Making the Fair Labor Standards Act Work for Today's Workers and Businesses

Testimony of Jonathan Wolfson, The Cicero Institute, at the Hearing of the House Committee on Education and Workforce Subcommittee on Workforce Protections on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

Chairman Mackenzie, Ranking Member Omar, and members of the House Committee on Education and Workforce Subcommittee on Workforce Protections: Good morning and thank you for having me today. It is an honor to testify before this subcommittee on ways to protect American workers and the nation's economy by modernizing the Fair Labor Standards Act to make the law work for the modern American Economy to encourage continued growth and opportunity for the economy.

My name is Jonathan Wolfson and I am the Chief Legal Officer & Policy Director for the Cicero Institute, a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. Previously I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the US Department of Labor (DOL) where I also served as the Regulatory Policy Officer and Regulatory Reform Officer or chair of DOL's Regulatory Reform Task Force. In these roles and in my time in private law practice I have seen how the law regularly affects workers, businesses, and consumers by creating barriers that make it harder or incentives that make it easier for American workers to thrive.

Today's hearing focuses on the Fair Labor Standards Act (FLSA), a seminal law that set the boundaries for much of American employment law for nearly a century. The FLSA has also been the foundation upon which federal agencies have built a substantial regulatory apparatus that may or may not actually align with the intent of the legislators who drafted that law so many years ago. *See* 29 C.F.R. Chapter V. That regulatory apparatus and the rules written by the Wage and Hour Division can and do change when new Presidents are elected and these rulemakings impose costs on workers, businesses, and the economy.

I will focus my remarks on four key points:

First, the FLSA was and remains an important framework for employment law in American, but the law is vague in many important places or even fails to define key terminology, leaving much of the law subject to regulators' interpretation and businesses without the clarity they need to conduct their business.

Second, in our tight labor market businesses are looking for a competitive edge to attract and retain the most talented workers, but the FLSA often limits the flexibility of workers to negotiate for and employers to offer a different mix of pay and benefits than Congress contemplated in the 1930s and 1940s.

Third, the modern economy is very different from the economy of the FLSA and the FLSA should be updated to reflect this reality.

Finally, there are some specific FLSA reforms proposed both in this and prior Congresses that would help address some of the largest shortcomings of the FLSA and help America's employment laws meet the unique workforce challenges of this Century.

1. The FLSA's lack of clarity leaves important decisions up to regulators.

The FLSA was originally written in 1938 and while it has been amended multiple times since then, many of the key definitions and concepts were unclear when written and that lack of clarity remains to this day. For example, the definition of "employer" is circular: "'Employer' includes any person acting directly or indirectly **in the interest of an employer** in relation to an employee." 29 USC 203 (emphasis added). Likewise, the definition of "employee" relies on the reader having a general understanding of the terminology already since "the term 'employee' means any individual employed by an employer." 29 USC 203.

To provide color to those two definitions alone, the United States Department of Labor and its Wage and Hour Division have had to issue hundreds of pages of regulations, guidance, and compliance assistance, not to mention the numerous cases filed by the Office of the Solicitor. In just the last two administrations, WHD regulations on independent contracting, litigation about those rules, and the materials to support the rulemakings number into the thousands of pages. *See*, *e.g.,* 89 FR 1638 (2024), 86 FR 1168 (2021).

But it is not just circular definitions that create openings for the regulators to step in and create new regulations. Some definitions made sense when written but as time has progressed they seem to be ripe for revision. For example, the definition of a "tipped employee" is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 USC 203. Upon that relatively simple and seemingly clear definition DOL has built an entire regulatory scheme resulting in significant paperwork burden for businesses and leaving many employers vulnerable to liability and investigation not because they have treated workers earning more than $30 per month in tips as "tipped workers," but rather because they have treated workers who spend less than a certain amount of time in a day performing worked WHD deems not to be "tipped work" (a term not defined by the FLSA).

Unclear and outdated laws are not unique to WHD or even DOL, so every year regulatory agencies fill thousands of pages of the Federal Register, publish hundreds of regulations, and issue tens of thousands of opinions, interpretations, rulings, and other "guidance." And while a regulated party might prefer a world where Congress' laws are the only ones they must follow, they know the power a regulator has to disrupt or even shut down their businesses. And for this reason, generations of lawyers have supported their families by helping businesses to navigate the administrative state both at the federal and state levels.

We should admit that some responsibility for this phenomenon certainly falls on legislators who want to take the easy path, pass a bill, put out the press release, and move on without getting into

the real hard work of parsing out specifics. It is a lot easier to pass a law to "keep kids safe from dangerous jobs" and leave it to the Wage and Hour Division to develop detailed rules and guidance that regulate who is a child, what kinds of jobs are dangerous, and when a family member might be exempt from the rules.

Responsibility also falls on the legislative process and political gridlock that makes it very difficult to pass any kind of legislation. Every time a new requirement enters the bill, or every time a specification goes away, some legislators who may have been part of the supporting coalition might be less willing to remain supportive. And when Congress is divided like it is today, these narrow coalitions might be all the more precarious if bills start being weighed down with lots of detailed specifics. Legislators are thus incentivized to be less specific to increase the likelihood that a bill passes.

But none of these explanations justify Congress giving away its legislative authority to the executive branch, even if we might be able to explain why it happens all the time today. The Constitutional structure doesn't call for executive branch to write the laws, just enforce them. But we've gotten this out of whack and that's why we are here today.

Ultimately these shortcomings of the FLSA drive businesses to request and WHD to provide clarity on what the law means. While the US Supreme Court has called into question deference to agency interpretations of the law, the lack of clarity in laws will only drive more requests for agency clarifications, clarifications that require more review from courts. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The best way to fix this challenge is to make the FLSA more clear.

2. Current FLSA Limits Worker and Business Flexibility on Compensation

My economics professors taught me that a business will only remain a going concern if its long-term profits exceed its long-term expenses. And for many employers, one of their biggest budget line items is payroll costs. In a tight labor market, workers can command higher wages, greater and different benefits, and more flexibility. And in some cases, today's workers want perks that may not have been contemplated in a 1940s factory.[1] But sometimes the ability to provide those perks or a different combination of benefits is limited not by the willingness of the employer to provide what the employee wants, but by the laws and regulations surrounding those benefits. And when that occurs, both the worker and the business are worse off because the business may have to provide compensation in a way the employee values less than at the same cost to the employer or more of the less valuable thing at a higher cost of the employer.

Public employees, for example, are permitted to trade time and a half overtime pay for compensatory time where the worker receives 90 minutes of vacation for every hour of overtime they work instead of extra pay. *See* 29 USC 207(o). But this alternative is *not* available to employees of non-government organization, whether for profit or nonprofit. So employees of,

[1] Kerry Jones, "The Most Desirable Employee Benefits," Harvard Business Review, Feb. 15, 2017, available at: https://hbr.org/2017/02/the-most-desirable-employee-benefits.

say, a tax preparation company cannot request extra vacation for their long hours during tax season and must instead accept time and a half pay for those hours. Thus the law forbids workers from making the deal they would prefer when they work overtime, all in the name of "protecting workers."

Similarly, many workers today live in two earner households and childcare may be one of their largest expenses. Many workers may be more than happy to trade some compensation both during normal hours and, importantly, for overtime hours they work, if their employer would provide onsite childcare. And many businesses might be interested in providing employees with onsite childcare to reduce the likelihood employees will have to miss work if their outside childcare provider is not able to provide service on a particular day. But the Department of Labor has been clear for years that regular childcare paid for by an employer must count toward the employee's regular rate of pay, the rate that must be paid at 150% for all overtime hours.[2] This means that employees and their employers are again prohibited from entering into compensation agreements they would both readily make because of federal regulations. And to make matters worse, since this is a function of the overtime regulations, that means that the highest paid employees, those not subject to an overtime provision, are effectively permitted to make this kind of tradeoff while their lower-paid counterparts are not.

These are but two examples that show that while the FLSA is intended to protect workers, that protection can often harm the very same workers, all while making it harder for employers to afford to pay their own workers. This drives up costs for consumers, reduces worker satisfaction, and makes managing a workforce more difficult especially for the small businesses that are the backbone of the American economy.

3. Today's Economy Looks Different from the Economy of 1938

It is almost a truism to say that today's economy is very different from the economy at the time the FLSA was originally drafted. To the workers of today, the demographics of the workforce, the prominent industries, the duration of work for the same employer, the levels of education, and the rise of technology life in the first half of the 20th century would seem quite foreign. In fact, since only 2000, the workforce is more educated (by 14 percentage points), older (median age up 3 years), less white (down 11 percentage points), and more immigrant (up 6 percentage points).[3]

The changes over the last 25 years are mere blips on the radar in comparison to the FLSA-era workforce. One major change in the American workforce is the labor force participation rate. In 1948, 86.6% of men were part of the labor force while a mere 32.7% of women were part of the

[2] *See* Stephen Miller, "SHRM Praises Introduction of Child and Elder Care Benefits Bill," July 15, 2022, available at: https://www.shrm.org/topics-tools/news/benefits-compensation/shrm-praises-introduction-child-elder-care-benefits-bill.

[3] *See* Luona Lin, Juliana Menasce Horowitz, and Richard Fry, "Most Americans Feel Good About Their Job Security but Not Their Pay" Pew Research Center, December 2024, available at: https://www.pewresearch.org/wp-content/uploads/sites/20/2024/12/PST_2024.12.10_americans-jobs_report.pdf.

civilian labor force. By 1999, a full 60% of women were part of the labor force while 74.7% of men were in the labor force. And in 2023 the male labor force participation rate had fallen to 68% while the female rate was 57.5%.[4]

Numerous Americans work remotely or only go to their office a few days per week.[5] Many American workers now perform work in one state while their employer operates in another. Some workers even perform work in the United States while their employer operates internationally. And still other workers perform work for multiple different employers both foreign and domestic, whether as an employee or an independent contractor. While some Americans in 1938 and in the post-World War II era certainly had unique work arrangements, the prevalence of these kinds of work arrangements makes it much more difficult to presume that every worker in today's American economy desires the kinds of workplace, compensation arrangements, and benefits as the employee of 1950. The fact that in an economy where more than 50 million Americans are working as independent contractors shows that workers are interested in something different from the traditional workplace of mid-20th Century America.

Despite these differences, the Fair Labor Standards Act assumes that today's American worker wants DOL to protect them from such things as free daily employer-provided meals, on-site childcare, and compensatory time. And DOL dutifully investigates employers who dare to provide their employees with alternative forms of compensation not originally contemplated by the drafters of the FLSA. It's time for Congress to step up and bring the FLSA into the 21st century, offer employees and employers flexibility in negotiating compensation, and give workers a chance to chart the course that makes the most sense for their needs and wishes.

4. FLSA Reforms Worth Consideration

Members of the House Education and Workforce Committee will have ample opportunity to address many of the FLSA's shortcomings in this Congress. Multiple bills that have been filed in prior Congresses or that have already been filed this Congress are worthy of consideration because they help to bring the FLSA into the 21st century. I will highlight five.

A. Modern Worker Empowerment Act (H.R. 1319, 119th Congress)

The Modern Worker Empowerment Act protects the large and growing number of self-employed workers who wish to remain self-employed. Some 72 million Americans are independent workers and the vast majority prefer to be independent workers instead of employees.[6] Because the FLSA does not define "independent contractors" and merely defines employee and employer, businesses have long had to guess whether a worker might be classified as an "employee" even if

[4] *See* USBLS, Women in the Labor Force, June 25, 2024, available at: https://www.bls.gov/cps/demographics/women-labor-force.htm.
[5] *See* Sabrina Wulff Pabilonia and Jill Janocha Redmond, "The rise in remote work since the pandemic and its impact on productivity," BLS, October 2024, available at: https://www.bls.gov/opub/btn/volume-13/remote-work-productivity.htm.
[6] MBO Partners, "State of Independence 2024," available at: https://www.mbopartners.com/state-of-independence/.

both the worker and the business intend for the worker to be an independent contractor. WHD has developed its own standards over time and the courts have also attempted to identify key factors that indicate independence or employment.

Unfortunately, by layering multiple factors upon factors workers and businesses lack certainty on whether their relationships are subject to FLSA regulation. This diminishes the number of contracting relationships, leaving willing workers unable to find work and businesses in need of labor without workers to do it.

This bill would focus on two factors: the independent workers' control of the work performed under the contract and the independent workers' opportunities and risk inherent in entrepreneurship. By making it easier for workers to know they will be independent contractors and easier for a business to know those individuals with whom they contract are self-employed, this law would reduce the risks from contracting with an independent worker and open more opportunities for work and flexibility for the self-employed worker.

B. Tipped Employee Protection Act (H.R. 1612, 118th Congress)

The Tipped Employee Protection Act clarifies that an employer may pay a tipped wage to any worker whose total wages and tips for a day, week, or pay period exceeds the federal minimum wage. Under the FLSA, an employer should be able to pay a tipped wage to any worker who receives at least $30 per month in tips. Rather than follow the letter of the statute, WHD has developed a complicated scheme that requires employers to track a tipped workers' time in minute detail, only allowing employers to count certain activities as "tipped work" and requiring the employers to pay a higher wage for all "untipped work."

Unfortunately, this means that businesses that employ workers who earn tips are often caught in the crosshairs of WHD investigations not because they violate the letter of the statute, nor because their workers are paid less than the federal minimum wage per hour, but because they neglect to pay their workers a higher wage for portions of an hour when the tipped worker is engaged in a task the bureaucrats at DOL do not consider to be "tipped work."

This bill removes the outdated $30 threshold and uproots the tedious tracking requirements in DOL regulations by simply clarifying that a worker who receives tips and other wages must earn at least the federal minimum wage for all hours worked. This simple change will save compliance costs and numerous headaches for businesses and still ensure that tipped workers receive the wages they deserve.

C. Working Families Flexibility Act (H.R. 1980, 117th Congress)

The Working Families Flexibility Act gives private sector employees the ability to choose between overtime pay and compensatory time off. While government employees have long had this option, private-sector workers currently do not, limiting their ability to balance work and personal responsibilities.

Rigid overtime policies often force workers to take additional pay when they might prefer extra time off. For working parents, caregivers, or those who value leisure time more than additional pay, this restriction makes it harder to manage family obligations or personal development, and may even lead to more stress on the worker.

This bill allows workers to accumulate comp time in lieu of overtime pay, giving workers more control over their own schedules and more vacation time to spend in the way the employee wants. By expanding flexibility, the law would help employees balance work and life without financial sacrifice.

D. Empowering Employer Child and Elder Care Solutions Act (H.R. 3271, 118th Congress)

The Empowering Employer Child and Elder Care Solutions Act encourages businesses to provide caregiving benefits by ensuring that such assistance does not inflate an employee's overtime pay rate. Current FLSA regulations discourage employers from offering dependent care support because doing so makes every hour of the employees' overtime more expensive.

Without employer-provided assistance, many workers struggle with the high costs of child and elder care. This financial strain often forces employees—particularly women—to reduce work hours or leave the workforce entirely.

By removing barriers to employer-sponsored caregiving benefits, this bill would encourage more businesses to provide assistance, helping workers remain in their jobs while managing caregiving responsibilities. This bill could both support families and improve workforce participation, all while benefiting the businesses that hire workers who need these benefits.

E. Modern Worker Security Act (H.R. 1320, 119th Congress)

The Modern Worker Security Act allows businesses to contribute to portable benefits accounts such as health insurance and retirement accounts for independent workers without risking their employment classification status. Under current law, companies that offer benefits to independent contractors may inadvertently trigger reclassification of the worker as an "employee," discouraging the businesses from extending such support.

Many independent workers lack access to typical employee benefits with the ease of their employee counterparts in the economy. Without employer-sponsored options, self-employed individuals must navigate finding these benefits without an HR office to perform the work on their behalf.

This bill establishes a federal safe harbor, ensuring that businesses can provide benefits without changing an independent worker's classification. By protecting access to portable benefits, this law would support independent workers while preserving their flexibility and autonomy.

Conclusion

The FLSA was created to protect workers, but as the economy and country have changed, many of those protections now inhibit workers from entering into the kinds of relationships they may want with businesses. Whether that is a benefit the worker wants the FLSA prohibits or a relationship the worker hopes to develop that may trigger scrutiny from WHD regulators, many of today's workers would be better off with changes to the FLSA. Rather than relying on the administrative state to look for gaps in the statute to create rules that address today's challenges, Congress can and should act to bring the FLSA into the 21st century, promoting an employment law system that benefits workers, businesses, and consumers alike while helping our economy continue to grow.

I am grateful for the opportunity to share my perspective and look forward to your questions.