

Non-Union Construction Companies Face Significant Threats Under the PRO Act

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In February 2020, the House of Representatives passed the Protecting the Right to Organize Act of 2019 (H.R. 2474), known as the PRO Act. The PRO Act contains a number of anti-management, pro-union [changes to various labor laws](#), many of which have existed in the United States for decades. President Biden has already promised to sign the PRO Act if it comes across his desk, and with a Democratic-controlled House and Senate, it likely will. Several of the proposed changes will be critical to our clients in the construction sector, but there is one in particular that we find especially concerning.

Within the PRO Act's relatively innocuous language is wording that would strip Section 8(b)(4) out of the National Labor Relations Act (NLRA). Section 8(b)(4) is the federal labor law that outlaws secondary picketing, boycotts and related activity.

Secondary activity is when a union enmeshes a neutral company even though the union's dispute is with a different primary target (normally a non-union subcontractor). Typically in this situation, the neutral company and the target company happen to be working on a common job site with numerous other contractors. The danger to the job site is that once a picket line goes up, all the union employees for the union contractors will probably refuse to cross the picket line to go to work – even if they are not directly involved in the dispute.

The remedy sanctioned by Section 8(b)(4) of the National Labor Relations Act, which prohibits secondary boycotts or secondary activity, is the creation of a two-gate system at the job site. Typically there would be a gate reserved for the picketing union and picketed company and a separate gate for employees of the non-picketed companies. Thereby, the problem of having to cross a picket line is eliminated and the job is back on schedule.

Without the ability to set up either a second gate or a reserve schedule allowing the non-union company to work at different times from the union company, the non-union company will find itself in a very painful dilemma of either being kicked off the jobsite or having to sign a union contract. The PRO Act would eliminate the Section 8(b)(4) option to allow the jobsite to continue and as a result could force the non-union construction companies to either go out of business or sign union contracts.

Since 1947, however, this has been held illegal. Under federal labor law, it is unlawful for a union to pressure a neutral company to punish a targeted company. The United States Supreme Court long ago allowed for the usage of reserve gates or reserve times to isolate a labor dispute on a common site project. Under a two-gate system, a union would have to confine its picketing to a gate reserved solely for the targeted company, and the job could proceed with every other non-targeted or union companies using a second gate.

If in fact the PRO Act is signed by President Biden, removing the protection for neutral companies from other companies' labor disputes, the increased leverage for labor organizations could significantly shrink the non-union construction industry in the United States. For instance, the Associated Builders and Contractors, a trade organization of over 25,000 non-union construction companies, is especially vulnerable if the Pro Act is signed into law.

The Biden Administration also has plans to reinstate "card-check" union organizing. This would eliminate secret ballot union elections at the NLRB and force non-union companies to sign union agreements if 51 percent of their employees sign a petition.

Then there is the \$15 minimum wage drive, which would create upward pressure on base pay rates for unskilled labor in all work classifications. That will necessarily propel all wage rates upward, drastically increasing corporate costs and lowering corporate profits.

The next 24 months could be rocky for the construction industry. We encourage all contractors, owners and general construction managers to join us in watching these developments closely.

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