NATIONAL AFFAIRS

How to Modernize Labor Law

Andrew Stern and Eli Lehrer

To the graduating classes of 2017, the American workplace of 1957 would seem like a foreign world. Sixty years ago, only a little more than a third of all women went to work, the overwhelming majority of them in low-status careers. A majority of men working could likely be called "hardhats" of one sort or another. They worked in factory, farm, mining, or service-industry jobs that often relied on physical strength.

Education and skill levels were far less important than they are today. Just under 42% of students finished high school, and less than one worker in 10 had a bachelor's degree. This wasn't really a problem because, outside the rarefied worlds of law, medicine, high finance, and academia, few employers would demand one anyway. Outside of farms, the great majority of full-time jobs had predictable nine-to-five hours; many of those that didn't were equally predictable shift-work at manufacturing plants.

Larger employers managed careers, benefits, and training. Most workers were expected, and sometimes required, to retire at 65. This wasn't usually a problem, of course, since the average life expectancy for men was less than 67 years: Long, expensive retirements were neither common nor expected. While the still-new Social Security system provided a retirement safety net for the relative handful who had long retirements, other government benefits were decidedly modest; there was no Earned Income Tax Credit, no Supplemental Security Income (although some state-level programs served a similar purpose), no Medicare, and no Medicaid. Many employees who had "health insurance" actually had hospitalization-only coverage or "mini-med" plans that few today would

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consider adequate. More than a quarter of the private-sector workforce belonged to labor unions, and, at least for white males, profitable union-heavy employers like General Motors provided ever-rising wages and expanding benefits to nearly everyone who worked there. There's little doubt that the peak of union power correlated with the creation of a mass middle class, by far the largest in the world — albeit one that largely excluded female and non-white workers from its broad prosperity.

Two years later, President Dwight Eisenhower signed what's arguably the last major addition to the corpus of law concerning unions, the Labor-Management Reporting and Disclosure Act. The law — which established secret-ballot elections for union offices, as well as various anti-corruption measures — was considered relatively minor in 1959. Few thought it would be the last word in labor relations. The other major labor laws — the National Labor Relations Act, the Taft-Hartley Act, and the Fair Labor Standards Act — were still of reasonably recent vintage, dating from the Franklin Roosevelt and Harry Truman administrations. At the time, nearly everyone likely thought further tweaks were inevitable. But they never came.

Indeed, while major laws like the Employee Retirement Income Security Act of 1974 and the Patient Protection and Affordable Care Act of 2010 have changed employee-benefit structures in myriad ways, the fundamental federal rules governing employer-worker relations were written for a different era. The law was written for industrial-era workers doing routine, often physically demanding work on set shift schedules.

The rules governing labor organizations are just as stringent as the laws regulating employee-working conditions often were back in the heyday of unions. Even in right-to-work states, where workers can opt out of paying union dues, workers in bargaining units are not allowed to negotiate on their own behalf, and unions must represent even those who do not pay dues. Good arguments can be made that it's unfair to allow workers to gain the benefits of a union contract without paying for it — and equally unfair to force representation on workers who don't want it. In states that aren't right-to-work, some workers are forced to pay union-agency fees or make alternative contributions and receive representation that they actively do not want. A similarly good argument can be made that this is also unfair.

These arrangements may have been appropriate in the mid-20th century, but we need a discussion about whether they remain appropriate in

the 21st-century economy. Indeed, it's possible to argue *both* that current laws are too inflexible for those who own enterprises *and* too restrictive on those who try to organize workers to defend their own interests.

Unions clearly haven't fared well over the past several decades. Even now, after eight years of an administration that openly supported unionization and with a clear set of National Labor Relations Board rulings that unions say are "pro-worker," private-sector participation in organized labor stands at its lowest levels — below 7% — since the passage of the National Labor Relations Act in 1935. Even when one includes government employees, about a third of whom are covered by union contracts, only a little more than 11% of U.S. workers belong to organized labor, down from 28% at the high-water mark for unionization in 1954.

There's little doubt that the decline in organized labor has correlated strongly with stagnation (at best) and decline (in many cases) in real wages paid to less-skilled workers and particularly to less-skilled men, as well as vastly lower labor-force participation rates for men. Of course, the decline of organized labor isn't the only factor contributing to this trend, but it's unquestionable that stronger unions correlated strongly with higher real wages for the working class. As former Federal Reserve chairman Ben Bernanke observed, "Whatever the precise mechanism through which lower rates of unionization affected the wage structure, the available research suggests that it can explain between 10 percent and 20 percent of the rise in wage inequality among men during the 1970s and 1980s."

Even when Democrats generally sympathetic to unions held a 60-seat majority in the U.S. Senate, organized labor's 2009-2010 push for the Employee Free Choice Act — which would have required employers to recognize a union if a majority of employees signed a union loyalty card — came up short. (So-called "card check" is currently allowed only if employers consent to it, which most won't do.) If private-sector unions want to persist, much less thrive, they'll need to make significant changes to their strategy, their financial model, and the law. The current path toward economic irrelevancy and terminal decline obviously isn't good for organized labor itself, but it also correlates with a number of negative trends affecting less-skilled workers, particularly wage stagnation.

But if labor organizations perceive management as "winning," few on the management or ownership side of the equation find the current situation copacetic either. Companies without unions, but with large,

modestly skilled workforces, often establish special offices dedicated solely to resisting unionization efforts. This costs millions of dollars. Companies with innovative business models — like the sharing-economy companies Uber, Handy, Instacart, and Lyft — have faced dozens of state inquiries and a number of lawsuits that call into question whether their labor practices make them "employers." Questions about who constitutes an employer also have been raised of the entire franchise-based business model, with implications for everything from small home-based carpet-cleaning operations to massive hotel and restaurant chains.

Even conventional large employers would like more flexibility to take on "project-based" workers and pursue new business models than they have right now. While a few state-level proposals have moved forward to create a "third" category of worker — one who is neither an employee nor a contractor — the prospects for similar legislation at the federal level are dim, with little consensus about how to define this new category.

In short, regardless of which side of the labor-management divide that one sits, there's good reason to be skeptical that national reforms are feasible or that they would change much even if they were enacted. Indeed, efforts to reform and update our federal labor laws to meet new realities have failed for more than a generation. It's time for a new path, one that takes advantage of one of the most successful public-policy innovations of the past 50 years: waivers from federal law to allow state experimentation.

Such waivers are already allowed under a wide range of laws, including the Social Security Act, the Elementary and Secondary Education Act (2002's No Child Left Behind Act expanded their use greatly), and the Affordable Care Act. A system to allow state waivers from major labor laws similarly could give every interest group a chance to try bold reforms the federal framework doesn't currently allow. If properly structured, such waivers could facilitate experiments with new business and revenue models for labor organizations, provide new opportunities for entrepreneurs, create new jobs, and expand prosperity. No one will like everything waivers might make possible, but everyone could find *something* to like. And in the end, American workers and employers could both be better off.

THE CASE FOR WAIVERS

Nearly all recent public-policy innovations that *anyone* would count as a triumph have been the result of innovations in state and local laws,

rather than federal ones. The left, most recently, has been successful in pushing through raises in state and local minimum-wage standards, with a $15 per-hour minimum becoming law in New York, California, and the District of Columbia, to name a few. Bills calling for higher minimum wages are likely to be introduced in nearly all states, and, regardless of federal action (which President-elect Donald Trump has signaled some support for), it's safe to predict that at least a few more will pass them this year. Paid leave has become a government-mandated benefit in a number of states and cities, while new scheduling laws have passed in Seattle and San Francisco and are under consideration elsewhere.

Indeed, in many ways, the success of these efforts belies the story of unions' shrinking public influence. Unions have retained power in many cases by expanding the ranks of public-sector employees covered by collective-bargaining contracts, and by modifying many state laws to make the public sector more union-friendly. The growth of mandatory paid family and medical leave — a concept endorsed and outlined by both the Republican and Democratic candidates in the 2016 presidential election and included in President-elect Trump's formal list of campaign promises — probably would not have happened without a concerted union effort to call for it. Unions, in many ways, have expanded their influence beyond their own membership to call for a variety of reforms that they see as benefiting society more broadly. In the absence of the decentralized, firm-based collective-bargaining process envisioned by the NLRA, the United States may be evolving toward a more European-style system of greater universal social benefits.

But the left's successes on the state level have been more than matched by successes on the right. Efforts to make right-to-work a national policy or to allow employers to place new limits on organizing have been turned back again and again at the federal level, but have thrived at the state level. Over the past five years, right-to-work has expanded from its historical stronghold in the South to such traditionally union-heavy, union-friendly states as West Virginia, Michigan, Indiana, and Wisconsin. On the other hand, Virginia, which voted for Hillary Clinton and clearly leans more toward the Democratic column, narrowly rejected a state constitutional amendment enshrining a version of "right to work" in the constitution (although it was a more straightforwardly anti-union proposal since, unlike most right-to-work laws, it didn't protect employees from being fired for union membership).

State-level "paycheck protection" efforts, which restrict unions' ability to spend money on politics without members' express approval, also have gained ground, as have procedures to make de-certification easier in states like Wisconsin.

There even have been some labor-law innovations moving forward at the state level with what could be described as broad ideological support. For example, the only concrete legislative proposals to create new worker categories and benefit structures for "gig economy" workers have been made at the state level. A few of these laws, mostly limited to the on-demand transportation industry, have even come into force.

In short, partisans across the political spectrum should agree that all real labor-law "progress," however one defines the term, has come from the state level. Moreover, nearly all of this progress has been facilitated by an approach that allows states to promulgate their own laws and procedures. The Fair Labor Standards Act, which establishes the national minimum wage, is explicitly subject to state-level preemption for states that want to set a higher minimum. The Taft-Hartley Act, likewise, bans fully "closed shops" (which allow workers to be fired for joining or refusing to join a union) and allows union-only shops by default, but allows states to opt for right-to-work laws of their own.

Allowing these sorts of experiments to expand and thrive will require more of the same — specifically, a waiver process for all major labor laws of the sort already seen in right-to-work and minimum-wage laws.

WAIVERS IN ACTION

Ideally, the waiver process would be modeled on what Harvard Law School's David Barron and Todd Rakoff call "big waiver" in a 2013 article for the *Columbia Law Review*. In a nutshell, it would allow states, localities, firms, and unions to fundamentally rewrite many of the major laws that govern labor relations in the United States. Labor-law waivers would be broad grants of new and different authorities to achieve broad goals by means different from those currently allowed by statute.

The goal would be to encourage an environment of "experimental federalism," in which states, localities, and even individual firms could serve as true laboratories of democracy, trying new and innovative models for worker-employer relations. The laws eligible for waivers should include, at minimum, the National Labor Relations Act, the Fair Labor Standards Act, the Labor-Management Reporting and Disclosure Act, the Employee

Retirement Income Security Act, and the Taft-Hartley Act. Some experiments may require waivers from more than one of these laws, while some waiver requests might be combined with existing waiver provisions, such as those allowed under the Affordable Care Act (insofar as it continues to exist in its current form) and the Social Security Act.

Labor-law waivers, like the "big waivers" currently granted under education and social-welfare laws, would have to follow a few fundamental rules. An absolute necessity is that the waivers would have to accomplish the stated purpose of the law; barring this, as Barron and Rakoff argue, waivers wouldn't pass constitutional muster anyway. Their impact on the federal budget would have to be neutral or yield cost savings, although they might require increases in state or local spending.

The waivers also typically should have a time limit, probably in line with the five-year default used for programs like Medicare and Medicaid. After that time, they could be renewed, extended, or canceled. Within that window, the waivers couldn't be canceled without a hugely compelling public-policy rationale; as is typical with existing waivers, they shouldn't be undone simply because of a change of administration. They also should be subject to a public-comment and review process, which could be expedited if local governments, major employers, and labor organizations all requested the same specific waiver.

Most of the fundamental rules and standards governing labor-law waivers wouldn't differ significantly from those already seen in American administrative and regulatory law. What would differ is *who* could apply for them. While existing "big waiver" requests always stem from a governmental unit (usually a state, sometimes a school district or local government), the labor-law-waiver application process could also be opened to firms and labor organizations.

For example, a manufacturer could request a waiver to begin using formal workplace committees, similar to those common in continental Europe, that include workers to discuss quality, productivity, and worker morale, but without actually initiating the process of collective bargaining. Such a structure was contemplated under the Teamwork for Employees And Managers Act introduced in the mid-1990s by Republican congressman Steve Gunderson and senator Nancy Kassebaum, which drew some bipartisan support. More recent efforts to create "works councils" that take on certain union-like responsibilities have faced resistance, with a study by the U.S. Chamber of Commerce

concluding they are flatly illegal under current federal law. Permitting experimentation with such councils or committees might be one of the first and most promising waivers to be granted.

Local waivers also could permit experimentation within larger organizations. Union locals and local units of national enterprises could request waivers that wouldn't necessarily apply across the entire union or company. The retailer Target might apply for a waiver to experiment with a 44-hour default workweek in Colorado, or Las Vegas's Culinary Workers Local 226 might ask for a waiver to sell benefit-plan services to outsiders.

Given the administrative complexity of the waiver-application process (applications for Social Security Act waivers can run into the thousands of pages), caution must be exercised to ensure it does not simply become a rent-seeking opportunity for larger firms and better-established unions, who would unavoidably have built-in advantages by virtue of scale. Insisting on public hearings and open-comment periods would help ensure the process is transparent. There also should be an expedited process to grant waivers to similarly situated companies and labor organizations. For example, if the department-store chain Macy's were to receive a waiver, a smaller competitor like the regional chain Belk could expect that its application for the same waiver would be processed very quickly with a minimum of paperwork.

The waiver process itself shouldn't offer an obvious advantage either to labor or to management. It should instead promote joint agreement, collaboration, and compromise. For every way it might be used to allow unions to expand their membership and influence, it should also offer opportunities for employers to enhance their profitability and experiment with new business models. Nearly every aspect of the world of work could be the subject of some form of waiver, but three broad categories of waiver bear further examination as potentially transformative: wage and hour rules, labor-organization structure, and benefits provision.

WAGE AND HOUR RULES

A 2005 National Bureau of Economic Research paper showed that, from the 1970s to the early 2000s, the number of men working more than 50 hours per week grew among those in the highest quintile of wage earners, but actually fell among those in the lowest quintile. On one hand, first-year associates starting out with big law firms are often asked to put in workweeks of more than 90 hours, while medical-residency

accreditors had to take action in 2003 to limit the average medical resident to "only" an 80-hour week. (Doctors, not coincidentally the highest earners of the categories tracked by the Bureau of Labor Statistics, work nearly 60 hours a week on average through their entire careers.)

Meanwhile, the growth of single-parent and single-earner households have made full-time work logistically difficult for many on the lower rungs of the income ladder, and overall workforce-participation rates for males are at the lowest levels on record. As firms make more expanded use of on-call scheduling, partly due to improvements in scheduling software, it has also become difficult for lower-income service-industry workers to stitch together hours, even at multiple part-time jobs.

The Obama administration's signature legislative achievement, the Affordable Care Act, mandates that large employers provide health benefits to those who work at least an average of 30 hours per week or 130 hours per month or pay penalties. This has attracted cheers from organized labor and some workers, as well as criticism from many employers that rely on mostly part-time workforces. The administration also promulgated rules, which were enjoined by court order in late November, that expand by more than 4 million the ranks of those eligible for overtime pay. Such changes could open up slightly more jobs and raise wages for some individuals. But they also could lead to pay cuts when employers decide to hire additional workers rather than paying time and a half.

As the employment landscape continues to evolve, the idea of a set number of hours in a workweek may become obsolete in some fields. For those performing "gig" work in the on-demand economy with companies like Uber, Lyft, and TaskRabbit, the very idea of "work hours" is hard to define. Does work begin when someone switches on an application? Arrives at the job site? What about "breaks"? Is there any way to pay for them? As currently defined in the law, overtime *can't* apply to a worker who picks his own start and end times on a daily basis.

The wage and hour system doesn't come close to reflecting current realities, but waivers might point the way toward a fix. Employers and employees both might benefit from new flexible arrangements that allow for various tradeoffs. Most simply, waivers might allow some private employers to experiment with allowing workers to bank additional paid time off as "comp time"—already widespread among public-sector workers—in lieu of the time-and-a-half overtime legally mandated for most hourly workers. Waivers might also allow averaging of overtime over several weeks or a

month, perhaps in tandem with mandates that employers provide part-time flex-scheduled workers a greater degree of schedule predictability.

Within the gig economy, waivers might be used to extend the reach of laws requiring time-and-a-half pay to select workers who put in large numbers of hours, or it might limit workers' hours. Some jurisdictions might also experiment with different definitions of full time for purposes of benefits and other protections offered to workers. Localities and states might seek waivers to experiment with shorter or longer default work weeks, either for all workers or for certain select categories of workers, based on factors like experience and the physical demands of a given job. It might be reasonable, for example, to require that coal miners get time-and-a-half pay after only 35 hours on the job, while the overtime threshold might be raised to 45 hours for office administrators.

Both federal and state waivers also could be used to extend certain full-time employment benefits to people who would otherwise legally remain freelancers. Sharing-economy companies like Uber and Lyft have already expressed their openness in private and in public to make it possible for gig-economy workers to assure that employers pay them as promised through administrative procedures, rather than court hearings. Waivers also could be used to resolve some of the most controversial and fraught issues in labor law, such as the treatment of franchisors.

Many firms would probably elect to extend workers' compensation to freelance and self-scheduled employees — immunizing the employer from most lawsuits for on-the-job injuries while guaranteeing the employee scheduled benefits on a no-fault basis — but avoid doing so now for fear of being declared "full-time" employers. Labor-law waivers could make it possible for them to do so without fear. Indeed, experiments with such waivers for workers' comp deserve quick consideration.

Some of these experiments are relatively simple and would have easy-to-predict outcomes for all the stakeholders. For example, there's already extensive research on the widespread use of comp time in lieu of overtime for public-sector employees, making clear its advantages like flexibility and job satisfaction and its disadvantages such as somewhat lower pay. Other experiments might well produce controversy from the moment they are proposed. Nullifying right-to-work laws through a local waiver would be sure to raise enormous objections from the right while an exemption from benefit mandates would likely move many on the left to protest. Nonetheless, there are distinct and important

possibilities to find new and innovative ways to schedule workers and regulate their hours that current law doesn't allow. Waivers could make those possible and allow for broad experimentation.

labor-organization structures

Current labor law puts both labor unions and employers in an all-or-nothing situation: Employers that recognize a union, something they're legally required to do if employees vote to certify one in a secret-ballot election, must engage in "good faith" collective bargaining. They generally are in a lifelong relationship with their "union partner," whether or not they want to be and whether or not their competitors have the same relationships.

Likewise, employers face significant hurdles to allowing rank-and-file workers a management role in the enterprise outside of a collective-bargaining context. As a result, labor organizing becomes a high-stakes, winner-take-all game. Most non-union employers desperately want to remain union-free, for both competitive and ideological reasons, and will engage in costly campaigns to prevent unions from becoming certified.

To maximize the opportunities allowed under current law, unions sometimes expend energy on maladaptive behaviors that really don't serve anyone's long-term interests. Since 2011, organized labor groups have been able to create new "micro unions" that represent only a very small percentage of a worksite's employees. One of the earliest efforts allowed a department store's cosmetics-department workers, but not anyone else at the store, to form a union. To defeat these unions, employers may decide to abolish certain job categories altogether, an approach the anti-union Workplace Policy Institute has actually recommended in some cases.

While this may be an effective strategy to resist organized labor, it's probably not the best business practice in many industries. Basic economics suggests the division of labor and gains from specialization are among the best ways to increase productivity. For their part, private-sector unions might be pleased to reverse their declining numbers even in a minor way, but they probably aren't going to restore their glory days by organizing workers in groups of five or 10 at a time.

Given the perceived and real costs of a unionized workforce, many employers are willing to push or break the law (and even to pay fines for doing so) in order to prevent union certification. In practice, employees

are fired or disciplined far too often for merely expressing interest in unions, despite a profusion of laws that theoretically protect them. The fact that employers can require employees to listen to anti-union presentations, while unions typically can't do the same, has served to tilt the playing field decisively against organized labor in many contexts. Legal waivers could help to change this.

Under the waiver approach, the biggest potential change for both employers and unions could be granting unions the ability to "unbundle" their services and benefits. Right now, union officials can face criminal charges if they sell anything to employers — even services like a health plan that employers might be willing to spend good money to buy in a free and open market. Over the long run, it might be possible to find political consensus to repeal these prohibitions from the U.S. code. But in the meantime, waivers could allow some experiments with unbundling, for instance, union representation and job-benefits services, or give them the space to create entirely new structures.

New modes of representation offer tremendous promise. Unions might look into whether to represent individuals in dealings with work providers outside the context of collective bargaining. Although some aspects of employer-employee relationships are probably best left to lawyers, the day-to-day grievance-handling and workplace-mediation processes provided by good shop stewards ought to be available to non-union workers willing to pay for such services either individually or collectively. Either existing unions or new types of labor organizations might meet and confer with management and even negotiate work conditions, but leave matters of wages or benefits or both to negotiations between managers and individual employees. Unions could offer lobbying or regulatory advice, or could allow their apprenticeship and training-center expertise to be offered in the market.

Waivers could be used to expand some existing models to new contexts. Hiring halls — union-run entities that supply businesses with trained workers — are common in construction and maritime trades, but essentially banned in other industries. Given that project-based work has become increasingly common in many other industries, hiring halls for everything from hotel banquet staff to project-based computer programmers could assure employers of trained workforces and could better align worker and management interests. Experiments with hiring halls on a broader basis also deserve consideration.

More radical experiments are also possible. National collective-bargaining agreements for entire industries once existed in most U.S. heavy industries and remain common in continental Europe. Today, the handful of industry-wide collective-bargaining agreements that exist are almost all local or regional, although a limited form of industry-wide bargaining exists for the three Detroit-headquartered automakers. Under current law, such industry-wide agreements are very hard to facilitate and not terribly attractive to many employers. Indeed, as Garth Mangum and R. Scott McNabb document in their 1997 book on the steel industry, efforts to build non-adversarial relationships between steel producers and unions were possible only *after* the collapse of industry-wide collective bargaining. New procedures and laws to more closely align labor and management interests would probably be needed to get any business owners to even consider coming to the table on an industry-wide basis. It's an open question whether industry-wide collective bargaining can be revived, or whether it would be desirable to do so, but any experiments will be very difficult without a system of waivers. And they certainly seem worth a try in some industries.

benefits provision

Many unions have developed real expertise in administering a wide variety of benefit plans, and waivers could allow them to be offered to more people. While the quality of these benefit plans and the competence with which they are run varies a great deal, there's little doubt that unions offer the greatest reservoir of expertise on employee-benefit administration independent of the insurance industry, employers, and the government.

Eli Lehrer has already proposed, in these pages (see "The Future of Work" in the Summer 2016 issue), a legal structure by which benefits might be provided to "gig" workers independent of any given employer or union. Allowing unions to open their benefits plans to employers and employees could have numerous advantages. Health-insurance plans that some unions already use might be able to compete directly in the private market (as several union-founded health plans already do for federal employees) or be marketed to other employers, even those with non-union workforces.

For benefits that are less consequential and more easily available in the private market — dental insurance, retirement, and short-term disability coverage — allowing major unions to open their plans to others

voluntarily could have real advantages. Lower administrative costs means that these types of benefits are often much cheaper when purchased through an employer or a union. Unions could realize profits while providing valuable services to workers and employers alike. Some unions or new organizations might even reinvent themselves as democratically run, worker-owned, professional employer organizations, that employ workers as a legal matter and contract with employers for jobs. This would combine some of the features of a hiring-hall system with an entirely new type of business structure.

Unions might even assume some of the benefit responsibilities currently undertaken by the government. In particular, waivers could allow experimentation with structures modeled on the Northern European Ghent system that uses unions to administer unemployment, disability, and sometimes job-retraining benefits. This might offer a more flexible and personalized alternative to the current unemployment and disability system. Given unions' obvious interest in having dues-paying members who work jobs, this might also overcome some of the perverse incentives implicit in government-run unemployment and disability benefits.

Like everything else that might be tried with waivers, this would just be an experiment. The actual record of Ghent systems where they do exist doesn't suggest significantly better workforce re-engagement results than in the United States, although all of the Ghent-system countries do have higher overall workforce-participation levels among adult males (as do almost all other wealthy countries in the Organization for Economic Cooperation and Development).

There may be reasonable and perhaps even serious criticisms of specific plans to allow unions to provide new types of benefits. Some experiments will undoubtedly fail. But there's little doubt that some will succeed and provide new, innovative ways to supply job-related benefits. And it's worth trying in any case.

WAIVERS COULD WORK

While our goal in proposing waivers is, in part, to reinvigorate the labor movement, there's little doubt the system we propose could erode some private-sector unions as they exist. But the current model of private-sector unions is already in near-terminal decline. While it may preserve the jobs and livelihoods of those currently leading unions,

attempts to preserve the entire system exactly as it appears are very unlikely to arrest the long-term decline of private-sector unions, no matter who wins elections or what particular legal changes get made around the margins.

Unions could and should learn to love waivers. They would allow experimentation with new business models that could, in turn, vastly increase the number of people involved in labor unions as well as unions' own success as business enterprises.

Conservatives might also be skeptical, and not without reason, of anything likely to promote the growth of organized labor. But it bears noting that the decline of organized labor has correlated closely with the growth of government and the welfare state. A larger, healthier, organized-labor movement might well oppose many Republican politicians but, if it were given a larger role in benefit administration and a way to link its own livelihood to those services, it could also serve to contain further growth of the state. If President-elect Trump is serious about his desire to turn the GOP into a "workers' party," real support for new labor organizations and forms could be a concrete way to allow this to happen.

The more-powerful unions of the 1950s provided a bulwark against communism and were often skeptical of new government-provided benefits: Newly empowered unions could serve a similar purpose and play a larger role in providing a social-safety net. It's not something all conservatives will ever embrace but something they should at least consider. In any case, a simple regard for the right of free association should lead at least some conservatives to be more skeptical of the most strident efforts to stop union organizing flat and fire workers for engaging in it.

For employers, labor-law waivers would allow experimentation with new business models, as well as new relationships with their workers. It's unlikely that *any* particular set of regulations is actually going to satisfy all or even most employers or allow the flexibility that many feel they need. Waivers would allow employers and entrepreneurs to experiment with new ways to create value without necessarily imposing new rules on all of them at once, as state and federal legislative action now does. New labor-organization structures might also allow at least some employers to find ways to actually partner with unions (or new organized-labor structures that aren't "unions" under the law) rather than seeing them as perpetual adversaries.

American labor laws were written to meet the needs of a different era. Political gridlock and the sheer diffusion of business models has stopped labor law from changing with the times. A stronger organized-labor movement or new forms of worker organizations that better meet workers' individual needs would benefit many workers and, if given the proper flexibility, could also benefit employers and entrepreneurs. Labor-law waivers, properly constructed, would provide a broad canvas for national experimentation. Without them, we will have to live with an unsatisfactory status quo.