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# Corporate Crackdown Project: Protecting Workers From Corporate Crime

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SPECIAL THANKS TO ZENA WOLF

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# Introduction

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Nowhere is the government's failure to hold corporate crime accountable more evident to voters than in the realm of workers rights. In the United States, corporations routinely get away with stealing employee wages, ignoring workplace safety, and discriminating against marginalized people.

As President, Donald Trump sabotaged the functions of the Department of Labor (DOL) and associated agencies — accelerating a harmful, longstanding trend of weaker workplace regulations in the process. Trump appointed anti-worker ideologues to key roles, and as a result labor law enforcement was rolled back even further. This came at the expense of working families and union organizers.

In contrast, Joe Biden has pledged to be the “most pro-union President leading the most pro-union administration in American history.” While congressional gridlock presents a challenge to his administration's labor agenda, meaningful progress can still be made through the strong enforcement of existing laws. In doing so, the Biden administration will be able to prove its commitment to workers' welfare, and win support from the public in the process.

The following report is the first installment of Data for Progress and the Revolving Door Project's collaborative Corporate Crackdown Project. In this report, we critically assess the record of the Biden administration in a number of vital agencies. The report concludes with a number of recommendations for the administration going forward.

Within the Department of Labor, this report assesses the Biden-era track record of:

- ▶ The **Wage and Hour Division** (WHD), which is primarily responsible for enforcing minimum wage and overtime laws
- ▶ The **Office of Labor-Management Standards** (OLMS), which is responsible for “labor-management transparency”
- ▶ The **Occupational Safety and Health Administration** (OSHA), which is responsible for setting and enforcing workplace safety standards
- ▶ The **Employee Benefits Security Administration** (EBSA), which is responsible for protecting benefits and pensions of workers in employer-sponsored retirement and health benefit plans

Additionally, this report examines the activities of:

- ▶ The **National Labor Relations Board** (NLRB), an independent agency tasked with ensuring fair collective bargaining standards
- ▶ The **Equal Employment Opportunity Commission** (EEOC), an agency that administers and enforces laws against workplace discrimination
- ▶ The **Office of the United States Trade Representative** (USTR), specifically as the office's functions relate to labor matters



## Wage and Hour Division (WHD)

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### I. OVERVIEW

The **Wage and Hour Division** (WHD) of the DOL is responsible for the enforcement of federal minimum wage, overtime pay, and child labor laws, among others. The WHD employs investigators across the country to document potential violations of the Fair Labor Standards Act (FLSA) and other laws. WHD investigators are empowered to recommend criminal charges for willful violations of the FLSA and other relevant laws.

Donald Trump hindered the division's ability to enforce its statutory responsibilities. The Trump-era WHD enabled employee misclassification, which allows employers to skirt FLSA responsibilities. During this period, the agency removed deterrents against wage theft, effectively enabling employers to steal from tipped workers. The WHD saw a dramatic \$50 million decrease in recoveries in the 2020 fiscal year, which coincided with the agency's functions going remote due to the coronavirus. In October 2021, the DOL Office of the Inspector General condemned the Trump-era WHD's poor implementation of temporary paid-leave benefits.

Since coming into office, the Biden administration has pushed to reinvigorate the WHD's ability to enforce wage law. To lead the agency, Biden nominated David Weil, a strong labor advocate who led the division during the Obama administration. Weil is a fervent critic of Uber and other companies that misclassify employees as independent contractors to avoid FLSA responsibilities. Under the Biden administration, the WHD launched a public awareness campaign to educate workers about their "essential protections" during the pandemic.

### II. THE BIDEN ADMINISTRATION'S ACTIONS TO SUPPORT WHD

#### Cracked Down On Misclassification Of Employees As Independent Contractors

Misclassifying employees as independent contractors allows employers to deny workers benefits under the FLSA. Misclassified workers are not guaranteed minimum wage protections or "time-and-a-half" pay for overtime work. In 2019, Trump's WHD issued anti-worker interpretive letters that made it easier for corporations to misclassify workers as independent contractors.

In February 2021, the WHD scrapped these interpretative letters, thereby abandoning the Trump administration's guidance. In May 2021, the agency also withdrew the "Independent Contractor status under the Fair Labor Standards Act" rule, which was issued in the last weeks of the Trump presidency.

In doing so, the WHD stopped a rule that would have simplified the six-factor independent contractor test to help employers misclassify workers. Additionally, Biden's WHD withdrew a Trump-era opinion letter that determined truck drivers' sleep time was not eligible for overtime pay under the FLSA.

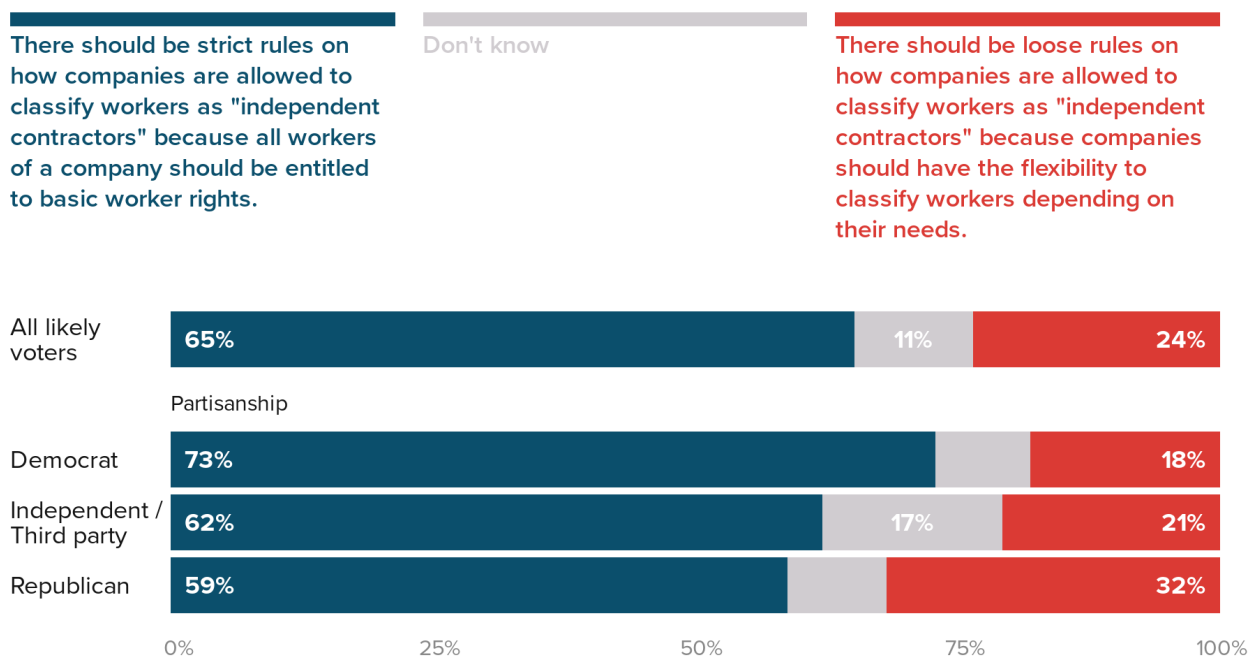
Polling by Data for Progress in November 2021 found wide support for restricting companies' ability to misclassify workers as independent contractors. By a wide 41 percent margin, voters across party lines agreed that there should be strict rules on employee classification in order to protect workers' rights. This notably includes a majority of Republican voters, who were found to support restricting

companies' ability to misclassify workers by a +25-point margin. It's clear that stopping corporations from skirting their obligations to employees proves popular across party lines.

## Majority of Voters Prefer Strict Rules on How Corporations Classify Independent Contractors

"Independent contractors" are workers that provide services to businesses, but are not classified as full-time employees, so they are not entitled to minimum wages, overtime pay, anti-discrimination protections, union rights, or injury compensation.

When thinking about how companies are allowed to classify workers as "independent contractors", which of the following statements comes closer to your view, even if neither is completely right?



November 10–15, 2021 survey of 1,323 likely voters

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## Rolled Back Trump Initiative Which Shielded Employers From Consequences For Wage Theft

Wage theft — the act of an employer not paying an employee the full wages they are legally owed, such as not paying workers overtime — is an epidemic in the United States, with one report in 2017 estimating billions in damages as a result.

Employers have been enabled to steal employees' wages because of a lax regulatory environment, which only got worse under Trump. In 2018, the WHD created the Payroll Audit Independent Determination (PAID) initiative, a voluntary reporting system for employers guilty of wage theft. Under the program, employers would avoid liability for their crime if they admitted to the offense and paid back the money stolen. The virulently anti-worker rule was likened to someone robbing a bank and facing no legal penalty as long as they returned the money and pledged not to do so again.

The Biden administration rolled back Trump's PAID rule in January 2021. Per WHD guidelines, employers that violate minimum wage or overtime laws are subject to civil fines of \$1,000 per violation.

### **Empowered Regional WHD Officials To Enforce Labor Law, Instead Of Using Agency Head As A Choke Point**

The Trump-era Department of Labor worked to disempower department officials from punishing labor law violations. Trump's WHD administrator issued instructions that centralized the agency's authority under her command. As a result, regional officials had to seek her direct approval before using agency tools to punish violators. This move created a "chilling effect" to deter career officials from policing wrongdoing.

On March 8, 2021, Biden's interim WHD administrator revoked these instructions. In doing so, regional officials are now able to vigilantly enforce wage law. These officials are once again able to use tools such as enhanced compliance agreements (ECAs), which require violators to strictly adhere to the terms of a settlement agreement.

### **Rolled Back Trump's "Joint Employer" Rules**

When someone works for two (or more) employers, said employers are jointly liable for the employee's hours worked under both. This arrangement, long understood by regulators, was challenged by the Trump WHD. In 2020, Trump's WHD issued rulemaking to make it easier for joint employers to escape FLSA responsibilities.

The most powerful elements of the rule were largely struck down by a federal judge in September 2020. In July 2021, Biden's WHD formally voided the entire rule, a major victory for workers and blow to employers seeking to skirt FLSA responsibilities.

### **Reinstated Obama's "Double Damages" Initiative, Enabling Greater Payouts From Wage Theft Cases**

During the Obama administration, the WHD was enabled to pursue prelitigation liquidated damages, sometimes referred to as "double damages." Under this arrangement, the WHD was able to seek double the payment stolen from workers in instances of unpaid overtime and minimum wage. Unsurprisingly, revoking this pro-worker policy was a priority of the business lobby following Donald Trump's election.

In June 2020, the Trump administration quietly rolled back Obama's initiative to seek double penalties in wage settlements. This rollback was supposedly done to remove "barriers to economic prosperity as America strives to defeat the economic effects of [the coronavirus pandemic]." As part of the Biden administration's decentralization of WHD powers, regional officials are once again permitted to seek liquidated damages.

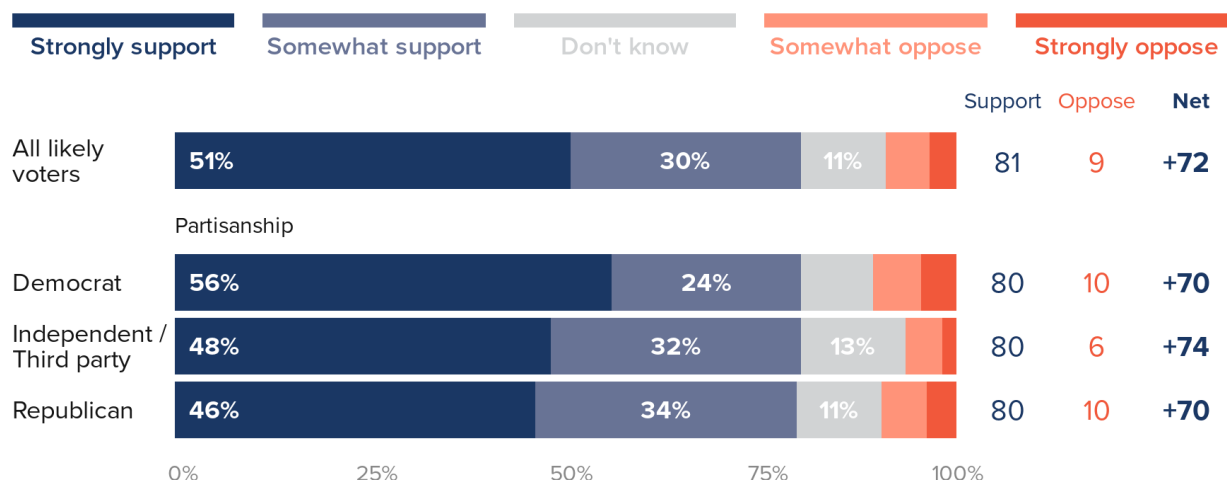
Polling by Data for Progress found that the vast majority of Americans support efforts to provide victims of wage theft with fair reimbursement. 80 percent of Democrats, independents, and Republicans indicated support for a recent policy change that mandates full reimbursement of wages withheld from workers. It's clear that requiring employers who steal workers' wages to provide their victims with no less than a full reimbursement is popular across ideological lines.

## Majority of Voters Support 100% Back Pay in Cases of Wage Theft

In the past, employers who were withholding wages from workers were ordered by the courts to pay back their workers 80% of the wages and compensation they were owed.

Recently, the federal government changed this requirement so that now employers who are found in court to withhold wages from workers have to pay back no less than 100% of the wages and compensation their workers are owed.

Do you support or oppose this new requirement to pay workers who were withheld wages no less than 100% of what they were owed?



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## Strengthened Protections For Tipped Workers

In September 2021, the DOL rolled back Trump-era rules that limited the department's own ability to penalize employers who stole tipped employees' wages. The new rule clarifies that managers and supervisors can *contribute* to tip pools, but are not permitted to *receive* a share of the tips paid to rank-and-file workers.

Additionally, the Biden administration rolled back Trump-era rulemaking on the so-called "80/20 rule". Under Trump, the WHD issued rulemaking that enabled employers to pay workers the tipped minimum wage of just \$2.13 an hour for non-tipped tasks. By reviving the "80/20" rule, employers are limited in their ability to pay employees the tipped minimum wage for non-tipped tasks.

### III. LEVERAGING THE WHD TO PROTECT WORKERS

#### Building Agency Capacity

The WHD's ability to rein in wage theft and other corporate crimes is inhibited by the agency's lack of capacity. According to a May 2021 report by the Economic Policy Institute (EPI), the WHD went from an average of one investigator per 69,000 workers in 1978 to one investigator per 175,000 in 2018.

This number falls well short of the 10,000 workers per investigator recommendation of the United Nations' International Labour Organization. EPI's findings are made even more concerning by the fact that the WHD is effectively the only agency capable of punishing wage law violations in many states.

#### Reversing The Declining Number Of Recoveries From Wage Violations

Data collected since the onset of the Coronavirus pandemic paints an alarming image of WHD enforcement trends. According to the WHD's Office of the Inspector General, the agency saw a 21% drop in back wages recovered in the 2020 fiscal year than in the year prior. This means that the likely millions of dollars' worth of stolen wages remain out of the hands of workers.

According to a 2021 study by the Peterson Institute for International Economics (PIIE), WHD's weak enforcement of wage laws has helped cultivate an environment in which there are few deterrents against companies seeking to commit wage theft.

#### Intensifying Scrutiny Of The Agricultural Sector

It's no secret that farmworkers are among the groups of workers in this country most vulnerable to exploitation. America's agricultural production relies on the tireless work of immigrant workers, including both undocumented workers and workers on temporary work visas.

Research conducted by the Economic Policy Institute (EPI) painted a disturbing picture of the conditions of farmworkers: Over 70% of farms investigated by the WHD were found to violate farmworkers' rights, including through wage theft. Despite this, EPI calculated that the chance of a farm employer being investigated by the WHD is just over one percent.

It's clear that the WHD should allocate far more resources towards investigating farm employers for wage theft and other violations. In order for this scrutiny to be effective, the federal government must safeguard the rights of undocumented workers, who risk deportation if they speak out about poor conditions.

## IV. GENERAL ASSESSMENT

**Under Biden, the WHD has made meaningful steps towards reversing the damage inflicted on the agency under Trump. While a welcome development, the WHD's functions remain hindered by a paucity of resources.**

Since Biden's inauguration, the agency rolled back Trump-era initiatives that enabled wage theft, especially at the expense of tipped workers. Regional officials whose powers were stripped away during Trump are once again empowered to tackle wage violations.

WHD enforcers are once again allowed to seek "double damages" to deter further violations, and rules that enabled "joint employers" to skirt FLSA responsibilities were invalidated. David Weil's appointment to lead the WHD is a good sign that the agency will clamp down on employee misclassification, and the agency has rolled back Trump-era initiatives that made doing so easier.

With this in mind, it must be stressed that these developments point to a revival of the *status quo ante* of 2017, not the beginning of a new path for the agency. While infinitely preferable to Trump's anti-labor agenda, the Biden administration needs to transform the WHD into an agency much stronger than it was in the Obama era and before.

It is unfortunately necessary to recognize that the agency's ability to hold employer misconduct accountable is complicated by a hostile judicial environment: Overtime protection rules implemented during the Obama administration were stifled by a district court judge before they could go into effect in 2016.

That said, the primary obstacle facing the WHD is a paucity of human and financial resources. The White House needs to prioritize increased funding and staffing for the agency in budget agreements, so that it will be able to pursue vigorous enforcement. At the legislative level, the Biden administration must push for an end to forced arbitration clauses, which effectively prevent many victims of wage theft from seeing justice. The Biden administration should take the advice of former Department of Labor official Nancy Leppink and consider "revok[ing] franchise licenses and federal contracts from companies with a history of wage theft".



## Office of Labor-Management Standards (OLMS)

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### I. OVERVIEW

The **Office of Labor-Management Standards** (OLMS) is the subdivision of the DOL tasked with promoting “labor-management transparency.” In theory, the agency penalizes both businesses and unions that engage in impropriety during union elections. In reality, the OLMS has long penalized union corruption while turning a blind eye to employers that break laws during union elections.

*Bloomberg Law* describes OLMS as the “federal government’s main check on private-sector labor unions,” a creation of the Cold War designed to crack down on “purported Communist infiltration in the labor movement.” In the modern era, conservatives have leveraged the OLMS’s powers to curb labor organizing. It’s unsurprising, then, that the Trump administration pushed for a relative increase in OLMS funding alongside steep cuts to the DOL itself.

The OLMS enforces the Landrum-Griffin Act, which primarily serves to regulate union conduct. However, the law also mandates transparency from businesses that enter “arrangement[s] with a labor relations consultant” to “persuade employees to exercise or not to exercise [the] right to organize and bargain collectively.” In other words, if managed correctly, the administration could leverage OLMS’s functions to curb the “union-avoidance industry,” which operates in secrecy.

### II. THE BIDEN ADMINISTRATION’S ACTIONS TO SUPPORT THE OLMS

#### Appointed Strong Worker Advocates To The Agency

Biden’s appointment of labor lawyer Jeff Freund as OLMS director was an inspired choice. Freund has criticized the OLMS for releasing deceiving statistics that imply union corruption is far more common than it actually is. As director, Freund has condemned anti-labor organizations that “take our data [to] produce a picture based on cherry-picking examples.” Freund intends to launch an OLMS outreach campaign to promote the benefits of unions and spread awareness about wage theft and other employer offenses.

Under Freund, former AFL-CIO General Counsel Lynn Rhinehart joined the OLMS as a senior advisor. Rhinehart was formerly a fellow at the Economic Policy Institute (EPI), a progressive think tank with strong ties to organized labor. EPI has documented the commonality of businesses violating labor law during union elections.

#### Moved To Nix Trump’s Anti-Labor “2020 Rule”

The OLMS has long imposed burdensome reporting requirements on unions to exhaust their resources. Under Trump, the OLMS instituted the “2020 rule,” which mandated unions with over \$250,000 in annual receipts disclose sensitive information related to their trusts.

This invasive rule meant that relevant unions would have to share information related to strike funds, apprenticeship programs, and credit unions. In March 2021, Biden’s OLMS halted enforcement of the rule in a victory for unions. In May, the OLMS officially published a proposal to rescind the burdensome and invasive rule.

### III. LEVERAGING THE OLMS TO PROTECT WORKERS

#### Reinstating The “Persuader” Rule

In 2016, the Obama-era DOL instituted the “persuader” rule. Had it been implemented, the rule would’ve mandated businesses to report when they hire consultants to crush union drives. Unfortunately, the persuader rule was struck down by a federal judge and formally nixed in 2018. OLMS head Freund has suggested reinstating the rule “as well as can be managed, given what we know the department faced in 2016.”

Many legal experts, including a group of 35 scholars who attested as much in a 2016 letter, agree the persuader rule is legally permissible. Given the impact the persuader rule would have if implemented, the OLMS must pursue reinstating the rule despite possible hurdles from conservative jurists.

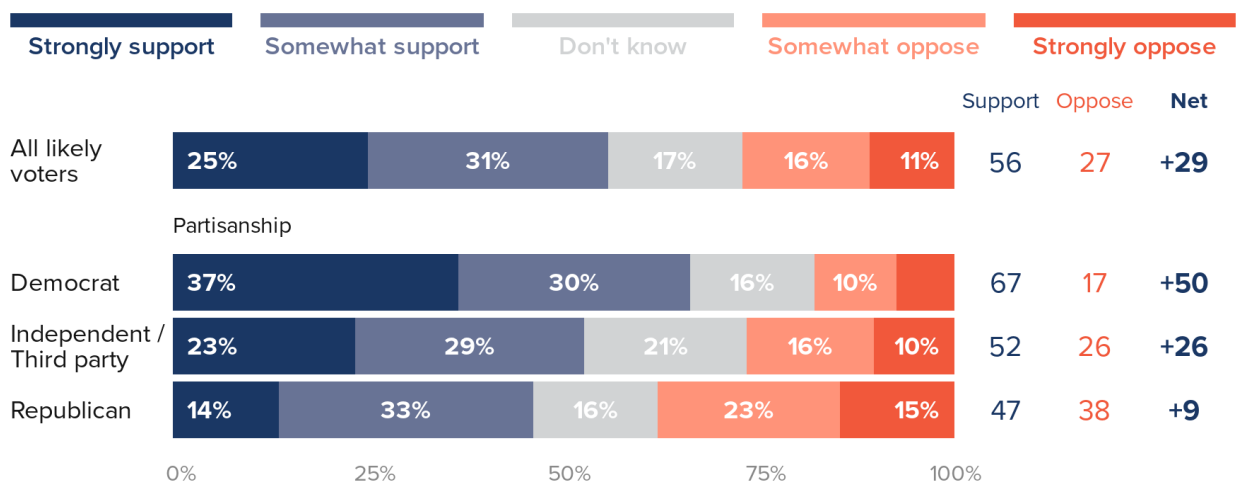
The persuader rule alone can only go so far to clamp down on the union-avoidance industry. Provisions in the Protect the Right to Organize (PRO) Act, which is currently under debate in Congress, would provide necessary new rules. The PRO Act would ban anti-union “captive audience” meetings, in which employees are forced to attend presentations by employers meant to scare them away from unionizing. Other PRO Act provisions curb employers’ ability to delay union certifications. However, while insufficient on its own, forcing this secretive industry to come out of the shadows is a necessary first step achievable through a renewed persuader rule.

Polling by Data for Progress in November 2021 found wide political support for requiring transparency from employers that hire union-avoidance consultants. By a +29-point margin, voters across party lines indicated support for such a regulation. This number includes both a majority of Democrats (67 percent) and independents (52 percent), as well as a 47 to 38 percent plurality of Republican voters.

## Majority of Voters Support Transparency when Employers Hire Union-Busting Consultants

Some government regulators are considering a proposal that would require all employers to say when they use private consultants to disrupt unionization efforts among their workers.

Do you support or oppose this proposal?



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## Ending Abusive Probing Of Worker Centers

Worker centers assist workers who aren't part of a collective bargaining organization. During the Trump administration, the OLMS conducted abusive probes targeting non-profit worker centers. These were made in an effort to subject worker centers to the same burdensome reporting requirements imposed on unions.

Under Trump, the *Centro de Trabajadores Unidos en Lucha* (CTUL), which pushed major corporations to use unionized janitorial services, faced OLMS harassment. As it probed the Texas Workers Defense Project (TWDP), Trump's OLMS hired a union-avoidance consultant who sought burdensome disclosure requirements on worker centers.

In April 2021, Freund publicly stated his opposition to probing worker centers, and called for the OLMS to cease this activity. Freund should go forward with issuing agency guidance on worker centers to help them “organize their conduct,” so that they can avoid unfair scrutiny from a future Republican administration.

## IV. GENERAL ASSESSMENT

**It's clear that the little-known and ostensibly unimportant OLMS could prove useful in clamping down on employer misconduct if leveraged correctly. Nevertheless, despite positive overtures from agency leadership, it remains to be seen if the agency will be able to hold employers to their obligations under the Landrum-Griffin Act.**

The Biden administration's choices for agency personnel were very strong, especially given the agency's history. Invalidating the abusive, anti-union “2020 Rule” was a needed development, and the Biden-era OLMS should receive credit for it. Nevertheless, it remains to be seen whether the OLMS will be mobilized in the way Director Freund envisions.

While an effort to implement the “persuader rule” would face inevitable legal challenges, it is too important of an initiative not to attempt. Not only is it moral to require these disclosures: It would be a major step toward righting the historic injustice of the agency inequitably enforcing the Landrum-Griffin Act's provisions related to employers.

Furthermore, Freund must follow through on bringing probes of worker centers to a halt, and, more importantly, issue guidelines that would help protect them from future right-wing harassment.

## Occupational Safety and Health Administration (OSHA)

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### I. OVERVIEW

The **Occupational Safety and Health Administration** (OSHA) is responsible for setting and enforcing safe workplace standards. Created by the Occupational Safety and Health (OSH) Act of 1970, OSHA deputizes inspectors known as compliance officers to inspect workplaces for health hazards. OSHA is empowered to levy civil penalties or, in some cases, criminal sanctions against negligent employers.

The Trump administration drastically reduced the agency's powers, even as corporations have forced their employees into unsafe and illegal situations. The damage is in no way hypothetical; in September 2020, the agency reported that it had closed more than half of workers' coronavirus safety complaints without even investigating. In February 2021, an inspector general report confirmed that the increased risk from the pandemic, and the decreased OSHA capacities and inspections, actively put workers' safety at risk.

Reinvigorating OSHA to ensure safe standards at American workplaces should be understood as a racial justice issue. According to the AFL-CIO, workplace deaths increased among Black and Latino/a workers in 2018, with fatality rates for both groups (3.6 and 3.7 per 100,000 workers, respectively) exceeding the general fatality rate of 3.5 per 100,000. Furthermore, strengthening OSHA is crucial to ending the poor working conditions faced by many immigrant workers. The same AFL-CIO study revealed the highest number of workplace deaths of immigrant workers in over twelve years.

It's clear that the nation's premier workplace safety regulator was a casualty of Trump's anti-regulatory agenda. Since coming into office, Biden has made meaningful steps towards reversing this and charting a new course for the agency. From strong personnel choices, revoking Trump-era initiatives, and implementing long-overdue policies, Biden's OSHA stands to be a force for workers' welfare.

### II. THE BIDEN ADMINISTRATION'S ACTIONS TO SUPPORT OSHA

#### Staffed OSHA With Strong Workers' Safety Advocates

OSHA lacked a permanent administrator from 2017 through 2021. To lead the agency, Biden tapped Doug Parker, head of California's Division of Occupational Safety and Health (Cal/OSHA). Cal/OSHA's workplace safety standards are among the strongest in the country, including in areas such as workplace violence. Under Parker, Cal/OSHA fined a food manufacturing plant \$450,000 for negligence that led to the spread of the coronavirus. In contrast, the federal government has never fined a food processor over \$15,600.

Besides Parker, Biden bolstered OSHA's personnel force with the appointment of Ann Rosenthal as Senior Advisor. Rosenthal is a former DOL official and former fellow at the Economic Policy Institute (EPI), a progressive think tank with ties to organized labor. Rosenthal was outspoken in her criticism of the Trump-era OSHA's nonchalant approach to worker safety during the pandemic. Given that a series



of staff departures have led to the loss of decades of institutional knowledge, strong personnel choices are particularly important for OSHA.

### Created Heat Standards Through Executive Order

As the climate crisis intensifies, heat-related deaths from causes such as heat stroke are going to become increasingly common. Data provided by the DOL Bureau of Labor Statistics (BLS) shows that the triannual average of worker heat-related deaths has doubled in the last three decades. This crisis is particularly present in the agricultural industry, where workers are up to thirty times more likely to die of heat-related illness than the general workforce by one estimate.

In recent years, a small number of states, including California and Washington, adopted workplace heat illness prevention standards. In September 2021, the Biden administration took the long-overdue step of ordering OSHA to develop a federal workplace heat standard. The White House announced that OSHA investigators would be deputized to respond to workplace complaints on days where the temperature exceeds 80 degrees Fahrenheit.

### Implemented A Temporary Coronavirus Emergency Workplace Standard

On March 15, Biden ordered the creation of an emergency temporary standard to protect health care workers and frontline workers from the coronavirus. The order created new requirements for workplace settings in industries such as meat processing, manufacturing, seafood, and high-volume retail. It should be noted that these standards weren't released until June, prompting condemnation by Democratic lawmakers and workers' advocates.

In October, OSHA began taking steps towards stripping three states of their ability to regulate workplace safety due to inadequate coronavirus protection. Regulatory agencies in Arizona, South Carolina, and Utah all failed to adopt equivalent or sufficiently similar coronavirus safety standards to those issued in June.

### Implemented Corporate Vaccine Mandates

In September 2021, the Biden administration issued an executive order mandating vaccines for large employers and health care providers. This long-overdue public health measure is expected to impact approximately 100 million workers. The order would fine employers \$14,000 per violation, requiring strong enforcement from OSHA.

While this move is welcome, OSHA's ability to enforce this rule is inhibited by its lack of resources. Indeed, at its current capacity, experts and former OSHA officials warned that the agency would not be able to carry through on its enforcement duties. This further underscores the institutional damage the agency has faced and the need for the Biden administration to reinvigorate it.

## Advanced Proposal To Mandate Illness And Injury Reporting

In October 2021, OSHA revived a proposed Obama-era rule on illness and injury reporting standards that was scrapped by the Trump administration before taking effect. The proposed measure requires large employers to provide injury and illness reports to the agency. Specifically, firms that employ over 250 people would be required to electronically submit injury and illness records, which would then be posted publicly by the agency.

Under the status quo, employers have to *log* injury and illness records, but are not required to *submit* them annually. Indeed, employers are only required to share this information in the event of a serious emergency, which is especially problematic given the narrow standards for this designation: As one commentator noted, “even a third-degree burn that ends with a trip to the emergency room [that doesn’t] lead to in-patient hospitalization” does not qualify under current guidelines.

As a result, officials’ ability to estimate the rate of workplace injuries and illness has been hindered, and officials have only been able to operate under data collected during inspections at specific facilities and an annual Bureau of Labor Standards (BLS) survey. Providing OSHA with comprehensive workplace safety data will empower the agency to deputize inspectors at relevant workplaces, and in the process bolster the agency’s ability to ensure compliance.

## III. LEVERAGING OSHA TO PROTECT WORKERS

### Building Agency Capacity

The Biden administration inherited a “hollowed-out agency,” according to a former OSHA official, with a loss of “decades of institutional knowledge” from the departures of senior staff during the Trump administration. From September 2016 to June 2021, OSHA personnel shrunk by 12.5 percent. In 2019, there was only approximately one full-time OSHA employee for every 88,977 American workers.

In order to increase capacity and give the agency the tools it needs to protect workers, the Biden administration must increase OSHA’s funding and staff. The Biden administration has signalled support for doubling the number of inspectors on OSHA’s payroll to around 1,500 by the year 2024.

### Reversing The Declining Number Of Investigations Into Workplace Violations

Between February 1st and October 26th of 2020, an Inspector General report found that the number of investigations conducted by OSHA fell by 50 percent compared to the same time period in 2019, despite a 15 percent increase in safety complaints to the agency.

In addition, programmed inspections fell dramatically between 2005 and 2019 by 6,504 — a 31 percent decrease — to keep up with unprogrammed inspections brought on by whistleblower complaints. Increasing programmed inspections would provide additional oversight on high hazard industries.

## Ending The Crisis Of Workplace Violence

Workplace violence in the United States is a crisis that has been overlooked by regulators for far too long. Defined as “any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior” at a work site, a 2020 report by the AFL-CIO provides alarming insight on the subject. According to the report, workplace violence became the second-leading cause of deaths on the job in 2018.

In the care sector, the rate of workplace violence is particularly alarming: In the ten year period between 2009 and 2018, incidents of workplace violence more than doubled in both private hospitals and home healthcare services. As concerning as these statistics are, it is even more so given that OSHA has conceded that “[v]iolence is vastly underreported” in healthcare settings. One peer-reviewed study found underreporting is a “hindrance to determining the actual extent of WPV toward health care workers.”

Under the Obama administration, OSHA initiated the rulemaking process on creating a national workplace violence standard, which was designed to protect care workers in particular. Unfortunately, the rulemaking process on this standard stalled during Trump’s presidency. In April 2021, Biden announced his support for H.R. 1195, a piece of proposed legislation that would require OSHA to finalize an interim final workplace violence standard within one year of enactment.

Unfortunately, there is no guarantee that the legislation, which is based on California’s statewide standards for workplace violence, will make it through Congress. As such, Biden’s OSHA needs to go forward with initiating rulemaking on the matter, regardless of the outcome of the legislation. Furthermore, OSHA should use its existing power under the General Duty Clause authority to penalize employers for failing to address workplace violence.

## Strengthening Protections For Whistleblowers

OSHA is responsible for the administration of over 20 laws that serve to protect whistleblowers in the workplace who report an unsafe working environment. In the fiscal year 2020, OSHA received a record number of whistleblower retaliation complaints amid the COVID-19 pandemic, with 3,448 in total on the date ending September 30, 2020.

Alarming, the National Employment Law Center (NELP) released a report in October 2020 finding that only one in five complaints between April through August 2020 were docketed for investigation by the agency, and only two percent in total were resolved. For starters, OSHA needs to reestablish the Whistleblower Protection Advisory Committee, which was created by the Obama administration but discontinued by Trump.

In a 2020 OSHA Whistleblower Stakeholder Meeting, policy analyst Katie Tracey provided useful suggestions for the agency to protect whistleblowers. This includes a proposal for an outreach campaign to ensure workers know of their protections as whistleblowers under the relevant laws governing OSHA. Additionally, OSHA should be required to take action following a whistleblower complaint in a designated time period, and be mandated to communicate any reasons for a delay in response.

It must be noted that that undocumented immigrants disproportionately work in hazardous sectors such as agriculture. As such, a cross-agency effort to safeguard the rights of undocumented workers to speak publicly about dangerous working conditions must accompany efforts to strengthen OSHA's whistleblower program.

## IV. GENERAL ASSESSMENT

**OSHA's performance in the Biden era stands out as among the strongest of any labor-related agency. The Biden administration has reversed multiple disastrous Trump-era OSHA initiatives, such as the sabotage of injury and illness reporting rules. Under Biden, the agency has moved to implement long-overdue workplace heat standards, and has taken a proactive approach to combating the coronavirus pandemic.**

After failing to protect workers in the first year of the pandemic, OSHA has now been leveraged to promote public health measures. This has included assisting the vaccination process, and intervening in states that have failed to protect workers from the coronavirus. OSHA has shown strong leadership. After years of pressure from activists, OSHA is now implementing first-of-its-kind national workplace heat standards.

As mentioned previously, however, strong rulemaking “on paper” does not translate into meaningful action without proper enforcement, which requires resources. OSHA, as with other crucial federal agencies, remains grossly under-resourced, which has naturally hindered its ability to investigate wrongdoing. Given that the agency is designed to advocate for workers in dangerous environments who would otherwise be voiceless, the OSHA's must safeguard protections for whistleblowers in the workplace. Furthermore, the agency must move forward with rulemaking on creating a national standard for workplace violence.

Going forward, OSHA must also prioritize collaboration with other agencies to coordinate efforts to protect workers. This includes fellow DOL agencies such as the Mine Safety and Health Administration (MSHA), and non-DOL agencies such as the Environmental Protection Agency (EPA) and the National Institute for Occupational Safety and Health (NIOSH) to protect workers from toxic substances.



## Employee Benefits Security Administration (EBSA)

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### I. OVERVIEW

The Employee Benefits Security Administration (EBSA) protects the benefits and pensions of all workers in employer-sponsored retirement and health benefit plans — approximately 154 million workers in the United States. EBSA enforces the Employee Retirement Income Security Act of 1974 (ERISA), which sets standards for these plans and benefits.

Under ERISA, participants are empowered to file grievances and appeals when the standards are not met. During the Trump administration, EBSA failed to hold financial criminals accountable. For example, in 2018, EBSA provided exemptions for managers affiliated with firms convicted of currency price fixing. In doing so, the agency enabled them to continue serving retirement fund clients despite their history of misconduct.

In addition, the EBSA oversees the fiduciary rules for financial advisors, an industry rife with exploitation. To lead the agency, Biden made the strong choice of nominating union-tied attorney Lisa Gomez. At her confirmation hearing, Gomez seemingly indicated support for the proposed Women's Retirement Protection Act (WRPA), which would expand access to employer-sponsored retirement plans to many part-time workers.

### II. THE BIDEN ADMINISTRATION'S ACTIONS TO SUPPORT EBSA

#### Rejected Trump-Era Rules Prohibiting Firms From Investing With A Conscience

One of the Trump administration's final rules prevented fiduciaries from considering environmental, social, and governance (ESG) factors when selecting investment plans. This likely drove beneficiaries to invest in corporations that disproportionately drive climate change and social unrest more than they otherwise would have. As one Department of Labor official stated, "These rules have created a perception that fiduciaries are at risk if they include any [ESG] factors in the financial evaluation of plan investments."

Biden's executive order on climate risk from May 2021 directed the Secretary of Labor to come up with a replacement for this harmful rule. In March 2021, the EBSA announced that it would not enforce the Trump administration's final rules on ESG factors. As a result, retirement plan officials are now empowered to consider ESG factors when making investment decisions.

#### Revoked Trump-Era Letter Enabling Financial Criminals

In 2020, the Trump administration issued an alarming opinion that protected fiduciaries who committed financial crimes abroad. In the United States, fiduciaries seek what is known as a Qualified Professional Asset Manager Exemption (QPAM) to allow them to engage in transactions otherwise banned by ERISA. Under the rule issued by Trump, the Department of Labor was prohibited from considering convictions abroad when assessing QPAM applications.

In other words, financial crimes committed outside the United States could no longer be considered disqualifying in QPAM Exemption requests. Thankfully, in 2021, EBSA revoked this decision, and the agency is now allowed to consider both domestic and foreign penalties when deliberating as to whether to grant exemption status.

### III. LEVERAGING EBSA TO PROTECT WORKERS

#### Cracking Down on Abusive Mortgage Servicers

Predatory behavior in the mortgage servicing industry is rampant. A lawsuit by former Representative Brad Miller shows how EBSA's power to enforce ERISA could serve as a broad tool to end abuses in the mortgage-servicing industry. Miller's suit argues that companies in the industry only act in their own self-interest, making the majority of their money from kickbacks and harming both consumers and investors in the process.

This behavior has a detrimental impact on mortgage-backed securities and their investors, including pension funds. Furthermore, this behavior is in direct violation of requirements that they act in the best interest of their pension clients. Both the Consumer Financial Protection Bureau (CFPB) and state attorneys general have gone after this business model, but the Department of Labor has yet to pursue a case against them. By flexing the power of the EBSA's enforcement of ERISA, Biden's Department of Labor could crack down on an entire industry of corporate wrongdoing.

#### Ramping Up Enforcement

EBSA wields its enforcement powers to clamp down on both civil violations, such as operating pension and welfare plans solely to the benefit of the plan managers, and criminal violations, such as embezzlement. According to the Government Accountability Office (GAO), the number of EBSA cases closed has decreased steadily since 2014, despite the fact that recoveries have continued to increase in this time period.

As explained in a GAO report in May 2021, "EBSA began a strategy to focus on cases that would result in large monetary recoveries for participants" in the year 2013. Though perhaps understandable, the crucial role played by EBSA in safeguarding benefit plans means that it is concerning to see such a stark decline in cases closed in 2014.

#### Holding The Healthcare Industry Accountable

EBSA is currently working with the Internal Revenue Service (IRS) and the Center for Consumer Information & Insurance Oversight within the Centers for Medicare and Medicaid Services (CMS) to create rules needed to administer the No Surprises Act, which serves to end surprise medical billing. It is imperative that the agency does not waver on creating effective rules to implement the legislation, despite pushback from healthcare industry interests.

Going forward, EBSA must crack down on violations of the Mental Health Parity and Addiction Equity Act (MHPAEA). Under the MHPAEA, group health plans are required to provide participants the equivalent level of benefits for mental health and substance use treatment as they do for standard medical and surgical care.

To be sure, it was welcome that the Department of Labor and United Healthcare reached a first-of-its-kind settlement agreement for MPHAEA violations in September 2021. Nevertheless, an analysis published in 2020 suggests that MPHAEA violations have often gone unpunished. Given that the 2020 Consolidated Appropriations Act (CAA) empowered EBSA's ability to clamp down on MPHAEA violations, this must be met with action.

## IV. GENERAL ASSESSMENT

**Under the Biden administration, EBSA has revoked two notable Trump-era initiatives and has begun to implement legislation against surprise medical billing. Nevertheless, the agency must ramp up enforcement and use its powers for ambitious goals, such as cracking down on predatory mortgage-servicers.**

The positive actions undertaken by EBSA during the Biden administration thus far have largely consisted of rolling back harmful Trump-era initiatives. While these are needed developments, EBSA under Gomez needs to take a much bolder approach to regulation and holding wrongdoers accountable than the agency did under Obama.

Given the powers wielded by the agency, it is crucial that the Biden administration leverages the agency to clamp down on misconduct in the mortgage-servicing and healthcare industries, among others. The agency's increased power to police MPHAEA violations following the 2020 CAA means that violators must be met with swift action.

# National Labor Relations Board (NLRB)

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## I. OVERVIEW

The **National Labor Relations Board** (NLRB) is an independent agency of the federal government. Created by the National Labor Relations Act (NLRA) of 1935, the NLRB is tasked with ensuring that collective bargaining rights are respected. The board is composed of five members that act as a quasi-judicial body, and the agency's General Counsel acts as a prosecutor.

Powers wielded by the NLRB include the ability to decertify union elections and decide the outcome of labor complaint cases. The General Counsel is the NLRB's most powerful official, holding *de facto* unreviewable prosecutorial discretion. The office is empowered to pursue which allegations of unfair labor conduct it so chooses, and is entitled to take the legal positions chosen by the officeholder. The agency is not currently empowered to issue monetary fines against employers who commit unfair labor practices (ULPs), but would gain this power if the PRO Act passes.

During the Trump administration, the agency became a hindrance to union efforts. The Economic Policy Institute (EPI) described the NLRB as having "systematically rolled back workers' rights." Data shows that from 2017 to 2020, unfair labor practice complaints dropped by around 36 percent. The Trump-era NLRB's anti-labor bias was so deep that the board tried to ban the "Scabby the Rat" mascot from appearing at union events. Alarmingly, the agency failed to utilize the full extent of its resources, with the NLRB failing to obligate over \$5 million in appropriations in the 2019 fiscal year.

The Biden administration has begun reinvigorating the agency as a body that advocates for workers. Under Biden, notable hostile actors within the NLRB have been replaced by strong advocates of workers' welfare. In addition to notable instances of Trump-era policies being rolled back, the NLRB's new leadership has signalled willingness to challenge harmful precedent over half a century old. The NLRB has also increased its outreach efforts, including launching social media efforts in Spanish.

## II. POSITIVE NLRB DEVELOPMENTS DURING THE BIDEN ERA

### Fired Trump's Anti-Labor Appointees And Replaced Them With Workers' Advocates

Though largely invisible in the public eye, General Counsel Peter Robb was among the most vigilant enforcers of the Trump administration's anti-labor agenda. As such, Biden's decision to fire Robb on day one of his presidency was a welcome move. Biden also removed Alice Stock, Robb's Deputy General Counsel, from her position.

During his tenure, Robb pushed to centralize the NLRB's functions, an effort made to deprive career regional officials of their power to hold violators accountable. Under Robb, the NLRB's Division of Advice, which acts directly under the General Counsel, consistently sided with employers over workers in coronavirus-related disputes. Personnel in policy, and removing anti-labor stalwarts from positions in the NLRB was a necessary step towards revitalizing the agency.

In Robb's place, Biden appointed Jennifer Abruzzo of the Communication Workers of America (CWA) as General Counsel. Abruzzo's nomination was praised by union leaders, with the late AFL-CIO president Richard Trumka upholding her as someone who has "tirelessly fought for working people her entire career." Abruzzo has been joined by other strong worker advocates, such as Fight for 15-affiliated attorney Gwynne Wilcox, who was nominated for a vacant NLRB seat.

Despite the change in personnel, it is worth noting that opinions issued by Robb's office have been invoked beyond his tenure. For instance, on January 25, 2021, an NLRB regional office in Philadelphia determined cannabis workers aren't protected by labor law, citing an unreleased memo by Robb. Nevertheless, as discussed later, the Biden administration has made progress in undoing much of the damage of Robb's tenure.

### Rolled Back Harmful Trump-Era NLRB Initiatives

Labor unions enter into pre-certification neutrality agreements with employers during union elections to set the terms for union organizing campaigns and deter employer intervention. In 2020, the Trump-era NLRB sought to clamp down on these agreements, making the absurd case that they constitute illegal employer support for unionization. In 2021, Biden's NLRB dismissed a complaint made by Trump-era General Counsel Peter Robb that was seen as the first step towards formally restricting neutrality agreements.

Under Trump, the NLRB issued rules designed to further obstruct labor organizing under the guise of holding "negligent" unions accountable. In essence, this rule penalized harmless errors by union officials — such as misplacing paperwork or not returning phone calls promptly — as "gross negligence," in order to allow for increased litigation against unions. This rule was rolled back by Biden's NLRB in 2021, as were measures to mandate unfair disclosure requirements from unions. Additionally, a procedural



revision that was slammed by NLRB staffers as an obvious effort to curb the agency's investigative powers was withdrawn.

### Entrenched Student Workers' Rights

The graduate student workers' movement has grown in campuses across the United States, despite hostility from Trump's NLRB. In March 2021, the NLRB scrapped a proposed 2019 rulemaking that was designed to hinder graduate students at private colleges from unionizing.

The Biden NLRB has also advanced the rights of student athletes, with General Counsel Abruzzo issuing an opinion that athletes at private colleges have collective bargaining rights. Abruzzo opined that college athletes are "statutory employees, who have the right to act collectively to improve their terms and conditions of employment."

### Supported Tech Workers' Organizing

In recent years, there has been a trend toward labor organizing in the tech industry. Under Biden, the NLRB has made positive moves to support workers at major tech companies. In April, the NLRB found that Amazon illegally fired two user-experience designers who pushed the company to improve warehouse workers' conditions.

In May, the NLRB's acting General Counsel revived a complaint by Google workers who were fired after protesting the company's collaboration with U.S. Customs and Border Control. How the NLRB approaches the case of Janneke Parrish, a former Apple employee who launched a complaint with the board after being fired for organizing, will be a key test for the agency.

### Moved To Strengthen Settlement Agreements

In September 2021, Abruzzo issued a memo directed at regional officials regarding settlement payment policy. Abruzzo called for settlement deals to include consequential damages in order to deter employers from engaging in abusive behavior and to help wrongfully fired employees.

Abruzzo advised regional officials to seek no less than 100 percent of back pay and benefits owed in settlement. In this order, Abruzzo ordered regional offices to include default language in all settlements in order to punish settlement breaches.

## III. LEVERAGING THE NLRB TO PROTECT WORKERS

### Solving The NLRB's Staffing Shortage

The NLRB's enforcement capacity has long been hindered by the agency's paucity of resources. Between 2010 and 2019, the NLRB suffered a 26 percent decrease in total staff. Given the crucial role of regional offices, the fact that these offices have seen an even larger 33 percent decrease in this period is alarming. In order for the agency to effectively clamp down on violations of workers' collective bargaining rights, it needs increased resources to be able to build up an adequate number of enforcement personnel.

## Reviving The ‘Joy Silk’ Doctrine

In August 2021, General Counsel Abruzzo indicated her interest in reviving the so-called “Joy Silk doctrine.” In the *Joy Silk Mills v. National Labor Relations Board* (1947) decision, the NLRB held that a company must bargain with a union that was authorized through workers’ authorization cards, not created via an election.

The precedent created by the *Joy Silk* decision meant that employers had to demonstrate “good faith doubt” when they challenged the authenticity of workers’ authorization cards. It is imperative that the NLRB revive the Joy Silk doctrine in order to boost union organizing campaigns and eliminate a top recourse for employers looking to crush them.

## Expanding The NLRB’s Remedial Power

The NLRB’s ability to rein in employer misconduct is hindered by its inability to levy civil monetary fines against employers engaging in unfair labor practices (ULPs). Currently, the agency only possesses the power to secure “make whole” relief. In other words, the NLRB has the ability to secure wages lost by an employee due to ULPs. Needless to say, the NLRB’s inability to penalize corporate wrongdoers for ULPs means it is limited in its capacity to deter future misconduct.

Advocates for providing the NLRB the power to penalize ULPs have placed their hopes in the passage of the PRO Act, which would give the board this power. However, General Counsel Abruzzo has identified a potential means to which the board could expand its remedial power without new legislation. Abruzzo instructed officials to consider the applicability of a unique Nixon-era case as it relates to the possibility of “compensat[ing] employees for the losses they sustain because of their employers’ failures to bargain”.

In the *Ex-Cell-O* (1970) case, the NLRB considered mandating a company to compensate workers for wages and benefits they would have received under a union contract, which were lost due to the company’s illegal refusal to bargain with workers. While the NLRB ultimately did not go forward with this remedy, the Court of Appeals for the District of Columbia Circuit affirmed the NLRB’s ability to do so in the same year. Should the PRO Act fail to pass, the NLRB must go forward with this proposed route to expand the agency’s remedial powers.

## Cracking Down On Employee Misclassification

By misclassifying employees as independent contractors, employers are able to deprive workers of their minimum wage and overtime pay rights provided by the Fair Labor Standards Act (FLSA). Alongside agencies such as the DOL’s WHD, the NLRB has a crucial role to play in securing minimum wage protections and overtime pay for these workers.

Alongside other key agencies, the NLRB has a major role to play in the fight to end employee misclassification. The NLRB should overturn the *Supershuttle DFW* and *Velox Express, Inc.* decisions made in 2019, both of which bolstered employers’ ability to misclassify employees as independent contractors.

## Allow For Redo Of The Compromised Amazon Union Vote In Bessemer, Alabama

Following over a year of tireless organizing, workers held a unionization vote in April 2021 at Amazon's warehouse in Bessemer, Alabama (BHM1). The vote to unionize under the Retail, Wholesale and Department Store Union (RWDSU) ultimately failed.

During the unionization campaign at BHM1, Amazon employed an array of aggressive tactics to intervene in the election. These included so-called “captive audience meetings,” where workers were forced to watch 30 minute anti-union presentations on their shift.

Amazon's tactics successfully thwarted the unionization effort, a major blow given the attention the campaign received. This makes it particularly crucial that the NLRB take the advice of an NLRB hearing officer and allow for a redo of the BHM1 vote. The NLRB hearing officer argued that tactics such as placing a generic mailbox near the facility's entrance compromised the integrity of the election. As the most-watched union election in recent years, one which targeted one of the most powerful employers in the world, this particular case has large symbolic stakes for the agency's credibility alongside the need for the warehouse workers to have a chance at a free and fair election.

## Cracking Down On Captive Audience Meetings And Coercive Interrogations Of Workers

The continued legality of captive audience meetings subverts the principles of free and fair union elections. In some 90% of all union elections, employers mandate these meetings, in which workers are forced to watch or listen to anti-union propaganda presentations. As of now, the NLRB's main impact on captive audience meetings has been prohibiting employers from holding these meetings 24 hours prior to ballots going out in a union election.

While most advocates of ending these anti-democratic intrusions place their hopes upon the passage of the PRO Act, there are multiple potential avenues the NLRB can take to clamp down on these meetings. As labor lawyer Brandon Magner suggested, the NLRB could potentially implement a ban on captive audience meetings, as doing so “should escape First Amendment scrutiny because they regulate employer *conduct*, not employer speech.”

Magner also proposed clamping down on employers' ability to interrogate employees, specifically regarding the potential union sympathies of workers. While the coercive interrogations of workers is formally illegal, NLRB decisions under Republican presidents have helped provide leeway to employers in the area. In 2020, Trump's NLRB sided with an employer who said it would “not help or be good for anyone” for workers to refuse to train temporary employees, following by demanding a show of hands to indicate their positions. The NLRB must reassert that the coercive questioning of employees is a violation of labor law.

## IV. GENERAL ASSESSMENT

**The ongoing reinvigoration of the NLRB is a highlight of Biden’s tenure in the realm of labor issues. Right-wing ideologues have been removed from positions in the agency in favor of allies of organized labor. The agency’s new leadership has made meaningful progress in undoing the damage of the Trump era. Additionally, the agency has positioned itself to relitigate issues related to card check authorization and expanding its remedial powers.**

Under Biden, the NLRB has invalidated a number of harmful Trump-era directives designed to unfairly burden unions. Additionally, the agency has positioned itself as an ally of both tech worker and student athlete organizing, a far cry from the hostility shown by the agency under Trump. As the most powerful figure in the agency, General Counsel Abruzzo has outlined an exciting vision, with her openness to reviving the *Joy Silk* doctrine and utilizing the *Ex-Cell-O* remedy.

For the agency to be as effective as the American worker needs it to be, however, the NLRB’s paucity of resources must be solved. The NLRB must listen to the advice of the agency officer who called for a redo of the Amazon union election in Bessemer, which was compromised by the company’s illegal intervention. Doing so is a rare opportunity to send a clear public message through agency enforcement activity, not merely a press release. Furthermore, the agency must push to end the abusive practice of “captive audience” meetings that Amazon used in said election.

Given the scale of union-busting activity in the United States, the Biden administration should consider radical approaches to penalizing violations of the National Labor Relations Act (NLRA). As suggested by AFL-CIO chief economist William Spriggs, the federal government ought to deny union-busting corporations lucrative federal contracts.

## Equal Employment Opportunity Commission (EEOC)

*Note: The following section assesses the EEOC’s actions, some of which are done in conjunction with the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP)*

### I. OVERVIEW

The Equal Employment Opportunity Commission (EEOC) plays a crucial role enforcing rules against workplace discrimination. Established by the Civil Rights Act (CRA) of 1964, the EEOC is an independent agency composed of five members, with two chosen to serve as chair and vice chair, respectively. The EEOC also employs a General Counsel, who is tasked with conducting litigation on behalf of the Commission.

The EEOC is tasked with enforcing Title VII of the CRA, making the agency crucial to protecting women, people of color, and LGBTQ+ individuals in the workforce. The EEOC also enforces a variety of other laws, including safeguards against ableism, pregnancy discrimination, and ageism in the workforce. The EEOC presides over enforcement programs that operate in both the private and federal public sectors, and pursues both monetary and non-monetary penalties. Additionally, the EEOC operates a mediation program to facilitate negotiation agreements between parties in a discrimination case.



Under Trump, the agency's functions were defanged at the behest of business interests. According to a former EEOC counsel, the Trump-era EEOC's dereliction of its statutory responsibilities constituted a "case of industry capture by the business community." In 2020, the EEOC received fewer complaints than at any time since at least 1992. While this statistic was likely impacted by COVID-19 disruptions, the fact of the matter is that a decline in complaints was felt throughout Trump's presidency.

Given the key role the EEOC plays in protecting workers from marginalized communities, it is crucial that it is reinvigorated. Though Biden was able to install Democrat Charlotte Burrows as the agency's chair, the body continues to have a 3-2 Republican majority. The next opportunity for a Democratic majority is in 2022 following a scheduled vacancy, and the EEOC's work will be inhibited as long as Republicans hold a Commission majority. Nevertheless, Burrows as Chair still has the power to set the agency's agenda.

## II. POSITIVE EEOC DEVELOPMENTS DURING THE BIDEN ERA

### Froze Trump-Era "Union Time" Rules

On January 7, 2021, two weeks before the end of Trump's presidency, the EEOC issued regressive rulemaking on union time and wellness programs, which specifically targeted the federal civil service. If enacted, federal workers who are union representatives would have faced restrictions on not their ability to pursue workplace complaints during working hours.

The American Federation of Government Employees (AFGE), the largest federal employee union, slammed the rule as an effort to "deter workers from reporting workplace discrimination." On February 12, just weeks after Biden's inauguration, the EEOC froze the rule, thereby preventing it from taking effect.

### Removed Trump's Extremist General Counsel

Perhaps no one represented the Trump-era EEOC's stark shift rightward as well as General Counsel Sharon Gustafson. Gustafson's initial nomination to the position was widely condemned by civil rights advocates, especially in the LGBTQ+ community.

In her position, Gustafson consistently justified anti-LGBTQ+ workplace discrimination under the guise of religious liberty. On disability issues, Gustafson's office reportedly determined that being denied leave for a disability *did not* violate the Americans with Disabilities Act (ADA).

After her refusal to resign from the position at the White House's request, President Biden fired Gustafson from her position in March. While Gustafson's firing led to outrage from conservatives, it was a necessary move to begin the process of reinvigorating the EEOC. It should be noted, however, that it took until October 2021 for Biden to nominate a permanent replacement.

### Ensured Rights For Trans Workers

Despite being inhibited by the body's Republican majority, Burrows has used her position to advocate for LGBTQ+ workers. To commemorate the one year anniversary of *Bostock v. Clayton County* in June, the agency released new workplace resources on gender identity and sexual orientation. The agency notably clarified that employees have the right to use the bathroom corresponding to their gender identity.

## Revoked Trump-Era EEOC Conciliation Regulation

In 2019, the Trump-era EEOC reformed the conciliation process to tilt the scales further in favor of employers in discrimination suits. Under these new rules, employers were given “a written summary of the known facts” in a case, which included the agency’s theory of the case, as well as potential exculpatory evidence. Organizations such as the National Women’s Law Center (NWLC) identified the rule as a way of further stacking the decks against employees in discrimination lawsuits.

In May 2021, the White House issued a statement of support for a congressional effort to invalidate the rule through the Congressional Review Act. After both the House of Representatives and the Senate voted to roll back the rule, Biden formally signed legislation dismantling the regulation in June. Though this change came from Congress and the White House as opposed to through the EEOC’s own rulemaking, it is mentioned here for altering agency practice for the better.

## Enforced Employer Vaccine Mandates

The successful coronavirus vaccine effort has saved countless lives. The White House’s effort to “substantially increase the number of Americans covered by vaccination requirements” through requirements which “will become dominant in the workplace” will help stop the spread of the virus.

In October, EEOC clarified that political views are not legitimate reasons for exceptions to employer-placed vaccine mandates. Per one report, the commission determined that workers requesting an exemption who cannot “provide requested information risks losing [the ability to claim their] employer improperly denied an accommodation.”

## Advanced Pay Equity Through Reinstating Fair Pay Data Collection Guidelines

In 2017 and 2018, the EEOC ordered employers to collect pay equity data through Component 2 of the annual EEO-1 form. Under this arrangement, employers had to report pay data broken down by the race, gender, and ethnicity of workers.

The Office of Federal Contract Compliance Programs (OFCCP), which is tasked with enforcing the collection of EEO-1 data to provide to the EEOC, discontinued the practice under Trump. The move to end the collection of this data was criticized by groups such as the National Women’s Law Center (NWLC), which described it as an example of Trump’s EEOC “abandon[ing] its own mission to ensure equality, including equal pay, in the workplace.”

As President, Biden has pledged to end racial and gender pay disparities. Following an extended period of ambiguity as to whether Component 2 would be reinstated, the OFCCP reversed its policy to not “request, accept, or use EEO-1 Component 2 data.” In doing so, the EEOC will be able to analyze this useful data once again.

### III. LEVERAGING THE EEOC TO PROTECT WORKERS

#### Strengthening Caregiver Protections

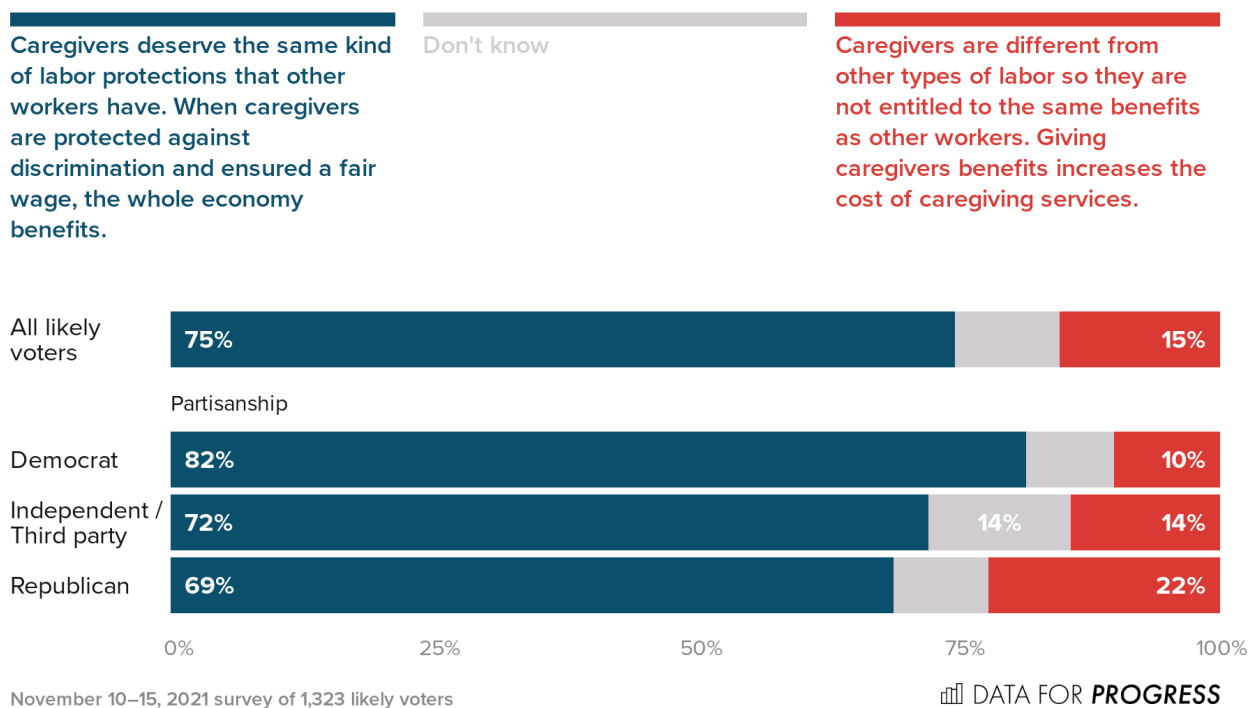
In a testimony before the [EEOC](#), Fatima Goss Graves of the National Women's Law Center noted that the “pandemic has revealed [our] reliance on the underpaid and undervalued caregiving work of women of color.” During the Biden administration, positive steps towards protecting caregivers have been made. For example, the EEOC made a Colorado-based care service provider pay \$250,000 to caregivers who faced harassment on the job.

Nevertheless, safeguarding caregivers' welfare necessitates policy changes. In 2021, EEOC Chair Burrows [suggested](#) that she is interested in revising and strengthening [2007 agency guidelines](#) on caregivers. Once the agency has a working Democratic majority, amending these insufficient guidelines to protect caregivers from mistreatment must be a priority.

Polling by Data for Progress in November 2021 found that voters across party lines support strengthening protections for caregivers. By a +60-point margin, respondents agreed that providing caregivers with the same labor rights given to workers in other sectors would benefit the economy at large. This number includes 82 percent of Democrats, 72 percent of independents, and 69 percent of Republican respondents. It's clear that guaranteeing fair pay for caregivers and protecting workers in the sector from discrimination commands support across party lines.

## Majority of Voters think Caregivers Deserve Same Labor Protections as Other Workers

When thinking about caregivers, such as those for children and the elderly, which of the following statements comes closer to your view, even neither is completely right?



## Solving The EEOC's Hiring Squeeze

The EEOC has long faced staffing shortages that have contributed to a backlog in cases. Though the backlog of private employee charges actually fell from 49,607 in 2018 to 43,580 in 2020, this number remains alarmingly high for an understaffed agency. Under Trump, the agency downsized to untenable levels, with only 1,939 employees in 2020 compared to 3,390 in 1980.

The degree to which EEOC's paucity of resources prevents victims of workplace discrimination cannot be underestimated. According to a 2019 report, the EEOC and state and local partner agencies achieve monetary gains for discrimination victims less than 18% of the time. EEOC officials have gone on record criticizing the agency for effectively closing complaints without investigation due to budget woes.

Given that mandatory arbitration clauses in employment already limit many workers' ability to achieve justice in discrimination cases, the situation is an all-around disaster for accountability. At the very start, the EEOC must be able to employ full-time 450 staff members to fulfill Chair Burrows' recommendations.

## Safeguarding Accessible Workplace Options

The mass expansion of remote work options in many sectors during the Covid-19 pandemic helped make workplaces more accessible for many people with disabilities. Unfortunately, many employers were also able to get away with rejecting disabled employees' requests for accommodation.

In September, the agency launched its first remote work bias suit of the pandemic era over a disabled employee who was not given rightful accommodations during the pandemic. It is imperative that the EEOC continues its scrutiny of unfair denials of accommodation for workers with disabilities.

## Extending Recordkeeping Requirements

Currently, the EEOC requires that employers record allegations of discriminatory workplace practices "for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later." Needless to say, only mandating that these records be maintained for a twelve month period is insufficient and further hinders the EEOC's enforcement capabilities.

Once Democrats control a majority on the body, the commission should move to implement uniform three-year recordkeeping standards as advised by Patrick Patterson, who formerly served as Counsel to the EEOC Chair.

## Instituting Long-Delayed Sexual Harassment Guidance

Existing EEOC guidance on sexual harassment dates back three decades, and these standards have been criticized as insufficient for protecting workers. This situation is made worse by the fact that the EEOC plays a uniquely crucial role in punishing workplace sexual harassment. While the EEOC has the authority to punish sexual harassment by enforcing sex nondiscrimination laws, sexual harassment does not fall under the purview of agencies such as OSHA.

During the Obama administration, the EEOC began drafting updated guidance regarding the agency's enforcement of laws protecting employees from sexual harassment. The rules were formally submitted to the White House Office of Management and Budget (OMB) in November 2017, a month after the emergence of the "Me Too" movement in the mainstream.

In 2020, however, it emerged that the rule remained absent from the agency's searchable database. This was reportedly due to internal opposition to the guidelines from Trump administration officials who opposed considering the harassment of LGBTQ+ employees as sexual harassment. Under Biden, EEOC Chair Burrows has stated she intends to "revisit and move forward on guidance in that area".

## IV. GENERAL ASSESSMENT

**Under Biden, Chair Burrows has made positive moves in areas such as LGBTQ+ rights. The invalidation of harmful Trump-era conciliation and wellness time rules were meaningful developments towards reinvigorating the agency. Nonetheless, the EEOC faces severe structural problems as a result of being under-resourced. Most importantly, the agency won't have a Democratic majority until 2022, likely foreclosing the possibility of meaningful policy changes until then.**

As mentioned previously, the EEOC's performance under Biden cannot be meaningfully assessed until the body acquires a Democratic majority. As it currently stands, Chair Burrows has wielded her own powers to create positive developments in areas such as LGBTQ+ rights. In order to enact meaningful policy changes, Biden must nominate an individual with strong commitments to ending workplace discrimination to the EEOC's open seat in 2022.

President Biden should be commended for firing former General Counsel Gustafson from her position, as well as his decision to sign legislation revoking Trump-era conciliation rules. In the realm of pay equity, public statements from the OFCCP indicate that the federal government will be able to access more useful data on pay discrimination in the near future.

As with other labor-related agencies, the EEOC's primary issue is a paucity of resources that must be addressed through increased funding. The agency's ability to effectively regulate discrimination and abuse in the workplace is also hindered by outdated rulemaking in areas such as sexual harassment guidance.

# United States Trade Representative (USTR)

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Note: *The following section assesses the USTR's actions on labor-related issues. In particular, collaborative efforts between the USTR and the DOL Bureau of International Labor Affairs (BILA) are noted. As such, important actions undertaken by the USTR in other policy areas, such as intellectual property (IP) rights, are not assessed here.*

## I. OVERVIEW

The **Office of the United States Trade Representative** (USTR) is a Cabinet-level office tasked with negotiating trade deals and policy. It's no secret that American trade policy in recent decades has prioritized the interests of capital over those of both American and foreign workers. Biden's choice for Trade Representative, Katherine Tai, has taken some steps towards rebuilding the office's relationship with organized labor. In this role, Tai became the first Trade Representative to address the AFL-CIO.

There have also been policy shifts enabled by the implementation of the United States-Mexico-Canada Agreement (USMCA). While Donald Trump's signature trade deal was unmistakably very friendly to corporate interests, one aspect of the deal has boosted the progressive agenda. The USMCA created the "rapid-response mechanism" (RRM), which allows the USTR to penalize union-busting companies abroad.

Supported by the likes of Senator Sherrod Brown, the RRM allows the United States to slap tariffs on the exports of a factory found to abuse workers' welfare. The mechanism also allows U.S. Customs to block products created by these factories from entering the United States.

## II. POSITIVE USTR DEVELOPMENTS DURING THE BIDEN ERA

### Labor Advocates Appointed To Key Roles

Under Tai, the USTR's staff contains individuals with progressive, labor-friendly views on trade. These include Nora Todd, a former advisor to Senator Sherrod Brown (D-OH) who is the agency's chief of staff. During her tenure in Brown's office, Todd helped conceptualize the RRM.

In April 2021, Beth Baltzan, a former fellow at the anti-monopolist Open Markets Institute, joined the USTR in an advisory role. Baltzan has written extensively about trade policy, and has called for trade policy that curates "fair, competitive markets designed to limit corporate power" to replace the status quo approach.



### RRM In General Motors Case

In May 2021, the USTR initiated its first complaint under the rapid-response mechanism. The agency did so after receiving reports that workers at a General Motors plant in Silao, Guanajuato were being denied the right to free association and the ability to collectively bargain. As a result, workers at the plant were able to vote in August on whether to keep their existing collective bargaining agreement.

In the end, workers were able to reject their current arrangement, making the possibility of forming an independent union possible. Had General Motors not respected the results or interfered in the election, the USTR could have implemented a 25 percent tariff on pickups made at the Silao plant.

### RRM In Tridonex Case

In May 2021, the AFL-CIO lodged a complaint that a Tridonex factory in Tamaulipas, Mexico, was denying workers the right to organize. In response, the USTR launched its second RRM complaint one month later. The USTR announced that “Mexico has 10 days to agree to conduct a review and, if it agrees, 45 days from today to remediate” in the dispute.

In the end, the USTR was successfully able to force Tridonex to provide severance and six months of back pay for workers fired for organizing. The terms of the condition also mandated that workers at the factory be allowed to organize without intimidation or interference.

## II. LEVERAGING THE USTR TO PROTECT WORKERS

### Pushing For The RRM’s Inclusion In Future Trade Deals

In May 2021, Katherine Tai stated that the USTR’s employment of the RRM “demonstrates that we will act when workers in certain facilities are denied their rights under laws necessary to fulfill Mexico’s labor obligations.” In the six months that followed, her claim was bolstered by the USTR’s success in securing two major victories for Mexican workers through the RRM.

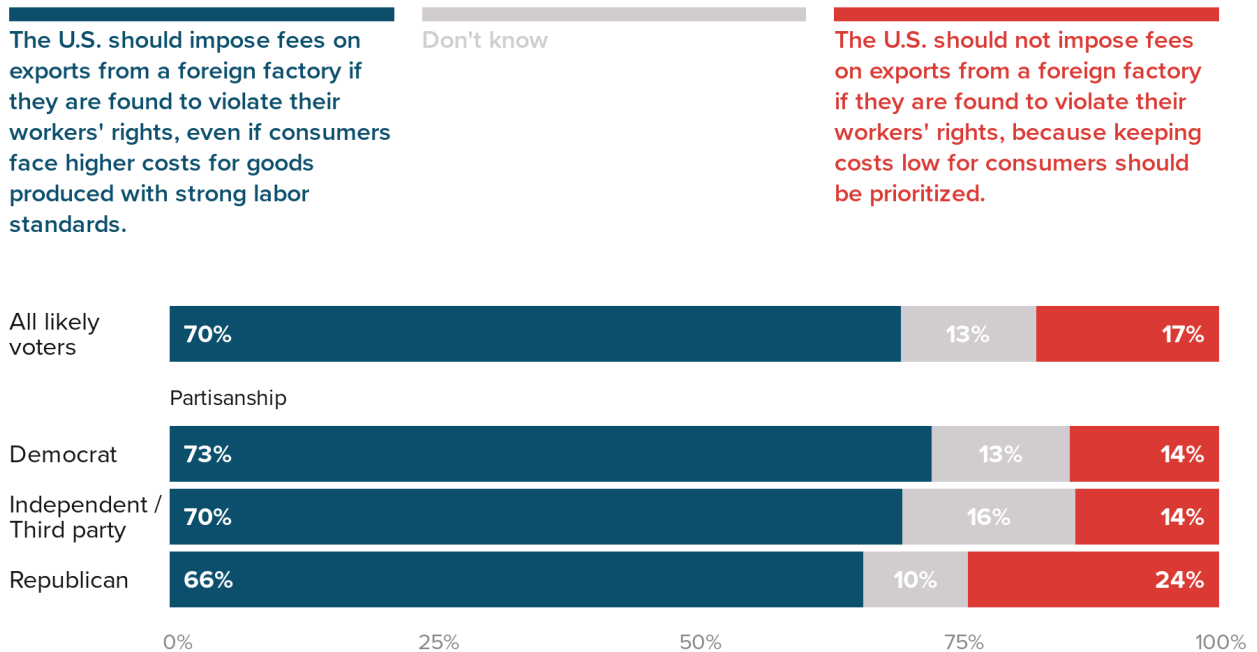
As such, it is imperative that Biden’s USTR pushes for the inclusion of the RRM mechanism in future trade deals. Indeed, Senator Sherrod Brown, whose office helped conceive of the mechanism, has urged the tool be included in “every trade agreement going forward to protect American jobs.”

Polling by Data for Progress conducted in November 2021 found broad political support for regulations that penalize companies that abuse workers abroad through import fees. By a +57-point margin, voters across party lines indicated support for such measures, even if they might result in higher prices for American consumers. It’s clear that Americans across the political spectrum are tired of American trade policy prioritizing corporate profits over workers’ welfare.

# Majority of Voters Support Fees on Foreign Factories That Violate Workers' Rights, Even if Prices Increase

Some government regulators are considering a proposal that would impose fees on a foreign factory's exports if that factory was found to have violated their workers' rights.

When thinking about this proposal, which statement comes closest to your view, even if neither is exactly right?



November 10–15, 2021 survey of 1,323 likely voters

DATA FOR **PROGRESS**

## Create An International Working Group On Labor Issues

On October 12, 19 House Democrats signed a letter to Tai urging the USTR to advocate for workers at the World Trade Organization's 12th Ministerial Conference (MC12). The conference, which is scheduled for November 30, 2021, does not currently have a working group on worker rights.

The letter urges Tai to create an “informal working group with like-minded countries to discuss the issue of labor standards and trade” in the meantime, a useful first step in coordinating such efforts.

## IV. GENERAL ASSESSMENT

**Under Tai, the USTR has added progressives to staffing positions, and she has led an outreach campaign to improve ties with organized labor. The use of the RRM has produced successful outcomes for workers on both occasions it has been used.**

The novel RRM has so far been as useful as hoped for when envisioned by policymakers such as Senator Sherrod Brown. In both times it has been applied, it has been used to benefit the Mexican labor movement, a break from U.S. trade policy's bias towards business interests in recent decades.

It is important that the USTR coordinates with its counterparts on the international stage to create similar labor-friendly trade policies. It is imperative that the office pushes to include an RRM mechanism in future trade deals to benefit organized labor.

## Summary: The Biden Administration's Record On Labor Law Enforcement

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After decades of weak enforcement, American employers feel comfortable violating labor laws with impunity. Across the United States, employers get away with withholding workers' wages, failing to maintain safe work sites, and discriminating against marginalized employees. This is not even to make mention of abusive employment practices such as the existence of non-compete clauses, which hinder fair competition in labor markets at the expense of workers.

Since Biden's inauguration, meaningful steps have been taken towards reversing the damage of the Trump administration's war on workers. Across relevant agencies, anti-worker Trump appointees have been replaced by allies of organized labor, and many of the past administration's most heinous initiatives were overturned.

At the DOL **Wage and Hour Division** (WHD), Trump-era initiatives that enabled wage theft have been invalidated. Career officials are once again empowered to crack down on employer misconduct, and are now able to seek "double damages" to deter further violations. Additionally, Trump-era efforts to ease employers' ability to misclassify employees were withdrawn, as were initiatives to help "joint employers" skirt responsibilities to their workers. Unfortunately, the WHD remains hindered by a paucity of resources, and reinvigorating WHD enforcement requires increased funding for the agency.

Under Republican presidents, the low-profile **Office of Labor-Management Standards** (OLMS) has served as a hindrance to union efforts. As such, the choice of a career labor lawyer to lead the agency was a strong one. Thus far, the agency has revoked burdensome Trump-era paperwork requirements for unions. Going forward, the OLMS needs to take an ambitious approach to reining in the union avoidance industry by requiring employers to disclose their use of anti-union consultants. Additionally, the OLMS needs to safeguard worker centers from future right-wing probes after they were targeted under Trump.

Many of the most positive labor-related developments under Biden have been seen at the DOL **Occupational Safety and Health Administration** (OSHA). OSHA has begun long-overdue rulemaking to create workplace heat safety standards, and revived a proposal to strengthen injury and illness reporting. While the agency's response to the pandemic was a failure under Trump, under Biden it has promoted safe coronavirus workplace standards and assisted the vaccination campaign. Going forward, OSHA must strengthen whistleblower protections and create a national standard on workplace violence. In order to effectively enforce these rules, the agency must receive increased federal funding.

At the DOL **Employee Benefits Security Administration** (EBSA), harmful Trump-era initiatives were invalidated. These include a directive that prohibited firms from investing with a conscience, and an alarming opinion letter that effectively served to enable financial crime abroad. Going forward, the agency must ramp up enforcement of ERISA and use its powers to rein in abusive practices in the mortgage servicing and healthcare industries.

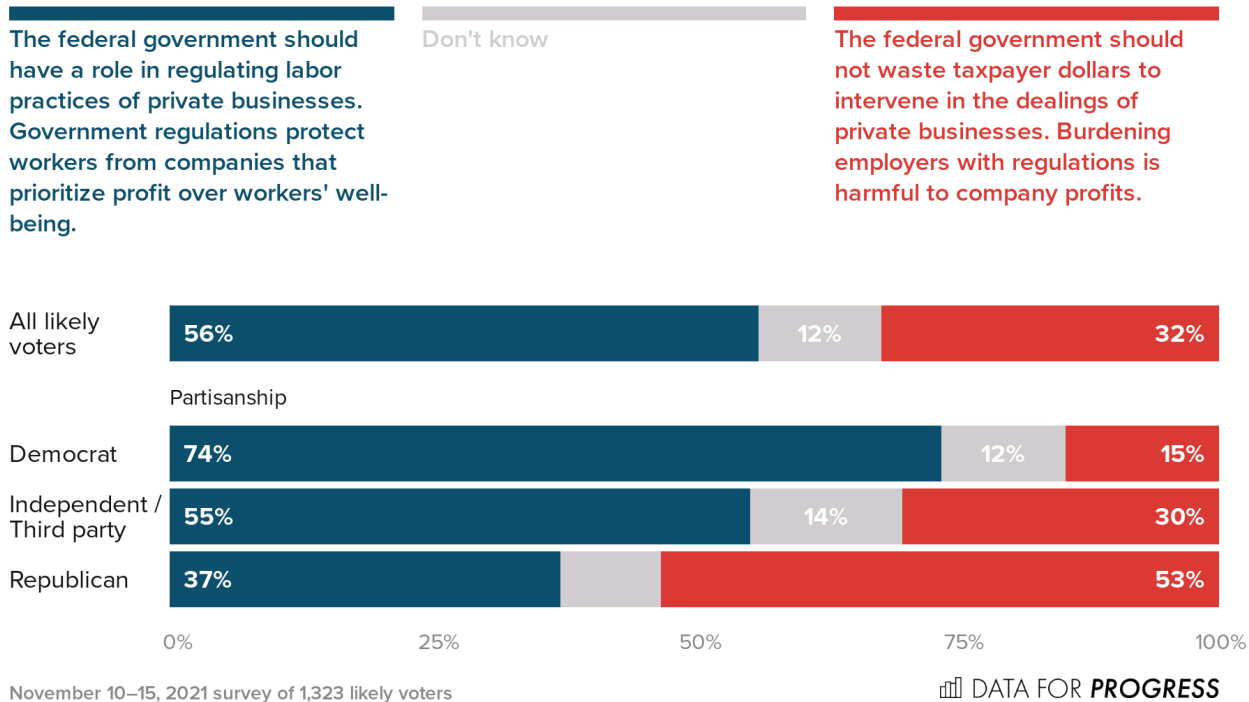
At the **National Labor Relations Board** (NLRB), anti-worker Trump appointees were replaced by strong allies of organized labor. Harmful Trump-era initiatives that burdened unions were invalidated, and the NLRB's new leadership has moved to strengthen settlement agreements in favor of workers. The agency has indicated interest in reviving pro-labor legal doctrine regarding card authorization, and has been friendly towards labor organizing in the tech industry and the student worker movement. That said, the agency remains burdened by a lack of resources and an inability to levy monetary fines. Going forward, the NLRB must allow for a redo of the unionization vote at Amazon's Bessemer factory, and crack down on the future use of "captive audience meetings".

Despite the continued Republican majority on the **Equal Employment Opportunity Commission** (EEOC), some progress has been made by the agency under Biden. Trump-era regulations that tipped the scale in favor of employers in discrimination disputes were invalidated. The agency is once again committing itself to the collection of fair pay data, and has notably assisted the vaccination effort. Additionally, the agency's chair has used her position to advocate for the rights of trans workers. The EEOC remains unfortunately understaffed, and continues to be governed by antiquated regulations in many important policy areas.

Under the Biden administration, the **Office of the United States Trade Representative** (USTR) has worked to build constructive relationships with organized labor. The USTR has used the novel "rapid-response mechanism" (RRM) to boost labor organizing efforts in Mexico by deterring employer abuses. Going forward, the USTR must push for the inclusion of the (RRM) in future trade deals.

# Majority of Voters Think Federal Regulations are Necessary to Protect Workers

When thinking about government regulations around the labor practices of private businesses, which statement comes closer to your view, even if neither is completely right?



Going forward, the Biden administration must continue to push for stronger labor regulations to protect workers' welfare. In doing so, the White House will be able to safeguard the rights of workers and win broad political support in the process. Polling by Data for Progress in November 2021 found that voters across party lines support stronger federal regulations on the labor practices of private businesses by a +24-point margin.

As a presidential candidate, Biden promised to “check the abuse of corporate power over labor” to reverse this trend and even the tilted scales. To turn this vision into reality, the Biden administration must use all available regulatory tools to hold employer crimes accountable. Furthermore, the administration and congressional leadership must prioritize increased funding for labor law enforcement agencies to strengthen their ability to hold violators accountable. Millions stand to benefit from strong enforcement of labor regulations, and doing so will help bolster the Biden administration's case to voters.