Legal Update Article

Build Back Better Act Threatens Class and Collective Action Waivers

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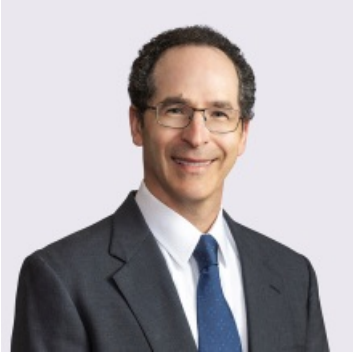

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The U.S. House of Representatives on November 19, 2021, passed the Build Back Better Act (H.R. 5376), ambitious climate protection/social spending legislation that now awaits deliberation in the Senate. Tucked inside the massive bill are numerous provisions of interest to employers. For example, there is a provision that effectively may prohibit employers from adopting class and collective action waivers. By creating significant civil penalties, the bill calls into question the ongoing viability of the U.S. Supreme Court's 2018 decision in *Epic Systems Corp. v. Lewis*, which condoned the use of class and collective action waivers in employment arbitration agreements pursuant to the Federal Arbitration Act.

The bar on class waivers is one of several onerous amendments to the National Labor Relations Act (NLRA) set forth in the legislation. (In a separate blog post, attorneys in the Jackson Lewis Labor Relations practice group discuss these proposed amendments more broadly.) If enacted in its current iteration, the Build Back Better Act would make it an unfair labor practice for a covered employer to require employees to agree not to engage in collective or class action or to join such litigation.

The bill states that it would be unlawful for an employer to

> enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction[.]

The bill also makes it unlawful to "coerce" an employee into promising not to pursue or join such an action, or to retaliate against an employee for refusing to make such a promise. (The provision would expressly allow such agreements if permitted by a collective bargaining agreement between the employer and the employees' union – if the employees are represented for collective bargaining by a union.)

A violation of this provision would result in civil penalties under the NLRA. The bill proposes civil monetary penalties for violations of the NLRA, which has never had civil penalties before — as much as $50,000 per violation ($100,000 for repeat offenses). The size of these civil monetary penalties could effectively bar the ongoing use of class and collective action waivers in employment or arbitration agreements.

Employers increasingly enter into arbitration agreements with employees and independent contractors, in which the parties opt to resolve disputes on an individual (rather than class or collective) basis. Many employers without arbitration programs also have initiated the use of "stand-alone" class waivers. These strategies have allowed for the expedient and cost-effective resolution of claims and have minimized the enormous pressure on employers to settle questionable claims. The restriction on class and collective action

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waivers embodied in the current version of the Build Back Better Act would upend what has proven to be a critical risk management tool for employers in the face of an employment class action wave that shows no sign of slowing — and as employers confront novel challenges posed by COVID-19 and the uneasy return to "normal."

Business groups are understandably concerned about these draconian amendments. The U.S. Chamber of Commerce, for one, has voiced its strong disapproval. Indeed, the bill's more controversial provisions were not expected to remain in the final bill voted on in the House; so far, however, the NLRA amendments have survived intact. In the Senate, though, the legislation faces an uncertain future, and may well succumb to procedural hurdles and opposition from Senate Republicans and moderate Democrats. We will keep a watchful eye as Senate deliberations unfold, as passage of this provision, though questionable, would usher in a harsh class action litigation climate for employers.

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