

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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House GOP Report Describes Vision for America; Appropriations Season in Full Bloom; Bills Advance

The aftermath of last week's mass shooting in Orlando, Florida, was felt on the Hill. The House implemented an unscheduled recess, postponed an appropriations bill markup and vowed to "repackage" counterterrorism bills to address threats to homeland security; the Senate floor was held up for nearly 15 hours by a talking filibuster about "the need to prevent gun violence." Nevertheless, last week Congress was bustling with HR activity. Speaker Paul Ryan released other policy reports outlining the House GOP's blueprint for the future, and House and Senate committees vetted healthcare bills, explored the NLRB's joint employer standard, and dove deep into appropriations bills.

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GOP Report Highlights Opposition to DOL Rules, Executive Orders and More

Earlier this year, House Speaker Paul Ryan (R-WI) announced the creation of six committee-led [task forces](#) "charged with developing a bold, pro-growth agenda." This agenda is being rolled out in the House GOP's policy paper dubbed "A Better Way" (report). Two installments of the report were released last week. [One section](#) — The Economy — focuses on the work of the Reducing Regulatory Burdens task force and the [other section](#) — The Constitution — reflects the efforts of the Restoring Constitutional Authority task force.

The newly released installments focus on reforming the rulemaking process and re-establishing and enforcing limits on agency authority. Specifically, they reflect proposals to:

- Ensure that regulations are written "only when necessary," are "minimally intrusive" and don't create "barriers for new and small businesses"
- Prevent federal agencies from issuing sub-regulatory guidance that has a significant impact on the economy, and prohibit creation of "brand new requirements and standards," without public notice or an opportunity for the public to comment



The report criticizes specific agency regulations and decisions, as well as executive orders. It also provides examples of administrative activities that it suggests “circumvent the formal rulemaking process and deny the public an opportunity to [provide] review and comment.”

The latest installments of the report focus on the House GOP’s views on important employment and employee benefit related matters. Below are highlights of their perspective on those matters.

Retirement Policy. Improvements would include a revised legislative framework permitting and promoting the use of and reliance on electronic communications and sponsorship of open multiple employer plans (open-MEPs). (See the section in our [June 13 Legislate](#) titled “House Republicans Promote Retirement Vision,” which discusses another portion of the report called “Building Retirement Security through the Private Retirement System.”)

Fiduciary Rule. The newly released rule will jeopardize workers’ retirement security as they will lose access to affordable financial planning advice and, in some cases, to employer-sponsored retirement plans. As such, House Republicans will continue to support legislation that would interfere with the rule’s effective implementation, including the Retail Investor Protection Act ([H.R. 1090](#)).

Comment. Various efforts have been launched to block the fiduciary rule. However, to date they have not been successful. The [joint resolution](#) that would have nullified the rule was vetoed by President Obama and other bills have not advanced. (For additional information on H.R. 1090, as well as other bills designed to thwart the rule, please see our [April 25](#) and [April 11](#) issues of *Legislate*; for background on the fiduciary rule, see our [April 22 For Your Information](#).)

Union/Labor Policy: Joint Employers and Micro-Units. Recent NLRB decisions upsetting long-standing policies for joint employers and micro-units must be reversed. Specifically, the report calls for restoring previously settled labor policies by overturning the NLRB’s [Browning-Ferris Industries of California, Inc.](#) and the [Specialty Healthcare](#) decisions. The former permits two employers to be considered joint employers without finding that both had “actual, direct and immediate” control over the essential terms and conditions of a worker’s employment. The latter effectively overturned the NLRB’s policy of not certifying micro- or “fractured” units.

Comment. Various efforts have been launched to reverse the impact of the *Browning-Ferris* decision, including legislation introduced in both the House and Senate. (Please see our [March 21 Legislate](#) for information on these bills.) Furthermore, last week the Senate Small Business and Entrepreneurship Committee held a [hearing](#) to explore the impact of the decision on small businesses. Testimony provided by the witnesses was both in support of and against the decision. For example, one witness stressed that the new joint employer standard will “upend both franchise businesses and business service contracting” and “undermine a proven business model that provides many economic benefits and opportunity for Americans.” Testimony by another witness stated that the decision is “merely” a return to the “traditional joint employment standard” and “will improve the quality of jobs in the small business sector.” (For additional background on the NLRB’s joint employer standard, please see our [March 28 Legislate](#).)

Blocking and Tackling

As discussed in our [June 13 Legislate](#), there are other avenues to hinder effective implementation, operation, administration or enforcement of regulations, including policy riders for appropriations bills and resolutions of disapproval under the Congressional Review Act (CRA). However, garnering sufficient support to pass funding bills with controversial policy riders or CRA resolutions is challenging at best and, if passed by both chambers, likely to be vetoed by President Obama. Thus, the policy proposals outlined in A Better Way may best be viewed as the GOP’s vision for governing in a future Republican-controlled administration.

Overtime Rule. The final rule “may cause significant disruptions in the workplaces that are likely to harm employers and their employees” and “will stifle workplace flexibility, destroy jobs, limit opportunities for low-skill and low-wage workers to climb the economic ladder, [and] impose additional labor costs on small businesses.”

Comment. Although the report reflects House Republicans’ frustration with both the rule and the process by which it was finalized, the [GAO](#) found that the DOL “complied with applicable requirements in promulgating the rule.” Both chambers have introduced joint resolutions of disapproval to block implementation of the rule, with the House introducing its [resolution](#) last week. In addition, the rule may be challenged in court, perhaps alleging that the DOL failed to conduct an appropriate cost-benefit analysis on its economic impact as required by the Regulatory Flexibility Act and Administrative Procedure Act. (For additional background on legislation designed to interfere with the rule becoming effective, please see our [June 13](#) and [May 23](#) issues of *Legislate*.)

Federal Contractors. The Fair Pay and Safe Workplaces Executive Order will “unfairly deny federal contracts to an employer who is *alleged* to have violated” federal or state labor laws and create “another layer of bureaucracy onto a federal procurement process that is already plagued by delays and expensive inefficiencies.” Efforts to reverse or scale back this executive order are being played out in the appropriations process, too. Please see the Appropriation Bills section below for more information

(Mis)classification of Independent Contractors. The DOL sub-regulatory guidance for classifying workers as independent contractors under the FLSA will result in “fewer opportunities for workers and entrepreneurs, fewer innovative services for American consumers, and greater costs and burdens for employers” as it fails to consider “the benefits to employers and consumers of utilizing independent contractors” in the “new and evolving sharing economy.”

Comment. The report includes a case study on employee misclassification to illustrate the House GOP’s view that the current administration’s regulatory approach does not bode well for America and negatively impacts the workplace. (For background on the DOL Wage and Hour Division’s view for classifying workers as employees or independent contractors, please see our [July 16, 2015](#) *For Your Information*.)

Appropriations Bills

Although the fiscal year 2017 Homeland Security Appropriations Bill committee markup was postponed from last week to this week, the appropriations process is in full bloom. Numerous House and Senate committees and subcommittees continue to work diligently in an effort to advance appropriations bills. Although these bills are primarily designed to allocate funding for government agencies and programs, legislators often attempt to include “riders” to advance policy positions.

In addition to items reported on in our [June 13](#) *Legislate*, here are select highlights from the appropriations process relevant for employers.

Federal Contractors. The Fair Pay and Safe Workplaces Executive Order (Executive Order 13673) requires businesses seeking government contracts worth more than \$500,000 to disclose violations of 14 federal labor and employment laws — and state law counterparts — for the previous three years. Last week, the Senate passed the [National Defense Authorization Act for Fiscal Year 2017](#), a defense authorization bill that scales back the scope of the order by excluding Defense Department contractors that have not been suspended or debarred from federal

procurement for labor violations under existing rules. In addition, the House Financial Services and General Government Appropriations Bill, FY 2017 (approved by the House Appropriations Committee) and the Senate FY 2017 Labor, Health and Human Services, and Education and Related Agencies (Labor-HHS) Appropriations Bill (approved by the Senate Appropriations Committee) includes provisions that would deny funds to implement Executive Order 13673.

Comment: Whether the bills will advance with these provisions is yet to be determined as Democrats do not want to see an erosion of the order.

EEO-1 Report. Earlier this year, the EEOC [proposed changes to the annual Employer Information Report EEO-1](#) that would impose new, complex and burdensome pay data collection and disclosure requirements on employers, including federal contractors, with 100 or more employees. (For additional information on the proposed changes, please see our [February 26 For Your Information](#).) Efforts to block the EEOC's proposed changes have been introduced in the appropriations process. Specifically, an amendment offered by Rep. Andy Harris (R-MD), as well as one by Sen. Lamar Alexander (R-TN), for the House Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 ([H.R. 2578](#)) would bar the EEOC from implementing its proposed changes to the form. A comparable provision was not included in the version of the funding bill approved by the Senate Appropriations Committee in May. (For additional background, please see [Sen. Alexander's press release](#).)

Comment. In response to the EEOC's proposed changes, Sen. Alexander introduced the EEOC Reform Act ([S. 2693](#)). This 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, before the proposed data collection mandates are imposed on private employers. (Please see our [April 4 Legislate](#) for more information.)

Labor Related LGBT Protections. Executive Order [13672](#) amended Executive Orders [11478](#) and [11246](#) to prohibit federal contractors from discriminating on the basis of sexual orientation or gender identity. Rep. Sean Patrick Maloney (D-NY) tried to leverage the appropriations process to ensure that federal funding could not be used in contravention of the Order. Specifically, he offered amendments to the following four appropriations bills: the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2017 ([H.R. 4974](#)), the Legislative Branch Appropriations Act, 2017 ([H.R. 5325](#)), the Energy and Water Development and Related Agencies Appropriations Act, 2017 ([H.R. 5055](#)), and the Department of Defense Appropriations Act, 2017 ([H.R. 5293](#)). On each occasion, Rep. Maloney's efforts were defeated.

Healthcare Legislation Vetted

The full House Ways and Means Committee, the primary tax writing committee, vetted and advanced numerous healthcare bills during a markup last week. As noted in Chairman Kevin Brady's (R-TX) [opening statement](#), the bills reviewed were among those put forward by House members during the [May 17 hearing](#) held by the committee's Health Subcommittee. (See our [May 23 Legislate](#) for information on the subcommittee hearing.)

The table below identifies the bills considered during the full House Ways and Means Committee markup. In addition, the committee's website includes an [array of documents and materials](#) related to these bills.

Legislation	Sponsor(s)	Potential Impact
Small Business Health Care Relief Act H.R. 5447	Reps. Charles Boustany (R-LA) and Mike Thompson (D-CA)	Would permit small employers to use a health reimbursement arrangement (HRA) to help their workers buy individual-market coverage
Veterans TRICARE Choice Act H.R. 5458	Rep. Chris Stewart (R-UT)	Would permit veterans to opt in and opt out of Health Savings Accounts (HSAs) without causing them to permanently lose eligibility for TRICARE benefits
(no name) H.R. 5452	Rep. John Moolenaar (R-MI)	Would improve access to HSAs for those who get services at Indian Health Service facilities
(no name) H.R. 5445	Rep. Erik Paulsen (R-MN)	Would almost double the HSA contribution limit, allow spouses to make catch-up contributions to the same account, and allow more flexibility between incurring expenses and actually setting up an account
Tribal Employment and Jobs Protection Act H.R. 3080	Rep. Kristi Noem (R-SD)	Would provide relief from ACA's employer mandate for tribally owned businesses and would exempt tribal employers from the mandate
Student Worker Exemption Act of 2015 H.R. 210	Rep. Mark Meadows (R-NC)	Would provide relief from the ACA's employer mandate for universities that employ student workers by exempting those workers
Halt Tax Increases on the Middle Class and Seniors Act H.R. 3590	Rep. Martha McSally (R-AZ)	Would repeal the ACA provision that increased the threshold for deducting medical expenses from 7.5% to 10% of income

Looking Ahead

Later this week, House Republicans are expected to release the portion of their policy blueprint that reflects recommendations of the [Republican healthcare reform task force](#) for an ACA "repeal and replacement" bill. In addition, both chambers will continue work on appropriation bills.

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