

Beltway Buzz, October 29, 2021

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Second Time Is the Charm? On October 28, 2021, Democrats in the U.S. House of Representatives released text of their revamped and slimmed-down [Build Back Better Act](#) (H.R. 5376) (though at nearly 1,700 pages, “slimmed down” is a relative term). Of course, a similar announcement was made back in [July 2021](#) and that resulted in three months of political drama and infighting. Here are the headlines from a labor and employment policy perspective.

- ***Paid Leave***

- The proposed \$500 billion federal paid family and medical leave program went from a promised 12 weeks of paid leave, to a rumored 4 weeks, to being dropped from the bill entirely in an effort to bring down costs.

- ***Labor Provisions***

- The bill would authorize the imposition of civil penalties of up to \$50,000 for each unfair labor practice (ULP) committed by an employer and up to \$100,000 for certain repeat violations. The “public interest” is one of the statutory factors that the National Labor Relations Board would consider in assessing the penalty amount. The bill would also permit civil penalties to be assessed against individual directors or officers of an employer.
- Significantly, other labor provisions that would have created new penalties for actions such as hiring permanent replacements during a strike or prohibiting class action arbitration agreements have been stripped from the bill.

- ***Wage and Hour Provisions***

- The bill would increase fines on employers that repeatedly or willfully violate federal minimum wage or overtime prescriptions from \$1,100 to \$20,740. The fines for unlawfully keeping employees’ tips would increase from \$1,100 to \$11,620. Civil penalties for violations of child labor prohibitions would also increase.

- ***Workplace Safety***

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- Pursuant to the bill's workplace safety provisions, the maximum penalty for a willful or repeat violation would increase from \$70,000 (currently adjusted for inflation to \$136,532) to \$700,000, and the minimum penalty would increase from \$5,000 (currently adjusted for inflation to \$9,753) to \$50,000. Caps on serious violations and failures-to-correct violations would increase from \$7,000 (currently adjusted for inflation to \$13,653) to \$70,000.

Fans of *Schoolhouse Rock!*, the animated educational children's series of 1970s and 1980s Saturday morning television, understand that a bill is not a law, so there is still a ways to go. Currently, the timeframe for moving this legislation through the House and the U.S. Senate (remember that Democrats will not need Republican votes on this) is unclear.

OSHA Update. It's another week filled with workplace safety policy developments.

- **OSHA Vaccine ETS Update.** The Occupational Safety and Health Administration's (OSHA) COVID-19 vaccine emergency temporary standard (ETS) is still being reviewed by the Office of Information and Regulatory Affairs (OIRA). Since OSHA sent the ETS to OIRA on October 12, it has scheduled 130 meetings with stakeholders. Currently, there are no publicly scheduled meetings for the week beginning November 1, 2021.
- **OSHA Assistant Secretary Confirmed.** On October 25, 2021, the Senate [confirmed the nomination](#) of Douglas L. Parker to be assistant secretary of labor for occupational safety and health. Parker will have a lot on his plate once he is sworn in: the forthcoming vaccine ETS, the current ETS for healthcare workplaces, a third revision to regulations addressing injury and illness reporting, and the development of a hazardous heat standard (more on this below). [Martha I. Casillas](#) presents unique [California-based insights](#) on what Parker will bring to his new role. Parker will be the first confirmed assistant secretary for OSHA since David Michaels left the position on January 10, 2017.
- **The Heat Is On.** Speaking of the heat stress standard, on October 27, 2021, OSHA issued an [advance notice of proposed rulemaking](#) (ANPRM) to begin the process of developing a hazardous heat standard for indoor and outdoor workplaces. OSHA is soliciting feedback on a variety of issues, including but not limited to: (1) potential underreporting of heat-related illness in the workplace; (2) which industries or occupations are most at risk for such illness; (3) best practices to help protect workers from heat illness; and (4) "[h]ow should climate change be factored into an OSHA heat illness and injury prevention standard?" Comments are due on or before December 27, 2021.

EEOC Updates Guidance on Vaccines and Religious Accommodations. In the wake of federally mandated employee vaccination requirements, this week the U.S. Equal Employment Opportunity Commission [updated](#) its COVID-19 guidance "addressing questions about religious objections to employer COVID-19 vaccine requirements and how they interact with federal equal employment opportunity (EEO) laws." Among other clarifications, the updated guidance makes clear that "objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as 'religious beliefs' under Title VII [of the Civil Rights Act of 1964]." [Katherine Dudley Helms](#) and [Andrew L. Metcalf](#) have the [details](#).

DOL Finalizes Tip-Credit Rule. On October 29, 2021, the U.S. Department of Labor's Wage and Hour Division published its [final tip-credit rule](#). The regulation partially replaces a Trump-era rulemaking with the so-called 80/20 rule, which prohibits an employer from taking a tip credit under the Fair Labor Standards Act (FLSA) if an employee's non-tip-producing work "exceeds, in the aggregate, 20 percent of the employee's hours worked during the workweek." The final rule becomes effective on December 28, 2021. [Steven F. Pockrass](#) and [Victoria L. Vish](#) have the [details](#).

PUMP for Nursing Mothers Act Passes House. On October 22, 2021, the U.S. House of Representatives passed the [Providing Urgent Maternal Protections \(PUMP\) for Nursing Mothers Act](#) (H.R. 3110). While the 2010 Break Time for Nursing Mothers law, which amended section 7 of the FLSA, requires employers to provide reasonable break time and space (other than a bathroom) for nursing workers to pump breast milk, the PUMP for Nursing Mothers Act would expand coverage to include employees exempt from the FLSA and would provide an enforcement mechanism to address situations in which employers fail to provide such accommodations. The bill passed the House, 276–149, with 59 Republicans voting in favor of the legislation.

The Buck Stopped There. Seventy-two years ago this week, the Fair Labor Standards Act Amendments of 1949 were enacted into law. Among other provisions, the 1949 amendments increased the minimum wage from \$.40 to \$.75 per hour, defined the phrase "regular rate of pay" for the purposes of calculating overtime (it was undefined in the original act), expressly prohibited "oppressive child labor," and empowered the Department of Labor to take legal action to recover unpaid wages on behalf of employees. Upon signing the bill into law, President Harry S. Truman [stated](#), "[T]he improvements made by the new act will go far toward achieving our basic purpose of assuring minimum labor standards necessary for health, efficiency and general well-being of workers."

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