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The Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), a bill that amends the National Labor Relations Act (NLRA)

In addition to sidelining employers from the legal process

Finally, in the (likely) event that an election under PRO Act rules results in a union win, employers will have limited leverage to obtain reasonable terms in first contract negotiations. In addition to the broad picketing and strike rights discussed below, a newly-certified union would have the ability to force the employer to interest arbitration after a period of approximately 120 days, thus guaranteeing a contract before decertification could occur, likely on relatively favorable terms.[3] Unlike the current and longstanding system under which parties bargain for as long it as takes to get a first contract, the PRO Act would allow either party to force non-binding mediation after 90 days of failing to agree to a contract. If the parties are unable to reach an agreement within 30 days of initiating the mediation process (or after an additional period of mediation agreed upon by the parties) , the negotiations would be sent to interest arbitration. There, an arbitration panel (which may or may not have any meaningful knowledge of the employer's business and industry) would decide the terms of the Agreement on the basis of several factors, including the employer's finances, "employees' ability to sustain themselves, their families, and their dependents," and the wages and benefits provided by competitors. The PRO Act would require that the arbitration process be completed within 120 days, all but ensuring that a contract will be completed within one year. Undoubtedly, this process would require employers to disclose sensitive financial information to the arbitration panel and the union. This arbitrator-created contract would remain in place for a period of two years. The uncertainty and risk of this process would no doubt result in some open-shop contractors agreeing to standard area agreements in order to avoid the possibility of an even worse result.

**Effective Nullification of State Right-to-Work Laws**

Currently, many states maintain "right-to-work" laws, which prohibit employers and unions from agreeing to "union security" or similar clauses mandating that all bargaining unit members pay dues and fees to the union as a condition of employment. While the NLRA itself and Supreme Court precedent do not permit a requirement of union membership as a condition of employment, the issue of union security clauses or so-

union (where the employer has not already recognized another union or had an election in the last 12 months), but only for 30 days without filing a petition for an election. It allows picketing to truthfully advise the public that an employer does not have a contract with a union, but only if the picketing does not have

context strikes have not been common, although they have seen an increase in recent years

Furthermore, the PRO Act would authorize civil penalties, in addition to any other remedy, of up to $50,000 per violation and up to $100,000 in certain cases (discrimination, retaliation, or cases of discharge or "other serious economic harm") where a previous violation has been found in the preceding five years. The PRO Act also allows for an employer's directors and officers to have personal liability assessed against them for civil penalties if they directed or committed the violation, established a policy that led to the violation, or had actual or constructive knowledge of and authority to prevent the violation and failed to do so. Because at least

The PRO Act would also amend the NLRA to cover many workers currently classified as independent contractors. While the NLRA will continue to cover only employees and not independent contractors, the PRO Act adds a new, more stringent test for determining who qualifies as a statutory "employee." Under this so-called "ABC" test (because of its three conjunctive parts), a worker performing "any service" for an employer is considered (i.e., presumed to be) an employee unless (A) the worker is free from direction and control both under any contract and in fact, (B) the work that is being performed is outside the course of (i.e., different than) the employer's usual business, and (C) the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the work being performed. The test is conjunctive because all three parts must be met in order to exclude the worker from the presumption of being an employee. The first and third (A and C) factors are common independent contractor traits – free from direction and control and engaged in an independent trade or business; however, part B is the real bee in the bonnet here – if the work being performed or service provided is the same as the employer's usual business, the worker cannot be an independent contractor and will be considered an employee under the NLRA.

The PRO Act's ABC test is the same as California's AB5, which has received much attention. However, even California's AB5 contains an exemption from the ABC test for individuals meeting certain criteria that perform work under a subcontract in the construction industry. The PRO Act contains no such exemption, calling into question any subcontract (particularly with an individual person) to do the same work that the contractor usually performs.

The practical implication is that some independent contractors in the construction industry may be considered employees under the NLRA – expanding the universe of workers who could be organized by unions and who would be protected to engage in concerted activities.

While that may be of concern to some open-shop contractors, what is likely to be more alarming is that the PRO Act also makes it a stand-alone unfair labor practice "to communicate or misrepresent to an employee" that they are not an employee under the NLRA – meaning that misclassification as an independent contractor under the ABC test (or misclassification as a supervisor) would in and of itself be an unfair labor practice. Given the PRO Act's significantly enhanced remedies and penalties (discussed above) employers should be very concerned about this issue. In fact, the NLRB's current complaint forms automatically allege a violation – interference with, restraint, or coercion in the exercise of protected NLRA rights – in all cases[12] that would, under the provisions in the PRO Act, require the NLRB to seek injunctions against employers in federal court, subject employers to civil penalties of up to $50,000 "per violation" or $100,000 for cases of "other serious economic harm," and create potential personal liability for directors and officers that "directed or committed the violation." Individuals would also have a private right of action (i.e. be able to sue employers directly in federal court) for 8(a)(1) violations and receive the enhanced remedies discussed above.

**Expanded Joint Employer Liability**

The PRO Act would codify a broad standard for joint employer liability that was established in an Obama Board decision (*Browning-Ferris Industries*) and reversed by the Trump Board through rulemaking. The concept of "joint employment" is used in various employment situations to mean that more than one employer is responsible for compliance with some legal requirement with respect to employees. In the context of the NLRA, this means that one employer may be liable for another employer's unfair labor practices and/or

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bargaining obligations. Under current NLRB regulations (supported by AGC), an employer may be deemed a joint employer under the NLRA only when it actually exercises substantial direct and immediate control over essential terms and conditions of employment of another company's employees and does so in a manner that is not limited and routine. The PRO Act would revert back to the Obama Board ruling extending joint employer liability to situations where one employer has exercised only indirect control over the terms and conditions of employment of another company's employees or has merely reserved authority to control such terms and conditions. For example, if a contractor requires that its subcontractor comply with wage and hour obligations and health and safety requirements, and reserves the right to audit the subcontractor's compliance, is the contractor now a joint employer of the subcontractor's employees and liable for the subcontractor's labor practices and bargaining obligations? To this end, the PRO Act specifically states that, "nothing herein precludes a finding that indirect or reserved control standing alone can be sufficient given specific facts and circumstances." Contractors should beware of any legislation that might require them to assume additional legal obligations and penalties on behalf of others.

**Prohibition on Class/Collective Action Waivers**

The PRO Act would also revive an overruled Board decision (*D.R. Horton*) that prohibited employers from requiring employees to agree to mandatory collective and class action waivers as a condition of employment. These waivers, which are contained in arbitration agreements, are typically utilized by non-union employers to protect against costly class and collective action lawsuits under the federal Fair Labor Standards Act (FLSA) and state wage and hour laws. Such waivers protect employers by requiring aggrieved employees to bring individual arbitration claims, which are less attractive to plaintiffs' lawyers who chase the large attorney fee awards often awarded in mass wage and hour litigation. The PRO Act would prohibit such waivers for non-union employers only. Indeed, unionized employers and unions would apparently be free to include such provisions in their collective bargaining agreements, while non-union employers would commit an unfair labor practice by doing so. This disparity raises the prospect that unions attempting to organize an open-shop contractor might threaten to foment such litigation as a means to coerce such employers into voluntary recognition.

**Persuader Requirements**

Another part of the PRO Act recycled from previously failed rulemaking relates to certain reporting requirements under the Labor Management Reporting and Disclosure Act (LMRDA). The rulemaking, known as the "Persuader Rule," would have upended the statute's reporting exemption for "advice." Under the LMRDA, reports must be filed with the DOL (to include financial terms) by the employer and any person who undertake "activities where an object thereof is, directly or indirectly to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." However, the LMRDA has an "advice exemption," which excludes from reporting "giving or agreeing to give advice" for such purposes. This exemption has traditionally drawn a bright line between persons who engage in direct contact with employees (reportable) and everything else (not reportable). The PRO Act would instead require reporting of "any arrangement or part of an arrangement in which a party agrees, for [a purpose as set out above], to plan or conduct employee meetings; train supervisors or employer representatives to conduct meetings; coordinate or direct activities of supervisors or employer representatives; establish or facilitate employee committees; identify employees for disciplinary action, reward, or other targeting; or draft or revise employer personnel policies, speeches, presentations, or other written, recorded, or electronic communications to be delivered or disseminated to employees."

The PRO Act would require reporting by contractors and their advisors, including legal counsel, for all manner of regular activities that could be construed as having a direct or indirect purpose of "persuading" employees in the exercise of their rights. As AGC of America raised in its comments to the failed rulemaking, it also implicates advice given by chapter managers and staff to member contractors – things like educational advice on the do's and don'ts of labor relations.