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**The Assault on Management has Begun  
Biden Pro-Union Agenda**

**Friday, October 15 , 2021  
Baltimore, MD**

**L. Michael Zinser**



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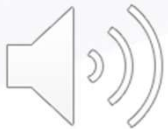
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**My Personal Motto: "Never, never, never, never give up."**



# The Assault on Management has Begun

## President Biden Fires NLRB General Counsel Robb

- On January 20, 2021, a few minutes after being inaugurated, President Biden fired NLRB General Counsel Peter Robb.
- Robb's term was due to expire November 20, 2021; still had ten (10) months to run.





# The Assault on Management has Begun

## President Biden Fires NLRB General Counsel Robb

- An incoming President has never before fired the General Counsel of the NLRB prior to the expiration of his term.
- Peter Robb was viewed as an obstacle to immediately pursuing a pro-union agenda.



# The Assault on Management has Begun

## President Biden Nominates Jennifer Abruzzo to be General Counsel



- President Biden nominated Abruzzo to replace Peter Robb as General Counsel.
- Abruzzo was Special Counsel for Strategic Initiatives for the Communication Workers of America at the time of her nomination.
- Abruzzo's nomination is controversial; appearing before the Senate Committee on Health, Education, Labor, and Pensions, Abruzzo was questioned sharply about whether she had a hand in preparing for Biden's firing of Robb.



# The Assault on Management has Begun

## President Biden Nominates Jennifer Abruzzo to be General Counsel



- Abruzzo's testimony revealed hostility to independent contractor status.
- Senate confirmation vote was a 50-50 tie, with Vice President Harris voting for Abruzzo to break the tie.
- Every Republican Senator voted against Abruzzo.



# The Assault on Management has Begun

## Lauren McFerrin Named Chairman of the NLRB



- Shortly after firing Peter Robb, President Biden named Democrat NLRB member Lauren McFerrin to be the Chairman of the NLRB.
- In a recent speech, new Chairman McFerrin indicated she would seek to reverse current caselaw that makes it easier to prove independent contractor status and overturn cases which have ruled that Employers do not have to allow unions to use their email systems for union business.





# The Assault on Management has Begun

## President Biden Nominates Gwynne Wilcox



- On May 26, 2021, President Biden nominated Gwynne Wilcox to fill a vacancy.
  - Wilcox is a hardcore union lawyer from a New York City union law firm.
  - A co-author of “Clean Slate for Worker Power: Building a Just Economy and Democracy.”
  - Calls for radical revision of labor law.
  - Favors expanding NLRA to cover independent contractors, eliminating elections and allowing for union recognition based on so-called “card check”.





# The Assault on Management has Begun

## President Biden Nominates Gwynne Wilcox



- Favors banning the right of Management to permanently replace employees who go on economic strikes.
- Favors banning state Right-to-Work laws.
- Wilcox will use her seat on the NLRB to tilt the law in favor of unions.
- On July 28, 2021, the Senate voted 52-47 to confirm Wilcox.



# The Assault on Management has Begun

## President Biden Nominates David Prouty



- On July 28, 2021, the Senate voted 53-46 to confirm Prouty to fill the seat being vacated by William Emmanuel on August 27, 2021
  - Prouty is also a hardcore union lawyer.
  - Prior to his confirmation, he was General Counsel to Service Employees International Union Local 32BJ
  - With the confirmation of Prouty, pro-union Democrats now have a 3-2 majority at the NLRB.



# The Assault on Management has Begun

## General Counsel Abruzzo's Activist Agenda



- On August 12, 2021, General Counsel Abruzzo issued Memorandum 21-04 outlining areas where she will seek reversal of current cases favoring Management.
- **Employer Handbook Rules**-Abruzzo wants to revisit confidentiality, non-disparagement, social media, media communication, civility, respectful and professional manner, offensive language, and no-camera rules.
- **Confidentiality Provisions**
- **Employer Email Systems**-Current caselaw says that employees in unions may not utilize an Employer's email system for union business. Abruzzo wants to reverse that and go back to an Obama-era precedent called *Purple Communications*, which disrespected the private property rights of Employers.





# The Assault on Management has Begun

## General Counsel Abruzzo's Activist Agenda



- **Private Property Rights**-Abruzzo wants to reverse caselaw allowing Employers to exclude non-employee union organizers from its property.
- **Payroll Deduction of Union Dues**-Abruzzo seeks to reverse current law which allows an Employer to cease deducting union dues upon a contract's expiration.
- **Independent Contractor Status**-Current caselaw protects independent contractor status, *St. Joseph News-Press* is the key precedent for the newspaper industry. Expect Abruzzo to attack independent contractor status.
- **Bargaining Over Discipline**-Abruzzo seeks to reverse caselaw that provides the Employer to have no duty to bargain over discipline of employees who have been organized but not covered by a Collective Bargaining Agreement.



# The Assault on Management has Begun

## General Counsel Abruzzo's Activist Agenda



- On August 19, 2021, General Counsel Abruzzo issued Memorandum 21-05 concerning 10(j) injunction proceedings.
- General Counsel Abruzzo indicates there will be greater frequency of the use of to 10(j).
- Abruzzo will target unfair labor practices occurring during organizing campaigns, shortly after certification of a new union.



# The Assault on Management has Begun



## Protecting the Right to Organize Act

- On March 9, 2021, the U.S. House of Representatives passed the Protecting the Right to Organize (PRO) Act by a vote of 225 to 206.
- The name is little more than slick marketing.
- The PRO Act is a transparent attempt to resurrect dying labor unions that only represent 6.2% of the private sector workforce.
- Note: The Biden Administration is seeking a 10.1% increase in the NLRB's budget despite its declining caseload.





# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **NLRB Quickie Election Rule**

- Compresses the timeframe between the date of the filing of the election and the election itself.
- Deprives Employers of the First Amendment right to inform employees about the issues involved in unionizing.
- Bans Employer captive audience speeches.
- Elections can be held off company premises.
- Allows mail or electronic balloting for voting, increasing the potential for voting fraud.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Independent Contractor Status Attacked**

- Changes the definition of independent contractor and codifies the so-called ABC Test, which restricts independent contractor status.
- Under the ABC Test, an individual is an employee unless **(1)** the individual is free from control and direction in performing a service, both under the contract and in fact; **(2)** the service is performed outside the usual course of the Employer's business; and **(3)** the individual is customarily engaged in an independently established trade or occupation of the same nature as the service performed.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Independent Contractor Status Attacked**
  - This new ABC Test would not recognize “entrepreneurial opportunity” as a key factor as does current NLRB caselaw.
  - Under current caselaw, an independent contractor has the right but is not required to provide services to more than one (1) company.
  - Under the ABC Test, independent contractor status would not be recognized unless the contractor was actually performing services for more than one (1) company.





# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Redefine and Reduce Supervisor Status**
  - An individual must spend the majority of his/her work time on Supervisor-type duties; that is not current law.
  - Under current law, if an individual has the authority to “assign” or to “responsibly direct” employees, he/she is a Supervisor.
  - The PRO Act strikes “assign” and to “responsibly direct” from the NLRA factors of Supervisor authority.
  - The PRO Act seeks to restrict the size and scope of the management team by changing the definition of Supervisors to make them employees.
  - By limiting the size of the Supervisory team, Management’s First Amendment right to communicate is thus limited.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Permanent Replacement of Strikers and Lockouts**
  - The PRO Act bans the permanent replacement of striking employees.
  - Since 1938, under Supreme Court precedent, Employers have had the right to hire permanent replacements of economic strikers.
  - The PRO Act ends this right.
  - The PRO Act allows intermittent strikes by employees; intermittent strikes, under current law, are illegal acts of sabotage.
  - The PRO Act bans Employer offensive lockouts.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Secondary Boycotts**

- Currently, secondary boycotts are illegal.
- Congress amended the National Labor Relations Act in 1959 to prohibit secondary boycotts.
- The PRO Act would wipe out restrictions Congress passed in 1947 and 1959.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Compulsory Interest Arbitration in First-Time Contracts**
  - Interest arbitration is a circumstance under which an Arbitrator, rather than the parties, writes the terms of the Collective Bargaining Agreement.
  - Under current law, unions are not allowed to insist upon interest arbitration.
  - It is considered a permissive non-mandatory subject of bargaining.
  - The PRO Act changes that; the PRO Act requires the parties to bargain collectively for ninety (90) days.





# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Compulsory Interest Arbitration in First-Time Contracts**
  - If no agreement is reached at the end of ninety (90) days, the parties are required to submit the unresolved issues to an Arbitrator who then writes the terms of a two (2)-year agreement.
  - Under the PRO Act, interest Arbitrators are to consider the Employer's financial status, size and type of business, the employees' cost of living, employees' ability "to sustain themselves, their families, and their dependents", Employer wages, and the wages and benefits of other Employers in the same business.
  - Under this scheme, an employees' lifestyle and debt level, rather than the free market, are determiners of wages, hours, and working conditions.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Limitation on Employer Economic Bargaining Weapon**
  - Under current law, Employers are permitted to unilaterally impose the terms of the last offer if the parties have reached a bona fide impasse in negotiations.
  - The PRO Act makes that unlawful.
  - This tilts the balance of bargaining power in favor of unions.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Employer Email Systems**

- Current caselaw says that an Employer has the right to prohibit employees and a union from using its email system for union business.
- The PRO Act reverses this standard and allows employees to use an Employer's email systems for all Section 7 activities "absent a compelling business rationale."
- This demonstrates a lack of respect for private property rights.



# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **New Unfair Labor Practice Remedies**
  - It enhances remedies for unlawful discharges.
  - Provides for gross backpay (no mitigation required), front pay, consequential damages, and liquidated damages equal to two (2) times the damages awarded.
  - Damages may be awarded to illegal aliens, reversing a U.S. Supreme Court case holding otherwise.
  - The PRO Act imposes personal liability on Employer Officers or Directors.
  - The PRO Act creates a new private right of action for unfair labor practice charges in U.S. District Court in a situation where the NLRB dismisses a charge or fails to decide within sixty (60) days.
  - The PRO Act allows the award of liquidated and punitive damages and attorneys' fees.





# The Assault on Management has Begun

## Protecting the Right to Organize Act

If passed by the Senate, the PRO Act would do the following:

- **Right-to-Work Laws**

- Would effectively eliminate Right-to-Work laws that exist in 27 states.
- Would effectively eliminate the right of a state to enact a Right-to-Work law.



# The Assault on Management has Begun

## Conclusion on the PRO Act

- The U.S. Senate is currently evenly split, 50 Republicans and 50 Democrats.
- The Filibuster Rule requires at least 60 votes to move the PRO Act forward.
- It is hard to imagine 10 Republicans voting for the PRO Act.
- If the filibuster is eliminated, the PRO Act will become law because Vice President Kamala Harris can cast a tie-breaking vote.



# The Assault on Management has Begun

## Conclusion on the PRO Act

- September 8, 2021, House Education & Labor Committee released language to put part of the PRO Act in the federal budget to pass through a process known as “Budget Reconciliation”.
- Budget Reconciliation requires a majority and cannot be filibustered.



# The Assault on Management has Begun

## Conclusion on the PRO Act

- The following items from the Pro Act were included in this proposed addition to the budget:
  - Civil penalties against Employers up to \$50,000 per violation
  - Civil penalties up to \$100,000 per violation within the previous five (5) years that resulted in discharge of or “serious economic harm” to an employee.
  - Personal liability for Directors and Officers for unfair labor practice.
  - Eliminate the right to hire permanent replacements during strikes.





# The Assault on Management has Begun

## Conclusion on the PRO Act

- Eliminate the right of Employers to lock out employees.
- Makes it an unfair labor practice to mistakenly classify someone as an independent contractor or Supervisor.
- Prohibits the right of Employers to have “captive audience” speeches during a union organizing campaign.
- Makes it unlawful to require Class-Action Waiver Agreements.



# The Assault on Management has Begun

## Conclusion on the PRO Act

- Since these changes significantly impact substantive policy of federal labor law, there is a question whether the budget reconciliation process can be used.
- The Senate has a rule intended to limit extraneous provisions from inclusion and reconciliation bills.
- Any Senator may raise a point of order that a provision of the Reconciliation Bill is extraneous.
- The Senate Parliamentarian decides whether a provision is extraneous and can be struck.



# The Assault on Management has Begun

## Task Force on Worker Organizing and Empowerment

- On April 26, 2021, President Biden issued Executive Order 14025, Worker Organizing and Empowerment.
- Chaired by Vice President Harris and Co-Chaired by Secretary of Labor Marty Walsh
- Do everything possible to support Biden's policy of support for worker power, worker organizing, and collective bargaining.
- Administration wants a 10% increase for NLRB funding, even though caseload is down.



# The Assault on Management has Begun

## U.S. Department of Labor Withdraws Independent Contractor Rule



- Trump Administration Secretary of Labor Eugene Scalia had finalized a new independent contractor rule.
- The rule was scheduled to go into effect May 7, 2021.
- On Wednesday, May 5, 2021, the Biden Administration withdrew the rule two days before it was to go into effect.
- The rule that was withdrawn would make it easier for independent contractor status to be established.
- The rule gave great weight to entrepreneurial opportunity.





# The Assault on Management has Begun

## U.S. Department of Labor Withdraws Independent Contractor Rule



- If a contractor has the right but not the obligation to provide services to more than one (1) company, that is great evidence of independent contractor status.
- Like the NLRB, expect the Department of Labor to be hostile to entrepreneurship and independent contractor status.
- President Biden has stated he supports a new rule for the Department of Labor that incorporates the ABC Test.



# The Assault on Management has Begun

## U.S. Department of Labor Withdraws Independent Contractor Rule



- Section 13(d) is not affected.
- Section 13(d) is statutory and was unaffected by the rule.
- Section 13(d) exempts from the minimum wage, overtime, and child labor provisions individuals “engaged in the delivery of newspapers to the consumer.”



# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- For private Employers, the Occupational Safety and Health Administration (OSHA) will be issuing an emergency regulation requiring companies with 100 or more employees to require their staff to be fully vaccinated against Covid-19.
- Employees who refuse to be vaccinated will be required to produce negative Covid-19 test results on a weekly basis.
- Employers covered by the regulation could face fines up to \$14,000 per violation for refusing to comply.
- The regulation will require large Employers to provide employees with paid time off to receive the vaccination and to recover from any side effects. No effective date has been announced.
  - It will arrive in the “coming weeks”



# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- The President said there would be a grace period between the issuance of the regulation and enforcement.
- Expect the legality of such a regulation to be challenged in the court system.
- The pharmaceutical companies who make the vaccines have been granted immunity from lawsuits.
- Private Employers have no such immunity.





# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- OSHA can enact a rule if “workers are in grave danger due to exposure to ***toxic substances*** or agents determined to be toxic or physically harmful or to new hazards”.
- It is doubtful that Covid-19 is a toxic substance.
- OSHA has never mandated vaccinations.
- OSHA has typically issued emergency-type regulations to apply to particular industries.



# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- Employers have concerns about compliance and enforcement.
- Are Employers supposed to pay for unvaccinated workers weekly testing?
- What kind of proof of testing or vaccination must they require?
- There will be employees who will be fired, and they will sue immediately.
- The President does not have the authority to do this without Congressional authorization.



# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- The Occupational Safety and Health Act of 1970 authorizes OSHA to enact rules that are “reasonably necessary or appropriate to provide safe or healthful employment in places of employment”.
- The mandate is unreasonably and unnecessarily broad.
- It applies to all employees, even those who work at home.
- Previous Covid infection does not excuse employees from the vaccine requirement even though natural immunity tends to be more robust and longer lasting than vaccinated immunity.



# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- People with natural immunity are at heightened risk of vaccine side effects caused by an augmented inflammatory response.
- Lawsuits have already been filed challenging vaccine mandates as applied to employees with natural immunity.
- OSHA plans to use an Emergency Temporary Standard.
- OSHA has used that legal authority only 10 times in 50 years.
- 6 of those Emergency Temporary Standards have been challenged in court, with the courts striking down 5 and upholding only 1.





# The Assault on Management has Begun

## Sweeping New Covid-19 Vaccination Requirements

- White House Chief of Staff Ron Klain tweeted, “OSHA doing this vax mandate as an emergency safety rule is the ultimate workaround for the Federal Government to require vaccinations.”
- OSHA was established to ensure workplace safety, not to act as a “workaround”.
- If this works, what principle would limit OSHA’s authority?
- Could it ban employees from smoking?
- Could it ban employees from consuming foods containing trans fats while working at home?



# **The Assault on Management has Begun**

## **Sweeping New Covid-19 Vaccination Requirements**

- Our nation's founders limited government authorities because they recognized that much mischief can be done under the theory of being "for your own good".



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