FUTURE OF WORK: PRESERVING WORKER PROTECTIONS IN THE MODERN ECONOMY

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

AND THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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FUTURE OF WORK: PRESERVING WORKER PROTECTIONS IN THE MODERN ECONOMY

Wednesday, October 23, 2019
House of Representatives,
Subcommittee on Health, Education, Labor, and Pensions
Joint with the
Subcommittee on Workforce Protections,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:18 a.m., in Room 2175, Rayburn House Office Building. Hon. Frederica S. Wilson (Chairwoman of the subcommittee) presiding.

Present: Representatives Wilson, Adams, Courtney, DeSaulnier, Norcross, Jayapal, Morelle, Wild, Harder, Underwood, Shalala, Levin, Stevens, Trahan, Walberg, Byrne, Roe, Cline, Taylor, Johnson.

Also Present: Representatives Scott and Foxx.

Staff Present: Tylease Alli, Chief Clerk; Jordan Barab, Senior Labor Policy Advisor; Ilana Brunner, General; Kyle deCant, Labor Policy Counsel; Daniel Foster, Health and Labor Counsel; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Kevin McDermott, Senior Labor Policy Advisor; Richard Miller, Director of Labor Policy; Max Moore, Office Aid; Udochi Onwubiko, Labor Policy Counsel; Veronique Pluviose, Staff Director; Banyon Vassar, Deputy Director of Information Technology; Katelyn Walker, Counsel; Rachel West, Senior Economic Policy Advisor; Cyrus Artz, Minority Parliamentarian; Courtney Butcher, Minority Director of Member Services and Coalitions; Akash Chougule, Minority Professional Staff Member; Cate Dillon, Minority Staff Assistant; Rob Green, Minority Director of Workforce Policy; Jeanne Kuehl, Minority Legislative Assistant; Hannah Matesic, Minority Director of Operations; Ben Ridder, Minority Professional Staff Member; and Lauren Williams, Minority Professional Staff Member.

Chairwoman WILSON. The Subcommittees on Health, Employment, Labor, and Pensions and Workforce Protections will come to order. Welcome, everyone. I note that a quorum is present.

The subcommittees are meeting today in a hearing to receive testimony on the future of work and preserving worker protections in the modern economy.

Pursuant to Committee Rule 7(c), opening statements are limited to the Chairs and the Ranking Members. This allows us to hear from our witnesses sooner and provides all Members with adequate time to ask questions.

I recognize myself now for the purpose of making an opening statement.

Today we are gathered for the first of three hearings to explore the future of work. This series of hearings will provide an opportunity for experts and stakeholders to share how evolving business models and rapidly changing employment arrangements coupled with increased use of technology and automation are impacting workers and employers.

We look forward to hearing ideas on policy options that ensure innovation, complements worker protections, civil rights, and economic security.

Today's hearing will focus on how Congress can ensure that workers have fair wages, hours and benefits, safe work places, and an opportunity to bargain for better working conditions at a time when American work places are rapidly shifting.

For most of the 20th century, companies primarily hired workers directly but over the last three decades, there have been a fissuring of the workplace where companies are increasingly shifting employment to subcontractors, temporary workers, or workers misclassified as independent contractors. The most visible example of the fissured workplace can be found in the on-demand economy where some companies misclassify their workers as independent contractors.

The employment relationship is key to our nations'Nation's foundational labor and employment laws. And the erosion of this relationship threatens to not only undermine our nation's labor laws but to also erode the progress we have made towards a strong, American middle class.

That is why preventing worker misclassification and strengthening and maintaining joint employment standards are key to ensuring that workers have access to legal protections and can exercise their rights.

For example, in my district in Miami, Florida, a large swath of workforce is subcontracted or temporary workers who are hired to support the large tourism, hospitality, and health industries.

These workers who are the backbone to multiple, billion-dollar industries are currently limited to their abilities to collectively bargain and advocate for themselves. In most cases, workers are forced, are being forced to work in extremely unsafe conditions.

A full revamp of workers' protections is necessary to ensure safer working conditions and better benefits. The right to organize as the law currently stands does not empower our constituents to harness their true economic potential.

The Protecting the Right to Organize Act we call the PRO Act which we recently advanced through this committee, would strengthen joint employment standards under the National Labor Relations Act to ensure that workers can bring to the negotiating table all of the companies that have a say in the terms and conditions of employment.

The PRO Act would also broaden the NLRA's employment standards to prevent workers from being misclassified as independent contractors and thereby deny their rights to organize and collectively bargain.

Now that the PRO Act has advanced through our committee, we must continue our discussion for ways to complement and strengthen our current labor laws.

Today, we will examine whether or not bargaining can be used to establish the industry wide floors that prevent individual employers from undercutting wages and working additions in order to compete.

I also look forward to a discussion about how to ensure benefits provided to workers in the fissured workplace, truly achieve meaningful improvements for workers. Innovation is not compatible with collective bargaining rights or good work place benefits.

Congress has a responsibility to ensure that the changing economy does not undermine the rights of American workers. Today's hearing is an important step towards shaping the future of work that facilities innovation and growth while preserving the worker protections and benefits that held from the core of American prosperity.

I would like to thank our witnesses for joining us today and I now recognize HELP Ranking Member Walberg for an opening statement. Mr. Walberg.

[The statement of Ms. Wilson follows:]

Prepared Statement of Hon. Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions

Today, we are gathered for the first of three hearings to explore the "future of work." This series of hearings will provide an opportunity for experts and stakeholders to share how evolving business models and rapidly changing employment arrangements, coupled with increased use of technology and automation, are impacting workers and employers.

We look forward to hearing ideas on policy options that ensure innovation complements worker protections, civil rights, and economic security.

Today's hearing will focus on how Congress can ensure that workers have fair wages, hours and benefits; safe workplaces; and an opportunity to bargain for better working conditions at a time when American workplaces are rapidly shifting.

For most of the 20th century, companies primarily hired workers directly. But over the last three decades, there has been a "fissuring" of the workplace where companies are increasingly shifting employment to subcontractors, temporary workers, or workers misclassified as independent contractors.

The most visible example of the fissured workplace can be found in the on-demand economy, where some companies misclassify their workers as independent contractors.

The employment relationship is key to our nation's foundational labor and employment laws, and the erosion of this relationship threatens to not only undermine our nation's labor laws, but to also erode the progress we've made toward a strong American middle class. That is why preventing worker misclassification and strengthening and maintaining joint employment standards are key to ensuring that workers have access to legal protections and can exercise their rights.

For example, in my district in Miami, Florida, a large swath of the workforce is subcontracted or temporary workers who are hired to support the large tourism, hospitality, and health industries. These workers who are the backbone to multiple billion-dollar industries are currently limited in their abilities to collectively bargain and advocate for themselves. In some cases, workers are being forced to work in extremely unsafe conditions. A full revamp of worker protections is necessary to ensure safer working conditions and better benefits. The right to organize as the law currently stands does not empower our constituents to harness their true economic potential.

The Protecting the Right to Organize Act, which we recently advanced through this committee, would strengthen joint employment standards under the National Labor Relations Act to ensure that workers can bring to the negotiating table all of the companies that have a say in the terms and conditions of employment. The PRO Act would also broaden the NLRA's employment standard to prevent workers from being misclassified as independent contractors and thereby denied their rights to organize and collectively bargain.

Now that the PRO Act has advanced through our committee, we must continue our discussion for ways to complement and strengthen our current labor laws. Today we will examine whether or not sectoral bargaining can be used to establish industry-wide floors that prevent individual employers from undercutting wages and working conditions in order to compete.

I also look forward to a discussion about how to ensure benefits provided to workers in the fissured workplace truly achieve meaningful improvements for workers.

Innovation is not incompatible with collective bargaining rights or good workplace benefits. Congress has a responsibility to ensure that the changing economy does not undermine the rights of American workers.

Today's hearing is an important step toward shaping a future of work that facilitates innovation and growth while preserving the worker protections and benefits that help form the core of American prosperity.

I would like to thank our witnesses for joining us.

Mr. WALBERG. Thank you, Madame Chair. Today we are here to discuss the future of work. Madame Chair, I vote in favor of the future of work. It is a good thing. And so it is worth moving forward.

But with the ever-evolving economic landscape which in fact is pretty good right now, the lowest unemployment rate for all sectors or at least most all sectors in history, at least in the last 50 plus years, and the increased wage for middle class expansions taking place the landscape is pretty good. It is an important issue though for us to consider.

Yet I find it ironic given committee Democrats recently passed radical legislation, the PRO Act that would take our labor laws back to the 1930's.

My colleagues across the aisle seem to feel that they believe that forcing workers into labor unions is the only way to ensure proper wages and benefits. So Federal law should promote unions, even at the expense of workers own rights and freedoms and choices.

Democrat's ultimate goal, it appears, is to all but eliminate independent contractor status, classifying as many workers as possible as employees in order to subject them to unionization.

Labor union membership continues to plummet due the modern economic growth and unions own failings. Instead of increasing transparency and accountability to serve their members better, union leaders are exerting their political influence to push backward looking radical labor laws that would allow them to consolidate power, further coerce workers, line their own pockets, and bolster their own agendas while depriving workers of freedom, flexibility, and innovation in the work place.

It appears the Democrat's reforms would take us back to the past while harming workers, businesses and the economy as a whole at a time when economic growth and innovation are creating real progress and prosperity for American workers. That is why committee Democrats recently approved H.R. 2474, far reaching legislation which limits the rights of workers to make free and informed decisions. This is not what the future of work in America should

look like or needs to look like. There is nothing progressive about what will be discussed during this hearing.

Instead of considering unworkable policies that will harm workers and businesses, we should be discussing ways to encourage flexible work arrangements and access to employer sponsored benefits without creating costly and restrictive mandates. These are the kind of reforms necessary to adapt our laws for the future of work.

For example, multi-employer plans should allow small employers to join together to sponsor a single retirement plan for employees which would significantly reduce costs for employers who might not otherwise be able to afford offering retirement benefits.

Additionally, committee Republicans have long championed the expansion association health plans which allow small businesses to join together to provide their employees with high quality healthcare at more affordable costs.

These are just two examples of innovative reforms that meet the needs of a 21st century workforce. American workers are benefiting from a strong economy ushered in by Republican led tax and regulatory reform.

Wages are rising. Unemployment is near record lows. And millions of jobs have been created since President Trump took office. Individual freedom and pro-growth economic policies create the best path forward for workers and job seekers, not more coercion and red tape.

That is what I believe, Madame Chair. I am going got stick to it, but I look forward to participating in this hearing and I yield back.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Today, we are here to discuss the future of work. With the ever-evolving economic landscape, it is an important issue for us to consider. Yet I find it ironic given Committee Democrats recently passed radical legislation that would take our labor laws back to the 1930s.

My colleagues across the aisle believe that forcing workers into labor unions is the only way to ensure proper wages and benefits, so federal law should promote unions even at the expense of workers' own rights and freedoms. Democrats' ultimate goal is to all but eliminate independent-contractor status, classifying as many workers as possible as employees in order to subject them to unionization.

Labor union membership continues to plummet due to the modern economy, economic growth, and unions' own failings. Instead of increasing transparency and accountability to serve their members better, union leaders are exerting their political influence to push backward-looking radical labor laws that would allow them to consolidate power further, coerce workers, line their own pockets, and bolster their own agendas while depriving workers of freedom, flexibility, and

innovation in the workplace. The Democrats' reforms would take us back to the past while harming workers, businesses, and the economy as a whole at a time when economic growth and innovation are creating real progress and prosperity for American workers.

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American workers are benefitting from the strong economy ushered in by Republican-led tax and regulatory reform. Wages are rising, unemployment is at near-record lows, and millions of jobs have been created since President Trump took office. Individual freedom and pro-growth economic policies create the best path forward for workers and job-seekers, not more coercion and red tape.

Chairwoman WILSON. Thank you, Mr. Walberg. I now recognize Workforce Protection Subcommittee Chair Adams for an opening statement

Ms. ADAMS. Thank you, Madame Chairwoman Wilson and thank you to the witnesses for being here today. The foundation Federal protections for workers including fair wages, reasonable hours, and safe work places are grounded in two key employment laws. The Fair Labor Standards Act and the Occupational Health and Safety Act.

These landmark laws were passed when the overwhelming number of workers and employers were connected through traditional, direct relationships. An employee could tell who their employer was by looking at the name of the building where they worked but as the relationship between workers and employers is changing, the protections provided by our key labor employment laws are eroding.

For example, the rising trend of working misclassification in which a worker who should be an employee under the law is as an independent coordinator is undermining the Fair Labor Standards Act.

When employees are misclassified, employers are able to strip workers of minimum wage and overtime protections and gain an unfair, competitive advantage by classing them as independent contractors.

Similarly, the lack of clarity in work arrangements can undermine the safety of workers because there is less certainty about who is responsible for supplying safety equipment and safety training. This adds risks for temporary and contract workers who are twice as likely to die from falls than workers in traditional employment according to Labor Department data.

And workers who are misclassified do not have protections under Federal whistleblower laws including the anti-retaliation provisions of the Occupational Safety and Health Act and other whistleblower laws overseen by OSHA.

As our witnesses will discuss today, we don't have to choose between strengthening and modernizing protections for American workers or building a vibrant and modern economy. Without innovation, workers and businesses may lose out on opportunities to succeed.

But without a strong and sustained effort from Federal policy makers, the changing relationship between workers and employers and the emergence of new business models and new technology will continue to erode the financial security and safety of America's

workers. We can have an economy that values workers and an economy where business can succeed.

Proposals we have previously discussed in this committee including the Payroll Fraud Prevention Act would be important steps in the right direction. All of us agree that the foundational labor and employment laws are outdated in the modern economy.

So the question at the heart of today's hearing is whether we will update and strengthen those protections or further weaken them. The future of work will be determined by our answer to that question. I yield back, Madame Chair.

[The statement by Chairwoman Adams follows:]

Prepared Statement of Hon. Alma S. Adams, Chairwoman, Subcommittee on Workforce Protections

Thank you, Madame Chairwoman Wilson.

The foundational federal protections for workers –including fair wages, reasonable hours, and safe workplaces – are grounded in two key employment laws: The Fair Labor Standards Act and the Occupational Health and Safety Act.

These landmark laws were passed when the overwhelming number of workers and employers were connected through traditional, direct relationships.

An employee could tell who their employer was by looking at the name on the building where they worked.

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All of us agree that the foundational labor and employment laws are outdated in the modern economy.

The question at the heart of today's hearing is whether we will update and strengthen those protections or further weaken them.

The "future of work" will be determined by our answer to that question. I yield back.

Chairwoman WILSON. Thank you, Chair Adams. The Ranking Member of workforce protections, Member Byrne, will join us later, he is unable to be with us now and we will be, he will be able to give his opening statement.

Without objection, all other Members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m. on November 5, 2019.

I will now introduce our witnesses. David Weil is the Dean and Professor of the Heller School for Social Policy and Management at Brandeis University. Mr. Weil serves as the administrator of the Wage and Hour Division of the U.S. Department of Labor under President Barack Obama from 2014 to January 2017. Welcome.

Brishen Rogers is an associate professor of Law at Temple University School of Law, at Temple University Beasley School of law and a Fellow at the Roosevelt Institute. Professor Rogers' research focuses on labor and employment, concentrating on how the law shapes workers collective action, the impact of technology on employment practices, and the relationship between law and inequality.

Rachel Greszler is a Research Fellow in Economics, Budgets, and Entitlements at the Heritage Foundation. Ms. Greszler provides research and commentary on workplace issues including Federal employee compensation, women's issues, and labor policies such as minimum wage and paid family leave.

Jessica Beck is a co-founder and Chief Operating Officer of Hello Alfred, a technology and residential service company that is changing the way people live in cities by integrating help directly into the home through a combination of technology, smart data, logistics, and high touch hospitality. Ms. Beck and her cofounder, Marcela Sapone built a service-based business that assists households in more than 20 cities across the United States.

I appreciate all of the witnesses being here today and we all look forward to your testimony. Let me remind the witnesses that we have read your written statements and they will appear in full in the hearing record.

Pursuant to Committee Rule 7(d) and committee practice, each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

Let me also remind the witnesses that pursuant to Title 18 of the U.S. Code, Section 1001, it is illegal to knowingly and willfully falsify any statement, representation, writing, document, or material fact presented to Congress or otherwise conceal or cover up a material fact.

Before you begin your testimony, please remember to press the button on the microphone in front of you so that it will turn on and the Members can hear you. As you begin to speak, the light in front of you will turn green. After 4 minutes the light will turn yellow to signal that you have one minute remaining. When the light turn's red, your 5 minutes have expired, and we ask that you please wrap it up.

We will let the entire panel make their presentation before we move to Member questions. When answering a question, please remember to once again turn your microphone on. I will first recognize Dr. Weil. Welcome.

TESTIMONY OF DAVID WEIL, PH.D., DEAN AND PROFESSOR, THE HELLER SCHOOL FOR SOCIAL POLICY AND MANAGEMENT, BRANDEIS UNIVERSITY

Mr. WEIL. Thank you, Chair Wilson, Chair Adams, Ranking Member Walberg, Ranking Member Byrne and Members of the subcommittees.

My name is David Weil and I am the Dean of the Heller School for Social Policy and Management at Brandeis University. And I did have the honor of serving as President Obama's Administrator of the Wage and Hour Division of U.S. Department of Labor from 2014 to 2017 when I had the honor of appearing before this committee on several occasions.

I offer these comments regarding the topic of today's hearing informed by my past and ongoing academic research as well as my experience as the head of the Federal agency in charge of enforcing our most basic labor standards.

We can understand the future of work by understanding the present of work. In the past few years there have been innumerable conferences and convenings on the future of work. These meetings typically focus on issues like robotics, artificial intelligence, and platform or gig business models like Uber and Lyft.

But gig work is currently estimated to affect a very small part of our labor force. And speculations on the impact of technology in the past have often proven to be off the mark. A focus on changes that are already impacting working people and will continue to do so in my view is far more useful. Millions of workers in the U.S. have jobs that don't pay enough, provide few if any benefits, and lack basic workplace protections we once took for granted.

Most relevant here, employers have moved away from a traditional employment model and towards greater reliance on outsourcing, contracting and subcontracting, franchising in its many forms, and most recently platform business models. This change that has been described by the subcommittee chairs represents both the present and the future structure of work and is what I have termed the fissured workplace.

The fissured workplace model has allowed employers to shift risks and responsibility onto workers and has incentivized the misclassification of employees as independent contractors.

We cannot understand policy solutions without understanding the way we got here, which I have outlined in detail in my written testimony and academic writings.

The fissured workplace has social and economic consequences for workers. As you move downward in a fissured workplace structure, incentives to cut corners rise leading to violations of our fundamental labor and employment standards such as the minimum wage, overtime, or even the basic concept that people should be paid for the work they do.

For a family struggling to get by the typical losses are rising from these violations translate to more than 5 weeks of groceries, a month of rent, or 5 weeks of childcare. Different forms of workplace fissuring can also undermine providing workers safe and helpful workplaces.

Compared to their employee counterparts, independent works have a disproportionately higher chance of injury or death. Because

of its concentration particularly in low wage sectors, the fissured workplace significantly impacts people of color and women and compounds the historic and systemic disparities that have faced them in the workplace.

And the fissured workplace is prevalent throughout the economy. The impact of fissuring on wage and hourly structures of the economy is sizable. My conservative estimate of workers operating in highly fissured industries says we have over 23 million workers or about 19 percent of the private sector workforce.

If we consider the additional workers and occupations in industries with partial presence of fissured practices, my estimate of its prevalence would exceed 35 percent. It is therefore essential that our public policies address fissuring. Our policies need to provide rights and protections for workers in this increasingly challenging environment.

My colleague Tonya Goldman and I outlined a proposal to provide basic protections to workers, employees, and independent contractors in ways that recognize changes in the workplace that I have described.

We do so by defining three concentric circles of workplace rights and protections. An inner circle would assure fundamental rights like receiving minimum payment for work, provision of a safe and helpful workplace and protections against retaliation for use of rights guaranteed to all workers regardless of employment status.

A middle circle would provide employee rights and protections emanating from a clear and consistent definition of employment.

And finally, an outer circle would provide access to safety net benefits like unemployment insurance and workers compensation and non-mandatory benefits like retirement.

But laws are only as good as our ability to enforce them. When I led the Wage and Hour Division it had 1,000 investigators in the field even though the agency had responsibility for 7.3 million establishments.

Enforcement agencies need sufficient number of investigator and tools to do their work. New technology—

[The statement of Mr. Weil follows:]

Preparing for the Future of Work Through Understanding the Present of Work:
A Fissured Workplace Perspective

Testimony before the U.S. House of Representatives Committee on Education and Labor
Subcommittee on Workforce Protections and Subcommittee on Health, Employment, Labor, and Pensions

Honorable David Weil, Ph.D., Dean and Professor Heller School for Social Policy and Management, Brandeis University

Joint Subcommittee hearing on "The Future of Work: Preserving Worker Protections in the Modern Economy"

Washington, DC
October 23, 2019

Chair Wilson, Chair Adams, Ranking Member Walberg, Ranking Member Byrne, and members of the subcommittees. My name is David Weil and I am the Dean and a professor at the Heller School for Social Policy and Management at Brandeis University. I also had the honor of serving as President Obama's Administrator of the Wage and Hour Division at the US Department of Labor between 2014 and 2017. I offer these comments regarding the topic of today's hearing, "The Future of Work: Preserving Worker Protections in the Modern Economy" informed by my ongoing academic research as well as my experience as the head of the federal agency in charge of enforcing our most basic labor standards.

Understanding the future of work by understanding the present of work

In the past few years, there have been innumerable conferences, workshops, and convenings on the "future of work." These meetings typically focus on issues like robotics, artificial intelligence, and platform business models like Uber and Lyft. But these topics regarding the future of work are generally regarded as affecting a relatively small part of the workforce and speculations on the impacts of technology have often proven to be off the mark.[1]

A focus on changes that have impacted the present workplace and will continue to do so in my view is far more useful. Millions of workers in the US have jobs that don't pay enough, provide few—if any—benefits, and lack opportunities for advancement or career growth. A median worker in 2017 did not earn much more than one in 1979.[2] The pronounced decline in union membership, particularly for private-sector employees, growing international competition in trade-exposed

[1] Current estimates of the size of the digital platform economy are generally around 1 percent of the workforce (*see* Larry Katz and Alan Krueger. "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015." ILR Review, 72, no.2 (June 2017): 382-416.

[2] Jay Shambaugh, Ryan Nunn and Becca Portman, "Introduction: Thirteen Facts about Wage Growth.." *in* REVITALIZING WAGE GROWTH: POLICIES TO GET AMERICAN WORKERS A RAISE, in Jay Shambaugh & Ryan Nunn (eds.), (Washington, DC: Brookings, 2018).

industries, deregulation of sectors of the economy, and growing market concentration at the product and labor market level have all contributed to the decline in wages and working conditions.

Additionally, and most relevant here, employers are moving away from a traditional employment model and outsourcing and subcontracting much of their work. This change in both the present and future structure of work, is what I have termed the "fissured workplace." The phrase encompasses increased outsourcing, contracting and subcontracting, franchising in its many forms, and most recently platform business models.[3] The fissured workplace model has allowed employers to shift risks and responsibilities onto workers and incentivized the misclassification of employees as independent contractors. Its impacts on workers span a range of outcomes including lower wages, fewer benefits, unreliable hours, and limited or no labor and employment protections. The growth in earnings inequality that has been documented over the last few decades can also be traced in part to the fissuring of work.[4]

We arrived at this place through an evolution that occurred over the past three decades. Major companies throughout the economy have faced intense pressure to improve financial performance for private and public investors. They responded by focusing their businesses on core competencies—that is, activities that provide the greatest value to their consumers and investors—and by shedding less essential activities. Firms typically started outsourcing activities like payroll, publications, accounting, and human resources. But over time, this spread to activities like janitorial work, facilities maintenance, and security. In many cases it went even deeper, spreading into areas once regarded as core to the company: housekeeping in hotels; cooking in restaurants; loading and unloading in retail distribution centers; even basic legal research in law firms.

Like a fissure in a once-solid rock that deepens and spreads, once an activity like janitorial services, housekeeping, or package delivery is shed, the secondary businesses doing that work are affected, often shifting those activities to still other businesses. A common practice in janitorial work, for instance, is for companies in the hotel or grocery industries to outsource that work to cleaning companies. Those companies, in turn, often hire smaller businesses to provide workers for specific facilities or shifts. These work arrangements alter who is the employer of record or make the worker-employer tie tenuous and far less transparent.[5]

The fissuring of the workplace impacts present and future workers' earnings, benefits, safety net protections, health and safety, and other labor protections. As I will discuss below, conservatively 23 million workers work in highly fissured industries, several of which are among the projected fastest growing industries over the next decade. The rise of on-demand employment relationships adds further to the prevalence and impacts of the fissured workplace. The future of work demands that we address the way that the present state of work has been transformed so that we can assure workers a more promising future.

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[3] DAVID WEIL, THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard University Press, 2014); *see also* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 640 (2012).

[4] David Weil. "Income Inequality, Wage Determination, and the Fissured Workplace." in Bradford DeLong, Heather Boushey, and Marshall Steinbaum, (eds) ON THOMAS PIKETTY'S CAPITAL. (Cambridge, MA: Harvard University Press, 2017), pp. 209-231

[5] David Weil, "Enforcing Labour Standards in Fissured Workplaces: The US Experience," The Economic and Labor Relations Review, 22, no. 2 (July 2011): 33-54.

Worker and social consequences of the fissured workplace

Because each level of business in a fissured workplace structure requires a financial return for their work, the further down one goes, the slimmer are the remaining profit margins. At the same time, as you move downward, labor typically represents a larger share of overall costs—and one of the only costs in direct control for those entities. That means the incentives to cut corners rise—leading to violations of our fundamental labor and employment standards such as the minimum wage, overtime, or even the basic concept that people should be paid for the work they do. The extent of these violations was something that was most disturbing to me when I served as the Wage and Hour Administrator.[6]

The growth of fissured work arrangements and increasing misclassification of workers as independent contractors[7] means that now and in the future, more people will work without the protections of our fundamental labor and employment laws and without the ability to access important social safety net benefits.[8] These workers are not covered by the minimum wage or overtime protections, lack access to unemployment insurance or workers' compensation, or the right to collectively bargain for improved wages, benefits, and working conditions. Workers classified as employees but embedded in fissured workplace arrangements are more likely to face violations of the Fair Labor Standards Act. Illustrations of this include the failure to pay janitors and cleaners,[9] cable and satellite installers,[10] carpenters, home care workers, and other workers the

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[6] Indicative workplace investigations of violations of these standards can be found in the following US Department of Labor Wage and Hour Division press releases: construction workers (US Department of Labor Wage and Hour Division, News Release, 14-0827-SAN, "Paul Johnson Drywall Inc Agrees to Pay $600,000 in Back Wages, Damages and Penalties Following US Labor Department Investigation" (19 May 2014), online: <www.dol.gov/newsroom/releases/whd/whd20140827>; cleaners (US Department of Labor Wage and Hour Division, News Release, 16-1818-DAL, "US Labor Department Sues Oklahoma Cleaning Company, Alleging Its Cleaning 'Franchises' Are Employees" (29 September 2016), online: <www.dol.gov/newsroom/releases/whd/whd20160929-3>; hotels (US Department of Labor Wage and Hour Division, News Release, 16-1045-SAN, "Staffing Agency to Pay More than $151K in Overtime Back Wages, Damages, After Misclassifying 275 Hotel Employees as Independent Contractors" (2 June 2016), online: <www.dol.gov/newsroom/releases/whd/whd20160602>; fracking (US Department of Labor Wage and Hour Division, News Release, 14-1883-PHI, "US Labor Department Helps More Than 3,500 Pennsylvania And West Virginia Oil and Gas Workers Recover $4.5M In Back Wages For Unpaid Overtime" (9 December 2014), online: <www.dol.gov/newsroom/releases/20141209>; food service (Eric Schroeder, "J&J Snack Foods to pay $2.1 million to settle wage dispute," *Food Business News* (29 October 2015), online: <www.foodbusinessnews.net/articles/5155-j-j-snack-foods-to-pay-2-1-million-to-settle-wage-dispute>

[7] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009); Françoise Carré, *(In)dependent Contractor Misclassification*, Economic Policy Institute (Jun. 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification; National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, 2-6 (Jul. 2015), http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf; U.S. Department. of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015) available at http://www.blr.com/html_email/AI2015-1.pdf (withdrawn by the Secretary of Labor on June 7, 2017).

[8] Weil, *supra* note 3; Maltby and Yamada, 38 B.C. L. REV. at 247 ("All of these effects—"companies" or "employers" treating individuals as independent contractors rather than employees, large firms contracting out work to small firms, and the growth of temporary help agencies—increase the net number of independent contractors.").

[9] *See, e.g.,* Vazquez v. Jan-Pro Franchising International, Inc., 923 F.3d 575 (9th Cir. 2019); Awuah v. Coverall North America, Inc., 707 F. Supp. 2d 80 (D. Mass. 2010).

[10] *See, for example,* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir.2013); Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. 2015); Solis v. Cascom, Inc., 3:09CV257, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011);

wages and overtime they had rightly earned—losses typically equivalent to losing three to four weeks of earnings.[11] For a family struggling to get by, the loss arising from these violations translate to more than five weeks of groceries, a month of rent, or five weeks of childcare. This also results in an estimated $4.7 billion in lost income tax revenues at the federal level.[12]

Different forms of workplace fissuring can also undermine providing workers safe and healthful work places. Having multiple parties with unclear responsibilities for health and safety can create a work environment where the likelihood of injuries or fatalities increases. This was the case in the mid-2000s as the explosion of cell phone use spurred by the iPhone led to the rapid expansion of cell tower networks. Major companies like AT&T and Verizon drew on a highly subcontracted system to undertake that work. In that period, the fatality rate among cell tower workers—often those at the bottom of multi-leveled subcontracting—was three times that facing underground coal miners.[13]

Workers who are hired on a temporary or conditional basis often do not know who is the responsible party to report safety problems or, more often, are reluctant to exercise their right to complain about unsafe conditions due to fear of reprisal.[14] And the prevalence of misclassification of workers as independent contractors in many dangerous work settings like construction, logistics, and transportation can increase fatality risks. Analysis of the Census of Fatal Occupational Injuries (CFOI) found that in 2017, about 12% of fatal workplace injuries were experienced by independent workers (defined as workers with short-term jobs that involve a discrete task and have no guarantee of future work). Compared to their employee counterparts, independent workers have a disproportionally higher propensity of injury or death due to a workplace incident.[15] The lack of health and safety protections extends beyond temporary workers to include many self-employed workers whose employer of record, training requirements and reporting procedures are often ambiguous. Self-employed workers make up one-fifth of workplace fatalities and are more than twice as likely to suffer a workplace fatality than workers in traditional employment arrangements.[16] Health and safety risks arising from fissured relationships can also spillover to

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Thornton v. Mainline Communications, LLC, 157 F. Supp. 3d 844, 849 (E.D. Mo. 2016);; Lang v. DirecTV, Inc., 801 F. Supp. 2d 532 (E.D. La. 2011); *but see* Chao v. Mid–Atlantic Installation Services, Inc., 16 Fed. App'x 104 (4th Cir. 2001).

[11] U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, https://www.dol.gov/whd/data/index.htm (last visited Aug. 30, 2019).

[12] GAO-09-717, *supra* note 7.

[13] WEIL, *supra* note 3 (Chapter 5); Jason M Breslow, "Labor Department Warns of 'Alarming' Rise in Cell Tower Deaths," *Frontline* (13 February 2014), online: <www.pbs.org/wgbh/frontline/article/labor-dept-warns-of-alarming-rise-in-cell-tower-deaths/>. A workplace fatality on the first day of work for a staffing agency worker is discussed in Michael Grabell, Jeff Larson and Olga Pierce, "Temporary Work, Lasting Harm," *Pro Publica* (18 December 2013), online:<www.propublica.org/article/temporary-work-lasting-harm?utm_campaign=get-involved&utm_source=youtube&utm_medium=video&utm_term=temp-land>.

[14] Sean Tucker and Nick Turner. "Waiting for Safety: Response by Young Canadian Workers to Unsafe Work." Journal of Safety Research, 45, no.1 (June 2013): 103-110.

[15] Stephen Pegula and Matt Gunter. "Fatal Occupational Injuries to Independent Workers." US Bureau of Labor Statistics, Beyond the Numbers: Workplace Injuries, 8, no. 10 (August 2019) <https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm?view_full>

[16] 2017 fatalities based on Bureau of Labor Statistics, Census of Fatal Occupational Injuries, 2018. https://stats.bls.gov/iif/oshwc/cfoi/cfch0016.pdf; Number of workers in self-employed and traditional categories based on Bureau of Labor Statistics (2018b), Current Population Survey Labor Force Statistics, 2018 <https://www.bls.gov/webapps/legacy/cpsatab9.htm>

others, such as the finding that outsourcing hospital cleaners increases the spread of health care-associated infections.[17]

Being split off from the main firm affects more than labor standards compliance; it can also lower wages and worker access to benefits. When you work as an employee for a major business, decades of research shows that wages and benefits tend to increase over time.[18] But earnings fall significantly when a job is contracted out[19]—even for identical kinds of work and workers. Opportunities for "climbing the ladder" fade because the person in the mailroom (or, more likely, at the IT service desk) is now a subcontractor without a pathway upward in the organization. That not only means lower wage growth and reduced access to benefits, but also diminished opportunities for on-the-job training, protections from social safety nets like unemployment insurance and workers' compensation, access to valuable social networks, and other pathways to upward advancement. As a result, increasing evidence suggests that the fissured workplace contributes to growing earnings inequality.[20]

The fissured workplace and misclassification of workers significantly impact low-wage workers, people of color, immigrants, and undocumented workers. Women, people of color, and immigrants, often work in low-wage and fissured sectors. Hispanic workers, for example, are overrepresented in service occupations.[21] Women make up the majority of the low-wage workforce. And in specific low wage industries affected by fissuring, like temporary help services, security guards and patrol services, home health care, hospitality, and logistics, women of color make up more than one-quarter of the workplace.[22] These changing workplace dynamics will therefore compound the historic and systemic inequities that prevented many women and people of color from being protected by standard labor protections under the Fair Labor Standards Act and the National Labor Relations Act. Historically, these laws excluded classes of workers, including domestic workers, independent contractors, and agricultural workers, disproportionately impacting women and people of color.

Digital platforms and the fissured workplace

On-demand work platforms and apps such as Uber, Lyft, and Handy create new capacities to execute their core business strategies drawing on workers classified as independent

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[17] Adam Seth Litwin, Ariel Avgar and Edmund Becker. "Superbugs Versus Outsourced Cleaners: Employment Arrangements and the Spread of Health Care-Associated Infections, ILR Review, 70 no. 3 (2017): 610-641.

[18] See generally Charles Brown and James Medoff. 1989. "The Employer Size-Wage Effect." Journal of Political Economy, 97, No. 5 (October 1989):1027-1059; John Gibson and Steven Stillman, "Why Do Big Firms Pay Higher Wages?" The Review of Economics and Statistics, 91, No. 1 (February 2009):213-218.

[19] Deborah Goldschmidt & Johannes F. Schmieder, "The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure," The Quarterly Journal of Economics, 132, no.3 (2017): 1165-1217.

[20] See generally Erling Barth, Alex Bryson, James C. Davis, and Richard Freeman, "It's Where You Work: Increases in the Dispersion of Earnings across Establishments and Individuals in the United States," Journal of Labor Economics 34, no. S2 (Part 2, April 2016): S67-S97; David Weil, "Inequality and the Fissured Workplace." Canadian Labour and Employment Law Journal 21, no.2 (Spring 2019): 207-238; David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context." RSF Journal of the Social Sciences, 6, no.1 (2020, forthcoming):147-165.

[21] Non-white includes black, Asian, and Hispanic or Latino. Bureau of Labor Statistics, "Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity." Current Population Survey Labor Force Statistics, 2019, <https://www.bls.gov/cps/aa2017/cpsaat11.htm.>.

[22] Author's calculation based on Current Population Survey Labor Force Statistics, 2019, <https://www.bls.gov/cps/aa2017/cpsaat11.htm.>.

contractors.[23] Rather than representing an entirely new form of business as is often asserted by those companies and other commentators, many platform business models can be understood as digital fissured workplaces where adherence to core competencies is assured through software algorithms that create strong incentives, disincentives, and monitoring mechanisms that operate in many respects as a management system.

Digitally-enabled branded platform businesses like Uber, Deliveroo and Handy connect users with a service that has been carefully crafted to have certain qualities, characteristics and benefits. The app provides users with the service that has a specific quality standard - characteristics that are assured by the company, and in most cases a pre-specified price for services set by the platform and not by the individual service providers (e.g. Uber or Lyft drivers). In general, branded platforms specify to their providers the type of service, the prices that will be allowed, the timing and in some cases place that services will be delivered as well as other central attributes of the service.

Because of their independent contract status and the fact that the price for services are set by the platform and not the provider, the net earnings of platform workers may be significantly lower than if they worked as employees—sometimes pushing them below the federal minimum wage. The impact of Amazon Flex on the pay and conditions of delivery workers is indicative. Started in 2015, Amazon Flex offers "flexible opportunity for Delivery Partners to turn free time into supplemental or part-time income." It does so via a system where individuals, vetted via a multi-step on-line course, bid for small deliveries via an Amazon Flex app, and deliver those packages within very tight time restrictions set by Amazon using the driver's own vehicle. After accounting for vehicle fuel, amortization, insurance, maintenance, tolls, and other costs, drivers received net earnings of $5.30 per hour (significantly below the Federal minimum wage of $7.25). This compares to average earnings of $23.10 for UPS and $14.40 for FedEx drivers (Vernon 2018).[24]

The hyper-incentives created by platform business models potentially lead to long hours and inadequate systems to reduce health and safety risks. The recent death of Amazon Flex drivers suggests that the model may increase the likelihood of injuries and fatalities relative to other delivery providers while also shifting responsibility for accidents from employers to workers. [25]

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[23] David Weil and Tanya Goldman, "Labor Standards, the Fissured Workplace, and the On-Demand Economy," Perspectives on Work, 20, (2016): 26-29.

[24] Not surprisingly, the estimated cost per delivery for Amazon Flex are significantly below that of UPS: $1.50-2.00 per package versus $4.00-6.00 for UPS or FedEx. However, the services are not direct substitutes because some of the costs that the latter providers charge customers are born by Amazon prior to the Flex drivers receiving parcels. See David Vernon, "UPS, FDX: A Deep-Dive on Amazon Flex and the Threat from Crowdsourced Delivery." A/B Bernstein Analysts, May 24, 2018, Exhibit 5, pp. 6-7. See also Olivia Zaleski, "Amazon Raises Minimum Pay for Everyone—Except These Workers." *Bloomberg*, November 1, 2018, <https://www.bloomberg.com/news/features/2018-11-01/amazon-flex-workers-are-left-out-of-minimum-pay-raises>. On June 7, 2019, FedEx announced that it would no longer be providing express shipping service for Amazon. *See* Michael Corkery, "FedEx Says it will Stop Express Mail for Amazon." *New York Times*, June 8, 2019, p. B4.

[25] Fatalities related to platform business models are discussed in Patricia Callahan, "Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost," *New York Times* (5 September 2019), online: <https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html>.

Prevalence of the fissured workplace

The different formats that fissured workplaces take create challenges to measuring its size in the workforce. To do so, one can start with the kinds of alternative work practice tracked by the Bureau of Labor Statistics' Contingent Worker Survey (CWS). The four practices that BLS classifies as "alternative work arrangements" —independent contracting, on-call employment, temporary help and contract work— are measured in the CWS through the household survey, and certainly are all linked to the concept of fissuring. Based on the CWS, the BLS estimated that there were 15.5 million workers in alternative work arrangements in the US.[26] The recent CWS estimates represent a slight decrease in the incidence of alternative work arrangements from 10.7 percent in 2005 to 10.1 percent in 2017, primarily because of a decline in the share of workers classified as independent contractors.[27]

There are a number of reasons that the CWS does not fully capture the incidence of alternative work practices. To begin, the CWS definition of alternative work includes independent contractors—that is, those workers who are not considered employees under the definitions of workplace laws. Though the criteria for classifying independent contractors vary under state and federal statutes, a growing body of evidence indicates that workers often incorrectly classify themselves as employees when they are not being treated that way by the organization for whom they work.[28] Even if they correctly identify themselves as employees rather than independent contractors, workers may not be aware of the presence of workplace intermediaries like staffing agencies, third party management companies, or franchise arrangements. This further reduces the reported number of worker in alternative work arrangements in the CWS.[29]

Even accounting for these measurement problems, the boundaries of the fissured workplace are not synonymous with those of the CWS' narrow definition of alternative work arrangements. The fissured workplace describes a business strategy rather than the adoption of individual work practices or arrangements and as captured more narrowly by household surveys like the CWS. Fissured workplace arrangements can exist when employment itself is "traditional" (i.e. ongoing and full time) but the worker is employed by a subcontractor, franchisee, or other business organization that undertakes the work of a lead business. Such employment would never

[26] Bureau of Labor Statistics (2018c), Contingent and Alternative Employment Arrangements, May 2017 <https://www.bls.gov/news.release/pdf/conemp.pdf>

[27] Bureau of Labor Statistics, 2018. Katz and Krueger (*supra* note 1) originally estimated significant growth in alternative work practices in their own survey in 2015 (constructed to estimate the prevalence of these practices at a time when it was unclear if the CWS would be repeated). Their revised estimates indicate "there likely has been a modest upward trend in the share of the U.S. workforce in alternative work arrangements during the 2000s" (Lawrence Katz and Alan B. Krueger. "Understanding Trends in Alternative Work Arrangements." RSF Journal of the Social Sciences, 6, no.1 (2020, forthcoming)).

[28] A number of recent studies show that self-employment has been growing when using Internal Revenue data sources (based on actual tax filings) even though household sources like CWS suggest little change in incidence. *See* Katharine Abraham, John Haltiwanger, Kristin Sandusky, and James Spletzer. "Measuring the Gig Economy: Current Knowledge and Open Issues." National Bureau of Economic Research, Working Paper No. 24950 (2018); Katz and Krueger (supra note 1); and Katharine Abraham and Ashley Amaya. "Probing for Informal Work Activity," NBER Working Paper No. 24880, (August 2018). Ongoing work by Abraham, Hershbein and Houseman indicate that part of the discrepancy may arise from misunderstanding by household survey respondents of their actual employment status (*see* Katharine Abraham, Brad Hershbein, and Susan Houseman. 2018. "Independent Contract and Informal Work: Preliminary Evidence on Developing Better Measures in Household Surveys." Working Paper).

[29] As a result, workers appear to have a difficult time accurately reporting on their work status in standard surveys, further compounded when household surveys are based on proxy respondents (Abraham and Amaya *id*).

be picked up in the CWS and would require information about contracting relationships between companies rather than household surveys to detect.

One can get a conservative and admittedly rough estimate of the size of the fissured workplace by tallying a subset of industries where fissured relationships have been well documented and appear to be widespread on the basis of industry-based studies and enforcement data.[30] Table 1 provides a list of these industries and the number of workers (overall and non-supervisory and production employees) in each as reported in the BLS Current Employment Statistics for 2017. I compare the total number of workers in these highly fissured industries to total employment in the private workforce to provide a rough estimate of scale.

The list in Table 1 is far from comprehensive. It does not include many industries where there is fissured activity alongside with continuing traditional forms of employment.[31] I also do not include industries where fissuring has become common in particular occupational areas, such as: the use of adjunct professors in higher education; outsourced lower level contract work in legal services, real estate, and financial services; mechanical and ground transportation work in air transport; a variety of copy editing, illustration, and marketing functions in publishing industries; extensive subcontracted work in fracking in oil and gas extraction; or contract mining in the coal mining industry.

Table 1 therefore represents a very conservative estimate of the extent of fissuring in the economy. Based on that, close to 19 percent of the private sector workforce (23 million workers) are in industries where fissured arrangements predominate. If we consider the additional workers in occupations and in industries with mixed partial presence of fissured practices, the prevalence could easily double, making fissuring as pervasive as were unions in the US at their pinnacle in 1956 (34 percent).[32] And, like unionization, the presence of fissuring in one workplace spills over to the wage setting decisions of other businesses and to the labor markets in which they compete for workers. That means that the impact of fissuring on the wage and salary structure of the economy is sizeable.

Realigning responsibility and protections in the workplace

There remains a critical paradox for the companies that shed so many activities to other organizations. If the lead entities provide the satellite businesses upon which they depend exquisite detail in the timing, specifications, quality, and of course price for their contracted services—and research and experience say they do—shouldn't the companies have some responsibility for compliance with laws? Answering the question of "who is responsible here?" given the ambiguity introduced by the fissured workplace is therefore of critical importance.

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[30] To be included on the list, the industry needed to have had significantly affected by fissured practices as documented by detailed cases studies (including those conducted by the author), evidence from enforcement sources that indicate significant use of these practices, and / or detailed appraisals in investigative reporting. The selection errs on the side of conservatism as described further in the text. See Weil (2020) *supra* note 20 for details of this analysis.

[31] For example, to be conservative in the estimate, I do not include any manufacturing (NAICS 31-33) or public administration (NAICS 92) industries, even though subcontracting and outsourcing is extensive in the former and staffing agencies and other forms of contracting out in the latter.

[32] Four of the top ten industries projected to have the highest employment growth are highly fissured: construction, warehousing and storage, services to buildings, and home health care services. These four industries alone are projected to add nearly 2 million workers over the next ten years.

There were industries that were highly sub-contracted in the 1930s, when Congress enacted the Fair Labor Standards Act and even earlier than that.[33] But subcontracting was limited to a subset of business models and limited to a handful of industries, including mining, garments, construction, and industries where child labor was also prevalent. Congress was aware of the problematic business models in those industries and the importance of addressing them through protective legislation.[34] In drafting the FLSA, Congress like the Supreme Court presumed that in most industries, work and employment were synonymous and drew upon traditional employer / employee relationships.[35]

Many of our fundamental workplace protections—spanning from being assured pay for work done, provision of a safe workplace, and protections against retaliation from exercise of many workplace rights—emanate from employment. Benefits provision and the basic workplace safety net of policies like unemployment insurance, workers compensation, and paid leave are linked to employment. Fissuring also raises important questions about how to fund the range of family-friendly policies given the complexity of employment relationships in many of the industries where women represent a high percentage of the workforce.

For reasons described above, the disparity between the degree of control exercised by lead business organizations and their responsibility under law is large and problematic. Current state and federal laws provide a patchwork structure for assigning responsibility, some relying on master-servant concepts arising from the common law to broader definitions of the "economic reality" of employment arising from statutes like the Fair Labor Standards Act. Reevaluating existing policies and assessing what is needed to provide the rights established by workplace and labor statutes is therefore warranted.

Revising our basic workplace standards and protections should be grounded in some basic principles. Workplace laws are based in a recognition of the uneven nature of bargaining power in the labor market. As the California Supreme Court recently noted in its Dynamex decision, "Wage and hour statutes…were adopted in recognition of the fact that individual workers generally

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[33] *See* Kati L. Griffith, "The Fair Labor Standards Act at 80: Everything Old is New Again," Cornell Law Review 104, no. 3 (March 2019): 101-150.

[34] Keith Cunningham-Parmeter, "From Amazon to Uber: Defining Employment in the Modern Economy," Boston University Law Review 96 (2016): 1673-1728. ("For example, New Deal reformers passed the FLSA in part to disrupt the nation's "sweating" system, wherein garment manufacturers contracted with sweatshops to produce their wares. Under this scheme, the sweatshops exposed workers to oppressive working conditions, while the clothing manufacturers that hired the sweatshops distanced themselves from these violations and protected their brands from reputational harm. By extending liability to parties that "permitted" wage violations, Congress placed these clothing manufacturers squarely within FLSA's crosshairs. In addition to holding end-user garment companies accountable for wage violations, Congress also passed the FLSA to solve the persistent problem of middlemen who employed children in certain American industries. By making these firms answer for their use of underage labor, Congress targeted businesses that hid behind middlemen who formally employed children. Thus, in both the context of the sweating system and child labor, Congress attempted to bypass intermediaries and hold end-user companies responsible for workplace violations, even when intermediaries had the most direct interaction with workers.") (internal citations omitted); Griffith, *supra* note 31 at 579 ("the FLSA's framers foresaw that some businesses might change certain formalities such as where work is located, or how pay arrangements are structured, in ways that evaded coverage.").

[35] In a recent majority decision by the Supreme Court, Justice Gorsuch notes in 1925, "a 'contract of employment' usually meant nothing more than an agreement to perform work." See New Prime Inc. v. Oliveira, 139 S.Ct. 532, 539 (2019). Justice Gorsuch further notes that the Railroad Labor Board in 1922 interpreted "employee" to include anyone "engaged in the customary work directly contributory to the operation of the railroads." Id. at 543. Dictionaries of the day similarly considered "employment" as synonymous with "work." (Id. at 539).

possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."[36] Workplace laws seek to address that imbalance by providing minimum wages, overtime, and the requirement that they be provided a safe workplace. They also recognize that workers may have a limited ability to face risks in the labor market. Unemployment insurance and workers compensation were established to provide a safety net for spells of job loss and injury at work. Those basic imbalances persist and should remain the underpinnings of employment policies.

Restructuring of work and labor markets may also mean that workers will have more jobs, less stability in employment, and increased demands –and preferences –for flexibility in their schedules. Whether that need for flexibility arises from the nature of work or changing preferences of workers (or a combination of both), it implies a greater need for public policies to accommodate greater volatility of work and the risks that come with it. But rather than treat that flexibility as a tradeoff for the principle of rights and protections described above, they should seek to solve for both.[37]

In work with Tanya Goldman, we seek to operationalize these principles while still building from two existing categories of work central to our system of workplace and labor rights and protections: employment and independent contracting. We do so by defining three concentric circles of workplace rights and protections, an inner core assured regardless of employment status; a middle circle providing rights linked to employment, and an outer ring providing social safety net and benefit protections to both categories of workers via multi-party financing mechanisms.[38]

Core rights regardless of employment status: At the center of this concentric circle model are central rights and protections so fundamental that they should be tethered to work itself, whether as an employee or independent contractor. In the basic labor standards area, this starts with the principle that people should be compensated for the work they do at a minimum wage rate reflecting basic social needs. Workers receiving the minimum rate of pay typically have the least leverage in labor markets and therefore face the greatest need for protection, particularly with the erosion of the minimum wage.

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[36] Dynamex, 416 P.3d at 32; Rosenwasser, 323 U.S. at 361 (wage and hour laws are intended to protect workers against "the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health").

[37] Some analysts have argued that emerging work relationships do not fit into the existing legal definitions of employee and independent contractor, necessitating new laws. They suggest a third designation other than "employee" and "independent contractor" could benefit some workers by providing additional protections for workers who might otherwise be considered independent contractors. A third designation, the argument goes, might also benefit workers by explicitly allowing businesses to provide some benefits, such as group insurance plans, they would not otherwise provide for fear of creating additional indicia of an employment relationship. (See, e.g. Seth Harris and Alan B. Krueger. "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker" Discussion Paper 2015-10, The Hamilton Project. Washington, DC: The Brookings Institution). While changes in the structure of work necessitate a re-balancing of employment protections, technological changes do not necessitate a new worker designation that could codify eroded labor standards. While there may be some instances where app-based companies have characteristics that do not match neatly with one or the other of the models we discuss, this ambiguity is not distinctive to the on-demand sector but can be found in the wider economy.

[38] See Tanya Goldman and David Weil. "Who's Responsible Here?" Working paper, Heller School for Social Policy and Management, Brandeis University (August 2019).

Equally, workers should not be discriminated against for exercising or attempting to exercise rights, even when they lack a formal employment relationship. Prevention of or prompt response to retaliation for the exercise of rights is critical to protecting the rule of law and workers' rights. Employers strategically retaliate to undermine law enforcement and obstruct justice by silencing victims and witnesses.[39] When there is a culture and expectation of retaliation, workers are silenced, and workplace violations go unreported and unaddressed. Even when retaliation is addressed, it is hard to undo the chilling effect that the retaliatory action has already had on other workers in discouraging them from speaking up and reporting violations.[40] Combatting retaliation is therefore fundamental to protecting labor and employment standards, the rule of law, and worker power. Recent Supreme Court decisions that limit worker voice in regards to individual and collective action further raise the importance of this protection.[41]

Finally, the right to work in a safe environment should be a fundamental right, regardless of employment. Congress recognized in passing the Occupational Safety and Health Act the importance of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions."[42] Congress further acknowledged the importance of incentivizing employers and employees to reduce occupational safety and health hazards to promote safe working conditions.[43] A core right that protects workers from retaliation is again essential to ensure that workers can freely report hazards and injuries for the safety of workers and civilians.

Rights assured through employment: The next level of rights, protections, and responsibilities are linked to employment status, providing additional protections and rights specific to that status. These include the right to be paid the minimum wage and overtime and receive meal and rest breaks under the Fair Labor Standards Act, the right to organize and be represented through collective bargaining based on the National Labor Relations Act, and safety net protections, including workers' compensation and unemployment insurance.[44]

The second ring of the concentric circle rests on two elements. First, there should be a presumption of an employment relationship that the putative employer must rebut. A rebuttable presumption will help re-balance the power dynamics between workers and employers and

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[39] See, e.g., Tanya Goldman, *Addressing and Preventing Retaliation and Immigration-Based Threats to Workers*, Center for Law and Social Policy and Rutgers (Apr. 2019), available at https://www.clasp.org/publications/report/brief/labor-standards-enforcement-toolbox-addressing-and-preventing-retaliation.

[40] Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (noting that in a 2013 report on Alabama's poultry processing industry, almost 100 percent of the workers who had previously witnessed employer retaliation were uncomfortable asking their employers about problems with workplace safety, discrimination, and wages) (citing Tom Fritzsche, *Unsafe at These Speeds*, Southern Poverty Law Center and Alabama Appleseed Center for Law & Justice, 2013, https://www.splcenter.org/20130228/unsafe-these-speeds).

[41] See, e.g., *Epic Systems Corporation v.* Lewis, 138 S.Ct. 1612, 1616 (U.S. 2018) (upholding mandatory arbitration provisions prohibiting class actions in employment contracts); *Janus v. American Federation of State, County, and Mun.* Employees, Council 31, 138 S.Ct. 2448 (U.S. 2018) (prohibiting state and local government workers from negotiating collective bargaining agreements with fair share fee arrangements); Lamps Plus, Inc., v. Varela, 139 S.Ct. 1407 (U.S. 2019).

[42] 29 USCA § 651(b).

[43] Id.

[44] Under state and local law there is growing momentum around additional rights and protections related to work, including access to paid sick and safe time, paid family and medical leave, fair and predictable schedules; and fair chance employment.

rightfully place the burden of proof on the only entity in the fissured workplace who might have access to the necessary evidence to establish the existence or lack of an employment relationship. This is particularly relevant once again with the principle that workplace protections seek to redress imbalances in labor market bargaining position.

Second, that default rule should be coupled with a stronger, more predictive test for defining who is an employee for purposes of rebutting the presumption. In order to ensure that a revised system moves forward, such a test must address deficiencies of the status quo: lack of clarity of the boundaries of employment that reflects underlying economic realities. We believe there are several reasonable standards from which to draw. The first is the economic realities test arising from the Fair Labor Standards Act, but in this case would be applied more broadly. The second is the ABC Test developed in several states, most recently by the California Supreme Court in its *Dynamex* decision. A third option is a hybrid from these two tests, focusing on factors most indicative of workers in need of protection from these laws.[45]

Access to safety net and non-mandatory benefits for all workers: The "outer ring" of the concentric circle model of workplace policy would recognize that workers are likely to face greater volatility in the course of their working years in terms of having a larger number of employers and shorter spans of work, regardless of employment status. It would provide access to social safety net benefits (workers compensation and unemployment insurance) and to non-mandatory benefits for both employees and independent contractors.[46] Broadening access to workers compensation and unemployment insurance would provide a hedge against the risks that have been shifted onto a growing percentage of workers in both employee and independent contractor status.

Non-mandatory benefits systems could be created to provide a mechanism for workers to accumulate resources for training, skill development, paid time off, and retirement savings for employees and independent contractors. For example, it could include methods to provide workers with a means to accumulate retirement savings beyond those arising from Social Security or those that would continue to be provided through traditional employer-based systems. Rather, retirement benefit systems would provide mechanisms for workers to accumulate savings from the joint worker and employer contributions arising from a larger number of employers or contracting partners in the course of their work lives. Like retirement savings, other outer ring benefits could be structured in the fashion of multi-employer funds with contributions related to hours worked.

The ongoing need for strategic enforcement

An enforcement agency with broad responsibilities like the Wage and Hour Division or the Occupational Safety and Health Administration inevitably faces challenges of limited resources. When I led the Wage and Hour Division, the statutes for which it had responsibility covered 7.3 million establishments and 135 million workers.[47] Under the Obama administration, the agency

[45] See Goldman and Weil, *supra* note 38.

[46] Third ring social insurance could also recognize that legitimate independent contractors may seek ways to reduce risk exposure arising from health and safety injuries (workers compensation) or intermittent periods where they lack work (unemployment insurance). Those workers could also be provided mechanisms to pay into such risk pools either through their own direct contributions or those of their customers. Benefit levels and coverage under either social insurance program would reflect the levels of worker contributions either through employer contributions (from all sources) or their own contributions in the case of independent contractors.

[47] *Wage and Hour Division: Resources for Workers,* U.S. Department of Labor,

increased the number of investigators to almost 1000 from a low of 700 at the end of the Bush administration. Yet that represents a tiny number relative to the scale of workplaces the agency oversees. The challenge is further compounded by the complexity of enforcement introduced by the fissured workplace. Thinking about how to prioritize and make sure that the agency's investigators and efforts focused on where we could have greatest impact on compliance therefore became central. Our shorthand for the approach was "strategic enforcement."

The foundation of strategic enforcement required shifting a far larger portion of investigations to a proactive approach, chosen on the basis of agency priorities and undertaken as part of a plan to improve compliance.[48] It also required WHD offices to sometimes decide not to pursue complaints, thereby freeing investigator time to pursue proactive, directed investigations. Doing so was possible in part because the law allows workers to undertake back wage claims via private rights of action. At the same time, the agency refined methods of triaging complaints so that it pursued incoming complaints where significant problems seemed to be present, in situations related to broader investigation priorities, and where it was unlikely that workers would be able to pursue their claims for back wages.

Through these efforts, pro-active investigations grew as a percent of all investigations from 24% in 2008 to over 50% by 2017. Increasing our capacity to undertake proactive ("directed") investigations was the bedrock of the strategic enforcement approach. The agency prioritized directed investigations to focus on industries and occupations where statistical evidence indicated a higher prevalence of violations and systemic problems. It built upon mapping the structure of industries so that enforcement tools and outreach could have an impact not just on compliance at the bottom of fissured structures but on the organizational relationships that led to those violations. This approach was designed to insure that limited resources for enforcement, deterrence, and education would lead to broader and lasting changes in compliance.

We fundamentally changed the way we did enforcement and outreach so that the parties who had impact on the fissured workplace were engaged in the resolution of problems from which they arose. For example, we pursued an active policy of invoking joint employment where appropriate and by the law in our enforcement actions. But we also did so in issuing guidance—Administrator Interpretations—that clearly laid out the legal and judicial basis pertaining to the application of joint employment. We addressed the issue of joint employment in our educational and public outreach to industries where it had become commonplace. And we engaged with state and local government partners on this issue by coordinating enforcement and outreach efforts in industries with highly fissured workplace structures. That work, in concert with the work of advocacy organizations and progressive employers, led to broader awareness by the public.

Providing resources to enforcement agencies to have a sufficient number of investigators in the field and the tools they need to do their work is fundamental and essential to assure compliance with workplace and labor laws. At the same time, there will always be a need for enforcement agencies to use their resources carefully to achieve greatest impact through the strategic approaches described above and that are being carried out now in many states. There is much more that can be learned about new methods to improve compliance. The challenges faced

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http://www.dol.gov/whd/workers.htm.

[48] For a detailed discussion of this work, see David Weil, "Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change." Journal of Industrial Relations 60, no. 3 (June 2018): 437-460.

by working men and women subject to violations of our most basic labor standards are reminders of the continuing importance to do so.

Conclusion

The changes in business organization that underlie the fissured workplace have been transformative. But workplace policies have not adequately factored these profound changes into the rights and protections for workers and the responsibilities placed upon business and other organizational entities. Public policies therefore hew to familiar paths that miss important characteristics of the problems they seek to address.

Although current political realities in the U.S. may preclude addressing the impacts of the fissured workplace in the short term, policymakers will be required to deal with them because of their broad impacts in the long term. But in considering that task, it is important to remember that the problematic consequences of the fissured workplace are not the result of inexorable forces that cannot be stopped. They arise from deliberate choices made by businesses and organizations. That means the present and the future of workers can likewise be affected by the conscious choices of policy makers in the public, private, and non-profit sectors.

New technologies, the changing expectations of employees and the dynamic nature of business will always affect the nature of work. This has been true throughout economic history. But this does not mean we should neglect our need to balance financial outcomes with the protections, rights, and considerations of fairness that underlie our workplace policies.

Table 1
Highly Fissured Industries, 2017

NAICS code	Industry	All Employees (in thousands)	Nonsupervisory & production employees (in thousands)
23611	Residential Building Construction	752.5	483.7
23813	Framing Contractors	83.6	73.7
23831	Drywall and Insulation Contractors	242.5	204.7
4451	Grocery Stores	2705.3	2380.3
44711	Gasoline Stations with Convenience Stores	824.7	695.8
4841	General Freight Trucking	1002.0	886.0
4853	Taxi and Limousine Services	78.5	N/A
4931	Warehousing and Storage	1026.9	904.3
5152	Cable and Other Subscription Programming	52.69	N/A
51731	Wired & Wireless Telecommunications Carriers	692.0	583.9
56132	Temporary Help Services	2940.1	2821.3
56142	Telephone Call Centers	530.5	469.6
56143	Business Service Centers	78.2	64.2
561612	Security Guards and Patrol Services	742.0	N/A
56171	Exterminating and Pest Control Services	119.8	95.8
56172	Janitorial Services	1078.0	963.5
56173	Landscaping Services	780.5	651.0
56179	Other Services to Buildings and Dwellings	91.1	73.7
56292	Materials Recovery Facilities	60.0	N/A
6216	Home Health Care Services	1419.7	1318.1
72111	Hotels (except Casino Hotels) and Motels	1615.1	1383.1
72231	Food Service Contractors	499.3	437.9
72233	Mobile Food Services	199.6	169.9
722513	Limited-Service Restaurants	4380.6	3858.3
811192	Car Washes	168.8	143.7
8121	Personal Care Services	710.4	605.6
81293	Parking Lots and Garages	140.7	124.2
81299	All Other Personal Services	75.6	N/A
	Total Private	124,259.4	102,415.3
	Total Highly Fissured Industry Employment	23,091	19,392
	Percentage of private workforce	**18.6%**	**18.9%**

Source: Current Employment Statistics, 2017, Seasonally Adjusted (Annual Estimates, 000s). *See* David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context." RSF Journal of the Social Sciences, 6, no.1 (2020, forthcoming):147-165.

Chairwoman WILSON. Thank you Dr. Weil.

Mr. WEIL. Thank you.

Chairwoman WILSON. Thank you. We will now recognize Professor Rogers. Welcome.

TESTIMONY OF BRISHEN ROGERS, J.D., ASSOCIATE PROFESSOR, TEMPLE SCHOOL OF LAW, VISITING ASSOCIATE PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER; FELLOW, ROOSEVELT INSTITUTE

Mr. ROGERS. Madame Chair Wilson, Madame Chair Adams, Ranking Members Walberg and Byrne, and Members of the subcommittees, thank you for this opportunity to testify today.

My name is Brishen Rogers. As the chair said I'm a professor at Temple University Beasley School of Law and a Fellow at the Roosevelt Institute. I'm also currently a visiting Associate Professor at Georgetown University Law Center.

I'm here in my individual capital, not representing an organization. I have been asked to discuss two issues related to the present and future of work.

The first is whether to reform our labor laws to encourage more centralized forms of bargaining and standard setting. The backdrop here is that an important goal of unions and public policy is to take wages out of competition to prevent a race to the bottom. This is good both for workers and for responsible employers.

But our labor law today makes it quite difficult by encouraging enterprise level bargaining or bargaining at the individual worksite or firm.

Now unions have worked around this when possible. The UAW's pattern bargaining strategy is a great example. But it's very hard to do in today's economy in part for reasons that my colleague, Dr. Weil, just mentioned.

To illustrate consider how fast food works might try to build a pattern bargaining structure today. They'd first have to organize one McDonald's restaurant at a time. Now the PRO Act would make it much easier for them to do so. That's essential but it's arguably not enough.

In order to get to scale they would have to organize the individual restaurants and then merge them into a lager bargaining unit. Franchisees could refuse to enter that units and whether or not McDonalds is an employer of the workers at issue will determine whether it needs to be a part of the unit.

Even if the workers succeed in building a nationwide unit of McDonalds workers, they would have to do that with all of the company's competitors. That's effectively impossible today. Enterprise bargaining is quite unusual in comparative perspective.

In continental Europe, collective bargaining typically involves unions and employer associations that negotiate agreements across entire industrial sectors. There is a significant amount of evidence that those practices encourage both more economic equality and they protect responsible employers against unfair competition without having negative effects on economic performance.

We could draw lessons from those systems and from our own history to develop more centralized forms of bargaining or standard setting.

I'll say just a tiny bit about how we could potentially do that. One option would be for Congress to amend the Fair Labor Standards Act to create industry committees or wage boards with the power to set minimum terms at the sectoral level.

We did this under the Fair Labor Standards Act as originally passed. The committees could have equal members of representatives of employers and workers, could take public testimony, deliberate and recommended minimum terms for the sector to the Department of Labor.

As an alternative or a supplement, Congress could revise the NLRA to enable true sectoral bargaining or bargaining between unions and firms across a sector. Now, it would be unwise to sim-

ply substitute sectoral bargaining for enterprise bargaining. But Congress could for example mandate or encourage multi-employer bargaining.

It could also enable unions who are organized or who have organized at the enterprise level to also negotiate at the sectoral level, perhaps by granting bargaining rights in stages based upon the amount of support a union has within the relevant sector.

I would be happy to discuss details of either of these ideas in the Q and A. I'll note though that both of them would ideally supplement and bolster enterprise bargaining rather than replacing it. Enterprise bargaining still has to be the foundation of an industrial relation system in this country.

The second issue I have been asked to disuses is the idea of portable benefits. The developments that I noted earlier and those discussed by Dr. Weil have also eroded employees' or workers' access to benefits.

One reason is that our laws require companies to provide benefits to employees in many instances but not to independent contractors or to employees of their subcontractors. A number of gig economy companies and think tanks have proposed that we put together, enact safe harbors which would allow them to provide benefits to their workers without the risk that they would then be classified as those workers' employers.

I'm not sure this is the best way to protect workers today for two basic reasons. The first is that Uber, Lyft, and many other gig economy companies today, arguably already employ their workers under current law because they exert so much control over them. They would almost certainly be their employers under the PRO Act and they are almost certainly their employers under California's AB5.

That means those companies already have duties to provide many of those workers benefits and carving out a safe harbor would enable them to evade rather than uphold that duty.

Second, and here I'll wrap up, we have models for portable benefits that would protect workers. Construction workers frequently move between employers and long ago they built portable benefit funds that are co-managed by unions.

Social security and Medicare are also portable in that they are provided and administered by public agencies. The best option for workers will like be—

Chairwoman WILSON. Thank you.

Mr. ROGERS.—benefits that are collectively bargained or publicly provided. Thank you.

[The statement of Mr. Rogers follows:]

UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND LABOR
JOINT HEARING OF SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
AND SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Hearing on *The Future of Work: Preserving Worker Protections in the Modern Economy*

October 23, 2019

Prepared Statement of Brishen Rogers
Associate Professor, Temple University Beasley School of Law
Visiting Associate Professor, Georgetown University Law Center (Fall 2019)
Fellow, Roosevelt Institute

Madam Chair Wilson, Madam Chair Adams, Ranking Members Walberg and Byrne, and members of the Subcommittees, thank you for this opportunity to testify today. I am a professor at Temple University law school, a visiting professor at Georgetown University Law Center, and a fellow at the Roosevelt Institute. I am here today in my capacity as a scholar. My research focuses on issues confronting low-wage workers, including the challenges they face in seeking to unionize and bargain collectively in today's economy.

I have been asked to testify about two topics. The first is whether we should reform our labor laws to enable more centralized forms of bargaining. Parts I and II, below, summarize the enterprise bargaining model that dominates in the United States and contrast it with more centralized bargaining models that are common in Europe. Part III then argues that legal reforms to enable more centralized bargaining or standard setting would help ensure worker voice and would encourage economic equality. Part IV discusses two possible reforms to advance that goal. The first would amend the Fair Labor Standards Act (FLSA) to create an "industry committee" system in which an administrative agency would empower workers and employers to jointly set wages and other basic terms within particular sectors. The second would amend the National Labor Relations Act (NLRA) to enable or require more centralized or "sectoral" collective bargaining.

I want to emphasize in advance the importance of the Protecting the Right to Organize Act (PRO Act) to restoring worker voice in today's economy. The reforms I'll discuss would not be a substitute for the PRO Act. Instead, they would complement and supplement the PRO Act. Industry committees would ensure some collective representation for workers who will find it difficult to unionize under the PRO Act, while sectoral bargaining would amplify the power of workers who have already unionized or who are seeking to unionize.[1]

The second topic I have been asked to discuss is benefits portability. Part V argues that any reforms to encourage portable benefits should not relieve companies of duties under labor and employment laws and should give workers a voice in plan design and administration.

[1] This argument is developed in detail in KATE ANDRIAS AND BRISHEN ROGERS, REBUILDING WORKER VOICE IN TODAY'S ECONOMY, ROOSEVELT INSTITUTE (August 2018). In that report, Prof. Andrias and I propose four reforms to rebuild worker voice: ensuring NLRA coverage to all vulnerable workers, enabling enterprise-level organizing and bargaining, restoring the right to strike, and enabling sectoral bargaining and standard-setting.

I. Enterprise Bargaining in the United States: An Overview

Three aspects of United States labor law and industrial relations are especially important and unusual in comparative perspective. First, our labor law encourages "enterprise bargaining," or bargaining at the worksite or firm level. This emphasis is written into the NLRA itself, section 9(b) of which provides that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the *employer unit, craft unit, plant unit, or subdivision thereof.* (Emphasis added.)

In practice, that has often meant that bargaining units are limited to a single job classification within a particular worksite.[2] Notably, given the difficulties of organizing under the NLRA, unions themselves often seek small bargaining units, since it is easier to build and maintain majority support within those units. The NLRB has also interpreted that language to prohibit it from mandating "multi-employer" bargaining units. While multi-employer bargaining has been common at various times and in various industries, it "is and always been consensual in nature."[3] If an employer refuses to join a multi-employer unit, the union has no legal power to compel them to do so, and a strike on that issue will be "unprotected," meaning workers who take such action are subject to discipline or even dismissal.[4]

Second, collective bargaining in the United States is understood, in law and practice, as a private matter. The NLRB's role is limited to that of "administrator and supervisor, rather than co-negotiator."[5] It can find that an employer (or union) is not bargaining in good faith and order the parties back to the table, but it has no power to impose contract terms. Indeed, there is no requirement that the parties reach any agreement at all. The outcome of the bargaining process is left to the parties, and to their respective economic weapons, i.e., the strike and the lockout.[6]

These first two aspects of our labor law reflect the historical origins of the NLRA in the early 20th century, when heavy industries dominated our economy and employed tens of millions. Employers' refusal to deal unions prior to the NLRA led repeatedly to major strikes, and to

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[2] *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING § 5.1, at 76–84, 103-104 (2d ed. 2004) (discussing emphasis on single-employer, localized bargaining in U.S.).

[3] *Kroger Co*., 148 N.L.R.B. 569, 575 (N.L.R.B. August 27, 1964) (Members Leedom and Jenkins, dissenting). *See also Pacific Metals Co*., 91 N.L.R.B. 696, 699 (1950) ("the essential element warranting the establishment of multiple-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than individual action.")

[4] Unions have been able to build larger units through "after-acquired store" clauses in collective bargaining agreements, under which the employer agrees to accrete newly organized shops into the overall bargaining unit. *See Houston Division of Kroger Corp*., 219 NLRB 388 (1975).

[5] Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

[6] *See* Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972) ("Two fundamental ideas lie at the core of the national labor policy: (i) freedom of employee self-organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours, and other conditions of employment through the negotiation and administration of collective bargaining agreements.")

dangerous and low-paid work, both of which threatened economic stability. At the time, protecting workers' rights to unionize seemed sufficient to encourage stable and peaceful collective bargaining. What's more, the worksite was a natural site for bargaining, since factories and mines brought together tens of thousands of workers. Workers could also exercise power effectively at industrial facilities by striking. By using these new rights to organize and bargain collectively, workers and unions built this nation's middle class after World War II.[7]

The third important aspect of our labor law developed more recently. As revised by Congress in 1947, and interpreted by the NLRB and courts, that law tolerates and even encourages employer resistance to unionization. As these issues were discussed in hearings on the PRO Act,[8] I will reiterate them only briefly. Employers can resist unionization lawfully, for example by requiring employees to attend meetings during working time, on pain of termination, at which they campaign against unionization.[9] Companies can also ban union organizers from talking to workers on their property, or on publicly accessible parking lots.[10] Workers' rights to strike or picket for recognition are limited.[11] What's more, the NLRB's weak remedial powers encourage employers to violate the law by retaliating against workers for seeking to unionize. Such workers may then face a years-long battle to reclaim their jobs,[12] after which their typical remedy is only reinstatement with back pay, minus any wages earned in the meantime.[13] Employers in some cases view such damages as a cost well worth paying to avoid unionization.

Due to these weaknesses of our law, there is a broad and longstanding consensus among labor law scholars that the NLRB-supervised elections process insufficiently protects employees' rights to unionize.[14] Indeed, the weakness of our labor law is striking in comparative and international

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[7] The federal government's labor policy during World War II also boosted unions' power. In order to avoid strikes that would hamper the war effort, the government "invited labor and corporations into tripartite bargaining over national wage and economic policy." Andrias, *New Labor Law*, *supra* note 5 at 17, citing Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989).

[8] United States Cong., House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, *Hearing on The Protecting the Right to Organize Act: Deterring Unfair Labor Practices*, May 8, 2019, 116th Cong. (testimony of Mark Gaston Pearce, former Chairman, NLRB); *see also id*., (testimony of Richard L. Trumka, President, AFL-CIO). United States Cong., House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, *Hearing on Protecting the Right to Organize Act: Modernizing America's Labor Laws*, July 25, 2019, 116th Cong. (testimony of Richard F. Griffin, Jr., former General Counsel of National Labor Relations Board); *see also id*., (testimony of Prof. Charlotte Garden).

[9] *See Peerless Plywood Co*., 107 N.L.R.B. 427 (1953) (holding that captive audience meetings are prohibited only if held within 24 hours of an election).

[10] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[11] 29 U.S.C. § 158(b)(7) (2018).

[12] *See Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 684-85 (2010) (summarizing empirical evidence on incidence of retaliatory terminations, and their effect on union campaigns).

[13] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (workers terminated in retaliation for union activity must mitigate their losses by finding other jobs).

[14] *See generally* ROBERT A. GORMAN, MATTHEW FINKIN, & TIMOTHY P. GLYNN, COX & BOK'S LABOR LAW 81-87 (16th ed. 2016) (summarizing current elections process, criticisms of it, and proposals for reform); *Sachs, Enabling Employee Choice*, *supra* note 12; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102

perspective. The United States has not ratified various fundamental conventions of the International Labour Organization (ILO). Those include the Convention 87 on Freedom of Association and Protection of the Right to Organize, and Convention 98 on the Right to Organize and Collective Bargaining.[15] The ILO's Committee on Freedom of Association has also found that our labor law conflicts with core principles of workplace freedom of association.[16]

These aspects of our labor law can harm employers as well as workers. Most employers want to act responsibly toward their workers, respecting their rights and working collaboratively with them. Unionization can also benefit employers by helping to ensure a highly skilled and motivated workforce and by providing a mechanism for workers and management to discuss and resolve common concerns.[17] But our labor law often punishes responsible employers, since a union contract will raise their labor costs relative to their competitors. As a result, even otherwise responsible employers may resist unionization, and any gains made by unions can be quickly eroded by competition from non-union employers. Indeed, there is evidence that employers in the U.S. get trapped in a low-wage, low-productivity equilibrium; unable to raise wages, they focus on reducing labor costs to an absolute minimum, which can undermine the customer experience and harm their bottom line.[18]

The difficultly of organizing has led to a long-running decline in private sector unionization, from a high of almost 35 percent in the 1950s, to less than 7 percent today—even as Americans' opinion of unions has become quite favorable.[19] During the same period, economic inequality has risen significantly, as illustrated in Figure 1, which appears on the following page.[20]

The PRO Act would remedy many of these shortcomings. It would bolster the NLRB's power to deter and remedy unfair labor practices; streamline the union certification process; grant workers and unions full First Amendment rights to protest and boycott; and limit employers' powers to

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COLUM. L. REV. 1537 (2002); Paul Weiler, *Promises to Keep: Securing Workers Rights To Self-Organization Under the National Labor Relations Act*, 96 HARV. L. REV. 1769 (1983).

[15] NORMLEX Information System on International Labour Standards, *Up-to-date Conventions and Protocols not ratified by the United States*, INTERNATIONAL LABOUR ORGANIZATION, (last checked Oct. 18, 2019), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102871

[16] *See*, *e.g.*, ILO Committee on Freedom of Association, Case No. 2683, Complaint Against the United States, Report No. 357, *Report in Which the Committee Requests to be Kept Informed of Developments*, (June 2010) (considering activities of Delta airlines); ILO Committee on Freedom of Association, Case No. 2227, Complaint Against the United States, Report No. 332, *Report in Which the Committee Requests to Be Kept Informed of Developments* (Nov. 2003) (finding that *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2001), holding that undocumented workers are ineligible for backpay under NLRA, is inconsistent with fundamental principles of freedom of association). *See generally* LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004).

[17] *See generally* RICHARD FREEMAN AND JAMES MEDOFF, WHAT DO UNIONS DO? (1984).

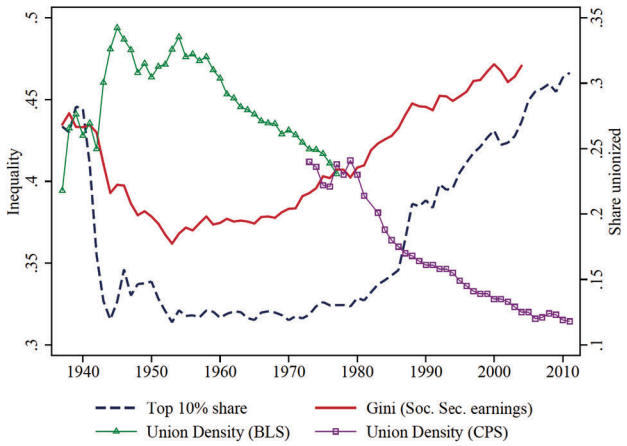
[18] *See generally* ZEYNEP TON, THE GOOD JOBS STRATEGY (2014).

[19] *See* Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High*, GALLUP.COM., (Aug. 28, 2019), https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx (finding that 64 percent of Americans had favorable view of unions).

[20] Source for Figure 1: Henry S. Farber, Daniel Herbst, Ilyana Kuziemko, and Sursh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* at 39, NBER Working Paper No. 24587 (May 2018).

deter unionization. Those are essential reforms. Additional reforms should nevertheless also be considered, for reasons I'll discuss in Part III.

Figure 1: Union Membership and Economic Inequality Since 1937



II. Centralized Bargaining in Continental Europe: An Overview

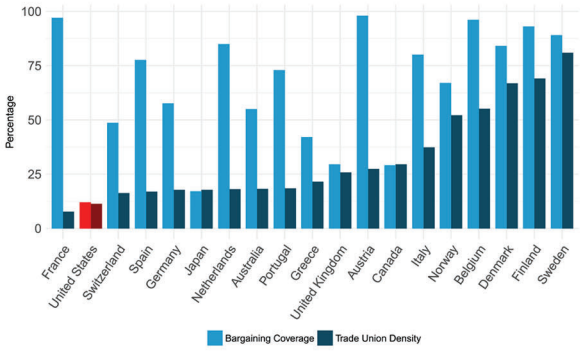
Responding in part to the weaknesses of U.S. law, a number of labor unions and scholars have suggested that the U.S. should borrow elements of industrial relations systems in Europe and other countries, where bargaining and standard setting are often more centralized. The term "sectoral bargaining" has become a shorthand for such proposals, despite the fact that they vary considerably. For clarity, I'll save the term "sectoral bargaining" for a particular form of centralized bargaining I discuss in Part IV.

Collective bargaining in Continental Europe is quite different than in the United States. Basic economic terms are negotiated by unions and employer associations that represent entire

industries, industrial sectors, or even the entire economy.[21] In Germany, for example, most collective bargaining agreements are sectoral and are negotiated at the regional level. In Italy, sectoral agreements typically cover the entire nation, but regional agreements are also permitted. In both countries, additional terms may be negotiated at the company level.[22]

Also, in both countries, the terms of such agreements can be applied to all firms in the sector through "extension" mechanisms. Germany extends many agreements through an administrative process, while in Italy workers can sue in labor courts to ensure that their employers pay wages established in collective bargaining.[23] The Scandinavian countries do not have extension laws, but their employer associations are large enough that the resulting agreements cover nearly all workers. As a result, while unionization rates and bargaining coverage are basically identical in the U.S., those numbers diverge in most European countries, as evident in Figure 2.[24] Canada, the United Kingdom, and Japan—which also emphasize enterprise bargaining—are the only nations on the figure other than the United States where coverage and density are basically identical.

Figure 2: Union Membership and Collective Bargaining Coverage



[21] *See generally* ANDRIAS AND ROGERS, *supra* note 1 at 7, 26-29; DAVID MADLAND, THE FUTURE OF WORKER VOICE AND POWER, CENTER FOR AMERICAN PROGRESS (October 2016).

[22] *Living and Working in Germany*, EUROFOUND (last checked Oct. 17, 2019), https://www.eurofound.europa.eu/country/germany; *Living and Working in Italy*, EUROFOUND (last checked Oct. 17, 2019), https://www.eurofound.europa.eu/country/italy.

[23] *Living and Working in Germany*, *supra* note 22*;*

[24] Source for Figure 2: Kathleen Thelen, *Presidential Address: The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSPECTIVES ON POLITICS 5, 18 (2019).

There is powerful evidence, across countries and time periods, that bargaining centralization correlates with higher wages for low-skill workers and greater income equality overall.[25] One reason is that centralized bargaining takes wages out of competition. This inherently strengthens unions, since they are not constantly fighting to protect their gains. Another reason is that bargaining in such countries is often a tripartite or quasi-public process rather than a private ordering process. The government is sometimes involved in the negotiations; and therefore may press employers for generous wages during prosperous times and press unions to mitigate wage demands during downturns.

Unions and employers in the United States have also built centralized bargaining structures. The United Automobile Workers' "pattern bargaining" strategy is an example. For decades, the union has negotiated an agreement with one of the "big three" automakers (GM, Ford, and Chrysler) and then pushed the other two to match terms. Because each company signs substantially the same agreement, none of them is put at a competitive disadvantage. The Teamsters' National Master Freight Agreement similarly covered the entire long-haul trucking industry, and numerous construction unions have used multi-employer and multi-worksite bargaining frameworks. More recently, the Service Employees International Union (SEIU) has built multi-employer bargaining units of janitors in many cities.[26] However, these efforts have increasingly become the exception rather than the rule: As unions have lost power, it has become much harder for them to build centralized bargaining.

Centralized bargaining can also benefit employers. As noted above, responsible employers want to pay good wages and provide good benefits; but in the absence of well-enforced minimum standards, they cannot do so without losing market share. By establishing minimum terms that apply across the board, centralized bargaining can enable employers to compete on other grounds, including productivity and quality of goods or services. Indeed, where centralized bargaining increases wages for less-skilled workers, it encourages employers to train them and enhance their productivity. Employers are also less likely to lose employees to competitors (and be unable to recoup training costs) where a wage floor has been set. These factors help to stabilize centralized bargaining structures once they are in place. There is also significant evidence that moving wage-setting decisions outside of the firm can encourage more harmonious labor relations, as unions and employers can then focus on production challenges and other issues that require collaboration.[27]

III. The Case for More Centralized Bargaining in Today's Economy

The long-running shift from manufacturing to services has limited workers' ability to build and exert collective power—and therefore to take wages out of competition. Below, I first provide

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[25] *See, e.g.*, Jelle Visser & Daniele Checchi, *Inequality and the Labor Market: Unions*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY (Nolan et al, eds., 2011) (arguing that unions' power, coverage, and level of bargaining coordination in particular nations correlates with economic equality in those nations); Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, VARIETIES OF CAPITALISM 21-22 (2001) (noting tendency toward more equal distributions of wealth and income in "Coordinated Market Economies" with more centralized bargaining compared to "Liberal Market Economies" with more decentralized bargaining). *See also* Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 Wis. L. Rev. 1 (1990) (connecting these trends to basic structure of labor laws in U.S. and Germany).

[26] Andrias, *supra* note 5, at 19-20, 46-47 (discussing these models and difficulty of replicating them); NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT 271-98 (1995) (describing pattern bargaining).

[27] Hall & Soskice, *supra* note 25; Rogers, *supra* note 25.

basic data on today's low-wage workforce and then discuss the structural and legal impediments they face to organizing and collective bargaining, especially at scale.

The size and composition of the low-wage workforce: Today, there are around 12.9 million manufacturing workers in the U.S., with a unionization rate just over 10 percent, and median wages of around $22 an hour. They still represent a substantial proportion of the workforce, and a healthy manufacturing sector is essential to national economic performance. But there are far more low-wage service workers, many of whom work for major corporations. For example, there are now over 13 million nonsupervisory retail workers—including 8.6 million salespeople, stock clerks, and cashiers—whose median wages are around $11.50 per hour. According to the Department of Labor's (DOL) Bureau of Labor Statistics (BLS), other large groups of low-wage workers include:

- 11 million food service workers, including 3.65 million in fast food;
- 4.2 million hand laborers, which includes warehouse workers;
- 3.2 million home health aides and personal care aides;
- 2.4 million janitors; and
- 1.8 million hotel and hospitality workers.

The median wage for each of those groups is under $15 an hour, with the exception of hotel workers, where the median is just over $15 an hour. Notably, while the so-called "gig economy" of Uber and Lyft gets a great deal of press, the BLS estimates that there are only around 370,000 taxi drivers, ride-hail drivers, and chauffeurs in the U.S. today.[28]

Women and people of color are significantly overrepresented here. In some sectors and occupations a majority of workers are women of color, and in the aggregate more than half of Black workers, and nearly 60 percent of Latinx workers, earn less than $15 an hour today.[29] That reflects legacies of discrimination in the labor market and elsewhere, as well as the exclusion of many low-wage workers from the NLRA.[30] It also reflects the decline of union representation. For example, two sociologists have estimated that "among women, black-white weekly wage gaps would be between 13 [percent] and 30 [percent] lower if union representation remained at high levels."[31]

The declining power of strikes: Our labor law significantly restricts workers' rights to strike. Restrictions on recognitional strikes were noted above.[32] Workers are also largely forbidden from picketing or inducing strikes at companies other than their primary employer;[33] and if they strike to obtain higher wages or benefits, they can be permanently replaced.[34] The PRO Act would

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[28] All data from U.S. Dept. of Labor, Bureau of Labor Statistics, bls.gov (last checked October 13, 2019).

[29] IRENE TUNG, YANNET LATHROP, & PAUL SONN, NATIONAL EMPLOYMENT LAW PROJECT, THE GROWING MOVEMENT FOR $15 (Nov. 2015).

[30] 29 U.S.C. § 152(3) (2018) (excluding agricultural workers, domestic workers, and independent contractors from protection).

[31] Jake Rosenfeld and Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AM. J. SOC. 1460 (2012).

[32] *See* note 11, *supra*, and accompanying text.

[33] 29 U.S.C. § 158(b)(4) (2018).

[34] *NLRB v. Mackay Radio & Tel. Co*., 304 U.S. 333, 345-46 (1938).

reverse those doctrines. But service workers are also easier to replace than industrial workers in many cases, since they have less specialized training, and perform less specialized tasks.

Smaller workplaces: Service workers also work in small workplaces, which are spread out across the country. That makes it nearly impossible for most service workers to build a UAW-style pattern bargaining system today. Consider how a union would pursue such a strategy in retail. Walmart alone has around 4,000 stores nationwide and would be essential to such an effort. The union may try to gain certification among Walmart workers within individual stores and then merge those into a larger bargaining unit. Doing that at the store level is no small task, however, since night-time and irregular work is common, and since workers often have multiple jobs, turn over quickly, and are easily replaced. Due to these factors, as well as Walmart's sophisticated union avoidance efforts, Walmart workers have been unable to unionize at a single location in the United States.[35]

Plus, in the event that a union did petition for an election, the company would likely argue that a different bargaining unit is appropriate, such as all of its stores within the state or nationwide.[36] If a nationwide bargaining unit were approved, the union would face the enormous logistical challenge of organizing millions of workers all at once. What's more, even if a union did succeed against those odds, it would only have rights to bargain with Walmart. It would need to run a similar campaign against the company's competitors in order to establish pattern bargaining.

Fast food workers, hotel workers, building service workers, and others would confront similar challenges. Some groups of low-wage workers are still worse off, as they have no common workplace at all. Home health aides and personal care aides work in individual homes, caring for elderly individuals and people with disabilities. Ride-share drivers, other gig economy workers, and various delivery drivers may never meet a co-worker in person, given the nature of their work. While some such workers have organized, it has been a very difficult process.

Fissured work arrangements: These challenges are compounded by the prevalence of "fissured" work arrangements, in which a third party sits between workers and the companies that utilize and profit from their labor.[37] Fissuring is legitimate and entirely lawful in many cases, but it can also be used to evade legal obligations. Examples include the misclassification of workers as independent contractors, which denies them rights under the NLRA and FLSA; certain forms of subcontracting, in which a larger company hires a contractor to perform tasks such as cleaning, security, or landscaping but pays so little that the contractor cannot comply with labor and employment laws; and franchising arrangements where a franchisor exerts control over terms and conditions of employment for franchisees' workers, as has been alleged in litigation against McDonald's. In each case, the principal firm rather than the workers' legal employer may control their wages, benefits, and other working conditions, and yet the workers have no rights to strike

[35] The United Food and Commercial Workers and some other unions have been able to build density within retail in certain geographical areas, but overall unionization rates are below 5%.

[36] *See, e.g.*, *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983).

[37] *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

against, picket, or bargain with the principal firm.[38] In the case of subcontracting, our labor law even allows a principal to terminate a subcontractor because its employees have unionized.[39] That creates incentives to pit subcontractors against one another, driving down wages.

Consider what a union of fast food workers would need to do to develop a pattern bargaining structure. According to public data, McDonald's alone has around 14,000 locations in the United States, 80 percent of which are operated by franchisees, and the average fast food location has around fifteen employees.[40] To build a large bargaining unit, the union would need to organize restaurants one at a time and then merge those stores into a multi-employer unit. As noted above, employers have no duty to join such a unit.[41] The alternate strategy of organizing at the regional level is foreclosed by the NLRB's inability to order an election in a multi-employer bargaining unit.[42] Plus, even if the workers succeeded in building a unit including most or all McDonald's restaurants at the regional or national level, they would only have rights to bargain with McDonald's.

Fast food workers are not alone. Many hotels now operate on a franchise model, so a franchisee rather than the brand attached to a hotel manages the building. Many franchisees further subcontract cleaning and other tasks, which adds an additional contractual layer between workers and parties with economic power. Janitors and security guards, similarly, work for subcontractors of buildings managers, who in turn contract with building owners. Subcontracting (via temporary labor agencies) is also increasingly common in manufacturing, and in warehouse work.

Employment at will and non-enforcement of statutory protections: Low-wage workers are also especially vulnerable to wage theft, unsafe working conditions, sexual harassment, and discrimination. McDonald's workers, for example, struck in various cities last year to demand the company implement better protections against sexual harassment, and unionized hotel workers have requested panic buttons to protect themselves against sexual assault by guests.[43]

Harassment, discrimination, and wage theft are of course illegal under modern employment law statutes, but enforcement of those rights can be very difficult without a union. This is one effect of the "employment-at-will" rule, under which either party to an employment contract may terminate it at any time, for any reason. Employment at will leaves workers who complain about lawbreaking vulnerable to retaliation or even termination, often with little hope of a remedy. Plus, when an employer may terminate an employment contract at any time, it may also change that

[38] 29 U.S.C. § 152(2) (2018) (defining "employer" for purposes of the NLRA); 29 U.S.C. § 158(b)(4) (2018) (prohibiting most concerted action against parties other than the employer).

[39] *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[40] Figures from Statista, www.statista.com (last checked Oct. 15, 2019).

[41] When particular locations are owned and operated by an individual franchisee who owns only that store, then the franchisee can simply shut down the store without legal consequence rather than dealing with a union. *Textile Workers Union v. Darlington Mfg. Co*., 380 U.S. 263 (1980).

[42] The PRO Act may hold McDonald's to such a duty as a joint employer of the franchisee's workers. The NLRB during President Obama's terms developed a new test for joint employment that may have had that effect; the Trump NLRB has begun rulemaking which would narrow that standard again by requiring that both joint employers exercise direct control over working conditions. National Labor Relations Board, Notice of Proposed Rulemaking, The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46691 (Sept. 14, 2018).

[43] Sarah Jones, *The 'Me Too' Movement Hits McDonald's*, THE NEW REPUBLIC, Sept. 17, 2018.

contract at any time. An employer may, for example, circulate a written agreement to arbitrate employment disputes and to forego class action claims, and tell workers that unless they quit, they are bound to its terms.[44] Unionization can substantially improve enforcement by giving workers collective voice and power to resist violations, as well as access to legal services.

Corporate concentration: Even as workplaces have become smaller, and fissuring has become far more common, many industrial sectors have become highly concentrated in recent decades. Leading economists have documented this trend,[45] and they've suggested that it helps explain wage stagnation.[46] Such concentration is apparent in various low-wage sectors. In fast food, for example, a small number of brands dominate the market, including McDonald's, Yum! Brands (parent of Taco Bell and Pizza Hut, among others), Burger King, and Wendy's. Similar trends are clear in retail (due largely to the growth of Walmart and other big box retailers), hotels (due to mergers), and in pharmacies (again due to mergers). When companies in those sectors operate through franchisees and subcontractors, they are exercising both legal and economic power over workers without bearing responsibility toward them. The sheer size of those companies also suggests that continental-scale unions will be necessary to counterbalance their power.

Summary: The long-term shift away from manufacturing and toward services has made it exceptionally difficult for workers to organize new bargaining units, since service workers are not concentrated in one place but rather dispersed among hundreds, thousands, or even millions of disparate worksites. Those challenges are compounded by extensive "fissuring" of employment, which leaves workers without a real counterparty if and when they do organize. And they are still further compounded by the enterprise bargaining model. The result is that even unionized workers today are frequently atomized and weak, undermining their voice at the workplace and in the broader economy.

IV. Policies to Encourage Centralized Standard-Setting and Bargaining

Congress can help workers organize and take wages out of competition by encouraging more centralized bargaining and standard setting. I outline two ways to advance that goal below.[47] To reiterate a point made above, such reforms are intended to supplement and bolster enterprise bargaining, not to replace it. To that end, any reforms would need to be carefully designed to ensure that they integrate with enterprise bargaining structures.

Proposal 1: Industry Committees. The first option would be to set minimum terms at the sectoral level through an administrative process. As law professor Kate Andrias has documented,

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[44] *E.g.*, *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471 (1st Cir. 2011); *see also Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058 (Colo. 2011) (continued employment can bind at-will employee to non-compete agreement); *see generally Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Ginsburg, J., dissenting) (detailing how mandatory arbitration, especially of class claims, undermines worker rights).

[45] *See, e.g.*, Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S101 (2014).

[46] *See, e.g.*, David Autor, David Dorn, Lawrence W. Katz, Christina Patterson, and John Van Reenan, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180 (2017).

[47] The discussion in this section draws extensively, at times verbatim, from ANDRIAS AND ROGERS, *supra* note 1

the United States has done this before.[48] The Fair Labor Standards Act of 1938 created "industry committees," populated by representatives of labor, management, and the public, with the power and obligation to raise minimum wages at the sectoral level, up to a statutorily specified target wage. Those committees (colloquially known as "wage boards") were constituted and operational for a number of years, but the relevant provision of the FLSA was repealed in 1949 as part of Congress' retrenchment of the New Deal labor legislation. Various state departments of labor can also establish such committees under state law, as New York recently did for fast food workers.[49]

As was the practice under the early FLSA, legislation could mandate the establishment of committees in the largest low-wage sectors. Committees ideally would have equal representation of workers and employers.[50] Worker seats could be allocated to unions and other membership-based worker organizations active in the sector, while employer seats could be allocated to leading employer associations and firms.[51] Following the process under the early FLSA, committees could take public and expert testimony, deliberate, and recommend minimum wages for the sector to the DOL, consistent with clearly defined statutory goals. Those recommendations could vary based on geography or other statutorily determined factors. Committees could also be empowered to set other minimum standards, such as scheduling policies (to encourage full-time work or predictable hours), benefits including health care (perhaps provided through a sectoral benefit fund), health and safety standards, training and paid leave policies, policies around sexual harassment, etc.

The DOL would then assess such recommendations and provide opportunity for public comment. Ultimately, if the recommendations were found to be consistent with the statutory mandate, the DOL would adopt them as regulations, making them binding on all firms within the sector and enforceable through administrative processes or private rights of action.[52]

Industry committees' standard setting would not be a collective bargaining processes as we typically understand it, and participating unions would not necessarily be certified as bargaining agents for all affected workers. They could nevertheless serve as a catalyst to worker-organizing

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[48] *See generally* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019).

[49] Andrias, *Forgotten Promise, supra* note 48 at 83-86. *See also* Sharon Block, *Sectoral Approach for Domestic Workers*, ONLABOR.ORG (July 16, 2019) (arguing that proposed federal Domestic Worker Bill of Rights provides for a similar sort of bargaining by creating a Domestic Worker Wage and Standards Board with equal numbers of representatives from workers and employers of domestic workers).

[50] A strategic consideration here is whether to also give the DOL a seat at the table. This may not be necessary either practically or legally, since the DOL would also have the power to review agreements, as discussed below.

[51] In some low-wage sectors, there are fewer major employers. Those include domestic work and childcare, where many individuals are employed by individuals. In those sectors, the administrative agency charged with developing and populating committees would need to determine how to ensure employer representation. This issue has been briefed in the past by the Domestic Workers' Alliance. Rachel Homer, *An Explainer: What's Happening with Domestic Worker's Rights*, ONLABOR.ORG (Nov. 6, 2013).

[52] An agency should have the power to do so without triggering a non-delegation problem so long as the its review is subject to specific constraints written into the statute. Longstanding doctrine permits Congress to delegate discretion to the Executive branch so long as the relevant statute provides "an intelligible principle" that the Executive must follow. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, the statute could provide that the Secretary must reject the agreement if it fails to advance goals such as ensuring all workers a living wage, reasonable working hours, or a rising standard of living.

efforts by enabling unions to engage workers in the process.[53] Such mobilization could be encouraged by protecting workers' rights to strike and take other concerted action to influence committees' deliberations; indeed, without such protections there is a risk that committees could be used by companies and state officials to thwart rather than encourage worker voice.[54] But if carefully designed, industry committees could provide workers some voice and could substantially improve wages and working conditions, even in heavily fissured industries. If the DOL set and enforced minimum standards for janitors, security guards, or other maintenance workers, for example, principal firms would have less power to force subcontractors to reduce wages.

Before beginning this process, the DOL would need to define sectors.[55] This would involve some difficult line-drawing at times, but that makes it classically suited for an administrative agency.[56] Sometimes this will be relatively straightforward, especially in concentrated markets like fast food. The major brands in that space often compete with one another for customers and workers, so it makes sense for them to be at the table together. In other major low-wage sectors, the line-drawing may be more complicated. For example, luxury hotels do not compete with motels, and different standards may be appropriate for workers in the two. At the same time, some major hotel companies operate both luxury and budget properties, so it may make sense for a master agreement to cover all properties but to differentiate among them as necessary.

Proposal 2: Sectoral Bargaining. As a second option, the NLRA could be revised to encourage or mandate collective bargaining between unions and all firms at the sectoral level. Right now, various labor unions, labor lawyers, and scholars are developing detailed sectoral bargaining proposals, so I will simply sketch how such a new system might work and highlight some of the questions Congress and the NLRB would need to address in designing it.[57]

To encourage sectoral bargaining, Congress could draw lessons from the European examples

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[53] Depending on how broadly their missions are defined, they could also help facilitate participation by worker organizations in a host of other labor policy decisions—including questions of health care, childcare, paid family leave, and the design and provision of employee benefits systems.

[54] This is one reason why worker organizations such as Rideshare Drivers United rejected Uber and Lyft's proposal for what the companies termed a "sectoral bargaining" system in California. *See* Alexia Fernandez Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, VOX.COM (Sept. 18, 2019).

[55] A related issue is the geographic scope of bargaining, *i.e.,* whether it will take place at the national level, the state level, the local level, or some combination of the three. Given substantial variance in the cost of living in different areas, it may make sense for any national agreements to simply set a floor, which lower-level agreements could supplement, particularly where workers organize enterprise bargaining units.

[56] For example, the Census Bureau and the Bureau of Labor Statistics use NAICS codes to determine employment levels and wages in particular occupations and sectors, OSHA promulgates many industry-specific standards, and the Federal Trade Commission must often determine whether various companies are competitors for purposes of price-fixing and other illegal arrangements. Those tools and methodologies could be adopted to help determine appropriate sectors for bargaining.

[57] Unions have developed various models of sectoral bargaining under state law for home care workers and others who are currently excluded from coverage under the NLRA. In developing a new sectoral bargaining system, Congress could draw lessons from those efforts. As they have been developed under state law, however, and have often involved public sector workers, those initiatives raise issues that are beyond the scope of this testimony. For discussions of the new models and potential future reforms, *see* IRENE TUNG AND CAITLIN CONNOLLY, UPHOLDING LABOR STANDARDS IN HOME CARE: HOW TO BUILD EMPLOYER ACCOUNTABILITY INTO AMERICA'S FASTEST-GROWING JOBS, NATIONAL EMPLOYMENT LAW PROJECT (Dec. 21, 2015).

discussed above. A straightforward step would be to revise the NLRA to encourage multi-employer bargaining.[58] This would enable unions that have already organized particular shops to build more centralized bargaining structures. Congress could also approximate European "extension laws" in various ways. For example, it could amend Davis-Bacon so that it covers the entire economy, not just public works and publicly funded projects. The DOL could then be given the power to adopt prevailing wages at the sectoral level, and apply them across the sector, once unions represent a certain percentage of workers in a sector.

Since building full-fledged sectoral bargaining units from scratch is basically impossible, Congress could grant unions sectoral bargaining rights in stages, based upon their support among the workforce. To illustrate, a union that has some threshold level of support within a sector (say, 5 percent) could be granted reasonable access to workers, including some rights to enter employers' physical property to speak with workers, as well as contact lists for workers. A union with more support (say, 25 percent) could have rights to bargain over core issues such as wages and pay scales, benefits, and scheduling. (Such bargaining may overlap with an industry committee process.) Finally, unions with majority support could have rights to bargain over all "mandatory" subjects under current law, including economic terms, work rules, grievance and arbitration procedures, and ideally over various "permissive" subjects including matters of corporate policy.

As with an industry committee system, Congress and the NLRB would need to define sectors to determine which employers and employees are covered by a new sectoral bargaining agreement. Ideally, any agreement that results would end up signed by most of the major players. The DOL could then be empowered to apply it throughout the industry through an administrative process, as discussed above. Congress and the NLRB would also need to decide whether such bargaining would take place in the first instance at the national, state, or even the metropolitan level.

Finally, Congress or the NLRB would need to determine what the parties may do in the event of an impasse. The right to strike is of course absolutely essential if workers are to exert power at any level, and it should be protected in the sectoral context. But strikes may not be realistic during early stages of sectoral bargaining. To prevent employers from simply going through the motions at the bargaining table, Congress might consider creating a process to set minimum terms in the event of an impasse. This might include interest arbitration, referral of the dispute to a DOL-constituted industry committee, or some similar mechanism.

Conclusion: Our labor law and system of collective bargaining was developed in the 1930s. The goals it sought to advance at that time are no less important today: encouraging worker voice, collective bargaining, and a decent standard of living for all. But the means through which our labor law advances those goals reflect the economy of an earlier era. Fundamental, structural changes to our labor law are necessary to restore its promise in today's economy.

At the same time, neither of the above proposals can stand alone. Each of them would supplement worksite-based representation, which the PRO Act would encourage. The industry committee proposal could apply across the economy but would be most helpful to low-wage workers in sectors with little or no union density. The sectoral bargaining proposal could encourage

[58] For a set of detailed proposals along those lines *see* MARK BARENBERG, WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING, ROOSEVELT INSTITUTE (2015).

organizing in sectors where unions cannot build majority support in the short term, while also enabling unions with some density to amplify their voice and power. Either or both reforms could reduce the barriers to worker self-organization under current law and the difficulty unions face in building power at scale.

V. Portable Benefits

The labor market changes described in Part III, and the decline of unions over the past decades, have also eroded employee benefits. Employers must provide certain benefits to their employees, including health care under the Affordable Care Act (ACA), unemployment insurance, and workers' compensation. But companies are not typically required to provide such benefits to independent contractors. Certain other benefits are available only to full-time employees, not to part-time employees. Those can include employer-sponsored health care under the ACA, employer-sponsored retirement plans, or unemployment insurance.

These developments have led various think tanks and companies to propose that employee benefits should be made portable, particularly for gig economy workers and other workers who move among jobs frequently.[59] To be clear, the idea of portable benefits is not new. Unions in the construction industry, where workers frequently move between jobsites and employers, long ago built health, welfare, and pension funds that are portable for workers. Social security and Medicare are also portable, in that they are provided and administered by public agencies. States and localities have also made it easier for bona fide independent contractors to get benefits recently. The state of Washington's new Paid Family and Medical Leave program, for example, permits self-employed individuals to buy in.[60] But it is far from clear that portable benefits are the best solution for service workers and gig economy workers today. In deciding whether to adopt laws that would encourage benefits portability, several issues would need to be considered.

First and foremost, portable benefits programs should not enable companies to evade legal duties toward their workers. For example, some gig economy companies have proposed a safe harbor provision for benefits, so that providing benefits is not taken as evidence that they employ their workers.[61] But there are powerful arguments that those companies do employ their workers under existing law, given the amount of control they exercise over them,[62] and therefore that they are already required to provide them certain benefits. To eliminate any ambiguity about this question, California recently adopted a broader test for employment known as the "ABC test."[63]

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[59] *See*, *e.g.*, LIBBY REDER, SHELLY STEWARD, AND NATALIE FOSTER, DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS, ASPEN INSTITUTE (June 2019); Robert Maxim and Mark Muro, *Rethinking Worker Benefits for an Economy in Flux*, THE AVENUE BLOG, BROOKINGS INSTITUTION (March 30, 2018), at https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/

[60] Workers, Washington Paid Family & Medical Leave, (checked Oct. 17, 2019) at https://paidleave.wa.gov/workers

[61] *See*, *e.g.*, Lydia DePillis, *This is What the Social Safety Net Could Look Like For On-Demand Workers*, WASHINGTON POST, Dec. 7, 2015.

[62] *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989 (N.D. Cal. 2014) (denying defendant's motion for summary judgment given factual question regarding extent of control it exercised over drivers); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (same).

[63] California Assembly Bill No. 5 (2019) (adopting "ABC" test for employment, under which a worker providing services for pay is presumed to be an employee, unless the hiring entity demonstrates that the worker (A)

The PRO Act would utilize the same test and would cover ride-hail drivers as well as many other gig economy workers.

Second, lawmakers should prioritize providing benefits through public agencies or through collective bargaining. Where unions are not established, the public sector could develop and manage benefit programs to help ensure accountability to public goals and to workers, as well as reasonable administrative costs. New benefit structures could also require that a certain number of board members be elected by the beneficiaries themselves.[64] Collectively bargained benefits have many of the same advantages: Taft-Hartley funds are jointly administered by unions and employers, which helps ensure that benefit levels are appropriate to workers' needs and that the funds are actually managed with workers' interests in mind. In contrast, some portable benefits plans proposed by gig economy companies are essentially worker-funded forms of insurance. Those may reduce wages and may be inferior to the benefits workers would receive if they were properly classified as employees.

VI. Conclusion

For decades, our labor and employment laws have been a key part of our social contract. But that social contract has been eroded in recent years, due to changes in our economy, to various legal doctrines that have undermined workers' bargaining power, and to employer strategies designed to limit labor costs. To ensure that workers in today's economy can thrive, we need to restore the right to organize, while also considering more fundamental, structural changes to our labor law. We should also ensure that employee benefits are provided to workers as required under law, while encouraging publicly provided or collectively bargained benefits.

Thank you again for this opportunity to testify. I look forward to your questions.

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is free of their control, (B) performs work outside the usual course of the entity's business, and (C) is engaged in an independent trade or occupation.)

[64] REDER, ET AL, *supra* note 59, at 38 (discussing options for worker involvement in benefit fund design and administration). *See also* Sharon Block, *A Missed Opportunity: Worker Voice in Portable Benefits*, OnLabor.org (June 1, 2017).

Chairwoman WILSON. Thank you very much. Thank you. We will now recognize Ms. Greszler. Welcome.

TESTIMONY OF RACHEL GRESZLER, RESEARCH FELLOW IN ECONOMICS, BUDGET AND ENTITLEMENTS, THE HERITAGE FOUNDATION

Ms. GRESZLER. Good morning and thank you for the opportunity to testify today. My name is Rachel Greszler and I am a Research Fellow at the Heritage Foundation. The views exposed today are my own and don't necessarily represent those of Heritage.

The future of work is already here and it's not something that workers need to fear. But policy makers can help workers prepare for, adjust to, and thrive amidst these changes.

One of workers biggest fear against the future of work is that they might lose their jobs. And this is a legitimate concern because without a job, workers cannot provide for themselves and their family and they have no hope for higher income and opportunity.

That's why today's 50 year record low unemployment rate is so commendable. And because of the recent tax cuts and reduced regulatory burdens, workers are experiencing widespread income gains with low income workers receiving the biggest gains. But some lawmakers seem determined to stop this with the types of interventionist policies described thus far today. By fighting against innovation, opportunity, and choices, we will reduce workers incomes and short change our entire economy. Technological advancements naturally eliminate some jobs. But they also give rise to new jobs and astonishing new products and services.

Imagine what workers in the ice industry thought when the refrigerator came to market. All of those jobs cutting ice, moving snow, transporting and delivering it disappeared. But instead of becoming destitute, those workers found new jobs and most of those new jobs made them more productive.

So change creates opportunities and todays workers have opportunities to earn supplemental income, to be their own bosses, and to interact with a more diverse group of individuals and businesses.

So called independent work used to be reserved for highly educated individuals such as lawyers and consultants. But today, it's available to nearly all Americans and as many as 1 out of every 3 workers participates in independent work in some capacity. And nearly all of them, 9 out of 10 say they prefer being their own boss to being an employee.

But instead of more autonomy, many law makers want to control workers and employers though policies that will lead to fewer jobs, lower incomes, and more—and less opportunity.

Consider the $15 minimum wage passed by the House this summer. When California raised their minimum wage, Muriel Sterling who owns her own family daycare in Oakdale, California, had to reduce some of her workers hours and she had to raise tuition costs which made it harder for families to be able to afford childcare.

And when Michigan increased its minimum wage, Pastor Jack Mosely explained that his faith-based recovery program had to close its Taste of Life restaurant leaving the programs 12 participants without jobs or quote the opportunity interact with other employees and to talk to customers and feel like they were part of something.

Sadly, disadvantaged and inexperienced workers are the first to lose their jobs when high minimum wages create survival of the fittest labor markets.

Then there is the Protecting the Right to Organize Act advanced by this committee which would overturn three Supreme Court cases, strip 27 states of their right to work laws, and upend the gig economy as well as franchising and contract-based employment models.

For starters, the PRO Acts pro union, anti-worker provisions would strip workers of basic democratic rights. Now as Americans we may not always support the political candidates that get elected but at least we are not support—forced to make financial contributions to them or stripped of our rights to a secret ballot election.

Nor would one candidate ever be prohibited from talking about the other candidate's policies. But that's what the PRO Act wants for the workplace.

The PRO Act would also hurt a lot of workers by changing the definition of employee. This past summer, my family had the blessing of being able to help a refugee family that had first become jobless and then homeless. Were it not for a temporary job agency that helped this father to obtain work within days of requesting it, that family would not be living in their own home today.

Instead of regressive policies, lawmakers can help workers adapt to and thrive in today's labor market by reducing taxes and unnecessary regulations, by advancing choice based portable and affordable benefits, and by giving workers choices over how they work, who they work for, and if they want union representation.

Policy makers have two options. Help employers and employees respond to the changing nature of work or try to prevent those changes from happening.

The former leads to progress and higher incomes and opportunities for all while the latter benefits a select few with a smaller economy for everyone. Thank you.

[The statement of Ms. Greszler follows:]

The Heritage Foundation

CONGRESSIONAL TESTIMONY

The Future of Work: Helping Workers and Employers Adapt to and Thrive in the Ever-Changing Labor Market

Testimony before the
Health, Education, Labor, and Pensions Subcommittee

and the

Workforce Protections Subcommittee

of the Education and Labor Committee

U.S. House of Representatives

October 23, 2019

Rachel Greszler
Research Fellow in Economics, Budgets, and Entitlements
The Heritage Foundation

My name is Rachel Greszler. I am a Research Fellow in Economics, Budgets, and Entitlements at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

In my testimony today, I would like to first emphasize the most important factors in creating workforce opportunities and protections; second, examine some of the changes happening in what is called the "Future of Work"; third, discuss some misguided policies that would hurt many of the workers they are intended to help; and fourth, propose ways to more broadly help workers and the economy to adapt to, and benefit from, the ever-evolving workplace.

Jobs and Productivity Are Essential for Workplace Protection and Opportunity

Before worrying about wages, benefits, and other working conditions, workers first and foremost need jobs. The opportunity to work, earn a living, and provide for one's family is not only the most fundamental component of the labor market—it is also a central component of personal satisfaction and fulfillment. That is not something that will not change, no matter what the future of work brings.

In this regard, the exceptionally strong labor market is producing widespread gains in

employment, income, and opportunity. Just last week, the Bureau of Labor Statistics (BLS) reported that the unemployment rate hit a 50-year low of 3.5 percent.[1] Even more impressive was an all-time low of 6.3 percent for the comprehensive joblessness measure, which includes even those individuals who say they would like to work but have not looked for work. (The comprehensive jobless rate is a measure developed by the Mercatus Center that falls in between the BLS's U-5 and U-6 measures of unemployment).[2]

Of course, workers want more than just *a* job. They want a job that pays well, is fulfilling, and that provides opportunity for growth. The key to such a job is increased productivity. So, how can policymakers help workers achieve that?

Governments can attempt to micromanage workplaces—either directly through minimum wage laws or mandated benefits, or indirectly by forcing unions upon workers and employers—but employers ultimately cannot stay in business if they cannot cover their costs. Without workers becoming more productive, such forced actions will lead to fewer jobs and lower income.

On the other hand, if workers and employers have more autonomy to pursue their own goals and are allowed to keep more of their own earnings, the result is greater entrepreneurial activity, higher investment, and technological gains that make workers more productive. The more that workers produce, the more they earn, and the more the economy grows. Not surprisingly, that is what happened with the Tax Cuts and Jobs Act (TCJA) [3] and other deregulatory changes—incomes rose and are still rising. And, they are rising the most for low-income earners; over the past year, incomes increased 6.6 percent at the 10th percentile of workers, compared to 3.3 percent for the 90th percentile of workers. [4]

The Future of Work

The future of work is not some far-off event, nor a tectonic shift in the workplace. The future of work is already here, found in gradual changes, such as new methods of learning, new types of automation, and increased use of alternative work arrangements. These changes are all happening alongside traditional workplace and educational foundations.

A Rise in Independent Work for Supplemental Income. Various measures find that anywhere between 10 percent and 40 percent of workers engage in alternative work arrangements. Depending on the definition, this could include owning one's own business, performing contract work, participating in the gig economy, or working in a temporary position. Nevertheless, much of these alternative work arrangements occur alongside, or in addition to, other work, as nine out of every 10 workers continue to be engaged in traditional employment.[5]

A 2016 study of the U.S. and European labor forces by the McKinsey Global Institute,

[1]BLS, "The Employment Situation—September 2019," October 4, 2019, https://www.bls.gov/news.release/pdf/laus.pdf (accessed October 21, 2019).
[2]Michael D. Farren, "Comprehensive Jobless Rate Hits New All-Time Low," The Mercatus Center, October 4, 2019, https://www.mercatus.org/bridge/commentary/comprehensive-jobless-rate-hits-new-all-time-low (accessed October 18, 2019).
[3]While the TCJA boosted economic output by allowing individuals to save, invest, and spend more of their own money, the positive impacts of the tax cuts will be tempered by higher deficits if Congress fails to rein in federal spending.
[4]The White House, *Economic Report of the President*, March 2019, https://www.whitehouse.gov/wp-content/uploads/2019/03/ERP-2019.pdf (accessed October 21, 2019).
[5]U.S. Department of Labor, "Contingent and Alternative Employment Arrangements—May 2017," USDL-18-0942, June 7, 2019.

"Independent Work: Choice, Necessity, and the Gig Economy," classified independent workers into four different groups: (1) free agents, (2) casual earners, (3) "reluctants," and (4) financially strapped. Of the 20 percent to 30 percent of workers that the study found to be engaged in independent work, 30 percent were free agents, electing independent work as their primary job; 40 percent were casual earners, choosing independent work to supplement other income; 14 percent were reluctants, relying on independent work as their primary income while they would prefer traditional employment; and 16 percent were financially strapped, supplementing their income out of necessity.[6]

The Gig Economy. While independent work as a whole has experienced significant growth over the past decade, the biggest growth component appears to be supplementation of traditional work with gig-type jobs. So-called gig-economy work fills an important niche, allowing workers to earn supplemental income for all types of goals and priorities, from saving for a house to paying for kids' activities or college to providing income while sinking resources into a new business venture. Yet, the gig-economy remains a small component of the labor market, accounting for about 1 percent of total employment.[7]

Contracting. An important component of independent work is contracting. Contractors typically perform more specialized jobs that require either short-term work or less than a full-time position. Contracting can be an efficient means for employers and workers alike because it allows employers to gain more specialized services, and is a way for workers to maximize their productivity and incomes.

Being able to purchase contracted services, as opposed to having to employ full-time employees, is particularly important for small businesses. Among small businesses that use contractors, the smallest ones use the most contractors: Businesses with only one to four employees used 6.7 contractors, on average.

If employers—particularly very small ones—had to hire every worker as full-time employee, they would be forced to decide among not having the work done at all; hiring a formal employee and likely paying him for idle time; or having a full-time employee do a job that is outside his skillset and position.

Benefits of Independent Work. Independent work allows higher labor force participation because it provides job opportunities for individuals who either cannot or do not want to commit to a traditional job. For example, many individuals with disabilities who cannot perform a traditional job can pick up independent work as their conditions and abilities allow; older individuals can stay engaged in the workforce, semi-retired, on their own terms (one of every three independent contractors is 55 or older);[8] students can earn income while gaining education and training; and parents and caregivers can perform independent work to earn income without having to sacrifice their family needs and desires.

In most cases, independent work or alternative work is an individual's desired choice. According to the BLS Alternative Work

[6]McKinsey Global Institute, "Independent Work: Choice, Necessity, and the Gig-Economy," October 2016, https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy (accessed October 19, 2019).
[7]Pew Trusts, "How Well Are Independent Workers Prepared for Retirement?," June 28, 2019, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/how-well-are-independent-workers-prepared-for-retirement (accessed October 21, 2019).
[8]U.S. Department of Labor, "Contingent and Alternative Employment Arrangements—May 2017."

Arrangements Survey, nine of every 10 independent contractors prefer contract work to a traditional work arrangement.[9] One of the biggest benefits of independent work is the ability to be your own boss, including setting your own schedule, picking which jobs you perform, and how you perform them.

Flexibility is a huge benefit to independent workers. A recent economic analysis of one million Uber drivers found that they valued the completely flexible work platform at about 40 percent of their earnings.[10] In part, that was due to drivers choosing to work more hours as a result of the freedom to choose *when* to work—in fact, if the average Uber driver had to commit to a traditional taxi-cab platform, he or she would not drive at all.[11]

Shortcomings of Independent Work. Despite overwhelming satisfaction with the choices, flexibility, and income opportunities afforded by independent work, this type of employment lacks some of the benefits of traditional employment. Most notably, independent workers do not have employer-provided benefits, such as health care and retirement savings accounts. Even though contractors often receive higher wages to compensate for the lack of benefits, it remains more difficult and costly for independent workers to obtain health insurance, retirement savings accounts, and other traditional employment-based benefits.

Misguided Policies and Unintended Consequences

Despite a very strong labor market in which there are more job openings than there are people looking for jobs, and workers thus have an upper hand in negotiating for higher compensation, some workers are still struggling. They may be "left behind," stuck in a low-wage job, or want more stability and opportunity. Or, they may be happy with their work, but lack some of the benefits and security associated with formal employment arrangements.

When addressing these concerns, it is helpful for policymakers to view them in broad context, considering not only the concerns expressed by discontented workers, but also the unexpressed concerns of contented workers who could be made discontented by proposed changes. Congress should consider policies in light of how they will affect all workers, particularly the least advantaged, and assess them on the basis of achieving higher incomes and greater opportunities.

Forcing Unions on Workers and Employers Lowers Employment, Restricts Income, and Threatens Workers' Privacy

Legislation, such as the Protecting the Right to Organize (PRO) Act, would further expand unions' government-granted monopoly status and strip workers of personal rights and privacies, including overturning three Supreme Court cases and 26 state right-to-work laws.[12]

Unions were established to benefit workers, but when they receive monopolistic power and undue influence, they do not have to provide value to workers to remain in business. This

[9]Ibid.
[10]M. Keith Chen, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen, "The Value of Flexible Work: Evidence from Uber Drivers," *Journal of Political Economy* (December 12, 2018), https://www.journals.uchicago.edu/doi/abs/10.1086/702171?mobileUi=0& (accessed October 21, 2019).
[11]Rachel Greszler, "The Value of Flexible Work Is Higher Than You May Think," Heritage Foundation *Backgrounder* No. 3246, September 15, 2017.
[12]G. Roger King, Testimony before the Subcommittee on Health, Education, Labor and Pensions of the Education and Labor Committee, U.S. House of Representatives, July 25, 2019, https://republicans-edlabor.house.gov/uploadedfiles/roger_king_pro_act_testimony_-_july_2019.pdf (accessed October 21, 2019).

lack of value is evidenced by the relatively small portion of members' dues that unions spend representing workers, as well as by a decline in union membership when workers have a free choice not to unionize.

Declining union membership is due, at least in part, to failure of unions to adjust to changing workplaces. Unlike, say, a 1950s assembly line where workers clocked in at 9 a.m. and out at 5 p.m., and all produced 20 widgets a day, few jobs today are so clear-cut or routine. Yet unions maintain rigid compensation and workplace structures that prevent performance-based compensation and thus lead to lower productivity and pay.[13]

While unions can be successful in forcing companies to provide above-market compensation, this merely shifts resources from lower-skilled and younger workers who lose their jobs to higher-skilled and longer-tenured workers who receive higher compensation. It can also lead to industry-wide declines because no company can maintain above-market wages in the long-run. Automobile manufacturing in America is less than half of what it was just two decades ago,[14] and the United Automobile Workers (UAW) union is at least partly to blame.[15] The UAW drove compensation costs so high (over $70 per hour, now that pension promises made decades ago have come due) that plants are closing down and hundreds of thousands of workers have lost their jobs.[16]

Furthermore, stripping individuals of their privacy protections and their right to a secret-ballot vote would be both unprecedented and harmful to workers, particularly in light of the coercive and threatening actions of certain labor unions. As the government has taken steps to increase privacy protections (such as making it illegal for telemarketers to call numbers registered on the do-not-call-list), and as there are bipartisan efforts to enact further privacy protection laws, it is both ironic and disconcerting that Congress is simultaneously considering forcing employers to provide employees' personal information without their consent (including their home addresses) to outside organizations that want to solicit their business.

Finally, by stripping states' rights to pass "right-to-work" laws, federal policymakers would be violating state lawmakers' ability to provide worker freedoms and their rights to establish an economic and business climate that they believe is most conducive to growth and opportunity.

There is nothing inherently wrong with unions, but workers must be free to choose whether to

[13]Studies show that average pay rises by 6 percent to 10 percent after companies adopt pay-for-performance structures: Alison L. Booth and Jeff Frank, "Earnings, Productivity, and Performance-Related Pay," *Journal of Labor Economics*, Vol. 17, No. 3 (July 1999), pp. 447–463; Edward Lazear, "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5 (December 2000), pp. 1346–1361; Tuomas Pekkarinen and Chris Riddell, "Performance Pay and Earnings: Evidence from Personnel Records," *Industrial and Labor Relations Review*, Vol. 61, No. 3 (April 2008), pp. 297–319; Adam Copeland and Cyril Monnet, "The Welfare Effects of Incentive Schemes," *Review of Economic Studies*, Vol. 76, No. 1 (2009), pp. 93–113; and Daniel Parent, "Methods of Pay and Earnings: A Longitudinal Analysis," *Industrial and Labor Relations Review*, Vol. 53, No. 1 (October 1999), pp. 71–86.

[14]Federal Reserve, "Domestic Auto Production," Bank of St. Louis, https://fred.stlouisfed.org/series/DAUPSA (accessed October 20, 2019).

[15]Rachel Greszler, "Why VW Workers Have More To Lose Than Gain From Unionizing," The Heritage Foundation, May 13, 2019,https://www.heritage.org/jobs-and-labor/commentary/why-vw-workers-have-more-lose-gain-unionizing.

[16]Tomi Kilgore, "Auto Industry Cutting Jobs at the Fastest Pace Since the Financial Crisis," Market Watch, May 21, 2019, https://www.marketwatch.com/story/auto-industry-cutting-jobs-at-the-fastest-pace-since-the-financial-crisis-2019-05-21 (accessed October 19, 2019).

join them and to be represented by them, and Congress must not grant them special favors.

Inaccurate Definitions of "Employee" Could Eliminate Entire Business Models

As more workers engage in alternative work arrangements, a small portion—who would prefer traditional employment—have expressed dissatisfaction with their employment options. Subsequently, certain policymakers are seeking to reclassify independent workers as "employees," and to reclassify employees of a small, family-run franchise as "joint employees" of a both their actual employer as well as a larger company. The end result of such efforts would be to slightly increase the level of traditional employment by shifting some current independent workers into more formal employee relationships, but at the expense of reducing total employment and income because it would not be possible for companies to fully employ all the individuals with whom they do business. In other words, these new definitions would benefit a small few at the expense of many.

Joint Employer Definition. Codifying the drastically altered *Browning-Ferris* [17] definition of a "joint employer" would upend both the franchise and business-services contracting models in the United States. [18] Franchisors should not and will not take on legal liability for workers whom they do not hire, fire, pay, supervise, schedule, or promote—in short, workers over whom they exercise no direct control. Instead, they will restrict the number of their franchises, fewer people will be employed, and fewer goods and services will be produced (leading to higher prices for consumers).

Similarly, requiring businesses to become employers of individuals with whom they simply contract limited services would upend an efficient and beneficial workplace model. It would be extremely unwieldy, if not impossible, for employers to bargain across multiple different businesses that employ the same contractor. Consequently, companies would simply not contract with unionized labor. By increasing legal liabilities and raising the cost of many services, the proposed "joint employer" definition would reduce employment and opportunities for workers, curtail business growth, and leave consumers with fewer choices and, likely, higher prices.

A November 2018 study by the American Action Forum found that the *Browning-Ferris* joint employer definition, which impacts up to 44 percent of private-sector workers, has 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 franchises.[19]

Independent Contractor vs. Employee. Independent contractors are different from employees in a number of important ways, and each status has its own advantages and shortcomings.

Independent contractors are their own bosses. They choose when, where, how, and for whom they work. Because they do not have a formal employer, independent contractors do not qualify for things like unemployment insurance, and are not subject to rules, such as

[17] *Browning-Ferris Industries v. NLRB,* August 27, 2015.
[18] James Sherk, "Keeping the American Dream Alive: The Challenge to Create Jobs Under the NLRB's New Joint Employer Standard," Testimony before the Committee on Small Business and Entrepreneurship, The U.S. Senate, June 16, 2016, https://www.heritage.org/testimony/keeping-the-american-dream-alive-the-challenge-create-jobs-under-the-nlrbs-new-joint (accessed October 19, 2019).
[19] Ben Gitis, "The Joint Employer Standard and the Supply Chain," American Action Forum, November 26, 2018, https://www.americanactionforum.org/research/joint-employer-standard-and-supply-chain/ (accessed October 19, 2019).

hour limits and wage restrictions. Moreover, because they do not have an employer, they do not receive employer-provided benefits, such as health insurance and retirement savings plans. Instead, they have to obtain these on their own, often at a higher cost both because of unequal tax treatment as well as higher administrative costs for individual vs. group-based benefits. In addition to being one's own boss, independent work provides greater income potential because workers are typically more productive when paid to perform a specific job than when paid a salary or hourly rate, and independent work does not limit the number of hours individuals can work.

Applying the proposed three-part "ABC" test would invalidate decades of legal precedent and add a fourth, different, test for defining employees within federal statute.[20] By adding two factors that ignore and can negate the "common law" test that defines an employee based on an employer's level of control over that worker, the ABC test could wipe out employment and income opportunities for millions of Americans. Instead of causing companies to formally employ previously independent contractors (as its proponents claim), the provisions of the PRO Act would instead prevent certain types of companies from doing business with independent contractors. For example, the "B" component of the test would prevent a limousine company from using any type of delivery contracting services because it is in the business of delivering passengers places. The "C" component of the test would essentially drive out the small guys by preventing companies from contracting with individuals who do not actively market their services and do not work for multiple different customers.[21]

In short, applying the proposed ABC test to determine workers' status could effectively eliminate most gig-economy and contract jobs because trying to fit them into traditional employment platforms is like trying to force round pegs into square holes—it just will not work.

Take Uber, for example. If policymakers force Uber to treat drivers as formal employees, the company would have to take away the very autonomy and flexibility that draws drivers to the platform. Instead, drivers would have to follow Uber's prescribe shifts, they would be told which passengers to pick up instead of choosing ones convenient to their location and schedule, drivers would have to request time off in advance, and they may no longer be able to work for another company besides Uber. Moreover, the increased liability on Uber's behalf could cause the company to enact supervision measures such as installing cameras in drivers cars so that Uber could have more control over drivers workplace conditions. Finally, customers could count on a steep increase in prices, which would reduce demand and lead to even fewer Uber jobs.

The problem with attempting to provide more benefits and protections to independent workers is that the overwhelming majority of them have chosen independent work precisely *because* they do not want the restrictions that come along with traditional employment. Moreover, many of these workers already have the benefits of traditional employment, either through their own work or through a family member's. Only 16 percent of gig-economy workers rely on the gig platform for their main job.[22]

[20]Trey Kovacs, "The Case Against the Protecting the Right to Organize Act," August 27, 2019, https://cei.org/content/case-against-protecting-right-organize-act#_edn28 (accessed October 21, 2019).
[21]Ibid.

[22]Board of Governors of the Federal Reserve System, "Report on the Economic Well-Being of U.S. Households in 2017," May 2018, https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-preface.htm (accessed October 22, 2019).

Requiring virtually all workers to report to a boss would eliminate millions of jobs and opportunities, leaving workers, employers, and consumers all worse off. Stripping workers of options that offer autonomy and flexibility would particularly hurt less-advantaged workers, such as single parents and individuals with disabilities, who need accommodating schedules and greater autonomy.

Wage and Hour Restrictions Reduce Employment and Flexibility

Higher wages are a great thing when they come from a free market as a result of workers becoming more productive. The government, however, cannot make workers more productive, and employers cannot stay in business if they are forced to pay workers more than they produce.

A $15 Minimum Wage. The Raise the Wage Act, which would establish a nation-wide $15 minimum wage, would lead to millions of lost jobs, and a survival-of-the-fittest labor market with no place for less-experienced or disadvantaged workers. Moreover, the Congressional Budget Office explained how a $15 minimum wage would negatively affect the entire economy through higher prices, smaller total incomes, larger deficits, higher interest rates, higher inflation, a more rapid pace of automation; and a smaller economy.[23]

Liberal and conservative economists alike caution against a $15 minimum wage. In 2015, Alan Krueger of President Barack Obama's Council of Economic Advisers, called a $15 minimum wage "a risk not worth taking," and said it would "put us in uncharted waters, and risk undesirable and unintended consequences." [24] Similarly, former Clinton Administration economist Harry Holzer cautioned that a $15 minimum wage would be "extremely risky," particularly for young and less-educated workers who need to gain work experience.

Even in wealthier, high-cost cities, such as Seattle, the shift to a $15 minimum wage has resulted in only small gains for the most experienced workers, with significant losses for the least-experienced and less-advantaged. [25] A $15 minimum wage could devastate lower-cost and more rural areas of the country.

Unless Congress has a solution for addressing millions of newly unemployed workers and for confronting the consequences of an economy that has no place for workers who cannot produce at least $35,000 of value (the cost to employers of employing a full-time worker at $15 per hour), they should instead leave minimum-wage laws to state and local governments, which can better set the appropriate rate for their communities.

Expanded Overtime Threshold. Hourly workers are subject to overtime rules that require employers to pay them time-and-a-half for any hours over 40 that they work in a given week. Additionally, salaried workers who earn less than about $23,700 per year (rising soon under a new Department of Labor rule to about $35,700) are also subject to overtime rules and pay. Some policymakers would like to raise the overtime salary threshold to closer to $50,000,

[23]CBO, "The Effects on Employment and Family Income of Increasing the Federal Minimum Wage," July 2019, https://www.cbo.gov/system/files/2019-07/CBO-55410-MinimumWage2019.pdf (accessed October 21, 2019).
[24]Alan B. Krueger, "The Minimum Wage: How Much Is Too Much?," The New York Times, October 9, 2015, https://www.nytimes.com/2015/10/11/opinion/sunday/the-minimum-wage-how-much-is-too-much.html (accessed October 21, 2019).
[25]Allison Schrager, "A New Study of Seattle's Minimum Wage Hike Shows Who It Helps, and Who It Hurts," October 22, 2018, https://qz.com/1429986/a-new-study-of-seattles-minimum-wage-hike-shows-who-it-helps-and-who-it-hurts/

with the intent of raising incomes for lower-wage and middle-wage workers.

The problem with raising the salary threshold in an attempt to increase wages is that businesses will respond to such changes by adjusting other factors to keep their overall labor costs constant. As left-leaning economists Jared Bernstein and Ross Eisenbrey explained, additional overtime costs "would ultimately be borne by workers as employers set base wages taking expected overtime pay into account."[26]

Three ways that employers will respond to higher overtime thresholds are: (1) taking away worker flexibilities, such as working from home; shifting work from one week to another to meet family needs; or taking away benefits, such as vacation days; (2) shifting salaried employees to hourly workers, which leads to less-stable incomes and more employer restrictions on when and where employees must perform their work; and (3) reducing employees' base pay both to cover expected overtime pay as well as excessive compliance costs.[27]

Government-Mandated Benefits Are Burdensome, Costly, and Inefficient

Employer-provided benefits can be an efficient and helpful way for individuals to obtain health, life, and disability insurance, or a retirement savings account, because larger pools of workers result in lower average prices and smaller administrative costs.

Government-mandated benefits, on the other hand, can have the unintended consequence of reducing employment, restricting pay and other benefits, and causing employers to discriminate against workers who are most likely to incur higher costs because of those benefits.

Even less helpful and efficient, however, would be government-provided benefits, such as a national paid family leave program. Employers are already rapidly expanding access to paid family leave benefits, and a government program—with a new tax on workers—would shift these privately financed costs to workers. Those costs would be disproportionately born by lower-income workers, as studies have shown government-provided paid family leave to be regressive with middle-income and upper-income earners disproportionately benefiting from them. In addition to the higher costs, a one-size-fits-all government program cannot meet workers' needs in the ways that more accommodating and flexible employer-provided programs can.

How to Benefit Workers Through Choice and Opportunity

Government interventions in the labor market—attempting to mold the labor market to meet politicians' changing desires, instead of allowing the private sector to meet the market's demands—can benefit certain groups, but always at the expense of others, and typically in ways that create a smaller economy for everyone. Instead of trying to micromanage the labor market, Congress can enact policies that help employers and workers respond to the changing nature of work. This will lead to higher incomes and a larger economy for everyone.

[26]Jared Bernstein and Ross Eisenbrey, "New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Institute, March 13, 2014.

[27]The Obama Administration estimated that employers would spend $295 million complying with its proposed increase in the threshold to about $47,800, while workers would receive an estimated $1.2 billion in additional wages. This amounts to a 25 percent compliance cost.

Modernized, Choice-Based Labor Organizations. At their inception, unions served the important purpose of protecting workers' safety, preventing worker exploitation, and giving workers an otherwise unheard voice. But as many of the things unions used to provide are now protected by law or enforced by a globally competitive free enterprise system, traditional union functions have become of less value and importance. Yet, unions generally have not adapted to provide benefits that are of value to today's workers. In some instances, unions have served to the outright detriment of workers by preventing them from being rewarded for their hard work.[28] And, some workers have lost trust in unions amidst all-too-common findings of union corruption and embezzlement.[29]

Workers' Choice and Members Only Arrangements. The union exclusivity model is flawed on both sides: Workers in a unionized workplace cannot be represented by anyone other than the union, and unions must represent all workers, including those in right-to-work states and public employees' unions, who choose not to join the union.

States that have enacted right-to-work laws could free unions from the so-called free rider problem by enacting workers' choice or members' only models in which unions do not represent non-union members. Such structures would require workers who want union-provided services to pay for those services, and would free workers to choose their own representation. This structure could even allow workers to pick and choose the services for which they want to contract with the union.

Unions as Professional Organizations. Workers do not have to be employed by the same company or even in the same field of work in order to benefit from unions. One of the most successful and fast-growing unions in the U.S. is the Freelancers Union. This completely optional—and dues-free—union has attracted 450,000 members by providing what workers value, such as education, insurance benefits, and advocacy.

Union-Provided Training. As technology and trade continue to alter the workplace, unions could provide valuable training to workers to help prepare them for changes within their own job or help them gain the skills and experience for a new type of work. Some unions do provide worker training, but expanding it outside the job they already perform could be particularly beneficial for workers in declining industries.

Representation Services. Union-prescribed pay scales, which focus only on tenure and title, do not make sense for many workplaces where there are either many different positions or a wide range of skills and expertise. In those cases, unions could still provide value through things like representation services and setting minimum salary, while allowing individual workers to directly negotiate their compensation packages with their employer. This is the type of structure that the Major League Baseball players' association provides.

Reduced Government Barriers to Wage Growth and Flexibility. Higher incomes are universally beneficial, and income growth is particularly important for lower-income earners. The only way for workers' wages to rise is if the workers become more productive,

[28]James Sherk, "Why Did This Union Oppose Higher Pay For Its Members," The Daily Signal, May 18, 2014, https://www.dailysignal.com/2014/05/18/union-oppose-higher-pay-members/.

[29]Bob Gilson, "American Federation of Government Employees Still Most Corrupt Union in the U.S.," FedSmith, August 3, 2017, https://www.fedsmith.com/2017/08/03/american-federation-government-employees-still-most-corrupt-union-usa/ (accessed October 21, 2019).

and investment—both in education and training as well as in technology that makes workers more productive—is crucial to rising incomes.

Lower Taxes. Americans spend more on taxes than they do on food, clothing, and housing combined. [30] If policymakers want to raise workers' incomes, they should start by letting them keep more of what they earn. Similarly, the less that the government takes in taxes from employers, the more employers will have left over to compensate their workers. Following the TCJA and other deregulatory efforts, the wages of lower-income workers expanded rapidly, at twice the pace of the highest-income earners.

No Double Taxation of Savings and Investment. Double taxes are doubly discouraging. By taxing savings and investment income twice, Congress reduces the amount of saving and investment in the economy. Yet, saving and investment are key to economic growth and higher wages. Congress could increase incomes for everyone by taxing it only once.

Expanded Expensing. By generally not allowing companies to account for the full cost of their investments when they incur the costs, the U.S. tax code reduces investment, which translates to lower productivity and income gains. The tax cuts temporarily fixed this problem by allowing companies to immediately "expense" some short-lived investments, but other investments, such as buildings, still have to use the costly and complicated pre-TCJA system. Permanent tax cuts and expanded expensing could boost the size of the economy by 4.3 percent,[31] leading to significant income gains across all income groups.

Fewer Regulations. Regulations impose tremendous costs on businesses, particularly on smaller businesses and entrepreneurs who do not have the resources to comply with—or often even understand—the complex web of federal regulations. When entrepreneurs face fewer barriers to entry, they create more jobs. And when businesses do not have to comply with costly and unwarranted regulations, they have more resources to devote to raising wages. In a tight labor market where employers have to compete for workers, they will do so by raising wages and benefits.

Clarified Definition of Employee. Businesses already face three different definitions of an employee in federal statutes. This can make it difficult for businesses to differentiate between employers and contractors, and extremely costly if they make the wrong determination.

If Congress expands the definition of employee such that businesses can be held liable for the actions of workers over whom they exercise little or no control, fewer jobs will be available for workers, and fewer opportunities for entrepreneurs. Workers who do keep their jobs will face stricter workplace rules that do not meet their needs and desires.

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

[30]Rachel Greszler, "Today, You Pay Your Federal Taxes. Tomorrow Is the Real Tax Freedom Day," The Daily Signal, April 15, 2019, https://www.dailysignal.com/2019/04/15/today-you-pay-your-federal-taxes-tomorrow-is-the-real-tax-freedom-day/.

[31]Permanent TCJA and expanded expensing for all investments would grow the economy by 4.3 percent over the pre-tax reform baseline, or about 2.6 percent over the temporary current law baseline. See, Adam N. Michel and Parker Sheppard, "Simple Changes Could Double the Increase in GDP from Tax Reform," Heritage Foundation *Issue Brief* No. 4852, May 14, 2018, https://www.heritage.org/taxes/report/simple-changes-could-double-the-increase-gdp-tax-reform..

on how much control an employer exerts over a worker. Similarly, Congress should codify the definition of a "joint employer" to apply only if one company exercises direct and immediate control over another company's employees.

A Responsible Federal Budget and Fiscal Outlook. Although the economy is doing well and the labor market is strong, this will not last forever. The longer that Congress waits to confront the U.S.'s undeniably unsustainable fiscal outlook, the more severe the consequences will be, including low or no wage growth; a labor market where workers will be lucky to have a job; and large and abrupt cuts in government services, including promised entitlement benefits.

Equal Tax Treatment of Health Insurance and Retirement Savings. Current tax law provides a significant financial advantage for employer-provided health insurance benefits that is not available to self-employed purchases of health insurance, and tax-free retirement accounts provide higher limits for employer-provided plans than for individual retirement accounts (IRAs). Policymakers should equalize the tax treatment governing health insurance and retirement savings, regardless of whether an employer or an individual purchases a plan.

Accessible, Affordable, and Portable Benefits. The average worker will change jobs 12 times throughout his career. That can mean changing health insurance 12 times, and either having to roll over retirement accounts or managing many different accounts. Independent workers, for their part do not have access to less-expensive group-based health insurance, disability insurance, and retirement savings accounts. Policymakers should make it easier for individuals to pool together to purchase group-based insurance by expanding the concept of association health plans so that workers will have access to choice-based and portable benefits that meet their needs.

Increased Paid Family Leave Through Universal Savings Accounts or Tax-Free Savings Withdrawals. Universal savings accounts (USAs) would allow workers to save money for any purpose while paying taxes only once. This would make it easier for workers to accumulate higher savings, which could be used for a variety of life's circumstances, including family and medical leave.

Although not as beneficial as USAs, allowing workers to make penalty-free withdrawals from their IRAs or 401(k) plans is another way to help workers take paid family leave. The Setting Every Community Up for Retirement Enhancement (SECURE) Act would allow workers to make penalty-free withdrawals from their retirement plans for the birth or adoption of a child.

Increased Paid Leave by Allowing Workers to Choose Paid Time Off. Current law prohibits low-wage private-sector workers (those making less than about $23,700, and soon to be $35,700) from choosing to take paid time off or extra pay in exchange for overtime hours. Public-sector workers have this option. The Working Families Flexibility Act would allow workers to choose between time off and extra pay for the overtime they work.[32] This would allow a low-wage worker who works two hours of overtime each week for a year to accumulate four weeks of paid time off.

Lower Taxes and Regulations. After the TCJA went into effect, many companies polled their workers, asking what they would like to receive as a result of companies getting to keep more of their earnings. Many workers said they wanted new or expanded paid family leave

[32]Rachel Greszler, "Mike Lee's Bill Would Boost Paid Family Leave Without Growing the Government," The Daily Signal, April 11, 2019, https://www.dailysignal.com/2019/04/11/mike-lees-bill-would-boost-paid-family-leave-without-growing-government/.

policies, and companies responded by providing them. More than 100 large companies announced new and expanded policies, and the top 20 employers in the U.S.—including Starbucks, Lowes, and Wal-Mart, which typically employ lower-wage workers—now all provide paid family leave.[33] Freeing up resources for businesses allows them to provide the compensation that workers desire.

Summary

Workers need not fear the future of work. Across time, change and innovation amidst the free market have led to rising incomes for everyone. Rather than try to bring back the labor market of the past by telling workers and employer how they must interact with one another, dictating compensation packages, and limiting with whom employers can do business, policymakers should help workers and employers to adapt to changes.

Congress can help workers adapt to and benefit from changes in technology and the nature of work by: enacting pro-growth policies that generate a stronger economy and competitive labor market; by allowing the private sector to respond to workers' demands; by allowing options (outside the traditional nine-to-five job) for individuals to earn a living or to supplement their income; and by making it easier for non-traditional employees to access traditional work-place benefits.

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[33]National Partnership for Women & Families, "Leading on Leave: Companies with New or Expanded Paid Leave Policies (2015–2019)," August 2019, http://www.nationalpartnership.org/research-library/work-family/paid-leave/new-and-expanded-employer-paid-family-leave-policies.pdf

Chairwoman WILSON. Thank you, Ms. Greszler. We will now recognize Ms. Beck. Welcome.

TESTIMONY OF JESSICA BECK, CO–FOUNDER AND COO, HELLO ALFRED

Ms. BECK. Good morning. Thank you for the opportunity to share my perspective on the important topic of the future of work.

My name is Jessica Beck and I am the Chief Operating Officer of Hello Alfred, a tech enabled service company I cofounded 5 years ago that's changing the way people live in cities by building help directly into the home.

Today I would like to share with you our experience as a tech enabled service company that intentionally chose a W–2 employee model.

5 years ago, my cofounder, Marcela Sapone, and I, launched our business founded on a simple idea. Let's give people back their time.

Through our app, we offer our customers the ability to request help with anything they need from groceries delivered directly into their fridge to pet care, clothing care, handyman services, and more.

We deliver against these needs through our Alfred Home manager staff who visits our members' homes each week to fulfill their requests.

Today we operate in more than 20 cities across the United States and provide our services through a combination of technology and human help.

While our brand is focused on transforming the lives of our customers, from the beginning we have cared deeply about creating good jobs and meaningful work.

When we launched Hello Alfred in 2014, the gig economy was the default approach for tech enabled service startups. If we had followed this trend, we would logically have made our Alfred home managers contractors.

This model reduces cost and risk associated with hiring, firing, and wage changes as independent contractors are not subject to minimum wage laws and companies have limited responsibility for tax withholding, benefits, insurance, or training.

However, we observed that a byproduct of this model was a more transactional relationship between the workers who power these platforms and the platforms themselves. And we were determined to build our business differently.

For us, the conversation ultimately wasn't about 1099 versus W–2 but instead about how we could create the right relationship with our workers, not just a cheaper one.

We ultimately chose to make our Alfred home managers W–2 employees and as a result, we are able to provide them with a series of important things.

For example, systems that enable long term life planning including benefits such as competitive healthcare plans for themselves and their families, opportunities to advance their skills and training through learning and development and career pathways, fair compensation.

Alfred home manager wages have some variation depending on location, but the average is 56 percent higher than the markets minimum wage. By way of example, San Diego's minimum wage is $12 per hour but our Alfred's average about $20 per hour.

We did this because we believe that an employee centric approach where we have a strong, trusted relationship with our staff ultimately enables us to deliver a better experience for our customers.

A more successful workforce creates a more successful business and we believe there should not be a disconnect between a company's success and the personal success of its workers. The reality is that creating good jobs is good for business as well as good for

innovation and growth. This outlook requires business leaders to embrace their responsibility of shaping a new generation of jobs where we are not commoditizing skills or side stepping hard won protections.

It's also worth noting that our decision to choose a W–2 employer relationship added cost to our model. We estimated that to be about 20 to 30 percent more than had we chosen a 1099 model.

However, as a business we also see innumerable long-term benefits to this investment. For example, we have a lower employee turn rate which translates into lower recruiting and training costs for us.

We have an increase in internal promotions and tenured employees who began as Alfred home managers which maintains not only important institutional knowledge but also leads to new ideas. Some of our best innovations come from this group.

We are proud to look around our company and see former home managers who are now trainers, hospitality experts, or even leading entire cities.

Most importantly, workers who feel valued and are given opportunities to grow within a company tend to produce an excellent product. We rank high in customer satisfaction and have been able to maintain strong control of our brand by having a consistent high-quality work from our employees which is an essential factor in any service based model.

Regardless of which business model employers choose to pursue, there needs to be a concerted effort to provide meaningful benefits, protections, and development opportunities for the people who do work for these companies.

When we as business leaders don't make the appropriate worker choice, the impact can distance the worker from the company. This deprives the worker of the benefits that being part of an organization can provide such as career advancement, learning, development, and training. It also deprives the company of the ideas, lessons, and diversity of skills its staff could otherwise contribute.

I am hopeful that we will see more stewards of good business practices in the years to come. Employees shouldn't be seen as cost centers, but instead as human beings who are delivering real work and value and deserve the same in return. The result will be good for business, good for the worker and good for our workforce at large. Thank you.

[The statement of Ms. Beck follows:]

HELLO Alfred

Written Testimony from Jessica Beck

Co-founder and COO of Hello Alfred

Joint Hearing Of Subcommittee On Health, Employment, Labor, And Pensions

And Subcommittee On Workforce Protections

On *The Future of Work: Preserving Worker Protections in the Modern Economy.*

October 23, 2019

Thank you for the opportunity to share my perspective on the important topic of worker's rights. I'm grateful for the chance to lend my voice as an employer advocating for companies to set up the right relationship with their employees from the start.

My name is Jessica Beck. I am the Chief Operating Officer of Hello Alfred, a technology and residential experience company I co-founded that is changing the way people live in cities by building help directly into the home. Five years ago my co-founder, Marcela Sapone, and I launched our business founded on a simple idea: let's give people their time back. Through a combination of technology and smart data, logistics, and high touch hospitality, we built a service-based business that integrates frictionlessly into homes in more than twenty cities across the United States, returning time and headspace to the lives of our members.

We offer our members the ability to ask for help with anything they need: from groceries delivered directly into their fridge to pet care, personal training, handyman services and everything in between. From there, an "Alfred Home Manager" visits our members' homes weekly to take care of those needs, either fulfilling the task themselves or partnering with a local small business or expert so that our company's success is shared with them as well. We're on a mission to transform the way people are living in cities today—where we can be neighborhood conscious, more aware of our footprint and impact, and more connected— all through the transformative act of asking for, and receiving, help.

While our brand is focused on transforming the lives of our members, Marcela and I have also given deep thought from the beginning as to what fair and meaningful work would look like for our (now 300-plus) employees. In 2014, as we were launching Hello Alfred, the "gig economy"

business model was picking up momentum for other service startups, both in terms of company growth as well as venture investment being funneled into them. With studies such as the Intuit 2020 Report estimating 17 million Americans working as contractors and projections that 40% of the workforce will be classified as freelancers by 2020, the trend in this model of business was undeniable. If we had followed this model, it would have been logical for us to have made our Alfred Home Managers contractors. This model reduces cost and risk associated with hiring, firing, and wage changes, as independent contractors are not subject to minimum wage laws. Companies have limited responsibility for tax withholding, benefits, insurance, or training.

However, we also saw that tech and service platforms were developing a transactional mentality toward the workers who powered their platforms, and we were determined to build our business differently. This conversation is not actually about 1099 vs W-2, it is about companies taking responsibility to create the right relationship with their workers, not simply the cheapest one. The current debate sometimes creates a false dichotomy of flexibility (found via 1099 worker positions) vs stability (the W-2 model). In reality, W-2 workers can also work for more than one company, have flexible work hours, and be ensured stability in their income and benefits.

Regardless of which business model employers choose to pursue, there needs to be a concerted effort to provide meaningful benefits, protections and development opportunities for the people who drive business for these companies. At Hello Alfred, we're proud to support our employees' growth through investing in foundational elements that make up a good job.

As W-2 employees, we are able to provide our Alfred Home Managers with:

- Systems that enable long term life planning, including benefits such as competitive healthcare plans for themselves and their families.
- Opportunities to advance their skills and training through new and continuously evolving opportunities for career advancement. We're proud to have so many Home Managers employed at Hello Alfred, and equally proud when we're able to help one of our Home Managers reach a career milestone or transition to another role within the company, if they choose to do so. Making those pathways available and accessible is a constant consideration.
- Fair compensation for their work. An Alfred Home Manager wage has some variation depending on location, but averages over 56% higher than their market's minimum. For example, San Diego's market minimum is $12, with our Alfreds averaging $20 per hour, while Dallas' market minimum is $7.25, but Alfreds earn more than $17 on average.

We believe in service as a true discipline of its own and the people who perform this work are experts in their field, a distinction that has made all the difference for us as we pioneer a new industry built on trusting others for help. We also believe there should not be a disconnect

between our company's success and the personal success of our workers. By creating an employee-centric business, we deliver a better experience for our members and a higher quality product.

The reality is that creating good jobs is good for business, as well as good for industry innovation and growth. This outlook requires business leaders to accept a level of responsibility in shaping a new generation of jobs, where we are not commoditizing skills and sidestepping hard won protections and benefits tied to current employment simply because it is less economic in the short term.

It is worth noting that our decision to structure the Alfred team as employees added cost to our model, which we estimate to be an additional 20-30% more than a 1099 model due to additional benefit and taxes. However, there are also innumerable long term benefits to this investment:

- We've seen a lower churn rate, which translates to lower recruiting and training costs.
- We've maintained institutional knowledge and our new and tenured employees have generated countless innovative ideas that have come to fruition over our five years.
- We've seen an increase in our internal team promotions and are proud to look around our company and see former Alfred Home Managers who are now Alfred trainers, hospitality experts, or even leading entire cities as Area Managers. Our ability to grow is enhanced by this talent.
- Most importantly, workers who feel valued and are given opportunities to grow with a company tend to produce an excellent product. We rank high in customer satisfaction because we are able to deliver a consistent quality of work to our members week after week—an essential factor in any service-based model.

For certain business models and practices, there may be sound reason to take a different approach and employ 1099 contractors, as long as that decision is made carefully and within legal bounds. But it's essential that the business leaders of today and tomorrow take true care as to what relationship best benefits not only them but their employees. When we as business leaders don't make the appropriate worker relationship choice, the immediate impact is that of distancing the worker from the company. Investment through job training, skill development, and career advancement is hampered. The results of this are not only detrimental to the company and the worker, but ultimately the country's workforce at large. There is in fact a strong correlation between a country's GDP and its investment in human capital. One of the main takeaways of the first edition of the World Economic Forum's *Human Capital Report* in 2015 was that fulfilling people's potential could boost global GDP by twenty percent.

We have a tremendous opportunity as business leaders to make decisions for our companies that benefit our employees and our bottom-line, and I'm hopeful that we'll see more stewards of good

business practices in the years to come. Employees shouldn't be seen as cost centers, but instead as human beings who are delivering real work and value and deserve the same in return. The result will be good for business, good for the worker, and good for our workforce at large. An increase in technology-enabled service businesses with people truly factored into the core of the business model will have positive second and third order consequences on the world we live in today and the future of work tomorrow.

Chairwoman WILSON. Thank you, Ms. Beck. Under Committee Rule 8(a) we will now question witnesses under the 5-minute rule. I will now yield myself 5 minutes.

Professor Rogers, as companies increasingly contract out for work that they would previously hire directly, how does that exacerbate the challenges workers face when they organize a union or engage in other concerted activities?

Mr. ROGERS. Thank you for that question. Outsourcing and subcontracting, fissuring, franchising, in many circumstances can impact workers' rights to organize in a couple of ways.

One is that workers' primary employer may not actually have any economic power over their working conditions. The company

that actually has that power may be a third party. But the workers cannot get that third party to the table. That means that meaningful collective bargaining is effectively impossible.

A second challenge is that workers do not have rights to strike pickets or really organize or bargain with that third party under existing law. I'll note that the PRO Act would remedy many of those short comings.

Chairwoman WILSON. How does sectoral bargaining prevent individual companies from undercutting wages and working conditions in order to compete?

Mr. ROGERS. So the best example of sectoral bargaining in the United States is probably the United Auto Workers pattern bargaining strategy in which the UAW negotiates a contract with one of the big three automakers and then pushes the other two to match the terms of that contract. Now that's not actually complete sectoral bargaining because there are still many nonunion plants in the country.

But what that does is it prevents the three, any of the three automakers from underbidding the other two. A true sectoral bargaining would actually lift up wages and benefits for all of the workers in the industry therefore ensuring that there is a level playing field for all companies.

Chairwoman WILSON. Thank you. Ms. Beck, can you elaborate on your decision-making process as a founder when you chose to employ W–2 workers even though it was a more expensive option. Why did you make the business decision to cover these cots?

Ms. BECK. Thank you for the question. At the end of the day, we were very focused on building a relationship of trust with our customers and also with our employees.

And when we considered the things that a business should do in order to do that, the costs were far less than the benefits that we thought we would receive.

So if we could invest in our workforce, give them the protections, the benefits that they deserved, they in turn would deliver a high quality experience to our customers.

Chairwoman WILSON. Thank you. Professor Rogers, in your testimony you discuss some of the abuses associated with legal safe harbors and some companies rely on to deny their workers are employees even when they are providing them benefits. Why is this harmful and how would the PRO Act address this problem?

Mr. ROGERS. The greatest problem here in my view is that the definition of employment under the NLRA right now looks to the common law test and interprets the common law fairly narrowly to require a fairly high degree of control over the work.

The test itself however is incredibly malleable and incredibly confusing. What the PRO Act does is substitutes the so-called ABC test which is much more tractable, much more clear and that would lead to gig economy workers being classified as employees in most cases.

As a result, they would then be eligible for most employer mandated benefits.

Chairwoman WILSON. Thank you. Dr. Weil, is there a difference in earnings if a worker is employed by a main business instead of having their job contracted out?

Mr. WEIL. Thank you, Chair Wilson. The answer is yes, and the difference can be substantial. Many of the best estimates put that at something like a 20 percent differential when a worker is doing the same work for often the same organization but has been contracted out to another organization.

So the impacts on both wages and also access to benefits can also be quite pronounced and dramatic from a shift like that.

Chairwoman WILSON. Does the fissured workplace negatively impact a works ability to advance within a company? What does this mean for wage growth?

Mr. WEIL. I think that's one of the most profound effects of the fissured workplace that we are only now seeing and putting together in the economic data.

The fact that a worker in the old model of employment who was a janitor, worked for a company and could enjoy a job ladder within the company.

When that janitor is a subcontracted or in other ways a staffing agency worker, that opportunity for advancement is undercut. And that has implications on his or her job earnings profile over the course of their work life.

Chairwoman WILSON. Thank you so much. I yield, my time is up. And now Members from questions—questions from Members. Dr. Adams, I am sorry. Mr. Wahlberg, our Ranking Member, North Carolina.

Mr. WALBERG. I love North Carolina—

Chairwoman WILSON. Michigan.

Mr. WALBERG.—but I choose the beautiful state of Michigan. Home of 20 percent of the world's freshwater and a beautiful color scheme right now but North Carolina is a beautiful state to vacation in.

Ms. Greszler, Republicans have long championed the expansion of association health plans as an effective and affordable health care solution for many workers. In 2017, I was proud to introduce the Small Business Health Fairness Act with former Representative Sam Johnson to expand access to high quality, lower cost healthcare plans for employers and workers and see it pass the House.

The Department of Labor has also done important work to expand access so to HP's by allowing more employers and small business to participate in these plans.

In April, I also introduce H.R. 2294, the Association Health Plan Act of 2019 which would ensure continued access to coverage for association health plans established under DOL's AHP rule.

In your testimony, you mentioned that expanding access to HP's would give workers more choice, portability and portability for their healthcare benefits.

Let me ask you this question. Why are choice and access important to workers and do you think that increasing an availability of AHP's will benefit workers and their families?

Ms. GRESZLER. Yes, thank you. We have actually done some polling on this at the Heritage Foundation and we found that what is most important to families is to have a choice and feel like they are empowered in being able to get access for themselves and for their loved members and to make some decisions about what type of

healthcare they receive. And that's why association health plans are so important particularly for smaller business.

There are a lot of costs associated with finding a health plan and running that and this association health plan model drives down those costs not only administratively but also by bringing together a pool of workers so that they can offer a lower price.

And that's something that's particularly important to these small businesses and something that they have trouble is finding an affordable health plan that both they and their workers can use for their healthcare. So small businesses this is something that would help them tremendously.

Mr. WALBERG. And they generally want a partner with that because of I guess what I would question I would like to ask you now about the tight labor market that is out there. We know that job creators offer benefits such as health insurance plans. We talked about retirement contributions, paid leave to recruit and retain workers. It is just a matter of course that is necessary to have those employees.

We also know that thanks to a strong economy spurred on by our Tax Cuts and Jobs Act and deregulatory actions there are more jobs than job seekers. About 7 million the last figure I saw. So again, how does todays tight labor market affect employee benefits?

Ms. GRESZLER. Well, we are still seeing companies expand their benefits because of the tight labor market. Something they have to do. They're having to compete to get the workers that they need.

Mr. WALBERG. Competition.

Ms. GRESZLER. There are people out there that are offering thousand dollar signing bonuses in lower wage jobs. We have seen a race to the top in the type of benefits that people are offering.

They're even health insurance and pet insurance because that's what some workers are asking for. And paid family leave has expanded rapidly.

We now have the top 20 employers in the U.S., a lot of these that are employing lower wage works like Lowes, Home Depot, Starbucks, they now all offer paid family leave because it's something that their workers want and they're responding to that.

Mr. WALBERG. And competition.

Ms. GRESZLER. And competition.

Mr. WALBERG. Yeah. Ms. Greszler, many businesses use subcontractors and independent contracts because this framework allows for flexibility, ready access to skilled workers, and the ability to responsibly manage costs.

These relationships are particularly important for businesses that operate on thin margins such as small, rural hospitals and I have a number of those, allowing them to dedicate more resources to patient care.

The Democrats bill H.R. 2474, the PRO Act, which was recently approved by this committee as indicated, codifies a broad and vague standard for joint employment that could make these hospitals the employer of the independent contractor or contractor's employees.

What are the primary concerns you have with this joint employer standard in the PRO Act as it pertains to businesses and workers alike?

Ms. GRESZLER. Particularly as you talked about smaller, rural hospitals, a lot of the businesses simply won't be able to offer the services they currently do or the quality of service that's offered there.

I grew up in a small town in western New York and after my father and some of the other orthopedic surgeons retired, there were none there and so they had to contract to bring some in.

Similarly, my uncle is a retired physician and it's a job that he can do, the kind of traveling doctor model. And so you're bringing people who have higher skills than are available in that community and as a result, patients have access to that higher quality, more specialized care.

And that's the biggest benefit of contracting is you get a more specialized product as opposed to having to use one of your current employees to perform say 5 different jobs that they aren't necessarily equipped to do.

Mr. WALBERG. So better quality and care.

Ms. GRESZLER. Exactly.

Mr. WALBERG. Thank you. I yield back.

Chairwoman WILSON. Thank you. Dr. Adams, North Carolina.

Ms. ADAMS. Thank you, Madame Chair, and thank you to all the witnesses. Dr. Weil, currently misclassification is not itself a violation of the Labor—Fair Labor Standards Act so how would making misclassification a violation of FLSA and allowing civil monetary penalties in a private right of action for violations help combat misclassification?

Mr. WEIL. Thank you, Chair Adams, and you've pointed to a major problem of misclassification and that is because of its use by some employers, it undercuts the competitive position of other employers by make—and because misclassification in and of itself is not a violation of the Fair Labor Standards Act it's very difficult to root out those businesses that are using it as a competitive edge by providing penalties expressly for the active misclassification and the willful act of misclassification.

It would act as a deterrence for those kinds of models, stopping the employers who are using it as a business model decision, and it would also support those businesses that are doing the right thing in complying with the law in terms of their competitive position.

Ms. ADAMS. Great, thank you. Dr. Weil, while you discuss in your testimony that wage theft related to the fissuring of work place can be devastating to low wage workers in terms of lost earnings, can you elaborate on what the loss of earnings means to a worker practically?

Mr. WEIL. Thank you. You know, I think one of the starkest things I saw as Wage and Hour Administrator were the actual cases of the impacts of the loss of wages by hardworking people because of practices like misclassification.

Because of the fact that they were not being compensated, not just for the minimum wage but even for hours worked. For a typical family that could mean up to 4 weeks or 5 weeks of childcare. It could mean the practical things like not being able to pay rent for a month.

Because so much of misclassification affects low wage workers, its impacts are magnified because of how tight those household budgets are and because in many cases their real wages haven't gone up in decades.

Ms. ADAMS. Yes, and many folks are just kind of living paycheck to pay check and if it is not—if it is not going to be correct then that is a problem.

Mr. WEIL. Right.

Ms. ADAMS. So during the Obama Administration, OSHA defined a policy where it would hold both temporary worker agencies and host employers responsible for safety and health violations depending on the circumstances of the specific case.

Can you describe for us how that works and whether it is an effective way of ensuring the safety of workers employed by temporary agencies?

Mr. WEIL. Yes, thank you for the question. OSHA's temporary work policy was very much a recognition of what had changed in the workplace. And it used the fact that it holds responsible not just the direct employer but what is called the controlling employer which can be the company that's hiring the staffing agency or temporary working agency also responsible for complying with laws.

And that requirement for both parties who both have a stake in the game to take responsibility for compliance with OSHA was an extremely important part of OSHA's enforcement policy and improving or reducing the likelihoods of injuries and fatalities particularly in complicated work settings where you do have multiple employers.

Ms. ADAMS. Thank you. Ms. Beck, do you believe that your employment practices have a positive impact on your brand?

Ms. BECK. Thank you for the question. I generally believe that investing in good employment practices is good for business and our business at large. And for us, our brand is the thing that we promise to our customers. So investing in a good employment practice enhances our brand, provides our customers with a better product, increases customer satisfaction.

Ms. ADAMS. So are you saying that it does have, your practices do have positive impact on your brand?

Ms. BECK. I believe that to be true, yes.

Ms. ADAMS. Okay. Thank you very much, Madame Chair, I yield back.

Chairwoman WILSON. Thank you. Now, Dr. Roe, Tennessee.

Dr. ROE. Thank you, Madame Chair. I don't know what economy we are describing, but in my lifetime, this is the best one I have seen.

We have 7 million open jobs. The unemployment rate is 3 and a half percent, it is the lowest since 1969. Median incomes are up 12 percent. Real median household incomes are up $7,000 under the Trump Administration to $65,000 plus.

African American teens, unemployment in 2010 was 48 percent. It is now at a record low. African American unemployment is at 6 percent. Latino, the lowest on record. I mean, these are all things we should be celebrating and talking about and how we improved that.

And one of the things I think that Ms. Beck, and I totally agree with your business model. And when you are done, would you come, please send your people over and show me how to use this electronic thermostat I have at my condo. That would be very helpful because I can't figure it out.

It is a model that you have that we used in our practice forever. We have an employee that has been with my medical practice for 42 years. And I hope you have the same success we have.

and, Ms. Greszler, I'm going to go over just a couple of things I think that are important in the sharing economy. When I was a resident physician, we didn't make very much money and so I needed to go out and work in emergency rooms to make extra money to support my family.

That is exactly what you were talking about. I went into rural communities and worked a shift at night or maybe worked the entire weekend to help support my family. It worked perfectly.

The other day I got in an Uber with my wife to go to an event. The person was, who drove the Uber was a flight attendant who had rented a car that you could get off the street, she wanted to make some money so she could work that weekend to make a little, have some fun that weekend and not spend any of her hard earned money she makes on an airplane taking care of me. And she rented the car, drove the Uber and pocketed the money. I can't think of anything that works better.

I thought it was one of the neatest things I have seen in that type of economy, to let people decide what is good for them. And right now, the things that we need in this country, workers, and Ms. Beck pointed it out are workers with skills both hard and soft skills.

And I think that is what is lacking at the lower end and in our state we are, in Tennessee, we are trying to do that, providing free community college and free technical school for people to bring those skill levels up so they can make more money and they're more employable.

The—just as an independent contracting, Ms. Greszler, as an independent contacting varies by industry, the one size fits all policy ignores the complexity and nuances that I just mentioned of such work arrangements and the value they bring to the economy.

In your opinion, how would this change in the Nations employment laws affect the millions of hair dressers, child care workers, other professionals who currently rely on those flexible work arrangements afforded them by their designation as an independent contractor?

Ms. GRESZLER. Well, I think independent work the biggest benefit of it is the flexibility and also the ability to earn additional income. There is no cap on the income you earn.

When you are in a traditional employer employee relationship, you are often limited 40 hour per week to your salary and often prevented from working from anybody else.

Only 16 percent of people who participate in the gig economy use it as their primary from of income. A lot of them are just working on the side and whether that's just to have some extra spending money, to save for education for their children, maybe for their own education, or to start a business of their own to have some income

that is coming in while you are becoming an entrepreneur, those are all things that are the choices those individuals make and they lead to better outcomes going forward.

And so I don't see how restricting people from being able to earn additional income and being able to have flexibility will be helpful going forward. Flexibility is something that's been particularly helpful to women who are now in the labor market in equal numbers and without that I think we will have a lot of mothers that simply choose not to work at all because they can't find a job that meets their demands.

Dr. ROE. You know, people are renting out part of their homes, sharing their homes. There is all kinds of things that benefit everyone.

Professor Rogers, I have got one question for you. I know you support the PRO Act, but do you support the part in there that doesn't allow for a secret ballot?

We just had a letter written by many members of the, I would have signed the letter, on the USMCA agreement requiring a secret ballot for unions in Mexico.

And, look, if you want to belong to a union that is your business. You have a right to do that. I think that is the single most important thing we have as an American is a secret ballot.

Mr. ROGERS. I support the majority sign up procedure under the PRO Act.

Dr. ROE. The question I asked was do you support a secret ballot so that I can go in there if I want to vote for a union I can, if I want to vote against it I can. Nobody looking over my shoulder.

Mr. ROGERS. So the problem is that workers under existing law can demonstrate unambiguously that they want a union and their employer can refuse to recognize that union—

Dr. ROE. My time has expired. Thank you.

Chairwoman WILSON. Thank you. Mr. Courtney from Connecticut.

Mr. COURTNEY. Thank you, Madame Chairwoman, and thank you to all the witnesses for being here today. Particularly, Ms. Beck, again for your testimony that shows that innovation and flexibility in a workforce are not incompatible with the employer employee relationship.

And again, I think it is just a really impressive bit of testimony today that is refreshing, you know, to sort of reiterate that point.

Dr. Weil, you proposed ensuring that certain basic protections are tethered to work rather than to the employment relationship and this includes ensuring all workers no matter their classification as paid for their work earn a minimum wage are guaranteed a basic right to a safe working environment.

Can you just sort of flesh that out a little bit that, you know, you know, how this would actually work in practice that using work as the trigger as opposed to the employment relationship?

Mr. WEIL. Thank you, Congressman Courtney. I think what we are talking about is a core set of rights that are so fundamental, we want to get out of this box are you an employee or are you an independent contractor.

Those are legitimate and important categories that I think play very important roles in our workplace and labor laws. But things

like not being retaliated against for the use of rights which is fundamental to our whole system of workplace rights, being assured a safe and healthful workplace and being assured that you will be paid for the work you do to me are fundamental features that we should make sure people receive regardless of their employment status whether they are an employee or an independent contractor.

The mechanisms to ensure those might differ somewhat but you want to make sure that those ends happen when a person is at a workplace. And we get out of this box of figuring out for something so fundamental.

Mr. COURTNEY. Again, based on your background, I mean, would, again, for example right to getting paid for your work, I mean, tied to work rather than employment necessarily. I mean, would that be housed in your old division at the Department of Labor? I mean, is that sort of the—I mean, at some point we have to deal with legal structures here.

Mr. WEIL. Right, right. I think it could be. I think it could be and I think we are talking about provision of minimum payment for work whether that work is done through an employment setting or an independent contract setting.

I think the most important thing is to assure that those rules are clear to all people who employ people and that they make their decisions accordingly.

Mr. COURTNEY. Okay. And again, I know you have done, you know, great work on this issue, written books and so in the course of your research, do we have any idea about the number of workers who are not covered by OSHA as a result of the fissuring workplaces?

Mr. WEIL. Well, the most direct answer to that would be we know that self-employed workers have no coverage under OSHA. And if you look at that that's 16 million workers right there.

The estimate I gave before that roughly somewhere between 20 percent up of the workforce is in fissured relationships, I think also gives one a sense of the lack of coverage of so many of those workers.

Mr. COURTNEY. And because of that lack of OSHA protection, I mean, do we have any sense of just, you know, the risk level and the exposure to injury and fatalities as a result of that, you know, shortcoming?

Mr. WEIL. Absolutely, I mean, I can give you two quick examples. One is a story that happened for Amazon Flex workers. Amazon Flex workers deliver packages to people but are paid as independent contractors.

There have been a number of cases reported of fatalities for those flex workers working long hours and because of the incentive structures.

It's also becoming more common in the meat packing industry which we know is a very dangerous industry for certain work to be done at night by subcontractors and increasingly that practice as we have found in many other parts of the economy, that subcontracting is done to people paid as independent contractors.

And again because of that misclassification, those workers in very dangerous settings have no OSHA coverage.

Mr. COURTNEY. Well, thank you for, you know, again putting the focus on that. I am, you know, certainly believe that as a committee and as a Congress, you know, we can figure this out, you know. This is really not mission impossible in terms of providing basic protections for people and still allowing companies like Ms. Beck to innovate and thrive and succeed.

And, you know, to say that they are incompatible and that we just have to kind of totally release people into this brave new world in my opinion is just an unacceptable level of risk. And we again as a country we can do better than that. I yield back.

Chairwoman WILSON. Thank you, Mr. Courtney. My Byrne.

Mr. BYRNE. Thank you, Madame Chairman.

Chairwoman WILSON. From Alabama.

Mr. BYRNE. Good morning, everybody. In my prior life I was a labor and employment attorney representing small to medium sized businesses. And you can sort of picture my clients. They don't have HR directors because they can't afford HR directors. They are just trying to make their business go. And it is hard. It is hard to run a business these days.

And so when we add complexity to the laws that they have to comply with, you leave them with one of two choices. One is to go through an inordinate amount of expense to try to get legal advice so that they comply with the law. Or that they inadvertently fail to comply with the law.

That is not helping the American economy and that is certainly not helping the people that work for those small businesses. So I look at the definition of employee in this PRO Act, I got to tell you, even as a lawyer, I look at that, I would have a hard time advising some of my clients whose an employee and whose not. Who is an employer and who is not.

We actually had a meeting a year or so ago. We met with some gig workers and one guy as I recall was both an Uber and a Lyft driver.

And I asked him I said do you consider yourself to be an employee or an independent contractor? And he said I consider myself to be a franchisee. I said well, I know you are not that. But even he was confused.

So I am trying to think who we are benefiting here with all of this. Now, I know that there is a big push out there to totally destabilize the equilibrium between labor and management under our labor laws.

Because unions even under a very friendly administration, the Obama Administration, continued to lose market share because what unions are selling, workers aren't buying. They don't have the stuff that workers are looking for.

So we think by piling on these sorts of definitions, somehow we are going to give the unions a better chance here. I don't think so. I think you are just going to make things work for small or medium sized business and for those people that work there. Because all they want is a job.

And, Ms. Greszler, you are right. There are lots of young women out there that they want a job but they want to control their hours and so they want to work for themselves.

But if we make it so difficult for a business to know when somebody is an independent contractor when they are an employee, those businesses are just going to say well, I am just not going to hire anybody. I am going to quit doing it which means we have cut out opportunities for those young women that have those business. I have got them in my own family.

[The statement by Mr. Byrne follows:]

Prepared Statement of Hon. Bradley Byrne, Ranking Member, Subcommittee on Subcommittee on Workforce Protections

Thank you for yielding.

American workers are benefitting from a strong economy ushered in by Republican pro-growth policies. Wages are on the rise, jobs are being created, and unemployment is at a 50-year low.

Instead of building on these successes, Democrats in Congress are advocating policies that will take our labor laws and economy backwards.

Specifically, Democrats are pushing legislation that will severely restrict the independent-contractor classification, increasing costs and legal risks to business owners.

These efforts are ongoing even despite the fact that many Americans in the modern economy desire to work for themselves on their own terms. Workers recognize and seek out the freedom and flexibility these arrangements provide. This is a growing trend among American workers that should be encouraged, not impeded.

Yet, Democrats want to penalize this kind of entrepreneurship by creating an expansive, confusing definition of "employee," which will increase costs for business owners as well as consumers, while limiting work opportunities for individuals who desire flexibility rather than working for only one employer or being forced into a one-size-fits-all union contract.

Democrats claim that many if not all employers are intentionally misclassifying workers to deny them protections and benefits. But under the Fair Labor Standards Act (FLSA) there are already sufficient incentives for employers not to misclassify workers. Indeed, there is a great deal of misinformation out there about the issue of worker misclassification. In fact, during our last subcommittee hearing on this issue, a witness confused the source and substance of a related statistic with misquoted data erroneously attributed to the federal government. As we proceed to examine these issues, it is important we create and develop policy based on the best and most accurate information possible. It's not all bad news. The Department of Labor (DOL) has taken steps to improve clarity and flexibility for workers and employers alike, empowering workers to earn more in the strong U.S. economy. For example, DOL's recent overtime rule provided a responsible, reasonable solution that will allow more than a million additional workers to qualify for overtime pay without significantly increasing the burden on employers.

Additionally, DOL and the National Labor Relations Board are working on proposed rules to update the standard for joint-employment under the FLSA and National Labor Relations Act, respectively. These updates will create clear, precise standards so that workers know upfront who controls the terms of their employment and with whom they will negotiate wages and benefits, and businesses know upfront the extent of control they can exercise without subjecting themselves to unwanted union harassment and costly litigation. The Trump administration's joint-employer standards will replace unworkable Obama administration standards that increased compliance costs and created confusion for workers and businesses alike.

We need more policies like these that reflect the realities of a 21st century workforce. Rather than supporting backward-looking proposals which promote outdated workplace policies, Republicans champion reforms that expand opportunities for flexibility, innovation, and entrepreneurship to give workers and job-seekers opportunities to compete successfully in the 21st century economy.

I look forward to hearing from our witnesses today.

Thank you, I yield back.

Mr. BYRNE. So, Ms. Greszler, let me ask you. In light of this definition that they have got of employee and employer under PRO Act and based upon your expertise, do you believe punishing small

businesses with costly fines for misinterpreting under workable definition of employee is the right approach?

Ms. GRESZLER. No. I think you will end up driving these small businesses out of business. The PRO Act includes a $100,000 fine for misclassifying an employee. The average income of a small business owner is $73,000 per year. That would wipe out more than their entire income for the year. These small business owners simply can't pay that fine, but they also can't comply with the law. It's so vague what the definition is now under those provisions of an employee versus a contractor that they're probably just going to not hire any contactors anymore.

As a result of that you have less specialized services, you are having lower quality that you are providing to your customers. You are going to end up losing those customers to the bigger businesses that do have the money to pay for the expensive lawyers to tell them whether, what they need to do in terms of contract versus employee relationships.

It's just going to benefit the big guys and drive out the little guys.

Mr. BYRNE. Now that and that is what I am most worried about. You are right. The big guy is going to take care of themselves. They will be fine. I am not worried about them.

But most people I America work for small to medium size business. Now you go into an area like the I represent in south Alabama, we don't have that many big businesses. Most people, the vast majority of people work in a small or medium sized business.

And most of those people just want to go to work every day, do their job, get paid fairly, get fair benefits, and all this stuff we are arguing about up here doesn't mean a hill of beans to them. It really doesn't. But we would make things all this complicated to try to solve a problem that is not really there.

So, Professor Rogers, I am going to ask Dr. Roe's question again. It is a real simple question. Yes or no. Do you support secret ballot elections?

Mr. ROGERS. I support secret ballot elections in instances where employees have a legitimate right to choose a union. And you—

Mr. BYRNE. Do you think they don't have that now under present law?

Mr. ROGERS.—we have found under our existing law and practices that there, those rights are simply illusory.

Mr. BYRNE. Well, I can tell you from my experience and I have done dozens of union elections, you are absolutely wrong. They have plenty of rights. They exercise those rights and taking away their right to exercise that ballot secretly would be a slap in their face and I yield back.

Chairwoman WILSON. Thank you, Mr. Byrne. Mr. Morelle, New York.

Mr. MORELLE. Good morning, thank you, Chairman Wilson—Chairwoman Wilson and Chairwoman Adams, for holding this hearing and to all of our witnesses for being here today to share their expertise as we discuss the future of work and I am struck by this.

I don't see this necessarily although I understand why people draw this conclusion. The question before us today is really about

independent contractors, the fissured work place and not whether you are pro union or non-union. This is really about how we properly classify people for the work that they do. And the United States is witnessing a rapidly changing workforce as the 21st century economy continues to unfold, and it is critical seems to me that we consider the future of work but we also consider the future of worker benefits.

And we know that when an employer-employee relationship exists, the employee has access to core statutory protections under the NLRB, FLSA, and OSHA but that isn't the case when you are classified as an independent contractor.

So this is really important as we sort of consider this. And there is obviously questions to access to health coverage, retirement plans, paid leave, workers compensation, and unemployment insurance all of which is by no means guaranteed if you are an independent contractor.

I do want to get to another topic, but I was struck by something I didn't entirely plan to ask about but, Ms. Beck, I am just curious about the model that you use.

Are the, are your employees, do they work as other platform opportunities where the worker makes the decisions about when he or she is available for work? Do you sort of log on when you are available to work or are there set hours? How does that model work?

Ms. BECK. Thank you, that's a great question. For us so we do provide all of the protections, benefits, wage, insurance, that are commensurate with a W–2 employee relationship. And we also provide sort of a fixed hours in which you can work but that doesn't mean that every worker of ours works all of those hours.

So within the guidelines that we provide, workers have, they work independently, they work autonomously, and they check in and check out as appropriate.

Mr. MORELLE. So if just to—if I am a worker and I typically work 9 to 5 but on some morning I have to take my, you know, family member to the doctor and so for those two hours I am not available, is there a bank of hours that you don't have to work or is it simply that they indicate that they are not available for that time and work their own hours? And is there a minimum number of hours they have to work weekly or how, I am just trying to understand the model because it does seem very innovative.

But it also seems, I am just trying to understand if it works like the other platforms do who argue that they must be independent contractors and not employees?

Ms. GRESZLER. I think our business model is, you know, we have designed the system that we use based on our business model. So but to answer your question directly, there is no minimum number of hours that an employee has to work on our platform although most choose to work 4 or 5 days a week.

If someone has to take time off they ask for it, they clock out, and then they clock back in when they need to come back.

Mr. MORELLE. So there is not you have X number of sick days or X number of vacation days. They just sort of work when they choose to work?

Ms. GRESZLER. We have sick days and vacation days commensurate with the laws that we otherwise follow but it is flexible within those guidelines.

Mr. MORELLE. Great. Well, thank you very much and I agree and associate myself with my colleague and friend, Mr. Courtney's remarks that it does seem to me that you can do this and still have an innovative model for your business.

It clearly, I don't think to those who make the argument that you can't have innovation when you continue to have an employer employee relationship and I think your example gives evidence of that.

I wanted to just shift for a second and I know I only have a minute but thinking about retirement plans particularly as there is a current retirement crisis facing our country and too many people, young people in particular building towards their retirement and I thought perhaps, Professor Rogers, you might just—can you comment on how classifying workers as independent contractors makes it more challenging for people to have adequate retirement?

Mr. ROGERS. Sure and thank you for the question. I think this occurs in a couple ways. So, if we are talking about the lower wage workforce, individuals who are classified as independent contractors often have lower pay than individuals who are classified as employees as Dr. Weil indicated. Because of that there is simply less money to go into retirement funds even when they're available.

The second reason is that many if not most companies do not provide such funds to independent contractors, the savings vehicles that they would provide to employees.

Mr. MORELLE. This is a great topic. Thank you, Madames Chairs, for it. Obviously, I am out of time but I think we will have further discussion and I appreciate it.

Chairwoman WILSON. Thank you, Mr. Morelle. Mr. Taylor from Texas.

Mr. TAYLOR. Thank you, Madame Chair, and thank you, Madame Chair, appreciate this hearing and appreciate to the witnesses.

Ms. Greszler, you actually represent diversity on this panel. You are the only one without a Harvard degree. Nobody got that one. All right.

So I just wanted to, you know, I am very fortunate to represent a very successful community in Plano, Texas which actually has the highest per capita income city in North America with over a quarter million people.

And I have employers that have pursued a W–2 employee strategy and I have employers that have pursued aggressive use of the 1099 structure, you know, for instance, insurance companies use 1099 contractors to do insurance adjusting. That is the normal model for insurance adjustment.

And 1099 contractors will, and many IT professionals in Plano Texas that are using the 1099 model to go in and do piece work, right. So they are building a particular technology platform, it is a two, three month job. They are going and doing that for the next company. They are doing that remotely and so the 1099 prospect it just it is a better way for them to do that business.

One thing that I have noticed is my state is a right to work state and businesses that come into my state consistently talk about how that is a feature, that is why they come to Texas. We have, you know, very low unemployment.

Actually, our income growth in the state of Texas in the first two quarters this year was 7 and a half percent. Just so just staggering increasing in income growth in Texas as a right to work state.

One thing that I have noticed looking at the charts is that union membership among young people is actually going down, right. So younger and so it is not only are you seeing total numbers for union membership go down, but you are seeing the younger, the new generation seems to be less union oriented, particularly in the technology space which I have a lot of technology companies in my district.

Can you speak to why that is? I mean, what is going on? What in your mind giving a National trend, I see that locally but what do you see on a National level?

Ms. GRESZLER. Well, I think younger workers prefer having more autonomy and they also want a structure that not only lets them be rewarded for the things that they achieve, a pay for performance type structure, but also something that's not just a rigid ladder.

It has no, you know, they want no cap. They want to have open opportunities so that they can say my income might double in 2 years instead of I know it's going to raise three percent every year and not go beyond that.

And so they want more options and that's not something that unions are offering. Instead, you know, the unions are rigid pay scales and they're providing services that frankly are not representing the workers themselves and I think that is why we see a decline in the desire to be a member when a worker actually has a choice as they do in Texas is that people are choosing not to be there anymore because they don't want to pay for something that's not benefitting them.

And they also don't want to pay for other things that are taking place in terms of lobbying against policies they might be against, corruption that's happening in the unions. These are hard earned dollars and if you are going to be contributing hundreds if not a thousand dollars of your paycheck to a union, you want to see it benefitting you directly.

Mr. TAYLOR. Now in the, the other thing I just want to talk about, you know, just going to talk about the economy growing generally and how as unions decline, the economy continues to improve. I mean, is there a correlation there or is that just something that is happening?

Ms. GRESZLER. No its absolutely—you can compare the right to work states versus the non-right to work states and over the past 25 years, median income growth and that's what we are talking about here is we want workers' wages to go up. It's increased 165 percent in right to work states compared to 99 percent in the non-right to work states.

And it's the same thing when you look at employment growth. Look at GDP growth. It's all far higher in those states that are right to work that give workers those choices in the, as a result of choice as more opportunity.

Mr. TAYLOR. Thank you. And, Ms. Beck, just to talk about your business model and it is interesting to hear how you think, thought through the 1099 contractor versus the W–2 and I think you have really made the right choice for your business.

But, I mean, have you ever or would you ever consider hiring a 1099 contractor to come in and evaluate your HR system or to, you know, do some IT work or are you just sort of ideologically opposed to 1099 contractors, you would never consider hiring one?

Ms. BECK. Thank you. It's a great question. At the end of the day, I think every business has to make the choices that both benefit its, you know, business but also its workers. So as a, you know, blank statement we are not opposed to 1099 contractors for everything.

Mr. TAYLOR. Okay.

Ms. BECK. I just think that when you are thinking about you own workforce and your front-line staff and the people who are really driving the core of your business, then the relationship has to be the right relationship. And for us, that was a W–2 relationship versus a 1099.

Mr. TAYLOR. Sure, no and I appreciate that at the core of a business and again, you know, at least, you know, in Plano, Texas we have a numerous businesses that are enormously successful that pay very well that are using the 1099 model to grow their business and provide a really good lifestyle for the people that had the fortune of living in Colin County. Madame Chair, I yield back.

Chairwoman WILSON. Thank you. Thank you, Mr. Taylor. Mr. Norcross, New jersey.

Mr. NORCROSS. Thank you. Appreciate you holding this hearing and talking about the future. And really like the comments from all the folks who start talking about we can look at the future by looking at today.

And, you know, the idea of somehow blaming every problem on the unions today it is just absolutely remarkable. I guess it is the only talking points we can get across. So there are other things other than that.

Having spent close to 40 years in the business, when we talk about corruption where we hear that. It is in the business side of the equation. There are bad people everywhere. But your very own statistics saying that union membership is declining yet you are blaming everything on the unions is just remarkable. So I will just leave that.

Let us talk about the gig economy and the subcontractors or the misclassification. Yeah. This is a great entrepreneurial spirit. I want to become my own boss, but you know what, I want more than one customer.

Mr. Uber of the world, you are my only customer and I am an independent contractor so now I become my own HR manager. I become my own tax consultant. I am my own safety director, so I am up on all the current issues. I am my own lawyer because I might get sued. I am my own mechanic because now I have to take care of that vehicle. And oh yes, I am my own retirement consultant so when I get to those golden years, I might have a few dollars put away.

So the idea of wanting to take on all that responsibility so you can make minimum wage is just beyond me why we think this is a really good idea.

But let us just home in on one of those issue. Dr. Weil, OSHA. I now become an independent contractor. I am an electrician. I go into a refinery to work as that one-man job. Tell me, what are the chances of that worker being up to snuff on the OSHA regulations?

Mr. WEIL. That's a great question, Congressman Norcross. There are a few problems that worker has. Number one is as you say, the likelihood they understand the health and safety standards that should be protecting them is probably pretty low because for all the reasons you've just outlined.

The real problem is if that person is self-employed independent contractor but is being put in that environment and sees a problem, that person has no standing because of that status.

So our laws make it very difficult for that person to do anything because of that status. So it's that, those coupling of that problem of both the likelihood they don't have the information they need in a case like OSHA and then the absence of their right to complain which is basic to the whole OSHA system working.

Mr. NORCROSS. And the legal side of it they are now because they are their own company, they are liable for any issues that happen on those jobs.

Mr. WEIL. That's right. That's true.

Mr. NORCROSS. So there is a difference between staring your own company and growing it and we don't want to dissuade anybody from going and building that great company. But the gig worker is completely different.

Do you think anybody from Uber is putting away, I don't know 15 percent of the money they earn so that someday they will be able to retire? What are the chances?

Mr. WEIL. It's a huge challenge because that Uber driver, that Lyft driver, independent contractor working on a platform like that, not only is going to have to cover the expenses for things like gasoline obviously, for paying for expenses on their cars, for keeping their car up, but then there are all those hidden expenses that its very unlikely that they're putting money aside, like long term retirement. The other thing I would add to that is the Uber platform is really a branded business. I mean, we have a verb we use. We say we are going to Uber somewhere.

Now that to me says you have a brand there that employs very cleverly a large group of people to make it work but all the terms that matter to an independent contractor, a true independent contractor are being determined by the platform.

Mr. NORCROSS. So this isn't just to beat up Uber, it is just as you said it is a verb and when we look at their model of innovation doing it through the app I think is wonderful.

The idea of making everybody a subcontractor so they defer all those costs. The Uber driver pays his own Social Security, right? Both sides of that equation. If there is not enough work, do they collect unemployment?

Mr. WEIL. No, they don't. They are not covered by unemployment insurance as an independent contractor.

Mr. NORCROSS. So with my 5 seconds left I want to make a distinction. There is a difference between becoming an entrepreneur, starting your own company and trying to just deter fault for your cause of being an employee. With that I yield back.

Chairwoman WILSON. Thank you, Mr. Norcross. Dr. Shalala of Florida.

Ms. SHALALA. Thank you very much, Madame Chair. I do want to point out that the House of Representatives does not have an HR office which I think we should have obviously.

But, Dean Weil, I, you have worked in the Department of Labor and the Hour and Wage Division if I remember correctly was founded in 1938 and you talked about only having 1,000 employees.

Would it have made a difference if you had 5,000? Have you thought about how we would manage enforcement in a gig economy, in this new economy with lots of independent contractors?

And how we would think about reorganizing not only that division but the entire Department of Labor?

Mr. WEIL. Thank you, Congresswoman Shalala, for that excellent question. That represents I think one of the biggest challenge we faced was the fact that we had 1,000 investigators to cover 7.3 million workplaces. That is a challenge that any enforcement agency always has.

But when you layer on it the complexity of what has happened with all of the different forms of subcontracting and independent contracting, it makes it incredibly difficult for an enforcement agency, whether its Wage and Hour or OSHA or any enforcement agency to undertake its task as required by the law.

I think it requires one to think differently which we tried to do, be more strategic in how you use those scarce resources and even with more resources you would still have to make the tough choices about where you prioritize your enforcement so that it really has an impact on compliance and improving compliance.

Ms. SHALALA. So have you also thought about, I have been on the website 1,000 times about information for individual contractors that is usable so that they know what their rights are.

It seems to be that you have to almost re-conceptualize the whole concept of enforcement if we are moving to this kind of an economy.

Mr. WEIL. I think that's very true. I think that one has to think about the whole tool box. That enforcement and vigorous enforcement is foundational but there is also things as you state like education, outreach, trying to make people aware about what the law says they're supposed to do.

We use for instance administrator interpretations because we wanted to inform the employer community about what the law says and what the responsibilities were.

Ms. SHALALA. Thank you. Professor Rogers, how do you think about whether benefits, a benefit package ought to be provided by the public sector versus the private sector?

You are at Temple which is on TIAA–CREF I think. And for those of us that are academics, we have a mobile, that is unless our states don't have their own systems, we have a mobile system. I have been in, taught in 5 universities and so I have TIAA–CREF,

you know, in all of those places and cumulatively it doesn't matter where I have gone, I have had the same pension system.

Mr. ROGERS. So thank you for the question, Congresswoman Shalala. TIAA–CREF is a great example of a portable benefits system that actually works quite well. Because you have a large number of university and college professors around the country that are able to participate and multiple employers in the different universities participate as well.

You know, I think that's a model that can be replicated in the industries where we have many, you know, multiple different employers but we would have to create incentives for those employers first off to treat their workers as employees and to give them generous benefits.

Ms. SHALALA. What about buying into those systems for individuals?

Mr. ROGERS. So this was—excuse me, what was the last part?

Ms. SHALALA. What about buying into those platforms for individuals?

Mr. ROGERS. So Washington State has created a mechanism where individuals and I believe very small companies can buy into a public benefits system. That I believe covers paid time off or paid leave.

There was a proposal a couple of years ago to allow individuals to buy into CALPERS, the California Public Employee Retirement System.

And there is a pretty strong economic argument for permitting that because the administrative costs are simply so low and because CALPERS can negotiate for much better investment rates, fees for investment providers.

Ms. SHALALA. Thank you very much. It seems to me this is the way we ought to think about it. What existing platforms can we use and rethinking the enforcement mechanisms at the same time. Thank you, Madame Chair.

Chairwoman WILSON. Thank you, Dr. Shalala. Mr. Scott, chair—oh, Dr. Foxx.

Mrs. FOXX. Thank you very much—

Chairwoman WILSON. I have you down as ex officio.

Mrs. FOXX. Thank you very much, Chairman. I want to thank our panelists for being here today. Ms. Greszler, in your testimony you mentioned that the biggest growth component in the economy appears to be individuals who are supplementing traditional work with gig type work.

This seems like an important point to consider when crafting Federal labor and employment policies. How should we account for the future growth of the sharing economy and the demands of modern workers who seek freedom and flexibility in their work arrangements?

Ms. GRESZLER. Well, I think we shouldn't stop it from happening is the first thing. And we need to recognize that first the gig economy is a small portion of total employment. It's about 1 percent but it's a huge opportunity for workers. Workers aren't using that as their primary source of income. If you are an Uber driver and you want a steady job, you got a taxi cab company and you get that.

These workers want something that is optional, that allows them to pick the jobs they do, the days they do them, and it's particularly beneficial to less experience or disadvantaged workers.

Think of somebody who has a disability and they might not be able to wake up every day and be able to perform a 9 to 5 job, but they can say hey, I feel good today, I can go out and drive Uber. I can do some things on Task Rabbit.

And so we are going to isolate those people and force them to not having a job at all in some cases or not getting that additional income that they would like for whatever purpose it is if we try to just kill this sector of the economy.

Mrs. FOXX. Of course, this way of work has been around since the beginning of time. When I was in college and working full time, I typed other people's papers at night to make a little extra money. So those of us who are ambitious and wanted to make money have always found ways to do this on the side.

Ms. Greszler, Democrats are so certain that labor unions are the key to the future of work that they are willing to sacrifice workers own liberties to achieve the goal of enabling labor unions in all work places around the country. As you know, this committee recently approved H.R. 2474, the Protecting the Right to Organize Act on a party line vote after Democrats unanimously rejected dozens of amendments to preserve and protect workers' rights.

What are some of the ways this radical bill undermines workers' rights in order to satisfy Democrats desire to force more workers into labor unions?

Ms. GRESZLER. There's all sorts of problems here. Everything from taking away an employee's right to not pay a portion of their income into the dues of a union membership. Privacy implications here, having your personal information including your home address given to a union when you don't want that to happen.

Having a third-party arbitrator step in, be the one that is in control of those negotiations.

And then talking about the secret ballot election. I mean, that is the fundamental component of our democracy is that you have the right to choose, have a secret ballot and have nobody else look at that.

If we are going to support this type of provision, I would ask those who do support it if you would also support having people who work for Donald Trump's campaign in the next election be the ones that go to individual homes and take the votes of individuals.

Or do we think that instead, those people should be able to work and walk into a secret ballot to booth to cast their votes.

Mrs. FOXX. Thank you. It is especially ironic that these people want to only vote on the MCA if the, we force Mexico to have a secret ballot for union elections but not in this country.

Ms. Greszler, in your testimony, you point to the fact that small businesses often use contractors. In fact, my husband and I have done that over the years as we were contractors. In fact, businesses with only 1 to 4 employees utilize 6.7 contractors on average.

Can you explain how contracting is beneficial to both the business and the contractor and what might be the impact that the Democrats desired definition of employee were to become the law?

Ms. GRESZLER. Contracting is particularly crucial to smaller businesses and that's why we see them using more contractors.

My sister owns her own veterinary clinic in the area. It's small and there is a number of female doctors there. It's primarily all female staff and she uses relief doctors to come in and that's the way they have been able to provide their employees with paid family leave.

Without being able to use those relief doctors, they wouldn't be able to offer that. And so this is something that is so crucial to small businesses helping them thrive and grow.

Mrs. FOXX. Thank you. One more question. Can you elaborate on how Congress can better foster an environment that will lead to an even stronger economy, greater innovation, higher wages and more opportunity for American workers and businesses alike?

Ms. GRESZLER. Freedom, opportunity, choices, you know, the tax cuts have been doing wonderful things for American families.

The average family with children has $2900 more in their pocket every year. $45,000 over 10 years. And that gives them the choice. It gives them what they want to spend that money on. It helps them afford childcare, all types of opportunities going forward.

So whatever we can do on the tax side, a lot of Americans don't realize that's actually everyone's biggest expense. They spend more on taxes than they do on food, clothing and housing combined.

So let's lower those tax burdens, and also on the regulatory side, this is just a huge burden. I don't think that many people have had the experience of running a small business or even employing one person but it's incredibly complex and there is this great fear about doing something wrong and being charged huge fines as a result of that and so whatever we can do to reduce those burdens going forward.

Chairwoman WILSON. Thank you.

Mrs. FOXX. Thank you very much. Thank you, Madame chairman.

Chairwoman WILSON. Mr. Scott, our chair—

Mr. SCOTT. Thank you, Madame Chair.

Chairwoman WILSON.—education and labor.

Mr. SCOTT. Thank you. Dr. Weil, 5 minutes went by pretty quickly and I think there was, did you get to answer all the questions I think the strategic enforcement was the, what was left off of your statement. Were you able to get that, what you wanted to say in?

Mr. WEIL. I did but I would be delighted to talk further about the importance of that in this workplace.

Mr. SCOTT. What did you want to say?

Mr. WEIL. Well, I think as I was responding to Congresswoman Shalala, we face a real challenge under any circumstance given resource constraints, and I appreciate the attention that has been given to the importance of enforcement resources.

But we also have to think about how we deploy the and how we work with other parties and those other parties include state governments, worker advocacy and unions, and employers in making sure that people comply and they understand their rights, particularly given the complexity of multi-employer, joint employer, and rooting out problems like misclassification in the workforce.

I think we showed that one could make inroads in that during the Obama Administration, but I also think we showed the need for additional enforcement resources for all of our workplace agencies.

Mr. SCOTT. Thank you. Professor Rogers, you indicated that it is difficult to form a union today. Can you say, give a little example of what you are talking about?

Mr. ROGERS. Sure, I'd be happy to. You know, basically workers face a very high probability of retaliation from their employers when they begin to organize.

Sometimes and often that retaliation is frankly illegal. It's unlawful under the National Labor Relations Act but it's very difficult to deter because the NLRA is limited to awarding back pay and workers have to actually, you know, mitigate their damages in the meantime.

So that means if you begin to organize and you have a very substantial risk of being terminated, then waiting months or even years to get your job back. If you're making under $15 an hour, under $30 an hour, workers, you know, you will make the rationale choice not to stand up in the first place because the risk is simply so high. That's one among many, many problems. I could talk about this for a while.

Mr. SCOTT. You mentioned the problem with contract workers. We have said a lot, a few things that a contract worker doesn't get that an employer, employee would get like minimum wage and overtime, workers comp, unemployment compensation, you know. What about if you are an independent contractor, what rights do you have on unemployment discrimination?

Mr. ROGERS. You have to no rights under Title VII. You have some rights under Section 1981 of the Civil Rights Act for racial discrimination but no rights under Title VII as an independent contractor.

Mr. SCOTT. What protection would you have as a whistleblower?

Mr. ROGERS. Under which statute? Just in general?

Mr. SCOTT. Well, just in general as a whistleblower for retaliation for being a whistleblower, retaliation for reporting injuries or an unsafe workplace?

Mr. ROGERS. In general, none. If you're not covered as an employee under the act, you're not covered by the retaliation provisions of the act. And that's true for the NLRA, FLSA, ERISSA, OSHA.

Mr. SCOTT. And what could be done to protect workers who are, who may in fact be an independent contractor under present law? How would they, how could they be protected for things like minimum wage, overtime, unemployment compensation, workers comp, discrimination?

Mr. ROGERS. Well, I think there are a couple issues there. One is that a lot of workers are misclassified as independent contractors.

When workers are misclassified, they're denied rights under all those statutes even though they really should be entitled to them.

Solving that is, you know, a matter of changing the definition of employment and holding companies to duties toward workers over whom they have power regardless of whether they kind of qualify

under the common law tests or certain other tests. You know, there are various bona fide independent contractors, but bona fide independent contractors tend to have the labor market power to negotiate for decent wages and working conditions on their won.

They're not necessarily the workers who need protection under the Fair Labor Standards Act or the NLRA for example.

Mr. SCOTT. And if you are an independent contractors, you had—you don't have the right to collectively bargain?

Mr. ROGERS. It's actually even worse than that. Collective bargaining by independent contractors can be a violation of the antitrust laws. And so an employer could seek an injunction against collective action by independent contractors.

Mr. SCOTT. Thank you, Madame Chair.

Chairwoman WILSON. Thank you, Dr. Scott. Mr. Cline, Virginia.

Mr. CLINE. Thank you, Madame Chair, thank the witnesses for being here.

It has recently been reported that 50 percent of Millennials and 75 percent of Gen Z'ers according to Forbes have quit their jobs due to issues related to mental health. These numbers have been steadily climbing over recent years which makes the conversation about workplace flexibility and benefits an important one. I commend the chair for holding this hearing today.

Keeping options available to workers so that they can choose a job that fits their needs is of the utmost importance considering statistics like these. Employers should be able to be—to give options of benefits to workers such as Ms. Beck has done with her business.

Such as working other businesses, providing benefits such as working remotely, performance rewards, continuing education. These types of benefits make them a more attractive employer and the employee happier.

By restricting these choices of individuals that directly impact the workers wellbeing through broad over regulation by the Federal Government however we are eliminating viable workforce options that have brought our economy to where it is today.

I would note from Ms. Becks testimony that when she made the decision to structure her team as employees, it added an additional 20 to 30 percent cost to the model more than a 1099 model due to additional benefit and taxes.

Unemployment has hit a 50 year low at 3.5 percent. This is in large part due to the recent deregulatory efforts taken by the Department of Labor and giving the power of choice back to individuals.

As I speak the unemployment numbers speak to our success as a nation, but we were founded to create a more perfect union and I believe in consistently continuing to better it.

Expanding employment options is one such way we can keep up with the modern worker and as a way that workers greatly value.

So much of the district that I represent in Virginia is rural and policies like the Protecting the Right to Organize Act would have a negative impact on businesses but particularly small businesses in rural areas.

It would inappropriately preempt and prohibit right to work laws in 27 states that value and protect this fundamental right. This is

unacceptable and would hurt both the employees and employers in my district.

So, Ms. Greszler, can you talk about the impact of bills like the Protecting the Right to Organize Act and how they would impact businesses, particularly small businesses and businesses in rural localities?

Ms. GRESZLER. Well, by forcing unionization upon workers and employers that don't want that and that wouldn't choose that model, you're dictating that both the wages and the total benefit packages that those workers get.

And younger workers today place less value on having something like a defined benefit pension. They have high student loans to pay, they might be saving for a home, paying for childcare costs, and it's not necessarily beneficial for them to have 15 percent of their wage of their compensation tied up in retirement benefit particularly when you look at the union structure and they have been well known for having strong retirement benefits but the reality is they can only pay for 40 cents of what they've promised in all of these benefits. And so those workers are recognizing that they don't want to get into a system where a high portion of their compensation goes to a retirement benefit that's actually not going to be there for them when they retire, that will be insolvent by then.

And so I think that we need to instead of looking towards the union model, look towards more portable, accessible, affordable things. The average worker is going to change jobs 12 times throughout their career. They might want something that they can take with them throughout those jobs so that they don't have to change doctors, don't have to roll over retirement plans or start new ones.

But let's look towards more portability that can help workers accommodate instead of just driving that out of the market entirely.

Mr. CLINE. Can you also talk about transparency when it comes to union organization and accountability for workers? This, the act that is under consideration would force the sharing of personal information of workers and can you comment on that and the impact that would have on workers?

Ms. GRESZLER. Yes, I have talked to workers personally who don't want union representatives coming and knocking on their door and trying to get theme to sign cards that they might not want to sign.

And we need to have more accountability on these unions and members or people who are potentially considering voting for or against a union need to know what is going to happen to their money if it goes towards that union.

And there was talk about the corruption in there and the fact that this is just normal, and it happens everywhere. I don't think that makes it right and it is actually more frequently happens amongst unions and workers need to know where their money is being spent and there needs to be proper disclosure of that.

Mr. CLINE. Thank you. Ms. Beck, are you, are your workers unionized?

Ms. BECK. Our workers are not unionized. But with the thing that I think is important about that is as an employer, I want to make sure that our workers have everything that they need. So

that's why we pay a fair wage, you know, we are 56 percent above the average minimum wage, provide benefits, career enhancement—

Mr. CLINE. And I am glad that you are able to do that. It was an additional 20 to 30 percent cost in your model but I am glad you were able to make the choice to do that. And with that, Madame Chair, I yield back.

Chairwoman WILSON. Thank you, Mr. Cline. Ms. Wild from Pennsylvania.

Ms. WILD. Thank you, Madame Chair. I am really disappointed that at Ms. Foxx is no longer here because I wanted to challenge her to a typing competition.

I too typed papers for others in college but I was 18 or 19 years old, not middle aged and trying to support a family.

I have questions for you, Ms. Greslzer. In your written testimony you say there is nothing inherently wrong with unions, but workers must be free to choose whether to join them.

And this is a quote, Congress must not grant them special favors. So I want to talk for a couple minutes about the law and special favors.

Under the NLRA, employers can hold as many mandatory captive audience speeches as they like to argue against unionization, but unions cannot compel attendants to hear speeches that are in favor of unionization correct?

Ms. GRESZLER. I'm not an attorney. I believe that's correct but I don't know for sure.

Ms. WILD. Well, you are here as a witness. Let me see. Let me go to your area of expertise. You have provided us with a Congressional testimony on the future of work helping workers in and employers adapt to and thrive in the ever-changing labor market. As a research fellow from, for the Heritage Foundation and you are not able to answer that question?

Ms. GRESZLER. I have not looked specifically at that component of the law and I can't provide you with 100 percent certainty.

Ms. WILD. Well, what—I won't hold you to 100 percent certainty. What do you understand to be the rule on that?

Ms. GRESZLER. That is my general understanding.

Ms. WILD. Thank you. Under current law, if an employer files an unfair labor practices claim against a union, the NLRA requires the NLRB counsel to petition for a temporary injunction against unions pending disposition of the claim.

But, if the union files an unfair labor practices claim against the employer, the NLRB has discretion but is not required to seek a preliminary injunction against employers pending disposition of the claim. Correct?

Ms. GRESZLER. I will believe your word for it. I have no idea on that one.

Ms. WILD. Same answer as before? You are not a lawyer? But that is your understanding, right?

Ms. GRESZLER. I'm an economist and I do cover a broad area of policies, labor is one of them, but I am not well versed in the specific components and statutes of labor law.

Ms. WILD. Okay. And let me just ask you are you aware that employers only have to notify employees of their NLRA rights if the employer is found to have violated the NLRA?

Unlike title VII, the ADEA, FMLA, and OSHA, an employer does not have to past and maintain notices advising employees of their collective bargaining rights, correct? Are you aware of that?

Ms. GRESZLER. Again, this is above my level of understanding of labor laws.

Ms. WILD. Well, let me represent to you that all of those statements are true, and I am going to ask for confirmation of that from Professor Rogers in just a second, but I would respectfully submit to you, Ms. Greszler, that the unions aren't the ones getting special treatment under the law.

Professor Rogers, can you comment on those items that I just asked Ms. Greszler about and confirm one way or the other whether they are true?

Mr. ROGERS. Everything is true with one exception which is that not in all cases does the NLRB have to seek an injunction with the union ULP's. That's only when it comes to recognitional and organizational picketing and secondary boycotts.

Ms. WILD. Okay. Thank you for that clarification. Other than that, I am correct about employers be able to hold as many mandatory captive audience speeches as they like but unions are not able to?

Mr. ROGERS. Correct.

Ms. WILD. And that employers don't have to post the notices like they do for OSHA and ADEA and FMLA and so forth?

Mr. ROGERS. Correct.

Ms. WILD. Thank you. I have a couple more questions for you, Professor Rogers. As somebody who has—I practiced law for 30 plus years before I came to Congress. I was a trial lawyer, actually on the defense side most of the time. One of the fundamental tenants of justice that I firmly believe in is that judges have to avoid conflicts of interest and or even the appearance of a conflict of interest. And the best ones I knew always erred on the side of recusal to avoid the appearance of impropriety.

But as I understand it, the Republican majority of the NLRB attempted to overturn the Browning-Ferris joint employer rule in high brand industrial contractors by holding that an entity is only an employer if it is actually exercised directed immediately control. Is that correct?

Mr. ROGERS. That's correct.

Ms. WILD. And it isn't it true that NLRB board member William Emmanuel was a former lawyer at Littler Mendelson, the firm that represented the employer on the losing end of the Browning-Ferris decision?

Mr. ROGERS. I believe that's correct, I don't want to stipulate that it was Littler specifically but yes, he was involved in the litigation.

Ms. WILD. Okay. So you wouldn't be able to comment on the fact that Mr. Emmanuel did not reveal to the litigants his connection to the dispute, seek a waiver from them or recuse himself from overturning the Browning-Ferris discussion?

Mr. ROGERS. Oh, that's absolutely my understanding and of course the decision was vacated as a result once the conflict of interest came to light.

Ms. WILD. Thank you very much.

Chairwoman WILSON. Thank you, Ms. Wild.

Ms. WILD. I yield back.

Chairwoman WILSON. Thank you. Mr. Levin of Michigan.

Mr. LEVIN. Thank you, Madame Chairwoman, and thanks so much for holding this very, very important hearing and I salute your leadership.

I want to spend my time digging into the possibilities for sectoral bargaining with Professor Rogers. Recognizing Dr. Weil's really important work before, during, and after your government service on the fissured workplace, recognizing that our labor laws are so antiquated and despite all the protestations about how workers are forced to be in unions and all this nonsense.

Virtually no workers in the private sector are in unions. 6.4 percent, the lowest in 100 years. And there is no way workers can rebuild voice and power in our economy without a much freer market for worker representation.

So, Professor Rogers, stipulating that we must pass the PRO Act and take whatever measures to allow workers to form unions much more freely, I am impatient.

I have read your whole testimony which we always say we read all of your all's testimony but in this case, I read all of that.

And I don't—I am frustrated by the idea that we have go to in stages over a lot of years, but I don't disagree about the practical difficulties of getting to a sort of a European scale of sectoral bargaining from where we sit right now.

So how can we do this most expeditiously? And don't put on an incrementalist hat and a, you know, we are not Eeyore here. We are thinking big about what, the changes we need to make for the American people so they can get their little piece of the American dream which despite low unemployment and the booming stock market, they don't see in ahead of them.

Mr. ROGERS. Thank you for the question. So I guess two thoughts and then we will continue the conversation. The most expeditious way to at least get some sectoral standard setting structure in place would be to amend the Fair Labor Standards Act to established wage boards.

You know, under the original FLSA, those were essentially in place to set wages, but it would be plausible, Australia has a system for example to use that type of structure to set standards beyond wages. So you could look at scheduling policies, particularly concern for retail workers. Health and benefits—

Mr. LEVIN. But let me just ask you, don't you think that we face a, we should sort of choose between either going with, you know, wage boards or other, you know, public solutions like that or sectoral bargaining, sectoral bargaining—

Mr. ROGERS. I think the two can complement each other.

Mr. LEVIN. Okay.

Mr. ROGERS. I mean, wage boards can set minimum standards. And, you know, they can do more than wages. Right.

Mr. LEVIN. Right.

Mr. ROGERS. In terms of sectoral bargaining, you know, the challenge is that if we all of a sudden convert to a sectoral bargaining model but still require unions to have majority support before they can bargain, in very few sectors are unions going to be able to bargain. Right.

Mr. LEVIN. Right.

Mr. ROGERS. So, you know, if you want to act very quickly you could say well, in any industry in which unions have 5 percent density, the union has rights to at least bargain over some topics.

Mr. LEVIN. But there, so there is a wide, wide range in other countries right, between say France—

Mr. ROGERS. Correct.

Mr. LEVIN.—with very relatively low worker membership in unions but very high sect, you know, participation in sectoral bargaining.

And in Sweden where people are sort of all mostly 70 percent are in unions and they have sectoral bargaining.

So could we move from—could we start with France and then move towards Sweden? I mean, why—

Mr. ROGERS. We potentially could. You know, part of the difference is that France has extension laws.

Mr. LEVIN. Right.

Mr. ROGERS. Sweden does not, right. So the unions bargain in France at the sectoral level. Then those standards are set across the country thorough administrative action. The, you know, that would certainly be a decent starting point in the U.S., but you would have to have something like a most representative union, most representative status determination which is what France does to figure out who has bargaining rights.

Mr. LEVIN. All right. Well, I think I am going to need you and your colleagues to work with us to figure out the best way to get there because I don't, I mean, we are facing a situation where 1 in arguably 2 generations of American workers are looking at having a standard of living below what their parents had.

That is the reality and we can't stand for that. We need to transform our economy so that workers have power in their workplace and nationally so that they can have a middle-class standard of living.

And I am counting on you, this is great work that you and your colleagues are doing, and I am looking forward to working with you to make that a policy reality. Thanks so much, Madame Chairwoman, I yield back.

Chairwoman WILSON. Thank you, Mr. Levin. Ms. Jayapal of Washington.

Ms. JAYAPAL. Thank you, Madame Chair, and thank you for, to our distinguished witnesses for your testimony.

I represent the Seattle area and obviously we have a lot of technology innovation, a very robust economy. In fact, an employment rate of 96.9 percent in Seattle and we also are the countries first major city to pass a $15 minimum wage which I was very proud to be a part of.

We have the first city wide domestic workers bill of rights. And at the state level, we were the first state in the country to tie minimum wage to inflation. We are also in the top three for highest

minimum wage statewide across the country. And middle-class workers are about to be paid fairly for their overtime work at the state level. And this is in contrast to the Trump Administration's faulty proposal for overtime that leaves most middle-class workers behind.

It is no coincidence that Washington State also has one of the highest union densities in the country. Top—we are number three in the country. We actually have unionization rate of about almost 20 percent which is double the national average. And so people in my district understand that innovation does not mean worker exploitation.

So I want to start, actually go back to Mr. Rogers because, Professor Rogers, because I want to pick up on my colleagues questions to you. And specifically around centralized bargaining and standard setting structures, especially for low wage industries.

As you may know, I have introduced the Domestic Workers Bill of Rights, H.R. 3760. It creates a Federal domestic workers wage and standards board, modeled off of the wage boards in Seattle, California, and New York.

And the board would make recommendations on Federal standards for domestic workers including wage recommendations, workplace protection standards and improvements to benefits.

Professor Rogers, how would a Federal standard setting board change the domestic work industry?

Mr. ROGERS. So it would change it in, and thank you for the question. It would change it potentially in profound ways for the better. As you know, domestic workers are excluded from the National Labor Relations Act. That exclusion goes back to the original passage of the act.

And the reasons for it are rooted frankly in white supremacy and southern Congressional leader's insistence at the time that domestic and agricultural workers be excluded from the major new deal labor legislation as a condition of its passage.

They actually supported unionization and fair wages just not for agricultural and domestic workers who at the time in the south were of course overwhelmingly African American.

So that exclusion stands until today. Enterprise bargaining, to shift to the need for a new bargaining model for domestic workers, enterprise bargaining effectively won't work for them because the enterprise is an individual household. So individual bargaining they already have enterprise bargaining in a way.

Sectoral bargaining could do a couple of things through a wage board process or standard setting process it can bring public attention to the challenges domestic workers face. It can set minimum terms and enforce them. And perhaps most importantly can give domestic workers a voice in that standard setting and enforcements.

Ms. JAYAPAL. Thank you. I mean, this is to me one of the most exciting advances in the future of work is the work we are doing with domestic workers and as one home care worker put it, and this is her quote, the solution is to make sure that workers are at the table on the front end and have a say in those these platforms and programs were developed and run and I think that is what we have done.

Mr. Weil, you ran the Department of Labor's Wage and Hour Administration. You have written extensively on the future of work. The conversation about the future of work is often dominated by a set of platform-based companies who claim that they are so different and so innovative that they should be exempted from the laws that protect workers right to organize or to be paid fairly, to work safely without harassment and discrimination.

And many of these platform-based companies actually refused to treat workers as employees and they spend millions to litigate and lobby to evade their responsibilities towards workers.

And this is said with deep respect for the innovation that does come from these companies. But they do use measures including deactivating workers without any opportunity for appeal or charging workers punitive fines, setting unpredictable rates of compensation.

You have talked about this as fissured workplaces. Tell me the top three harms that are caused by these kinds of practices.

Mr. WEIL. Well, thank you for the question. And I think you've outlined them. It is the fact that workers in that status of independent contractors lose basic rights like the right to a minimum wage. And the right to be paid, the right to access to a benefit like overtime, all of our social safety net protections, the right to collective bargaining. Essentially all of our rights that are very much vested in employment.

There are certainly parts of the digital economy where workers are legitimate independent contractors, where the digital platform acts as an electronic market to bring users and providers together. You know, that's the yellow pages kind of hyper level of that.

Chairwoman WILSON. Thank you, Mr. Weil. Thank you. Thank you very much.

Ms. JAYAPAL. Thank you, Mr. Weil. I yield back.

Chairwoman WILSON. Ms. Underwood of Illinois.

Ms. UNDERWOOD. Thank you, Madame Chair. Dr. Weil, in your written testimony you pointed out that women are disproportionately represented in the types of short term and contract jobs that we are discussing in today's hearing. Generally, do these women have access to paid family and medical leave at work or even unpaid leave that protects their jobs?

Mr. WEIL. Thank you for the question, Congresswoman Underwood. The answer is no. According to most recent national compensation survey, only about 18 percent of private sector women have access to paid leave.

And if we look at the bottom quartile, that number goes down to only 8 percent.

Ms. UNDERWOOD. Wow. Based on your experiences at the Department of Labor, how does having access to paid family leave and medical leave benefit workers?

Mr. WEIL. In a huge way. Because of the absence of that leave, people face very difficult disruptive choices of leaving a sick child at home alone to fend for him or herself. Or a worker in a healthcare profession having to come into work when they're sick. And not only therefore running themselves down but exposing other people to their health problems.

Ms. UNDERWOOD. Right. And that is awfully burdensome for both the worker and the employer.

Mr. WEIL. Absolutely.

Ms. UNDERWOOD. Let us talk about how short term and contract work affects workers ability to save for retirement. Now most Americans with retirement savings have an employer sponsored plan like a 401K.

Professor Rogers, do companies that use short term or gig workers in the U.S. generally offer these workers access to a 401K or other retirement account?

Mr. ROGERS. Not that I know of. No.

Ms. UNDERWOOD. And why can access to an employer sponsored plan be so important to the workers ability to save for retirement

Mr. ROGERS. Well, let's say access to an employer sponsored plan of some sort would be really helpful. It's because the, you know, savings especially early during your career can compound over time.

If you save in your 20's and 30's that can, you can accumulate a pretty significant amount of funding, especially by the time you retire.

Ms. UNDERWOOD. And so how does limited access to those account affect the short term and gig economy worker?

Mr. ROGERS. It means those workers essentially have zero retirement savings. And I'll also add, I don't think this has been mentioned yet, because Social Security is not withheld typically—

Ms. UNDERWOOD. Right.

Mr. ROGERS.—the workers have to withhold it themselves and they may to be able to do that.

Ms. UNDERWOOD. Retirement security is a big concern for my community in northern Illinois. According to the Federal Reserve, half of workers in this country think that their retirement savings are quote not on track.

Like many Americans these workers may plan to rely on Social Security to supplement their income and retirement but short term and contract workers as you mentioned often receive less from employers there too.

So for example, a mom and pop shop restaurant that hires an employee as a delivery driver pays Social Security and Medicare taxes for that employee, Professor Rogers, is that correct?

Mr. ROGERS. If they are an employee and if the employer is following the law, yes.

Ms. UNDERWOOD. Okay. But most of the big food delivery apps that we are hearing about today are set up so that they don't have to cover those expenses for their drivers, is that right?

Mr. ROGERS. They're set up to evade those expenses is the way I would put it, yes.

Ms. UNDERWOOD. Okay. And so instead even after tax deductions, many drivers for those company have to cover those Social Security and Medicare tax expenses themselves, right?

Mr. ROGERS. Correct.

Ms. UNDERWOOD. The ability to save for retirement is crucial for American workers of all ages. But millennials are facing additional burdens.

The Brookings Institution reports that it is more difficult for millennials to save enough for retirement than it is for previous generations. So this is for both Professor Rogers and Dr. Weil.

As this committee continues conversations on the future of work, what are the essential components of policy that empowers workers and provides retirement security especially for younger Americans that we need to keep in mind. Let us do Dr. Weil first.

Mr. WEIL. I think the key is portability. I think both sides talk about portability. I think it's something we have to provide all workers so that they can move, work in situations and multiple employers and be able to save.

But one can do that compatibly with also the protections we have under our employment laws.

Ms. UNDERWOOD. Okay. Thank you.

Mr. ROGERS. I would just add to that designing portable benefits in such a way that workers have a voice in their design and administration and just general protections for the right to organize and general workplace protections which will make it easier for workers to save for retirement.

Ms. UNDERWOOD. Thank you. While the future of work has the potential to offer many workers new flexibility and opportunities, we must ensure our policies and laws evolve at the same time to ensure that anyone who works full time can provide for their family.

We must also ensure that these workers have access to high quality health insurance by protecting the Affordable Care Act and by lowering costs that make health coverage out of reach for far too many.

I have introduced legislation to address this, the Healthcare Affordability Act, which would make insurance more affordable for nearly 20 million Americans including many of the workers we are discussing here today.

Thank you, Madame Chair, for holding this important hearing and thank you to all of our witnesses for being here. I yeild back

Ms. JAYAPAL. Madame Chair.

Chairwoman WILSON. Thank you. Thank you, Ms. Underwood.

Ms. JAYAPAL. I have a unanimous consent request. Madame Chair, I would like to introduce the following reports into the record.

A 2018 data and society report entitled "Beyond Disruption, How Tech Shapes Labor Across Domestic Work and Ride Hailing."

A 2019 Institute for Policy Studies report entitled "Protecting Domestic Workers Rights."

And a statement by SEIU entitled the "Future of Work, Preserving Worker Protections in the modern economy."

Chairwoman WILSON. Without objection so ordered.

Ms. JAYAPAL. Thank you, Madame Chair.

Chairwoman WILSON. Ms. Stevens of Michigan.

Ms. STEVENS. Thank you, Madame Chair. And thank you to our witnesses. I thoroughly enjoyed reading through your testimony.

I come from the great state of Michigan where the UAW strike is on everyone's mind and it is very visceral, it is very real, it has been going on for a long time.

We know that we have reached a tentative agreement but that our UAW workers are still out there on the picket line and part of why they are striking is in part of what we are discussing at today's hearing.

UAW contract negotiations as they have gone on throughout the years, you know, workers have been able to fight for increased wages and better benefits and unfortunately there is this model, this bargaining model has become increasingly less common.

Although the conversation I had with one of my regional directors earlier today was that they believe that the work they are doing and that the strike that is taking place will have global ramifications.

So, Professor Rogers, how do we encourage this type of model of sectoral bargaining across other industries?

Mr. ROGERS. So the auto industry is actually a, it's a really nice example of some of the merits of sectoral bargaining because pattern bargaining got the UAW close to sectoral bargaining for, you know, for long periods of time. And still in some ways gets the UAW close to sectoral bargaining.

With the exception, with two exceptions basically. There are as you know quite a few non-union part suppliers into the auto workers today. Then there are also many non-union plants that have opened, especially transplants by foreign auto makers that have remained nonunion.

So one of the challenges the UAW and the U.S. Automakers face is wage competition from those other entities. Sectoral bargaining could set a wage floor and, you know, ends that unfair competition.

Ms. STEVENS. Yes. And what type of role do portable benefits play and as, you know, negotiations are going on for current portable benefits systems. Could you speak a little bit about that?

Mr. ROGERS. In the—

Ms. STEVENS. You mentioned it in your testimony I think and I know you talked about, you know, building wealth and protecting healthcare pensions but I don't know if you can talk a little bit about portable benefits?

Mr. ROGERS. I mean, I think in general providing high quality benefits that workers can get access to regardless of their skill levels and who they work for is essential. Portable benefits is part of that.

I would just, I am a little cautious about a full-throated endorsement of portable benefits because in some cases, the proposals for portable benefits have essentially been framed so as to let many companies off the hook for duties they already owe toward workers.

Ms. STEVENS. Yeah. Well, and obviously we are here today talking about worker protections and, Ms. Beck, I know from your testimony which was really well done and your model is one to be commended and I think the conversation around the future of work in the 21st century age and how we grow a 21st century labor movement really speaks to maybe something that you could shed some more light on at a 10,000 foot view which is how we drive innovation but also ensure that workers' rights are protected?

Ms. BECK. Yes, thank you for that great question. I very much believe investing in our workforce is investing in innovation.

And the examples that I would give you are, you know, when our Alfred home managers are in the field or working with customers, it is their ideas and their observations that ultimately become the next great thing that our company does. So I think it's extremely important to view the relationship between a workforce and innovation as a very positive thing.

Ms. STEVENS. Yes. Well, at this time I would like to thank our two fabulous chairwomen who lead subcommittee on education and labor that I sit on and this is exactly what we are doing on this committee which is advocating for the individual worker and the voice of our economy that is relying on good and sound practices.

And thank you all so much for your time and expertise today. Thank you. I yield back the remainder of my time, Madame Chairwoman.

Chairwoman WILSON. Thank you, Ms. Stevens. I remind my colleagues that pursuant to Committee practice, materials for submission for the hearing record must be submitted to the Committee Clerk within 14 days following the last day of the hearing preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing, of this hearing. Only a Member of the Committee or an invited witness may submit materials for inclusion in the hearing record.

Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record by way of an internet link that you must provide to the Committee Clerk within the required timeframe. But please recognize that years from now that link may no longer work.

Again, I want to thank the witness for their participation today. What we have heard is very, very valuable.

Members of the committee may have some additional questions for you and we ask the witnesses to please respond to those questions in writing. The hearing record will be held open for 14 days in order to receive those responses.

I remind my colleagues that pursuant to Committee practice, witness questions for the hearing record must be submitted to the Majority Committee Staff or Committee Clerk within 7 days. The questions submitted must address the subject matter of the hearing.

Closing statements. I now recognize workforce protections Ranking Member Ms. Adams for closing statement.

Ms. ADAMS. Thank you, Madame Chair, and thank you all very much for being here. I do want to echo my appreciation to the witnesses for taking the time to be with us today.

The Fair Labor Standards Act and the Occupational Health and Safety Act were passed with the core mission of guaranteeing workers fair wages, reasonable hours and safe work places. Yet as our witnesses made clear, under the fissured work place workers today are facing a race to the bottom that undermines basic worker protections. In response, Congress must take bold, decisive action to protect workers.

I look forward to working with my colleagues to improve the lives of workers and to restore the purpose of our essential labor and employment laws.

So thank you again to our witnesses for your testimony. The takeaways from this hearing will provide important context as we look ahead to our next future of work hearings.

These hearings will focus on how we can empower workers with competitive and in demand skills to avoid displacement and protect workers' civil rights amid the growing use of platforms and algorithms in employment related decision making.

But most importantly, today's hearing will help guide this committees' continued efforts to improve the lives of workers and serve our constituents.

I yield back, Madame Chair, thank you.

Chairwoman WILSON. Thank you, Dr. Adams. I now recognize now workforce protections Ranking Member for his closing statements. Mr. Byrne.

Mr. BYRNE. Thank you, Madame Chairman, and I appreciate this hearing. The title of it is the future of work, preserving workforce protections in the modern economy and I think it is a very important topic. I appreciate all of the witnesses being here today.

I would have like to have heard from a worker. I do talk to workers a lot. Not just when I am out doing my thing as a Congressman but sometimes when I go around visiting businesses I want to stop and talk to the people that work at the business.

How are you doing? How is the place going? They seem pretty happy to me. We have three percent unemployment in Alabama right now.

There is a recent study out that shows that the people who benefitted the most in terms of wage performance are people at the bottom who are seeing wage increases like they haven't seen in many years.

I have yet to have one person at any of my town halls, at any of the businesses I have visited anywhere, come up to me and say I don't think I have enough workforce protections or anything close to that.

They are mainly worried about making sure that we are going to have an economy that produces the jobs that they need to make money and provide what they need to provide for their families.

I am see—I encounter a large number of people who are working in what I consider to be alternative type work situations. That is just the future, I think. When we talk about the future here, I think that is the future.

We have fewer jobs where people show up for the same place 9 to 5 and more situations where people will be working out of their homes or in other situations.

And I don't think our laws match up with that. I don't think they do all. Because we haven't rethought them in decades. But we still have this old mindset that are an all working in factories, doing the same repetative thing over and over again.

If you have been into a modern factory, you know that is not the case anymore. It is dramatically different.

We have benefitted a lot in the state of Alabama from a manufacturing resurgence. Automotive, aviation, you name it. And when I go in those places and I see how they are producing what they are producing it is unreal. It is like going into some sort of a science fiction movie, the way they do it.

And they are constantly innovating, and the innovators are the workers. It is not the management that is doing the innovation, it is the men and women on the line. And it is really cool to watch them do what they do by the way, they are really good at it.

Not once have I had one of them come to me and say, "I wish I had a union." Not once has anyone ever said to me, "I wish I had a union."

I am afraid if they had sat through this hearing today, they would say that doesn't have anything to do with what I am thinking about, what I am concerned about in my job.

And noticing everything that I said right now, I didn't talk about the people that owned the businesses or run the businesses. I am talking about the people that work there. And I think we have missed the mark today.

I think we should be sitting down and talking to those workers and say what do you need? You know, my experience is most of the people that own and manage these businesses do that. They sit down with their workers and say what do you need? Because they can't be a successful business if those employees are not working at maximum efficiency, maximum quality.

Now there are more and more people as I said becoming independent contractors. And I think we have to understand they are doing that by choice. They want the flexibility that comes with that.

And here comes the big Federal Government with a bunch for new regulations out there that are going to make independent contracting very difficult.

So I wish we could have a different hearing where we brought in the workers and we asked the workers what do you need. And I think we would get a very different set of answers than what we got today.

Thank you for holding this hearing and I yield back.

Chairwoman WILSON. Thank you, Mr. Byrne. We can say that the workers need workforce protection and that is what our committee is slated to do at this, as we move forward.

I am going to now recognize myself for the purpose of making a closing statement.

I want to thank our witnesses for their compelling testimonies today. This hearing revealed the challenges posed by the changing relationship between employers and workers.

As we heard from today's witnesses, the increasing share of workers hired as subcontractors, temporary workers, or independent contractors is undermining workers' rights and protections.

We know that innovation has the potential to improve the lives of workers, but Congress must ensure that innovation does not come at the expense of our nation's labor laws.

At the end of the day, we have the responsibility to preserve and strengthen workers' rights.

Today we discussed some of the opportunities we have to pass legislation this Congress that will improve the quality of life for workers and their families in the modern economy.

As we move forward, I look forward to working with my colleagues to advance bills like the Protecting the Rights to Organize

Act, the PRO Act, which will help reduce income inequality and expand access to the middle class.

I also look forward to a continued discussion on how we can meaningfully expand benefits for workers and how industry wide bargaining can truly achieve improvements for workers in the fissured workplace.

If there is no further business, without objection, the committee stands adjourned. And thank you for coming.

[Additional submissions by Ms. Jayapal follow:]

Institute for Policy Studies

Policy Brief

Washington, D.C. October 2019

Protecting Domestic Workers' Rights

An examination of care work trends shows where labor rights are under attack.

DOMESTIC WORK: THE ORIGINAL GIG WORK

Domestic workers could be considered the "original gig economy workers." Workers in this field, whether they be house cleaners or home care workers, do the necessary and often devalued work that keeps the rest of the economy running. Domestic work is also, quite literally, the future of work. As the Bureau of Labor Statistics reports, home health aides and personal care aides are anticipated to be two of the top four fastest-growing occupations by 2028. But despite the growing dependence on domestic workers, pay and worker protections are remarkably inadequate. The history of exclusion of domestic workers from labor laws is steeped in the industry's legacy of slavery. Domestic workers are predominantly women, especially women of color, which means poor pay and protections exacerbate existing inequalities. Many issues faced by domestic workers today can offer more insight about the future of employment. Like other gig workers, domestic workers are affected by ambiguous employer-employee relationships, and are prone to carve-outs that exclude them from receiving crucial worker protections.

ATTACKS ON WORKER RIGHTS

One source of erosion in worker protections is the misclassification of employees as independent contractors, a practice that's especially common among low-wage work like domestic work. The isolation of domestic work means workers are particularly vulnerable to misclassification. Misclassification comes at a high cost for workers. As the National Employment Law Project explains, classification as an independent contractor means workers are responsible for paying both the employer and the employee side of Social Security and Unemployment taxes, whereas employees only pay half that amount. Independent contractors are not entitled to a variety of worker protections, including a minimum wage and overtime pay, workers' compensation, unemployment insurance, employer benefits like healthcare and retirement funding, and protection from discrimination.

The costs of misclassification are not borne by workers alone. Several franchisees launched a lawsuit against California home care company Griswold International in 2014, alleging that the company's franchise model, which depended on its use of independent contractors as care workers, was illegal in several states and cost them $3 million in franchise startup fees. Meanwhile, the companies profiting off domestic work are mounting legal and lobbying fights to erode the rights of the workers they employ. Franchisors in the rapidly-growing home care industry push for carve-outs that would allow them to deny domestic workers, and workers, across sectors, crucial labor protections. The Home Care Association of America and the International Franchise Association — which includes dozens of home care franchise agencies among its members — launched a failed lawsuit against an Obama-era Department of Labor regulation that extended

basic protections, like overtime and minimum wages, to 2 million home care aides. The IFA has also fought against bills that would prevent misclassification, provide fair workweek scheduling. The association also joined home care agencies in an unsuccessful lawsuit against Seattle's minimum wage raise. All of these fights, regardless of their success, are meant to keep worker advocates in a constant state of defense while eroding protections that could help domestic workers, and workers across all sectors.

CODIFYING WORKER PROTECTIONS

Policymakers have several options ahead of them to provide domestic workers — and all workers — with crucial protections. First and foremost, Congress should pass the national Domestic Workers Bill of Rights. The legislation takes a broad definition of domestic worker and hiring entity to set a floor for domestic worker rights regardless of classification as an employee or employer, and would help prevent the kind of pay docking and abuses that are rampant in domestic work. Congress should also pass the PRO Act. The legislation would give workers more bargaining power while codifying a host of other provisions that protect workers — including protecting workers with multiple employers and preventing misclassification.

Inequality.org is the Institute for Policy Studies online portal into all things related to the income and wealth gaps that so divide us, in the United States and throughout the world.

Contact: negin@ips-dc.org, **202 787 5209**

Weekly inequality newsletter:

https://inequality.org/resources/inequality-weekly/

Twitter and Facebook: @inequalityorg

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International President

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Executive Vice President

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October 23, 2019

The Honorable Frederica S. Wilson
Subcommittee on Health, Employment, Labor, and Pensions
House Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Tim Walberg
Subcommittee on Health, Employment, Labor, and Pensions
House Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Alma S. Adams
Subcommittee on Workforce Protections
House Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bradley Byrne
Subcommittee on Workforce Protections
House Committee on Education & Labor
U.S. House of Representatives
Washington, D.C. 20515

The Future of Work: Preserving Worker Protections in the Modern Economy
Written Testimony of Lesia Louro, SEIU Member

Dear Chairwoman Wilson, Chairwoman Adams, Ranking Member Walberg, Ranking Member Byrne, and Members of the Subcommittees on Health, Employment, Labor, and Pensions and Workforce Protections:

My name is Lesia Louro. I'm a home care worker from Barstow, California, and a member of SEIU 2015. I provide in-home care for two clients and still have to hold down another job just to get by. I have dedicated my whole life to helping people, I feel that homecare work is my calling.

The work I do allows older Americans, people with disabilities and other individuals who need support to remain at home instead of being placed in a nursing home or other facilities. I have provided care for one of my clients for a decade. He has no family and I am his lifeline, providing assistance with everything from bathing and grooming to medication management and helping him manage his doctors appointments. Without help, he would never be able to stay in his home. He is now 94 years old and is deaf, his vision is failing, and he has difficulty walking. While we communicate by writing, the fact that I have been able to work with him for so long has allowed us to actually develop a sign language of our own. I also help another client who also has difficulty hearing and limited movement. I help prepare his food, help him shower, and other duties so he is able to live independently at home. My day begins at 5:00 AM and does not end until 8:00 PM. Some of those hours go unpaid because the state only allows a certain number of hours of service under Medicaid, but I will never let one of my clients down.

My story is like so many other home care workers around the country. Our jobs are among the fastest growing in the country, but, at median wage of $11.52 per hour, we're also among the lowest paid.[i] Despite the rapidly growing demand for home care workers that will only further explode as a result of aging baby boomers, we're making less than other professionals, and less than men overall. Like other service and care jobs, home care work has historically been done by workers of color and by women. In fact, around 90 percent of the home care workforce is women, the majority of whom are women of color.[ii] Much of that work has historically been underpaid and undervalued. We have been carved out of basic labor protections, like workers' compensation, and many have no benefits, like paid sick time, that so many others take for granted. It is one of the reasons that the turnover rate for home care workers is as high as 60 percent in some markets.[iii]

Home care workers like me had to fight for years to rewrite the rules just to win one of the most basic protections people working in America have—the right to form our union to be able to fight for living wages, overtime, sick leave, and training. Home care work can be so isolating—it is hard and we work in people's homes not together at one work site. And home care doesn't work the same way as other jobs—we don't have a traditional boss we can hold accountable like other people do. So we have had to get creative to win improvements. Over the past three decades, we have worked state by state to pass laws that give us an ability to have a say in Medicaid rates and pay, in training to provide better care, and a voice in funding for crucial programs on which our clients depend. Under these innovative models around a half a million home care workers have been joining together in SEIU in California, Washington, Oregon, Minnesota, Illinois, Massachusetts and Connecticut. But it should not have to be this hard or take this long for workers to be able to have a voice in our own jobs and the path forward for our families, especially when jobs like mine are the jobs of the future. Home care jobs can't be outsourced and largely can't be automated. Human compassion and interaction is core to what we do. We should not have to participate in civil disobedience and take arrest just for raises that are cents.

My union is what makes it possible for me and my fellow home care workers in California to fight for quality jobs. Through our union, we have won higher pay, better training opportunities and basic benefits like paid sick leave and overtime, and being a part of our union gives us the strength in numbers we need to make sure the state allocates the funding we need to pursue our passion and continue to provide care to those who need it.

Things have gotten a lot better for me and my clients because of my union. But too many workers are still in the shadows. Millions of home care workers across the country, including those in California not paid by the state, still don't have a way to advocate for higher wages or enforce their rights. We need to rewrite the rules again to make it so these workers have a voice, too.

And all of us still need family-sustaining wages, many of us need better health benefits and retirement security, and we need a voice in how we address the long-term care crisis in this country for the people like me who provide the care and those who receive it.

My union has given me a sense of community, and while things like online platforms have the promise to help home care workers across the country connect, they can also easily reinforce so many of the problems that home care workers face, working in the shadows without any standards or ability for workers to enforce their rights. The solution is to make sure that workers are at the table on the front end and have a say in how these platforms and programs are developed and run. Unions give us the ability to do that. Through our union we will keep raising job standards to make sure that these jobs are good quality jobs, so that people can finally enter the industry and view this essential care work as a long term career.

I would like any elected leader to walk a day in my shoes. It is easy for people to sit in a room and talk about the future of work, but that conversation is incomplete if the workers whose fates and lives are at stake don't have the right to have a say in our own futures.

Sincerely,
Lesia Louro
SEIU Member
SEIU Local 2015

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[i] PHI, *US Home Care Workers Key Facts* (2019). Available at https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/
[ii] Id.
[iii] PHI, *SURVEY: Home Care Worker Turnover Topped 60 Percent in 2014* (2015). Available at https://phinational.org/survey-home-care-worker-turnover-topped-60-percent-in-2014/

[Questions submitted for the record and their responses follow:]

COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

November 4, 2019

Mr. David Weil, Ph.D.
Dean and Professor
The Heller School for Social Policy and Management
Brandeis University
415 South Street
Waltham, MA 02453

Dear Dean Weil:

I would like to thank you for testifying at the October 23, 2019 Health, Employment, Labor and Pensions and Workforce Protections Joint Subcommittee hearing entitled *"The Future of Work: Preserving Worker Protections in the Modern Economy."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, November 12, 2019 for inclusion in the official hearing record. Your responses should be sent to Udochi Onwubiko of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Health, Employment, Labor and Pensions and Workforce Protections Joint Subcommittee Hearing
"The Future of Work: Preserving Worker Protections in the Modern Economy"
Wednesday, October 23, 2019 10:15 a.m.

Chairman Robert C. "Bobby" Scott (D-VA)

- Dr. Weil, earlier this year, the Department of Labor's Wage and Hour Division issued a proposed change to its interpretive regulations on joint employment under the Fair Labor Standards Act. Was this proposal to change the Department's interpretative regulations consistent with Congressional intent for protecting workers in the fissured workplace from substandard wages? What would be the impact of the proposal, if finalized?

- Dr. Weil, earlier this year the Wage and Hour Division issued an opinion letter concluding workers at a particular on-demand company were independent contractors rather than employees. Did you find the conclusions reached in this opinion letter problematic? Did this opinion letter signal the Department's position with regard to enforcement of key wage and hour laws for gig workers?

[Mr. Weil response to questions submitted for the record follows:]

Brandeis University
The Heller School for Social Policy and Management

November 11, 2019

Representative Robert "Bobby" C. Scott, Chair
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott,

I am pleased to provide these additional responses to your questions to be included as part of the record of my testimony at the October 23, 2019 hearing of the Pensions and Workforce Protections Joint Subcommittee entitled "The Future of Work: Preserving Worker Protections in the Modern Economy." I include the supplemental questions provided by the Committee and my responses.

Earlier this year, the Department of Labor's Wage and Hour Division issued a proposed change to its interpretive regulations on joint employment under the Fair Labor Standards Act. Was this proposal to change the Department's interpretative regulations consistent with Congressional intent for protecting workers in the fissured workplace from substandard wages? What would be the impact of the proposal, if finalized?

First, I do not believe that the interpretive regulation is consistent with the FLSA's interpretation of joint employment. The FLSA has a broad definition of what it means "to employ" which is defined as "to suffer or permit work." This definition is applicable to a setting where multiple potential employers that hold joint responsibility for employment, such as occurs with staffing agency and their clients. As I have testified in this hearing, these arrangements have become common, raising the need to hold all parties to the employment relationship responsible for labor standards compliance.

Second, the definition of joint employment interpretation arises from the Fair Labor Standards Act itself. Neither the Secretary of Labor nor the Wage and Hour Administrator was delegated authority by Congress by the Fair Labor Standards Act to issue regulations regarding the definition of employment or joint employment (in contrast, for example, to defining overtime coverage under the FLSA). Only Congress has the authority to change that definition through amendment of the Act.

David Weil , Dean and Professor
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For these reasons, I would regard the administration's joint employment interpretive regulation only as guidance, similar to the Administrator's Interpretations that we issued during the Obama administration. It should therefore be subject only to the same deference and scrutiny as would any guidance document. And in my view, that guidance is inconsistent with the definition of joint employment arising from the FLSA.

Earlier this year the Wage and Hour Division issued an opinion letter concluding workers at a particular on-demand company were independent contractors rather than employees. Did you find the conclusions reached in this opinion letter problematic? Did this opinion letter signal the Department's position with regard to enforcement of key wage and hour laws for gig workers?

I do find that opinion letter (FLSA 2019-6, issued April 29, 2019) troubling for two reasons. First, it raises concerns in regards to the way that political leadership of the Wage and Hour Division positioned the opinion letter at the time of its release. An opinion letter, in the words of the WHD itself, "…is an official, written opinion by the Department's Wage and Hour Division (WHD) on how *a particular law applies in specific circumstances presented by the individual person or entity that requested the letter*" (italics added). As such, it is supposed to be narrowly focused and relevant to the particular fact situation described by the party requesting the letter.

In this instance, the Wage and Hour Division released the opinion letter in a fashion that implies a more general statement of policy going beyond the particular employer and area of guidance. In the press release announcing the release of the letter, Keith Sonderling, Acting Administrator of the Department's Wage and Hour Division stated "Today, the U.S. Department of Labor offers further insight into the nexus of current labor law and innovations in the job market."[1] This quote, and other comments made by Mr. Sonderling and agency spokespersons seemed to imply that the letter represented a more general statement of policy—that is, a form of administrative guidance. The process of drafting, reviewing, and issue guidance is far different. For example, when I served as Administrator of the Wage and Hour Division, we issued Administrator Interpretations to provide such guidance.

Second, the opinion letter draws broad conclusions about the employment status of the individuals working in that company that are not based on a detailed discussion of the specific practices of that company. Instead, the facts reviewed in the letter read as a more generic summary of platform models rather than a detailed analysis of the business practices and organizational policies of the particular company. Similarly, I view the application of the FLSA's "economic realities test" in the opinion letter as a perfunctory application of the factors making up that test to support what appears to be a foregone conclusion.

[1] See "U.S. Department of Labor Issues a New Wage and Hour Opinion Letter, Concludes Service Providers for a Virtual Marketplace Company are Independent Contractors." US Department of Labor Press Release, April 29, 2019 < https://www.dol.gov/newsroom/releases/whd/whd20190429>.

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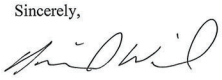
The administration has been clear in its desire to relax definitions of who is an employee to permit greater use of independent contractor status in platform business models. I read this opinion letter and the method of its release as another indication by the political leadership of the Labor Department intention to give a green light for a lax interpretation of the legal requirements pertaining to platform business models.

I would be happy to provide further clarification on these issues.

Sincerely,



David Weil
Dean and Professor

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[Whereupon, at 12:43 p.m., the subcommittees were adjourned.]