Wage Theft Bill Would Increase Risk, Severity Of FLSA Claims

By **Christopher Pardo and Beth Sherwood** (August 3, 2022)

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In May, Sen. Patty Murray, D-Wash., Rep. Rosa DeLauro, D-Conn., and Rep. Bobby Scott, D-Va., introduced the Wage Theft Prevention and Wage Recovery Act in Congress.[1] The act currently has 45 Democratic — and no Republican — co-sponsors.[2]

Murray, the chair of the Senate Health, Education, Labor and Pensions Committee, was quoted in a press release as saying that the act "strengthens federal protections to make sure all workers are paid for the work they've done — and can fully recover wages their employers have stolen from them."[3] She explained that the goal is to "ensure workers across the country get paid what they've earned."[4]

In practical effect, should it become law, this proposed legislation would have far-ranging impacts on employers that go well beyond the commonsense proposition that people should be paid the wages they have earned. This is because the act seeks to amend the Fair Labor Standards Act in extreme ways, outlined below.

First, the act would require all employers to provide a written disclosure to nearly all employees, within 15 days of hire and in their primary language, covering:

- The rate and standard of pay, e.g., hourly, shift-based, salary or commission;
- Whether the employee is exempt or nonexempt from minimum wage requirements;
- Whether the employee is exempt or nonexempt from overtime requirements — and if exempt, an explanation of why;
- The name of the employer and any other names used by the employer to conduct business; and
- The physical — and, if different, mailing — address of the employer's main office or principal place of business.

Second, the employer would be required to provide pay stubs containing the name of the employee, the total gross and net wages paid, the beginning and end date of the pay period, all names under which the employer does business, a listing and explanation for all

deductions, and contact information for an employer representative.

If an employee is nonexempt, a listing of all hours worked and the applicable pay rate for each during the pay period must also be included.

As it concerns salaried, exempt employees, the pay stub must include the amount of any salary paid during the applicable period.

There are also separate requirements for individuals receiving piece rates, commissions and additional compensation, such as allowances and reimbursements.

Third, the act would change final paychecks by requiring full payment of any remaining salary to be provided on the scheduled payday or 14 days after termination — whichever is earlier. This compensation must include compensation due "for all time worked and benefits incurred (including retirement, health, leave, fringe, and other benefits)."[5] Failure to comply could result in up to an extra 30 days of pay for the employee involved.

Fourth, the act would require employers to keep employee records for five years and permit inspection of such records within 21 days of any employee request.

Violation of this record-keeping provision would create a rebuttable presumption that any credible documentary evidence or testimony presented by the employee regarding wages owed and hours worked is accurate.[6]

Fifth, the act would change FLSA collective actions from an opt-in model to an opt-out model, similar to most current Federal Rule of Civil Procedure 23 class actions and a significant departure from the way FLSA representative actions have ever functioned.

For example, under an opt-out model, class members are automatically included in a class action unless they affirmatively choose to opt out, often in order to pursue their own claims individually. They need not be aware of the lawsuit in order to join it.

By contrast, under the current collective action opt-in model, potential members of the collective must affirmatively choose to be part of the collective class in order to join in the award if the lawsuit is successful, and are also bound by the statute of limitations which is only tolled based on the individual collective action member's opt-in date.

Sixth, the act would change wage recovery by requiring payment for all hours at an employee's agreed-upon wage and overtime rate, rather than at the minimum wage or minimum overtime wage rates, which the FLSA has never done and for which recovery has traditionally been within the purview of state laws. This provision would also explicitly include rates set forth in collective bargaining agreements.

Seventh, and relatedly, the act would invalidate and prohibit all arbitration agreements and class action waivers arising under the FLSA, overturning U.S. Supreme Court precedent, which is another extreme deviation from current law.[7]

Eighth, the act would increase civil and criminal penalties, as well as recoverable damages, for nearly all violations.

Ninth, and finally, the act would amend the Portal-to-Portal Act by increasing the statute of limitations applicable to all such claims, with two-year statutes becoming four-year statutes, and three-year statutes becoming five-year statutes. This would significantly increase

potential liability — doubling it in the case of the standard two-year statute of limitations.

For all of these reasons, the effect of the act would be to sharply increase both the risk and the severity of claims brought under the FLSA, potentially making them more attractive than class actions based on state law commonly pursued in many jurisdictions.

Coming on the heels of Congress passing a law prohibiting the enforcement of predispute arbitration agreements in sexual assault and sexual harassment claims, the act appears to be part of a broader trend disfavoring the use of arbitration agreements, in addition to creating various additional federal rights.

If this law were to pass, and both sex discrimination and FLSA claims were no longer arbitrable, employers would be understandably concerned that arbitration agreements concerning other discrimination and wage claims may soon be unenforceable, as well.

With union organizing on the rise in 2022, employers should also be aware of the likelihood that this legislation would upset well-settled legal doctrines of labor law, such as those surrounding the Labor Management Relations Act.

Because the vast majority of collective bargaining agreements set forth grievance procedures ending in arbitration, LMRA preemption effectively prevents unionized employees from bringing lawsuits for alleged violations of their collective bargaining agreements.

But, if the act permits employees to bring claims under collective bargaining agreements in court, and further prevents employers from enforcing arbitration agreements, then the doctrine of LMRA preemption would effectively be overturned.

This is yet another way that the act could expose employers to additional litigation risks and costs, as compromising the LMRA preemption doctrine could lead to the threat of increased litigation, including in the class action context, from unionized employees.

Beyond these additional threats of litigation, the act would likely increase the frequency and scope of investigations and enforcement actions by the U.S. Department of Labor's Wage and Hour Division.

For example, this legislation would require the division to enforce collective bargaining agreements and other contracts, which it has not done previously.

Some have commented that these requirements would strain the already overburdened agency, such that increased actions would not be an immediate outcome.

However, as Rep. Bobby Scott has noted, the act's co-sponsor, DeLauro, is chair of the House Appropriations Committee, and would therefore be well-placed to ensure that the division has the resources required to begin targeting employers for enforcement.[8]

As it remains to be seen whether the act will gain additional support in the House sufficient to move to the Senate, no immediate steps are required. However, it may be advisable for employers to review their insurance policies and consider whether additional coverage may be needed.

Most employment practices liability policies already exclude or seriously limit the coverage of FLSA and similar state wage and hour claims.[9] These exclusions and limitations are

attributable to the massive liability potentially involved with these claims — which this act would dramatically increase.

Therefore, employers may benefit from reviewing their existing policies, considering whether all potentially applicable policies may be sufficient to cover these sorts of wage and hour claims, and determining whether supplemental or stand-alone wage and hour coverage may be desirable.

Whatever may occur next, this proposed legislation is a helpful reminder that it is far easier to build a plane on the ground than it is to try to build it in the air.

This bill may pass in a current or modified form, or it may inspire similar state legislation. Employers will want to ensure compliance with applicable state law on employee records, pay practices and pay disclosures; monitor compliance with collective bargaining agreements and other employee contracts; and review their insurance coverage policies well in advance of this bill's theoretical passage.

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[1] Wage Theft Prevention and Wage Recovery Act, H.R. 7701, 117th Cong. (2022) ("Act").

[2] Cosponsors, Congress.Gov, H.R. 7701 Wage Theft Prevention and Wage Recovery Act, https://www.congress.gov/bill/117th-congress/house-bill/7701/cosponsors.

[3] Press Release, U.S. Senate Committee on Health, Education, Labor, & Pensions, Murray, DeLouro, Scott Introduce Bill to Stop Wage Theft and Improve Wage Recovery (May 10, 2022), https://www.help.senate.gov/chair/newsroom/press/murray-delauro-scott-introduce-bill-to-stop-wage-theft-and-improve-wage-recovery.

[4] Id.

[5] Act at § 101(c)(1).

[6] Act at § 104(c).

[7] See EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (" The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration act seems to protect pretty absolutely.").

[8] Harris, Andrew and Francis, Laura D., Punching In: Nondiscrimination Audits Coming for US Contractors (May 16, 2022) https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XBMLJV4O000000?bna_news_filter=daily-labor-report#jcite.

[9] For an in-depth discussion of this topic, we recommend that readers review a blog post

on the subject: Fehling, Geoffrey B., Pardo, Christopher M., and Sherwood, Beth L., Assessing Wage and Hour Insurance Coverage Following Proposed FLSA Amendments (June 21, 2022) https://www.huntonak.com/en/insights/assessing-wage-and-hour-insurance-coverage-following-proposed-flsa-amendments.html.