

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Buck Consultants on Capitol Hill; House and Senate Pass Budget Resolutions

This week, Buck Consultants — a Xerox Company — testified on Capitol Hill about the need for consistent federal guidance on wellness programs. The hearing also featured testimony on legislation that would bring more transparency to EEOC enforcement actions and provide a safe harbor for employers to use criminal background checks as required by federal, state, or local law. Both chambers of Congress also passed budget resolutions this week, and held hearings on the Obama Administration's FY 2016 employment and labor budget request. The House also passed Medicare legislation that would increase premiums for certain enrollees and limit benefits paid by Medigap plans.

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Healthcare

Wellness programs and changes to Medicare were the focus in Congress this week.

Wellness Programs

Tami Simon [testified](#) on March 24 before a congressional committee on the need for legislation or clear EEOC guidance on wellness programs. Tami is the Managing Director of the Knowledge Resource Center and the Career practice at Buck Consultants — a Xerox Company. Tami testified before the Workforce Protections Subcommittee of the House Education and the Workforce Committee on behalf of the American Benefits Council — of which Buck Consultants is a member. Collectively, the Council's members either sponsor directly or provide services to employee benefit plans that cover more than 100 million Americans.

Tami's key message for members of Congress was that inconsistent federal regulation is threatening the sustainability of employer sponsored wellness programs. The EEOC has recently initiated enforcement actions against several such programs — alleging that the use of rewards and incentives to encourage participation in the

ACA Turns 5

The Affordable Care Act (ACA) turned five on Monday — March 23, 2015. The Senate Finance Committee held a [hearing](#) marking this anniversary — with Republicans criticizing the reform law's rollout and impact on businesses, and Democrats celebrating the insurance market reforms and health coverage expansions.

programs violates the Americans with Disabilities Act (ADA). These actions also allege that wellness programs that collect genetic information violate the Genetic Information Nondiscrimination Act (GINA). The EEOC lawsuits have had a chilling effect on employer-sponsored wellness programs.

Tami testified in support of [H.R. 1189](#)—the Preserving Employee Wellness Programs Act of 2015. Among other changes, the legislation would provide that:

- The use of rewards and incentives by a wellness program does not violate the ADA — as long as the program satisfies HIPAA's requirements for health-contingent programs.
- The collection of information about a disease or disorder of a family member shall not be considered a violation of GINA for another family member participating in the wellness program.

Medicare

The House passed legislation on Thursday ([H.R. 2](#) — the Medicare Access and CHIP Reauthorization Act of 2015) that would change how physicians are reimbursed under Medicare. As a partial offset to its [cost](#), the legislation contains two provisions that would impact Medicare enrollees:

- **Income-related premium adjustments.** Effective in 2018, enrollees in two income brackets would pay higher Part B and D premiums; enrollees with income between \$133,500 to 160,000 (doubled for a couple) would pay 65% of the premium (up from 50%); and enrollees with income between \$160,000 to 214,000 (also doubled for a couple) would pay 75% of the premium (up from 65%).
- **Medigap policies.** For newly eligible enrollees beginning in 2020, Medigap policies would be prohibited from covering the Part B deductible. Note that this change does not apply to employer-sponsored coverage for employees and retirees.

The legislation would also extend the Children's Health Insurance Program (CHIP) for an additional two years. Congressional staff have prepared an [overview](#) and section-by-section [explanation](#) of H.R. 2.

While the legislation faces an uncertain future in the Senate — for example, Democrats on the Senate Finance Committee have [expressed concern](#) with various aspects of the legislation, the White House has expressed its support. Yesterday's vote in the House ([392 to 37](#)) also revealed significant bipartisan support for H.R. 2 — with 212 Republicans and 180 Democrats voting for the bill's passage.

Retirement

For retirement plans, this week's budget debate in Congress (see sidebar discussion below for more information on the legislation) was notable because there were no new revenue provisions included in the budget legislation to offset the cost of federal spending — for retirement plans or any other deep pockets. A PBGC premium hike and new rules liberalizing when Roth conversions may be made within 401(k) plans were paired with federal budget legislation in the past several years because the provisions raise revenue. (Please see our [January 4, 2013](#) and [December 20, 2013](#) editions of *Legislate* for more information.)

What are the prospects for H.R. 1189?

It remains to be seen. The EEOC has announced that it will issue guidance in the near future on the application of the ADA and GINA to wellness programs (see our *FYI Alert* from [March 23, 2015](#) for more information on the EEOC announcement). Congress is likely to wait to see the content of the EEOC guidance before legislating in this area.

Budget resolutions pass Congress

The House passed a budget resolution for FY 2016 on Wednesday — [H.Con. Res. 27](#). The Senate passed its budget resolution ([S.Con. Res. 11](#)) today.

The resolutions are noteworthy for two reasons. First, they allow reconciliation procedures to be used to repeal and replace the ACA. (Please see our November 25, 2014 and January 16, 2015 editions of *Legislate* for more information on using the reconciliation process to change the ACA.)

Second, the budget resolutions set the top line spending limits for FY 2016 so that the appropriations committees can draft legislation funding the federal government. Appropriations legislation must be enacted before October 1, 2015 to avoid a federal government shutdown. It's possible that non-budget related provisions may be attached to government funding legislation — such as changes to the ACA. More detail will be available this summer as the appropriations committees draft government funding legislation.

Note that Senate procedural rules permit a wide variety of amendments to be considered as part of the budget debate. For example, on Thursday, Senators approved the following amendments to the budget resolution:

- Sick leave: Approved 61 to 39, the [amendment \(SA 798\)](#) offered by Senator Patty Murray (D-WA) would expand access to paid sick leave by allowing workers to earn seven days of paid leave annually.
- Pregnancy discrimination: Approved 100 to 0, the [amendment \(SA 632\)](#) offered by Senator Bob Casey (D-PA) would prohibit employment discrimination against pregnant women and require employers to offer workplace accommodations.
- Equal pay: Approved 56 to 43, the [amendment \(SA 409\)](#) offered by Senator Deb Fischer (R-NE) would promote equal pay and prevent retaliation against employees for seeking or discussing wage information.
- Same-sex spousal privileges: Approved 57 to 43, the [amendment \(SA 1063\)](#) offered by Senator Brian Schatz (D-HI) would ensure that all legally married spouses have access to Social Security and veterans benefits after the death of their spouse.
- Healthcare: Approved 56 to 44, the [amendment \(SA 692\)](#) offered by Senator Tim Scott (R-SC) would increase disclosure of any tax related to the healthcare overhaul as part of health insurance monthly statements.
- Definition of full-time: Approved unanimously, the [amendment \(SA 442\)](#) offered by Senator Susan Collins (R-ME) would restore a “sensible” definition of full-time employee for purposes of the ACA.

Even though approved, these budget amendments do not have the force of law and require separate legislation to be enacted.

Labor and Employment

Legislation affecting the EEOC and the president's FY 2016 budget proposal were the focus of Congress this week for labor and employment.

EEOC

In addition to considering wellness programs, Tuesday's [hearing](#) in the Workforce Protections Subcommittee also featured testimony on H.R. 548, H.R. 549, and H.R. 550 — three bills that would change the procedures under which the EEOC commences lawsuits involving multiple plaintiffs or systemic discrimination, provide greater transparency

on court cases brought by the EEOC and require the EEOC to conciliate in good faith before bringing suit, and permit employers to use criminal background checks if required by federal, state or local law. (See our [February 20, 2015 Legislate](#) for more information on these bills.)

Much of the testimony and questioning during the portions of the hearing on these three bills focused on criminal background checks. One witness advocated for greater restriction on employer use of criminal background checks, citing the disparate impact on racial minorities given current arrest rate statistics and concerns over stereotyping individuals as unemployable for arrests or convictions that occurred many years ago. Other witnesses questioned restrictions on employer use of background checks and an employer's discretion to make employment decisions — noting that employers are in the best position to judge which ex-offenders are suitable for their jobs.

Administration's Budget Request

A subcommittee of the House Appropriations Committee held a [hearing](#) Tuesday on the FY 2016 budget request for the NLRB featuring the agency's Chairman Mark Pearce and General Counsel Richard Griffin, Jr. The testimony revealed that about 80% of the agency's budget is for personnel compensation, 10% for rent and security, and 10% for everything else — such as technology expenses. Lawmakers took the opportunity to question the witnesses about the NLRB's "quickie" election rule — the subject of a joint resolution (S.J. Res. 8) Congress approved last week to block its implementation. (See our [March 20, 2015 Legislate](#) for more information on the resolution.) Other questioning focused on the NLRB's joint-employer standard, its *Specialty Healthcare* decision, and its recent effort to exert jurisdiction over Indian tribes.

A subcommittee of the Senate Appropriations Committee held a [hearing](#) Thursday on the DOL budget request for FY 2016, which includes a request for \$13.2 billion in discretionary funding and an increase of \$41.5 billion in new mandatory spending. (See our [February 6, 2015 Legislate](#) for more information on the FY 2016 budget proposed by the White House.) DOL Secretary Thomas Perez testified that the agency is being more strategic about enforcement of wage violations, workplace safety, and protecting worker retirement savings — noting that \$1.9 billion was requested in the president's FY 2016 budget proposal for worker protection agencies. This includes an increase of over \$31 million for the Wage and Hour Division — which Secretary Perez said will allow WHD to focus on industries that employ vulnerable workers and are most likely to violate worker protection laws such as minimum wage, overtime, and FMLA rights. Last week, Secretary Perez testified in budget hearings before two House committees. (See our [March 20, 2015 Legislate](#) for more information on those hearings.)

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