Strengthening Labor Protections Provided by the Fair Labor Standards Act

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The Fair Labor Standards Act of 1938 created the institutional structure which defined minimum standards for U.S. labor markets. It was the first federal law to limit child labor, and through its overtime provisions, it defined the standard work week as 40 hours. It also established the minimum wage, which employers were required to pay employees. In addition to these direct effects, the Fair Labor Standards Act made necessary administrative and legal determinations of the distinction between an independent contractor and an employee, between those with substantial professional or managerial roles and other employees, and defined when employees were considered to be working.

The U.S. economy and U.S. labor markets are dynamic and in constant flux. The need for different occupations and skills has changed substantially since the passage of the Fair Labor Standards Act, and the application of the Act has changed considerably over time. For example, when the Fair Labor Standards Act was passed, the minimum wage provisions covered in the main, goods-producing industries and utilities. Amendments to the Act have extended its coverage to include the employees of wholesale and retail firms and hospitals, among other industries added to coverage by the Act. Likewise, inflation has necessitated raising the Federal minimum wage to maintain its role in assuring adequate hourly compensation for low-wage employment.

In keeping with its statutory mandate to update the exemption, the U.S. Department of Labor has proposed increasing the minimum annual salary that an employee must be paid to qualify for a managerial or professional exemption from overtime pay. This exemption reflects a recognition that certain professional and managerial occupations are well paid, that their incumbents have considerable control over their work time and so do not require the protections of the overtime or minimum wage provisions of the Fair Labor Standards Act. An example of this would be a faculty member of a university. Faculty typically hold advanced educational credentials, have broad control over their hours of work and receive compensation above the median income of families in the United States. Employees in this position do not require the overtime protections of the Fair Labor Standards Act. The tests for exemption from the overtime provisions include both a duties test and an income test. Employees are exempted from overtime and minimum wage provisions if their work

- is directly related to the management of his or her employer's business, or

- is directly related to the general business operations of his or her employer or the employer's clients, or
- requires specialized academic training for entry into a professional field, or
- is in the computer field, or
- is making sales away from his or her employer's place of business, or
- is in a recognized field of artistic or creative endeavor.

In addition, as DOL and the courts have long recognized, the single best test of exempt status is a salary high enough to demonstrate that the employee is highly valued. A salary test has been a definitional criterion since 1938.

The Department of Labor's move to update the income criteria for qualifying for an exemption from overtime is a long overdue step. In 1975, an individual had to earn $250 per week to be eligible to be exempted from overtime. Calculated on a 52 week work year, this corresponded to an annual income of $13,000, 110% of U.S. median family income in 1975. The weekly pay required for exemption was increased to its current level of $455 per week in 2004. Again, calculated on a 52 week work year, this corresponded to $23,600; only 53% of the median family income of $44,434 in 2004. Currently, $23,600 is only 45% of median family income and is less than the U.S. poverty level for a family of four in 2016. If families were entirely dependent on an individual earning $455 per week, they would qualify for federal benefits including food stamps, the earned-income tax credit and Medicaid. Far from only being available to employees with a secure and sustainable "executive or professional" standard of living, the overtime exemption can be applied to individuals who are receiving federal income maintenance payments.

If DoL proposed to return the standard of 110 % of median family income, they used in 1975; the overtime exemption would require a weekly salary of $1,099. Instead they have established the new threashold at just below 2016 U.S. median family income

Raising the value of the income test for qualifying for the overtime exemption can only help employees. It does not require that employees be shifted from salaried to hourly pay; it does not require any change in employee duties. By making extended work hours better compensated, it can provide an increase in the earnings of some employees, spur the hiring of more employees to cover the extended hours currently worked by those who would no longer be exempted, or encourage employers to better manage employee hours.

A second issue is whether the gig economy requires the creation of new classes of employees who might be exempt from the minimum wage, from overtime, from unemployment insurance and other protective labor legislation. Again, carrying the theme of modernization forward, similar issues have been addressed in the past within the framework of the Fair Labor Standards Act and other protective legislation. Much of the excitement about the challenges posed by Uber or similar services comes from speculative examples which, when examined more closely, turn out to be greatly at variance with the reality of the work. The concern that Uber drivers might be doing other work or personal errands when they are "on call" turns out to be at variance with the requirements which Uber has for its drivers. Requirements that drivers respond within 15 seconds of receiving a ride request and that they respond positively to at least 80% of requests to

remain an Uber driver strongly suggest that Uber drivers are more closely controlled and have less freedom of action than many other employees who work away from direct supervision.

The gig economy, and its strengths and weakness, is not as new as some advocates suggest. Construction has many of the characteristics of the Gig economy. Employment is temporary and craft workers regularly move between employers. The distinction between employee and legitimate self employed workers is not always clear. Although construction can and does provide family supporting jobs, it is also characterized by serious problems for many employees. Outside of the union sector, health benefits and pension benefits, including 401(k) plans are rare. Training for employees is also rare and this has occasioned regular complaints by construction employers and owners about labor shortages and the deficiencies of the skilled workforce. There is also rampant misclassification of employees as independent contractors. This deprives employees of unemployment insurance, workers compensation coverage, of the employer share of FICA. It also results in substantial underpayment of federal and state taxes and works to the disadvantage of employers who play by the rules. The informal employment structures of the construction industry support the extensive use of undocumented workers, wage theft and other forms of exploitation. Given this experience with enforcing minimum labor standards in the gig economy in construction, it would be better as many states have already chosen to do, put more resources into enforcement than create new statuses which are challenging to enforce and encourage firms to skirt the law.

Fifty, forty possibly even 30 years ago there was broad agreement on **shared prosperity.** As firms prospered, improved productivity learned to do things better; they shared those gains with their employees. For example, George Romney, President of American Motors both established profit sharing for employees and limited the pay of top managers – gave back money every year. The philosophy of shared prosperity resulted in better pay, benefits, improved economic security, and investments in employees and employee training. This was not just for industrial firms, major retailers such as Sears provided both good salaries and benefits and a career path to diligent employees. The belief in shared prosperity was also expressed in the implementation of protective labor legislation including extension of the Fair Labor Standard Act to cover wholesale and retail trade, to cover hospitals and the public sector; the passage of ERISA to improve the security of private pension systems and the establishment of OSHA under the Nixon administration to create a safer and more healthful workplace.

The path of shared prosperity has largely been abandoned for one which all too often pits employers against employees. We see this in stagnant real wages and a very slow improvement in family incomes over 35 years. To the degree there has been improvement it is because women are working additional hours. Evidence of the abandonment of the path to shared prosperity is also found in the levels of income and wealth inequality which rival the 1920s and the Gilded Age. Perhaps too, in the rising support for populism, a previously quaint aspect of U.S history as citizens on the right and left believe the system is fixed against them. The abandonment of the path to shared prosperity appears not only in outsourcing, offshoring, tax inversions and other

headline-grabbing changes but also in the details of protective labor law. Under the rubric of economic necessity, several states have reduced U.I. Coverage to 20 weeks. This comes on top of a long failure to modernize the U.I system to address the issues of working women and shortened careers. Currently, only 1 in 3 unemployed workers receives U.I benefits. Two states have allowed, and more states are considering, worker compensation opt-outs which deprive injured employees of many of the protections they had under the state systems. Similarly, the Supreme Court's allowing private arbitration of employment rights in place of court trials, under terms established by the employer, greatly disadvantages employees in the pursuit of their rights.

The U.S economy is dynamic, and U.S. labor markets are in constant flux. The administration of protective labor legislation such as the Fair Labor Standards Act has always had to address this flux by modernizing, by updating administrative rules and adapting to the changing nature of employment. It has done this successfully for a number of changes which, at the time, seemed to change everything, but turned out to be less momentous. There is no obvious reason to believe if our purpose is to promote shared prosperity for employers, for employees and their families, that current changes cannot be addressed within the current framework.