



WFNA Targets Mainstreet Consumers and Businesses

Just in time for the upcoming 2018 and 2020 election cycles, union lobbyists have unveiled legislation that would target workers' rights, small and local businesses, entrepreneurs, the gig economy, and main street consumers in an effort to make unionization easier and increase the number of dues paying members.

On June 13, 2018, Senator Patty Murray (D-WA) and Representative Bobby Scott (D-VA) introduced the deceptively named Workers' Freedom to Negotiate Act (WFNA), [S. 3064](#) and [H.R. 6080](#) respectively. This radical legislation includes provisions that would:

- strip away workers' free choice in union elections as well as their privacy rights;
- codify into law the NLRB's controversial *Browning-Ferris Industries (BFI)* joint employer 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 twenty-eight 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;
- prohibit arbitration agreements in employment contracts;
- infringe on the due process rights of employers;
- strip away "secondary boycott" protections that prevent unions from using their anti-trust exemptions and immunity from certain state laws to target businesses for anti-competitive purposes other than organizing; and
- blacklist federal contractors and subcontractors from procurement opportunities over allegations that the company violated federal or state labor law with no proof of actual wrongdoing.

More details on the WFNA's troubling provisions are set forth in more detail below.

Eliminates Workers' Free Choice and Privacy: The WFNA would codify the shortened representation election time frames that are in the [Ambush Election Rule](#). These shortened time frames serve no other purpose than silencing debate about the possible disadvantages of unionization generally or the specific union in question. The bill would also eliminate employers' ability to challenge union misconduct during elections and greatly expand the Board's power to foist union representation on employers and employees without an election. Finally, the WFNA mandates that employers provide to union organizers the contact information for all employees without prior approval from the employees themselves. Employees would not be able to opt out of this requirement and would not have a say in which contact information is provided, needlessly exposing them to potential harassment and intimidation tactics.



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Codifies the Damaging Joint Employer Standard: The WFNA 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 National Labor Relations Act (NLRA). Joint employers are jointly responsible for labor violations committed against the jointly employed workers as well as bargaining with respect to those 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. The new joint employer standard has also hampered businesses’ efforts to encourage “corporate responsibility” among franchisees, contractors, and vendors to the detriment of workers and consumers. 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.

Limits Opportunity for the Self-Employed and Gig Economy: The WFNA 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. It is difficult to qualify as an independent contractor under the “ABC” test; the change will therefore result in many workers losing the freedom and flexibility that comes with independent contractor status, such as determining their own hours, what work they choose to do, and how they perform that work. Freedom and flexibility are oftentimes the main reason for such workers choosing to be independent contractors and is especially prevalent for those who have chosen to work in the gig economy. The “ABC” test will also result in consumers losing the ability to meet on-demand needs through the use of crowdsourcing, damaging the burgeoning gig economy as well as the general American economy as a result.

Imposes Government Control Over Private Contracts: The WFNA includes a provision that would eliminate freedom of contract by mandating compulsory, binding arbitration on the employer and employees if the two parties do not reach a collective bargaining agreement within the first 120 days of negotiations. Under the WFNA an arbitrator, who would be unfamiliar with business operations, would impose terms that are binding upon both parties, even if one or both find those terms unacceptable. Employees are not even provided with the opportunity to vote on whether they approve their new contract. Furthermore, 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’ operations to objectively evaluate a business’ otherwise lawful position on



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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: The WFNA 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 was formally rescinded by DOL on July 18, 2018. Like the persuader rule, the WFNA 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.”

Bans Arbitration Agreements Prohibiting Class Actions: If passed the WFNA would infringe on current law that allows employers to enter into any contracts with their employees that limit the employees’ ability to file collective legal claims against the employer. The Federal Arbitration Act, which has been tried and tested throughout the judicial branch and upheld by the Supreme Court, allows employers to require such a promise from its employees. However, the WFNA would eliminate that right. Labor unions hypocritically secured for themselves an exemption from this provision within the WFNA, allowing them to continue to use arbitration agreements when negotiating a bargaining agreement.

Infringes on Due Process Rights of Employers: The WFNA significantly infringes on employers’ due process rights in several ways. As noted above, the bill would make it increasingly difficult for employers to obtain legal counsel to help them navigate the



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complex and convoluted labor laws involved in a union organizing campaign. The bill also prohibits employers from holding meetings with employees in order to explain the employer's position with regards to union organization. Union organizers have successfully included these provisions in the bill to make it even more difficult for workers to hear both sides of the debate on union organization prior to a representation election. Furthermore, the WFNA eliminates employers' standing in a pre-election hearing determining an appropriate bargaining unit. Employers would no longer be able to participate in the pre-election hearing to express their perspective on which employees should or should not be included in a petitioned-for bargaining unit, explicitly rejecting their input even though they are the most knowledgeable on the roles and duties of their employees.

Strips Away Employees' Right-to-Work Protections: The WFNA would render Section 14(b) of the NLRA meaningless and thus deprive workers across the country of their right to choose whether to fund union activity. Right now, twenty-eight states have Right-to-Work laws that prohibit 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: The WFNA 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. The existing restrictions against "secondary" coercion were adopted by Congress in 1947, and were strengthened by Congress in 1959, because unions engaged in tactics that were deemed excessive and abusive. The WFNA 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 the union.

Eliminates Limits on Recognitional Picketing and Anticompetitive Behavior, Allowing Unions to Harm Rather than Organize Companies: The WFNA would eliminate provisions in existing law that limit unions to thirty days of recognitional picketing, unless the union files a representation petition seeking an NLRB election. Under the WFNA, unions could engage in recognitional picketing without any limitation — causing injury to employers, consumers, suppliers and customers — without filing a petition requesting employees vote on whether they want union recognition. Furthermore, the NLRA's existing protections against secondary boycotts prevent unions from using their anti-trust exemptions and immunity from certain state laws to target businesses 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.



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Blacklists Employers for Allegations of Wrongdoing: If passed into law, the WFNA would allow unelected bureaucrats to blacklist federal contractors and subcontractors from future government contracts if the businesses allegedly violated any of fourteen federal labor laws and their equivalent state laws over the previous three years. This would include administrative merit determinations, arbitral awards or decisions, or civil judgements. This provision is designed to provide enemies of the employer as well as union organizers trying to establish a union within the employer's workplace with leverage over the business' viability. The WFNA calls for Labor Compliance Advisers to be placed within each department of the federal government involved in procurement and grants them authority to call for the suspension or actual debarment of contractors and subcontractors from the agency's procurement process, granting these unelected bureaucrats the power to destroy a company on mere accusations of wrongdoing that could have been filed by an entity wishing to do harm to the employer.

For the extensive reasons stated above, CDW believes the Workers' Freedom to Negotiate Act's damaging provisions would inflict serious harm on the American workplace. CDW and the below-listed signatories strongly urge you to oppose this misguided legislation.