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 disputes and eliminate National Labor Relations Board (Board or NLRB) procedures for resolving them. It would allow unlimited picketing for recognition, even against neutral employers. And, it eliminates a contractor's ability to sue a union 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 practices and bargaining obligations. It adds civil penalties for employers and creates personal liability for directors and officers of up to $100,000 for unfair labor practices. It makes an employer responsible for back pay, front pay, and other damages plus an additional amount of two times those damages in termination or other cases of "serious economic harm." It creates a private right of action for employees to sue employers in federal court even if their charges have been dismissed by the Board, where they can get those same damages, plus damages for pain and suffering, punitive damages, and attorney's fees and costs. There is much more to the PRO Act than making it easier for unions to organize non-union employers.

This paper will discuss some of the changes that the PRO Act would make that are most relevant to union-signatory contractors. It will not go into detail on all of the changes the PRO Act would make,

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[2] The PRO Act (H.R. 2474) was introduced in the House of Representatives on May 2, 2019 as a bill to amend the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act of 1959. It was amended on September 25, 2019, adding additional proposed changes. For those interested, the full bill and information regarding the amendments may be found here.

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.[4] Current law allows picketing in jurisdictional disputes, but only where the employer is ignoring an order or certification from the Board regarding the assignment of work. It allows picketing for recognition of the union (where the employer has not already recognized another union or had an election in the last 12 months), but then only for 30 days without filing a petition for an election. It allows picketing to truthfully advise the public that an employer does not have a contract with an employer, but only if it does not have the effect of causing others to not perform services.

The PRO Act eliminates all union unfair labor practices related to picketing and would make such picketing lawful – secondary, jurisdictional, recognitional or otherwise.[5] It will no longer be an unfair labor practice to picket a secondary, neutral employer to force it to stop doing business with the union's real, primary target. For example, if a union wants to organize a non-union employer on a jobsite, it can picket at all gates and at all times – regardless of where the non-union contractor enters or whether it is even present on the jobsite at the time. The effect will often be to shut down the jobsite until the offending employer is organized or permanently removed.[6] Pickets could follow the neutral contractors

[3] It should not be overlooked that union-signatory contractors in the construction industry may still be faced with a union election. Many (if not most) agreements in the construction industry are "pre-hire" agreements under Section 8(f) of the NLRA. Such agreements are specific to the construction industry and have a special status that binds the contractor and union only for the duration of the agreement, after which each is theoretically free to walk away. These relationships may, however, be converted by election (or by agreement in certain circumstances) to Section 9(a) relationships, which bind the union and the contractor to a duty to bargain a new agreement upon expiration of every contract. More on this issue will be discussed at the conclusion of this paper.

[4] On multiemployer jobsites, where the primary and all secondary employers (including the owner of the premises) co-exist, in order to be lawful the picketing must be confined to the times when the primary is present and engaged in normal business at the site, be limited the places reasonably close to where the primary is located, and disclose clearly that the dispute is with the primary employer. This is why on picketed projects alternate work schedules for the primary employer(s) and/or separate gates are established. Picketing can only then occur at the appropriate gate and/or at the appropriate time.

[5] The PRO Act would delete in their entirety Sections 8(b)(4) (covering secondary activity and jurisdictional picketing) and 8(b)(7) (covering recognitional picketing) of the NLRA.

[6] Because of the potential for significant economic disruption due to secondary activity, Section 10(l) of the NLRA currently mandates that secondary activity charges be given priority over all other cases and authorizes the Board to seek injunctive

to their other jobs as well in order to put pressure on them to stop working on the job with the non-union contractor. The neutrals could be picketed at their home offices. Picketing could continue indefinitely, and there is nothing – short of surrendering to the union's demands – that could make it stop, as such secondary picketing would be lawful under the PRO Act.

In addition, picketing or threatening to picket in furtherance of a jurisdictional dispute would not be an unfair labor practice. For example, if Union A thought it should be awarded work given to Union B by Contractor C, Union A could picket and/or threaten to picket Contractor C to shut down the job, and it would not be an unfair labor practice. Union A could threaten to picket and/or picket another job and it would not be an unfair labor practice. Union A could picket another contractor (such as a general contractor to whom Contractor C is a sub) to put pressure on Contractor C to reassign the work and it would not be an unfair labor practice. Contractor C would have no recourse to the NLRB for an unfair labor practice in any of these situations.[7]

This issue is further compounded because the PRO Act also eliminates the NLRB's procedures for resolving jurisdictional disputes and for seeking an injunction to stop picketing in the interim.[8] This is particularly problematic given that a contractor generally has no private right to seek an injunction. This obviously puts picketed contractors in a no-win, no-way-out situation, where doing what the union wants – reassigning the work – would just lead to the same action by the other union, creating a never-ending seesaw of disputes.

Perhaps the most significant point to make for union contractors here is that elimination of picketing restrictions will most significantly affect union contractors. The employees of open-shop contractors likely will not respond to picketing and jurisdictional disputes and they will still go to work. It is the union contractors' employees who will be faced with the dilemma of choosing whether to cross a picket line to go to work, and it is the union contractors who will have to deal with the consequences.

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relief to stop the picketing until the matter can be adjudicated. The PRO Act would delete Section 10(l) of the NLRA. In addition, the PRO Act would delete Section 303 of the LMRA, which allows businesses to sue unions in federal court to recover damages resulting from unlawful secondary activity.

[7] Contractors may be able to pursue grievance and arbitration of the matter under their own collective bargaining agreement (depending on the language of the agreement) for non-strike picketing by a signatory union against its signatory contractor. Contractors may also be able to sue the union in court under Section 301 of the LMRA (which authorizes suits for violations of contracts between an employer and a labor organization) for certain conduct; however, a full discussion of Section 301 is beyond the scope of this paper. But, this may not cover picketing against the general contractor or owner or any other neutral secondary in order to put pressure on the contractor to reassign the work in their favor.

[8] The PRO Act would delete in its entirety Section 10(k) of the NLRA, which provides for the resolution of jurisdictional disputes. Without formal Board enforcement or resolution procedures, the parties' only method of resolving jurisdictional disputes would be under voluntary procedures such as the grievance and arbitration procedures of their contracts or through a program such as the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). Because it is a voluntary resolution procedure, the contractor and the unions must have stipulated to the Plan for it to be used. It is also important to note the potential differences in results under 10(k) and voluntary procedures like the Plan. The NLRB in a 10(k) proceeding will regularly uphold the contractor's choice of assignment, while a Plan proceeding or other voluntary method is less certain to do so. This is because the NLRB places greater emphasis on such criteria as employer preference, employer past practice, and economy and efficiency of operations.

In addition, the PRO Act would delete the "hot cargo" provisions of the NLRA (Section 8(e)), which currently make it unlawful to enter into agreements where an employer stops doing business with or handles the products of another person. These "hot cargo" provisions are basically union-only provisions or union-only subcontracting agreements. Under the NLRA currently, such agreements are generally unenforceable and void. In the construction industry, however, these agreements are lawful so long as they are limited to work to be done at the site of construction. Meaning, union-only subcontracting agreements that apply only at the site of construction but not to off-site operations such as pre-fabrication or other non-construction work are lawful. The PRO Act would delete Section 8(e), making union-only clauses lawful in all respects in all places. Because such clauses would be lawful, a union could strike or picket in order to force a contractor to agree to off-site union-only restrictions.

Decreased Leverage in Bargaining

The goal in most bargaining situations is to reach agreement on a new contract before expiration of the current contract. However, if the parties are unable to reach agreement, each has economic weapons to leverage their positions. The union may strike and withhold its labor to weaken the contractor's (or contractors' in a multiemployer group) ability to prolong negotiations. The contractor(s) can lock out employees – offensively and/or to defend against "whipsaw" strikes (strikes against one or only a few contractors in a multiemployer group at a time), to attempt to force the employees and union to agree to a contract on the contractors' terms.[9] In certain situations, contractors may unilaterally implement their proposals after reaching impasse in negotiations. Regardless of the leverage applied, it is up to the parties to decide when they have had enough and a deal should be reached. The PRO Act would change this dynamic by putting a heavy thumb on the bargaining scale in favor of labor, by significantly increasing unions' leverage and restricting that which may be exercised by contractors.

First, under the PRO Act, unions would be able to engage in strike tactics that have previously been found unlawful. Although the NLRA states that nothing therein "shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right," there are in fact some limits. Under current law, for example, it has been held unlawful to engage in "slowdown" strikes because the employee is being paid for work while not fully engaged. The same is true for intermittent strikes, where workers withhold their labor on and off for short periods of time. These types of "hit and run" strikes are hard to predict and react to. However, the PRO Act would make these and other manner of strikes lawful by adding to the NLRA that, "the duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited." It is unclear how broad this protection would be – but it could potentially allow slowdowns and partial strikes (refusing to perform only certain parts of the job), which as the Board has held, "are neither strike nor work."[10] Intermittent strikes would certainly be permitted by the PRO Act. And, because such activity would be protected, employers would have neither recourse to the Board

[9] Whipsaw strikes are a particularly effective tactic because the union can target contractors perceived to be more vulnerable while keeping some/most of their workers on the job without a loss of income. Defense against whipsaw strikes is one of the reasons multiemployer groups exist, because they can band together and lock out all union employees.

[10] This assumption is supported by another part of the PRO Act, which makes it unlawful for an employer to "promise, threaten, or take any action" "to permanently replace an employee who participates in a strike as defined by section 501(2) of the Labor Management Relations Act," (which defines a strike as "concerted slowdown or other concerted interruption of operations by employees") or "to discriminate against an employee who is working or has unconditionally offered to return to work for the employer because the employee supported or participated in such a strike."

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 bargaining prior to a strike." It is unclear how this would be applied in the context of a whipsaw strike – where only some contractors in a multiemployer group but not all have been struck. Regardless, the elimination of offensive lockouts gives unions all of the cards as to the timing and use of this economic weapon.

Third, the PRO Act would prohibit unilateral implementation of proposals by an employer when the parties reach an impasse in bargaining. Under current law, once bargaining parties have reached a bona fide impasse after bargaining in good faith, the employer may implement its final offer. The PRO Act would instead require employers to "maintain current wages, hours, and working conditions pending an agreement."[11] The prospect of unilateral implementation is valuable leverage, because it keeps the union at the table, bargaining so as not to reach impasse. The removal of the threat of unilateral implementation removes the incentive for the union to bargain for anything other than the terms the union wants, because all current terms must be maintained and could not legally be replaced until a new agreement is reached. Although continued bargaining may delay more favorable terms for the union, they would never have to agree to less favorable terms. And, because employers could not offensively lock out employees in the absence of a strike, the status quo would continue indefinitely without suspension of employment or any loss of wages or benefits. In addition, the PRO Act provides that this duty to bargain continues forever, absent decertification of the union in an election – making it unlawful to withdraw of recognition based on evidence (such as an employee petition) of a loss of majority status by the union. It is unclear whether this would apply to Section 8(f) contractors as well.

Fourth, in the event that the union did strike, the PRO Act would make permanent replacement of strikers unlawful. Current law draws a distinction between economic strikers and unfair labor practice strikers. When employees strike and claim unfair labor practices as the impetus of the strike, an employer may only temporarily replace them. But, when employees strike for economic pressure or gain (rather than against an alleged unfair labor practice), an employer may "permanently" replace them.[12] The PRO Act would make it unlawful for an employer "to permanently replace an employee who participates in a strike as defined by section 501(2) of the Labor Management Relations Act."[13]

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[11] Arguably, this would apply only to contractors in a Section 9(a) relationship who have a duty to bargain under Section 8(d) after expiration of an agreement. However, the application of the law is uncertain.

[12] "Permanently" replaced employees are put on a preferential hiring list upon an unconditional offer to return to work, not prohibited from ever returning to work.

[13] Again, section 501(2) states: "The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." (emphasis added)

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 relief; and (7) attorney's fees and costs for the prevailing party. These proposed remedies are well in excess of those available in any other type of comparable civil rights suit.[18] In addition, there do not appear to be any limits or caps on the amount of damages that would be available – making high-dollar recovery in such cases a very realistic possibility, regardless of the actual damages allegedly incurred.

Finally, the PRO Act would expand the powers of the Board – giving the administrative agency the power of self-enforcing orders that would remain in effect unless modified or superseded by a court. The PRO Act would also add civil penalties of up to $10,000 for each violation – with each day of violation of a final Board order constituting a separate offense. The Board would also be required in certain cases to obtain temporary injunctive relief, such as reinstatement of terminated employees, based on the Board's belief that an unfair labor practice charge is true, even before any hearing on the matter is ever held.

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[17] In this regard, it is worth noting that the PRO Act also adds new employer unfair labor practices for permanently replacing strikers, discriminating against a striker who has unconditionally offered to return to work, locking out employees prior to a strike, and misrepresenting employee classification status (misclassification as being excluded from the definition of "employee," such as misclassification as an independent contractor or other person excluded from coverage under the NLRA).

[18] For example, under federal discrimination and harassment lawsuits based on protected classifications (race, color, religion, disability, gender, etc.), a plaintiff can recover monetary damages of back pay, front pay, compensatory and punitive damages, and attorney's fees and costs – but not liquidated damages. Under federal wage and hour lawsuits and under the FMLA, a plaintiff can recover lost wages, liquidated damages, and attorney's fees and costs – but not compensatory or punitive damages. The PRO Act aggregates all possible forms of monetary and other potential recovery into its remedies.

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 reserved control standing alone can be sufficient given specific facts and circumstances." Contractors should beware of any legislation that might require them to assume additional legal obligations and penalties on behalf of others.

"Persuader" Reporting Requirements

Many parts of the PRO Act are recycled bits of previously failed legislation or administrative rulemaking. One such provision relates to certain reporting requirements under the Labor Management Reporting and Disclosure Act (LMRDA) that were the subject to the so-called "Persuader Rule" proposed by the Department of Labor (DOL) in 2016 and rescinded in 2018, which would have upended the statute's reporting exemption for "advice." Under the LMRDA, reports must be filed with the DOL (to include financial terms) by the employer and any person who undertake "activities where an object thereof is, directly or indirectly to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." However, the LMRDA has an "advice exemption," which excludes from reporting "giving or agreeing to give advice" for such purposes. This exemption has traditionally drawn a bright line between persons who engage in direct contact with employees (reportable) and everything else (not reportable). However, the PRO Act would require reporting of "any arrangement or part of an arrangement in which a party agrees, for [a purpose as set out above], to plan or conduct employee meetings; train supervisors or employer representatives to conduct meetings; coordinate or direct activities of supervisors or employer representatives; establish or facilitate employee committees; identify employees for disciplinary action, reward, or other targeting; or draft or revise employer personnel policies, speeches, presentations, or other written, recorded, or electronic communications to be delivered or disseminated to employees."

The PRO Act would require reporting by contractors and their advisors, including legal counsel, for all manner of regular activities that could be construed as having a direct or indirect purpose of "persuading" employees in the exercise of their rights. As the Associated General Contractors of America (AGC) raised in its comments to the proposed rule, it also implicates advice given by chapter managers and staff to member contractors – things like educational advice on the do's and don'ts of labor relations, guidance in the development of personnel policies and guidelines, assistance with responding to picketing activities, advice on dealing with other labor disputes, and all manner of other regular, day-to-day activities that involve no contact whatsoever with employees. The PRO Act would make the Persuader Rule law. The practical result is that contractors will either forego getting advice from legal counsel and AGC chapter managers as to important labor relations matters or they will trigger onerous reporting

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

The PRO Act would clearly make it easier for unions to organize open-shop contractors. It would provide that employers have no standing as a party or to intervene in election proceedings, it includes elements of the "quickie election" timeline giving employers less time to react to election petitions, it would allow organizing of only micro-units (small portions) of the employer's workforce at a time, it would make unlawful an employer's ability to hold mandatory meetings (i.e., "captive audience" meetings) with employees to discuss the election and the employer's position on the union, it would require employers to allow use of the employer's email and other electronic communication systems and devices for protected activities including union organizing, and it would allow the union to determine the method and place of voting in elections, including by mail ballots or electronic voting.[19] All of these changes are intended to make organizing easier and lead to the organization of more workplaces. Union contractors may feel that organizing their open-shop competitors would be a positive thing. However, there are potential drawbacks to having employers organized by individual elections under the PRO Act in the construction industry.[20]

Consider, for example, the effect that an influx of individually organized contractors could have on local area agreements. One of the benefits of construction industry agreements is that they are usually done on a multiemployer basis – through membership in associations like the AGC or by signing "me too" agreements where contractors agree to be bound by the multiemployer agreement. Most union contractors are subject to the same terms for the same type of work through the same agreements. However, when a contractor is organized by election and the union is certified as the Section 9(a) representative, a duty to bargain in good faith for a contract attaches to both the employer and to the union. The union may not in such situations present a "take it or leave it" agreement as it does for contractors signing on to area agreements in Section 8(f) relationships. Instead, the employer may insist on bargaining an individual agreement, with separate and distinct terms from the multiemployer agreement. And, with the PRO Act's mandatory interest arbitration provisions for initial contracts (discussed above), the parties themselves may not have control over the terms of the final agreement. This would likely, for example, result in agreements with different expiration dates than the multiemployer agreement[21] – meaning that these contractors may have a contract still in effect and be

[19] These methods of voting are similar to "card check" procedures, in that it is not necessarily a secret ballot process in a controlled setting.

[20] This issue was originally discussed in a 2009 AGC paper by Michael H. Boldt in the context of the proposed Employee Free Choice Act (EFCA), from which the PRO Act has borrowed elements such as interest arbitration for initial contracts. The concerns raised in that paper are equally true with regard to the PRO Act and the following discussion in this paper recites many of the same issues raised in that paper that should be of concern to union contractors. In addition, the 2009 paper discussed in depth the effect on union contractors of possible conversion of their Section 8(f) relationships to Section 9(a) relationships through easier elections. That aspect will not be explored here, but should be considered as the flexibility of Section 8(f) relationships would be lost in such a case. There also exists the possibility that a rival union could use the election process to expand its jurisdiction and become the representative of a contractor's employees instead of the union the contractor elected to sign on with to start.

[21] Under the interest arbitration provisions of the PRO Act, the term of the initial agreement decided in arbitration will be for a period of two years from the decision of the panel. It is therefore unlikely to have an expiration date that is the same as the local area multiemployer agreements.

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 the union contractor space. The unions should also be concerned about different contract terms given the prevalence of "most favored nations" clauses, whereby the union must grant to existing contractors more favorable terms from other agreements. And, it would likely be a violation of the union's duty to bargain and an unfair labor practice (even under the PRO Act) for the union to refuse to consider different terms.

It is also possible that the open shop contractor's employees already perform work claimed by more than one craft, which would result in a multi-craft bargaining unit when organized. Such units are likely to cause jurisdictional disputes on jobs where, for example the multi-craft union employees are performing work claimed by other unions on the job. With the elimination of jurisdictional picketing restrictions in the PRO Act, the multi-craft employer could find itself subject to pickets and, with the elimination of secondary picketing restrictions, the general contractor and owner and others could find themselves picketed as well.

Conclusion

The PRO Act is perhaps the most far-reaching attempt to change labor laws we have ever seen. In one fell swoop, through dozens of distinct amendments, it would change the entire landscape of organizing, bargaining, and employer/employee rights. It combines and makes into law a number of previously attempted bills, overturned decisions, and rescinded rules. It has the potential to cause extreme trouble on jobsites through the legalization of all manner of picketing. It would significantly alter the balance in employer-union negotiations and labor relations. It would exponentially increase employer liability, including personal liability of directors and officers. It would add potential reporting requirements for routine advice, with potential criminal and civil penalties for failure to do so. Although it may seem that union contractors would have reasons to support the PRO Act because it supports increased union organizing, this assumption simply does not bear out. The PRO Act has the potential to cause significant disruption in the construction industry – even and especially for union contractors.