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Labor Law Reform On the Horizon: Ten Things to Watch Under the PRO Act

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Practice Area: Labor and Employment

On March 9, 2021, the House passed the Protecting the Right to Organize (PRO) Act of 2021. Although supported by President Biden, the PRO Act now must pass the Senate, where it is anticipated to meet stiff Republican opposition. If enacted into law, the PRO Act would be the most significant labor law reform in the United States since the World War II-era Taft-Hartley Act and the 1935 Wagner Act, which created the National Labor Relations Board ("NLRB") and first granted private sector employees the right to form and join labor organizations ("unions").

The United States House of Representatives passed an earlier version of the PRO Act in February, 2020, but the Senate declined to take further action at the time. While certain major business interests, such as the U.S. Chamber of Commerce, are opposed, President Biden has voiced his support for the PRO Act. At present, it is uncertain whether the PRO Act will become law—and if so, in what form.

If enacted, the PRO Act would result in sweeping changes to the National Labor Relations Act ("NLRA"), including drastically expanded damages, fines, and civil penalties—in some cases imposing personal liability on company officers and directors—as well as expanding pro-employee and union protections. The following is a summary of ten key areas employers should be aware of under the PRO Act.

1. End of State Right-to-Work Laws
Currently, the NLRA allows states to ban the payment of mandatory union dues in order to work for an employer. Such states are often referred to "right-to-work" states. In "right-to-work" states, employees are free to choose whether they wish to pay union dues, but the dues payment cannot be a condition of employment. Currently, 27 states, including Wisconsin, have opted for "right-to-work." The PRO Act would amend the NLRA to invalidate state right-to-work laws. Under the PRO Act, unionized workplaces could require payment of union dues pursuant to "union security clauses" designed to enforce payment of union dues for bargaining and other representational functions. The price for failure to pay is steep; employees who decline to pay—regardless of their right-to-work—are subject to termination under the "union security clause."

2. Striking Employees Can No Longer Be Permanently Replaced
Currently, employers have the right to "permanently replace" employees who go on strike in support of their union. During strike situations, employers are often able to obtain replacement workers in order to maintain continuity of operations during the strike. Under the PRO Act, employers will lose the right to permanently replace employees who go on strike during collective bargaining. Instead, employees can walk off the job to obtain increased pay and benefits with the assurance that they can return to work whenever they want. The loss of the right to permanently replace employees is anticipated to give unions a serious advantage in collective bargaining negotiations, especially since the PRO Act will also allow intermittent, partial, and other types of "wildcat" strikes.

The expansion of the union's economic weapons will be exacerbated by narrowing those of the employer. The NLRA has long recognized that employers should have a counterpart to the economic strike by employees; just as employees may withhold their labor, employers may "lockout" employees in connection with collective bargaining to even the playing field. The PRO Act could take the lockout option away from employers in certain strike situations, further tilting the balance of power towards the union in negotiations.

3. "Secondary" Strikes and Boycotts Will Be Fair Game
In order to maintain economic peace and stability, as well as fairness in labor disputes, the NLRA has long prohibited "secondary" strikes and boycotts against third party employers and contractors. Under these "secondary" rules, unions are required to direct their strikes and economic actions at the "primary" employer whose employees they represent. Indeed, it is unlawful for unions to picket and boycott "secondary" employers, such as contractors, vendors, and other businesses, in order to exert bargaining pressure on the primary.

The PRO Act would legalize "secondary" strikes and boycotts. This no-holds-barred approach will mean that neutral "innocent bystander" employers, such as vendors, suppliers, and neighboring businesses, who have nothing to do with a particular labor dispute, can be picketed and boycotted by unions in order to exact bargaining demands from employers from completely different companies. This means that under the PRO Act, even if your employees did not choose to be represented by a union, you could find your business subject to strikes and boycotts without any way to protect your business.

4. Eroded Distinctions Between Employees, Independent Contractors, and Supervisors
The NLRA has long recognized that only employees, as opposed to managers, supervisors and independent contractors, have the right to form, join, or assist unions. Therefore, the definition of "employee" and "supervisor" under the NLRA has been a critical issue. Unions have long pushed for legislation to expand the definition of "employee" and limit the definition of "supervisor" to bring a greater number of individuals under their sway. Independent contractors are also currently exempt from the scope of the NLRA.

The PRO Act would expand the definition of "employee," adopting the California "ABC" test to exclude most workers from exempt independent contractor status. The PRO Act would also require employers to act at their peril, even if acting in good-faith; employers found to have mistakenly classified their workers as independent contractors would be in violation of the NLRA. As most employers know, the distinction between an employee and an independent contractor is inherently fraught with uncertainty. Placing the onus on the employer to get it right at the outset is likely to result in employers "erring" on the side of caution, often contrary to the intent of the individual and the employer.

The PRO Act would also narrow the definition of "supervisor" making it more difficult for an employer to classify its front-line supervisors and management as exempt from union-coverage—for example by removing the "assign" and "responsibly direct" functions from the definition of "supervisor."

The PRO Act would also expand the concept of a "joint employer" under the NLRA. Currently, employers, such as franchisers, are only liable for the acts of their franchisees or contractors if they both directly control the terms and conditions of employment of the employees. The PRO Act would restore the 2015 Browning-Ferris decision that subjected employers to "joint employer" liability even if the two entities did not directly control the terms and conditions, instead exercising "indirect" control, even if unexercised and only "reserved" in a contract. Therefore, franchisers and employers could be held responsible for violations they did not actually commit themselves. In light of the greatly increased damages and penalties under the PRO Act (which will be discussed below), this is a significant source of potential legal exposure.

5. Federal Arbitrators to Impose Terms of Labor Contracts
The NLRA has long recognized the basic principle that collective bargaining is a negotiation between the union and the employer for a labor contract whose content is determined by—and only by—the parties themselves as a product of their own private negotiations. Pursuant to this private negotiation principle, while both sides are required to bargain in good faith to reach an agreement, the NLRA does not "compel either party to agree to a proposal or require the making of a concession." Accordingly, newly certified or recognized unions bargain with employers to reach an initial agreement. If the parties are unable to reach agreement after good faith bargaining, the NLRA allows the employer to implement its last, best and final offer given a legitimate bargaining impasse —whether further bargaining would be futile.

The PRO Act would change all this if adopted. In first contract situations, an "interest arbitration" model—common with public sector and government unions—will be adopted. If the employer does not agree to union demands within 30 days of a request for mediation, federal arbitrators will be empowered to set the terms of the agreement, taking into account such factors as the employers' size and ability to pay, and the cost of living of the employee and their families, as well as comparator information in the area and industry. For the first time, federal employees will impose the terms and conditions of employment in private workplaces, regardless of business needs.

6. Mandatory Arbitration Agreements and Email Systems
The PRO Act contains several provisions that would erode the employer's right to run the business and maintain the workplace. The Supreme Court's 2018 *Epic Systems* decision legalized mandatory arbitration agreements that require employees to submit all employment-related claims, including class and collective actions, to arbitration. The PRO Act would overturn *Epic Systems*, and invalidate such mandatory arbitration agreements, subjecting employers to defend costly class action litigation in court.

The PRO Act would also provide employees with the right to use employers email and electronic communication systems for union and other organizing activities, absent a compelling business reason. The Obama-era NLRB administered this same standard to routinely invalidate employer electronic communications policies. But this time, any violations would come at a considerably higher cost in the form of punitive damages and civil penalties, and even personal liability (see section 9 below).

7. Quickie Elections and Card Checks
The PRO Act would bring back the Obama-era "quickie" election procedures, where pre-election hearings were set for eight days after the union files for recognition with the NLRB. Employers will have only 20 days—at most—to prepare for the pre-election hearing. But the PRO Act goes further, removing employer input in setting how the employee election proceedings will proceed, and granting the NLRB discretion to allow unions to determine the key parameters of the election, such as date(s), method (mail-in versus in person), and location.

Moreover, the PRO Act would expand union rights to "cherry pick" the employees they wish to represent and exclude other employees despite having a community of interest. The PRO Act would reverse the NLRB's 2017 *PCC Structurals, Inc.* standard and restore the Obama-era standard, which allows unions wide latitude in excluding "undesired" groups of employees from representation.

When it comes to elections, the NLRB has long recognized that Board-supervised elections, conducted to protect employee free choice, are the preferred method of union certification. However, the PRO Act provides that if a union loses the election, the NLRB may set aside the results of the election and certify the union as the representative on the basis of union authorization cards submitted by employees to the union at any time over the past year.

8. Blocking Charge Policy
Union representation is premised on majority-support. Under the NLRB's previous "blocking charge" policy, employees often sought in vain to get to a vote to remove a union that has lost its majority. The PRO Act will reinstitute the NLRB's old "blocking charge" policy. Under the "blocking charge" policy, employees who wished to ask the NLRB to remove ("decertify") the union where the union had lost a majority of support would often never get to an election. This was because the union could file an indefinite series of unfair labor practice charges, "blocking" the de-certification election from taking place for extended periods of time, for months, even years.

9. Punitive Damages, Civil Penalties, Personal Liability, Private Right of Action
Punitive damages and fines were never part of the NLRA's enforcement scheme. Instead, the purpose of damages was to restore the status quo and make an employee whole for any losses. In extreme cases of widespread unfair labor practices, injunctive relief could be available to the affected employee or union. Experience showed that make whole remedies and orders to restore the status quo were best suited for maintaining productive labor-management relations, where the grievance and arbitration process—private dispute resolution between the parties—was the default method of solving problems.

The PRO Act would rework this make-whole enforcement scheme into a punitive measure to punish employers for even technical and minor violations, such as failure to post a notice or missing a deadline to provide information to the union by a day or less. Instead of restoration of the status quo, the PRO Act provides for front pay, consequential damages, and punitive and double damages in the form of "liquidated damages." Interim earnings and failure to look for work by employees will not be taken into account, providing employees with possible windfalls in NLRB settlements.

In addition to punitive damages for affected employees, for the first time, employers would be subject to additional penalties for violations, such as a continuing $500 a day violation for failure to maintain the NLRA rights notice. A civil penalty for each violation up to $50,000 ($100,000 in cases of previous violations) will be imposed—over and above damage awards paid to employees.

Moreover, the PRO Act provides that directors and officers may be subject to personal liability for these civil penalties in cases where the director or officer directed or committed the violation, established a policy leading to the violation, or had actual or constructive knowledge of the violation and failed to prevent it.

The PRO Act also grants employees a private right of action to sue their employers in court in the absence of NLRB injunction litigation, in addition to NLRB charges, where employees will be able to recover attorney fees and costs if they prevail, in addition to punitive damages.

10. Mandatory Injunctions in Discharge and Other Cases
Under Section 10(j) of the NLRA, the NLRB has exercised its discretion to seek federal injunctions as an extraordinary remedy in cases of widespread unlawful conduct. In practice, NLRB injunction litigation was relatively unusual, reserved for the worst offenders.

The PRO Act would make injunctions the norm. Specifically, in any case involving allegations of discharge or "other serious economic harm to an employee," the NLRB Regional Office is directed to forego a full investigation, and instead engage in a quick "preliminary" look at the case. If the Region believes, based on this preliminary investigation, that there is "reasonable cause to believe such charge is true," the Region is required by law to seek federal injunctive relief as a matter of course—before even deciding the merits of the case.

Not only does the PRO Act make injunctions routine; they would also be routinely granted. The federal district courts are required by the PRO Act to grant the injunctions before the merits of the case are actually given their day in court. The only time a federal district court may deny the injunction is when the court "concludes that there is no reasonable likelihood" that the NLRB will actually "succeed on the merits" of the case. In other words, the injunction will be granted unless it is impossible that the NLRB would win its case. And all of this injunction litigation would take place without a full investigation of the merits of the charge.

Conclusions and Take Aways
The foregoing is merely an overview of the changes proposed by the PRO Act; changes which would drastically change the landscape of employer/union relations. The deck will be stacked against employers in NLRB proceedings and in federal court on the passage of the PRO Act.

It is important for employers to re-assess their labor/management relations policy. This begins with its union-free policy and continues to its negotiation strategies. Longer-term contracts may help to blunt the volatility that could result from labor unrest, from which an employer may have few defensive options. Regardless, employers should evaluate their vulnerabilities under the law, if passed, and the steps to be taken now to avoid the appearance of union animus in its policy adoption and administration.

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