

# Worker Flexibility and Small Business Protection Act

For decades, massive corporations have worked to evade their responsibilities under traditional labor and employment laws in order to give themselves maximum leeway to deny workers their rights and protections without fear of legal liability. Corporations have done this primarily by “fissuring” the workplace, a phrase that refers to a range of actions taken by employers to restructure their businesses and business relationships to create multiple layers of companies between the top business and the worker, including the use of subcontractors, temp agencies, franchising, and classifying workers as independent contractors. This fissuring has enabled employers to avoid having legally-recognized employment relationships with the workers performing labor for them, allowing them to depress wages, undermine workers’ efforts to form unions, skirt payment of unemployment insurance premiums, and profit from workers’ rights violations while isolating themselves from legal liability for those violations. This systemic restructuring has also hurt small businesses by enabling corporations to squeeze them into intense competition with scofflaw companies that undercut them by violating workers’ rights, pushing small businesses to try to cut corners while big business is insulated from any liability.

The “Worker Flexibility and Small Business Protection Act” is bold legislation designed to address the “fissured workplace” and resulting erosion of workers’ rights, wages, and bargaining power. The bill makes legislative reforms to restore workers’ rights and protect small businesses from corporate abuse by making amendments to the following labor laws: Fair Labor Standards Act (FLSA), National Labor Relations Act (NLRA), Occupational Safety and Health Act (OSH Act), Migrant and Seasonal Agricultural Workers Protection Act (MSPA), Mine Act, Davis-Bacon Act (DBA), Service Contract Act (SCA), Walsh-Healey Act, Family and Medical Leave Act (FMLA), and Federal Unemployment Tax Act. Most amendments are made across laws, but some are statute-specific or create new rights that are situated primarily within the FLSA.

## **Summary**

The bill provides nearly all workers with most of the traditional labor rights they are entitled to as employees while also ensuring them flexibility at work; helps to protect small businesses by making big businesses responsible for respecting their workers’ rights; enables consumers to avoid funding workers’ rights violations by establishing public transparency on worker treatment; and provides for worker protections to be strengthened year after year instead of eroding in order to ensure a safe and secure future for workers.

The bill is comprised of four main titles:

**Title I—Right to Flexibility and Employee Protections at Work**

**Title II—Small Business Protection through Shared Responsibility for Workers’ Rights**

**Title III—Public Transparency on Workers’ Rights Violations**

**Title IV—Creating Broad and Increasing Worker Protections**

**Title I:** Gives workers who are currently treated by their employers as independent contractors the right to keep the scheduling and other work flexibility that they currently have and gives all employees greater scheduling flexibility; strengthens the definition of “employee” under

traditional labor laws in order to ensure most workers are properly classified as employees; and provides for meaningful misclassification enforcement and penalties.

**Title II:** Protects small businesses by making big businesses jointly responsible for worker protections so that they cannot shirk their responsibility for respecting workers' rights or manipulate smaller businesses into violating workers' rights; protects franchisees/licensees by making franchisors/licensors responsible for corporate-driven violations; puts CEOs and top shareholders on the hook for workers' rights violations; creates a host of new protections for the millions of "temp workers" across the country, including ensuring they are not paid less than direct employees, have the right to transition to full direct employees after one year, and have access to unemployment insurance and workers' compensation; and requires large employers to create plans to address workers' rights violations throughout their supply chains.

**Title III:** Provides consumers with information that enables them to avoid funding workers' rights violations by requiring employers to post a rating reflecting their violations of workers' rights and by directing the Department of Labor (DOL) to create a website with all such ratings.

**Title IV:** Ensures that worker protections strengthen with each year instead of eroding by requiring workers' rights to be interpreted broadly, exceptions to be interpreted narrowly, and prohibiting agencies from weakening worker protections; and increases the time period that workers have to sue to vindicate their rights.

## Section-by-Section

### **Title I—Right to Flexibility and Employee Protections at Work**

Section 101—Right to Flexibility (new rights built into FLSA alone)

**Right to Keep Flexibility**

**Right to Request Future Flexibility**

Section 102—Right to Employee Protections at Work (all laws except for SCA)

**Strengthen Employee Test – ABC-Plus test**

**Presumption of Employee Status**

**Misclassification as a Standalone Violation**

**Incorporation to further Violations**

**Presumption of Retaliation**

**Statutory Employers in Heavily Misclassified Industries** (FLSA, NLRA, OSHA, & FMLA alone)

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**Private Attorneys General** (FLSA alone)

### **Title II—Small Business Protection through Shared Responsibility for Workers’ Rights**

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**Joint Responsibility**

Section 202—Massive Corporations (all laws)

**Joint Responsibility for all Corporate-Family Employees**

**Joint Responsibility as Owners, Directors, Officers, and Managing Agents**

**Joint Responsibility as 10 Largest Shareholders**

Section 203—Franchisors (all laws)

**Joint Responsibility for Franchise Employees**

**Franchisee Protection from all Franchisor-Driven Violations**

Section 204—Temporary Staffing Companies (all laws, except for new rights below)

**Joint Responsibility for Temporary Workers**

**Equitable Treatment for Temporary Workers** (new rights in FLSA alone)

**New Protections for Temporary Workers: Employer Registration, Employee Rights, Prohibition on Permatemps** (all new rights in FLSA alone)

Section 205—Licensors (all laws)

**Joint Responsibility as Licensors**

**Licensee Protection from all Licensor-Driven Violations**

Section 206—Labor Contractors (all laws, except new prohibition below)

**Joint Responsibility for Labor Contractor Employees**

**Prohibition on Union-Busting through Contract Manipulation** (NLRA alone)

Section 207—Supply Chain Responsibility Plan (all laws)

### **Title III—Public Transparency on Workers’ Rights Violations**

Section 301—Consumer Right to Know about Compliance with Workers’ Rights (FLSA)

### **Title IV—Creating Broad and Increasing Worker Protections**

Section 401—General Standards for Applying and Interpreting Workers’ Rights (all law)

**Interpretation of Protections/Exemptions**

**No-Less-Protection Rule**

Section 402—Statutes of Limitation (most laws, not Mine Act, MSPA, or SCA)

### **Title V—General Provisions**

Section 501—Severability

## **Title I—Right to Flexibility and Employee Protections at Work**

### **Section 101—Right to Flexibility** (new rights in the FLSA alone)

#### **1. Right to Keep Flexibility**

Any employee who is currently classified as an independent contractor by an employer has the right to maintain the schedule and scheduling flexibility with that employer that the employee has before the enactment of this act. The employee shall continue to possess such schedule and scheduling flexibility for the duration of the employee's employment. The employer may not discharge such employee except upon a showing of just cause and may not discharge or otherwise discriminate against such employee because of or with relation to the employee's schedule or scheduling flexibility.

#### **2. Right to Request Future Flexibility**

All employees shall have the right to request to have the schedule that they desire. An employer may not discharge or discriminate against an employee for making a request. An employer must respond by either granting the request in full or providing the employee with a written justification for any portion of the request that the employer is denying based on compelling business necessity. If the employer does not grant the request in full, the employee may request review by DOL. DOL may overrule the employer's denial if DOL finds a lack of a compelling business necessity.

### **Section 102—Right to Employee Protections at Work** (across all laws except for SCA)

#### **1. Strengthen Employee Test – ABC-Plus test**

An individual performing any labor for remuneration shall be considered an employee and not an independent contractor, unless—(A) the individual is free from control and direction; (B) the labor is performed outside the usual course of the employer's business; and (C) the individual is customarily engaged in an independently established business. Employee status shall not be affected by any "agreement" stating the worker is an independent contractor. Non-compete agreements with workers are evidence of control and, therefore, employee status.

#### **2. Presumption of Employee Status**

An individual performing any labor for remuneration shall be presumed to be an employee, which can only be overcome by clear and convincing evidence.

#### **3. Misclassification as a Standalone Violation**

Making it a violation to wrongly classify an employee as an independent contractor, including civil penalties of \$10,000 for first violation, \$30,000 if repeat or willful, and 1% of net profits if widespread. May not be refunded by employment liability insurance.

#### **4. Incorporation to further Violations**

Prohibiting employers from having employees form a corporation, partnership, LLC, or other entity in order to facilitate, or evade detection of, a workers' rights violation.

5. **Presumption of Retaliation**

Action taken against an employee within 90 days of exercising her rights shall create a rebuttable presumption that the action was unlawful retaliation.

6. **Statutory Employers in Heavily Misclassified Industries**

Entities in certain industries with widespread misclassification shall be the employers of all workers performing labor beneficial to the entity: (1) transportation entities, being any entity that benefits from labor performed by workers in the form of any transportation in any vehicle, including transportation network companies, technology platform companies, passenger or food transportation companies, and cargo transportation companies; and (2) network dispatch entities, being any entity that uses a digital network to connect individuals or entities seeking services or labor with people seeking to provide services or labor, but not neutral online marketplaces or union hiring halls. Such workers must be compensated for time, immediately before performing labor, that is spent waiting for, receiving, reviewing, considering, accepting, and transporting themselves to perform it; minimum of 3 minutes, maximum of 30 minutes.

7. **Misclassification Enforcement through Reclassification & Stop Work Orders**

Mandating the issuance of a reclassification orders against an employer found to have misclassified an employee as an independent contractor; the employer must immediately comply, but has the right to a review for reconsideration, a hearing, and court appeals. Further mandating the issuance of a stop work order against an employer who refuses to comply with a reclassification order for 2 or more workers for 30 days (limited to the location of the violation, but if the employer has had a stop work order for misclassification in the past, then the subsequent stop work order shall cover all locations); the employer must immediately comply, but has the right to a review for reconsideration, a hearing, and court appeals; stop work order remains in effect until compliance and an agreed-upon payment schedule for backpay, damages, and civil penalties; employees affected by the work stoppage must be paid by the employer for up to 10 days of lost compensation. Violating a reclassification order results in a civil penalty of \$5,000 per day and net profits from the duration of the violation go to the misclassified employee. Any employer who successfully proves the individuals were not misclassified shall not be liable for any backpay, damages, and civil penalties, and shall be owed any demonstrable lost net profits (during stop work order) as demonstrated by clear and convincing evidence, and reasonable attorneys' fees.

8. **Private Attorneys General (In the FLSA alone)**

Give employees the right to sue an employer and recover 25% of the civil penalties on behalf of the employee and any other current or former employees, with the remainder going to the other employees. An employee must first file a notice with DOL of the employee's complaint and intention to file a civil action and DOL shall have 60 days to review and may decide to pursue the civil action on behalf of the employees, which will deprive the employee of the ability to pursue the action. If DOL does not pursue the action within 60 days, the employee may proceed. The action may not be sent to arbitration without the consent of DOL.

## **Title II—Small Business Protection through Shared Responsibility for Workers’ Rights**

### **Section 201—General Shared Responsibility for Workers’ Rights (across all laws)**

#### **1. Joint Responsibility**

Muscular joint employer test that adds to and expands existing standards. It first has a provision that reinforces the fact that multiple entities can all be employers of a single employee if they all satisfy the existing statutory definitions (not DBA, SCA, or Walsh-Healy, because they do not have such definitions); and then sets out the following additional standard to broaden responsibility.

Two or more persons shall be employers, acting directly or indirectly, with respect to an employee if—

- (A) each person directly or indirectly benefits or seeks to directly or indirectly benefit from the performance of labor by an employee; **and**
- (B)(i) each person exerts actual direction or control, directly or indirectly, over any material term or condition of the employee’s employment, including through an intermediary; **or**
  - (ii) each person exerts functional direction or control, directly or indirectly, over any material term or condition of the employee’s employment, including through intermediary; **or**
  - (iii) each person is legally capable, without regard as to whether such capability is used, of
    - (I) directly or indirectly exerting direction or control over any material term or condition of the employee’s employment; or
    - (II) directly or indirectly ensuring compliance with or upholding the rights and protections with regard to the employee’s performance of the labor in question; **or**
  - (iv) based on an act or omission of the two or more persons, the employee reasonably believed that such persons were the employee’s employers and the employee did not have actual knowledge that any of the persons were not the employee’s employer. **For the NLRA alone:** (in addition to the above language); **or**
  - (v) based on the totality of the circumstances of the industrial realities, including the way separate persons have structured their commercial relationship, 2+ persons wield sufficient influence over any material term or condition of an employee’s employment such that meaningful bargaining could not occur in the absence of the 2+ persons.

### **Section 202—Massive Corporations (across all laws)**

#### **1. Joint Responsibility for all Corporate-Family Employees**

An employer shall also be responsible for the rights and protections of an employee of a subsidiary of the employer, or subsidiary under a subsidiary.

#### **2. Joint Responsibility as Owners, Directors, Officers, and Managing Agents**

A civil penalty may be assessed against an owner, director, officer, or managing agent of the employer if the individual directed or committed the violation; established a policy

that led to the violation; or had actual or constructive knowledge of the violation, had the authority to prevent the violation, and failed to prevent the violation.

**3. Joint Responsibility as 10 Largest Shareholders**

The ten largest shareholders of an employer shall be jointly and severally liable for all violations; and shall be responsible for 10% of damages, civil penalties, or other restitution or fees assessed against the employer, with the employer responsible for 90%.

Section 203—Franchisors (across all laws)

**1. Joint Responsibility for Franchise Employees**

A franchisor shall also be responsible for rights and protections with regard to an employee, where a franchisee is responsible for the rights and protections.

**2. Franchisee Protection from all Franchisor-Driven Violations**

A franchisee shall have the right to legal indemnification from the franchisor if the violation was at the behest or direction of the franchisor; pursuant to franchisor policies, agreements, or contractual obligations; or due to other direct or indirect franchisor control or pressure. A franchisor may not have a franchisee waive this right and may not retaliate against a franchisee for utilizing this right to actually seek indemnification; civil penalty of \$100,000 on franchisor for violating these prohibitions.

Section 204—Temporary Staffing Companies

**1. Joint Responsibility for Temporary Workers (across all laws)**

An employer shall also be responsible for rights and protections with regard to covered employees provided by another employer to perform labor for the employer; the term ‘covered employee’ means an employee provided by another employer to perform labor for the employer, including a temporary or short-term contract employee.

**2. Equitable Treatment for Temporary Workers (In the FLSA alone)**

An employer may not pay wages to covered employees provided by a staffing company less than the employer pays to direct employees for similar work (or 80% if the lower pay is due to a seniority system, merit system, production quality/quantity, or any factor other than employment status). If covered employees are not provided with the same benefits as direct employees, the covered employee shall be paid the wage required above plus either (a) 25% or (b) the amount the employee would have to pay to secure equivalent benefits, whichever is less; in no case shall the minimum wage rate required here be less than 125% of the federal minimum wage.

**3. New Protections for Temporary Workers: Employer Registration, Employee Rights, and Prohibition on Permatemps (all new rights in FLSA alone)**

**Registration:** Temporary staffing companies must register with DOL in order to operate: proof of UI account, proof of workers’ compensation insurance, report on race & gender of employees. DOL may revoke registration due to workers’ rights violations. Employer with officer, director, partner, manager, or owner who had registration revoked in last 5

years is ineligible to register. DOL shall maintain a website of registered employers, suspended employers, and revoked employers. Employers may only contract with registered staffing companies. Employers must keep records.

**Miscellaneous rights:** Covered employees may not be charged for registering, obtaining work, drug tests, background checks, or method of payment (debit cards). Staffing company employers may not restrict employees from accepting direct employment with an employer the employee performs work for or charge a conversion fee to the employee/employer. Staffing companies shall provide employment notices to employees (name, address, wages, duration, transportation, etc.).

**Meals:** Covered employees have the right to refuse to purchase a meal, shall not be charged for meals not consumed, and shall not be charged more than the cost of the meal.

**Transportation:** Covered employees may not be charged for transportation by either employer; the staffing company is responsible for the safety of any transportation it secures for employees; staffing company may not refer covered employees to any transportation unless it's public or free; if a covered employee is provided with transportation, then the employee must be provided with return transportation; if sent to a job that does not exist, the employee shall be reimbursed transportation costs and paid for 2 hours of work.

**Equipment:** Covered employees shall not be charged for equipment and shall be reimbursed if required to purchase equipment.

**Prohibition on Permatemps:** after working 1,040 hours in 12-month period, employers must convert a covered employee into a direct employee. An employer may not evade this through multiple short-term contracts or by replacing the covered employee with a different covered employee.

**Labor Disputes:** Employers may not utilize covered employees during labor disputes with its direct employees.

**Penalties:** Civil penalties for violations (\$6,000 per day per employee for employee protection violations; \$500 per day for registration violations); potential revocation of registration if employer willfully commits a violation within 3 years of an earlier violation.

#### Section 205—Licensors (across all laws)

1. **Joint Responsibility as Licensors**

An entity licensing its brand, name, or other likeness to an employer for consideration shall also be responsible for rights and protections of the employees of such employer.

3. **Licensee Protection from all Licensor-Driven Violations**

A licensee shall have the right to legal indemnification from the licensor if the violation was at the behest or direction of the licensor; pursuant to licensor policies, agreements, or contractual obligations; or due to other direct or indirect licensor control or pressure. A licensor may not have a licensee waive this right and may not retaliate against a licensee for utilizing this right to actually seek indemnification; civil penalty of \$100,000 on licensor for violating these prohibitions.



## Section 206—Labor Contractors (across all laws)

### 1. **Joint Responsibility for Labor Contractor Employees**

An employer shall also be responsible for rights and protections with regard to an employee of a labor contractor, or labor subcontractor under a labor contractor.

### 2. **Prohibition on Union-Busting through Contract Manipulation** (NLRA alone)

Creating a new unfair labor practice if employers reject contractors because they have workforces represented by labor organizations or end an existing contract when a contractor's employees are considering to organize or have chosen to organize, or if employers threaten to take either of these actions.

## Section 207—Supply Chain Responsibility Plan (across all laws, but FLSA is primary)

### 1. **Supply Chain Responsibility Plan**

Each large employer (100+ employees) shall develop and carry out a supply chain responsibility plan that details how the employer will attempt to ensure that its supply chain does not include employers that regularly violate workers' rights (across all labor laws, including foreign countries' national labor laws). Shall include: an assessment of violations (of all labor laws) by (a) each larger employer in the supply chain (19+ employees) and (b) each employer that provides a large volume or dollar amount of the supply chain; a plan for removing any employers that regularly violate workers' rights from the supply chain or, if removal is not possible due to a limited number of suppliers, then a plan for utilizing its leverage as a purchaser to improve compliance; and a list of the organizations that can assist the employer, including workers' rights advocates. The plan shall be submitted to DOL annually and shall be posted publicly on the employer's website. DOL shall be the primary enforcer of these provisions, but it shall be a separate violation of each individual labor law to not develop and submit such plan to DOL or to exclude a covered law from such plan; civil penalty of \$50,000 per month.

## Title III—Public Transparency on Workers' Rights Violations

### Section 301—Consumer Right to Know about Compliance with Workers' Rights

#### 1. **Workers' Rights Compliance Ratings** (In the FLSA alone, but includes all laws)

Employers shall be required to post in its main entryway and to its website a notice of compliance with labor laws over the past three years, to be updated annually. The notice shall provide a rating of the employer's compliance with labor laws in the form of a concise English-language summary paired with an emoji face or cartoon face and color that reflect that summary: (1) Excellent, meaning no or few violations over the 3-year period; (2) Good, meaning some violations but no major or extensive violations; (3) Okay, meaning multiple violations or very few major or extensive violations; and (4) Needs Improvement, meaning several violations, more than a few major or extensive violations, or willful or repeated violations. DOL shall create the notice and shall prescribe through regulations what number, degree, and extent of violations within the

past three years qualify for each rating. Employers may request that DOL reconsider its rating; DOL shall accept such request and conduct a second review; DOL shall either alter its rating or the employer shall post the original rating. If the employer remedies violations and reforms its practices to ensure future compliance, it may request an additional review; DOL shall accept such request and conduct a review, and either revise the rating or not. DOL shall create a public website that contains all ratings for all employers. Penalties of \$1,000 per worker per day in civil penalties as well as a requirement to publish the rating in a local newspaper if the employer does not post the rating physically and on its website.

## **Title IV—Creating Broad and Increasing Worker Protection**

### **Section 401—General Standards for Applying and Interpreting Workers’ Rights**

1. **Interpretation of Protections/Exemptions** (across all laws)  
All protections afforded employees shall be interpreted expansively in favor of the employee or individual claiming classification as an employee. All exemptions and exclusions shall be interpreted narrowly against the employer, or person alleged to be an employer, and limited in application to those persons or circumstances plainly and unmistakably within the language and spirit of the exemption or exclusion. Any person asserting the applicability of an exemption or exclusion shall prove such applicability by clear and convincing evidence.
2. **No-Less-Protection Rule** (across all laws)  
The agency shall not take any action to reduce a protection afforded an employee through any regulation, guidance, opinion, ruling, standard, order, adjudicative decision, or other interpretation from the protection provided to the employee through a prior regulation etc., unless such reduction is explicitly and specifically mandated by an Act of Congress. Agencies may request Congress to take such action. A reviewing court shall defer to any regulation etc. that increases or otherwise strengthens a protection afforded to an employee unless it is plainly erroneous or inconsistent with the law.
3. **Statutes of Limitations** (most laws, not Mine Act, MSPA, or SCA)  
Extend all SOLs to 4 years, 6 if willful/repeat.

## **Title V—General Provisions**

### **Section 401—Severability (a general severability clause)**