PROTECTING THE RIGHT TO ORGANIZE ACT

FREQUENTLY ASKED QUESTIONS

Why the *Protecting the Right to Organize (PRO) Act*?

Decades of attacks on workers' right to organize have caused a steep decline in union membership. In 2019, just 10.3 percent of American workers were union members, the **lowest rate of membership** since the Bureau of Labor Statistics began collecting statistics in the early 1980s. At its peak in the 1950s, the rate of union membership was **roughly 33 percent**. However, millions more American workers would join a union if their workplace rights were protected. In a recent poll of workers across the country, **48 percent of non-union workers** said they would vote to join a union.

This discrepancy exists because the National Labor Relations Act (NLRA) lacks basic enforcement tools. Under current law, there are no civil penalties for companies that violate workers' collective bargaining rights. And when workers are unlawfully fired or retaliated against, it takes years for them to recover lost wages, if they ever receive justice at all. As a result, employers are free to deploy unlawful tactics to prevent workers from voting in favor of a union or avoid recognizing and negotiating with workers even after they vote to form a union.

The *PRO Act* is a sensible proposal that restores fairness to the economy by strengthening the federal laws that protect workers' right to join a union. The *PRO Act*:

- Introduces meaningful, enforceable penalties for companies and executives that violate workers' rights;
- Restores workers' ability to stand together by weakening anti-labor "right to work" laws, and closes loopholes that corporations use to exploit workers;
- Strengthens workers' right to free and fair union elections and requires corporations to respect the results.

Is the *PRO Act* the same as the California law AB 5, which distinguishes employees from independent contractors?

No, the *PRO Act* amends that the NLRA, which regulates union organizing and collective bargaining. The *PRO Act* does not alter or amend federal or state laws governing wages and hours, unemployment insurance, workers' compensation, and overtime.

The *PRO Act* codifies the "ABC Test" in order to determine whether workers are employees for the purpose of union organizing and collective bargaining**.** This test presumes that a worker is an employee 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.

If a worker is an employee under the *PRO Act*, they will have the right to join or refrain from union representation, engage in collective action in the workplace, and bargain over the terms and conditions of their work.

The ABC Test in AB 5 relies on the same factors listed above. However, AB 5 uses the ABC Test to presume that workers are employees for the purposes of state law, which includes laws governing wages and hours, unemployment insurance, workers' compensation, and overtime. AB 5 does not cover private sector labor relations, such as collective bargaining, where federal law controls the field.

Notably, California is not the only state that has an ABC Test. Over 20 states use the ABC Test for some purpose, typically workers' compensation or unemployment insurance. **Massachusetts uses the same test** for its wage and hour laws, and unlike California, it does not exclude any industries from its coverage. **Illinois**, **Connecticut**, and **New Jersey** also use similar tests, and also do not exclude any industries. Similarly, the *PRO Act* does not create any exemptions from the ABC Test.

How does the *PRO Act* affect joint employment? What does that mean for franchisees?

Labor law has long held that when more than one company controls the terms and conditions of employment, those companies are considered "joint employers." It is essential for employees to be able to collectively bargain with both joint employers to ensure the parties calling the shots are at the table. These protections are particularly important for employees of subcontractors and staffing agencies, for whom the name on the door of the building where they work is not the same as the name of the company that signs their paycheck.

The *PRO Act* ensures that companies cannot evade their responsibility to negotiate with workers by hiding behind subcontractors and staffing agencies. Under the *PRO Act*, any company that directly controls, indirectly controls, or maintains the power to control a person's working conditions must engage in collective bargaining. This is the same standard that the NLRB enacted in its 2015 *Browning-Ferris* decision, which was affirmed in 2018 by the **United States Court of Appeals for the D.C. Circuit**.

Importantly, this is not an issue that directly affects franchises. The NLRB has never issued a final decision finding a franchisor to be a joint employer of its franchisees' employees. In fact, the *PRO Act*'s joint employer standard protects franchisees by preventing franchisors from dictating franchisees' employee relations while leaving franchisees on the hook for any violations. For this reason, when the Republican majority at the NLRB began considering whether to abandon the *Browning-Ferris* standard, the **Alliance of Franchisees and Dealers** urged the NLRB to keep this standard.

Does the *PRO Act* eliminate secret ballot elections by requiring employers to recognize unions based on "card check"? Does the *PRO Act* create a backdoor to card check?

No. The *PRO Act* actually strengthens secret ballot elections by ensuring they are free and fair to both workers and employers.

Under current law—which has been in effect since 1935—an employer may voluntarily recognize a union if a majority of employees demonstrate support through signed cards or a petition to organize. If the employer decides not to recognize the union based on those signatures, the NLRB directs a secret ballot election to

determine whether the employees will be represented by the union. The *PRO Act* does not alter these requirements.

Instead, the *PRO Act* bolsters workers' rights if their employer interferes in a union election. Under the *PRO Act,* if a majority of workers voiced their support for forming a union prior to the election, and the employer's unlawful conducted impaired a fair election, the employer must recognize the union unless it can prove that its interference did not affect the election outcome.

Contrary to the argument that this legislation undermines the secret ballot, the *PRO Act* expands the use of secret ballot elections. Current law allows employers to withdraw its recognition of a union without an election to decertify the union if the employer has evidence that the union lost majority support. The *PRO Act* creates parity in union elections by requiring that a decertification election by secret ballot must take place before the employer can withdraw its recognition.

What does the *PRO Act* mean for undocumented workers?

In 2002, the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* held that undocumented workers were no longer entitled to reinstatement or backpay when employers violate their right to organize. This decision removed a vital check on workplace abuses, and it incentivizes employers to hire undocumented workers in order to discourage their workforce from unionizing. The *PRO Act* overturns this decision, making it more difficult to undermine union organizing drives simply by firing undocumented workers with impunity.

Does the *PRO Act* encourage unions to picket or boycott unaffiliated businesses?

Since 1947, the NLRA has prohibited unions from participating in peaceful picketing, strikes, or boycotts against companies that do business with their employers, or in solidarity with workers of other employers. This activity is known as secondary activity.

However, this peaceful activity is also protected by the First Amendment, and out of step with modern Supreme Court cases that find speaker- and content-based restrictions on speech presumptively invalid. Peaceful picketing is no different from similar protest activity by civil rights advocates or animal welfare protestors. Under the *PRO Act*, workers' speech will receive the same First Amendment protection as other forms of peaceful protest.

How does the *PRO Act* affect employees' privacy in union representation elections?

The *PRO Act* makes no changes to existing law regarding employees' privacy during union elections.

For over 60 years, the NLRB has required employers to provide a list of names and home addresses of the employees who will vote in the union representation election. This is designed to create a modicum of parity during union representation elections, because employers already have this information to reach their employees. The *PRO Act* codifies the NLRB's 2014 updates to this employee list, which require employers to also include job classifications, telephone and cell phone numbers, and email contact information in the possession of the employer.

According to **information the NLRB provided** in 2018, no person has ever charged a union with abusing the voter information list since the NLRB updated its election procedures in 2014. Even when the Republican NLRB **overhauled** its union representation procedures on December 18, 2019, it did not change the voting list

requirements. The *PRO Act* simply codifies the existing consensus position regarding employee contact information.

How does the *PRO Act* affect so-called state "right to work" laws?

Unions have a legal duty to represent all workers in a bargaining unit, including those who are not members of the union. In so-called "right to work" states, employers and unions are prohibited from voluntarily entering agreements in which all employees are required to contribute "fair share fees" to cover the basic costs of representation and bargaining.

State prohibitions on these agreements create a free-rider problem because the union must represent any employee regardless of whether they pay their fair share. The *PRO Act* weakens these state laws so that unions and employers can agree to collect dues from the workers that unions are legally obligated represent.

Does the *PRO Act* require employers to report information covered by attorney-client privilege?

No. The *PRO Act* increases transparency by requiring employers and anti-union consultants to publicly disclose arrangements where the consultant crafts an employer's campaign against a union. Studies show that employers **hire anti-union consultants** in approximately 75 percent of union elections.

Under the Labor-Management Reporting and Disclosure Act (LMRDA), employers and consultants must publicly disclose when a consultant is contracted to *directly* and *indirectly* communicate with employees regarding the employer's position in a union election, but the Department of Labor (DOL) has long interpreted the law to exclude reporting of *indirect* persuasion arrangements—including producing anti-union literature, writing speeches for captive audience meetings, and identifying employees for discipline or reward.

In 2016, DOL estimated that it only received reports of 25.9 percent of the total number of contracts for direct and indirect persuader activities. As a result, these anti-union consultants can operate in the dark most of the time, and employees do not know whether and how much money their employers are spending to campaign against a union.

In 2016, the Department of Labor attempted to close that loophole by enacting its Persuader Rule to require the reporting of *indirect* persuader activity, but the Trump administration rescinded this rule on July 17, 2018. A letter to Congress signed by over 500 attorneys, including **244 members of the American Bar Association**, rebuts the false claim that the Persuader Rule interferes with attorney-client privilege. Nothing in the Persuader Rule required the reporting of privileged information or legal advice, and the same is true of the provision in the *PRO Act*—which effectively codifies the Persuader Rule.

Does the *PRO Act* reward corruption by dishonest union officials?

No. Federal law requires labor unions to extensively report and disclose financial transactions and administrative practices to the Department of Labor to ensure transparency and deter misuse of union funds. The *PRO Act* does not alter or amend the reporting requirements that currently apply to labor organizations.

Some United Auto Workers leaders and Fiat Chrysler Automobiles executives have been, and are currently being, **investigated and prosecuted** for corruption. Allegations of corruption should be fully investigated and those who are charged should be prosecuted and held accountable. Nobody—whether they belong to a union

or not—is above the law. That is why current law provides robust criminal and civil penalties for companies that seek to influence unions and their leaders through payment of money, and similarly sanctions unions and their leaders when they solicit such payments.