

# PUBLICATION

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## Proposed PRO Act: An Act to Follow

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**The Protecting the Right to Organize Act (PRO Act) was passed by the U.S. House of Representatives on March 9. While it previously passed the House last year, this time around it has significant backing from the Biden Administration, but it faces overwhelming odds in the Senate under the current filibuster rules.**

The PRO Act, if passed in the Senate, would represent one of the most sweeping pro-union reforms in decades and would drastically expand the current National Labor Relations Act (NLRA) in a way that favors unions, with expanded damages for violations, including potential individual liability. In light of President Biden's expressed support for the PRO Act, employers need to be aware of dramatic changes to the current statutory scheme if Congress succeeds in passing it. Below is a summary of just some of the sweeping changes proposed by the legislation.

### What Does the Proposed PRO Act Do?

**Limits State Right-to-Work Laws.** Many states have current "right-to-work" laws that prohibit unions from forcing employees to contribute dues to a labor organization providing representation to the employer's workforce. The proposed PRO Act would allow unions to require all employees in a covered bargaining unit to contribute dues to the labor organization, regardless of any state law to the contrary. This provision would significantly expand a union's ability to gain funding to conduct various organizing activities.

**Expands the Definition of Joint Employer.** The PRO Act would expand the current definition of joint employer to any entity that "codetermines or shares control over the employee's essential terms and conditions of employment." The definition also would allow the National Labor Relations Board (NLRB) to consider both "direct and indirect" control over the terms and conditions of employment. The proposed expansion of the definition to the previous definition created by the NLRB's 2015 Browning-Ferris opinion would significantly increase the likelihood that certain entities, like those in franchisor-franchisee relationships, would be considered to be joint employers. This could expand potential liability to a wide range of additional entities.

**Expands the Definition of Employee.** The PRO Act, if passed, also expands the definition of "employee" so that it would be harder for employers to exclude individuals from the definition as independent contractors. To be considered an "independent contractor," the individual would need to perform a service that is "outside the usual course of the business of the employer." If an employer misclassified the employee as an independent contractor, the employer could be found to be in violation of the NLRA. This provision would make the stakes regarding classification of employees or independent contractors much higher. The change could have a sweeping effect on millions of workers currently participating in the "gig" economy as independent contractors.

**Limits the Meaning of "Supervisor".** The current NLRA excludes "supervisors" from union coverage. The proposed PRO Act would redefine "supervisor" so that those individuals who "assign" work to others or who responsibly direct the work of others would not necessarily be considered "supervisors" excluded from the protection of the Pro Act. Therefore, more employees would be eligible for union rights.

**Limits Actions Employers May Take Against Striking Employees.** Under the proposed PRO Act legislation, employers would commit an unfair labor practice if they replaced or discriminated against

employees who participate in strikes. Further, employers would no longer have the right to permanently replace those employees. This drastically reduces the risk to employees who choose to participate in strikes, as they can return to their positions without loss of pay and benefits.

**Limits Employer Rights to Speak to Employees in "Captive Audience" Meetings.** Under the current statutory regime, employers may require employees to attend meetings where the employer can discuss the pros and cons of union representation. The proposed PRO Act limits the ability of employers to require employees to attend such meetings. Employers would commit an unfair labor practice if they require or coerce an "employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties . . ." Thus, employers would have fewer opportunities to influence employee decisions regarding union status.

**Allows an Arbitration Panel to Determine the Rights of the Parties if They Fail to Agree.** Previously, employers could not be forced to accept terms and conditions of a bargaining agreement if the parties were unable to reach an agreement following good faith bargaining efforts. Under the proposed legislation a federal arbitration panel would be allowed to set the final terms and conditions of the bargaining agreement for a period of two years if the parties cannot reach an agreement regarding the applicable contract terms. The appointed arbitration panel would be empowered to consider such factors as the employer's "financial status and prospects"; "size and type of the employer's operations and business"; employees' "cost of living"; employees' ability to sustain themselves and their families on wages earned; and the wages and benefits of comparable employers.

**Limits Employers' Ability to Require Arbitration Agreements.** The proposed PRO Act limits the ability of employers to require employees to enter into agreements to arbitrate disputes by making it an unfair labor practice to force employees to waive their rights not to litigate disputes in court. This provision could increase the litigation costs for employers tremendously by forcing them to defend expensive class action suits in court.

**Expands Employee Access to Information and Use of Employer Electronic Communications.** The proposed PRO Act provides that employers are required to post notices relating to the protections provided under the Act. It further requires that an employer who is directed to undertake an election regarding union representation must provide a voter list to the labor organization that is petitioning to represent the employees, including home addresses, work locations, shifts, job classifications, phone numbers, and personal email addresses. The legislation also would require that an employer allow employees to use the "electronic communication devices" of the employer, including computers, laptops, internet access, email and company cell phones, to engage in protected union activities unless the employer can demonstrate a "compelling business rationale" for limiting such access.

**Expands Damages for Violations.** The PRO Act further expands the potential damages available for violations of the law and unfair labor practices. Such expanded penalties include increased penalties of \$50,000 for each violation and as much as \$100,000 for violations that result in the discharge of an employee or other serious economic harm to the employee. Directors and officers may also be personally liable for violations. Other available damages include back pay, front pay, consequential and liquidated damages, attorneys' fees, and punitive damages.

## Takeaway

Due to the enormous impact passage the PRO Act could have on employees' rights to organize, employers should pay close attention to whether this legislation moves forward in coming months. If passed in the Senate, it may have a momentous impact on the ability of employees to organize collectively through the use of unions. Therefore, the PRO Act is one important act to follow.

We will continue to alert you to developments regarding this legislation and its potential impact on employers. If you have any questions about the PRO Act, please contact the author or your Baker Donelson attorney.