



The Protecting the Right to Organize Act (PRO Act) (H.R.2474)

The Protecting the Right to Organize Act (PRO Act) (H.R.2474) would, among other purposes, dramatically expand the definition of "employee" in the National Labor Relations Act (NLRA), adding an ABC test to determine if someone is an independent contractor or employee for purposes of union organizing. The legislation would thereby make it harder to defend the independent contractor status of respondents receiving incentives for participation in marketing research.

The ABC factors are hard to satisfy for any business, but dramatically more difficult for research participation, complicating the researcher-respondent relationship and the future viability of the marketing research industry.

H.R. 2474 passed the House Education & Labor Committee on September 25, 2019.

Background

The U.S. Department of Labor, IRS, and state labor and tax agencies sometimes claim that respondents receiving incentives for participation in marketing research¹ should be treated as employees of the companies conducting the research. This can bring responsibility for unemployment insurance payments, taxes and fees, minimum wage, overtime pay, extra recordkeeping, and more.

However, marketing research participants who receive compensation for their time and effort are independent contractors and should be treated as such.

Some participants in marketing research studies, such as focus groups or online panels, receive reimbursement for their participation in a study, depending on the length and circumstances of the study, the specialized knowledge or background of the participant, etc. However, research companies that conduct these studies sometimes face cases in which a person receiving a small reimbursement for participating in a single focus group study is characterized as an employee of the firm conducting the study.

Factor tests for employee classification did not develop with marketing research in mind; the ABC test was conceived in relation to classic professions like construction workers, and struggles with research participation, which is not a profession at all.

Research respondents are obtained according to the demographic or other specific needs of a client; participation is voluntary, and participants are free to opt-out at any time. Respondents may participate in multiple studies at the same time, but that participation is not a profession, and participants cannot easily make a living at it. In fact, the research industry goes to great lengths to prevent individuals from participating in too many research studies, referred to as "cheater-repeaters". Individuals that attempt to make a living this way produce skewed data instead of representative data. Cheater-repeaters also threaten the integrity of research results because they frequently get onto panels using fake ID and data, and similarly provide fake or erroneous responses to questions.

The Insights Association opposes the current definition of an "employee" in the PRO Act

The prospect of respondents in the U.S. being unionized represents a serious threat to marketing research and data analytics studies involving incentives, a significant portion of the U.S. insights industry's work.

The PRO Act presents the perfect opportunity to clarify in federal labor law that marketing research respondents are independent contractors and should not be mistaken to be employees of research companies and organizations. The Insights Association advocates amending the definition of "employee" in the PRO Act to clarify exactly that.²

Absent an amendment of this nature, or one striking the redefinition of employee altogether, the Insights Association opposes the PRO Act.

¹ Marketing research is the process of acquiring, analyzing and understanding opinions, attitudes and experiences from the public, regarding products, services, issues, candidates and other topics. That data is used to develop new products, improve services, and guide policy. It is used by all kinds of entities, including health care providers, private businesses, academic institutions, and governments.

² IA recommended the following amendment to the definition of "employee" in the PRO Act: *The term "employee" shall also not include a participant in marketing research receiving compensation for that participation. Marketing research involves the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences, or behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional, or marketing efforts are involved and through which there is no attempt to influence a participant's attitudes or behavior.*