

# Legislate<sup>®</sup>

## Key Legislative Developments Affecting Your Human Resources

Volume 7 | Issue 42 | October 24, 2016

### Peek into Post-Recess, Lame-Duck Session

Navigating the “lame-duck” session, the short legislative period after the November 8 election, will be a complex, high-stakes endeavor for members of Congress. Their first priority is to keep the government operating after December 9, when funding will end.

**In this issue:** [Background](#) | [Election Outcome](#) | [Government Funding](#) | [Policy Riders](#) | [Stand-Alone Legislation](#) | [Supreme Court](#) | [Closing Thoughts](#)

#### Background

Although the current congressional term ends on January 3, 2017, the government’s 2016 fiscal year ended September 30 with a continuing resolution to fund the government through December 9. To avert a government shutdown on December 10, members of both congressional chambers, upon their return to session the week of November 14, must again address funding. Moreover, the lawmakers will need to contend with a series of other issues including whether to:

- Attach any policy matters to a minibus or an omnibus funding bill
- Advance stand-alone legislation
- Hold Supreme Court confirmation hearings to fill the late Justice Antonin Scalia’s seat

Please see our [September 28, 2015 Legislate](#) for guidance on what a government shutdown could mean for private employers and the benefit plans they sponsor. As noted in that issue, the impact — arising in part from furloughs or layoffs — could be extensive, affecting numerous HR operations (such as annual enrollment) and benefit plan operations (such as eligibility to participate and/or to receive a distribution).

#### Election Outcome

This election campaign period has been anything but traditional. While the outcome is far from sure, some experts are speculating that, with a number of congressmen leaving Congress on January 3, the Senate and perhaps the House might flip from Republican to Democratic control. In such case, there may not be enough congressmen during the lame-duck session interested in advancing legislation and securing



bipartisan solutions. In other words, should many lawmakers lose their seats during the November 8 election, Congress may become somewhat paralyzed and ineffective during the lame-duck session.

## Government Funding

Averting a threat of a government shutdown has been a recurring issue in all but four of the most recent 40 fiscal years. However, this year — with a lame-duck session — there will be additional challenges if, in fact, many lawmakers lose their seats and control in one or more chambers change. Nevertheless, in all likelihood, there will be a certain amount of kicking the can down the road. Conventional wisdom suggests that a series of continuing resolutions (CRs) — stopgap funding measures designed to keep the government operating — will be enacted. Most likely, it will be two one-week CRs, taking us to late December when many lawmakers (particularly those who will not be returning) want to get home for the holidays. After that, the question is whether there will be a longer-term CR to fund the government through mid-March (when the debt ceiling is reached) or mid-September (when the threat of the government defaulting on its obligations becomes real), or somewhere in between.

## Policy Riders

Legislation unrelated to funding is often attached as a “rider” to funding a bill. This year, possible riders that may affect employers and employee benefits run the gamut. Congressional efforts to delay the effective dates of the overtime rule and the fiduciary rule could be attached, as well as more substantive provisions. For example, savings plan provisions included in the Retirement Enhancement and Savings Act of 2016 relating to automatic enrollment lifetime income disclosure, hardship withdrawals and loans may become riders to a stop-gap funding bill. (See our [Legislate](#) from [September 26](#) for additional information on these legislative proposals.)

## Stand-Alone Legislation

Although unlikely, it is possible that certain bills with bipartisan support could advance during the lame-duck session. High on the list of possibilities is legislation relating to mental health parity and saving the PBGC’s multiemployer pension insurance system, which is headed towards insolvency. (Please see our [September 6 Legislate](#) for background on mental health parity legislation and our [August 29 Legislate](#) for more on the financial status of the PBGC programs and potential options to fix them.) Lest anyone think that the chances of this legislation advancing during the lame-duck session are low, one only needs to be reminded that Multiemployer Pension Reform Act (MPRA) was enacted in the final days of December 2014 with little vetting whatsoever. (For background on MPRA, see our [March 7 Legislate](#) and [January 12, 2015 For Your Information](#).)

## Supreme Court

Following Justice Scalia’s death earlier this year, President Obama nominated Chief Judge Merrick Garland of the US Court of Appeals for the District of Columbia Circuit to fill his seat on the bench. The Senate has not taken action to confirm or even consider Judge Garland. No hearings have been held and there has been no recommendation to approve or deny the nomination. Should Hillary Clinton become president and the Senate becomes Democratic-controlled, there is a possibility that during the lame-duck session the current Republican-controlled Senate will seek to quickly vet and



confirm Judge Garland. Specifically, the Republican-controlled Senate Judiciary may finally act on President Obama's nomination in an attempt to ensure that Mrs. Clinton does not have an opportunity to appoint someone to fill this vacancy with an individual deemed less desirable by Republicans. On the other hand, should Donald Trump win, it is highly unlikely that the Senate will act on the nomination. In such event, the current congressional term would end and Mr. Trump would nominate an individual for Senate consideration after he takes office. (See our [March 21 Legislate](#) for additional background.)

## Closing Thoughts

We've listed some reasonable legislative possibilities for the remainder of this year. But the upcoming lame-duck session may be just that — lots of talk, but no action. Please join us on [November 16 for a webinar](#) where we'll discuss not only the impact of the election on employer-sponsored plans, but also some of the issues outlined in this *Legislate*.

### Authors

Allison R. Klausner, JD  
Sharon Cohen, JD

### Produced by the Knowledge Resource Center of Xerox HR Consulting

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email [fyi@xerox.com](mailto:fyi@xerox.com).

You are welcome to distribute *Legislate*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.