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How Domestic Outsourcing Lets Companies Avoid Worker Protections

By Andrew Elmore

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Introduction

Since at least the 1980s, cutting labor costs to increase profitability has been a dominant competitive strategy for corporations in the United States. Key among cost-cutting strategies is domestic outsourcing: contracting out for workers by classifying workers as independent contractors, or by contracting with franchisees, staffing agencies, and subcontractors for workers.¹ Contracting out can be necessary for companies to obtain services outside their core functions. But outsourcing (or, using David Weil's term, "fissuring"²) the workplace has also enabled businesses to evade prevailing norms about treating employees fairly by creating new classes of peripheral workers.³ Domestic outsourcing has accelerated as organized labor, once a powerful countervailing force, has been shorn of its membership and political power. It has facilitated low-road workplace practices such that noncompliance with basic workplace laws is now common in many industries.⁴ Many businesses in these industries turn to domestic outsourcing to avoid detection for unlawful pay practices, either by misclassifying their employees as independent contractors or by paying their employees off the books.⁵ It has been especially harmful to low-wage workers and workers of color, who disproportionately work in fissured workplaces.⁶

¹ Arindrajit Dube, *The Wage Standard: What's Wrong in the Labor Market and How to Fix It* (Penguin Random House, 2026).

² David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014). Weil explains that "fissured employment strategies aim to improve profitability by focusing attention and controlling the most profitable aspects of firm value while shedding the actual production of goods or provisions of services."

³ Dube, *The Wage Standard*, 125; see also Bruce Western and Jake Rosenfeld, "Unions, Norms, and the Rise in U.S. Wage Inequality," *American Sociological Review* 76, no. 4 (2011): 513, 517, <https://doi.org/10.1177/0003122411414817>. Western and Rosenfeld note that unions advance a "moral economy" in which "norms of equity reduce inequality in pay."

⁴ See, for example, David Weil, "Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience," *The Economic and Labour Relations Review* 22, no. 2 (2011): 33, 33–35, <https://doi.org/10.1177/103530461102200203>. Weil identifies home healthcare, grocery stores, restaurants and hotels, residential construction, security, and retail and drug stores as fissured industries where legal noncompliance is common.

⁵ Between 10 and 30 percent of businesses misclassify at least some of their employees as independent contractors or pay them off the books. See Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, GAO-09-717 (Government Accountability Office, August 2009), <https://gao.gov/assets/gao-09-717.pdf>.

⁶ See Rebecca Smith and Claire McKenna, *Temped Out: How Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* (National Employment Law Project, 2014), <https://nelp.org/insights-research/temped-out-how-domestic-outsourcing-of-blue-collar-jobs-harms-americas-workers>. See also David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 5, no. 5 (2019): 147–50, <https://doi.org/10.7758/RSF.2019.5.5.08>. In home healthcare, a fissured industry, over half of workers are women of color. See Jocelyn Frye, "On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color," Center for American Progress, 2020, <https://americanprogress.org/article/frontlines-work-home>. The Bureau of Labor Statistics reports that women and people of color disproportionately work in fissured occupations in the United States. See, for



Many scholars and government and public policy reports have detailed the harms of domestic outsourcing, including eroding labor standards, contributing to income and racial inequality, and imposing often-insurmountable barriers on outsourced workers seeking to vindicate basic rights. This can prevent outsourced workers from pressing their employers for higher wages and can induce a race to the bottom across domestically outsourced workplaces:

- **Lower wages and lost overtime premiums.** Domestic outsourcing depresses outsourced workers' pay by separating them from the lead firm's internal wage scale.⁷ Economists Arindrajit Dube and Ethan Kaplan found, for example, that outsourcing imposes wage penalties of 4 to 7 percent for janitors and 8 to 24 percent for security guards.
 - Independent contractors are additionally excluded from minimum wage and overtime protections under the Fair Labor Standards Act (FLSA),⁸ and unlawful misclassification compounds the direct wage loss. One recent study estimates that 1 to 2 million workers are misclassified in the construction industry alone, resulting in roughly \$12 billion in unpaid wages and associated tax and insurance obligations.⁹
 - When lost health and retirement benefits are included, domestic outsourcing can degrade labor standards even further. A recent Economic Policy Institute report estimated, for example, that a typical construction worker's job is worth over \$20,000 less per year, or nearly one-third of wages and benefits, when the worker is treated as an independent contractor instead of an employee.¹⁰
- **Loss of federal labor rights.** Independent contractors are excluded from National Labor Relations Act (NLRA) protections for joining unions, collective bargaining, and concerted activity. Fissured employees cannot effectively access labor rights unless the lead firm that makes all key decisions about the work is

example, "Labor Force Characteristics by Race and Ethnicity, 2021," US Bureau of Labor Statistics, January 2023, <https://bls.gov/opub/reports/race-and-ethnicity/2021/home.htm>, table 8 (2022, home healthcare) and "Labor Force Characteristics by Race and Ethnicity, 2023," US Bureau of Labor Statistics, December 2024, <https://bls.gov/opub/reports/race-and-ethnicity/2023>, tables 1, 2, and 8 (food processing workers, nursing assistants, transportation workers, and housekeepers).

⁷ Arindrajit Dube and Ethan Kaplan, "Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards," *Industrial and Labor Relations Review* 63, no. 2 (2010): 287, 287, <https://doi.org/10.1177/001979391006300206>.

⁸ 29 U.S.C. §§ 206(a), 207(a)(1).

⁹ Laura Valle Gutierrez et al., "Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books," Century Foundation, 2023, <https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books>.

¹⁰ Ismael Cid-Martinez et al., *Misclassifying Workers as Independent Contractors Is Costly for Workers and Social Insurance Systems* (Economic Policy Institute, April 15, 2026), <https://epi.org/publication/misclassifying-workers-as-independent-contractors-is-costly-for-workers-and-social-insurance-systems>.



considered a joint employer (or legally responsible for NLRA obligations and liabilities).¹¹ Employees of subcontractors and franchisees also face the justifiable fear, unless the lead firm is a joint employer, that the lead firm will respond to unionization by terminating their subcontractor's or franchisee's contract. In heavily fissured sectors, such as food and drinking services and commercial cleaning, union density hovers near or below 1 percent.¹²

- **Exclusion from unemployment insurance and workers' compensation, and transfer of the employer's share of payroll taxes to workers.** Independent contractors are typically exempt from workers' compensation and unemployment insurance requirements and so are unprotected from the expenses and loss of income from workplace injuries and job loss. Temporary workers hired through staffing agencies are often unable to access unemployment insurance benefits after their work ends if the staffing agency is treated as the sole employer despite the client's direct control over the work. Classifying workers as independent contractors also makes workers solely responsible for both the employer-equivalent and employee-equivalent portions of Social Security and Medicare taxes, which an employment relationship ordinarily divides between the employer and employee.¹³
- **Unfair competition against law-abiding firms and downward pressure on labor standards across industries.** Shifting work off payroll by fissuring and classifying workers as independent contractors creates a competitive disadvantage for competitors that classify their workforces as employees. It also places downward pressure on labor standards in sectors where fissuring and misclassification are common.¹⁴

Laws regulating the workplace have done little to limit these harms. Businesses can easily avoid labor and employment law liabilities and obligations by exploiting their exemptions and ambiguities. Indeed, workplace laws can provide significant financial incentives to hire temporary instead of permanent employees and to misclassify employees as independent contractors through federal tax credits, subsidized small business loans, unemployment insurance taxes, and workers' compensation premiums.

There is both a need and popular support for policymaking to reverse these trends. Over the past decade, racial and economic justice campaigns by unions, worker

¹¹ See 29 U.S.C. §§ 152(3), 157, 158(a)(1), (5); and Weil, *The Fissured Workplace*, 179–88.

¹² See Weil, *The Fissured Workplace*, 254.

¹³ See 26 U.S.C. §§ 1401(a)–(b), 3101(a)–(b), 3111(a)–(b) (payroll taxes); 26 U.S.C. §§ 3301, 3306(c) (unemployment insurance). Whether independent contractors receive lower net income than employees for equivalent work depends on whether the worker can offset the increased Social Security and Medicare tax liability, for example, with business-expense deductions. Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 B.U. L. REV. 651, 658–66 (2020). And whether a worker loses benefits as an independent contractor depends on whether the worker additionally performs full-time work as an employee. *Id.* at 712–14.

¹⁴ Weil, “Enforcing Labour Standards,” 36–37, 41.



centers, and other social movement organizations have strengthened workplace standards at the state and local levels.¹⁵ Collectively, these pro-worker campaigns have generated a new moral economy, or an understanding of how the values of fairness, democratic participation, and equality should shape economic activity in the United States.¹⁶ Some of these efforts even scaled up to the federal level, seeking to broaden the definition of employment to include domestically outsourced workers. In 2015, the Obama-era National Labor Relations Board (NLRB) decided in *Browning-Ferris Industries of California* that multiple businesses are joint employers (and therefore legally responsible for employment obligations and liabilities) as long as they “share or codetermine those matters governing the essential terms and conditions of employment.” This is true even if one of the businesses does so indirectly or through a contract.¹⁷ The decision opened the door to making lead firms, such as fast-food franchisors like McDonald’s, jointly responsible with their franchisees for workplace-related legal obligations and liabilities. The Protecting the Right to Organize (PRO) Act, which passed in the House but not the Senate in 2020,¹⁸ would have codified the *Browning-Ferris* test for joint employment and established the ABC test (discussed later in this report) for federal labor law, presuming that workers are employees and not independent contractors unless the workers truly operate as separate businesses free from the key business’s control.¹⁹

Congressional gridlock and administrative rollback by the first Trump administration stymied these and other important Obama-era priorities. But the Biden administration took new, important steps to respond to these demands through administrative agencies and executive orders, such as increasing the minimum wage for federal

¹⁵ See Andrew Elmore, “Labor’s New Localism,” *Southern California Law Review* 95, no. 2 (2021): 256–57, <https://southerncalifornialawreview.com/2022/05/05/labors-new-localism>.

¹⁶ See César F. Rosado-Marzán, *A Baseline of Decency: The Moral Economy of Alt-Labor* (University of California Press, 2027, forthcoming). Marzán argues that worker centers have advanced a new moral economy that is more inclusive of workers who are often excluded from traditional labor and employment law protections. Also see Sanjukta Paul, “Recovering the Moral Economy Foundations of the Sherman Act,” *Yale Law Journal* 131 (October 2021): 175, 198–204, <https://yalelawjournal.org/feature/recovering-the-moral-economy-foundations-of-the-sherman-act>. Paul traces the legislative history of the Sherman Act to the moral economy of the Progressive Era’s antimonopoly movement. These law scholars build on E. P. Thompson’s influential account of the moral economy to describe a strongly held, communal understanding of fairness among economic actors, including between workers and employers, that can lead to popular resistance when those norms are breached. See E. P. Thompson, “The Moral Economy of the English Crowd in the Eighteenth Century,” *Past and Present* 50, no. 1 (1971): 76, 78–79, <https://doi.org/10.1093/past/50.1.76>. See also James Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (Yale University Press, 1976). James Scott explained the anger animating early 20th-century peasant revolts in Southeast Asia as a response to violations of a moral economy grounded in norms of reciprocity and the right to subsistence.

¹⁷ 362 NLRB 1599, 1614 (2015).

¹⁸ PRO Act, S. 1306, 116th Cong. (2019).

¹⁹ PRO Act, S. 1306, 116th Cong. § 2(a) (2019) (amending 29 U.S.C. § 152(3)); § 2(b) (amending 29 U.S.C. § 152(2)).



contractors.²⁰ The Biden-era NLRB eased the pathway for workers to access labor rights,²¹ and the Federal Trade Commission (FTC) used antitrust and consumer laws to target coercive and exploitative employer practices.²² The Biden administration also elevated state and local strategies to enable unions to build countervailing power. For example, the Biden administration embraced local law innovations discussed below, such as project labor agreements (covering contractors in publicly owned assets like airports) and community benefits agreements (covering developers that receive public subsidies) as federal policy. It required project labor agreements on federal public works projects, covering an estimated 200,000 construction workers. The Department of Energy changed its scoring process to give preference to applicants with a community benefits agreement.²³

The second Trump administration has once again sidelined these agencies and reversed many Biden-era policies.²⁴ But there remains substantial bipartisan support for strengthening workplace standards and protecting labor rights.²⁵ A wide spectrum of policy experts and organizations, including the Roosevelt Institute, have proposed that the next administration take bold action to improve the quality of work.²⁶ While the PRO Act and similar proposals are important, they are only a few among many steps needed to reign in the harmful effects of domestic outsourcing. A comprehensive plan is needed across federal, state, and local law to reduce the incentives for businesses to

²⁰ Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67, 224 (Nov. 24, 2021).

²¹ Lynn Rhinehart et al., “The Biden Board: How President Biden’s NLRB Appointees Are Restoring and Supporting Workers’ Rights,” Economic Policy Institute, May 1, 2024, <https://epi.org/publication/bidens-nlr-restoring-rights>.

²² Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024); Sandeep Vaheesan, “A Revival of Nondomination in Antitrust Law,” *George Washington Law Review* 93, no. 3 (2025): 610, 644–45.

²³ Amy Kapczynski and Joel Michaels, “Administering a Democratic Industrial Policy,” *Harvard Law and Policy Review* 19, no. 2 (2024): 279, 340; see Exec. Order No. 14,063, 87 Fed. Reg. 7363 (Feb. 9, 2022) (codified as 3 C.F.R. 14,063 (2023)).

²⁴ In 2025 President Donald Trump fired NLRB and FTC executives without cause despite their removal protections, which was upheld by the Supreme Court in *Trump v. Slaughter*, 609 U.S. 422 (2026). The NLRB’s new general counsel (GC) rescinded most of the GC guidance memoranda by the Biden-era GC Jennifer Abruzzo. William B. Cowen, “Rescission of Certain General Counsel Memoranda,” GC Memorandum 25-05, Office of the General Counsel, NLRB, February 14, 2025.

²⁵ Generally, there is substantial popular support for raising the minimum wage and for unions. See Megan Brennan, “Labor Union Approval Relatively Steady at 68% in U.S.,” Gallup, August 28, 2025; Leslie Davis and Hannah Hartig, “Two-Thirds of Americans Favor a \$15 Federal Minimum Wage,” Pew Research Center, July 30, 2019. The Faster Labor Contracts Act (FLCA), which would ease the path for newly formed unions to secure a first collective bargaining agreement, has attracted significant bipartisan support. H.R. 5408, 119th Cong. (2026). At this writing, the FLCA passed in the House and is pending in the Senate.

²⁶ See Elizabeth Wilkins et al., *The Good Life Agenda* (Roosevelt Institute, 2026), <https://rooseveltinstitute.org/publications/the-good-life-agenda>; Ben Zipperer, “Setting High Standards for a Federal Minimum Wage,” Economic Policy Institute, May 21, 2026, <https://epi.org/publication/setting-high-standards-for-a-federal-minimum-wage-raising-the-wage-to-two-thirds-of-the-national-median-wage-would-lift-pay-for-nearly-40-million-workers>; Oren Cass, *The Once and Future Worker: A Vision for the Renewal of Work in America* (Encounter Books, 2018); Oren Cass, “Worker Power, Loose Borders: Pick One,” *American Compass*, December 15, 2020.



use domestic outsourcing as a cost-saving strategy and to enable unions and worker centers to build countervailing power in fissured workplaces to strengthen workplace standards. This plan should include the following:

1. Removing legal exemptions, ambiguities, and incentives that encourage domestic outsourcing, by:

- Establishing presumptions across federal and state workplace laws that (1) workers are employed by the businesses that contract for their work; and (2) businesses that hire third-party intermediaries to directly control workers jointly employ those workers.
- Holding that lead firms in low-compliance industries that hire subcontractors and franchisees to direct work for their business are jointly and severally liable with their subcontractors and franchisees for workplace violations.
- Requiring user firms to offer the same labor standards to domestically outsourced workers as their own employees if the user firm directly controls those workers, such as workers hired through staffing agencies.

2. Penalizing deceptive and coercive workplace practices, such as misclassifying employees as independent contractors or treating temp workers as solely employed by staffing agencies, as violations of federal and state antitrust and consumer protection laws.

3. Removing the tax, loan subsidy, and insurance advantages for domestic outsourcing by:

- Excluding third-party intermediaries like franchisees and staffing agencies from claiming subsidies and tax credits intended for independent businesses that create good jobs.
- Encouraging state unemployment insurance and workers' compensation programs to adopt the ABC test.

4. Enabling workers to strengthen workplace standards and build countervailing power, by:

- Conferring a private right of action for workers in the NLRA to enforce basic federal labor rights, including the right to engage in protected, concerted workplace activities free from unlawful interference and discrimination.
- Relaxing federal labor law preemption of state and local labor law by administratively ceding the NLRB's primary jurisdiction over the labor relations of private-sector workplaces to those states that aggressively enforce workplace standards.
- Amending the NLRA to include a savings clause permitting states to enforce labor rights effectively while preempting state laws that permit employers to evade labor law obligations through domestic outsourcing.



- Construing worker participation in setting and enforcing standards as concerted activity protected by federal labor law.
- Using US Department of Labor funding for state and local enforcement of workplace standards to prioritize (a) states with effective models for setting sectoral standards and enforcing them; and (b) unions and worker centers that help workers vindicate workplace rights in states that do not enforce their own standards and/or that block local governments from doing the same.

These recommendations encompass federal administrative and congressional action to strengthen federal standards and to encourage pro-worker state and local measures. There are, to be sure, significant barriers that must be overcome to create a durable framework for reform. The overwhelming monetary advantage of large corporations and the decline of labor unions as a countervailing force have stymied large-scale congressional action in the past.²⁷ And after recent Supreme Court attacks on the administrative state, administrative priorities are even more vulnerable to immediate reversal.²⁸ Meanwhile, politically conservative interest groups—aided by state partisan gerrymandering and voting restrictions, especially in the Southeast—have successfully advanced anti-worker state policies and blocked pro-worker local policymaking despite a lack of popular support for these measures.²⁹ But these realities only underscore the need for bold federal action to extend norms of fairness in the fissured workplace in the short term, and to enable unions and worker centers to build the countervailing power necessary for long-term structural reforms.

²⁷ See Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton University Press, 2012), 5; Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age*, 2nd ed. (Princeton University Press, 2016), 133–35, 158; Kay Lehman Schlozman et al., *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton University Press, 2012), 87–88, 322–24. Politically conservative legal groups have (with the Supreme Court’s blessing) used antidemocratic political tactics such as partisan gerrymandering that further tilt federal policymaking away from the interests of median and minority voters. See generally Jed Handelsman Shugerman, “Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics,” *Columbia Law Review* 119, no. 3 (2019): 85, 88–89, <https://columbialawreview.org/content/hardball-vs-beanball-identifying-fundamentally-antidemocratic-tactics>; Joseph Fishkin and David E. Pozen, “Asymmetric Constitutional Hardball,” *Columbia Law Review* 118, no. 3 (2018): 915. The Supreme Court greatly limited the reach of the Voting Rights Act (VRA) by finding that racial gerrymandering does not overcome the presumption of legislative good faith unless race is the predominant factor (*Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 33 (2024)), and that a map diluting minority votes only violates the VRA if made for the specific purpose of weakening the minority group’s influence, rather than the “nonracial” factor of partisanship. *Louisiana v. Callais*, 146 S. Ct. 1131, 1161, judgment entered, 146 S. Ct. 1111 (2026).

²⁸ See Andrew Elmore, “Recentring Labor Law,” *UCLA Law Rev.* 73, no. 1 (2026 forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7643221.

²⁹ Jacob M. Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics* (Princeton University Press 2022), 8–9, 10–13; Alexander Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—And the Nation* (Oxford University Press, 2019), 1–14, 34–55, 178–90.



What Is Domestic Outsourcing, and How Does It Relate to Employee and Employer Power?

Domestic outsourcing, for the purposes of this report, means any business arrangement that permits a business to classify workers as *independent contractors* or use a third-party intermediary, such as a *franchisee*, *subcontractor*, or *staffing agency*, as the sole employer of record in order to save on labor costs. These categories are not mutually exclusive, and their defining features are not all unique.³⁰ They also involve overlapping legal questions. Nonetheless, understanding each model's most common features and uses illuminates how businesses structure their work relationships to avoid liabilities and obligations under laws designed to protect workers.

1. *Independent contractor*: A worker hired directly by a business to perform a specific task, with terms that are set by contract. Independent contractors are legally distinct from employees because they operate their own enterprises that are separate from, and do not functionally depend on, another business.³¹ Workers are commonly misclassified as independent contractors in the construction, janitorial, and transportation sectors, among others.³²
2. *Subcontractor*: Any company that contracts with a user-client to oversee a discrete project, using the company's own workforce. While entities often hire subcontractors to perform services that are outside the entities' core competencies (for example, a hospital laboratory may subcontract for specialized genetic tests by an outside reference laboratory), many businesses, such as garment manufacturers, growers, and construction project managers, integrate subcontractors in a vertical production system to direct work that is core to the lead firm's business and that the lead firm functionally controls.³³

³⁰ Staffing company Manpower, for example, franchises many of its offices the same way a fast-food company would. ManpowerGroup Inc., Form 10-K, Item 1. Business 5, February 18, 2025, <https://sec.gov/Archives/edgar/data/871763/000095017025023186/man-20241231.htm>. Walmart and Amazon subcontract much of their warehousing and transportation work, respectively, through subcontractors who in their economic dependence strongly resemble franchisees. See *Edmonds v. Amazon.com, Inc.*, No. C19-1613, 2020 WL 1875533, at *4-6 (W.D. Wash. Apr. 15, 2020) (Amazon); *Carrillo v. Schneider Logistics Trans-Loading & Distrib.*, No. 11-cv-8557, 2014 WL 183956, at *16 (C.D. Cal. Jan. 14, 2014) (Walmart).

³¹ See, for example, *National Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-30 (1947).

³² Veena B. Dubal, "Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities," *California Law Review* 105, no. 1 (2017): 65, 68; Andrew Elmore and Muzaffar Chishti, *Strategic Leverage: Use of State and Local Laws To Enforce Labor Standards in Immigrant-Dense Occupations* (Migration Policy Institute, 2018), 11, <https://migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant>.

³³ See, for example, *United States EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 634 (9th Cir. 2019) (agriculture); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (construction); *Zheng v. Liberty Apparel*, 355 F.3d 61, 69-73 (2d Cir. 2003) (garment).



3. *Franchisee*: A company that, like a subcontractor, directly manages a lead firm's (the franchisor's) work. But franchisees typically also pay upfront cost and ongoing fees to license and exclusively operate a franchisor's business format in a specific region. Franchise dependence is often structured into the franchising agreement through (a) substantial financial investments by franchisees in the business; (b) contractual restraints on franchisees, often limiting their activities to running that franchisor's stores; and (c) extensive franchisor control over franchise store operations through exhaustive operational requirements, unilateral power to renew and terminate franchise agreements, and detailed, mandatory operational rules.³⁴ Franchising permits large brands in geographically dispersed markets to sell uniform products and services across thousands of units while minimizing the financial risks of expansion by shifting the cost and risk of new operations to franchisees.
4. *Staffing agency*: An entity that supplies workers to a user-client for a fee (reflected as a percentage of the workers' wages) and often also handles those workers' payroll and other administrative functions. The user-client typically trains, supervises, and assigns staffing agency workers to work alongside their employees in the user-client's workplace.³⁵

Businesses have a substantial economic incentive to use domestic outsourcing to lower labor costs. Classifying workers as independent contractors relieves businesses from paying payroll and unemployment insurance taxes and workers' compensation premiums, and of the legal liabilities and obligations that apply to an employment relationship. In dangerous occupations and sectors with fluctuating labor demands, such as construction and transportation, the tax and insurance savings alone can amount to 30 percent of labor costs.³⁶ Outsourcing permits lead firms to impose all fixed operational costs on, and shift the costs of excess labor to, subordinate firms, making low wages and uncertain schedules a necessity for the subordinate firm to remain profitable. Fissuring also insulates lead firms from liability for their role in the informal economy if their subcontractors, staffing agencies, and franchisees misclassify their employees as independent contractors (by providing workers with a 1099 instead of a W-2) or pay them off the books entirely.

³⁴ See Andrew Elmore, "Franchise Regulation for the Fissured Economy," *George Washington Law Review* 86, no. 4 (2018): 907, 939; Andrew Elmore and Kati L. Griffith, "Franchisor Power as Employment Control," *California Law Review* 109 (2021): 1317, 1318.

³⁵ See Andrew Elmore, Kati L. Griffith, and Sachin S. Pandya, "Presuming Justice for Temp Workers," *William and Mary Law Review* 67, no. 2 (2025): 341, 362–84, <https://scholarship.law.wm.edu/wmlr/vol67/iss2/2>.

³⁶ Valle Gutiérrez et al., "Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified."



Power is the ability to set or shift the terms of an exchange—in this case, businesses’ and workers’ capacity to set or shift wages and other work terms.³⁷ Worker power (also called *bargaining power* in labor law) is the worker’s ability to obtain better work terms, either individually or collectively.³⁸ In Hirshman’s voice/exit framework, this includes power obtained through “voice,” or seeking to improve one’s current work, and “exit,” or finding other, better work.³⁹ Voice and exit offer different, interacting sources of worker power that can countervail an employer’s labor market power. Labor law has long recognized that workers can increase their market power through voice collectively, by joining unions, collectively bargaining, and striking. Or, especially in tightened labor markets, workers can exit by quitting substandard work and finding superior work.⁴⁰

In contrast, legal and social divisions weaken worker power. As primary examples, immigrants and people leaving incarceration have limited ability to protest or seek better work elsewhere—that is, to use their voice and exit rights.⁴¹ Systemic employment discrimination likewise lowers the market power of people of color and women by limiting their ability to exit substandard work through promotions or by finding better work.

Exit and voice are complementary and mutually reinforcing forms of power: Workers are better positioned to demand higher wages from their current employer when they can easily find better work. Workers’ superior exit power during the tight labor market from 2022 to 2024, for example, increased their voice power by reducing their fear of retaliation for organizing or striking by raising employers’ cost of losing workers. This contributed to the high wage increases in collective bargaining agreements during that period, as seen in the 2023 United Auto Workers historic collective bargaining agreement with the Big Three carmakers.⁴² In contrast, during hiring slowdowns, as in

³⁷ Elmore and Griffith, “Franchisor Power as Employment Control,” 1323, citing Marissa Brookes, “Power Resources in Theory and Practice: Where to Go from Here,” *Global Labour Journal* 9, no. 2 (2018): 254, 255, <https://doi.org/10.15173/glj.v9i2.3571>.

³⁸ See Cynthia Estlund, “Losing Leverage: Employee Replaceability and Labor Market Power,” *University of Chicago Law Review* 90, no. 2 (2022): 437, 439–40, <https://chicagounbound.uchicago.edu/uclrev/vol90/iss2/5>.

³⁹ Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

⁴⁰ Dube, *The Wage Standard*, 18. Dube explains that the recent drop in wage inequality “happened because tight labor markets forced employers to compete for workers, curbing employer power and lifting pay at the lower end.”

⁴¹ See Gregory Day, “Antitrust for Immigrants,” *Cornell Law Review* 109 (2024): 911, 918, <https://publications.lawschool.cornell.edu/lawreview/2024/08/01/antitrust-for-immigrants>. Day argues that unauthorized workers are more likely to accept poor work conditions and less likely to complain about unlawful treatment because of the threat of arrest and deportation.

⁴² See Robert Combs, “Analysis: Wage Hikes for Union Workers Hit New Heights in Q1,” *Bloomberg Law*, July 30, 2024, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-wage-hikes-for-union-workers-hit-new-heights-in-q1>. Combs reports an average of over 7 percent in pay raises in collective bargaining agreements ratified in the first quarter of 2024. See also Molly Cook Escobar and



2025, workers have little power to protest existing workplace standards if they cannot find a better job.⁴³

For employers, power means monopsony power, or a business's power to pay less than a competitive wage without prompting employees to quit.⁴⁴ The emerging consensus among labor economists is that all businesses have some monopsony power, keeping workers from quitting despite subcompetitive pay, for at least three reasons: (1) *concentrated hiring markets*, in which few employers are hiring in an applicant's area; (2) *search frictions*, or an applicant's "practical hurdles of finding, applying for, and landing a better job"; and (3) *job differentiation*, or workers' preferences regarding location, schedules, duties, and other nonwage attributes that make workers less responsive to wage differences across jobs.⁴⁵ Businesses also often use contractual restraints to augment their market power over employees, such as covenants not to compete and franchisor no-poaching requirements for franchise owners.⁴⁶ As economist Arindrajit Dube explains, the overall evidence suggests "that firms can get away with paying only about 80 percent of what workers would earn in a truly competitive market."⁴⁷

There are traditional constraints on monopsony power: norms of fairness, minimum wage standards, and collective bargaining agreements with unions. But businesses can remove these constraints through domestic outsourcing. By outsourcing workers to low-cost subcontractors, businesses can evade the norm of pay parity that applies to their own employees.⁴⁸ Hiring temps through staffing agencies likewise allows businesses to depart from the expectation that workers doing the same jobs within a firm should receive similar treatment by treating temps as outsiders, with lower pay, fewer benefits, and less job security than employees.⁴⁹ Businesses can also evade the

Chritine Zhang, "A Summer of Strikes," *New York Times*, updated September 15, 2023, <https://nytimes.com/interactive/2023/09/03/business/economy/strikes-union-sag-uaw.html>. The authors quote labor scholar Ruth Milkman, who attributed the historic strike activity of 2023 to "the tight labor market."

⁴³ See Leila Bengali, Ingrid Chen, Addie New-Schmidt, and Nicolas Petrosky-Nadeau, *The Recent Slowdown in Labor Supply and Demand*, FRBSF Economic Letter 2026-02, January 12, 2026, <https://frbsf.org/research-and-insights/publications/economic-letter/2026/01/recent-slowdown-in-labor-supply-and-demand>.

⁴⁴ Dube, *The Wage Standard*, 26–28; Suresh Naidu et al., "Antitrust Remedies for Labor Market Power," *Harvard Law Review* 133, no. 2 (2018): 536, 538, <https://harvardlawreview.org/print/vol-132/antitrust-remedies-for-labor-market-power>.

⁴⁵ Dube, *The Wage Standard*, 40–43; see also Naidu et al., "Antitrust Remedies," 538.

⁴⁶ Suresh Naidu and Eric A. Posner, "Labor Monopsony and the Limits of the Law," *Journal of Human Resources* 57 (2022): S284, S287–93, <https://doi.org/10.3368/jhr.monopsony.0219-10030R1>; Samuel Muehleman et al., "Monopsony Power, Pay Structure and Training," *Industrial and Labor Relations Review* 66, no. 5 (2013), <https://jstor.org/stable/24369573>.

⁴⁷ Dube, *The Wage Standard*, 32–33.

⁴⁸ Dube, *The Wage Standard*, 28–29, 125.

⁴⁹ Andrew Elmore, "Mobility and Power in Temp Work," *BYU Law Review* 51, no. 1 (2026): 79, 128, <https://digitalcommons.law.byu.edu/lawreview/vol51/iss1/6>.



constraint of minimum wage standards by classifying workers as independent contractors or by hiring undercapitalized subcontractors who have little incentive to comply with legal requirements.⁵⁰ Finally, businesses can evade or weaken collective bargaining agreements by contracting out for work from the start or by using staffing agencies to quickly and permanently replace strikers with workers who have no loyalty to the union.⁵¹

Legal Regimes That Encourage the Use of Domestic Outsourcing, and Their Effects on Workers

I and other observers have critiqued labor and employment law and adjacent areas for entrenching the harmful effects of domestic outsourcing on workers.⁵² This section will detail the ways in which ambiguities and exemptions in labor and employment, tax, insurance, and antitrust laws tolerate and even subsidize the use of domestic outsourcing as a business strategy to cut labor costs and diminish workers' market power.

Effective Exemptions from Labor and Employment Law

Businesses often avoid their labor and employment law obligations by misclassifying their employees as independent contractors or by hiding their employer status behind third-party intermediaries.

⁵⁰ Mark Erlich, "Misclassification in Construction: The Original Gig Economy," *Industrial and Labor Relations Review* 74, no. 5 (2021): 1202, 1214, <https://doi.org/10.1177/0019793920972321>; Elmore and Chishti, *Strategic Leverage*, 10 (citing one state audit that "found that 23 percent of audited companies in transportation and warehousing industries misclassified workers").

⁵¹ Longstanding NLRB policy permits employers to hire permanent replacements for "economic" strikers, effectively leaving those strikers' employment in limbo until there is a future vacancy. *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). Mackay does not apply to strikes caused, at least in part, by an employer's unfair labor practice. See *Mastro Plastics Corp. v. Nat'l Lab. Rels. Bd.*, 350 U.S. 270, 278 (1956).

⁵² See, for example, Elmore, "Franchise Regulation," 927–32. I argue that a narrow joint employer liability test encourages franchisors to impose labor and employment law obligations on franchisees, who have little incentive to comply with these legal requirements. I and others have criticized employer sanctions for hiring undocumented immigrants in immigration law for pushing immigrant workers into the informal labor market, encouraging employers to misclassify immigrant workers as independent contractors, and degrading working conditions for all workers. See Elmore and Chishti, *Strategic Leverage*, 12–13; Michael J. Wishnie, "Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails," *University of Chicago Legal Forum* 2007, no. 1 (2007): 193, 195, <http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/8>. Wishnie notes that employer sanctions "ha[ve] led to increased workplace exploitation of undocumented immigrants, . . . and eroded wages and working conditions for U.S. workers."



In determining whether a worker is employed by a business, courts typically use a control-based standard derived from the common-law “right to control” agency test.⁵³ This is a “totality of the circumstances inquiry to consider the putative [or alleged] employer’s extent of reserved and exercised control over hiring, supervision, compensation, firing, and other direct and indirect indicia of an employment relationship.”⁵⁴

Uniquely among federal statutes, the FLSA defines “employer” as including any business that “suffers or permits” an employee to work. Courts interpret this definition as more expansive than “traditional agency law principles.”⁵⁵ A business meets the FLSA definition of an employment relationship if the worker economically depends on the entity as a matter of “economic reality.”⁵⁶ Despite this difference between the FLSA and other statutes, the entity’s control is central for all federal statutes, both to the question of whether a worker is an employee or independent contractor, and whether an entity is a joint employer.⁵⁷ This section addresses both of these questions in turn.

Using Independent Contractors

Self-employed workers, or independent contractors, are excluded from labor and employment law because they fall outside the statutory definition of “employee.” This

⁵³ The Supreme Court has held that federal statutes presumptively use “the agency law definition for ‘employee’ unless it clearly indicates otherwise.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992). Both the National Labor Relations Act and Title VII use the common-law right-to-control test. See, for example, *Felder v. U.S. Tennis Ass’n*, 27 F.4th 834, 843 (2d Cir. 2022) (entities are joint employers if “according to common law principles, [they] share significant control of the same employee”); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1199–200 (D.C. Cir. 2018) (NLRA joint employment test “has deep roots in the common law.”).

⁵⁴ Elmore et al., “Presuming Justice for Temp Workers,” 392.

⁵⁵ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326–27 (1992) (noting “striking breadth” of this definition); 29 U.S.C. § 203(g); Bruce Goldstein et al., “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” *UCLA Law Review* 46, no. 4 (1999): 983, 1030–75. The authors trace the meaning of “suffers or permits” from Progressive Era state child labor laws to the enactment of the FLSA.

⁵⁶ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–30 (1947). The judgment found that butchers hired as independent contractors in a meat-processing business were employees because they performed a “specialty job on the production line” that was consistent with an employment contractor relationship under the FLSA.

⁵⁷ Kati L. Griffith, “The Fair Labor Standards Act at 80: Everything Old Is New Again,” *Cornell Legal Review* 104, no. 3 (2019): 557, 589, <https://scholarship.law.cornell.edu/clr/vol104/iss3/1>.



assessment is guided by a nonexclusive list of factors⁵⁸ that are intended to look beyond the labels in a contract and to assess the full extent of the business's reserved and exercised control over the worker. But this multifactor control-based test creates substantial uncertainty for work relationships that defy easy categorization, like drivers and delivery workers. Drivers for transportation network companies (TNCs) like Uber, Lyft, and DoorDash, for example, often drive their own vehicles and can choose when they work. But courts have also found substantial evidence of control in this relationship.⁵⁹ As a result, despite a decade of litigation, there remains uncertainty about whether drivers are employees or independent contractors.⁶⁰

The federal agencies have done little to clarify this test. Before the first Trump administration, the US Department of Labor (DOL) adhered to the Supreme Court's multifactor "economic reality" test to determine coverage under the FLSA.⁶¹ In 2021 the Trump administration adopted a narrow rule that primarily considered control and the worker's opportunity for profit or loss.⁶² The Biden administration rescinded that rule and reverted to the traditional test.⁶³ As of this writing the DOL has proposed a new rule that would again emphasize control and the worker's opportunity for profit or loss.⁶⁴ Likewise, the National Labor Relations Board in 2019 reversed decades of precedent grounded in the NLRA's use of common-law agency principles to define "employee." Instead, it declared in *SuperShuttle* that entrepreneurial opportunity is the "animating principle" of the independent contractor test.⁶⁵ While the Biden-era NLRB

⁵⁸ *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (citing *Rutherford*, 331 U.S. at 730, in listing factors as "1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business"); see also *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (using same factors).

⁵⁹ *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 144–48 (3d Cir.), amended, 979 F.3d 192 (3d Cir. 2020). See also *Uber Techs., Inc.*, Appeal Bd. No. 596722, at 10–13 (State of N.Y. Unemployment Ins. Appeal Bd. July 12, 2018), <http://uiappeals.ny.gov/uiappeal-decisions/596722-appeal-decision.pdf>. The New York Unemployment Insurance Appeal Board concluded that Uber drivers were employees under New York state unemployment insurance law.

⁶⁰ In *Razak*, while the Third Circuit found sufficient evidence of Uber's control over the drivers to preclude summary judgment, after remand the trial resulted in a hung jury, and appears to have settled before the second, ordered, trial. *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2024 WL 2831805, at *18 (E.D. Pa. June 4, 2024).

⁶¹ Wage and Hour Division, "Fact Sheet No. 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), US Department of Labor, rev. July 2008.

⁶² Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).

⁶³ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024).

⁶⁴ Wage and Hour Division, "US Department of Labor Proposes Rule Clarifying Employee Classification Under the FLSA," press release, Department of Labor, February 25, 2026.

⁶⁵ *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (using narrow "entrepreneurial activity" test for independent contractors).



reestablished the common-law standard in 2023 in *Atlanta Opera*,⁶⁶ it is unclear at the time of writing whether the Trump NLRB intends to return to *SuperShuttle*. Since 2019 the NLRB has adhered to a rule that misclassifying employees as independent contractors is not itself an unfair labor practice.⁶⁷

The overall effect of federal litigation and policy vacillation is to leave open the question of whether workers who work in isolation (which can be characterized as either independence or powerlessness) are employees or independent contractors. While companies like Uber that are heavily involved in assigning and supervising work are unlikely to prevail outright in litigation, they can settle any case to avoid changing their classification of workers as independent contractors. And businesses charged with unfair labor practices can wait out any adverse NLRB decision until a change in administration compels the board to revert to a previous, narrower interpretation of the rule.

To deter misclassification, many states have established a presumption of employee status through a streamlined test, often called the “ABC test.” The ABC test presumes that workers are employees unless the putative employer can show that the worker performs work (a) free from control, (b) in an independent trade, and (c) outside the defendant’s usual business.⁶⁸ Since the Fair Labor Standards Act and Title VII do not preempt state laws that exceed federal standards,⁶⁹ and states are not bound to common-law definitions in designing workers’ compensation and unemployment insurance systems, states are free to adopt the ABC test for their employment and employment discrimination laws. But to date, fewer than half the states have adopted the ABC test in at least one of their employment statutes.⁷⁰

⁶⁶ The Atlanta Opera, Inc., 369 NLRB No. 106 (2023) (overruling *SuperShuttle* and returning to the broader, common-law standard).

⁶⁷ *Velox Express, Inc.* 368 N.L.R.B. No. 61, 2019 L.R.R.M. (BNA) 324, 327 (Aug. 29, 2019).

⁶⁸ Robert Sprague, “Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?” *William and Mary Business Law Review* 11, no. 3 (2020): 733, 748, <https://scholarship.law.wm.edu/wmblr/vol11/iss3/4/>; see, for example, N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C); Mass. Gen. Laws ch. 151A, § 2.

⁶⁹ 29 U.S.C. § 218(a) (FLSA savings clause); 42 U.S.C. § 2000e-7 (2022) (Title VII savings clause); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) (finding state unemployment insurance system to be within states’ power to tax); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584 (1937) (state unemployment insurance tax is not void because of limitations to the definitions of “employer” and “employee”); *New York Cent. R. Co. v. White*, 243 U.S. 188, 208 (1917) (affirming authority of state to establish workers compensation system with rules that depart from common-law principles).

⁷⁰ See Cong. Research Serv., R46765, *The ABC Test and Federal Legislation* 1 (Apr. 19, 2021) (the ABC test “has been adopted in at least 20 states and the District of Columbia to determine employee status for purposes of various state labor and employment laws”).



Evading Joint Employment

In joint-employer inquiries, the analytical frame shifts to the related question of who is an employer. As with the independent contractor question, courts have fashioned a variety of multifactor, totality-of-the-circumstances tests drawn from common-law factors to assess the putative joint employer's control over the workers. This includes "reserved" control (set forth in contract, whether or not actually exercised) and "indirect" control (exerted through a third-party intermediary rather than directly).⁷¹ Under this common-law standard, there is little doubt that most user-clients of staffing agencies are joint employers because the user-client reserves substantial control over temp work, including directly supervising temp workers.⁷²

Businesses using subcontractors and franchisees, however, have had greater success arguing that they are not joint employers because their primary form of control is indirect.⁷³ A potential watershed moment came in 2015, when the NLRB decided in *Browning-Ferris* that reserved control in contractual arrangements and indirect control over workplace standards could show joint employment status,⁷⁴ and the NLRB's general counsel sought to show that McDonald's jointly employs its franchise store employees.⁷⁵ But in December 2019, the NLRB settled this case without addressing the claim that McDonald's is a joint employer⁷⁶ and has since retreated from its

⁷¹ *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997) (FLSA); *N. L. R. B. v. Greyhound Corp.* (S. Greyhound Lines Div.), 368 F.2d 778, 781 (5th Cir. 1966) (citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)) (NLRA).

⁷² See, for example, *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 209 (3d Cir. 2015) (staffing agency and client are joint employers under Title VII); *Butler v. Drive Auto. Indus. of America*, 793 F.3d 404, 415 (4th Cir. 2015) (same); *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 138–45 (2d Cir. 2008) (staffing agency and client are joint employers under Fair Labor Standards Act).

⁷³ See, for example, *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 689–94 (D. Md. 2010) (Comcast did not jointly employ cable technicians because it did not exercise direct control over hiring and firing, supervision, or pay); *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1160 (C.D. Cal. 2003) (garment manufacturer was not a joint employer of garment employees, despite presence of manufacturer quality control personnel in worksite, because only the contractor directly controlled employees).

⁷⁴ *Browning-Ferris*, 362 NLRB 1599, 1614 (2015).

⁷⁵ Hassan A. Kanu, "McDonald's Gets Win in Labor Case Backed by Fight for \$15," *Daily Labor Report*, Bloomberg Law, December 12, 2019, <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-gets-win-in-major-labor-case-backed-by-fight-for-15>.

⁷⁶ See Hassan A. Kanu, "McDonald's Labor Board Ruling Attacked on Ethics Grounds," *Daily Labor Report*, Bloomberg Law, January 7, 2020, <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-case-should-be-reopened-on-ethics-grounds-lawyers>.



Browning-Ferris position.⁷⁷ Courts continue to ignore or minimize allegations of franchisor control of franchise stores and to find franchisors' indirect control insufficient to show a joint employment relationship.⁷⁸

Meanwhile, in February 2026, the NLRB formally reinstated a narrow 2020 joint-employer standard that requires showing that the putative joint employer exercises "substantial direct and immediate control" over at least one essential term of employment.⁷⁹ This rule effectively exempts entities from labor and employment law if they rely on indirect and reserved control to manage their workforce. In 2019 the US DOL during the first Trump administration attempted to similarly narrow the FLSA in rulemaking by limiting the joint-employer inquiry to evidence of actual control. This effort failed because FLSA's broad "suffer or permit" standard goes beyond the common-law control test and requires consideration of, among other things, the worker's economic dependence on the putative employer.⁸⁰ While the DOL rescinded that rule after it was struck down by a trial court, as of this writing the current Trump DOL has proposed a similar rule that would focus on evidence of actual control, which would exclude most franchisors.⁸¹ Many states go even further and expressly exempt franchisors from state liability as joint employers.⁸²

Excluding lead firms as joint employers effectively exempts their domestic outsourcing strategies from wage and hour liability and from the obligation to bargain under labor law. Businesses that franchise or subcontract their operations and who are not legally

⁷⁷ The first Trump NLRB promulgated a rule limiting a joint employment finding to entities that have "substantial direct and immediate control" over at least one essential term and condition of employment of another employer's employees. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184, 11,187, 11,198 (Feb. 26, 2020). While the Biden NLRB sought to replace this rule with the *Browning-Ferris* test in 2023 (see Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (Oct. 27, 2023)), a federal trial court vacated that rule in 2024 (Chamber of Com. of the U.S. v. NLRB, 723 F. Supp. 3d 498 (E.D. Tex. 2024)), and this year the NLRB reinstated the 2020 rule. See 91 FR 11843 (February 27, 2026).

⁷⁸ *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014) (finding insufficient evidence that a fast-food franchisor trained the plaintiff, set policies for the franchise store, and reserved the right to control "selection, supervision, or training of personnel" in the franchise agreement); *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019) (rejecting the franchisor's alleged participation in an FLSA violation as evidence of a franchisor's joint employer status); *In re Domino's Pizza Inc.*, No. 16CV2492, 2018 WL 4757944, at *5 (S.D.N.Y. Sept. 30, 2018) (same); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 738-39 (Cal. 2014) (same for state employment discrimination claim).

⁷⁹ Standard for Determining Joint-Employer Status, 91 Fed. Reg. 9,707 (Feb. 27, 2026).

⁸⁰ See *New York v. Scalia*, 490 F. Supp. 3d 748, 779 (S.D.N.Y. 2020).

⁸¹ Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 21,878 (Apr. 23, 2026) (to be codified at 29 C.F.R. pts. 500, 780, 791, 825). Both proposed rules focus on the four direct control factors; the primary difference between the current proposed rule and the rescinded 2020 rule is that the current proposed rule allows that other factors may be relevant. See *id.* at 21889-90.

⁸² Marni von Wilpert, "States with Joint-Employer Shield Laws Are Protecting Wealthy Corporate Franchisers at the Expense of Workers and Small Businesses," Economic Policy Institute, February 12, 2018. As of 2018, at least 18 states have enacted franchise-specific joint-employer shield laws.



joint employers are free to ignore unlawful practices by their subcontractors and franchisees. It is also a highly effective union avoidance strategy: The lack of an employment relationship between the lead firm and employees of the franchisee or subcontractor leaves the workers' right to picket the lead firm unclear and may open their union to a damages suit by the lead firm.⁸³

Exemptions from Federal and State Tax and Insurance Obligations

The Internal Revenue Service (IRS) uses a similar control-based multifactor analysis to determine whether a worker is an employee or independent contractor for payroll tax purposes. But it is susceptible to the same blurring problem as in labor and employment law.⁸⁴ This offers businesses that domestically outsource their workers a potent competitive advantage over businesses that do not. Businesses that classify workers as independent contractors have no federal unemployment insurance program (FUTA) liability⁸⁵ and can shift the usual employer share of Social Security and Medicare contributions onto workers.⁸⁶

State payroll, unemployment insurance, and workers' compensation systems universally permit staffing agencies to pay taxes and premiums as the sole employer of record of the workers they place with user-clients.⁸⁷ Additionally, 18 states expressly exempt franchisors from unemployment insurance tax obligations and workers' compensation premiums for their franchisee employees.⁸⁸ This relieves franchisors and user-clients of staffing agencies of any increase in unemployment insurance tax rates or workers'

⁸³ The NLRA secondary boycott rule provides businesses that are not the primary employer with a damages suit against unions that picket them. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(b)(4)(B). While strikers may be able to picket subcontractors or franchisees if the purpose is recognitional or the subordinate firms are "allies" of the franchisee or subcontractor (see *Douds v. Metro. Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.1948)), this is a fact-intensive inquiry. Compare *Retail Clerks Int'l Union & Retail Store Emp. Union, Loc. 655 v. Quick Shop Markets, Inc.*, 604 F.2d 581, 587 (8th Cir. 1979) (finding that union's picket of franchisees was not a secondary boycott because union represented franchisor's employees and reasonably believed that franchisor had franchised stores to avoid bargaining, and the intent of the picket was to induce the franchisees to recognize the union as those employees' representative) with *Bennett v. Loc. 456, Teamsters & Chauffeurs Union*, 459 F. Supp. 223, 230 (S.D.N.Y. 1978) (finding that franchisees of Carvel are not "allies" despite their dependency on Carvel because Carvel could continue its business should a picket shut down any individual franchisees).

⁸⁴ IRS, "Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding 1-4," Department of the Treasury, 2026. The IRS uses a twenty-one-factor test based on the common law test. See Rev. Rul. 87-41, 1987-1 C.B. 296.

⁸⁵ Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 439 (codified as amended at 26 U.S.C. §§ 3301-3311).

⁸⁶ 26 U.S.C. § 3111(a)-(b).

⁸⁷ George Gonos, "The Contest Over 'Employer' Status in the Postwar United States: The Case of Temporary Help Firms," *Law and Society Review* 31, no. 1 (1997): 81, 95, <https://doi.org/10.2307/3054095>.

⁸⁸ Wilpert, "States with Joint-Employer Shield Laws."



compensation premiums, since layoffs and workplace injuries or deaths will be attributable to the franchisees and staffing agencies as the sole employer.

Effective Exemptions from Antitrust Law

In many domestic outsourcing arrangements, lead firms restrain their subordinate firms' operations by contract, for example, a franchisor's limits on the geographic reach of and products sold by a franchisee. This implicates antitrust liability, since such restraints do not necessarily receive the immunity afforded coordination within a single enterprise.⁸⁹ But by the 1970s law-and-economics scholars argued that most of these "vertical restraints" are permissible because of their efficiency and benefits for consumers.⁹⁰ The Supreme Court endorsed a permissive rule of reason test for most vertical restraints in *Continental T.V. v. GTE Sylvania*.⁹¹ This has largely removed restraints commonly used in domestic outsourcing from antitrust scrutiny in the past 50 years.⁹² While recent private litigation and public agency enforcement have curbed some franchisor practices, especially "no-poaching" terms forbidding franchisees from hiring other franchisees' employees,⁹³ antitrust law's permissive approach to franchisor restraints of franchisees has permitted franchisors to closely control franchisee business operations, notwithstanding their formal status as independent businesses.

In addition to giving domestic outsourcing a partial liability shield, antitrust law has also given businesses a plausible legal weapon in requiring workers classified as independent contractors to show in their collective actions that they meet "the 'statutory labor exemption' to antitrust liability—or . . . one of the other safe harbors

⁸⁹ See *American Needle, Inc. v. National Football League*, 560 U.S. 183, 195–96 (2010) (explaining that § 1 of the Sherman Act reaches concerted action among separate economic actors that deprives the marketplace of independent centers of decisionmaking).

⁹⁰ See Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 288 (1978) ("Analysis shows that every vertical restraint should be completely lawful."); Richard A. Posner, *Antitrust Law: An Economic Perspective* (1976).

⁹¹ 33 U.S. 36 (1977). See Michael A. Carrier, "The Rule of Reason: An Empirical Update for the 21st Century," *George Mason Law Review* 16, no. 4 (2009): 827, 829. The vast majority of rule-of-reason cases are resolved in favor of defendants because the plaintiff cannot not show an anticompetitive effect.

⁹² In *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Supreme Court recognized the potential procompetitive benefits of vertical maximum resale-price restraints and replaced their per se prohibition with rule-of-reason analysis. See 33 U.S. 36, 22. By 2007, the Supreme Court held that vertical minimum resale-price agreements are subject to the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007). See Sanjukta Paul, "Antitrust as Allocator of Coordination Rights," *UCLA L. Rev.* 67, no. 2 (2020): 378, 395–401 (describing antitrust law's preference for hierarchical coordination).

⁹³ *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-2334, 2023 WL 5496957 (7th Cir. Aug. 25, 2023) (finding that no-poach agreements imposed by franchisors on franchisees can violate antitrust law); *Arrington v. Burger King Worldwide, Inc.*, 44 F.4th 1285 (11th Cir. 2022) (remanding dismissal of antitrust claim on grounds that franchisees are independent businesses); *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, 2019 WL 2290884 (E.D. Mich. May 24, 2019) (denying motion to dismiss antitrust claim); *in re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-cv-00825-JHM (W.D. Ky. Oct. 21, 2019) (same); *Yi v. SK Bakeries LLC*, No. 3:18-cv-05627, Dkt. 33 (W.D. Wash. Nov. 13, 2018) (same).



from antitrust liability.”⁹⁴ Recent case law supports the view that antitrust law does not constrain the concerted activities of workers classified as independent contractors.⁹⁵ But the NLRB has flip-flopped on whether drivers for TNCs like Uber, Lyft, and DoorDash are employees or independent contractors.⁹⁶ If TNC drivers are not employees under the NLRA, they organize in a gray area in which their concerted activities likely do not violate antitrust law but do not receive the protection of labor law, either.

To address this gray area, some states have permitted organized labor to represent drivers of TNCs in state labor law. Under the Parker immunity doctrine, states may regulate collective bargaining for workers classified as independent contractors without courting antitrust law scrutiny.⁹⁷ In 2024, Massachusetts created a unique form of collective bargaining for TNC drivers under state law that permits TNC drivers to organize in a single sectoral unit regardless of which TNC they drive for.⁹⁸ In May 2026 the Massachusetts Department of Labor Relations certified the App Drivers Union as the first official bargaining representative of app-based drivers in the nation, representing 70,000 workers “who now have the power to collectively bargain.”⁹⁹ If a similar law in California enacted in October 2025 has a similar outcome, “an estimated 900,000 new workers would be covered.”¹⁰⁰

⁹⁴ See *FTC v. Superior Court Trial Lawyers Ass’n (SCTLA)*, 493 U.S. 411, 423–24, 428 (1990) (independent contractor attorneys’ “concerted action in refusing to accept further CJA assignments until their fees were increased was . . . a plain violation of the antitrust laws”); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (finding unlawful collective action by independent dentists). See Cynthia Estlund and Wilma B. Liebman, “Collective Bargaining Beyond Employment in the United States,” *Comparative Labor Law & Policy Journal* 42, no. 2 (2021): 371, 372. The Norris-LaGuardia Act exempts bona fide labor disputes from antitrust scrutiny and does not confine the definition of “labor dispute” to “the proximate relation of employer and employee.” 29 U.S.C. § 113(c).

⁹⁵ *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 313–14 (1st Cir. 2022) (finding that workers in a bona fide labor organization may engage in concerted activities notwithstanding their classification as independent contractors).

⁹⁶ In 2019 the Trump general counsel opined that Uber drivers are independent contractors for similar reasons. See *Uber Technologies Inc., Cases 13-CA-163062 et al.*, NLRB Division of Advice Memorandum (issued April 16, 2019) (advising regional offices to dismiss unfair labor practice claims against Uber on the ground that drivers are independent contractors). The Biden NLRB in 2023 announced a return to the common-law standard, which would likely find that TNC drivers are employees. *The Atlanta Opera, Inc.*, 369 NLRB No. 106 (2023).

⁹⁷ *Parker v. Brown*, 317 U.S. 341 (1943); see Estlund and Liebman, “Collective Bargaining Beyond Employment,” 385. The Ninth Circuit has held that Parker immunity does not extend to local lawmaking without express state-law approval. See *Chamber of Com. of the United States v. Seattle*, 890 F.3d 769, 789.

⁹⁸ Mass. Gen. Laws ch. 150F (2024).

⁹⁹ Amanda Holpuch, “Ride-Share Drivers in Massachusetts Formally Unionize,” *New York Times*, May 25, 2026.

¹⁰⁰ David Madland, “Fast Facts About Massachusetts Rideshare Sectoral Bargaining,” Center for American Progress, May 26, 2026.



Effective Exemptions from State and Local Law

Weaknesses in federal labor law have led unions to build countervailing power through state and local experimentation. Local jurisdictions for decades have experimented with project labor agreements (PLAs) for businesses performing public work and those operating in publicly held assets like airports. They have also required community benefits agreements (CBAs) between organized labor, community groups, and developers that receive public subsidies, such as hotels and grocery stores in large-scale developments.¹⁰¹ PLAs and CBAs both often require labor peace agreements, and have eased the path to unionization for hundreds of thousands of service-sector workers in the United States.¹⁰² More recently, state and local governments have experimented with forms of sectoral co-regulation in which unions and worker centers participate in agency deliberations with businesses to establish sectoral minimum standards.¹⁰³

But state and local labor policymaking is often blocked by NLRA preemption and, for local lawmaking, state preemption. First, the NLRA preempts state or local laws that regulate labor relations between unions and employers.¹⁰⁴ In *San Diego Building Trades Council v. Garmon*,¹⁰⁵ the Supreme Court held that the NLRA preempts state and local laws that seek to regulate conduct arguably regulated by the NLRA.¹⁰⁶ Under *Machinists v. Wisconsin Employment Relations Commission*, states may not regulate “economic weapons of self-help” such as strikes and lockouts, which the NLRA intends to leave the employer and union free to engage in as part of the bargaining process.¹⁰⁷ The sweeping preemptive scope of *Garmon* and *Machinists* has foreclosed many state and local attempts to address NLRA weaknesses, including lawmaking that bars NLRA violators from public contracts and prohibits the use of public funds to defeat union

¹⁰¹ Scott L. Cummings and Andrew Elmore, “Mobilizable Labor Law,” *Indiana Law Journal* 99, no. 1 (2023): 127, 193–96, <https://repository.law.indiana.edu/ilj/vol99/iss1/3>. The NLRA does not preempt PLAs in publicly held assets like airports if the local government requires labor peace in its role as a market participant, in which a city acts in its proprietary interests (as a property owner) as the purchaser of services completing a project without disruption rather than as a regulator seeking to set policy. See *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229 (1993). Since CBAs are private agreements and cities do not condition development permits on a CBA, they are not government takings and do not implicate NLRA preemption.

¹⁰² Cummings and Elmore, “Mobilizable Labor Law,” 174–80; see also Steven Greenhouse, “How One Local Union Is Doubling Wages for America’s Airport Workers,” *The American Prospect*, April 2, 2020, <https://prospect.org/2020/04/02/local-union-doubling-wages-for-america-airport-workers>.

¹⁰³ See Andrias, “The New Labor Law,” 10.

¹⁰⁴ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985).

¹⁰⁵ 475 U.S. 282 (1986).

¹⁰⁶ *Building & Construction Trades Council v. Associated Builders & Contractors* (“Boston Harbor”), 507 U.S. 218, 246 (1993).

¹⁰⁷ 427 U.S. 132 (1976).



campaigns.¹⁰⁸ The only express authority the NLRA gives states is to enact right-to-work laws banning unions from collecting “fair share” fees from the employees they represent,¹⁰⁹ which 26 states have enacted.¹¹⁰

Second, abusive forms of state preemption have emerged that stamp out all regulation and punish local governments that seek to establish them.¹¹¹ This is a potent threat to “labor localism,” or “city-based strategies to strengthen and lift workplace standards, using local law instead of or in addition to labor law.”¹¹² Crafted by businesses and anti-labor allies in response to local racial and economic justice campaigns, state preemption laws now foreclose local minimum wage, sick pay, and similar mandates in over half the country.¹¹³ In right-to-work states that preempt local labor lawmaking—which includes virtually all Southern states—there is often little to no enforcement of labor or safety and health standards beyond what federal agencies provide.¹¹⁴

¹⁰⁸ *Chamber of Commerce v. Brown*, 554 U.S. 60, 65–66, (2011); *Wisconsin Dep’t of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 291 (1986).

¹⁰⁹ Section 14(c) of the NLRA expressly permits states to prohibit “membership in a labor organization as a condition of employment” in the state. 29 U.S.C. § 164(b) (2020). While this provision discusses membership, not dues, courts have extended the scope of Section 14(c) to include mandatory fees as well. *Sweeney v. Pence*, 767 F.3d 654, 671 (7th Cir. 2014).

¹¹⁰ Jennifer Sherer and Elise Gould, “Data Show Anti-Union ‘Right-to-Work’ Laws Damage State Economies,” Economic Policy Institute, February 12, 2024, <https://epi.org/blog/data-show-anti-union-right-to-work-laws-damage-state-economies-as-michigan-s-repeal-takes-effect-new-hampshire-should-continue-to-reject-right-to-work-legislation>.

¹¹¹ Abusive state preemption has emerged as a potent threat to many areas of regulation, including civil rights, public health, and environment protections. See Kaitlin Caruso et al., *Federal Authoritarianism and Abusive State Preemption* (Local Solutions Support Center, 2026), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/697a68566e8d5a5054b94edc/1769629782901/Federal+Authoritarianism+Abusive+State+Preemption.pdf>; Richard Briffault, “The Challenge of the New Preemption,” *Stanford Law Review* 70 (2018): 1995, 2022; Richard C. Schragger, “The Attack on American Cities,” *Texas Law Review* 96 (2018): 1163; Jennifer L. Pomeranz and Mark Pertschuk, “State Preemption: A Significant and Quiet Threat to Public Health in the United States,” *American Journal of Public Health* 107 (2017): 900 (detailing state preemption of local sick leave, food pantries, and LGBTQ protections).

¹¹² Elmore, “Labor’s New Localism,” 257.

¹¹³ See Hunter Blair et al., *Preempting Progress* (Economic Policy Institute, 2020), <https://files.epi.org/pdf/206974.pdf>; “Workers’ Rights Preemption in the U.S.,” Economic Policy Institute, <https://epi.org/preemption-map>.

¹¹⁴ See Jacob Meyer and Robert Greenleaf, “Enforcement of State Wage and Hour Laws: A Survey of State Regulators,” National State Attorneys General Program, Columbia Law School, April 2011, 13. Alabama, Florida, Georgia, Louisiana, and Mississippi have no dedicated staff to enforce labor or safety and health standards.



A Federal Agenda to Restore Workplace Protections for Domestically Outsourced Workers

Establishing a meaningful baseline of workplace standards will require taking immediate and long-term actions to (1) strengthen labor and employment law by holding lead firms accountable for the harmful effects of domestic outsourcing; (2) account for domestic outsourcing as a market power strategy to suppress wages in tax and subsidy programs, consumer protection, and antitrust laws; and (3) protect federal labor law and state and local labor experimentation as sources of countervailing power.

Holding Businesses Accountable for Unlawful Practices in Their and Their Subcontractors' and Franchisees' Workplaces

Addressing the widespread problem of misclassification will require streamlining and broadening the current right-to-control test to include low-wage workers who do not operate independent businesses. The PRO Act proposed to do this for the NLRA by adopting the ABC test for so-called independent contractors for labor law,¹¹⁵ for good reasons. As the California Supreme Court explained in *Dynamex Operations W. v. Superior Ct.*,¹¹⁶ the ABC test is “a simpler, more structured test for distinguishing between employees and independent contractors” because it presumes employment, shifting the burden to the putative employer to establish the key indicia of economic independence that separate independent contractors from employees.¹¹⁷ The ABC test has already been established in many states and can be readily adopted by courts and agencies to provide guidance about whether a worker is an independent contractor or employee. Federal labor and employment law should adopt the ABC test as the standard for defining “employee,” to set a more certain and protective line separating employees and independent contractors.

In contrast, for joint-employer liability, federal law reform efforts have focused on affirming the importance of reserved and indirect control in the test. The PRO Act, for example, would incorporate the *Browning-Ferris* “share or codetermine” standard, which would require the NLRB and courts to consider reserved and indirect control in

¹¹⁵ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 101(b).

¹¹⁶ 4 Cal. 5th 903 (Cal. 2018).

¹¹⁷ 4 Cal. 5th, 955–57. Employment is presumed if “(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity’s business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”



joint-employer inquiries.¹¹⁸ But decades of joint-employer litigation have shown that this is not enough. Well-financed corporations armed with sophisticated legal counsel have learned to structure their relationships with third-party intermediaries in ways that control-based tests cannot easily discern. Workers and third-party intermediaries that depend on a single company's business for economic survival understand that company guidelines and recommendations that come with the possibility of contract termination are commands.¹¹⁹ But too often, control-based tests ignore the power dynamics of these relationships and minimize the control that lead firms have over subordinate firms.¹²⁰

Even in states with an ABC test for independent contractors, leaving the common-law test in place for joint employment creates an incentive for businesses to use third-party intermediaries as a way to keep their domestic outsourcing business model intact.¹²¹ FedEx, for example, responded to court rulings that its drivers are employees by franchising its driving routes, "once again shifting its operations outside of the boundaries of employment." When California adopted the ABC test for wage and hour law, Uber similarly announced its intention to shift to a franchise model.¹²²

A presumption of joint employment for business relationships in which lead firms typically reserve and exercise sufficient control (direct and/or indirect) to establish a joint-employer relationship can streamline the process and remove the uncertainty in these business models.¹²³ The Occupational Safety and Health Administration (OSHA) effectively establishes a presumption of joint employment for user-clients of staffing agencies with a "multi-employer doctrine" that imposes liability on companies for

¹¹⁸ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 101(a).

¹¹⁹ Elmore and Griffith, "Franchisor Power," 1346–55.

¹²⁰ See Keith Cunningham-Parmeter, "From Amazon to Uber: Defining Employment in the Modern Economy," *Boston University Law Review* 96 (2016): 1671; Julia Tomassetti, "From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker," *Lewis and Clark Law Review* 19 (2015): 1083.

¹²¹ Uber, for example, has considered shifting to a franchising model to avoid coverage under the broad ABC state employment tests. See Erin Mulvaney and Paige Smith, "Uber, Lyft Won't Eliminate Legal Fights with New Business Models," *Daily Labor Report*, Bloomberg Law, August 26, 2020, <https://news.bloomberglaw.com/daily-labor-report/uber-lyft-wont-eliminate-legal-fights-with-new-business-models>.

¹²² Andrew Elmore, "Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine," *UC Davis Law Review* 55 (2021). This shift ultimately proved unnecessary after Uber secured passage of Proposition 22 in California, which exempted it and other TNCs from state employment law. See Kate Conger, "Uber and Lyft Drivers in California Will Remain Contractors," *New York Times*, November 4, 2020, <https://nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>.

¹²³ I have previously proposed a presumption of joint employment for franchisors and similar lead firms upon an initial showing that the business has the power "to shape their subordinate firms' workplace because of the subordinate firm's dependence on the lead firm for economic survival." Elmore, "Regulating Mobility Limitations," 1263.



hazards caused by conditions they create or that are under their control, irrespective of employer status.¹²⁴

Courts and agencies can use presumptions for specific types of domestic outsourcing that are particularly consistent with an employment relationship. For example, I, Kati Griffith, and Sachin Pandya have proposed a rebuttable presumption of joint employment in two scenarios:

- If a franchisor constrains its franchisees' or its franchisees' employees' mobility, such as through a noncompete or no-poaching agreement.¹²⁵
- If a user-client of a staffing agency reserves the right to directly supervise the staffing agency's employees.¹²⁶

A presumption of joint employment is appropriate in these circumstances, we argue, because a business that reserves the right to hire, fire, or supervise a separate employer's employees (either directly or by restraining the separate employer's control) reserves a level of control over an employment relationship that makes it, more likely than not, a joint employer. Other presumptions might include lead firm contracts that (a) require a significant, nonrecoverable capital investment by the subordinate firm and in which the lead firm has the unilateral right to terminate the subordinate firm's contract; and (b) fix labor costs at rates that assume lower wages than the lead firm provides its own employees who have substantially similar job duties. Requiring the alleged joint employer to produce such evidence is also fair, since the lead firm is the party most likely to have the relevant evidence—in this case, the contract between the lead firm and the subordinate firm setting forth each entity's right to control the work.

This proposal for presumptions of employment/joint-employment status is not intended to list all possible grounds for a presumption, or to replace other approaches. Further industry-specific presumptions can be identified through public hearings to provide agencies a more detailed and comprehensive view of workforce transformations in those industries.

Courts that have rejected extending the ABC test to the joint-employment inquiry have objected (a) that it is inappropriate to use a test designed to answer whether the worker is an employee to answer whether the business that hires the third-party

¹²⁴ Under OSHA's multi-employer doctrine, established to protect temp workers who are particularly vulnerable to workplace injury and death, client oversight of worksite safety practices extends OSHA liability to them in cases in which client-controlled hazards cause injury to temporary workers, "regardless of whether the employees threatened are its own or those of another employer on the site." *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999) (explaining OSHA multi-employer doctrine).

¹²⁵ Letter from author, Kati Griffith, and Sachin Pandya to Lauren McFerran, Chair, NLRB, December 6, 2022 (on file with author).

¹²⁶ Elmore et al., "Presuming Justice for Temp Workers," 384–88.



intermediary is an employer;¹²⁷ and (b) that applying the ABC test literally would extend joint liability to all users of third-party intermediaries that employ their workers.¹²⁸ Both these objections can be addressed by shifting the inquiry to the relationship between the user-client and the third-party intermediary as the appropriate frame in a joint-employer inquiry.¹²⁹ It is also fair, since a business that controls a third-party intermediary logically controls those workers under that third-party intermediary's control.¹³⁰ While this would deem many franchisors to be joint employers, it would exclude businesses that hire subcontractors by arm's-length agreements to provide an ancillary service.¹³¹

Importantly, establishing presumptions of joint employment would not require congressional action: Presumptions as a burden of production are authorized by the Administrative Procedure Act and raise no constitutional objections,¹³² and FLSA, NLRA, and Title VII all authorize the NLRB, DOL, and Equal Employment Opportunity Commission (EEOC) to seek such presumptions.¹³³ The NLRB can establish such presumptions by rulemaking or adjudication.¹³⁴ The DOL may seek to establish such presumptions by rulemaking across the statutes it implements, as the Trump administration has recently sought in its proposed uniform, narrow joint-employer standard.¹³⁵ And these agencies and the EEOC can argue in favor of this presumption in litigation and issue interpretive guidance citing any favorable rulings. While the Supreme Court in *Loper Bright Enterprises v. Raimondo*¹³⁶ instructs courts not to defer to agency interpretations of law, I, Griffith, and Pandya have previously explained that *Loper Bright* distinguishes mixed questions of law and fact, such as employment and joint-employment determinations, which are “necessarily ‘intertwined with’ factfinding.” In these cases, “agencies routinely use rebuttable presumptions to streamline the factfinding process.” So long as substantial evidence supports an

¹²⁷ *Jinks v. Credico (USA) LLC*, 488 Mass. 691, 702 (2021) (“The ABC test thus asks a question that differs from the question relevant to determining whether an entity is a joint employer”); *Henderson v. Equilon Enters.*, 253 Cal. Rptr. 3d 738, 751-54 (Cal. Ct. App. 2019); see also *Salazar v. McDonald's*, 944 F.3d 1024, 1032 (9th Cir. 2019) (“*Dynamex* ‘has no bearing here, because no party argues that Plaintiffs are independent contractors’”).

¹²⁸ See Elmore, “Regulating Mobility Limitations,” 1263.

¹²⁹ See *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (finding that the appropriate question in a joint-employer inquiry is whether the putative joint employer “codetermine[s]—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment”).

¹³⁰ Kati L. Griffith, “An Empirical Study of Fast-Food Franchising Contracts: Towards a New ‘Intermediary’ Theory of Joint Employment,” *Washington Law Review* 94 (2019): 171, 187–98.

¹³¹ Elmore, “Regulating Mobility Limitations,” 1264.

¹³² Elmore et al., “Presuming Justice,” 386; Fed. R. Evid. 301; Administrative Procedure Act, 60 Stat. 237, 79th Cong. (1946).

¹³³ Elmore et al., “Presuming Justice,” 388.

¹³⁴ *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (finding that the NLRB has the statutory authority to adopt rebuttable presumptions for the NLRA, so long as such presumptions “rest on a sound factual connection between the proved and inferred facts”).

¹³⁵ See 91 Fed. Reg. 21,878 (Apr. 23, 2026).

¹³⁶ 603 U.S. 369 (2024).



agency's presumption that an entity is an employer or joint employer, "a court is likely to find that a rebuttable presumption that the client is an employer is appropriate."¹³⁷

This proposal for agency-established rebuttable presumptions is intended as a short-term, partial solution to deter domestic outsourcing. While it avoids the endless litigation and agency policy oscillations of a totality-of-the-circumstances test, a presumption of control based on the power of the lead firm is susceptible to lead firm manipulation. Lead firms will respond to a version of the ABC test by removing the reserved control from contracts that might trigger a presumption. This malleability is inherent in the control-based nature of the joint-employer doctrine.¹³⁸

In the long term, addressing this critique will require law reform that extends liability to lead firms outside of the framework of control, by (a) holding all businesses involved in coordinating work jointly and severally liable for violations by any of their subordinate firms in low-compliance sectors, and (b) directly regulating domestic outsourcing strategies that drive unlawful conduct. As an example of the former, states and cities have extended joint and several liability to all user-clients of staffing agencies¹³⁹ and to businesses that use subcontractors in industries in which labor violations are common, such as the construction, meatpacking, and garment industries.¹⁴⁰ Some states have also taken the latter approach with staffing agencies.

¹³⁷ Elmore et al., "Presuming Justice."

¹³⁸ See Noah D. Zatz, "Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment," *ABA Journal of Labor and Employment Law* 26 (2011): 279, 280.

¹³⁹ See Cal. Lab. Code § 2810.3 (West 2015) (A "client employer" "shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor"); N.J. Stat. Ann. § 34:11-58.2 (West 2019) ("A client employer and a labor contractor providing workers to the client employer shall be subject to joint and several liability and shall share civil legal responsibility for any violations of the provisions of State wage and hour laws or State employer tax laws . . ."); N.J. Stat. Ann. § 34:8D-7 (West 2023) (covering "temporary laborers" assigned through "temporary help service firms" to third-party clients, for non-professional and non-clerical work); D.C. Code § 32-1303(6) (2024) ("both the temporary staffing firm and the employer shall be jointly and severally liable for violations of" living wage and sick leave local laws); Denver, Colo., Municipal Code § 51-24(b) ("Any employer . . . who has contracted with an employer or worker, directly or indirectly, for labor from which such person is the beneficiary, including general contractors, clients of staffing agencies, and labor brokers, shall be jointly and severally liable" for labor violations).

¹⁴⁰ Minnesota, for example, extends labor protections in the meatpacking industry to "independent contractors and persons performing work for an employer through a temporary service or staffing agency." Minn. Stat. Ann. § 179.871. Eight states and Washington, DC, extend liability to construction contractors for their subcontractors' wage claims. See Cal. Lab. Code § 218.7(a)(1) (2024) ("A direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner"); D.C. Code § 32-1303(5) (2024) ("A subcontractor, including any intermediate subcontractor, and the general contractor shall be jointly and severally liable to the subcontractor's employees for violations of this chapter, the Living Wage Act, and the Sick and Safe Leave Act"); Haw. Rev. Stat. Ann. § 388-11.5 (same); 820 Ill. Comp. Stat. 115/13.5 (2022)



New Jersey's Temporary Workers' Bill of Rights, for example, requires covered temporary workers to be paid at least the same average rate of pay and receive equivalent benefits as the user-client's permanent employees when they perform the same or substantially similar work.¹⁴¹ Analogous provisions could also be designed for independent contractors and franchisee employees, requiring that these workers have the same labor standards (including, in the case of independent contractors, tax and insurance obligations) as the lead firms' employees performing similar work. In contrast to other prohibitions on labor conditions that degrade area labor standards, which can be difficult or impossible to enforce,¹⁴² conditioning outsourced work on adherence to the business's own employment practices, as in the New Jersey law, merely requires a comparison of the temp workers' wages and benefits stated in the staffing agency contract with the user-client's own pay and benefit practices.

(same); 820 Ill. Comp. Stat. 175/42 (2023); 56 Ill. Admin. Code § 260.500 (2024) (same except specifically applied to "temporary labor service agencies for the services of day or temporary laborers"); Md. Code Ann., Lab. & Empl. § 3-507.2(c) (2018) (same); Minn. Stat. Ann. § 181.165 (same); Or. Rev. Stat. Ann. § 652.197 (same); Nev. Rev. Stat. § 608.150 (2017) (same); Va. Code Ann. § 11-4.6 (2020) (same). Lastly, California holds "brand guarantors," including garment manufacturers, as "jointly and severally liable with any manufacturer and contractor who performs those operations for the garment manufacturer or brand guarantor" for wage and hour violations. Cal. Lab. Code § 2673.1.

¹⁴¹ N.J. Stat. Ann. § 34:8D-1 et seq.; see *New Jersey Staffing All. v. Fais*, 110 F.4th 201, 208 (3d Cir. 2024) (rejecting staffing agency association's dormant Commerce Clause and other constitutional challenges to this law).

¹⁴² The H-2A nonimmigrant agricultural visa, for example, conditions H-2A visas on a DOL certification that granting the petition "will not have an adverse effect on the wages and working conditions of similarly employed U.S. workers," among other requirements. Wage and Hour Division, "Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)," US Department of Labor, June 2026, <https://dol.gov/agencies/whd/fact-sheets/26-H2A>. But wages for agricultural workers are close to half of wages for comparable workers. Daniel Costa, "Farmworkers Earned 40% Less than Comparable Nonagricultural Workers in 2022," Economic Policy Institute, October 5, 2023, <https://epi.org/blog/the-farmworker-wage-gap-farmworkers-earned-40-less-than-comparable-nonagricultural-workers-in-2022>. The predecessor to the H-2A program, the notorious 1951 Bracero Program, similarly required wages at "either a stipulated amount or the prevailing area wage paid domestic workers for performing similar tasks, whichever was greater," Agricultural Workers-Republic of Mexico, Pub. L. No. 82-78, 65 Stat. 117 (1951). But contemporaneous "DOL reports documented the fact that Braceros had been used illegally to undermine strikes called by U.S. workers." Philip Martin, "Guest Workers: New Solution or New Problem?," *University of Chicago Legal Forum* 2007 (2007): 289, 301 (citing US Department of Labor, Mexican Farm Labor Program, Consultants Report 272 (1959), reprinted in Extension of Mexican Farm Labor Program: Hearings on S. 1466, S. 1945, and H.R. 2010 before a Subcommittee on Agriculture and Forestry, 87th Cong, 1st Sess, 272 (1961) ("Knowledge of the availability of Mexican nationals weakens the domestic workers' bargaining position and contributes to the depression of area wage levels")).



Prohibiting Coercive and Exploitative Practices in Domestic Outsourcing Through Consumer Protection and Antitrust Laws

Another crucial way to protect labor standards in industries where domestic outsourcing is common is to prohibit forms of domestic outsourcing that violate federal and state consumer protection and antitrust laws. The FTC under President Biden prioritized using consumer protection and antitrust law to curb employers' use of market power to suppress worker wages and restrain labor competition.¹⁴³ In 2022 the FTC issued a statement about gig work, announcing its intention to address the problems of businesses exerting control over workers without undertaking employer responsibilities, workers' resulting diminished bargaining power, and employers' excess labor market power in concentrated markets as "unfair, deceptive, and anticompetitive practices" (UDAP).¹⁴⁴ Using its UDAP authority, in 2017 the FTC had resolved litigation against Uber for exaggerating its drivers' income,¹⁴⁵ and in 2021 resolved an enforcement action against Amazon for withholding tips from Amazon Flex drivers, having Amazon make a \$61.7 million payment to its drivers in restitution.¹⁴⁶ In its 2022 policy statement, the FTC also signaled its intention to broadly construe "unfair methods of competition" (UMC) to include workers¹⁴⁷ and expressed a particular interest in addressing worker misclassification as a UMC.

These statements and enforcement actions have shown the willingness of agencies and courts to consider claims that labor-market concentration and monopsony practices create systemic vulnerability for workers.¹⁴⁸ But so far, they have not changed the incentive structure of misclassification. Building on its Biden-era enforcement actions, the FTC should consider the misclassification of employees as independent contractors

¹⁴³ See *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 70 (2021) ("The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels").

¹⁴⁴ "FTC Policy Statement on Enforcement Related to Gig Work," FTC, 2022, 1, 4–6.

¹⁴⁵ See *Stipulated Order for Permanent Inj. and Monetary J.*, *FTC v. Uber Techs., Inc.*, No. 3:17-cv-00261-JST, slip op. at 3–4 (N.D. Cal. Feb. 2, 2017); see also *United States v. Sullivan*, 131 F.4th 776, 780 (9th Cir. 2025) (referencing FTC investigation of Uber's data security practices, which were alleged to have permitted a hacker to download "sensitive information pertaining to tens of thousands of Uber drivers").

¹⁴⁶ "Amazon to Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers," FTC, press release, February 2, 2021, <https://ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.

¹⁴⁷ FTC, Comm'n File No. P221202, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" 8–10 (2022).

¹⁴⁸ *Ucharima Alvarado v. Western Range Association*, No. 3:22-cv-00249-MMD-CLB, Doc. 276 (D. Nev. Mar. 5, 2025); *Victoria Ross v. University of Pittsburgh Medical Center*, No. 1:24-cv-00016 (W.D. Pa. Jan. 18, 2024).



as a UDAP.¹⁴⁹ Per the FTC’s 2022 policy statement, misclassification may also be a UMC in the meaning of Section 5 of the Federal Trade Commission Act (FTCA). If regulators uncover evidence that misclassification by some businesses puts competitive pressure on rivals to do the same, it would show the “negative impact on competitive conditions” identified in the FTC’s recent Section 5 Policy Statement as a key element for a UMC violation.¹⁵⁰ As I have previously argued, the FTC should also consider rulemaking and enforcement that treats the user-client misclassification of temp workers as solely employed by staffing agencies as a violation of consumer protections and antitrust law.¹⁵¹

And during this period of federal retrenchment, state and local agencies should treat lead-firm claims that they are not joint employers as a form of misclassification that violates state consumer protection and antitrust statutes. A number of states provide a broader definition of “unfair” business practices than the FTCA.¹⁵² California’s unfair competition law (UCL), for example, defines unfair business practices as including “any unlawful, unfair or fraudulent business act or practice,” which includes employer conduct that harms workers.¹⁵³ As one court reasoned, misclassification supports a UCL claim because it creates an “unfair competitive advantage . . . over competitors that properly classify similar workers as employees. . . .”¹⁵⁴ This general theory of unfair behavior by companies seeking to avoid legal obligations in coordinating low-wage work has been upheld in several states as a basis for a UCL claim.¹⁵⁵

¹⁴⁹ See Jonathan F. Harris, “Consumer Law as Work Law,” *California Law Review* 112 (2024): 20–21. Jonathan Harris proposes treating certain abusive employer practices as violations of UDAP laws, such as requirements that employees pay back the costs of on-the-job training unless they continue to work for the employer for a fixed duration.

¹⁵⁰ FTC, “Policy Statement Regarding the Scope of Unfair Methods”; see also 15 U.S.C. § 45(a)(1); see Neil W. Averitt, “The Meaning of ‘Unfair Methods of Competition’ in Section 5 of the Federal Trade Commission Act,” *Boston College Law Review* 21 (1980): 227, 231. See also Hiba Hafiz & Ioana Marinescu, “Labor Market Regulation and Worker Power,” *University of Chicago Law Review* 90 (2023): 489. Hiba Hafiz and Ioana Marinescu propose federal and state enforcement of antitrust laws prohibiting noncompetition and other worker restraints to “increase workers’ bargaining power and reduce workers’ search and moving costs between employers.”

¹⁵¹ Elmore, “Power and Mobility in Temp Work,” 135–44.

¹⁵² See Samuel Evan Milner, “From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts,” *American University Law Review* 78 (2024): 857, 890. Milner discusses how Little FTC Acts are broader than Section 5 of the FTCA because they typically do not require “showing any independent harm to the competitive process.” The California Supreme Court has held “that any business act or practice that violates the Labor Code through failure to pay wages is, by definition,” a violation of the state unfair competition law. *Cortez v. Purolator Air Filtration Prod. Co.*, 999 P.2d 706, 716 (Cal. 2000); see also *Herr v. Nestlé U.S.A., Inc.*, 135 Cal. Rptr. 2d 447, 485 (Cal. Ct. App. 2003).

¹⁵³ Cal. Bus. & Prof. Code § 17200. The unfairness definition does not require a showing of an independent statutory violation so long as the conduct is sufficiently tethered to public policy. See *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999).

¹⁵⁴ *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1091 (N.D. Cal. 2019) (quoting *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018)).

¹⁵⁵ See *Diva Limousine*, 392 F. Supp. 3d at 1091; *Green v. Garcia-Victor*, No. 2017-0695 (La. App. 4 Cir. May 16, 2018), 248 So. 3d 449, 456, writ denied, No. 2018-0994 (La. Oct. 8, 2018), 253 So. 3d 800 (allegation that



Eliminating Federal and State Loan, Tax, and Insurance Incentives That Promote Domestic Outsourcing

Federal programs should exclude domestic outsourcing from eligibility for grants and loans intended for small entrepreneurs and to assist vulnerable workers. Franchisees accept a large proportion of Small Business Administration (SBA) loans, even though they are not independent businesses.¹⁵⁶ Although temp work generally does not improve workers' employment prospects,¹⁵⁷ staffing agencies likewise collect a large proportion of credits from the Work Opportunity Tax Credit (WOTC) program for offering temp work.¹⁵⁸ Federal tax credits for job creation and loans for small businesses should exclude those third-party intermediaries, such as franchisees and staffing agencies, that cannot demonstrate true independence or show positive employment outcomes for their employees.

Federal and state tax and insurance laws can also reduce economic incentives to misclassify employees as independent contractors by integrating misclassification deterrence as a conformity requirement for state unemployment insurance programs through the Federal Unemployment Tax Act and the Social Security Act.¹⁵⁹ The

Uber's practice of noncompliance with city regulations for transportation network companies in order to siphon business from licensed taxi drivers states a Louisiana UCL claim); *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. CIV.A. 13-10769-NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 27, 2014) (UCL claim stated in challenge to Uber's "operating" its service without incurring the expense of compliance with Massachusetts law and Boston ordinances); *Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F. Supp. 3d 1215, 1224 (D.N.M. 2020).

¹⁵⁶ *Small Business Franchising: An Overview of the Industry, SBA's Role, and Legislative Proposals: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 117th Cong. (2022) (testimony of Aaron Yelowitz, Senior Fellow, Cato Institute), <https://cato.org/testimony/small-business-franchising-overview-industry-sbas-role-legislative-proposals> (finding that 9.7 percent of SBA 7(a) loans and 10.1 percent of SBA 504 loans go to franchisees).

¹⁵⁷ David Autor and Susan Houseman, "Do Temporary-Help Jobs Improve Labor Market Outcomes for Low-Skilled Workers? Evidence from 'Work First,'" *American Economic Journal: Applied Economics* 2, no. 3 (2010): 96, 96; David Autor and Susan Houseman, "Temporary Agency Employment As a Way Out of Poverty?," NBER Working Paper No. 11742 (NBER, November 2005).

¹⁵⁸ Emily Corwin, "A Tax Credit Was Meant to Help Marginalized Workers Get Permanent Jobs. Instead It's Subsidizing Temp Work," *ProPublica*, August 23, 2022. Corwin reported on a study of WOTC-certified jobs, which showed that 13 of the top 14 employers certified for credits for employing people with felony records were temp agencies. See also Benjamin Pyle, "Informed Applicants: Anti-Discrimination Enforcement Based on the Use of Criminal Records," *Berkeley Journal of Employment and Labor Law* 47 (2026): 35, 43–45.

¹⁵⁹ 26 U.S.C. § 3304(a) (2024) (conditioning federal approval of state unemployment compensation laws—and employers' access to the FUTA tax credit—on state "conformity" with specified federal requirements for paying unemployment compensation); 2 U.S.C. § 503(a)(1) (2024) (requiring state laws, as a condition of federal unemployment insurance administrative grants, to include "such methods of administration as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due").



secretary of labor could issue guidance to state agencies regarding sufficient state standards to deter misclassification, with the ABC test and presumptions of joint employment as presumptively satisfactory.

Because workers' compensation is state-based with little federal involvement, encouraging state adoption of the ABC test and presumptions of joint employment would require a new, clearly conditioned grant program related to occupational injuries. Such a program would avoid legal challenge by refraining from threatening the loss of federal funds or taking other actions that would leave the states with no other choice than to comply.¹⁶⁰

Protecting Federal Labor Law and State and Local Labor and Employment Laws as Sources of Countervailing Power

For decades, labor observers have agreed that federal labor law has not effectively protected the rights of private-sector workers to build countervailing power by exercising their rights to join unions, collectively bargain, and strike.¹⁶¹ Workers can only vindicate NLRA rights through the NLRB, and businesses have leveraged the cumbersome, multilayer NLRB process to delay the resolution of unfair labor practice charges, oftentimes for years.¹⁶² The weakness of NLRB enforcement came into sharp relief in January 2025, when President Trump fired Board member Gwynne Wilcox without cause, leaving the NLRB without a quorum to issue decisions.¹⁶³ This left the NLRB inoperable for nearly a year, and generated scores of lawsuits against the NLRB by employers arguing that its investigations are unconstitutional. This year, the Supreme Court in *Trump v. Slaughter* upheld the president's authority to remove NLRB members and most other independent agency executives at will, finding that separation of powers prevents Congress from constraining the president's removal authority.¹⁶⁴ Long term, these executive and judicial attacks on the administrative state open the door to a presidential deregulatory strategy of removing all NLRB members in order to render the NLRB inoperable.

¹⁶⁰ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012); *S. Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

¹⁶¹ See, for example, Kate Andrias, "The New Labor Law," *Yale Law Journal* 126 (2016): 2, <https://yalelawjournal.org/article/the-new-labor-law>; Benjamin I. Sachs, "Employment Law as Labor Law," *Harvard Law Review* 121 (2008): 811; Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," *Harvard Law Review* 96 (1983): 1769; James A. Gross, *Rights, Not Interests: Resolving Value Clashes Under the National Labor Relations Act* (Cornell University Press, 2017).

¹⁶² Weiler, "Promises to Keep," 1796–99.

¹⁶³ See, for example, Kate Gibson, "Trump Has Paralyzed Agency That Safeguards Workers Rights, Labor Experts and Advocates Say," *CBS News*, February 10, 2025, <https://cbsnews.com/news/trump-nlr-national-labor-relations-board-gwynne-wilcox>.

¹⁶⁴ *Trump v. Slaughter*, 609 U.S. 422 (2026).



The NLRB's long-term structural problems and short-term crisis have made federal labor rights unusable for many workers in the United States.¹⁶⁵ Domestically outsourced workers are particularly vulnerable because they must first establish that they are employees of the business that hires them and/or the lead firm that controls workplace conditions before they can meaningfully access labor rights. This has become less likely as political and judicial attacks have diminished the NLRB's authority and capacity to shift labor policymaking in favor of these workers.

Making labor rights usable for vulnerable workers will require law reform that permits them to vindicate labor rights notwithstanding NLRB inoperability.¹⁶⁶ As I currently argue elsewhere, after *Slaughter*, a private right of action is necessary for workers to vindicate the rights to engage in protected, concerted activity free from employer interference and discrimination.¹⁶⁷ Employers would be more likely to accept union election outcomes and bargain in good faith without an available alternative of defeating union campaigns through lengthy NLRB delays, presidential interference, and endless litigation. Direct access to federal court would also enable domestically outsourced workers to challenge their classification as independent contractors or solely employed by subordinate firms without relying on an NLRB determination. This is particularly important for domestically outsourced workers in industries with low union density, where worker centers, and workers themselves, can use labor law claims as a mobilizing tool to build countervailing power. Nor is worker access to federal court to vindicate basic labor rights unfair to employers, since the NLRA already affords employers with a private right of action to seek injunctive and monetary relief from unions for similar violations.¹⁶⁸

Enabling Domestically Outsourced Workers to Build Countervailing Power Notwithstanding Labor Law's Exclusions and Weaknesses

State and local policymaking has emerged as a crucial area of law reform to strengthen and lift employment standards in order to build worker power and in turn

¹⁶⁵ See Elmore, "Recentring Labor Law."

¹⁶⁶ As I currently argue, this "can permit unions to protect workers and sustain a virtuous cycle of worker mobilization and proworker policymaking despite Board inoperability."

¹⁶⁷ Former Board Chair Lauren McFerran makes the same proposal, which was previously introduced by the PRO Act. See Lauren McFerran, "How to Save Labor Law from Slaughter," Century Foundation (December 11, 2025), <https://tcf.org/content/commentary/how-to-save-labor-law-from-slaughter>.

¹⁶⁸ Elmore, "Recentring Labor Law."



guard against domestic outsourcing practices.¹⁶⁹ State and local governments already share overlapping jurisdiction with federal agencies and have become primary actors in protecting and lifting labor standards.¹⁷⁰ State extension of collective bargaining rights to workers who are excluded from the NLRA, along with state and local forms of standard-setting and enforcement that include worker participation, have enabled unions and worker centers to overcome NLRA weaknesses and build countervailing power despite NLRA preemption.¹⁷¹

Federal policymaking can strengthen state and local policymaking and enforcement by reducing the NLRA as a barrier and through strategically funding states with innovative standards and enforcement models. For states that do not engage in public enforcement and that block local governments from stepping in, the federal government can fund unions and worker centers to enforce federal standards.

Expanding State Labor Laws to Cover Private-Sector Employees

States may regulate the labor relations of workers who are excluded from the NLRA, such as state and local employees.¹⁷² Organized labor has sought to lift the workplace standards of low-wage workers by extending state collective bargaining laws to other excluded workers, especially in home healthcare. Home healthcare workers often fall outside of the NLRA definition of “employees,” but in the 1990s as in-home care became

¹⁶⁹ The Harvard Law School Center for Labor and a Just Economy has proposed a number of state and local policymaking tools, including amending state constitutions and collective bargaining laws to strengthen labor rights for state and local workers and for private-sector workers excluded from the NLRA, and requiring worker representation on state boards to determine appropriate sector-specific work standards. See Center for Labor and a Just Economy, “Building Worker Power in Cities and States: A Toolkit for State and Local Labor Policy Innovation,” Harvard Law School, September 2024, <https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states>.

¹⁷⁰ Many states and cities have higher labor standards than federal law and enforcement powers far beyond federal agencies, such as treble-damages penalties, which have been shown to increase compliance with minimum wage laws. Daniel J. Galvin, “Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance,” *Perspectives on Politics* 14 (2016): 324, 341. Galvin finds that “the stronger the state’s employment laws, the lower the incidence of minimum wage violations, even when controlling for major covariates.” See, for example, Conn. Gen. Stat. § 31-72 (2024) (mandatory double wages for willful failures); N.J. Stat. Ann. § 34:11-4:10 (2024) (establishing up to 200 percent liquidated damages—that is, treble damages total—for knowing failures to pay wages); N.Y. Lab. Law § 683 (2024) (authorizing treble damages for wage theft unless the employer demonstrates the violation was unintentional and in good faith); Va. Code Ann. § 40.1-29(G) (2024) (up to double damages under with triple for knowing violations).

¹⁷¹ Kate Andrias and Benjamin I. Sachs, “Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality,” *Yale Law Journal* 130 (2020): 546, 551; Benjamin I. Sachs, “Despite Preemption: Making Labor Law in Cities and States,” *Harvard Law Review* 124 (2011): 1153, 1164.

¹⁷² The NLRA excludes “any State or political subdivision thereof” as an employer. 29 U.S.C. § 152(2). This “leaves States free to regulate their labor relationships with their public employees.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007); see Craig Becker, “The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response,” *Minnesota Law Review* 98 (2014): 1637, 1638–39. Becker notes that public-sector union membership grew tenfold between 1940 and 1970.



increasingly paid for by states, organized labor has successfully lobbied many states to permit home healthcare workers to collectively bargain for work standards through state law.¹⁷³ Home healthcare worker union organizing since the 1990s has led to the union membership of nearly one quarter, or roughly 800,000, of the 3.4 million home healthcare workers in the United States.¹⁷⁴ Other states additionally extend state labor law rights to agricultural workers.¹⁷⁵

But because of NLRA preemption, state collective bargaining law is limited to workers excluded by the NLRA. This limitation became glaring in 2025 when the NLRB lacked a quorum. But when several states, including California and New York, tried to step in with trigger laws permitting them to handle labor cases during that period, the board sought to enjoin these laws as preempted by the NLRA.¹⁷⁶ As of this writing, trial courts have granted preliminary injunctions partially enjoining the California trigger law and enjoining the New York trigger law.¹⁷⁷ The implication of this federal-state confrontation is grim: Forces hostile to labor law will seek to disable the board to create a no-man's-land in which NLRA rights cannot be vindicated by the board and the states are preempted from stepping in.

¹⁷³ Catherine L. Fisk and Margaux Poueymirou, “Harris v. Quinn and the Contradictions of Compelled Speech,” *Loyola of Los Angeles Law Review* 48, no. 2 (2014): 439, 446–47. Medicaid paid for half of care work by the 1990s, and by the 2000s “was the primary funding source for home health aide jobs.” Eileen Boris and Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* (Oxford University Press, 2012), 10.

¹⁷⁴ Dorothy Sue Cobble, *The Other Women’s Movement: Workplace Justice and Social Rights in Modern America* (Princeton University Press, 2004), 226. Home healthcare worker union organizing in the 1990s built on a foundation of, and existed alongside, non-union domestic and care worker activism in worker centers and in community organizing and welfare rights groups, as well as public-sector and healthcare unionism. Boris and Klein, *Caring for America*, 15–16, 123–51, 162–86, 192–209.

¹⁷⁵ See Hunter Knapp, “Essential, Not Expendable: Protecting the Economic Citizenship of Agricultural Workers,” *University of Colorado Law Review* 93 (2022): 459, 468. Knapp examines agricultural worker collective bargaining provisions in Arizona, California, Colorado, Kansas, Louisiana, New York, Nebraska, New Jersey, Oregon, Washington, and Wisconsin.

¹⁷⁶ 2025 N.Y. Sess. Laws Ch. 365 (McKinney) (codified as amended at N.Y. Lab. Law § 715 (McKinney 2025)); 2025 Cal. Legis. Serv. Ch. 139 (West); 2026 Wash. H.B. 2471; Marina Multhaup, “Washington Extends Labor Law to Private Sector Workers (if NLRA Preemption Ends),” OnLabor, March 30, 2026, <https://onlabor.org/washington-extends-labor-law-to-private-sector-workers-if-nlra-preemption-ends>; Elias Schisgall, “New York Leads Charge to Fill NLRB Void, Teeing Up Labor Fights,” Daily Labor Report, Bloomberg Law, June 20, 2025, <https://news.bloomberglaw.com/daily-labor-report/new-york-leads-charge-to-fill-nlrp-void-teeing-up-labor-fights>. Schisgall discusses New York, California, and Massachusetts proposals.

¹⁷⁷ Order at 12–13, *NLRB v. California Pub. Emp. Rels. Bd.*, No. 25-CV-02979 (E.D. Cal. Dec. 26, 2025) (order granting preliminary injunction) (partially enjoining California’s “trigger” law); *Amazon.com Services LLC v. New York State Pub. Emp. Rels. Bd.*, No. 1:25-cv-05311 (E.D.N.Y. Nov. 26, 2025) (order granting preliminary injunction) (enjoining enforcement of New York “trigger” law as likely preempted by the NLRA).



As I currently argue at length elsewhere, NLRB should support worker-protective states that seek to regulate the labor relations of private-sector workplaces.¹⁷⁸ Section 14(c)(1)-(2) provides that if the NLRB “decline[s] to assert jurisdiction over any labor dispute involving any class or category of employers,” then states and territories may assume jurisdiction over those labor disputes.¹⁷⁹ Law professor Benjamin Sachs proposes that these sections give “the Board a mechanism to unpreempt extensive sectors of the contemporary labor market and thereby to give states the latitude to experiment with alternative forms of labor law in those sectors of their economies.”¹⁸⁰ While the NLRB has yet to broadly embrace this option where it has declined jurisdiction, courts have interpreted the NLRA to permit states to step in and regulate.¹⁸¹ The NLRB should build upon this case law by issuing memoranda ceding its jurisdiction to states that have committed to sufficiently regulating labor relations, particularly in low-compliance sectors that states are better situated to regulate. This will enable unions and worker centers to build countervailing power by concentrating pro-worker policymaking at the state and local levels in those states. This will also empower the NLRB and general counsel to concentrate their resources on other enforcement priorities while overseeing the effectiveness of state regulation.

Relaxing NLRA preemption entirely raises the concern that state labor law would be used to dominate vulnerable workers.¹⁸² The NLRB can address this concern by only declining jurisdiction for states that extend full labor rights to workers and do not permit forms of employer domination that would violate the NLRA. Such a system would resemble the current process by which OSHA permits states to assume responsibility for occupational safety and health regulation. OSHA only authorizes state regulation “at least as effective” as OSHA’s and can revoke approval if the state becomes ineffective.¹⁸³ The NLRB could implement a similar process of entering into conditional agreements with states with effective programs.¹⁸⁴

¹⁷⁸ Elmore, “Recentring Labor Law.”

¹⁷⁹ 29 U.S.C. § 164(c)(1)-(2).

¹⁸⁰ Benjamin Sachs, “Unpreemption: The NLRB’s Untapped Power to Authorize State Experimentation,” OnLabor, December 24, 2022, <https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation>.

¹⁸¹ *Eatz v. DME Unit of Loc. Union No. 3 of Int’l Bhd. of Elec. Workers, AFL-CIO*, 973 F.2d 64, 68–69 (2d Cir. 1992) (these sections “permit state law to hold full sway in the event of Board declination, with Board and congressional oversight as the available remedy if the exercise of state law authority inadequately protected the collective bargaining process”); *Leedom v. Fitch Sanitarium, Inc.*, 294 F.2d 251, 254 (D.C. Cir. 1961) (Congress “intended to permit state agencies to assume greater responsibility should the federal agency decide to assume less”).

¹⁸² See Veena Dubal, “Sectoral Bargaining Reforms: Proceed with Caution,” *New Labor Forum* 31, no. 1 (2022): 11. Dubal raises concerns that state regulation of TNC drivers will result in worker domination unless there are guardrails protecting worker participation.

¹⁸³ 29 U.S.C. § 667; 29 C.F.R. § 1955.3(a)(1).

¹⁸⁴ See Elmore, “Recentring Labor Law.”



But even if the NLRB takes this approach, future administrations that are hostile to labor will displace state and local labor regulation by asserting jurisdiction. Stable, expansive state and local labor law regulation will require law reform. Among the key amendments needed to modernize labor law is a savings clause, analogous to the savings clause in the FLSA that makes the federal minimum wage a “floor” that states can raise.¹⁸⁵ Applied to the NLRA, a savings clause could permit states to strengthen labor law by extending labor law coverage beyond the common-law test. This could permit workers to assert private rights of action to challenge coercive and retaliatory employer responses to concerted activity; provide a fuller range of remedies, including compensatory and liquidated damages; and impose penalties for serious violations. This clause would also preempt state regulation that undermines collective bargaining relationships.¹⁸⁶

Encouraging Innovative State and Local Standards and Enforcement Models, and Deterring Abusive Forms of State Preemption

State and local policymaking since the 1980s has emerged as a crucial form of countervailing power to overcome NLRA weaknesses. Since 2012, the Fight for Fifteen and a Union movement has helped propel minimum-wage increases across the country—including 88 jurisdictions in 2026 alone (22 states and 66 cities and counties). In 14 states and 65 cities and counties, the minimum wage will reach or exceed \$15 per hour for at least some employees.¹⁸⁷ With the growth of state and local regulation of baseline work standards, state and local governments have used their wide-ranging authority to lift and strengthen work standards—including through licensing and permitting, procurement and contracting, tax credits, and wage theft prosecutions.¹⁸⁸

City agencies tasked with enforcing local labor standards often partner with local community groups and worker centers to protect local labor standards in vulnerable worker communities.¹⁸⁹ This form of public-private partnership, or “co-enforcement,”

¹⁸⁵ 29 U.S.C. § 218(a).

¹⁸⁶ Clean Slate for Worker Power, *Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level* (Center for Labor and a Just Economy, Harvard Law School, 2021), 9–12.

¹⁸⁷ Yannet Lathrop, *Raises from Coast to Coast in 2026: 68 Cities, Counties, and States Will Raise Minimum Wages on January 1, with 26 More Lifting Pay Later in 2026* (National Employment Law Project, 2026), <https://nelp.org/app/uploads/2025/11/NELP-Publication-Raises-from-Coast-to-Coast-in-2026.pdf>.

¹⁸⁸ See Terri Gerstein and LiJia Gong, “How Local Government Can Protect Workers’ Rights Even When States Do Not Want Them To: Opportunities for Local Creativity and Persistence Despite Double Preemption,” *Fordham Urban Law Journal* 51, no. 4 (2024): 977, 1011–22.

¹⁸⁹ Janice Fine, “New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward,” *University of Chicago Legal Forum* 2017 (2018): 143; Matthew Amengual and Janice Fine, “Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States,” *Regulation and Governance* 11, no. 2 (2017): 129. Formal programs have grown in recent years; by 2023 Janice Fine confirmed that of the 10 largest local labor standards offices, at least 7 provided funding to

has enabled local agencies to target domestic outsourcing by building trust in public enforcement among vulnerable worker communities and giving worker centers a voice in how complaints they bring to public agencies should be resolved.¹⁹⁰

States and local governments have also innovated negotiated standard setting, or leveraging state mechanisms that permit workers to participate in setting standards across sectors and regions.¹⁹¹ The NLRA does not preempt this form of standard setting because the recommended standards are not employer-specific and apply to all workers, whether or not they belong to a union.¹⁹² In recent years, the Fight for \$15 and a Union movement secured statewide sectoral bargaining for fast-food workers in California that resulted in a new \$20 an hour minimum wage for fast-food workers in the state.¹⁹³ In several states, other worker centers and unions expanded negotiated standard-setting approaches for home health and agricultural workers.¹⁹⁴

Many other states, however, have responded to the growth of local policymaking with abusive forms of state preemption law. Some local work standards are now preempted in 44 states, mostly in the past decade.¹⁹⁵ State preemption statutes have invalidated local minimum wage laws in 12 cities and counties.¹⁹⁶ This has been harmful to the political and economic rights of many vulnerable workers, with especially devastating consequences for residents of majority-minority cities in the Southeast.¹⁹⁷

community-based organizations for co-enforcement. Janice Fine and Jann Round, “Governing for Worker Power: Worker Centers Lead the Way on Labor Law Enforcement,” *New Labor Forum* (2023): 44, 48.

¹⁹⁰ “New Report Documents Innovative Community Enforcement Programs to Fight Wage Theft,” Economic Policy Institute, press release, June 3, 2023, <https://epi.org/press/new-report-documents-innovative-community-enforcement-programs-to-fight-wage-theft>; Jenn Round et al., *The Labor Standards Enforcement Toolbox: Tool 12: Introduction to Co-Enforcement* (Workplace Justice Lab, Rutgers University, 2022), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/WJL/Toolbox/Tool12_Intro_to_Co-enforcement_final.pdf.

¹⁹¹ See Cynthia L. Estlund, “Sectoral Solutions that Work: The Case for Sectoral Co-Regulation,” *Chicago-Kent Law Review* 98 (2024): 539, 544, 565. The best-known example of this came in 2015 by Fight for \$15 in New York, which participated in a state wage board that ultimately led to a \$15 minimum wage for fast-food workers. Andrias, “The New Labor Law,” 65–66.

¹⁹² *Metropolitan Life*, 471 U.S. at 754–55; *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. 1995); see Andrew Elmore, “Confronting Structural Inequality in State Labor Law,” *Maryland Law Review* 83, no. 4 (2024): 1192, 1218.

¹⁹³ Cal. Lab. Code 1475(a)(1) (2024); see Noam Scheiber, “California’s \$20 Fast-Food Minimum Wage Is About to Take Effect,” *New York Times*, March 28, 2024.

¹⁹⁴ Nevada and New York, for example, adopted similar standards boards for home-health and agricultural workers, respectively. Nev. Rev. Stat. §§ 608.530–608.650 (2025); N.Y. Lab. Law § 674-a (2025).

¹⁹⁵ “Workers’ Rights Preemption in the U.S.: A Map of the Campaign to Suppress Workers’ Rights in the States,” Economic Policy Institute, August 2019, <https://epi.org/preemption-map>.

¹⁹⁶ Laura Huizar and Yannet Lathrop, *Fighting Wage Preemption: How Workers Have Lost Billions in Wages and How We Can Restore Local Democracy* (National Employment Law Project, 2019).

¹⁹⁷ See, for example, *Lewis v. Alabama*, 896 F.3d 1282 (11th Cir. 2018), rev’d in part on other grounds on reh’g en banc, 944 F.3d 1287 (11th Cir. 2019) (criticizing Alabama’s “rushed, reactionary, and racially polarized” legislative process for preempting the majority-Black city of Birmingham, Alabama’s approved minimum-wage ordinance).



Extreme forms of state preemption that stamp out local economic regulation are antidemocratic and harmful to low-wage workers, especially workers of color in majority-minority cities.¹⁹⁸ They cannot be justified as promoting a uniform policy in many states, particularly those that have no minimum wage statute.¹⁹⁹ In states that are hostile to the economic and racial justice demands of low-wage workers, the National Labor Relations Board and US Department of Labor can protect state regulatory approaches and encourage unions and worker centers to build countervailing power. The NLRA protects concerted activity by workers seeking state and local wage standards.²⁰⁰ The DOL can also encourage state and local innovations such as these through its authority to fund state and local governments to enforce wage and hour law.²⁰¹ The DOL should direct private funding for enforcement in those states that (1) exempt domestic outsourcing from their wage standard—for example, with franchisor shield laws; or (2) block local governments from establishing their own standards, especially in states that have no state minimum wage or labor standards agency. DOL funding could also target effective collaborative relationships between public and private stakeholders in publicly negotiated sectoral work standards, and those that use co-enforcement as a strategic enforcement approach. Finally, Congress can condition a state's funds to implement workplace standards on its noninterference with local authority to regulate.²⁰² Federal action can support these innovations through federal support to the state and local jurisdictions that adopt them and protect worker participation. While the conditioning of state funds raises federalism concerns and is likely to be challenged,²⁰³ this litigation can clarify the important role that local governments play in protecting the economic and political voice of vulnerable workers.

¹⁹⁸ Elmore, “Confronting Structural Equality,” 1256–57.

¹⁹⁹ See “Wage and Hour Information,” Alabama Department of Labor, https://labor.alabama.gov/Wage_and_Hour_Info.pdf, last visited September 6, 2026.

²⁰⁰ The Supreme Court has long held that the NLRA broadly construes mutual aid or protection, including in nonunion workplaces, even if the concerted activities are “political” or advocate for the interests of other employees in other workplaces, such as a minimum wage increase. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569, 574–77 (1978); see also *In-N-Out Burger, Inc.*, 365 N.L.R.B. No. 39, slip op. at 1–3, 6–7 (Mar. 21, 2017), enforced, 894 F.3d 707, 714–20 (5th Cir. 2018) (employer application of a no-pin rule against employees wearing Fight for \$15 buttons is an unfair labor practice).

²⁰¹ 29 U.S.C. § 211(b) (authorizing DOL to reimburse state and local agencies for administering state labor laws).

²⁰² See *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.* No. 40–1, 469 U.S. 256, 268, 105 S. Ct. 695, 702, 83 L. Ed. 2d 635 (1985) (finding that a federal statute permitting local government to use federal funds for “any” governmental purpose preempted state statute requiring local government to distribute payments in specific way); see generally Nestor M. Davidson, “Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty,” *Virginia Law Review* 93 (2007): 959, 1000 (2007). Davidson identifies judicial protection of federal-local cooperation.

²⁰³ See *Nixon v. Miss. Mun. League*, 541 U.S. 125, 140–41 (2004) (cautioning that federal legislation that interferes with the state-local relationship should be treated with “great skepticism”).



Conclusion

Reestablishing a moral economy that extends a norm of fairness to all workers will require attending to the use of domestic outsourcing in many sectors as a dominant strategy to lower labor costs. Domestic outsourcing is an entrenched feature of many low-wage workplaces because of federal and state laws that permit businesses to retain the benefits of control while disclaiming the obligations of employment. This harms workers by suppressing wages and fragmenting worker voices.

Long-term solutions, such as broadly covering domestically outsourced workers by federal statute and affording them a private right of action to enforce federal labor rights, will require congressional action. But short-term, partial solutions are available. Federal agencies can streamline and extend the protections of labor and employment law to domestically outsourced workers through targeted presumptions of employment status. The FTC and state antitrust and consumer protection agencies can reduce employers' market power to suppress worker pay, by prohibiting misclassification and other coercive and exploitative business practices as violations of antitrust and consumer protection laws. Federal agencies can exclude businesses that engage in domestic outsourcing from tax credits and loan subsidies, and can promote broader employment standards in state unemployment insurance and workers' compensation systems.

Finally, strengthening labor standards will require state and local policymaking to overcome the weaknesses of federal labor law, with the participation of unions and worker centers to build countervailing power. Federal agencies can play an important role here as well: The NLRB can protect worker participation in labor standards enforcement and expand state authority to regulate private-sector labor relations by ceding its authority to states that effectively regulate labor relations. The US DOL can fund (1) states with innovative labor standard enforcement models and (2) unions and worker centers that organize in sectors where violations of basic workplace rights are routine, and in states that lack wage standards and block local jurisdictions from creating their own.





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