

August 3, 2021

The Honorable Mark Kelly  
United States Senate  
516 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Kelly:

Passage of the Protecting the Right to Organize (PRO) Act (S. 420) is the top priority of the labor movement. It is supported by the AFL-CIO and its 56 affiliated unions. The PRO Act has also been endorsed by unaffiliated international unions and a wide variety of civil rights, religious, and environmental organizations. Strengthening outdated labor law is key to rebuilding the economy and restoring fairness to the workplace. We urge you to support this vital legislation.

To date, you have heard from workers, union leaders, and allied organizations about the urgent need to pass the PRO Act, which would give workers a voice at the table to bargain for better wages, retirement, health and safety standards, and other vital benefits. In all likelihood, you have also heard from some who falsely claim that the PRO Act will hinder small businesses, undermine workers' rights, and disrupt the economy. This letter is intended to dispel some of the misconceptions related to employee misclassification, employee privacy, and joint employment.

### **Employee Misclassification**

The rise of misclassification has been one of the reasons that millions of workers across the country lack basic labor protections and are unable to make ends meet. All too often, employers have misclassified employees as "independent contractors" to deny them a living wage, benefits, the right to organize, and other basic workplace protections. As a result, misclassified workers often lack access to protections that every worker should be afforded such as workers' compensation, unemployment insurance, overtime, and a minimum wage.

Opponents of the PRO Act have claimed that it will harm small businesses that have a relationship with independent contractors, or end independent contracting itself. Some have also argued the PRO Act could restrict freelancers' ability to continue their work. All of these claims lack merit for a wide variety of reasons.

As an initial matter, the National Labor Relations Act ("NLRA") explicitly excludes independent contractors from coverage. The PRO Act does not change that. Under the PRO Act, independent contractor status would still exist, but it would be harder for employers to misclassify workers who are truly employees. Nothing in the PRO Act, including the ABC test, makes it harder for independent contractors to get work. Instead, it provides a clear and simple test for the National Labor Relations Board ("NLRB") to find employee status when workers seek to form a union or protection under the NLRA.

The PRO Act does not amend any of the laws that typically determine whether someone is hired as a W-2 employee, most notably tax law, but also minimum wage, overtime, unemployment

insurance, workers' compensation, or any state laws. To the extent a worker is deemed to be an "employee" under the ABC test in the PRO Act, that worker is then protected by the NLRA and able to form a union if they (and a majority of their coworkers) so choose. Nothing more. Merely being classified as an employee for the purposes of the NLRA does not change one's ability to freelance or engage in any other work.

Indeed, union workers in the building and construction trades often perform work for multiple employers, going from job-to-job for short periods of time. Union workers in the entertainment industry also perform their craft for multiple employers and are protected by collective bargaining agreements at each job, enjoying high wages and better benefits than non-union workers. The idea that the PRO Act, by expanding the base of workers who would be protected by the NLRA, somehow limits worker flexibility is simply not supported by the facts or the history of collective bargaining.

To put it simply, the PRO Act gives more workers the right to form a union and negotiate for the rights, compensation, and working conditions they lose when misclassified as "independent contractors."

### **Voter Eligibility Lists and Employee Privacy**

When a group of employees petition to form a union, the NLRB requires the employer to provide the relevant union with a list including the names and home addresses of those employees who are eligible to vote in the union election (sometimes called voter eligibility lists). This has been true for over 55 years. The Supreme Court has reviewed and approved of this requirement. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969). The Court did so because it recognized that voter contact information is necessary so that employees can receive information and make an informed decision on union representation.

In 2014, the NLRB expanded the eligibility lists to include "available personal email addresses, and available home and personal [cell phone] numbers." The NLRB understood that this change was necessary because workers needed the ability to receive timely information on the union through modern means of communication.

Some PRO Act opponents dubiously argue that the bill would strip workers of their right to privacy by continuing to require eligibility lists. This is also patently false. In truth, the PRO Act merely codifies the NLRB's existing practice, which has been in effect for over six years, to ensure workers have access to convenient and timely information leading up to the election.

Eligibility list privacy concerns are a red herring created by employer groups and corporations who fundamentally oppose the PRO Act. The NLRB itself and multiple federal courts have acknowledged that the very eligibility list requirements found in the PRO Act do not pose increased privacy concerns.

Indeed, the AFL-CIO has submitted multiple Freedom of Information Act ("FOIA") requests to the NLRB seeking any information the agency has regarding complaints over union use of eligibility lists. The NLRB's responses make clear that there have been no cases or

complaints concerning misuse of eligibility lists to invade employee privacy since the NLRB's current eligibility list rule took effect.

The United States Court of Appeals for the Fifth Circuit also rejected the privacy argument when employer groups mounted legal challenges against eligibility list requirements. It stated that there is "no evidence that disclosure of email address and a cell phone number presents either a greater risk of identity theft or a greater possibility of privacy infringement than a home address." *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 225-26 (5th Cir. 2016). The U.S. District Court for the District of Columbia made the same finding. *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 213 (D.D.C. 2015).

## **Joint Employment**

In today's economy, many businesses increasingly seek to create an arms-length relationship between themselves and the workers who keep their operations running. At the same time, these businesses retain the contractual right to control the terms and conditions of these workers' jobs. This trend is often called the "fissured workplace." Businesses do this to cut costs and evade the responsibility under federal labor and employment laws.

These business structures, like staffing firms, temp agencies, and subcontractors, often leave employees unable to raise concerns, or negotiate with, the entity that actually controls the workplace. In such arrangements, it can be confusing or unclear who has control over a worker's terms of employment. For example, if employees of a subcontractor were to organize a union and request to bargain, the subcontractor could simply refuse to bargain over certain issues because its contract with the prime contractor governs those aspects of the work (e.g., pay, hours, safety, etc.). This can be harmful to workers because the people who are actually able to dictate workers' terms and conditions of employment are not at the bargaining table.

The way to ensure that workers can actually negotiate with the entity who controls the work is to readily identify the entities as "joint employers." That is, because the two entities share or co-determine the details of the work, they should both be required to bargain over the parts that they control.

When companies are considered joint employers, they have an obligation to bargain with employees over working conditions that they control. But the current NLRB standard for finding a joint employment relationship is unrealistic and narrow in that it requires evidence of actual exercised control rather than the *contractual power* to control working conditions. The power to control working conditions is what should determine bargaining responsibilities, not whether you've used it.

Critics of the PRO Act have claimed that changes to the joint employer standard would outright end the business franchise model and would dramatically change liability rules. This is, again, simply untrue and a further attempt to leave workers with no opportunity to bargain with the controlling entity.

The PRO Act would restore and codify the more realistic *Browning-Ferris* joint employer standard that was announced during the Obama administration, allowing a company's indirect or reserved control over working conditions to be sufficient for finding joint employer status. The reason is simple - workers' right to collectively bargain cannot be realized if the entity that has the power to change workers' terms and conditions of employment is not at the bargaining table.

It is important to underscore that, as always, it would still be up to employees whether they want to organize a union and bargain with their employer or employers.

### **Now is the time to pass the PRO Act**

Workers across the country understand that the scales are tipped against them and that a full-time job no longer guarantees a stable income, dignity in the workplace, or the ability to support a family.

The data validates their perception. Since 1979, wages for workers in the bottom 90% grew by less than 24%. The decline in union representation has lowered the median hourly wage by \$1.56, a 7.9% decline (0.2% annually), from 1979 to 2017.

The past year has exacerbated real economic and social difficulties for working people in the United States and has only made pre-existing disparities worse. Our decades-old labor laws are no longer equipped to protect worker voice on the job or to promote collective bargaining as originally intended. Workers' inability to join collectively to correct the power imbalance in the workplace has led to increased income inequality, low wages, the erosion of benefits, and unsafe working conditions.

The US is falling behind on numerous fronts, and our labor protections are no exception. Workers need you now to show your support for the right to organize. Now is the time to strengthen that right and make it real.

We urge you to support the PRO Act.

Sincerely,

The American Federation of Labor  
and Congress of Industrial  
Organizations (AFL-CIO)

Actors' Equity Association (AEA)

Air Line Pilots Association (ALPA)

Amalgamated Transit Union (ATU)

American Federation of Government  
Employees (AFGE)

American Federation of Musicians of  
the United States and Canada (AFM)

American Federation of School  
Administrators (AFSA)

American Federation of State,  
County and Municipal Employees  
(AFSCME)

American Federation of Teachers  
(AFT)

American Guild of Musical Artists  
(AGMA)

American Postal Workers Union  
(APWU)

American Guild of Variety Artists  
(AGVA)

Association of Flight Attendants  
(AFA-CWA)

Association of Professional Flight  
Attendants (APFA)

Bakery, Confectionery, Tobacco  
Workers and Grain Millers  
International Union (BCTGM)

Brotherhood of Railroad Signalmen  
(BRS)

Communications Workers of  
America (CWA)

Department for Professional  
Employees, AFL-CIO (DPE)

The Guild of Italian American  
Actors (GIAA)

Industrial Union of Electronic  
Workers (IUE-CWA)

International Alliance of Theatrical  
Stage Employees, Moving Picture  
Technicians, Artists and Allied  
Crafts of the United States, Its  
Territories and Canada (IATSE)

International Association of Bridge,  
Structural, Ornamental and  
Reinforcing Iron Workers  
(Ironworkers)

International Association of Fire  
Fighters (IAFF)

International Association of Heat and  
Frost Insulators and Allied Workers  
(HFIAW)

International Association of  
Machinists and Aerospace Workers  
(IAM)

International Association of Sheet  
Metal, Air, Rail and Transportation  
Workers (SMART)

International Brotherhood of  
Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers  
(IBB)

International Brotherhood of  
Electrical Workers (IBEW)

International Brotherhood of  
Teamsters (IBT)

International Federation of  
Professional and Technical  
Engineers (IFPTE)

International Organization of  
Masters, Mates & Pilots (MM&P)

International Union of Bricklayers  
and Allied Craftworkers (BAC)

International Union of Elevator  
Constructors (IUEC)

International Union of Operating  
Engineers (IUOE)

International Union of Painters and  
Allied Trades of the United States  
and Canada (IUPAT)

Laborers' International Union of North America (LIUNA)

Major League Baseball Players Association (MLBPA)

Marine Engineers' Beneficial Association (MEBA)

Maritime Trades Department, AFL-CIO

Metal Trades Department, AFL-CIO

Major League Soccer Players Association (MLSPA)

National Air Traffic Controllers Association (NATCA)

National Association of Broadcast Employees and Technicians (NABET-CWA)

National Association of Letter Carriers (NALC)

National Basketball Players Association (NBPA)

National Education Association (NEA)

National Federation of Federal Employees (NFFE-IAM)

National Football League Players Association (NFLPA)

National Hockey League Players' Association (NHLPA)

National Nurses United (NNU)

National Postal Mail Handlers Union (NPMHU)

North America's Building Trades Unions (NABTU)

Office and Professional Employees International Union (OPEIU)

Operative Plasterers' and Cement Masons' International Association of the United States and Canada (OPCMIA)

Professional Aviation Safety Specialists (PASS)

Public, Healthcare & Education Workers (PHEW-CWA)

Retail, Wholesale and Department Store Union (RWDSU-UFCW)

Service Employees International Union (SEIU)

Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)

Seafarers International Union of North America (SIU)

Transportation Communications International Union/IAM (TCU/IAM)

Transportation Trades Department, AFL-CIO (TTD)

Transport Workers Union of America (TWU)

UNITE HERE

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA)

United Automobile, Aerospace &  
Agricultural Implement Workers of  
America International Union (UAW)

United Food and Commercial  
Workers International Union  
(UFCW)

United Mine Workers of America  
(UMWA)

United Steel, Paper and Forestry,  
Rubber, Manufacturing, Energy,  
Allied Industrial & Service Workers  
International Union (USW)

Utility Workers Union of America  
(UWUA)

Writers Guild of America, East  
(WGAE)