

Shortchanged—weak anti-retaliation provisions in the National Labor Relations Act cost workers billions

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Summary

Workers who exercise their federally protected right to organize a union or engage in collective action with their co-workers to improve their working conditions are supposed to be protected from retaliation by their employers. But because the anti-retaliation protections and remedies in the National Labor Relations Act (NLRA) are much weaker than anti-retaliation and whistleblower protections in other labor and employment laws, the NLRA provides no real deterrent to employers retaliating against workers and interfering with their rights. Under the NLRA's meager protections:

- ❑ Employers face no monetary penalties for illegally retaliating against workers for exercising their NLRA rights, and workers receive no compensatory damages when they face illegal retaliation.
- ❑ Workers can't pursue their anti-retaliation cases on their own if they choose; they must depend on the National Labor Relations Board (NLRB), which is often slow or fails to act.
- ❑ Workers who file cases before the NLRB don't get their jobs back on an interim basis while their cases are pending, which means workers whose rights have been violated can be out of work and losing pay for months and years. If they do get reinstated, deductions are taken out of the back pay they receive.

Because of these and other substandard protections, workers have been shortchanged billions of dollars in back pay and damages after being illegally fired for exercising their federally protected labor law rights. The Protecting the Right to Organize (PRO) Act pending in Congress would raise the baseline of NLRA anti-retaliation protections to more closely resemble modern anti-retaliation/whistleblower laws, providing more of a deterrent against lawbreaking by employers and making a real difference in the pocketbooks and lives of workers.

Federal labor law professes to protect working people against retaliation for exercising their statutory right to join together with their co-workers for the purposes of mutual aid and protection. Under the National Labor Relations Act (NLRA), private sector workers are supposed to be shielded from retaliation whether they are joining together to push for stronger safety protections, better pay, an end to harassment, or the formation of a union.¹ But in reality, this right is largely hollow because of fundamental and structural weaknesses in the NLRA that make it far weaker than other labor and employment laws with regard to anti-retaliation protections. As a result, current law fails to provide an effective deterrent against employer retaliation—an all too common occurrence in organizing campaigns.²

There are several structural shortcomings in the NLRA. First, there are literally no monetary penalties against employers that illegally retaliate against workers for exercising their NLRA rights. If an employer is found guilty of illegally retaliating against workers by firing them, refusing to hire them, or demoting them to lower-wage jobs, the National Labor Relations Board—established to investigate and prosecute violations of the NLRA—cannot, under current law, award compensatory damages to the worker for the harm caused by the retaliation or impose a monetary penalty against the employer for its illegal conduct.³ The NLRB is limited to requiring the employer to pay the back wages and other benefits due to the worker, *minus deductions for wages the worker earned, or could have earned*, while the case was pending.⁴ This lack of any monetary penalties against employers or compensatory damages for workers makes the NLRA far weaker than other labor and employment anti-retaliation laws. Even the Occupational Safety and Health Act (OSH Act), which also has notoriously weak protections, provides better remedies for workers than does the NLRA.⁵ Anti-retaliation/whistleblower provisions in other laws (such as the OSH Act) provide for monetary damages to compensate workers for the harm they experience from illegal retaliation, as well as attorneys' fees to compensate the worker's attorney for the time spent bringing the case.⁶ The NLRA is an outlier in this regard.

A second consequential shortcoming of the NLRA's anti-retaliation protections—and where it falls short of other anti-retaliation laws—is its lack of a mechanism for workers to pursue their cases on their own if they choose. Many other employment laws with anti-retaliation components—although again, not the Occupational Safety and Health Act—and almost all modern, 21st-century anti-retaliation/whistleblower protection laws allow workers to pursue their case before an administrative agency or federal court if the responsible enforcing agency fails or declines to act.⁷ Under the Federal Mine Safety and Health Act, for example, workers can bring their retaliation case before an administrative law judge if the Mine Safety and Health Administration declines to pursue the case.⁸ In contrast, there is no private right of action under the NLRA for workers to pursue their case before an administrative law judge or court: Workers are entirely dependent on the general counsel of the NLRB filing a complaint on their behalf. If the general counsel chooses not to act—as the Trump NLRB's general counsel did when he decided that Uber drivers were not employees protected by the NLRA—workers have no independent recourse.⁹

A third shortcoming in the NLRA is that it lacks provisions for ensuring that workers with meritorious cases get their jobs back on an interim basis while their cases are pending. Under the current system, cases take many months, and sometimes years, to resolve. The

NLRB investigates a worker's charge, determines whether the charge has merit, files a complaint, and then litigates the case before an administrative law judge. The parties can then seek review of the administrative law judge's decision by the National Labor Relations Board. In the meantime, the worker is out of work and losing pay. This creates a huge incentive for employers to drag out proceedings, especially because, as previously noted, at the end of the day, if the employer is found liable for violating the law, it faces no monetary penalties, only the requirement to deliver back pay minus deductions.¹⁰ In contrast, most anti-retaliation/whistleblower statutes, and all 21st-century anti-retaliation statutes, have a process for seeking preliminary reinstatement of workers, which shifts the economic and power dynamic from one favoring employers to one that is more fair to workers. The Federal Mine Safety and Health Act, for example, requires preliminary reinstatement at the beginning of a case unless the agency determines that a worker's complaint is frivolous, which rarely happens.¹¹ As a result, mine workers alleging retaliation quickly get their jobs back and cases typically settle on terms more favorable to the worker had preliminary reinstatement not been an option. Similarly, the Department of Labor has successfully pursued temporary restraining orders to win preliminary reinstatement of workers claiming they were fired in retaliation for exercising their rights under the Fair Labor Standards Act.¹²

Slow action when Amazon workers face retaliation for safety protests

In March and April 2020, workers at Amazon warehouses around the country, including in Chicago, in the New York City boroughs of Queens and Staten Island, and elsewhere held safety demonstrations and strikes to protest unsafe working conditions. This type of collective action is protected under the NLRA. Workers filed charges with the National Labor Relations Board alleging that they faced illegal retaliation by Amazon for participating in the protests. Nearly a year after the protests in Queens, Amazon settled the case with the NLRB. Amazon did not admit to violating the law but agreed to post a notice informing workers that Amazon would not interfere with the Queens Amazon workers' labor rights.¹³ As of this writing, the other cases are still pending at the NLRB. In one of the cases, the NLRB notified Amazon in late February—10 months after the protests—that it had found merit to the workers' charges and would be issuing a formal complaint.¹⁴ In another case, unfair labor practice charges were filed after several workers faced retaliation, including the firing of Chris Smalls, allegedly in retaliation for participating in a March 2020 protest over unsafe working conditions at an Amazon warehouse in Staten Island. As of mid-March 2021—a year after the incident in question—the case was still pending at the NLRB. The NLRA does not allow workers to bring their own case if the NLRB is too slow or fails to act. An *NBC News* report in March provided a fuller account of unfair labor practice proceedings against Amazon during the COVID-19 pandemic.¹⁵

The cumulative effect of these three shortcomings—no penalties or compensatory damages, no private right of action, and no preliminary reinstatement—is that workers asserting their rights under the NLRA are in a far worse position than workers alleging

illegal retaliation for exercising their rights under other labor and employment laws and other whistleblower protection laws. The NLRA's meager protections lag far behind the norm and result in substandard protections for workers exercising crucially important rights. It is a cruel irony that the two laws most important to workers being able to join together to protect their health and safety on the job—the National Labor Relations Act and the Occupational Safety and Health Act—are the two labor and employment laws with the weakest anti-retaliation protections.¹⁶ This is a situation that Congress must address.

How the Protecting the Right to Organize (PRO) Act fixes these structural shortcomings

The proposed Protecting the Right to Organize (PRO) Act (H.R. 842, S. 420) addresses each of the three fundamental shortcomings in current law described above (see **Table 1**). If enacted, it would close the enormous gap in protections for workers exercising their labor law rights and workers exercising their rights under other employment and whistleblower protection laws, so that exercising labor law rights will no longer have second-class status compared with rights under other laws.

First, under the PRO Act, workers facing illegal retaliation have access to full back pay without deductions for the time out of work, front pay¹⁷ if reinstatement is not feasible, consequential damages to compensate for harm caused by the violation, and double the amount of workers' back pay as liquidated damages. (See H.R. 842, S. 420, Section 106.) The PRO Act also establishes monetary penalties against employers for violating workers' rights under the NLRA and monetary damages for workers who face illegal retaliation. Employers that illegally retaliate against workers face a penalty of up to \$50,000 per violation, and this amount is doubled if the employer has previously been found to have violated the NLRA in the prior five years. In addition, the PRO Act authorizes civil penalties against corporate officers and directors who have knowledge of violations and failed to prevent them. (See H.R. 842, S. 420, Section 109.)

Second, and importantly, the PRO Act directs the NLRB to seek preliminary reinstatement of workers through injunctive relief from a federal district court when workers file charges of illegal retaliation and the NLRB finds reasonable cause to believe that a violation has occurred (See H.R. 842, S. 420, Section 108). Currently, seeking preliminary injunctive relief is discretionary on the part of the NLRB. Preliminary relief is rarely sought, and it is slow.¹⁸

Specifically, the PRO Act directs the NLRB to give illegal retaliation cases top priority over all other cases, to promptly investigate these cases, and to bring an action for preliminary injunctive relief if it finds reasonable cause to believe a violation has occurred. Courts are directed to order interim relief unless there is no reasonable likelihood that the NLRB will prevail on the claim—a more worker-protective standard like that of the Federal Mine Safety and Health Act.

Third, the PRO Act establishes a private right of action so that workers can pursue their retaliation cases in federal district court if the agency fails to act on a timely basis (See H.R.

Table 1

The National Labor Relations Act (NLRA) fails to provide crucial protections for workers alleging retaliation for exercising their rights

Comparing NLRA provisions with other laws and the PRO Act

Provision	Under the NLRA	Under other anti-retaliation/whistleblower laws	Under the PRO Act
<i>Compensatory damages for workers who are illegally fired for exercising their rights</i>	No	Yes	Yes
<i>Preliminary reinstatement of workers while their cases are pending</i>	No (unless 10(j) injunction, which is rare)	Yes	Yes
<i>Private right of action to pursue case if agency refuses or is slow to act</i>	No	Yes	Yes

Source: Authors' analysis of workers' anti-retaliation/whistleblower laws.

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842, S. 420, Section 109). Workers are empowered to bring their own lawsuit if the NLRB has not sought preliminary injunctive relief within 60 days of the worker filing a charge with the NLRB. Courts are authorized to award back pay, front pay, liquidated damages, consequential damages, punitive damages, and attorneys' fees to workers who prevail on their cases in court, similar to the provisions in most other anti-retaliation and modern whistleblower statutes.

Taken together, these provisions would modernize and strengthen the anti-retaliation protections in the NLRA so that they more closely mirror the protections in other labor and employment and whistleblower protection laws. It would make the right to engage in protected concerted activity to improve working conditions more robust by providing real recourse to workers who face interference or retaliation for exercising their rights and real penalties against employers that illegally retaliate against workers.

Workers have lost billions of dollars because of the NLRA's substandard protections

The substandard anti-retaliation protections in the NLRA have cost workers billions of dollars, even using the most conservative of calculations.

Each year, the NLRB obtains back pay awards and reinstatement orders for workers who suffer illegal retaliation for exercising their rights. The NLRB obtains these results largely through settlements with employers, as well as through decisions by administrative law judges and the NLRB. These awards offer a window into the money workers have lost because of the NLRA's inferior protections, as explained below.

Table 2

Number of reinstatement offers and back pay for workers obtained by the National Labor Relations Board, 2011–2020

Fiscal year	Reinstatement offers	Back pay (in millions)
2011	1,644	\$58.7
2012	1,254	\$44.2
2013	2,729	\$109.7
2014	3,240	\$43.8
2015	2,109	\$94.3
2016	1,648	\$52.3
2017	1,716	\$70.8
2018	1,270	\$54.0
2019	1,431	\$55.6
2020	960	\$37.9
Total:	18,001	\$621.3

Source: National Labor Relations Board, "Remedies," accessed April 17, 2021.

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Table 2 shows that over the past 10 years (through fiscal year 2020), the NLRB has obtained reinstatement orders for 18,001 workers who were fired in retaliation for exercising their NLRA rights.

Over this 10-year period, the NLRB also has obtained \$621.3 million in back pay for workers. This number includes back pay for workers who were illegally fired, but it also includes back pay for workers subjected to discriminatory layoffs, back pay for workers whose employers illegally made unilateral changes such as refusing wage increases, and other back pay situations. Thus, the amount of back pay recovered by the agency for workers facing illegal retaliation is only a portion of this \$621.3 million. Still, using the full \$621.3 million number, this represents an average of \$34,515 in back pay per reinstatement order.¹⁹

The PRO Act authorizes double back pay as liquidated damages. Had the 18,001 workers receiving reinstatement offers over the 10-fiscal-year period from 2011 to 2020 received double back pay as liquidated damages, this would have translated into an additional \$1.24 billion in damages to affected workers, or \$69,030 in additional damages per affected worker (i.e., in addition to the \$621.3 million in back pay). This estimate is low, because the NLRB's practice is to make deductions for interim earnings that the worker earned or could have earned, but the PRO Act provides for back pay and liquidated damages without these deductions. Thus, had the PRO Act's provisions been in effect, the actual recovery workers would have received would be significantly higher than \$1.86 billion (back pay plus the \$1.24 billion in damages cited above).

This number also does not include the other monetary remedies authorized in the PRO

Act, including front pay, consequential damages, punitive damages, and attorneys' fees. These awards can be substantial. For example, the Department of Labor recently announced an award of \$290,000, including \$150,000 in punitive damages, for a worker who faced illegal retaliation under the Federal Railroad Safety Act.²⁰ In another case, the Department of Labor ordered an employer to pay \$23,000 in back wages and \$70,000 in punitive damages under the anti-retaliation provisions of the Surface Transportation Assistance Act to two employees who were illegally fired for refusing to operate unsafe trucks. If these damages provisions had been in effect for the NLRA, as the PRO Act would authorize, workers would have recovered billions more in the past 10 years when they faced illegal retaliation for exercising their rights.²¹

These numbers also underestimate the true impact because the weaknesses and shortcomings in current law discourage workers from coming forward with complaints of unlawful retaliation and other unfair labor practices. Research shows that at least four in 10 workers say they do not come forward to report violations of their rights because they fear retaliation or think nothing will come of the complaint.²² If the NLRA included the more robust protections contained in the PRO Act, workers would be more willing to come forward with retaliation complaints if they believed the law and the agency provided effective and timely recourse.

Conclusion

The anti-retaliation protections and remedies in the National Labor Relations Act are much weaker than anti-retaliation and whistleblower protections in other labor and employment laws. Because of these substandard protections, workers have been shortchanged billions of dollars in back pay and damages after being illegally fired for exercising their federally protected labor law rights. The PRO Act would update and strengthen the NLRA's anti-retaliation protections to more closely resemble modern anti-retaliation/whistleblower laws. Passage of the PRO Act would make a real difference in the pocketbooks and lives of workers who face illegal retaliation on the job when they exercise their NLRA rights.

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Endnotes

1. See NLRA Section 8(a)(3), 29 U.S.C. 158(a)(3).
2. One in five union election campaigns involves a charge that a worker was illegally fired for union activity. See Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and

Lola Loustaunau, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, December 2019.

3. In *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the United States Supreme Court held that the NLRA is a remedial statute, not a punitive statute, and that the NLRB had no authority to impose penalties, fines, or other punitive measures on employers found to have broken the law. This remedial/punitive distinction has restricted the NLRB's ability to pursue penalties and even ordinary remedies if they are considered punitive.
4. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Deductions from back pay awards are made for wages the worker earned from the time of discharge to reinstatement. In addition, workers have a duty to mitigate (that is, try to avoid) lost wages, meaning that employers can sometimes take deductions for wages a worker could have earned but didn't. The NLRB has at times sought through informal settlements to recover damages to compensate workers for actual economic harm related to an employer's illegal conduct, such as the cost of medical procedures when the employee loses health insurance coverage. See National Labor Relations Board, Office of the General Counsel, *Memorandum, Subject: Seeking Reimbursement for Consequential Economic Harm*, July 29, 2016. From interviews with experts, this sort of relief is rarely sought or obtained. The NLRB's view is that consequential damages are not authorized by current NLRB law. See *Able Building Maintenance*, 366 NLRB No. 68, at n. 8.
5. See Emily Spieler, "Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act," *ABA Journal of Labor and Employment Law* 32, no. 1 (2017).
6. Spieler, "Whistleblowers and Safety at Work," 2017; see also United States Department of Labor, *Whistleblower Statutes Summary Chart*, accessed April 1, 2021.
7. For example, the Sarbanes-Oxley Act of 2002, which protects employees from retaliation for reporting corporate fraud, gives workers the right to bring their own case if the agency fails to act within 180 days (18 U.S.C. 1514A). This is typical of other 21st century anti-retaliation/whistleblower protection laws. See also Federal Railroad Safety Act (49 USC 20109), National Transit Systems Security Act (5 U.S.C. 1142), Consumer Product Safety Improvement Act (15 USC 2087), and Affordable Care Act (29 USC 218C), etc.
8. 22 USC 815(c)(3).
9. Lawrence Mishel and Celine McNicholas, *Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber*, Economic Policy Institute, September 2019.
10. The exception to this procedure occurs when the National Labor Relations Board decides to seek preliminary injunctive relief in federal district court to enjoin violations of the NLRA. These are known as 10(j) proceedings, and they are discretionary on the part of the general counsel and NLRB. Very few 10(j) proceedings are brought seeking preliminary reinstatement of workers who are illegally fired, and the process is very slow in these cases, typically taking months or years. For example, in 2020, the NLRB brought only eleven 10(j) cases in federal court, and only five of these cases involved allegations of illegal retaliation against workers.
11. See 22 USC 815(c): "[if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.]"
12. Author's interview with Janet Herold, former Regional Solicitor, U.S. Department of Labor, February 18, 2021.

13. Lauren Kaori Gurley, “[Amazon Illegally Interrogated Worker Who Led First COVID-19 Strikes, NLRB Says](#),” *VICE News*, March 22, 2021.
14. Rachel M. Cohen, “[Amazon Retaliated Against Chicago Workers Following Spring COVID-19 Protests, NLRB Finds](#),” *Intercept*, March 17, 2021.
15. Olivia Solon and April Glaser, “[Fired, Interrogated, Disciplined: Amazon Warehouse Organizers Allege Year of Retaliation](#),” *NBC News*, March 30, 2021. The news report noted at least 37 unfair labor practice cases filed against Amazon since February 2020, more than triple the number of cases filed in 2019.
16. As with the NLRA, the Occupational Safety and Health Act has no private right of action, i.e., no mechanism for workers being able to pursue violations of their rights before an administrative agency or federal court. Workers are wholly dependent on the Occupational Safety and Health Administration taking action to enforce their rights. Numerous reports have documented the severe shortcomings of OSHA’s actions to protect workers against retaliation, including failures to protect workers who have reported COVID-19 hazards during the pandemic. See Office of the Inspector General, *[COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic](#)*, U.S. Department of Labor, August 2020; Deborah Berkowitz and Shayla Thompson, *[OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints](#)*, National Employment Law Project, October 2020 (finding that OSHA resolved only 2 percent of retaliation complaints filed during the first six months of the COVID-19 pandemic); Ann Rosenthal, *[Death by Inequality: How Workers’ Lack of Power Harms their Health and Safety](#)*, Economic Policy Institute Unequal Power project, April 2021.

In addition, the OSH Act includes the shortest statute of limitations for bringing claims of any labor or employment law: 30 days, compared with a more typical 180 days, which is the norm for most labor and employment and modern whistleblower protection laws. See United States Department of Labor, [Whistleblower Statutes Summary Chart](#), accessed April 1, 2021.

Both the NLRA and OSH Act’s weak anti-retaliation provisions fall far short of international best practices, which include a private right of action, back pay compensation without deductions, award of attorneys’ fees, and other compensatory measures. See Tom Devine, *[International Best Practices for Whistleblower Policies](#)*, Government Accountability Project, July 2016.

17. Front pay is a make-whole remedy used in lieu of reinstatement if reinstatement is not possible.
18. See endnote 10.
19. This is an approximate figure, because not all back pay cases involve a reinstatement order and vice versa, but the overlap is substantial enough to support this calculation.
20. Occupational Safety and Health Administration, “[US Department of Labor Orders One of the Nation’s Largest Railway Companies to Pay More than \\$290K in Damages, Reinstate Whistleblower](#)” (news release), March 10, 2021.
21. It is worth noting that there are trade-offs involved between quick preliminary reinstatement and large back pay/damages awards. To the extent workers are quickly reinstated while their cases are pending, employers’ back pay liability is reduced or eliminated.
22. Spieler, “Whistleblowers and Safety at Work,” 2017, page 3.