CLIENT ALERTS & INSIGHTS

House Passes Union-Friendly 'PRO Act'; Employers Call It a Con

MARCH 11, 2021

Authors: Adam Primm

The House of Representatives passed a bill that would overhaul federal labor law with the express purpose of making it easier for unions to organize workers and more difficult for employers to classify them as independent contractors not subject to union control.

The Protecting the Right to Organize Act of 2021 (the "PRO Act") represents the most significant change to the National Labor Relations Act (the "NLRA") since it was enacted in 1935 to guarantee the right of private sector employees to organize into trade unions, engage in collective bargaining, and strike.

The PRO Act would streamline the union election process, expand the scope of unfair labor practices to outlaw retaliation against striking workers, and override state "right to work" laws that allow employees to opt out of paying dues in unionized workplaces. It also would bar employers from requiring employees to attend so-called captive audience meetings during which management may oppose union membership and prohibit employers from filing unfair labor practice charges against unions that conduct secondary strikes on behalf of workers in a different union.

The PRO Act also takes aim at the country's growing use of gig workers by revising the definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the NLRA, which does not cover independent contractors.

Finally, the PRO Act would amend the Federal Arbitration Act so an employer could not require employees to enter into agreements in which they waive the right to pursue or a join collective or class-action litigation. This would overrule the U.S. Supreme Court's decision in 2018 that "arbitration agreements providing for individualized proceedings must be enforced" and neither the FAA nor the NLRA suggest otherwise. The Supreme Court's decision ended a six-year dispute started by the National Labor Relations Board's decision in *D.R. Horton*, 357 NLRB 2277 (2012), which held that mandatory arbitration agreements that contain class and collective action waivers violate Section 7 of the NLRA.

"We should all remember that the National Labor Relations Act didn't just say that we shouldn't hamstring unions or merely tolerate them. It said that we should encourage unions," President Biden said in a statement. "The PRO Act would take critical steps to help restore this intent."

Unsurprisingly, employers and business trade associations have a different view of the bill that is focused on individual employee - as opposed to union - rights. The bill now heads to the Senate after a 225-206 vote largely along party lines.

"The PRO Act is a misguided attempt to fundamentally restructure American workplaces and would infringe on workers' rights to a secret ballot, workplace democracy and personal privacy," said National Association of Manufacturers Vice President Robyn Boerstling in a letter to Congress. "This bill is being considered during an unprecedented global pandemic, in which manufacturing workers are supplying Americans with the medicine, protective equipment and goods necessary to defeat COVID-19… It is critical that Congress consider policies that support manufacturers in the fight against COVID-19, but the PRO Act would do the opposite."

The future of the PRO Act in the Senate is uncertain. Republicans generally oppose it and Democrats would need 60 votes to overcome a filibuster. Given the bill's significance, we will continue to provide updates on the PRO Act as they come.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Corey Clay at cclay@beneschlaw.com or 216.363.4158.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

Rick Hepp at rhepp@beneschlaw.com or 216.363.4657.