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While Democrats Whittle Down Pro-Labor Provisions Of Social Spending Bill, Civil Penalties Remain

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As we discussed here, members of the House Education and Labor Committee have been attempting to end-run the procedural hurdles that have prevented the Protect the Right to Organize Act ("PRO Act") legislation from becoming law, through a process called "budget reconciliation." (For a refresher on the PRO Act, see our blog posts on the proposed legislation here and here.)

In September, the Committee released its proposed language for the federal budget incorporating several key provisions from the PRO Act that would have drastically amended federal labor law, such as establishing civil penalties for violations of the National Labor Relations Act ("NLRA"), personal liability for officers and directors, and newly-defined unfair labor practices that would effectively prohibit employers from utilizing some of the economic weapons traditionally thought to be lawful under the NLRA. Through the budget reconciliation process, these provisions have a greater chance of becoming law where the bill only requires majority support in both the House and Senate and is not subject to a filibuster.

However, as the social spending bill faced challenges from both parties, the Administration presented a revised framework on October 28, 2021, entitled the "Build Back Better Act." The new bill among other major edits, significantly pared down the proposed pro-labor provisions.

Even under the revised framework, there still exists for the first time ever civil penalties for those who commit unfair labor practices. If passed into law in its current form, the Build Back Better Act would:

- Impose civil penalties of up to $50,000 per violation of the NLRA;
- Double civil penalties up to $100,000 for NLRA violations that resulted in discharge or serious economic harm where the employer committed another similar violation

within the past 5 years; and

- Assess civil penalties against directors and officers where the facts indicate that personal liability is warranted.

Fortunately, some of the most significant PRO Act-inspired provisions of the prior reconciliation bill have been dropped from this spending bill; specifically, language that would have made it an unfair labor practice to:

- Permanently replace strikers;
- Discriminate against a worker who has unconditionally offered to return to work based on participation in a strike;
- Lockout, suspend, or otherwise withhold employment from employees prior to a strike;
- Misrepresent to a worker that they are excluded from the definition of "employee" under the Act, such as misclassifying independent contractor or supervisor;
- Require or coerce employees to attend so-called "captive audience meetings" or other campaign activities;
- Enter into, enforce, coerce, or retaliate against employees with respect to class or collective action waivers

The revised spending bill framework is now up for discussion and debate in both the House and the Senate. The bill needs majority support in both chambers in order to become law, and the amendments in the proposed language must withstand potential challenges in the Senate (called the Byrd Rule), which (as we discussed here) is intended to limit amendments that change substantive policy of federal law, rather than limited to taxes or spending. The significantly narrowed labor law amendments in the revised bill would seem to have a greater likelihood of withstanding a Byrd Rule challenge than the prior iteration.

As always, we will monitor this situation and report updates as they occur.

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