in which someone cares for a friend’s children after school, even when it is just one day per week.<sup>11</sup> Some families have sought to pool together caring for one another’s children through child care cooperatives—something like three families joining together and each watching children in their home one day a week, with no exchange of payment. Such situations will be increasingly desired amid COVID-19 if child care centers do not re-open, if parents do not have enough work to afford full-time child care, or if parents simply prefer to limit the contacts of their children. State and local governments should not regulate privately agreed upon and payment-free co-ops.

**Roll Back the U.S. Department of Labor’s Overtime Rule.** As of January 1, 2020, the salary threshold under which employers must pay workers overtime compensation jumped by 50 percent, from \$23,660 per year to \$35,568 (the equivalent of about \$17 per hour). Although this increase was far less than the Obama-proposed jump to \$47,476 (a federal judge issued an injunction against this rule, stating that it was “unlawful”), it will nonetheless hurt, not help, workers.<sup>12</sup> While the intent of this threshold is to increase wages for individuals who work more than 40 hours in any given week, economists widely acknowledge that employers will pass potential cost increases back to workers in the form of lower base pay. They will likely also take away flexibility for employees to work remotely (where employers cannot monitor their hours as easily), or to alter their hours from week to week to fit with their personal and family obligations. Particularly in light of the COVID-19-induced remote work and increased demands for flexible work hours, the Department of Labor should roll back its recent increase in the overtime threshold to give employers and workers the flexibility they need to keep more people employed.<sup>13</sup>



**Allow Hourly Workers to Choose Paid Time Off.** The coronavirus health crisis and many of the containment measures—children home from school and day care, and temporary shutdowns and slow-downs—have highlighted the value of paid time off. Yet, low-income workers are less likely to have access to paid time off and under current law, private-sector employers are prohibited from allowing lower-income hourly workers from choosing between pay and paid time off when they work overtime. The Working Families Flexibility Act, introduced by Senator Mike Lee (R-UT) and Representative Martha Roby (R-AL), would eliminate the current prohibition on private employers from offering so-called comp time to their workers. Many workers—especially parents of young children and those who care for older family members—rank workplace flexibility as more important than pay. Both during and beyond this global pandemic, lower-wage hourly workers should be granted the same right as state and local workers to choose between paid time off and cash pay.<sup>14</sup>

**Repeal the Davis–Bacon Act.** Since 1934, the Davis–Bacon Act has required contractors to pay “prevailing wages” on construction projects that receive federal funding and contracts (in excess of \$2,000) for the construction, alteration, or a repair of public buildings or public works. Reams of research have documented that the methods used to calculate prevailing wages are deeply flawed, and that the results bear no resemblance to actual wages.<sup>15</sup> In some cases, the Davis–Bacon rates are more than double the market wages. The compliance burden is particularly onerous on small businesses that have smaller margins to meet higher labor costs. In particular, the requirements unduly burden minority-owned businesses and open-shop contractors (those who do not force employees to join a union).

The Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, passed by a mostly party-line vote in the House of Representatives on May 15, 2020, would extend problematic prevailing-wage-rate requirements to contract tracers (individuals who work with patients to help identify and warn others who have had contact with an infected individual, in order to help stop chains of transmission) and related positions, laborers, and mechanics working on projects that receive federal funding or assistance under the act.<sup>16</sup> Imposing prevailing-wage laws in COVID-19 relief packages is counterproductive, as it would result in higher costs and fewer jobs.

The Congressional Budget Office (CBO) has estimated that repealing Davis–Bacon would save taxpayers \$1.4 billion per year by lowering construction costs.<sup>17</sup> Lowering costs leads to increased demand, and hence more



construction jobs. Repealing the act would stretch taxpayer dollars and create tens of thousands more construction-related jobs—or the savings could be returned to taxpayers in the form of tax relief. Either one would be a major improvement to the profligacy of the Davis–Bacon Act.

**Review and Eliminate Unnecessary Occupational Licensing Requirements.** Proponents of occupational licensing schemes tout them as consumer-protection initiatives, a way of safeguarding the public against unqualified or unscrupulous practitioners in fields involving specialized education, training, or skill that the average person lacks and cannot evaluate in others. For example, every state regulates the practice of medicine, and it is eminently reasonable to keep an unqualified party from diagnosing diseases, prescribing medication, or performing surgery. Yet, not every licensing requirement is intended to, or does, protect the public health and welfare. Most licensing schemes simply create state-licensed and state-enforced cartels that protect incumbents from competition by rivals offering better services or lower prices.<sup>18</sup> There is no good reason to require prospective barbers, bartenders, ballroom dance instructors, casket retailers, florists, hair braiders, home entertainment installers, interior designers, makeup artists, shampoo specialists, taxi drivers, and a host of other parties to complete lengthy and expensive training programs and pay stiff licensing fees.<sup>19</sup> For those reasons and others, Heritage Foundation analysts have previously criticized unnecessary or overly broad occupational licensing schemes, and has urged the states to reform their laws.<sup>20</sup> Now is an opportune time to do so.

Some reforms would help immediately to combat COVID-19. As of April 8, 2020, 30 states and the District of Columbia have expanded the number of available physicians by, for example, waiving limitations on practice of telemedicine by out-of-state physicians.<sup>21</sup> States can and should do more. They should grant provisional physician licenses to qualified medical school graduates who have not yet completed a post-graduate residency program.<sup>22</sup> States should encourage retired physicians to provide emergency assistance and permit them to do so.<sup>23</sup> States should grant other trained health care professionals—such as physician assistants, former military corpsmen or medics, registered nurses, and licensed nurse practitioners—greater freedom to support intensivists or pulmonologists treating COVID-19 patients, or to treat people for the other diseases and accidents that have not stopped during the pandemic.<sup>24</sup> Those steps will help to address the current physician shortage and offer potential long-term remedies for it as well.

The economy also needs resuscitation, and occupational licensing reform can play a role. Countless businesses have had to lay off a record number

of employees, and licensing requirements deny them an opportunity for earning income. Licensing requirements impose particular hardships on lower-income people and the young by denying them an opportunity to choose an unlicensed, lower-priced service provider and barring them from offering services themselves and working themselves out of poverty. People who have lost their jobs and need to resettle in another state might find that their licenses are not portable, leaving them potentially without the ability to earn any income in their line of work.<sup>25</sup> The states and Congress need to eliminate needless licensing restrictions and make it easier to transfer licenses across state lines so that more of the recently unemployed workers can earn an income.

**Eliminate Certificate of Need (CON) Laws.** Similar to licensing requirements, CON laws, which prohibit the entry or expansion of health care facilities without approval from other medical providers, exist in 36 states and the District of Columbia. Imagine if every individual who wanted to open up a restaurant, or every entrepreneur who wanted to start a business, had to first obtain approval from all of his or her would-be competitors—this is illogical, unjust, and the antithesis of a free market. Moreover, it can be harmful to public health, particularly during a pandemic. A study by the Mercatus Center found that states with CON laws have 30 percent fewer hospitals per 100,000 residents, as well as higher prices for medical care.<sup>26</sup> While 22 states have suspended their CON laws during the pandemic, the remaining 14 states should do the same and all 36 should end these laws for good.<sup>27</sup> Even after COVID-19, the aging of the baby-boom population will require an increased supply of medical providers and services—including alternative care facilities—and the establishment and expansion of medical care should be based on market demand instead of government command.

**Remove Barriers to Home-Based Businesses.** Much like government occupational licensing, barriers for home businesses also severely restrict the ability of people to earn a living. The aftermath of the COVID-19 crisis presents an opportunity to temporarily, or permanently, reduce zoning, permitting, and tax barriers to home-based businesses. Today, approximately 50 percent of businesses are registered or operated at the owners' residential addresses, particularly in the information, construction, and professional services fields.<sup>28</sup> Home-based businesses strengthen local communities, serve as incubators for larger businesses, and have a number of advantages for small business owners, including greater flexibility and lower operating costs.<sup>29</sup> These businesses are critical for marginalized groups and are particularly vital during economic downturns and social distancing.<sup>30</sup>

Unfortunately, local zoning regulations have a devastating effect on home-based businesses by banning their operation altogether, restricting their size, driving them underground, and subjecting them to onerous compliance burdens that make home operation too difficult.<sup>31</sup> States should designate a category of “no impact” home-based businesses (meaning small businesses with little impact on neighbors) that can operate without a special permit or license.<sup>32</sup>

**Treat Pandemic-Caused Remote Work as Office Work for Tax Purposes.** Following widespread office closures and stay-at-home orders, Americans are now working in new locations, sometimes in new a new state. Front-line workers have traveled to pandemic hotspots to help care for the sick and support the health care response to the coronavirus pandemic. These new work arrangements could ensnare unsuspecting taxpayers in new and complicated tax obligations. All states and localities should issue clear guidance to treat pandemic-caused remote work as in-office work to narrow the chances of taxpayers having to temporarily comply with new tax laws. States should also make longer-term structural reforms to protect out-of-state workers in normal times by raising the threshold for having to pay income taxes and clarifying sourcing rules for telehealth consultations.

Generally, if an individual works and earns income in a state, that state can require the worker to pay local income taxes. Some states create unnecessary headaches for many transient taxpayers by starting to tax workers after just one day of earning income in their state; others have higher thresholds before imposing the local tax laws. Business income taxes are also levied based on “nexus” rules, which determine where taxes are owed and often include the location of their employees, among other factors. A remote worker who traveled to a new state for telework during the coronavirus pandemic could trigger both new personal income taxes and new business taxes for his or her employer. Not properly complying with and documenting temporary telework arrangements have the potential to ensnare unsuspecting taxpayers—whether employers or employees—in novel tax systems across multiple jurisdictions, opening them up to new liabilities in the midst of a national emergency.

Several states have already issued guidance that remote work during the pandemic will be considered in-office work for tax purposes.<sup>33</sup> However, guidance that is more widespread is needed, as the majority of states have not issued any guidance or have explicitly stated their intention to enforce existing laws. New York Governor Andrew Cuomo, for instance, said that his state would continue to assess taxes on income from remote work earned while in the state.<sup>34</sup>

Individuals in professions that include regular travel, such as consultants and professional sports players, have to manage the complexity of multiple tax jurisdictions even in normal times.<sup>35</sup> States should also use this opportunity to consider longer-term reforms, such as increasing the number of days an individual must be present in the state before registering new tax liabilities. The U.S. Internal Revenue Service (IRS) uses a 31-day annual test as the threshold that determines if a non-citizen must pay U.S. income taxes, in addition to a three-year 183-day threshold.<sup>36</sup> States should implement a similar 31-day threshold as a sensible taxpayer protection. There is also uncertainty for many doctors and hospitals around the sourcing rules for the treatment of income earned from telemedicine patient care. The IRS and state legislatures should issue clear guidance that the income may be sourced to the hospital or doctor's office as it would be for an in-person visit so that the income does not register any novel tax liabilities.<sup>37</sup>

**Create More Flexibility for Truck Drivers Under the Hours-of-Service (HOS) Regulations.** The U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) regulates HOS for truck drivers.<sup>38</sup> These overly prescriptive HOS regulations include mandatory breaks for truck drivers and the maximum limit for on-duty time. In August 2019, the FMCSA published a proposed rule that would eliminate some of the onerous provisions of the existing regulations, giving truck drivers greater flexibility.<sup>39</sup> One commonsense reform called for by the proposed rule is to address the existing 30-minute break requirement. Under the existing rules, the 30-minute break requirement can only be met if the truck driver is on "off duty" status as opposed to "on duty, not driving" status. Practically speaking, what this means is that under the current rules, a truck driver, for example, when waiting in a break room for their truck to be unloaded would not be able to count that time as a break because he is "on duty."<sup>40</sup> The proposed rule corrects this by allowing drivers to count time not driving, but "on duty," as a break. Adopting this rule would help to alleviate current delivery delays caused by COVID-19 and would provide \$274 million in savings for the motor carrier industry, which could translate into higher compensation or more trucking jobs as well as reducing costs for consumers.<sup>41</sup>

**Give Workers the Choice to Join a Union.** With the high cost of union dues—about \$600 per year for someone making \$50,000,<sup>42</sup> and equal to what the average household spends on food in a month<sup>43</sup>—Congress should give all workers the freedom to choose to pay union dues or not, and simultaneously free unions from having to represent workers who do not pay union dues. In 23 states, private-sector employees can be fired if they refuse to pay union

dues—a monopoly practice that drives up union dues about 15 percent.<sup>44</sup> The National Right to Work Act would protect the right of private-sector employees across the country to decide whether paying union dues is a good investment, or if they want, or need, to keep their entire paycheck.<sup>45</sup> Absent congressional action, policymakers in the 23 forced-unionization states can and should provide this freedom by enacting right-to-work laws alongside an end to exclusive representation so that unions do not have to represent non-dues-paying employees.

**Give Employers the Freedom to Raise Unionized Workers' Pay.**

Currently, collective-bargaining agreements can act not only as a floor for wages, but also as a ceiling. Provisions in some union contracts specify the amount that an employee can be paid and do not allow employers to give individual employees better compensation than the agreement calls for. Employees who go above and beyond, especially those working on the front lines of the pandemic, deserve to receive individual raises and bonuses and should not be limited by a union contract. For example, if a business has shifted operations so that only 25 percent of workers need to be in front-line positions, providing higher pay to those workers would give an appropriate boost to workers willing to accept the jobs, while protecting at-risk workers and those not comfortable in front-line positions. Now, more than ever, as businesses struggle to stay afloat and adjust to new ways of doing business, employers need the flexibility to run their businesses free from the micro-management of unions.

**Not Eliminate Jobs Through Artificially High Minimum Wages.**

Research shows that minimum wage laws—particularly excessively high levels, such as \$15 per hour—create a survival-of-the-fittest labor market by eliminating jobs of inexperienced, marginalized, and lower-skilled workers. The result, according to the nonpartisan CBO, would be lower total incomes, higher prices, and higher deficits.<sup>46</sup> A \$15 minimum wage translates into more than \$35,000 in costs for employers, but many individuals have not yet accumulated the education and experience to produce \$35,000 worth of value, meaning they are extremely unlikely to be hired.<sup>47</sup>

New research shows that COVID-19 has resulted in disproportionate job losses within small businesses and among workers who have less education and experience and are employed in lower-wage jobs.<sup>48</sup> With small businesses and lower-wage workers already among the hardest hit by the economic impacts of COVID-19, setting artificially high minimum wages could drive more companies out of business and disproportionately eliminate jobs for less-advantaged workers. The federal government should not pursue a federal minimum wage increase as wages (and costs of living) vary significantly across

states and counties, which should be free to set their own minimum wages. Moreover, states that have recently enacted minimum-wage hikes should eliminate, or at least postpone, scheduled increases and consider reversing recent increases to open up doors to less-experienced or otherwise marginalized workers. This could particularly benefit young individuals who may not be able to attend school as planned, by giving them more opportunities to obtain valuable work experience and income to prepare for their futures.

## Conclusion

While America faced a half-century low in the unemployment rate prior to COVID-19, it now faces a record-high unemployment rate not seen since the Great Depression. While the pandemic-induced unemployment and economic downturn need not mimic the breadth and depth of the Great Recession, the pathway to recovery depends on having policies in place that foster flexibility, instead of rigidity, and that open, instead of close, doors to work opportunities for all Americans.

To help recover from the COVID-19 pandemic and set the stage for a strong labor market in the future, policymakers should not close off opportunities for non-traditional work, drive up the costs of employment, take away the autonomy of employers to manage their businesses, or constrain the ability of individuals to pursue flexible work options. Instead, policymakers should foster environments that attract and enable work opportunities for all Americans, including eliminating unnecessary regulations and licensing requirements, respecting individuals' right to work, repealing wage restrictions that reduce jobs, ending restrictions that limit workplace flexibility, and enabling more accessible and affordable child care. Now, more than ever, state and federal lawmakers should focus on replacing rigidity with flexibility and opening doors to income and work opportunities for all Americans.

**Rachel Greszler** is Research Fellow in the Grover M. Hermann Center for the Federal Budget, of the Institute for Economic Freedom, at The Heritage Foundation.



## Endnotes

1. Rachel Greszler, "The Value of Flexible Work Is Higher Than You May Think," Heritage Foundation *Backgrounders* No. 3246, September 15, 2017, <https://www.heritage.org/sites/default/files/2017-09/BG3246.pdf>.
2. UpWork, "Freelancing in America, 2019," <https://www.upwork.com/i/freelancing-in-america/> (accessed June 11, 2020).
3. *Ibid.*
4. Rachel Greszler, "6 Ways a Union-Backed Bill Will Upend the Job Market," The Daily Signal, February 5, 2020, <https://www.dailysignal.com/2020/02/05/6-ways-a-union-backed-bill-will-upend-the-jobs-market/> (accessed May 27, 2020).
5. Committee on Education and Labor (Republicans), "Protecting Independent Contractors During COVID-19," April 10, 2020, <https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=406938> (accessed June 11, 2020).
6. News release, "Reps. Miller and Foster Lead Bipartisan Letter to Support Gig Economy Workers During COVID-19 Pandemic," Congresswoman Carol Miller, West Virginia, 3rd District, March 23, 2020, <https://miller.house.gov/media/press-releases/rep-miller-and-foster-lead-bipartisan-letter-support-gig-economy-workers> (accessed April 10, 2020).
7. U.S. Department of Labor, "Wage and Hour Division—Final Rule: Joint Employer Part 791," January 12, 2020, <https://www.dol.gov/agencies/whd/flsa/2020-joint-employment> (accessed May 12, 2020).
8. Establishing this change by statute, instead of through the typically partisan National Labor Relations Board, would help to protect the viability of businesses that contract out core functions, those that use temporary staffing agencies, and franchises. James Sherk, "Unions Are Waging War on These Small Businesses," The Daily Signal, December 28, 2014, <http://dailysignal.com/2014/12/28/the-unions-are-waging-war-on-these-small-businesses/>, and Stephen Moore, "Obama, Unions, Trial Bar Take Aim At Franchise Model," Heritage Foundation *Commentary*, September 23, 2014, <http://www.heritage.org/research/commentary/2014/9/obama-unions-trial-bar-take-aim-at-franchise-model>.
9. Ben Gitis, "The Joint Employer Standard and the Supply Chain," American Action Forum, November 26, 2018, <https://www.americanactionforum.org/research/jointemployer-standard-and-supply-chain/> (accessed May 12, 2020).
10. Maryland Department of Education, Division of Early Childhood, "Family Child Care Orientation," <https://earlychildhood.marylandpublicschools.org/system/files/filedepot/3/familychildcareorientation.pdf> (accessed June 24, 2020).
11. For example, in one of the authors' home state of Maryland, a license is needed to provide paid care for children unless that care is "informal," which includes a friend, relative, or nanny who receives "no compensation of any kind," or if the individual "provides care for less than 20 hours per month." This means that an individual who watches a friend's child one day per week for six hours a day would exceed the 20 hours per month limit and must be licensed. The Maryland Early Childhood website notes that: "Providers who are not licensed or registered are offering illegal and potentially dangerous child care." See Maryland Department of Education, "Division of Early Childhood," <https://earlychildhood.marylandpublicschools.org/child-care-providers/office-child-care> (accessed June 24, 2020).
12. Rachel Greszler, "How a Federal Judge's Last-Minute Injunction Against the Overtime Rule Will Help Workers and Businesses," The Daily Signal, November 23, 2016, <https://www.dailysignal.com/2016/11/23/how-a-federal-judges-last-minute-injunction-against-the-overtime-rule-will-help-workers-and-businesses/>.
13. Rachel Greszler, "3 Ways Obama's New Overtime Rule Will Hurt Employees," The Daily Signal, August 26, 2016, <https://www.dailysignal.com/2016/08/26/3-ways-obamas-new-overtime-rule-will-hurt-employees/>.
14. Rachel Greszler, "A Simple Way to Help Workers and Employers Hurt by Coronavirus," Heritage Foundation *Commentary*, March 15, 2020, <https://www.heritage.org/jobs-and-labor/commentary/simple-way-help-workers-and-employers-hurt-coronavirus>.
15. James Sherk, "Why the Davis-Bacon Act Should Be Repealed," Heritage Foundation *WebMemo* No. 3451, January 12, 2012, [http://thf\\_media.s3.amazonaws.com/2012/pdf/wm3451.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/wm3451.pdf).
16. H.R. 6800, the Heroes Act, 116th Congress, 2nd session, pp. 153 and 573, <https://www.congress.gov/116/bills/hr6800/BILLS-116hr6800eh.pdf> (accessed May 27, 2020).
17. Congressional Budget Office, "Repealing the Davis-Bacon Act, Options for Reducing the Deficit: 2017 to 2026," December 8, 2016, <https://www.cbo.gov/budget-options/2016/52225> (accessed June 12, 2020).
18. Paul J. Larkin, Jr., "Public Choice Theory and Occupational Licensing," *Harvard Journal of Law & Public Policy*, Vol. 39, No. 209 (2016).
19. *Ibid.*, pp. 216–218 (list of occupations that require a license).
20. See, for example, Paul J. Larkin, Jr., ed., "Economic Liberty and the Constitution: An Introduction," Heritage Foundation *Special Report* No. 157, October 1, 2014, p. 1, <https://www.heritage.org/the-constitution/report/economic-liberty-and-the-constitution-introduction>; Alden F. Abbott and Paul J. Larkin, Jr., "North Carolina Dental Board and the Reform of State-Sponsored Protectionism," Heritage Foundation *Legal Memorandum* No. 150, March 30, 2015, [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM150.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM150.pdf); Paul J. Larkin, Jr., "Eliminating State Occupational Licensing Barriers to the Enlistment and Retention of Servicemembers: The Portable Certification of Spouses Act of 2019," Heritage Foundation *Legal Memorandum* No. 246, May 21, 2019, <https://www.heritage.org/sites/default/files/2019-05/LM-246.pdf>; and Paul J. Larkin, Jr., "Occupational Licensing Reform: The ALLOW Act," Heritage Foundation *Legal Memorandum* No. 212, July 21, 2017, [http://www.heritage.org/sites/default/files/2017-07/LM-212\\_0.pdf](http://www.heritage.org/sites/default/files/2017-07/LM-212_0.pdf).



21. Federation of State Medical Boards, "States Modifying In-State Licensure Requirements for Telehealth in Response to COVID-19," April 8, 2020, <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf> (accessed April 8, 2020).
22. Paul J. Larkin, Jr., "Covid-19 and the Provisional Licensing of Qualified Medical School Graduates as Physicians," *Washington & Lee Law Review*, Vol. 76, (2020), and Kevin Dayaratna, Paul J. Larkin, Jr., and John O'Shea, "Reforming American Medical Licensure," *Harvard Journal of Law & Public Policy*, Vol. 42, No. 253 (2019).
23. Amy Paturel, "Retired Doctors Want to Return to Work to Fight COVID-19. Here's What They Need to Know," Association of American Medical Colleges, April 8, 2020, <https://www.aamc.org/news-insights/retired-doctors-want-return-work-fight-covid-19-heres-what-they-need-know> (accessed June 12, 2020).
24. Ethan Bayne, Conor Norris, and Edward Timmons, "A Primer on Emergency Occupational Licensing Reforms for Combating COVID-19," Mercatus Center at George Mason University *Policy Brief*, March 26, 2020, [https://www.mercatus.org/system/files/timmons\\_bayne\\_and\\_norris\\_-\\_policy\\_brief\\_-\\_covid\\_series\\_-\\_a\\_primer\\_on\\_emergency\\_occupational\\_licensing\\_reforms\\_for\\_combating\\_covid-19\\_-\\_v1.pdf](https://www.mercatus.org/system/files/timmons_bayne_and_norris_-_policy_brief_-_covid_series_-_a_primer_on_emergency_occupational_licensing_reforms_for_combating_covid-19_-_v1.pdf) (accessed June 12, 2020) (listing state reforms), and "AFP-Florida Launches Digital Ads Urging Lawmakers to Expand Scope of Practice for Nurse Practitioners," Americans for Prosperity, March 4, 2020, <https://americansforprosperity.org/afp-florida-launches-digital-ads-urging-lawmakers-to-expand-scope-of-practice-for-nurse-practitioners/> (accessed June 25, 2020).
25. Stephen Slivinski, "You Can Take It with You: A Case for Occupational Licensing Reciprocity," Arizona State University Center for the Study of Economic Liberty, March 2, 2020, [https://csel.asu.edu/sites/default/files/2020-02/CSEL-2020-01-You-Can-Take-It-with-You-03\\_02\\_20.pdf](https://csel.asu.edu/sites/default/files/2020-02/CSEL-2020-01-You-Can-Take-It-with-You-03_02_20.pdf) (accessed June 12, 2020).
26. Anastasia Boden, "COVID-19 Increases Calls to Repeal Certificate of Need Laws that Limit State's [sic] Medical Capacities," Pacific Legal Foundation, April 30, 2020, <https://pacificlegal.org/covid-19-repeal-certificate-of-need-laws/> (accessed May 27, 2020).
27. Angela C. Erickson, "States Are Suspending Certificate of Need Laws in the Wake of COVID-19 But the Damage Might Already Be Done," Pacific Legal Foundation, March 31, 2020, <https://pacificlegal.org/certificate-of-need-laws-covid-19/> (accessed June 12, 2020).
28. Small Business Administration, "Frequently Asked Questions," [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (accessed April 18, 2020).
29. Olivia Gonzalez and Nolan Grey, "Zoning for Opportunity: A Survey of Home-Based-Business Regulations," Center for Growth and Opportunity, March 2020, <https://www.growthopportunity.org/archives/2020/policy-paper-2020.006.pdf> (accessed April 18, 2020).
30. Nolan Grey and Olivia Gonzalez, "Home-Based Businesses Are Coming," *City Journal*, March 31, 2020, <https://www.city-journal.org/covid-19-rise-of-home-based-businesses> (accessed April 18, 2020).
31. C. Jarrett Dieterle and Shoshana Weissmann, "When the City Comes for Your Home-Based Business," *The Wall Street Journal*, July 15, 2018, <https://www.wsj.com/articles/when-the-city-comes-for-your-home-based-business-1531691394> (accessed April 18, 2020).
32. Christina Sandefur, "Getting Out of Your Business," *Regulation* (Winter 2018–2019), <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2018/12/regulation-v41n4-5.pdf> (accessed April 18, 2020).
33. Andrew Moylan and Andrew Wilford, "Don't Let COVID Remote Work Become a Tax Trap," National Taxpayer's Union Foundation *Issue Brief*, April 24, 2020, <https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap> (accessed May 7, 2020).
34. Corey Crockett and James Ford, "Health Workers that Volunteered to Come to NY During Pandemic Have to Pay State Income Tax: Cuomo," PIX11.com, May 5, 2020, <https://www.pix11.com/news/coronavirus/health-workers-that-volunteered-to-come-to-ny-during-pandemic-have-to-pay-state-income-tax-cuomo> (accessed May 7, 2020).
35. Chris Stephens, "Both Teams Lose at Super Bowl Because of Jock Taxes," Tax Foundation, January 31, 2014, <https://taxfoundation.org/both-teams-lose-super-bowl-because-jock-taxes> (accessed May 7, 2020).
36. The test requires meeting the 31-day annual requirement and a three-year cumulative 183 days present in the U.S., which includes the current year, plus the days present in the two previous years. Only a fraction of the days in years two and three contribute to the 183-day total. For example only one-third of days present in the U.S. in 2019 would count for the 183-day test of whether the taxpayer's U.S. income is taxable in 2020. See Internal Revenue Service, "U.S. Tax Guide for Aliens," Publication 519, March 4, 2020, <https://www.irs.gov/pub/irs-pdf/p519.pdf> (accessed May 7, 2020).
37. Stephanie J. Zawada, "Telemedicine: The Promise and the Performance," Heritage Foundation *Backgrounders* No. 3373, December 17, 2018, [https://www.heritage.org/sites/default/files/2018-12/BG3373\\_0.pdf](https://www.heritage.org/sites/default/files/2018-12/BG3373_0.pdf), and Roxanne Bland, "The Future of Telemedicine and the Unrelated Business Income Tax," *Forbes.com*, March 25, 2020, <https://www.forbes.com/sites/taxnotes/2020/03/25/the-future-of-telemedicine-and-the-unrelated-business-income-tax/#60e838f57829> (accessed May 7, 2020).
38. Federal Motor Carrier Safety Administration, U.S. Department of Transportation, "Hours of Service of Drivers," *Federal Register*, Vol. 76, No. 248 (December 27, 2011), pp. 81134–81188, <https://www.federalregister.gov/documents/2011/12/27/2011-32696/hours-of-service-of-drivers> (accessed April 13, 2020).
39. Federal Motor Carrier Safety Administration, U.S. Department of Transportation, "Hours of Service of Drivers," *Federal Register*, Vol. 84, No. 163 (August 22, 2019), pp. 44190–44222, <https://www.federalregister.gov/documents/2019/08/22/2019-17810/hours-of-service-of-drivers> (accessed April 13, 2020).

40. Tom Madrecki, "The Regulation Files: Trucking Hours of Service Rules," Consumer Brands Association blog, September 30, 2019, <https://consumerbrandsassociation.org/blog/the-regulation-files-trucking-hours-of-service-rules/> (accessed April 13, 2020).
41. News release, "U.S. Department of Transportation Proposes \$74 Million in Cost Savings by Reducing Burdensome Rules on the Commercial Buses," Federal Motor Carrier Safety Administration, November 4, 2019, <https://www.fmcsa.dot.gov/newsroom/us-department-transportation-proposes-74-million-cost-savings-reducing-burdensome-rules> (accessed April 13, 2020).
42. Typical union dues equal two work hours per month. At \$50,000 per year, or about \$25 per hour, this amounts to \$600 in annual union dues.
43. Trent Hamm, "Lessons from the Average American's Food Expense," The Simple Dollar, April 13, 2020, <https://www.thesimpledollar.com/save-money/lessons-from-the-average-americans-food-expense/> (accessed May 18, 2020).
44. James Sherk, "Unions Charge Higher Dues and Pay Their Officers Larger Salaries in Non-Right-to-Work States," Heritage Foundation *Backgrounder* No. 2987, January 26, 2015, <https://www.heritage.org/jobs-and-labor/report/unions-charge-higher-dues-and-pay-their-officers-larger-salaries-non-right>.
45. S. 525, National-Right-to-Work Act, 116th Congress, <https://www.congress.gov/bill/116th-congress/senate-bill/525/related-bills> (accessed June 12, 2020).
46. Rachel Greszler, "Would a \$15 Minimum Wage Help or Hurt Low-Income Workers?" *The Hill*, July 13, 2019, <https://thehill.com/opinion/finance/452643-would-a-15-minimum-wage-help-or-hurt-low-income-workers> (accessed May 28, 2020).
47. James Sherk, "Raising Minimum Starting Wages to \$15 per Hour Would Eliminate Seven Million Jobs," Heritage Foundation *Backgrounder* No. 4595, <https://www.heritage.org/jobs-and-labor/report/raising-minimum-starting-wages-15-hour-would-eliminate-seven-million-jobs>.
48. Sumedha Gupta et al., "Effects of Social Distancing Policy on Labor Market Outcomes," National Bureau of Economic Research *Working Paper* No. 27280, revised June 2020, <https://www.nber.org/papers/w27280.pdf> (accessed June 2, 2020).