

What is the Protecting the Right to Organize Act?

A guide to the provisions that would harm workers and job creators

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The Protecting the Right to Organize Act (H.R. 842)¹ is a large controversial bill being considered by Congress that would overturn worker freedom throughout the country, stifle independent workers' ability to support their families, harm small business, and add additional burdens to job creators—among many other troubling provisions.

This guide breaks down the many facets of the PRO Act into three sections:

- Provisions harming employees and independent workers;
- Provisions harming job creators; and
- Provisions that would simply tilt the playing field and give unions unfair advantages. These provisions of the PRO Act would most affect private-sector employees and unions.

In 2020 the US House of Representatives passed the PRO Act with a vote of 224 to 194.² The bill was reintroduced in February 2021.³

Harming Employees and Independent Workers

Repealing Right-to-Work: The PRO Act would eliminate states' ability to protect people from being fired for not paying union fees. Currently, a majority of states have right-to-work laws protecting worker freedom and giving workers a choice to pay union fees or not. If the PRO Act passes, private-sector workers nationwide would no longer have a choice in union membership. If a union represents them, whether the workers want representation or not, they would also be required to pay. Currently this would affect over 2.8 million private-sector workers represented by unions in 27 right-to-work

¹ https://edlabor.house.gov/imo/media/doc/PRO_Act_Bill_Text.pdf; see also https://edlabor.house.gov/imo/media/doc/2021-02-04_PRO_Act_of_2021_Section_by_Section.pdf

² <https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions/>

³ <https://www.congress.gov/bill/117th-congress/house-bill/842/text?r=13&s=1>

states.⁴ The PRO Act would also eliminate the ability of states and localities to pass these laws in the future, preventing possibly millions more employees from enjoying the freedom to choose.

Public-sector employees would still enjoy right-to-work protections due to the Supreme Court's ruling in the *Janus v. AFSCME* case.⁵

Limiting Independent Work: The PRO Act would severely limit Americans' options to engage in flexible work through independent contracting. It would impose a strict test a worker must pass if he or she wishes to work under an independent contracting or freelancing arrangement.

The provision is modeled after California's Assembly Bill 5, which passed in 2019.⁶ The effect on California's independent workers was far reaching and devastating,⁷ especially for freelancers⁸ and women.⁹ The law was so disastrous to independent workers that California lawmakers created several exemptions to it a mere nine months into its existence,¹⁰ and voters struck down major portions of it affecting gig economy workers in November 2020.¹¹ The PRO Act seeks to nationalize much of the original AB5 law but without the exemptions California added.

Under this provision in the PRO Act, a worker must pass a three-pronged test, commonly referred to as the ABC test.¹² If they cannot meet each standard of the test, they may no longer work as an independent contractor and instead must be classified as an employee. (ABC generally refers to how the legislation is numbered and not an abbreviation of the parts.)

ABC test requires independent contractors be:

- A. Absent of control from the business. For example, the independent worker must be able to choose when and where they will work and how the work will be completed.
- B. Outside the usual course of business for the company. Under this test, for example, a freelance writer wouldn't be allowed to contract for a newspaper or publishing company but may be able to write website copy for a hotel.
- C. Customarily engaged in an independently established trade, occupation, or business. Courts will look to see if the independent worker is in business for themselves: Does the independent worker have their own business license, business address, or business email or phone? Do they receive income from multiple clients, advertise, or generally conduct themselves as a separate

⁴ In 2019 unions represented 2,865,037 private sector workers in right-to-work states according to a Unionstats.com analysis by Professors Barry T. Hirsch and David A. Macpherson from the Bureau of Labor Statistics Current Population Survey (CPS) Outgoing Rotation Group (ORG) Earnings Files, 2020

⁵ https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

⁶ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

⁷ <https://i4aw.org/resources/warnings-from-california-the-harms-of-attacking-entrepreneurship-and-freelancing/>

⁸ <https://www.nytimes.com/2019/12/16/business/media/vox-media-california-job-cuts.html>

⁹ <https://americansforprosperity.org/five-reasons-californias-assembly-bill-5-has-been-devastating-to-women/>

¹⁰ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257

¹¹ [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020))

¹² See. *Dynamex v. Superior Court* 4 Cal. 5th 903 (2018)

independent business?¹³ It should be noted that even if this part is satisfied, such as an independent worker forming an LLC or company before signing a client, they can still fail one of the other parts and be considered an employee.

When workers are reclassified as employees rather than independent contractors, they lose the ability to work for themselves and the flexibility and earning potential that comes from being an entrepreneur.

Unions heavily support the PRO Act and AB 5 because if independent workers are considered employees they can be unionized. This is one of the key ways unions hope to organize gig economy workers, but as California independent workers saw, many non-gig economy workers will also be harmed in the crossfire.

In addition to being burdensome, surveys show that the change is not wanted or needed. An ADP survey shows that “More than 70 percent of 1099-MISC gig workers say they are working as independent contractors by their own choice, not because they can’t find a ‘regular’ W-2 job. Most seem happy with gig work, with 60 percent saying they will continue to gig for the next three years.”¹⁴ Similarly, a Coalition for Workforce Innovation National Survey showed that 94 percent of independent contractors like their current arrangement.¹⁵

Disclosing Employee Private Information: The PRO Act would force employers to give unions employees’ names, “home addresses, ... and, if available to the employer, personal landline and mobile telephone numbers, and work and personal email addresses ...in a searchable electronic format”¹⁶ during an organizing election. The bill contains no safeguards to protect this information from being sold to third-party marketers or political campaigns, and it does not give employees the option to prevent unions from getting this information. Unions may use this information to more easily coerce workers into voting for a union during an election.

Taking Away Secret Ballot Protections: The PRO Act strips workers of secret ballot protections during contested union organizing elections. If a union claims an employer did something during the election to call it into question and the employer cannot prove they were innocent (the PRO Act would make all employers guilty until proven innocent), the National Labor Relations Board, which sides heavily with unions during Democratic Administrations,¹⁷ could throw out the secret ballot election.

The board would then recognize the union if the union shows it has cards or a petition from a majority of employees. This is essentially a card check scheme, which unions have attempted to persuade Congress to enact for over a decade. Under card check, unions only need to get a majority of employees to sign cards to organize an employer. The problem is that card check takes away

¹³ Dynamex p. 75-76

¹⁴ <https://www.adp.com/-/media/adp/resourcehub/pdf/adpri/illuminating-the-shadow-workforce-by-adp-research-institute.ashx>

¹⁵ <https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf>

¹⁶ PRO Act p 13

¹⁷ <http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf>

employee's right to a private ballot. Cards are signed in the open, and the process leads to intimidation, coercion, and deception of employees to get their signature.¹⁸

Taking Away Ability to Enter into Voluntary Agreement with Their Employer: The PRO Act takes away the ability of an employer and an employee to agree to resolve certain employment disputes out of court. The United State Supreme Court ruled¹⁹ that, according to federal law, employers and employees can agree to arbitration to resolve certain disputes. This streamlines the process and helps avoid drawn out and costly litigation. However, the PRO Act would make these voluntary agreements agreed to by an employer and an employee illegal. It would take away a cost-effective and time-efficient process limiting the ability of employers and employees to resolve employment issues. The prohibition on arbitration would result in taking away options and choice from employees and employers.

Demoting Supervisors to Regular Employees for Union Elections: In order to allow unions to organize more employees, the PRO Act redefines who is considered a "supervisor." Employees with some management responsibilities would no longer be considered supervisors unless they spend a majority of their time doing management duties.

Locking Workers into Unpopular Unions: The PRO Act would take away an employer's ability to withdraw recognition from a union within 90 days before a union contract expires when the employer has evidence that the union no longer is supported by a majority of employees.²⁰ Another section of the PRO Act would increase limits on when employees can ask for the NLRB for an election to remove the union at their workplace.

Harming Job Creators

Strip Franchise and Small Business Owners of Their Ability to Make Decisions About Their Businesses: The PRO Act would turn many employees of local small businesses and mom-and-pop shops into employees of large corporations. The PRO Act seeks to make small businesses easier targets for unionization by tying them more closely to their corporate counterpart. These changes will put small businesses at risks for lawsuits and limit their ability to make decisions for their own business.

The PRO Act would take away the ability of many small mom-and-pop businesses to control aspects of how they work with their employees, making them "joint employers" with large and often distant corporations.

For example, many local restaurant chains aren't owned by their corporate counterparts, but rather, by local individuals and families. While the corporation may dictate marketing standards and menus, it's the local franchise owner who operates the business, makes hiring decisions, sets wages, and

¹⁸ <https://www.mackinac.org/26955>

¹⁹ *Epic Systems Corp. v. Lewis*, https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf

²⁰ <https://www.littler.com/publication-press/publication/nlrb-eases-standard-withdrawing-union-recognition-upon-contract>

ensures health department and labor laws are followed. Under the PRO Act, the corporation would be responsible for the actions of the small business, meaning they will exert more control over franchises to mitigate liability.

Unions don't want to organize the multitude of small business owners but would rather simply pressure a corporate board to and make unionization easier.²¹

They also would like to make sure they can sue the larger corporation instead of the small business that may have limited funds. If the PRO Act passes and corporations are now liable for the actions of these small business, they will exert control over most aspects of employment, meaning these entrepreneurs will go from owners who can exert their own degree of choice and control to employees of large distant corporations.

In addition, the joint employer standard would harm small businesses contracting with larger ones. For example, a department store can contract with a janitorial company to clear the store after hours. Under the current and historically accepted standard, unless the department store has "substantial direct and immediate control" over things "such as hiring, firing, discipline, supervision, and direction"²² the employees are only employed by the janitorial company. However, under the PRO Act's "direct control and indirect control"²³ standard, both the janitorial company and the department store would be joint employers of the janitor. This was a standard the Obama administration attempted at the NLRB²⁴ but was overturned in 2020 by a Trump NLRB regulation.²⁵

Under the PRO Act, both joint employers would need to bargain with unions, could be picketed, and would be liable for violating labor law.

Allowing Unions to Attack Neutral Businesses: The PRO Act would allow unions to picket and try to harm businesses that are not involved with a union in a labor dispute. The change would upend decades of precedent created to ensure labor disputes do not spill over into neutral businesses.²⁶

The goal is to allow unions to try to harm or drive away customers from business that work with the company they target. The idea is to either drive away customers or harm suppliers of a target business so they will pressure the target to give into union demands. However, the result is harm to neutral businesses that have nothing to do with the union and the target employer's labor dispute.

Guilty Until Proven Innocent: As noted above, if a union accuses an employer of violating labor election rules during an organizing election, the employer is guilty until proven innocent. This is the exact opposite of how cases usually work in the criminal context. In that area, it would mean that someone accused of theft would need to prove they were innocent instead of the state proving they stole something. Worse, as also noted above, the employer would not be before a neutral judge but

²¹ <https://www.forbes.com/sites/realspin/2015/11/23/a-union-fight-for-members-not-a-15-minimum-wage/?sh=3b988d3f7e93>

²² <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-03373.pdf>

²³ PRO Act p. 2

²⁴ Browning-Ferris Industries of California, d/b/a BFI Newby Island Recyclery (Browning-Ferris), 326 NLRB No. 186 (2015).

²⁵ <https://www.nlr.gov/news-outreach/news-story/nlr-issues-joint-employer-final-rule>

²⁶ <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/secondary-boycotts-section-8b4>

rather before the NLRB, an entity that is highly political and, during certain administrations, biased in favor of unions.

Violating Attorney-Client Privilege: The PRO Act would force employers to disclose if they are receiving legal advice from attorneys on unionization issues and also require the attorney to disclose if they were paid for this information. This would be a sharp departure from the protections of attorney-client privilege. An attempt by the Obama Administration's Department of Labor to take away this privilege was first blocked by a Texas court²⁷ then rescinded by the Trump Administration's Department of Labor.²⁸

Forcing Contracts on Employers: In contrast to other parts of the PRO Act detailed above, which outlaw voluntary arbitration agreements between employers and employees, the PRO Act would force employers into arbitration with unions to create first contracts, even if one of them did not agree to the process. In order to fast track union contracts that do not receive employer and union agreement in 90 days, the contracts would then go to mediation (similar to marriage counseling where a mediator tries to get both parties to agree). If the parties do not agree within 30 days of mediation, then they are forced to go before an arbitration panel of three arbitrators that can force a two-year contract.

In short, the PRO Act would allow a panel of three arbitrators, who may not be familiar with the company or the employees, to force a two-year contract on employers and employees even if one never agreed to arbitration.

Increased Penalties: Job creators could be on the hook for large civil penalties under the PRO Act. These penalties could be levied personally against officers or directors of an employer. Simply not informing workers of their rights could cost \$500 per each violation. Violations could be as simple as an employer not having an employment law sign posted or not replacing one that was taken down.

Larger penalties for employee firings or other "serious economic harm" could be up to \$50,000. Penalties could be doubled to as much as \$100,000 if an employer committed another violation during the previous five years.²⁹

If the NLRB thinks the claim against an employer is frivolous or if the board does not act quickly enough, the union or employee can bypass the board and sue in federal court.

²⁷https://www.texasattorneygeneral.gov/sites/default/files/files/press/145_Final_Judgment.pdf;
https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august2018/dolpersuader/

²⁸ <https://www.dol.gov/newsroom/releases/olms/olms20180717>

²⁹ See. PRO Act p. 27

Giving Unions an Unfair Advantage

Gerrymandering of Employees: The PRO Act would allow unions to gerrymander units of workers they are trying to organize into groups that would make it easier for them to win an election. The goal is to create “micro unions,” which would guarantee a union win. If a union could not organize a majority of the employees at a grocery store, for example, but could get a majority of employees in the deli department, under the micro union’s “community of interest”³⁰ standard, the union could get their foot in the door and organize the smaller unit. Micro unions also pose greater headaches for employers if they have multiple unions organizing different micro unions with potentially different demands. For example, if the deli workers organize with Union A but the bakery workers organize with Union B and each union wants different hours to open and close the store, the employer would have to negotiate and harmonize the contracts with each of them.

Micro unions and the looser “overwhelming community of interest”³¹ standard is a departure from the “community of interest”³² standard, which is how union bargaining units were formed before the Obama NLRB went to the micro union standard and are again as of this writing. The historically accepted community of interest standard takes into account different factors of employees, such as separate departments, training, job functions, contact and interchangeability with other employees, how they are supervised, and the distinct terms of employment to determine what is a unit.³³

Ambush Elections: Imagine an election where one candidate gets to campaign for months, if not longer, and the other candidate only finds out there is a race less than three weeks before election day.³⁴ That is the type of scenario the PRO Act would create. Unions can organize for months, making their case to employees and gathering support before they go to an employer and ask to be recognized or for an election. This could be the first time the employer finds out about the union organizing attempt. They may have never spoken to their employees about what unionization would mean to them and the business.

Further, some employers, especially small ones, may not have a human relations or legal team experienced with all the legal requirements of what an employer can and cannot do during an organizing campaign. Even unintentional violations could cost the employer penalties (increased by the PRO Act) and cost the employees the right to a secret ballot during the election (see taking away the secret ballot section above.) The PRO Act would significantly shorten the union election process, taking away time employers could speak to their employees about unionization and giving unions an unfair advantage during the election.

Electronic and Remote Elections: The PRO Act would allow unions to decide to have an election “conducted through certified mail, electronically, at the work location, or at a location other than one

³⁰ Specialty Healthcare, 357 NLRB No. 83 (2011)

³¹ Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011)

³² PCC Structurals, Inc., 365 NLRB No. 160 (2017)

³³ <https://www.littler.com/publication-press/publication/whats-appropriate-nlr-b-overturms-specialty-healthcare>

³⁴ <https://www.washingtontimes.com/news/2012/feb/16/bringing-democracy-back-to-the-workplace/>

owned or controlled by the employer.” Again, it strips any ability of an employer to have a say in how the election is conducted. The PRO Act specifically states “No employer shall have standing as a party or to intervene in any representation proceeding...”³⁵

Unions Allowed to Use Employer Equipment for Union Business: The PRO Act would require employers to allow employees to use the employer’s computers, email, phones, and other equipment for union activity, taking away an employer’s ability to control their own technology and equipment.

Restricting Employer Speech: The PRO Act would stop employers from being able to have required meetings with their employees during working hours to present their views on unionization.

Removing Ability of Employers to Respond to Strikes: The PRO Act would stop employers from permanently replacing workers who go on strike. Under current law, these workers who go on strike for economic reasons (higher pay, etc.) are not automatically entitled to get their job back when the strike is over. Instead, they are put on a special hiring list and are entitled to come back to work when there is an opening.³⁶ The PRO Act would force the employer to reinstate strikers, even if they were replaced during the strike.

Preventing Lockouts: The PRO Act would prevent employers from “locking out” or stopping employees from working to further the employer’s position in contract negotiations.

Allow Hit and Run (Intermittent Strikes): While workers can stop working and go on strike for a variety of reasons, there are certain practices and strikes that are not protected. Intermittent strikes are not protected under the law, and employers can fire employees for engaging in such actions.³⁷ Unlike formal longer strikes, intermittent strikes are like hit-and-run action where a union will temporarily go on strike to harm an employer then go back to work. The PRO Act changes the law to protect these types of strike that could increase harm caused by unions to employers.

Sidelining Employers from Many Parts of the Union Election Process: Even though the union will be organizing an employer’s business, the PRO Act would prevent the employer from having almost any say in the union election process. Employers would have little to no say in which employees would be included in the election and be able to vote. The management side law firm Littler Mendelson says this “means employers would be denied any voice on such important issues as who should be eligible to vote, what unit is appropriate for bargaining, where and how the ballots will be counted, and many other issues.”³⁸ In short, the PRO Act would allow unions to stack the deck in their favor and give employers almost no say.

³⁵ PRO Act p. 15

³⁶ <https://www.nlr.gov/strikes>

³⁷ <https://www.nlr.gov/strikes>

³⁸ <https://www.littler.com/publication-press/publication/pro-act-would-upend-us-labor-laws-non-union-and-unionized-employers>