

TO: NALTO

FROM: McGuireWoods Consulting

DATE: October 19, 2021

RE: Congressional Update

Last month, we previewed potential action related to the PRO Act and how it may play into the budget reconciliation bill. To recap, on March 9, 2021, the House passed [H.R. 842](#), the Protecting the Right to Organize (PRO) Act of 2021. [S. 420](#), the Senate companion legislation, is currently pending before the Senate Committee on Health, Education, Labor, and Pensions (HELP). All but three members of the Democratic caucus are supportive cosponsors of the PRO Act. The three Democratic Senators that are currently not cosponsors are Senators Mark Warner (VA), Kyrsten Sinema (AZ), and Mark Kelly (AZ). Every Senate Republican currently opposes the bill.

Current Status and Legislative Outlook

The current Congress and Administration are the most pro-union in generations. They are actively looking to advance pro-union legislation in any legislative vehicle possible, which includes the current budget reconciliation bill.

On August 11, 2021, the Senate passed a \$3.5 billion budget reconciliation framework. The House passed the same framework on August 24, 2021. This set out a topline for overall spending. The House then proceeded to draft the actual language to fit within that framework.

House committees formally met mid-September to finalize the actual budget reconciliation legislative text. The House Education & Labor Committee included pro-union, PRO Act provisions, that:

- Allow the National Labor Relations Board (NLRB) to assess up to \$50,000 in penalties for each violation
 - Penalties may double if the company has recent violations
 - Allows for \$100,000 fines if violation results in an employee's termination
- Allow the NLRB to extend fines to individual officers and directors
- Creates and increases penalties on certain practices, including:
 - Permanent replacement of striking workers
 - Discrimination against workers who returned to work post-strike

- “Lock-outs” of workers considering unionization
 - Requiring employees to attend meetings discouraging union membership
 - Misrepresenting to a worker that they are not an employee and misclassifying employees as independent contractors
 - Requiring employees to promise not to support collective bargaining
 - * Notably, proposed language provides few definitions, leaving interpretation and enforcement to the NLRB
- Provide \$350 million for NLRB enforcement, \$50 million above the agency’s funding request

The House budget reconciliation bill does not include the ABC test. This is largely for two reasons. The Democrats need every single Senate Democrat to support the package and all the provisions must pass the “Byrd Rule.” The Byrd Rule requires all provisions within the budget reconciliation bill to impact the debt and deficit. It cannot be purely policy. While we believe the ABC test would violate the Byrd Rule and thus prohibit its inclusions, not all the advocates for the PRO Act agree and many are pushing for its inclusion.

To help fend off any inclusion of the ABC test in the budget reconciliation bill, MWC has set up several meetings, along with NALTO members, with key Congressional members and Committees.

Our first meetings were with the House Committee on Education and Labor. The ranking member’s office, a Republican, was very interested in how the PRO Act would impact healthcare delivery and wanted to use any information NALTO had to help push back on the ABC test, especially the manner in which it would affect rural hospitals. The Committee Chair’s office, a Democrat, visited with MWC and said he would review our material, but that they were very supportive of the PRO Act as written.

We also visited with Democratic Senators that included Sinema (D-AZ), Kelly (D-AZ), Tester (D-MT), and Manchin (D-WV). We additionally provided material to Senator Warner’s Office (D-VA). Our feedback from these offices was pretty consistent. Even the offices that cosponsored the legislation told us they recognize the importance of preserving access to healthcare – especially to rural areas, veteran facilities, and Indian Health Services. Senator Tester and Manchin, in particular, said changes to the PRO Act are necessary for them to support its passage. The message that even California recognized the need for exemptions in their legislation seemed to be persuasive to these offices.

We are working to see if any of the Democrats that said they wanted to see changes to the PRO Act before it passes would be open to proactively advocating for our exemption language. The language we are advocating for would ensure the ABC test for the purposes of the PRO Act, “does not apply to a licensed physician and surgeon, dentist, podiatrist, psychologist, veterinarian, or other advanced practitioner (i.e., Certified Registered Nurse Anesthetists (CRNAs), Physician Assistants (PAs), Nurse Practitioners (NPs)) performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation.”

Some meetings were more nuanced. For example, Congressman Ami Bera's office, (D-CA-7) said while they have intentionally stayed off of the bill, he views the entire health system landscape as requiring an overhaul. They initially pushed back on whether locum tenens were truly independent contractors instead of temporary employees. After much discussion, the office's policy advisor seemed to moderately warm to the idea that NALTO members are indeed independent and that health care delivery could be unintentionally compromised without the suggested carve-out.

As we work with Democrats who are PRO Act cosponsors that assure us that changes to the bill must be made in order to support final passage, we will expand our ongoing outreach to include Republicans and Democrats in the Senate who sit on the HELP Committee and have a voice on health-related issues. These members include Senators Alex Padilla (D-CA), Jacky Rosen (D-NV), Lisa Murkowski (R-AK), Richard Burr (R-NC), Roger Marshall (R-KS), and Tim Scott (R-SC).

Republican Senators, especially members that are doctors like Senators John Barrasso (R-WY) and Bill Cassidy (R-LA), are very supportive of prohibiting the expansion of the ABC test as it is proposed in the PRO Act. They are good advocates to raise our issues and highlight the impacts that the ABC test would have on healthcare, especially in rural areas. They are, however, less likely to try and improve the PRO Act because they oppose its overall passage. These are the types of members, however, that we want to target to see if they would support more proactive language, like Congressman Price's preemption proposal from several years ago.

MWC has visited with several healthcare organizations to see if there is any opportunity to build a coalition against the problematic provisions of the PRO Act. The American Hospital Association has told the Hill, when asked, that the PRO Act's codification of California's broad "ABC" test for assessing employee status, thereby requiring many independent contractors to be treated as employees under the NLRA, would have an adverse impact on hospitals and health systems. Other groups, like the American Medical Association and Emergency Physicians are more split on the issue and have been quiet on the Hill about the PRO Act. We are currently working to see if other groups like HCA or large individual hospitals would be open to engaging on this issue.

We anticipate the budget reconciliation package debate to extend into the fall, and maybe even into the winter. The budget reconciliation package will not be the only possible vehicle for the PRO Act. Congress will likely pass a massive year-end legislative bill that will not have the same Byrd Rule constraints. Because the PRO Act is a big priority for this Administration and Congress, we expect to see continued debate about the bill and additional efforts to include elements, or the full bill, in the months to come.