

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Gearing up for 2017: Funding Talks Front and Center While Other Legislative Activity Continues

While talks on government funding for 2017 have stalled, other legislative activity has continued. Some bills, consistent with policies set out in party platforms, have moved through committees and others have just been introduced. While unlikely to be enacted during the current legislative session, they may be reintroduced next year.

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Future of DOL Fiduciary Rule

Last week, the House Financial Services Committee approved (by a vote of 30 to 26 largely along party lines) the Financial CHOICE Act ([H.R. 5983](#)). It is a Republican-sponsored bill — primarily designed to scale back the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 — that includes a provision to repeal the [DOL fiduciary rule](#) and allow the SEC to take the lead on setting standards of conduct for brokers and dealers.

Comment. Regardless of whether this legislation advances, it's unclear when an SEC rule will be forthcoming or whether we'll see an SEC proposal any time soon. Thus, if this bill is enacted and the DOL fiduciary rule is repealed, we anticipate a significant delay before the DOL will be given a chance to issue a revised fiduciary rule. (For background on the fiduciary rule, see our [April 22 For Your Information](#). For background on other legislative efforts to block the rule, see our issues of *Legislate* from [July 11](#), [June 27](#) and [April 25](#).)



Dependent Care Assistance Programs

Earlier this month, Rep. Jim Sensenbrenner (R-WI) introduced a bill — the Increase Dependent Care Assistance Program (DCAP) Ceiling Act ([H.R. 5971](#)) — that would update Section 129 of the Internal Revenue Code (Code). Specifically, the legislation would increase the maximum contribution to a dependent care assistance program (also known as a dependent care flexible spending arrangement, or FSA). Under the bill, the maximum contribution of \$5,000 would be raised to \$7,500 (subject to COLA increases) annually. In addition, the bill would modify the “use it or lose it” rule, as it would permit the carryover of unused dependent care amounts from one year to the next.

Comment. For additional information on Rep. Sensenbrenner’s bill, see his [press release](#). Also, please see our [May 9 Legislate](#) for background on other legislation that would increase the allowable exclusion for dependent care assistance expenses and our [January 28 For Your Information](#) for an update on the rules permitting a carryover of up to \$500 for unused amounts in a healthcare FSA.

Labor and Employment

Rep. Jared Polis (D-CO) introduced legislation — Giving Workers a Fair Shot Act ([H.R. 5939](#)) — that would amend multiple labor and employment laws and increase employer penalties for violation. Some of the bill’s provisions echo those in other bills currently pending in both chambers. Key components of Rep. Polis’ bill address:

- **Union Negotiations.** The bill would amend the National Labor Relations Act (NLRA) to require companies to begin negotiations for an initial contract within 10 days after request by a newly certified or recognized employee representative. It would also provide for mediation and binding arbitration if no collective bargaining agreement is reached within prescribed time limits. Identical provisions are included in other pending legislation — the Workplace Democracy Act ([S. 2142](#) and [H.R. 3690](#)).
- **Persuader Activity.** The bill also addresses reimbursements to federal contractors. Specifically, it would disallow reimbursement under contracts entered into by an executive agency for costs incurred for certain activities related to “persuad[ing] employees of the contractor to exercise or not to exercise” their rights to organize and collectively bargain. (For background on the [DOL’s Office of Labor-Management Standards new persuader rule](#), which — although it is currently blocked by a preliminary injunction — broadly defines what constitutes persuader activity, please see our [July 5 Legislate](#).)

Child Care: Presidential Candidates’ Proposals

Hillary Clinton’s plan does not include a proposal on dependent care or other account-based programs. Her plan, however, guarantees “up to 12 weeks of paid family and medical leave to care for a new child” and she has stated that she would cap child care costs at 10% of a family’s income (See Mrs. Clinton’s [Fact Sheet](#) for additional information.)

Donald Trump’s plan includes a proposal to create a new dependent care savings account (DCSA) that would not have a “use it or lose it” feature. It would be “available to everyone, allow tax-deductible contributions and tax-free appreciation year-to-year” and be eligible for a 50% matching contribution (up to \$500 each year) by the “government.” His plan would also “add incentives for employers to provide child care at the workplace” and would “guarantee six weeks of paid maternity leave.” (See Mr. Trump’s [Fact Sheet](#) for additional information on his multi-point proposal.)

Comment: Mr. Trump’s DCSA proposal has features more closely aligned to health savings accounts (HSAs) than to current dependent care assistance programs. Nevertheless, Mr. Trump is not advocating revocation of Section 129, but would amend the Code to include DCSAs.

- **Pay Stubs.** The bill would also amend the Fair Labor Standards Act (FLSA) to establish federal pay stub requirements. Intended to increase pay transparency, it would require employers to provide pay stubs to their employees and disclose specific information on the stubs. The requirements in the bill are similar to those included in other pending legislation, such as the Pay Stub Disclosure Act ([S. 2630](#) and [H.R. 4376](#)). (Please see our [March 21](#) and [March 14](#) issues of *Legislate* for background on other bills addressing employee pay stubs.)
- **Supervisor.** The bill would amend the NLRA to redefine who is a supervisor for purposes of the Act. Under this bill, “supervisors” would have to have authority “for a majority of [an] individual’s worktime,” but would not have to have authority to assign employees or responsibility to direct them. (Please see our [August 15](#) *Legislate* for background on the meaning of “supervisor” for purposes of employer liability for workplace harassment under Title VII of the Civil Rights Act of 1964 and legislation — the Fair Employment Protection Act of 2016 [[S. 3089](#) and [H.R. 5693](#)] — that would broaden the category of workers for whose acts an employer may be held vicariously liable.)
- **Penalties.** The bill would also increase civil and criminal penalties for violations of the FLSA, NLRA, Occupational Safety and Health Act, Mine Safety and Health Administration Act, and the Migrant and Seasonal Agriculture Worker Protection Act.
- **Executive Compensation.** As noted in Rep. Polis’ [press release](#), the bill would make a number of changes to hold executives accountable and empower shareholders. Specifically, it would amend the Securities Exchange Act of 1934 to: generally prohibit the CEO and chairman at publicly traded companies from being the same person; expand insider trading restrictions for executives to one full year after they leave a company, and prohibit them from selling more than 25% of their company stock during a designated window before and after they leave the company; and require additional and binding shareholder votes on executive pay.

Mounting Concerns

Republicans and Democrats in both chambers are growing increasingly concerned that September 30 (the last day of fiscal year 2016) is fast approaching and there is no agreement — yet — for a continuing resolution (CR) to fund fiscal year 2017. With lawmakers on both sides of the aisle wanting to leave town and focus on the upcoming elections, the outcome of appropriations discussions remains unpredictable. A CR could run for a period as short as one day and as long as many months — and, indeed, there are predictions that run the gamut. Perhaps the only clear thing is that neither party will want to run the risk of being blamed for a government shutdown in this election year.



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