

PROPOSED LABOR REFORMS

This document outlines a potential labor policy reform agenda for the Trump administration. The policies are unified by three themes: eliminating job-killing regulations, expanding worker freedom, and creating a government that serves the people.

[See final page for a list of acronyms used throughout]

Eliminate Job Killing Regulations

President Trump campaigned on rolling back excessive regulations that kill jobs. Since winning the election has proposed eliminating 75 percent of the regulatory burden. Many of these regulations are labor regulations. The following Obama labor regulations should be administratively rescinded.

1. *Salaried overtime.* (DOL) The Obama administration raised the overtime threshold for salaried employees to \$47,500/year. This effectively turns salaried employees below that threshold into hourly employees. Employers will offset the overtime costs by lowering base salaries, leaving total pay unchanged. However, tracking hours will impose large compliance costs on businesses. The regulation imposes large costs with few benefits and should be rescinded. A district court judge in Texas has placed an injunction on these regulations as exceeding DOL's statutory authority.
 - a. DOL should withdraw its appeal of this decision and settle the lawsuit, entering into a consent decree agreeing it exceeded its regulatory authority.
 - b. DOL should consider raising the overtime threshold from ~\$23,000/year to a higher level that will not hurt the economy, such as \$32,000 a year.

2. *Joint employer redefinition.* (DOL & NLRB) The Obama administration has attempted to redefine when "joint employment" occurs – when two firms legally employ the same worker. Historically these agencies found joint employment when two or more firms exercised direct control over a workers' pay, hours, work duties, etc. The Obama administration extended joint employment to include a firm possessing "indirect" or "potential" control of working conditions. This would hold franchisors legally liable for their franchisees and clients legally responsible for their contractors. This liability would upend, and potentially destroy, the franchise business model and many business service contractors. It should be rolled back in its entirety.
 - a. The administration should swiftly appoint two new NLRB Members. They should prioritize overturning the *Browning-Ferris Industries* decision changing the joint employment standard.
 - b. The new NLRB GC should withdraw the joint employer charges against McDonalds.
 - c. DOL should submit CRA notice of its 2016 Administrators' Interpretation adopting new joint employment standards. Congress should repeal it through the CRA. That will prevent DOL from re-adopting this interpretation without Congressional authorization.

- d. Once the CRA is signed, DOL should begin rulemaking under 29 CFR 791, changing the chapter title from “Joint Employment” to “Employers and Employees” and outline clear standards delineating independent contractor status and joint employment status.
3. *Independent contractors.* (DOL and NLRB) The Obama administration redefined many independent contractors (who legally work for themselves) as employees (legally employed by a firm). This regulatory push threatens the viability of sharing economy firms like Uber and Lyft. It also makes it harder for Americans to go into business for themselves. It should be reversed.
 - a. The NLRB GC should withdraw its advice memo saying “misclassifying” employees as independent contractors may constitute an unfair labor practice.
 - b. DOL should submit CRA notification of its 2015 Administrators’ Interpretation defining almost all U.S. workers as employees. CRA repeal would prohibit DOL from re-adopting this interpretation.
 - c. DOL should suspend its “misclassification initiative” aimed at re-classifying workers as employees instead of independent contractors.
4. *Micro-unions.* (NLRB) The Obama NLRB instituted gerrymandered union bargaining units, e.g. the NLRB certified a Macy’s union including only cosmetics and fragrance workers. This allows unions to cherry pick bargaining units of solely their supporters. It pits employees against each other and makes it much more difficult for firms to manage their workplaces. For example, it is very difficult to transfer employees between micro-bargaining units. This new standard should be repealed.
 - a. The Trump NLRB should prioritize repealing the *Specialty Healthcare* case and its progeny permitting micro-unions.
 - b. The Trump NLRB should consider regulations formally outlining bargaining unit determinations. This would make it harder for unions to revert to the old standard when control of the Board next switches.
5. *Ambush elections.* (NLRB) The NLRB passed regulations shortening union elections from approximately 35 to 21 days. The rule gives employers less time to educate their workers about the downsides of unionizing. If employees will vote against a union after learning more about it, they are better off non-union. This rule will foist inefficient union work rules on employers that risk turning them into the next General Motors or Hostess. These regulations should be repealed.
 - a. The NLRB should begin the notice-and-comment process to reverse these regulations. The new regulations should also incorporate features described in the “worker empowerment section.”

Persuader regulations. (DOL) The Obama DOL issued regulations requiring lawyers who advise companies during union campaigns to disclose (1) the identities of all their clients (not just those in union campaigns); (2) how much those clients paid them; and (3)

the substance of their communications with those clients. The ABA opposes this as a violation of attorney-client privilege. DOL intends these regulations to deter lawyers from helping businesses oppose union organizing drives. This rule is intended to facilitate union organizing, which will hurt job creation. Unionized firms create fewer jobs than non-union firms. A Texas district court judge has enjoined the rule as exceeding DOL's statutory authority.

- a. DOL should drop its appeal to the 5th Circuit and settle the case, entering into a consent decree agreeing it exceeded its authority and committing to not reissuing similar regulations.

7. *Blacklisting.* (DOL).

8. *EEO-1 form.* (EEOC) The EEOC significantly modified the EEO-1 form that employers of more than 100 workers must file. The new form requires filling out over 3,300 data points, covering the total number of employees (broken down by gender, and seven race categories, and full-time status), in 10 occupations and 12 pay bands. Filling out the new form costs firms considerable time and money, but the data is still not detailed enough to meaningfully identify discrimination. The new firm wastes money that could be spent creating jobs while providing no economic benefit.

- a. The EEOC should return to the old EEO-1 form.

9. *Beryllium rule.* (DOL) The United Steel Workers worked with the Obama DOL and Materion (the largest beryllium producer) to develop regulations to protect those working with beryllium. All sides had reached a consensus that they believed would protect workers without risking their jobs. The final rules departed significantly from the draft regulations in ways that make it difficult for Materion to remain in operation.

- a. DOL should delay the effective implementation of the beryllium rule.
- .. DOL should explore returning the rule to the draft consensus regulations.

10. *Trial Lawyer Referrals* (DOL). The Obama DOL sends employees alleging labor violations whose cases it will not investigate a letter directing them to trial lawyers. This encourages excessive litigation.

- a. Suspend this program of automatic trial lawyer referrals.

11. Paid Sick Leave for Federal Contractors.

Beyond rescinding these Obama rules, the Trump administration should modify how it applies existing regulations to facilitate job creation:

12. *Eliminate the PLA mandate.* (EO) The Obama administration signed an EO encouraging project labor agreements on federal construction projects. PLAs require contractors to hire union workers, use union work rules, and pay union compensation scales. They raise

construction costs 12 to 18 percent. This EO prevents taxpayers from getting the best deal on infrastructure projects. These higher prices also mean construction appropriations fund fewer projects and thus employ fewer workers.

- a. POTUS should sign an EO rescinding the PLA mandate and instead requiring agencies remain neutral towards PLAs, neither penalizing nor rewarding firms that use them. This will create jobs and get taxpayers the best deal.

13. *Use accurate Davis-Bacon data.* (DOL) The Davis-Bacon Act requires federal construction contractors to pay prevailing local wages. DOL uses highly inaccurate survey methods that usually report union rates. These union rates also incorporate union job classifications and work rules. These inaccuracies inflate federal construction costs by 10 percent. They also make it difficult for non-union firms to bid on federal projects, as they do not use union work rules. The flawed DBA surveys cause federal appropriations to fund 100,000 fewer construction jobs than they otherwise would.

- a. DOL should use Bureau of Labor Statistics data to calculate DBA rates.

14. *Compliance assistance.* (DOL) The Obama DOL focused heavily on enforcement; it spent little effort helping good-faith employers comply with labor and safety regulations. Enforcement is important, but DOL should assist employers trying to do the right thing instead of treating every employer as a bad-actor in need of punishment. The IRS takes the same approach to tax obligations. Facilitating compliance assistance reduces the regulatory burden on businesses.

- a. OSHA and the WHD should direct resources towards compliance assistance.
- b. WHD should develop a new voluntary compliance program with incentives (e.g. only two years of back wages with no liquidated damages or civil monetary penalties, and issuance of WH-56 waiver forms for firms that identify and admit violations and seek help fixing them).
- c. WHD should make the chapter on investigation procedures in the WHD Field Operations Handbook public, so employers know what to expect during WHD investigations.

15. *Stop "salt" attacks.* (NLRB) Unions often employ "salts" – union organizers who apply for jobs at nonunion firms. Recently some unions have begun using salts to harass non-union firms. Whenever a non-union firm posts a job vacancy they send multiple salts to apply for it, often wearing their union uniform. If they are not hired they immediately file charges with the NLRB alleging anti-union discrimination. These charges cost the firm time and money to defend, while the government pays the cost of prosecuting them. Unions use aggressive salting to hurt non-union employers and drive them out of the market.

- a. The NLRB should change its case-law to remove penalties against firms that refuse to hire salts.

16. *Enforce DBA on Job Targeting* (WHD). Unions require their members on Davis-Bacon projects to pay hefty fees to “job targeting” funds which subsidize union bids for non-prevailing wage projects. Essentially unions use the premium pay on federal projects to subsidize competition with non-union contractors on non-government projects, instead of the full value of those wages going to the workers. The Copeland Act prohibits such behavior.
 - a. DOL should withdraw the June 20, 1995 letter of the Wage & Hour Administrator which declined to use the Agency’s resources to enforce Davis---Bacon Act violations for union job targeting programs.

Expand Worker Freedom

The law does little to hold unions accountable to their members. Few union member voted for their union. Many workers get unionized without a secret ballot vote. Once formed, unions need not stand for re-election. In many states unions can compel workers to pay dues. They use those dues to elect politicians their members oppose. Union executives, not rank-and-file members, hold power.

This unaccountability allows unions to ignore their members’ views. While President Trump did better among union voters than any Republican candidate since Reagan’s 1984 landslide, union executives spent their members’ money heavily to defeat him: 99 percent of union donations in the 2016 Presidential race went to Democrats.

If workers had more freedom in the workplace they could hold their unions accountable. President Trump embraced worker freedom in his campaign. In South Carolina he explained “I love the right-to-work ... It is better for the people. You are not paying the big fees to the unions. The unions get big fees. A lot of people don't realize they have to pay a lot of fees. I am talking about the workers. They have to pay big fees to the union. I like it because it gives great flexibility to the people.”

Through regulation and administrative actions, the Trump administration can unilaterally expand worker freedom – giving workers more choices and control over their money, while increasing union accountability to their members. Working with Congress the administration should support measures to further empower workers:

1. *Increase electoral accountability.* Only 6 percent of unionized private sector workers voted for their union. The remaining 94 percent have a union they did not select. This primarily happens because unions do not regularly stand for re-election. For example, the UAW organized General Motors in 1937; that decision still binds today’s GM employees. Consequently, unions lack democratic accountability to their members; they do not have to regularly earn the right to represent them. NLRB changes change can make it easier to file for new elections and hold unions more accountable:
 - a. Eliminate the “contract bar” to new elections. (NLRB) The NLRB will not hold an election in a unionized workplace – either to decertify the existing union, or to

replace it with a different union – during the course of a collective bargaining agreement. This typically leaves workers only a 30-day window every three years to switch or dump their union. This is one of the reasons union re-election votes rarely occur. This “contract bar” doctrine exists only in NLRB case-law; it does not exist in the text of the NLRA. The Trump Board should overturn it and allow workers and unions to file for new votes at any time.

- b. Put a time limit on the “presumption of majority support.” (NLRB) The NLRA allows employers to request a new vote if they believe their workers no longer support their union. This is a source of union electoral accountability. However, NLRB case-law has severely limited this accountability. The Board’s “presumption of majority support” doctrine only allows employers to request a vote after seeing overwhelming independent evidence their employees no longer support the union. This rarely happens. The NLRB should amend its case-law to put a time limit on the presumption of majority support. This would allow employers to request a new election after a set amount of time has passed since the last one (e.g. 3-6 years). Many employees who do not support their union could then easily vote it out.
2. *Paycheck Protection.* The Supreme Court has ruled that unions cannot force workers to fund their political activism. Even in states with compulsory dues, unions must allow workers to opt out of the political portion of those dues. However, unless workers affirmatively opt-out unions will spend their dues on politics. Paycheck protection laws invert this process. They require unions to obtain their members’ permission before spending their dues on politics. The Trump administration can increase worker freedom by expanding paycheck protection administratively:

- a. Federal employees. (OPM) OPM historically interpreted the Hatch Act to prohibit federal employees from “accounting for” or “handling” political funds. Clinton administration regulations eliminated those restrictions and allowed federal unions to collect PAC funds through the federal payroll system. Federal unions also routinely use payroll-collected dues for political purposes. OPM should return to the prior standard. Agencies should immediately stop collecting federal union PAC contributions. OLC or WH Counsel should conduct a thorough review and determine if the “handling or accounting for” proscriptions would also prevent agencies from collecting the political portion of federal union dues.

Construction workers. (DOL) Most unionized construction work occurs on publicly funded projects. The Copeland Anti-Kickback Act prohibits anyone (including unions) from requiring workers on federally funded projects to “kick back” part of their compensation in order to get the job. That would seem to include union dues. Compulsory dues are permitted on federal projects because the NLRA expressly authorizes them; that permission overrides the Copeland Act.

However, the Supreme Court ruled in *Communications Workers v. Beck* that the NLRA authorization only covers the non-political portion of union dues. DOL should update its Copeland Act regulations to account for this ruling. DOL should prohibit federal contractors from deducting the political portion of union dues from their employees' paychecks.

c. Homecare workers. (HHS/CMS) Every state has set up "homecare" programs under CMS waivers pursuant to §1915(c) of the Social Security Act. These waivers allow states to pay Medicaid funds to "workers" taking care of disabled individuals at home. The vast majority of these "workers" take care of disabled relatives or friends. 10 states have passed laws allowing the SEIU to deduct union dues from these Medicaid reimbursements. Although the Supreme Court ruled in *Harris v. Quinn* that these dues are optional, the states continue to deduct dues unless the workers affirmatively opt-out. There are documented cases of SEIU forging signatures to authorize continued deductions. Currently the SEIU takes approximately \$200 million annually from about 600,000 homecare aides. SEIU spends most of this money on progressive activism.

i. CMS should promptly issue regulations forbidding states from deducting union-related expenses from Medicaid reimbursements.

ii. CMS or DOJ should also investigate the SEIU for Medicaid fraud and bring charges, if appropriate.

3. Union Transparency. (OLMS in DOL) The LMRDA requires unions to disclose their financial activities. However, until the George W. Bush administration these transparency reports provided little useful information. DOL Secretary Chao updated the transparency regulations to require detailed financial disclosures. The Obama administration rescinded most of these regulations. Knowledge is power. Transparency helps workers hold their union accountable. Unions should not be able to hide their spending from their members – especially when 22 states force workers to pay dues. DOL should re-issue the rescinded transparency regulations. It should also move to expand transparency beyond what Sec. Chao required:

a. Updated LM-2 Forms. The updated LM-2 forms required unions to itemize the total compensation of their officers – not just their salaries. This prevents unions from hiding payments as deferred compensation that appear as a general line item for "benefits." Union members should know how much their officers pay themselves. DOL should re-issue these regulations.

b. Union trust funds. Most union trust funds (e.g. strike benefit or worker training funds) currently do not have to disclose their financial dealings. Union whistleblowers report that most "funny business" occurs in these funds. e.g. The head of the Los Angeles Operating Engineers training fund allegedly misappropriated \$25,000 to purchase breast implants for his mistress. DOL should re-issue the T-1 regulations that required union trust funds to itemize their expenses and receipts.

- c. Government union locals. The LMRDA covers private sector unions. Sec. Chao issued regulations that required local chapters of government unions to file transparency reports if their national headquarters file them. E.g. the NEA has organized several private schools, so NEA National Headquarters files transparency reports. This regulation required all local NEA affiliates to file transparency reports too. This prevents the national parent from transferring funds to local unions to bypass disclosure. DOL should re-issue this regulation.
 - d. Worker Centers. Unions fund “worker centers” to protest and organize workers, e.g. SEIU’s Fight for \$15 efforts. Under the LMRDA these Centers qualify as “labor organizations” required to disclose their financial activities. DOL does not require Worker Centers to file disclosure reports. DOL should issue an OLMS Administrator’s Interpretation clarifying that worker centers are labor organizations and must file financial disclosure reports. This will not take new regulation.
 - e. Resume auditing international unions. The Obama OLMS announced it would not audit international unions, e.g. SEIU National Headquarters, UAW national headquarters, etc. There is no justification for not auditing international unions. OLMS should resume its audits of international unions.
4. *Protect the Secret Ballot.* Federal law does not guarantee a secret ballot election when unionizing. Companies may request a secret ballot vote. However, unions can pressure companies not to do so. If they succeed unions can harass workers into joining through “card-check” procedures. One-third of new union members are organized without the protection of a secret ballot vote. Workers should not be pressured into joining an unwanted union. The Trump administration can take steps to protect secret ballot elections.
- a. Facilitate secret ballot petitions. (NLRB) Currently companies may only request a secret ballot election if a union verbally claims a majority of its workers support unionizing. Absent such a statement, firms may not request a vote. This allows unions to avoid elections they think they will lose -- pressuring companies to accept card-check instead. The NLRB should alter its regulations to recognize that requests for “card-check” procedures are an implicit declaration of majority support. The Board should allow any company whose union has requested card-check to call a secret-ballot election. This would substantially reduce the number of workers unionized without the protection of a secret ballot.
 - b. Investigate neutrality agreements. (DOJ) Federal law prohibits companies from giving unions (as institutions, not their members) “any thing of value.” This prevents companies from bribing unions to negotiate sweetheart deals. Many unions offer substantial concessions in exchange for “neutrality” and “card-check” agreements, where the firm agrees not to oppose unionizing or to ask for a secret ballot election. Neutrality and card-check look like “things of value” when given in exchange for concessions. If so, such agreements would be illegal. Such a finding would substantially reduce the number of workers organized without a

- a. The administration should promulgate a similar EO requiring contractors to post *Beck* notifications.
 - b. In RTW jurisdictions (State, Territory, Tribe, or Locality) the notifications should inform workers of their right to opt out of all union dues – not just the political portion.
8. *Whistleblower Protections for Union Officers.* (Legislation) Federal law does not provide whistleblower protections to union officers. Unions may legally fire officers who expose corruption. In several high-profile cases they have done so. The Union Integrity Act (introduced in the last Congress) would have applied the Dodd-Frank whistleblower protection framework to union officers. The bill's sponsor did not run for re-election last year.
- a. The administration should champion the Union Integrity Act or a similar legislative proposal.
 - b. Get advice from WH Counsel or OLC about whether the LMRDA bill of rights provides administrative justification for whistleblower protections.
9. *Penalize Employer and Employee Coercion.* (Legislation) Employers who fire workers for supporting a union face miniscule penalties (they must rehire the worker and pay back-pay, less whatever the worker has earned in the interim). Unions also face no institutional consequences if they use violence to pressure non-union workers. Individual thugs can be held liable, but the union itself is not liable for such pressure tactics. President Trump can protect workers by strengthening penalties against both employers and unions who attempt to coerce workers instead of persuading them:
- a. Add punitive damages for firing workers who support unionizing, e.g. \$100,000 or double the employee's annual salary (whichever is greater), plus attorney's fees. These penalties would have to be assessed through an article III court, not the NLRB, as NLRB does not comport with due process requirements for criminal law (its authority is only to remediate). So add a right of private action, and let NLRB refer cases to U.S. attorney.
 - b. Same penalties for unions who try to get workers fired for exercising their right-to-work or Beck right options.
 - c. Combine with the Freedom from Union Violence Act, which allows unions to be held liable for the extortionate use of violence.
10. *Support Local Right-to-Work.* (DOJ/Solicitor) The 6th Circuit Court of Appeals recently ruled the NLRA does not prevent Kentucky localities from passing RTW laws. That case cannot be appealed to the Supreme Court; shortly afterward Kentucky passed a statewide RTW law mooting the local ordinances. Localities in Illinois, Ohio, Maine and possibly Minnesota and Maryland are expected to soon pass their own RTW ordinances. Unions are expected to legally challenge these ordinances.
- a. The Solicitor General should encourage the Supreme Court to grant cert to these cases when they are appealed from lower courts. Nationwide authorization for

secret ballot election. The Supreme Court has never ruled directly on this question. SCOTUS was scheduled to hear a case examining this issue, but it was dismissed on technical grounds. DOJ should look for a test case to bring before the Supreme Court.

5. *Require majority support.* (NLRB and NMB) The NLRA requires a union to obtain majority support to represent a firm's workers. The NLRB interprets this as requiring unions to win a majority of the vote— even if that voting majority is a minority of the overall workplace. One-third of workers unionized in NLRB elections work in facilities where the union had minority overall support. This contributes to the problem of only 6 percent of unionized workers having voted for their union. Until 2010 the National Mediation Board interpreted similar language in the Railway Labor Act to require railway unions to obtain the support of an absolute majority of workers in a firm – not a majority of those who vote. The NLRB should adopt this standard and the NMB should return to it.
6. *Permit Works Councils.* §8(a)(2) of the NLRA prohibits “employer dominated labor organizations.” This proscription was meant to ban “company unions.” However it has been interpreted to prohibit employee involvement programs and work councils. Under this interpretation employer may not legally solicit input from representatives of their rank-and-file employees. U.S. law should not give workers an all-or-nothing choice between an independent union or no formal workplace input. Many workers do not want a tradition union, as employees in Volkswagen's Chattanooga facility demonstrated. The law should not deny these workers any other voice on the job.
 - a. (Legislation) The administration should champion legislation similar to the 1996 TEAM Act that allows work councils and employee involvement programs, provided they are not pretexts for company unions. This would expand employee involvement and voice in the workplace.
 - b. (NLRB) The NLRB should promulgate regulations or the GC should issue an interpretive memorandum expounding on the Board's decision in *Crown Cork and Seal (2001)*. This Clinton Board decision found members of a work council were technically members of management, and thus exempt from the §8(a)(2) proscription. This decision has attracted little attention. Highlighting its reasoning and outlining steps employers can take to make councils §8(a)(2) compliant would essentially eliminate the bar to non-union work councils in the U.S.
7. *Beck and RTW Notifications.* (EO) Recent GOP Presidents have signed EOs requiring unionized federal contractors to post notifications in their workplaces informing workers of their rights under *Communication Workers v. Beck*. In that case the Supreme Court held unions cannot force workers to pay the political portion of their dues. Unfortunately, many workers remain ignorant of their *Beck* rights and do not know they can opt out of their union's political spending. Informing workers of their rights helps them use their freedom.

local RTW would substantially expand worker freedom.

11. *Eliminate "Free Riding."* (Legislation) Right-to-Work laws prevent unions from having workers fired for not paying union dues. Unions argue that this creates a "free-riding" problem: the NLRA requires them to represent non-members who do not pay dues. This is inaccurate. The NLRA permits unions to negotiate "members-only" contracts. However, the NLRA only forces companies to bargain with unions that represent all workers (aka "exclusive representatives").
 - a. The administration should champion legislation that gives members-only unions the same rights as exclusive representative unions, provided that the members-only union obtains majority support in a secret ballot election. This would eliminate the "free riding" problem – the law would expressly allow unions to stop representing non-members. Such a change would eliminate the strongest argument against right-to-work. Note that few unions actually want to become members-only; provisions they value like seniority-based layoffs become unworkable if new hires can opt out.

12. *RAISE Act* (Legislation). Under the NLRA union contracts do not just set minimum pay rates; they set maximum pay too. Firms may not pay unionized workers more than the union contract without the union's permission. Consequently, most unionized companies cannot offer hard-workers additional performance-based pay. (In one recent case a union fought in court to force a grocery store to rescind performance raises 25 employees earned.) If unionized firms could offer performance pay their employees would work harder. This higher productivity would fund higher profits and higher wages.
 - a. The administration should support the Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act, which keeps union rates as a minimum wage but allows firms to pay individuals higher compensation without needing permission from the union.

13. *Employee Rights Act* (Legislation) The Employee Rights Act is a compilation of several bills that systematically transfer power and decision making from union executives to rank and file workers. All of its provisions have at least 2-1 support among union households. Most of the provisions have over 80 percent support. The Act:
 - a. Requires secret ballot elections when unionizing and prohibits card-check;
 - b. Guarantees workers the right to vote on proposed contracts before the union ratifies it;
 - c. Guarantees workers a secret ballot vote before a union calls a strike;
 - d. Includes paycheck protection;
 - e. Prohibits unions from using violence to intimidate workers;
 - f. Prevents unions from coercing workers who support decertification;
 - g. Requires unions to periodically stand for re-election;
 - h. Gives workers at least 30 days to think about unionizing before a vote gets called;
 - i. Lets workers decide if unions get their personal contact information; and

- j. Raises the union election victory threshold to 50% of all workers (not just voters);
 - i. The Administration should support the Employee Rights Act and encourage Congress to hold hearings on the abuses it seeks to remedy.

Government that Serves the People

The federal government exists to serve the American people. But it often serves itself. The average federal employee makes more than they would in the private sector – with federal benefits especially inflated. Civil service regulations make it very difficult to fire federal employees for poor performance. Meanwhile taxpayers subsidize government unions that lobby for a larger and less efficient federal government. The Trump administration should implement personnel reforms that create a government that actually serves the people.

1. *Reform Federal Pay.* (Legislation) The Trump administration should work with Congress to develop legislation overhauling federal compensation. The new system should prioritize performance over seniority and aim for parity with private-sector pay. Much of the details of these reforms was worked out by the Bush administration in developing the Nation Security Personnel System at DOD. The Obama administration eliminated the NSPS shortly after taking office.
2. *Reform Federal Benefits.* (Legislation) The Trump administration should work with Congress to develop and enact legislation bringing federal benefits in line with private sector standards. These reforms should include:
 - a. Eliminating the defined benefit FERS pension for new federal employees, while increasing the TSP employee match.
 - b. Requiring current federal employees to contribute more to their FERS pension costs, while giving them the option of switching entirely to the TSP (with the enhanced match)
 - c. Eliminating the requirement federal employees pay 25% of their healthcare premiums, to encourage greater competition on cost that would reduce overall premium costs; and
 - d. Bringing federal paid leave benefits in line with private sector standards at large firms;
3. *Federal pay freeze.* (EO) President Trump should issue an Executive Order suspending the annual cost-of-living-adjustment in federal employees' pay for 2018. President Trump should commit to maintaining this pay freeze until Congress sends him legislation comprehensively overhauling federal compensation.
4. *Explore the "Constitutional Option" for firing federal employees.* (WH Counsel) There are legal arguments that Article II executive power gives the president inherent authority to dismiss any federal employee. This implies civil service legislation and union contracts impeding that authority are unconstitutional. If so the President could issue an Executive

- Order outlining a streamlined new process for dismissing federal employees. This would facilitate the swift removal of poor performers.
- a. White House Counsel should conduct a thorough analysis of these legal arguments and report back on whether this is a constitutional exercise of Presidential power under an originalist interpretation of the constitution.
5. *Extended probationary period.* (OPM) Federal law requires OPM to set a “probationary period” during which newly hired federal employees are effectively at will. OPM regulations set that period at one year for most of the federal government. GAO has recommended that OPM increase the length of the probationary period.
- a. OPM should issue new regulations extending the probationary period to three years. This will give agencies more time to identify and remove poor performers.
6. *Expedited dismissal from sensitive positions* (OPM and all agencies). Ch. 75 of the CSRA allows streamlined dismissals in matters affecting national security. Under this process employees get a prompt hearing and one appeal within their agency. They may not appeal to an outside body. E.g. An agency can use these procedures to revoke a security clearance. If the clearance is necessary to perform the job, the employee also loses their job. In 2013 the Federal Circuit held in *Kaplan v. Conyers* agencies may use these streamlined procedures to remove an employee from a “sensitive” position – not just positions that require a security clearance. Agencies have no subsequent obligation to re-employ the worker in a non-sensitive position. Hundreds of thousands of federal jobs are rated as “non-critical sensitive.” Agencies can use Ch. 75 authority to swiftly remove poor performers from these positions.
- a. OPM should educate federal agencies about their expanded dismissal powers under *Kaplan v. Conyers*.
 - b. The White House or OPM should direct all agencies to set up streamlined Ch. 75 panels for the prompt dismissal of poorly performing employees in sensitive positions.
 - c. The White House and OPM should direct agencies that they are expected to use these powers to remove poorly performing employees from sensitive positions.
7. *Change the Douglas Factors.* Have WH Counsel or OLC examine how much authority MSPB has to change the *Douglas* factors to make it easier to remove poor performers.
8. *Issue EO limiting collective bargaining subjects in government.* 5 USC 7117(a)(1) states that “the duty to bargain in good faith shall ... extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.” As the 4th Circuit noted in *HHS v. FLRA*, 844 F.2nd 1087, 1099 (4th Cir. 1988) “Congress specifically intended that that term [rule or regulation] ‘be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply.’” This seems to suggest POTUS could issue an EO, or

OPM/FLRA could issue government-wide rules, taking subjects out of collective bargaining.

- a. WHCO should do legal research to determine if this is correct, and the extent of this authority.
 - b. Consider an EO setting forth government-wide standards for subjects currently subject to bargaining to take them out of the realm of negotiability, e.g.
 - i. Performance appraisals;
 - ii. Termination appeals;
 - iii. Disciplinary action processes;
 - iv. Contracting out;
 - v.
9. *Executive Order on Performance Accountability.* (EO and OPM) The President should issue a PM or EO saying that he expects high performance of all federal employees, and that he expects agencies to use all lawful powers to remove poor performers from their posts.
- a. Pursuant to this EO, OPM will educate all federal agencies about the dismissal authorities they possess (in addition to the streamlined Ch. 75 procedures) and how they can be effectively use to remove workers who are failing the high standards POTUS expects.
 - b. Agencies will be directed to educate their line managers about these authorities, and the directive communicated that POTUS expects them to put in the time and effort necessary under existing procedures to remove poor performers.
10. *Civil Service Overhaul.* (Legislation) Work with Congress to develop and pass legislation making it easier to fire federal employees, while retaining protections against political-based firings.
11. *End Collective Bargaining.* (EO/DOD) Government unions impede the efficiency of federal operations and direct the government to put the interests of government employees first. Curtailing collective bargaining in government serves the public good. The CSRA allows the President to exempt agencies from its coverage on the basis of national security concerns.
- a. POTUS should issue an EO exempting DOD from collective bargaining.
 - b. Explore the possibility of adding VA to this list. Possibly parts of DHS, State, and OPM.
 - c. The TAA administrator should cease collective bargaining with security screeners.
12. *Restrict Abusive Union ULPs.* Federal unions frequently file unfair labor practice charges against agencies over items subject to arbitration in their collective bargaining agreements. The FLRA General Counsel prosecutes hundreds of these ULPs each year that could be resolved at much lower cost to taxpayers through arbitration. Under the

Collyer Wire doctrine (192 N.L.R.B. 837 (1971)) the NLRB defers to arbitration when facing charges subject to arbitration.

- a. The FLRA should formally adopt a similar doctrine and stop prosecuting grievances subject to arbitration.
- b. Alternatively, abolish the FLRA GC and let unions and agencies argue directly before FLRA judges.

13. *Monitor Official Time.* (EO/OPM) The CSRA requires agencies to government employees to negotiate union contracts and process grievances while on the clock. The CSRA also allows agencies to grant unions additional "official time" if they conclude it is "reasonable, necessary, and in the public interest." Agencies may not allow unions official time to perform union business. Agencies now give away ~\$200 million in official time with little oversight to ensure statutory compliance. Official time has become an expensive subsidy to politicized interest groups. POTUS should issue an EO directing that:

- a. All federal agencies monitor OT use and costs, and that OPM make this data publicly available;
- b. That agencies ensure OT is used for activities that are in the public interest, and does not illegally subsidize internal union business;
- c. That no federal employee may spend more than 50% of their hours on OT;
- d. That unions may not use OT for lobbying or political activities;
- e. That OPM direct agencies on how to follow best-practices to limit OT expenses;
- f. That the IG's examine to ensure agencies are following OT best practices and OT is not being used inappropriately.

14. *Charge for Official Space.* (EO/GSA) Some agencies give federal unions free use of federal rooms. Others charge market rates to use federal building space. POTUS should issue a directive (possibly as part of the OT EO) requiring agencies to charge market rates (as determined by GSA) for use of federal facilities.

15. *Revoke Labor/Management Forum Mandate.* (EO) The CSRA prohibits unions from negotiating over "management rights." An Obama EO bypasses this prohibition by requiring agencies to first "discuss" how they plan to exercise these rights with federal unions. This inappropriately gives federal unions the ability to influence policy to benefit their members at the expense of the public. President Clinton signed a similar EO, which President Bush revoked shortly after taking office. These labor-management forums do not appear to have improved government efficiency. They are a waste of resources and ought to be revoked.

Miscellaneous

1. *Rigorously evaluate job training programs and grants.* (DOL) The Federal government spends billions on job training programs and grants. Yet many of these programs have never had “gold standard” multisite randomized controlled trial evaluations to assess their effectiveness. The evaluations that have occurred often show the programs provide workers little benefit. Some programs may actually hurt trainees’ financial prospects.
 - a. DOL should use its evaluation budget to undertake rigorous multi-site RCT evaluations of federal job training programs. Funding for ineffective or harmful programs should be discontinued.

Improve CPI Calculations with Online Data. (BLS) MIT’s “billion prices project” estimates inflation by using “web scraping” software to collect daily prices on from online retailers. Research shows retailers charge the same prices online and in physical stores for most goods. The BPP inflation estimates closely mirror the Consumer Price Index, at much lower cost and in real time.

- a. BLS should explore supplementing in-person price data collection with web-scraping software. This could substantially increase the CPI sample size and reduce CPI measurement error. More accurate inflation estimates would benefit the markets and monetary policymakers.
3. *Central States and UMW Pensions.* The Teamster’s Central States Pension has an approximately \$30 billion underfunded liability and will go bankrupt within a decade. When it goes bankrupt it will overwhelm the Pension Benefit Guarantee Corporation’s multi-employer pension fund/backstop. The United Mine Worker’s pension is in similar condition, but with much smaller liabilities.
 - a. DOL and Treasury should work with Central States to use the powers granted by the Kline-Miller pension reforms to reduce benefits to a level that restores the fund’s solvency.
 - b. Key priority is to avoid a taxpayer bailout. Social Security and Medicare are badly underfunded. The government does not have resources available to also cover \$600 billion in underfunded union pensions.
4. *Allow MEPPs Among Unrelated Employers.* (Legislation) Multiple-Employer Pension Plans allow employers to pool together to offer a defined contribution pension (401(k)s). Such pooling spreads out fixed costs and makes offering retirement benefits less expensive. Under existing regulations employers forming a MEPP must be economically related, e.g. in the same industry. This restriction makes it harder for small businesses to join together to offer retirement benefits.
 - a. The administration should support legislation eliminating the requirement that MEPP participants must be economically related. Legislation including this provision, the Retirement Enhancement and Savings Act of 2016, passed the Senate Finance Committee unanimously last year.

5. *CRA State IRA Mandate.* (Legislation/DOL) The Obama DOL issued regulations exempting some state-run IRA plans from ERISA. To qualify states must require business to either participate in their plan and automatically enroll employees, or offer their own retirement plan. States must also offer financial advantages to businesses that participate. Employers will probably respond by replacing their existing retirement benefits with state plans. Under the regulations states could deny employees control over their assets. The ERISA exemption would allow states to invest these funds on the basis of political considerations, e.g. pulling investments from companies whose managers donate to disfavored political causes. Employees would also lose the tax-exempt employer match that many currently enjoy.
 - a. The Obama administration passed this regulation within the CRA window. Congress should use the CRA to repeal this regulation and prevent it from coming back.

6. *Test Online Job Search Assistance for UI recipients.* (DOL) Utah recently tested a program requiring longer-term UI recipients to spend ~8 hours or so taking online modules on how to search for a job: how to write a resume, prepare for an interview, look for jobs, etc. The randomized controlled trial found this requirement cut UI expenditures ~13 percent. Half of that drop came from people leaving UI rather than participate in the training. They may have been people working on the black market attempting to collect UI at the same time. The other half of the decreased expenditures came from unemployed workers find jobs an average of one week sooner. The online training seemed to help them find jobs faster.
 - a. DOL should issue grants to states to experiment with similar requirements, and see if they have the same effect as in Utah.
 - b. If so, consider legislation making this part of UI.

7. *WIOA RSA regs.* Workforce Innovation and Opportunity Act regulations, stating that Rehabilitation Services Administration (RSA) has overreached congressional intent and the implementing regulations of WIOA by claiming that ANY employment provided by a community rehab program or ANY employment under the AbilityOne Program does not qualify for support through RSA. They want RSA to withdraw the prohibition, and restore the decades-long practice of allowing state rehab agencies to make case-by-case determination for the most appropriate employment situation for each individual with disabilities. Wanted to flag that for you, in case you think it's a good idea.

OSHA require condom use in pornography production. Most actors in pornography productions do not use condoms. This exposes them to serious risk of contracting STDs, especially AIDS. This is a workplace hazard that OSHA should regulate. OSHA should require that male performers in any paid pornography productions use condoms.

Memorandum: Proposed Union Reform Agenda for the Trump Administration

Most rank-and-file (private sector) union members voted for the President, while their unions are run by left-wing ideologues. This cleavage creates an opportunity for the President to appeal to union members while making it more difficult for union executives to oppose him.

Current labor law largely insulates union executives from the preferences of rank-and-file union members. They like this state of affairs. But union members prefer policies that protect their rights and hold union executives more accountable. Polling shows:

- 91 percent of union households support increasing penalties for union violence or threats;
- 77 percent of union households support instituting regular union re-election votes;
- 89 percent of union members support requiring unions to publicly disclose how they spend their members' dues, and
- 85% of union households support guaranteeing workers the right to a secret ballot election before unionizing.

Proposed Regulatory Changes to Increase Union Leaders' Accountability to the Rank-and-File

The Domestic Policy Council proposes the President embrace regulatory changes that hold unions more accountable to workers. These reforms would make it more difficult for union executives to take positions their current and potential future members strongly disagree with.

1. *Facilitating Union Re-Election Votes* (NLRB): The NLRA allows workers and employers to request union re-election votes. Nonetheless NLRB case-law imposes severe barriers to these requests. The NLRB should remove these barriers. More frequent elections would encourage union leaders to more closely reflect their members' wishes.
2. *Expand Union Transparency* (Labor Department): Federal law requires unions to publicly disclose how they raise and spend money. The Labor Department can strengthen these disclosure requirements and extend them to currently exempt union entities (e.g. trust funds, government union locals, worker centers). Greater financial transparency will make it harder for union executives to spend money on causes their members oppose.
3. *Protect Secret Ballot Elections* (NLRB): Unions frequently circumvent the NLRA's secret ballot election processes, pursuing "card-check" recognition that forces workers to publicly declare their preference. The NLRB should implement administrative changes that would make it much harder for unions to bypass secret ballot elections.
4. *Right-to-Work and Beck Notification* (Exec. Order): GOP Presidents typically require federal contractors to post notices informing workers of their right to opt-out of the political portion of union dues (*Beck* rights). President Trump should re-issue this order, with a proviso requiring notification of the right to opt out of all union dues in right-to-work jurisdictions. This puts a bit more pressure on unions to keep their members happy and willingly paying dues.

Proposed Presidential-Level Legislative Initiatives

The Domestic Policy Council also proposes that the President advocate a non-traditional labor legislative agenda. The President should prominently support legislation that aims to improve private-sector union representation instead of curtailing it. These proposals would be difficult for union executives to oppose and would help brand the President a supporter of union members. This legislative agenda would include:

1. *Ending "Free Riding"*: Union leaders complain that right-to-work laws force them to represent workers who do not pay dues. POTUS should send Congress legislation that gives unions the *option* of representing only dues-paying members. This would allow the President to eliminate a major union complaint without coercing workers to pay dues.

Prohibiting Union and Employer Coercion: Federal law imposes minimal penalties on employers who fire union supporters. The Supreme Court's *Enmons* decision exempted unions from the Hobbs Act's prohibitions on violent extortion. President Trump should send Congress legislation that closes both these loopholes, protecting workers from coercion by both unions and employers.

3. *Protecting Union Whistleblowers*: Union officers have no whistleblower protections. President Trump should send Congress legislation closing this loophole. In addition to being the right thing to do, it would show the President wants workers to have better unions.
4. *Allowing Union Members to Earn Raises*: Under federal law union contracts set both the minimum and the *maximum* wage; unionized employers cannot pay individuals more without union permission. This prevents hard-working union members from earning more than their union contract specifies. President Trump should endorse legislation making union rates *minimum* wages only, allowing employers to reward high-performers with higher pay.

Messaging and Political Implications

Note that while many of these changes are broadly popular, they are not especially salient to most workers. For example, union members are already unionized and so protecting the secret ballot does not motivate them. The proposed regulatory changes primarily matter by holding unions more accountable to their members. E.g. Secret ballots makes it costlier for union executives to take political stands that might cause workers to vote against them.

Note also that union executives will vehemently oppose facilitating firm-requested re-election votes. Polling shows that approximately 30 percent of union members are dissatisfied with their representation and would leave their union if they could. However, NLRB case-law makes it exceptionally difficult for firms to request new votes. Consequently, most dissatisfied union members remain unionized. If firms could periodically request new votes unions would lose a lot of members. A reasonable ball-park estimate is 15 percent of private sector union members would decertify their representatives. So while the rank-and-file workers either don't care, or are supportive, union executives will see letting firms ask for new votes as a major threat to their power and finances. They will come out strongly against it.