

# Legislate<sup>®</sup>

## Key Legislative Developments Affecting Your Human Resources

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## Congress Passes Government Funding; Senate Approves ERISA Section 4062(e) Legislation

Congress passed a two-month government funding bill this week, while the Senate also approved by unanimous consent a bill that would amend section 4062(e) of ERISA. Congressional hearings this week focused on retirement policy and oversight of the EEOC. The Paycheck Fairness Act again failed to advance.

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### Health Care

The House of Representatives (House) passed [H.R. 4](#) this week — the Jobs for America Act. Among other provisions, Section 102 of Division I of the bill would modify the Affordable Care Act's (ACA) definition of full-time employee — increasing the hours worked threshold from 30 to 40 hours per week. The bill would also make a technical modification to the ACA's employer shared responsibility requirement (Section 202 of Division I of H.R. 4) by allowing employers to disregard employees with certain military retiree coverage when calculating whether the employer has more than 50 full-time employees.

Both of these provisions are contained in separate bills — H.R. 2575 and H.R. 3474 — that passed the House earlier this year. See our [March 14, 2014](#) and [April 4, 2014](#) editions of *Legislate* for more information on the two bills.

H.R. 4 is not likely to be taken up in the Senate, and the White House released a [statement](#) that the president's senior advisers would recommend that he veto the bill if presented with it.

### Government Funding One Step at a Time

The House and Senate passed [H.J. Res. 124](#) this week — a [continuing resolution](#) (CR) that would fund the federal government through December 11, 2014. The CR does not include any modifications to the ACA. Since the CR only provides funding for ten weeks, Congress needs to pass additional legislation after the November 4 mid-term elections to fund the federal government for the rest of FY 2015.

## Retirement

Two congressional committees held hearings on retirement policy, and the Senate passed S. 2511 — which would modify section 4062(e) of ERISA.

### S. 2511

The Senate passed [S. 2511](#) by unanimous consent on Tuesday. The bill would modify section 4062(e) of ERISA by changing the definition of a substantial cessation of operations — defined as a cessation of operations at a facility that results in a separation of employment of more than 20% of the employees participating in a pension plan. Under current law, the PBGC may seek a bond or other collateral from a pension plan sponsor if there is such an event.

The legislation would change the definition to a permanent cessation of operations at a facility that results in a workforce reduction of more than 15% of eligible employees. All employees of a sponsoring employer who are eligible to participate in all defined contribution and defined benefit pension plans subject to ERISA are considered eligible employees. The legislation contains other special rules in determining whether there is a 15% reduction — for example, separated employees are not taken into account if they are replaced within a reasonable time by other employees who are US citizens and residents and are working at a facility in the US.

It is not clear when the House might take up the legislation. The legislation's prospects for House passage are probably good given the support by both political parties evidenced by Tuesday's Senate passage.

### Senate Finance Committee Hearing

On Tuesday, the Finance Committee held a [hearing](#) titled “Retirement Savings 2.0: Updating Savings Policy for the Modern Economy” held in connection with the tax-writing committee's ongoing work on tax reform. One witness focused on the challenges confronting defined contribution plans, such as many participants being ill-equipped to make sound asset investment decisions and that investment and other fees are too large. Another witness cautioned that the strength of America's voluntary employer-provided retirement system is its flexibility and that policy-makers should build on this existing system. The witness also testified that the coverage gap — referring to workers without access to retirement savings plans — is misunderstood, with the majority of private-sector workers that need and demand access to retirement plans having access to such plans. Another witness testified that claims by some that there is a retirement savings crisis are overstated, and that policy-makers should focus on solutions for targeted populations who have problems saving. A behavioral economist testified that financial incentives have a small impact on savings plan participation — suggesting that other reasons are responsible for poor savings rates such as consumerism and confusion about how much to save and how to make plan investment decisions. The witness testified that automatic enrollment is a particularly effective method of increasing savings plan participation.

### Committee on Ways and Means

On Wednesday, the Select Revenue Measures subcommittee of the Committee on Ways and Means held a [hearing](#) on defined benefit pension plans. Witnesses explored a variety of issues, including:

**Nondiscrimination testing.** A large employer testified that additional guidance is needed from the Treasury Department and IRS on nondiscrimination testing for closed defined benefit pension plans. The witness testified that absent such guidance — or enacted legislation revising the testing rules — employers will institute hard plan freezes for their presently closed plans as the plans begin to fail nondiscrimination testing.

**Mortality tables.** A representative of the Society of Actuaries testified on the process involved in updating mortality data and tables.

**Positive attributes of pension plans.** The executive director of a policy institute testified on the positive economic benefits of pension plans for the national economy as well as seniors and employees.

**Underfunded multiemployer pension plans.** One witness testified that Congress must act soon to address the funding challenges of severely underfunded pension plans, while another witness testified that the current interest rates used to determine the present value of multiemployer pension plan liabilities significantly understate plan liabilities and annual costs.

## Labor and Employment

On Wednesday, the House Education and the Workforce Committee's Subcommittee on Workforce Protections held a [hearing](#) on three legislative proposals that are intended to bring greater transparency and accountability to the EEOC. It follows a recent oversight hearing on EEOC regulatory and enforcement actions. A variety of private-sector witnesses testified at this week's hearing, with several expressing support for the bills and one witness testifying that the legislation would weaken the EEOC's ability to enforce anti-discrimination laws. The bills are:

- [H.R. 4959](#) – the EEOC Transparency and Accountability Act, which would require the commission to disclose publicly information on each case brought in court by the EEOC and to engage in good faith conciliation efforts (subject to judicial review) to resolve the matter before filing suit. The EEOC would also have to provide information on its public website and report to Congress instances in which it was sanctioned by a court or ordered to pay fees or court costs.
- [H.R. 5422](#) – the Litigation Oversight Act of 2014, which would require the Commission to approve by majority vote the filing of a lawsuit (or intervening in a pending lawsuit) involving multiple plaintiffs or an allegation of systemic discrimination — and publicly disclose case details on its website.
- [H.R. 5423](#) – the Certainty in Enforcement Act of 2014, which would modify the Civil Rights Act to provide that employers may engage in an employment practice that is required under federal, state, or local law. The bill is intended to address concerns about the EEOC's enforcement and policy approach to the use of criminal background checks by employers, including its updated 2012 enforcement guidance and recent lawsuits it pursued.

### Some Legislative Terms Defined

Our [September 5, 2014](#) *Legislate* provides a glossary of frequently used legislative terms like “cloture,” “up-or-down vote,” “mark-up,” and “continuing resolution.”

Each of the bills has been introduced and referred to the Education and Workforce Committee. The next step for the bills would be a [mark up](#) in the committee — which could be convened later this year.

On Monday, the Senate voted on a motion to invoke [cloture](#) on the proposed Paycheck Fairness Act ([S.2199](#)), and fell short of the 60 votes needed to advance the bill to an up-or-down vote, the second time this year the Senate failed to advance the

legislation. (See our [September 12, 2014](#) and [April 11, 2014](#) editions of *Legislate* for further details about this bill and the cloture vote that failed earlier this year.)

Also this week, Senators Mitch McConnell (R-KY) and Lamar Alexander (R-TN) introduced the National Labor Relations Reform Act. According to a [press release](#), key provisions include: increasing the number of board members from five to six (with three Republicans and three Democrats) and requiring four members to agree on any decision; allowing parties to seek independent judicial review of the general counsel's decision to issue a complaint and providing new discovery rights; and allowing parties in a case before the board to appeal to a federal appeals court if the board does not reach a decision within one year.

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