COALITION FOR A
DEMOCRATIC WORKPLACE

PRO Act Targets Mainstreet Consumers and Businesses

Democrats in Congress 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to implement policies that have been rejected by the judicial system, opposed on a bipartisan basis in Congress, and/or withdrawn by federal agencies that prior administrations tried to use to implement the policies unilaterally. CDW strongly urges Congress to oppose this misguided and radical legislation.

PROTECTING THE RIGHT TO ORGANIZE ACT:

In March, Democrats in Congress reintroduced the Protecting the Right to Organize (PRO) Act (H.R. 20, S. 852). This radical legislation would violate workers' free choice and privacy rights, cost millions of American jobs, threaten vital supply chains, and greatly hinder our economy. The bill boosts union membership at the expense of American workers and small businesses.

Some of the most egregious provisions would:

- strip away workers' privacy rights and key protections guaranteeing workers' free choice through secret ballots in union representation elections;
- curb opportunities for people to work independently through gig economy platforms or more traditional independent contractor roles;
- require workers to pay union dues as a condition of employment even in the twenty-seven states that have enacted Right-to-Work protections;
- force small businesses who rely on independent contractors to lay off workers and potentially close;
- change the legal standard for joint-employer liability, reducing opportunities for our country's small and local businesses through subcontracts, licensing, and franchising;
- violate employers' right to attorney-client confidentiality on complex labor law issues, making it harder for businesses, particularly small businesses, to secure legal advice;
- impose government control over private contracts;
- infringe on the due process rights of employers; and
- expose the economy to a flood of "blackmail" strikes used by unions to attack businesses simply to destroy the business and for anti-competitive purposes, even though these tactics were overwhelmingly banned by bipartisan majorities in Congress.

This bill would destroy jobs and the economy while infringing on the rights of employees and employers alike.

ELIMINATES WORKERS' FREE CHOICE:

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

frame serves no other purpose than silencing debate about the possible disadvantages of unionization. The bill would also greatly expand the Board's power to foist union representation on employers and employees without an election, depriving workers of their right to a vote, and eliminate employers' ability to challenge union misconduct during elections. In a national survey conducted by Forbes Tate Partners (FTP)[1], 57% of survey respondents believed workers should not be forced to join a union as a condition of employment, proving the American people do not support such policies.

VIOLATES WORKERS' RIGHT TO PRIVACY:

The PRO Act mandates employers provide to union organizers employees' personal information without prior approval from the employees. This would include home addresses, phone numbers, email addresses, work shifts, job classifications, and work locations. 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, intimidation tactics, stalking, and bullying on social media. FTP's survey found 75% of registered voters are concerned with this provision. The PRO Act also allows for use of electronic means of voting in union representation elections, removing secret ballot voting and enabling union organizers to intimidate and coerce workers into supporting unionization. Of those surveyed by FTP, 67% were concerned with this policy.

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. In FTP's survey, 70% of respondents were concerned with the PRO Act abolishing states' right-to-work 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.

LIMITS OPPORTUNITIES 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.

[1] Survey results can be viewed at http://myprivateballot.com/wp-content/uploads/2021/06/PRO_Act-National-Survey-Summary-6.28.21.pdf.

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. Businesses would no longer hire independent contractors to complete needed tasks out of fear of their potential liability, forcing them to end those contracts and killing small businesses that rely on that work. The PRO Act's "ABC test" and its potential impact concerned 70% of individuals in FTP's survey.

FAVORS LARGE CORPORATIONS OVER SMALL AND LOCAL BUSINESSES:

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 social responsibility" among franchisees, contractors, and vendors to the detriment of workers and consumers. In FTP's survey, 65% of voters were concerned about the bill upending the franchise business model, especially for first-time owners that could be immigrants or minorities. *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.

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 can't 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 binding terms 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 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.*

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 a company involved in a dispute. The existing restrictions against "secondary" coercion were adopted and strengthened by large bipartisan majorities in Congress in 1947 and 1959, after unions engaged in tactics that were deemed excessive, abusive, and harmful to the economy. Allowing secondary boycotts – or "blackmail" strikes – would permit unions to target companies for anticompetitive reasons that have nothing to do with labor disputes, exposing all consumers, unions, and businesses to coercion, picketing, boycotts, and similar tactics.

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, 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.

STRIPS BUSINESSES OF 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. The ABA specifically noted that 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." In FTP's survey, 68% of respondents were concerned about the PRO Act interfering with small businesses' access to legal advice on labor law matters.