
CONGRESSIONAL TESTIMONY

No Company Is Above the Law: The Need to End Illegal Union Busting at Starbucks

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My testimony briefly summarizes the state of the labor market since the start of the COVID-19 pandemic. Then, I discuss the changing nature of work, which has become less conducive to traditional union models that have failed to evolve substantially to meet the needs of an increasingly specialized and mobile workforce that desires greater autonomy and flexibility. I conclude by discussing alternative labor organization models that might better elevate workers' voices and meet their desires,

and by providing policy recommendations to protect workers' and employers' rights and to modernize labor policies so that more people will participate in the labor force and have opportunities to work in ways that are best for them.

The U.S. Workforce Still Lacks Workers

The labor market is strong, but the workforce still lacks workers. Although the unemployment rate is on par with the pre-pandemic and half-century low of 3.5 percent, employment today is 2.5 million workers below the pre-pandemic rate of employment.¹ The current 10.8 million job openings are 3.3 million above the pre-pandemic record high.²

¹For the methodology of the employment gap, see Rachel Greszler, "What Is Happening in This Unprecedented U.S. Labor Market? February 2022 Update," Heritage Foundation *Backgrounder* No. 3684, February 8, 2022., <http://report.heritage.org/bg3684>.

²U.S. Bureau of Labor Statistics, "Job Openings and Labor Turnover Survey," <https://www.bls.gov/jlt/> (accessed March 21, 2023).

The shortage of workers has caused tremendous struggles for employers and for consumers who have had to deal with product shortages, delays in services and deliveries, and rising prices. While employers have responded by raising workers' pay, adding new benefits, and creating more flexible work policies, employers' increased costs for those changes have added to inflationary pressures. Even with significantly above-average wage gains of 4.3 percent per year over the past two years, inflation has turned those 4.3 percent pay raises into 2.2 percent pay cuts, with the average worker losing \$3,600 in wages over the past two years.³

While the labor market remains strong for workers, workers and employers face growing uncertainty over the strength of the economy and the Federal Reserve's ability to maneuver a soft landing following a 34 percent (\$8 trillion) increase in federal debt over the past three years (roughly half of which was financed by the Federal Reserve creating new money).⁴

A particularly troubling part of the recent decline in labor force participation is that it has been most pronounced among young workers ages 20 to 24, who should be launching into the work world, gaining experience and life skills that will increase their future work and income opportunities. While employment among workers ages 25 to 54 is not back on par with pre-pandemic employment rates, employment among 20-to-24-year-olds is 2.0 percent below pre-pandemic rates. Sitting on the sidelines at such a crucial stage could have lifelong

³Author's calculations using average weekly earnings in real and nominal dollars from the Bureau of Labor Statistics monthly Employment, Hours, and Earnings data available for download at <https://www.bls.gov/data/home.htm> (accessed March 15, 2023).

⁴The total U.S. federal public debt was \$23.410 trillion on February 28, 2020, and \$31.459 on February 28, 2023. U.S. Department of the Treasury, "Debt to the Penny" dataset,

consequences for those individuals and the economy at large.

Work is foundational to human flourishing and societal wellbeing. The significant decline in employment over the past three years follows a more gradual decline in employment—particularly among men and young workers—over the prior two decades. Many government policies have contributed to these declines.⁵

Continued low levels of employment will reduce the rate of economic growth, diminish real incomes and output, result in greater dependence on government social programs, require higher levels of taxation, and exacerbate the U.S.'s already precarious fiscal situation.

On the other hand, a flourishing workforce will increase incomes and output, empower individuals and families to pursue their desires, and naturally ease the U.S.'s troubled finances.

To help to achieve an environment in which more Americans want to pursue work, are rewarded for their contributions, and are able to find jobs that meet their needs and desires, policymakers need to end welfare-without-work policies and break down government-imposed barriers that restrict education opportunities, that hold back workers' wages, that make it harder for employers to provide flexibility, and that limit individual workers' voices.⁶

<https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny> (accessed March 7, 2023).

⁵Rachel Greszler, "What Is Happening in This Unprecedented U.S. Labor Market? July 2022 Update," Heritage Foundation *Backgrounder* No. 3716, July 7, 2022, <https://www.heritage.org/sites/default/files/2022-07/BG3716.pdf>.

⁶*Ibid.*

The Changing Nature of Work

While many Americans still hold traditional 9-to-5 jobs that require them to report to a workplace, the workforce has become increasingly flexible. The establishment of the gig economy and growth in freelancing and contract work has enabled tens of millions of Americans of all demographics and education levels to engage in be-your-own-boss work. And COVID-19 caused a giant leap forward in remote work capabilities and in flexible, family-friendly workplaces. According to the Bureau of Labor Statistics, 27.5 percent of all private-sector businesses had employees teleworking some or all of the time in August and September 2022.⁷ And the percentage of workers with access to paid family leave increased by 79 percent between 2016 and 2022.⁸

Even before the pandemic, employers said that workplace flexibility was what workers most desired and what they were increasingly providing to attract and retain the workers they needed. All kinds of workers desire flexibility for many different reasons, and it is especially valuable—even essential—for parents and individuals with disabilities. Of the 59 million Americans who performed independent work in 2021, 32 million (55 percent) said they could not work for a traditional employer because of personal circumstances, such as their own health condition or their caregiving responsibilities.⁹

⁷U.S. Bureau of Labor Statistics, “Telework, Hiring, and Vacancies—2022 Data from the Business Response Survey,” March 22, 2023, <https://www.bls.gov/news.release/pdf/brs1.pdf> (accessed March 24, 2023).

⁸U.S. Bureau of Labor Statistics, “Employee Benefits Survey,” 2022, <https://www.bls.gov/ebs/latest-numbers.htm> (accessed March 21, 2023).

⁹Adam Ozimek, “Freelance Forward Economist Report,” Upwork, 2021, <https://www.upwork.com/research/freelance-forward-2021#:~:text=Upwork%E2%80%99s%202021%20Freelance%20Forward%20survey%20confirms%20the%20finding..the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b> (accessed March 24, 2023).

In addition to a rise in independent work and workplace flexibility, today’s workers are also increasingly educated and mobile. In general, work has become less rote and more specialized, and people tend to change jobs—even careers—more frequently. These changes have rendered the traditional union model less effective at elevating workers’ voices and maximizing workers’ wellbeing.

Politically Weaponized, Industrial-Era Union Model Does Not Benefit Most Workers

Labor unions have played an important role in U.S. history—particularly during the first half of the 20th century—securing worker health and safety protections, obtaining just wages in line with workers’ value, and giving workers a previously unheard voice with management. Many of the protections that unions fought to secure are now protected by law. And the globally competitive economy has simultaneously empowered workers and weakened monopolistic union control.

For example, when the only cars that Americans could buy were those produced in the United States, by members of the United Auto Workers, the union could impose above-market compensation without the threat of competition. But higher costs meant higher prices, fewer people able to afford cars, and fewer workers needed to produce them. Domestic auto production today is one-third of what it was just two decades ago,¹⁰ and unions

[lance%20Forward%20survey%20confirms%20the%20finding..the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b](https://www.upwork.com/research/freelance-forward-2021#:~:text=Upwork%E2%80%99s%202021%20Freelance%20Forward%20survey%20confirms%20the%20finding..the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b) (accessed March 24, 2023).

¹⁰Domestic auto production was 137,400 in January 2023, compared to 420,400 in January 2023. Prior to the pandemic, in 2019, domestic auto production was half of what it was two decades prior, in 1999. Source: Federal Reserve Bank of St. Louis, “Domestic Auto Production,” updated March 3, 2023, <https://fred.stlouisfed.org/series/DAUPSA> (accessed March 24, 2023).

undoubtedly contributed to shuttered auto manufacturing plants through their excessive compensation demands (two-thirds higher than foreign competitors)¹¹ as well as the red tape and restrictive work rules they imposed. Meanwhile, a globally competitive labor market helps workers to leave undesirable, unjust, or unrewarding jobs and pursue better opportunities. The largely unchanged industrial-era union model is not well suited to the increasingly educated, transient, and adaptable workforce. The shift away from lower-skilled manufacturing jobs toward higher-skilled manufacturing and more service-oriented jobs has rendered one-size-fits-all union policies and pay scales ineffective and undesirable for many workers and companies.

One-Size-Doesn't-Fit-All. The union model, with its seniority-based pay scales and rigid rules about schedules and time off may have worked for 1950s manufacturing plants or coal mines, but it doesn't work well for much of the 21st-century workforce that provides increasingly specialized products and services and that is living in a culture that demands greater flexibility. Yet, instead of adapting to changing circumstances, unions have maintained rigid compensation and workplace structures that limit productivity and flexibility.

Responses to the COVID-19 pandemic were a perfect example of unions holding workers and output back, instead of propelling them forward. When the COVID-19 pandemic temporarily shut down production for most manufacturers, one non-unionized auto company immediately engaged directly with its

workers, seeking their input on what they needed to be safe and feel comfortable returning to work. That enabled the company to limit production delays and prevent lost paychecks. Meanwhile, unionized car manufacturers were stuck in virtual negotiations with union bosses, as facilities and workers sat idle. And across all industries, years-long union contracts meant unionized workers missed out on the large pay raises non-unionized employers were providing in response to inflation and labor shortages.¹²

Even beyond the COVID-19 pandemic, unions' control over all things worker-related make it extremely difficult for managers to accommodate workers' circumstances and preferences. Flexibility is extremely important for parents, caregivers, and individuals with disabilities, but the fact that union policy handbooks—not managers—are what determine whether a worker can switch shifts, leave work for an emergency without incurring an infraction, or if an employee can work remotely when needed makes it extremely difficult for managers to be flexible and accommodating in unionized workplaces.

Nearly All Workers Prefer Pay for Performance—Not Tenure. Unlike a 1950s assembly line where workers clocked in at 9 a.m. and out at 5 p.m., and everyone produced 20 widgets a day, few jobs today are so clear cut or routine, and most workers want to be paid and promoted based on their unique contributions instead of how many years they have been on the job.

In addition to being considered a more just system, performance-based pay also enables

¹¹James Sherk, "Auto Bailout or UAW Bailout? Taxpayer Losses Came from Subsidizing Union Compensation," testimony before the Committee on Oversight and Government Reform, United States House of Representatives, June 10, 2013, <https://www.heritage.org/testimony/auto-bailout-or-uaw-bailout-taxpayer-losses-came-subsidizing-union-compensation>.

¹²F. Vincent Vernuccio, "With Inflation High, Unions Suppress Wages," The Wall Street Journal, August 7, 2022, <https://www.wsj.com/articles/with-inflation-high-unions-suppress-wages-collective-bargaining-contracts-starbucks-delta-nonunionized-workers-labor-law-negotiations-11659888541> (accessed March 25, 2023).

significantly larger income gains because it encourages greater productivity.¹³ Yet, unions not only impose seniority-based pay scales—they also explicitly prohibit employers from providing performance-based bonuses to employees, even when these bonuses are strictly above and beyond the union-negotiated pay scale.

While union wages have traditionally exceeded non-union wages (not taking into account factors such as the cost of living), non-union wage growth has significantly outpaced union wage growth in recent years. Between 2007 and 2022, median weekly union wages increased by 41.0 percent while non-union wages rose by 56.4 percent.¹⁴

Unions’ Broken Pension Promises. According to the most recently available data from the Pension Benefit Guaranty Corporation, unions had accumulated \$677 billion in unfunded pension promises.¹⁵ As of 2019, multiemployer or union pensions had set aside only 44 cents of every dollar they promised to pay, and this underfunding is pervasive across nearly every union pension plan.¹⁶ In 2019, more than two of three workers

and retirees with union pensions were in plans that were less than 50 percent funded, and more than nine of 10 workers and retirees were in plans that were less than 60 percent funded.¹⁷

The unprecedented \$90 billion taxpayer bailout of private union pensions passed through the partisan American Rescue Plan under the guise of COVID-19 relief (and the Administration’s extralegal measure to retroactively add \$4.5 billion more than the law specified to union pension coffers) was only the tip of the iceberg.¹⁸ That bailout did not impose a single meaningful constraint on plans receiving bailouts and instead encouraged plans to continue making unfunded pension promises.¹⁹

It is wrong that many newly unionized workers will be subject to the equivalent of wage theft by having significant portions of their compensation put into union pension funds that—absent additional taxpayer bailouts—will return to them mere pennies on the dollar in promised pensions.

Union Election Structure Suppresses Employees’ Voices. A primary purpose of the National Labor Relations Act, according to its

¹³Studies 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.

¹⁴U.S. Bureau of Labor Statistics, Current Population Survey, “Median usual weekly earnings (second quartile), Employed full time, Private wage and salary workers,” available for download at

<https://www.bls.gov/data/home.htm> (accessed March 23, 2023).

¹⁵Pension Benefit Guaranty Corporation, “Data Table Listing,” Table M-9, Aggregate Funding of PBGC-Insured Plans (1980-2019), Multiemployer Program <https://www.pbgc.gov/prac/data-books> (accessed March 24, 2023).

¹⁶Ibid.

¹⁷Ibid., Table M-13, Plans, Participants, and Funding of PBGC-Insured Plans by Funding Ratio (2019).

¹⁸Rachel Greszler, “Biden’s Abuse of Power Causes CBO to Raise Cost Estimate of Private Pension Bailouts by \$4.5 billion,” *The Daily Signal*, October 12, 2023, <https://www.dailysignal.com/2022/10/12/bidens-abuse-of-power-causes-cbo-to-raise-cost-estimate-of-private-pension-bailout-by-4-5-billion/>.

¹⁹Rachel Greszler, “What Taxpayers, Workers, and Retirees Need to Know About the Union Pension Bailout That Has Nothing to Do with COVID-19,” *Heritage Foundation Issue Brief* No. 6059, February 26, 2021, <https://www.heritage.org/sites/default/files/2021-02/IB6059.pdf>.

preamble, is “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”²⁰ Yet, National Labor Relations Board rules allow workplaces to be organized without workers’ having the opportunity to vote in a secret ballot election and without majority support from workers. Moreover, unionization is typically a once-and-done process because workers do not get to regularly vote on their representation and the process for decertifying a union is extremely difficult. Consequently, a 2016 Heritage Foundation report by James Sherk found that, “In practice, only 6 percent of [workers] covered by unions under the National Labor Relations Act (NLRA) have ever voted for union representation.”²¹

This lack of true workers’ voice and choice has been exacerbated in recent years as workers have quit their jobs at record paces (nearly one in three workers quit their jobs in 2022)²² and as unions have targeted industries with extremely high turnover rates.

High turnover rates mean that a diminishing share of workers have the opportunity to exercise their right to choose their representation. For example, Starbucks’ reported turnover rate of 65 percent is significantly below that of other quick-service restaurant rates of 150 percent or more.²³ Yet even with an exceptionally low turnover rate for its industry, it is likely that only a small

fraction of Starbucks employees working at a location that unionized two years ago had the opportunity to vote for their representation.

Many Workers Don’t Want to Pay for Unions’ Politics. Whereas unions originally focused on their own workers and workplaces, unions have increasingly turned their focus from individual member representation to political engagement. Today, up to one-third of workers’ dues go to unions’ political and ideological activities, with some unions spending more on politics than on representing their own members.²⁴ Many teachers, for example, have the majority of their dues handed over to state and national teachers’ unions, even though local unions are the only ones bargaining directly on their behalf. A 2018 report by Rebecca Paxton of the Pioneer Institute found that, on average, 84 percent of teachers dues went to state and national union organizations—not the local union.²⁵

This shift in union spending on politics as opposed to worker representation is ostensibly intended to reverse the decline in union membership through legislation that forces more workers into unions, instead of unions focusing on providing valuable services to the individual workers they represent.

The use of union members’ money and the application of unions’ power toward political candidates and causes is evidenced by former AFL-CIO union leader Richard Trumka’s

²⁰The National Labor Relations Act, 29 U.S. Code § 151.

²¹James Sherk, “Unelected Representatives: 94 Percent of Union Members Never Voted for a Union,” Heritage Foundation *Backgrounder* No. 3126, August 30, 2016, <https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union>.

²²U.S. Bureau of Labor Statistics, “Job Openings and Labor Turnover Survey,” <https://www.bls.gov/jlt/> (accessed March 24, 2023).

²³Jane Harkness, “Global Food and Beverage Companies That Have Cracked the Code on Employee Retention,” Force Brands, October 3, 2018,

<https://forcebrands.com/blog/global-food-beverage-companies-employee-retention/> (accessed January 31, 2023).

²⁴Free to Teach, “Where Do Your Union Dues Go? (2017–2018): Teachers Union Spending in Pennsylvania, 2017–18,” <https://www.freetoteach.org/where-do-your-union-dues-go/> (accessed September 10, 2020).

²⁵Rebekah Paxton, “Where to Teacher Union Dues Go?” Pioneer Institute *Public Policy Brief*, November 2018, https://pioneerinstitute.org/wp-content/uploads/dlm_uploads/PNR-225-UnionDues-PB-V05.pdf (accessed March 24, 2023).

quid pro quo threat to congressional lawmakers ahead of a vote on the union-backed Protecting the Right to Organize (PRO) Act:²⁶ “And to those who would oppose, delay or derail this legislation—do not ask the labor movement for a dollar or a door knock, We won’t be coming.”²⁷ That legislation was subsequently renamed the Richard L. Trumpka Protecting the Right to Organize Act of 2023.²⁸

Many workers have been turned off by unions’ political activism, their use of intimidation²⁹ and deceit³⁰ to gain members, and union corruption.³¹

Union Membership Rate at Record Low. Despite media reports about increased unionization and the Biden Administration’s “whole of government” approach to pushing more workers into unions, the unionization rate declined to a record low 10.1 percent across all workers, and 6.0 percent among private-sector workers in 2021.³²

Neither Companies Nor Government Agencies Should Be Above the Law

Companies that violate labor laws should be consistently and impartially prosecuted and workers who expose violations should be protected. Similarly, government agencies that fail to judiciously carry out the law should be held accountable, and agency staff who expose violations should be protected.

Claims of unfair labor practices should be promptly investigated with decisions and consequences consistently and impartially applied. It is important to note that allegations of unfair labor practices are not necessarily evidence of wrongdoing because as anyone can make a claim of an unfair labor practice. Alleging unfair labor practices is a tactic that unions can use to challenge election outcomes if the results do not go their way. Over the past decade, fewer than half of all the unfair labor practices alleged by unions have been substantiated by the NLRB.

Moreover, a recent proposal by the NLRB would encourage unsubstantiated allegations of unfair labor practices by halting union decertification election processes if unfair labor practices are filed, even if those charges are unsubstantiated or unrelated to the union decertification process.³³

²⁶Rachel Greszler, “6 Ways a Union-Backed Bill Will Upend the Job Market,” *The Daily Signal*, February 5, 2020, <https://www.dailysignal.com/2020/02/05/6-ways-a-union-backed-bill-will-upend-the-jobs-market/>.

²⁷Richard Trumpka, Twitter, February 5, 2020, <https://twitter.com/RichardTrumpka/status/1225128484374294531> (accessed September 8, 2020).

²⁸H.R. 20, 118th Congress, Richard L. Trumpka Protecting the Right to Organize Act of 2023, <https://www.congress.gov/bill/118th-congress/house-bill/20?q=%7B%22search%22%3A%5B%22employee+rights+act+senate+scott%22%5D%7D&s=1&r=3> (accessed March 25, 2023).

²⁹F. Vincent Vernuccio, “Card Check Coercion: Intimidation,” in *Protecting the Secret Ballot: The Dangers of Union Card Check* (Midland, MI: Mackinac Center for Public Policy, 2019), <https://www.mackinac.org/26958> (accessed March 24, 2023).

³⁰Sean Higgins, “Fraud Alleged in Auto Plant ‘Card Check’ Union Organizing Bid,” *Washington Examiner*,

September 26, 2013, <https://www.washingtonexaminer.com/fraud-alleged-in-auto-plant-card-check-union-organizing-bid> (accessed March 24, 2023).

³¹Eric D. Lawrence, “Feds: UAW’s FCA Unit ‘Riddled with Corruption’ During Scandal,” *Detroit Free Press*, December 12, 2018, <https://www.freep.com/story/money/cars/chrysler/2018/12/12/fca-uaw-scandal/2290892002/> (accessed September 10, 2020).

³²News release, “Union Members—2022,” U.S. Bureau of Labor Statistics, January 19, 2023, <https://www.bls.gov/news.release/pdf/union2.pdf> (accessed March 24, 2023).

³³National Labor Relations Board, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 87, No. 213, November 4, 2022, pp. 66890-66933 <https://www.govinfo.gov/content/pkg/FR-2022-11-04/pdf/2022-23823.pdf>

Troubling Claims of Misconduct Within the National Labor Relations Board (NLRB).

The purpose of the NLRB is to administer and enforce the NLRA and to conduct representation elections. Recent claims from Starbucks officials about NLRB officials' activity surrounding a union election in Overland Park, KS,³⁴ and a subsequent NLRB hearing officer's report that corroborated some of those claims, suggest that NLRB officials engaged in misconduct regarding their duties to conduct fair and impartial elections.³⁵ A March 7, 2023, letter from Ranking Member Cassidy to the NLRB Chairman and General Counsel noted that the troubling allegations by NLRB employees include:

Board employees making secret arrangements with union representatives to vote in-person in what all parties agreed would be a mail-ballot election; providing union agents with confidential, nonpublic information regarding vote counts in order to enable SWU [Starbucks Workers United] to target and intimidate employees; providing unions duplicate and triple ballots; and individualizing voting arrangements for voters hand-picked by SWU.³⁶

Moreover, Chairwoman Virginia Foxx of the Education and Workforce Committee stated, "The Committee understands that the NLRB employee misconduct in representation

³⁴Letter from Zarina Jenkins, Acting Exec. Vice President & Gen. Couns., Starbucks, & Kimberly J. Doud, Couns. for Starbucks, to Lauren M. McFerran, Chairman, NLRB, & Jennifer A. Abruzzo, Gen. Couns., NLRB, August 15, 2022.

³⁵Starbucks Corp., No. 14-RC-289926, at 9 (NLRB, February 24, 2023) (hearing officer's report and recommendations on objections).

³⁶Letter from Senator William M. Cassidy to Lauren M. McFerran, Chairman, NLRB, & Jennifer A. Abruzzo, Gen. Couns., NLRB, March 7, 2023, https://www.help.senate.gov/imo/media/doc/nlrb_weap_onization_letter.pdf (accessed March 24, 2023).

elections is more widespread than the allegations in the Starbucks letter and findings in the Hearing Office report."³⁷

The NLRB's potential interference in union elections is very troubling and Congress should continue to investigate allegations related to Starbucks Workers United, as well as other similar misconduct that could be occurring between NLRB officials and other labor organizations.

Politicization of Labor Policy Hurts Workers and Employers Alike. Important issues in labor policy have swung back and forth in recent years, making it difficult for employers and workers to go about their business and occupations without risks of lawsuits or even losing their livelihoods.

The Biden Administration's NLRB under General Counsel Jennifer Abruzzo has pursued an especially political agenda, seeking to overturn more than 40 prior NLRB decisions. Moreover, the General Counsel has arguably used memoranda to circumvent the court and rulemaking processes. Memoranda are supposed to provide useful information and guidance for employers, to help them to conform to the law, but they cannot be used to overturn past decisions or change the law.

Yet, Abruzzo's April 2022 memorandum, "The Right to Refrain from Captive Audience and other Mandatory Meetings,"³⁸ for example, provides guidance that is counter to a 65-year-

³⁷Letter from Rep. Virginia Foxx to Rebecca A. Dormon, Assistant to the Regional Director NLRB, Region 15, March 22, 2023, https://edworkforce.house.gov/uploadedfiles/letter_from_chairwoman_foxx_march_22_2023.pdf (accessed March 24, 2023).

³⁸See Jennifer A. Abruzzo, "The Right to Refrain from Captive Audience and other Mandatory Meetings," National Labor Relations Board, Office of the General Counsel, Memorandum GC 22-04, April 7, 2022, available for download at

old court decision,³⁹ and which directly violates employers' free speech rights. Just as employers may require workers to attend informational meetings about safety policies or workplace benefits, employers should be free to require workers to attend informational meetings about unions.⁴⁰

Recent polling from the Institute for the American Worker found that only 12 percent of workers opposed mandatory employer meetings on unions, and union households, black voters, and democrats had the strongest support for mandatory meetings.⁴¹ One of the reasons workers support mandatory union information meetings is to prevent workers from being singled out or intimidated if their choice to attend the meeting is viewed by union organizers and supporters as them opposing the union.

Clarity and Employee Rights Needed in Labor Law. Politicized labor laws that swing back and forth between Administrations, inconsistency in the application of labor laws, and memoranda that directly contradict labor laws make it difficult for employers and workers to know what they can and cannot do. These uncertainties put employers in difficult situations where they risk lawsuits in both directions.

For example, recent NLRB rulings have found companies to be guilty of unfair labor practices for dismissing employees who violated company safety policies or who harassed other workers because those violations occurred during a unionizing campaign. Yet, not firing workers who violate company policies could

<https://www.nlr.gov/guidance/memos-research/general-counsel-memos> (accessed March 24, 2023).

³⁹Babcock & Wilcox Co., 77 NLRB 577 (1948).

⁴⁰During mandatory employer meetings on unionization, employers are not allowed to threaten, interrogate, or make promises to employees, and like other mandatory workplace meetings, employees are paid for their time in the meetings.

create liabilities or lead to lawsuits from workers who were harmed by their co-workers' violations.

Complex and shifting labor law also adds unnecessary administrative and legal costs that make it harder for businesses to start and to expand.

Congress should codify important components of labor policy into law to provide clarity and continuity for employers and employees alike. That includes, among other things, creating a single bright-line test for independent contractors across all federal laws based on the common law definition, defining joint employer status based on direct and immediate control, and protecting important worker and employer rights. The Employee Rights Act includes these and other important provisions to modernize and stabilize labor law.⁴²

Alternative Labor Organizations

Unions thrive on adversarial relationships and strong-arm tactics, pitting employees against employers and preferring the role of bully instead of benevolent mediator. Union tactics, such as using 12-foot blow-up rats to depict company management and anyone who does not toe the union line, are dehumanizing and destructive to the basic workplace ideals of mutual respect and compassion.

Unions' typically combative stances are counter to the amicable relationships that workers and employers desire with one another, and are counter to employers' and employees' mutual reliance on one another.

⁴¹Institute for the American Worker, "Polling Results for Employer Meetings on Unionization," conducted August 2-9, 2022, <https://i4aw.org/resources/polling-results-for-employer-meetings-on-unionization/> (accessed March 26, 2023).

⁴²S. 3889, Employee Rights Act, 117th Congress, and H.R. 7194, Employee Rights Act, 117th Congress, <https://www.congress.gov/bill/117th-congress/house-bill/7194> (accessed March 25, 2023).

Policies like performance-based pay and bonuses, voluntary paid-family-leave benefits, and promotions from within help workers to grow and help companies to succeed. Direct communication is also mutually beneficial—whether it is a worker being able to negotiate a schedule or compensation package that meets her unique needs, or an employer receiving valuable employee input and ideas on how to improve the company, everyone benefits from his or her voice being heard.

So how can workers and employers have more communications with, and investment in, one another? The solution is voluntary engagement, absent the strong arm of unions or the heavy hand of government. The recent rise in wages, benefits, flexibility, and remote work options even as unionization has declined is evidence that a strong labor market is the best way for workers to achieve what they desire without the unintended consequences of government mandates or forced third-party interventions.

Workers should never be forced to pay for services they do not want, nor should they be prevented from choosing their own representation or representing themselves when talking or negotiating with their employer. Likewise, employers should not have to succumb to micromanagement by an outside organization to meet worker desires. Neither should be micromanaged by government regulations that prohibit choices or shut off opportunities.

The following models offer ways to improve employee and employer relations, for

workers' voices to be heard, and for both workers and employers to grow and succeed:

Worker-Choice Arrangements. The union exclusivity model is flawed on both sides: Workers in a unionized workplace can be forced to pay for representation they do not want (94 percent of union members never voted for a union) and can be prevented from communicating or negotiating directly with their employer; and unions must represent all workers, including those in right-to-work states and public employees' unions, who choose not to join the union and do not pay union dues.⁴³ Forced solidarity is unjust and unhelpful.

Worker-choice models would solve the free-rider problem that unions lament as well as the forced-representation problem that many workers lament. In worker-choice models, workers who want the benefits of the union would have to pay union dues, and those who do not could choose their own representation.⁴⁴ Unions could even allow workers to pick and choose the services they want to contract with the union to receive.

Professional Worker Organizations.⁴⁵ Workers do not have to be employed by the same company or even in the same field of work in order to organize around shared interests and pool their resources to obtain benefits, such as health insurance at a lower cost. The Association of Independent Doctors is a professional organization that provides a collective voice for independent doctors who previously lacked organization and combined power, while also offering reduced-cost insurance. The dues-free Freelancers Union

⁴³F. Vincent Vernuccio, "Worker's Choice: Freeing Unions and Workers from Forced Representation," Mackinac Center for Public Policy, June 1, 2016, <https://www.mackinac.org/22471> (accessed September 9, 2020), and James Sherk, "Unelected Representatives: 94 Percent of Union Members Never Voted for a Union," Heritage Foundation *Backgrounder* No. 3126, August 30, 2016, <https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union>.

⁴⁴States could allow worker-choice arrangements for public-sector employees by amending their labor laws, while Congress could allow them for private-sector workers by amending the National Labor Relations Act.
⁴⁵F. Vincent Vernuccio, "Unionization for the 21st Century: Solutions for the Ailing Labor Market," Mackinac Center for Public Policy, November 11, 2014, <https://www.mackinac.org/S2014-07> (accessed September 9, 2020).

has attracted nearly half a million workers across very diverse professions and wide income ranges by providing things that workers value, such as education, insurance benefits, and advocacy. An advantage of professional organizations is that workers can take their benefits with them from one job, contract, or gig to another.

Unions as Providers of Education and Certification. As technology and trade continue to alter the workplace, unions or worker associations could provide valuable education and voluntary certifications to help to prepare workers for changes within their own career or help them to gain the skills and experience for a new type of work. Some unions do provide valuable worker training; expanding training beyond the job that workers already perform could be particularly beneficial for workers in declining industries. Certifications can also improve workers' job options by serving as a trusted measure of knowledge and experience.

Representation Services. Unions have often focused on compensation, but the typical seniority-based structures that unions impose do not make sense for workplaces with a wide range of positions, skills, and expertise. Moreover, union-negotiated pension benefits are less valuable as many workers do not plan to stay in the same job or profession for their entire career. Yet, without dictating compensation, unions could still provide value through things like representation services and setting minimum salary requirements, while allowing individual

workers to negotiate their compensation packages directly with their employer. This is the type of structure that the Major League Baseball Players Association provides, for instance.

Solutions to Protect and Empower Workers

The only true way to elevate workers' voices is to allow them to express their voice how they desire—whether through a union, an alternative form of representation, or speaking directly with their employer. Government attempts to dictate who gets to speak on behalf of workers minimize individual workers voices.

In addition to laws addressing employer and employee relationships, policymakers can help to maximize workers' wellbeing by removing government barriers that prevent them from becoming more productive and achieving their goals.⁴⁶ To that end, policymakers should:⁴⁷

- **Allow worker-choice agreements** so that workers are not forced to pay fees to or be represented by unions, and so that unions are not forced to represent workers who are not dues-paying members. The Workers Choice Act would accomplish this.⁴⁸
- **Protect workers' rights to a secret ballot and in-person elections.** A stated purpose of the NLRA is "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own

⁴⁶Rachel Greszler, "The Future of Work: Helping Workers and Employers Adapt to and Thrive in the Ever-Changing Labor Market," congressional 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, <https://edlabor.house.gov/imo/media/doc/GreszlerTestimony102319.pdf> (accessed September 10, 2020).

⁴⁷Rachel Greszler, "Labor Policies for COVID-19 and Beyond: Recommendations to Get Americans Back to Work," Heritage Foundation *Backgrounder* No. 3506, June 30, 2020, <https://www.heritage.org/sites/default/files/2020-07/BG3506.pdf>.

⁴⁸H.R. 5147, 116th Congress, The Worker's Choice Act, <https://www.congress.gov/bill/116th-congress/house-bill/5147/text?r=7&s=1> (accessed March 25, 2023).

choosing...” The surest way to protect that right is through secret-ballot, in-person elections. The so-called card-check process allows workplaces to be unionized without a secret-ballot vote and through a process that too often includes intimidation,⁴⁹ misrepresentation,⁵⁰ promises, coercion, and threats. Moreover, a recently proposed NLRB regulation would further restrict workers’ rights by denying them the ability to appeal an employer’s voluntary recognition of a union through the card-check process if they believe that that process compromised workers’ true desires.⁵¹

Moreover, many recent elections have been conducted through mail-in ballots, which are subject to increased risks of fraud and coercion, as well as significantly lower voting rates. According to the NLRB, worker participation for in-person union votes was 79 percent during the FY 2020 to FY 2022 period, compared to 68 percent for mail-in elections.⁵² Congress should guarantee that a majority of employees have a right to a secret-ballot paper election—something that 76 percent of union households support.⁵³

- **Protect employers’ rights to free speech.** In light of recent NLRB actions to threaten employers’ free speech through memoranda, it may be necessary for Congress to clarify in law the 65-year old precedent that mandatory employer-led informational meetings on unions (so long as they do not include prohibited threats, interrogation, or promises) are protected under employers’ free speech.

- **Allow unionized workers to receive wages and bonuses.** Many union contracts prevent employers from providing pay raises or bonuses to workers. The Rewarding Achievement and Incentivizing Successful Employees Act would allow employers to provide performance-based raises without union consent.⁵⁴

- **Protect union members’ pensions** by applying the same rules and regulations to union pensions as to non-union pensions.⁵⁵

- **Enact the Employee Rights Act.** This proposed act includes important worker protections (including many of those listed above), such as privacy rights, secret-ballot elections, and protections from coercion and intimidation. It also includes

⁴⁹F. Vincent Vernuccio, “Card Check Coercion: Intimidation,” in *Protecting the Secret Ballot: The Dangers of Union Card Check* (Midland, MI: Mackinac Center for Public Policy, 2019), <https://www.mackinac.org/26958> (accessed March 24, 2023).

⁵⁰Sean Higgins, “Fraud Alleged in Auto Plant ‘Card Check’ Union Organizing Bid,” *The Washington Examiner*, September 26, 2013, <https://www.washingtonexaminer.com/fraud-alleged-in-auto-plant-card-check-union-organizing-bid> (accessed March 24, 2023).

⁵¹National Labor Relations Board, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 87, No. 213 (November 4, 2022), pp. 66890–66933 <https://www.govinfo.gov/content/pkg/FR-2022-11-04/pdf/2022-23823.pdf> (accessed March 25, 2023).

⁵²National Labor Relations Board, letter to the Honorable Virginia Foxx and Rick W. Allen regarding mail-in elections, November 3, 2022.

⁵³Employee Rights Act, “What Does the Employee Rights Act Accomplish?” <https://employeerightsact.com/> (accessed March 24, 2023).

⁵⁴H.R. 6952, 117th Congress, “RAISE Act,” <https://www.congress.gov/bill/117th-congress/house-bill/6952?q=%7B%22search%22%3A%5B%22H.R.+6952%22%5D%7D&s=1&r=1> (accessed March 25, 2023).

⁵⁵Rachel Greszler, “Congress’s Multiemployer Pension Committee Should Act Now: 12 Reforms to Protect Pensioners and Taxpayers,” Heritage Foundation *Backgrounder* No. 3368, November 20, 2018, https://www.heritage.org/sites/default/files/2018-11/BG3368_0.pdf.

modernizations to protect and support successful small-business models and to help to enable more flexible and increasingly desirable be-your-own-boss work opportunities.

While addressing employee and employer relations is important for unionized or potentially unionized workplaces, 94 percent of private-sector workers in the U.S. do not belong to unions and are unlikely to belong to unions anytime soon. To help encourage stronger labor force participation and opportunities for work that offer rising incomes and the flexibility that workers desire, Congress should:

- **Reduce regulations to free up resources for more productive uses.** 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, and educating and promoting workers.
- **Allow the private sector to provide benefits that workers desire,** such as the ability to accrue paid time off through the Working Families Flexibility Act.⁵⁶
- **Allow accessible, affordable, and portable worker benefits.** The average worker will change jobs 12 times throughout his career, but no one wants to

roll over his 401(k) plan or change health insurance 12 times. Current policies make it difficult for workers to obtain portable benefits.

- **Expand apprenticeship options.** The Apprenticeship Freedom Act⁵⁷ and Training America’s Workforce Act⁵⁸ would help to level the playing field so that apprenticeships could develop across more industries and provide more workers with the option of on-the-job, paid education ending in a successful career.
- **Refuse to close doors to work opportunities.** Excessive wage regulations, prohibitions on independent work options (including the Department of Labor’s recently proposed Independent Contractor rule), and attempting to redefine entire business models (including the NLRB’s proposed Joint Employer Standard) all limit income and growth opportunities.
- **Hold agencies and businesses accountable to the law.** No business or government agency should be above the law. Unfair labor practices and workplace violations should be prosecuted according to the law. Agencies should be held accountable so that they carry out their mission without prejudice or collusion. Lawmakers should provide clarity and certainty in labor laws by codifying clear definitions so that employers and workers

⁵⁶Private-sector employers are currently prohibited from offering lower-wage hourly workers the choice between accruing paid time off and receiving pay in exchange for their overtime hours. The Working Families Flexibility Act would end this restriction so that private-sector workers can have the same option as public-sector workers to accumulate paid time off. See Rachel Greszler, “Mike Lee’s Bill Would Boost Paid Family Leave Without Growing 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/>.

⁵⁷News release, “Rep. Good Introduces 40th Bill, the Apprenticeship Freedom Act,” Congressman Bob Good of Virginia, December 13, 2022, <https://good.house.gov/media/press-releases/rep-good-introduces-40th-bill-apprenticeship-freedom-act> (accessed March 11, 2023).

⁵⁸News release, “Thune, Scott Introduce Legislation to Combat Workforce Challenges,” John Thune, U.S. Senator for South Dakota, March 7, 2022, <https://www.thune.senate.gov/public/index.cfm/2022/3/thune-scott-introduce-legislation-to-combat-workforce-challenges> (accessed March 25, 2023).

are not subject to the whim of politicized memos and regulations.

Summary

Although uncertainty lingers, the labor market is strong, and workers have benefited from increased compensation and improved flexibility and family-friendly policies. Yet, there are still millions of missing workers, with government policies partly to blame.

Amidst evolving worker skills and desires and a continually changing way of work, traditional union structures fail to maximize most workers' voices and wellbeing. Unions' failure to adapt and provide services that directly benefit workers and to instead attempt to gain members and power through politics has been met with a massive decline in unionization in the U.S. Yet, workers' desires for upward mobility and increasing flexibility show that workers' voices are as important today as at any time before.

By definition, forced unionization and exclusive representation muffle the voices, deny the rights, and extract the earnings of at least a minority of workers. That does not mean that collective labor organizations are useless; it does mean that a transformation to voluntary worker associations would be far more helpful. Choice-based worker representation accompanied by reduced government barriers to worker pursuits can help to elevate the voices of union and non-union workers alike, improve their wellbeing, and expand their opportunities.

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