

Labor And Employment Policy To Watch In 2021's Second Half

By **Vin Gurrieri**

Law360 (June 29, 2021, 9:20 PM EDT) -- Democrats have pushed an aggressively pro-worker agenda since President Joe Biden's inauguration, proposing an array of plans that would significantly expand civil rights and labor protections for workers. Here, Law360 looks at a few bills and potential rules employers should keep an eye out for in the second half of 2021.

The Equality Act

One of the big-ticket items on the discrimination front for Democrats and civil rights advocates in recent years has been passage of the Equality Act, a **sweeping LGBTQ rights proposal** that would update civil rights statutes to explicitly protect people from bias based on sexual orientation and gender identity in various contexts. The House of Representatives approved the bill by a 224-206 vote in February.

If enacted, it would codify and expand the U.S. Supreme Court's **year-old ruling** in *Bostock v. Clayton County, Georgia*, by prohibiting discrimination based on sexual orientation or gender identity in employment, public accommodations and other areas. The justices by a 6-3 margin held in *Bostock* that a provision in Title VII of the Civil Rights Act banning workplace discrimination based on sex covers bias based on sexual orientation and gender identity.

Senate Republicans, however, voiced fears during a committee hearing in March that the proposal would undermine religious freedom and fairness in women's sports and undercut the safety of women-only spaces — criticisms that highlight the ongoing tension between religious freedom and LGBTQ rights that courts have struggled with over the past few years.

James Plunkett, a shareholder at Ogletree Deakins Nash Smoak & Stewart PC, said the bill, like many others currently working their way through Congress, may have a tough time overcoming the 60-vote filibuster in an evenly divided Senate.

"I think from the Republican viewpoint, they think that the Equality Act ... basically makes [the Religious Freedom Restoration Act] a second-class federal statute even though it's a federal statute that passed with ... overwhelming bipartisan support," Plunkett said.

The Protecting Older Workers Against Discrimination Act

The Protecting Older Workers Against Discrimination Act cleared the House on June 23 by a **247-178 vote**. The bill, known by the acronym POWADA, would lower the causation standards that plaintiffs need to meet to press age bias claims.

More specifically, people who sue their employers under the Age Discrimination in Employment Act will no longer have to show that age was the "but-for," or decisive, reason for an adverse employment action like a firing or demotion.

Instead, the bill would enshrine a so-called mixed-motive standard for their claims, meaning they would have to show only that age was one of the factors behind any alleged mistreatment, a lighter test than the but-for framework.

Additionally, the bill would soften the causation standard for plaintiffs to bring valid retaliation claims under Title VII of the Civil Rights Act or disability bias claims under the Americans with Disabilities Act by adopting a mixed-motive standard for those as well.

"If the evidentiary standards [are] lower and the burden is lower on the plaintiff, that makes the claims more difficult to defend and sometimes more difficult to resolve [because] they have a greater chance of surviving summary judgment and greater chance of [getting] to trial," said Adam Sencenbaugh, a partner at Haynes and Boone LLP. He added that it "obviously creates more risk [for] the employer of an unfavorable verdict."

But POWADA too could be another Democratic-backed bill that gets knocked off course by the filibuster, according to Ogletree's Plunkett.

"For many, it sounds innocuous and benign, but when you read the details of it, it does get into some pretty significant changes in terms of burdens of proof of not just the ADEA but other federal discrimination statutes," Plunkett said. "Can they get 10 Republicans to support that? I'm not sure."

The Pregnant Workers Fairness Act

One discrimination-related bill that has garnered hefty bipartisan support is the Pregnant Workers Fairness Act, which **easily cleared** the House in May by a vote of 315-101.

If enacted, the bill would require businesses with at least 15 people to make reasonable accommodations for workers who are pregnant. It would also forbid employers from making hiring and other employment decisions based on the need to make accommodations for pregnant workers, and require them to rely on a reasonable accommodation process that tracks a similar process associated with the Americans with Disabilities Act.

The U.S. Equal Employment Opportunity Commission would be charged with enforcing the statute if it makes it into law, and the proposal would also empower employees to bring their own lawsuits with the same rights and remedies available under Title VII.

Although versions of the bill introduced over the past decade have failed to clear Congress, the latest iteration boasts the support of a diverse coalition of stakeholders that includes the ACLU and the U.S. Chamber of Commerce.

Plunkett noted that the PWFA garnered about 100 Republican votes when it passed the House on top of near-unanimous Democratic support and that it enjoys the support of many groups in the business community.

Given that profile, Plunkett said it signals that the bill could gain enough support in the Senate to be the one that overcomes the filibuster.

"I think the issue maybe with the PWFA, like so many other things in Congress, is about time — the calendar, priorities, what else is going on in the Senate [and] where can it fit in," Plunkett said. "But I think there is potential bipartisan agreement on [it]."

The Protecting the Right to Organize Act

Besides legislation aimed at civil rights, one of the **top items** on the Biden administration's employment agenda — and the proposal that arguably worries the business community the most — is the Protecting the Right to Organize Act. The House **advanced the measure** by a 225-206 vote in March.

If passed, the PRO Act would usher in the broadest expansion of federal labor rights since Congress passed the National Labor Relations Act in 1935.

"It's a sweeping change that the Biden administration is pushing and backing," said Ellen Bronchetti, a partner at McDermott Will & Emery LLP. She said there is also "concern and thought" among those in the business community about what will happen if the legislative package can't clear the Senate. Employers are questioning whether the president "is going to try and implement at least pieces of the PRO Act through executive action" or whether changes will occur at the agency level via the U.S. Department of Labor and National Labor Relations Board, Bronchetti said.

Among the bill's provisions that promise to have widespread impact on employers, according to Bronchetti, is one that would make misclassification of workers as independent contractors a violation of the NLRA. Another would enshrine into federal law a strict ABC test for analyzing whether workers qualify as independent contractors similar to the one **adopted in California**.

"The practical impact [of] that — just that one piece — is that it would become more difficult for employers to rely on independent contractors as a significant portion of their workforce if the ABC test becomes the federal standard going forward," Bronchetti said.

"I think that because Biden has promised to strengthen worker protections and strengthen workers' right to organize, I think employers need to keep a real close eye on this legislation or versions of the legislation or pieces that might get pulled out and put elsewhere," Bronchetti added.

OFCCP's Religious Contractor Rule

On the regulatory front, the DOL's Office of Federal Contract Compliance Programs is nearing completion of a rule that repeals Trump-era regulations that allowed faith-based government contractors to avoid federal anti-discrimination law.

The OFCCP **signaled its intent** to upend the Trump administration's rule, which was **finalized in late 2020**, in a federal court filing earlier this year in a case **seeking to invalidate** the existing regulations.

The Trump-era rule stipulates that religious federal contractors be afforded the same carveout from anti-discrimination mandates that churches, religious schools and other nonsecular employers are given under federal civil rights laws, which clears them to make hiring and other employment decisions based on their faith. It also accounts for recent decisions by the Supreme Court aimed at protecting religious freedoms.

When it first proposed the rule in 2019, the OFCCP said it intended to clarify the scope of a religious exemption included in Executive Order 11246, which imposes affirmative action mandates on contractors and bars them from discriminating based on sex, religion, sexual orientation, gender identity and other characteristics.

Although the Biden administration's rule hasn't yet been unveiled, it is currently awaiting final approval from the White House's Office of Management and Budget, the final step before it can be released for publication in the Federal Register.

Sencenbaugh noted that the Biden administration has been "skeptical" of the defense the rule lays out for religious contractors and looks to roll the rule back. He added that the OFCCP under Biden is likely to promote additional rules pertaining to affirmative action and diversity and inclusion initiatives.

"Certainly, in this administration you'll see less emphasis on proactive steps to protect religious organizations from equal [employment] opportunity laws," Sencenbaugh said. "That doesn't appear to be a priority for the administration. I think they want these rules to apply more universally."

DOL's Overtime Rule

Labor Secretary Marty Walsh made news when he told the House Education and Labor Committee **in early June** that the DOL is reviewing Trump-era regulations that govern how white collar workers are paid overtime.

During his congressional testimony, Walsh told lawmakers that the **current threshold** of about \$35,000 is "definitely" too low and that his agency is exploring the possibility of pairing an increase with automatic future updates on a periodic basis. An item referring to potential new rulemaking subsequently showed up on the DOL's spring regulatory agenda as one of its long-term actions.

Finalized in 2019, the existing rule updated the Fair Labor Standards Act's overtime and minimum wage exemptions for executive, administrative and professional workers by hiking the standard salary threshold to \$35,568 per year or \$684 per week for those employees to qualify as exempt. It also hiked the so-called highly compensated worker threshold to qualify for the exemptions from \$100,000 to just over \$107,000.

That rule was one of the big-ticket items on the Trump administration's employment law to-do list after a controversial push by the Obama administration to **set a higher salary threshold** at around \$47,000. But the Obama DOL's version of the rule ended up being stymied in federal court.

The Trump DOL also eschewed a controversial mechanism from the Obama administration's rule that would have automatically increased the salary threshold every three years.

"I think you'll probably see more emphasis for the overtime rule. That was one of [President Barack

Obama's] big regulatory achievements that was blocked by a federal court in 2016," Sencenbaugh said, adding that Walsh's recent comments about the overtime rule could foreshadow an effort to lift the current salary threshold.

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