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A Guide to Labor and Employment Law Reforms

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KEY TAKEAWAYS

Laws governing the employer–employee relationship are extremely complex and costly.

The costs of labor and employment law complexity is borne primarily by employees in the form of lower wages and salaries.

Labor and employment laws should be reformed to increase freedom, enhance workplace flexibility, improve productivity, and reduce administrative and legal costs.

The morass of laws governing the employer–employee relationship is extremely complex. These laws are primarily enforced by the Department of Labor (DOL),[1] the National Labor Relations Board (NLRB),[2] and the Equal Employment Opportunity Commission (EEOC).[3] Among the key laws governing employment are the Fair Labor Standards Act of 1938 (FLSA);[4] the Labor–Management Reporting and Disclosure Act of 1959 (LMRDA);[5] the Occupational Safety and Health Act of 1970;[6] the Family and Medical Leave Act of 1993 (FMLA);[7] Title VII of the Civil Rights Act of 1964[8] and the Civil Rights Act of 1991;[9] the Equal Pay Act of 1963;[10] the Age Discrimination in Employment Act of 1967;[11] and the National Labor Relations Act of 1935 (NLRA).[12] There are at least 19 other significant federal laws governing employment[13] and countless state and local laws.

To improve perceived fairness, correct disparities in economic power, or achieve other objectives, all of these laws replace with inflexible government mandates a voluntary, privately ordered arrangement between service providers and those that pay them. These laws impose substantial compliance costs on employers and increase the risk and cost of employment-related lawsuits or enforcement actions. They therefore raise the cost of employing people, retard job creation, reduce wages and hinder the flexibility of both employers and employees. They have a disproportionately adverse impact on small firms because compliance costs do not increase linearly with size. Thus, an uncritical acceptance of the status quo is unwarranted.[14]

The primary focus of this *Backgrounder* is a series of federal regulatory and legislative reforms presently being actively considered. It provides a brief analysis of two dozen separate issues. It does not address workers' compensation,[15] the Americans with Disabilities Act,[16] the Patient Protection and Affordable Care Act,[17] the taxation of employee benefits,[18] the regulation or taxation of pensions[19] or qualified retirement accounts,[20] state or local employment laws,[21] occupational licensing,[22] employer responsibilities under the immigration laws,[23] or potential fundamental reforms to labor or employment law.

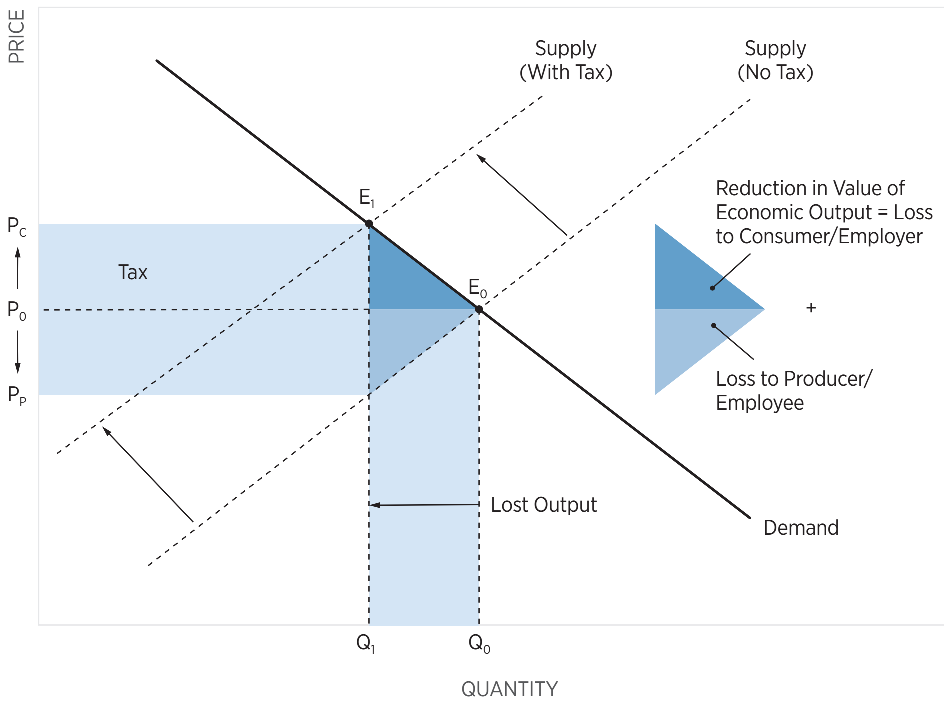
Economics of the Labor Market

Wage rates are generally determined by the interaction of the demand for and the supply of labor. In this sense, the price of labor (the wage rate) is determined like prices in other competitive markets. Private, for-profit employers hire and pay employees to earn a profit. They pay no more or less than the competitive labor market requires. In general, employers will continue hiring employees until the marginal costs of hiring those employees equals their expected marginal output or marginal product. Output, and therefore the demand for labor, is influenced by invested capital and technological factors.

Employers' costs include wages or salary, benefits, employer taxes or other mandatory payments, administrative costs, and contingent costs or risk of loss. To the extent that labor and employment laws increase benefit costs, administrative costs, and contingent costs (risk of loss), this will be borne primarily, although not exclusively, by employees in the form of lower wages and salaries.[24] Employer total costs cannot exceed employee product or the firm will fail.[25] Employer wages cannot long be lower than those paid by competing employers or employees will leave.

FIGURE 1

Imposition of a Tax



P_C — Price to consumer
P_0 — Price equilibrium
P_P — Price to producer
Q_0 — Quantity (output) without tax
Q_1 — Quantity after tax
E_0 — Equilibrium without tax
E_1 — Equilibrium with tax

SOURCE: Heritage Foundation research.

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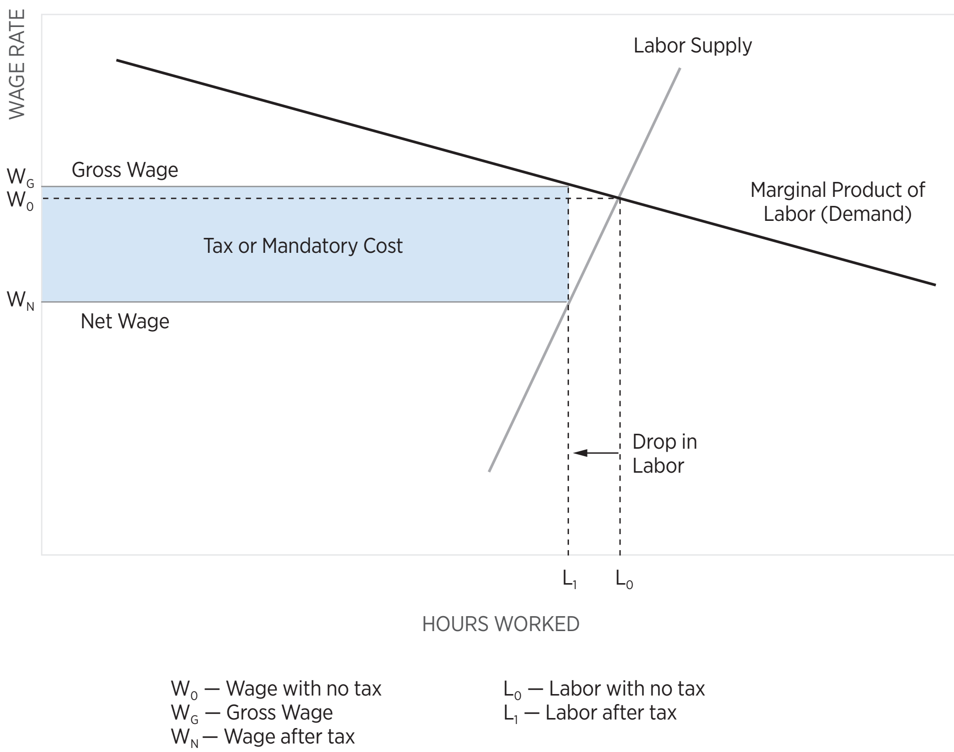
Markets and information are imperfect, and there are costs associated with job changes, so these effects are not instantaneous. Moreover, wage rates can be "sticky" downwards. But eventually, higher costs imposed by labor and employment laws will generally be borne by employees in the form of either wages and benefits that are lower than they would otherwise receive or lost jobs—or both.[26]

A tax, mandatory fee, or mandatory cost has a social cost (often called an excess burden or deadweight loss) and reduces output. This is illustrated in Figure 1. When a tax on a good or service is imposed, the price to the consumer or employer increases (to P_0 from P_c), and the amount produced declines from Q_0 to Q_1. The net of tax price to producers or employees (P_p) also declines. The social cost of the tax (deadweight loss or excess burden) is measured by the shown triangle and reflects the goods and services not produced or consumed (or the work not undertaken).

FIGURE 2

Economic Impact of a Tax or Mandatory Cost on Wages



SOURCE: Heritage Foundation research.

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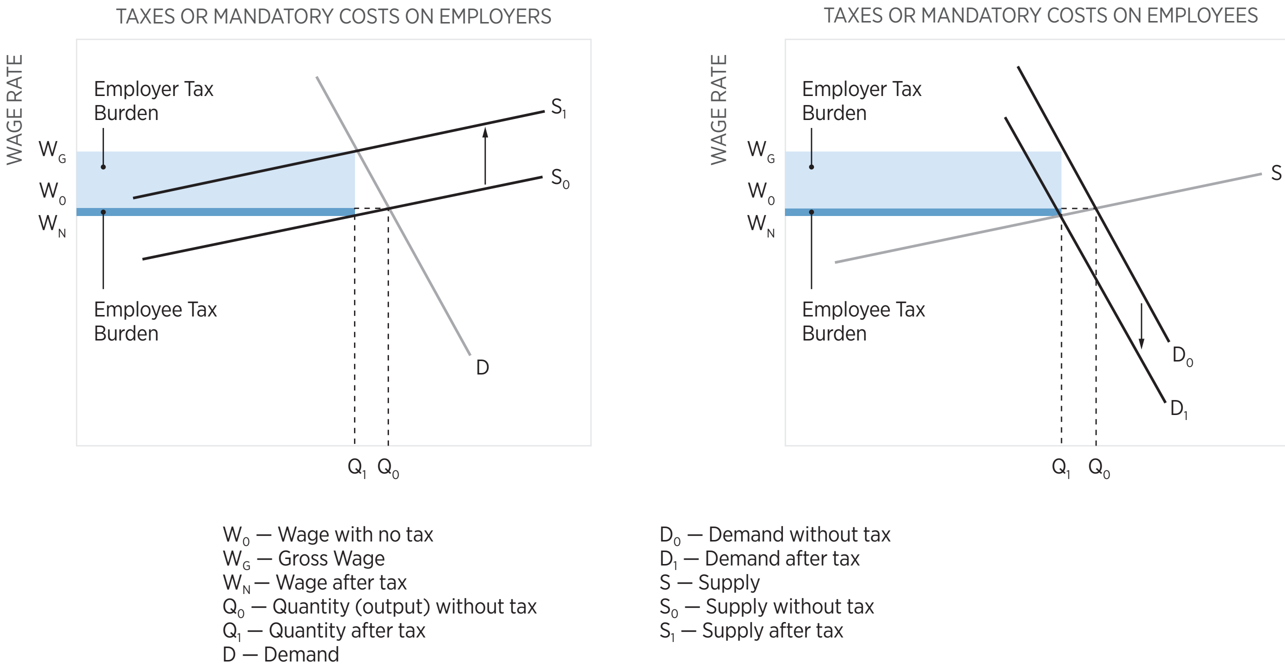
In the context of the labor market, a payroll or income tax on wages or a mandatory fee or mandatory cost associated with employment will reduce wages, employment, and hours worked. This is illustrated in Figure 2, with a decrease from L_0 to L_1.

In economics, an "elasticity" is how much one variable changes when another variable changes.[27] The price elasticity of demand is a measure of how much the quantity of a good or service demanded decreases when prices increase. The price elasticity of supply is a measure of how much the quantity of a good or service supplied increases when prices go up. These can be thought of as a measure of the sensitivity of supply or demand to price changes. Labor demand or labor supply elasticities measure how much labor demand or supply varies with compensation (wage rates).

Because labor supply is inelastic relative to demand,[28] it is relatively vertical on the diagram in Figure 2. The quantity of labor supplied does vary as wages vary but not by as much as demand varies as wages vary. This is

FIGURE 3

Employer Taxes or Mandates Are Economically Equivalent to Employee Taxes or Mandates



SOURCE: Heritage Foundation research.

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reflected in the size of the lower triangle being larger than the upper triangle in Figure 2. Thus, the economic losses associated with labor taxes or mandatory costs are disproportionately borne by employees (the suppliers of labor).

It does not matter whether the legal obligation to pay a tax or incur a cost is on the employer or employee. The economic impact is identical. This is illustrated in Figure 3.

If a tax or cost is imposed on employees, the supply curve will shift to the left since at any given pre-tax wage rate, less will be supplied because the after-tax wage is lower. The quantity of labor used will be less. If a tax or cost is imposed on employers, the demand curve will shift to the left since at any given pre-tax wage rate, less will be demanded because the after-tax wage rate is higher. The quantity of labor used will be less. The economic incidence (burden) of the tax is the same since the slopes of the demand and supply curves are the same. The legal incidence of the tax makes no economic difference.

Capital and labor are complementary factors of production. It takes both, as well as entrepreneurs and management, efficiently directing those factors toward a common objective for a business to succeed. The best way for policymakers to improve the well-being of workers is *not* to increase the cost and risk of employing people. Higher costs and greater risks harm employees. Instead, policymakers should seek to remove impediments to innovation and investment, which will increase worker productivity and result in higher wages.

Specific Issues

The remainder of this *Backgrounder* analyzes specific proposals to alter labor and employment law.

Minimum Wage

The current federal minimum wage affects approximately 2.1 percent of hourly paid workers.[29] Nearly half (47 percent) of these people are age 24 or less.[30] The primary effect of minimum wage laws is to make it illegal for inexperienced, low-productivity (usually young) people to work.[31] This makes it difficult for them to get the experience and skills to move up the economic ladder and to demonstrate their capabilities to employers. Employers forced to pay a higher minimum wage will: (1) hire more experienced, more productive workers; (2) substitute labor-saving technology and capital equipment for labor (automation); (3) if possible, move their operations to a jurisdiction that does not impose a minimum wage; (4) hire fewer employees and produce fewer goods and services; (5) reduce benefits such as insurance or paid leave; and (6) attempt to raise customer prices—or some combination of these six responses. In the latter case, customers will, in turn, sometimes decline to pay the higher prices by substituting other goods and services or not spending.

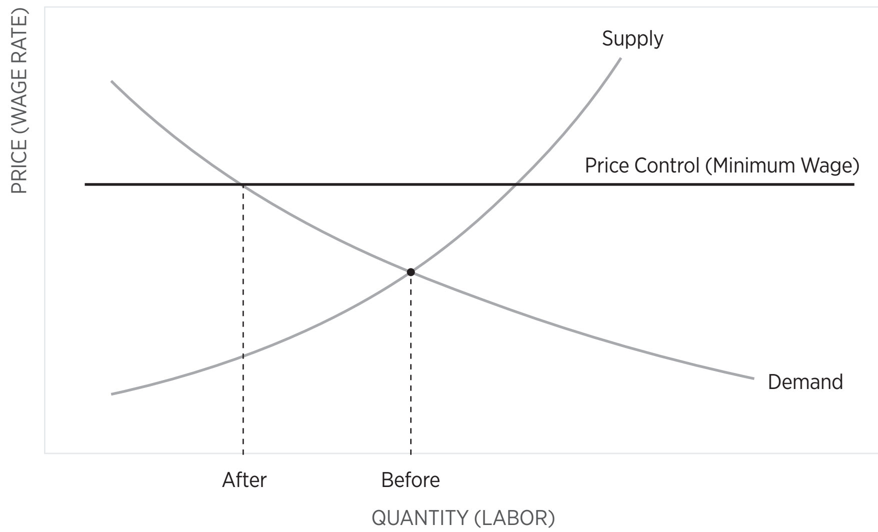
The market price of any good or service is determined by supply and demand. The price settles at a level at which supply equals demand. When government fixes a minimum price for any good or service that is above the market clearing price, supply will exceed demand. Demand, at the new higher price, will be lower. The dollar value (quantity) of market exchanges will decline.

Impact of Price Controls (Including Minimum Wage Laws)

Minimum wage laws fix the wage rate (price) of certain labor at above the market wage rate. Therefore, they result in less demand for labor at the

FIGURE 4

Impact of Price Controls, Including Minimum Wage Laws



SOURCE: Heritage Foundation research.

BG3535 heritage.org

higher price. Jobs will be lost (unemployment) and hours worked will be reduced.[32] This is illustrated in Figure 4.

The Raise the Wage Act passed the House by a vote of 231–199 on July 18, 2019.[33] It would gradually increase the federal minimum wage to $15.00 an hour. It would be fully phased-in after six years. This amounts to about at least $34,000 annually per full-time employee once employer taxes are considered.[34] The minimum wage thereafter would be indexed to the annual percentage increase, if any, in the median hourly wage of all employees. The Congressional Budget Office has estimated that a $15 per hour minimum wage would cost 1.3 million people their jobs—although potentially as many as 3.7 million people would lose their jobs.[35]

Independent Contractors

The issue of how to classify a worker as an employee or independent contractor has been contentious since at least the 1970s—and it has still not been adequately resolved. The legal criteria for determining who is and is not an employee are different for purposes of federal tax law;[36] various labor, employment and pension laws;[37] various state labor, employment, and workers' compensation laws; and tort law.[38] None of these standards are models of clarity. This situation causes substantial confusion and uncertainty, which in turn increases administrative costs, legal costs, and regulatory risk. This is of even greater importance given the employer mandate in Obamacare[39] and the rise of Internet platforms matching customers with service providers.

Provisions should be adopted establishing bright line tests for whether a payee is definitely an employee or definitely a contractor—and allowing the employer and employee to choose in the middle ground of ambiguous cases, provided that contractors in the middle ground are subject to 1099 reporting and moderate back-up withholding. Furthermore, the definition should be harmonized for tax, labor and employment, pension, and health care law purposes.

The Modern Worker Empowerment Act would replace the current DOL and judicially created standards (often called the "economic realities" test) with the tax standards for purposes of the FLSA.[40] This is a small but significant step in the direction of harmonization, and therefore welcome. However, the 20-factor tax test adopted is certainly not the model of clarity.[41] Any test that has 20 factors, with the weighting of those factors undetermined, will always be problematic in practice.

The NEW GIG Act is a reasonable attempt to provide a safe harbor governing worker classification for income and employment tax purposes as an alternative to the existing 20-factor test.[42] Under the legislation, a worker would be classified as an independent contractor if: (1) there is a written contract governing the terms of the work; (2) the worker incurs expenses, a significant portion of which are not reimbursed; (3) the worker agrees to work a particular amount of time, to achieve a specific result, or to complete a specific task; and (4) the arrangement also meets one of the following four criteria:

a. The service provider has a significant investment in assets or training which are applicable to the service performed;

b. The service provider is not required to perform services exclusively for the service recipient or payor;

c. The service provider has not been treated as an employee by the service recipient or payor during the previous year; or

d. The service provider is not compensated on a basis that is tied primarily to the number of hours actually worked.

This is similar to a Trump Administration Proposal included in the Administration's fiscal year 2020 budget proposal.[43]

The Protecting Independent Contractors from Discrimination Act would extend coverage of Title VII, Age Discrimination in Employment Act of 1967 (ADEA), FLSA, Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and Genetic Information Nondiscrimination Act (GINA) to any "individual who provides work for an employer under the terms of an independent contract."[44] It would thus go a long way down the road of eliminating the category of independent contractor. This legislation can be expected to have an adverse impact on worker pay, the number of independent contractors, and the flexibility of labor markets. It would also disproportionately harm small businesses because small firms rely heavily on contractors for services they cannot perform in-house.

Protecting the Right to Organize Act

On September 25, 2019, the House Committee on Education and Labor marked up and ordered that an amended version[45] of the Protecting the Right to Organize (PRO) Act[46] be reported out of committee for consideration by the full House. On February 6, 2020, it passed the House.[47] The legislation would make sweeping changes to labor laws, primarily the NLRA, that are designed to aid labor organizations. The discussion below is regarding the version approved by the House.[48]

Joint Employment. The PRO Act would codify the joint-employer standard the Obama-era NLRB adopted in its 2015 *Browning-Ferris* decision.[49] Specifically, the legislation provides that "[t]wo or more persons shall be employers with respect to an employee if each such person codetermines or shares control over the employee's essential terms and conditions of employment." Indirect control or reserved authority to control (i.e., potential control) would suffice to trigger a joint employment determination. This would often mean that employees of franchisees would also be treated as employees of franchisors—and would endanger the franchise business model[50] used by approximately three-quarters of a million businesses that employ nearly 9 million people.[51] (See the Joint Employment section below for a detailed discussion.)

Accelerated Union Elections. The PRO Act would codify the Obama-era NLRB's changes to union election procedures that took effect in 2015, often referred to by opponents as the "ambush" or "quickie" election rule.[52] (See the Accelerated Union Elections' section below for a detailed discussion.)

Micro Unions. The PRO Act would codify the Obama-era NLRB's 2014 *Specialty Healthcare* decision.[53] (See the Micro Unions section below for a detailed discussion.)

Pre-emption of State Right to Work Laws. State right-to-work laws provide that no person can be compelled, as a condition of employment, to join or pay dues to a labor union. The PRO Act would pre-empt state right-to-work laws by allowing collective bargaining agreements requiring all employees to pay union dues as a condition of employment—notwithstanding any state or territorial law to the contrary.[54] Twenty-seven states are currently right-to-work states.[55]

Broaden the Definition of "Employee" for NLRA Purposes. The PRO Act would substantially broaden the definition of employee for purposes of the NLRA by adopting the "ABC test."[56] This test effectively establishes a presumption that workers are employees. Under the definition, an individual performing any service shall be considered an employee and not an independent contractor unless: (1) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. Prongs (2) and (3) of this standard, in particular, would classify as employees many people who are classified as independent contractors under current law. California[57] and a substantial number of other states use some version of this standard for one purpose or another (e.g., unemployment insurance, workers' compensation, and sometimes wage and hour legislation). It is rarely used for all state labor, employment law, and state tax purposes.

Card Check. The PRO Act would impose a version of "card check"[58] and allow circumvention of the use of secret ballots in union elections.[59] The PRO Act would provide that even if a union lost an election using secret ballots, the NLRB would nonetheless have to certify the union if a majority of employees had signed a card authorizing the union representation—unless the employer demonstrates that alleged interference with a fair election by the employer would not have affected the outcome of the election. This would allow unions to circumvent secret ballot elections in which they allege employer interference, and further raises concerns with respect to intimidation of employee-voters.[60]

Mandatory Binding Arbitration. The PRO Act would institute mandatory binding arbitration in collective bargaining negotiations.[61] Mandatory arbitration would be required if an agreement is not reached within 120 days and would be binding for two years. Employees would be unable to vote on the contract determined by the arbitrators. There would be little means for an employer to challenge the arbitrators' decision.

Employer Electronic Devices. The PRO Act would require that employers allow the use of employer computers, e-mail, and phones for Section 7 protected concerted activity.[62] (See Protected Concerted Activity section below for a detailed discussion of these types of issues.)

Secondary Boycotts. The PRO Act would repeal prohibitions on "secondary boycotts"[63] and "recognitional picketing"[64] by unions directed toward companies that do business with the firm that the union is attempting to unionize.[65]

Joint Employment

"Joint employment" occurs when two entities are both considered employers of an employee with respect to the same job. The DOL recently changed its joint-employer rules for purposes of the FLSA, narrowing the Obama-era DOL's expansive definition of joint employment.[66] The Department adopted a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency*[67] (but modified) to assess whether the other entity: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. No single factor is dispositive in determining joint-employer status, and the appropriate weight to give each factor will vary depending on the circumstances. The new rule is expected to make it much less likely that franchisors and franchisees will be deemed joint employers.[68]

The NLRB and the EEOC are both considering revisions to the rules governing joint employment determinations.[69] The NLRB had published a proposed rule and the comment period has closed. The NLRB rule would govern determinations for purposes of the NLRA and the EEOC rules (assuming it is promulgated) would govern determinations for purposes of the various federal equal employment opportunity statutes.

The NLRB *Browning-Ferris Industries* decision[70] in August 2015 significantly altered its standard for evaluating joint employment. Reserving the right to control employees of another firm or indirectly controlling those employees was found sufficient to trigger a finding of joint employment. Notably, franchisors, who often reserve the right to control franchisees' employees in certain circumstances, would often be found to be joint employers along with franchisees.[71] As noted above, the PRO Act would codify the *Browning-Ferris* decision. Unions prefer a broad conception of joint employment because it is easier to organize one large franchisor than many small franchisees.

In December 2017, the NLRB reversed the *Browning-Ferris* decision in *Hy-Brand Industrial Contractors* and returned to the traditional rule requiring proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly and in a limited manner).[72]

Accelerated Union Elections

In April of 2015, the Obama-era NLRB promulgated a rule that substantially accelerated the pace of the union election process.[73] It allows unions to force an election in as few as 10 days.[74] The rule also gives unions access to employees' home addresses, work locations, shifts, job classifications, and, if available to the employer, personal landline and mobile telephone numbers, and work and personal e-mail addresses. It is often referred to by opponents as the "ambush" or "quickie" election rule because it gives little time for an employer, who typically is not unionized and may know little about labor law and petitions for representation, to present its case to employees. The PRO Act would statutorily codify these rules.

The median number of days from petition to election has declined 39 percent, from 38 in fiscal year 2014 to 23 in fiscal years 2016–2019.[75] From fiscal year 2014 to fiscal year 2019, the percentage of elections won by unions increased steadily from 68 percent to 88 percent,[76] although there may be many reasons for this increase.

The NLRB has published a request for information as a prelude to potentially modifying or reversing the Obama-era election rule changes.[77] Similarly, the NLRB indicated in its Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions filing with the Office of Management and Budget that it intended to adopt a final revised set of election procedures in 2019.[78]

Micro Unions

In *Specialty Healthcare*,[79] the Obama-era NLRB started the process of dismantling the traditionally understood "community of interest" rule for determining bargaining units by allowing the initial bargaining unit to be a single job description, namely certified nursing assistants. In *Specialty Healthcare*, the NLRB enunciated a new standard that effectively allows unions to determine the bargaining unit (i.e., the representation election electorate)—and the union determination is presumed correct unless the employer "demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." This presumption that the union determination of bargaining unit is correct was, in practice, virtually irrebuttable.

For example, in *Northrop Grumman Shipbuilding*,[80] the union was permitted to organize a departmental unit of 223 radiological control and other technicians out of 2,400 technical employees and 18,500 Northrop employees overall at the shipyard. A few years later, in the *Bergdorf Goodman*[81] case, the union sought to represent all full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department. The employer asserted that the smallest appropriate unit must be comprised of a store-wide unit, or, in the alternative, all selling associates in the store.

The NLRB allowed the union-chosen bargaining unit of 46 employees in the 2nd and 5th floor shoe departments to be separately organized. Such an approach allows unions to "cherry-pick" parts of a business in which they have majority support—even though they would lose an election in a larger bargaining unit. The *Specialty Healthcare* approach to bargaining-unit selection also means that even relatively small employers may be required to deal with many different unions.[82]

In December of 2017, the NLRB reversed *Specialty Healthcare* in its *PCC Structurals*[83] decision and returned to the traditional community-of-interest standard for determining an appropriate bargaining unit.

NLRB Jurisdictional Threshold Amounts

The NLRA allows the NLRB to decline jurisdiction over small companies. Those thresholds are generally $500,000 in annual revenue for a retail store and as low as $50,000 for other businesses.[84] At a minimum, those thresholds should be adjusted for inflation by the NLRB to $4 million for retail stores and $400,000 otherwise. Alternatively, Congress could pass legislation exempting small businesses from some or all of the NRLA. This would reduce compliance costs and regulatory risk for very small firms.

Protected Concerted Activity

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." These provisions apply in both unionized and non-unionized companies[85] and are among the most central guarantees in the NLRA. How these provisions are interpreted, however, can have a pronounced impact on the workplace and business operations.

The Obama-era NLRB dramatically expanded the scope of protected concerted activity as part of its protected concerted activity initiative and its social media initiative. *WorldMark by Wyndham*, for example, held that an employee was engaged in protected concerted activity when he questioned his supervisor, in front of his coworkers, about a new dress code, and that the employer warning was unlawful.[86] His actions were deemed (1) protected, (2) concerted, and (3) for the mutual aid and protection of his coworkers.

In *Knauz BMW*, the NLRB held that a business requiring its employees to be courteous to customers and one another is an unlawful infringement on the free speech rights implicit in the protected concerted activity protections in the NLRA.[87] Section 7 should not be construed to protect "offensive, demeaning, abusive or inappropriate remarks." It is quite likely that employers that permit the use of such language would find themselves liable under other theories (sexual harassment, civil rights violations, etc.). Federal law should not result in employer liability whether they prohibit inappropriate speech or permit it. These decisions, and others like them, are now being reversed.

In the 2019 *Alstate Maintenance* case, the board returned to a more traditional understanding of the distinction between protected group action and unprotected individual action.[88] Moreover, the Trump-era NLRB General Counsel has issued a memorandum indicating that employer rules (1) requiring civility, (2) prohibiting workplace photography or recording, (3) prohibiting insubordination, non-cooperation, or on-the-job conduct that adversely affects operations, (4) prohibiting disruptive behavior, (5) protecting confidential, proprietary, and customer information or documents, (6) prohibiting defamation or misrepresentation, (7) prohibiting employee use of employer logos and trademarks, (8) requiring authorization to speak for the company, and (8) disloyalty, nepotism, or self-enrichment are "generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act,[89] or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule."[90] The memorandum also discusses employer rules that require individualized assessment or that are prohibited.

Equality Act

The Equality Act[91] passed the House May 17, 2019.[92] It amends the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex, including sexual orientation and gender identity, in public accommodations and facilities (i.e., businesses selling to the public), education, federal funding, employment, housing, credit, and the jury system. It defines the term "gender identity" as "the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth."[93] It defines the term "sexual orientation" as "homosexuality, heterosexuality, or bisexuality."[94] It specifically provides that "an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity."[95] It also amends the Equal Credit Opportunity Act to prohibit discrimination on the basis of sexual orientation and gender identity.[96]

The legislation would empower the federal government to force radical new definitions of marriage and biological sex on all Americans. It would adversely affect the practices, freedom of speech, and freedom of religion of hospitals, health care providers, schools, creative professionals, and countless others.[97] Experience at the state level with similar laws demonstrate that it would undermine liberty, equality, privacy, and safety.[98]

The RAISE Act

The Rewarding Achievement and Incentivizing Successful Employees Act (RAISE) Act would amend the NLRA to permit unionized employers to give performance-based raises without union consent.[99] This would reduce the burden of collective bargaining on workplace productivity and would lead to higher wages.[100]

Worker's Choice Act

The Worker's Choice Act[101] would amend the NLRA to allow employees in a unionized workplace to independently negotiate their employment terms with their employer. This would lead to greater flexibility and potentially better compensation packages for workers who choose to exercise this option. It would only affect workers in right-to-work states; employees in non-right-to-work states would not be affected by it.[102]

Family and Medical Leave

The Family and Medical Leave Act of 1993 provides covered employees with up to 12 weeks of unpaid, job-protected leave per year for the birth and care of a newborn child, for placement with the employee of a child for adoption or foster care, to care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition, or to take medical leave when the employee is unable to work because of a serious health condition. It also requires that their group health benefits be maintained during the leave.

The FMLA has been found to have some unintended consequences including fewer promotions,[103] potential hiring discrimination for women who are more likely to use the leave, and adverse economic consequences for employers and co-workers resulting from misuse of the FMLA.[104]

The 2017 tax reform legislation[105] generally provides an employer credit of 12.5 percent to 25 percent of the wages paid during any period (up to 12 weeks) in which employees are on family and medical leave, provided that the wages paid were 50 percent or more of the wages normally paid.[106] This credit has been extended to the end of 2020.[107] It is only available with respect to employees who earn less than $78,000 annually.[108]

On December 20, 2019, the President signed into law the National Defense Authorization Act for Fiscal Year 2020,[109] which included the Federal Employee Paid Leave Act.[110] This Act provides up to 12 weeks of paid parental leave to many federal employees starting October 1, 2020. The legislation, however, was drafted so that a significant number of federal workers would not be eligible. Legislation has been introduced to broaden the provision to the entire federal workforce.[111]

The President's fiscal year 2021 budget includes a proposal to establish a federal-state paid parental leave benefit program within the unemployment insurance program that would provide six weeks of paid leave beginning in 2022.[112] The Administration estimates that its paid parental leave proposal would cost $28.1 billion in benefit and program administration costs over 10 years.[113] Legislators from both parties have introduced bills that would require paid paternal leave. For example, the Family and Medical Insurance Leave Act or the FAMILY Act[114] would create an Office of Paid Family and Medical Leave within the Social Security Administration to administer a new federal entitlement program. In general, caregivers would be entitled to a benefit of between $580 and $4,000 per month for a period of up to 60 days.[115] The benefit would be financed by a new payroll tax of four-tenths of 1 percent.[116] The

Congressional Budget Office estimates that this bill would, over 10 years, increase federal spending by $547 billion, increase taxes by $319 billion, and increase the deficit by $228 billion.[117] In the 116th Congress, Senator Marco Rubio (R–FL) introduced the New Parents Act.[118] Senators Joanie Ernst (R–IA) and Mike Lee (R–UT) have proposed the Child Rearing and Development Leave Empowerment Act or the CRADLE Act.[119] Both of these bills would provide parents with two to three months of paid benefits in exchange for those parents delaying their normal Social Security retirement age.

At a time when the federal government is running structural federal deficits of more than $1 trillion annually—and is expected to do so for the indefinite future—the national debt is growing more rapidly than the economy and entitlement spending is an ever-increasing share of federal spending,[120] the last thing Congress should do is launch a new entitlement program that is likely to cost more than estimated and grow substantially.[121] Furthermore, for the reasons discussed above in the Economics of the Labor Market section, these benefits will be overwhelmingly borne by employees in the form of lower wages. Polling shows that the public does not support such benefits if they have to pay for them.[122]

The programs that are funded by reducing beneficiary's future Social Security are problematic for different reasons. Social Security is already actuarially unsound, endangering benefits for *all* future retirees and threatening substantial tax increases.[123] Establishing the precedent of using Social Security benefits for non-retirement purposes would undoubtedly lead to further imbalances in the program, and when, in the future, benefits are reduced or delayed, calls will be made for higher taxpayer-financed benefits to make seniors "whole."[124]

The Families First Coronavirus Response Act generally requires employers to provide up to 80 hours of paid sick leave at the employee's regular rate of pay when the employee is unable to work because the employee is quarantined or experiencing COVID-19 symptoms and seeking a medical diagnosis. In addition, the Act requires employers to provide up to 80 hours of paid sick leave at two-thirds the employee's regular rate of pay if the employee is unable to work because of a bona fide need to care for an individual subject to quarantine. If the employee must care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, then up to 12 weeks of paid leave must be provided.[125] Employers are provided with a 100 percent tax credit for the cost of providing this leave.[126]

Overtime

The FLSA requires covered employers to pay employees a minimum wage[127] and, for employees who work more than 40 hours in a week, to pay at least 1.5 times the regular rate of pay.[128] Certain employees are exempt from these requirements.

In general, to qualify as exempt, an employee must be paid on a salary basis, be paid at least $35,568 per year (known as the standard salary level), and perform executive, administrative, or professional duties. The salary-level test does not apply to outside sales employees, teachers, and employees practicing law or medicine. Highly compensated employees (HCEs) earning more than $107,432 per year are usually, but not always, exempt. DOL regulations provide detail about the definitions that employers must use and some other exemptions.[129]

In September 2019, the Trump Administration raised the standard salary level from $23,660, the HCE level from $100,000, and made other changes to the regulations effective January 1, 2020.[130] The DOL estimates that the standard salary level increases will increase the number of employees receiving overtime pay by 1.2 million people, and the HCE level changes will affect 101,800 people.[131] As a form of price control, these rules are likely to have unintended adverse consequences on newly covered employees.[132]

EEOC Guidance on Criminal Background Screening. In 2012, the EEOC issued "guidance" requiring employers to do an "individualized assessment" each time they conduct a criminal background screen for employment to determine whether to do the screen and whether to rely on it. Its 52-page, 167-footnote "guidance" requires a business to balance a multitude of factors and provides no meaningful guidance.[133] The EEOC has launched hundreds of enforcement actions in this area.

Businesses should be able to protect themselves, their customers, and their employees by preventing, for example, rapists or thieves from entering their customers' homes.[134] The U.S. Court of Appeals for the Fifth Circuit has held that the EEOC guidance is a substantive rule that was not promulgated in compliance with the notice-and-comment provisions of the Administrative Procedure Act—and further, that the EEOC lacks authority to promulgate substantive rules implementing Title VII.[135]

The EEOC should withdraw this guidance. Congress should provide clear and reasonable rules governing criminal background screening.

Equal Opportunity Clause's Religious Exemption

The DOL's Office of Federal Contract Compliance Programs has proposed a rule that will broaden the civil rights protections afforded to religious organizations that contract with the federal government.

It would clarify that religious organizations may make employment decisions consistent with their sincerely held religious tenets and beliefs—without fear of sanction by the federal government. It would add to the existing regulations definitions of "exercise of religion,"[136] "particular religion," "religion,"[137] "religious corporation, association, educational institution, or society," and "sincere."[138] It would require that protection for the exercise of religion be construed broadly.[139] Opponents argue that the rule "would harm countless LGBTQ workers."[140] The comment period closed September 16, 2019. The number of comments received was 109,843.[141]

Working Families Flexibility Act

The Working Families Flexibility Act[142] amends the FLSA to authorize employers to provide compensatory time off to private employees at a rate of not less than 1.5 hours for each hour of employment for which overtime compensation is required, but only if it is in accordance with an applicable collective bargaining agreement or, in the absence of such an agreement, an agreement between the employer and employee.

The bill prohibits an employee from accruing more than 160 hours of compensatory time. An employer must provide monetary compensation for any unused compensatory time off accrued during the preceding year. The bill requires an employer to give employees 30-day notice before discontinuing compensatory time off. In the 115th Congress, the House passed substantially similar legislation.[143] The bill would increase flexibility in the labor market and enable employees to accumulate more paid leave.[144]

The Davis–Bacon Act

The Davis–Bacon Act requires that workers on most federally funded or federally assisted construction projects be paid no less than the "prevailing wages," as determined by the DOL, in the area where the project is located. Prevailing wages are typically higher than the average or median market wages. They are usually the wages paid to unionized workers.[145]

The primary effect of Davis–Bacon is to raise federal construction costs by protecting unionized shops from competition. The Congressional Budget Office estimates that repealing the Davis–Bacon Act would save federal taxpayers about $12 billion over 10 years.[146] Davis–Bacon should be repealed.[147]

Conclusion

Laws governing the employer–employee relationship are extremely complex. These laws replace a voluntary, privately ordered arrangement between service providers (employees and contractors) and those that pay them (employers and customers) with inflexible government mandates. These laws impose substantial compliance costs on employers and increase the risk and cost of employment-related lawsuits or enforcement actions.

Economic analysis demonstrates that these costs are primarily borne by employees in the form of lower wages. The existing labor and employment laws raise the cost of employing people, retard job creation, reduce wages, and hinder the flexibility of both employers and employees. They also have a disproportionately adverse impact on small firms because compliance costs do not increase linearly with size. Thus, an uncritical acceptance of the status quo is unwarranted.

The best way for policymakers to improve the well-being of workers is *not* to increase the cost and risk of employing people. Higher costs and greater risks harm employees. Instead, policymakers should reform labor and employment laws to increase freedom, enhance workplace flexibility, improve productivity, and reduce administrative and legal costs. This will increase wages and promote prosperity. Moreover, policymakers should seek to remove impediments to innovation and investment, which will increase worker productivity and result in higher wages.

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Endnotes

1. U.S. Department of Labor, https://www.dol.gov/ (accessed March 16, 2020). Subagencies of the DOL include the Occupational Safety and Health Administration (OSHA), the Office of Labor-Management Standards, and the Wage and Hour Division.
2. National Labor Relations Board, https://www.nlrb.gov/ (accessed March 16, 2020).
3. U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/ (accessed March 16, 2020).
4. 29 U.S. Code § 201 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-8 (accessed March 16, 2020). This act, among other things, governs overtime pay and the minimum wage.
5. 29 U.S. Code § 401 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-11 (accessed March 16, 2020). This act, among other things, establishes procedures for union elections and for information reporting by unions and employers to the DOL. LMRDA is also known as the Landrum–Griffin Act.
6. 29 U.S. Code § 651 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-15 (accessed March 16, 2020). This act created OSHA, which establishes and enforces workplace health and safety standards.
7. 29 U.S. Code § 2601 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-28 (accessed March 16, 2020). This act provides covered employees with up to 12 weeks of unpaid, job-protected leave per year for the birth and care of a newborn child; for placement with the employee of a child for adoption or foster care; to care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition. It also requires that the employees' group health benefits be maintained during the leave.
8. 42 U.S. Code § 2000e et seq., https://www.law.cornell.edu/uscode/text/42/chapter-21/subchapter-VI (accessed March 16, 2020). This act generally prohibits employment discrimination based on race, color, religion, sex, and national origin.
9. See 42 U.S. Code § 1981a, https://www.law.cornell.edu/uscode/text/42/1981a (accessed March 16, 2020). See also the Civil Rights Act of 1991 for other provisions. Civil Rights Act of 1991, Public Law 102–166, https://www.eeoc.gov/eeoc/history/35th/thelaw/cra_1991.html (accessed March 16, 2020).
10. 29 U.S. Code § 206(d), https://www.law.cornell.edu/uscode/text/29/206 (accessed March 16, 2020). This act generally prohibits pay discrimination on the basis of sex.
11. 29 U.S. Code § 621 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-14 (accessed March 16, 2020).
12. 29 U.S. CODE § 151 et seq., https://www.law.cornell.edu/uscode/text/29/chapter-7/subchapter-II (accessed March 16, 2020). The NLRA is also known as the Wagner Act. For a discussion of the economics of the NLRA, see Richard A. Posner, "Some Economics of Labor Law," *University of Chicago Law Review*, Vol. 51, No. 4 (1984) https://chicagounbound.uchicago.edu/uclrev/vol51/iss4/4 (accessed March 16, 2020) (American labor law is best understood as a device for facilitating, though not to the maximum possible extent, the cartelization of the labor supply by unions.).
13. A partial list would include the Americans with Disabilities Act (ADA), the Black Lung Benefits Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Drug-Free Workplace Act, the Employee Retirement Income Security Act (ERISA), the Pension Protection Act, the Federal Employees' Compensation Act, the Davis–Bacon Act, the McNamara–O'Hara Service Contract Act, the Drug Free Workplace Act, the Contract Work Hours and Safety Standards Act, the Uniformed Services Employment and Reemployment Rights Act, the Rehabilitation Act of 1973, the Genetic Information Nondiscrimination Act (GINA) and the Immigration Reform and Control Act, the Fair Credit Reporting Act (which is enforced by the U.S. Federal Trade Commission), the Worker Adjustment and Retraining Notification Act, the Patient Protection and Affordable Care Act (PPACA, also known as the "Affordable Care Act" or "Obamacare"), and the Employee Polygraph Protection Act.
14. For a discussion of various common myths in this area, see Mark S. Pulliam, "The Exploitation of Labor and Other Union Myths," *The Independent Review*, Vol. 24, No. 3 (Winter 2019/2020), https://www.independent.org/pdf/tir/tir_24_3_06_pulliam.pdf (accessed March 16, 2020).
15. Workers' compensation for employment-related injury or death is primarily a function of state law. For an introduction to this area see Jack Hood, Benjamin Hardy, Jr., and Lauren Simpson, *Workers' Compensation and Employee Protection Laws in a Nutshell*, 6th ed. (St. Paul, MN: West Academic Publishing: 2016).
16. 42 U.S. Code § 12101 et seq., https://www.law.cornell.edu/uscode/text/42/chapter-126 (accessed March 16, 2020).
17. Patient Protection and Affordable Care Act, Public Law 111–148.
18. Internal Revenue Service, "Employer's Tax Guide to Fringe Benefits," Publication 15-B, 2019, https://www.irs.gov/pub/irs-pdf/p15b.pdf (accessed March 16, 2020).
19. U.S. Department of Labor, "Employee Retirement Income Security Act (ERISA)," https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/erisa (accessed March 16, 2020), and U.S. Department of Labor, "Types of Retirement Plans," https://www.dol.gov/general/topic/retirement/typesofplans (accessed March 16, 2020).
20. Joint Committee on Taxation, *Present Law and Background Relating to Tax-Favored Retirement Saving and Certain Related Legislative Proposals*, JCX-3-16, January 26, 2016, https://www.jct.gov/publications.html?func=download&id=4865&chk=4865&no_html=1 (accessed March 16, 2020).
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23. Notably, the Immigration Reform and Control Act of 1986 (also known as Simpson–Mazzoli Act). See, for example, U.S. Citizenship and Immigration Services, "Form I-9, Employment Eligibility Verification," https://www.uscis.gov/i-9 (accessed March 16, 2020), and 8 U.S. Code § 1324a, "Unlawful Employment of Aliens," https://www.law.cornell.edu/uscode/text/8/1324a (accessed March 16, 2020).
24. This is analogous to the standard analysis of the incidence of employer payroll taxes. Absent extreme assumptions of infinitely elastic or inelastic supply or demand, the entire incidence will not be on employees (or employers), but since capital is much more mobile than labor, and labor supply elasticities for prime working-age adults are relatively low, the primary incidence is on employees. It does not matter whether the tax is an "employer" tax or an "employee" tax. See, for example, Stephen J. Entin, "Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays the Tax?," Heritage Foundation *Center for Data Analysis Report* No. 04-12, November 5, 2004, http://s3.amazonaws.com/thf_media/2004/pdf/cda04-12.pdf; George J. Borjas, *Labor Economics*, 6th ed., chapter 4 (New York City: McGraw Hill, 2013); Ronald G. Ehrenberg and Robert S. Smith, *Modern Labor Economics*, 10th ed., chapter 3 (Chandler, AZ: Pearson Education, 2009); N. Gregory Mankiw, *Principles of Economics*, 4th ed., chapter 8 (Boston: Cengage Learning, 2007), or many other textbooks on price theory, microeconomics, or principles of economics. See also John Olson, "What Are Payroll Taxes and Who Pays Them?" Tax Foundation, July 25, 2016, https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/ (accessed March 16, 2020).
25. Moreover, if employer costs rise to the level at which a firm's expected future return is below average, the capitalized value of that expected future return (typically the share price) will decline relative to other firms' value. Capital will flow *out* of industries with subnormal returns over time to those with higher returns.
26. In standard microeconomic or price theory terms, the "tax" or cost instituted introduces a wedge between the pre-cost market clearing wage rate (labor cost) and the post-cost wage rate (wages received). Both the wages received by the worker and the amount of labor (employment) will decline. See, for example, Donald N. McCloskey, *The Applied Theory of Price*, chapter 15 (New York City: MacMillan Publishing Company, 1982), https://www.deirdremccloskey.com/docs/price.pdf (accessed March 16, 2020), and Alan Auerbach, "The Theory of Excess Burden and Optimal Taxation," in Alan Auerbach and Martin Feldstein, eds., *Handbook of Public Economics* (Amsterdam: Elsevier, 1985).
27. At its simplest, an elasticity is the number determined by dividing the percentage change in quantity by the percentage change in price. The price elasticity of demand is negative (and the demand curve has a negative slope) since the amount demanded declines as prices increase. The price elasticity of supply is positive (and the supply curve has a positive slope) since the amount supplied increases as prices increase.
28. See, for example, Michael P. Keane, "Labor Supply and Taxes: A Survey," *Journal of Economic Literature*, Vol. 49, No. 4 (2011), pp. 961–1075, https://www.researchgate.net/publication/46460344_Labor_Supply_and_Taxes_A_Survey (accessed March 16, 2020). Labor supply elasticities vary by type of worker. Elasticities for prime working-age adults, for example, are substantially lower than for teenagers or seniors.
29. U.S. Bureau of Labor Statistics, "Characteristics of Minimum Wage Workers, 2018," Report 1078, March 2019, https://www.bls.gov/opub/reports/minimum-wage/2018/pdf/home.pdf (accessed March 16, 2020).
30. Ibid.
31. George J. Stigler, "The Economics of Minimum Wage Legislation," *The American Economic Review*, Vol. 36, No. 3 (June 1946), pp. 358–365, https://www.jstor.org/stable/pdf/1801842.pdf (accessed March 16, 2020), and "The Truth About a $15 Federal Minimum Wage," Heritage Foundation *Fact Sheet* No. 186, July 12, 2019, https://www.heritage.org/sites/default/files/2019-07/FS_186.pdf.
32. For a video providing a diagrammatical explanation, see Marginal Revolution University, "Price Floors: The Minimum Wage," February 25, 2015, https://www.youtube.com/watch?v=65kfAswiHLk (accessed March 16, 2020).
33. Raise the Wage Act, H.R. 582, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/house-bill/582/text (accessed March 16, 2020). The identical Senate companion bill is Raise the Wage Act, S. 150, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/senate-bill/150 (accessed March 16, 2020).
34. Fifty-two weeks times 40 hours per week = 2,080 hours annually times $15 per hour = $31,200 plus the employer share of Social Security and Medicare payroll taxes (7.65 percent) of $2,387 = $33,587 plus federal and state unemployment insurance taxes (which vary by state and employer experience rating), workers' compensation costs, and health care premiums (if mandatory).
35. Congressional Budget Office, *The Effects on Employment and Family Income of Increasing the Federal Minimum Wage*, July 2019, p. 3, https://www.cbo.gov/system/files/2019-07/CBO-55410-MinimumWage2019.pdf (accessed March 16, 2020).

36. For general background, see Joint Committee on Taxation, "Present Law and Background Relating to Worker Classification for Federal Tax Purposes," JCX-26-07, May 8, 2007, http://www.jct.gov/x-26-07.pdf (accessed March 16, 2020). See also the present law discussion in Joint Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2020 Budget Proposal*, JCS-1-19, July 2019, § IV.E, https://www.jct.gov/publications.html?func=download&id=5208&chk=5208&no_html=1 (accessed March 16, 2020).
37. For FLSA, the "economic realities" test governs. See *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). ERISA uses a "right to control" test. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Title VII cases use a different standard. See, for example, *Diggs v. Harris Hospital-Methodist, Inc.*, 847 F.2d 270 (5th Cir.) cert. denied, 488 U.S. 956 (1988). For purposes of the NLRA, see 29 U.S. Code § 152(3) and the many cases interpreting it. The NLRB must rule on who is an employee to determine who may vote on a representation petition. See *SuperShuttle DFW, Inc.*, National Labor Relations Board Case 16–RC–010963, January 25, 2019, https://apps.nlrb.gov/link/document.aspx/09031d4582a96a9c (accessed March 16, 2020) for the NLRB decision overruling *FedEx Home Delivery*, National Labor Relations Board Cases 34-CA-012735 and 34-RC-002205, September 30, 2014, https://apps.nlrb.gov/link/document.aspx/09031d45818e44c8) (accessed March 16, 2020) and returning to the traditional common law agency test in lieu of a version of that test (sometimes called an "economic dependency" standard) that restricted the importance of potential entrepreneurial activity. See also *NLRB v. United Insurance. Co. of America*, 390 U.S. 254 (1968).
38. Respondeat superior tort liability of an employer for employee torts is generally determined by applying the "direct and control" test. See, for example, *Restatement of the Law Third, Agency* (Philadelphia: American Law Institute, 2006) §§ 2.04 and 7.07, among others. Courts typically define "employee" broadly in Workers' Compensation cases to effect the remedial purpose of the statute. Various state statutes have different definitions.
39. The PPACA adopted the tax "common law" test.
40. Modern Worker Empowerment Act, H.R. 4069, 116th Cong., 1st Sess., https://www.congress.gov/116/bills/hr4069/BILLS-116hr4069ih.pdf (accessed March 16, 2020).
41. The IRS "common law" test considers 20 factors. See Internal Revenue Service, "Employee Relationship Guidelines for Federal Employment Tax, IRS Revenue Ruling 87-41, June 8, 1987. The IRS is not consistent in how it presents these factors. See Internal Revenue Service, "Employee or Independent Contractor?," § 2, Employer's Supplemental Tax Guide, Publication 15-A (for use in 2020), https://www.irs.gov/pub/irs-pdf/p15a.pdf (accessed May 21, 2020).
42. The New Economy Works to Guarantee Independence and Growth Act of 2019, H.R. 1625, 116th Congress, 1st Sess., https://www.congress.gov/bill/116th-congress/house-bill/1625/text (accessed March 16, 2020). The NEW GIG Act of 2019, S. 700, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/senate-bill/700?q=%7B%22search%22%3A%5B%22S.+700%22%5D%7D&s=2&r=1 (accessed March 16, 2020) is the identical Senate companion legislation.
43. *A Budget for a Better America: Promises Kept, Taxpayers First* (Washington, DC: Government Publishing Office, 2019), p. 89 ("Improve Clarity in Worker Classification and Information Reporting Requirements"), https://www.govinfo.gov/content/pkg/BUDGET-2020-PER/pdf/BUDGET-2020-PER.pdf (accessed March 16, 2020). For a more detailed description of the Administration proposal, see Joint Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2020 Budget Proposal*, Part IV, § E.
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46. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong., 1st Sess., February 10, 2020, https://www.congress.gov/bill/116th-congress/house-bill/2474 (accessed March 16, 2020). See also Protecting the Right to Organize Act of 2019, S. 1306, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/senate-bill/1306/text (accessed March 16, 2020). See also Committee on Education and Labor, "Protecting the Right to Organize Act of 2019, Section-by-Section," May 2, 2019, https://edlabor.house.gov/imo/media/doc/2019-05-02%20PRO%20Act%20Section%20by%20Section.pdf (accessed March 16, 2020), and Trey Kovacs et al., "The Case against the Protecting the Right to Organize Act," Competitive Enterprise Institute *OnPoint* No. 257, August 27, 2019, https://cei.org/sites/default/files/proact.pdf (accessed March 16, 2020).
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52. Protecting the Right to Organize Act of 2019, H.R. 2474, §§ 2(d)(7) and 2(e).

53. Ibid., § 2(e).

54. Ibid., § 2(k), which amends § 14(b) of the National Labor Relations Act [29 U.S. Code 164(b))]. On "Right to Work" laws generally, see James Sherk, "Right-to-Work Laws: Myth vs. Fact," Heritage Foundation *Issue Brief* No. 4319, December 12, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/IB4319.pdf; "Right to Work Frequently-Asked Questions," National Right to Work Legal Defense Foundation, https://www.nrtw.org/right-to-work-frequently-asked-questions/ (accessed March 16, 2020); and American Federation of Labor and Congress of Industrial Organizations, "Right to Work," https://aflcio.org/issues/right-work (accessed March 16, 2020).

55. "Right to Work States," National Right to Work Legal Defense Foundation, https://www.nrtw.org/right-to-work-states (accessed March 16, 2020).

56. Protecting the Right to Organize Act of 2019, H.R. 2474, § 2(a)(2).

57. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). See also Rachel Greszler, "California's 'Pro-Worker' Law Is Killing Jobs Left and Right," Daily Signal, January 7, 2020, https://www.dailysignal.com/2020/01/07/californias-pro-worker-law-is-killing-jobs-left-and-right/ (accessed March 16, 2020).

58. The Employee Free Choice Act passed the House, but the Senate failed to invoke cloture during its debate. See Employee Free Choice Act, H.R. 800, 110th Cong., 1st Sess., https://www.congress.gov/110/bills/hr800/BILLS-110hr800pcs.pdf (accessed March 16, 2020). The bill would have required the NLRB to certify a union without an election using secret ballots if a majority of the bargaining unit employees had signed a card authorizing designation of the union as their representative. This is known as "card check."

59. Protecting the Right to Organize Act of 2019, H.R. 2474, § 2(e), amending NLRA § 9(c), adding new paragraphs 5(A)–(C).

60. Rachel Greszler, "6 Ways a Union-Backed Bill Will Upend the Job Market," Daily Signal, February 5, 2020, https://www.dailysignal.com/2020/02/05/6-ways-a-union-backed-bill-will-upend-the-jobs-market/ (accessed March 16, 2020), and F. Vincent Vernuccio, "Protecting the Secret Ballot: The Dangers of Union Card Check," Mackinac Center for Public Policy, October 22, 2019, https://www.mackinac.org/archives/2019/s2019-09.pdf (accessed March 16, 2020).

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62. Ibid., § 2(d)(7).

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66. *Federal Register*, Vol. 85, No. 11 (January 16, 2020), pp. 2820–2862, modifying 29 Code of Federal Regulations § 791.1-3 (2020), https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf (accessed March 16, 2020).

67. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

68. Mick Mulvaney and Eugene Scalia, "Making Labor Rules Rational Again: A New Regulation Will Undo Obama's Aggressive 'Joint Employer' Definition," *Wall Street Journal*, January 12, 2020.

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