Heritage Special Report

SR-96
JULY 14, 2011

Published by The Heritage Foundation

Opportunity, Parity, Choice

A Labor Agenda for the 112th Congress

The Heritage Foundation
LEADERSHIP FOR AMERICA

Center for Data Analysis

The Heritage Foundation is a research and educational institution—a think tank—whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.

Our vision is to build an America where freedom, opportunity, prosperity, and civil society flourish. As conservatives, we believe the values and ideas that motivated our Founding Fathers are worth conserving. As policy entrepreneurs, we believe the most effective solutions are consistent with those ideas and values.

Leadership *for* America Ten Transformational Initiatives

This paper is part of the **Enterprise and Free Markets Initiative**, one of 10 Transformational Initiatives making up The Heritage Foundation's Leadership for America campaign. For more products and information related to these Initiatives or to learn more about the Leadership for American campaign, please visit *heritage.org*.


American Leadership


Education


Energy & Environment


Enterprise & Free Markets


Entitlements


Family & Religion


First Principles


Health Care


Protect America


Rule of Law

Opportunity, Parity, Choice

A Labor Agenda for the 112th Congress

By James Sherk

About the Author

James Sherk is Senior Policy Analyst in Labor Economics in the Center for Data Analysis at The Heritage Foundation.

214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

This paper, in its entirety, can be found at:
http://report.heritage.org/sr0096

Contents

Abstract

The U.S. labor market has barely improved since the recession officially ended two years ago. Nearly one in 10 workers remain unemployed, and job creation has stagnated. Archaic labor laws restrict employee involvement in the workplace while forcing many workers to support unions they oppose. Government-employee unions use their enormous political influence to maintain special privileges. Congress should (1) increase opportunity in the economy by removing barriers to job creation and pay increases; (2) create parity between private and government workers by reforming federal compensation and restoring a nonpartisan civil service; and (3) expand choice in the workplace by permitting employee involvement programs and increasing union accountability to their members. Labor law must be reformed to address both the recession and the reality of the 21st-century labor market.

The 112th Congress should address the challenges facing the U.S. labor market with an agenda of opportunity, parity, and choice. Specifically, Congress should increase:

Opportunity in the economy by

- Removing barriers to entrepreneurship and job creation;
- Accurately calculating prevailing wages;
- Limiting the National Labor Relations Board's discretion;
- Allowing workers to earn compensatory time to balance work and family life;
- Allowing union members to earn individual raises.

Parity between taxpayers and government employees by

- Bringing federal compensation in line with the private sector;
- Ceasing collective bargaining over national security;
- Restoring a nonpartisan civil service.

Choice in the workplace by

- Permitting work groups and employee involvement committees;
- Guaranteeing secret ballots in union elections;
- Protecting paychecks from being spent on politics without workers' consent;
- Increasing unions transparency and accountability to their members.

Congress can and should make the labor market work better for Americans.

Section I

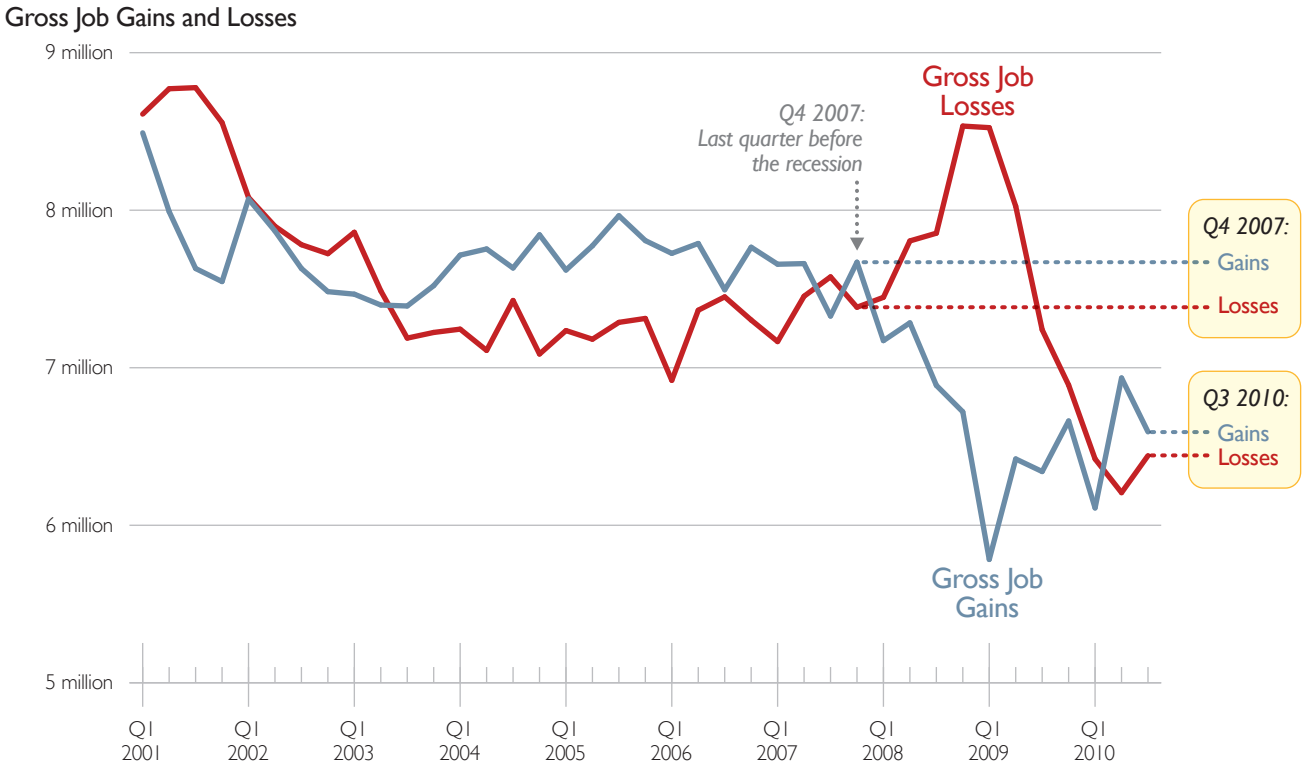
Expanding Opportunity

Americans have long seen the U.S. as a land of opportunity where those who work hard get ahead. The lingering recession has severely challenged this belief. Unemployment has remained above 8 percent for 28 months. The average unemployed worker has been without work for over 9 months.[1] The American dream now feels out of reach for millions.

Less Job Creation, Higher Unemployment. The popular perception is that a surge in layoffs and business failings caused the current surge in joblessness. There is some truth to this belief. Job losses increased sharply at the start of the recession. By mid-2009, however, job losses returned to pre-recession levels. Since then, they have continued to fall. Employers are currently eliminating fewer jobs than they did before the recession. Lower firing rates are the primary reason unemployment has fallen from its earlier highs.[2]

Fewer New Jobs Mean Higher Unemployment

Layoffs spiked during the recession but returned to pre-recession levels by mid-2009. Job creation, however, failed to bounce back at the same rate and lags far below pre-recession levels.



Source: U.S. Department of Labor, Bureau of Labor Statistics, "Business Employment Dynamics" / Haver Analytics.

Chart 1 • SR 96 heritage.org

1. U.S. Department of Labor, Bureau of Labor Statistics, "The Employment Situation–May 2011," June 3, 2011.
2. Lisa Barrow, "Explaining the Recent Decline in the Unemployment Rate," Federal Reserve Bank of Chicago *Chicago Fed Letter* No. 287, June 2011, at *http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2011/cfljune2011_287.pdf* (June 20, 2011).

The primary factor driving unemployment has in fact been less job creation. Job creation fell by 25 percent during the five quarters of the recession. Hiring has only partially recovered since then, and still remains 13 percent below pre-recession levels. Reduced creation of new jobs accounts for 99 percent of the drop in net employment since the recession began. Layoffs account for almost none of the currently elevated unemployment rate.[3]

American workers are less likely to be laid off today than they were four years ago—but those workers who do lose their jobs have a much harder time finding new work. Unemployment will not fall significantly until business investment and expansion picks up.

Improving the Business Climate

To expand the opportunities available to American workers, Congress should improve the business climate. Reducing or removing barriers to wealth creation would spur entrepreneurs and investors to act, in the process creating new jobs. As the demand for labor picks up, wages will also rise. The Heritage Foundation has outlined several tax and regulatory changes Congress can make that would encourage investment at little cost to the Treasury.[4] These measures include:

- Reforming regulations—such as Section 404 of the Sarbanes–Oxley Act—to reduce unnecessary business costs;
- Removing barriers to domestic energy production;
- Concluding the pending free trade agreements (FTAs) with Colombia and Panama, as well as the announced agreement with South Korea; and
- Reducing taxes on foreign earnings to encourage companies to repatriate the profits to America.

Enacting these measures would encourage investment and business expansion, creating new opportunities for American workers.

Oversight of Harmful Regulations. Another step the government can take to improve the business climate is to stop making it worse. As Dennis Lockhart, president of the Federal Reserve Bank of Atlanta, reports:

> We've frequently heard strong comments to the effect of "my company won't hire a single additional worker until we know what health insurance costs are going to be." More generally, our contacts cite a litany of uncertainties as reason for a wait-and-see posture toward expansion-related spending and hiring. These include the longer-term fiscal plan at the federal level, the extension of the Bush tax cuts, and the effect of various regulatory proposals.[5]

Many of the Administration's regulatory policies impair business prospects. These policies include:

- The regulations implementing Obamacare, which are already raising the cost of health insurance;
- The Environmental Protection Agency's pending carbon dioxide regulations, which will significantly raise energy costs;
- The National Labor Relations Board's push to expand unionization through snap elections and litigation against companies that expand non-union operations;
- The Labor Department's turn away from "compliance assistance" programs which help businesses comply with workplace regulations such as OSHA; and
- The Solicitor of Labor's announced plans to emphasize litigation against employers and deter legal violations by "shaming" employers.

3. Heritage Foundation calculations using data from U.S. Department of Labor, Bureau of Labor Statistics, "Business Employment Dynamics," 4th quarter of 2007 to 3rd quarter of 2010.
4. James Sherk, Karen A. Campbell, and John L. Ligon, "A Free Enterprise Prescription: Unleashing Entrepreneurs to Create Jobs," Heritage Foundation *Center for Data Analysis Report* No. 10-09, December 14, 2010, at *http://origin.heritage.org/Research/Reports/2010/12/A-Free-Enterprise-Prescription-Unleashing-Entrepreneurs-to-Create-Jobs*.
5. Dennis P. Lockhart, "Business Feedback on Today's Labor Market," Federal Reserve Bank of Atlanta Conference on Employment and the Business Cycle, November 11, 2010, at *http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm* (June 20, 2011).

Businesses know that the law will change in ways that hurt them, but they do not know how. This encourages them to take a wait-and-see approach before investing. As they wait, employment opportunities diminish.

Congress should act aggressively to reduce these job-killing fears. Since the Obama Administration is unlikely to voluntarily agree to rein in its regulatory agenda, Congress should conduct extensive oversight of it. Congress should aggressively investigate the consequences of proposed regulations on the economy. Where possible, Congress should cut off funding to implement the regulations. Congress should also take advantage of its powers under the Congressional Review Act to block recently promulgated regulations. Congress should do everything in its power to reduce the uncertainty businesses face about harmful future regulations.

Davis–Bacon Act and Project Labor Agreements

The collapse of the housing bubble badly hurt the construction industry. Since the recession began, more than one in four construction jobs have vanished and the unemployment rate in the construction industry is above 20 percent.[6] Two provisions of federal law needlessly reduce the availability of construction jobs and should be rescinded.

The Davis–Bacon Act requires federal construction contractors to pay "prevailing wage" rates that average 22 percent above market rates, essentially forcing the government to hire four construction workers for the price of five.[7] This will add $10.9 billion to federal construction costs in 2011. Suspending the law would stretch the same amount of infrastructure appropriations over more projects, employing 155,000 additional workers in the process.[8]

An executive order from President Obama strongly encourages federal agencies to use project labor agreements (PLAs) on federal construction projects. A PLA requires contractors to sign a collective bargaining agreement with construction unions before beginning work. These bargaining agreements require contractors to hire all workers through union hiring halls. This executive order discriminates against the 87 percent of construction workers who do not belong to unions. Preventing competition from non-union construction workers raises construction costs between 12 percent and 18 percent.[9] This also reduces the number of construction jobs in the economy.

Federal policy should not artificially inflate some workers' wages, while leaving others unemployed. Congress should repeal the Davis–Bacon Act and prohibit PLA requirements for all federally funded construction projects. This would allow construction appropriations to pay for more projects, giving taxpayers better value for their money and expanding the opportunities for unemployed construction workers.

Improve Accuracy of Prevailing Wage Determinations. If Congress does leave the Davis–Bacon Act on the books it should at least improve the accuracy of Davis–Bacon wage determinations. The statute calls for paying prevailing market wages. Actual Davis–Bacon rates are higher than market pay because the Department of Labor uses unscientific methods to calculate them.

The Government Accountability Office has identified severe flaws in the process used to calculate Davis–Bacon prevailing wages.[10] Two aspects of the Department of Labor's methodology are particularly problematic: the use of a non-representative sample and excessively small samples. Some Davis–Bacon rates are based on responses from as few as three workers.

---

6. Department of Labor, Bureau of Labor Statistics, "The Employment Situation," data collected by Haver Analytics.
7. Sarah Glassman, Michael Head, David G. Tuerck, and Paul Bachman, "The Federal Davis–Bacon Act: The Prevailing Mismeasure of Wages," Beacon Hill Institute, February 2008, at *http://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf* (June 20, 2011).
8. James Sherk, "Repealing the Davis–Bacon Act Would Save Taxpayers $10.9 Billion," Heritage Foundation *WebMemo* No. 3145, February 14, 2011, at *http://www.heritage.org/Research/Reports/2011/02/Repealing-the-Davis-Bacon-Act-Would-Save-Taxpayers-$10-9-Billion* (June 20, 2011).
9. David G. Tuerck, Sarah Glassman, and Paul Bachman, "Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem," Beacon Hill Institute, August 2009, at *http://www.beaconhill.org/BHIStudies/PLA2009/PLAFinal090923.pdf* (June 20, 2011).
10. U.S. Government Accountability Office, "Davis–Bacon Act: Methodological Changes Needed to Improve Wage Survey," GAO-11-152, March 2011, at *http://www.gao.gov/new.items/d11152.pdf* (June 20, 2011).

These errors make Davis–Bacon estimates scientifically meaningless. They also systematically inflate Davis–Bacon wages. Unions go to great lengths to ensure that their members return Davis–Bacon forms. Consequently, almost two-thirds of Davis–Bacon wages are at union rates despite low union density in the construction industry.[11]

Congress should insist that the Department of Labor produce scientific and accurate estimates of prevailing construction wages. The best way to do this is by transferring the resources and responsibility for conducting Davis–Bacon surveys to the Bureau of Labor Statistics.[12] The Bureau of Labor Statistics has expertise in producing scientific wage estimates and could meet this responsibility by expanding its existing compensation surveys. The Department of Labor has no excuse for relying on unscientific and error-riddled prevailing wage estimates. Accurately calculating Davis–Bacon rates would create many new construction jobs.

Reining in the National Labor Relations Board

The National Labor Relations Act (NLRA) gives private-sector workers the right to choose whether or not to join a labor union. It prohibits employers and unions from committing "unfair labor practices" (ULP) that obstruct this choice.

Workers should have the freedom to unionize or not. However, Congress drafted the National Labor Relations Act very sloppily. The act outlaws efforts "to interfere with, restrain, or coerce employees" but does not define what these terms mean.[13] This vagueness gives the National Labor Relations Board (NLRB) incredible discretion to define unfair labor practices. President Obama's NLRB has aggressively reinterpreted labor law in ways that promote union organizing and discourage job creation.

The NLRB just announced plans to dramatically reduce the length of time for union elections to as little as 10 days.[14] This will reduce the amount of time that employers have to explain the downsides of unionizing to employees. President Obama's NLRB wants workers to hear primarily from union organizers before they vote. This would prevent them from making an informed choice about the costs and benefits of unionizing.

The NLRB also plans to allow unions to selectively organize "mini-unions" that do not represent a majority of employees. This will enable unions to expand in firms where most workers oppose unionizing. It will also force businesses to negotiate separately with potentially dozens of separate bargaining units—a highly expensive prospect.

The NLRB is currently testing the limits of its legal authority with a case brought against Boeing by the International Association of Machinists (IAM). The union represents workers in Boeing's Washington state facilities. IAM frequently goes on strike to extract concessions. These strikes have cost Boeing billions of dollars. Consequently, Boeing built its new 787 airliner assembly line in South Carolina, which has a right-to-work law and lower union membership.

President Obama's NLRB contends that this move is an unfair labor practice. It argues that building a new plant in South Carolina coerces union members and deters them from striking—despite the fact that no union members in Washington State lost their jobs. It is seeking to force Boeing to relocate its nearly completed plant to Washington. The NLRB wants to give union members first preference for new investment and new jobs.

The NLRB's agenda of foisting unions on both employers and employees would reduce job opportunities in the economy. Studies consistently show that unionized businesses invest less and create fewer jobs than non-union employers.[15] If the NLRB limits businesses' ability to make better investments, or pressures employees to unionize through snap elections, businesses will create fewer jobs. However, the vagueness of the NLRA may enable the board to do exactly that.

---

11. *Ibid.*, p. 20.
12. "Examining the Department of Labor's Implementation of the Davis–Bacon Act," testimony by James Sherk before the Committee on Education and the Workforce, U.S. House of Representatives, April 28, 2011, at *http://www.heritage.org/research/testimony/2011/04/examining-the-department-of-labors-implementation-of-the-davis-bacon-act*.
13. National Labor Relations Act, Section 8(a)(1).
14. "National Labor Relations Board, Notice of Proposed Rulemaking," *Federal Register*, Vol. 76, No. 120, June 21, 2011, p. 36861.
15. James Sherk, "What Unions Do: How Labor Unions Affect Jobs and the Economy," Heritage Foundation *Backgrounder* No. 2275, May 21, 2009, at *http://www.heritage.org/research/reports/2009/05/what-unions-do-how-labor-unions-affect-jobs-and-the-economy*.

Congress should amend the National Labor Relations Act to remove the board's discretion. Instead, Congress should set clear standards for union organizing drives.[16] Congress should specify—beyond vague categories like "restrain" or "interfere"—what does and does not qualify as an unfair labor practice. Congress should expressly prohibit some activities, such as firing workers for supporting a union. Congress should also expressly permit other activities, such as factoring in the cost of unions when making investment decisions. Congress should give businesses clarity about acceptable behavior. This would remove the board's discretion to tilt the playing field in favor of either unions or employers, and encourage hiring.

At the very least Congress should expressly amend the National Labor Relations Act to reaffirm the longstanding construction of the act that new investment decisions—such as Boeing's investment in South Carolina—do not constitute an unfair labor practice. This would prevent abusive litigation by the NLRB and protect the ability of companies to freely make the best investments that will benefit the overall economy.

Saving the American Dream. America will face even greater economic problems as the baby boomers retire and begin drawing on Social Security and Medicare. Under current policies, the national debt will rise to 185 percent of the economy by 2035. Avoiding crushing levels of debt would require enormous tax increases. If left unchecked, these debt and tax burdens will lead to an economic collapse, such as is now occurring in many European nations. This spending crisis threatens future economic opportunity even more than the current recession. To preserve opportunity in the economy, entitlement programs must be reformed. The Heritage Foundation proposes such reforms with the "Saving the American Dream" plan.[17] Congress should act now to put entitlement programs on a sustainable path.

Compensatory Time

Since Congress passed the Fair Labor Standards Act in 1938, the workforce has changed dramatically. The law was written for a mostly male industrial economy. Since then, the economy has shifted toward services, and women have entered the labor force in large numbers. Today 47 percent of U.S. workers are female, up from 29 percent in 1950.[18]

Large social changes have accompanied these economic changes. One-income couples used to be the norm; today, two-thirds of married couples with children both work.[19] Single-parent families have also become increasingly common. Unfortunately, Congress has made few substantial changes to the Fair Labor Standards Act since it became law.[20]

Paid-leave laws often hurt the very workers they are intended to help.

Workers in today's economy increasingly want—and need—flexible schedules to help balance their work and family lives. It is no longer the case that most working parents have a spouse at home to attend to their children's needs. Many workers want more flexible hours so they can be with their families when needed.

The liberal solution involves requiring companies to provide more paid leave. Such laws often hurt the very workers they are intended to help. When the government requires employers to provide new benefits, they do. However, employers do not take the cost of new benefits out of their profits. Instead, they hold the workers' total

16. These standards should include both defining unfair labor practices and other practices not related to unfair labor practices, such as determining appropriate bargaining units and the minimum time frame for the election.
17. The Heritage Foundation, "Saving the American Dream: The Heritage Plan to Fix the Debt, Cut Spending, and Restore Prosperity," 2011, at *http://www.savingthedream.org/about-the-plan/plan-details/*.
18. Heritage Foundation calculations using data from the Department of Labor, Bureau of Labor Statistics, "The Employment Situation," Table A-1/Haver Analytics.
19. Department of Labor, Bureau of Labor Statistics, *Economic News Release*, "Families with Own Children: Employment Status of Parents by Age of Youngest Child and Family Type, 2009–10 Annual Averages," Table 4, March 24, 2011, at *http://www.bls.gov/news.release/famee.t04.htm* (June 20, 2011).
20. The exception to this statutory stasis is the minimum wage. Congress has expanded the coverage and frequently raised the minimum wage rate.

compensation constant, increasing benefits and decreasing cash pay by a roughly equivalent amount.[21] Mandatory paid leave has the unintended consequence of cutting workers' pay.

A better solution would be to give workers more control over their schedules and their pay. Federal employees have the ability to take overtime benefits as overtime pay or compensatory paid leave. This allows federal workers to bank extra hours at work and earn additional paid time off. Federal employees have the flexibility to be with their family when they need to without taking a pay cut.

Federal law denies private-sector employers and employees this freedom. The Fair Labor Standards Act requires employers of most hourly workers to pay time-and-a-half cash wages for work beyond the regular 40-hour workweek. Employees must receive cash wages; they may not choose to earn compensatory time instead—even if they value that flexibility.

Congress should remove this proscription and permit private-sector workers to earn compensatory time (comp time). Congress should allow employers to offer employees the choice between earning overtime pay or accruing additional hours worked in a comp-time bank, which they can draw from later. Several important principles should guide such a program:

- It should be voluntary for both employees and employers. The decision to take compensatory time in lieu of overtime pay should belong to the worker alone. Since comp time will not serve the needs of every business, the government should not force firms to offer it.
- Both employers and employees should have the freedom to revoke the comp time arrangement and cash out unused hours.
- The law should provide reasonable protections to employees to prevent them from being coerced into taking time off instead of overtime pay. These protections should avoid codifying unnecessary requirements or micromanaging workers' choices. Employers and employees should have the flexibility to find the arrangement that works best for their workplace.

A law designed for the economy of the 1930s does not meet the needs of today's workers. The rise of two-income and single-parent families has made flexibility a pressing concern for many employees. Allowing employees to earn comp time would help them balance work and family life. Congress should give private-sector workers the same flexibility and choices it has given federal employees.

Allowing Union Members to Earn Individual Raises (RAISE Act)

Federal law denies the 6.9 percent of private-sector workers who belong to a union the opportunity to earn a raise. This is because unions exclusively represent their members in negotiations with employers. No one else—including individual union members—may negotiate separate terms of employment. One contract covers everyone.

Union representatives cannot practicably assess the productivity of hundreds of employees and negotiate appropriate individual pay. Instead, most union contracts base promotions and raises on job classifications and seniority; individual performance reviews are rare.[22] Union members get the union rate for their position.

21. Jonathan Gruber, "The Incidence of Mandated Maternity benefits," *American Economic Review*, Vol. 84, No. 3 (June 1994), pp. 622–641; Patricia M. Anderson and Bruce D. Meyer, "The Incidence of a Firm-Varying Payroll Tax: The Case of Unemployment Insurance," NBER *Working Paper* No. W5201, August 1, 1995; Jonathan Gruber and Alan B. Krueger, "The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance," NBER *Working Paper* No. W3557, December 1990; and Price Fishback and Shawn Kantor, "Did Workers Pay for the Passage of Workers' Compensation Laws?" *Quarterly Journal of Economics*, Vol. 110, No. 3 (August 1995), pp. 713–742.
22. David Metcalf, Kirstine Hansen, and Andy Charlwood, "Unions and the Sword of Justice: Unions and Pay Systems, Pay Inequality, Pay Discrimination and Low Pay," *National Institute Economic Review*, Vol. 176, No. 1 (2001), pp. 61–75; Richard B. Freeman, "Union Wage Practices and Wage Dispersion Within Establishments," *Industrial and Labor Relations Review*, Vol. 36, No. 1 (October 1982), pp. 3–21; and Assar Lindbeck and Dennis Snower, "Centralized Bargaining and Reorganized Work: Are They Compatible?" *European Economic Review*, Vol. 45, No. 10 (December 2001), pp. 1851–1875.

The law does more than prevent employers from paying below the union rate—it also forbids higher pay. The National Labor Relations Board will strike down any bonuses and merit pay that were not first negotiated with the union.[23] Without this restriction many unionized businesses would pay high-performing employees more. They want to provide incentives for hard work and retain successful employees. Legally, however, they cannot. Union contracts impose a pay ceiling on union members.

As a result, more experienced and educated union members earn substantially less than they would without general representation.[24] Union members are also between one-third and one-quarter less likely to be promoted than non-union workers.[25] The law holds hard-working union members back. No matter how hard they work, they receive the same pay as everyone else. This hurts both those workers and the economy. Employees work harder and become more productive when they are rewarded for doing so. Basing pay partly on individual performance raises workers' earnings *and* corporate profits because it makes workers more productive.[26]

Congress should allow unionized companies to reward individual performance. Legislation currently before Congress would do just this. The Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act amends the National Labor Relations Act to allow employers to pay individual workers more than a collective bargaining agreement calls for. Union contracts would still set the minimum that workers would earn, but workers could earn more through their own hard work.[27] Employers could not selectively give raises to anti-union workers to undermine the union, however. Under the RAISE Act it would remain illegal to discriminate against workers on the basis of union membership.

If Congress allowed hard-working union members to earn more, they would take the opportunity to become more productive and get ahead. Productivity, profits, and pay would rise. Economic research shows that the average worker's earnings rise by 6 percent to 10 percent when the pay is performance-based.[28] This works out to between $2,700 and $4,500 more a year for the typical union member.[29] Instead of fighting over how to redistribute wealth, the RAISE Act encourages employers and employees to work together to create more wealth and spark economic renewal.

Employees work harder and become more productive when they are rewarded for doing so.

This is the type of policy that President Obama called for when criticizing the executive bonuses paid by AIG: "We believe in the free market, we believe in capitalism, we believe in people getting rich, but we believe in people getting rich based on performance and what they add in terms of value and the products and services that they create." The RAISE Act enables enterprising workers to be rewarded for their own hard work.[30]

23. *Colorado–Ute Electric Assn*, 295 NLRB 607 (1989); *McClatchy Newspapers*, 322 NLRB 812 (1996); *The Edward S. Quirk Co., Inc. dba Quirk Tire v. NLRB*, 241 F.3d 41 (1st Cir. 2001); *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000); and *Register-Guard Co.*, 339 NLRB 353 (2003).
24. Metcalf, Hansen, and Charlwood, "Unions and the Sword of Justice."
25. Kristin McCue, "Promotions and Wage Growth," *Journal of Labor Economics*, Vol. 14, No. 2 (April 1996), pp. 175–209.
26. Edward P. Lazear, "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5 (December 2000), pp. 1346–1361.
27. James Sherk and Ryan O'Donnell, "RAISE Act Lifts Pay Cap on 8 Million Workers," Heritage Foundation *Backgrounder* No. 2270, June 4, 2009, at *http://www.heritage.org/research/reports/2009/06/raise-act-lifts-pay-cap-on-8-million-american-workers*.
28. Alison L. Booth and Jeff Frank, "Earnings, Productivity, and Performance-Related Pay," *Journal of Labor Economics*, Vol. 17, No. 3 (July 1999), pp. 447–463; Lazear, "Performance Pay and Productivity"; Tuomas Pekkarinen and Chris Riddell, "Performance Pay and Earnings: Evidence from Personnel Records," *Industrial and Labor Relations Review*, Vol. 61, No. 3 (April 2008), pp. 297–319; Adam Copeland and Cyril Monnet, "The Welfare Effects of Incentive Schemes," *Review of Economic Studies*, Vol. 76, No. 1 (2009), pp. 93–113; Daniel Parent, "Methods of Pay and Earnings: A Longitudinal Analysis," *Industrial and Labor Relations Review*, Vol. 53, No. 1 (October 1999), pp. 71–86.
29. Heritage Foundation calculations based on data from the Department of Labor's Bureau of Labor Statistics on the median earnings of private-sector workers covered by collective bargaining agreements in 2010.
30. In Obama's Words, "Obama Remarks on AIG," *The Washington Post*, March 18, 2009, at *http://projects.washingtonpost.com/obama-speeches/speech/55/* (June 20, 2011).

Section II

Parity Between Taxpayers and Government Employees

Tension exists between the interests of private-sector taxpayers and government employees. Government employees provide essential services, such as police protection, paid for by taxes. It is in taxpayers' interests that government employees work harder and earn less, while government employees would prefer higher pay for less work.

The government should balance these interests fairly. The government should not overpay its workers. Government employment should not transfer wealth from taxpayers to government employees. Similarly, the government should not underpay its employees—public service should not require a vow of poverty. Rather, the government should pay its workers roughly what they would make in the private sector. There should be parity between taxpayers and government employees.

Inflated Federal Compensation. The Federal Employees Pay Comparability Act calls for such parity. Unfortunately, it only exists on paper. Research shows that most federal employees make more than they would in the private sector, while some federal employees earn below-market wages.

Average pay in the federal government is significantly higher than in the private sector: The average federal employee receives hourly wages and annual income that is 57 percent higher than that of the average private-sector worker. Including non-cash benefits increases the size of this federal compensation premium to 85 percent.

Part of this pay gap should exist. The federal government employs a more skilled and more experienced workforce than most private businesses. Federal employees should earn more than the average private-sector worker.

Pay Differentials Between the Private Sector and Federal Government

	Private Sector	Federal Civilian Employees	% Difference
Hourly wages	$18.27	$28.64	57%
Annual wage and salary	$50,111	$78,901	57%
Annual total compensation	$60,078	$111,015	85%

Sources: Hourly wages: Predicted average wages for each sector using Current Population Survey data for 2006–2009. Annual salary and compensation: Author's calculations of total payments per full-time-equivalent employee using data from the Bureau of Economic Analysis for 2006–2008. Excludes amortized pension costs for former personnel. See Appendix H for details. Both figures are inflation-adjusted to 2009 dollars using the Chained Consumer Price Index. For details of these calculations, see James Sherk, "Inflated Federal Pay: How Americans Are Overtaxed to Overpay the Civil Service," Heritage Foundation *Center for Data Analysis Report* No. 10-05, July 7, 2010, at *http://www.heritage.org/Research/Reports/2010/07/Inflated-Federal-Pay-How-Americans-Are-Overtaxed-to-Overpay-the-Civil-Service.*

Table 1 • SR 96 heritage.org

However, the superior skills of federal employees explain only part of their higher pay. After controlling for observable skills and characteristics, federal employees still receive cash wages 22 percent higher per hour than comparable private workers. Federal employees in occupations that also exist in the private sector—such as computer programmers, human resource specialists, and accountants—enjoy a similar premium.[31] The federal government pays substantially more than the amount accounted for by federal employees' skills.

Generous Benefits. The federal government also provides generous non-cash benefits: an average of $32,115 per employee annually, more than triple the average non-cash compensation of the average private-sector worker ($9,882 a year). The federal government gives its workers excellent health coverage. [32] The government also offers its employees especially generous retirement and paid leave benefits:

31. James Sherk, "Inflated Federal Pay: How Americans Are Overtaxed to Overpay the Civil Service," Heritage Foundation *Center for Data Analysis Report* No. 10-05, July 7, 2010, at *http://www.heritage.org/Research/Reports/2010/07/Inflated-Federal-Pay-How-Americans-Are-Overtaxed-to-Overpay-the-Civil-Service.*
32. Unlike many state and local employees, federal workers make significant contributions toward this coverage—they must pay at least 28 percent of their health care premiums.

- **Federal Employees Retirement System.** Federal employees are automatically covered under the Federal Employee Retirement System (FERS), which includes both a defined-benefit and a defined-contribution pension plan.[33] Employees in the defined-benefit plan with 30 years of experience may retire at the age of 56 with a full pension. Employees with less tenure may retire with full benefits at 60 or 62.[34] Any federal employee willing to accept reduced pension benefits may retire at 56.[35] In contrast to Social Security, federal employees may collect their pensions while working in a non-federal job. This allows federal employees to retire in their late 50s and take a job in the private sector while collecting pension benefits from the government. These benefits are almost entirely funded by taxpayers, not by employee contributions.

  Federal employees may also enroll in a defined-contribution Thrift Savings Plan (TSP) that functions similarly to a 401(k). Employees in the TSP receive matching contributions from the government of up to 5 percent of their pay. Federal employees in the FERS also receive Social Security benefits.

  Most private-sector employees must wait to retire until they qualify for Social Security at age 65 and only have one—not two—pension plans.

- **Paid Leave.** Federal employees also receive more generous leave benefits than private-sector workers. After three years on the job, full-time federal employees receive 20 days of paid vacation, 13 paid sick days, and 10 paid federal holidays a year. The paid sick days carry over without limit each year, and unused sick leave counts toward pension benefits. The average private-sector worker with that much experience receives 15 paid vacation days, nine sick days, and nine paid holidays annually—10 fewer days.[36]

  The superior skills of federal workers explain even less of these generous benefits than they do hourly pay. The typical federal employee has almost four times greater odds of participating in a pension plan than a comparably skilled private-sector worker. Data limitations make measuring the precise cost of overcompensation for federal employees difficult. However, conservative estimates show that the federal government pays workers an average of 30 percent to 40 percent greater total compensation than comparable private-sector workers would receive.[37]

- **Incredible Job Security.** In addition to higher earnings, federal employees enjoy incredible job security. Federal workers go through a one-year probationary period during which they can be fired with little difficulty. Once that period ends they are effectively tenured—they receive full civil service protections that make firing them for poor performance very difficult.

  The government does not let workers go in economic downturns, either. Since the recession started in December 2007, the federal government has hired 247,000 net new employees even as private employers have shed 7 million net jobs.[38]

Federal Pay and Benefits Reform

Excessive average federal compensation redistributes wealth from less-well-paid private-sector workers to more highly paid federal employees. Congress should not engage in this reverse redistribution of wealth—and certainly

33. This applies to all federal employees hired on or after January 1, 1984. Federal employees hired before that date are covered by the Civil Service Retirement System.
34. Federal employees with five to 20 years of service may retire with full benefits at age 62. Federal employees with at least 20 years of service may retire at 60.
35. The reduced-benefits formula is a 5 percent reduction in pension payments multiplied by the number of years the employee retires before age 62.
36. WorldatWork Survey, "Paid Time Off Programs and Practices," May 2010, p. 3, at *http://www.worldatwork.org/waw/adimLink?id=38913* (June 20, 2011).
37. *Ibid*.
38. Heritage Foundation using data from the Department of Labor, Bureau of Labor Statistics, Establishment Survey. This figure counts federal employees outside the uniformed military, the post office, and the temporary census workers.

not in times of massive deficits. The good fortune of landing a job with Uncle Sam should not be the ticket to financial success.

Congress would save taxpayers approximately $47 billion a year if it reduced federal compensation to market rates.[39] This would not eliminate the deficit alone, but it would be an important step toward putting America's fiscal house in better order.

Congress should reform federal pay wisely. Although the average federal employee receives above-market pay, many do not. Because the federal government bases raises largely on seniority and not performance, many highly skilled and high-performing federal workers do not earn above-market pay. Uniformly cutting federal pay would inappropriately penalize productive federal employees. Instead, Congress should equitably reduce federal pay to market rates.

Streamline Benefits. Congress should begin by streamlining benefits, since almost all federal employees receive more generous benefits than they would in the private sector. Specifically, Congress should:

- **Raise the Federal Retirement Age.** Private-sector workers should not have to pay for federal employees to retire a decade earlier than they can themselves. The federal government should gradually raise its retirement age by six months each calendar year until it reaches the Social Security retirement age.
- **Consolidate Pensions for New Hires.** Taxpayers should not have to pay for federal employees to receive two pension plans. The government should follow private-sector practices and move entirely to a defined-contribution pension plan for new hires. Starting on January 1, 2012, new federal employees should qualify only for the Thrift Savings Plan. Congress should also modestly raise the generosity of the employee match to 7 percent, conditional on additional employee contributions.
- **Move to a Paid Time Off system.** Private-sector employers are increasingly moving to paid time off (PTO) systems instead of traditional vacation and sick leave policies.[40] Under a PTO plan, workers receive a set number of days of paid time off per year that they may use for illness, vacation, or any other reason.[41] The employer does not monitor why they are absent. Congress should move federal employees to a PTO plan with leave benefits that match those of private-sector employers. This would mean giving a federal employee with five years experience 23 annual leave days[42]—10 fewer than the 20 vacation and 13 sick leave days they currently enjoy.

Over the long term these changes would result in significant savings for taxpayers.

Pay for Tenure Benefits. Congress should also require federal employees to pay for a benefit that they currently receive free: tenure. Employees value job security. Employees in the private-sector trade lower job security for higher pay and *vice versa*.[43] Federal employees do not. They receive incredible job security for free. Once they pass their probationary year, federal employees are effectively guaranteed their jobs unless they are grossly negligent. As a result, they face very little accountability for their performance. Estimates place the value of this job security at around 11 percent of federal employees' wages.[44]

Congress should not give this valuable benefit away for nothing. Congress should require federal employees who want tenure to pay a portion of their salary to receive it. Congress should give the Office of Personnel Management (OPM) the authority to set the exact price of tenure based on employee demand.

39. Sherk, "Inflated Federal Pay."
40. Forty percent of private-sector businesses used PTO plans in 2010, up from 28 percent in 2002. See WorldatWork Survey, "Paid Time Off Programs and Practices," p. 2.
41. Typically PTO plans do not include holidays such as Christmas and Thanksgiving, which employees often receive off as well.
42. WorldatWork Survey, "Paid Time Off Programs and Practices," p. 3. The average PTO plan gives 19 days off to an employee with four years of experience, while employers at the 75th percentile give employees with four years of experience 23 PTO days.
43. Enrico Moretti, "Do Wages Compensate for Risk of Unemployment? Parametric and Semiparametric Evidence from Seasonal Jobs," *Journal of Risk and Uncertainty*, Vol. 20, No. 1 (January 2000), pp. 45–66.
44. Andrew Biggs, "Are Federal Workers Underpaid," testimony before the Committee on Oversight and Government Reform, U.S. House of Representatives, March 9, 2010, at *http://www.aei.org/docLib/Biggs-HouseOversightTestimony-March2011.pdf* (June 20, 2011).

For example, Congress could require employees who want tenure to pay for it by giving up their annual General Schedule (GS) increase for a number of years. If the vast majority of federal employees signed up when the price was three years of their GS increase, it would show the price was too low. If very few federal employees signed up, that would indicate the price was too high. The Office of Personal Management would then adjust the number of years of GS increases that employees contributed until participation reached a target range of the federal workforce.

At the same time, Congress should reward employees who choose to become accountable for their performance. Congress could use a portion of the savings from tenure payments to increase the pay of employees who forgo tenure. This could happen, for example, through an annual "accountability bonus."

This policy would reduce the pay of the least effective federal workers while increasing the pay of the most deserving. Diligent workers know that they will not be fired—with or without tenure. These diligent employees will decline to pay for the benefit and instead take the bonus, earning more overall. Mediocre workers who fear being held accountable will accept lower pay in exchange for tenure. Requiring employees to pay for tenure would cut the pay of poor performers without penalizing exemplary federal employees.

Problems with the Current Pay System. Reforming benefits alone is insufficient to address federal-private disparities. Achieving parity means addressing cash pay as well. This requires a complete overhaul of the basic federal pay system, the General Schedule.[45]

The General Schedule consists of 15 pay grades and 10 steps within those pay grades.[46] Federal employees advance through the steps of the General Schedule by seniority, with faster promotions possible for what managers deem good performance. Except in cases of extreme misconduct, a civil servant will reach step 10 of his grade if he remains on the job long enough.

The General Schedule places strong emphasis on internal pay equity. Jobs of the same "level of work" are assigned to the same GS grade and are paid identically. The General Schedule also incorporates locality pay adjustments to account for cost-of-living differences across the country and overseas.

The pay bands for each GS grade are set by the President's Pay Agent.[47] The law requires the Pay Agent to evaluate jobs in the private sector and the federal government on the basis of required qualifications, level of difficulty, and amount of responsibility. It uses these surveys to determine the level of work the job involves and what grade a job of that level would translate to in the General Schedule. The Pay Agent then averages pay to determine the pay for each grade level. Finally, the Pay Agent adds a locality adjustment.

The Pay Agent has frequently expressed concerns with this methodology.[48] As the Office of Personnel Management explains, it collapses the factors influencing pay into just two dimensions: the level of work and a locality-based adjustment. However, private-sector employers do not pay solely according to the "level of work" a job entails.[49] Pay is determined by workers' market productivity and the relative supply of labor. Productivity is *related* to work level, but is ultimately determined by worker skills. Not surprisingly, private-sector occupations that the OPM decides involve similar work levels often pay different wages. In the federal government, occupations graded at the same GS level are paid identically. This effectively superimposes the federal government's own pay guidelines onto the private sector, leading to large variations from market pay.

Additionally, the federal government promotes its employees at a faster rate than that of private-sector employers. As a consequence, federal employees often hold positions above those they would be qualified to hold in

45. The General Schedule covers roughly 70 percent of federal employees. Separate pay systems cover political appointees, senior executives, and blue collar workers.

46. GS grades 1 through 7 denote entry-level positions; grades 8 through 12 mark mid-level positions; grades 13 through 15 are top-level and management positions.

47. The Pay Agent consists of the Secretary of Labor and the Directors of the Office of Personnel Management and the Bureau of Labor Statistics.

48. The President's Pay Agent, "Memorandum for the President: Annual Report on General Schedule Locality-Based Comparability Payments," December 2, 2008, at *http://www.opm.gov/oca/payagent/2008/2008PayAgentReport.pdf* (June 20, 2011).

49. U.S. Office of Personnel Management, "A Fresh State for Federal Pay: The Case for Modernization," White Paper, April 2002, p. 48.

the private sector.[50] For example, a senior accountant in the federal government might be only a junior accountant in the private sector. The Pay Agent's focus on a job's work level masks differences in employee qualifications.

A New Pay System. The General Schedule is fatally flawed. It overcharges taxpayers while almost completely ignoring the performance of federal employees. It does not reward dedicated employees or penalize slackers. The government needs a new pay system.

Congress should replace the General Schedule with a performance-pay system with broad pay bands tied to market rates. Instead of the 15 grades of the General Schedule, each occupation would have entry-level, junior, and senior pay bands, with wide ranges of pay for each. Managers would assign pay within each band, and promotion between bands, on the basis of performance.

Performance pay will not necessarily reduce costs. In some of the demonstration pay-for-performance systems, the government has experimented with managers who have promoted a majority of employees to the top of their pay bands, raising costs.[51] The key to preventing performance-rating inflation is placing strict limits on total compensation spending. Congress could do this by freezing the total amount spent on federal salaries (in nominal dollars) for the next five years.[52] Caps on the money available for raises forces managers to be judicious when awarding them.

Congress can and should equitably bring federal compensation in line with market rates.

Collective Bargaining at National Security Agencies

The federal government's most important job is protecting the lives of American citizens. Labor disputes and union work rules should not obstruct national security. That is why the FBI, CIA, and Secret Service do not collectively bargain with their employees. The most effective agents—not those with the most seniority—should protect the President and the American people.

Unfortunately this is not true in all security agencies. Several agencies within the Department of Homeland Security, such as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), engage in collective bargaining. This reduces the government's flexibility when defending the country.

For example, the CBP unilaterally reassigned officers from the Port of Houston to Bush International Airport. At the Port of New Orleans the CBP unilaterally implemented a new master schedule. In response, the National Treasury Employees Union (NTEU) filed grievances against the CBP. The arbitrator ruled that the CBP should have provided the union with notice and the opportunity to bargain before making the changes.[53]

The government needs the flexibility to rapidly respond to new threats and intelligence, and to implement best practices. It should not have to wait on union negotiations before acting. Under current law it does.

Unionizing the TSA. This problem will soon get worse. The Obama Administration has decided that the Transportation Security Agency (TSA) will engage in limited collective bargaining with airline security screeners.[54] TSA Administrator John Pistole recently decided that the TSA will collectively negotiate performance management

50. Melissa Famulari, "What's in a Name? Title Inflation in the US Federal Government," Working Paper, 2002, revision requested by *Industrial and Labor Relations Review*.

51. Silvia Montoya and John Graham, "Modernizing the Federal Government: Paying for Performance," Pardee RAND Graduate School *Occasional Paper*, 2007, p. 25, at *http://www.rand.org/content/dam/rand/pubs/occasional_papers/2007/RAND_OP213.pdf* (June 24, 2011).

52. This freeze would decrease total spending on federal pay in real (inflation-adjusted) terms. Pay increases for deserving employees would be financed by the pay reductions taken by employees who decide to purchase tenure and by replacing retiring senior employees with new hires.

53. Decision of M. David Vaughn in federal arbitration between the Bureau of Customs and Border Protection and National Treasury Employees Union, November 15, 2006. The full decision is available from the author upon request.

54. John Pistole, "Determination: Transportation Security Officers and Collective Bargaining," Transportation Security Administration, February 4, 2011, at *http://www.tsa.gov/assets/pdf/determination_tso_and_collective_bargaining.pdf* (June 20, 2011).

processes, employee awards and recognition processes, and shift and transfer policies. Pistole prohibited bargaining over pay, promotions, security procedures, personnel deployments, or fitness-for-duty standards.[55]

Government employee unions are now the largest special interest group in the country.

The decision to limit bargaining subjects will prevent unions from doing as much harm to the TSA as they have to other agencies. The TSA needs the maximum flexibility to rush screeners to high-risk locations and modify screening procedures at a moment's notice. By taking security procedures and personnel assignments off the bargaining table, Pistole has preserved this flexibility—for now.

However, a future TSA administrator could remove these limitations. Permitting collective bargaining gives government unions millions of dollars in new dues, which they can use to lobby for more powers. As a result, limited collective bargaining is likely to become less limited over time.

Endangers Passengers. Collective bargaining at the TSA would be a mistake even if the bargaining limitations remain in place. The collective bargaining framework is inherently adversarial. Pitting employees and employers against each other at the bargaining table fosters attitudes of "labor versus management." This often leads to strikes and job actions.

This has happened in other countries that allow security screeners to bargain collectively, such as Canada. During Thanksgiving of 2006, the Canadian security screeners union pressured management by instructing its members to hand-search every piece of luggage—causing long backups and many missed flights. To ease the backlog, managers allowed 250,000 passengers to board their plans without being screened.[56] Labor disputes should not endanger passengers.

Pistole's determination prohibits such "collective job actions."[57] Unfortunately, government unions often strike illegally despite such prohibitions, putting vital public services at risk.[58] Unionizing the TSA carries the risk of illegal labor disputes that would endanger passengers.

Collective bargaining will also make rewarding and motivating employees more difficult. Today, the TSA evaluates screeners' performance and gives raises and bonuses to high performers. This allows the TSA to keep screeners motivated despite the tedium of the job.

Government unions typically oppose merit awards. They prefer seniority-based systems that ignore individual performance. Pistole has decided to bargain collectively over awards and recognition procedures. This will allow unions to negotiate away merit recognition, reducing the incentive for good performance.

Cease Collective Bargaining in DHS. In most parts of government, labor disputes and union inefficiencies raise costs for taxpayers. In national security agencies, they also put lives at risk. America cannot afford conflict between unions and management that could allow a terrorist attack to succeed. Congress should expressly prohibit collective bargaining in the Department of Homeland Security. Americans deserve to have their taxes spent effectively to defend them.

Restoring a Nonpartisan Civil Service

A century ago, America embraced the principle of a nonpartisan civil service. The abuses of the patronage system—where politicians used government employees as part of their political machines—led President Theodore

55. Transportation Security Administration, "Fact Sheet: TSA Administrator Pistole's Decision on Collective Bargaining," February 4, 2011, at *http://www.tsa.gov/press/happenings/2011/11_0204_fact_sheet_on_collective_bargaining.shtm* (June 20, 2011).
56. "Luggage Security Lax During Pearson Labour Dispute: Report," CBC News, December 20, 2006.
57. Pistole, "Determination."
58. For example, Detroit public school teachers went on strike in September 2006—despite a state law banning strikes. In December 2005, an illegal strike by transit workers paralyzed New York City during the busiest shopping days of the year.

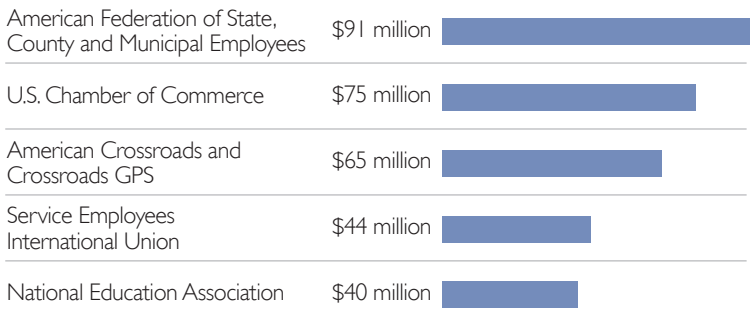
Roosevelt to issue Executive Order 642 in 1907.[59] The order prohibited civil service employees from participating in partisan political campaigns. During the Great Depression, evidence emerged showing that employees of New Deal agencies were being used to campaign for politicians the Administration supported. In response, Congress passed the "Hatch Act." Named after Democratic Senator Carl Hatch, the act prohibited federal employees from donating to or participating in election campaigns. Congress believed that government employees should not be a partisan interest group but should serve the public impartially.

Unfortunately, this is no longer the case. In the 1960s and 1970s, state legislatures began allowing government unions to organize state and local employees. These government unions quickly became political. The Hatch Act Reform Amendments of 1993 exempted most federal employees from the act.

Government employee unions are now the largest special interest group in the country. Government unions now spend more than any other outside group on U.S. elections. Of the five largest spenders in the 2010 election cycle outside of political parties, three were unions that represent government employees. The American Federation of State, County and Municipal Employees (AFSCME) took the top spot, spending $91 million to elect its members' bosses. That total dwarfed the Chamber of Commerce's $75 million, and the $65 million raised by Republican Party-allied groups. As Larry Scanlon, head of AFSCME's political operation said: "We're the big dog, but we don't like to brag."[60] This spending gives government unions significant political power.

Three of Top Five Political Spenders Are Government Unions

Non-Political-Party Spending During 2009–2010 Election Cycle



Sources: Brody Mullins and John McKinnon, "Campaign's Big Spender," *The Wall Street Journal*, October 22, 2010; and Steven Greenhouse, "Union Spends $91 Million on Midterms," The Caucus, New York Times Blog, October 22, 2010.

Chart 2 •SR 96 heritage.org

Government unions use this power to redirect public policy to serve their interests instead of the interests of the general public. Higher taxes and more government spending directly benefit government unions, although they harm the overall economy. Tenure laws keep bad teachers on the job, but increase job security for government employees. So government unions are the driving force behind most campaigns to raise taxes and oppose budget cuts.[61] They fight to keep tenure laws on the books.

Government unions press policymakers to serve their interests first. At times they state this openly. A Service Employees International Union (SEIU) representative told California legislators that "We helped to get you into office, and we got a good memory. And come November, if you don't back our program, we'll help get you out of office."[62]

Government should serve the general good first, not the interests of its own employees. The law recognizes this for some federal employees. The CIA, the FBI, and most judicial employees may not participate in partisan

59. Jack Maskell, "'Hatch Act' and Other Restrictions in Federal Law on Political Activities of Government Employees," Congressional Research Service *Report for Congress* No. 98-885, p. 1, October 23, 1998.
60. Brody Mullins and John McKinnon, "Campaign's Big Spender," *The Wall Street Journal*, October 22, 2010, and Steven Greenhouse, "Union Spends $91 Million on Midterms," *The New York Times* blog *The Caucus*, October 22, 2010, at *http://thecaucus.blogs.nytimes.com/2010/10/26/union-spends-91-million-on-midterms/* (June 20, 2011).
61. James Sherk, "The New Face of the Union Movement: Government Employees," Heritage Foundation *Backgrounder* No. 2458, September 1, 2010, at *http://www.heritage.org/research/reports/2010/09/the-new-face-of-the-union-movement-government-employees*.
62. Steven Malanga, "The Beholden State: How Public-Sector Unions Broke California," *City Journal*, Vol. 20, No. 2 (Spring 2010), at *http://city-journal.org/2010/20_2_california-unions.html* (June 20, 2011). For a video of the SEIU member making this statement, see "SEIU Threat," YouTube.com, June 18, 2009, at *http://www.youtube.com/watch?v=avB_iFEURY4* (June 20, 2011).

campaigns.[63] They remain officially neutral in political races (although they are free to privately express their views).

America should return to its long-standing tradition of a nonpartisan civil service. Congress should restore the original Hatch Act and prevent all federal employees from engaging in partisan political campaigns. Congress should also extend Hatch Act coverage to employees of state and local governments whose salaries are paid in whole or part with federal funds. Those who execute and enforce the laws should not be part of a political machine.

63. Jack Maskell, "'Hatch Act' and Other Restrictions in Federal Law on Political Activities of Government Employees," p. 4.

Section III

Expanding Choice in the Workplace

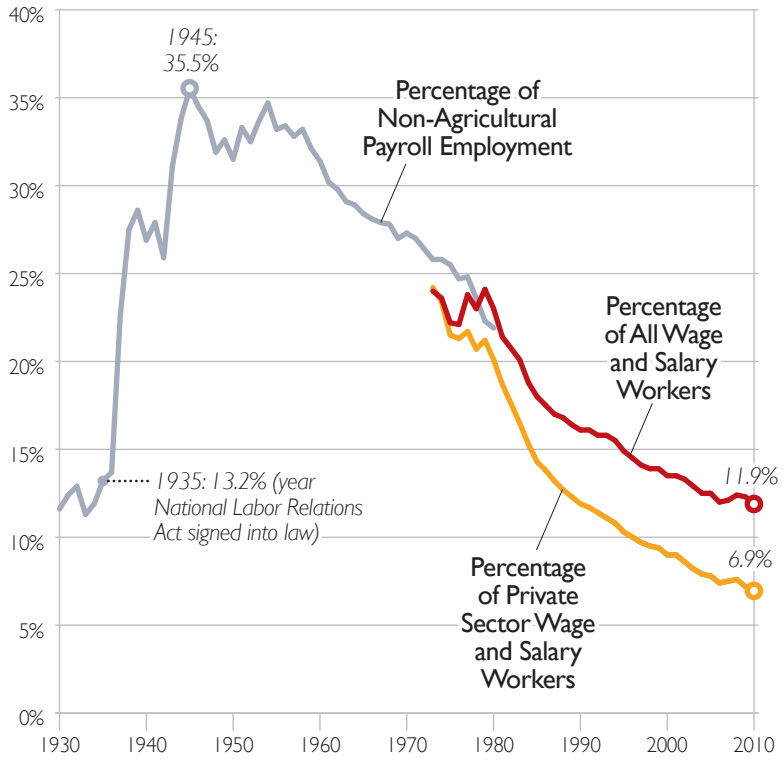
Private-sector employees and employers—not the government or outside unions—should decide how they want to work together. If employees decide that they want to unionize, they should be free to do so. If employees do not want a union, they should not be forced into one. If employees and employers want to use alternative workplace participation systems the law should not stand in their way.

Unfortunately the law often denies employees this free choice. The law forces workers to choose between no representation in the workplace and adversarial collective bargaining. It prohibits non-union employee involvement programs that give workers a voice at work. In some cases the law allows unions to pressure workers into joining without the privacy of a secret ballot. Many of the union transparency measures that allow workers to see how their dues are spent have been repealed. Unions frequently spend their members' dues on political activities without their consent. Congress should fix these abuses to give workers more choice in the workplace.

Falling Union Membership. Private-sector union membership has fallen sharply over the past generation. In 2010, just 6.9 percent of private-sector workers belonged to unions—fewer than when President Franklin Delano Roosevelt signed the National Labor Relations Act.

Union membership has fallen because most employees do not want to unionize. Polling shows that only 9 percent of non-union employees want to join a union, while 81 percent do not.[64] As a result, unions have not recruited enough new members to replace those they lose when unionized companies go bankrupt.

Union Membership Falling to Historic Lows



Note: This chart displays union membership using two separate data sources: assorted union reports filed with the Department of Labor between 1930 and 1980, and data from the Current Population Survey. Data for 1982 have been interpolated.

Source: Data for 1930–1980: U.S. Department of Labor, assorted labor union reports and Haver Analytics; 1977–2010: Heritage Foundation calculations using data from Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey," Unionstats.com, at *http://www.unionstats.com,* and from the U.S. Department of Labor, Bureau of Labor Statistics.

Chart 3 • SR 96 heritage.org

64. Rasmussen Reports, "Just 9% of Non-Union Workers Want to Join Union," March 16, 2009, at *http://www.rasmussenreports.com/public_content/business/jobs_employment/march_2009/just_9_of_non_union_workers_want_to_join_union* (June 20, 2011).

Little Reason to Unionize. The fact that few workers want to unionize should not be surprising. Changes in the economy and the workplace have made unions less attractive.

Private-sector unions now have little power to raise their members' wages. Deregulation and free trade have made the economy more competitive. Consequently, unionized companies cannot pass higher labor costs on to consumers.[65] If they raise their prices, consumers will take their business elsewhere. As a result, unions do not negotiate higher pay. Research shows that private-sector workers who vote to join a union earn no more than workers who vote against unionizing.[66] This removes much of the incentive to organize and pay union dues.

Modern human resource management practices also emphasize the importance of treating employees well. As a result, overwhelming majorities of employees say that they are satisfied with their jobs and like their supervisors.[67] Very few workers feel they need protection from an abusive employer.

Instead, most workers believe they and their employers are on the same side. Employees want to work cooperatively with management.[68] Most workers have no interest in unionizing against their companies.

Permitting Non-Union-Employee Committees

This does not mean that employees do not want a voice in the workplace. Surveys show that workers want to participate in workplace decisions and want to be heard by their supervisors. What they want to avoid is conflict with management.[69]

Many employees (and employers) would like employee involvement (EI) programs and work groups in which workers and supervisors can meet to discuss workplace issues. These programs can take many forms. Examples include self-directed work teams, safety committees, and production committees.[70] The essential element is advancing employee interests through employee involvement. Polls show that 60 percent of workers prefer EI programs to improve working conditions over either more government regulations or labor unions.[71]

Examples of effective EI programs that advance worker interests abound. For instance:

- Webcor Packaging, Inc., a manufacturing company in Flint, Michigan, formed a plant council consisting of five elected employees and three appointed managers to examine ways to improve work rules, wages, and benefits. The council members took suggestions from all employees and made recommendations to management based on those suggestions.
- Employees at Electromation, Inc., in Elkhart, Indiana, opposed a plan to change the attendance bonus the company offered. In response, the company met with randomly selected employees and formed action committees to solve various workplace problems. The company asked committee members to meet with other workers and promised to implement the solutions if they were not cost-prohibitive.[72]

65. Barry T. Hirsch, "Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?" *Journal of Economic Perspectives*, Vol. 22, No. 1 (Winter 2008), pp. 153–176.
66. Robert J. Lalonde, Gerard Marschke, and Kenneth Troske, "Using Longitudinal Data on Establishments to Analyze the Effects of Union Organizing Campaigns in the United States," *Annales d' Economie et de Statistique*, Vol. 41–42 (January–June 1996), pp. 155–185; Richard B. Freeman and Morris M. Kleiner, "The Impact of New Unionization on Wages and Working Conditions," *Journal of Labor Economics*, Vol. 8, No. 1 (January 1990), pp. S8–25; and John DiNardo and David S. Lee, "Economic Impacts of New Unionization on Private Sector Employers: 1984–2001," *Quarterly Journal of Economics*, Vol. 119, No. 4 (November 2004), pp. 1383–1441.
67. Gallup, "Work and Workplace," survey of 557 adults employed full or part-time, conducted August 5–8, 2010, at *http://www.gallup.com/poll/1720/work-work-place.aspx#* (June 24, 2011).
68. Richard Freeman and Joel Rodgers, *What Workers Want* (ILR Press: Ithaca, NY, 2006), pp. 56–58.
69. Barry Hirsch and Jeffrey Hirsch, "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" *Florida State University Law Review*, Vol. 34 (2007), p. 16.
70. Freeman and Rodgers, *What Workers Want*, p. 101.
71. *Ibid.*, p. 8.
72. Steven C. Bahls and Jane Easter Bahls, "Labor Pains: Employee Focus Groups May Seem Like a Good Idea, But They Could Land You in Court," *Entrepreneur*, December 1997.

Law Restricts Employee Choice and Voice. These EI programs gave workers a say in the workplace and improved working conditions. They were also illegal. The government forced Webcor and Electromation to disband their EI programs.[73] Section 8(a)(2) of the NLRA prohibits employer-dominated "labor organizations." This outlaws virtually any work council or EI program that gives workers a real voice in the workplace. Any form of two-way discussions between workers and management over working conditions outside of collective bargaining violates the law.

This benefits unions by restricting their competition. It forces employees into an all-or-nothing choice: They can speak with their employers through a labor union, or they cannot speak at all. The law forbids anything in between.

Current law forces workers to choose between unions and no representation at all.

Workers should have the right to freely choose how to work with their employers. Congress should not force workers to choose between unions and no representation at all. By an 85 percent to 10 percent margin, workers say they prefer employee organizations run by employees and management together to organizations run by employees alone.[74] Congress should remove the 8(a)(2) restriction and give employees that choice.[75]

Secret Ballot Protection Act

Unions desperately want to increase their membership, but they have done little to make themselves more attractive to 21st-century workers. Rather than reforming themselves, they try to make the non-union option more difficult.

Unions traditionally organized through secret ballot elections. They start by soliciting employee signatures on union authorization cards. Once they collect enough signatures they submit them to the National Labor Relations Board and ask for a vote. After a 5 week to 6 week campaign, the NLRB conducts the election. If a majority of workers vote to organize, the employer must recognize the union. If not, the union must leave the workers alone for at least one year.

This system protects workers' privacy: neither the union nor management knows how any individual voted. Workers can express their true choice without fearing retaliation from either side.

However, the law does not guarantee workers a secret ballot election. A company can legally recognize a union on the basis of signed authorization cards and without a secret ballot—known as "card-check" recognition. Some employers actually agree to this. No official figures exist on the extent to which companies agree to card-check. Unions claim that 80 percent of new members join through card-check. Independent research puts this figure closer to 25 percent.[76] Irrespective of which figures are more accurate, many workers lose their right to a secret ballot.

Harassment and Pressure. Card-check makes workers' choices public information: signing a union card becomes a binding commitment to join. This tells union organizers exactly who supports them and who does not. They take full advantage of this knowledge. In card-check campaigns, union organizers return again and again to the homes of workers who have not signed to pressure them to change their minds. With card-check, "no" only means "not yet."[77]

73. *Ibid*. Webcor was forced to disband its program in 1997, and Electromation was forced to abandon its program in 1994.
74. Freeman and Rodgers, *What Workers Want*, pp. 56–58.
75. James Sherk, "Giving Employees Free Choice in the Workplace," Heritage Foundation *WebMemo* No. 1954, June 12, 2008, at *http://www.heritage.org/Research/Reports/2008/06/Giving-Employees-Free-Choice-in-the-Workplace*.
76. Rafael Gely and Timothy Chandler, "Card Check Recognition: New House Rules for Union Organizing," *Fordham Urban Law Journal*, Vol. 35 (2008), p. 247.
77. Testimony of Ron Kipling, Director of Room Operations, New Ontani Hotel and Garden, Los Angeles, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, July 23, 2002.

Some unions even threaten reluctant workers. During a card-check campaign at the MGM Grand in Las Vegas, union organizers threatened that they would see to it that workers who did not sign would get fired when the union was recognized.[78]

Uninformed Choice. Card-check deprives workers of an informed choice, even when unions do not resort to threats. Unions pay their organizers to recruit new dues-paying members. Organizing visits are sales calls, not educational meetings. Organizers are taught to deflect topics like strike histories and dues increases that make workers reluctant to join.[79] Instead they press workers to sign after a high-pressure, one-sided sales pitch. With card-check, workers cannot change their minds after learning more.

Protect Secret Ballot Elections. Card-check makes organizing new members much easier for unions—but only by making it harder for workers to say "no." Secret ballot elections protect employees. The privacy of the voting booth prevents either side from making threats or harassing holdouts. Election campaigns give workers time to hear and reflect on both sides of the argument and then cast an informed vote.

Congress should protect secret ballots in unionizing elections. The proposed Secret Ballot Protect Act (SBPA)[80] guarantees workers the right to vote in a secret ballot before joining a union. It mandates that companies can only collectively bargain with unions formed through secret ballot votes. This prohibits card-check campaigns. Businesses should not have the ability to waive their employees' right to vote in privacy.

Paycheck Protection

Union members must pay union dues—typically between 1 percent and 2 percent of their pay. In the 28 states without right-to-work laws, employees in unionized companies must pay dues, regardless of whether they belong to the union.

Union members have little say in how their dues are spent. Surveys show that large majorities of union members believe they do not receive enough for what they pay.[81] Many union members particularly object to their unions' political spending. In 2010, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) national headquarters spent one-sixth of its budget on political lobbying.[82]That year, AFSCME spent one-third of its budget on political activities.[83]

Fully 60 percent of union members object to their dues being spent in this manner.[84] Many union members do not want their dues supporting politicians they oppose. Others would rather not give any money to politicians. Legally this does not matter. Unions can spend dues over their members' objections.

Let Workers Decide. The law should empower union members, not union bosses. Workers should decide how their money is spent. The law should require unions to obtain permission before spending their members' dues on political activities.

Under the Supreme Court precedent established in *Communications Workers v. Beck* (1988), workers cannot be forced to donate to political causes, and are entitled to demand a refund of the portion of their dues spent on politics. However, unions erect multiple roadblocks in front of workers who want to exercise their *Beck* rights.

78. Testimony of Bruce Esgar, employee, MGM Grand Hotel, Las Vegas, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, July 23, 2002.
79. Testimony of Jen Jason, former organizer, UNITE-HERE, before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007.
80. H.R. 972 and S. 217.
81. WordDoctors, "Benchmark Study of Union Employee Election Year Attitudes," Question 34, October 2010. Survey of 760 union members.
82. U.S. Department of Labor, Office of Labor-Management Standards (OLMS), Form LM-2 Labor Union Annual Report, American Federation of Labor-Congress of Industrial Organizations, 2010, File No. 000-106, at *http://www.unionreports.gov* (June 20, 2011).
83. U.S. Department of Labor, Office of Labor-Management Standards (OLMS), Form LM-2 Labor Union Annual Report, American Federation of State, County and Municipal Employees, 2010, File No. 000-289, at *http://www.unionreports.gov* (June 24, 2011).
84. WordDoctors, "Benchmark Study of Union Employee Election Year Attitudes," Question 41.

Unions implement bureaucratic obstacles, such as accepting such requests only 30 days of the year, making it difficult for workers to formally request a refund of their dues. Often unions refuse to honor those requests unless workers file charges with the National Labor Relations Board.[85] In many cases, they also require members to resign from the union if they do exercise their *Beck* rights.[86] So, while workers theoretically have the ability to opt out of their union's political campaigns, in practice that option is usually closed.

Paycheck Protection. Two-thirds of union members believe unions should have to obtain members' approval before spending their dues on politics.[87] Several states have passed "paycheck protection" laws to make this happen. Rather than forcing workers to navigate union roadblocks, paycheck protection laws require unions to obtain annual consent from their members to spend their dues on political causes. Paycheck protection allows union members who wish to engage in political activism to do so, while ensuring that those who do not can opt out.

Congress should pass a federal paycheck protection law to protect the rights of workers nationwide. The experience of state paycheck protection laws should guide the federal legislation.

Some state paycheck protection laws regulate only the collection of union dues. They require unions to refund to workers who do not give permission the portion of their dues spent on politics. Unions react by essentially laundering their political spending. Washington state voters passed such a paycheck protection law in 1992. Subsequently, the Washington teachers union began sending members' mandatory dues to the Community Outreach Program (COP), from which teachers did not have the choice of opting out. The COP then spent millions of dollars of teachers' dues on political causes, effectively sidestepping the law.[88]

Stronger paycheck protection laws regulate both the collection and spending of union dues. They require all direct or indirect union political spending to come from financially separate accounts. Unions must obtain annual written permission from their members to devote a portion of their dues to these voluntary political accounts. This prevents unions from sidestepping their members' wishes through creative accounting. Idaho and Utah passed strong paycheck protection laws covering government unions. Union political spending subsequently dropped dramatically. Given the choice, most union members did not want their dues spent on politics.[89]

Congress should modify campaign finance laws to require direct and indirect union political activities and lobbying to be financed through such voluntary accounts. Congress should also specify that workers cannot be fired for refusing to make political contributions. Union members should decide for themselves if they want their dues spent campaigning for politicians.

Union Transparency

The Labor-Management Reporting and Disclosure Act (LMRDA) requires unions to publicly disclose how they spend their members' money. Transparency enables non-union employees to make an informed choice about the benefits of unionizing. It also enables union members to hold their union accountable.

Disclosure Loopholes. However, the enforcement of the LMRDA falls far short of these goals. The Department of Labor has created broad exemptions to the transparency the law requires. Many unions operate trust funds for the benefit of their members, such as strike funds, training funds, credit unions, and apprenticeship programs. Until the end of the Bush Administration, the government did not require most union trusts to disclose their finances. Only trusts wholly operated and funded by an individual union were required to file financial disclosure forms.[90]

85. Robert P. Hunter, "Paycheck Protection in Michigan," The Mackinac Center for Public Policy, September 1998, pp. 6–7, at *http://www.mackinac.org/archives/1998/s1998-05.pdf* (June 20, 2011).
86. *Ibid.*, p. 5.
87. WordDoctors, "Benchmark Study of Union Employee Election Year Attitudes," Question 38.
88. Michael Reitz, "Paychecks Unprotected: Lessons Learned in California and Other States," Capital Research Center *Labor Watch*, January 2006, at *http://www.capitalresearch.org/pubs/pdf/LW0106.pdf* (June 20, 2011).
89. *Ibid.*

These standards exempted large numbers of union trust funds. Trusts funded by employer contributions negotiated by a union did not need to disclose their spending—they were not considered wholly union funded. Neither did trusts operated jointly by several unions.

These loose standards enabled union officers to engage in questionable behavior without their members' knowledge. For example:

- One credit union for union members was almost entirely financed (97 percent) by members of one labor local. The credit union's directors were all officers or employees of the local. Over 60 percent of the credit union's loans went to just four people, three of whom were officers of the local. However, because other locals contributed a small amount of the credit union's funds, it was not required to disclose its finances.[91]
- Nepotism drained millions of dollars from a health and welfare fund operated by the Laborers' International Union of North America. The fund paid the son-in-law of a board member $119,000 a year to manage a scholarship program that gave out $28,000 a year. A daughter of that board member earned $112,000 as a "confidential secretary" who checked voice mail messages. One year she checked just 109 messages—at a cost to union members of over $1,000 per call.[92]
- In collective bargaining, the United Auto Workers negotiated the creation of trust funds to retrain laid-off autoworkers. Reporters found that these training funds sponsored NASCAR racers, hosted a "Hollywood Showcase" at the 2000 Democratic Convention, and put on lavish conventions in Las Vegas.[93]

The LMRDA covers unions that represent private-sector workers. Some government unions, such as the National Education Association, represent a small number of private-sector workers (for example, teachers at a unionized private school). Their national headquarters must disclose their finances.

Previously, the local chapters of these unions were not required to file. This allowed the national headquarters to sidestep disclosure by transferring money to locals without private-sector members.

Chao Reforms. In 2003, then Department of Labor Secretary Elaine Chao (and current distinguished fellow at The Heritage Foundation) instituted reforms to address these problems. Chao required local chapters of government unions to file financial disclosure reports. She also required trusts that received more than half of their funding from labor organizations—including multiple unions—or that had a majority of their members appointed by labor unions to file. Contributions that unions negotiated with employers counted toward this funding threshold.

Union leaders fought these reforms in court, repeatedly filing suit to block their implementation. The courts ruled against union leaders in most cases, but the lawsuits bogged down the trust disclosure measures until after President Obama took office.

Obama Rolls Back Transparency. Under President Obama, the Department of Labor has steadily rolled back the union transparency measures. In December 2010, the Labor Department finalized regulations eliminating the

90. Specifically, only those trusts had to file for "which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization." See "Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule," *Federal Register*, Vol. 75, No. 230 (December 1, 2010), p. 74939, at *http://www.federalregister.gov/articles/2010/12/01/2010-29226/rescission-of-form-t1-trust-annual-report-requiring-subsidiary-organization-reporting-on-the-form#citation-2*(June 24, 2011).

91. "Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization Is Interested, Form T-1," *Federal Register*, Vol. 73, No. 192 (October 2, 2008), p. 57415, at *http://www.federalregister.gov/articles/2008/10/02/E8-22853/labor-organization-annual-financial-reports-for-trusts-in-which-a-labor-organization-is-interested#p-29* (June 24, 2011).

92. Steven Greenhouse, "Laborers' Union Tries to Oust Officials of Benefits Funds," *The New York Times*, June 13, 2005, at *http://www.nytimes.com/2005/06/13/nyregion/13labor.html* (June 20, 2011).

93. Robert Hunter, Paul Kersey, and Shawn Miller, "The Michigan Union Accountability Act: A Step Toward Accountability and Democracy in Labor Organizations," Mackinac Center for Public Policy, December 2001, p. 12, at *http://www.mackinac.org/archives/2001/s2001-02.pdf* (June 20, 2011).

new union trust reporting requirements and ending disclosure for local chapters of government unions.[94] Under the new rules, the loopholes that allowed many union trusts to avoid disclosure will return, and many government unions will once again be exempted from financial disclosure.

Congress Should Protect Union Transparency. Union members want this transparency: 89 percent of union members agree that unions should disclose their spending. In part this is because 66 percent of union members believe their leaders mostly look out for themselves.[95] Transparency holds self-interested union officials accountable to the rank-and-file. Members of UFCW Local 7 in Colorado voted out their president after they learned he gave his children six-figure jobs on the union payroll.[96]

Congress should modify the LMRDA to ensure it provides the transparency the law requires. Congress should reinstate the detailed reporting requirements for union trusts, and expressly cover local chapters of government unions. Union members and potential union members deserve transparency so they can make informed choices.

94. "Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule," *Federal Register*, Vol. 75, No. 230 (December 1, 2010), p. 74936, at *http://www.federalregister.gov/articles/2010/12/01/2010-29226/rescission-of-form-t1-trust-annual-report-requiring-subsidiary-organization-reporting-on-the-form#p-3* (June 27, 2011).

95. Word Doctors, "Benchmark Study of Union Employee Election Year Attitudes."

96. Andy Vuong, "Accused of Nepotism, Head of Food Workers Union Voted Out," *The Denver Post*, September 23, 2009, at *http://www.denverpost.com/ci_13397820* (June 20, 2011).

Conclusion

Congress has made few significant changes to U.S. labor law since the 1940s. Labor law should promote opportunity in the economy, choice in the workplace, and parity between taxpayers and government employees. Too often it does the opposite. Congress should:

- Remove legal barriers that impede business expansion and job creation;
- Remove the NLRB's discretion to reinterpret labor law;
- Require the Department of Labor to calculate prevailing wage rates accurately;
- Allow workers to earn compensatory time;
- Permit union members to earn individual raises;
- Align federal compensation with that in private sector;
- End collective bargaining in national security agencies;
- Restore a nonpartisan civil service by restoring the original Hatch Act;
- Permit non-union employee work groups;
- Guarantee secret ballots in workplace elections;
- Ensure that union members decide whether their dues are spent on politics; and
- Increase union transparency and accountability.

It is time to bring U.S. labor policy into the 21st-century to deal with the challenges facing today's workers.

214 Massachusetts Avenue, NE • Washington, DC 20002 • (202) 546-4400 • heritage.org