



Section-by-Section

COMMITTEE ON EDUCATION & LABOR

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The Hon. Robert C. "Bobby" Scott • Chairman

Protecting the Right to Organize Act of 2019

Short Title

The title of the bill is the *Protecting the Right to Organize Act*.

Findings

The National Labor Relations Act (NLRA) was designed to encourage collective bargaining in the workplace, which ensures higher wages and better benefits to workers who exercise their right to organize unions. However, many employers maintain policies that restrict workers' abilities to engage in activities protected by the NLRA, and the law lacks a credible deterrent for employers that retaliate against workers who exercise protected rights. The penalties for violating the NLRA are weaker than those for violating other labor and employment laws, and workers lack a private right of action to pursue relief on their own. Workers are frequently misclassified as independent contractors or supervisors, and thus excluded from the protections afforded to employees covered by the NLRA. Further, workers who form unions are frequently frustrated by delays in reaching a first collective bargaining agreement.

Purposes

The purposes of the *Protecting the Right to Organize Act* ("PRO Act") are to strengthen protections for employees engaged in collective action, to expand coverage of the NLRA to more employees, to facilitate a process by which workers and employers can reach a first collective bargaining agreement, to provide for stronger remedies for employees whose rights under the NLRA have been violated, to provide for penalties against employers who violate those rights, to safeguard the right to strike, to repeal prohibitions on collective action, to permit fair share fee arrangements, to improve the purchasing power of wage earners in industry, and to guarantee more effective enforcement of the NLRA.

Section 101. Amendments to the National Labor Relations Act

(a) Definitions of Employer, Employee, and Supervisor

(1) *Protecting employees who have multiple employers.* This section states that two more persons shall be employers under the NLRA if each codetermines or shares control over the employees' essential terms and conditions of employment. In applying this standard, the Board or a court of competent jurisdiction shall consider as relevant direct control, indirect control, reserved authority to control, and control exercised in fact. The PRO Act codifies the joint employer standard the National Labor Relations Board (NLRB) enacted in its 2015 *Browning-Ferris* decision.

(2) *Ensuring that employees are not misclassified as independent contractors and denied protections of the NLRA.* The definition of "employee" under Section 2(3) of the NLRA is amended to clarify that an individual

performing any service is an employee and not an independent contractor unless (1) the individual is free from the employer's control in connection with the performance of the service, both under the contract for the performance of service and in fact; (2) the service is performed outside the usual course of the business of the employer; and (3) 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.

(3) Ensuring that employees are not wrongly classified as supervisors and denied protections of the NLRA. The definition of "supervisor" in Section 2(11) of the NLRA is clarified to require that the individual's supervisory activities be executed for "a majority of the individual's worktime." The *PRO Act* also modifies the list of supervisory activities in Section 2(11) to remove the individual's authority to "assign" and "responsibly to direct" employees.

(b) Allowing the National Labor Relations Board (NLRB) to engage in economic analysis

The NLRA currently prohibits the NLRB from appointing any individuals for the purposes of engaging in economic analysis. Removing that prohibition would allow the NLRB to conduct economic assessments to ensure that its policies and regulations are supported by economic analysis—rather than rely on outside organizations with an interest in the outcome of the proceeding.

(c) Strengthening Workers' Rights to Engage in Protected Activities

(1) Prohibiting Employers from Permanently Replacing Employees Who Strike. Strikes are a last resort for workers when all other efforts to improve wages and conditions through collective bargaining are exhausted. However, current law allows employers to cripple the effectiveness of a strike by "permanently replacing" striking workers. This retaliatory tactic often deters unions from engaging in a strike when all other efforts to improve working conditions fail. This section prohibits employers from permanently replacing striking workers, and from discriminating against employees who supported or participated in a strike.

(2) Removing Limitations on Secondary Strikes. The NLRA currently prohibits unions from engaging in "secondary" picketing, strikes, or boycotts, where workers of one company would picket, strike, or support a boycott in solidarity with another company's workers to improve wages or conditions. This section removes those prohibitions to permit unions to exercise these basic First Amendment rights.

(3) Prohibiting captive audience meetings. Employers often respond to union campaigns by requiring employees to attend captive audience meetings designed to persuade employees against joining the union. If an employee refuses to attend a captive audience meeting, the employer may fire him or her. This section would prohibit employers from requiring employees to attend meetings or participate in anti-union campaign activities.

(4) Facilitating Initial Collective Bargaining Agreements. Once a union has been recognized or certified as the employees' bargaining representative, the employer and union must commence bargaining within 10 days of the union submitting a written request. If the parties have failed to reach an agreement after 90 days of bargaining, or for additional periods as the parties may agree upon, then either party may request mediation facilitated by the Federal Mediation and Conciliation Service (FMCS). If the parties cannot reach an agreement 30 days after mediation is requested, or for additional periods as the parties may agree upon, then the FMCS shall refer the dispute to a tripartite arbitration panel. The findings of this panel shall be binding upon the parties for a period of 2 years, unless the parties mutually agree in writing to amend during such period.

(5) Ending prohibitions on collective and class action litigation. The NLRA protects workers' rights to engage in "concerted activities for the purpose of...mutual aid or protection." However, on May 21, 2018, the Supreme Court held in *Epic Systems Corp. v. Lewis* that, despite this explicit protection, employers may force workers into signing arbitration agreements that waive the right to pursue work-related litigation jointly, collectively or in a class action. This section overturns that decision by explicitly stating that employers may not require employees to waive their right to collective and class action litigation.

(6) Notice-posting and transparency. The NLRB shall promulgate regulations requiring employers to post and maintain notices to employees of their rights under the NLRA, and to notify each new employee of the information in the notice. Employers must provide unions with a list of all employees in the bargaining unit no later than 2 business days after the NLRB directs an election. This list must contain the employees' names, home addresses, work locations, shifts, job classifications, and, if available to the employer, personal landline and mobile telephone numbers, and email addresses.

(d) Ensuring Fairness in Union Representation Elections

(1) Removing Employer Standing in Representation Cases. Under current procedures before the NLRB, when employees file a petition for an election, the employer is deemed a "party" to that election. This section would deny standing to employers in union representation cases, preventing outside entities from interfering in the employees' decision on whether to join a union. This section would harmonize the NLRB's procedures with those of the National Mediation Board, which denies standing to employers in union representation cases for workers covered under the Railway Labor Act.

(2) Remedying election interference. In a representation election, when a majority of valid ballots have been cast in favor of the union, the NLRB shall issue an order requiring the parties to bargain. If a majority of valid ballots have not been cast in favor of union representation due to election interference by the employer, and a majority of employees in the voting unit have signed authorization cards designating the union as their representative, then the NLRB shall issue an order requiring the employer to bargain with the union.

(3) Streamlining election procedures. This section would codify portions of the NLRB's 2014 regulations to modernize its representation election procedures. Once a union files a petition for an election, the NLRB must schedule a pre-election hearing not later than 8 days after notice of the hearing is served on the labor organization. After the election, if the results are in dispute, the NLRB must schedule a post-election hearing not later than 14 days after the filing of objections.

(e) Preventing of Unfair Labor Practices

The *PRO Act* provides that, when an employee has been discharged or suffered serious economic harm in violation of the NLRA, the NLRB shall award the employee backpay (without any reduction based on the employee's interim earnings), front pay, consequential damages, and "an additional amount as liquidated damages equal to 2 times the amount of damages awarded." An employee cannot be denied relief under the NLRA on the basis that the employee is an unauthorized alien under the Immigration Reform and Control Act, which reverses a 2002 Supreme Court decision.

(f) Enforcing Compliance with Orders of the Board

The NLRB's orders shall be self-enforcing, similar to orders of other federal agencies. If a party refuses to comply with an order of the NLRB, then the NLRB may initiate contempt proceedings in federal district court. A party that is adversely affected by an NLRB order may seek review before federal court of appeals within 30 days of the order being issued.

(g) Injunctions Against Unfair Labor Practices Involving Discharge or Other Serious Economic Harm

The *PRO Act* requires the NLRB to seek temporary injunctive relief whenever there is reasonable cause that an employer unlawfully terminated an employee or significantly interfered with employees' rights under the NLRA. The district court shall grant this temporary relief for the duration of the NLRB proceedings, unless the court concludes that there is no reasonable likelihood that the NLRB will succeed on the merits of its claim. This parallels a provision in the NLRA that requires the NLRB to seek temporary injunctive relief whenever a union is charged to have engaged in unlawful secondary boycott activity.

(h) Strengthening Remedies and Enforcement for Employees Exercising Their Rights at Work

(1) Civil Penalties for Violations of the Posting Requirements and Voter List Requirements. If an employer violates the *PRO Act* by failing to post a notice or to inform new employees of their rights under the NLRA, or by failing to produce the voter eligibility list on time, then the NLRB shall order the employer to provide the information to employees and shall impose a civil penalty not to exceed \$500 for each violation.

(2) Violations Causing Serious Economic Harm to Employees. If an employer commits a violation of the NLRA that results in discharge or other serious economic harm to the employee, then the employer shall be subject to a civil penalty not to exceed \$50,000, though the NLRB may double that penalty in any case where the employer has committed another such violation in the previous 5 years. In determining the size of such a penalty, the NLRB may consider the gravity of the violation, the impact of the violation on the employee, and the size of the employer. The NLRB may, under certain circumstances, hold an officer or director of an employer personally liable, and assess a civil penalty against them.

(3) Private right to civil action. If the NLRB does not seek an injunction to protect an employee within 60 days of filing a charge for retaliation against the employee's right to join a union or engage in protected activity, that employee may bring a civil action in federal district court. The district court may award relief available to employees who file a charge before the NLRB.

(i) Clarifying the Right to Strike

The NLRA already states that nothing in the statute, unless otherwise stated, interferes with or diminishes the right to strike. The *PRO Act* adds that the "duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited."

(j) Fair Share Agreements

Under the NLRA, a union is the exclusive representative of the employees it represents, meaning that the union must represent all workers within a bargaining unit equally and without regard to their membership in the union. The NLRA allows unions and employers to agree that employees who are not members of the union, but

benefit from a collective bargaining agreement, may be assessed a fair-share fee to support the costs of bargaining and implementing the agreement. However, Section 14(b) of the NLRA permits states to pass laws that prevent unions from requiring union membership as a condition for employment. Many states have passed laws that prohibit unions and employers from requiring fair-share fees from workers who benefit from representation but are not members of the union. These laws create a free rider problem, where individuals enjoy the benefits from representation without paying any of the costs, which shifts the costs of free riders onto the shoulders of coworkers who elect to join the union and pay dues. The *PRO Act* permits unions and employers to agree to require fair-share fees, regardless of state laws, to cover the costs of collective bargaining and contract administration.

Section 102. Amendments to the Labor Management Relations Act

The *PRO Act* repeals a provision that provides employers with a private right of action to sue unions that conduct secondary strikes. Because the *PRO Act* would permit secondary activity, the bill repeals the private right of action.

Section 103. Amendments to the Labor-Management Reporting and Disclosure Act

The *PRO Act* codifies the Obama administration's "Persuader Rule," which the Trump administration rescinded on July 18, 2018. This rule would require employers to disclose arrangements they enter into with consultants to directly or indirectly persuade employees on how to exercise their rights under the NLRA. Such arrangements include planning or conducting employee meetings, drafting speeches or presentations to employees, training employer representatives, identifying employees for disciplinary action or targeting, or drafting employer personnel policies.