THE PRO ACT: WHAT UNION CONTRACTORS NEED TO KNOW

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The stated purpose of the Protecting the Right to Organize (PRO) Act of 2019[2] is "to strengthen the National Labor Relations Act (NLRA) to safeguard workers' full freedom of association and to remedy longstanding weaknesses that fail to protect workers' rights to organize and collectively bargain." The title of the PRO Act itself – "Protecting the Right to Organize" – solely references union organizing. Union contractors might assume from the description and title that they would not be opposed to this bill, because they are already organized – most by choice – and it would be in their best interests to see their open shop competition organized as well. However, the PRO Act does not just address union organizing, it goes much, much further and if enacted will have serious consequences for union contractors in the construction industry.

The PRO Act would make wholesale changes to the law to allow things like picketing directly against neutral contractors to gain leverage in a dispute with another employer. No more separate gates on jobsites to contain picketing. It would legalize picketing in jurisdictional dispud it eliminates a contractor's ability to s for damages due to a union's secondary activity. The PRO Act would also significantly add to unions' leverage in the bargaining process. It would allow intermittent and possibly partial strikes and slowdowns. It prohibits permanent replacement of strikers. It makes pre-strike lockouts by contractors unlawful. It eliminates a contractor's (or association's) right to bargain to impasse and implement terms for a new contract. It allows expansion of union-only subcontracting restrictions beyond the jobsite – and the right to strike to get them. It expands joint employer liability for another employer's unfair labor

particularly the changes to the union representation process – things like allowing micro-units for bargaining, changing the definition of a supervisor, allowing electronic voting in elections, and ordering an employer to bargain even when a union loses an election. Nor does it address a tightened definition for employee/contractor status or making the misclassification of workers an independent unfair labor practice. There are dozens of significant changes to the NLRA proposed in the PRO Act. These items may very well still affect union contractors.[3] However, the focus of this paper is on the areas of most immediate impact.

Increased Picketing

Although picketing in any form can be disruptive, the NLRA currently strikes a balance between protecting workers' rights to picket for legitimate ends while minimizing disruptions and limiting disputes to the parties involved. It allows picketing directed at an employer with whom the union has a lawful dispute (a "primary employer"), but outlaws picketing directed at neutral ("secondary") employers for the purpose of forcing them to stop doing business with the primary or others.

In addition, the PRO Act would delete the “hot carg

nor could they take disciplinary action against employees. It is hard to overstate the potential economic impact of such activities on contractors.

Second, the PRO Act would make "offensive" lockouts by contractors unlawful. Offensive lockouts are initiated by an employer before a strike, and allow employers to control the timing and strategy of ceasing operations in order to put pressure on the union to agree to its proposals. The Pro Act would make it unlawful to "promise, threaten, or take any action" to "lockout, suspend, or otherwise withhold employment from employees in order to influence the position of such employees or the representative of such employees in collective barg

Finally, the Pro Act would require interest arbitration of first contracts. Under current law, the parties are left to their own strategies and devices for obtaining an agreement. Neither party is required to agree to the demands of the other and may employ the economic pressure of strikes and lockouts to obtain their objectives or an employer may impose its proposals after bargaining to impasse. However, the PRO Act would require bargaining parties, "[w]henever collective bargaining is for the purpose of establishing an initial collective bargaining agreement following certification or recognition of a labor organization," to meet and negotiate within 10 days of a demand, mediate on request if there is no contract after 90 days, and settle the contract by arbitration after an additional 30-day period. A three-member arbitration panel would be empowered to decide the terms of the contract ("interest arbitration"), and "shall" base its decision on the following factors: "(i) the employer's financial status and prospects;[14] (ii) the size and type of the employer's operations and business; (iii) the employees' cost of living; (iv) the employees' ability to sustain themselves, their families, and their dependents on the wages and benefits they earn from the employer; and (v) the wages and benefits other employers in the same business provide their employees." The contract imposed on the parties by this panel would be effective for two years. It is unclear from the bill whether this would apply to existing relationships which are converted from Section 8(f) to Section 9(a) (by agreement/recognition or through an election), but it certainly could be argued that it does.[15] The impact is that unions will have little reason to agree to an employer's proposals when they know that a group of outsiders will impose terms that take into account factors that do not include the employer's objectives or intent.

Enhanced Remedies and Penalties, Private Lawsuits, and Increased Board Powers

Current remedies for unfair labor practices are generally limited to cease-and-desist orders (stop doing something unlawful), notice postings, orders to take some affirmative action (such as reinstatement of a terminated employee), and back pay remedies where an employment loss is indicated. Other available remedies depend on the nature of the violation, but may include more extraordinary things like making an employer read a notice posting to employees or ordering bargaining in certain egregious violations in election cases. The PRO Act would dramatically increase the remedies and penalties available under the NLRA.

The PRO Act would require statutory remedies in cases of discrimination, retaliation, or "discharge or other serious economic harm"[16] of back pay (without reduction for interim earnings or failure to earn interim earnings), front pay, consequential damages (indirect or special damages), and an additional amount of liquidated damages equal to two times the amount of damages awarded.

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[14] It is unclear whether this would require the employer to "open its books" to show its financial status, which would not otherwise be required in bargaining unless the employer claimed economic distress or an inability to pay in response to union demands.

[15] For example, the bargaining mandate begins when a union has been "newly recognized or certified as a representative as defined in section 9(a)." (emphasis added). Arguably, this could include a newly recognized or certified 8(f) to 9(a) employer.

[16] The NLRA makes it unlawful to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" and "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]." Reference to the terms "discrimination" and "retaliation" in this paper refer to these types of violations.

In addition, the PRO Act would authorize civil penalties, in addition to any other remedy, of up to $50,000 per violation and up to $100,000 in certain cases (discrimination, retaliation, or cases of discharge or "other serious economic harm") where a previous violation has been found in the preceding five years. The PRO Act also allows for an employer's directors or officers to have personal liability assessed against them for civil penalties if they directed or committed the violation, established a policy that led to the violation, or had actual or constructive knowledge of and authority to prevent the violation and failed to do so. Because at least the $50,000 civil penalties can be assessed for any employer unfair labor practice, a director or officer could find themselves personally liable for things like not bargaining in good faith (a common charge in bargaining situations) or failing to supply information requested by the union in bargaining. Personal liability could also exist if the Board found an employer handbook policy to be unlawful. The PRO Act would authorize corporate and personal liability for civil penalties in all cases of employer unfair labor practices.[17]

The PRO Act also authorizes lawsuits by aggrieved employees. In cases of interference with rights protected under the NLRA or discrimination, "any person who is injured" by such conduct may file a civil action against the employer in federal court within ninety days after the earlier of sixty days from the filing of a charge or after the person has been notified that no complaint will be issued on the charge. The damages that would be available in such cases are: (1) back pay (without reduction for interim earnings or failure to earn interim earnings); (2) front pay (when appropriate); (3) consequential damages (damages that are a consequence of the violation); (4) an additional amount as liquidated damages equal to two times the cumulative amount of damages under 1 through 3; (5) punitive damages (accounting for the gravity and impact of the violation and the gross income of the employer); (6) other relief available under certain civil rights statutes, including compensatory damages for things like pain and suffering, reinstatement, or injunctive relie

Expanded Joint Employer Liability

The concept of "joint employment" is used in various employment situations to mean that more than one employer is responsible for compliance with some legal requirement with respect to employees. In the context of the NLRA, this means that one employer may be liable for another employer's unfair labor practices and/or their bargaining obligations. The PRO Act would extend joint employer liability to situations where one employer has even indirect control over the terms and conditions of employment of another company's employees or has reserved authority to control such terms and conditions. For example, if a contractor requires that its subcontractor comply with wage and hour obligations and health and safety requirements, and reserves the right to audit the subcontractor's compliance, is the contractor now a joint employer of the subcontractor's employees and liable for the subcontractor's labor practices and bargaining obligations? To this end, the PRO Act specifically states that, "nothing herein precludes a finding that indirect or reserv

obligations by doing so – and potential civil and criminal penalties if they fail to do so. Either result puts contractors in a difficult and unacceptable position.

Not Everything About Organizing Open Shops is Good for Union Contractors

available to work when the multiemployer agreement expires and those employees may be on strike. The retirement plan may not be the union's multiemployer pension plan but a 401k already established by the employer, which would do nothing to bring new contributions to the multiemployer plans. And, it is questionable whether a newly organized employer could or would be forced by a panel of interest arbitrators into participating in an underfunded plan where the employer would have potential withdrawal liability. If the employer already had an established personnel department with hiring procedures it may not want to agree to and it may well not be forced into hiring hall provisions. In addition, there could be differences in wage rates, other benefits like health care, overtime for hours worked over eight in a day, rates for weekend make-up work, and any other term and condition of employment. As pointed out in AGC's 2009 paper, the uniformity of area agreements could be undermined and the possibility exists that previously open shop contractors will be more competitive than historically union contractors while bidding in th