



# LABOR'S LITANY OF DANGEROUS IDEAS: THE PRO ACT



**U.S. CHAMBER OF COMMERCE**  
Employment Policy Division



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## Introduction

In the world of labor and employment policy, it is a well-known fact that organized labor has been hemorrhaging members for the past 65 years, and labor leaders have sought innumerable ways to reverse that trend. Since peaking at roughly 35% of the workforce in the 1950s, union membership has steadily declined. In 2018, it stood at just 10.5% of the workforce, with a mere 6.4% membership rate in the private sector.<sup>1</sup>

To address this decline, the union movement has turned to its political allies hoping that a dramatic rewrite of the National Labor Relations Act (NLRA) and other statutes will help. Prior to the midterm elections in 2018, lawmakers introduced two pieces of legislation: the Workplace Democracy Act by Sen. Bernie Sanders (I-VT) and Rep. Mark Pocan (D-WI) and the Workers' Freedom to Negotiate Act by Sen. Patty Murray (D-WA) and Rep. Bobby Scott (D-VA).<sup>2</sup> While these two bills differed in some ways, they were both legislative wish lists that contained numerous disturbing proposals, such as eliminating right-to-work laws and redefining the concept of joint employment.

Following the 2018 elections, however, a new piece of legislation emerged. It included all the bad ideas from the previous bills under a single banner. This legislation is called the Protecting the Right to Organize (PRO) Act, introduced on May 2, 2019, by the new chair of the House Education and Labor Committee, Rep. Bobby Scott (D-VA), and Sen. Patty Murray (D-WA), ranking member of the Senate Committee on Health, Education, Labor, and Pensions.<sup>3</sup> Despite its name, there is nothing positive about the bill.

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With over 200 co-sponsors in the House and 40 in the Senate as of this writing, the PRO Act would dramatically change the NLRA in ways that would be harmful to workers, employers, and the economy. Like its predecessor bills, the PRO Act would obliterate many worker and employer protections that have been in the law for over 70 years. It would provide labor unions with numerous means to advance their organizing agenda, and it represents a significant threat to employers that must be taken seriously. That the president of the AFL-CIO, Richard Trumka, testified in person at the first House hearing on the PRO Act serves as a key indicator of how important this legislation is to labor leaders.<sup>4</sup>

This paper highlights the major changes to the established framework of labor and employment relations that organized labor has in mind with the PRO Act. While it is unlikely to become law in the current Congress, the PRO Act is a harbinger of things to come if the political winds shift in 2020. When speaking of the dramatic changes to labor law proposed in 2017, Senate Minority Leader Chuck Schumer (D-NY) said, “We are going to fight, fight, fight to get this done. ... Should we ... get the majority, this will be at the top of our list[.]”<sup>5</sup> If he is true to those words, the PRO Act could wreak havoc on American businesses and dwarf the nearly successful effort to enact card check in 2009.

## Getting Rid of Right-to-Work

Like its predecessors, the PRO Act would effectively annul every state right-to-work law in the country without any action by state legislatures. Right-to-work laws prohibit contracts that require employees to pay union dues or fees as a condition of employment. Those laws were made possible by the Taft-Hartley Act of 1947 (also known as the Labor-Management Relations Act, or LMRA), and since its inception, 28 states have adopted right-to-work measures.<sup>6</sup>

<sup>1</sup> “Union Members—2018.” News release. Bureau of Labor Statistics, January 18, 2019. Available at <https://www.bls.gov/news.release/union2.nr0.htm>. Last accessed November 8, 2019.

<sup>2</sup> S. 2810 and H.R. 5728—115th Congress and S. 3064 and H.R. 6080—115th Congress, respectively.

<sup>3</sup> S. 1306 and H.R. 2474—116th Congress.

<sup>4</sup> Subcommittee on Health, Employment, Labor, and Pensions hearing: “The Protecting the Right to Organize Act: Deterring Unfair Labor Practices,” May 8, 2019.

<sup>5</sup> See Senate Democrats: “Senate & House Democrats Stand With Labor Leaders to Unveil ‘A Better Deal’ For Workers”; News Conference; November 1, 2017. Available at <https://www.youtube.com/watch?v=snoAmFD1V6I>. Last accessed November 1, 2019.

<sup>6</sup> 29 U.S. Code § 151–169. While 28 states have passed right-to-work statutes, one state (Missouri) subsequently repealed its law in a referendum.

Repealing right-to-work laws has been perhaps the single most important objective of organized labor since Congress passed the LMRA over the objections of President Harry Truman. The LMRA amendments made illegal some of labor unions' most insidious behavior, such as secondary boycotting that targeted businesses without any direct involvement in a labor dispute. It also provided employers with the right to express their opinions about the pros and cons of having a union in the workplace.

The typical critique of right-to-work laws is that they “lower wages and benefits, weaken workplace protections, and decrease the likelihood that employers will be required to negotiate with their employees[.]”<sup>7</sup> Contrary to that assertion, a comprehensive study by NERA Economic Consulting assessed the impact of right-to-work laws and found that they actually are beneficial to the economy.<sup>8</sup> As expected, the report found that in states with right-to-work laws, unemployment was lower, and private sector employment grew at almost twice the rate.

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The greater reason for organized labor’s disdain for right-to-work laws lies in the fact that they prohibit employers and unions from adopting contracts that require employees to pay union dues or fees as a condition of keeping their jobs. Given that unions rely on dues and fees to fund much of their activities, allowing employees the option whether to financially support a union puts a dent in a union’s bottom line.

For a labor movement that has seen its membership decline for the last 65 years, the status quo amounts to an existential crisis, and union leaders see right-to-work laws as one of the key reasons for it. The PRO Act would effectively end right-to-work laws, albeit not through federal preemption. Instead, the bill would merely allow collective bargaining agreements to require employees to pay fees for bargaining and representation regardless of a state’s right-to-work status. Thus, state legislators would not even have to take these laws off the books; they simply would be nullified, and workers could once again be fired for not paying an unwanted union. Suffice it to say, this is a radical proposal that would upend one of the most fundamental aspects of labor law.

## Opening the Door for Stealth Card Check

The PRO Act would resurrect one of organized labor’s principal objectives from the Obama era: card check organizing. Enshrined in the cynically named Employee Free Choice Act (EFCA), the card check proposal came very close to becoming reality in 2009. That bill would have permitted unions to organize a workplace by gathering signature cards from a majority of workers, rather than seeking a private ballot election administered by the NLRB. This provision would have allowed union organizers to approach workers virtually anywhere to get their signature, be it at work, at home, or at the grocery store. Such a process, in which cards are also signed in the open, opens the door to coercive or intimidating tactics to “convince” the worker to sign.

Instances of such intimidating tactics during organizing campaigns have been well documented over the years. For example, in one campaign to organize adjunct professors at Washington University in St. Louis, a biology instructor who described himself as “normally pro-union” lamented the pressure used, saying, “I’m really concerned about how oblique the whole process has been, how aggressive and rude and stalking the representatives were of the union, how they have not reached out and contacted us in a way that is inviting, rather than stalking us.”<sup>9</sup>

The same instructor already belonged to the National Education Association through his employment at a community college, and he described how “very pushy and rude” representatives of the Service Employees International Union (SEIU) approached his wife at their home “demanding my cell phone number” in their effort to organize at Washington University. When she told the organizers on another unsolicited visit that her husband would contact them if he wanted to speak with them, the organizers threatened to come back again, leading her to tell them she would call the police if they did.<sup>10</sup> A former organizer for the United Steelworkers admitted that such “visits to [prospective members] homes

<sup>7</sup> Economic Policy Institute, Right-to-work. Available at <https://www.epi.org/research/right-to-work>. Last accessed October 29, 2019.

<sup>8</sup> Jeffrey A. Eisenach, Ph.D.; NERA Economic Consulting, “Right-to-Work Laws: The Economic Evidence,” May 2018. Available at <https://www.uschamber.com/article/right-work-laws-the-economic-evidence-2018-update>. Last accessed October 29, 2019.

<sup>9</sup> Singer, Dale. “As Washington U. Adjuncts Consider Union, Issues Arise On Both Sides.” St. Louis Public Radio, December 31, 2014.

<sup>10</sup> *Id.*

... were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union." The organizer revealed his discomfort with these tactics, testifying in 2007 that he "became revolted by the ugly methods that we were encouraged to use to pressure employees into union ranks."<sup>11</sup>

Facing unified opposition from the business community and other organizations that objected to the inherently coercive nature of the bill, EFCA did not come up for a vote in 2009 or 2010, although the support of just one additional senator could have put it over the top. Among its numerous flaws, the idea of stripping employees of their right to vote in a private ballot resonated especially poorly with many constituents, who were vocal with their opposition. Nevertheless, card check has remained a priority for organized labor, so it comes as little surprise that the PRO Act includes it. What makes the PRO Act more sinister, though, is the cynical mechanics of the card check process it would establish.

Rather than pursue card check directly, which legislative advocates know is fraught with political risk, the PRO Act goes about it slightly differently. The bill employs what could be called a "stealth" card check process that stacks the deck against employers. The PRO Act states that if a union loses a private ballot election and the NLRB "determines that the election should be set aside because the employer has committed a violation of this Act or otherwise interfered with a fair election," it is up to the employer to demonstrate that the alleged "violation or other interference is unlikely to have affected the outcome of the election."<sup>12</sup> Such a standard is rather vague and subject to a great deal of conjecture based on the makeup of the NLRB. But the bottom line is that the employer is forced into the difficult predicament of proving a negative.

If the employer is unable to convince the NLRB of its innocence, the bill states that the "the Board shall, without ordering a new or rerun election, certify the labor organization" if the union has collected signed authorization cards from a majority of the employees in the proposed bargaining unit.<sup>13</sup> The time window for collecting those cards includes any point from one year *prior* to the election until the date the Board decides to set aside the election. Thus, if a union were able to persuade more than 50% of the workers at a facility to sign cards as much as a year before the election but then lost the vote on election day it still would win, and the NLRB would be *prohibited* from holding a private ballot election—even if most workers wanted one. For unions, it's a case of "heads I win, tails you lose."

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This aspect of the PRO Act's form of card check gives unions every incentive to challenge election results, claiming that any number of alleged violations affected the outcome. Depending on the makeup of the Board, this could be a low bar to clear. For example, in the Obama years, the Board routinely cited employers for commonplace provisions in employee handbooks. It's not hard to imagine how such frivolous charges could be construed into claims of election interference. Since the law would put the onus on the employer to prove a negative (i.e., that something did *not* affect the election results), the result would be a de facto card check regime. It's one thing to undermine the democratic principle of a private ballot—it's particularly underhanded to do so by stealth.

## Government Meddling With Contracts

Like EFCA, the PRO Act includes a provision that would skew the collective bargaining process by mandating first contract arbitration. This process would result in contracts that would be binding on both parties regardless of their provisions. For unions, suboptimal contract language is less important than the overriding issue, which is that once a contract is locked in, workers would have to start paying dues. For employers, however, such language could be devastating.

<sup>11</sup> Prepared Statement of Ricardo Torres, former union organizer for the United Steelworkers; U.S. House of Representatives; *Strengthening America's Middle Class Through the Employee Free Choice Act*; Hearing before the Subcommittee on Health, Employment, Labor, and Pensions; February 8, 2007 (110th Congress); Government Printing Office; Available at <https://www.gpo.gov/fdsys/pkg/CHRG-110hrg32906/html/CHRG-110hrg32906.htm>. Last accessed October 29, 2019.

<sup>12</sup> H.R. 2474 § 4(d)(1)(D).

<sup>13</sup> *Id.*

The PRO Act states that following certification of a union, an employer must begin collective bargaining within 10 days of receiving a written request to do so from the newly certified union. If the employer and the union fail to ratify a contract after 90 days, either party would be permitted to seek the intervention of the Federal Mediation and Conciliation Service (FMCS). The FMCS then would have 30 days from the date of the request to reach an agreement. If that effort fails, either party could turn to a federal arbitration panel composed of three individuals, two selected by each respective party and the third by mutual agreement.

This aspect of the bill contrasts with EFCA, which also required the FMCS to refer the issue to an arbitration panel established under the FMCS's own regulations but did not allow the parties to select the panelists. Given the makeup of the panel under the PRO Act, it is difficult to predict whether two out of the three would agree on the terms to include in a proposed contract, thus the prospect of an indefinite negotiation or impasse remains plausible.

The PRO Act adds another twist in that it would require the arbitration panel to consider factors not mentioned in EFCA. The panel would be required to consider the following items in determining the terms of the contract:

- “(i) the employer’s financial status and prospects;
- “(ii) the size and type of the employer’s operations and business;
- “(iii) the employees’ cost of living;
- “(iv) the employees’ ability to sustain themselves, their families, and their dependents on the wages and benefits they earn from the employer; and
- “(v) the wages and benefits other employers in the same business provide their employees.”<sup>14</sup>

Regardless of the arbitration panel’s makeup, the requirement to consider the foregoing items would necessarily introduce highly subjective judgments. This provision would require the arbitration panel, which may or may not have any business experience, to evaluate the “financial status and prospects” of a company or employees’ “ability to sustain themselves” with what amounts to a divining rod. It is a recipe for frustrating the goal of achieving a first contract.

In addition, the PRO Act ignores the complexity of first contract negotiations, especially for larger or more geographically diverse employers, by trying to squeeze that process into a compressed time frame. Rather than leading to a productive, mutually agreeable solution, the PRO Act incentivizes a union that may not be getting what it wants to stretch out negotiations to trigger the arbitration process. Neither side would have any certainty about what may end up in the final contract. But for the union, the goal of securing a binding contract—which is what it wants—would be realized.

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Unfortunately for the workers covered by an arbitrated contract, they would have no say over or vote on any of its terms. Thus, the fate of their pay, benefits, and other aspects of their employment would be left in the hands of whoever wound up on the arbitration panel. Meanwhile, an employer could have imposed upon it outlandish contract terms, such as complicated work rules or involvement with a failing multiemployer pension plan that could jeopardize its business altogether. Despite the problems inherent to such a situation, a contract determined by the arbitration process would be binding on the parties for two years, like it or not.

The risks involved with mandatory first contract arbitration are not merely theoretical. Indeed, public sector contracts imposed by arbitrators with no skin in the game have caused financial distress, or even bankruptcy, in numerous municipalities and as many as 20 states. The city of Scranton, Pennsylvania, learned the hard way what an arbitration panel can do to ruin the municipal fisc when a panel found that the city owed \$30 million in back pay to its firefighters and police officers. That decision left the city with just \$5,000 in the bank and caused it to default on some of its obligations to avoid bankruptcy.<sup>15</sup>

<sup>14</sup> *Id.*

<sup>15</sup> Malanga, Steven. “Death by Arbitration.” *City Journal*, Autumn 2012.

Another arbitration order found the city of Philadelphia owed \$200 million to its police and firefighters.<sup>16</sup> In Michigan, one of the earliest states to allow binding arbitration, a former union organizer who campaigned for the legislation allowing it later became the mayor of Detroit, where “[a]mid stagnant revenues, arbitration panels granted Detroit workers generous cost-of-living increases.” Twelve years after lobbying for the state’s arbitration statute, the erstwhile labor activist conceded, “[s]lowly, inexorably, compulsory arbitration destroys sensible fiscal management.”<sup>17</sup> There no reason to believe that would not be true in the private sector as well.

## Preserving Ambush Elections

The PRO Act would impact union representation elections by codifying a controversial regulation relating to election procedures promulgated by the Obama-era NLRB. Historically, the NLRB has not engaged in rulemaking, which is more common at cabinet agencies, but the NLRB bucked that trend when it issued its “ambush election” rule in 2014.<sup>18</sup>

The ambush election rule was deliberately designed to hasten the process for holding representation elections. The shortening of the time period between the filing of an election petition and the actual election intentionally makes it more difficult for employers to respond to an organizing effort. The rule also changed the issues allowed to be challenged at the NLRB and the timing of those challenges, thus undermining employers’ due process rights. As a result, employers have been left with very little time to respond to an organizing drive, particularly if they do not have ready access to legal representation well versed in labor law.

Perhaps of more concern, the ambush election rule requires employers to turn over personal contact information for their employees. The information covered consists of “a list of employees with contact information, including ... modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations.”<sup>19</sup> What makes this part of the ambush election rule even more objectionable is that employees have no right to opt out of having that information provided to a union that may want to “put them in fear of what might happen to them, their family, or homes if they didn’t change their minds about the union.”<sup>20</sup>

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The current NLRB has begun the process of reversing some aspects of the ambush election rule, but it does not plan to repeal it in its entirety. Whatever improvements the Board is able to implement, though, would be overridden by the PRO Act, which converts the Obama-era regulation into statutory law.

The PRO Act goes even further than the ambush election rule, however, by also prohibiting employers from requiring workers to attend staff meetings at which the employer may express its views on union issues—even though such meetings are held during company time and while employees are being paid. Unions have dubbed these “captive audience meetings,” and the PRO Act effectively says that workers can walk out of such meetings if they desire. Telling workers they can skip staff meetings is unlikely to be conducive to an effective work environment, but the larger point for labor is that workers should hear just one perspective—the union’s.

<sup>16</sup> *Id.*

<sup>17</sup> “Binding Arbitration Has Hurt, Not Helped, Struggling Cities.” Commentary. *Investors’ Business Daily*, December 3, 2013; Available at <https://www.investors.com/politics/commentary/some-cashstrapped-cities-pushed-to-the-brink-by-arbitrators-rulings>. Last accessed October 29, 2019.

<sup>18</sup> National Labor Relations Board, “Representation—Case Procedures,” 79 Fed. Reg. 74308 (December 15, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> See Prepared Statement of Ricardo Torres. Note 11, *supra*.

## Increasing Liability

The PRO Act includes numerous provisions that expand liability for employers, including a strict test for determining independent contractor status, a vague joint employer standard, and banning arbitration agreements.

### IMPLEMENTING THE NEW ABC TEST AND ITS EFFECT ON INDEPENDENT CONTRACTORS

The PRO Act addresses another pressing object of organized labor, which is to undermine the ability to utilize independent contractors. Under the NLRA, independent contractors are not eligible to unionize, which has been a source of great frustration for labor leaders. The PRO Act would codify a relatively novel independent contractor definition that is taking root in certain jurisdictions, specifically California's version of the "ABC" test as established by state legislation known as AB-5.<sup>21</sup>

The ABC test has been used by many courts when determining whether someone is an independent contractor and is found in numerous state laws. Generally, the three factors (A, B, and C) evaluated include the following:

- A) The worker is free from control or direction in the performance of the work under the contract of service and in fact;
- B) The service is performed either outside the usual course of the business for which it is performed or *is performed outside of all places of business of the enterprise for which it is performed*;
- C) The individual is customarily engaged in an independent trade, occupation, profession, or business.

Under AB-5, which became law in 2019, California modified Part B of the test by removing the language "or is performed outside of all places of business of the enterprise for which it is performed." Doing so makes it much more difficult to classify an individual as an independent contractor, which threatens a whole range of companies, including those doing business in the so-called gig economy. The PRO Act includes the language of AB-5 word for word (although it notably does not include any of AB-5's numerous exemptions). Outside of the economic damage, the result would be a whole new pool of workers eligible for unionization.

### EXPANDING JOINT EMPLOYMENT

During the Obama administration, the Democratic majority at the NLRB adopted numerous lopsided policies to facilitate union organizing efforts, and one of those policy shifts involved an expansion of joint employment liability. In August 2015, the NLRB issued a decision in a case called *Browning-Ferris (BFI)* that rewrote the definition of what it means to be a joint employer under the NLRA. The current NLRB is in the process of a rulemaking that would return to the more sensible pre-*BFI* standard, but the PRO Act would make such a rule void.

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The vague and sweeping *BFI* standard was designed to ensnare a variety of employers in joint employment relationships, particularly businesses engaged in franchising or subcontracting.<sup>22</sup> Rather than examine a putative joint employer's actual control of the terms and conditions of employment such as the ability to hire, fire, and discipline, the *BFI* standard for joint employment was based on "indirect" or even "potential" control over those terms. In other words, the decision abandoned a relatively clear, bright-line standard in favor of a broader, less precise one.

The *BFI* decision exposed a wide variety of businesses to liability for workers employed by legally separate entities under a theory espoused by former Wage & Hour Administrator David Weil. Prior to his appointment to that position, Weil penned a book called *The Fissured Workplace*, which criticized commonplace (and, in many cases, long-standing) business practices.<sup>23</sup> The book's thesis is that employers deliberately

<sup>21</sup> The formal title is, "An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor," signed into law September 18, 2019.

<sup>22</sup> NLRB. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FRP-II, LLC*, 362 NLRB No. 186 (08/27/2015).

<sup>23</sup> Weil, David. *The Fissured Workplace: Why Work Became so Bad for so Many and What Can Be Done to Improve It*. Boston: The President and Directors of Harvard College, 2014.



“shed their role as direct employers of the people responsible for their products, in favor of outsourcing work to small companies that compete fiercely with one another,” resulting in “declining wages, eroding benefits, inadequate health and safety conditions, and ever-widening income inequality.” Accordingly, Weil advocates for expanded regulatory intervention to stop this supposed shirking of responsibility.

Shortly before Weil’s tenure began, another development paved the way for the *Browning-Ferris* decision beginning in 2012 when the SEIU launched its “Fight for \$15” campaign. That effort targeted the fast food industry with a highly organized series of protests and street theater directed at major franchisors, with McDonald’s being the prime target. According to public disclosure forms, the SEIU spent close to \$100 million on the Fight for \$15, which was as much about unionizing employees of individual franchise restaurants as it was about wages. The obstacle to that objective, though, was the legal separation between a franchisor and a franchisee. The NLRB’s *BFI* standard was designed to remove that legal obstacle and pave the way for a nationwide bargaining agreement with large franchisors, which would potentially garner a union like the SEIU tens if not hundreds of millions of dollars in dues and fees each year.

As mentioned, the current NLRB is in the process of issuing a more rational joint employer standard. But the PRO Act would codify *BFI*, making a rule pointless. The legislative outcome would make countless employers liable for workplaces they don’t control and workers they don’t actually employ.

## ABOLISHING ARBITRATION AGREEMENTS

One of the bedrock protections of the NLRA is that employees have the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>24</sup> Over time, the scope of that protection has been construed fairly broadly, but during the Obama administration, the NLRB read into Section 7 a novel interpretation that purported to ban commonplace arbitration clauses in employment contracts. Although the U.S. Supreme Court struck down that dubious theory, it would be codified by the PRO Act.

In 2012, the NLRB issued a decision in *D.R. Horton*, in which it declared that an employer may not require employees to sign arbitration agreements prohibiting them from pursuing class action lawsuits because, in the view of the Obama Board, class action lawsuits are concerted activity protected by the NLRA.<sup>25</sup> Using that decision as precedent, the Board proceeded to invalidate similar arbitration agreements in other cases until the Supreme Court had to intervene, which it did in 2018.

The Supreme Court heard a set of challenges to the NLRB’s anti-arbitration agreement stance, which were consolidated under the case *Epic Systems Corp. v. Lewis*.<sup>26</sup> In *Epic Systems*, the Court overturned a Ninth Circuit ruling that the NLRA’s protection of concerted activity superseded the Federal Arbitration Act (FAA). The Supreme Court reiterated its long-standing position that the FAA governs the validity of arbitration agreements and that the NLRA does not preempt the law’s requirement that such agreements be enforced saying, “Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act’s saving clause nor the NLRA suggests otherwise.”

The PRO Act would reverse the Supreme Court’s decision in *Epic Systems v. Lewis* by making it an unfair labor practice “to enter into or attempt to enforce” any agreement that prohibits employees from pursuing or participating in a class action lawsuit rather than arbitration. It would also make it unlawful for an employer “to coerce an employee into undertaking or promising not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee” or “to retaliate or threaten to retaliate against an employee for refusing” to do so.<sup>27</sup> In short, the PRO Act would eliminate the use of arbitration clauses in employment agreements with the exception of those between an employer and a labor organization. An increase in needless class action litigation would likely follow if the bill becomes law.

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<sup>24</sup> 29 U.S. Code § 157.

<sup>25</sup> NLRB. *D.R. Horton, Incorporated*, 357 NLRB No. 2277 (01/03/2012), and *D.R. Horton, Incorporated v. NLRB*, No. 12-60031 (5th Cir. 2014).

<sup>26</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

<sup>27</sup> H.R. 2474 § 4(c)(5).

## Tilting the Adjudication Field

The NLRA sought to establish a framework for labor relations that would minimize the widespread disruptions that plagued the economy at the time of its passage. Numerous strikes marred by violence, including the shutdown of ports along the West Coast, hastened Congressional efforts to create a means for employers and employees to negotiate the terms and conditions of employment through collective bargaining. The NLRA also includes a list of unfair labor practices that apply to both employers and unions to minimize labor strife. Yet the PRO Act would undo the NLRA's attempt to establish a level playing field and, instead, tilt the advantage heavily toward organized labor in several ways.

Among the changes contemplated by the PRO Act, one of the most egregious would strip employers of their ability to advocate their positions during representation cases before the NLRB. The bill states that “[n]o employer shall have

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standing as a party or to intervene in any representation proceeding under this section.”<sup>28</sup> This drastic departure from the current law would deprive employers of their legal right to challenge, for instance, the composition of a proposed bargaining unit or the classification of employees eligible to join a union (i.e., supervisors versus non-supervisors). Such a radical policy shift should alarm anyone interested in fundamental fairness.

In addition to depriving employers of long-standing procedural rights, the PRO Act would expand the list of unfair labor practices for employers and impose sizable financial penalties on them for alleged violations of the law. By contrast, it includes no penalties for unions and would actually allow them to engage in activities that have been illegal for more than 70 years.

Some of the behavior the PRO Act would legalize is in direct contradiction to the NLRA's core purpose, which was “to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred.”<sup>29</sup> Among those were disruptive short-term strikes and the targeting of third-party businesses not involved in a labor dispute.

### INTERMITTENT STRIKES

One of the tactics unions use when engaged in a dispute with an employer is as old as the organized labor movement itself: the strike, which the NLRA defines in part as a “concerted stoppage of work by employees[.]”<sup>30</sup> In a typical strike, such as the United Auto Workers' September–October 2019 strike against General Motors, employees stop working until the union and the employer come to an agreement on whatever is being disputed, for example, the terms of an expiring contract.

When a strike is lawful, employees who participate in it are generally protected from retaliation by an employer, but not all strikes are lawful.<sup>31</sup> Indeed, the NLRB has stated that “[a] strike may be unlawful because an object, or purpose, of the strike is unlawful,” and the misconduct of strikers likewise could render a strike unlawful.<sup>32</sup> One category of strike behavior that the NLRB does not generally permit is the intermittent strike, in which employees engage in a series of short-term walkouts. The NLRB's former general counsel, Frederick L. Feinstein, summarized this position in 1998, observing that “a refusal to work will be considered unprotected intermittent strike activity ‘when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.’”<sup>33</sup>

<sup>28</sup> H.R. 2474 § 4(d)(1)(A).

<sup>29</sup> 29 U.S. Code §§ 151–169.

<sup>30</sup> 29 U.S. Code § 142.

<sup>31</sup> 29 U.S. Code § 157, § 163.

<sup>32</sup> NLRB, “Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board,” U.S. Government Printing Office, 1997.

<sup>33</sup> NLRB, *Report of the General Counsel*; September 1, 1998; Available at <http://www.lawmemo.com/nlrb/gcreport.htm>. Last accessed October 9, 2018. (*N.b.* Upon expiration of his term on March 2, 1998, President Clinton appointed Mr. Feinstein Acting General Counsel. On October 22, 1998, he received a recess appointment to resume as general counsel.) See also *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1547-50 (1954).



In recent years, the use of intermittent strikes has increased in certain sectors such as retail and fast food. One prominent example of this phenomenon is the SEIU’s Fight for \$15, which has attempted to organize a series of walkouts at fast food restaurants starting in 2012. During the Obama administration, the Division of Operations-Management in the NLRB’s Office of General Counsel attempted to tee up a Board decision that would “clarify”—or uphold—the legality of such intermittent strikes.<sup>34</sup> To that end, it issued in 2016 a memorandum to the agency’s regional directors instructing them to include particular language in cases involving intermittent strikes so that the NLRB could “clarify its jurisprudence on intermittent and partial strikes and extend the [NLRA’s] protection to multiple strikes over the same labor dispute, except in certain limited circumstances.”<sup>35</sup>

Notwithstanding that effort, a newly constituted NLRB in 2019 addressed the issue of intermittent strikes and their legality in its *Walmart* decision.<sup>36</sup> Like McDonald’s, Walmart found itself being targeted by another union-backed worker center that orchestrated a series of at least four separate days of protest and walkouts at various locations nationwide. Following one of the protests, Walmart disciplined or discharged 54 employees, which prompted an appeal to the NLRB.

In its analysis, the Board noted that it has considered intermittent strikes unprotected since a 1949 Supreme Court decision;<sup>37</sup> thus, while workers may lawfully protest through intermittent strikes, employers are also free to discipline them under the NLRA. The NLRB observed in *Walmart* that there was “direct evidence of a plan to strike, return to work, and strike again, repeatedly,” which it called a “rare straightforward” case of unprotected intermittent striking.

If the PRO Act becomes law, intermittent strikes like those in the *Walmart* case would become protected activity. The bill would amend the NLRA to state that “the duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited.”<sup>38</sup> Similarly, the bill would eliminate provisions currently in effect that limit unions to 30 days of recognitional picketing under Section 8(b)(7) of the NLRA. Thus, employers confronting unpredictable, repeated, and disruptive walkouts would lose the legal protection needed to keep their businesses functioning.

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## REPLACING STRIKING EMPLOYEES

In 1938, the Supreme Court issued a decision in *NLRB v. Mackay Radio & Telegraph Co.* that addressed an area of the law that the NLRA did not contemplate.<sup>39</sup> In particular, it considered the issue of whether an employer may permanently replace employees who choose to strike for economic reasons, such as wages and benefits (as opposed to striking over unfair labor practices), a practice by employers that was already accepted at the time. In its ruling, the Court unanimously found that employers are within their rights to permanently replace employees on an economic strike because employers must be able to continue running their businesses, much to the consternation of organized labor.

As part of an ongoing dispute with the company, Mackay Radio & Telegraph Co., the American Radio Telegraphists Association voted to go on strike. While the employees went on strike, the company hired replacement workers. When the strike ended, it refused to dismiss the replacement workers and reinstate the employees who had walked out, which led to an unfair labor practice charge.

When the case reached the Supreme Court, the Court found that the company had not violated the NLRA because it declined to rehire some of the employees. As it observed, the NLRA clearly lays out certain protections for employees, but “it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and

<sup>34</sup> NLRB, Office of the General Counsel, Division of Operations-Management, “Management Memorandum OM 17-02,” October 3, 2016. Available at <http://apps.nlr.gov/link/document.aspx/09031d458222ee14>. Last accessed October 29, 2019.

<sup>35</sup> NLRB, “Brief Insert: Intermittent Strikes,” Available at <http://apps.nlr.gov/link/document.aspx/09031d4582231e89>. Last accessed October 29, 2019.

<sup>36</sup> *Walmart Stores, Inc.* 368 NLRB No. 24 (July 23, 2019).

<sup>37</sup> *Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949).

<sup>38</sup> H.R. 2474, § 4(i).

<sup>39</sup> *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.”<sup>40</sup>

Despite some effort during the Obama administration to adopt a more union-friendly stance, that position has remained the law, but changing that remains another of organized labor’s objectives. The reason is simple: not being able to replace workers who walk out on an economic strike could cripple employers. The PRO Act would realize labor’s objective by making it an unfair labor practice “to permanently replace an employee who participates in a strike” or to “discriminate against an employee who is working or has unconditionally offered to return to work for the employer because the employee supported or participated in such a strike.”<sup>41</sup>

## SECONDARY BOYCOTTS

While restricting employers’ flexibility in labor disputes, the PRO Act would legalize behavior by unions that the NLRA declared to be unlawful because of its disruptive impact on commerce. Known generally as secondary boycotts, one long-standing definition is that they are “a combination to influence A by exerting economic or social pressure against persons with whom A deals.”<sup>42</sup> In other words, they try to coerce a third-party business that has nothing to do with a labor dispute in order to harm one that does.

The NLRA prohibits secondary boycotts when their objective is to compel—

- Membership in an employer or labor organization.
- A so-called hot cargo agreement.
- Recognition of an uncertified union.
- Recognition of a union if another union has been certified.
- Assignment of certain work to certain employees.<sup>43</sup>

The legal debate over the use of secondary boycotts has existed since at least the early part of the 20th century, when the Supreme Court issued its 1907 decision in *Loewe v. Lawlor*.<sup>44</sup> That case deemed organized labor itself as unlawful under antitrust principles, but the underlying facts involved a nationwide boycott that included intimidating tactics

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used to pressure wholesalers into canceling orders with the company being targeted. In 1921, the Supreme Court again found in *Duplex Printing Press Co. v. Deering* that secondary boycotts were not protected by the Clayton Act, which Congress had passed in 1913 in reaction to the *Loewe* decision.<sup>45</sup>

By the late 1920s, the Supreme Court’s stance toward organized labor remained fairly consistent, but unions lobbied Congress heavily to enact legislation freeing them to engage in more aggressive pressure tactics, including secondary boycotts. Congress ultimately passed the Norris LaGuardia Act in 1932, also known as the Anti-Injunction Bill, which prevented courts from issuing injunctions against peaceful labor activities. After the

NLRA passed in 1935, the ability of unions to organize and engage in secondary boycotts lawfully became the norm until 1947, when Congress enacted the Taft-Hartley Act.

<sup>40</sup> *Id.*

<sup>41</sup> H.R. 2474 § 4(c)(1)(B).

<sup>42</sup> Frankfurter, Felix & Nathan Greene. *The Labor Injunction* 43 (1930).

<sup>43</sup> NLRB, *Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*. See also 29 U.S. Code § 151.

<sup>44</sup> 208 U.S. 274 (1907).

<sup>45</sup> 254 U.S. 443 (1921).

Following World War II, a series of strikes ensued as wartime restrictions on them were lifted, and secondary boycotts were part of organized labor’s arsenal. By design, they were highly coercive and pressured companies doing business with the union’s real target. The goal was to lead the neutral employer to cease doing business with the primary target or to convince the primary target to accede to the union’s demands to stop the harm being imposed on the neutral employer. In the face of the mass disruptions caused by the post-war strikes, Congress passed the Taft-Hartley Act, which restored the ban on secondary boycotts. The PRO Act would remove the prohibition against them once again, and it likewise would eliminate an employer’s right to sue unions for engaging in secondary boycotts. As a result, labor unions would be allowed to harass consumers and businesses that have nothing to do with a labor dispute, bringing ever more employers into the crosshairs.

## Restoring the Persuader Rule

During the Obama administration, the U.S. Department of Labor’s Office of Labor-Management Standards (OLMS) promulgated a rule that would have imposed a burdensome reporting requirement on employers and the labor relations consultants they hire. Known as the “persuader rule,” the proposal was designed to hamper employers’ ability to respond effectively to an organizing drive by dissuading them from using labor consultants.

The persuader rule would have significantly changed OLMS’ well-established interpretation of the Labor-Management Reporting and Disclosure Act (LMRDA), which includes the various reporting obligations of labor unions, employers, and labor consultants.<sup>46</sup> Section 203 of the LMRDA requires disclosure of arrangements between employers and “every person” whose activities are intended to influence whether employees choose to bargain collectively (i.e., unionize). When such an arrangement is made, a labor consultant is required to file a disclosure report to OLMS within 30 days that includes the consultant’s income “of any kind” from employers and the source of the income as well as disbursements made for the consultants’ services. An employer must file its own report as well.

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Notwithstanding that requirement, Section 203 also contains an exception for “giving or agreeing to give advice” to an employer, a provision commonly known as the “advice exemption.” The OLMS interpretative manual, a document used by the agency’s investigators, provides the agency’s interpretation of each provision of the LMRDA, including Section 203. For decades, it construed the advice exemption broadly to mean that reports were only required if a labor consultant had direct contact with employees, as opposed to merely giving advice to the employer alone.

Changing that interpretation to severely curtail the advice exemption was one of the AFL-CIO’s suggestions for the Obama administration’s transition team back in 2009, with the rule change listed as one of the labor federation’s “High +” priorities.<sup>47</sup> Accordingly, the Obama administration eventually sought to address the advice exemption via a rulemaking, which OLMS promulgated in early 2016.<sup>48</sup> The agency’s new interpretation made it much more difficult for employers and labor consultants to qualify for the exemption, and the business community promptly challenged it in federal court.

Issuing a preliminary injunction against the Obama administration’s rule, the judge hearing the case declared that it was “not merely fuzzy around the edges. ... [it] is defective to its core,”<sup>49</sup> and he later issued a permanent, nationwide injunction against it. Following the ruling, the Trump DOL rescinded the Obama administration’s persuader rule and restored the long-standing interpretation of the advice exemption.<sup>50</sup> However, the PRO Act would restore the persuader rule’s interpretation, and it would make it an unfair labor practice for employers to require employees to participate in workplace meetings or activities related to an organizing campaign.

<sup>46</sup> 29 U.S. Code 433.

<sup>47</sup> AFL-CIO 2008 Transition Project, “Recommendations for the Obama Administration: Regulation of Union Finances and Elections Under the Labor Management Reporting and Disclosure Act,” p. 7. Available at [https://web.archive.org/web/20161123224309/https://otrans.3cdn.net/2607359fc5c7820a44\\_p3m6btw14.pdf](https://web.archive.org/web/20161123224309/https://otrans.3cdn.net/2607359fc5c7820a44_p3m6btw14.pdf).

<sup>48</sup> U.S. Department of Labor, Final Rule, “Interpretation of the ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act,” effective April 25, 2016. 81 FR 15924 (March 24, 2016).

<sup>49</sup> *National Federation of Independent Business et al. v. Perez et al.* 2016 WL 3766121 (N.D. Tex. June 27, 2016).

<sup>50</sup> Office of Labor-Management Standards, “Rescission of Rule Interpreting ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act,” 83 FR 33826 (July 18, 2018).

## Imposing Financial Penalties

The PRO Act would impose onerous, one-sided financial penalties on employers—but not on unions—for alleged unfair labor practices. In particular, the proposal would impose “remedies” for alleged discrimination against employees for exercising their rights under the NLRA or for committing an unfair labor practice resulting in the discharge “or other serious economic harm to an employee.”

In such cases, the PRO Act states that “the Board shall award the employee back pay without any reduction (including any reduction based on the employee’s interim earnings or failure to earn interim earnings), front pay (when appropriate), consequential damages, and an additional amount as liquidated damages equal to two times the amount of damages awarded.”<sup>51</sup> The bill allows for the imposition of punitive damages and payment of attorneys’ fees. In

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addition to these, it includes penalties up to \$50,000 for each violation, but that doubles to \$100,000 “in any case where the employer has within the preceding five years committed another such violation.”

The PRO Act also would make NLRB orders self-enforcing, thereby obviating initially the need for a federal court to order compliance, and it would impose on “any person who fails or neglects to obey an order of the Board” a civil penalty up to \$10,000 for each violation. Furthermore, it makes each violation of an NLRB order a separate offense, “except that, in the case of a violation in which a person fails to obey or neglects to obey a final order of the Board, *each day such failure or neglect continues shall be deemed a separate offense*” (emphasis added).<sup>52</sup> In other words, an employer could be fined up to \$10,000 *per day* for failing to obey an order from the NLRB. If an employer continues not to obey an NLRB order after 30 days, the PRO Act requires a federal court to order compliance.

To add additional teeth to these penalties, the PRO Act imposes the potential for personal liability on “any director or officer of the employer who directed or committed the violation, had established a policy that led to such a violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation.” The bill leaves the decision of whether or not personal liability “is warranted” in the hands of the NLRB, whose members at times have demonstrated a considerable pro-labor bias if not outright hostility toward employers, which highlights the potential for abuse of this kind of power.

Given the lopsidedness of the NLRB process, employers may consider appealing to the judiciary, but they may fare no better if they choose to do so, as the PRO Act states that “findings of the Board with respect to questions of fact ... shall be conclusive,” absent extraordinary circumstances. The bill would prohibit a court from considering any arguments by an employer that were not first made before the NLRB during its adjudication process. Meanwhile, the PRO Act gives employees the right to file a civil suit in federal court regardless of whether the NLRB decides to pursue its case, thus allowing them two bites at the proverbial apple while driving up legal costs for employers.

## Poisoning the Well Even Further

On September 25, 2019, the House Committee on Education and Labor took up the PRO Act in a markup that amended the bill before it was approved by the committee along a 26-21 party-line vote.<sup>53</sup> First, the committee adopted what is termed an “amendment in the nature of a substitute” proposed by Rep. Scott, which added five more provisions. The committee then adopted four additional stand-alone amendments, all of which simply made a bad bill even worse and deliberately more onerous.

The new provisions would require employers to maintain the existing terms and conditions of employment pending an agreement with the union. The practical effect of this change is that it would force an employer to maintain the status quo even if the current terms of a contract are unaffordable or put the employer at a competitive disadvantage. Moreover, it would remove a key incentive for unions to bargain in good faith, given that the current contract terms would govern regardless of how long it takes for the union and the employer to reach a deal.

<sup>51</sup> H.R. 2474 § 4(e).

<sup>52</sup> H.R. 2474 § 4(f)(1)(C).

<sup>53</sup> “Major Labor Law Overhaul Proposal Approved by House Panel.” *Bloomberg Law, Daily Labor Report*, September 25, 2019.

The amendment would overturn the NLRB's 2019 decision in *Johnson Controls*, which allows an employer to withdraw recognition of a union within 90 days prior to the expiration of a collective bargaining agreement if evidence exists that the union has lost majority support.<sup>54</sup> In such situations, the *Johnson Controls* decision requires a union to demonstrate majority support through a secret ballot election run by the NLRB. More importantly, it gives employees who may not have ever had a chance to vote on union representation the ability to voice their opinion through an election, something that unions would rather not risk.

As discussed above, the PRO Act already requires employers to turn over sensitive information about their employees, such as personal emails and phone numbers, in a voter list. The committee amendment furthers this invasion of privacy by specifying that employees' personal information must be provided to the union must be in searchable electronic format. As if turning over private contact details were not enough, the amendment contains no restrictions on how unions may use this information. In fact, a union could disseminate it for purposes that have nothing to do with collective bargaining, and unless the NLRB were to promulgate a rule prohibiting it, a union could potentially provide a voter list to unrelated third parties.

“As if turning over private contact details were not enough, the amendment contains no restrictions on how unions may use this information. In fact, a union could disseminate it for purposes that have nothing to do with collective bargaining, and unless the NLRB were to promulgate a rule prohibiting it, a union could potentially provide a voter list to unrelated third parties.”

The next change would codify the NLRB's 2014 ruling in *Purple Communications, Inc.*, which held that employees have a statutory right to use workplace email systems to discuss activity protected under the NLRA, including union organizing.<sup>55</sup> That case overturned the Board's 2007 *Register Guard* decision permitting employers to prohibit the use of email systems for non-business communications, which relied on decades of precedent that employees do not have a right to use an employer's equipment for union organizing efforts. The amended PRO Act would make access to employer email systems for organizing mandatory.<sup>56</sup>

The last change in the substitute bill would similarly codify the NLRB's ill-conceived 2011 decision in *Specialty Healthcare*, which opened the door for so-called micro-unions.<sup>57</sup> In its decision, the Board declared that it would allow a union to represent a bargaining unit if the union demonstrates that the employees in the unit share a “community of interest.” In order to add additional employees into a proposed bargaining unit, an employer would have to demonstrate that those employees shared an “overwhelming community of interest” with the proposed unit. The practical effect of that decision was the creation of small, fractured bargaining units within workplaces ranging from a private aviation facility to a cluster of Panera restaurants. *Specialty Healthcare* was overturned by the Board in a decision called *PCC Structurals*, but the Pro Act would turn back the clock and revive it.<sup>58</sup>

“The amended PRO Act would make access to employer email systems for organizing mandatory.”

After passing the substitute bill, the committee proceeded to approve four additional amendments. The first amendment to the bill would make misclassification of an employee (i.e., as an independent contractor) an unfair labor practice in and of itself. The second would allow the NLRB to conduct representation elections “through certified mail, electronically, at the work location, or at a location other than one owned or controlled by the employer,” opening the door for endless mischief if not outright fraud during representation elections. The third extends the PRO Act's monetary civil penalties to alleged violations, such as threats or refusal to bargain, even if they cause no serious economic harm. The last amendment would make it illegal for an employer to engage in an “offensive” lockout, in other words closing a facility during contract negotiations. Doing so would grant even more leverage to unions.

<sup>54</sup> *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019).

<sup>55</sup> *Purple Communications, Inc.*, 361 NLRB No. 1050 (April 30, 2014).

<sup>56</sup> *The Guard Publishing Company d/b/a The RegisterGuard*, 351 NLRB No. 1110 (December 16, 2007).

<sup>57</sup> *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 934 (August 26, 2011).

<sup>58</sup> *PCC Structurals, Inc.*, 365 NLRB No. 160 (December 15, 2017).



## Conclusion

The PRO Act is organized labor's latest attempt to fundamentally rewrite labor law. The proposal eclipses the old card check fight from a decade ago, a modified version of which is just one of the PRO Act's several policy prescriptions designed to give unions substantial advantages in the organizing process, while saddling employers with new liabilities. Despite its radical nature, it has unfortunately gained significant support within the current House majority.

While the PRO Act may not get past the Senate, the fact that organized labor has recruited over 200 co-sponsors in the House and 40 in the Senate highlights the seriousness of the campaign to pass it. A sustained effort to oppose this bill is needed to keep it from advancing any further than it has already, or, if the political winds shift, reaching the desk of a president who would sign it. EFCA was considered at the time a major threat, and it was just such an effort that kept that bill from passing. In the PRO Act, labor has put forward a proposal that is far more threatening to workers, employers, and the economy.



# NOTES



## NOTES





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