COALITION FOR A
DEMOCRATIC WORKPLACE

Workplace Democracy Act: EFCA's Evil Twin

Just in time for the upcoming 2018 and 2020 election cycles, union lobbyists have unveiled legislation that would steamroll workers' rights, small and local businesses, entrepreneurs and the gig economy in an effort to make unionization easier and increase the number of dues paying members. The union-backed bill would strip workers of the right to secret ballot elections, eliminate protections against forced union membership, interfere with a company's access to legal counsel and attorney-client confidentially and make it substantially more difficult for Americans to start their own business or work for themselves. ***Forcing workers into unions through intimidation and mandates and stripping rights to legal counsel and private voting will not lead to stable labor relations and is not a solution any politician should support. This bill is a bad deal for American workers, businesses and consumers.***

On May 9, Senators Bernie Sanders, Elizabeth Warren, Kirsten Gillibrand and Cory Booker—all expected Presidential contenders—along with Representative Mark Pocan introduced the deceptively named Workplace Democracy Act or WDA - S. 2810 and H.R. 5728. The WDA would:

- strip workers' right to private voting and secret ballots in union elections;
- codify the National Labor Relations Board's controversial *BFI* joint employment standard that has threatened our country's small and local businesses;
- curb opportunities for people to work independently through gig economy platforms or more traditional independent contractor roles;
- eliminate Right to Work protections for workers across the country, including in the 28 states that have passed Right to Work laws;
- interfere with attorney-client confidentiality and make it harder for businesses, particularly small businesses, to secure legal advice on complex labor law matters; and
- strip away "secondary boycott" protections in the law that prevent unions using their exemptions from anti-trust laws and immunity from some state laws to target business for anti-competitive reasons and purposes other than organizing.

EFCA - But Worse:

This is not the first time organized labor has tried to take away workers' rights to a private ballot. Over a decade ago, union lobbyists in DC repeatedly pushed Congress to pass the equally deceptively named Employee Free Choice Act, or EFCA, which would have replaced secret ballot elections with "card check" as the method for determining whether employees wanted union representation. Under a card check scheme, workers are forced to "vote" for or against the union by signing or not signing sign cards in front of coworkers and union organizers, inviting conflict, intimidation and harassment. Fortunately, after strongly negative voter reactions, Congress wisely rejected EFCA.

Despite Congress' and the American People's repeated rejections of EFCA, union lobbyists are once again looking to make organizing easier by steamrolling employee rights. But this time, they are expanding on prior efforts, by including attacks on small and local businesses, gig economy workers and Right to Work protections.

In fact, the WDA is a compilation of overreaching and ill-conceived proposals which have been soundly rejected by Congress, the courts, and the American people over the last 50 years. Unions are urging politicians to overlook the many concerning violations of workers' and employers' rights within the legislation.

The Coalition for a Democratic Workplace (CDW) will continue to fight against organized labor's all-out effort to increase the number of dues-paying union members without regard to the negative impact such actions would have on employees, employers, and the economy and will continue its work to advance policies that protect the rights of employees, foster the American Dream, and strengthen the economy.

The WDA's very troubling provisions include the following:

Eliminates Workers' Free Choice and Privacy:
Secret ballot elections have been a cornerstone of workers' rights and an integral part of labor relations since the earliest days of the National Labor Relations Act (NLRA). Every employee should have the right to vote privately on whether they want a union; and, for **over seventy years**, employees have largely decided whether to join a union through a secret ballot election overseen by the National Labor Relations Board (NLRB).The WDA, however, would replace private voting with the card check process as the method for determining whether employees want union representation. Under a card check scheme, employees are forced to "vote" for or against union representation by signing or not signing "authorization cards" in front of union organizers and co-workers. Card check unnecessarily and unfairly subjects workers to peer pressure, intimidation, and harassment.

Codifies the Damaging Joint Employer Standard:
The WDA would codify the controversial 2015 NLRB *BFI* decision that **expanded** and **muddled** the standard for determining when two separate companies are "joint employers" under the NLRA. Joint employers are jointly responsible for labor violations committed by the other and bargaining with respect to any jointly employed workers. The *BFI* decision overturned **decades** of established labor law and **undermined** the relationships between brand companies and local franchise business owners; contractors and subcontractors; and businesses and their suppliers and vendors. In short, *BFI* has cast a cloud of **uncertainty** over business models that have created **millions of jobs** and allowed hundreds of **thousands of individuals** to achieve **the American Dream** of owning their own small business. The *BFI* standard also has hampered businesses' efforts to provide guidance to and impose quality and conduct standards on franchisees, contractors, and vendors to the detriment of workers and consumers.

Limits Opportunity for the Self Employed and Sharing Economy:
WDA would import into the NLRA the California Supreme Court's recently adopted "ABC" test to determine whether a worker is an employee or an independent contractor. As it is difficult to qualify as an "independent contractor" under the "ABC" test, many workers could **lose the freedom** and flexibility

of determining their own hours, what work they choose to do, and how they perform that work — including those who have chosen to work in the burgeoning gig economy.
At the same time, **consumers would lose** the ability to meet on-demand needs using technology to crowd source independent workers. They would again need to rely on the schedules of vendors, who may not be able to meet demand in a timely manner, leaving people struggling to find transportation and taking time off work to meet vendors during set four-hour or eight-hour blocks.

Imposes Government Control Over Private Contracts:
Another hold over from the days of EFCA, WDA contains a provision that would **eliminate freedom of contract** by mandating compulsory, binding arbitration on the employer and the employees if the two parties do not reach a collective bargaining agreement within the first 120 days of negotiations.
Under the WDA, an arbitrator, who is unfamiliar with the business operations, would impose terms that are binding upon both parties, even if one or both find those terms unacceptable. In fact, employees would not be provided with the opportunity to vote on whether they approve their new contract. Employers have very limited avenues for redress if they cannot afford the terms imposed. Thus, if an arbitrator miscalculates what wages or benefits the company can afford, or forces the company into failing multiemployer pension plans, the employer may simply **go out of business.**

In fact, binding arbitration in the public sector has been blamed for **multiple municipal bankruptcies** and for fueling the public sector pension crisis. Many states and municipalities have taken steps to eliminate or curb arbitrator authority in the wake of fiscally irresponsible arbitrator decisions. While courts and arbitrators are equipped to settle legal disputes, they lack the expertise and the intimate knowledge of a business's operations to objectively evaluate a business's otherwise lawful position on contract terms. Moreover, government control of contract terms runs counter to the intent of the NLRA as evidenced by the following statement by the Senate Committee on Education and Labor at the time the NLRA was passed:

The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

Breaches Attorney Client Confidentiality:
WDA would amend federal law to include many of the provisions of the failed 2016 Department of Labor (DOL) "persuader" regulation under the Labor-Management Reporting and Disclosure Act (LMRDA). The regulation was enjoined by a federal court and is currently being rescinded by DOL.

Like the persuader rule, the WDA provision would **force a breach of attorney client confidentiality** and make it more difficult for employers to access legal counsel or other expert advice on complex labor and employee relations issues during union organizing drives. The court that struck down the rule found it **"defective to its core**" because it:

- entirely eliminates the LMRDA's "advice" exemption and requires the disclosure of a "great deal of advice that is actually protected from disclosure";
- "undermine[s] the attorney-client relationship and the confidentiality of that relationship"; and
- is "vague and impossible to apply."

Many stakeholders also expressed disapproval during the rulemaking process, including the American Bar Association (ABA), which repeatedly voiced its opposition to the proposed regulation. The ABA specifically noted that it "was not taking sides on a union–versus management dispute," and its "sole objective" was to defend "the confidential client-lawyer relationship by reversing a rule that imposes unjustified and intrusive burdens on lawyers, law firms and their clients."

Strips Away Employees' Right-to-Work Protections:
WDA would repeal Section 14(b) of the NLRA and thus deprive workers across the country of the right to choose whether to join a union by abolishing right-to-work laws in favor of compulsory unionization. Right now, 28 states have right-to-work laws that prevent contracts from requiring employees join a union as a condition of employment, empowering individuals with free choice.

Brings Coercion, Picketing, and Boycotts into the Home and onto Main Street:
WDA would rescind all restrictions in the NLRA that currently make it unlawful for unions to impose economic injury on "neutral" third parties that are not involved in an underlying labor dispute, such as consumers, companies or other unions that do business with the company involved in the labor dispute. The existing restrictions against "secondary" coercion were adopted by Congress in 1947, and they were strengthened by Congress in 1959, because unions engaged in tactics that were deemed excessive and abusive, especially based on the injury imposed on "neutral" parties. The WDA would eliminate "neutral" status by rescinding all "secondary" prohibitions, which would expose all consumers, employers, suppliers, vendors, franchisors, franchisees, and all other businesses to coercion, picketing, boycotts and similar tactics, regardless of whether they have any dispute with any union.

Eliminates Limits on Recognitional Picketing and Anticompetitive Behavior — Allowing Unions to Harm Rather than Organize Companies:
The WDA would eliminate provisions in existing law that limit unions to 30 days of recognitional picketing, unless the union files a representation petition seeking an NLRB election. Under the WDA, unions could engage in recognitional picketing without any limitation — **causing injury to employers, consumers, suppliers and customers** — without filing any petition, at any time, that would permit employees to vote on whether they want union recognition. Also, the NLRA's existing protections against secondary boycotts prevent unions from using their anti-trust exemptions and immunity from some state laws to target business for anti-competitive reasons and purposes other than organizing. If "secondary" boycotts become lawful, unions may engage in anti-competitive tactics directed at particular companies, with immunity from prosecution under federal anti-trust statutes and state laws against unfair competition.