



COALITION FOR A
DEMOCRATIC WORKPLACE

Testimony of

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on behalf of the COALITION FOR A DEMOCRATIC WORKPLACE

For the

House Education and Labor Committee

Subcommittee on Health, Employment, Labor, and Pensions

Hearing on

Protecting the Right to Organize Act: Modernizing America's Labor
Laws

July 25, 2019

*Mr. King acknowledges the assistance of his colleague Gregory Hoff at the HR Policy Association in preparing this testimony.

Introduction and Statement of Interest

Chairperson Wilson, Ranking Member Walberg, and distinguished members of the Subcommittee:

Thank you for this opportunity to again appear before the Committee. I am the Senior Labor and Employment Counsel at HR Policy Association, and I am testifying here today on behalf of the Coalition for a Democratic Workplace (“CDW”), a broad-based coalition of employers and associations who have a continuing active interest in our nation’s labor laws, and of which HR Policy Association is a member. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

The Coalition for a Democratic Workplace is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a long- standing effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers and the economy. CDW was originally formed in 2005 in opposition to the so-called Employee Free Choice Act (EFCA) – a bill similar to the PRO Act – that would have stripped employees of the right to secret ballots in union representation elections and allowed arbitrators to set contract terms regardless of the consequence to workers or businesses.

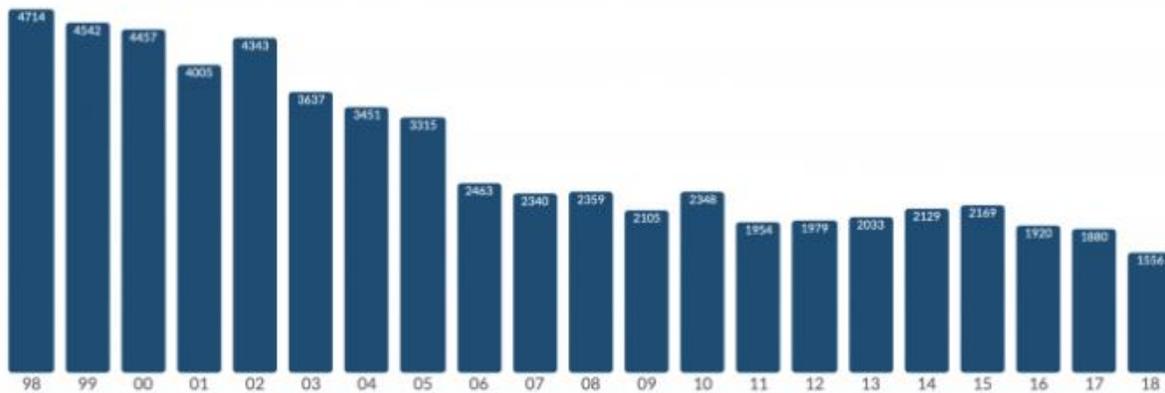
The HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association’s membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

Summary of Opposition to H.R. 2474

The Protecting the Right to Organize Act of 2019, H.R. 2474 is an unprecedented attempt to radically change our nation’s labor laws to assist labor organizations without any regard to any negative impact the provisions of the bill would have on workers, consumers, employers, and the American economy. Such provisions include (1) amendments to the National Labor Relations Act (“NLRA” or “the Act”) to change the definition of joint employer status under the NLRA – a position directly opposite the bipartisan position the House of Representatives took in passing the Save Local Business Act, passed in November of 2017; (2) an expansive definition of employee status under the NLRA that blindly follows a controversial California court decision which substantially narrowed the definition of independent contractor status (the California “ABC” test); (3) authorization for unions to obtain personal employee information including employee personal cell phone numbers and personal email addresses, among other information; (4) a complete undermining of the secondary boycott laws that protect neutral employers and employees – especially small and medium-sized business entities – from being brought into labor disputes of

other parties; (5) a government-mandated procedure for third party arbitrators to dictate employment terms in first negotiations, and eliminate an opportunity for employees to vote on ratification; and (6) a resurrection of the “card check” process whereby employees can be forced into union representation without having the benefit of a secret ballot vote. H.R. 2474 would also overrule three Supreme Court decisions,¹ and make extreme changes to the procedures of the National Labor Relations Board (“NLRB” or “Board”). H.R. 2474 upsets in many important areas the delicate balance in our labor laws between employers and labor interests – indeed, many of the laws amended by this legislative proposal have been in effect for decades, including numerous state right-to-work laws, and have not been altered in the manner suggested in this legislation by either Democrat or Republican controlled congresses.

Finally, the underlying premise of this comprehensive labor organization wish list is the incorrect assumption that our labor laws are broken and severely disadvantage union interests. The NLRB and the NLRA are not broken – the Board is one of the most efficient and productive agencies in the federal government and the NLRA has greatly contributed to the maintenance of labor-management stability in this country for decades. Labor organizations have simply not devoted the necessary resources to organizing activity and have not adapted to a changing workplace. As the charts below clearly show, union organizing and the number of petitions filed by unions with the National Labor Relations Board have fallen nearly 63% from 5,000 in 1997 to 1,854 in 2017.

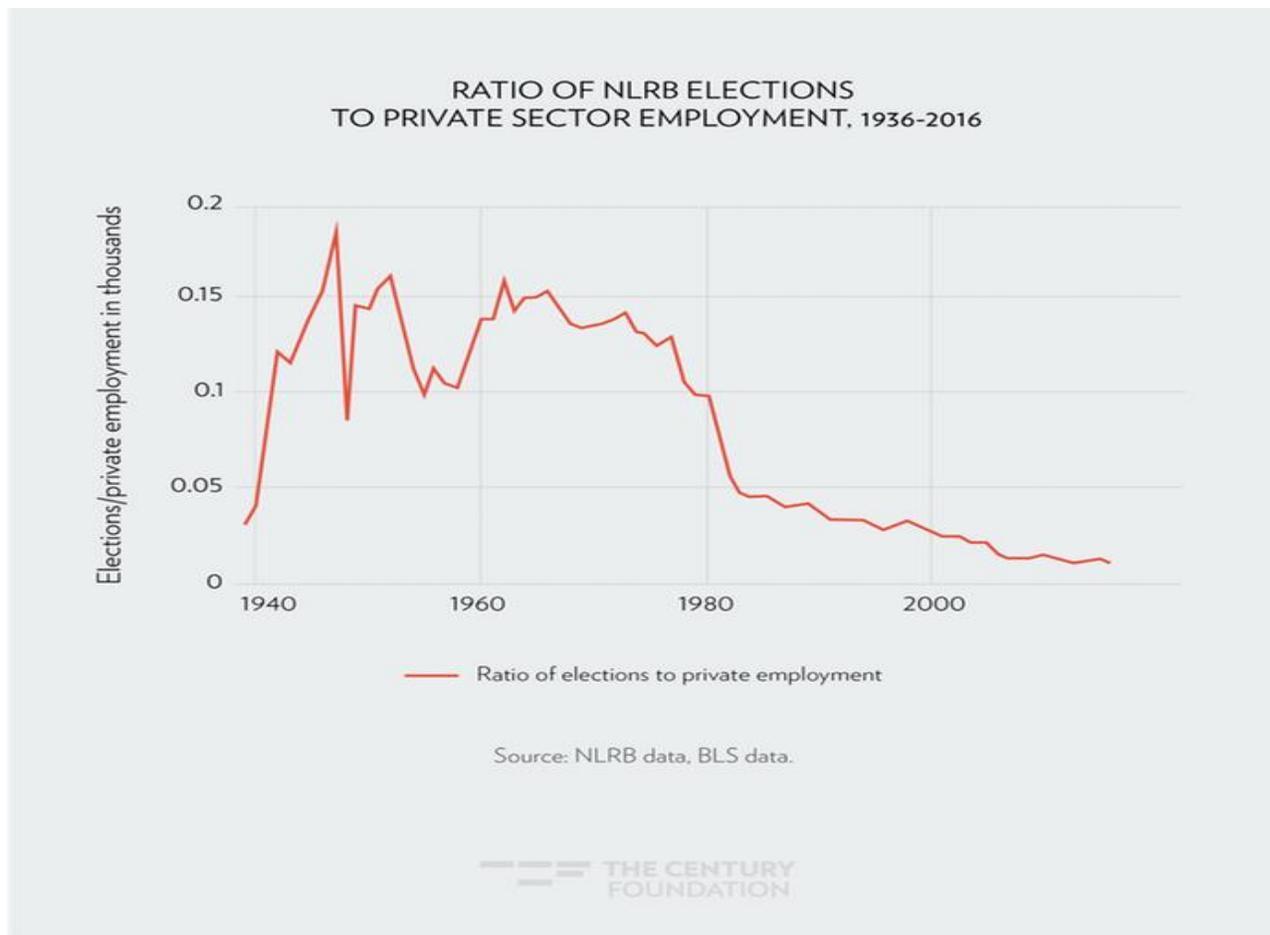


Source: Labor Relations Institute

In FY 2018, the number of petitions filed dropped even further to 1,597, the fewest number in over 75 years.² Perhaps most telling, as the rate of private sector employment has increased, the number of NLRB elections has decreased precipitously.

¹ *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018); *Hoffman Plastic Compounds, Inc., v. NLRB*, 533 U.S. 137 (2002); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

² See also Exhibit 1, which shows similar data from the National Labor Relations Board.



Further, when examining data from the U.S. Department of Labor Bureau of Labor Statistics, the lack of union attention to union organizing is even more evident. In FY 2018, there were 110.5 million potential private sector employees available for organizing in the country under the National Labor Relations Act.³ The number of employees petitioned-for, in that same year, according to NLRB statistics, was only 73,109.⁴ Accordingly, unions only sought to represent .066% of potential new members in this country. An examination of data from other years also establishes the same exceedingly low union organizing rate.

This lack of attention by the union movement to traditional organizing also was recently outlined in an article entitled “AFL-CIO Budget is a Stark Illustration of the Decline of Organizing”⁵ According to this article, the AFL-CIO’s internal budget for 2018-2019 dedicates less than one-tenth of its budget to organizing – down from nearly 30% a decade ago. This article states “the percentage of the budget dedicated to all organizing activities is about the same as the

³ *Union Membership Annual News Release*, BUREAU OF LABOR STATISTICS (Jan. 18, 2019), https://www.bls.gov/news.release/archives/union2_01182019.htm.

⁴ *Election Reports – FY 2018*, NLRB, <https://www.nlr.gov/reports/nlr-performance-reports/election-reports/election-reports-fy-2018>.

⁵ Hamilton Nolan, *AFL-CIO Budget is a Stark Illustration of the Decline of Organizing*, SPLINTER (May 16, 2019), <https://splinternews.com/afl-cio-budget-is-a-stark-illustration-of-the-decline-o-1834793722>.

portion dedicated to funding the Offices of the President, Secretary-Treasurer, Executive Vice President, and associated committees [under the AFL-CIO] the largest portion of the budget – more than 35% – is dedicated to funding political activities.” The statistics are clear. Unions have, for whatever reason, lost their desire and commitment to organize workers and they are increasingly relying on Congress to relieve them of the burdens of organizing with proposals such as the PRO Act that we are discussing today. Further, the labor movement is increasingly relying upon assistance from pro-union regulations promulgated by the regulatory agencies and decisions of the NLRB.⁶

Labor law leaders themselves have acknowledged the failure of the union movement to commit sufficient resources and attention to organizing. For example, the late Hector Figueroa, the influential former leader of SEIU Local 32BJ, in an op-ed published in the New York Times earlier this month, argued that “you will find that with only a few exceptions, most unions are not committing significant resources to organizing nonunion workers.”⁷ Figueroa further noted:

For too long, too many unions have avoided the tough work that needs to be done to organize nonunion workers, to convince our own members that it’s in their interest to expand our ranks, and to retool our organizations by putting resources into building power. We have let ourselves be backed into a corner, by trying to just hold on to what we have and fighting only for workers who are already union members.”⁸

Labor advocates have further taken union leadership to task for failing to adapt and incorporate new technologies and social media opportunities into their organizing efforts. In particular, Mark Zuckerman, former Deputy Director of the Domestic Policy Council in the Obama White House and President of the Century Foundation, observed:

It is surprising that one of the most successful and powerful social movements in the nation’s history – the labor movement – has not launched a coherent, large-scale digital organizing strategy to recruit a new generation of workers.⁹

⁶Notwithstanding the Obama Board’s substantial change in labor policy in favor of unions, and the Obama Board’s adoption of expedited or ambush election rules, union density still has declined. See, e.g., Michael J. Lotito et al., *Was the Obama NLRB the Most Partisan Board in History?*, WORKPLACE POL’Y INST. (Dec. 6, 2016), <https://www.littler.com/publication-press/press/was-obama-nlrbs-most-partisan-board-history> (noting that the Obama Board overturned nearly 4,600 years of established law).

⁷ Hector Figueroa, “The Labor Movement Can Rise Again” N.Y. TIMES (Jul. 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/hector-figueroa.html>.

⁸ *Id.*

⁹ Mark Zuckerman, *Finding Workers Where They Are: A New Business Model to Rebuild the Labor Movement*, THE CENTURY FOUNDATION (Feb. 6, 2019), <https://tcf.org/content/report/finding-workers-new-business-model-rebuild-labor-movement/?agreed=1>. See also, “Unions aren’t exactly early adopters, and many still haven’t embraced digital” Jack Milroy, *Why Unions Need a Digital Strategy*, MEDIUM (Apr. 29, 2016), https://medium.com/@jack_milroy/the-list-makes-us-strong-why-unions-need-a-digital-strategy-42291213298a; “It is heartbreaking to witness our movement risk near-irrelevance when workers are ready to take action” Figueroa, *supra* note 5.

Congress should not be misled regarding the reasons for the decline in union membership. Further, Congress should not respond to requests to continually rescue the labor movement from its own shortcomings. H.R. 2474, unfortunately, is a prime example of exactly this type of rescue attempt. H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws in a manner harmful not only to employers and employees but also ultimately to the nation's economy. CDW, and its hundreds of members, including the HR Policy Association, strongly oppose its enactment.¹⁰

Specific Objections to H.R. 2474

- **Section 2 – The Policy Statements**

This Section of the PRO Act is largely political policy rhetoric and contains inaccurate statements in a number of areas, including the statement on page 4 that “employers routinely fire workers for trying to form a union at their workplace” and the statement at page 4 that “many employers maintain policies that restrict the ability of workers to discuss workplace issues with each other directly contravening [NLRA]... rights.” These activities are unlawful, and the Board provides mechanisms for addressing these problems. Statements at page 6 of the bill are also incorrect that state that Congress disapproves of the right of employers to permanently replace economic strikers; and that “...employers have abused the representation process of the NLRB to impede workers from freely choosing their own representatives and exercising their rights under the Act.”

- **Section 4 – Establishment of a New Joint Employer Standard**

This Section of H.R. 2474 adopts the widely criticized standard established in *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015) to determine joint employer status under the NLRA.¹¹ Indeed, this provision is directly opposite of the bipartisan position the House of Representatives took on this issue in a floor vote on the Save Local Business Act in November of 2017. Further, this provision of the legislation arguably goes even beyond the holding in the *Browning-Ferris* case, by stating that joint employer status can be established under the NLRA based solely on “indirect or reserved control.” This proposal inappropriately expands the definition of joint employer status, which would result in unnecessary protracted litigation and potential liability for many business entities. This legislative proposal has the potential to destroy the franchisor and franchisee model that has led to the creation of millions of jobs in this country and the development of hundreds of thousands of successful small business entities.¹² CDW does, however, support the initiatives

¹⁰ CDW fully endorses the previous opposition testimony presented by attorney Philip Miscimarra of the Morgan Lewis law firm, who also previously served as both a member and chairman of the National Labor Relations Board.

¹¹ *Browning-Ferris Indus.*, 352 NLRB No. 186 (2015)

¹² For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, see International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer Status (Jan. 28, 2019); see also Brief of Amicus Curiae The International Franchise Association in Support of Defendant, *Roman et al. v. Jan-Pro Franchising Int'l, Inc.*, No. 3:16-cv-05961 (9th Cir. 2019).

currently being undertaken by the NLRB to better define when a joint employer status is established under the NLRA. CDW also supports the notice of proposed rulemaking initiative being undertaken by the United States Department of Labor to clarify when joint employer status is established under the Fair Labor Standards Act.

- **Section 4 - Definition of Employee Status**

This Section of the legislation essentially adopts the “ABC” test developed by the California Supreme Court.¹³ If adopted, it would invalidate decades of legal precedent regarding the definition of independent contractor status and make it far more difficult for workers to establish independent status, evidenced by California’s struggle to codify the standard into law without creating multiple carve outs. The fact that an individual performs a service for a business that is within the scope of the services customarily provided by such entity should not – and has not – automatically make such an individual an employee of the entity in question. This proposal clearly is directed at the evolving nature of the type of work that many individuals do on an independent basis in the evolving “gig” economy, and would have a devastating impact on such workers. The issue of when an individual is an employee or an independent contractor should be addressed in separate legislation, and then only after a thorough study of the many complex issues associated with this area. The blind approach taken in H.R. 2474 to this issue should be clearly rejected.

- **Section 4 - Alteration of the Definition of a Supervisor Under the NLRA**

While CDW agrees that it would be helpful to clarify the definition of supervisory status under the NLRA, the approach being taken in H.R. 2474 is clearly a one-sided and biased approach to make more individuals employees under the Act and therefore, become eligible for union representation. There is no factual or legal basis to support the proposed amendments to Section 2(11) of the NLRA contained in this bill. It is critical that employers have the ability to rely upon the requisite number of supervisors and managers to run their business. Finally, this proposal would unnecessarily, and improperly overrule decades of NLRB case law established under both Democrat and Republican Boards regarding the definition of supervisory status under the NLRA.

- **Section 4 – Establish Authority for the National Labor Relations Act to Engage in Economic Analysis**

While credible arguments can be made that the NLRB should be provided with the authority to engage in certain economic analysis, particularly in the rulemaking area, more study and thought should be given to when and how the Board should engage in this type of analysis. The simple one-line provision in H.R. 2474 that would provide authority for the Board to engage in economic analysis is not the correct way to proceed on this issue.

¹³ *Dynamex Operations W. v. Superior Court*, 232 Cal.Rptr.3d 1 (2018).

- **Section 4 – Prohibition on Employer Hiring Permanent Replacements in Economic Strike Situations**

The PRO Act, as stated above, erroneously stated in its preamble that Congress has previously concluded that employers are prohibited from hiring permanent replacements in economic strike situations. This provision of H.R. 2474 is yet another example of the one-sided and incorrect approach taken in this legislation. The case law, including U.S. Supreme Court decisions, clearly permits employers to continue their operations during economic strikes by hiring replacement workers.¹⁴ The right of unions to strike and the right of employers to hire permanent replacements is an important balance of interests under our Nation’s labor laws and permits both unions and employers to engage in “economic warfare” if disputes cannot otherwise be resolved. While the CDW believes that the option for employers to use permanent replacements should only be carefully and thoughtfully utilized, such right nonetheless needs to be maintained as it is critical to achieve the necessary balance of interests when strikes occur.

- **Section 4 - Employer Presentations to Employees**

H.R. 2474 makes it an unfair labor practice for an employer to hold mandatory employee meetings in the workplace in union campaign settings (“i.e., so-called captive audience speeches”). To our knowledge, there is no evidence to support the conclusion that employers can unduly influence employees to oppose unionization in such meetings. Further, an employer is considerably restricted in what it can say in such meetings. For example, election objections can be successfully pursued by a union or unfair labor practices charges could be successfully filed against an employer if, in such meetings, the employer threatens employees who support unionization, or the employer promises better benefits to employees if they oppose unionization. Further, the faulty premise that such meetings seriously impede a union’s ability to win an election is specious at best, particularly due to the ability of employees to communicate through social media with unions and also among themselves using a wide array of options. Indeed, an employee’s ability today to go online to obtain facts and information about the issues of union representation is greater than ever. In summary, these meetings have virtually no bearing on the success or lack thereof of the union movement and should not be made unlawful. Finally, it needs to be noted that unions, unlike employers, have the right to visit employees at their homes and engage in campaign activity in such settings.

- **Section 4 – Government Controlled Collective Bargaining – Arbitrator Imposed Terms (Interest Arbitration) in Initial Bargaining Situations**

H.R. 2474 establishes for the first time in the NLRA, government control of collective bargaining. In negotiations, the legislation establishes minimum time frames for parties to negotiate. If an agreement cannot be reached within such timeframe, panels of arbitrators are mandated to impose employment terms on the parties. This is an exceedingly poor policy decision

¹⁴ *Hoffman Plastic Compounds, Inc., v. NLRB*, 533 U.S. 137 (2002).

by the drafters of the PRO Act. Third party arbitrators may know virtually nothing about the employer's business and have no economic interest or stake in the future of the business entity in question. The ultimate terms that such arbitrators impose upon the parties may lead to the closure of the business entity and the loss of jobs of its employees.

- **Section 4 - Restriction on Employer Prohibitions on Employee Class or Collective Action Filings**

This provision would invalidate the U.S. Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which held that employers can place restrictions on employees' class or collective action filings.¹⁵ The approach of this legislation ignores the sound reasoning of the Supreme Court's majority in *Epic Systems* and also undermines substantial legal precedent regarding the Federal Arbitration Act that encourages nonjudicial resolution of workplace disputes. Class and collective action litigation have literally "spun out of control" in the last decade, and legitimate attempts by employers to resolve workplace disputes through alternative procedures other than protracted, expensive class and collective action litigation should be encouraged by the Committee, not discouraged.

- **Section 4 – NLRB Election Rules – Requirement that Employees Furnish Personal, Private Information to Petitioning Unions**

This subsection of H.R. 2474 is a substantial invasion of the privacy rights of employees. The legislation would require employers to provide to petitioning unions their employees' "personal landline and mobile telephone numbers and work and personal email addresses," along with other information, if the employee is in a voting unit being proposed by the petitioning union. The legislation does not permit the employee to opt-out of providing this personal information and provides absolutely no protection that such personal information would be kept confidential and not shared with others.

- **Section 4 – Prohibition on Employer Party Status in NLRB Representation Proceedings**

This subsection is a substantial violation of employer due process rights as employers have compelling interests to protect in such proceedings, including the important interest as to which job classifications are to be included in a voting unit. Further, employers have critical interests in which employees are to be classified as supervisors, managers, and confidential employees as such individuals are vitally important for an employer to successfully operate its business. Finally, employers have substantial interests in the procedure to be utilized in any NLRB conducted election as employers must necessarily protect against inappropriate interference with their operations during an NLRB election. There is no evidence to support the need to prohibit an

¹⁵ *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

employer from being a party to an NLRB election proceeding. To completely eviscerate an employer's party status in representation election proceedings is not only a violation of employer's due process rights, but will result in a completely unworkable NLRB election procedure.

- **Section 4 – Imposition of Bargaining Orders Through Card Checks**

This subsection of the legislation brings back “card checks” and memories of the failed Employee Free Choice Act that was strongly supported by organized labor. Under the new iteration, virtually any type of proven irregularities in an NLRB election that a union loses would result in a bargaining order if, in the year proceeding the election, the petitioning union had obtained signatures on authorization cards for a majority of the employees in the voting unit. There is no compelling evidence whatsoever to support such a radical change in federal labor law. Indeed, this approach is simply a “backdoor card check” approach to determine union representational status. *Gissel* bargaining orders¹⁶ are available today to unions if they can establish that employers have committed numerous and severe unfair labor practices or objectionable conduct during the critical pre-election period. Finally, a very small percentage of unfair labor practice cases ever reach the Board or courts for decision. In FY 2018, nearly 80% of unfair labor practice charges were either resolved by way of settlement, at the regional board level, or at the administrative law judge stage, or withdrawn, with Board Orders comprising only 2% of the disposition of such charges.¹⁷ Stated alternatively, representatives of organized labor have continually, incorrectly overstated both the number of cases where severe election misconduct occurs and misrepresented the type of alleged employer conduct that is at issue in such cases.

- **Section 4 – NLRB Election Rules and Timelines**

The PRO Act codifies certain Obama NLRB era election timelines (also known as “ambush” or “quickie” election regulations). These timelines were very controversial at the time they were adopted and are being reviewed by the Board at present. Any change in Board election procedures should be done by examining all aspects of the election process.

- **Section 4 – Making Decisions of the NLRB Self-enforcing**

The PRO Act changes the current procedure of how Board decisions are enforced by making such decisions effective upon their issuance. The current procedure is that the Board must seek enforcement of its orders in the courts. If the procedure in this area is going to change, other NLRA procedural changes also should be addressed, including a change that would permit employers to directly appeal NLRB decisions in representation cases to the courts without having to first go through the internal Board process of being charged with a technical Section 8(a)(5) violation of failure to bargain in good faith. This current elongated prerequisite for employers to appeal

¹⁶ See *NLRB v. Gissel Packing Co.*, 89 S.Ct. 1918 (1969).

¹⁷ *Disposition of Unfair Labor Practice Charges in FY18*, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges>.

representation decisions is not an appropriate use of resources for any party, including the Board and unions, and results in unnecessary delays in resolving the issues in question.

- **Section 4 - Establishment of NLRB Civil Fine Remedies and Increased NLRB Injunction Authority**

H.R. 2474 contains numerous subsections that establish civil fines for employer violations of the NLRA and permits NLRB representatives to obtain expedited injunctive relief in federal district courts. There are numerous problems with this approach. First, in the 84-year history of the NLRA and its predecessor, there has never been a procedure that imposed fines and penalties on parties to Board proceedings. If the NLRA is to be restructured in this way, rogue unions that violate the NLRA should also be subject to the same type of civil fines and injunctive procedures. The PRO Act, in its one-sided approach, ignores union misconduct altogether and excludes labor organizations from any type of civil fines and expedited injunctive relief. More fundamentally, this legislative approach is based on the false premise that there are a large number of NLRA violations that merit this type of remedy. As noted above, very few unfair labor practice cases ever reach the Board level and the courts for resolution. Of the cases that do require full NLRB and judicial attention, a very small number involve serious and repeated alleged violations of the Act. Cases that do reach the Board and court level often involve policy issues and close call factual situations as to whether the NLRA has been violated. Civil fines simply are not necessary as a remedy to such a small percentage of cases. In any event, if civil fines are to be included in the NLRA, both rogue employer and rogue unions should be equally subject to such sanctions.

- **Section 4 - Directors and Officers Liability for NLRA Violations**

This subsection of H.R. 2474 extends potential civil penalties to directors and officers of an employer “based on the particular facts and circumstance presented” and “civil liability could be ...assessed against any director or officer of the employer who directed or committed the violation, had established a policy that led to such violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation.” Again, our nation’s labor laws have never been written as civil penalties statutes, and there is no basis to begin to proceed in that direction at present, particularly when there are exceedingly few instances to compel such a remedy. Additionally, there is great ambiguity on how and when such liability might be assessed. Civil fines in this area and other areas discussed above are also a particular concern given the ever-increasing “policy oscillation” by Boards under different administrations. Stated alternatively, given the frequently changing direction of the Board in important labor policy areas, it would be exceedingly unfair to employer officers and directors to be assessed liability based on unknown changes in the law. Finally, even if the NLRA were to be so amended, as noted above, union officers and officials also should be included in such civil liability.

- **Section 4 - Assessment of Attorneys’ Fees and Punitive Damages**

This legislation would also provide for the potential recovery by employees and unions of their attorneys fees and provide for the potential of punitive damages for violation of the NLRA. Again, the legislation does not provide that unions who also violate the NLRA would have any such legal exposure. In any event, for reasons stated above, these non-traditional remedies are not appropriate to be included in the NLRA, and there has been no case made that the NLRA should be amended to include them.

- **Section 4 – Approval of Intermittent Work Stoppage**

H.R. 2474 would permit unions and employees acting in concert to engage in frequent work stoppages and strikes. This unprecedented permission to engage in protected activity presumably would also include worker slowdowns, “work to rule” employee actions, frequent filing of 10-day strike notices directed against healthcare employers under Section 8(g) of the NLRA, and other union tactics intended to disrupt an employer’s operations. There is no objective rationale to support this radical change of our labor laws. Indeed, this provision is especially harmful to employers when it is coupled with an earlier proposal in the PRO Act to prohibit employers from permanently replacing economic strikers.

- **Section 4 - Fair Share Agreements Permitted**

This provision of the PRO Act would invalidate state right-to-work laws and permit unions to negotiate agreements with employers that require bargaining unit employees to either become a member of the union or make a financial contribution to the union for representation expenses (i.e., become a “fee payer”) as a condition of continued employment. This subsection would overturn 26 state laws that currently prohibit such clauses in collective bargaining agreements. This part of the NLRA should not be changed. States should continue to determine their position on this issue without interference from the federal government.

- **Section 4 - Right of an Employee to File a Private Right of Action in Federal District Court for Alleged Violations of the NLRA**

The PRO Act for the first time in the history of the NLRA would provide employees with a private right of action to pursue claims of unfair labor practices in federal district court if the NLRB failed to proceed with the individual’s charge within 60 days. While the CDW agrees that the NLRB should expeditiously process cases at the Board level, the solution to this issue is not the creation of a new private right of action. This approach will likely flood already overworked federal district courts and unnecessarily clog their dockets. Although there may be a certain appeal to creating a “labor court” system in the country, our federal district courts at present do not have expertise in this area of the law. Additionally, having a dual track for employees to pursue a private right of action while concurrently having the NLRB proceed in addressing the same case could unnecessarily complicate the resolution of unfair labor practice charges. Again, as stated a number of times previously, the Board has an excellent track record in expeditiously resolving a high percentage of its cases at the regional and administrative law judge level, and there is no need,

therefore, for a private right of action. Finally, the NLRB at present is reviewing how it processes cases at the Board level and is exploring procedures to expedite its decisional cases processing. The Board should be permitted to complete its important work in this area without legislative interference.

- **Section 4 - Reinstatement of the Persuader Rule and Expanded Consultant Reporting**

H.R. 2474 also includes a reinstatement of the Obama era Department of Labor expanded reporting requirement rule for entities that provide assistance for employers and entities in union campaign situations. This rule was revoked by the present Administration on July 18, 2018. The Committee has not developed any record to support this proposed change in the law. Indeed, there are already in place substantial reporting requirements for employers and entities that provide financial assistance to employers in campaign situations. Finally, if the Committee is going to pursue this area, it should review the activities of worker centers, employee committees, and like organizations to determine whether they should also be required to report their activities to the United States Department of Labor on the same basis as traditional labor unions.

- **Section 4 – Removal of Secondary Boycott Restrictions on Unions**

The PRO Act, in one of its most radical proposals, removes the ability of employers to obtain relief in court for illegal secondary boycott activities of unions. Secondary boycott protection for business entities, including in particular smaller entities that can be subject to boycott pressure and coercion, is often essential for their survival. Removal of such a deterrent from our nation’s labor laws should not occur. Indeed, employers at present already face substantial obstacles in prohibiting illegal secondary activity.¹⁸ The PRO Act takes absolutely the wrong approach in this area – restrictions against secondary boycott activities should be strengthened and neutral employers and employees should not be subject to such coercive activities. Indeed, the very survival of some business entities depends on the appropriate enforcement of laws in this area.

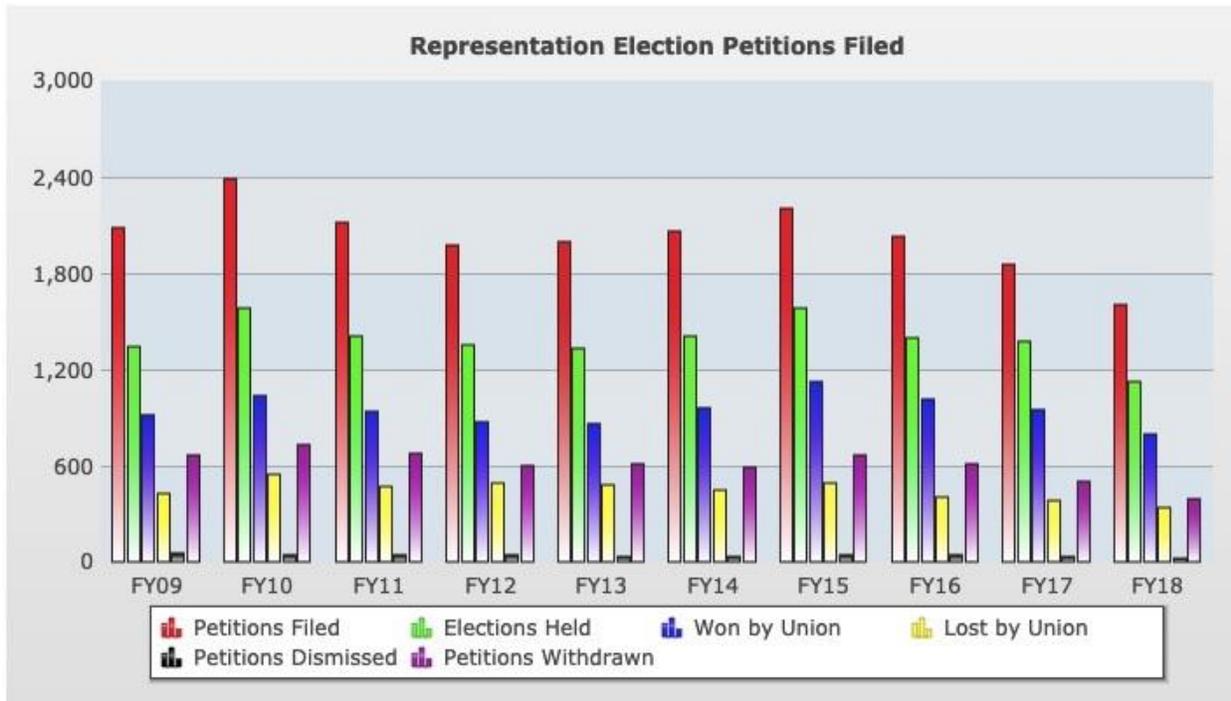
Conclusion

H.R. 2474 is a “wish list” serving only the interests of labor organizations that represent at most approximately 6% of the nation’s private sector workforce. The argument that the lack of success of the union movement can be attributed to our nation’s labor laws is not correct. Unions, to their detriment, have devoted increasingly smaller portions of their resources to union organizing, but yet are increasing the amount of resources devoted to political activity. Their apparent “gameplan” is to have Congress and federal regulatory agencies assist them in increasing union density in the country without regard to the impact on employees, consumers, and others. Our nation’s labor laws are not broken, and Congress should not make radical changes as suggested in H.R. 2474. The numerous proposals in this legislation are not well thought out, are not supported

¹⁸ See, e.g., *Wartman v. UFCW*, 871 F.3d 638 (4th Cir. 2017); *Int’l Union of Operating Engineers et al.*, 2019 WL 3073999 (N.L.R.B. Div. of Judges) (Jul. 15, 2019); *Laborers’ Int’l Union of North America et al.* 2015 WL 5000792 (N.L.R.B. Div. of Judges) (Aug. 21, 2015).

by record evidence, and are unnecessarily biased against employers and employees. CDW, therefore, opposes the enactment the legislation.

EXHIBIT 1¹⁹



	Petitions Filed	Elections Held	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
FY09	2082	1335	915	420	46	657
FY10	2380	1571	1036	535	37	725
FY11	2108	1398	935	463	43	667
FY12	1974	1348	868	480	38	597
FY13	1986	1330	852	478	27	607
FY14	2053	1407	952	440	24	586
FY15	2198	1574	1120	480	39	663
FY16	2029	1396	1014	401	38	610
FY17	1854	1366	940	375	29	493
FY18	1597	1120	790	330	17	386

¹⁹ Representation Petitions, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>.