The Daily Dish

The PRO Act in Pieces

ISABEL SOTO | AUGUST 20, 2021

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The Protecting Right to Organize (PRO) Act has been a controversial piece of legislation since it was first introduced in 2019. The legislation would fundamentally change U.S. labor law, yet there are crucial provisions that could be passed through regulatory action alone. In fact, the Biden Administration is attempting to do just this right now, leading to the reclassification of independent contractors as full employees and the expansion of the joint-employer standard.

Under the Trump Administration, the method of determining if a worker is a full employee or independent contractor under the Fair Labor Standards Act (FLSA) was changed to an "economic realities test" that allowed for a more nuanced approach to worker classification. The Biden Administration quickly rescinded this rule, however. What could likely follow now is a much narrower definition of independent worker or a broader definition of employee, much like what the PRO Act is attempting to do with the "ABC test."

The ABC test could encourage a more mechanical and blunt approach to worker classification that assumes workers are employees unless three specific elements hold true. If nationalized, the ABC test could affect 8.5 percent of gross domestic product and at least 13 million workers. Further it would make the flexible nature of independent work far more difficult and may force workers to enter a traditional arrangement, in addition to increasing costs to employers.

Similar movement is occurring on the joint-employer front, used to determine if one or more additional entities is responsible for the same group of workers. The joint-employer standard also falls under the FLSA, and its latest 4-part iteration – itself a response to an Obama-era rule – was officially rescinded in July 2021. The Trump-era rule was narrower, making it harder to be considered a joint employer and thereby reducing liability for employers.

Now that the rule has been rescinded, employers have limited guidance to know or understand if they are in a situation of joint-employment. The joint-employer standard is of particular concern to the franchise industry whose ability to empower individuals to operate independently owned small businesses faces significant risk if the standard is broadened. Currently, due to the withdrawal of the Trump-era rule, businesses rely on a patchwork of legal precedent and court decisions to take a guess at their joint-employment status.

In the current labor climate clarity is key and introducing uncertainty into already complex areas of labor law not only hurts businesses but could negatively affect workers as well. By rescinding these two Trump-era regulations, the Biden Administration is opening the door to rewriting labor law along the lines of the PRO Act without any congressional action at all.