



## **The impact of the PRO Act on Construction Employers**

**By: Andy Martone**

When President Biden was on the campaign trail, he promised that he would be “the most pro-union president you've ever seen.” He was not kidding.

The PRO Act has passed the House.

While it is still too early to tell if the PRO Act will make it through the Senate – and, if it does, what changes will be made, with a staunchly pro-union President in the White House, labor and employment laws affecting construction employers are likely to change, possibly radically.

### **The PRO Act**

Much has been said about the Protect the Right to Organize Act (“PRO Act”) and its potential impact on employers. For once, the hype is essentially accurate, and this article is not long enough to explain all of the anti-employer changes to established labor law contained in the PRO Act.

A substantial portion of the PRO Act is aimed at non-union employers and will not have much of an impact on construction employers who are already union.

However, there are at least three changes that will substantially affect construction employers:

1. **Picketing and Union Pressures will Increase** -- For construction employers, the single biggest impact that the PRO Act would have would be the elimination of most of the legal restrictions on union picketing.

The basic law of picketing has been established for decades. The PRO Act would change all of that, basically making it legal for unions to picket anyone they want to, for any reason they want to, at any time they choose.

This means that a union could picket an employer for jurisdictional reasons (the PRO Act would eliminate 10(k) jurisdictional hearings) to force an employer to assign certain work to that union or to a signatory subcontractor. It would also allow a union to picket neutral employers (for example, project owners) to force them to cease doing business with employers with whom the union has a dispute. Finally, it would permit “union-only” subcontracting clauses that extend beyond a project site, forcing employers to buy goods and services from union manufacturers and suppliers.

2. **Collective Bargaining will be Unbalanced** -- In addition to supercharging union picketing, the PRO Act would also hamstring employers negotiating collective bargaining agreements.

First, the PRO Act would eliminate an employer's right to implement its final proposals after the parties reach impasse. Instead, the expired collective bargaining agreement would remain in effect until the parties reach agreement, during which time the union could picket and strike. Implementation is one of the few collective bargaining tools that employers possess to balance out strikes and picketing, and if it is taken away from employers, unions would literally have no reason to agree to any pro-employer change to a collective bargaining agreement unless the employer “buys” the change from the union.

In addition, the PRO Act would eliminate an employer's rights to lock employees out during a labor dispute and to permanently replace economic strikers. While these tools are seldom used in the construction industry, their elimination essentially empties the employer's tool chest during collective bargaining.

3. **Substantially Increased Liability for Employers** -- The PRO Act would also expand an employer's liability for unfair labor practices by including consequential damages (for harm resulting from the alleged conduct – including things like emotional distress), front pay until the employee finds another comparable job, and liquidated damages equal to twice the total of the other damages.

Employers would also be subject to civil penalties between \$50,000 and \$100,000 for each unfair labor practice and would also have to comply with NLRB Orders – *even if they are appealing* – or face \$10,000 fines and court injunctions. An employer's Directors and Officers could also be personally liable for these penalties.

Finally, the PRO Act would also create a private right of action for unfair labor practices, allowing employees to get their own attorneys and sue employers in federal court for punitive damages and attorneys' fees. This would open the floodgates of civil litigation.

Construction employers cannot afford to be politically inactive and should stay tuned while supporting and advocating to protect the rights of employers, whether individually or through construction employer organizations.