A Resurrected PRO Act Could Pay Dividends For Big Labor This Time Around

Insights
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As we recently forecasted, the House of Representatives has reintroduced a bill designed to radically transform the labor relations landscape, substantially tilting the playing field towards organized labor. The "Protecting the Right to Organize Act of 2021," or PRO Act, was introduced on February 4 after an earlier version of the same legislation failed to clear the Senate last year. However, now that both houses of Congress and the White House are controlled by the Democratic party, this proposal stands closer than ever to becoming law. What do employers – both unionized and non-unionized – need to know about this startling prospect, and what can you do to help prevent it from becoming reality?

The PRO Act: A Primer

If you think you've heard about this proposal before, you're not experiencing déjà vu. The same bill was passed by the House a year ago this month. But at that time, it faced a hostile Senate controlled by the G.O.P. – which kept the proposal from reaching the floor for an up-or-down vote – and a president that would have vetoed the measure in the unlikely event it reached his desk. The winds of change have shifted, however, and we now have a Senate controlled by the Democrats by the slimmest of margins and an unabashedly pro-union president who campaigned on promises to deliver for organized labor.

So what could you be in store for if this law passes? Whether you currently operate in a unionized environment or have yet to encounter a labor union, be prepared to rethink just about everything you know about the regulatory framework governing your labor relations functions. The PRO Act would make it far easier for unions to organize your workforce, grant far more power to workers protesting working conditions, and shackle unionized businesses like never before, while undermining other longstanding employment models embedded with workplaces across the country.

Radical Shift In Union Organizing

If passed, the PRO Act would radically transform the process of union organizing, tilting the balance of power towards unions to a remarkable degree by altering seven critical steps in the organizing process.

- **Reinstalling "Quickie" Elections:** In the absence of majority card support, the PRO Act would reinstate controversial rules substantially reducing the period of time between a petition for representation and the ensuing election is held, placing employers at a significant disadvantage when it comes to educating workers on the facts they may need to make an informed decision.
- **Cutting Employers Out Of The Process:** The bill would deny employers standing to appear in administrative proceedings for purposes of challenging the petitioned-for bargaining unit or otherwise contesting the representation process. It would also give the petitioner an option to choose whether the election will be conducted electronically, by mail, or at an alternative location not controlled by the employer. If the union loses an election in which it possessed a majority of signed authorization cards, then the agency would be empowered to automatically issue a bargaining order.
- **Creating A National Gag Rule:** Further hamstringing employers, the proposed law would for the first time prohibit all businesses from convening mandatory "captive audience" meetings for purposes of sharing facts on third party representation, effectively gagging them from utilizing their free speech rights in a group setting.
- **A Return To "Micro" Units:** The PRO Act would effectively bar employers from challenging petitions for smaller, gerrymandered groupings of employees within departments or shifts that may be more sympathetic to union interests – representing a stark reversal of gains achieved by employers through the National Labor Relation Board's (NLRB's) 2017 decision in *PCC Structurals*, litigated by Fisher Phillips attorneys.
- **Expanding Pool Of Potential Union Members:** The proposed bill would substantially narrow the statutory definition of "supervisor," thereby expanding the base of workers who could organize into unions and engage in other "concerted" activities protected by the National Labor Relations Act (NLRA). It would do so by requiring only that workers devote a majority of their worktime to performing supervisory duties in order to be considered a part of management, while eliminating other key "indicia" of supervisory status such as the responsibility to "assign" and "responsibly direct" other employees.
- **Permitting Workers To Use Company Equipment:** The PRO Act would also restrict employer rights to control their own computers, equipment, and related electronic communications systems by establishing statutory employee rights to use them on premises for protected activities, absent compelling business considerations. Not only would employers be forced to allow workers to do so in union organizing campaigns, but they would also be limited in their ability to manage workplace dialogue via company-owned email, intranet, and other digital messaging platforms.
- **Compelling Disclosure Of Confidential Fee Information:** Finally, the law would revive the moribund "persuader" rule, which attempted to require disclosure of confidential information associated with fees paid to legal counsel in connection with virtually all forms advice rendered in the context of an organizing campaign.

Shifting Power To Protesting Workers

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The PRO Act would also take steps to further empower workers participating in workplace disputes – at the expense of their employers' rights to manage the workplace.

- **Permitting Secondary Boycotts:** Breaking from 85 years of established legal authority, the PRO Act would allow unions to extend economic pressure to ensnare companies that are not otherwise involved with them in a primary labor dispute. The law would eliminate the longstanding prohibition on secondary boycotts and allow unions to apply such pressure through protests, pickets and related activities.
- **Emboldening Protesting Workers:** The proposed law would encourage intermittent and recognition strikes, such as the quickie strikes of the Fight for $15 Movement, by amending federal labor law to authorize strikes regardless of the duration, scope, frequency, or intermittence.

Constraining Unionized Employers

Further, the proposed law would restrict the rights of unionized employers when it comes to several critical activities.

- **Blocking Permanent Replacements:** The PRO Act would prohibit employers from exercising their rights to permanently replace workers engaged in an economic strike. This right has long since been recognized as the employer's counter-right to the union's right to strike. Without it, strikers will always be entitled to reinstatement whenever the strike is over – regardless of whether they were replaced in the interim.
- **Prohibiting "Offensive" and Pre-Strike Lockouts**: The bill would also prohibit employers from utilizing lockouts as an offensive economic weapon, or from doing so at all prior to a strike – thereby leaving intact only the prospect of a post-strike "defensive" lockout.
- **Prohibiting Anticipatory Withdrawal of Recognition:** The bill would overturn a 2019 Board decision allowing employers to withdraw recognition in anticipation of contract expiration – compelling them instead to work through the agency's formal decertification election process.
- **Forcing Union Contracts:** The proposed law would force unionized employers to come to the table within 10 days of an initial union demand, and empower a tripartite arbitration board to impose collective bargaining agreements of up to two years in duration on all parties that fail to reach an agreement within the first 120 days of negotiations for an initial contract, depriving employers of a critical input into the terms and conditions governing their workplace against the backdrop of unreasonable union demands. The bill would also prohibit employers from implementing changes to working conditions upon reaching "impasse" in first contract bargaining – forcing them instead to maintain the "status quo" for the duration of such negotiations.

Shattering Commonplace Workplace Standards For All Employers

But the PRO Act wouldn't just impact unionized workplaces. It would completely transform workplace law for unionized and non-union businesses alike by invalidating arrangements that have become commonplace over the last several decades.

- **Broadening Misclassification Law:** The PRO Act would significantly expand the definition of "employee" to capture workers who are currently independent contractors, making it difficult for businesses to properly classify workers as such. In bringing California's ABC test to the national stage, the bill would require businesses to prove (a) the individual is free from the employer's control, (b) the service they perform is outside the usual course of the employer's business, and (c) the individual is engaged in the same trade or business as called upon to perform. This would deny many individuals their choice and ability to work independently, threatening the expanding gig economy, and eliminating business flexibility to flex their size due to growth. The bill would also make it an independent violation to misclassify workers as independent contractors.
- **Expanding Joint Employment:** The PRO Act would also codify the extremely broad joint employer standard previously established by the Obama NLRB by virtue of its decision in *Browning Ferris Industries* ("BFI"), exposing employers to liability for workplaces they don't control and workers they don't employ. Under this standard, courts and government agencies would be free to consider the exercise of control over employment terms that is either direct or *indirect,* and actual or potential, leading to a potential joint employer finding merely by establishing that a business has "reserved" such authority.
- **Prohibiting Arbitration Agreements:** The PRO Act would ban pre-dispute arbitration agreements in all workplace settings, effectively overturning the Supreme Court's landmark decision in *Epic Systems* upholding use of class waivers. Eliminating the ability of employers and employees to resolve disputes through arbitration would potentially overwhelm the court system by increasing needless and expensive lawsuits, including class action ligation.
- **Mandatory Posting Requirement:** The bill reinstates prior proposed regulations compelling employers to post notices educating employees on their rights under the NLRA, and to notify all new hires of the information on that notice with penalties of $500 for every incident of technical non-compliance.
- **Expanding Legal Exposure:** Finally, the bill would adopt never-before-seen penalties that would liquidate (double) the amount of damages (up to $100,000) for violations, in addition to providing for backpay, front pay and consequential damages. It would also create a new private right of legal action against employers directly in federal court, providing for recovery of back pay (without any reduction for interim earnings), front pay, consequential, liquidated, and punitive damages, and attorneys' fees. Punishment at such levels could have a severe chilling effect on employers seeking to assert their free speech and other statutory rights when it comes to day-to-day workplace activities.

What's Next?

It's worth noting that although it enjoys the support of the new administration, the bill faces a number of hurdles before it becomes law – chief of which is a filibuster that threatens to block any further progress on this legislation to the extent it remains in place through the current session of Congress. Even within the Democratic side of the aisle, the bill could generate opposition from some of its own moderate members. That being said, one of the chief impediments to its passage has already been removed, and the bill could receive a friendlier reception under the current political climate.

Even if the bill ultimately stalls over the coming months, its progress bears watching, as agencies such as the NLRB and the Department of Labor (DOL) could attempt to implement some of its components through exercise of their rulemaking or decision-making authority. For example, once it returns to Democratic control later this year as expected, the NLRB could choose to revisit business-friendly joint employer and independent contractor standards established under the Trump administration. Similarly, the DOL could choose to resurrect a persuader rule that was enjoined in the late stages of the Obama administration.

Regardless of whether the bill becomes law in the short term, employers are encouraged to consult with their legal counsel to devise proactive labor relations strategies tailored to the unique aspects of their workplace cultures given this rapidly shifting regulatory environment. Look for additional resources from Fisher Phillips designed to arm employers with the tools they need to weather the labor relations storm going forward. In the meantime, you may want to express any practical concerns directly to your elected representative, before this legislation threatens to undermine the interests of businesses large and small.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For guidance and support in preparing for these developments, we would encourage you to contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

This Legal Alert provides an overview of a specific federal bill. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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