

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Supreme Court Post-Scalia and EEO-1 Forms

Tackling labor and benefits questions with an eight-person SCOTUS bench posed challenges for both an ACA case and a significant public sector unions case. There was no shortage of congressional response on the Supreme Court's vacancy and activities, although Congress was out last week. The Senate responded last month to controversial changes proposed to the EEO-1 Form.

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SCOTUS Vacancy and Garland Nomination

The Supreme Court vacancy left by Justice Antonin Scalia's death has created friction among Senate Republicans and has resulted in 4 to 4 tie decisions being issued by the Court.

Senate Republicans' Mixed Response. Judge Merrick B. Garland's nomination to the Supreme Court is in limbo. On one hand, no formal hearings have been scheduled to vet his qualifications. However, some Republican Senators are open to, and even encouraging, the nomination process to move forward. Here's where some of the Senators stand on the issue:

- Sen. Chuck Grassley (R-IA), Chairman of the Senate Judiciary Committee, continues to stand by his initial position to "withholding support for the nomination during a presidential election year," with the full support of Senate Majority Leader Mitch McConnell (R-KY) and Sen. Orrin Hatch (R-UT), a former chairman of the Senate Judiciary Committee.
- Sen. Jerry Moran (R-KS), reversing himself, does not believe that the confirmation "process ought to go forward."
- Sen. Mark Kirk (R-IL) met with Judge Garland last week and is encouraging other Senate Republicans to be "open-minded" and do the same.
- Sen. Pat Toomey (R-PA) and Sen. Susan Collins (R-ME) have agreed to meet with Judge Garland, with Toomey noting that he will do so "out of courtesy and respect for both the president and the judge," and Collins is urging others to do so.



- Sen. Jeff Flake (R-AZ), a member of the Senate Judiciary Committee, made clear that, should a Democratic presidential nominee succeed to the White House in the next administration, he would take action to confirm Judge Garland.
- Sen. Kelly Ayotte (R-NH), Sen. John Boozman (R-AK) and Sen. Rob Portman (R-OH) have said they would meet with Judge Garland, with Portman noting he would do so if asked.

For additional background on Judge Garland's nomination by President Obama, please see our [March 21](#) *Legislate*.

Agency Fees. Last week, [the Supreme Court's 4 to 4 tie decision](#) in the *Friedrichs v. California Teachers Association* case affirmed [the lower court's decision](#) permitting public employee unions to require nonmembers to pay a "fair share" or "agency" fee as long as those fees do not include portions for political activities. We noted in our *Legislate* from [February 29](#) the likelihood that, without Justice Scalia, the Court would be evenly divided and the lower court decision would be upheld. As such, this decision sets no precedent and leaves public union fees in place for now. (See our *FYI Alert* from [March 30](#) for additional information on this decision.)

Comment. If, as expected, a petition for rehearing is filed, the Supreme Court will decide whether to reconsider this case with a full bench after the vacancy from Justice Scalia's death is filled.

ACA and Contraceptives. As noted in our [February 29](#) *Legislate*, the *Zubik v. Burwell* case involves the Affordable Care Act (ACA) requirement to provide prescription contraceptives to women as a preventive service and whether the accommodation for religiously affiliated nonprofits is a violation of the Religious Freedom Restoration Act (RFRA). During last week's [oral arguments](#), the justices did not appear to forge a consensus and, given the [unusual order](#) issued immediately thereafter, perhaps were headed to another 4 to 4 tie decision. In any event, the justices' order directs the parties to submit ideas as to whether and how contraceptive coverage may be obtained from insurance companies by affected employees without the notice requirement (as required by the accommodation) and without requiring the religiously affiliated nonprofits to be involved. (For additional background on this case, please see our [November 16, 2015](#) *For Your Information*.)

Senate Responds to Controversial Proposed Revisions to EEO-1 Form

As noted in our [February 26](#) *For Your Information*, the EEOC's proposed revisions to the annual Employer Information Report EEO-1 would subject employers, including federal contractors, with 100 or more employees to new, complex and burdensome data collection and disclosure requirements. Specifically, starting with the 2017 filing, the revised form would require employers to collect and provide additional detailed compensation and hours worked data, broken down by gender, race and ethnicity, within defined pay bands and job categories.

In March, the [EEOC held a hearing](#) on the revised form. The EEOC's view that the proposed changes will "assist the agency in identifying pay disparities that warrant further investigation and assist employers in promoting equal pay in their workplaces" was challenged during testimony provided at the hearing. Specifically, one witness noted that the "data the EEOC wants to collect from employers does not help root out those employers with illegal and discriminatory practices."

In response to the EEOC's proposal, on March 16, Sen. Lamar Alexander (R-TN), chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, introduced the EEOC Reform Act ([S. 2693](#)). [In his view](#), the EEOC has come up with "an absurd rule" and this bill "would give the EEOC a dose of its own medicine." Among other things, the bill would require the EEOC to collect information, consistent with the proposed revisions to the

EEO-1 Form, from federal agencies and the executive branch of government, before the proposed data collection mandates are imposed on private employers. (For a summary of the provisions of the bill, please go [here](#) on the Senate HELP Committee's website.)

Comment. The 60-day public comment period on the proposed EEO-1 changes ended on April 1. How the EEOC responds to comments remains to be seen. Perhaps the EEOC will modify its proposal and delay its release — both of which would be a welcome change for employers.

Finally, on March 16, numerous Democratic senators sent a [letter](#) to the EEOC supporting the proposed changes and, on March 31, many Democratic congressmen sent a similar [letter](#).

Looking Ahead

As soon as the final overtime and fiduciary regulations are released, employers and plan sponsors can expect a flurry of congressional activity in response.

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