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PERSPECTIVE

## The PRO Act and the future of American labor law

By Mark S. Spring

The number of employees who belong to unions, particularly in the private sector, has dropped substantially in the last 40 years. According to the U.S. Labor Bureau of Labor Statistics, in 2020, only 10.8% of all workers in the U.S. were members of a union. Amongst private-sector workers, only 6.3% of employees are union members. In 1980, well over 20% of all private-sector employees belonged to unions. There are many factors that contribute to this steep decline, however for purposes of this article, we will focus on looking forward toward the future of labor laws and unionization in the U.S.

Unions have been attempting to use their political power to alter this trend. The union movement has made numerous attempts to make it easier for unions to organize employees and expand the number of workers who are eligible to unionize. The most recent aggressive attempt was during the Obama administration, when various members of Congress unsuccessfully attempted to enact the Employee Free Choice Act. This

statute would have amended the National Labor Relations Act to allow unions to organize employees without an election, simply by showing that the majority of the employees in the bargaining unit had executed written

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authorization cards demonstrating a desire to be represented.

This legislation was met with fierce opposition from the U.S. Chamber of Commerce and many in the business community. Even some Democrats opposed the bill, citing the fact that it strips employees of the right to vote in a secret ballot election. As a result, the Employee Free Choice Act did not get the congressional support it needed and eventually died.

Today the PRO Act is being pushed behind an aggressive movement to level the income distribution in the U.S. and President Joe Biden's ardent support for unions. The union movement is attempting once again to reverse the trend

of decreasing unionization with comprehensive legislation designed to make it more difficult for employers to oppose unionization of their workforce.

On March 9, on largely party-line voting, the PRO

Act passed through the House of Representatives. 219 Democrats supported the bill (seven voted against it) and five Republicans supported the bill (186 voted against it).

### Key Provisions of the PRO Act

If enacted in its present format, the PRO Act would fundamentally change labor law. It would be the most comprehensive piece of labor legislation to be enacted since 1935, when the NLRA was first passed. Some of the key provisions of the act include:

*1. Elimination of Right-to-Work Laws:* The act would eliminate state right-to-work laws, which prohibit union security clauses that force employees to pay

union dues in order to maintain employment. Those laws would be preempted by the PRO Act.

*2. Make More Workers Employees:* The act would change the test for independent contractor status for union organizing purposes to the ABC test used in California, a much more restrictive test that ensures that a much larger percentage of workers are classified as employees, giving them the right to organize.

*3. Elimination of Captive Audience Meetings:* During a union organizing drive, employers often meet with employees during work hours to explain to the employees why the employer believes that unionization would be a mistake and attempt to convince them why they should reject the union. The act would make it illegal to force employees to attend these meetings.

*4. Easing the Path for Unions to Communicate With Workers:* The act would require employers to share certain information with unions about how to reach employees during a union campaign. The act would also authorize unions to utilize employers email systems and other electronic

communications systems to communicate with employees during organizing and related activities.

*5. Increasing the Penalties Against Employers:* The act gives the National Labor Relations Board more discretion to impose broader penalties, including new financial penalties, on employers who violate the NLRA. If an employer improperly interferes with an election that rejected the union, there would no longer be a second election. The union could simply organize by a card check procedure in such circumstances.

*6. Implementation of Interest Arbitration for First Contracts:* Under the Pro Act, after a union organizes, if the employer and union cannot reach an agreement, within a few months, the union could take the matter to interest arbitration, where a panel of arbitrators would decide the terms and condi-

tions of the first contract.

These changes would constitute the largest fundamental change in American labor law in one statute since the passage of the NLRA. The balance of power would shift dramatically toward the union movement and employers would have a much more difficult time opposing unionization if the PRO Act was passed. As a result, the employer and business community strongly dis-favors this legislation.

#### **What Is Next for the PRO Act?**

There is little question that President Biden would sign the PRO Act due to his ardent support of unions. However, there remains one very significant obstacle: The Senate. The way the Senate is currently constructed, with the filibuster in place, at least 60 senators would have to vote for the act for it to become law. With the

Senate split evenly with 50 Democrats and 50 Republicans, getting 60 votes is a near impossibility. It would be shocking if 10 Republicans came out to support the act given the massive objections to the legislation by the business community. In addition, it now appears highly unlikely that the filibuster will be eliminated or even materially narrowed.

Thus, although the PRO Act has gotten a significant amount of press and garnered a lot of discussion and debate, it is not likely to be enacted in its current form or anything close to it. It is possible that Democrats will take small pieces of the act and try to weave them into other legislative initiatives, hoping that they can make some progress, but exactly how that will be attempted, and how successful it will be remains to be seen. Meanwhile, most of the changes in American

labor law are likely to come from decisions by the new Biden NLRB, once he gets his Democratic majority on the board, which will likely occur late this year. ■

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