THE PRO ACT: WHAT OPEN-SHOP CONTRACTORS NEED TO KNOW

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The Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), a bill that amends the National Labor Relations Act (NLRA), the Labor Management Relations Act, and the Labor-Management Reporting and Disclosure Act, passed the U.S. House of Representatives on March 9, 2021. AGC of America opposes the bill. As its name indicates, the bill has organizing at its core, and, if enacted, it will change the manner and enlarge the scope of organizing in significant ways. However, the PRO Act does not just address union organizing. It goes much, much further and poses serious consequences for all construction contractors.

The PRO Act would make sweeping changes to labor law. Most notably, the bill would:

- significantly restrict the ability of employers to defend against top-down union organizing campaigns, making them virtual bystanders during the election process, and would greatly increase unions' leverage in the bargaining process;
- legalize picketing in all respects at all times, including unlimited picketing for recognition and picketing against neutral employers;
- allow union-only subcontracting restrictions beyond the jobsite and strikes to get them;
- allow intermittent and possibly partial strikes and slowdowns, while prohibiting permanent replacement of strikers;
- effectively nullify state right-to-work laws, taking away employees' choice to contribute fees to a labor organization, and instead requiring them to do so;
- greatly increase penalties and damages payable by employers, and create personal liability for directors and officers;
- expand the universe of covered employees through a strict independent contractor test; and
- broaden the definition of "joint employer" to expand a contractor's potential liability for another employer's unfair labor practices and bargaining obligations.

This paper will discuss these and the other proposed changes that are most relevant to open-shop construction contractors. There are literally dozens of changes to the NLRA proposed in the PRO Act, some of which are not covered in any detail here but may very well still affect open-shop contractors. However, the focus of this paper is on the areas of most significant impact – which are still numerous.

Organizing and Elections

After decades of declining private-sector unionization, the PRO Act seeks to arm union organizers with most every legal and tactical advantage possible to increase their likelihood of winning election petitions (or pressuring open-shop contractors into voluntary recognition) and to ensure that, once a union has its foot in the door, it is able to force the employer to agree to favorable terms. In several instances, these election and

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organizing aspects of the PRO Act recycle union-friendly National Labor Relations Board (the Board or NLRB) decisions and initiatives that were subsequently abandoned or overruled. In some cases – like mandatory first contract arbitration and barring employers from being parties to election proceedings – they go much farther.

Supervisory Status

During pre-petition organizing campaigns (i.e., when a union is rallying employee support behind an election petition) and any resulting petition, the efforts of front-line supervisors are critical to remaining union-free. They know their employees better than anyone else, and often are more trusted than higher management. Consequently, they are often the most effective messengers for communicating an employer's perspective, and typically have the best sense of what really matters to potential voters. While supervisors may not query (or "interrogate," in the Board's parlance) their supervisees about their sentiments for or against the union, employees often volunteer such information to them, and supervisors are free to share that information with management's campaign response team.

Notably, because employers may not utilize non-statutory "supervisors" as their agents during organizing and elections (even if they are viewed as supervisory by their hourly peers), supervisory status has long been a hotly-contested issue between employers and unions. For employers, the stakes are high: Incorrectly categorizing a potential bargaining unit member as a supervisor may mean unfair labor practice liability and potentially having a positive election result overturned on the basis of employer interference.

Unfortunately, under the PRO Act, the universe of employees who qualify as statutory supervisors could shrink substantially. Currently, the Act defines supervisor as "any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." Under the PRO Act, putative supervisors would have to exercise supervisory authority during a majority of their worktime. Additionally, assigning work to employees or "responsibly direct[ing]" them would no longer qualify as hallmarks of supervisory status. In short, employers under the PRO Act will have fewer front-line supervisors who can assist in defending against organizing campaigns and election petitions, further neutering employer efforts to remain open-shop.

Election Rules and Procedure

In terms of election proceedings themselves, the PRO Act would further disadvantage employers in a number of other respects. Perhaps most notably, employers would no longer have standing to participate as a party to, or intervene in, the Board's processing of the election petition. In other words, the employer would effectively have no say in key issues such as the date and time of the election, the composition of the proposed bargaining unit (i.e., who would be in the group represented by the union), and which employees are eligible to vote. It is hard to overstate just how significantly this change would hobble employers. Effectively, the processing of an initial representation petition would involve only one party – the union, and the union alone.[2]

[2] The potential for an increase in elections – and union wins in elections – will have a significant impact on the very nature of bargaining and bargaining relationships in the construction industry. 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. However, when a contractor is organized by election, the union is certified as the Section 9(a) representative, which binds the union and the contractor to a duty to bargain a new agreement upon expiration of every contract. In such cases, the duty to bargain in good faith for a contract attaches to both the employer and to the union. The union may not in

In addition to sidelining employers from the legal process, the PRO Act would further tip election proceedings in favor of the union in the following respects:

- Employers would no longer be able to require employees to attend group meetings or otherwise attend employer campaign activities, further impeding employer efforts to communicate their opinions on unionization, and depriving employees of a balanced perspective on union shop employment. Currently, under longstanding Board precedent, the only similar restriction is a ban on mandatory group meetings (i.e., "captive audience" speeches) during the 24 hours immediately prior to the vote.

- Overturning a 2019 Board decision, employees would be entitled to use employer systems to which they already have access – such as email, text-messaging applications, and audio/video communication tools (cell phones, walkie talkies, in-vehicle messaging) – to engage in union organizing and election campaigning.

- Unions would have control over where and by what means the vote itself would be conducted, with the unilateral ability to choose a physical vote site (on *or* off employer property or jobsite), election by mail ballot or even electronic balloting (internet or telephonic – where "a vote may be cast at any site chosen by a participant in such election"). These changes create greater risk of coercive union pressure campaigns and increase the potential for operational disruptions during polling periods. Moreover, with employers lacking standing to participate in such elections and their ability to campaign greatly circumscribed, mail ballot or electronic elections could effectively amount to a "card check."

- The Board would give even greater deference to the union's preferred bargaining unit, including "micro units" of a single classification, which a union may utilize to get its foot in the door. That could mean multiple sets of rules for employees who normally work side-by-side, and administrative headache at best, and an employee relations nightmare at worst.

- Finally, the PRO Act would codify and expand the use of *Gissel* bargaining orders, an extraordinary remedy by which the Board orders an employer to recognize and bargain with a union without an election or despite a union election loss after determining that the employer committed an unfair labor practice so egregious as to prevent a fair election. The PRO Act directs the Board to set aside a union election loss, certify the union as the bargaining representative, and order the employer to bargain with the union if the Board finds that the employer violated the NLRA or "otherwise interfered with a fair election" and if a majority of the employees in the bargaining unit signed union authorization cards within one year of the Board's finding. The bill puts the burden of proof on the employer to demonstrate that the violation or other interference is unlikely to have affected the election results – a very difficult burden to meet. Some critics of the bill call this "back-door card check" because it partially achieves the goals of the highly controversial Employee Free Choice Act bill defeated in 2009.

First Contract Bargaining

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. This could lead to the same craft employees on the same projects with very different terms of employment.

Finally, in the (likely) event that an election under PRO Act rules results in a union win, employers will have limited leverage to obtain reasonable terms in first contract negotiations. In addition to the broad picketing and strike rights discussed below, a newly-certified union would have the ability to force the employer to interest arbitration after a period of approximately 120 days, thus guaranteeing a contract before decertification could occur, likely on relatively favorable terms.[3] Unlike the current and longstanding system under which parties bargain for as long it as takes to get a first contract, the PRO Act would allow either party to force non-binding mediation after 90 days of failing to agree to a contract. If the parties are unable to reach an agreement within 30 days of initiating the mediation process (or after an additional period of mediation agreed upon by the parties) , the negotiations would be sent to interest arbitration. There, an arbitration panel (which may or may not have any meaningful knowledge of the employer's business and industry) would decide the terms of the Agreement on the basis of several factors, including the employer's finances, "employees' ability to sustain themselves, their families, and their dependents," and the wages and benefits provided by competitors. The PRO Act would require that the arbitration process be completed within 120 days, all but ensuring that a contract will be completed within one year. Undoubtedly, this process would require employers to disclose sensitive financial information to the arbitration panel and the union. This arbitrator-created contract would remain in place for a period of two years. The uncertainty and risk of this process would no doubt result in some open-shop contractors agreeing to standard area agreements in order to avoid the possibility of an even worse result.

Effective Nullification of State Right-to-Work Laws

Currently, many states maintain "right-to-work" laws, which prohibit employers and unions from agreeing to "union security" or similar clauses mandating that all bargaining unit members pay dues and fees to the union as a condition of employment. While the NLRA itself and Supreme Court precedent do not permit a requirement of union membership as a condition of employment, the issue of union security clauses or so-called "fair-share" or "agency" fees clauses is left to the states. Under the PRO Act, however, state "right-to-work" laws would effectively be nullified, as the PRO Act would make valid and enforceable – regardless of state law to the contrary – clauses requiring payment by all employees in a bargaining unit of representation costs, collective bargaining, contract enforcement, and related expenditures. This would be an enormous financial win for organized labor, as the growing prevalence of right-to-work laws have the potential to significantly cut into union revenues. While employers would not be required to agree to such clauses, there is no doubt that unions in formerly right-to-work states will make them a top bargaining priority.

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 for recognition of the

[3] Currently, unions hold an irrebuttable presumption of majority status for at least one year following an election win. During that period (and during the first thirty-three months of any collective bargaining agreement) employees are barred from filing a decertification petition to vote the union out.

[4] On multiemployer jobsites, where the primary and all secondary employers (including the owner of the premises) coexist, 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.

union (where the employer has not already recognized another union or had an election in the last 12 months), but 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 a union, but only if the picketing does not have the effect of causing others to not perform services. It allows picketing in jurisdictional disputes, but only where the employer is ignoring an order or certification from the Board regarding the assignment of work.

The PRO Act eliminates all union unfair labor practices related to picketing and would make such picketing lawful – secondary, recognitional, jurisdictional, or otherwise.[5] It would 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 an open-shop employer on a jobsite, it can picket at all gates and at all times – regardless of where the open-shop 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 open-shop employer is organized or permanently removed.[6] Pickets could follow the neutral contractors to their other jobs as well in order to put pressure on them to stop working on the job with the open-shop 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. The effect may well be that open shop contractors will simply be excluded from mixed jobs (jobs with both union and open-shop contractors), if they become a picketing nuisance.

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 under which an employer promises to stop doing business with or handling the products of another employer. 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 prefabrication or other non-construction work are lawful. The PRO Act would delete Section 8(e) altogether, making union-only subcontracting clauses lawful in all respects in all situations, reducing the likelihood of even off-site work being subcontracted to open-shop contractors.

Strikes

Section 8(a)(1) of the NLRA generally prohibits employers from terminating or disciplining employees based on their engagement in protected concerted activity. Employees have the right to engage in "protected concerted activity" whether they are in a union or not and whether they work for a union-shop or an open-shop contractor. Refusing to work (striking) may be considered protected concerted activity in certain circumstances when the refusal is related to terms and conditions of employment. In order to benefit from this protection, the refusal generally must come from two or more employees acting jointly, although, a single employee's refusal may be considered protected concerted activity if that employee is acting on behalf of other employees, trying to induce group action, or seeking to prepare for group action. In the non-union

[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 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.

context strikes have not been common, although they have seen an increase in recent years. The PRO Act makes strikes more likely and more disruptive.

Under the PRO Act, contractors would be subject to 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 off and on 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 by employees (refusing to perform only certain parts of the job), which as the Board has held, "are neither strike nor work."[7] 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 nor could they take disciplinary action against employees. It is hard to overstate the potential economic impact of such activities on contractors.

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

Unfair labor practices are not limited to union-signatory contractors. The protections of the NLRA contain rights guaranteed to all covered employees, regardless of whether their employer is signatory to a collective bargaining agreement or not. Unfair labor practices charges in the non-union context can arise if some adverse action is taken by an employer towards an employee or employees acting in concert concerning wages, hours, and other terms and conditions of employment or where an employer policy or practice is alleged to interfere with, restrain, or coerce employees in the exercise of rights under the NLRA. Unfair labor practice charges are also often a component of union organizing campaigns. 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"[8] 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 the other damages awarded.

[7] 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 a "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."

[8] 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.

Furthermore, 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 and 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, directors and officers could find themselves personally liable if, for example, the Board found an employer handbook policy to unlawfully interfere with employees' right to engage in protected concerted activity. The PRO Act would authorize corporate and personal liability for civil penalties in all cases of employer unfair labor practices.[9]

The PRO Act also authorizes lawsuits by aggrieved employees. Currently, employees complaints of an unfair labor practices by an employer file charges with the NLRB. The PRO Act would give such employees a big second bite at the apple by giving them a right to sue the employer in federal court under certain circumstances. 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.[10] The damages that would be available in these lawsuits 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.[11] In addition, there appears to be no limit or cap 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.

Independent Contractor Analysis

[9] 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). These issues are also discussed in this paper.

[10] The lawsuit can be filed 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.

[11] 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.

The PRO Act would also amend the NLRA to cover many workers currently classified as independent contractors. While the NLRA will continue to cover only employees and not independent contractors, the PRO Act adds a new, more stringent test for determining who qualifies as a statutory "employee." Under this so-called "ABC" test (because of its three conjunctive parts), a worker performing "any service" for an employer is considered (i.e., presumed to be) an employee unless (A) the worker is free from direction and control both under any contract and in fact, (B) the work that is being performed is outside the course of (i.e., different than) the employer's usual business, and (C) the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the work being performed. The test is conjunctive because all three parts must be met in order to exclude the worker from the presumption of being an employee. The first and third (A and C) factors are common independent contractor traits – free from direction and control and engaged in an independent trade or business; however, part B is the real bee in the bonnet here – if the work being performed or service provided is the same as the employer's usual business, the worker cannot be an independent contractor and will be considered an employee under the NLRA.

The PRO Act's ABC test is the same as California's AB5, which has received much attention. However, even California's AB5 contains an exemption from the ABC test for individuals meeting certain criteria that perform work under a subcontract in the construction industry. The PRO Act contains no such exemption, calling into question any subcontract (particularly with an individual person) to do the same work that the contractor usually performs.

The practical implication is that some independent contractors in the construction industry may be considered employees under the NLRA – expanding the universe of workers who could be organized by unions and who would be protected to engage in concerted activities.

While that may be of concern to some open-shop contractors, what is likely to be more alarming is that the PRO Act also makes it a stand-alone unfair labor practice "to communicate or misrepresent to an employee" that they are not an employee under the NLRA – meaning that misclassification as an independent contractor under the ABC test (or misclassification as a supervisor) would in and of itself be an unfair labor practice. Given the PRO Act's significantly enhanced remedies and penalties (discussed above) employers should be very concerned about this issue. In fact, the NLRB's current complaint forms automatically allege a violation – interference with, restraint, or coercion in the exercise of protected NLRA rights – in all cases[12] that would, under the provisions in the PRO Act, require the NLRB to seek injunctions against employers in federal court, subject employers to civil penalties of up to $50,000 "per violation" or $100,000 for cases of "other serious economic harm," and create potential personal liability for directors and officers that "directed or committed the violation." Individuals would also have a private right of action (i.e. be able to sue employers directly in federal court) for 8(a)(1) violations and receive the enhanced remedies discussed above.

Expanded Joint Employer Liability

The PRO Act would codify a broad standard for joint employer liability that was established in an Obama Board decision (*Browning-Ferris Industries*) and reversed by the Trump Board through rulemaking. 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

[12] Form NLRB-501, for unfair labor practice charges against employers, automatically states for the charging information for all such charges: "The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act . . ."

bargaining obligations. Under current NLRB regulations (supported by AGC), an employer may be deemed a joint employer under the NLRA only when it actually exercises substantial direct and immediate control over essential terms and conditions of employment of another company's employees and does so in a manner that is not limited and routine. The PRO Act would revert back to the Obama Board ruling extending joint employer liability to situations where one employer has exercised only indirect control over the terms and conditions of employment of another company's employees or has merely 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.

Prohibition on Class/Collective Action Waivers

The PRO Act would also revive an overruled Board decision (*D.R. Horton*) that prohibited employers from requiring employees to agree to mandatory collective and class action waivers as a condition of employment. These waivers, which are contained in arbitration agreements, are typically utilized by non-union employers to protect against costly class and collective action lawsuits under the federal Fair Labor Standards Act (FLSA) and state wage and hour laws. Such waivers protect employers by requiring aggrieved employees to bring individual arbitration claims, which are less attractive to plaintiffs' lawyers who chase the large attorney fee awards often awarded in mass wage and hour litigation. The PRO Act would prohibit such waivers for non-union employers only. Indeed, unionized employers and unions would apparently be free to include such provisions in their collective bargaining agreements, while non-union employers would commit an unfair labor practice by doing so. This disparity raises the prospect that unions attempting to organize an open-shop contractor might threaten to foment such litigation as a means to coerce such employers into voluntary recognition.

"Persuader" Reporting Requirements

Another part of the PRO Act recycled from previously failed rulemaking relates to certain reporting requirements under the Labor Management Reporting and Disclosure Act (LMRDA). The rulemaking, known as the "Persuader Rule," 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). The PRO Act would instead 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 AGC of America raised in its comments to the failed rulemaking, 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. A recent amendment to the PRO Act would also add whistleblower discrimination protections for employees who report violations of the persuader rule or other violations of the LMRDA.

Posting Requirements

The PRO Act also requires the Board to enact regulations requiring each employer to post and maintain "a notice setting forth the rights and protections afforded employees" under the NLRA. The notice would be posted in conspicuous places where notices to employees are usually posted, both physically and electronically. In addition, employers would be required to notify each new employee of the information contained in the notice. The form and content of the notice will be developed and made available by the Board, so it is unclear at this time exactly what the notice would include but if the PRO Act is passed, it would likely include reference to the provisions discussed herein as well as traditional statements of employee rights. The Board may assess civil penalties of up to $500 per violation and order compliance with the posting requirement.

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 failed 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 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. The PRO Act has the potential to cause significant disruption in the construction industry for open-shop contractors.