PRO ACT EXPLAINER: 10 PROBLEMS FIXED BY THE PRO ACT

Protecting the Right to Organize (PRO) Act
H.R. 842 | S. 420

1. THE PROBLEM: EMPLOYERS ROUTINELY BREAK THE LAW WITH IMPUNITY. Today, there is an epidemic of lawlessness by America's wealthiest and most powerful corporations. In more than 40% of all union organizing drives, employers are charged with illegally firing union supporters, making illegal threats or engaging in other illegal behavior. Employers fire pro-union workers in 1 out of every 5 union organizing campaigns, a time-tested tactic to intimidate workers and discourage us from organizing. Employers do this because they can get away with it without suffering any real consequences. Employers know that if they are found to have illegally fired a worker, our weak labor laws only require them to pay the worker back wages, minus all wages the worker earned in the meantime. This typically amounts to a drop in the bucket, which employers see as just a cost of doing business. Even worse, it can take months or years for illegally fired workers to get their jobs back or receive back pay. There are no civil penalties against companies for violating the rights of workers under the National Labor Relations Act (NLRA), and workers cannot bring civil lawsuits against companies that do so. This culture of lawlessness and impunity helps explain how it is possible that only 14.3 million workers belong to a union, while more than 60 million unrepresented workers say they would vote to join a union if they could.

THE SOLUTION: The PRO Act will modernize our labor law by strengthening remedies against employer violations of the NLRA to bring those remedies in line with other workplace laws. These commonsense reforms will make employers think twice before breaking the law. Specifically, the PRO Act will:

- Require the National Labor Relations Board (NLRB) to seek a federal court order to give illegally fired workers their jobs back.
- Allow illegally fired workers to recover three times the amount of their full back pay, without any subtractions, along with damages for other harm suffered.
- Provide for penalties, up to $50,000 per violation for unfair labor practices under the NLRA and up to $100,000 for each violation for repeat offenders.
- Allow the NLRB to issue fines up to $10,000 per day for failure to comply with an order.

- Make companies and individual corporate officers who violate the law, or who know about labor law violations and fail to stop them, liable for civil penalties.
- Give workers the option of filing a civil action in federal court (through what is called a "private right of action") against their employer so they are not dependent on the NLRB to pursue their cases for them.
- Require employers to post notices informing employees of their rights under the NLRA, giving the NLRA the same visibility as other workplace laws.

2. THE PROBLEM: EMPLOYERS ROUTINELY INTIMIDATE AND THREATEN WORKERS WITH COERCIVE UNION-BASHING. Under current law, employers can use their control over the workplace to bombard workers with coercive anti-union messaging and prevent workers from communicating with the union. Employers routinely include anti-union messages in orientation materials for new employees and use company email to broadcast anti-union messages in the workplace, while barring workers from using company email to advocate for a union. In 9 out of 10 union organizing campaigns, employers require workers to attend mandatory "captive audience" meetings, where employers issue veiled threats and deliver anti-union propaganda to pressure workers to vote against the union. Employees can be fired or disciplined for failing to attend the meeting and union supporters have no chance to respond. Furthermore, two-thirds of employers require workers to meet one-on-one with their supervisors during organizing campaigns. These messages of fear and intimidation come from the very people who control our paychecks, how much time we can spend with our family and whether we will have a job at all. Meanwhile, employers can legally keep union organizers off their property so union organizers cannot talk directly with employees on the job. As President Biden recently said: "Every worker should have a free and fair choice to join a union….It's a vitally important choice—one that should be made without intimidation or threats by employers….There should be no intimidation, no coercion, no threats, and no anti-union propaganda."

THE SOLUTION: To address employer intimidation and employer monopolization of the information received by workers, the PRO Act will:
- Prohibit employers from forcing workers to attend "captive audience" meetings.
- Require employers to allow workers to use company email for organizing purposes unless there are compelling business reasons not to.
- Require employers to provide contact information for all relevant employees once the NLRB has directed a union election.

3. THE PROBLEM: EMPLOYERS MANIPULATE THE OUTDATED NLRB ELECTION PROCESS. The NLRB election process is outdated and gives employers too much power to use delaying tactics to postpone elections so they can spend more time campaigning against the union. Employers often delay elections through litigation, challenging the makeup of the bargaining unit, even though such challenges typically affect only a small percentage of the unit. Employer compliance with NLRB orders is delayed because the board must seek enforcement by a federal appeals court before its orders are legally binding.

THE SOLUTION: To modernize and streamline the NLRB's union election process, the PRO Act will:
- Allow elections to take place by mail, electronically or at a convenient location.
- Address tactics employers use to delay by restoring other changes the Obama administration made to the election process.
- Make clear that the decision over the appropriate bargaining unit is to be made by workers and the NLRB, not to be manipulated by employers, by ensuring that workers can form commonsense

bargaining units made up of those who share similar terms of employment and working conditions and keeping employers from interfering in administrative hearings on union representation.

- Allow the NLRB to certify the choice of workers to join the union, in cases where the employer has skewed the results of a union election by breaking the law, by reviewing authorization cards the workers already have signed, rather than ordering a rerun election.
- Make NLRB orders self-enforcing, with binding legal effect, until a federal appeals court decides otherwise.

4. THE PROBLEM: EMPLOYERS ROUTINELY REFUSE TO NEGOTIATE A FIRST CONTRACT. Too often, when workers choose to form a union, employers refuse to even sit down and bargain, or they drag out the bargaining process for as long as possible to avoid reaching a first collective bargaining agreement. Employers engage in this kind of behavior because the lack of progress in reaching a first contract undermines worker support for the union, and because employers face no monetary penalties for such bad-faith bargaining. As a result, more than half of all newly formed private sector unions still do not have a first contract after one year, and 37% lack a first contract after two years. Countless workers vote to form a union but never get to enjoy the benefits of a union contract because of employer recalcitrance.

THE SOLUTION: The PRO Act creates a road map for workers and management to reach a first contract. After workers vote to form a union, the NLRB will be required to order the employer to start bargaining in good faith within 10 days of the union's request, and these orders can be enforced in a U.S. District Court to avoid delays in the appellate court system. The PRO Act also establishes a process for mediation and arbitration to help the parties negotiate a first contract. If no agreement is reached within 90 days, the PRO Act provides for mediation. If no agreement is reached through mediation, the PRO Act provides for mandatory arbitration of a two-year contract.

5. THE PROBLEM: OUR RIGGED LABOR LAW DISEMPOWERS WORKERS AND UNDERMINES UNIONS. In order to win a wage increase, a voice on new technology, safety improvements or other bargaining priorities, workers need leverage to put economic pressure on our employers to accept our demands. By contrast, current law gives management too much power to force its position on workers, including limiting workers' fundamental right to strike, which is our ultimate leverage in bargaining. First, a 1938 Supreme Court decision allows employers to fire and permanently replace workers who strike over economic issues. As a result, the number of strikes in the United States is at a level that is historically very low, despite increased strike activity in 2019. Second, in 1947, Congress prohibited workers from engaging in "secondary" activity such as picketing or otherwise putting pressure on "neutral" companies other than the workers' employer, even if those companies can influence the employer by withholding their business until workers and the employer reach a collective bargaining agreement. This ban on secondary activity does not reflect the realities of today's business structures, which typically include subcontracting and other similar relationships. Finally, current law allows management to declare that contract negotiations have reached an "impasse" and then lock out workers from the workplace (and stop issuing paychecks) or unilaterally implement the employer's proposals. Along with restrictions on workers' ability to strike and to put other economic pressure on the employer, this places employers in the driver's seat in bargaining and greatly undermines workers' bargaining power.

THE SOLUTION: The PRO Act recognizes that working people need the freedom to withhold our labor—the freedom to strike—and to engage in picketing to push for the workplace changes we need. The PRO Act will prevent employers from firing and permanently replacing workers on strike; empower workers to stand in solidarity with other workers by picketing, striking or boycotting other employers;

prohibit employers from locking out workers; require employers to maintain the status quo on wages and benefits during bargaining, thus preventing employers from making unilateral changes to put pressure on workers to accept the employers' demands; and protect strikes of any duration, scope or frequency.

6. THE PROBLEM: JIM CROW RIGHT TO WORK LAWS DRAIN UNION RESOURCES AND STRENGTH. "Right to work" laws, originally created in the 1940s to keep Black and White workers apart, have been promoted by a network of billionaires and special-interest groups to weaken workers' collective voice on the job and give more power to corporations. They have had the effect of lowering wages and eroding pensions and health care coverage in states where they have been adopted. Specifically, right to work laws prohibit unions and employers from voluntarily agreeing to collect "fair share fees" from nonunion members to cover the costs of bargaining, contract administration and grievance processes, even though unions are required by law to do this work on behalf of members and nonmembers alike. Right to work laws thus create a "free rider" problem because, without fair share fees, nonmembers get the benefits of union membership without contributing toward the costs, which drains union resources and undermines union power. Right to work laws are some of the last vestiges of the Jim Crow-era and are steeped in a history of racism; it is time to dump them into the garbage can of history.

THE SOLUTION: The PRO Act overrides state right to work laws by allowing unions and employers to voluntarily negotiate "fair share" agreements, whereby all workers covered by the collective bargaining agreement contribute to the costs of activity the union is required to undertake on our behalf.

7. THE PROBLEM: TOO MANY WORKERS ARE DENIED BARGAINING RIGHTS UNDER THE NLRA. Under the NLRA, too many workers lack protection for our bargaining rights, including employees misclassified as independent contractors, employees misclassified as supervisors and employees with multiple employers. Many employers, including platform companies such as Uber and Lyft, misclassify their employees as independent contractors to deny these workers of their bargaining rights and to save on payroll costs. Other employees are denied NLRA protection when they are misclassified as "supervisors" merely because they make routine decisions in the workplace. Finally, under current law, employers that utilize staffing firms, temp agencies and subcontractors can evade their responsibility to bargain with workers even though they have control over workers' wages, schedules, health and safety, and other conditions of employment, leaving workers unable to bargain with the party that is able to meet our demands at the bargaining table. This is a growing problem as more and more companies outsource various functions to subcontractors in what is known as the "fissuring" of the workplace.

THE SOLUTION: To strengthen protections for the bargaining rights of more workers, the PRO Act will:

- Ensure that employees are not denied bargaining rights by being misclassified as independent contractors (it does so by adopting a clear legal test of employee status—for purposes of the NLRA only, not for purposes of any other federal or state law—called the "ABC test," and by making employee misclassification a violation of the NLRA).
- Ensure that employees are not misclassified as supervisors (it does so by narrowing the set of responsibilities that could designate a worker as a supervisor).
- Ensure that all firms that share control over workers' terms of employment are considered "employers" and are therefore required to bargain with the workers.

8. THE PROBLEM: EMPLOYERS ARE REWARDED FOR EXPLOITING UNDOCUMENTED WORKERS. In 2002, the Supreme Court held in *Hoffman Plastic Compounds Inc. v. NLRB* that undocumented workers cannot obtain remedies for violations of their rights under the NLRA, which gives employers an incentive to hire undocumented workers so they can violate their rights without any penalty.

THE SOLUTION: The PRO Act overrules the 2002 Supreme Court decision in *Hoffman Plastic* to ensure that workers can obtain remedies for violations of our rights under the NLRA without regard to immigration status.

9. THE PROBLEM: TOO MANY OBSTACLES THWART COLLECTIVE ACTION. Under current law, employers can require workers to sign, as a condition of employment, agreements waiving our right to join collective or class-action lawsuits and substituting a process of individual arbitration. These agreements effectively allow employers to break the law with impunity, since the individual arbitration process is controlled by employers and does not give the employer an incentive to change its illegal behavior.

THE SOLUTION: The PRO Act will ban collective and class-action waivers, allowing nonunion employees to engage in collective action or class-action lawsuits to enforce their basic workplace rights rather than being forced to arbitrate such claims alone. In addition, under the PRO Act, employers cannot prohibit employees from using work computers for purposes of collective action.

10. THE PROBLEM: UNION-BUSTING CONSULTANTS MAKE BIG BUCKS STOPPING WORKERS FROM ORGANIZING A UNION. An entire union-busting industry now works nonstop to block working people from exercising our rights, instead of letting us decide for ourselves and respecting our decisions. Three out of every four employers hire anti-union consultants to defeat union organizing campaigns, spending at least $340 million every year. A huge loophole allows employers to avoid reporting these activities if the union-buster avoids direct contact with workers.

THE SOLUTION: The PRO Act requires employers to disclose how much they are spending on union-busting and closes the reporting loophole.