

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Congress' Playbook Includes Tackling DOL Rules and Encouraging Executive Action

Last week, Republicans in Congress continued efforts to reverse DOL rules affecting retirement plans and long-standing labor policy. Democrats in Congress called on the President to take executive action to “ban the box” for federal agencies and government contractors, and renewed the push for a minimum wage hike. Bipartisan support to protect the voluntary pension system gained momentum.

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Fiduciary Rule Under Fire

Employers are relieved that the [final rule](#) addresses many of the concerns they had with the proposed rules. As noted in our [April 22 For Your Information](#), the final rule reflects a better framework for employer sponsored ERISA-governed retirement and welfare plans than anticipated. Indeed, the final rule makes clear that numerous common plan sponsor employee interactions are excluded from the definition of fiduciary investment advice. Furthermore, recommendations to welfare plans, other than those with investments such as health savings accounts (HSAs), are excluded from the rule.

Notwithstanding the DOL’s notable efforts to create a rule that reflects some meaningful consideration of concerns voiced by employers and other stakeholders, reaction to the rule has been swift. (See our *Legislate* from [April 11](#).) House and Senate Republicans, believing that the final rule is flawed and will adversely impact retirement savings, introduced resolutions ([H.J. Res. 88](#) and [S.J. Res. 33](#)) disapproving of the rule, with the House resolution already passed by the full House.



Notwithstanding the Republicans’ dissatisfaction with the rule, Congressional Democrats generally have praised it. Moreover, President Obama, disagreeing with the Republicans’ assessment, would veto the resolutions if presented to him. Indeed, according to a [Statement of Administration Policy](#) issued by the Office of Management and Budget,

the “Administration strongly opposes” action that would overturn the rule that, in its view, is “critical to protecting Americans' hard-earned savings and preserving their retirement security.”

Disconnecting PBGC Premiums from Budget

Congressional support for the Pension and Budget Integrity Act of 2016 ([H.R. 4955](#)), introduced last month continues to grow. The bipartisan legislation that would bar Congress from increasing PBGC premiums to offset general government (non-pension) program spending was introduced with five co-sponsors and now has picked up three additional sponsors.

Comment. Employers rallying behind this legislation anticipate that momentum will continue to build and garner additional support. Furthermore, although PBGC premium increases could still occur, so long as they are tied to pension plan policy rather than being a “budget gimmick,” employers expect that the legislation will help maintain the long term viability of the voluntary employer sponsored defined benefit pension plan system. Indeed, as noted by Rep. Jim Renacci, (R-OH), the legislation should “protect the PBGC from losing vital premium contributors.”



Persuader Rule Challenged

The controversial [persuader rule](#), finalized in March by the DOL’s Office of Labor-Management Standards (OLMS) and challenged by House Republicans with the introduction of a [joint resolution](#) under the Congressional Review Act (CRA), was the subject of a House Subcommittee on Health, Employment, Labor, and Pensions [hearing](#) last week. According to Rep. Phil Roe (R-TN), the subcommittee’s chairman, the resolution to block the rule was introduced as the rule dramatically alters the “well-established ‘advice’ exemption” and “will chill employer free speech.” Further, by undermining employers’ ability to communicate with workers during union organizing campaigns, the rule “will stifle debate and restrict worker free choice — with the sole purpose of stacking the deck in favor of organized labor.” Several witnesses at the hearing voiced views consistent with Rep. Roe. For example, one witness testified that the new rule will have a “chilling” effect on employers that in turn will cause employees to be “deprived of an opportunity to discover their employer’s view” and “be less informed.”

For additional background on this rule, applicable for persuader arrangements, agreements and payments made on or after July 1, 2016, please see our [March 28 Legislate](#).

“Ban-the-Box” Policy Advances

A growing number of states and cities have enacted “ban-the-box” laws that limit the use of criminal history and background checks for employment purposes in the public and/or private sector. Legislation that would similarly alter federal agencies’ and federal contractors’ employment practices has been introduced in the House and Senate, but has stalled. Specifically, although the Fair Chance Act ([H.R. 3470](#) and [S. 2021](#)), sponsored by Rep. Elijah Cummings

(D-MD) and Sen. Cory Booker (D-NJ), respectively, has bipartisan support and has been referred to numerous committees, it is not expected to advance.

On April 20, more than 50 House Democrats sent a [letter](#) to President Obama, urging the Office of Personnel Management (OPM) to adopt a ban-the-box policy for federal agencies and executive action to prohibit federal contractors from inquiring about applicants' criminal history during the "early stages" of the hiring process. Consistent with prior [remarks](#), President Obama recently asked businesses to take on the [Fair Chance Business Pledge](#) to "help formerly incarcerated individuals to rehabilitate and reintegrate back into their communities." [Xerox has taken the pledge](#) and has noted that it "is proud to join other corporate leaders in 'banning the box.'"

On April 28, OPM released a [proposed "ban-the-box" rule](#) (published in today's *Federal Register*) that would bar federal agencies (but not federal contractors) from asking about a job applicant's criminal history — and other background information that is currently collected such as credit history — prior to a conditional offer of employment. While there are no set exceptions, OPM will consider such requests on a case-by-case basis.

Please see our [September 21, 2015](#) *Legislate* for background on the Fair Chance Act, our [April 8, 2016](#) *For Your Information* and our [December 22, 2015](#) *FYI Roundup* for background on newly enacted local legislation.

Comment: Whether the president will use executive action to ban the box for federal contractors remains to be seen. In the meantime, House and Senate Democrats will likely continue their efforts to advance the pending legislation.

Renewed Call to Increase Minimum Wage

Last month there were renewed efforts to raise the federal minimum wage. Congressional Democrats, including House Minority Leader Nancy Pelosi (D-CA), Labor Secretary Tom Perez and Sen. Patty Murray (D-WA), held a news conference to bring awareness to the subject. Sen. Murray urged Republicans to join Democrats "in our efforts to give working families a raise" while Secretary Perez called for action on the Raise the Wage Act ([H.R. 2150](#) and [S. 1150](#)), legislation introduced in April 2015 by Rep. Bobby Scott (D-VA) and Sen. Murray, respectively. In addition to the news conference, during a press briefing held last month, the White House noted that President Obama is "strongly supportive of Democratic efforts in the United States Congress to raise the minimum wage." Moreover, the president himself stated that "Congress needs to act to raise the federal minimum wage ... for all Americans."

Comment. The federal minimum wage was last increased in 2009 to \$7.25 an hour. However, a majority of states and many cities and counties now have state or local minimum wage rates that are higher than the federal floor. Most recently, California and New York raised their minimum wage rates to \$15 an hour, to be gradually phased in over the next few years. (Please see our *For Your Information* editions from [January 20, 2015](#), [December 9, 2015](#) and [April 27](#) for additional information on state and local minimum wages.)



Looking Ahead

The Senate and the House are on recess this week, with the Senate returning on May 9 and the House returning on May 10.

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