Insight

The Return of the PRO Act

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Executive Summary

- The Protecting the Right to Organize (PRO) Act is a sweeping revision of labor law that includes changes to the joint-employer standard, worker classification, and a repeal of right-to-work laws in 28 states including Guam.
- Broadly, the PRO Act would strengthen the hand of labor unions but weaken workers' flexibility and control over their employment options.
- The PRO Act would also have significant and wide-ranging costs: The joint-employer provision could affect 44 percent of the labor force and cost up to $33.3 billion for the franchise sector alone; worker reclassification could cost businesses up to $12.1 billion and put 8.5 percent of gross domestic product at risk; and repealing right-to-work legislation would directly affect 28 states (including Guam) and threaten growth in employment, output, and number of businesses.
- The PRO Act failed to pass the Senate in the previous Congress, and while the 2021 version is essentially unchanged and expected to pass the House of Representatives again, it may fail to get the 60 votes needed to pass the Senate under current rules.

Introduction

The House of Representatives is expected to vote this week on the Protecting the Right to Organize (PRO) Act, a sweeping revision of labor law. This bill seeks to empower unions and has been painted accordingly as a pro-worker initiative, but several provisions would, on top of imposing significant economic costs, remove employment options that give workers more flexibility and control over their employment. The bill includes, among other provisions, changes to the joint-employer standard, worker classification, and a repeal of right-to-work laws in 28 states including Guam.

The PRO Act was passed by the House of Representatives last year but failed to pass the Senate. The 2021 version of the legislation remains largely the same; while it is expected to pass the House, it will likely not pass the Senate under its current rules. As a result, union leaders are considering supporting the elimination of the filibuster.

What follows is a short recap of the PRO Act's major provisions along with an analysis of their likely impact. (More detail on costs and the PRO Act can be found here.)

Joint Employer

The PRO Act would expand of the joint-employer standard, which determines when two or more employers are jointly responsible for the same employees. Take, for example, the relationship between a construction company and a subcontractor: If the construction company is deemed a joint employer, it would be held liable for any National Labor Relations Act (NLRA) violations committed by the subcontractor.

Under the PRO Act, the definition of a joint employer would be expanded to include entities that exert direct or indirect control over workers, when in the past the joint-employer standard has been direct control alone. Changes to the joint-employer standard affect business relationships across industries including contracting, subcontracting, and franchise agreements. American Action Forum research found that the broadened joint-employer standard would impact 44 percent of private-sector employers, or 54.6 million workers. Furthermore, this change could lead to $17.2 billion to $33.3 billion in lost annual output for the franchise business sector.

This change to the joint-employer standard could effectively destroy the franchise model, a sector that has seen great success, particularly for women and ethnic and racial minorities. Forcing franchises to make the choice to withdraw support for their franchisees or, worse, abandon the model entirely could put jobs at risk in addition to shuttering the small businesses owned by franchisees.

Worker Reclassification

The PRO Act would make changes to the NLRA that would limit workers' ability to be classified as independent contractors. The bill would do so by codifying the "ABC test" definition of employee. The PRO Act assumes that all workers are employees unless they can meet the three criteria of the ABC test to identify an independent contractor. The likely result would be that millions of workers would be reclassified as employees: Nearly 59 million workers reported freelancing in the past year. Given that, this provision would likely affect substantial percent of the workforce, hurt overall growth, and affect multiple industries.

This reclassification would go directly against the preferences of independent workers and significantly increases costs on employers. Based on a survey from the Bureau of Labor Statistics, fewer than 1 out of every 10 independent contractors would prefer a traditional employment relationship. There are many benefits to independent work including flexibility, entrepreneurial opportunity, and a level of autonomy not typically found in hourly employment. Assuming 15 to 50 percent of independent contractors would be reclassified as employees under the ABC test, businesses could face between $3.6 billion and $12.1 billion in additional costs. Most recently, the ABC test became part of California labor law through Assembly Bill 5 (AB 5), and previous AAF research found that a national version of AB 5 could put up to 8.5 percent of gross domestic product at risk.

Right to Work

Right to work (RTW) legislation allows workers to choose whether to join a union without losing their jobs or being forced to pay union dues. The PRO Act would overturn these protections in the current 28 RTW states and keep other states from enacting such legislation. Removing RTW legislation would restrict choice for workers and reduce the pressure for unions to be accountable to the people they do represent.

Furthermore, economic research shows that RTW states perform better than non-RTW states along key metrics including employment growth, real private-sector output, and growth in number of businesses. Between 2001 and 2016, RTW states saw a 37.6 percent increase in real private-sector output, compared to non-RTW states that only saw a 28.5 percent change in output. During this same timeframe, RTW states saw 26.7 percent employment growth compared to non-RTW growth of 15.4 percent. Further, from 2001 to 2015, the number of firms increased by 10.2 percent in RTW states and only 2.8 percent in non-RTW states.

Conclusion

The PRO Act is crafted in such a way that the provisions are self-reinforcing and work to strengthen union power, ultimately harming workers and small businesses in addition to stifling economic growth. It is therefore not surprising that the bill—which has been introduced in previous Congresses—has faced bipartisan opposition. Truly pro-worker legislation must take into account workers' ability to choose how they want work and their freedom of association.