



## COALITION FOR A DEMOCRATIC WORKPLACE

### **PRO Act Targets Mainstreet Consumers and Businesses**

*DC union lobbyist are pushing the PRO Act, which aims to boost the number of dues paying union members at the expense of workers, small and local businesses, entrepreneurs, and main street consumers. The legislation attempts to implement policies that have been rejected by the judicial system, opposed on a bipartisan basis in Congress, and/or abandoned by the agencies asked to enforce them. CDW strongly urges Congress to oppose this misguided and radical legislation.*

#### **PROTECTING THE RIGHT TO ORGANIZE ACT:**

On February 6, 2020, House Democrats forced through the Protecting the Right to Organize (PRO) Act ([H.R. 2474](#), [S. 1306](#), 116<sup>th</sup> Congress). This radical legislation included 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* joint-employer standard that has threatened our nation'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-seven 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; and
- 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.

The bill is expected to be reintroduced any day. More details on the PRO Act's troubling provisions are set forth below.

#### **ELIMINATES WORKERS' FREE CHOICE AND PRIVACY:**

The PRO Act would codify into law [the shortened representation election time frames](#) created by the Obama-era National Labor Relations Board (NLRB). 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 PRO Act 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. Additionally, the bill mandates employers provide to union organizers employees' contact information 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 information was provided, exposing them to potential harassment and intimidation tactics.



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### **CODIFIES THE DAMAGING JOINT-EMPLOYER STANDARD:**

The PRO Act would codify into law the NLRB's controversial 2015 *Browning-Ferris Industries (BFI)* decision that expanded and muddled the standard for determining when two separate entities are "[joint-employers](#)" under the National Labor Relations Act (NLRA). Joint-employers are mutually responsible for labor violations committed against the jointly employed workers as well as bargaining obligations with respect to those workers. The *BFI* decision overturned decades of established labor law and undermined the relationships between nearly every contractual relationship, from the franchise model to those between contractors and subcontractors and suppliers and vendors. The *BFI* standard also hampered businesses' efforts to encourage "corporate responsibility" among franchisees, contractors, and vendors to the detriment of workers and consumers. *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 PRO Act would import into the NLRA the California Supreme Court's recently adopted and failed "ABC test" to determine whether a worker is an employee or an independent contractor. The ABC test makes it very difficult to qualify as an independent contractor; the change will, therefore, result in many workers losing independent contractor status and the freedom and flexibility that comes with it, such as determining their own hours, what work they choose to do, and how they perform that work. This is at odds with what independent contractors actually want; many of them, especially those in the gig economy, choose independent work because of the flexibility and autonomy it offers. Additionally, the conversion of gig economy workers to employees will likely result in consumers losing the ability to meet their on-demand needs through such application-based companies, damaging the burgeoning and innovative gig economy as well as the US economy as a whole.

### **IMPOSES GOVERNMENT CONTROL OVER PRIVATE CONTRACTS:**

The PRO Act includes a provision that would eliminate freedom of contract by mandating compulsory, binding arbitration on employers and employees if they cannot reach a collective bargaining agreement within the first 120 days of negotiations. Under the PRO Act an arbitrator, who would be unfamiliar with the 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 of 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 be forced 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



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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:**

The PRO Act would amend federal law to include many of the provisions of the Department of Labor's (DOL) failed 2016 "persuader" regulation under the Labor-Management Reporting and Disclosure Act (LMRDA), despite the fact that the regulation was enjoined by a federal court and formally rescinded by DOL in July 2018. Like the persuader rule the PRO Act 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 eliminated the LMRDA's "advice" exemption and required the disclosure of a "great deal of advice that is actually protected from disclosure"; "undermine[d] the attorney-client relationship and the confidentiality of that relationship"; and was "vague and impossible to apply". Many stakeholders expressed strong disapproval during the rulemaking process, including the American Bar Association (ABA), which repeatedly voiced its [opposition](#) to the proposal. The ABA specifically noted that it "was not taking sides on a union-versus-management dispute;" 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:**

The PRO Act would amend Section 14(b) of the NLRA to require all employees contribute fees to a labor organization, essentially invalidating all Right-to-Work laws across the country, including in the twenty-seven states whose populations and representatives voted for and implemented such laws. This provision deprives workers nationwide of their right to choose whether or not to fund union activity, eliminating individuals' freedom of (and from) association.

### **BRINGS COERCION, PICKETING, AND BOYCOTTS INTO THE HOME AND ONTO MAIN STREET:**

The PRO Act would rescind all NLRA restrictions that currently make it unlawful for unions to impose economic injury on neutral third parties that are not involved in an underlying labor dispute, including consumers, companies, or other unions that do business with the company involved in the dispute. The existing restrictions against "secondary" coercion were adopted by Congress in 1947, and were strengthened by Congress in 1959, after unions engaged in tactics that were deemed excessive and abusive. The elimination of neutral status



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will expose all consumers, unions, and businesses to coercion, picketing, boycotts, and similar tactics, regardless of whether they have any dispute with the union in question.

**ELIMINATES LIMITATIONS ON PICKETING AND ANTI-COMPETITIVE BEHAVIOR:**

The PRO Act 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 PRO Act unions could engage in recognitional picketing indefinitely, causing injury to employers, suppliers, and customers. Additionally, the NLRA's existing protections 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 also become lawful (as explained above), unions could engage in anti-competitive tactics against particular companies and be immune from prosecution under federal anti-trust statutes and state laws against unfair competition.