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July 22, 2021

Tilting the playing field toward organized labor: Congress considers the PRO Act

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Buried in the massive infrastructure bill making its way through Congress may be a big gift to Big Labor: key parts of the Protecting the Right to Organize Act, known as the "PRO Act." The PRO Act is Big Labor's top legislative priority. If passed, the PRO Act would usher in the most fundamental changes to national labor law in decades — all of them decidedly union-friendly.

Faced with a continuing decline in union membership, Big Labor's "wish list" is embodied in the PRO Act. Among its many provisions, the PRO Act would:

Make elections quicker and easier for unions to win

The PRO Act would make a number of process changes designed to tip the scales in favor of unions. For example, the PRO Act would allow unions to petition to organize "micro units" of employees selected by the union, enact the National Labor Relations Board's "ambush election" rules into law so they cannot be easily changed by a later Administration, and prohibit employers from holding required meetings for employees to educate them about their rights under the National Labor Relations Act (NLRA). Employees being asked to vote in a union election might only hear the union's sales pitch and not get a full picture of what it really means to work in a unionized workplace. Employees also would have the right to use employers' electronic communications systems for union organizing purposes.

Make it more difficult for employers to get legal advice

Big Labor has armies of organizers and lawyers, and union organizing is their business. Most employers targeted by unions are not familiar with the NLRA and do not employ lawyers. They need help understanding the law and the rules of union organizing. But the PRO Act attempts to discourage employers from getting advice — and attorneys from providing it — by requiring employers to make public filings that disclose their relationships with and amounts paid to law firms that provide any direct or indirect advice concerning union organizing. The PRO Act has been interpreted to apply to advice about such basic matters as drafting personnel policies. This causes serious issues for both employers and law firms, and makes much-needed legal advice less accessible. Passage of the PRO Act may leave employers in the dark, not knowing where the guideposts are, while unions charge ahead with a process they know like the backs of their hands.

Expand eligibility to join a union

Only "employees" may form or join a union. "Supervisors" and "independent contractors" are not "employees." The PRO Act would narrow the definitions of "supervisor" and "independent contractor," thereby expanding the pool of "employees" who can be organized. Many lower-level supervisors would become part of the bargaining unit they previously supervised. Gig workers may be granted NLRA rights overnight. More "employees" means more potential dues-paying members, and more clout for Big Labor. Fewer "supervisors" means less opportunity for employers to get their message across.

Overturn right-to-work laws

Right-to-work laws, which exist in a majority of U.S. states, protect employees from being forced to join a union or pay union dues or fees as a condition of getting or keeping a job. In other states, such as New York, California, Illinois, Massachusetts, and others, employees can be forced to pay dues or fees, or even become a union member, and employees who do not comply can be lawfully fired. The PRO Act would supersede right-to-work laws in every state.

Encourage more strikes and picketing

The PRO Act would allow intermittent strikes, which are banned under current law. Unpredictable and erratic strikes can disrupt operations far more than a continuous strike, which is already a potent weapon for labor. The PRO Act also would allow "secondary picketing," meaning a union could lawfully picket at a neutral employer to pressure it to stop doing business with the primary employer with which the union has an actual labor dispute. Under this rule, any business could find itself surrounded by a picket line if it has the misfortune of doing business with a company that is in the sights of Big Labor.

Tie employers' hands in the event of a strike

Under current law, employers may permanently replace workers who are striking for economic reasons, such as to obtain a larger raise or better benefits. This has always been considered a fundamental tradeoff of labor law: Workers can withhold their labor, but employers can keep their businesses operating by replacing the workers, either temporarily (in the case of unfair labor practice strikers) or permanently (in the case of economic strikers). The PRO Act would eliminate an employer's right to hire permanent replacements for economic strikers.

Expand employer liability for related businesses

The PRO Act would expand the possibility of "joint employer" liability for unfair labor practices committed by another employer. Under current law, one employer (such as a franchisor) could only be responsible for the alleged unfair labor practices of another employer (such as a franchisee) if the first employer has "substantial direct and immediate control" over the second employer's workers. If the PRO Act were to pass, the mere existence of reserved authority or indirect control — even if never used — would allow liability to be imposed on the second employer for the first employer's actions. Commentators have suggested this change in the law could have substantial effects on franchising and on any number of affiliated entities.

Impose arbitration of first contracts

It is not unusual for negotiation of a first contract to be a lengthy process. This is particularly true if the employer has never had unionized employees before or if the union is "homegrown" and not part of a national union. The PRO Act all but ignores the relationship-building that must occur to reach a first contract. Instead, the law would establish a "shot clock" for reaching agreement and

force the parties into "interest arbitration," where a panel of arbitrators would impose contract terms on the employer and employees.

Add monetary penalties

One of Big Labor's biggest complaints is that the NLRA does not have "teeth." The PRO Act would amend the NLRA to provide, for the first time, for monetary penalties and damages to deter employers from engaging in unfair labor practices. Liability could extend to individual directors and officers of the employer.

Looking ahead

The PRO Act has passed the House twice: first in 2019 and then again in March 2021. It remains stalled in the Senate, which Democrats control by the slimmest of margins (50-50, with Vice President Harris as the tie-breaker). To avoid an almost-certain death of the bill by filibuster, union supporters are seeking to add key provisions of the PRO Act to the "must-pass" infrastructure bill, which they hope will pass via "reconciliation" — a procedural maneuver exempt from the filibuster.

Provisions that could be included under reconciliation include the monetary penalties sections of the PRO Act. The National Labor Relations Board (NLRB) would be granted authority to impose fines of up to $100,000 in addition to collecting damages on behalf of aggrieved workers.

Big Labor remains committed to passage of the full PRO Act and is adamantly opposed to compromise: "This legislation is absolutely critical in its entirety," the Secretary/ Treasurer of the AFL-CIO recently declared. To ensure movement on its priorities, Big Labor is embarking on a major advocacy initiative directed to all 100 Senators to pressure them to pass the PRO Act. And as we've previously reported, Big Labor has a friend in the White House: President Biden has often declared his endorsement of unions and already has rewarded unions for their support during the Presidential campaign. If the PRO Act (or any of its provisions) reaches his desk, it is a certainty he will sign it.

Businesses should be prepared for more legal changes that will tilt the playing field in favor of unions.

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