

# WASHINGTON UPDATE

Incentive Federation, Inc.  
March 12, 2021

George B. Delta, Esq.  
(703) 582-7040  
[gdelta@verizon.net](mailto:gdelta@verizon.net)

## The Proposed PRO Act of 2021 Might Effectively Eliminate Independent Contractor Status

On March 9, 2021, the House of Representatives passed H.R. 842, Protecting the Right to Organize Act of 2021 (the “PRO Act”), by a vote of 225-206, with five Republicans joining the Democrats in favor of it. If enacted, the PRO Act would represent the most sweeping changes in labor law in a very long time. The five most important provisions of the Act are as follows:

1. The PRO Act would override “right to work” laws that are in effect in 27 states. These laws generally allow workers in workplaces represented by unions to opt out of the union and avoid union dues. Currently workers who work for such companies would continue to be covered under the wage and benefits contract that the union has negotiated in its collective bargaining agreement with the employer. If enacted, the PRO Act would override state right to work laws and allow unions to collect dues from those who opt out to cover the cost of collective bargaining and administration of the contract.
2. The Act would forbid employer interference in and influence over union elections. Currently, companies use the well-worn tactic of company sponsored meetings with mandatory attendance to lobby against unionization drives. In addition, employees would be allowed to vote in elections regarding whether to organize at location outside of company property.
3. When a successful union drive still fails to achieve an initial contract between employer and employees, the PRO Act would permit newly certified unions to seek mediation and binding arbitration to settle negotiations that have reached a stalemate.
4. The PRO Act would prevent employers from using the immigration status of an employee against him/her in determining the terms of employment.
5. The PRO Act contains substantial civil penalties and liquidated damages for violation of workers’ rights. In some instances, directors and officers could also be held liable. It also contains various statutory remedies in cases of discrimination and retaliation.

While one’s views on the efficacy of the main provisions of the proposed law can vary, it also contains an important change in the definition of independent contractor

status that is worrisome and not terribly well conceived. It would define an independent contractor using what is commonly known as the ABC test, a holdover from the 1930s, before the Internet and the gig economy. Section 101(b) of the PRO Act would amend section 2(3) of the National Labor Relations Act (29 U.S.C. section 152(3)) to provide that an individual performing any service would be deemed to be an employee and not an independent contractor unless: “(A) 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; (B) the service is performed outside the usual course of the business of the employer; and (C) 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.”

In other words, an individual must satisfy all three parts of the ABC test to be classified as an independent contractor. The first prong of the test, part (A), is based on the traditional common law control test for independent contractors that the IRS has been using. Part (A) looks at three factors that determine control--financial, behavioral, and the type of relationship. The financial aspect looks at method of payment. While employees are typically guaranteed a certain amount of compensation for work (often determined on an hourly basis, sometimes determined monthly or annually), an independent contractor is paid in a more flexible manner, often a flat fee for services rendered. The behavioral aspect of the test looks at actual control. The employer sets and controls an employee’s hours, but an independent contractor has a flexible schedule and can set his/her hours. Independent contractors typically determine when, where, and how they work. The type of relationship refers to contracts, the time for performing services, and benefits. Employees typically get benefits such as vacation, sick leave, and health care coverage. Independent contractors do not. Moreover, independent contractors generally work on projects, while employees have longer term relationships.

Part (A) of the ABC test has been in effect for about a century, and employers and those they hire have familiarity with it and usually know how to work with it. Part (B) is a bit more controversial, and it is aimed at companies like Uber, Lyft, and DoorDash. If you drive for Uber or Lyft, Part (B) would make you an employee because cab service is the usual course of their business. Likewise, if you deliver food for DoorDash, you would probably be classified as its employee. If you are a free lance writer, Part (B) can get tricky. If you write copy or an article for a law firm, you can still be an independent contractor, because that is outside the law firm’s usual course of business. If you write an article for a magazine, however, you may well fail this test and be classified as an employee. This prong may also be problematic in construction, where some of the workers (subcontractors) may be classified as employees, depending on the services they perform. For example, electricians and plumbers working on a site might qualify as independent contractors, while regular construction workers might be deemed to be employees. States like California that had used the ABC test enacted specific exemptions for construction workers so they could remain independent contractors.

Part (C) refers to whether the individual has more than one client for whom he or she performs services. Lawyers, consultants, architects, writers, and the like would easily satisfy this part of the test since they work for multiple clients. Licensed professionals could qualify to be independent contractors.

If the PRO Act were to become law, it would endanger the independent contractor status of many individuals in the incentive, rewards, and recognition marketplace. For example, independent reps who are currently independent contractors under the common law test the IRS uses may have to be reclassified as employees. For example, the independent reps who belong to IMRA should continue to satisfy Part (A) and (C) of the ABC test. Part (B) would be problematic, however. Indeed, it is difficult to imagine how the service rendered by an independent rep could be deemed to be performed outside the usual course of the business of the employer. At the very least, the ABC test would introduce an unwelcome degree of uncertainty in the incentive marketplace. For anyone interested, there is a good article on the ABC test and its application in the gig economy in the William & Mary Business Law Review last year. It is available at: <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1196&context=wmbler>

The PRO Act has now been introduced in the Senate, where its fate is much less certain. The Senate is evenly split among Democrats and Republicans, and it is unclear if the PRO Act has the support even of all the Democrats. It appears to have no support among Republicans, and, if the filibuster remains in effect, there are not enough votes to invoke cloture (60 votes are required) to bring the bill to a vote. The Democratic senators who may not support the PRO Act include Joe Manchin (D-WV), and Kyrsten Sinema (D-AZ). Others that should be contacted by those incentive professionals that may be affected by the Act include Sen Raphael Warnock (D-GA), Jon Ossoff (D-GA), Mark Kelly (D-AZ), Margaret Hassan (D-NH), Jeanne Shaheen (D-NH), and Jon Tester (D-MT). These last six Democratic senators support the PRO Act, but they may be amenable to amending or clarifying the ABC test.

### **Conclusion**

The PRO Act is a complicated bill that is 880 pages long that will make fundamental changes to U.S. labor law. It has passed the House and it has the support of President Biden. Its prospects of passing the Senate are questionable currently. Accordingly, it is important to contact the senators mentioned above to at least try to clarify or revise the ABC test as it would apply to certain traditional independent contractor relationships. If you have any questions about this update or the PRO Act as a whole, you may contact me at [gdelta@verizon.net](mailto:gdelta@verizon.net) or at (703) 582-7040.

The text of H.R. 842 is here: <https://www.congress.gov/bill/117th-congress/house-bill/842/text#toc-H3A91F8B36FE4415495CD8B9AE4E2AC4A>

Contact information for U.S. senators is here: <https://www.senate.gov/senators/senators-contact.htm>