What's Ahead for Labor Policy

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FOR PUBLIC POLICY

With Democrats controlling the House, Senate and presidency, there are new questions for those interested in labor policy: What should we expect for labor issues in the immediate future?

There are a number of ramifications that may come from these election results that are not directly related to labor. These include attempts to pack the Supreme Court, eliminate the filibuster and incorporate new states. Nevertheless, there are many initiatives that people interested in labor policy should be prepared to address. These include both legislative and administrative actions, each of which are significant, but not guaranteed.

Legislative Actions[1]

Naturally, this question inherently involves some degree of prognostication. But some actions are more likely to occur than others if the filibuster were to be eliminated. First, and particularly noteworthy, is the Protecting the Right to Organize Act of 2019, or PRO Act. This legislation would be a sea change in labor and employment law and has already been passed by the House and endorsed by President Biden.

PRO Act Changes to Labor and Employment Law

Elimination of Right to Work. The PRO Act would ban all right-to-work laws, regardless of state or territorial laws. This would, for obvious reasons, be catastrophic for worker freedom, and would allow unions in 27 states to get workers fired for not paying dues.

National implementation of California's Assembly Bill 5 standard for independent contractors. Under this standard, a purported independent contractor will be classified as an employee unless:

- "The individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- The service is performed outside the usual course of the business of the employer; and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

Essentially, this test makes it incredibly difficult for any worker to be classified as an independent contractor. As implemented in California, this standard has had disastrous results, and, if implemented nationally, could cost the economy up to $12.1 billion annually.

Even the California bill sponsor tacitly admitted AB-5 went too far. Last year the California Legislature passed a host of exemptions to AB-5, and voters follow suit with a ballot initiative that further watered down the law. However, the PRO Act has none of these exemptions and will be more extreme than the current California law.

It is worth noting that this standard is directly in conflict with a recently promulgated DOL rule for classifying independent contractors. Under that standard, the determination of whether a worker is an employee or an

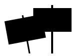
1 Please note that these bills were introduced in the 116th Congress and would need to be reintroduced to be passed. Nevertheless, given their prior introduction, these bills serve as a helpful outline of what can be expected from the 117th Congress.

independent contractor is based on an "economic reality" test, which examines whether the worker is self-employed or dependent on an employer for work. This standard is beneficial, but the Biden administration may attempt to repeal and replace the rule with the test contained in AB-5. Protecting worker freedom may then require opposing not only attempts to repeal the current standard, but also the adoption of a different standard.

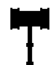
Dramatically increased penalties for labor law violations. The PRO Act would also implement extreme penalties for employers violating the act. Fines for violations could be as high as $50,000, with charges increasing up to $100,000 when the employer has committed another violation within the last five years. If the NLRB were to determine that a director or officer was personally liable for the violation, the penalty may also be assessed against the individual for failing to prevent it, even if they were unaware of the violation but should have known of its existence.

In addition, the NLRB would have the ability to award up to two times ordinary damages, which already include back pay, front pay and consequential damages.[2] These excessive costs would be an extreme burden on employers and could harm general economic performance.

Elimination of secret ballot elections. The PRO Act would essentially mandate card check procedures. If a union alleges an employer somehow compromised an election and the employer could not prove they did not, the NLRB could throw out the election results and recognize the union via signed cards. In other words, employers are guilty until proven innocent, and the penalty is unionization based on card check, which unions prefer because it is easier to use intimidation and coercion to garner support for organizing.



Legalize Secondary Boycotts. The PRO Act would authorize secondary boycotts. This is when a union pressures another employer to stop doing business with the union's employer until the union's demands are met. These boycotts can disrupt entire industries, put unfair and unreasonable pressure on employers, and provide unions with inordinate bargaining power at the negotiating table.



Creation of a private cause of action for labor law violations. The PRO Act would permit private individuals to sue employers if the NLRB chooses not to bring a complaint against an employer. Under this standard, if the NLRB refuses to act against an alleged unfair labor practice, the person who brought the complaint may then sue for certain violations of the NLRA.[3] This would expand potential liability for employers, particularly since the PRO Act also provides for an award of attorney's fees upon a successful suit. This change would drastically increase litigation by the trial bar and would dramatically increase the costs of operating a business.

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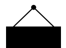
2 Damages suffered by a plaintiff as a consequence of the NLRA violation. Typical examples include loss of reputation, loss of anticipated raises, loss of alternative job opportunities and similar matters.

3 These violations include discrimination intended to discourage union membership and interference with employees attempting to organize.

Mandate binding arbitration for the first two years of any new contract. This changes the current standard, under which only good faith bargaining is required, after which an employer can implement their preferred contractual language if it was previously offered to the union before impasse. This change would remove employers' ability to regulate their workplaces by handing the ultimate decision on terms and conditions of employment to unelected and unaccountable arbitrators.

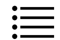
Forbidding arbitration agreements. This would alter the law by making arbitration agreements illegal. These are used when employers and employees voluntarily agree to arbitrate an employment dispute, as opposed to litigating those disputes in court. As with providing a private cause of action, this is a gift to the trial bar and would dramatically increase lawsuits against employers.

Ban employers from replacing strikers. Under the PRO Act, workers would no longer be able to permanently replace striking employees. As a result, an employer will be much less likely to find qualified employees to perform work during a strike, as those employees would not be able to retain their position after the strike ends.



Require employers to post a notice informing employees of their rights under the PRO Act. This includes an explanation of new unfair labor practices, including, the provisions preventing an employer from requiring employees not to join class actions or retaliate against employees for doing so.

Adoption of many Obama-era NLRB decisions (discussed in detail below).



Codification of the NLRB's ambush election rules (discussed in detail below).

The Public Service Freedom to Negotiate Act

The Public Service Freedom to Negotiate Act represents another tremendous threat to worker freedom. This act, while incapable of overriding the Supreme Court's 2018 Janus v. AFSCME decision, which affirmed public employees' First Amendment rights to not have to pay union dues or agency fees in order to keep their jobs, would nevertheless drastically limit state's abilities to manage government employees. If enacted, PSFNA would essentially prevent any further efforts and repeal current laws designed to protect worker freedom for public sector employees.

Most notably, the PSFNA would force all states to adopt collective bargaining with almost no limitation. This would be even more extreme that what is seen in even union-heavy states like New York. It would prevent almost any type of public sector labor reform at the state level. Reforms like those seen in Wisconsin, including union recertification, would be overruled by federal law.

Specific measures include:

Guaranteed unionization privileges. Privileges granted to public employees under the PSFNA include:

- The right to form, join or assist a labor organization or to refrain from doing so;
- The right to collectively bargain;
- The right to engage in protected, concerted activities;

Coerced collective bargaining. Under the PSFNA, public employers will be forced to collectively bargain. This is particularly burdensome in light of the additional reforms contained in the act.

Other requirements. The PSFNA also requires:

- *A ban on recertification requirements.* Employers would be required to recognize unions that are representing their employees, and a union could not be required to recertify under state law.
- *Limitations on decertification.* Decertification is only permitted if at least 30% of union members sign a petition. A decertification petition cannot be circulated within the first year a union begins representing employees, within one year after the expiration of a valid collective bargaining agreement, or when a collective bargaining agreement is in place. The only exception is that a decertification petition can be circulated during a 30-day period, 90 days before the expiration of an effective collective bargaining agreements.
- *Binding arbitration.* All collective bargaining agreements must contain procedures for binding arbitration. This dramatically limits a public employer's ability to control its budget and workplace, often preventing the government from negotiating new contracts to avoid deficits. Similarly, binding arbitration for matters of discipline can protect employees whose bad behavior would otherwise result in termination.
- *Payroll deduction.* Under the act, public employers would be required to deduct union dues from paychecks. Depending on implementation this could be a violation of Janus v. AFSCME, as Janus required evidence that employees have affirmatively and knowingly consented to all dues deductions. The PSFNA complicates this procedure by preventing states from adopting measures designed to ensure compliance with this requirement.
- *Restrictions on strikes and lockouts.* Public employers may not lockout employees, and emergency services employees are not permitted to strike or measurably disrupt emergency services.

Conflicting state laws overruled. If the Federal Labor Relations Authority determines that state laws conflict with the above requirements, the requirements of the PSFNA apply. In essence, the act overrules all state efforts to regulate public sector bargaining.

Enforcement by the FLRA. Under the PSFNA, the FLRA is tasked with adopting rules designed to establish and administer collective bargaining requirements as provided above. The FLRA is also tasked with resolving complaints regarding violations of the act and resolving disputes relating to arbitration decisions. The FLRA is also empowered to petition U.S. appeals courts to ensure that its orders are enforced.

Private right to enforce. The PSFNA provides any party the ability, once 180 days have passed after a petition has been presented to the FLRA, to sue states to enforce compliance with the act or any order of the FLRA. Suits will be heard in federal courts, and attorney fees are available as an award.

The Worker Flexibility and Small Business Protection Act

An act less likely to pass, but perhaps more damaging to worker freedom than the PRO Act, is the Worker Flexibility and Small Business Protection Act. The provisions of this act, particularly if combined with the PRO Act, would severely damage the economy and hurt workers across the country. Given its extreme nature, it is unclear if this act has a significant chance of success, even with a Democratic trifecta. Nonetheless, if enacted, the SBPA would implement the following policies:[4]

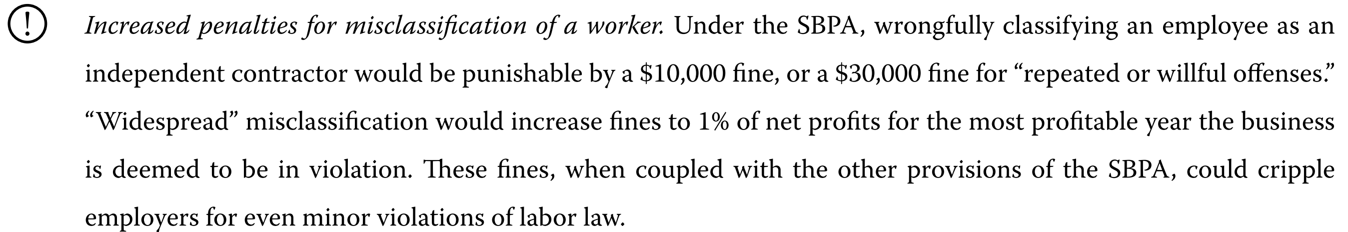
National adoption of California's ABC test for independent contractors. Unlike the PRO Act, which would also implement the ABC test, this bill would specifically exempt transportation and delivery companies if they operate under a collective bargaining agreement. Essentially, the SBPA adopts the ABC test, but coerces some gig companies into unionizing in exchange for exemptions essential to their operation.

Legislation of the Joint Employer Rule. As with the PRO Act, the SBPA would also adopt the NLRB's Browning-Farris standard (as discussed below). If adopted, this would mean that a franchisor (such as McDonald's) would be considered a joint employer with their individual franchisees. This would not only expose franchisors to liability for acts almost entirely outside of their control, but it would also allow unions to organize workers across an entire franchise by dealing directly with corporate offices, rather than individual work locations. Essentially, this allows unions to unionize employees of franchises without the need to ever have a meaningful presence on individual worksites.

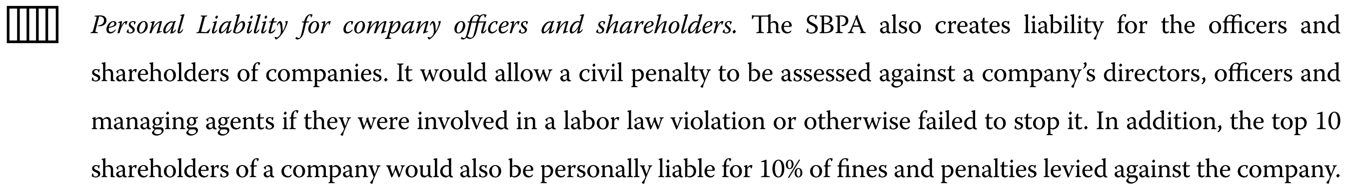
Classification of employee scheduling as a DOL matter. Perhaps most shockingly, the SBPA would require any employee scheduling request to be accepted unless an employer can justify a denial by demonstrating a "compelling business necessity." The employer has the burden of demonstrating that necessity. If an employer cannot do so, they must grant the employees request. As a result, every single refusal to accommodate an employee's request for

4 It is worth noting that, unlike the PRO Act, the SBPA is hundreds of pages. As a result, our review of this act is limited to the most impactful propositions.

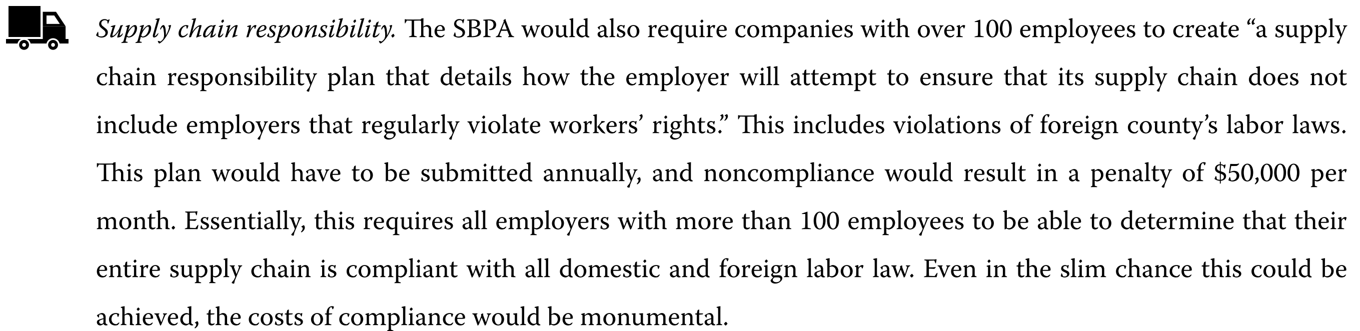
a particular number of shifts, hours per day, hours per week, work location or unpaid time off could be appealed to the DOL.



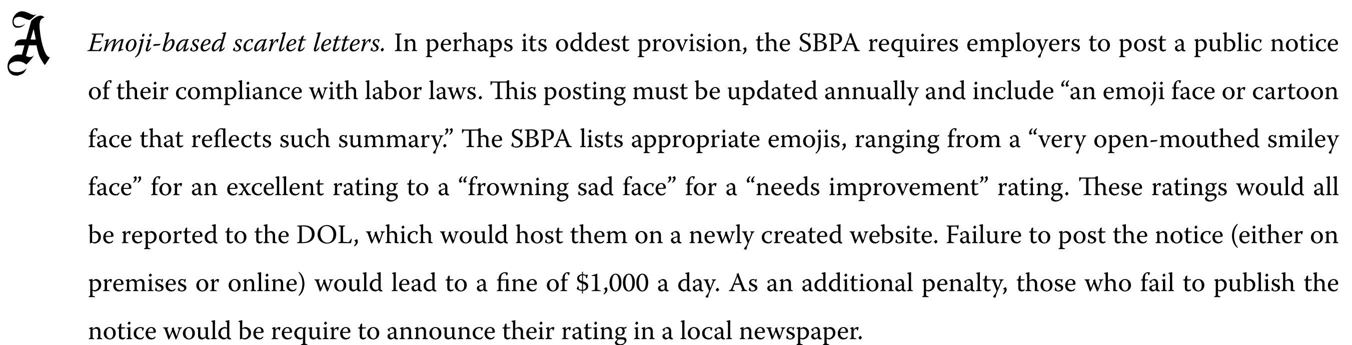
Increased penalties for misclassification of a worker. Under the SBPA, wrongfully classifying an employee as an independent contractor would be punishable by a $10,000 fine, or a $30,000 fine for "repeated or willful offenses." "Widespread" misclassification would increase fines to 1% of net profits for the most profitable year the business is deemed to be in violation. These fines, when coupled with the other provisions of the SBPA, could cripple employers for even minor violations of labor law.



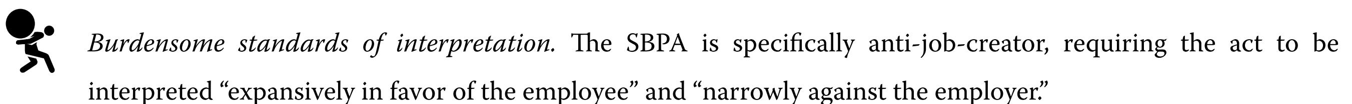
Personal Liability for company officers and shareholders. The SBPA also creates liability for the officers and shareholders of companies. It would allow a civil penalty to be assessed against a company's directors, officers and managing agents if they were involved in a labor law violation or otherwise failed to stop it. In addition, the top 10 shareholders of a company would also be personally liable for 10% of fines and penalties levied against the company.



Supply chain responsibility. The SBPA would also require companies with over 100 employees to create "a supply chain responsibility plan that details how the employer will attempt to ensure that its supply chain does not include employers that regularly violate workers' rights." This includes violations of foreign county's labor laws. This plan would have to be submitted annually, and noncompliance would result in a penalty of $50,000 per month. Essentially, this requires all employers with more than 100 employees to be able to determine that their entire supply chain is compliant with all domestic and foreign labor law. Even in the slim chance this could be achieved, the costs of compliance would be monumental.

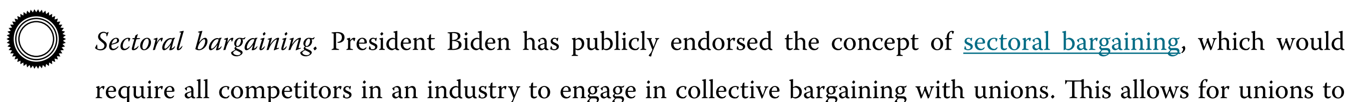


Emoji-based scarlet letters. In perhaps its oddest provision, the SBPA requires employers to post a public notice of their compliance with labor laws. This posting must be updated annually and include "an emoji face or cartoon face that reflects such summary." The SBPA lists appropriate emojis, ranging from a "very open-mouthed smiley face" for an excellent rating to a "frowning sad face" for a "needs improvement" rating. These ratings would all be reported to the DOL, which would host them on a newly created website. Failure to post the notice (either on premises or online) would lead to a fine of $1,000 a day. As an additional penalty, those who fail to publish the notice would be require to announce their rating in a local newspaper.



Burdensome standards of interpretation. The SBPA is specifically anti-job-creator, requiring the act to be interpreted "expansively in favor of the employee" and "narrowly against the employer."

Other Legislative Efforts



Sectoral bargaining. President Biden has publicly endorsed the concept of sectoral bargaining, which would require all competitors in an industry to engage in collective bargaining with unions. This allows for unions to

essentially force unionization on all employers across an industry even when previous attempts to unionize have been unsuccessful. Rep. Haley Stevens added an amendment to the PRO Act that would require the Government Accountability Office to report on sectoral bargaining in other countries, and similar provisions are likely to arise in other labor bills.

As an example, sectoral bargaining would require workers at Honda's Marysville, Ohio, plant to accept UAW bargaining wages, benefits and working condition, despite not currently being unionized because workers at all automobile manufacturers would become subject to the same collective bargaining agreement. Such a provision would allow unions to easily and forcibly unionize entire sectors of the economy, without the need to get support from individual workplaces. This could be accomplished either through state-level action (such as approval by the New York Wage Board) or through federal action.

Pension bailout for public and private sector. With a Democratic trifecta, President Biden is likely to push for pension bailouts. An example of this can be seen with the Rehabilitation for Multiemployer Pensions Act and the Butch Lewis Act, which would have created a loan program for failing group pension plans. While Senate Republicans prevented the passage of this bill in the 115th Congress, such efforts may not be successful in the current Congress.

Administrative Risks

It is also highly likely that both the National Labor Relations Board and the Department of Labor are going to make serious attempts to return to standards established by the Obama administration. Although many of these policies are included as part of the PRO Act, the administrative state may take these measures independently, regardless of whether the PRO Act is passed. This likely includes attempts to reintroduce the following rules and decisions, all of which were implemented under the Obama administration, but which have since been reversed by the NLRB under Trump.

NLRB Decisions and Rules

- The Browning-Ferris Industries decision, which overturned 30 years of precedent regarding the joint employer standard. Under the "Browning-Ferris standard," employers using subcontractors or staffing firms are considered joint employers with those third parties and can be held liable for the working conditions experienced by those parties. It is irrelevant whether an employer actually controls the working environment; the only question is whether the employer has a right to control that environment. This standard would almost certainly be applied

equally to franchisors, which would suddenly become liable for the acts of their franchisees' employees despite having little, if any, underlying involvement.

The Specialty Healthcare decision, which authorized the creation of "micro unions" within a workforce, allowing smaller units of employees to be unionized even when a union was unsuccessful at unionizing the entire employee group. Should this decision be reversed, the NLRB will determine whether a micro union can be created based on whether the petitioning employees share a "community of interests." If so, a union is presumed to be appropriate, even if those employees also share a community of interests with other employees. This "micro-union standard" is a reverse of the traditional community of interest standard, which only permitted unionization if the interest of the employees seeking unionization was sufficiently distinct from those of other employees to justify a separate bargaining unit. Under the micro-union standard, an employer may only successfully challenge the appropriateness of a bargaining unit by showing that the petitioning employees share such an "overwhelming community of interest" with other employees that they shouldn't be divided from them for purposes of unionization. This places a heavy burden on employers attempting to demonstrate that subsets of employees should not be able to unionize. As an example, employees in Macy's cosmetics and fragrances department were permitted to form a micro union, despite the fact that Macy's employees as a whole were not unionized.

- The Purple Communications decision forbade employers from prohibiting use of its email system for nonbusiness purposes. Under this standard, employers could not prohibit employees from using the employer's email system for union activity.
- Reinstatement of 'ambush elections,' would alter the timeline between a union's request for a vote on unionization and the subsequent election. These rules made it far more difficult for employers to communicate with employees about unionization, which in turn made it easier for unions to organize.
- Expansion of the NLRB's jurisdiction. Under the Obama administration, the NLRB claimed jurisdiction over airplane-side workers from the National Mediation Board, which administers the Railway Labor Act. This move was reversed by the Trump administration, but it is possible a reconstituted NLRB will reinstate its previous jurisdictional claim.
- It is important to note that the NLRB is unlikely to undertake these efforts until Aug. 27, 2021, when William Emanuel's term — and the Republican majority — expires. At that time, the Biden administration will have the ability to regain a majority on the NLRB by nominating new (presumably Democratic) members to fill open seats.

DOL Regulations

- The DOL is likely to pursue re-adoption of its 2016 persuader regulation, which required labor lawyers to disclose facts about their relationships with employers. Although this rule has been held to be an illegal violation of

attorney-client confidentiality, the DOL could attempt to implement a more narrowly tailored rule aimed at the same purpose. This change would also be implemented if the PRO Act were to be adopted.

- Other areas where the DOL may act include repealing the recently-adopted independent contractor rule (see PRO Act discussion above), requiring paid sick leaving, and increasing the minimum wage to $15.00 or more an hour. These efforts should be closely monitored.

Occupational Safety and Health Administration COVID Rules

- Another risk to employers comes from the potential promulgation of COVID safety rules by OSHA. Traditionally, OSHA rules must follow the rulemaking process outlined by the federal Administrative Procedures Act, which requires significant study and factual support, as well as reasoned analysis, prior to the adoption of a rule. OSHA does, however, possess the ability to adopt "emergency temporary standards," which bypass the rulemaking process. Should OSHA use this process, it could level highly burdensome COVID safety requirements on all employers, with significant liability for any violations. This would dramatically exacerbate the already disastrous effects of lockdown policies and would further cripple the U.S. economy.

Conclusion

There is no question that all of the above represent significant challenges for worker freedom in the near future. Nevertheless, it is essential that we all be aware of these challenges and develop appropriate strategies to address them. Through our efforts, we can educate the public and lawmakers on the terrible effects of these policies and demonstrate their impact on the American people. In addition, each of our organizations play a key role in ensuring that politicians are held accountable for the positions they take on these policies, and keeping labor policy at the forefront of the public's and media's attention will be vital.

Although there is no doubt that the incoming administration will offer a less favorable environment with respect to labor policy, our collective efforts can protect those policy wins that have been achieved under the Trump administration and prevent new policies that would hurt the nation's workers.

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