PROTECTING THE RIGHT TO ORGANIZE ACT

SECTION BY SECTION

Section 1. Short Title

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

Title I – *Amendments to the National Labor Relations Act*

Section 101. Definitions of Employer, Employee, and Supervisor

(a) Protecting employees who have multiple employers. This section states that two or more persons shall be employers under the *National Labor Relations Act (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, which was overturned by the Trump NLRB in a rulemaking. The Biden administration restored the joint-employer standard—drawing from the *Browning-Ferris* decision—in its 2023 Rule which was later struck down in the U.S. District Court of the Eastern District of Texas.

(b) 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.

(c) 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.

Section 102. Reinstating the National Labor Relations Board's (NLRB) Congressional Reporting Requirement

The NLRB submitted annual reports to Congress for most of its history that detailed significant case activities and operations. The NLRB discontinued its reporting after 2009, after Congress terminated numerous federal agency reporting requirements. The *PRO Act* reinstates the NLRB reporting requirement to ensure Congress has essential data on processes and procedures of the agency. This section also requires the NLRB to include in these reports information about how the Members have exercised their recusal obligations pursuant to federal ethics laws.

Section 103. 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.

Section 104. Strengthening Workers' Rights to Engage in Protected Activities

(a) 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 resorting to a strike. This section prohibits employers from permanently replacing striking workers, and from discriminating against employees who supported or participated in a strike.

(b) Prohibiting offensive lockouts. Under current law, employers may offensively lockout employees by prohibiting them from returning to the worksite until they accept the employer's offer—even in the absence of a strike. This usurps workers' control over the timing and duration of any work stoppage, undercutting their bargaining power. Current law also permits employers to hire temporary replacements during offensive lockouts, and there is no limitation on the duration of an offensive lockout. The *PRO Act* prohibits any lockouts from occurring prior to a strike, while maintaining employers' right to respond to strikes with defensive lockouts.

(c) Preventing the misclassification of workers. The *PRO Act* clarifies that an employer violates the NLRA by misclassifying an employee. Because the NLRA only protects workers if they are employees, communicating to employees that they are not covered under the law falsely communicates that they do not have rights under the NLRA, and that their organizing activities are futile. This provision overturns the NLRB's August 29, 2019 decision in *Velox Express*, which held that misclassification is not a violation of the NLRA.

(d) Removing limitations on secondary picketing and strikes and limitations on recognitional picketing. 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. The NLRA also currently constrains workers' ability to picket employers with the goal of achieving union recognition. This section removes those prohibitions to permit unions to exercise these basic First Amendment rights.

(e) 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, where the employees can face discipline or termination for not attending. If an employee refuses to attend a captive audience meeting, the employer may fire them. This section would prohibit employers from requiring employees to attend captive audience meetings or participate in anti-union campaign activities.

(f) Protecting collective bargaining after the first contract. To prevent employers from declaring an impasse in bargaining and unilaterally implementing new terms or conditions of employment, the *PRO Act* requires employers to maintain existing terms and conditions of employment pending an agreement with the union. This retains the status quo ante while bargaining is pending.

(g) Eliminating employers' ability to unilaterally withdraw union recognition. On July 3, 2019, the Trump NLRB issued a decision in *Johnson Controls, Inc*. that would allow an employer to announce that it will withdraw recognition of a union within a 90-day time frame before the expiration of a collective bargaining agreement based on evidence that the union has lost majority support. The *PRO Act* overturns this decision by prohibiting employers from unilaterally withdrawing recognition of a union without an election to decertify the labor organization.

(h) Facilitating initial collective bargaining agreements. Once a union has been recognized or certified as the employees' bargaining representative, the *PRO Act* requires the employer and the union to 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. This panel will consist of one member selected by the employer, one selected by the union, and one mutually agreed to by both the employer and union; the employer and union must agree to this panel within 14 days of the referral. A majority of the panel shall render a decision settling the dispute within 120 days, absent extraordinary circumstances or an agreement between the parties. 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.

(i) 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, without regard to union status.

(j) 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. The regulations must ensure that the notice is provided in languages spoken by the employees. The *PRO Act* also streamlines election procedures, similar to the NLRB's 2023 Election Rule, to require that employers 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. This list must also be provided in a searchable electronic format.

(k) Protecting employee concerted activity conducted electronically. The *PRO Act* codifies the NLRB's 2014 decision in *Purple Communications*. This decision ensured that employees' right to engage in concerted activity, which includes discussions of wages and working conditions, is protected even when it occurs on workplace email or other employer-provided electronic communication systems. However, the Trump NLRB overturned that decision in *Caesars Entertainment* on December 17, 2019.

Section 105. Ensuring Fairness in Union Representation Elections

(a) Preventing employers from gerrymandering union representation elections. By codifying the NLRB's traditional standard for determining the appropriate bargaining unit, the *PRO Act* prevents employers from gerrymandering a bargaining unit as a way to include individuals in the voting unit who have no interest in joining the union. Under this provision, the Board must find that, when a union petitions to represent a unit of employees, the petitioned unit is appropriate if the union demonstrates that the employees share a community of interest, unless any excluded employees share an overwhelming community of interest with the employees in the unit.

(b) Permitting offsite union representation elections. Under current law, NLRB elections typically occur on the premises of the employer, even if the employer is opposed to union organizing. The *PRO Act* allows the employees petitioning for the election to choose whether the election will be conducted electronically, through certified mail, or at another location other than the one owned or controlled by the employer, as a way to ensure employees can cast their ballots in neutral, non-coercive environments.

(c) 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 even though the employer is not on the ballot. This section would deny party status to employers in union representation proceedings, such as hearings regarding which workers should be permitted to vote. 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*.

(d) 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.

(e) Streamlining election procedures. This section would codify portions of the NLRB's 2023 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. When the NLRB's regional director directs an election, the agency shall transmit the notice of election at the same time as the direction of election, and the employer must post that notice within two days after it is served in a place where employees will see it. The NLRB's regional directors must schedule the election for the earliest date practicable, but not later than the 20th business day after the direction of election. 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.

(f) Restoring longstanding precedent protecting collective bargaining. This section would codify longstanding NLRB precedent by requiring that the NLRB must dismiss a petition for a decertification or other election for certain periods of time to protect the collective bargaining process or to prevent coercion in an election. This includes the "recognition bar," which prevents elections for a reasonable time after the employer voluntarily recognizes the union, so the employer and union can focus on collective bargaining; the "successor bar," which prevents elections for a reasonable time after a successor employer begins bargaining with the union; the "remedial bargaining order bar," which prevents elections for a reasonable time after the Board issues a remedial bargaining order, so the employer and union can develop a stable bargaining relationship; the "contract bar," which prevents elections for up to the first three years of a bargaining agreement, to allow the union to focus on implementing the agreement; and the "blocking charge," which suspends the processing of any election until after the Board resolves any unfair labor practice charges, to prevent any alleged coercion from undermining the integrity of the election. On April 1, 2020, the Trump NLRB weakened the recognition bar and the blocking charge, which were then restored in the NLRB's 2023 Fair Choice-Employee Voice Rule under the Biden Administration. Similarly to the Biden-era rule, the *PRO Act* restores longstanding precedent in order to prevent employers from undermining contracts and preserving stability in collective bargaining, while allowing for employees to have the right to elect a different union or no union at all.

Section 106. Preventing 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, all direct and foreseeable pecuniary harm, 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 the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*.

Section 107. 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.

Section 108. Injunctions Against Unfair Labor Practices Involving Discharge or Other Serious Economic Harm

The *PRO Act* requires the NLRB to seek temporary injunctive relief whenever it determines that there is reasonable basis to find 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.

Section 109. Enacting Penalties to Strengthen Enforcement for Employees Exercising Their Rights at Work

(a) 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.

(b) Civil penalties to violations of employees' rights. If an employer commits a violation of employees' rights under the NLRA, 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 and where such penalty involves discharge or serious economic harm. 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.

(c) 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.

Section 110. 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."

Section 111. 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. 26 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 of 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 voluntarily agree to require fair-share fees, regardless of state laws, to cover the costs of collective bargaining and contract administration.

Title II – Amendments to the *Labor Management Relations Act,* 1947 and The *Labor-Management Reporting and Disclosure Act* of 1959

Section 201. Conforming Amendments to the Labor Management Relations Act (LMRA)

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

Section 202. Amendments to the Labor-Management Reporting and Disclosure Act (LMRDA)

(a) Requiring reporting of indirect persuader activities by anti-union consultants. The *PRO Act* clarifies a provision in the LMRDA that requires 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. This provision codifies a Department of Labor disclosure rule clarifying reporting requirements for "indirect" activities carried out by union avoidance consultants that was rescinded in July 2018. The *PRO Act* also directs the Department of Labor to make this information available through a searchable electronic format.

(b) Whistleblower protections. This section creates whistleblower protections for employees of an employer or labor organization who report violations of the *Labor-Management Reporting and Disclosure Act*.

Title III – Other Matters

Section 301. Electronic Voting in Union Elections

This section directs the NLRB to develop a system and procedures to conduct representation elections remotely through the internet or a telephone.

Section 302. Government Accountability Office (GAO) Report on Sectoral Bargaining

This section directs the Comptroller General to provide a report detailing the policies and procedures governing collective bargaining on the sectoral level in the countries where such bargaining occurs.

Section 303. Severability

This section states that, if any provision in the *PRO Act* is invalidated in court, then the remainder of the *PRO Act* will continue to be in effect.

Section 304. Authorization of Appropriations

This section authorizes the appropriations of such sums as may be necessary to carry out the provisions of the *PRO Act*.

Section 305. Rule of Construction

This section states that no provision of the *PRO Act* shall be construed to amend section 274A of the Immigration and Nationality Act.

Section 306. Rule of Construction

This section states that the *PRO Act* shall not be construed to affect the jurisdictional standards of the NLRB, including any standards that measure the size of a business with respect to revenues, that are used to determine whether an industry is affecting commerce for purposes of coverage under the NLRA.

Section 307. Rule of Construction

This section states that the *PRO Act* shall not be construed to affect the privacy of employees with respect to the voter lists provided to labor organizations by employers pursuant to elections directed by the NLRB.

Section 308. Rule of Construction

This section states that the *PRO Act* shall not be construed to affect the definitions of "employer" or "employee" under the laws of any state that govern wages, work hours, workers' compensation, or unemployment insurance.

Section 309. GAO Report

This section directs the Comptroller General, one year after enactment of the *PRO Act*, to commence a study regarding the effects of the bill's definition of "employer" and "employee." The Comptroller General has six months to complete this study, which must be transmitted to the House Committee on Education and Workforce and the Senate Committee on Health, Education, Labor, and Pensions. This section states that the President may consider such findings and may issue recommendations within 60 days or choose not to issue recommendations. This section also states that it is the sense of the House of Representatives that the House of Representatives shall consider whether to accept, reject, or modify any such recommendations.