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The cons of the PRO Act

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The Protecting the Right to Organize Act of 2021 (also known as the "PRO Act") is back with its laundry list of organized labor's most-wanted government handouts. After decades of declining membership, unions see the PRO Act as a way to energize their rolls of dues-paying members by making it much easier for unions to organize in the modern workplace and restrain the ability of employers to fend off organizing drives. The U.S. House of Representatives passed it on to the Senate last week, by a vote of 225-206.

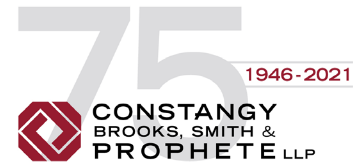
Citing concerns about a shrinking middle class, income inequality, and economic insecurity for families, the AFL-CIO has hailed the PRO Act as the most significant worker empowerment legislation since the Great Depression. It would make many radical changes to longstanding labor law and election processes. The following are the "highlights":

Joint employer standard. The PRO Act would codify the joint employer standard set forth in the NLRB's 2015 ***Browning-Ferris* decision**, making it much more likely that two or more employers would be considered "joint employers" of a worker assigned by an employment or temporary agency. The Board in *Browning-Ferris* held that indirect or reserved control could be considered to determine joint employer status as opposed to just direct control or control exercised in fact. The indirect or reserved control standard would put many businesses in jeopardy of being deemed joint employers by virtue of contractual provisions in agreements with professional employer organizations and temporary labor agencies, and in franchise agreements.

Elimination of "Right to Work." The Act would allow bargaining agreements to require payment of dues by all represented employees, upending state laws that let employees opt out of union membership and dues obligations.

"Captive audience" meetings. The Act would prohibit small-group meetings where employees are compelled (and paid) to attend so that they can learn about unions. Long a staple of employer strategy during union election campaigns, attendance at such meetings would become voluntary.

"Employees" versus "independent contractors." The Act would expand the definition of "employee" to allow workers currently classified as independent contractors to form and join unions. The Act would adopt **California's "ABC Test"** in determining whether a worker was an "employee" or an "independent contractor." This would essentially make every worker



who performs work in the usual course of business of the company an employee instead of an independent contractor.

Use of company resources for organizing. The Act would allow employees to use company computers, email, internet access, telephones, etc., to communicate with co-workers for union organizing purposes.

No permanent replacement of strikers. The Act would prohibit the permanent replacement of workers who participate in strikes. Under current law, employers can permanently replace workers who go on economic strikes, subject to preferential recall rights.

No lockouts. The Act would prohibit employer-initiated work stoppages designed to influence the position of employees or their bargaining agent before a strike.

Fewer "supervisors." The Act would tighten the test for determining which employees are "supervisors" within the meaning of the National Labor Relations Act. Under the PRO Act, an employee would not be a "supervisor" unless the supervisory activities were conducted "for a majority of the individual's work time." The Act would also eliminate "assign" and "responsibly to direct" employees from the NLRA list of supervisory duties. The effect would be to classify more employees as "non-supervisory" and thus eligible to join a union – particularly team leaders or line leaders.

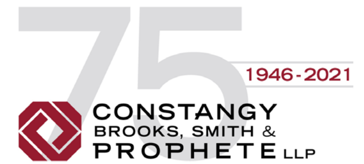
***Excelsior* list.** Under the PRO Act, employers would be required to provide to the union the list of eligible voters within a mere *two days* from the date that an election is directed. This list must include names, work locations, shifts, job classifications, home addresses, home telephone numbers, cell phone numbers, work email addresses, and personal email addresses.

First contract negotiations and arbitration. The PRO Act would require the employer and the union to begin bargaining within 10 days of the union's request, following certification of the union as the collective bargaining agent. Then, if no agreement is reached after 120 days, a three-member arbitration panel would decide the terms of a two-year collective bargaining agreement.

No class/collective action waivers. Employers would be prohibited from entering into class or collective action waivers with employees, or enforcing the waivers.

Private right of action for NLRA claims. The PRO Act would allow employees to sue employers directly for alleged violations of the NLRA, and recover punitive damages and attorneys' fees. Currently, an employee must file an unfair labor practice charge with the National Labor Relations Board, which can prosecute the charges in administrative proceedings.

The PRO Act now heads to the Senate, where its future seems far from certain. Democrats will have to muster a number of Republican votes or eliminate the filibuster to push this through. If it passes in the Senate, President Biden has said he will sign it as part of his promise to be the nation's "most pro-union president."



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