Workplace Regulatory Reform

Testimony presented to the

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Introduction

Chairman Byrne, Ranking Member Takano and members of the Committee, I am pleased to have the opportunity to appear today to discuss workplace regulatory reform. My testimony will focus on two key points:

- The Trump Administration has made considerable progress in implementing broad-based regulatory reform and has virtually halted the imposition of new regulatory costs burdens;

- The Trump Administration, Congress, and the courts have effectively blocked a number of misguided labor regulations issued during the Obama Administration;

I will discuss each of these points in additional detail.

Regulatory Reform under President Trump

Since President Trump took office, his administration has departed in several ways from the policies of President Obama's. Perhaps the most striking has been in the area of regulatory reform. The Obama Administration finalized a costly regulation at the average rate of 1.1 per day, and the cost of complying with those regulations added up to $890 billion — according to the agencies themselves that issued the regulations. That cost is an average stealth tax increase of over $110 billion a year. Enter the Trump Administration, which from the president's inauguration to September 30 of last year (the end of the federal government's fiscal year) added essentially zero additional regulatory costs.[1] While much of this administration's reduction in the regulatory burden can ultimately be traced to delays or paperwork reductions, the taming of the regulatory state has nevertheless been remarkable. Congress also contributed to this effort by invoking the Congressional Review Act (CRA) to repeal 14 rules.[2]

New regulatory cost burdens fell by more than two-thirds — from an average $110 billion per year during the Obama Administration to $30.6 billion in 2017. And the vast majority of those costs originated from rules published in the last few days of the Obama Administration. Specifically, $24.8 billion came from 38 rules published from January 3 to January 19, 2017, before President Trump took office. In other words, for all of 2017 the Trump Administration imposed only $5.8 billion in regulatory costs. Of note, independent agencies that are not controlled by the president issued $6.7 billion in regulations. That means executive agencies that are directly controlled by the president yielded $900 million in net regulatory cost savings.[3] Among the independent agencies, the National Labor Relations Board (NLRB) has been particularly in effective in repealing damaging labor relations decisions during the previous administration. Specifically, a 2015 decision to

expand the joint employer standard threatens millions of jobs and billions of dollars in investment. Despite the NLRB's efforts to rescind that decision in recent months, it appears that the Board will be unable to do so anytime soon, and the damaging 2015 decision will remain in effect in the years to come.

Going forward, the Trump Administration has promised to make even more progress in reducing the burden of the regulatory state. For 2018, the administration produced a regulatory "budget" — the amount by which the nation's 24 regulatory entities are permitted to increase the overall cost of complying with regulations. These budgets, detailed by the American Action Forum's (AAF) Dan Bosch, show that overall deregulation will accelerate. Annualized costs are to decline by $687 million, or an up-front $9.8 billion.[4] Not all entities must deregulate equally. Eight entities received budgets of zero — that is, flat overall regulatory burdens — while the remaining 16 received negative targets — that is, continued deregulation. Of note, nobody received an increase. Among the decreases, the largest is mandated for the Department of the Interior, with $196 million in annualized reductions, or $2.8 billion in up-front costs.

The current administration should also be commended for enforcing a common method of measuring regulatory costs, especially by making sure that every regulatory entity uses comparable time periods over which to do the cost accounting. The infrastructure of regulatory budgets and cost accounting is in relative infancy and will likely continue to improve in the years to come.

The economic benefits of this major overhaul of the nation's regulatory system cannot be overstated. On multiple occasions, AAF has examined the implications of over-regulation and found that it has significantly strained economic and labor market growth. For instance, AAF found that every $1 billion in regulatory compliance costs reduces industry employment by 3.6 percent.[5] In a separate report, AAF found that stopping the growth in regulatory burdens can result in substantial growth in employment, business, and wages. In particular, AAF examined how local economies responded to state-imposed regulatory moratoria. It found that when implementing a moratorium, a state would gain, on average, over 15,000 jobs, create nearly 3,000 new small businesses, and increase total wage earnings by more than $129 million per quarter.[6]

All Three Branches of Government are Reversing Harmful Labor Regulations Issued Under the Obama Administration

In a short period, the current administration, Congress, and the courts have rolled back or blocked several significant labor regulations issued during the Obama Administration.

The Overtime Pay Rule

The courts and the Trump Administration together have ensured that President Obama's costly overtime pay rule will never be implemented. In May 2016, the Department of Labor (DOL) finalized the overtime pay rule, which would have expanded the number of workers entitled to time-and-a-half pay when working beyond 40 hours per week.[7] Under current federal labor law, workers are exempt from overtime pay if they are salaried, earn a minimum weekly amount, and meet certain duties requirements. The Obama Administration intended to expand the number of workers entitled to overtime pay by increasing the minimum pay requirement from $455 to $913 per week ($23,660 to $47,476 per year) — a threshold that would have automatically increased every three years.[8] This means that the rule would have made eligible for overtime pay currently exempt workers who earn between $455 and $913 per week.

Although the DOL intended for the rule to take effect on December 1, 2016, U.S. District Judge Amos Mazzant granted a nationwide injunction in November 2016, preventing its implementation.[9] In his ruling, Judge Mazzant explained that the DOL cannot base overtime pay eligibility solely on salary level. While the DOL challenged the decision at the end of the Obama Administration, the DOL under the Trump Administration decided to abandon the original overtime regulation and issue its own.[10] In June 2017, the DOL asked the appeals court to uphold Judge Mazzant's decision, but still affirm its ability to raise the salary threshold.[11] At the end of August 2017, Judge Mazzant issued his final decision in the case and officially invalidated the regulation.[12] In his ruling, the judge clarified that the DOL can still adjust overtime pay regulations by raising the salary threshold. He concluded, however, that President Obama's overtime pay rule raised the salary threshold by so much that it effectively made irrelevant the duties requirements that are also needed to exempt workers from overtime. Following the judge's latest decision, the DOL filed an appeal to challenge the ruling in an effort to maintain its authority to issue overtime regulations.[13]

Meanwhile, the DOL has continued its work toward issuing a new, scaled-back overtime regulation. In particular, last year it sought public comment[14] and a new proposed rule is expected in October 2018.[15] The new rule will likely increase the salary threshold but to a much lower level than in the previous regulation.

This is good news for American families. A close inspection of President Obama's rule reveals that not only would it have failed to significantly increase worker pay, but it also would have imposed massive costs on businesses. The Congressional Budget Office (CBO) found that 4 million people would have been newly eligible for overtime pay.[16] Yet, only 900,000 of those employees actually work more than 40 hours per week and would have received a raise. But even for these workers, the increase in pay would have been marginal; CBO estimated their annual earnings would have risen by just 2 percent. Meanwhile, businesses would have faced massive payroll and compliance cost burdens. The

CBO estimated that businesses would have, on average, spent over $1 billion annually simply to familiarize themselves with the rule, modify their payroll systems, and manage their workers' hours. More troubling, the CBO concluded that businesses would have passed these burdens directly on to consumers through higher prices. Consequently, while 900,000 workers may have received a small raise, the combination of higher prices and lower profits for family-owned businesses would have caused real family income to decline by $2.1 billion in 2017 and by an average of $1.2 billion per year thereafter. Efforts by the Trump Administration to scale back this regulation will shield businesses and families from these costs.

Joint Employer Interpretation

The Trump Administration has also taken steps to reverse the establishment of a broadened and confusing joint employer standard. In August 2015, the National Labor Relations Board (NLRB) overturned decades-long precedent by broadening the legal standard for designating a firm a joint employer.[17] When a firm is considered a joint employer, the federal government holds it responsible for the labor practices of a separate independent business. Traditionally, a firm is a joint employer if it exerts "direct control" over the employment or pay practices of a separate business. In its August 2015 decision, however, the NLRB introduced a new "direct or indirect control" standard that is far more ambiguous and could be applied to multiple business relationships. Soon after, the DOL followed suit when it issued an Administrative Interpretation that abandoned the traditional standard in favor of the new one in application of federal labor law.[18]

In June 2017, however, the DOL announced that it was reversing course and returning to the traditional joint employer standard.[19] While full repeal of the broadened joint employer standard still requires action from the NLRB or Congress, this was welcome news for businesses and workers. There is no evidence that the broadened standard benefits workers, and research indicates that the new standard threatens economic and labor market growth by undermining the franchise business model.

As is clear in the NLRB's then-general council's amicus brief, the NLRB broadened the joint employer standard to empower collective bargaining.[20] Yet, there is little reason to believe the new standard would increase union membership. The NLRB's general council asserted that the previous joint employer standard, established in 1984, eroded collective bargaining and that the broader standard would help reverse the long-term decline in private sector union membership. As illustrated in an AAF report, however, there is no evidence suggesting a link between the 1984 standard and collective bargaining.[21]

Meanwhile, the new standard upends the franchise business model, one of the most dependable sources of job creation in the United States. Since 2012, franchise jobs have

grown at 3.4 percent annually, far outpacing the rest of the private sector's 2 percent job growth rate. The new standard could slow job growth, however, as corporations are less likely to provide logistical support to franchisees and may simply opt to open company-owned stores instead of selling franchise licenses to independent businesses. AAF found that these effects could result in a loss of up to 1.7 million jobs over 10 years.[22]

Additionally, early evidence indicates that the new standard is already harming the industries that are particularly vulnerable to it. In particular, a major portion of hotel workers are employed by franchises. AAF found that since the NLRB introduced the new standard, growth in hotel employment, wages, and hours have all stalled.[23] Consequently, the sum of all pay earned by all workers in the hotel industry went from rising 5.7 percent annually before the NLRB's decision to declining by 1.2 percent after its decision.

Although the DOL has rescinded its previous joint employer interpretation, however, the NLRB's decision to broaden the standard remains in effect and continues to threaten franchise businesses and jobs. Not only does the broadened standard threaten 1.7 million franchise jobs, but it may also be holding up billions in investment recently freed by the Tax Cuts and Jobs Act (TCJA). In particular, AAF's Gordon Gray and Ben Gitis found that the TCJA provided franchised businesses with $140 billion in savings over the next 10 years.[24] Until there is clarity in the joint employer standard, however, those businesses are not likely to use those savings to invest and expand their operations.

The surest way to return confidence and clarity to the joint employer standard is through congressional action. One option is Subcommittee on Workforce Protection Chairman Byrne's Save Local Business Act, which would establish in law the traditional "direct control" standard under both the National Labor Relations Act and the Fair Labor Standards Act.[25]

Independent Contractor Interpretation

In July 2015, the DOL issued an Administrative Interpretation on independent contractors that fundamentally undercut the nature of independent work (commonly referred to as the "gig economy"). In particular, the DOL announced that it would broadly assume an employment relationship for all workers in the economy, including independent contractors.[26] In June 2017, however, the DOL announced it had rescinded that interpretation.[27]

Again, this was welcome news for American workers, as the previous interpretation had essentially forced a traditional and rigid employer-employee framework onto an increasingly fluid work environment. In so doing, it threatened to stifle growth in this sector of the labor force, about which policymakers and analysts still have much to learn.

Overall, there remains little consistent and comprehensive data on the gig economy. However, the data we do have suggest that it is growing and it provided struggling workers an opportunity to continue to make ends meet in the years following the Great Recession.

An AAF-Aspen Institute report examined the gig economy as identified by the General Social Survey and Census nonemployer statistics.[28] It found that in 2014, 14.1 percent to 20.5 percent of all workers were in the gig economy. Additionally, from 2002 to 2014, while total employment only grew by 7.5 percent, gig economy workers increased by between 9.4 percent and 15 percent. Between 2010 and 2014, growth in independent contractors alone accounted for 29.2 percent of all jobs added. Nonemployer firm data indicate that gig economy work enabled by online platforms is also expanding rapidly, particularly in the transportation sector where ridesharing services are active. In metropolitan areas the total average annual growths of establishments and receipts in the transportation sector were 7.7 percent and 9.4 percent, respectively, prior to the introduction of a ridesharing service. They rose to 39.3 percent and 20.4 percent, respectively, in the years after the introduction of a ridesharing service.

Other research suggests that the growth in the gig economy has been even more dramatic. Katz & Krueger (2016) found that the portion of workers active in the gig economy increased from 10.1 percent in 2005 to 15.8 percent in 2015.[29] These figures suggest that gig economy employment rose by 9.4 million during that period. During the same timeframe, total employment in the U.S. economy grew by 9.1 million, slightly less than the growth in the gig economy. Thus, a major implication of their study is that all net job growth between 2005 and 2015 occurred in the gig economy.

Since data on the gig economy remain limited, the welfare effects of its growth are not very well understood. However, the data that do exist suggest that the gig economy has served as an important countercyclical economic buffer to workers and families who fell on hard times during the Great Recession and ensuing anemic recovery. In 2014, gig economy workers reported working fewer weeks in the previous year than regular payroll employees. Additionally, 6.7 percent to 12 percent of gig economy workers had been laid off from previous work, compared to 5.4 percent of all employed people.[30]

Other statistics suggest that gig economy arrangements are more flexible than standard payroll jobs. Specifically, those in the gig economy are more likely to be part-time workers than those in regular payroll jobs. Gig economy workers are also more likely to work from home.[31] These facts indicate that workers may use the gig economy to supplement their household income while looking for regular jobs, caring for family, or attending school. The DOL's July 2015 Administrative Interpretation that treated all these workers as traditional employees threatened to undercut these very qualities, which make the gig economy flexible and highly accessible.

Due to its countercyclical nature, the gig economy's future is still uncertain. Despite its rapid growth over the last decade, evidence has emerged that as the overall economy improves, growth in gig economy jobs has started to taper off. The JPMorgan Chase Institute found that growth in gig economy jobs enabled by online platforms peaked in 2014 and has since slowed as more workers have obtained traditional payroll jobs.[32]

Together, the evidence of the gig economy suggests that its growth provided ways for workers to supplement their incomes and continue to receive earnings in new and unique ways, particularly during the latest economic downturn. Before enacting policies governing this portion of the economy, it is vital that researchers and policymakers continue to build a better understanding of it. The previous administration's independent contractor interpretation threatened to stifle its growth without examining the opportunities it presents.

Fair Pay and Safe Workplaces Rule (the "Blacklisting Rule")

In March 2017, President Trump signed into law House Committee on Education and the Workforce Chairwoman Foxx's CRA resolution that blocked the Fair Pay and Safe Workplaces rule, which is commonly referred to as the blacklisting rule.[33] The rule resulted from an executive order issued by President Obama and would have required federal contractors bidding for contracts over $500,000 to report any violations of 14 federal labor laws and similar state labor laws. Serious labor law violations would have prevented the companies from receiving federal contracts.

As written, the blacklisting rule would have been extremely bureaucratic, slowing the contracting process, costing taxpayers, and harming small businesses. In particular, the reporting process would have been a lengthy and costly, involving seven new steps before awarding a contract: contractor report, review by a contracting officer, review by labor compliance advisor, enforcement authority consultation, contracting officer consolation, and determination of responsibility. Not only would have contractors been required to report their own labor violations, but they would have also been required to track and report any violations occurring in subcontractor or supplier businesses. Additionally, contractors would have had to report both actual and *alleged* labor violations, increasing the pool of reviewed incidents. Finally, after the contract is awarded, the same process would have been repeated every six months.[34]

Estimates suggest that had this rule been in effect in 2014, the federal government would have had to apply all seven steps to nearly 100,000 contract actions. With limited federal resources, this process simply would have been an inefficient use of taxpayer dollars and would have brought the federal contracting system to a standstill. The rule also would have

been particularly harmful to small businesses, which often do not have the resources to monitor subcontractor labor violations on a regular basis.[35]

Moreover, the imposition of these new requirements would have been entirely unnecessary. The labor laws and regulations have already created effective enforcement mechanisms that protect employees of federal contractors. From wage and hour protections enforced by the DOL to collective bargaining protections enforced by the NLRB, federal contractors must follow the same laws and regulations that apply to the rest of the private sector. Additionally, the federal government already grants federal agencies with significant contractor suspension and debarment authority. Agencies thus already have the ability to exclude companies from federal contracting for labor violations.[36]

Not only was this regulation bureaucratic, costly, and unnecessary, but it was also illegal, according to a federal court. In October 2016, a federal court granted a preliminary injunction that blocked most of the rule, deeming that it violated federal labor laws, the First Amendment, and due process rights.[37]

The enactment of Chairwoman Foxx's CRA ensures the federal contracting system will continue its regular operations. Meanwhile, contract company workers are still guaranteed significant workplace protections by existing federal enforcement mechanisms.

Conclusion

The Trump Administration has made significant progress in overhauling the federal government's overall regulatory system. And in conjunction with the courts and Congress, the administration has effectively addressed many of the problematic labor regulations issued by the Obama Administration. In particular, the overtime rule, joint employer and independent contractor DOL interpretations, the persuader rule, and the blacklisting rule have all been blocked.

Notes

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