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Rich Meneghello (00:00)
Welcome to the FP 5: Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking topics down into five parts. I'm Rich Meneghello, Chief Content Officer here at Fisher Phillips.

The US House just recently passed what could become the most significant change to American labor law in generations. Today we're talking the Faster Labor Contracts Act: it will fundamentally reshape how first union contracts are negotiated if it becomes law. And so today we're breaking down what the bill would do, why it matters, and what employers should be watching next.

And there's absolutely nobody in the firm better qualified to talk about this than Steve Bernstein. Steve Bernstein is the Co-chair of our firm's Labor Relations Practice Group and he's the Regional Managing Partner of the Fisher Phillips offices in Tampa, Pensacola, and Sarasota. Steve, you certainly get around. Thanks for being on the show today.

Steve Bernstein (00:59)
My pleasure, Rich. Thank you for having me.

Rich Meneghello (01:01)
For those who don't know you, and it's shocking for me to realize that some clients out there haven't had the pleasure of working with you, why don't you tell us a little bit about your practice area and what you do on a daily basis?

Steve Bernstein (01:13)
Sure thing, Rich. Yeah, I'm a lifer here at the firm, 36 years and counting. I came to this firm to practice labor relations, learning under some folks who did it at a very high level. And fortunately for me, that's been my legacy here for the last three plus decades. On a given day, I'm a problem solver in any number of contexts. I have a number of clients that are unionized, have been from day one, and in their universe I maybe kind of work through a grievance case that may need to go into arbitration, or I prepare them for the possibility of a strike or collective bargaining. I've got clients that have a foot in both worlds. Some are unionized but also have nonunion locations and there we may be spending a fair amount of time on the importance of positive employee relations, working with their supervisors and managers to frankly make them better people persons and to you know review their strategies and policies to make sure that they're designed to protect their people-first culture. So it's a pretty broad spectrum.

Rich Meneghello (02:16)
Well, let's get into the five-part conversation that makes the FP 5 what it is. So the first thing we're gonna be talking about, the US House of Representatives just recently passed a bill that would be the biggest change to American labor law in nearly a century, the Faster Labor Contracts Act. Are we calling that the “F-L-C-A”?

Steve Bernstein (02:35)
I think that's the acronym de jour anyway, yes.

Rich Meneghello (02:37)
Yes. Okay, not “Fulka”?

Steve Bernstein (02:39)
No, I don't like that one.

Rich Meneghello (02:41)
Okay, we'll go “F-L-C-A”. Steve, tell us about the Faster Labor Contracts Act and what it would do if it ultimately becomes law.

Steve Bernstein (02:49)
Yeah, it's an interesting piece of legislation because I feel like in some ways it's flown under the radar. You know, it escaped the House on what's called the discharge bill, basically, which sometimes goes unnoticed. But I have to say it's gotten a lot of attention from the business community, certainly from our clients, and in particular from my colleagues in the Labor Relations group. And I think all of us agree that it's hard to overstate the significance of this piece of legislation in terms of what it may do, not just to our practice but to the dynamic between employees, organized labor and the employer. It's really a sea change, I think, in so many ways. And yet it surprises me that it doesn't seem to get the attention it deserves.

Rich Meneghello (03:29)
So if it gets passed, as I understand it would be, this is the first attempted amendment of the NLRA, National Labor Relations Act, in nearly fifty years. What specifically would it do? What are the big things that it would do if it was passed?

Steve Bernstein (03:45)
The name, I think, can sometimes be misleading. It's called the Faster Labor Contracts Act. It remains to be seen whether even that can be achieved through this legislation but in theory, what it’s designed to do is to impose strict timetables on negotiations for an initial collective bargaining agreement between an employer and a union, and in doing so, it would force mandatory binding arbitration if those parties are unable to meet within certain specified timetables, and ultimately, impose contract terms on those parties regardless of whether they actually wanted them or even voted on them.

Rich Meneghello (04:21)
I mean that's such a shocking change to the way things have been done, you know, in our nation's history for so long, which begs the question why do lawmakers think a change is necessary?

Steve Bernstein (04:32)
Yeah, and I think there a number of answers to that, depending on who you ask, but there's certainly some data that's been put out there by proponents of the bill to at least build an argument that something is needed in order to move this process along faster. And the process we're describing is first contract negotiations, as opposed to what we might call renewal or successor contract negotiations.

So here you're dealing with an employer and a union at the earliest stages of their relationship. And there is data to suggest that on average it can take well over a year before that process that we call collective bargaining ultimately leads to a contract. And there are many who would say that that's too long, that the contract that at least in theory employees were voting on when they voted for a bargaining representative should come sooner. And so that essentially is the theory behind it. And this is not our first foray into attempts like this. We saw it with a bill called the PRO Act, which never became law, but certainly got the attention of many just a few years ago. And this is one of its chief components, it seems, as if Congress carved this piece out and put it forth as a separate bill.

Rich Meneghello (05:48)
Okay. Well that shifts us to our second thing. Let's dive in a little bit deeper about the specifics of the FLCA, Faster Labor Contracts Act. It would change the clock when it comes to negotiating the first union contracts, like you said, Steve. Can you walk our audience through the specifics of what it would do and how it would change things?

Steve Bernstein (06:13)
Yeah, and I think maybe that's a good starting point, Rich, because in many ways it would create a clock were none exists. So the way the bill, as it's currently drafted, is designed to work is that a union wins an election, assuming they do, the NLRB will typically certify the results of that election in the absence of challenged ballots or objections within somewhere around 10 days to two weeks. Once that certification issues, unions will typically in short order impose what's called a bargaining demand. They'll ask to come to the table. And the minute that that bargaining demand comes in on the heels of certification, you basically have 10 days just to get to the table. Now, 10 days may sound like an awful lot, but you have to think about the way these negotiations work. You've got participants potentially coming from all over the country. You've got first to respond to emails, reserve the room, and so forth. And so the first clock that's ticking is towards your obligation to get to the table. And that clock ticks down ten days from the date of the request.

So moving forward, let's say that you're at the table on day five, nine, or 10. The next clock starts ticking, and that is the clock that ticks towards your obligation to reach a contract before a federal mediator is appointed. That clock lasts for 90 days. So you sit down on day one, from that day on, the parties have 90 days to achieve a complete collective bargaining agreement, start to finish with all contents and presumably moving it through the ratification process, which itself can take time.

Rich Meneghello (07:56)
It's yeah, the more we hear about it, the more you peel back the layers of the onion, the more you realize how big of a change this would be. And so let's then bring to the next big change that would happen, the law also imposes a specific outcome if you *don't* reach an agreement at a certain timetable, tell us about that.

Steve Bernstein (08:15)
So if you add the ten to the 90, you're at a hundred days, right? So that's where we are at this point. And let's assume for the sake of this discussion, try though the parties might, you're now at day 100, and you know, absent an agreement on by day 100, a mediator is going to be appointed from the Federal Mediation and Conciliation Service. And that mediator would be assigned to the negotiation. Now the mediator is operating under their own clock, and that's a 30-day clock, basically to mediate the dispute and to somehow achieve what the parties themselves were unable to achieve over the prior 100 days or so, and that is to get the contract over the finish line and ratified.

Rich Meneghello (08:58)
And let's take it one step forward. What happens if we don't reach a mediated agreement in that window?

Steve Bernstein (09:05)
Now, if you're doing the math at home, we're up to day 130. At that point, the mediation process has expired, and the parties have essentially 14 days to agree on a three-member arbitration panel, to be distinguished from mediation. These are arbitrators empowered to impose a binding contract as a trio. The parties select the arbitrator, if they're unable to do so, one is essentially selected for them, each side picking one and then together picking a third. And it is that group that will now be tasked with deciding what goes in that contract with no clock whatsoever.

Rich Meneghello (09:45)
Okay, so Steve, if you could put that time frame into context, how does that square with the way you are currently seeing first contract bargaining actually work?

Steve Bernstein (09:56)
Well, it really would turn it on its head, Rich. You know, there's a saying that goes that "the most perfect negotiation is where all sides are equally miserable." And while that's you know hyperbole to some extent, there's a reason that that cliche exists. Compromise is the bedrock of our labor relations model. And it's there for a reason. It's designed basically to allow the parties, frankly, to get to know each other through potentially adversarial, even contentious circumstances, but out of that comes a relationship that is designed to stand the test of time. That's how it works today. It is give and take. It's not done under any artificial clock, recognizing that all of these situations are unique. And of course, it does give rise to at least the possibility of a work stoppage from time to time, as each side has the opportunity to exert whatever economic leverage is available to it. But more often than not, it achieves contracts, that for lack of better word, have staying power.

Rich Meneghello (10:56)
Okay, so based on all you're talking about, Steve, which sounds like essentially creating a very proscriptive structure around something that 'till now has been very loose and purposely designed with a lot of flexibility, do you think ultimately this is going to benefit unions and hurt employers, or do you think it's gonna hurt both parties?

Steve Bernstein (11:18)
You know, as written now, I think it has the potential to hurt both parties equally. And I would add that, you know, small businesses that may lack the resources of larger ones probably will pay a heavier price. But on the on the flip side, I think it's employees in many ways who stand to suffer the most. Because if they don't work with their representatives and the employer on the other side to achieve the difficult in many cases objective of an organic contract within a 120 days, they're gonna lose any influence over what goes in that contract.

Rich Meneghello (11:59)
Well, that's a great segue, Steve, to our third thing to talk about the Faster Labor Contracts Act. And that is the arbitration process itself and the arbitrators. So as you told us, if you don't reach a deal in time, this panel of three government-appointed arbitrators would end up writing your first contract that employers and unions and employees would be stuck with for two years. That seems absolutely shocking, Steve. I was, as a non-labor attorney, I was really shocked to hear like something like that could be potentially proposed and this close to actually becoming law.

Steve Bernstein (12:34)

Yeah, it's interesting and I can only assume that a lot of people maybe are missing some of the nuances of it. Maybe others are fully aware of the implications we've been discussing, but let's go back to some of the statistics that are used often to support this legislation. You know, the reality is that you've got 120 days to get a contract essentially on your own, that's four months. We know generally speaking that less than ten percent of all first contracts are negotiated within a four-month period. So if nothing else, that would also suggest that 90% give or take of all first contract negotiations would be implicated by this bill. It's simple math. So we could be entering an era where this legislation is not implemented in a graduated way, but overnight, nine out of every 10 first contracts will bear the signature of this legislation and essentially will result in artificially-imposed language from start to finish.

Rich Meneghello (13:41)
Wow. Steve, we've worked together for a while. And one of the things I think that I most appreciate about working with you, and I'm sure your clients love this about you too, is that you take a very measured approach to things. You don't overreact. You take your time and you're deliberate about them. So I know you're no Chicken Little worrying about "the sky is falling."

But with that said, can you lay out some potential nightmare scenarios that you can envision would happen if we're seeing arbitrators imposing this first time contract on parties without their specific buy-in, just being laid out to them. What sorts of things could employers need to worry about? And not just employers, both sides.

Steve Bernstein (14:26)
That's important to point that out, Rich, because there's a large number of people that will live with the consequences of legislation like this and it's not limited to employers. But you know, starting there, you certainly open up the possibility of forcing parties into multi-employer pension plans that, you know, on occasion have been known to carry with them the specter of withdrawal liability if they're underfunded. That can be a game-changing scenario in a negative way for any business from the standpoint of its contingent liability and exposure.
Beyond that, you know, you look at scenarios where the parties are required to agree to language that bears no resemblance to other union contracts within the area or potentially within their industry or even within the employer itself, if you're talking about an employer in multiple locations. You have the risk of injecting a greater cultural rift when you're carving out a contract that doesn't even take into account how employees are treated at other locations.

You may also be looking at situation where arguments or assumptions are put in force that represent an abnormally high economic package that could put the business at a competitive challenge, but conversely you could have a situation where the end result is unreasonably low package that's imposed on the parties there by hampering the ability of the employer to recruit talent over a two-year period or causing retention issues.
You know, the only other thing I would say is that we have to remember the durational impact of this binding contract is two years. And most parties, not all but most, will negotiate on average a contract of three years in duration. So you think about it, you're going to go to all this trouble, the arbitrators aren't under any timetable to get it done. And at the end of the day, they're only going to end up with a deal for two years. At that point, the two years comes and goes, and it's almost as if the parties roll up their sleeves and begin the real work of organic bargaining thereafter. But for the business, the challenge is they're duty-bound to honor the status quo by law once that contract expires. And so, you know, this notion that it stabilizes the relationship, well, I guess it's true, it'll probably reduce the likelihood of strikes in the first contract, but I imagine it'll dramatically increase the prospect of strikes over a successive contract.

Rich Meneghello (16:50)
Yeah, absolutely.

This is the FP5, and I'm Rich Meneghello here with Steve Bernstein, the Co-chair of our firm's Labor Relations Practice Group and the Regional Managing Partner of our offices in Tampa, Pensacola, and Sarasota. Quick reminder: you can find a link to an insight giving you all the details on the Faster Labor Contracts Act in the show notes.

Let's turn to thing number four, Steve. And you've sort of hinted at a few of them and we've talked about some of them, but the unintended consequences that I'm not sure that those in support of this bill and maybe some of the lawmakers who voted in favor of it completely understand, but the cruel irony is that it's called the Faster Labor Contracts Act, but in talking to you about it, it doesn't seem like there's any guarantee that this will produce faster contracts, among other problems. What are some of the issues that you see with this that you think some people might be missing?

Steve Bernstein (17:52)
Well, I think that's a good starting point, Rich, because the clock that we've talked about is turned off the moment the trio of arbitrators is appointed. And without a clock, you have to accept the fact that the real heavy lifting, if you will, of crafting and tailoring and finalizing contract terms isn't going to be operating under any timetable at all and could ultimately, you know, sit for months and years, during which at least theoretically the parties could have been doing the important work of bargaining the contract themselves and cutting a deal that lasts longer than the two years that they can provide.

So I don't wanna you know contemplate bad behavior by either side, you know we want to think the best of the stakeholders. But there's a lot at stake here. I could foresee situations where opportunists, including on the organized labor side, attempt to run out the clock, so to speak, that exists to get to the un-clocked arbitration process, knowing that there's at least a chance that something will be imposed that they perhaps might see to their benefit. Something that we have to accept might not benefit employees at all, like automatic dues deduction or in non right-to-work states, forced union membership. So you know, we have to accept that not everything that goes into a contract has a direct impact in a positive way on employees or a negative way on the employer. It's there because it helps the union administer that contract and that's a very different concept.

Rich Meneghello (19:27)
And we've been talking about when it comes to this clock hitting certain folks harder, parties harder than others, what specifically are we talking about when it comes to small businesses? I know you mentioned it a little bit earlier, but I think it's worth diving into a little deeper here.

Steve Bernstein (19:41)
Well to me it comes down to resources. And you know the reality is, our firm and certainly our labor relations group have a long, rich history of representing smaller businesses. In some ways you could argue they're not just the backbone of our firm, but the backbone of our economy. They're job creators. And by the same token, they sometimes lack the extensive resources that, you know, the Fortune 500 businesses have. It's a different dynamic, that shouldn't be news to anyone.

But against the backdrop of a bill that imposes a fairly rigorous timetable and ultimately delegates to a trio very real power over the economic future of a business, we have to assume it's the small businesses that stand to lose the most if this bill becomes law. And we know that the vast majority of unionized employers probably fall into that small business category. So when you look at a situation where a government-imposed contract could dictate two years of wages and benefits that maybe a larger business could, for lack of a better word, stomach or spread out over different cost centers, that could pose an existential threat to a business that's already operating on thin margins.

Rich Meneghello (21:00)
Okay, which brings us to our fifth and final point. you know, we're we specifically have been talking about this in the context of this could happen, this might happen, because yes, this passed the House, but it would still need to be, get through the US Senate and then be signed by the President before it becomes law, which means this is not set in stone. Certainly there's momentum behind it, but it's not law yet.

Employers do now have a voice, and they can have an impact on whether this ultimately becomes law. So Steve, let let's first talk procedurally. What's the timetable we're looking at here? What are we looking at in terms of what needs to happen for this to become law?

Steve Bernstein (21:40)
So as you point out, Rich, all eyes are on the Senate at this point. And you know, where we are at June 29th when we're recording this is we're coming up against a tight calendar. We know summer recess is on the horizon. Beyond that, we can look now just to, my goodness, four months plus away, and we're at midterm elections. There's a lot that can happen between now and then, but we know this much: the bill would have to at least obtain 60 votes to overcome the filibuster, that's not likely to change. And so when you look at the way the Senate is divided and the partisan split, it's certainly going to take some Republican votes to move through the Senate, depending on what happens in the midterms. And it's too early to know whether this is going to come up for a vote or even how it might come up for a vote. As we sit here now, we don't know, for example, whether it would be tacked down to a larger bill or voted on its own or voted at all, depending on how it might be marked up coming through the Senate, dovetailing it with the House version. And of course, there's that larger question of whether the Administration would wade into this process, which it has yet to do so. So there's a lot of unknowns from a procedural standpoint, both as to timing and ultimately what this thing looks like when it comes out the other end.

Rich Meneghello (22:59)
there any specific steps that employers can take to prepare for this becoming law, if it seems now the momentum seems like it's too much to bear and we predict this is going to become law, what are some things that employers can do ahead of time to try to perhaps maybe blunt the effect of this law from being catastrophic to their industry?

Steve Bernstein (23:19)
Good question, Rich. And I think we have to remember that this bill essentially starts on day one from the prospect of a certification of election results in favor of a labor organization. So walking backwards from that scenario, and frankly, regardless of that scenario, it's really important for all employers, I think, these days to take a hard look at their employee relations infrastructure and make sure that they're building sustainable programs that are designed to strengthen ties between employees and management and to frankly demonstrate the advantages of working directly with one another to build a better workplace. That's always been important, but I would argue it's

probably critical now and to do what you reasonably can and what's in your control as a business to assess any vulnerabilities in that department before they come to fruition.

But I'd add that, you know, this is a bargaining framework that is purported to be imposed on the parties. And so pressure-testing your readiness for that scenario is important as well. For those businesses that are hybrid and that they have unionized and non-union sectors, they need to start thinking about how this kind of model would impact them at their nonunion locations and to really consider what their first contract strategy would look like against this backdrop.

Rich Meneghello (24:44)
Amazing. Steve, we've been running this podcast now for much of the year and we've had a lot of our incredible attorneys on talking about some really interesting topics, but I think this might be my favorite episode yet. So really appreciate your time and your expertise and your analysis on this. Thanks so much, Steve.

Steve Bernstein (25:04)
It's my pleasure, Rich, thank you for having me. And we'll obviously continue to monitor this closely going forward.

Rich Meneghello (25:16)
Well, Steve, thanks again for being on the show. But before we let you go, we always want to have the audience get an opportunity to get to know you a little better in the same five question format. Are you ready for the hardest five questions you're gonna be asked now?

Steve Bernstein (25:31)
Sure thing, Rich, throw them at me.

Rich Meneghello (25:33)
All right, first one. You're a big business traveler. When you're on an airplane, window seat or aisle seat?

Steve Bernstein (25:40)
Aisle seat all the way, and if you need to use the restroom next to me you're on your own.

Rich Meneghello (25:44)
Yeah, you know, I'm a hundred percent aisle seat. I don't, literally don't understand people who are window seat people. Unless if you're over the age of sixteen, like you've seen what you're gonna see. Just enjoy the fact that you're alive in an airplane. You don't need to look out the window. Two, favorite musical band or artist, Steve.

Steve Bernstein (26:01)
I'm gonna pick a more obscure one. I'm a big music fan like you, Rich, and so this would be a very long podcast if we focused on this one. But I'm gonna pick a band out of the seventies called Big Star, which had a couple releases that no one bought until 20 years later when people like me discovered ‘em.

Rich Meneghello (26:19)
Big Star. And so I've obviously you never saw them in concert?

Steve Bernstein (26:23)

Actually I did, but by that point there are only about 50 percent of them left, so it was like half Big Star.

Rich Meneghello (26:30)
Mmm, Medium Star. Three, I know, Steve, one of your passions, so that's why I tailored this question just for you. What's your favorite wine?

Steve Bernstein (26:37)
You know, I'm constantly trying to check out new things and take one for the team, but I never go too long without dipping into a Southern Rhône, so that's my go-to.

Rich Meneghello (26:47)
Okay. You are gonna be visiting Oregon sometime soon, so I hope you have a chance to get some of the local Pinot Noir, which I'm sure you will.

Steve Bernstein (26:54)
You guys have some good ones up there for sure.

Rich Meneghello (26:57)
Related question, Steve, you have one final last meal on earth. What are you eating?

Steve Bernstein (27:02)
Well, you know, if my mom were listening, I imagine gefilte fish would be on there, but I won't touch that stuff as far as I can throw it. So I'm a carnivore and I'm gonna have to stick with a good strip steak, medium rare.

Rich Meneghello (27:16)
Okay, all right. What's on the side?

Steve Bernstein (27:19)
All potatoes, no vegetables.

Rich Meneghello (27:21)
Okay, I love it. Yeah, you don't need to eat vegetables. It's your last meal on earth. You're fine.

And finally, five, you are, like I said, a big business traveler. You're constantly visiting cities across the country, including many that have FP offices. What's your favorite city to visit that has an FP office?

Steve Bernstein (27:37)
Wow, it's a laundry list now. What are we up to about 41 or 42 and counting? yeah. I have to say until recently I would have said San Francisco because I love going back there. It's just a beautiful city. But then I had an opportunity to visit our Mexico City office, I might have to put that on the top of the list now.

Rich Meneghello (27:53)
Yeah, it's hard to beat the ambiance, the food and the hospitality of that office, because they roll out the red carpet for you, don't they?

Steve Bernstein (28:04)
They do, wonderful people down there.

Rich Meneghello (28:05)
Yeah, absolutely. Well, Steve, thanks a lot. Glad you've had a chance to be on the podcast and super happy to get to know you a little better.

Steve Bernstein (28:13)
Thank you, Rich. It's been an absolute pleasure.

Rich Meneghello (28:17)
And thanks to you for listening to the FP 5.

You can find a link to a detailed insight on the Faster Labor Contracts Act in this episode's podcast show notes, and you can keep up to date on the bill's progress by subscribing to our insight system at fisherphillips.com/subscribe. We'll see you next week.

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