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How the Protecting the Right to Organize (PRO) Act of 2021 Is Likely to Affect Employers Across All Industries

The Protecting the Right to Organize Act of 2021 (PRO Act), passed by the United States House of Representatives on March 2, 2021, has made its way to the United States Senate.

Enactment of the PRO Act would bring about the most significant changes to labor law in the United States since the National Labor Relations Act (NLRA) was passed during the Great Depression era. The PRO Act adds, amends, and rescinds more than fifty provisions of the NLRA, in addition to overturning well settled United States Supreme Court precedent. President Biden affirmed that he would sign the bill into law, and with Democrats holding a majority in the Senate – unless a filibuster occurs – the PRO Act is poised to pass.

While select provisions of the PRO Act are discussed in this alert, we encourage employers to be aware of all changes in the new law as its implications are far-reaching, and impact not only unionized workforces, but non-union employers as well.

I. Limiting Independent Contractor Classification

One change that is certain to affect employers in many industries is the PRO Act's requirement that the "ABC" test be used when determining whether a worker is classified as an independent contractor. The ABC test is considered much narrower that the more widely applied "economic realities" test.

Under the ABC test, it is presumed that a worker is an employee unless the employer demonstrates that:

(1) the employer neither exercised control over the worker nor had the ability to exercise control in terms of the completion of the work;

(2) the services provided were either outside the usual course of business or performed outside of all the places of business of the enterprise; and

(3) the individual is customarily engaged in an independently established trade, occupation, profession, or business.

Under this test, classifying an individual as an independent contractor will become increasingly difficult. The PRO Act's expansion of the definition of an "employee" is likely to disrupt entire industries, including those that operate in the "gig economy" space, which is mostly comprised of individual laborers such as Uber drivers and other freelance workers.

II. Joint Employer Liability

Another change of which employers should be aware is the PRO Act's expansion of joint employer liability, which may have particular importance to the contracting community. Under the PRO Act, liability for unlawful labor practices may be extended to an employer merely based on reserved or indirect control over another employer's employees. Essentially, an employer will be deemed to be jointly and severally liable for the acts or omissions of a joint employer under this meager standard.

The definition of a "supervisor" has also been narrowed, meaning that an employee solely with the authority to "assign" work may not necessarily be considered as a "supervisor" who is excluded from the PRO Act's protection related to employees' rights to organize and collectively bargain in the workplace.

These changes are likely to have a heightened impact on the construction industry as it relates to the general contractor and subcontractor relationship. Unless the structure of these types of employment relationships are altered, joint employers are likely to face increasing exposure to liability under the new law.

III. States' Right to Work Protections and Union-Related Impacts

The PRO Act also removes the ability for individual states to establish "right-to-work" protections. There are presently 27 states that prohibit unions from forcing employees to pay union dues or fees. Under the PRO Act, unions are permitted to require that a collective bargaining agreement, to which an employer is signatory, compel all employees of that employer to pay union dues or fees, even if an individual employee has no interest in being part of the union.

Moreover, the PRO Act allows union members to engage in "intermittent strikes," and even "secondary picketing," where unions picket a neutral employer for the sole purpose of strong-arming that employer from doing business with an employer with whom the union has an issue. These types of strikes and picketing are prohibited under the NLRA as it exists now.

Additionally, employers previously had the right to retain workers it hired as replacements for striking workers instead of hiring the striking workers back (i.e., a "lock out"). However, the PRO Act prohibits an employer from permanently replacing its workers who are on strike with new employees.

Other notable provisions include limiting the ability of employers to contest union election petitions, restricting and requiring reporting of any legal advice that either "directly or indirectly" relates to employees exercising their rights under the NLRA, facilitating union organizing in micro-units, affording employees the right to utilize employer electronic systems to organize and engage in protected concerted activity, prohibiting employers from using mandatory arbitration agreements with employees, and forcing parties into collective bargaining agreements via interest arbitration (i.e., a mechanism for resolving a bargaining dispute when an employer and union are at an impasse).

IV. Final Thoughts

Finally, it is also important to note that the PRO Act significantly expands available penalties for violating the NLRA, including the ability for individual employees to seek back pay, front pay, consequential damages, liquidated damages, punitive damages, attorneys' fees, civil penalties (that are subject to be doubled if the employer has more than one violation in five years), and statutory remedies for cases involving discrimination and retaliation.

Directors and officers may also be subject to liability for civil penalties if they personally directed or committed the violation, 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 circumstances that could give rise to liability.

Employers will need to consider more than a few limited adjustments if the PRO Act is passed. A well-conceived program and strategy to ensure compliance, including new strict reporting and requirements related to securing legal advice in matters of labor relations, will be required. Existing policies and contracts may require modification and new ways of doing business may need to be explored to bring the employer into compliance with the new law's myriad and complex facets.