

The PRO Act's Attack on Independent Contracting

Question: Does the PRO Act adopt the "ABC" test from California's controversial AB 5 legislation?

Answer:

- Yes, the PRO Act uses the exact same language, word-for-word, found in California's AB 5's law. Under that test, it is significantly more difficult for a worker to demonstrate that he or she is an independent contractor.

Question: What does the ABC test in the PRO Act do that is different from AB 5?

Answer:

- The PRO Act would amend the National Labor Relations Act (NLRA) and use the ABC test to define employment under that law, which governs the relationship between employers, employees, and labor unions. Unlike AB-5, which only applies to California, the PRO Act would apply the ABC test to all 50 states for the first time ever.

Question: What is the impact of the ABC test in the context of the NLRA?

Answer:

- The NLRA currently does not have jurisdiction over independent contractors. Under the PRO Act, independent contractors could be deemed employees for purposes of federal labor law, which would allow unions to organize them and negotiate over their wages and working conditions – and collect dues from them.

Question: California's AB-5 covered the state's wage hour statutes and other laws. By comparison, isn't adopting the ABC test only under the NLRA a fairly minor change?

Answer:

- No. The reality is that the PRO Act would apply California's ABC test to all 50 states (and without the dozens of exemptions that California had to enact once the impact of the ABC test became clear). That alone is a dramatic change, and it would be the first time the federal government has adopted this restrictive ABC test.

- It also is likely that if the ABC test is established under one federal law, it will spread into other areas. For example, the Department of Labor is already engaged in rulemaking on independent contracting.

Question: Since the PRO Act only amends the NLRA, wouldn't it only impact those workers who choose to join a union?

Answer:

- If the ABC test were the only change to the law, perhaps. But other parts of the PRO Act mean that the impact on independent contractors and freelancers will not be limited just to those who "choose to join a union." For example, the PRO Act eliminates right-to-work laws, so that any independent contractor or freelancer pulled into a union would be forced to pay union fees or lose their job.
- In addition, even freelancers and independent contractors who voted "no" on a union would still be bound by all the wages and working conditions negotiated in a union contract. This could deprive them of flexible hours, rates, and performance measures.
- Moreover, union elections under the NLRA are decided by a majority of the percentage of workers that *actually vote*. In many cases, this is less than a majority of all the workers impacted. With independent contractors, this problem will be magnified because by their very nature, independent contractors and freelancers are dispersed. Many may not realize a union election is actually taking place.
- The upshot will be that a handful of workers can make a decision that would drastically change working conditions for potentially thousands of independent contractors and freelancers – not just those who "choose to join a union."

Question: If independent contractors change their mind or are dissatisfied with a union, couldn't they just decertify them?

Answer:

- No. The PRO Act would make it far more difficult, and in some cases impossible, for workers to decertify an unwanted union.

Question: Would the ABC test under PRO Act make it more difficult for independent contractors and freelancers to find work?

Answer:

- Should the PRO Act pass, businesses will be reluctant to take on independent contractors who could end up in a union, or for whom the business must accept an employer-employee relationship where one does not currently exist. This will limit earning opportunities for these workers.