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The Case against the Protecting the Right to Organize Act

Union Wish List Bill Would Harm Workers and the Economy

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The Protecting the Right to Organize Act of 2019 (H.R. 2474) would radically overhaul United States labor relations law to facilitate labor union organizing without regard to the negative consequences on workers, consumers, employers, and the economy.[1]

H.R. 2474 is sweeping in nature. It would preempt state labor laws, overrule three Supreme Court decisions, and transform the National Labor Relations Board (NLRB) from a remedial body to a punitive one. Among other changes, some provisions of the PRO Act would:

- Put workers' private information at risk;
- Require workers to pay dues to a union as a condition of employment;
- Change the definition of joint employment in order to ease union organizing;
- Amend the definition of employee to increase the pool of employees eligible for unionization;
- Impose government-mandated arbitration to dictate employment terms in first negotiations; and
- Promote card-check organizing, a process that forces union representation on workers without a secret-ballot election.
- Deny workers the opportunity to receive vital information on the organization that will represent them.

What is the underlying premise for this complete overhaul of the nation's labor law? As Rep. Frederica Wilson (D-Fla.) puts it, "here in the U.S., a combination of weak labor laws, employer opposition and hostility, and relentless political attacks on union members has driven membership down to historic lows."[2] On one point, Rep. Wilson is right. Private sector union membership rates have steadily declined for decades, but not for the reasons she states.

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Numerous factors have played a role in the precipitous drop, which union officials have failed to grapple with. Since union membership reached its peak in mid-1950s,[3] there has been an expansion of free trade, greater global competition for employees, increased employee turnover, overall better work conditions for non-union employees, and government regulations now establish workplace standards in areas that were previously collectively bargained over.[4] But instead of adapting to respond to these challenges, labor union leaders are seeking to tilt labor law far in favor of union organizing in a way that chips away at the individual right of every worker to refrain from union representation.

Furthermore, worker preferences have changed over the past several decades. Individuals desire greater flexibility and independence at the workplace rather than the uniformity that comes with collective bargaining and union representation.

In addition, as the number of workers available to organize in the private sector has increased, the number of union elections have decreased dramatically. As Roger King, senior labor and employment counsel at the HR Policy Association, observes, labor unions have not "devoted the necessary resources to organizing activity."[5] In King's written testimony before the House and Labor Committee, union petitions for election have declined by nearly 63 percent from 1997 to 2017.[6]

Labor unions have not only consistently failed to adapt to the changes in the workplace and worker desires by offering new services individuals' would voluntarily purchase, they also have not invested the necessary funds on organizing. Rather, labor unions have chosen to use their political influence to urge Congress and regulators to overhaul labor law and rules in order to ease union organizing at the expense of workers' freedom of association. As shown from financial disclosure reports submitted to the Department of Labor, the AFL-CIO, the nation's largest federation of labor unions, regularly spends significantly more on politics and lobbying than on representational services.[7]

During the Obama administration, labor union political investments paid dividends. The NLRB, the primary federal agency governing private-sector labor relations, overturned a collective 4,559 years of precedent, with nearly all of the changes advantaging organized labor.[8] Yet, despite the myriad rulemakings and decisions handed down by the NLRB to ease union organizing, the percent of wage and salary workers who are union members hit all-time lows in 2018. Overall union membership dropped to 10.5 percent of workers and 6.4 percent in the private sector.[9]

This failure to bolster union membership, even with the favorable rules promulgated by federal agencies, has strengthened organized labor's resolve that the only solution is to push for legislation like the PRO Act. Implementing such a policy would take away workers right to choose how they spend their earnings, limit flexible work arrangements, and endangers workers' privacy. This report analyzes the primary provisions of the bill and how they harm individual workers and the economy at-large.

- *Trey Kovacs*

The PRO Act Would Codify Provisions of the NLRB's Ambush Election Rule. In previous years, the NLRB and the U.S. Supreme Court have recognized that federal labor policy favors "uninhibited, robust, and wide-open debate in labor disputes."[10] Both employers and unions enjoy wide latitude regarding what is said or written during a union election. In a Supreme Court opinion delivered by Justice Thurgood Marshall, this has been viewed as necessary to "insure the free exchange of information and opinions, and thus to promote the informed choice by the employees needed to make the system work fairly and effectively."[11]

But the sponsors of the PRO Act recognize that labor unions win more elections when they take place quickly and workers only get to hear about the benefits of union representation, not any of the potential downsides. To achieve these goals, the PRO Act codifies provisions of an NLRB regulation commonly referred to as the "ambush election" rule, which overhauled rules governing union representation procedures. The rule went into effect in April 2015.

The PRO Act, like the ambush election rule, would shorten the time frame between the filing of a petition and the date on which an election is conducted to as little as 10 days. Under such a compressed time frame, workers have little time to educate themselves on the potential disadvantages of union representation and leaves employers little opportunity for debate. It also reduces employers' ability to file pre-election appeals and election disputes over voter eligibility, scope of the bargaining unit, and supervisor status.[12] As former NLRB member Brian Hayes explained in his dissent against the ambush election rule, "the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[13]

Union organizing manuals generally instruct to keep organizing efforts quiet until well over half of potential voters have signed authorization cards before filing a petition for a union election.[14] So, while the PRO Act leaves employers with little time to engage with employees, labor unions normally often spend months working to organize a workplace, extolling the benefits of union representation, without the employer's knowledge. Rarely mentioned by union organizers are the facts that there is no guarantee the union will even be able to ratify a first collective bargaining agreement, the union may not negotiate a pay increase, or that tradeoffs are inherent to the collective bargaining process.

Analysis of NLRB elections after implementation of the ambush election rule reveal unions win more when workers have little time to make a decision. Before the ambush election rule went into effect, from 2004 to 2014, unions won only 60 percent of elections conducted in 36 to 42 days but won more than 86 percent of elections conducted in less than 21 days.[15] From 2016 to 2018, unions won better than seven out of every 10 representation elections that they held under the supervision of the NLRB.[16] Labor unions never enjoyed a 70 percent win rate in any of the prior decades. In the first six months after the inception of the new election rules, unions won 77 percent of the 57 fastest run elections—those conducted over 16 days or less.[17]

Shortening the union election process is a solution in search of a problem, contrary to claims by AFL-CIO President Richard Trumka that it is necessary to "help reduce delay in the process and make it easier for workers to vote on forming a union in a timely manner."[18] Union elections conducted by the NLRB have been historically conducted efficiently, while holding the necessary pre-election hearings and providing employees with adequate time to contemplate the decision on whether or not to unionize. In the year prior to implementation of the ambush election rule, in FY 2014, nearly 96 percent of all initial elections were conducted within 56 days of the union filing a petition. Further, in FY 2014, even in contested elections, the median days from a petition to election was 59 days.[19] And elections are normally conducted much faster. Between FY 2010 and FY 2014, the median number of days from petition to election was 38 days in each fiscal year.[20]

Not only did the NLRB efficiently conduct union elections prior to the Obama administration's rule change, unions won a majority of elections under the previous, longstanding rules. In the two fiscal years prior to the rule-change, unions won 63 percent and 68 percent of representation elections in FY 2013[21] and FY 2014, respectively.[22] After the rule went into effect, union election win rates rose—reaching a peak of 72 percent in FY 2016.[23] But the union gain from the rule is heavily outweighed by the lack of time workers have to educate themselves on unionization, a critical decision that impacts nearly every aspect of an individual's work conditions.

The PRO Act's codification of the ambush election also poses a serious threat to worker privacy.[24] It compels employers to provide employees' contact information to union organizers, including personal cell phone numbers, email addresses, and work schedules, without any opportunity for workers to opt out of their employers sharing their personal data with third parties. Government should not have the power to force employers to disclose workers' contact information to any special interest group for any cause. In fact, the Obama NLRB acknowledged in a guidance memo that releasing employees' private information may lead to the lists being used to sell to telemarketing services and "harass, coerce, or rob employees."[25]

The PRO Act's provisions to speed up the NLRB election process and infringe on workers' privacy are misguided. A collective bargaining agreement negotiated by a labor union severely affects practically all of an individual's employment conditions, including access to negotiated social benefits like pensions, strike funds, and training funds. In addition, once unionized, federal labor law grants labor unions the power to collect dues from workers it represents as a condition of employment. As with any important decision, workers deserve ample time to contemplate their decision on whether or not to join a union.

- *Trey Kovacs*

The PRO Act's Redefinition of Joint Employment Would Reduce Opportunities for Workers and Expand Liability for Businesses. The PRO Act would codify the National Labor Relations Board's 2015 *Browning-Ferris Industries* decision, which expanded the definition of joint employer in the National Labor Relations Act to include *indirect* control and *unexercised potential* control. Prior to the 2015 NLRB case, the

Board had determined whether two companies were joint employers by looking solely at who had *direct* control over the workers. This traditional joint employer standard was established by the NLRB in a 1984 case, *TLI, Incorporated*, in which the Board ruled that:

> [W]here two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.[26]

However, on August 27, 2015, the NLRB under the Obama administration issued the *Browning-Ferris Industries v. NLRB* decision. This decision drastically altered the definition of joint employer. In that ruling, the NLRB overturned 30 years of precedent, abandoning its longstanding definition of joint employer. Under the standard established in the *Browning-Ferris* decision, a company may be held liable for labor violations by other employers they contract with, by merely exercising *indirect* control or possessing *unexercised potential* control over employees. This stands in stark contrast to the longstanding bright-line test, under which one company exercised *direct and immediate* control over another company's workforce. The Board ruled in that case:

> In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past. … But we will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner.[27]

The purpose of this expanded definition was twofold. First, labor unions could more easily unionize workers, particularly those working for franchise businesses, as the expanded definition would allow unions to negotiate one collective bargaining agreement with the large franchisor, rather than individual agreements with each small franchisee business. Second, employees could more easily sue larger companies with deep pockets for possible labor law violations by the small business they work for, even though the large parent companies had little to do with the individual worker.

This new definition has created problems for both workers and employers. Indirect control is broad and ambiguous, which makes it hard for businesses to determine when they are operating in a joint employment situation, and thus when they might be held liable for labor law violations committed by another business.

This increased liability has led to larger businesses refusing to contract out jobs to smaller businesses. Keeping these jobs in-house has resulted in higher costs for businesses and higher prices for consumers. A November 2018 study by the American Action Forum (AAF) discusses the expansive nature of the rule. The analysis found that the broad *Browning-Ferris* joint employer definition could impact 54.6 million private sector workers—comprising 44 percent of the private sector workforce.[28] Interestingly, while the Obama administration claimed that this rule would help lower-income individuals, the AAF study showed that these workers are actually highly paid because their jobs require science and math backgrounds.

In addition, the joint employer rule has cost franchise businesses as much as $33.3 billion annually and led to 376,000 lost jobs and a 93 percent increase in lawsuits against franchise businesses. Furthermore, 92 percent of franchised businesses surveyed by the International Franchise Association said that their franchisors are providing fewer services to them in order to avoid being sued as a joint employer.[29]

Because of the harmful effects of this rule, the NLRB under the Trump administration overturned the *Browning-Ferris* decision when it issued a new ruling in *Hy-Brand Industrial Contractors* on December 14, 2017. However, the NLRB's Inspector General claimed that one NLRB board member, William Emanuel, had a conflict of interest and should not have participated in the *Hy-Brand* case. The NLRB then vacated that decision and turned to rulemaking to fix the joint employer definition. The NLRB is currently working on the final rule.

However, Democrats in Congress, worried that a new final rule from the NLRB will hurt their union allies, have included a provision in the PRO Act to make the expanded definition of joint employer permanent.

- *Olivia Grady*

PRO Act Would Adopt Flawed "ABC" Test to Define "Employee" for NLRA Purposes. The PRO Act would undo more than seven decades of legal precedent by amending the National Labor Relations Act to define the term "employee" under the following "ABC" test:

> An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—
>
> ''(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
>
> "(B) the service is performed outside the usual course of the business of the employer; and

> ''(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.''

The ABC test is fundamentally flawed. It is not so much a "test" as much as it is a statutory prohibition against companies in certain industries doing business with independent contractors. Instead of creating yet another different test to define the term "employee" for purposes of federal statutes, Congress should seek to harmonize federal statutes around one uniform definition.[30] A harmonized definition of "employee" would better enable all stakeholders to achieve proper worker classification and allow government agencies to more efficiently ensure proper compliance.

The term "employee" is currently defined under a "common-law" test,[31] which is the predominant test used to determine whether an individual is an employee or independent contractor for purposes of federal statutes governing work relationships.[32]

The practical effect of amending the NLRA to replace its current common-law test with an ABC test would be to recognize as independent contractors for purposes of the NLRA only a subset of those individuals currently recognized as such. This is because the A factor *is* the common-law test. The ABC test recognizes as independent contractors only those individuals who qualify as independent contractors under the common-law test—the test currently applied for purposes of the NLRA—and also satisfy the additional B and C factors.

Factor B exposes a business to a metaphysical inquiry as to what is its "usual course of business." This factor can be especially problematic to a business that operates as an intermediary connecting independent service providers with third-party clients. An intermediary will fail the test if it is determined to be in the business of providing the same type of services as the independent service providers.

The B factor has been recognized as nearly impossible to satisfy by firms operating in certain industries, such as motor carriers. This has resulted in some courts holding the B factor to be preempted by the Federal Aviation Administration Authorization Act, as applied to motor carriers.[33] In this regard, for example, the Supreme Judicial Court of Massachusetts offered the following analysis:

> *Prong two* [Factor B] *provides an impossible standard* for motor carriers wishing to use independent contractors. ... A delivery driver for a motor carrier necessarily will be performing services within "the usual course of the business of the employer" whenever a court concludes that delivery services are part of its usual course of business. ... Prong two thereby, in essence,

> requires that motor carriers providing delivery services … use employees rather than independent contractors to deliver those services.[34] [Emphasis added]

Finally, factor C requires a business to establish that an individual is actually engaged in an independently established trade, occupation, profession, or business. For example, the Connecticut state Supreme Court stated that, to satisfy this factor, an individual must not only be free to engage in an independent established trade occupation, profession or business, but must *actually* do so customarily.[35] The court explained that it evaluates the totality of the relationship between the individual and the contracting business to determine whether this factor is satisfied. Facts relevant to this analysis include whether the individual:

- Performed work of the same nature for third parties;
- Maintained a home office;
- Was independently licensed by the state;
- Has business cards;
- Sought similar work from third-parties
- Maintained his own liability insurance; and
- Advertised his services to third parties.[36]

This factor is especially problematic because a company seldom knows enough about an individual's activities unrelated to the company to determine whether the individual would satisfy this factor. A company doing business with an independent contractor has no business reason to know this information—all that matters is that the contractor deliver on the agreed upon work. Consequently, a company often will not learn whether this factor can be satisfied with respect to an individual until after an audit has begun or a lawsuit has been filed—but by then it is too late.

Factor C also fails to consider the burgeoning class of entrepreneurs who work as independent contractors only to earn supplemental income. These individuals might choose to work for only one client. Such an individual who operates with complete autonomy—and clearly qualifies as an independent contractor under a common-law test—could nonetheless fail an ABC test because the individual chooses not to actively market the individual's services to others but is content to limit his or her work to one company.

By replacing the current common-law test with an ABC test, the PRO Act would expose independent contractors and their clients to an increased risk that their independent-contractor relationship will not be respected for purposes the NLRA.

Furthermore, an ABC-style test has not been applied before for purposes of a federal statute. If enacted, the PRO Act would increase the number of different tests defining the term "employee" for purposes of different federal statutes from three to four, thereby increasing

the uncertainty as to whether an independent-contractor relationship will be respected for purposes of federal statutes.

At the state level, an ABC test is most commonly applied for the limited purpose of state unemployment benefits, but the trend at the state level is toward replacing these ABC tests with a common-law test. Thus far this year, three states replaced an "ABC" test with a common-law test, while no state adopted an ABC test.[37] The PRO Act would move in the opposite direction.

As noted, the predominant test currently applied for purposes of federal statutes is the common-law test. The NLRA already is in accord with this definition. Congress should reject the flawed "ABC" test proposed in the PRO Act. A better approach for achieving proper worker classification would be to harmonize the definition of "employee" for purposes of federal statutes around one unified definition, namely, the common-law test.

- *Russell A. Hollrah and Patrick A. Hollrah*

PRO Act Strips Workers of State Right to Work Protections. No individual should be forced to financially support a private organization they disagree with. State right to work laws, which provide workers the freedom to choose whether or not to pay fees to a union, enshrine this principle into law. Presently, 27 states have adopted such laws (some states have right to work provisions in their constitutions).[38] Workers in several states have enjoyed these protections since the 1940s.[39]

Yet, the PRO Act would effectively repeal these state laws and compel all private sector workers covered by the National Labor Relations Act (NLRA) to pay fees to a labor organization as a condition of employment or risk termination. The bill amends Section 14(b) of the NLRA, which permits states to enact right to work laws. This provision of the NLRA, as amended under the PRO Act, would require that all employees in a "bargaining unit shall contribute fees to a labor organization."[40] With this change, workers who are not union members would lose the freedom to choose whether or not to pay union fees in order to keep their jobs.

Right to work laws play a critical role in U.S. labor law. Under the NLRA, once a union successfully organizes a workplace, it is certified as the monopoly bargaining representative of all employees in the bargaining unit, including workers who voted against unionization. This arrangement, known as "exclusive representation," grants unions the authority to represent and negotiate a contract on behalf of all the employees at a workplace.

Thus, right to work laws represent a compromise. Unions may act as exclusive representatives, while right to work laws act as a check on this authority granted to unions by providing workers the opportunity to opt out of paying for representation they do not want.

Right to work laws provide a partial remedy to another problem that arises from exclusive representation. Once a union is certified as the exclusive representative of a bargaining unit, it never has to face reelection. This leads to a situation known as inherited union representation, where workers are represented by a union chosen by past employees that they had no say in selecting. Research finds that less than 10 percent of private sector workers voted for the union that represents them.[41]

Inherited union representation is prevalent because the majority of union organizing happened decades ago and the employees that voluntarily chose union representation have either retired or changed jobs. For example, Ford Motor Company recognized and agreed to a collective bargaining agreement with the United Automobile Workers (UAW) union on June 20, 1941.[42] The UAW represents over 40,000 Ford employees today. No current Ford employees have been afforded the opportunity to vote on whether they desire the UAW's representation.

Furthermore, research indicates that right to work laws positively impact economic growth and employment. A 2018 study prepared by National Economic Research Associates, commissioned by the United States Chamber of Commerce, found that right to work states' economic performance surpasses that of non-right to work states in several areas. Between 2001 and 2016:

- Private sector employment grew by 27 percent in right to work states, compared to 15 percent in non-right to work states;
- Personal income rose by 39 percent in in right to work states, compared to 26 percent in non-right to work states;
- Growth in private sector GDP in right to work states grew by 38 percent, compared to 29 percent in non-right to work states.[43]

Other research reinforces these findings. A 2014 study published by the Competitive Enterprise calculated and ranked states' per capita income loss from not having right to work law over a 35-year period (1977-2012), while controlling for variables like population growth, manufacturing capacity, and education level. It found a significant and positive relationship between economic growth in a state and the presence of a right to work law. Real personal income grew by 123 percent across the United States over the duration the study, but right to work states saw a much faster growth rate of 165 percent, while non-right to work states saw below average growth of 99 percent.[44]

Had non-right to work states adopted right to work laws in 1977, the first year of the period analyzed, annual income levels would have been an estimated $3,000 per person higher in 2012, or more than $13,000 for a family of four. The total estimated income loss in 2012 from the lack of right to work laws in 28 U.S. states was $647.8 billion.[45]

In the case of right to work laws, good policy is good politics, given that such laws are popular. A 2014 Gallup poll asked: "Some states have passed right-to-work or open shop laws that say each worker has the right to hold his job in a company, no matter whether he joins a labor union, or not. If you were asked to vote on such a law, would you vote for it, or against it?" Among respondents, 71 percent said they would vote for right to work, while only 22 percent said they would vote against, and 7 percent had no opinion.[46] A 2015 survey conducted by Rasmussen Reports, a plurality, 35 percent, of likely U.S. voters believed right to work laws "are good for the state's economy," while only 26 percent said right to work laws were bad for the economy, and 28 percent responded they were not sure.[47]

The PRO Act's provision to repeal state right to work laws is a misguided policy that would undermine worker freedom. Right to work laws act as a crucial check on labor union coercive powers. For workers who had no say in selecting a union and are thus compelled to accept union representation, the ability to opt out of paying dues enables them to hold union officials accountable. Right to work laws place the burden on union leadership to continually prove the organization's value to their membership. But above all other considerations, workers deserve the freedom to choose how to spend their hard-earned pay.

- *Trey Kovacs*

The PRO Act Would Impose Card Check by Stealth. In 2009, Democrats attempted and failed to pass the Employee Free Choice Act, which would have taken away workers' rights to use the secret ballot in unionization elections. Even though they controlled the House and Senate, and Barack Obama was in the White House, the bill fell just short of passage. Still, bad ideas die hard, and the worst provisions of that legislation are back a decade later, in the Protecting the Right to Organize Act of 2019.

The PRO Act would give more power to the National Labor Relations Board (NLRB), which conducts union certification elections. The Act says, in part, that when a union loses an election, the board can declare that the employer interfered. It can then negate the election, cite union petitions or authorization cards—the so-called card check option—and say the union succeeded in organizing the worksite.

The Act creates a burden of proof for the employer, who must prove that it did not interfere in the election. If it cannot do that, and the union certifies that it had received signed authorization cards from a majority of workers, the NLRB can step in. It states, "the Board shall, without ordering a new election, certify the labor organization as the representative of the employees in such unit and issue an order requiring the employer to bargain with the labor organization."

Card check takes away the right of employees to vote by secret ballot, in a free and fair election, to decide whether to be represented by a union. Collecting signatures on cards is not the same as winning an election through a secret ballot.

A recent election conducted by the United Auto Workers (UAW) in Chattanooga, Tennessee, offers a good example of how the PRO Act could forcibly impose unionization on unwilling employees. In 2014 and again in 2019, the UAW sought to unionize the Chattanooga Volkswagen plant. Both times, a majority of employees voted, via secret ballot, against union representation. If the PRO Act were in place, there would have been a presumption that Volkswagen had somehow acted in bad faith to interfere with the election. The NLRB would have certified the union and forced the workers who said "no" into joining and paying dues to the UAW.

Under the PRO Act, a union seeking to organize a worksite must certify that it has received signed authorization cards from a majority of employees. The cards must have come at "any time during the period beginning one year preceding the date of the commencement of the election and ending on the date upon which the board makes the determination of a violation or other interference." The Act does not specify what the cards must say.

There have been cases of union organizers misusing the card-check process. Union representatives can tell employees that signing a card means only that there will be a certification election or that they will receive information about the union, and then turn around and use those cards to force itself on those workers. In the 2014 UAW election in Chattanooga, the UAW claimed it had enough authorization cards to unionize the plant.[48] In response, employees filed an unfair labor practice charge with the National Labor Relations Board that said the UAW had gotten employees to sign a card that simply called for a secret ballot election, not for authorizing the union.[49]

In sum, the PRO Act would take away the secret ballot from workers in order to make it easier for unions to organize worksites over the objections of employees.

- *F. Vincent Vernuccio and Morgan Shields*

The PRO Act Would End Voluntary Arbitration and Institute Mandatory Binding Arbitration in Contract Negotiations. Amidst numerous harmful provisions in the Protecting the Right to Organize Act are two that may not be getting significant attention yet would radically change private sector arbitration. Not only would the PRO Act make it a legally defined "unfair labor practice" for employers and employees to voluntarily contract to use arbitration to resolve workplace matters, it would simultaneously mandate the use of binding arbitration to establish initial union workplace contracts.

The American Bar Association refers to arbitration as "a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments."[50] Indeed, arbitration is regularly agreed to by employers and employees, employers and unions, and other parties looking to settle disputes or negotiations with each other. The American Arbitration Association alone has administered over 5.8 million cases since 1926.[51] The PRO Act's arbitration provisions

would take away the ability of employers, employees, or unions to voluntarily agree to the use of arbitration.

So what could we expect from the PRO Act in regard to mandatory binding arbitration? Imagine you and your coworkers vote for union representation. The union is confirmed as your exclusive representative and begins contract negotiations with your employer soon after. While you wait for your employer and union representative to present a fair contract for all parties involved, you learn that the union you elected will no longer be negotiating on your behalf. Instead, a third-party arbitration panel has taken over. Before long, the arbitration panel delivers a workplace contract that neither you nor your employer find satisfactory—perhaps the union dislikes it as well—but are nevertheless forced to comply with. The union starts collecting dues from your paycheck, and for the next two years you are locked into a contract with worse terms than before.

The troubling scenario outlined above could become reality in many workplaces. When initial contract negotiations do not lead to an agreement, talks between unions and employers would transition to 30 days of mediation by the Federal Mediation and Conciliation Service and then a mandated third-party arbitration panel. The arbitration panel—comprised of a member selected by the employer, a member selected by the union, and a third member agreed upon by both—acts independently and is accountable to neither party.[52] Nonetheless, this panel would determine a binding contract without the consent of the very workers and employers whose livelihoods are at stake.

In the public sector, 28 states use binding arbitration to settle contract negotiations for some or all government employees, while seven more lack defined policies, meaning some state and local governments have leeway to utilize it.[53] While government employment is not an apples to apples comparison with private sector workplaces, employers and workers should be concerned about the prospect of untenable contracts that may not even lead to the policies workers seek. One detailed study of collective bargaining in the public sector revealed that states with public sector binding arbitration spent on average between $625 to $735 more annually per resident than states that do not engage in mandatory collective bargaining.[54] Government accumulating debt and raising taxes to cover the costs of excessive spending is detrimental enough for taxpayers, but the consequences can be even more dire for businesses that have to close up shop if they cannot generate a profit.

Union leaders have shared strong support for the PRO Act, including the mandatory binding arbitration provision.[55] Perhaps they believe this will lead to better negotiations and good contracts, but there are reasons this policy should give pause to the workers they seek to represent and collect dues from.

First, workers today can directly weigh in and ratify or reject union-negotiated contracts. Sometimes unions may reject the workers' voting preference and ratify a contract regardless, such as when a large UPS contract was ratified by Teamsters in 2018 despite workers voting

54 percent in opposition.[56] However, when contracts are settled through binding arbitration, the democratic process typically afforded to union members is completely eliminated.

Second, unions do not begin collecting dues from workers until they finalize an initial contract. The arbitration path could be favored by some union leaders eager to begin collecting union dues from workers regardless of how initial contracts may impact workers or employers.

The PRO Act mandatory arbitration provision could also drastically interfere with and damage positive workplace relationships. As revealed by Gallup:

- 58 percent of workers in 2018 were completely satisfied and 27 percent more somewhat satisfied (combined 85 percent) with their boss or immediate supervisor.
- 48 percent were completely satisfied and 43 percent somewhat satisfied (combined 91 percent) with their job overall in 2018.
- In 2016, 87 percent felt a strong sense of loyalty to the company/organization they work for.[57]

Unions are guaranteed freedom of speech and association by the First Amendment of the U.S. Constitution. No laws or regulations should infringe upon these rights. Unfortunately, many provisions within the PRO Act, including mandatory third-party binding arbitration, go beyond protecting the rights of unions or workers. Instead, this policy undermines personal choice over who to associate with and the ability to engage in open, voluntary relationships that benefit all parties.

Not all voluntary arbitration settlements today yield desirable outcomes just as not all uses of mandated binding arbitration are guaranteed to fail workers and employers. However, the process of removing voluntary contracting while implementing binding arbitration represents two major steps in the wrong direction. If supporters of the PRO Act want to bring greater economic opportunity to workers in America, they should instead prioritize policies that remove barriers to opportunity such as occupational licensing reform, which could provide millions of new, well-paying jobs while simultaneously making many important services more accessible and affordable for families.

- *Austen Bannan*

The PRO Act Would Make it More Difficult for Workers to Make an Informed Decision Regarding Unionization. Unions often claim that American labor law is unfair, and that it allows companies to coerce employees, thus preventing unions from winning representation elections. They say the culprit are consultants that companies hire to guide them through the campaign. Unions often like to demonize these consultants by calling them names like "union busters." Then unions make it sound like companies are denying employees free will by having meetings to educate employees on

union representation, referring to them as "captive audience meetings." The truth is consultants are providing much needed information that gives employees the ability to make an informed decision at the ballot box.

One of the provisions of the PRO Act will prevent employers from talking to employees about unionization at all. Meetings and consultants educating employees will be unlawful. This means that the only information the employee will be provided comes from the unions themselves. Not only is this one-sided, it can also mislead employees as to what unions can and cannot do.

In a typical a union representational campaign, union organizers engage with employees for months. During this time, they try to get employees to sign authorization cards to demonstrate a show of interest in union representation, which the National Labor Relations Act requires for an election to take place. Most of the time, the union's interaction with employees is done without the employer's knowledge. The company only finds out either when a petition for an election is filed with the National Labor Relations Board or the union claims to have majority support of the employees and demand recognition directly from the company.

What are consultants doing or telling employees that unions do not want them to hear? The answer is a lot. The reason companies hire consultants is the same reason they would hire a CPA. Like tax law, labor law is complex.

I am the CEO of a consulting firm that works with companies on these representational campaigns. My firm, RWP Labor, and our consultants meet directly with employees to educate them on the intricacies of U.S. labor law. A typical curriculum includes the following topics and sessions:

- Our first session is with frontline managers and supervisors who are not in the bargaining unit—the employees who are eligible voters in the election. We walk them through the do's and don'ts of what they can and cannot say during the campaign period. This is because labor law greatly restricts employers on what they can say or do. For example, an employer cannot say to the employees that they think they may have to shut down the business if the union becomes the employees' representative. That is considered a threat of a negative outcome that would occur as a result of unionization and could result in either an employee or the union filing an unfair labor practice complaint with the NLRB.
- We then meet with employees in the bargaining unit. Normally, in our first session we educate the employees on their rights under the National Labor Relations Act. We use the NLRB-published "Basic Guide" as our textbook. Our session discusses topics such as the duty to negotiate by the company and the union. We show employees what demands are considered mandatory subjects of bargaining and

which demands companies do not have to consider. We talk about strikes and the difficult procedures required to decertify a union.

- Collective bargaining is an important session because the unions have been telling employees that they will get a seat at the table and have promised that the company will cave to their demands. We explain that this is not entirely true as the collective bargaining agreement is between the company and the union. The employees are not signatories to the contracts.
- In another session, we discuss unionization as a freedom of association issue. During the typical organizing period unions do not share a lot of information about themselves. We show employees the union's constitution and bylaws; normally it is the first time they have seen them. Although it is called a constitution, it reads more like a rulebook, with the union structured as a top-down organization. We also look at the union's finances, as reported in Form LM-2, which unions are required to file with the Department of Labor. We show the employees how dues money is spent. The LM-2's usually have exorbitant salaries and lavish expenses. They show political contributions made that some employees may not agree with.
- Everyone wants job security and unions often tout they will get it for their members. In another session, we show how that process really works. For example, layoffs in union-represented businesses are normally done by seniority. The most recently hired workers are the first to be let go—great if you been there the longest, bad if not. The point is there is no consideration to merit.

Representational elections are conducted by the NLRB, a U.S. government agency that guarantees the anonymity of the voters. When employees walk into the voting booth alone, they can vote with the knowledge of exactly what is at stake for themselves and their company.

Companies know that a union representational election involves a major business decision that will forever impact their business. That major decision will not be made by the companies leadership; the decision belongs to the employees. For that reason, we submit that it is not only the right of employers to educate the employees; it is their duty.

- *Russ Brown*

Notes

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