



# Labor Gets Wishlist Bill Passed In House

Insights

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The U.S. House of Representatives just passed a bill that would tilt the scales of labor law unequivocally in favor of organized labor. The Protecting the Right to Organize (PRO) Act would bring about a radical shift in labor relations and could even reverse the steady decline of unionization seen in this country since the 1950s. To reach this goal, the PRO Act takes aim at virtually every pro-employer right, outlawing and replacing them with a Frankenstein-like collection of pro-labor protections. What do employers need to know about the bill passed on February 6, and what could the future hold?

### Summary Of The PRO Act

The PRO Act, if passed by the Senate and signed into law by the president, would do the following:

- **Card Check:** It would resurrect a portion of the failed Employee Free Choice Act; namely “card check” organizing. This new right would rely on employee-signed authorization cards whenever a union loses an election due to alleged employer interference. The National Labor Relations Board (NLRB) would be empowered to overlook the cornerstone of our democracy, ignoring employee secret ballot results, and instead installing a union if it received a majority of the employee-signed cards.
- **Quickie Elections:** The new law would once again reduce the time from filing a union organizing petition until the required election date, reintroducing a law that was just recently trimmed back to provide more balance.
- **Secondary Boycotts:** It would allow unions to ensnare companies not involved in a primary labor dispute between its own employees and the union. The bill would eliminate the prohibition on secondary boycotts allowing unions to apply pressure through protests and pickets on any unaffiliated employer.
- **Permanent Replacements:** The PRO Act would prohibit employers from its right to permanently replace workers who are 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 this right, the employees who strike will always be entitled to their former jobs whenever the strike is over.
- **Right-To-Work Laws:** The law would eliminate all Right-to-Work laws, which protect workers from mandatory payment of union dues. This right exists in more than a majority of the states

and has existed since the Taft-Hartley Act of 1947. Right-to-Work laws prohibit the parties from compelling employees to pay union dues under penalty of termination.

- **Forced Contracts:** It would require mandatory collective bargaining agreements when the parties fail to reach an agreement during negotiations for the first contract. This would take away an employer's voice in rejecting non-competitive and unreasonable union proposals. Moreover, through the imposition of a contract, employees would lose their right to vote on whether the contract is acceptable to them. The PRO Act would set certain standards for the imposition of the contract, considering such factors as:
  - the employer's financial status and prospects;
  - the size of the employer's operations;
  - the employees' cost of living;
  - the employees' ability to sustain themselves, families, and dependents on the wages/benefits they earn from the employer; and
  - the wages and benefits other employers in the same business provide their employees.
- **Gag Rule:** The law would prohibit employers from communicating with their employees during the union organizing campaign, thereby gagging employers from educating employees with a balanced set of facts.
- **Representation Units:** It would ban employers from their ability to advocate before the NLRB concerning representation unit issues. This deprives employers of the opportunity to challenge the union's grouping of employees in a voting group, a right earned by employers in the 2017 PCC Structuralists decision litigated by Fisher Phillips attorneys.
- **Embolden Protesting Workers:** The law would encourage intermittent and recognition strikes, like the quickie strikes of the Fight for \$15 Movement, by amending the NLRA to authorize strikes regardless of the duration, scope, frequency, or intermittence.
- **Expand Penalties:** It would adopt never-before-seen penalties, as high as \$100,000, for violations of the National Labor Relations Act.
- **Prohibit Arbitration Agreements:** The PRO Act would increase needless and expensive class action lawsuits by overturning the Supreme Court's Epic Systems decision and banning arbitration agreements.
- **Persuader Rule:** It would revive the moribund persuader rule, which tried to require disclosure of attorney-client privileged information about advice during an organizing campaign in filings employers would be required to submit to the Department of Labor's Office of Labor-Management Standards.
- **Expand Misclassification:** It would expand the definition of "employee" to capture many workers who are currently independent contractors. This new law would codify California's ABC test (codified by the controversial AB-5 statute) for independent contractors by denying individuals the ability to work independently, threatening the expanding gig economy, and eliminating the

flexibility of companies to flex their size due to growth. Independent contractors would exist only if the individual is free from the employer's control, the service they perform is outside the usual course of business of the employer, and the person is engaged in the same trade or business as called upon to perform.

- **Expand Joint Employment:** Finally, the PRO Act would herald a return to the 2015 *Browning-Ferris (BFI)* "joint employer" standard which would expose employers to liability for workplaces they don't control and workers they don't employ.

### **What's Next And What Do Employers Need To Know?**

The bill passed the House last week by a vote of 224-194. However, the Trump administration has indicated it would veto it if it passed the Senate, and the Republican-controlled Senate is unlikely to put the law up for a vote. In other words, the chances of the bill actually becoming law in 2020 is virtually impossible.

However, the bill serves as a litmus test for Democrats in their support for labor's agenda in the coming election season. Moreover, 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.

Employers should pay attention to this bill and others along the same lines that will crop up in the coming months. We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or a member of the firm's Labor Relations Practice Group.

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