

4 W&H Bills To Watch For In The Second Half Of 2021

By **Daniela Porat**

Law360 (July 2, 2021, 2:08 PM EDT) -- The latter half of this year promises to yield much debate and legislation on major wage and hour issues — from a minimum wage hike to the strengthening of a lactation break law.

Here, Law360 takes a look at the four bills to keep an eye on in the next six months.

Raise the Wage Act

Raising the federal minimum wage is at the top of the Biden administration's economic agenda, and whether or not the Raise the Wage Act passes, the issue is "not going away," said Libby Henninger, a shareholder for management-side firm Littler Mendelson PC.

The Raise the Wage Act would gradually raise the federal minimum wage from \$7.25 to \$15 an hour and phase out the tipped minimum wage of \$2.13. The bill was introduced in January and is among a batch of federal efforts to tackle this priority, including an executive order raising the minimum wage for federal contract workers and a proposed rule reforming the tipped credit.

"It's obviously going to have a broader impact on certain lower-wage industries, certain areas of the country" where local jurisdictions haven't stepped in to raise wages, Henninger said.

Such effects might include employers' cutting back on workers' hours or benefits, said Russell Bruch, a partner at management-side firm Morgan Lewis & Bockius LLP.

Employers just need to plan for these changes and be mindful of how wage adjustments affect overall morale, he said.

For example, an employer might transition a worker from full-time to part-time status to save some costs associated with providing benefits.

"But you also have to be mindful of employee relations issues and making sure that you have happy workers," Bruch said.

Similarly, Bruch said employers need to think about whether a higher minimum wage will require businesses to subsequently increase the pay of workers with seniority, another question of managing employee relations.

The bill's low chance of passing reminds Nina Maja Bergmar, an attorney for worker-side firm Bergmar Law LLC, of the death of the Paycheck Fairness Act in the Senate in June.

"That kind of broke my heart," she said.

Bergmar, who practices primarily in Georgia, where the federal minimum wage trumps the state's \$5.15 an hour, said the Raise the Wage Act would help a lot of her clients live productive lives.

"I have clients working 80 hours a week just to make a living wage, and honestly, that's unacceptable in the richest country in the world," she said. "But I think that politics is just blocking any kind of progress at this point."

Providing Urgent Maternal Protections for Nursing Mothers Act

A federal bill with a potentially more auspicious fate is the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, introduced in the House and Senate with bipartisan support in May.

The bill would expand coverage of the Fair Labor Standards Act's lactation break provision to exempt employees and correct a loophole in the 2010 Break Time for Nursing Mothers that made the law entitling certain workers to lactation breaks practically unenforceable.

"We're moving in the right direction," Bergmar said. "I just wish that this was already an obvious right that women should have in the workplace."

The 2010 law afforded workers unpaid lactation breaks and a private space to express milk, but its placement in the overtime section of the FLSA meant only nonexempt employees were covered.

If employers deny workers breaks anyway, those employees are left without meaningful recourse because the only remedy for missed breaks is unpaid wages, which makes this law "virtually useless in almost all practical application," in the words of then-U.S. Magistrate Judge T. Michael Putnam in *Hicks v. City of Tuscaloosa*.

As is the case with minimum wage laws, many states already provide accommodations for nursing parents, Henninger said.

And while many employers might already extend coverage for nursing breaks to employees excluded from the FLSA's current provisions, "having that as a formal protection, I think, is positive," said Henninger.

California's AB 1003 On Wage Theft as Grand Theft

The Golden State, often viewed as on the vanguard of employment law, introduced a bill in February that would make the intentional theft of wages tantamount to grand theft, a criminal offense.

In its initial iteration, the bill was too broad, said Mike Nader, a shareholder at management-side firm Ogletree Deakins Nash Smoak & Stewart PC.

The first draft of the bill covered any violation of the law that led to the deprivation of wages, which

"would have resulted in too low of a bar for plaintiffs to assert that not only have they been civilly deprived of wages, but also that it was a criminal act," Nader said.

The emphasis has now shifted toward the "intentional deprivation of wages" by "fraudulent or other unlawful means," according to the current bill text. An employer could be charged with grand theft of wages, which includes tips, if they took more than \$950 from a single worker or \$2,350 from two or more workers over a 12-month period. Independent contractors would be covered by the bill as well.

"In my over 20 years of representing companies in California, I have never seen an employer intentionally deprive someone of wages," Nader said. "It's always a mistake, an accident, an administrative oversight. It's never an intentional fraudulent act."

Previously the California Chamber of Commerce branded the bill as a "job killer," a moniker reserved for bills that would "decimate economic and job growth" in the state, according to the chamber's website. But the designation was removed after the bill was narrowed in April to apply only to situations where the violations were intentional.

The expense and difficulty of civil litigation means many workers don't have the recourse to recoup wages, said Matthew Helland, a partner at Nichols Kaster PLLP.

"Imposing criminal penalties for wage theft will benefit workers and law-abiding employers alike by encouraging compliance and punishing employers that continue to violate the law," he said in an email to Law360.

Questions remain, however.

For Nader, a key issue is how the law will hold an individual criminally responsible for decisions that are often layered and collective.

"There usually are several people in the company making important decisions on how wages are paid," he said. "It'll be difficult for prosecutors to decide which individual allegedly made a fraudulent and intentional decision to deprive someone of wages, because it's usually a collaboration of several people in a company all acting in good faith to ensure compliance."

Forced Arbitration Injustice Repeal Act

The Forced Arbitration Injustice Repeal Act, or FAIR ACT, would prohibit employers from using predispute arbitration clauses in employment contracts as a workaround to resolving employment issues in court. It was introduced in the House in February Rep. Hank Johnson, D-Ga. and in the Senate in March by Sen. Richard Blumenthal, D-Conn.

Agreements between workers and companies to submit disputes to out-of-court arbitration have become more common since the U.S. Supreme Court held in its 2018 Epic Systems Corp. v. Lewis ruling that they don't interfere with workers' right to collectively litigate wage claims under the FLSA.

But critics have argued that the out-of-court proceedings disadvantage workers and make it more difficult to hold companies accountable through public litigation and collective efforts.

Referring to the bill's main idea that workers would not have to agree to arbitration before an

employment dispute arises, Bergmar said "from a fairness perspective, I think that that's how it should be."

--Additional reporting by Mike LaSusa. Editing by Vincent Sherry.

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