

A Good Job for Everyone

Fair Labor Standards Act must protect employees in nation's growing service economy.

By Craig Becker

As the nation celebrates Labor Day, Americans are in the throes of a “jobless recovery” whose causes and scope are the subject of anxious debate. But two facts appear incontestable—the vast majority of jobs that are being created are in the service sector, and many of these new jobs require little skill and pay low wages.

Yet as the debate rages about whether jobs have been lost or gained, there is little sustained analysis of what public policies should be pursued to ensure that new jobs will be good jobs: that is, at a minimum, that they will pay a living wage, provide health insurance and other benefits, and conform to overtime, health, and safety regulations. The uneasy application of the Fair Labor Standards Act to the expanding sectors of the new service economy illustrates the need for renewed attention to our nation's labor policies.

'CHISELING WORKERS' WAGES'

More than 20 million of the 21.6 million new jobs projected to be created during the first decade of the 21st century will be in the service sector. Among the 20 occupations expected to grow the most are food preparation and serving workers, retail salespersons, cashiers, janitors, waiters and waitresses, nurses aides, orderlies and attendants, security guards, home health aides, and groundskeepers.

The growth of low-wage jobs has caused some to wax nostalgic for the heyday of American heavy industry. But it requires little historical inquiry to discover that at the start of the last century, the growth of factory employment evoked apprehension. In 1912, Theodore Roosevelt spoke of the “human wreckage” created by the “scrap heap system of industrialism.”

Manufacturing jobs were not inherently good jobs. Rather, it was a set of public policies, formulated in the context of sustained workplace and political mobilization, that combined with economic circumstances to transform often dirty, dangerous,

low-wage factory jobs into occupational doorways to the middle class.

Most important of these policies, the Fair Labor Standards Act and the National Labor Relations Act established the foundation for federal labor policy. In 1935, Congress passed the NLRA, vesting workers with a right to organize. Three years later, the FLSA mandated a minimum wage and created a standard 40-hour workweek by requiring compensation at a rate of one and one-half times the workers' regular rate for all additional hours.

In 1934, President Franklin Delano Roosevelt, introducing the bill that later became the FLSA, told Congress, “A self-supporting democracy can plead no justification for . . . chiseling workers' wages or stretching workers' hours.”

Today, however, such chiseling is endemic in the expanding sectors of the economy and even among the largest companies. The Urban Institute recently found that 2 million immigrant workers earn less than the minimum wage. In 1998, the Department of Labor reported levels of compliance with the FLSA as low as 5 percent in restaurants and 35 percent in hotels and motels. A 2000 survey by the department revealed that 60 percent of nursing homes were violating the FLSA's minimum wage, overtime, or child labor provisions. State audits of unemployment insurance systems in 2002 found that misclassification of workers as independent contractors, to avoid compliance with employment laws and payroll taxes, increased by more than 40 percent since the prior year. The Employer Policy Foundation, an employer-supported think tank, estimated that workers would receive an additional \$19 billion annually if employers obeyed the law.

NOT ENOUGH ENFORCEMENT

The reasons for the high rates of noncompliance in the expanding service sectors are transparent. Provision of services is labor-intensive and highly competitive; employers compete by

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lowering prices, often at the expense of wages and the law. The risk of sanction for such illegal means of competition is low because enforcement is unlikely.

Notably, there are too few government inspectors—a situation that has worsened during the past quarter-century. During the Eisenhower administration, there was one investigator in the Labor Department’s Wage and Hour Division for every 46,000 employees. From the mid-1970s on, this ratio steadily diminished to one inspector for every 150,000 workers by the mid-1990s. In 2001, the Wage and Hour Division conducted 55 percent of its investigations solely by fax and telephone, hardly an effective means of detecting most forms of cheating.

Nor has the current Labor Department aggressively sought to preserve the universality of the FLSA’s minimum standards—the broad coverage essential to preventing unfair methods of competition as Congress intended through the FLSA. Just three months after President George W. Bush took office, the department withdrew a proposed revision of its regulations promulgated under the Clinton administration that would have made clear that most home-care workers are covered by the FLSA.

And just two weeks ago on Aug. 23, the department’s comprehensive revision of the “white collar” exemptions to the FLSA took effect. The Economic Policy Institute estimates that the revision will remove nearly 6 million workers from the overtime protection of the act, including many in the fastest-growing occupations.

DODGING THE LAW

Today, many large, visible employers in the new service economy seek to avoid both the legal consequences and moral opprobrium that should attach to violations of the FLSA by interposing a contractor between themselves and the low-wage workers whose labor they use.

This device has a long pedigree—for example, in the garment industry—and Congress addressed it in two respects in the FLSA. First, drawing on child labor laws enacted during the Progressive Era, Congress adopted a definition of the term *employ*—“to suffer or permit to work”—that departed from the narrow, common law definition, and, according to the FLSA’s Senate sponsor, future Supreme Court Justice Hugo Black, was “the broadest definition that has ever been included in any one act.”

Second, Congress included the “hot goods” clause in the FLSA, making it unlawful to transport or sell goods in interstate commerce that were produced by workers not paid in accordance with the act. Starting in the Clinton administration, the Labor Department has used this provision to leverage its enforcement resources, seeking to enjoin shipment of such “hot goods” in the garment industry to induce large manufacturers to police their contractors’ compliance.

But the application of the “hot goods” clause to the service sector is uncertain. Many employers, including the nation’s largest, Wal-Mart, continue to assert that they are not responsible for the compensation of service workers, such as janitors, whom they “suffer or permit” to work on their premises, so long as they do not sign their checks or directly supervise their work.

Finally, the key factor in the FLSA’s under-enforcement is that low-wage workers often do not know their rights and, if they do, fear retaliation and therefore accept substandard pay and long hours.

The Supreme Court has made the common-sense observation that many employees “cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.” But more than a lack of sophistication is at issue. Many workers effectively waive their rights as a condition of employment because the one legal principle that their employers have clearly explained to them is that they are employed at will.

The FLSA cannot be seen in isolation from all the related public policies that converted manufacturing jobs, once thought oppressive, into highly desirable jobs. Minimum workplace standards, such as those set by the FLSA, will not be effective unless workers have the security, knowledge, and means to enforce them. In other words, workers must have some form of independent, workplace representation—a union. Yet today, less than 10 percent of private-sector employees are represented.

Seventy years ago, Franklin Roosevelt declared, “Our nation so richly endowed . . . should be able to devise ways and means of insuring to all able-bodied working men and women a fair day’s pay for a fair day’s work.” On this Labor Day, we should recommit ourselves to this ideal.

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