

Grab a Front Row Seat – Controversial Workplace Topics and Reaction to SCOTUS Nominee

The House and Senate were both in session last week, and President Obama announced a Supreme Court nominee. With limited days before the next recesses, Congress tackled numerous, mostly controversial labor, employment and employee benefits topics. Legislation was introduced and hearings were held that touched on wage theft, overtime, joint employer standards, multiemployer pension reform, fiduciary standards and more.

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Supreme Court Nominee

Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit has been nominated by President Obama to fill the Supreme Court vacancy due to Justice Antonin Scalia's death. As of yet, the Republican-controlled Senate has not taken any action to fulfill its responsibility to advise the president and consent to the nomination. And no action is expected until next year. As Senate Majority Leader Mitch McConnell (R-KY) stated, the "Senate will appropriately revisit the matter when it considers the qualifications of the nominee the next president nominates, whoever that might be." (See our [February 29 Legislate](#) for additional background on the process to fill the vacancy and the potential impact of Justice Scalia's death on pending labor, employment and ERISA cases, and see our [March 11 For Your Information](#) for background on the Court's ERISA preemption decision, absent Scalia, in the *Gobeille v Liberty Mutual* case.)



Comment. During his almost 20 years on the appellate court bench, Chief Judge Garland authored numerous decisions showing deference to National Labor Relations Board decisions holding that employers committed unfair labor practices. As such, should he be confirmed as a Supreme Court justice, employers may be concerned that his decisions will not be pro-employer. However, it's possible that his opinions may speak more to his deference to agency decision-makers. Indeed, to characterize his decisions as being pro-employer or anti-employer may be too simplistic.

ACA Subsidies on the Hot Seat

Earlier this month, the House discussed and examined the Affordable Care Act (ACA) subsidies in different forums. At issue is the recoupment of improper subsidies. A [report](#) released by the Republican staff of the Senate Homeland Security and Governmental Affairs Committee indicated that, as of June 2015, approximately \$750 million in improper subsidies had been awarded to more than 500,000 people ultimately determined to be ineligible.

House Judiciary Committee: Last week, the Task Force on Executive Overreach (Task Force), chaired by Rep. Bob Goodlatte (R-VA) and Rep. Steve King (R-IA), held a [hearing](#) examining whether actions taken by President Obama and his administration overstepped their bounds. Specifically, the Task Force looked at whether directives provided through blog posts, regulatory fact sheets and letters illegally skirted the legislative process and whether taxpayer money that was not appropriated by Congress was used to pay subsidies to insurance companies under the ACA.

Comment. To the extent the Task Force finds that overreach has occurred, beyond making recommendations to restore the balance of powers, it is not known what actions may be taken to hold the executive branch accountable for any such overreach. As for the ACA subsidies, perhaps no action will be taken. The issue is being addressed in a federal district court currently, as the House has brought a lawsuit against the Obama administration.

House Ways and Means Committee: On March 10, Rep. Lynn Jenkins (R-KS) introduced a bill, Protecting Taxpayers by Recovering Improper Obamacare Subsidy Overpayments Act ([H.R. 4723](#)), that would permit full recovery of ACA subsidy overpayments that arise from individuals who underreport their incomes to the IRS. Under current law, there is a cap on the amount an individual needs to repay in the case of an overpayment. Last week, House Ways and Means Committee Chairman Kevin Brady (R-TX) made clear this bill is critical to the committee's efforts to reduce waste, fraud and abuse.

Senate Finance Committee. Last week, this committee, chaired by Sen. Orrin Hatch (R-UT), held a hearing that, among other things, examined the current status of the ACA. In his prepared remarks, he noted that, "[w]hile the subsidies, including those granted to GAO's fictitious applicants, are paid to health-care insurers, they nevertheless represent a benefit to consumers and a cost to the government." Presumably, he was expressing his concern that this should be addressed to reduce unnecessary ACA-related costs.

House Budget Committee. Last week, this committee, chaired by Rep. Tom Price (R-GA), introduced its [Fiscal Year 2017 budget proposal](#). This proposal provides a framework for Congress to balance the budget in 10 years. It assumes adherence to the caps set forth in the [Bipartisan Budget Act of 2015](#), as well as projected savings and spending reductions. Notably, the [proposal](#) assumes savings from the recovery of improper ACA subsidies as well as a full repeal of the ACA.

ACA Replacement

The House budget proposal includes policy statements setting forth guidelines and principles for any ACA replacement legislation. Specifically, it provides that such legislation should "enhance affordability, accessibility, quality, innovation, choices, and responsiveness in coverage for all Americans." To achieve these goals, the proposal provides that the ACA replacement law would need to reflect the following:

- A level playing field (“equity”) so that individuals who receive and purchase employer-sponsored health care coverage and those who receive and purchase coverage independent of a working relationship are treated the same from a tax perspective. Individuals who purchase their coverage from an employer do so with pretax dollars (i.e., with compensation not subject to income and employment tax); while those who purchase coverage on the individual market have to do so with after-tax dollars.
- Portable coverage so that individuals can have their coverage “follow them in and out of jobs throughout their career.”
- The ability to purchase coverage across state lines — for individuals, as well as for small business owners through membership in trade or professional associations.
- Increased flexibility for individuals to select “health care coverage that best meets their needs.”
- Increased price transparency to foster cost comparisons and better, more informed decision-making.

Comment. Should Republicans control the White House and/or the Congress next year, there is a possibility that the ACA could be repealed and replaced. If so, employers will want to consider what steps they might take to manage the transition to the new health care landscape. (Please see our [January 25 Legislate](#) for background on two ACA repeal and replacement bills introduced by the House and that may gain meaningful traction later this year and in 2017.)

Mental Health Legislation

Last week, Senator Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, introduced the [Mental Health Reform Act of 2016](#). A draft of this comprehensive mental health bill that includes a focus on enhancing compliance with the current mental health parity laws was released earlier this month. Our [March 14 Legislate](#) provides additional information about this bill. A [summary](#) of the bill has been provided by the Committee. The bill will now move to the full Senate for consideration. It is expected to be considered, and ultimately consolidated, with four other Senate bills ([S. 1455](#), [S. 2256](#), [S. 480](#) and [S. 2687](#)) that address substance abuse.



Comment. Although these bills are likely to gain momentum, consideration will be delayed as the Senate will not return to session until April 4 following a two-week recess.

Cadillac Tax — Update

Following the two-year delay of the so-called Cadillac tax until 2020, there has been little congressional activity focused on the tax. However, last week another bill ([S. 2698](#)) was introduced by Sen. John Thune (R-SD) to exclude certain health arrangements from the deductible 40% excise tax on employer-sponsored health coverage that exceeds prescribed limits.

Joint Employer Standard

Last week, the joint employer standard was addressed in newly sponsored legislation and examined in two separate hearings.

Legislation. Once again, Sen. Alexander introduced legislation in an effort to ensure that any joint employer is reasonable and workable. Last year, in response to the NLRB's controversial [Browning-Ferris Industries of California, Inc.](#) decision that turned upside down longstanding principles governing the determination of joint employer status, Sen. Alexander introduced the Protecting Local Business Opportunity Act ([S. 2015](#)). This legislation, identical to [H.R. 3459](#) introduced by Rep. John Kline (R-MN) and Rep. Phil Roe (R-TN), would reinstate the NLRB's prior standard specifying that two or more employers may be considered joint employers only if each has "actual, direct, and immediate" control over essential terms and conditions of employment. To further his efforts, Sen. Alexander introduced a bill ([S. 2686](#)) last week to clarify the treatment of two or more employers as joint employers under the National Labor Relations Act (NLRA). Specifically, the bill, also called Protecting Local Business Opportunity Act, adds a single sentence to the NLRA which provides that "two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate." (For additional information on the *Browning-Ferris* decision and congressional reaction to the ruling, please see our [November 2, 2015 Legislate](#) and our [September 25, 2015 For Your Information](#).)

Small Business Hearing. Last week, the House Small Business Subcommittee on Investigations, Oversight and Regulations held a [hearing](#) to explore the effects of the NLRB's and DOL's new joint employer standards for small firms. According to Chairman Crescent Hardy (R-NV), the DOL's new standard is "a threat to small businesses and need[s] to be reconsidered before significant damage is done." Likewise, testimony provided by one witness expressed the opinion that the DOL's Wage and Hour Division guidance would "dismantle the franchise model, foreclose entrepreneurship opportunities for small businesses and transform franchisees into managers and employees from independent owners and operators." On the other hand, opposing testimony suggested that the NLRB decision reflects a return "to the traditional joint employment standard endorsed by the U.S. Supreme Court more than fifty years ago" and that it "presents a workable joint employment test that does not create uncertainty for small business."



Education and the Workforce Hearing. Finally, the House Education and the Workforce Committee discussed joint employer standards in its meeting with DOL Secretary Tom Perez as the sole witness. For information about his testimony, please [see below](#).

Wage Theft Legislation, More of the Same?

Once again, legislation has been introduced to combat "wage theft." The Wage Theft Prevention and Wage Recovery Act (WTPWR Act), introduced by Rep. Rosa DeLauro (D-CT) in the House and Sen. Patty Murray (D-WA) in the Senate, seeks to tackle the problem more comprehensively than the Pay Stub Disclosure Act ([S. 2630](#) and [H.R. 4376](#)). (See our [March 14](#) and [January 25](#) editions of *Legislate* for additional background on the Pay Stub Disclosure Act.) In addition to mandating that employers provide certain disclosures to employees, the WTPWR Act strengthens the penalties that may be imposed on employers that engage in wage theft and provides improved tools to facilitate recovery of such wages. Below are some key elements of the WTPWR Act ([S. 2697](#) and [H.R. 4763](#)).

Criminal Exposure. Employers who willfully engage in wage theft, falsify records, or retaliate against employees who complain or cooperate with a DOL investigation could be subject to criminal prosecution.

Civil Penalties. Employers will be subject to civil penalties, new in some cases and greater in other cases, if they fail to provide employees with:

- Initial disclosure of their employment terms
- Regular paystubs (with detailed information about the pay and any deductions)
- Final paychecks within 14 days of separation or by the payday for the pay period, whichever is earlier
- Minimum wage and overtime pay as required by the Fair Labor Standards Act (FLSA), or if they fail to comply with FLSA recordkeeping requirements

Damage Award. Under the bill, employees who are victims of wage theft would be entitled to damages equal to triple the wages owed, plus interest (up from double the wages owed). And, for employees who are fired in retaliation for filing a wage theft complaint or cooperating with a DOL investigation, the bill would provide damages in an amount equal to quadruple the wages owed, plus interest.

Employee Rights. The bill provides employees will with the right to inspect employer records and a longer time (generally four years) to bring a claim against an employer. Furthermore, for collective actions, the bill would provide an “opt-out” — rather than an “opt-in” rule.

For information on DOL Secretary Tom Perez’s comments on wage theft during his testimony at the House Education and the Workforce Committee, please [see below](#).

DOL Secretary Testifies Twice on Numerous Topics

DOL Secretary Tom Perez testified — as the sole witness — about numerous DOL topics at two congressional hearings last week. The [first](#) was held by the House Education and the Workforce Committee and the [second](#) was held by the Senate Appropriations Committee’s Subcommittee on Labor, Health and Human Services, Education, and Related Agencies. Many members of the both committees provided remarks and asked questions and, on more than one occasion, referred back to President Obama’s 2017 fiscal year budget proposal. (See our [February 15 Legislate](#).) Here are the secretary’s prepared [House remarks](#) and [Senate remarks](#) as well as a recap of his testimony below.

Fiduciary Regulations. The fiduciary regulations have been submitted to Office of Management and Budget (OMB) for review and are expected to be issued in the upcoming months. In response to committee remarks that there are “strong, bipartisan concerns” that the DOL’s fiduciary rule will result in less access to affordable retirement advice for lower and middle income families and fewer small businesses offering retirement plans, Secretary Perez noted that there is a “shared interest in making sure that everyone has access to retirement advice.” Furthermore, in response to committee concerns that there is “no indication that the final rule will be different” from the proposed rule, Secretary Perez responded by confirming that all the submitted comments were read and considered, and that he will explain the changes reflected in the final rule when it’s released. Finally, in one particularly interesting comment made by the secretary about variable annuities, he noted that they are complex financial instruments that may no longer be offered as a result of the pending rule, but are ones that are not needed by most Americans. (For additional information on the DOL’s proposed regulations, please see our [April 21, 2015 For Your Information](#).)



Also, see our [February 8, 2016](#) and [December 21, 2015](#) *Legislate* publications for information on various congressional efforts to derail DOL's attempt to finalize the rule.)

Overtime Regulations. The regulations have been submitted to OMB for review and are expected to be issued soon, perhaps within the next 60 days. In response to concerns that the overtime regulations will stifle workplace flexibility and pose particular difficulties for small businesses, Secretary Perez noted that there is no need to change employees from salaried to hourly to receive overtime pay. And, like the pending fiduciary regulations, he noted that when the final rule is published, he will discuss it further. Specifically, he stated that the department reviewed and considered all comments, including those that expressed concern that the rule is one of general applicability and should reflect regional differences. (For additional information on the DOL's proposed regulations, please see our [March 16 FYI Alert](#).)

Joint Employer. Secretary Perez respectfully disagreed with Chairman Kline's characterization that the DOL is "aggressively trying to expand the definition of joint employer across all labor and employment laws." According to Secretary Perez, the DOL has been applying the joint employer standard — not expanding it — both in the OSHA and wage and hour context. (For additional information on joint employer standards, please see the [section above](#).)

Wage Theft. Secretary Perez noted that, based upon a recent study, wage theft is a "huge problem in this country" and many individuals don't even know they are victims. (See [above section](#) for additional information on wage theft legislation.)

Multiemployer Pension Plan Reforms. Secretary Perez noted that there is a "team of folks that have already been engaged" — both bicameral and bipartisan — to address these issues. He did not commit, however, as requested by Chairman Kline, to get reforms done this year. (For additional information on multiemployer pension plan reform efforts, please see our [March 7 Legislate](#).)

Workforce Innovation and Opportunity Act (WIOA). On the delay in issuing regulations to implement [WIOA](#), Secretary Perez noted that the DOL has worked closely with, and provided guidance to, states, and most of WIOA is already implemented. Notwithstanding pressure from the committee that the DOL is not in compliance with the Administrative Procedures Act, Secretary Perez noted that final regulations will be released in June. (For additional information on the WIOA, please see the committee [summary](#).)

Paid Leave. Secretary Perez stated that "the most important piece of public policy that we could undertake to increase labor force participation is a federal paid leave law. That would enable us to be at the same level of female labor force participation as Canada." (For additional information on the president's FY 2017 budget proposal for paid leave programs, please see our [February 15 Legislate](#).)

Worker Classification. Secretary Perez noted that there is an "appropriate role" for contractors in the workplace. However, as noted by the secretary, since there are abuses and misclassification — some of which may indeed be fraud, the DOL is focusing on this area to ensure that there is a level playing field for employers and workers get the wages and benefits to which they are entitled. He notes that it is relevant in the "legacy economy" as well as the emerging and growing "on-demand economy." He also spoke about the upcoming study and efforts to collect data to understand contingent workers and those who have alternative work arrangements. Specifically, he noted that, as the future of work is changing, it must be studied "with granularity" to ensure that workers, businesses and communities succeed. (For additional information on the "on-demand economy" (or "gig economy") please see our [February 8 Legislate](#).)

Looking Ahead

The Senate is on a two-week recess, returning on April 4. The House is in session for a few days this week, followed by a recess, returning on April 12.

Authors

Allison R. Klausner, JD
Marjorie Martin, FSPA, EA, MAAA

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