Richard L. Trumka Protecting the Right to Organize (PRO) Act Section-by-Section

Senate HELP Committee Ranking Member Bernie Sanders

Section 1. Bill title: The Richard L. Trumka Protecting the Right to Organize Act.

Title I – Amendments to the National Labor Relations Act (NLRA)

Section 101. Definitions: Amends the definitions of employer, employee and supervisor to protect employees who have multiple employers, and to protect employees from losing NLRA protections due to misclassification as either independent contractors or supervisors.

(1) Joint employer: Codifies the joint employer standard enacted by the National Labor Relations Board (NLRB) in its 2015 *Browning-Ferris* decision by stating that two or more persons shall be employers under the NLRA if each such person codetermines or shares control over the employee's essential terms and conditions of employment. Directs the National Labor Relations Board (NLRB) or a court of competent jurisdiction in applying this standard to consider direct control, indirect control, reserved authority to control, and control exercised in fact.

(2) Employee: Amends the definition of "employee" under section 2(3) of the NLRA by clarifying that an individual performing any service is an employee and not an independent contractor, unless (1) the individual is free from control and direction 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) Supervisor: Clarifies the definition of "supervisor" section 2(11) of the NLRA to require supervisory activities be conducted "for a majority of the individual's worktime," and modifies the list of supervisory activities by striking "assign" and "responsibility to direct" employees.

Section 102. Reports: Reinstates previously longstanding requirements regarding the NLRB's annual reports to Congress and the President, including exempting said reports from the Federal Reports Elimination and Sunset Act of 1995 and requiring each report to include no less detail than reports issues prior to the termination of the reports. Codifies ethics reporting for Board members by requiring reports list all cases in which the Designated Agency Ethics Official (DAEO) provided advice regarding Member recusal from participating in a case or rulemaking and cases for which the DAEO determined that a Member recuse themselves.

Section 103. Appointment: Removes the current NLRA prohibition on the Board from appointing any individuals for the purposes of engaging in economic analysis to allow the NLRB to conduct its own economic assessments to support its formulation of policies and regulations.

Section 104. Unfair Labor Practices: Strengthens workers' rights to engage in protected activities by clarifying unfair labor practices by employers and labor organizations and the employer duty to bargain, facilitating streamlined and more transparent union election and certification processes, and ending prohibitions on collective and class action litigation.

(1) Clarifies unfair labor practices by employers by prohibiting employers from permanently replacing employees who strike, and from discriminating against employees who supported or participated in a strike. Additionally prohibits employers from locking out, suspending, otherwise withholding employment from employees in order to influence the position of such employees or their representatives in collective bargaining prior to a strike. Also prohibits employers from communicating or misrepresenting to an employee that they are not an employee under the Act.

(2) Removes prohibition on 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.

(3) Prohibits employers from requiring employees to attend "captive audience" meetings designed to persuade employees against joining the union or participate in anti-union campaign activities. Under current law, if an employee refuses to attend a captive audience meeting, the employer may fire them.

(4) Clarifies the employer duty to bargain by (1) requiring employers to maintain current terms and conditions of employment while bargaining to an agreement; and (2) maintaining an employer's duty to bargain absent union decertification, strengthening union bargaining power after contract expiration and in situations where majority status becomes rebuttable presumption.

(5) Amends the obligation to bargain collectively by requiring that once a union has been recognized or certified as the employees' bargaining representative, the employer and union must begin 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, then either party may request mediation facilitated by the Federal Mediation and Conciliation Services (FMCS). If the parties cannot reach an agreement 30 days after mediation is requested, then the FMCS shall refer the dispute to a tripartite arbitration panel. The findings of this panel will be binding upon the parties for a period of two years, unless the parties mutually agree in writing to amend during such period.

(6) Ends prohibitions on collective and class action litigation by explicitly stating that employers may not require employees to waive their right to collective and class action litigation. This reverses the U.S. Supreme Court's holding in *Epic Systems Corp. v. Lewis (2018)* that, despite the NLRA's explicit protection for workers to engage in "concerted activities for the purposes of…mutual aid or 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.

(7) Directs the NLRB to 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. Also requires employers to provide unions with a list of all employees in the bargaining unit no later than two business days after the NLRB directs an election. The list of employees must include employees' names, home addresses, work locations, shifts, job classifications, and if available, personal landline and mobile telephone numbers and email addresses. Also confers section 7 rights to employees to use employer-provided electronic communication devices and systems, absent a compelling business rationale.

Section 105. Representatives and Elections: Ensures fairness in union representation elections by removing employer standing in representation cases, remedying election interference, and streamlining election procedures.

(1) Amends current NLRB procedures to deny standing to employers in union representation cases, bringing the NLRB's procedures in line with those of the National Mediation Board, and preventing outside entities from interfering in the employees' decision on whether to join a union. Additionally reverses the NLRB's 2017 *PCC Structurals, Inc.* standard on unit appropriateness by codifying the Obama-era standard, which states that a proposed unit share a community of interest and employees outside the unit do not share an overwhelming community of interest with employees inside. Further, the Act allows unions to request the Board to direct the election be conducted by mail, electronically, at the work location, or at a location other than one controlled by the employer.

(2) Requires the NLRB to issue an order requiring the parties to bargain if in a representation election, a majority of valid ballots have been cast in favor of the union. 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) Codifies portions of the NLRB's 2014 regulations to modernize its representation election procedures and further the swift processing of petitions. Once a union files 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, and continue from day to day until completed. A Regional Director shall transmit the notice and direction of election electronically or by overnight mail (if electronic transmission is unavailable). No later than two days after the service of the notice of hearing, employers are required to post the Notice of Petition for Election in conspicuous places, distribute the notice electronically (if the employer customarily communicates with employees electronically), and maintain such postings until the petition is dismissed, withdrawn, or replaced by the Notice of Election. Regional Directors shall schedule elections for the earliest date practicable, but no later than 20 business days 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

(4) Codifies election bars to processing a petition for an election to insulate unions against electoral challenges by requiring the Board to dismiss any petition for an election if in the prior year (1) the employer recognized a union without an election; (2) the union and employer engaged in their first bargaining session following an NLRB-issued bargaining order; or (3) the union and successor employer engaged in their first bargaining session following a succession. The Board shall also dismiss any petition for an election if there is a lawful written collective bargaining agreement in effect unless the agreement has been in effect for more than three years or the petition is filed between 60 and 90 days prior to the end of the three-year period. The NLRB shall suspend processing of any petition for an election if a union files an unfair labor practice charge alleging conduct in violation of section 8(a) and requesting the suspension of a pending petition until the merits of the charge are resolved.

Section 106. Damages for Unfair Labor Practices: Provides that when an employee has been discriminated against, charged, or suffered serious economic harm in violation of the NLRA, the Board shall award the employee back pay (without any reduction based on the employee's interim earnings), front pay, consequential damages, and "an additional amount as liquidated damages equal to two times the amount of damages awarded." Specifies that 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, reversing a 2002 U.S. Supreme Court decision.

Section 107. Enforcing Compliance with Orders of the Board: Provides that 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 a federal court of appeals within 30 days of the issuance of the order.

Section 108. Injunctions Against Unfair Labor Practices Involving Discharge or Other Serious Economic Harm: 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' NLRA rights. 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. Penalties: Strengthens remedies and enforcement for employees exercising their rights at work by imposing civil penalties for violations of the posting and voter list requirements, as well as unfair labor practices by employers and other NLRA violations causing serious economic harm to employees, and by creating a private right to civil action for employees.

(1) Directs the NLRB to impose a civil penalty of up to $500 for each violation when an employer fails to post a notice, to inform new employees of their NLRA rights, or to produce the voter eligibility list on time. The Board shall also order the employer to provide the relevant information to employees.

(2) Imposes a civil monetary penalty of up to $50,000 (in addition to any NLRB-ordered remedy) for each violation of an unfair labor practice by employers and the NLRB may double that penalty in any case where the employer has committed another such violation in the previous five years. In determining the size of the 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) Provides that 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. Limitations on the Right to Strike: Strengthens the right to strike by clarifying 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 Permitted: Permits unions and employers to agree to require fair-share fees, regardless of state "right to work" laws, to cover the costs of collective bargaining and contract administration.

Title II – Amendments to the Labor Management Relations Act & the Labor-Management Reporting and Disclosure Act

Section 201. Conforming Amendments to the Labor Management Relations Act, 1947: Repeals a provision that provides employers with a private right of action to sue unions that conduct secondary strikes.

Section 202. Amendments to the Labor-Management Reporting and Disclosure Act of 1959: Codifies the Obama administration's "Persuader Rule," (rescinded by the Trump administration in July 2018) requiring employers to disclose arrangements they enter into with consultants to directly or indirectly persuade employees on how to exercise their NLRA rights. 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.

Title III – Other Matters

Section 301. Severability: Clarifies that if any provision or application of this Act is held invalid, the remainder of the Act shall not be affected.

Section 302. Authorization of Appropriations: Authorizes such sums as may be necessary to implement the Act.