

# Workers' rights in the age of COVID

Workers' rights, especially "essential" workers' rights, have moved to the forefront during the pandemic. Shortages of personal protective equipment (PPE) and regulator's reluctance to aggressively enforce workplace safety laws play directly into union playbooks. Meanwhile, "essential" or "frontline" workers tend to hold jobs at the bottom of the pay ladder. Employers who overlook these concerns may face the dual dilemma of increased post-COVID enforcement and unionization. Plus, legislation that would make unionizing far easier is on the horizon. The Protecting the Right to Organize (PRO) Act likely would jumpstart the biggest expansion of unions in a century.



## A majority of frontline workers belong to a protected class

Workers who cannot telework have been labeled essential or frontline workers. Because they must interact with co-workers, and often the public, they are at higher risk of contracting COVID-19. The majority of essential workers work in the healthcare, food, and agriculture industries where women and people of color comprise the majority of workers. Less than 30% of the total workforce is currently telecommuting according to the Bureau of Labor Statistics. For African-American workers, the figure is 19.7% and for Hispanics, it sits at 16.2%. This means minorities are disproportionately represented in the essential workforce.

Any adverse action employers take against these groups of workers very likely constitutes disparate impact discrimination. That is, plaintiffs' lawyers can easily prove an employer's action disproportionately impacts workers belonging to a protected class. No proof of intent to discriminate is needed.

## Labor's safety argument is bolstered by employer PR nightmares

The lack of PPE has been a flashpoint since the pandemic began, and union organizers have been quick to point out the risks to frontline workers. After Amazon workers in New York went on a one-day strike to highlight the lack of PPE, the company responded by firing protesting worker Chris Smalls. Amazon had ordered Smalls to social distance after a potential COVID exposure and the company claimed Smalls violated that directive.

Smalls, an African-American, made a video detailing his concerns. In a meeting with Amazon CEO, Jeff Bezos, Amazon's General Counsel, David Zapolsky described Smalls as "not smart or articulate." Zapolsky further opined that the company "would be in a much stronger PR position" if the media focused on Smalls. When Zapolsky's musings leaked, the media instead focused on them and Zapolsky was forced to apologize. Smalls then went on to form the Congress of Essential Workers, which called for a general strike on Election Day to highlight the risks essential workers face.

Employers who appear to put profits over employee safety create a public relations nightmare. Unions are using this narrative in their organizing activities. They argue that whistleblowers like Smalls would be protected by collective bargaining agreements. Research shows that unionized workers, who have union protection, are more likely to raise workplace safety concerns. Unionized employers are also 30% more likely to face an inspection for a workplace health or safety issue, likely because union workers do not fear calling OSHA or other state and federal agencies. These are powerful incentives to sign union cards and call for an election in previously non-union workplaces.

## **Unions highlight low frontline worker pay to build support**

Because frontline workers tend to occupy low-paying positions, their plight has gained traction in the media. Some employers have responded with raises, others with bonuses or hazard pay. Unions have taken notice and publicly questioned why these workers have been paid so little for so long.

Private sector unions have made gains with low-paying service jobs in recent years. As a result, more than two-thirds of union members are women or people of color. Unions argue they level the playing field for minorities, pointing to a study showing unionized women earn 5.8% more than comparable non-unionized women. For black workers, the figure is 13.7% higher. Unionized Hispanic employees earn 20.1% more than their non-union counterparts.

## **The PRO Act would greatly strengthen unions**

Unions are arguing that the pandemic has highlighted economic inequality that has existed for too long. Low wage workers appear to be bearing the brunt of pandemic restrictions. Not surprisingly, unions point to higher wages, better benefits including health insurance, and paid leave in their organizing pitches.

Unions have a strong argument for workers to organize. However, several legal obstacles stand in their way. Unions continually decry the general lack of worker protections in the U.S. compared to other industrialized countries. They lament the steady erosion of worker rights to unionize, reflected in the falling unionization numbers.

To combat these restrictions, organized labor is backing the Protecting the Right to Organize (PRO) Act, a piece of legislation that passed the House of Representatives in March 2020. The PRO Act is unlikely to pass in the Senate this session. However, that may change should the recent election user in a Democratic Senate majority.

### **Under the PRO Act:**

- The National Labor Relations Board (NLRB) and workers would schedule and operate union elections.
- The employer's right to challenge election related-issues would be eliminated.
- Employers could not compel employees to attend, nor retaliate against those who do not attend, so-called "captive audience" meetings where employers present their anti-union arguments.
- Once workers vote for a union, the parties would negotiate through a mediator with tight time constraints. If mediation fails, the negotiation goes to binding arbitration.
- The NLRB would be required to immediately seek an injunction to reinstate a worker fired for protected organizing activity.

- Corporate liability for National Labor Relations Act (NLRA) violations would be established and corporate officers would be individually liable.
- Employees would be able to file private actions for NLRA violations.
- Workers would have the power to override “fair share” payments that non-union workers pay when they benefit from collective bargaining. The fair share ban is a staple of many states’ “Right to Work” legislation. The 1947 Taft-Hartley Act currently prevents federal pre-emption of state union organizing laws.
- Employers would be barred from requiring class-action waivers upon hire under the Act.
- Limits on employee misclassification would be created by forcing employers to use the more stringent “ABC” test to determine independent contractor status.

In short, the PRO Act is organized labor’s wish list. The pandemic and the government’s slow response to fund a second round of stimulus have set the stage for the act’s potential passage. Currently, 42 senators co-sponsor the Senate version of the PRO Act. A change of parties could clear the way for its passage.

## Current OSHA requirements

Pending legislation aside, current laws require employers to provide a safe workplace. The Occupational Safety and Health Act’s general duty clause creates broad worker protections. The Occupational Safety and Health Administration (OSHA) has provided COVID-[specific guidance](#) for employers.

## What employers can do in a union situation

Currently, in the pre-PRO Act world, employers have options when they face an organizing effort. Employers may hold employee meetings on company time and property to answer questions and discuss the company’s position and unionization. Just make sure the meetings aren’t held in a supervisor’s office.

Here are some of the things employers can say:

- Describe the good features of working for your company, such as existing benefits, job security, and steady work.
- Remind them that signing union authorization cards does not mean they must vote for the union.
- Inform them of the disadvantages of belonging to a union, such as the possibility of strikes, serving on picket lines, paying dues, fines, and assessments.
- Explain the meaning of the phrases “dues checkoff” and “union shop.”
- Inform them of any prior experience you’ve had with unions and what facts you know about the particular union that’s trying to organize them.
- Tell your employees how their wages and benefits compare with other unionized and nonunionized companies with less desirable packages.
- Disclose the names of known gangsters or other undesirable elements who may be or have been active in the union, provided this is accurate information that can be verified by official sources.
- Inform them that, insofar as their status with the company is concerned, they are free to join or not to join any organization they choose.
- Express the hope that your employees vote against this or any union.

## What employers can’t do in a union situation

The following list covers some activities that constitute unfair labor practices. Make sure that you don’t:

- Discriminate in *any* way against any employee for participating in union activities. This prohibition applies to all aspects of employee relations.
- Promise or grant benefits to your employees (such as wage increases, holidays, benefits, or improvements

in working conditions) to encourage them to abandon the union.

- Make threats based on employee support of the union, including threats of discharge, layoffs, plant closure, or discontinuing current benefits.
- Interrogate your employees or prospective applicants concerning union-organizing activities.
- Prevent pro-union oral solicitation by employees during nonworking hours and breaks.
- Prohibit union insignia on shirts and jackets.
- Engage in the surveillance of employees to determine their views on the union.

Neither of these lists is exhaustive. As always when facing an organizing effort, consult with counsel for guidance.