



COALITION FOR A **DEMOCRATIC WORKPLACE**

October 4, 2021

Dear Members of Congress:

The Coalition for a Democratic Workplace (“CDW”), composed of more than 600 major business organizations representing millions of employers employing tens of millions of workers nationwide, write to express our serious concerns with numerous provisions related to the National Labor Relations Act (“NLRA” or “Act”) included within the Reconciliation Bill. Specifically, these provisions create new and egregious civil monetary penalties (“CMPs”) for violations of the NLRA, impose personal liability for such violations on directors and officers, mandate neutrality agreements in union organizing campaigns for entities seeking certain grants, and provide extensive funding for an electronic voting system that will not protect the privacy and voting rights of workers.

These provisions are significant, substantive policy changes and are therefore inappropriate for inclusion in the Reconciliation Bill. Reconciliation bills are intended to focus on items with budgetary effect and are not intended to radically change policy through measures that merely produce an incidental budgetary effect. As outlined below, the implementation of these policies on the employer and employee communities are substantial and radical changes to current law. Congress should therefore go through regular order in its attempts to implement them.

Civil Monetary Penalties under the National Labor Relations Act (Sec. 21006)

The incorporation of civil monetary penalties into the NLRA is a radical change to the Act. The NLRA currently does not give the National Labor Relations Board (“NLRB” or “Board”) authority to impose such penalties, so CMPs would be a drastic departure from the status quo. Additionally, the NLRA is intended to be a remedial statute. It is designed to ensure that aggrieved parties can be made whole as quickly and effectively as possible. The CMPs included within the Reconciliation Bill, however, will fundamentally alter the purpose of the Act, making it instead a punitive law that can easily be exploited by entities with anti-competitive motives.

The size of the CMPs within the Reconciliation Bill are grossly out of line with existing labor and employment laws. The language permits the NLRB to impose \$50,000 fines on employers for even the most technical violations of the Act, and the Board can impose fines as high as \$100,000 under certain circumstances. In comparison, penalties for minimum wage or overtime violations can only reach \$1,000 per violation. The maximum penalty for serious violations under workplace safety and health laws is \$13,653. Even violators of child labor laws are subject to a maximum civil money penalty of only \$10,000. Congress cannot justify the excessiveness of the CMPs or the fact that such high penalties are only targeted against violations of the NLRA.



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Small businesses across the country will be disproportionately and negatively impacted by these CMPs. A single fine of \$50,000 for a technical violation of the NLRA, something as simple as a poorly worded provision in an employee handbook for example, could destroy a small business. This is especially true in today's current economic environment where many small businesses are still struggling to stay afloat due to the COVID-19 pandemic and resulting economic downturn.

Additionally, these CMPs will result in an onslaught of litigation. Employers will have dozens of unfair labor practice allegations charged against them. Due to the high cost of being found in violation of the Act, each and every alleged violation will need to be adjudicated. This will result in a substantial slowdown in the effort to expeditiously resolve unfair labor practices and make impacted workers whole. Rather than an employee quickly receiving backpay or reinstatement following a violation, the employee will remain in limbo as the proceedings play out for each potential violation. These delays will also create industrial instability. The prohibition of legal employer actions, such as lockouts and employee communications, in this section also contributes to unpredictability, leaving well-intentioned employers without a stable standard upon which to base their treatment of employees. The economy will grind to a halt as employers are forced to spend their resources on legal processes to resolve allegations. This too violates the intent of the NLRA, which strives to limit or eliminate practices that result in the obstruction of commerce.

Personal Liability for Directors and Officers (Sec. 21006)

The Reconciliation Bill also includes personal liability for directors and officers of the employer in question. Under the Reconciliation Bill, these individuals could be found personally liable for violations of the Act if they simply established a policy that eventually led to a violation. This is an unprecedented policy change and will result in individuals' lives being destroyed for unintentionally violating the complex and intricate laws governing labor relations.

Union Neutrality Requirement for Direct Care Grants (Sec. 22302)

The Reconciliation Bill creates a new grant program for the development of the direct care industry and workforce. One requirement, however, for all interested applicants is that they must pledge to remain neutral in any union organizing effort involving the direct care workers served by the grant. This is an astounding policy change that is in direct conflict with section 8(c) of the NLRA, which explicitly permits employers to express "any views, argument or opinion . . . in written, printed, graphic or visual form" regarding unionization. Employers have the right to engage with employees about the pros and cons of unionization and discuss what unionization could mean for their workplace, and employees have the right to be fully informed prior to their vote. Unionization is a significant change in the relationship between employers and their employees, and employers should therefore be able to engage with their workers to discuss the issues. That said, should Congress want to radically change employers' role in union organizing drives, they should be required to do so through regular legislative order.



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Funding for Implementation of an Electronic Voting System (Sec. 21002)

The Reconciliation Bill provides \$5 million in funds for the NLRB to implement an electronic voting system for union representation elections. This is woefully misguided. Electronic voting means employees will vote for or against union representation through email or an application on their phones. There is no way to ensure the vote being submitted is in fact the vote of the individual employee. Furthermore, by not ensuring an NLRB-supervised election is held via secret ballots, workers could be forced to vote in front of their colleagues and/or union organizers, leaving them exposed to potential harassment, coercion, and intimidation.

Electronic voting has already proven to be a concern. On September 3, the National Mediation Board announced it would be conducting elections via mail-in ballots for a time. During the NMB's evaluation process of its own electronic voting system, their contractor failed to provide requested information. The NMB is now looking to build a "new safe and secure electronic voting system that totally complies with all federal security standards."

CDW thanks you for your consideration of these concerns. We look forward to continuing working with you on these important matters.

Sincerely,

Kristen Swearingen
Chair
Coalition for a Democratic Workplace