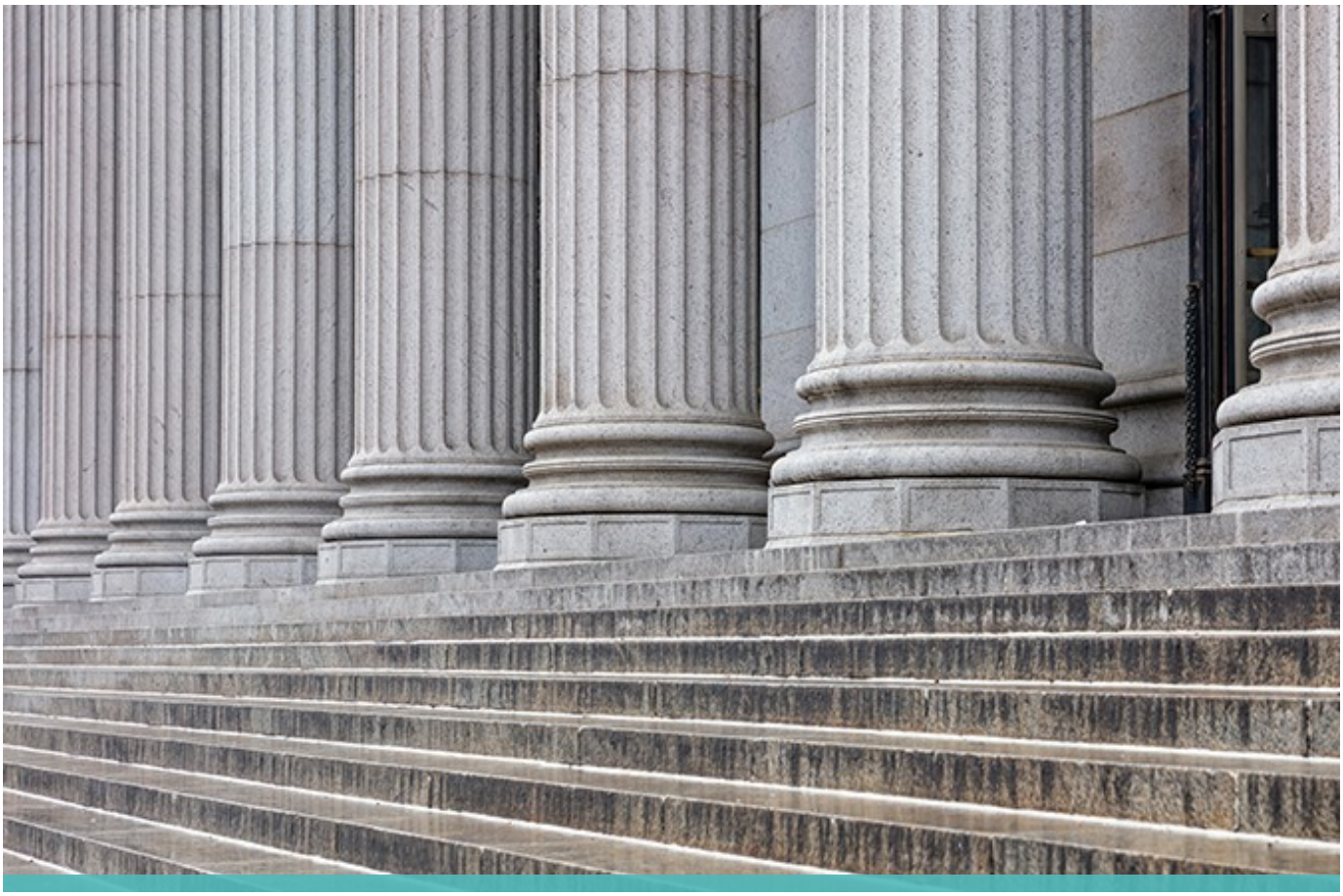
The PRO Act and its potential impact on the franchise industry



Scott N. Opincar | Thursday, August 19, 2021

The Protecting the Right to Organize Act is a top policy focus of the Biden administration, Democrats in Congress and union leaders. The International Franchise Association and other franchise associations have opposed passage of the PRO Act, which passed the U.S. House of Representatives on March 9, 2021, and is stalled in the Senate. They argue that the pro-union legislation includes provisions that could cause franchisees to be treated as employees. Unions, however, support the PRO Act as a way to energize their rolls of dues-paying members by making it much easier for unions to organize in the modern workplace and restrain the ability of employers to fend off organizing drives.

The Senate is expected to vote in the near future on the nomination of David Weil to serve as administrator of the Wage and Hour Division of the Department of Labor. The Wage and Hour Division is responsible for enforcing all major labor laws and has the ability to shape the direction and enforcement of labor law in the United States. Weil, who previously served in the same position under former President Obama, supports expanding the definition of joint employer to include indirect control, drastically increasing the legal liability that franchisors have over franchisees. This would increase corporate control over locally-owned franchise businesses, which currently enjoy relative independence because franchisers have limited liability over their day-to-day operations.

Below is a list of certain important provisions of the PRO Act:

- **Joint employer standard.** The PRO Act would codify the joint employer standard set forth in the

National Labor Relations Board's 2015 *Browning-Ferris* decision, making it much more likely that two or more employers would be considered "joint employers" of a worker assigned by an employment or temporary agency. The Board in *Browning-Ferris* held that indirect or reserved control could be considered to determine joint employer status as opposed to just direct control or control exercised in fact. The indirect or reserved control standard would put many businesses in jeopardy of being deemed joint employers by virtue of contractual provisions in agreements with professional employer organizations and temporary labor agencies, and in franchise agreements. The ruling meant that if a franchisee failed to pay an employee overtime, then the franchisor—the national brand—could be held legally accountable, even though the national brand had no knowledge of the situation at the franchise. The ruling also meant that the national brand could be forced to legally recognize and bargain with unions, instead of the unions having to organize each franchise location individually. McDonald Hopkins discussed the *Browning-Ferris* rule in a February 9, 2018 blog.

In addition to the PRO Act, on July 29, 2021, the Department of Labor announced a final rule rescinding the "Joint Employer Status Under the Fair Labor Standards Act" final rule (Joint Employer Rule). The final rule becomes effective on September 28, 2021.

As explained in the final rule, the DOL believes that the current Joint Employer Rule improperly narrowed the test for vertical joint employment and conflicted with decades of DOL interpretation, the text of the Fair Labor Standards Act, and Congressional intent. In addition, the current Joint Employer Rule's vertical joint employment standard failed to account for prior DOL guidance and did not significantly impact courts' resolution of vertical joint employment cases while it was in effect. A May 27, 2021 McDonald Hopkins blog examined the Department of Labor's final rule.

- **Elimination of "Right to Work."** The PRO Act would allow bargaining agreements to require payment of dues by all represented employees, upending state laws that let employees opt out of union membership and dues obligations. Currently, 27 states have enacted right-to-work laws in the U.S.
- **"Employees" versus "independent contractors."** The PRO Act would expand the definition of "employee" to allow workers currently classified as independent contractors to form and join unions. The PRO Act would adopt California's ABC Test in determining whether a worker is an "employee" or an "independent contractor." Under the ABC Test, a worker is considered an employee and not an independent contractor, unless the hiring entity meets all three conditions of the ABC test:
  - The person is independent of the hiring organization in connection with the performance of the work, both under the contract for the performance of the work and in fact.
  - The person performs work that is outside the hiring entity's business.
  - The person is routinely doing work in an independently established trade, occupation, or business that is the same as the work being requested and performed.
- **Use of company resources for organizing.** The PRO Act would allow employees to use company computers, email, internet access, telephones, etc., to communicate with co-workers for union organizing purposes.
- **No permanent replacement of strikers.** The PRO Act would prohibit the permanent replacement of workers who participate in strikes. Under current law, employers can permanently replace workers who go on economic strikes, subject to preferential recall rights.
- **No lockouts.** The PRO Act would prohibit employer-initiated work stoppages designed to influence the

position of employees or their bargaining agent before a strike.

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