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Alerts

# Why Employers Need to Pay Special Attention to the Protect the Right to Organize Act of 2021

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*Insights for Employers*

With little fanfare or press coverage, the United States House of Representatives passed a sweeping bill on March 9, 2021, that would amend provisions of federal labor law that in some cases have been in place as long ago as 1947. Called the Protect the Right to Organize Act of 2021 (PRO Act), the bill goes far beyond protecting the right to organize, as its title suggests. The bill proposes to amend the National Labor Relations Act (NLRA) in significant ways, such as limiting employer lockouts and other tools, eliminating the secondary boycott provisions of Section 8(b) NLRA, and significantly increases penalties for unfair practice violations. These changes, in effect, reverse decades-old Supreme Court precedent and recent initiatives of the National Labor Relations Board (the Board).

Employers need to be aware of the impact of the PRO Act on their operations and the rights of their employees. The PRO Act has moved to the Senate, where it faces an uncertain fate, but even if half of the bill survives, it will dramatically change the landscape of labor/management relations. In this alert, we analyze the more significant changes by category.

## New Labor Law Definitions

Section 101(a) of the PRO Act overrules a National Labor Relations Board rule and adopts the definition of joint employment from the Board's 2015 decision in *Browning-Ferris*. Under the new definition, joint employers will include those who "co-determine or share control" over employees, and relevant factors will include evidence of direct control, indirect control, reserved authority to control, or control exercised in fact. This means that if a contract between the employer and a third-party provides the third-party with authority to exercise some measure of control, the reservation of that right could be enough to establish joint employment even if the third-party never exercised its contractual right.

The PRO Act also redefines "employee" and narrows the definition of an independent contractor. Section 101(b) states that a worker is not an independent contractor unless the worker is: (1) free from the employer's control both in contract and in fact; (2) the worker provides services outside the usual course of business of the employer; and (3) the worker is customarily engaged in an independently established trade or occupation. As we have covered in prior Hinshaw blog posts and alerts, this is part of a trend with federal and state regulators to broaden protection for workers who may be

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characterized as independent contractors by employers.

The PRO Act also narrows the definition of a "supervisor." Section 101(c) states that to fit within the statutory exemption of "supervisor" and not be covered by the NLRA, the worker must execute supervisory duties for a majority of the working time. The existing definition also is modified to remove the word "assign" and the phrase "responsibly to direct" from the definition of a supervisor. This change would clarify that so-called lead persons who may assign work periodically would not be considered supervisors under the Act.

## Strikes, Lockouts, and Other Economic Weapons

The PRO Act establishes broad new rights for unions and restricts existing rights for employers. United States Supreme Court precedent established some of these employer rights over 80 years ago, and they have since remained in place. For example, Section 104(a) eliminates an employer's ability to hire permanent replacements for striking workers in an economic strike. This right, which employers have exercised since the late 1930s, would make it more difficult for employers to hire workers to continue operations during a strike.

The prevailing interpretation of the PRO Act always has been to allow the parties to exercise lawful economic weapons to advance their agenda at the bargaining table. One such economic weapon is the offensive lockout by the employer, which has been sanctioned under certain circumstances as a lawful economic weapon by the United States Supreme Court since the mid-1960s. This would no longer be the case under the current version of the bill, as proposed Section 104(b) would prevent an employer from implementing a lockout of employees before a strike by the union. The law does preserve the right of employers to implement defensive lockouts.

Section 104(d) significantly limits the types of unfair labor practices which could be alleged against unions and amends statutory provisions in place since 1947. This section eliminates Section 8(b)4 and 8(b)(7) from the NLRA, the former of which sets forth the secondary boycott prohibitions designed to protect the interests of "neutrals" to a primary labor dispute between the union and the employer. Essentially, this amendment would enable unions to picket at neutral sites such as vendors or customers of the primary employer with whom it has a dispute.

PRO Act would also ban an employer's ability to hold captive meetings during an organizational drive. For approximately 70 years, the NLRA has been interpreted by the Board and the courts to permit an employer to hold a meeting with its employees about terms and conditions of employment provided the meeting is on working time, the employer pays compensation to the employees for that time, and that there are no threats, coercion, or promises of a benefit made during the meetings. Under the PRO Act, captive meetings would be a thing of the past.

Additionally, the PRO Act would codify the Obama Board's 2011 decision in *Specialty Healthcare,* which gave unions the right to define a proposed bargaining unit for certification purposes. An employer now effectively must accept that definition unless it can show that the excluded employees have an "overwhelming community of interest" with the unit proposed by the Board.

## Limitations on Employers During Bargaining

It is difficult to determine which provisions of the PRO Act are the most business-unfriendly, but the limitations and new provisions on the bargaining process have to make the final cut. For example, Section 104(f) limits the right of employers to implement new terms of employment after an impasse in negotiations, a right recognized by the United States Supreme Court since 1962. An impasse occurs when the parties have bargained in good faith, and it is clear that continued bargaining will not result in an agreement. Under existing Supreme Court precedent, employers are free to implement enhancements to terms and conditions of employment proposed at the bargaining table and after an impasse in negotiations. Unions long have chaffed at this precedent and believe the unilateral implementation of terms and conditions upon impasse weakens the union's bargaining decision.

Section 104(g) of the PRO Act states that employers no longer can withdraw recognition of a union without a decertification election. For example, employers currently can rely upon objective evidence such as an employee petition signed by a majority, or perhaps every member of the bargaining unit, to justify a withdrawal of recognition, and, a refusal

to bargain with a union the employer knows no longer has majority support. The PRO Act would eliminate that right on the part of employers despite even the existence of overwhelming evidence that the union no longer has the support of the members it purports to represent.

Perhaps the most significant aspect of the bill is the provision on what could be called interest arbitration. It has been a longstanding principle of national labor policy that the government does not dictate the terms that a union or an employer must accept. Federal labor policy brings the parties to the bargaining table and requires bargaining in good faith, but it does not require agreement to either side's proposals. Section 104(h) of the PRO Act has new rules on bargaining for a first contract. Bargaining must commence within ten days of the union request, and if the parties still do not have a contract after 90 days, either side may request mediation from the Federal Mediation and Conciliation Service (FMCS). If there still is no agreement during that 30-day period after FMCS has been involved, the PRO Act dictates that the FMCS "shall" refer the matter to a tripartite arbitration panel, which is composed of one arbitrator selected by the union, one arbitrator by the employer, and one mutually agreed upon. The arbitration must occur within 14 days, and a majority of the panel will decide what substantive provisions will be in the contract, and those terms will remain in place for two years.

Another Supreme Court decision that has frustrated organized labor since its issuance is *Epic Systems Corp. v. Lewis,* which upheld an employer's right to use arbitration agreements that, in certain circumstances, waived an employee's right to participate in collective and class actions. Critically for employers, even non-union employers, who have used arbitration agreements featuring such provisions, this bill effectively overrules the *Epic* decision and voids the use of such waivers.

Section 105(b) states that a union would choose whether an election is conducted electronically, by certified mail, and/or at a location other than on the employer's premises. Section 105(c) removes employer standing when employees file a petition, and this would include lack of standing at hearings on determinations of which employees can vote. Why should employers not have standing on a matter that affects their operations? It is hard to articulate a good reason, but the PRO Act nevertheless limits that right.

The proposed bill even goes so far as to provide unions with an additional post-election remedy. Section 105(d) states that when the majority of the ballots in a secret ballot have been cast in favor of the employer if the union files and prevails on an unfair labor practice charge alleging interference or coercion, the NLRB "shall" order bargaining if the union before the election had a majority showing by authorization cards, which effectively allows the NLRB to overturn the election results in favor of the employer. Also, when a union receives a majority of the votes, the NLRB "shall" issue a bargaining order, notwithstanding the period for which an employer may file objections based on union misconduct.

Section 105(f) codifies the recognition, successor, remedial bargaining order bar, and contract bar provisions. It also modifies and codifies the concept of a "blocking charge," which would delay an election upon the filing by the union of an unfair labor practice charge. The election would be delayed until the unfair labor practice charge is decided.

## Labor Organizing and Use of Employer Property

Under the Obama Board, a decision known as *Purple Communications* was issued, which gave employees significant rights concerning the use of an employer's email and other systems to organize or otherwise engage in protected concerted activities. A recent decision of the Board under the Trump administration rolled back *Purple Communications* consistent with prior longstanding Board precedent. This recent decision was opposed by organized labor, and 104(k) of the PRO Act seeks to codify the decision of the Obama Board in *Purple Communications*.

## Remedies

Unions have long been dissatisfied with the remedies available to the NLRB to address unfair labor practices by employers. The PRO Act states that employees shall receive back pay "without reduction for interim earnings" in determining liability. The bill also provides for consequential damages and liquidated damages which is defined as two (2) times other damages. The decision also reverses the 19-year-old *Hoffman Plastics* Supreme Court decision, which held undocumented workers are entitled to the protection of the NLRA but are not entitled to back pay damages as they could not have lawfully earned them.

Section 109 of the PRO Act institutes various financial penalties, including a $500.00 penalty for failure to post information appropriately. More significantly, concerning employee rights under Section 109(b), the Board may impose a civil penalty not to exceed $50,000.00. That amount could be doubled if the employer committed "another such violation within five years." Section 109(c) also provides a private right of action if the NLRB does not seek injunctive relief and allows an employee to bring an action in district court. The PRO Act also "requires" the NLRB to seek temporary injunctive relief if there is a "reasonable basis" for an unfair labor practice charge. This could mean that an employee discharged for cause could be ordered reinstated while the Board investigation and complaint process continues.

## Right to Work Limitations

So far, 28 states have declared themselves so-called "right to work" under Section 14(b) of the NLRA. The practical import of this action is that employees cannot be required to pay union dues to work at an employer or be part of a bargaining unit. Nevertheless, a union must provide services to those dissenting employees for grievance/arbitration and collective bargaining purposes. Unions have long characterized state right to work provisions as enabling "freeriders," and with good reason. Unions have to provide services, but employees are not required to pay dues, even in an amount to compensate unions for the services. Section 111 of the PRO Act deals with fair-share and "permits" employers and unions to voluntarily agree to a fair-share provision which then would be binding on a dissenting employee.

## Employer Rights Limited

The bill also strips employers of other rights. Section 201 of the PRO Act Bill takes away an employer's right to a private right of action to sue a union for unlawful secondary activity. With the elimination of the secondary boycott provisions under Section 8(b), that right is now superfluous, so why not clean up those messy employer rights. Section 202 requires employers to identify "consultants" who provide services to employers to persuade employees during an organizational drive, train employees, and even those who draft employer policies.

Likely anticipating that much of this bill might be unconstitutional, the House included Section 303, which addresses severability. In other words, if any section of the PRO Act is struck down, it would not affect the other provisions of the overall bill.

Despite the significant amendments and departures from established labor law, the PRO Act passed the House quickly and relatively unnoticed. It likely will be revised in the U.S. Senate, where more moderate voices exist, and the composition of the chamber is divided equally. It is difficult to assess how much of the PRO Act House advocates believe will actually pass. However, even if some of the bill survives, it will represent a drastic revision of labor law and federal labor policy.