

June 16, 2021

No. 270

The Protect the Right to Organize Act Empowers Unions at Workers' Expense

Union Wish-List Bill Would Undermine Workers' Freedom of Association

By Sean Higgins*

The Protecting the Right to Organize (PRO) Act is touted by its supporters as advancing the rights of workers.¹ However, it does little to expand the rights of individual workers. Instead, its main provisions would give organized labor greater power to compel workers to join unions in order to keep their jobs. Union leaders would not need the PRO Act if most workers were as eager to unionize as they and their allies claim.²

Much news coverage and commentary on the legislation has implied that the right to organize itself is severely limited, but that is hardly the case. Private sector workers have had the right to collectively bargain since at least 1935, when Congress passed the National Labor Relations Act (NLRA), which makes it illegal for an employer to fire or punish workers for engaging in union activities. It also requires employers to negotiate a contract with a union that the government has recognized as the workers' exclusive bargaining representative.

The above applies if workers want a union, but not all workers see the advantage in having one. Currently, only 6.3 percent of private sector workers are union members, down from 20.1 percent in 1983.³ The PRO Act is meant to reverse that downward trend. It is the most extensive overhaul of the NLRA since the 1947 Taft-Hartley Amendments to the law.⁴

However, unlike Taft-Hartley, which allowed state legislatures to enact right to work laws to give individual workers the choice of whether or not to join a union, the PRO Act skews the law to compel workers to join unions. It also amends the Labor-Management Reporting and Disclosure Act (LMRDA), which could potentially give the Secretary of Labor new powers to act unilaterally.

Here is what the PRO Act actually does:

Abolish All Right to Work Laws. A common feature of union-management contracts is a provision known as a "security clause." These require the business to fire any worker who refuses to join the union that represents the employees or at least pay a fee to the union in lieu of dues. The individual worker has no say in the matter. The employer typically deducts the fees directly from the worker's paycheck. Workers in 27 states are protected from this practice by right to work laws, which prohibit contracts with security clauses.⁵ The

* Sean Higgins is a research fellow at the Competitive Enterprise Institute.

PRO Act would amend the NLRA to abolish all state right to work laws. Many workers in the 27 right to work states could suddenly find themselves forced into joining or otherwise financially supporting unions.

Nothing in any state's right to work law prevents workers from joining unions if that is what they want. The laws simply leave that decision up to the individual worker's choice. Unions and their allies often claim that workers really want to belong to unions.⁶ "More than 60 million people [are] ready to secure a voice on the job," AFL-CIO President Richard Trumka told reporters in 2019—that voice being a union. Were that truly the case, then right to work laws would be largely irrelevant. The fact that unions and allies want to get rid of them suggests that many workers make use of them.

Critics of right to work laws argue that allowing workers to opt out of paying dues results in weak, underfunded unions that cannot represent workers effectively.⁷ They claim that since the benefits of a union's collective bargaining go to all employees at a particular workplace, then the workers who refuse to support the union act as "free riders" at the expense of the ones who do.⁸

However, unions can just as easily act as free riders by collecting dues from workers who had no say in the matter. Many unions continue to act as the workers' exclusive collective bargaining representative decades after the initial organizing election, with no requirement for recertification. For instance, there is not a single living auto worker in Michigan who has had an opportunity to vote on being represented by the United Auto Workers.⁹ Michigan's recently adopted right to work law gives workers a choice of whether to join or not.¹⁰ It also gives workers a tool to help them hold the union accountable, by being able to withhold dues in cases of malfeasance or incompetence by union officials.¹¹

As for the unions being weaker, a portion of the members not paying dues does not affect a union's ability to negotiate a contract with management. Yet, the loss of membership revenue does matter in a union's ability to make political donations. If the workers are not paying, maybe they do not like where their union's donations are going. And if so few workers are paying in that the union cannot afford to keep the lights on, then maybe the workers do not want the union in the first place.

Right to work laws are in no way responsible for organized labor's decline. The majority of states that have adopted such laws, primarily southern and rural ones, did so in the 1940s and 1950s.¹² The height of the labor movement's power was in the 1950s through the 1970s, with union membership in the United States rising to as high as one-third of all workers.¹³ Unions' decline as a percentage of the workforce began in the 1980s, when it fell to about one-fifth of all workers. It has since fallen to 10.8 percent overall and just 6.3 of private sector workers.¹⁴

That decline was due to a variety of factors that had nothing to do with right to work laws, including foreign competition, automation, expanded federal workplace safety regulations (which supplanted the need for unions in many workplaces), and broader economic

changes.¹⁵ The number of right to work laws remained mostly unchanged during that time period.

Moreover, right to work laws do not prevent states from having strong unions. Nevada is a right to work state, yet 13.4 percent of its workers are unionized, well above the national average.¹⁶

Ultimately, right to work laws protect individual workers' freedom of association. Rolling them back would severely undercut that right.

Undermine Entrepreneurs by Broadening the Definition of Joint

Employment. The PRO Act would codify the Obama administration's attempt to rewrite the Department of Labor's (DOL) definition of "joint employer," which would vastly expand the number of instances in which employers can be held legally liable for workplace violations by other businesses.¹⁷ Under the NLRA, a business can be held liable for another business' violations if it has "direct control" over the latter's workplace practices, such as in the case of a contractor giving directions to a subcontractor.

The PRO Act would extend joint employer liability to cases of "indirect control," an overly broad term with no clear definition in the legislation. Potentially under the PRO Act, any connection between two businesses could serve as the basis for the NLRB to claim that one has indirect control over the other.

The expansion is primarily directed at franchise businesses, like fast food and hotel chains.¹⁸ While many people may assume that the individual businesses are owned by the parent corporations, most are independent franchises that operate under the umbrella corporate brand.¹⁹ The PRO Act would make the parent corporations responsible for workplace violations by these independent businesses, a situation that the Chamber of Commerce and other business groups contend might force many corporations to move away from franchising as a business model.²⁰ National Federation of Independent Business President Juanita Duggan called the PRO Act "a direct threat to small businesses that operate as subcontractors and franchisees."²¹

That would deal a terrible blow to entrepreneurialism. Franchising offers aspiring entrepreneurs one the surest ways to start a business, including in low-income communities. For a small business owner, franchising with an established parent corporation offers brand recognition, marketing, and training in business operations. The PRO Act could undermine all that.

For unions, however, it would make organizing campaigns easier. Unions could target the corporate parent and try to unionize all of its franchisees in one fell swoop. Under the current "direct control" standard, unions have to organize franchisees one at a time.

Limit Freelance Work by Ending Gig Economy Businesses' Use of Contract Labor. The PRO Act would effectively ban many freelance side jobs and most jobs in the so-called gig economy, such as ridesharing, by redefining the term "contractor" under the

NLRA. The PRO Act's definition would force most gig economy businesses to treat their workers as traditional employees, rather than as contractors, as they do now, which would eliminate many workers' options of doing short-term work for quick cash. For unions, contract workers are considerably harder to organize, since the NLRA's provisions mainly apply to traditional employees.

Currently, contractors and freelance workers are legally considered to be independent businesses.²² Therefore, contractors are generally not subject to federal laws covering workplace matters like overtime, the minimum wage, or health insurance. Instead, contractors negotiate their own terms with the business to which they offer their services. This affords a great deal of freedom to both the business and the contractor to reach agreement on terms like hours and pay.

It also allows contract work to be done quickly and with a minimum of red tape. The contractor and the business can approve a quick, short-term arrangement and get the job done. In a situation involving traditional employees, federal regulations require the employer to set and control the worker's schedule and other work conditions.

Most so-called gig economy companies, such as app-based ridesharing businesses Uber and Lyft, use contract workers exclusively, arguing that being able to quickly arrange short-term work is key to their business model.²³ Rideshare drivers work as much or as little as they want. Many drive part-time, some as little as few hours a week. Including part-timers ensures a large pool of potential drivers, which makes it possible to serve passengers quickly. If the companies had to classify drivers as employees, they would only be able to retain the ones that drive full-time. That would undermine the ability to provide the fast, affordable service that distinguishes them from traditional taxicab companies.

Unions and their allies argue that businesses often abuse contracting rules by misclassifying workers as employees to get out of complying with federal workplace laws.²⁴ However, workers often say they value the freedom to work when they want and for as long or as briefly as they want.²⁵ In a survey of its drivers in California, Uber found that only a minority chose to drive for 40 hours or more hours a week and many only drove a few hours in a week.²⁶

The PRO Act would limit contract work to jobs "performed outside the usual course of the business of the employer" and to cases in which the worker is "customarily engaged in an independently established trade, occupation [or] profession." In other words, businesses could only hire contractors for jobs outside of their central operations, while workers could only do contract work for their main means of earning a living. For example, a rideshare company like Uber could not offer one-trip driving contracts to individual drivers because facilitating transportation is Uber's main business. Each driver would have to be a regular employee. Uber could hire a contractor to do something like renovate an office because that is not directly related to its business. An independent worker could get that contract only if office renovation was something that the worker ordinarily does.

In short, the PRO Act would eliminate most workers' side hustles. Companies would not be able to afford to keep people who only want to work sporadically as regular employees. Even if a worker was established as a freelancer, a business may not be able to use him or her if the work relates to the companies' "usual course of business." For instance, could a news website contract with a freelance photographer under the PRO Act? If the site regularly publishes photos, maybe not.

The Biden administration's stated intention in supporting the PRO Act is to help workers who do these gig-type jobs full time. Secretary of Labor Marty Walsh told Reuters in April, "We are looking at it but in a lot of cases gig workers should be classified as employees. ... I think it has to be consistent across the board" to ensure that gig workers get "all of the things that an average employee in America can access."²⁷ That sounds good in the abstract, but many gig employees prefer contract work to regular employment. The PRO Act does not accommodate them.

Allow the Creation of "Micro-Unions," Enabling Unions to Bypass the Need for Full Worker Support. Union organizing bids often involve disputes over the "appropriate unit" of workers that the union would represent—that is, which workers should be covered by the contract and which should be excluded. Traditionally, the NLRB's standard has been for a bargaining unit to include all of the workers with a "community of interest" at a given workplace, with the board deciding disputes over the composition of the unit.²⁸ The PRO Act would change that to allow collective bargaining in cases where only a portion of the workplace would be organized, provided that the "employees outside the unit do not share an overwhelming community of interest with employees inside." The distinction might seem slight, but it could theoretically allow a union to organize, for example, certain sections of a department store and leave out other sections.

The change would allow unions to get a foothold in businesses where they lack enough support to organize a majority of the workers. Instead, the unions can try to organize just the workers who support them and then try to build a broader presence from there. Businesses and regulators have long opposed this practice because having only part of a workplace organized can lead to friction between the workers at the business.²⁹ The central aim of the NLRA was to promote "labor peace." That is why it gives unions "exclusive representation" over all workers at a business, even the one who refuse to join the union.³⁰ That ensures that all worker grievances and other issues are dealt with through the same process. The PRO Act's micro-unions would only represent their own members.

Micro-unions are not necessarily a bad idea. Ironically, allowing them respects workers' freedom of association, similar in many respects to right to work laws, which the PRO Act would eliminate. Because micro-unions would not cover an entire workplace, they would be limited to the sections where union support was strongest. Workers inside a micro-union would not have right to work protections if their state does have a right to work law, but there would likely be fewer workers seeking those protections because the union would only represent workers in areas with strong pro-union support.

The main difference is that in right to work situations the union is still obligated to represent non-members in collective bargaining, while micro-unions would not have to represent non-members. Whether that is good or bad for the union or the workers depends on the situation. Under right to work, employees can become free riders on the union since they—in theory—benefit from the union’s collective bargaining without having to pay dues. On the other hand, union exclusive representation requires non-member workers to go through the union to seek redress of grievances. That gives unions significant leverage over non-members. In micro-union situations, non-members cannot act as free riders because they do not benefit from collective bargaining, and they do not have to rely on the union to seek remedy for grievances.

In short, micro-unions are worth experimenting with, but ideally, they should be paired with right to work laws. Workers who want to join a union would find it easier to do so, while workers who do not could not be coerced into joining. The benefits of collective bargaining would go only to union members. That would maximize worker freedom and allow workers to see for themselves whether union membership has helped improve their compensation or working conditions. Workers in a micro-union could opt out if they felt it was not getting the job done. Eliminating right to work laws while introducing micro-unions would take away that choice.

Make Unions Automatic Winners in Disputed Elections. In cases in which a union lost a workplace election but it alleges that the employer interfered in the voting, the PRO Act would require a NLRB investigation to confirm the allegation. Then the union would automatically be declared the winner. The burden of proof would be on the employer, which would have to definitively show that its interference—which it likely would contest happened—did not alter the outcome of the vote. The PRO Act would require employers to prove their innocence, which is contrary to any notion of due process.

It also would make that especially hard by designating many common practices that businesses use during workplace elections as “unfair.” The PRO Act would make it illegal for employers to hold a mandatory meeting to talk about an upcoming union vote and make the case against collective bargaining. It also would make it illegal for a business to “coerce” an employee into not joining or supporting a union. What does coerce mean in this context? The PRO Act does not say, which means that potentially any action by an employer that expresses opposition to unionization could be construed as an attempt at coercion.

Gives Workers No Say on the Use of Their Private Contact Information. The PRO Act would require employers to give employees’ “personal landline and mobile telephone numbers, and work and personal email addresses” to unions mounting an organizing bid. The workers would have no say in this. If an employee were to ask her employer not to give this information away, the employer would be legally obligated to reject the request.

Why is this necessary in the Internet age? Any worker interested in joining a union can go online, get information, and contact the union. Giving workers’ contact information to a union guarantees that many workers will receive unwanted calls and knocks at their door.

As with the PRO Act's elimination of right to work protections, this provision would be unnecessary if workers were as supportive of collective bargaining as unions claim.

Gives the Secretary of Labor Broad Powers to Investigate NLRA Violations.

The version of the PRO Act that passed the House of Representatives would amend the Labor-Management Reporting and Disclosure Act to include whistleblower protections, providing the Department of Labor with potentially broad investigative powers to go after any business that runs afoul of a union.³¹ The Senate version does not include this section. It is not clear why it was removed, but it could be put back in at some point.

The House version amends the LMRDA to state that employers cannot "terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any applicant, covered employee, or former covered employee, of the employer or the labor organization" for providing information to a union or law enforcement agency "relating to any violation of, or any act or omission that such employee reasonably believes to be a violation of, any provision of this Act." The law protects any employee who "believes that he or she has been terminated or in any other way discriminated against."

In other words, any past or present employees who believe they have been discriminated against in any way, even if they were never threatened with firing, can file a complaint against a company and the Department of Labor can then investigate. What constitutes a violation in this situation is vague and probably intentionally so. The PRO Act has several provisions intended to force companies to change longstanding workplace practices. These create new legal gray areas on employee classification, joint employment, and other matters.

Once an investigation is initiated, a DOL administrative law judge would have subpoena power for documents. Investigations would require a person to file a complaint, which would not pose much of an obstacle for many unions. Having a person who is secretly attempting to organize a company apply for a job there is an old union practice known as "salting."³² Under the PRO Act, that person would theoretically have the ability to request subpoenas once an investigation is underway. Companies could be ordered to pay restitution and change their workplace practices.

As noted, most of the PRO Act's provisions amend the National Labor Relations Act, which is enforced by the National Labor Relations Board, an independent government agency that is separate from Department of Labor. However, the PRO Act's whistleblower protection covers "any provision of this Act," which means it would potentially give the DOL authority to investigate violations of the NLRA, at least in cases where the violation relates to the PRO Act. Furthermore, there is a lot of ambiguity in the PRO Act, so it could give the Secretary of Labor a lot of ways to be creative in its enforcement.

Conclusion. Supporters of the PRO Act claim that it will expand workers' rights. In reality, aside from allowing workers to opt out of mandatory company meetings relating to unions, it simply does not give individual workers any new significant rights vis-à-vis their employer. Instead, individual workers would lose the right to opt out of being in a union in

many situations, to earn income doing side hustle jobs, and to keep their personal contact information private.

Notes

- ¹ S.420 – Protecting the Right to Organize Act, 117th Congress, First Session, February 24, 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/420/related-bills>.
- ² Joe Biden and Richard Trumka, “Put power back in workers’ hands,” *Pittsburgh Post-Gazette*, September 7, 2020, <https://www.post-gazette.com/opinion/Op-Ed/2020/09/07/Joe-Biden-Richard-Trumka-Put-power-back-in-workers-hands-Labor-Movement-Unions/stories/202009040046>.
- ³ Bureau of Labor Statistics, “Union Members Summary,” news release, January 22, 2021, <https://www.bls.gov/news.release/union2.nr0.htm>.
- ⁴ National Labor Relations Act, 29 U.S.C. §§ 151-169, <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act>.
- ⁵ National Right to Work Committee, “Right to Work States Timeline,” accessed May, 11, 2021, <https://nrtwc.org/facts/state-right-to-work-timeline-2016/>. Sean Higgins, “Big Labor unprepared to battle new right-to-work laws” *Washington Examiner*, June 11, 2013, <https://www.washingtonexaminer.com/sean-higgins-big-labor-unprepared-to-battle-new-right-to-work-laws>.
- ⁶ Richard Trumka, “Working People Will Not Settle,” Remarks at Christian Science Monitor breakfast, August 29, 2019, <https://aflcio.org/speeches/trumka-working-people-will-not-settle>.
- ⁷ Elizabeth Shermer, “The right to work really means the right to work for less,” *Washington Post*, April 24, 2018, <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/24/the-right-to-work-really-means-the-right-to-work-for-less/>.
- ⁸ Editorial, “Debate: How Should Unions Deal with Free Riders?” *Labor Notes*, May 4, 2018, <https://www.labornotes.org/exclusiverep>.
- ⁹ Department of Justice, “The United States Reaches a Settlement with the United Auto Workers Union to Reform the Union and End Corruption and Fraud,” news release, December 14, 2020, <https://www.justice.gov/usao-edmi/pr/united-states-reaches-settlement-united-auto-workers-union-reform-union-and-end>.
- ¹⁰ Sean Higgins, “Michigan supreme court upholds state right-to-work law,” *Washington Examiner*, July 29, 2015, <https://www.washingtonexaminer.com/michigan-supreme-court-upholds-state-right-to-work-law>.
- ¹¹ Sean Higgins, “UAW Corruption Case Reveals Lack of Accountability at Union,” *OpenMarket*, Competitive Enterprise Institute, December 12, 2020, <https://cei.org/blog/uaw-corruption-case-reveals-lack-of-accountability-at-union/>.
- ¹² National Right to Work Committee, “Right to Work States Timeline.”
- ¹³ Brantly Callaway and William J. Collins, “Unions, Workers, and Wages at the Peak of the American Labor Movement,” National Bureau of Economic Research, Working Paper 23516, June 2017, https://www.nber.org/system/files/working_papers/w23516/w23516.pdf.
- ¹⁴ Department of Labor, Bureau of Labor Statistics, “Union Members—2020,” news release, January 22, 2021, <https://www.bls.gov/news.release/pdf/union2.pdf>.
- ¹⁵ Robert Hunter, “Four Reasons for the Decrease in Union Membership,” Mackinac Center for Public Policy, August 24, 1999, <https://www.mackinac.org/2325>.
- ¹⁶ This figure includes both private and public sector workers. Department of Labor, Bureau of Labor Statistics, “Union Members in Nevada—2020,” https://www.bls.gov/regions/west/news-release/unionmembership_nevada.htm.
- ¹⁷ Sean Higgins, “NLRB rules against McDonald’s in major labor law case,” *Washington Examiner*, July 29, 2014, <https://www.washingtonexaminer.com/nlr-b-rules-against-mcdonalds-in-major-labor-law-case>. Trey Kovacs, “Labor Regulators Target McDonald’s,” *Real Clear Policy*, March 10, 2019, https://cei.org/opeds_articles/labor-regulators-target-mcdonalds/.
- ¹⁸ Sean Higgins, “Corporations targeted for directing franchise hiring,” *Washington Examiner*, July 24, 2018, <https://www.washingtonexaminer.com/policy/economy/corporations-targeted-for-directing-franchise-hiring>. Alina Selyukh, “McDonald’s Not Responsible for How Franchisees Treat Workers, U.S. Agency Rules,” National Public Radio, December 12, 2019, <https://www.npr.org/2019/12/12/787126119/mcdonalds-not-responsible-for-how-franchisees-treat-workers-u-s-agency-rules>.

-
- ¹⁹ Sean Higgins, “Business owners: NLRB’s McDonald’s decision will ruin franchise model,” *Washington Examiner*, September 9, 2014, <https://www.washingtonexaminer.com/business-owners-nlrbs-mcdonalds-decision-will-ruin-franchise-model>.
- ²⁰ U.S. Chamber of Commerce policy statement, “The NLRB and the Joint-Employer Standard,” March 15, 2015, https://www.uschamber.com/sites/default/files/022022_cns_l_joint_employer_eventprogram_final_rev.pdf. Sean Higgins, “Big biz warns NLRB ‘joint employer’ rule goes beyond franchising,” *Washington Examiner*, March 21, 2015, <https://www.washingtonexaminer.com/big-biz-warns-nlr-joint-employer-rule-goes-beyond-franchising>.
- ²¹ National Federation of Independent Business, “Small Business Welcomes Decision to Withdraw Joint Employer,” news release, June 7, 2017, <https://www.nfib.com/content/press-release/labor/small-business-welcomes-decision-to-withdraw-joint-employer/>.
- ²² Cornell Law School Legal Information Institute, “Contractor: Definition,” accessed May 11, 2019, https://www.law.cornell.edu/wex/Independent_Contractor.
- ²³ Sean Higgins, “App Shrugged: Will Uber Go Galt in California?” *National Review*, August 19, 2020, <https://www.nationalreview.com/2020/08/uber-threatens-leave-california-employment-regulation-dispute/>.
- ²⁴ AFL-CIO policy statement, “Full and Fair Employment,” accessed May 11, 2021, <https://aflcio.org/what-unions-do/empower-workers/1099-economy>.
- ²⁵ Sean Higgins, “Fed up ridesharing drivers nevertheless have questions about California legislative fix,” *Washington Examiner*, September 12, 2019, <https://www.washingtonexaminer.com/policy/economy/fed-up-ridesharing-drivers-nevertheless-have-questions-about-california-legislative-fix>.
- ²⁶ Libby Mishkin, “Which drivers do the most trips?” Uber, September 25, 2020, <https://medium.com/uber-under-the-hood/which-drivers-do-the-most-trips-9c475e99e071>.
- ²⁷ Nandita Bose, “EXCLUSIVE U.S. Labor Secretary supports classifying gig workers as employees,” Reuters, April 29, 2021, <https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/>.
- ²⁸ “NLRB Adds New Three-Part Test to Standard for Evaluating Appropriateness of Bargaining Units,” *National Law Review*, Vol. IX, No. 322 (November 18, 2019), <https://www.natlawreview.com/article/nlr-adds-new-three-part-test-to-standard-evaluating-appropriateness-bargaining>.
- ²⁹ Tim Devaney, “Business groups alarmed by rise of ‘micro-unions’ in workplace,” *The Hill*, July 26, 2014, <https://thehill.com/regulation/labor/213408-business-groups-sound-alarm-about-rise-of-the-micro-union>.
- ³⁰ Sean Higgins, “When Joe Biden Talks about Worker Choice, He Means Only 1 Choice,” *Reason*, April 27, 2021, <https://reason.com/2021/04/27/when-joe-biden-talks-about-worker-choice-he-means-only-1-choice/>.
- ³¹ H.R. 842 - Protecting the Right to Organize Act, 117th Congress, First Session, February 24, 2021, <https://www.congress.gov/bill/117th-congress/house-bill/842/text>.
- ³² Bourre Lam, “Life as an Undercover Union Organizer,” *The Atlantic*, March 21, 2016, <https://www.theatlantic.com/business/archive/2016/03/undercover-union-organizer/474387/>.