



A Robinson+Cole Legal Update

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U.S. House Passed the PRO Act: How It Could Affect the Future of Labor Law

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On March 9, 2021, the United States House of Representatives passed the Protecting the Right to Organize (PRO) Act. The PRO Act (the Act), if it becomes law, would make vast, union-friendly changes to the National Labor Relations Act (NLRA). The House originally passed the Act in 2019, but it did not make any progress in the Senate. This time, its fate may depend on whether the Senate eliminates the filibuster. Even if the Act doesn't get through the Senate in its entirety, it may be possible for parts of the Act to pass the Senate and reach President Biden, who has already spoken emphatically about his support for unions and union organizing.

Passage of the PRO Act would represent the biggest change in labor law in decades. Below is a summary list highlighting some of the changes the Act would bring to existing labor law.

- **Extend joint employer liability.** A joint employer is held jointly and severally liable for the unfair labor practices committed by an employer if the joint employer possesses “substantial direct and immediate control” over the employer’s employees. The PRO Act would extend liability for joint employers by creating liability based on the mere existence of reserved or indirect control over the employer’s employees.
- **Expand “employee” definition by narrowing the definition of both supervisors and independent contractors.** The NLRA governs employees rather than supervisors or independent contractors, and the PRO Act would redefine who qualifies as a supervisor and an independent contractor. As to the definition of a supervisor, the PRO Act eliminates two elements of the current definition (“assign” and “responsibly direct”) and requires that a supervisor act in that capacity for a majority of their work time. For independent contractors, the Act implements the “ABC” test. To be classified as an independent contractor, the ABC test would require that a worker be free from the purported employer’s control, operate outside the typical course of the purported employer’s business, and be customarily engaged in an independent trade. With this test, the NLRA would likely cover gig workers, such as Lyft drivers and Instacart shoppers.
- **Implement numerous changes to union election rules.** The PRO Act would codify the National Labor Relations Board’s (NLRB) 2015 “quickie” election rules (which means a union election could take place within as little as 13 days from an election petition), would permit unions to petition for units of very small groups of employees, and allow the petitioning union to specify the location of the election or to specify that the election be conducted by mail or electronically. Employers also would no longer be a “party” in NLRB election proceedings, nor could employers require employees to attend meetings to educate them about their options and rights with respect to the union election or what it means to be part of a union.
- **Eliminate right-to-work protections.** Currently, 27 states have established right-to-work protections that prohibit employees from being compelled to pay union dues or fees as a condition of their employment. The PRO Act would allow unions to insist that a collective bargaining agreement compel all employees in a bargaining unit to pay union dues or fees, even if they do not want to.
- **Allow more picketing and more strikes.** The NLRA permits only picketing when it is directed at a primary employer with which the union has a lawful dispute. The PRO Act would permit secondary

picketing, meaning that unions could picket a neutral employer for the purpose of pressuring it to cease doing business with the primary employer. The PRO Act also would expressly permit intermittent strikes.

- **Eliminate an employer's right to permanently replace economic strikers and prohibit offensive lockouts.** This change would overturn long-standing U.S. Supreme Court precedent on the right of an employer not to discharge workers whom it has hired during a strike.
- **Mandate interest arbitration for initial contracts based on nebulous factors.** The PRO Act would allow an arbitration panel to decide the terms of an initial collective bargaining agreement if the parties fail to reach an agreement within as little as 120 days. The Act also specifies the factors on which the panel shall base its decision about the contract's terms. Those factors include not only the employer's financial status, but also its "prospects," as well as the employees' ability to sustain themselves, their families, and their dependents on the wages and benefits offered by the employer. Those initial terms would be binding for two (2) years.
- **Enhance remedies and penalties.** The PRO Act would allow for liquidated damages, civil penalties (which can be doubled if there was another violation in the last five years), and statutory remedies for cases of discrimination and retaliation. Under the Act, the NLRB could hold directors and officers liable for civil penalties in situations in which they directed or committed the violation, had established a policy that led to such a violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation, among other things.
- **Dissuade legal advice.** The PRO Act would require employers to report any arrangement, including an engagement with a law firm, that "directly or indirectly" attempts to persuade employees on how to exercise their rights under the NLRA, including advice concerning the drafting of personnel policies. This change likely would require extensive reporting measures for any legal advice that could be interpreted as persuading workers with respect to whether to join a union.

Any one of these changes would be significant. Robinson+Cole's Labor and Employment Group is monitoring further developments on the PRO Act's progress, if any, through the legislative process.

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