LABOR AND EMPLOYMENT LAW

Congress should

- repeal the National Labor Relations Act;
- repeal the federal minimum wage, overtime, and other provisions of the Fair Labor Standards Act;
- repeal the Family and Medical Leave Act;
- repeal the Davis-Bacon Act (the 1931 law that requires federal public works contractors to pay local prevailing wages, as calculated by the U.S. Department of Labor, which often reflect local union wage rates);
- require the Department of Labor to follow notice-and-comment rulemaking and to conduct economic analysis before issuing regulations that increase burdens on private parties;
- repeal federal age discrimination law, including its ban on the practice of automatic retirement ages at private workplaces;
- repeal in whole or large part the Americans with Disabilities Act, in particular its coverage of disabilities beyond traditional categories, such as deafness, blindness, and paraplegia; and
- reverse executive orders on employment practices of federal contractors when those orders do not either safeguard constitutional principles or assist the government in procuring the best-quality and lowest-cost products and services from a wide universe of contractors.

"Employment at will" is the phrase that developed to describe the law governing labor markets in a free society: either party could bring an employment relationship to an end, typically on short notice, and terms of pay and benefits were left for the two sides to negotiate. The federal labor law ushered in by the Progressive Era and New Deal infringed on that liberty in several ways. For example, it became unlawful for an employer not to bargain with a union that claimed the support of a majority among a group of workers;

minimum wage and overtime rules applied regardless of the two sides' preference for other terms; and so forth.

Although labor unions were an institution central to the New Deal scheme, they entered a long decline after World War II. Union membership fell from a peak of 35.0 percent of wage and salary workers in 1945 to 10.3 percent in 2021, and only 6.1 percent in the private sector in that year. That decline is in stark contrast to the health of public-employee unions, which now boast 33.9 percent density. The strike threat also declined, from a peak of 60 million workdays lost annually in the late 1950s to approximately 1 million now. The political power of unions, however, has remained important, with the decline of some once-mighty industrial and trade unions offset by impressive gains for their counterparts in government employment.

All the while, private employers' legal worries remained. Even as union bargaining shrank in importance, new kinds of legislation and litigation grew. Where unions had once angled for "fringe benefits," for example, Congress and other levels of government in recent decades enacted laws mandating benefits that had previously been voluntary, such as family leave, medical coverage, and pregnancy benefits. Already favored by the tax system, and now also the subject of legislative prescription, employee benefits became a large part of compensation packages; their cost to employers sometimes rivaled that of wages or salaries themselves.

Government was also interfering more with decisions to hire and, especially, fire. The most important single contributor was the steady expansion of antidiscrimination law from the 1960s onward. First came the seemingly limited goal of overcoming the legacy of racial discrimination. Then, before long, the list of protected categories included sex, age, disability, veteran status, and many others. Most employees fell into at least one protected category; that meant, if fired, they might cast back over their experience to identify some evidence of bias and sue, arguing that bias played a role or that they had suffered related injuries, such as retaliation or harassment. Age and disability were especially important expansions because age had traditionally been a legitimate reason for termination—but in 1978, standard policies requiring retirement at age 65 became unlawful. In some cases, workers fired for their inability to carry out job responsibilities could sue by alleging that the employer had discriminated against them on the basis of a protected category, such as illness, disability, use of leave, or mental/emotional issues covered by the Americans with Disabilities Act.

Four Great Moments in European Labor Law

Economists often credit America's successful culture of entrepreneurial startups, especially in creative and technology fields, to our relatively free labor market. In places like Europe, governments have gone much further to regulate hiring and firing of workers, conditions on the job, and even pay scales. Four examples from the headlines follow:

- "German Army Forced to Lay Down Weapons due to 'Overtime Limits.'" *The Telegraph*, April 10, 2016.
- Immediate client service turnaround? *Mais non!* "France Might Pass a Law That Makes It Illegal to Send After-Hours Work Emails." *Washington Post*, May 12, 2016.
- European Union regulators have ordered symphony orchestras to reduce the decibel level of many standard works in the concert repertoire, lest musicians suffer hearing loss. "Music; the Shushing of the Symphony." *New York Times*, January 11, 2004.
- Executives at Air France and the French national railway admit that labor law has made it impossible to dismiss some employees they suspect of Islamic radicalization, who thus remain on the job. *New York Times*, February 20, 2016.

The sad irony is that even as the United States has moved rapidly toward more "European" labor policies, many countries in Europe itself, including Germany, Portugal, and Spain, have reacted to signs of growing dysfunction by reintroducing significant elements of free-market reform.

All of these changes were given teeth because private attorneys seeking damages and fees were beginning to propel many workplace disputes—akin to one of the roles formerly filled by unions but without unions' institutional commitment to stick around for the long term. With new causes of action and entitlements to damages multiplying, litigation—both by individual employees and in the form of class actions—grew steadily during the past half century, becoming a substantial share of the dockets of federal courts.

While lawyers prospected the new terrain, they also discovered rich veins to exploit in older labor law as well. For example, the Fair Labor Standards Act of 1938 and similar state laws said that managers and professional employees generally did not have to be paid overtime. Did that category cover stockbrokers? Insurance agents? Junior news reporters? Companies that guessed wrong began paying out millions and even

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tens of millions of dollars in class-action lawsuits. Disputes proliferated over whether or not one or another bit of work-related effort had to be kept on the clock. Were employers breaking the law by not putting employees on the clock for time spent donning and doffing work clothing? Looking at a spreadsheet while eating lunch? Taking a phone call from the office on the weekend?

How It All Backfires

All these interventions tend to backfire. Economic research suggests that the overall portion of employer revenue paid toward labor costs tends to self-adjust based on factors of supply and demand, so that if legislation or litigation requires new outlays on a certain benefit, other elements of the compensation packet will tend to stagnate or even shrink to make room. In fact, the effect may be specifically felt by particular classes of workers singled out as intended beneficiaries of such laws, assuming the employer can foresee that such a class of workers will be more expensive.

Mandating benefits, for example, tends to slow the growth of take-home pay, leaving the overall share of national income going to labor unchanged. When legal changes expand overtime entitlements, many employers can dodge a permanent upward jump in payroll costs by suppressing the level of base pay or rearranging schedules. When minimum wages rise, employers invest less in training and on-the-job amenities. And of course, they employ fewer unskilled applicants and newcomers: indeed, notes economist Deirdre McCloskey, "The minimum wage arose in the early 20th century as a Progressive policy designed to [harm] low-wage workers." The nationwide federal minimum wage has also served as a weapon in sectional warfare, allowing economic interests from high-cost regions such as the urban Northeast to hinder the migration of workplaces and jobs to lower-cost areas of the country.

Few policies make less sense than minimum wage laws as a way of assisting the poor. To begin with, most persons who hold those jobs live in families that are not poor: the average family income of minimum wage workers under age 25 was $65,900 as of 2012. The Congressional Budget Office analyzed a proposed rise in the federal minimum wage and found that only 19 percent of the rise in wages would go to families below the poverty line. So persuasive is the economic case against the minimum wage that a *New York Times* editorial in the 1980s famously bore the headline, "The Right Minimum Wage: $0.00."

Discrimination law, too, often fails to confer the intended benefits on protected groups—or even makes things worse. Notoriously, labor force participation by disabled persons plunged after the 1990 enactment of the Americans with Disabilities Act, with its mandates for accommodation and other new sources of legal risk. When government makes it obligatory to underwrite costly benefits such as paid parental leave, employers tend to hire fewer persons they rationally predict are likely to use those benefits.

Of all these categories, age discrimination law may be the most self-defeating: the group most likely to wring money out of bosses through such claims is well-paid older males in managerial and professional jobs. Since the law was passed, that very group has suffered one of the steepest declines in labor force participation, often replaced with involuntary joblessness. After all, why should an employer hire an expensive 61-year-old who might need a pricey buyout if things don't work out? Better to fish in other recruitment ponds.

Further defeating the assumptions of the carefully designed old regulatory schemes, new technologies, especially the internet, have changed the structures of the workplace itself. The 1930s-vintage laws envisioned a workplace in which two classes of employees, workers and management, gathered at a designated factory or office building, clocked in and out at specific times (so that minimum wage and overtime obligations could be calculated), and got paid at regular two-week or monthly intervals by a single employer on whom new regulatory obligations could periodically be loaded.

Now, many of those distinctions have blurred. If you have five work tabs and six personal tabs open on your browser, are you "on the job"? Does it matter whether you are at your office workstation, on a lunch break, aboard a plane, or stretched out on your sofa at home? What if your pay is assembled from multiple gig assignments with clients, rather than a single, stable boss? Even as computer-aided manufacturing has erased old lines between blue- and white-collar on the factory floor, so, too, team organization concepts have blurred distinctions between managers, peers, and subordinates.

In a rational world, all of this should have led to a reexamination and often repeal of the old laws. The federal Fair Labor Standards Act—with its high-stakes litigation arising from elaborate guessing games about how to classify and categorize employees—should have been the first to go. And while expected economic impact on protected groups is not the only reason for enacting employment discrimination laws, legislatures should at least have revisited areas of the law where members of protected groups actually lost ground in the workplace after the law was extended to cover them—as with age and disability.

But no such luck. Critics of these laws mostly did not agitate for their repeal, and since the turn of the millennium, a newly invigorated left has taken up the slack and pushed for a massive, symbolic expansion of these laws—whether or not they work as intended. The most weirdly popular idea of all has been to hike the minimum wage to a level high enough to put major economic sectors and whole states far out of compliance—$15 an hour was the popular slogan for a while, and now some proposals go to $22 or higher. That scheme does considerable economic damage even when enacted in cities with some of the nation's highest wage levels already, like New York, San Francisco, and Seattle. As a nationwide standard that would bind low-wage regions, the more ambitious benchmarks would appear almost insane. In Mississippi, for example, the median wage for *all* hourly jobs in 2014 was $13.76, which means a $15 standard would have put the typical job out of compliance.

Among the Obama and Biden administrations' signature initiatives was to use executive orders, administrative actions, and the nominally independent National Labor Relations Board to drive a much-intensified regime of labor and workplace regulation without asking Congress. Biden, for example, decreed a $15 minimum and the abolition of the tipped wage for federal contractors. The National Labor Relations Board, for its part, has extended labor law liability across subcontractor and franchisee relationships, created new election procedures to speed up unionization, declared insubordination to be a protected right, declared many common employer handbook policies an unlawful entrenchment on collective action, tried to push temporary workers and religious college faculty into collective bargaining, and much more.

Meanwhile, the Department of Labor has been no less active, pushing through a range of unilateral initiatives. The most controversial was a doubling of the salary threshold (from $23,660 to $47,476), below which most employers must pay time-and-a-half overtime to white-collar workers (it also indexed the new threshold to future advances in the wage level). Small businesses, restaurants, retail chains, finance, computer services, and colleges are among the sectors expected to be badly hurt by this move.

Like the earlier attempts at regulating the workplace, obligatory overtime pay for managerial and technical employees is pretty much guaranteed to backfire. With much more of the white-collar workforce on the clock, employers will be under legal pressure to revoke telecommuting arrangements, restrict access to company cellphones and email after business hours, and disallow comp time setups that make a day with the kids possible. Aside from sowing widespread disruption, the rules will frustrate ambitious individuals who tend to prefer the freedom and perks of salaried status and willingly tackle long hours to learn skills and rise into the management ranks. One big, if unstated, ideological aim is to get more people to think of themselves as clock-punching subordinates, free from the politically unproductive "management mentality" of salaried types.

Who Is Harmed by the Fair Labor Standards Act?

Coverage of overtime and minimum wage debates tends to acknowledge that employers are harmed. Sometimes, the coverage also notes that workers are left idle by being priced out of jobs. But that's just the start. Others lose out as well:

- grocery co-ops that rely on member volunteers to stock shelves;
- developmentally disabled persons in community employment;
- workers asked to surrender company cellphones and stop using company online services after hours;
- elders for whom overnight home attendants—suddenly unaffordable under an overtime mandate—had been the alternative to nursing home care;
- restaurant, airport, and other service workers who made far more under a tip system;
- interns and first jobholders in competitive, sought-after fields like fashion journalism and political campaign work;
- drivers left with a choice of a machine car wash or nothing because by-hand washes are unsustainable when a tip system gives way to a $15 minimum wage;
- disabled persons who rely on now-unaffordable personal care assistants;
- small wineries with community volunteer programs; and
- telecommuters recalled to in-office assignments only.

Why don't these groups and their experiences count for more in the legislative process?

Conclusion

The U.S. Constitution enumerates no general federal government power to regulate national labor markets. Congress should take its oath to the Constitution seriously and execute a broad retreat from this area.

Suggested Readings

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