

## Employers: Will The PRO Act Affect You?

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This week, Congress plans to vote on the [Protecting the Right to Organize \(PRO\) Act](#), which likely will mean drastic pro-union changes to U.S. labor laws.

The PRO Act, as it currently stands, would overhaul the National Labor Relations Act, would end states' authority to have right-to-work laws and prevent companies from replacing striking employees.

One particularly impactful and controversial provision would be changing the definition of "employee" to include independent contractors. Currently, independent contractors are exempt from the NLRA, meaning they cannot organize unions and claim NLRA protections. However, the PRO Act would essentially remove this exemption, enlarging the definition of what an employee is and allowing former independent contractors eligible to organize and join labor unions.

The fundamental challenge of the legislation for many independent contractors is the "ABC employment test" (which is not specifically called ABC in the PRO Act but it is there through definition) which states that a worker should be considered an independent contractor only if they met each of these three criteria:

**A:** The worker is free from the control and direction of the hiring entity in connection with the work's performance, both under the contract for the performance of the work and in fact.

**B:** The worker performs work that is outside the usual course of the hiring entity's business.

**C:** The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

The "B" is the issue. If you are in the same line of business as a client, you are considered an employee. That's frequently the case for gig economy contractors such as Uber and DoorDash drivers who would no longer be independent drivers but employees.

Another PRO Act measure will bring the return of the restrictive "persuader" or "union buster" rules. President Joe Biden's plan would reinstate and codify Obama's persuader rule into law. The Obama administration proposed a regulation that would have required employers to report the identity and compensation of a lawyer or consultant (called a "persuader") to help combat union organizing. These persuader regulations are intended to discourage lawyers and consultants from helping employers fight unions. Employers would be forced to walk a tightrope by hiring counsel to help them follow the labor law but not be participating in "union busting" activity.

Other PRO Act provisions for employers to watch include:

- Prohibit mandatory arbitration agreements in employment contracts
- Require interest arbitration if the union and employer cannot decide on a collective bargaining agreement.

- Codify quickie or ambush election rules which shorten the amount of time between filing for a petition for election and the actual election
- Institute card checks which allow unions to challenge election results and get certified automatically in certain circumstances
- Provide a private cause of action for unfair labor practices outside of the National Labor Relations Board's jurisdiction
- Introduce new civil penalties for labor law violations, including personal liability
- Authorize secondary boycotts, which allow unions to target any company through picketing and protests, even those unrelated to a labor dispute

There's still a possibility that the PRO Act may not pass through Congress, or it could be altered if it does pass. The House Democrats hold a small vote margin and the U.S. Senate is split 50-50, with 60 votes needed for passage.

## **Key Takeaway**

Employers should be aware of the PRO Act and how it might affect their business. Both unionized and nonunion organizations should pay close attention in the coming days to see if the PRO Act is passed as there are many provisions that could affect their operations.

Barley Snyder attorneys will be keeping a close eye on the act's trip through Congress. If you have any questions about how this can affect your business, please [contact me](#) or any member of the [Barley Snyder Employment Practice Group](#).