The PRO Act – Card Check Elections, First Contract Arbitration, Secondary Boycotts, and Employer Exclusion from the Election Process

The PRO Act would allow a union to be certified to represent employees *even if it loses an election* – if there is an allegation of employer interference.

Current Law	Today, the National Labor Relations Board (NLRB) orders an election if 30% of employees in a potential bargaining unit sign authorization cards expressing interest in union representation. Thereafter, a secret ballot election is supervised by the NLRB. If the union receives a majority of the votes cast, it is certified as the employees' bargaining representative. Election results can be challenged if conduct by the employer or the union interfered with the employees' freedom of choice, and a new election may be ordered. A union losing an election can only be certified if an employer has engaged in severe violations of the NLRA.
PRO Act	Under the PRO Act, if the NLRB finds that an employer has unlawfully interfered, a union that obtained a majority of voting unit employee signatures on union authorization cards can be certified to represent employees even if it loses an election. The burden is on the employer to prove that the alleged violation(s) did not impact the outcome of the election.
Implications	The PRO Act places an unfair burden on an employer accused of interfering in a representation election to prove its innocence. If the employer fails, the workplace is unionized on the basis of authorization cards rather than a secret ballot election. The Act places no similar burden of proof on unions who may be accused of misconduct.

The PRO Act would require that an employer and union who are unable to reach agreement on an initial collective bargaining agreement to submit to mandatory arbitration.

Current Law	Today, after the NLRB has certified a union following an election, the company and the union negotiate the initial collective bargaining agreement. While both parties are required to bargain in good faith, there is no legal time limit to reach agreement.
PRO Act	Under the PRO Act, the parties must begin bargaining 10 days after the election results are certified. If they can't reach an agreement within 90 days, the union may request federal mediation assistance. If mediation is unsuccessful, the parties must submit to mandatory arbitration. The initial collective bargaining agreement would be established by a three-member panel of arbitrators and could be in place for up to two years.

Implications	Establishing an initial collective bargaining agreement is a complex and sensitive process and is often the most important contract between the parties as it sets the baseline for terms and conditions of employment for decades. Establishing an arbitrary time limit and imposing workplace policies dictated by an outside party shows no regard for the unique needs and circumstances of employers, employees, and unions. Parties need adequate time to build an effective relationship that can allow for fair and constructive negotiations with a final contract that meets their unique needs.

The PRO Act would allow 'secondary boycotts' – actions by unions that put pressure on a neutral ('secondary') employer or its employees to force it to stop doing business with a company with which it is in dispute.

Current Law	Unions are prohibited from pressuring neutral ('secondary') employers to stop doing business with an employer with which it has a dispute (the 'primary' employer). Specifically, unions can't encourage the employees of a secondary employer to engage in a strike and not handle goods of the employer with which the union has a dispute. Unions also cannot pressure the secondary employer to stop purchasing products or performing services for the primary employer. And, provisions negatively impacting secondary employers may not be included in collective bargaining agreements. The prohibition on secondary actions is subject to strong enforcement by the NLRB.
PRO Act	Under the PRO Act, secondary activity will no longer be prohibited. Unions will be allowed to use pressure on neutral employers to advance their interests in a dispute with a primary employer.
Implications	This provision is potentially the most far-reaching of the PRO Act. If prohibitions on secondary activities are removed, all employers – regardless of union status – may be subject to union-directed activity which may negatively impact their business.

The PRO Act would exclude employers from participating in decisions about who is in a proposed bargaining unit, which employees are considered supervisors, and even the date and location of a representation election.

Current Law	Today, once thirty percent of employees in an appropriate voting unit have indicated an interest in having a union representation election, the NLRB works with the union and the company to determine things like: • Which employees are included in the voting unit; • Which employees will be considered supervisors and managers (excluded from the bargaining unit);

	• When and where the election will be held (generally at the employer's location).
PRO Act	Under the PRO Act, the employer would be excluded from participating in the NLRB process to determine the specific details of the election.
Implications	Without a voice in determining the terms of the election, employers will be unfairly prohibited from defending against union strategies. One of these is creating numerous smaller bargaining units. This lowers the number of votes a union needs to win an election and creates a workplace fragmented by multiple bargaining units with separate terms and conditions of employment.

The PRO Act – Employee Meetings

	The PRO Act would prohibit employers from requiring that employees attend company meetings to discuss unionization during a campaign.
Current Law	Today, companies can require that employees attend meetings on paid company time during a union campaign to discuss the pros and cons of unionization. There's no limit on the number of employer meetings, as long as they're not held within 24 hours of a scheduled election. Companies can't promise increases in pay/benefits if the union is rejected and can't threaten loss of pay/benefits if the union wins the election. Unions can't hold mandatory meetings and are not guaranteed access to company property. However, union representatives can make visits to an employee's home; the company can't.
PRO Act	Under the PRO Act, companies would not be allowed to require attendance at meetings to discuss unionization during a union organizing campaign; doing so would be considered an unfair labor practice.
Implications	Employee meetings during a union campaign are one of the most effective ways companies win organizing elections. A 2009 study found that on average companies held 10 meetings during the course of a campaign; and union success rates fell from 73% when companies did not hold meetings to 47% when they did. Losing the ability to require employees to attend a meeting to discuss the pros and cons of unionization would limit a company's ability to communicate its position on the pros and cons of unionization.

The PRO Act – Supervisors

	**The PRO Act would narrow the definition of a supervisor, potentially increasing the number of employees who can vote in an election and be represented by a union and decreasing the number of employees an employer can use to campaign against the union and effectively managing its business.**
Current Law	Supervisors are generally defined as those who, on behalf of the company, have the authority to perform any one of twelve specific functions (including assigning and responsibly directing other employees). Employees who are designated as supervisors cannot vote in a union election and cannot be represented by the union. Employers can require supervisors to assist in the campaign against unionization but must ensure they do not commit unfair labor practices, which could be attributable to the employer and overturn the results of the election.
PRO Act	Under the PRO Act, the current definition of supervisor would be narrowed to require that the supervisory authority be exercised for a "majority of the individual's work time." It would also remove the authority of assigning and directing employees from the specified functions indicating supervisory status.
Implications	Narrowing the definition of a supervisor could expand the number of employees eligible to vote in an organizing election. In addition, those employees could resist any instructions from the employer to assist in the campaign, even though they are often the employer's most effective voices. They would also be subject to the terms of the collective bargaining agreement, which could impact their compensation and the ability of the employer to effectively run its business.

The PRO Act – Independent Contractors

	The PRO Act would adopt narrow criteria to classify a worker as an independent contractor, expanding the number of workers that could be considered employees entitled to the protection of the NLRA, including the ability to form unions.
Current Law	Today, independent contractors are not covered by the protections of the NLRA and can't vote on or be represented by a union. The test for determining whether an individual is an independent contractor considers a number of traditional factors, and Trump NLRB decisions broadly defined independent contractor status.
PRO Act	Under the PRO Act, the classification of an independent contractor would follow a three-part test (the "ABC test) included in California's recent independent contractor law. Under this test, the worker would be considered an employee unless the employer could demonstrate that the worker is: • Free from the control and direction of the company in performing work; ***and*** • Performs work that is outside the usual course of the company's business; ***and*** • Customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the company.
Implications	Employers frequently use independent contractors to perform work that is in the course of the company's business such as insurance agents, IT workers, etc. This test makes it impossible to treat such workers as independent contractors, thus potentially expanding the number of workers that could be covered by a union agreement.

The PRO Act – Private Right of Action

	**The PRO Act would give employees the right to file a complaint alleging an employer unfair labor practice in federal court.**
Current Law	An employee who believes a company has committed an unfair labor practice must file a charge with the NLRB. The General Counsel (GC) of the NLRB decides whether to bring a formal complaint before the Board and then prosecutes that case before the NLRB. The sheer volume of cases—around 20,000 charges filed annually--underscores the value of this role. Roughly 25% of all charges are dismissed as lacking merit and the GC achieves settlement with roughly 96% of all charges with merit, typically within 7-14 weeks. After a case is decided by the NLRB, the losing party may seek review in federal court.
PRO Act	Under the PRO Act, employees would have the right to file a lawsuit in federal court. They would be able to file the suit 60 days after they file a charge with the NLRB, or if the NLRB GC dismisses their charge.
Implications	The current NLRB process provides a swift and effective way to resolve alleged violations, avoiding prolonged litigation in the courts. It also ensures that allegations without merit are quickly dismissed. Allowing unfair labor practices to be filed in federal court creates the opportunity for costly and time consuming litigation.