

# Legislate<sup>®</sup>

## Key Legislative Developments Affecting Your Human Resources

Volume 6 | Issue 23 | September 21, 2015

## Health Care, Pension, Workers' Rights Issues Brewing — Yet, Government Funding Takes Center Stage

In the week ahead, Congress' key task will be to continue its focus on finding solutions to avert a government shutdown. Last week, legislation to stop “pay for delay” practices by pharmaceutical companies was reintroduced, and efforts to repeal the Cadillac Tax gained momentum. New bills were introduced aimed at enhancing workers' rights, including a so-called “ban the box” bill that would affect federal contractors; multiemployer pension plan legislation gained new co-sponsors.

**In this article:** [Government Funding Top Priority](#) | [Health Care](#) | [Pension and Retirement](#) | [Labor and Employment](#)

### Government Funding Top Priority.

Concern in Congress continues to grow as the September 30 deadline to pass a government funding bill draws near. With a great deal of attention diverted to Pope Francis and his first scheduled trip this week to the United States, including Washington D.C., there is heightened apprehension that Congress will not have sufficient time to solve the funding challenge and avert a shutdown. Continuing discussions between Senate Majority Leader Mitch McConnell (R-KY) and Speaker John Boehner (R-OH) about a short-term government funding bill provide a measure of hope that Congress will have additional time to agree on a solution through fiscal year 2016.

#### Shutdown Exceptions

Mandatory spending programs, such as Social Security, Medicare and Medicaid, as well as unemployment compensation, will continue even if the government has to shut down.

### Health Care — Bills, Hearings, Reports

**Cadillac Tax.** Efforts to repeal the so-called “Cadillac Tax” gained momentum with the introduction on September 17 of [S. 2045](#), the Middle Class Health Benefits Tax Repeal Act of 2015. (See last week's [Legislate](#) for more information.) The bill, which was introduced by Sen. Dean Heller (R-NV), and includes Sen. Martin Heinrich (D-NM) as an original co-sponsor, demonstrates the same bipartisan support that is the foundation for [H.R. 2050](#), the Middle Class Health Benefits Tax Repeal Act and [H.R. 879](#), the Ax the Tax on Middle Class Americans' Health Plans Act, which are the other two bills calling for a repeal of the 40% excise tax on high cost plans. Indeed, a majority of House of Representative members has co-sponsored at least one of the House bills.

**Comment.** If repeal efforts are successful, employers can continue providing employer-sponsored health coverage without having to trim benefits to avoid imposition of an excise tax.

**Prescription Drugs.** On September 9, Senators Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) reintroduced [S. 2109](#), the Preserve Access to Affordable Generics Act, which would prohibit brand name drug companies from paying generic drug companies to delay entry of a generic drug into the market through “pay for delay” agreements. As [noted](#) by Sen. Grassley, the legislation is designed to “speed generic drugs getting to the market.” In turn, this would provide employers with the opportunity to better control health plan costs.

Prescription drugs were also the focus of a September 17 House Ways and Means Committee. The Committee reviewed [H.R. 1270](#), Restoring Access to Medication Act of 2015, which would repeal the ACA rule prohibiting over-the-counter (OTC) drugs from being reimbursable as eligible expenses under health savings accounts (HSAs) and health flexible spending arrangements (FSAs). Employees would welcome the ability to access to pre-tax HSA and FSA funds for a broader range of health-related expenses.

**ACA Coverage.** On September 17, the House Ways and Means Committee meeting reviewed [H.R. 2061](#), titled Equitable Access to Care and Health Act. This bill would broaden the group of individuals eligible for a religious exemption from the ACA’s individual health coverage mandate to include those who rely “solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual.”

**Comment.** The ACA’s employer shared responsibility provisions apply to full-time employees who are exempt from the individual mandate. To determine whether an employer is an applicable large employer, employees exempt from the individual mandate still need to be counted.

## Pension and Retirement — Bills, Hearings, Reports

**Participant Education.** The Government Accountability Office (GAO) publicly released a [report](#) on September 4, titled Clearer Regulations Could Help Plan Sponsors Choose Investments for Participants. The report was requested by Sen. Elizabeth Warren (D-MA) (member of the Senate Committee on Health, Education, Labor, and Pensions) and retired Rep. George Miller (D-CA) (former ranking member of the House Committee on Education and the Workforce). The report addressed default investment vehicles in automatic enrollment 401(k) plans and identified plan sponsor challenges when selecting qualified default investment options (QDIAs), particularly when considering adding special features such as products offering guaranteed retirement income into the QDIA. The report recommends that the DOL “assess the challenges” and “implement corrective actions” through clarifying guidance or regulations.

### Health Insurance Mergers

On September 10, the House Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a [hearing](#) that was triggered, in part, by the proposed Aetna-Humana and Anthem-Cigna insurance company mergers, and explored whether such mergers would result in better health care quality and lower costs for consumers.

### QDIAs

The Pension Protection Act of 2006 included provisions to facilitate adoption by plan sponsors of automatic enrollment programs and enrollment of plan participants in the plan’s default investment. In 2007, to limit plan fiduciary liability for default investments, the DOL identified target date funds, balanced funds and managed accounts as QDIAs that could qualify for safe harbor protection.

### Multiemployer Plans

MPRA was enacted on December 16, 2014. Our [January 12, 2015 For your Information](#) discusses the MPRA changes to the funding and PBGC rules for multiemployer pension plans, as well as new rules permitting certain financially distressed multiemployer plans to suspend accrued benefits. Two of our June 29, 2015 *For Your Information* publications cover the proposed [IRS](#) and [PBGC](#) regulations on MPRA issued thus far.

**MPRA.** Multiemployer pension plan legislation remains on the radar. [H.R. 2844](#) and [S. 1631](#) — both of which are titled Keep Our Pension Promises Act — were introduced in June 2015 and have now gained additional co-sponsors. These bills seek to repeal the pension cutback provisions under the Multiemployer Pension Reform Act of 2014 (MPRA) that allow reductions in pension benefits to participants in multiemployer pension plans. The bill also seeks to modify the rules for petitioning the PBGC for a partition of a financially-troubled pension plan and would amend the federal bankruptcy code to assign first claim priority to ERISA pension obligations.

On September 10, the Treasury Department held a public hearing on [proposed and temporary rules](#) for implementing pension cuts for retirees in severely troubled multiemployer pension plans, as authorized by the MPRA. The House Ways and Means Committee's Subcommittee on Select Revenue Measures scheduled and then canceled a [hearing](#) on MPRA and

alternative multiemployer pension plan designs. It has not yet been rescheduled.

### Labor and Employment Bills

**Ban the Box — Employment Applications and Criminal History.** On September 10, Sen. Cory Booker (D-NJ) and Rep. Elijah E. Cummings (D-MD) introduced the Fair Chance to Compete for Jobs Act of 2015 ([S. 2021](#) and [H.R. 3470](#), respectively). With limited exceptions, the bill would prohibit federal contractors and federal agencies from inquiring about the criminal history of a job applicant prior to a conditional offer of employment. The bill would permit pre-offer inquiries for positions related to law enforcement and national security duties, positions that require access to classified information, or when access to criminal history information before the conditional offer stage is required by law.

**WAGE Act – Proposed New Protections and Rights for Workers.** On September 16, Sen. Patty Murray (D-WA) and Rep. Robert C. Scott (D-VA) introduced The Workplace Action for a Growing Economy (WAGE) Act ([S. 2042](#) and [H.R. 3514](#), respectively). The bill would amend the NLRA to provide greater protections for workers engaged in union organizing or other collective action and impose new penalties on employers that interfere with such activities or commit unfair labor practices. Among other things, the bill would:

- Triple back pay awards to workers who are fired or retaliated against by an employer
- Provide workers with a private right of action to bring suit to recover monetary damages and attorneys' fees, and seek equitable relief, in federal court
- Hold employers jointly responsible for violations affecting workers supplied by another employer
- Establish civil penalties of up to \$50,000 for employers who commit unfair labor practices and double penalties for repeat violations

#### Not a New Idea

Prior to the introduction of this legislation, numerous states and local governments had taken action to implement so-called “ban the box” policies. (For the latest on this subject, see our *For Your Information* from [June 18, 2015](#).) The “ban the box” terminology comes from employment applications that inquire whether an applicant has a criminal history, which the applicant answers by checking a box.

- Give the NLRB authority to impose penalties on officers and directors of employer violators
- Allow the board to issue a bargaining order upon finding that the employer prevented a free and fair election if a majority of employees signed authorization cards within the preceding 12 months
- Set a 30-day time limit for employers to challenge an NLRB decision
- Require employers to post a notice from the NLRB and inform workers of their NLRA rights at hire

**Equal Employment for All Act.** On September 16, Rep. Steve Cohen (D-TN) introduced [H.R. 3524](#), titled the Equal Employment for All Act of 2015. The identical bill ([S. 1981](#)) was introduced in the Senate by Sen. Elizabeth Warren in August. The bill would amend the Fair Credit Reporting Act to generally prohibit the use of consumer credit reports for employment purposes — even if the employee or applicant authorizes the procurement or use of a report. An employer would, however, be allowed to use a consumer report in making employment decisions when the consumer applies for, or currently holds, employment that requires national security clearance.

The Fair Chance Act enjoys a measure of bipartisan support, and may gain traction in this Congress. However, neither the WAGE Act nor the Equal Employment for All Act is expected to advance.

#### Authors

Allison R. Klausner, JD  
Nancy Vary, JD

#### Produced by the Knowledge Resource Center of Buck Consultants at Xerox

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email [fyi@xerox.com](mailto:fyi@xerox.com).

You are welcome to distribute *Legislate*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.