

WILL BIG LABOR'S BIG WISHLIST RETURN FOR 2021? THE IMPLICATIONS OF A RESURRECTED PRO ACT ON BUSINESSES LARGE AND SMALL

Insights
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When the House of Representatives passed [the PRO Act](#) last year with the aim of overhauling federal labor law for the benefit of organized labor, we predicted the legislation would stall in the face of the Republican Senate and an administration that was unlikely to sign it into law. As we said in our February 10, 2020 alert, [Labor Gets Wishlist Bill Passed In House](#), "the chances of the bill actually becoming law in 2020 is virtually impossible. However, ... the PRO Act could serve as a harbinger for an eventual pro-labor bill that could gain traction in D.C. should there be a change in the political winds in the White House or Senate in 2020." With [the election of Joe Biden to the White House](#) and the Senate soon to be controlled by Democrats, it's safe to say that the winds have quite clearly shifted.

But although Democrats have since secured full control of Congress (albeit by the narrowest of margins in the Senate), the fate of this legislation still remains unclear. It would need to be reintroduced in the House (either in its most recent form or in some variation) before confronting the prospect of a filibuster in the Senate. And even if the filibuster is eliminated, it's uncertain whether all 50 Democratic senators most likely necessary for passage would agree to such sweeping legislation. Nonetheless, [President-elect Biden has underscored that the policy interests of organized labor will be a priority for his administration](#), and for that reason it's fair to assume that we will see a variation of this legislation reemerge in 2021. On that basis alone, it is important for all employers to understand the significance of its potential components.

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Significant Expansion Of Individual Rights

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The PRO Act contained a mind-boggling number of sweeping initiatives, many of which purported to expand the rights of individual employees. For example, the bill would have revived the more expansive joint employer definition to further the reach and impact of the National Labor Relations Act (NLRA) on businesses relying upon contingent labor. By the same token, it sought to expand the number of workers enjoying NLRA protection by narrowing the scope of “independent contractors” as defined by the Act. For all intents and purposes, this provision would have extended organizing rights to millions of “gig” workers.

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The bill also aimed to narrow the definition of supervisor to require that such individuals devote a *majority* of their worktime to performing supervisory duties, while eliminating other key “indicia” of supervisory status. The net effect of these revisions would have led to a substantially expanded base of workers enjoying the right to organize and engage in other “concerted” activities protected by Section 7 of the NLRA.

The PRO Act also sought to create a new private right for individuals to bring legal action against their employers directly in federal court. This right-to-sue included recovery of back pay (without any reduction for interim earnings), front pay, consequential, liquidated and punitive damages, and attorneys’ fees. To make matters worse, the bill would have imposed fines against employers of up to \$100,000 for labor violations.

By increasing the pool of protected workers and arming them with the right to bring individual lawsuits, the PRO Act would have drastically shifted the labor relations dynamic. The practical effects of this paradigm could very well have reinvented the role of unions in general.

Strengthening Union Power

The PRO Act contained a number of additional provisions aimed at enhancing the viability and leverage of unions themselves. Among other things, the legislation would have substantially revised NLRA Section 14(b), the provision empowering states to prohibit parties from contracting for “union security” language requiring union membership as a condition of employment – otherwise known as “Right-to-Work” laws. Instead, the Act would have been amended to

allow such agreements to require fair share fees from individuals who choose not to join unions on a nation-wide basis. Doing so would allow unions to dramatically replenish their coffers at the expense of non-members – even in Right-to-Work states.

The PRO Act also included proposed changes designed to make it easier for unions to organize employees by replacing secret ballot elections with “card check,” reinstating the bar on new elections on the heels of voluntary recognition, and overturning the recently modified “quickie” election timetables. With respect to unionized employers, the bill would have also mandated mediated consummation of CBA terms in the absence of mutual agreement, effectively putting their contractual fate in the hands of a third party.

The legislation contained additional provisions that aimed to effectively legalize intermittent strikes, secondary boycotts, and related activities, while depriving employers of their long-standing right to permanently replace economic strikers. The net impact of these provisions alone, if put into law, would dramatically tilt the labor relations scales toward the interest of organized labor at the expense of unionized employers.

Eliminating Employer Power And Prerogatives

Against the backdrop of expanded rights for unions and individual workers alike, the PRO Act would have put a corresponding end to well-established employer rights. For example, it would have prohibited employers from holding mandatory “captive audience” meetings with employees to discuss the pros and cons of third-party representation. By the same token, the bill also purported to eliminate employer rights to actively participate in representation proceedings, relegating them to the ministerial duty of providing detailed voter eligibility lists to the union – while at the same time expanding upon the circumstances triggering reporting and disclosure of legal fees.

Lastly, the PRO Act would have reinstated prior restrictions on an employer’s right to control its own computers, equipment, and related electronic communications systems by establishing statutory employee rights to use them on premises for Section 7 activities, absent compelling business considerations. The bill would have also reinstated a limited ban on class waivers within mandatory arbitration agreements.

Time To Secure A More Balanced Approach

It remains to be seen whether some or all of these legislative initiatives will see the light of day in 2021, but it's fair to assume that it will soon be resurrected or modified by the House. Given the transformational character of last year's PRO Act, it is vital for employers to convey their business concerns to elected representatives in the 117th Congress who will soon be grappling with similar legislation.

Absent material revision, the PRO Act would create a sea of change in the federal labor relations dynamic – dramatically tilting policy scales toward the interests of organized labor at the expense of the business community. All stakeholders must be attentive to any further legislative developments in the labor relations arena.

In the meantime, 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.