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# Briefly

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## WHAT IS THE *PRO ACT?*

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"The PRO Act would rewrite [labor law] in favor of the interests of organized labor … [and] eviscerate the balance Congress hoped to achieve when it passed the NLRA 80 years ago."

The Protecting the Right to Organize Act (PRO Act) is legislation passed by the U.S. House of Representatives on February 6, 2020. This legislation, if passed by the Senate and signed into law by the President, would radically change existing labor law and amend the National Labor Relations Act (NLRA, or "Act") in several important ways.

This legislation has an interesting history. After the Democrats took control of the House in mid-2018, organized labor began a concentrated effort to introduce this legislation. The PRO Act was initially introduced in May of 2019 by the Democrats on the House Education and Labor Committee. The bill languished for several months, as moderate Democrats expressed concerns that the bill was anti-business. After several months of consideration, the bill was approved by the Committee at the end of September of 2019. However, the House failed to act on this legislation until after the New Year, when a group of 76 House members wrote a letter to Speaker Pelosi, Majority Leader Hoyer, and Majority Whip Clyburn asking them to advance the legislation. Before its passage in the House, Richard Trumka, organized labor leader, told Democrats that "he" would withhold organized labor campaign contributions from any Democrat who opposed the bill. The bill then passed on February 6, 2020, by a mainly partisan vote of 224-194.

The PRO Act would rewrite the National Labor Relations Act in favor of the interests of organized labor. It is said this approach would eviscerate the balance Congress hoped to achieve when it passed the NLRA 80 years ago.

This bill has several controversial provisions, including several amendments to the National Labor Relations Act.

1. ***Joint-Employer* definition.** The definition of "joint employer" would be revised to adopt the expansive definition of joint employment as set forth in the National Labor Relation Board's (NLRB, or "Board") 2015 *Browning-Ferris* decision. Under that definition, two or more persons shall be deemed employers "if each such person codetermines or shares control over the employee's essential terms and conditions of employment." Under this expansive definition, an employer could be held liable for employees they do not actually employ simply by having an "influence" over their terms and conditions of employment. Under the Browning-Ferris definition, there is no requirement that the employer actually exercise such control over the workers, just that the employer have the indirect right or reserved authority to exercise such control.

2. ***Independent Contractor* expansion.** The PRO Act would expand the definition of "employee" to include those traditionally considered to be independent contractors. Under this bill, workers shall be deemed an employee and not an independent contractor unless the worker is "free from control and direction in connection with the performance of the service, … the service is performed outside the usual course of the business of the employer, and the individual is customarily engaged in an dependently established trade, occupation, profession, or business of the same nature as that involved in the service performed." This would impose on the entire country the stringent definition of independent contractor recently adopted by California, and deny individuals the ability to work as independent contractors.

3. **Expands unfair labor practices related to strikes.** This legislation would restrict the ability of employers to

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keep their workplaces open during strikes. It prohibits employers from permanently replacing employees who support or participate in a strike. In addition, it also prohibits discriminating against any employee because the employee supported or participated in a strike. It also prohibits lockout, suspension, or withholding employment from any employee in order to influence the position of such employee in collective bargaining prior to a strike. It also prohibits employers from requiring employees to attend or participate in employer campaign activities unrelated to the employee's job duties.

4. **Secondary boycotts allowed.** The PRO Act would permit unions to engage in "secondary boycotts." This would allow unions to target neutral, third-party employers and companies who merely do business with the target of a union campaign. Currently, the NLRA prohibits such behavior to protect employers and their employees from being dragged into unrelated labor disputes.

5. **Recognitional picketing.** The PRO Act would eliminate provisions in existing law that limit unions to thirty days of recognitional picketing unless the union files a representation petition seeking an NLRB election. Under this proposed legislation, unions could engage in recognitional picketing indefinitely, potentially causing injury to employers, suppliers and customers.

6. **"Ambush" election procedures.** The PRO Act would return to the NLRB's 2015 "ambush" election rules for purposes of establishing an initial collective bargaining agreement following certification or recognition of a labor organization. Employers would be required to commence collective bargaining within 10 days of receipt of a written request for collective bargaining. Thereafter, if the parties have not reached an agreement within 90 days of commencement of bargaining, mediation may be requested. If an agreement is not then reached within an additional 30 days from the date of request for mediation, binding arbitration may be forced by either party. The arbitrator, who would be unfamiliar with the business' operations, would impose terms binding upon both parties, even if unacceptable. This would undermine the collective bargaining process, force an employer to be bound by a potentially unaffordable contract, and deny employees a vote on the terms and conditions of their own employment.

7. **Nullify class action waivers.** The PRO Act would reverse existing U.S. Supreme Court decisions which held that arbitration agreements mandating individual arbitration are enforceable under the Federal Arbitration Act. In banning class action waivers in employment arbitration agreements, the PRO Act would likely lead to an increase in class action lawsuits.

8. **Require posting of NLRA rights.** The PRO Act would require employers to post a notice informing employees of their rights under the NLRA. In 2013, the D.C. Circuit Court of Appeals held that the NLRB's 2011 notice posting rule was invalid.

9. **Disclosure of employee voter list.** One provision of the PRO Act would require employers to provide the "Excelsior list" (the election eligibility list) within two days of when a union petition has been filed. This provision would negatively impact employee confidentiality, as it requires the disclosure of employees' personal identifying information, including home addresses, work locations, shifts, job classifications, and if available to the employer, personal landline and mobile telephone numbers, and work and personal email addresses. The voter list must be provided in a searchable electronic format approved by the NLRB, unless the employer certifies that it does not possess the capacity to produce the list in the required form.

10. **Reinstate rights of employees to use employer-provided communication systems.** This bill would reverse recent Board decisions which held that employees do not have the right to use electronic communication systems provided by the employer during union organizing. The PRO Act would amend Section 7 of the NLRA to include the right to use electronic communication devices and systems of the employer to engage in activities protected under Section 7, if such employer has given the employee access to such devices and systems in the course of the employee's work, absent a compelling business rationale.

11. **Elections.** The Pro Act would also undercut the secret or private ballot process by which workers vote for or against a union. Currently, labor organizers must collect authorization cards showing employee support for a union, at which point the NLRA requires a secret or private ballot election to determine if workers really want to unionize. The results of the election determine whether the unit shall be represented by the labor organization. However, under the PRO Act, unions would be given a means to overturn the results of those elections and allow them to unionize just by signed authorization cards collected by union organizing representatives. If the union demonstrates to the Board that the employer committed a violation of the Act or "otherwise interfered with a fair election," the Board is given authority to - without ordering a new election - certify the labor organization if a majority of employees in the bargaining unit have signed authorization cards. This method opens the door for less than scrupulous tactics to be employed to gather signed union authorization cards, as that process would be in public where employees would be subjected to potential threats and coercion from union agents. This is a not-so-subtle attempt to return to the

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rejected Employee Free Choice Act, which would have replaced private ballot elections with authorization card checks.

12. **Increased damages for unfair labor practices.** The PRO Act would also expand the unfair labor practice scheme by granting the NLRB the ability to award liquidated damages in amounts that are up to two times the amount of damages awarded, in addition to the traditional back pay, front pay, consequential damages and injunctive relief currently available under the National Labor Relations Act. In addition, the NLRB would have the authority to issue civil penalties of not more than $10,000 against any individual who fails or neglects to obey an order of the Board. The Board is also given authority under the PRO Act to issue additional penalties regarding violations of the NLRA from $500 to $50,000 per violation, with the ability to double the amount of the violation up to an amount not to exceed $100,000. The Board is also given the ability to assess penalties against any "director or officer of the employer who 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." The PRO Act would also create a new private civil cause of action outside of NLRB jurisdiction, increasing the amount and type of damages available to workers aggrieved by any violation of the NLRA, including traditional damages, attorneys' fees and punitive damages.

13. **Nullification of states' right-to-work laws.** Perhaps the most controversial provision of the PRO Act is the "Fair Share Agreements Permitted" provision, which would allow labor organizations to require all employees in a bargaining unit to contribute fees for the cost of representation, collective bargaining, contract enforcement, and related expenditures as a condition of employment. *This provision would effectively repeal right-to-work laws that have been adopted in 27 states.* These laws give employees the rights to work without having to provide membership dues to a union with which they do not wish to affiliate. These laws also protect employees from being fired for refusing to be a member of a union. The PRO Act would nullify these laws.

14. **Labor-Management reporting and attorney-client privilege.** The PRO Act would codify the U.S. Department of Labor's (DOL) 2016 "persuader" regulation which narrowed the "advice exception" of the Labor-Management Reporting and Disclosure Act by requiring labor lawyers and firms to disclose significant facts about their relationships with employers. In 2016, a federal court held that the persuader rule was incompatible with the law and attorney-client confidentiality, and it was formally rescinded by the DOL on July 18, 2018. The "persuader" rule was strongly condemned by many, including the American Bar Association. This revision as contained in the PRO Act would make it more difficult for businesses to secure legal advice on complex labor law matters, as employers and their legal advisors would be required to file public reports with the DOL to disclose any arrangement that indirectly persuades employees about union organizing or collective bargaining.

15. **Whistleblower protections.** The PRO Act would also expand whistleblower protections for employees or agents of the employer and the union who report, testify regarding, or assist in the investigation of any alleged violation of the NLRA, or who object to or refuse to participate in any activities which the employee reasonably believes to be in violation of the NLRA. Specific complaint procedures and timetables are provided for the filing of a complaint with the Secretary of Labor, the subsequent investigation, and the issuance of relief, including damages and injunctive relief.

If passed, this legislation would be the most significant change to labor law since Congress passed the 1947 Taft-Hartley Act, which limited organized labor and precipitated the ongoing decline in union membership. Unions have long complained that employers are not held accountable for questionable tactics in fighting organizing drives. If passed, the PRO Act would certainly swing the pendulum back in favor of unions in this process.

The PRO Act is opposed by many business groups and organizations, including the U.S. Chamber of Commerce, the Society for Human Resource Management, the National Federation of Independent Business, the International Franchise Association, the National Retail Federation, and Americans for Prosperity.

It is highly unlikely that the PRO Act will be approved in the Senate, given the current Republican majority. Further, the Trump administration announced on February 5, 2020, that the President would veto the bill if presented to him for signature. However, this legislation is a clear indicator of the direction that organized labor and its Democratic supporters will take under a Democratic administration. As a result, employers should take note and prepare for potential future change in the labor law arena.

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