

August 2016

### INSIDER BRIEFING

The Republican and Democratic National Conventions were the center of political activity in July. Each party released its platform setting forth their respective policy positions, including those affecting the workplace. (See this month's [In Focus](#) article for a discussion of the parties' platforms.) However, Cleveland and Philadelphia were not the only sites of important workplace policy developments last month. Prior to Congress' recessing until September, there was some notable legislative activity in Washington impacting employers. The federal agencies were busy advancing their labor and employment agendas during the waning months of the Obama Administration, while efforts were underway in Congress to block recent rulemaking.

The appropriations process remains the most viable vehicle for Congress to block or alter the Administration's workplace policy agenda. On July 14, the House Appropriations Committee [approved](#) along party lines a Labor, Health and Human services funding bill containing provisions to block the DOL's new overtime rule along with some other notable labor and employment actions and initiatives.

The bill provides \$12 billion for the DOL, which is \$138 million below the fiscal year 2016 enacted level and \$765 million below the President's budget request. Besides including a "rider" blocking the DOL's overtime rule, the funding measure would

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### ON THE MOVE

For the first six months of 2016, over 100 labor, employment, and benefits bills were enacted throughout the country. Many touched upon topics that have stalled at the federal level. Bills promoting equal pay, limiting the use of an applicant's criminal history in making employment decisions, endorsing wage transparency, and legalizing certain uses of medical marijuana, have all become law since January 1, 2016. Heading into the second half of the year, this legislative pace shows no signs of slowing.

Although the majority of state legislatures have recessed for the year, some key jurisdictions, including California, are still active. In July alone, nearly 20 labor and employment bills at the state level were enacted, and about half as many ordinances were adopted at the municipal level.

In addition, several labor and employment-related ballot initiatives will be in the hands of voters on

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## INSIDER BRIEFING, CONTINUED

prohibit enforcement of the DOL's fiduciary rule.

The Committee-approved funding bill includes \$215 million for the National Labor Relations Board (NLRB) – a decrease of \$59 million from last year's enacted level and \$59.7 million below the President's budget request. The legislation also includes several policy provisions to stop many controversial NLRB regulations and decisions. House appropriators, through funding riders, are seeking to prohibit the enforcement of the NLRB's new joint-employer standard and its "ambush" election regulations. The bill also includes provisions that would prohibit the use of electronic voting and the enforcement of "micro" bargaining unit standards.

The standalone Labor-HHS Appropriations bill is unlikely to reach either the House or Senate floor, let alone the President's desk. Rather, the funding legislation is expected to be incorporated into an omnibus appropriations bill, the timing and content of which is uncertain. The policy riders in the House Appropriations Committee's bill are sure to be the subject of heated debate with congressional Democrats and the White House. Which, if any, of the policy riders will work their way into the final omnibus funding bill will likely remain unknown until the last-minute, as eleventh-hour, high-level negotiations between congressional leaders and the White House often determine the final product.

The appropriations process is not the only route members of Congress are taking to halt or alter agency rulemaking. Employers across the country are facing a December 1, 2016, effective date for the DOL's recent revisions to the white-collar overtime regulations. With this start date looming, Congressman Kurt Schrader (D-OR) introduced legislation to delay the effective date of the rule and eliminate its indexing provision. The Overtime Reform and Enhancement Act (H.R. 5813), introduced on July 17, would incrementally phase in the new threshold of \$47,476 over the next three years, beginning with a 50 percent increase this December. Congressman Schrader commented: "[w]ithout sufficient time to plan for the increase, cuts and demotions will become

inevitable, and workers will actually end up making less than they made before." Reps. Jim Cooper (D-TN), Henry Cuellar (D-TX) and Collin Peterson (D-MN) co-sponsored the legislation. That the bill sponsors are Democrats is notable. The legislation still faces a certain Presidential veto should it pass both Houses of Congress. Nonetheless, Democratic congressional support for the bill reflects concerns raised by the employer community about the DOL's approach to raising the salary threshold.

Members of Congress also took aim at the Equal Employment Opportunity Commission's (EEOC) recent wellness regulations. In May, the EEOC issued final rules addressing the treatment of wellness programs under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. However, EEOC rules differ in certain respects from provisions in the Affordable Care Act and its implementing regulations that codified and increased the financial incentives that can be offered in connection with health-contingent wellness programs. These inconsistencies create compliance challenges for employers seeking to use wellness programs to contain healthcare costs and improve the health of their workforce.

On July 14, Senator Labor Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions Committee, and Senator Johnny Isakson (R-GA) introduced two resolutions under the Congressional Review Act (CRA) to block the EEOC's ADA and GINA final rules. Under the CRA, the Senate and House vote on a joint resolution of disapproval to stop, with the full force of law, a federal agency from implementing a rule or regulation or from issuing a substantially similar regulation without congressional authorization. A resolution of disapproval needs only a simple majority to pass and cannot be filibustered or amended. Senator Alexander [stated](#):

Congress was clear in its support of workplace wellness programs in the health care law, which gave the administration the authority to allow

## INSIDER BRIEFING, CONTINUED

employers to offer a 50 percent discount on health insurance premiums. But the EEOC is taking away that authority and overruling the actions of the Departments of Health and Human Services, Labor, and Treasury, which have been clear in their regulations implementing the law.

In another important development, the EEOC took a step closer to finalizing changes to the EEO-1 report to include pay data. In February, the EEOC issued an initial proposal under the Paperwork Reduction Act to amend the EEO-1 to require employers with 100 or more employers to report W-2 wages and hours worked for employees in 12 pay bands. On July 14, the EEOC published a revised proposal submitted to

the White House Office of Management and Budget (OMB) for approval. The revised proposal largely tracks the original proposal, although the deadline for submitting the 2017 EEO-1 report was pushed back six months until March 31, 2018, to better align with W-2 reporting. According to the EEOC's [Q&A](#) on the revised proposal:

The collection of pay information on the EEO-1 report will help the EEOC improve its enforcement efforts to combat pay discrimination, identify trends, and help employers assess their pay policies and practices. EEO-1 pay data will be used to better focus resources and investigations, not as the sole basis to find discrimination. A finding of discrimination could come after an investigation.

However, the revised proposal is beset with the same fundamental flaws as the original. Several commenters to the initial proposal challenged the accuracy and reliability of using broad, aggregated W-2 pay data to indicate instances of pay discrimination and criticized the Commission for seriously underestimating the burden of the new EEO-1 report on employers. The EEOC did significantly increase its cost estimates, but concerns about their burden estimates and the utility of the information remain. Public comments on the revised proposal are due August 15.

The NLRB issued a long-anticipated decision, *Miller & Anderson, Inc.*, reversing its 2004 decision in *Oakwood Care Center*, and holding that in determining if a combined bargaining unit is appropriate, it will apply traditional "community of interest" factors. Under the July 2016 decision, a union seeking to represent employees in a bargaining unit composed of employees solely employed by a "user employer" (a company that hires temporary workers) and those jointly employed by the user employer and temporary labor provider does not have to obtain the consent of both employers. The

### Quote of the Month

*"We need to be the leading voices about creating a new portable benefit system."*

— Senator Mark Warner (D-VA) speaking about independent contractors in today's economy at the morning breakfast for Virginia's delegates to the Democratic National Convention

## INSIDER BRIEFING, CONTINUED

decision is notable because it is a continuation of the Board's expansive view of the joint employer relationship and efforts to expand the reach of the National Labor Relations Act to the contingent workforce.

The final rule implementing the Fair Pay and Safe Workplaces Executive Order has yet to be issued. However, agencies are already proceeding with implementation of the so-called blacklisting rule. On July 1, the NLRB General Counsel issued an operations-management memorandum ([OM 16-23](#)) to its regional directors on collecting data in connection with the Fair Pay and Safe Workplaces Executive Order. According to the memorandum, the NLRB has correlated certain data points already tracked in the NxGen case management system for forwarding to "Labor Compliance Advisors." However, beginning with complaints issued on or after July 1, 2016, the agency will collect four additional data points, "which are necessary to link the data in NxGen with the data gathered by the other enforcement agencies and with the data in the GSA acquisition systems." Attached to the memorandum is a fillable pdf form that charged-party employers can use to furnish these four data points regarding their businesses. The fact that the NLRB is proceeding with the data collection before the rule has even been finalized raises concerns for government contractor employers. It also indicates the Administration's intent on finalizing the blacklisting rule, which, according to the latest regulatory agenda, is slated for release in August.

Covered government contractors are also eyeing release of the final rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors and Subcontractors. The DOL is scheduled to issue the final paid leave rule by September 30, 2016. With its July 22 submission of the final rule to OMB for review, the DOL appears to be on track to make this September deadline. OMB review typically takes between 30 and 90 days.

As the DOL redoubles its efforts to finalize regulations before the end of President Obama's term, lawsuits challenging recently finalized rules continue. Littler filed one such complaint challenging portions of the Occupational Safety and Health Administration's (OSHA) electronic recordkeeping rule. The enforcement date for the rule has subsequently been delayed until November 1, 2016.

Meanwhile, employers are facing a 78.156% increase in OSHA penalties effective August 1, 2016. The 2015 bipartisan budget agreement required OSHA to raise its citation penalties for the first time in 25 years, eliminating the agency's exemption from having to index penalties to keep pace with inflation. The initial "catch-up adjustment" penalties were tied to the percentage difference between the Consumer Price Index in October 1990 and the October 1990.

Members of Congress may have left Washington until September to return to the campaign trail in their home states and districts, but a number of workplace policy issues will surely be the topic of numerous campaign events and town halls across the country. Meanwhile, the regulators will likely work feverishly in a hot and humid Washington to complete their labor and employment agendas.

*– By Ilyse Schuman and Michael J. Lotito*

## ON THE MOVE, CONTINUED

Election Day. In July, at least five new employment-related measures were certified for the November ballot. An initiative in Washington would both raise the state minimum wage and mandate paid sick leave. Under the ballot initiative, employees could accrue at least one hour of paid sick leave for every 40 hours worked. The measure would also raise the hourly minimum wage for employees at least 18 years old to \$11.00 in 2017, \$11.50 in 2018, \$12.00 in 2019, and \$13.50 in 2020.

Voters in the City of Flagstaff, Arizona will similarly decide on November 8 whether to increase the minimum wage, in yearly increments, to \$15.00 an hour by January 1, 2021.

Both California and Massachusetts have certified ballot initiatives providing for the legal use of recreational marijuana, while Arkansas voters will determine whether to legalize its use for medical purposes only.

More voter initiatives are expected at the state and local levels in the coming months. As for state legislation, some notable bills advanced in July.

### Equal Pay

Massachusetts now has one of the most stringent equal pay laws in the country. On August 1, the governor signed the [Act to Establish Pay Equity](#). When it takes effect in 2018, this law will prohibit an employer from paying male and female employees

different rates for comparable work. The revised definition of "comparable work," however, is vague, therefore making it hard for employers to assess jobs for comparison. Under the law, employers are also prohibited from asking job applicants about their salary history, or banning discussions about wages in the workplace.

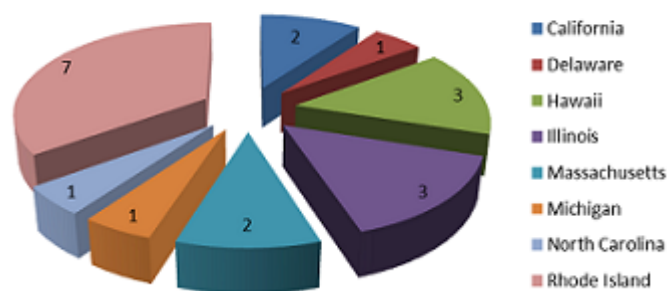
### Minimum Wage

The Baltimore, Maryland City Council approved an ordinance that seeks to increase the city's minimum wage to \$10.00 per hour on January 1, 2017, to \$10.50 on July 1, 2017, to \$12.00 on July 1, 2018, to \$13.50 on July 1, 2019, and to \$15.00 on July 1, 2020. Under a revised amendment to the measure, businesses making less than \$500,000 per year or with 25 or fewer employees would be exempt from the new rates. A second reading of this ordinance is scheduled for August 8.

The City Council for San Mateo, California, voted for an ordinance to increase the city's minimum wage to \$11.65 per hour January 1, 2017, to \$13.35 per hour on January 1, 2018, and to \$15.00 per hour January 1, 2019. This ordinance must undergo a second reading to advance.

San Leandro, California is also considering an ordinance to increase its minimum wage. Under this initial proposal, the city's minimum hourly wage would increase, in increments, to \$15.00 per hour by the year 2020. Businesses with fewer than 26 employees

**Number of State Labor & Employment Laws Enacted in July 2016**



This chart shows the number of generally applicable labor and employment laws enacted at the state level in July 2016.



## ON THE MOVE, CONTINUED

would have an extra year to comply.

### Wage Theft

Rhode Island's governor signed two bills targeting wage theft. On July 12, the governor enacted legislation (HB 7628 / S 2475) providing employees with additional means of redress for nonpayment of wages. An employer who is found guilty of wage theft and does not reimburse the employee for the contested amount within 30 days of a final decision could have its business license revoked. An aggrieved employee can bring a claim for nonpayment of wages within three years of the alleged violation. A prevailing plaintiff is entitled to an award of attorneys' fees and litigation costs.

A week later, Rhode Island's governor signed HB 7254, which prevents employers from withholding or deducting amounts from an employee's paycheck without the employee's written consent. Employers found in violation of this law are subject to damages equal to triple the amount of unlawfully withheld or deducted funds.

New York's governor signed an executive order on July 20 to improve enforcement of unpaid wages and other forms of "worker exploitation." Executive Order [No. 159](#): *Establishing a Permanent Joint Task Force to Fight Worker Exploitation and Employee Misclassification*, will create a Joint Task Force on Employee Misclassification and Worker Exploitation ("Joint Task Force") to facilitate inter-agency information-sharing and protocols to target employee misclassification, wage theft, and unsafe working conditions.

On the opposite coast, the Berkeley, California City Council adopted an ordinance that will require building contractors to prove they paid their employees before obtaining a certificate of occupancy for the new construction. Under the terms of Ordinance No. 7,495-N.S., covered contractors must submit to the city a Pay Transparency Attestation and Construction Pay Transparency Report indicating compliance with their wage payment obligations.

### Social Media

Two governors took opposite stances on workplace privacy laws. Hawaii's governor vetoed a measure (HB 1739) that would have prohibited employers from requiring, requesting, or coercing employees or potential employees to provide access to their personal accounts. In contrast, Illinois' governor signed a bill (HB 4999) amending the Illinois Right to Privacy in the Workplace Act to strengthen some provisions related to an employer's access to an employee's or applicant's social media accounts. Specifically, the amendments make it unlawful for an employer to request, require, or coerce an employee or applicant to (a) authenticate or access a personal online account in the presence of the employer (i.e., "shoulder surfing"); (b) invite the employer to join a group affiliated with any personal online account of the employee or applicant; (c) join an online account established by the employer or add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account; or (d) discharge, discipline, discriminate against, retaliate against, or otherwise penalize an employee for refusing to provide a username, password, or other access to a personal account. The law includes several exceptions. For example, employers are allowed to access accounts as part of a lawful investigation.

### What's Next?

California lawmakers are finishing consideration of a handful of labor and employment-related bills, and will send the approved legislation to the governor by August 31. By this time, most other state legislatures will have already adjourned for their legislative terms. As for ballot initiatives, the deadlines for certifying proposals for consideration on November 8 are fast-approaching for many localities. Therefore, while the majority of state and local employment laws have been considered for 2016, anything can happen between now and Election Day.

– By Ilyse Schuman and Tessa Gelbman

# GLOBAL REPORT

The following is roundup of international labor and employment news:

## Africa

*Namibia.* Employers in Namibia have launched a coalition—the [National Employers' Organisation \(NaNEO\)](#)—in the capital city of Windhoek, to represent and advocate for the employer community. Similar to the U.S. Chamber of Commerce, the NaNEO intends to organize and lobby on behalf of employers in all sectors.

## Asia/Pacific

*India.* Under the terms of [new legislation](#), private employers in India must provide their employees with six months of maternity leave, up from the 12 weeks of leave available under current law. This Maternity Benefit Bill is expected to be considered during the Monsoon session of Parliament.

*Japan.* Japan's Labor Ministry intends to [revise its sexual harassment guidelines](#) to clarify that they apply to individuals "regardless of their sexual orientation and identity." The current guidelines direct employers to take steps to prevent harassment in the workplace, and impose disciplinary measures on those found guilty of such harassment. The revised guidelines are expected to be issued in January 2017.

*Malaysia.* Malaysia's minimum wage increase took effect on July 1, 2016. The [Minimum Wage Order 2016](#) ('Perintah Gaji Minimum' PGM2016) applies to all employers, regardless of the number of employees. Under the Order, the minimum wage will increase from RM900 to RM1,000 per month, or RM4.81 per hour, in Peninsular Malaysia, and from RM800 to RM920 per month (RM4.42 per hour) in Sabah and Sarawak.

*New Zealand.* Although parental leave advanced in other countries, the New Zealand government used its financial [veto power](#) to kill legislation that would have entitled employees to 26 weeks' of paid parental leave. The country's finance minister deemed the measure cost-prohibitive. Current law allows up to 22

weeks of paid parental leave.

## Central America

*El Salvador.* The U.S. Justice Department and the Republic of El Salvador [entered into a memorandum of understanding](#) (MOU) to target employment discrimination based on citizenship, immigration status and national origin. Under the MOU, the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) and the Salvadoran government will train Salvadoran consular staff on the anti-discrimination provision of the Immigration and Nationality Act (INA), and participate in events organized by Salvadoran consulates to educate workers and employers and distribute educational materials to the embassy and its consulates. In addition, the embassy "will establish a system for referring discrimination claims from the embassy and consulates to OSC."

## Europe

### Privacy

The U.S.-EU [Privacy Shield](#) became effective on July 12, 2016. The Privacy Shield is an alternative framework to the invalidated "Safe Harbor" agreement between the U.S. Department of Commerce and the European Commission governing the transfer of personal data. While many aspects of the Privacy Shield should be familiar to multinational employers, there are still a [number of steps](#) employers must take before using the framework.

### Collaborative Economy

A recently released [Eurobarometer survey](#) on the European gig economy indicates most respondents (52%) were aware of services provided by collaborative platforms, and at least 17% responded that they had availed themselves of such services at least once. Predictably, the younger the respondents, the more likely they were to have either heard of or used services provided by the gig economy. Respondents between the ages of 25 and 39 had the greatest user rate at 27%. The level of education also

## GLOBAL REPORT, CONTINUED

played a role. Those who finished schooling at age 20 or older were more likely to have used gig economy services. The countries with the greatest user rate are France (36%) and Ireland (35%); Malta and Cyprus had the lowest rates at less than 5% each.

### Middle East

*Israel.* The Israeli legislative body has [approved](#) a paternity leave bill that will give new fathers up to five days of leave. The first three days of this leave, however, will be deducted from the employee's vacation leave. If the employee does not have three days of accrued vacation time, he could take unpaid leave. The remaining two days will be deemed sick leave allowing the employee to receive 50% of their pay. The Knesset approved this measure on June 27.

### North America

*Canada.* The Supreme Court of Canada, in [Wilson v. Atomic Energy](#), held that private federal employers must have just cause to dismiss non-managerial employees. Failure to do so will likely subject the employer to an order for reinstatement.

#### *Mexico – Labor Standards*

The U.S. Bureau of International Labor Affairs has issued a report in response to a submission filed by U.S. and Mexican labor unions and worker advocacy groups alleging the Mexican government has failed to meet its obligations under the North American Agreement on Labor Cooperation (NAALC) regarding a chain of Mexican retail stores. As discussed in an agency [press release](#), the groups allege the Mexican government “failed to enforce its labor laws effectively with respect to freedom of association and collective bargaining, specifically citing concerns about so-called ‘protection contracts’ (referring, generally, to collective bargaining agreements negotiated through unions that do not represent covered workers, without

worker support or knowledge).” The submission also alleges the government’s failure to enforce minimum wage standards and pregnancy anti-discrimination law. One of the NAALC’s objectives is to “promote compliance with, and effective enforcement by each Party of, its labor law.”

#### *Mexico – Maternity Leave*

The Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*) recently [published](#) Circular 10/16 to announce new regulations for issuing maternity leave certificates. These regulations became effective on July 1, 2016.

### South America

*Columbia.* The U.S. Office of Trade and Labor Affairs (OTLA) has [agreed to review](#) allegations that the Government of Columbia has violated the United States-Colombia Trade Promotion Agreement (CTPA) by “fail[ing] to effectively enforce its labor laws through a sustained and recurring course of action or inaction in a manner that affects trade or investment; waiv[ing] or otherwise derogated from its statutes or regulations in a manner affecting trade or investment; fail[ing] to adopt and maintain in its statutes and regulations, and practices thereunder, the rights as stated in the International Labor Organization Declaration on Fundamental Principles and Rights at Work (ILO Declaration); fail[ing] to ensure the proceedings in its administrative, judicial, or labor tribunals are transparent and do not entail unwarranted delays; and fail[ing] to ensure that final decisions in such proceedings are made available without undue delay.” The charges were submitted to the OTLA by the American Federation of Labor and Congress of Industrial Organizations and five Colombian workers’ and civil society organizations. The OTLA will complete its review and issue a report to the Secretary of Labor within 180 days.





## IN FOCUS

### ***Election 2016: Republican v. Democratic Party Platforms***

The Republican and Democratic National Conventions have ended with Donald Trump and Hillary Clinton as their respective party's official nominees for President. In their acceptance speeches, the nominees laid out their contrasting visions for their presidencies. Beyond the high-profile televised speeches attracting millions of viewers, each party released its platform setting forth its official position on numerous foreign and domestic issues. These politically-minded documents provide insight to the parties' approaches to workplace policy matters and what a Republican versus Democratic Administration in 2016 may hold for labor, employment and benefits issues.

The six-chapter [Republican Party Platform](#) spans 54 pages, beginning with "Restoring the American Dream" and concluding with "America Resurgent." The first chapter encompasses the GOP's view on "Workplace Freedom for a 21<sup>st</sup> Century Workforce." The Platform takes aim at "anachronistic labor laws that limit workers' freedom and lock them into the workplace rules of their great-grandfathers." The National Labor Relations Board (NLRB), Department of Labor (DOL), and recent rulemakings and decisions, are targeted.

The Platform specifically calls out the NLRB for "attacking the franchise model of business development" – no doubt a reference to the *Browning-Ferris* decision and changes to the joint-employer standard. The recently finalized overtime rule also comes under fire in the Platform's reference to the DOL "wielding provisions of the Fair Labor Standards Act from the 1930s, designed to fit a manufacturing workplace, to deny flexibility to both employers and employees." The GOP Platform also criticizes the repeal of "union transparency rules that allowed members to discover what was being done with their dues" and opposes project labor agreements. Support for the right of states to enact "right-to-work" laws was included in the platform, as was an intention to "restore fairness and common sense to that

agency."

The Republican Platform also makes reference to technological advancements and providing workers with "flexibility and family-friendly options to make the most of them, especially portability in pension plans and health insurance." Portable benefits in the context of the "gig" economy has garnered attention by policymakers on both sides of the aisle. Its inclusion in the Republican Party Platform is evidence of the growing importance of portable benefits as a discussion point, and that future policy changes may be in the offing.

The GOP Platform does express a commitment to nondiscrimination and the importance of nondiscrimination policies, stating:

All Americans deserve the opportunity to pursue their American dream free from discrimination. Clear nondiscrimination policies ensure all employees have the chance to succeed based solely on their merits. These policies are vital to creating an inclusive, innovative, and competitive workforce.

However, the Platform does not call for any new federal anti-discrimination laws.

Efforts to raise the federal minimum wage have been blocked in Congress, but remain a hot topic in the upcoming presidential and congressional elections. Donald Trump recently said he would support raising the federal minimum wage to \$10 per hour – a stance that differs from that stated in the Republican Party Platform. The Platform is silent on specifically raising the federal minimum wage. Rather, the Platform contends that minimum wage is an issue that should be handled at the state and local levels.

It should come as no surprise that the Republican

## IN FOCUS, CONTINUED

Party Platform strongly criticizes the Affordable Care Act (ACA). The Party calls for repeal of the ACA, which congressional Republicans have repeatedly advocated. In its place, the Platform seeks to:

recover the traditional patient-physician relationship based on mutual trust, informed consent, and confidentiality. To simplify the system for both patients and providers, we will reduce mandates and enable insurers and providers of care to increase healthcare options and contain costs. Our goal is to ensure that all Americans have improved access to affordable, high-quality healthcare, including those struggling with mental illness.

The ACA has provided one of the sharpest contrasts between Republican and Democrats in Congress and in the 2012 and 2014 election cycles. It remains one in this election as well.

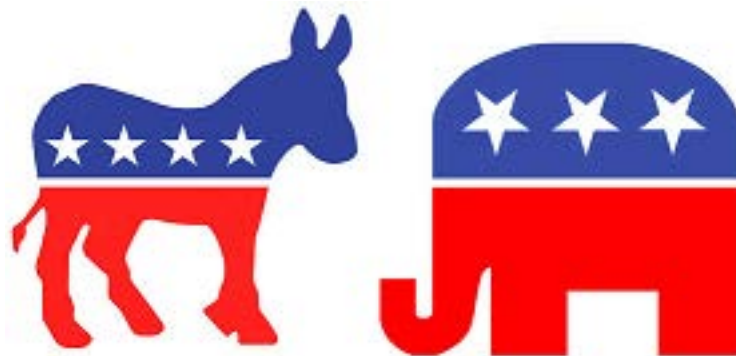
The Republican policy document summarizes the Republican approach to employer-employee relations as follows: “Republicans believe that the employer-employee relationship of the future will be built upon employee empowerment and workplace flexibility.” Although not expressly stated, this approach stresses “empowerment and flexibility” over federal government mandates and an expansion of existing

federal labor and employment laws.

The approach articulated in the Republican Party Platform stands in contrast to that set forth in the Democratic Party Platform. The 51-page [Democratic Party Platform](#) builds upon the “Middle Class Economics” agenda of President Obama’s Administration. According to its Platform, “the Democratic Party believes that supporting workers through higher wages, workplace protections, policies to balance work and family, and other investments will help rebuild the middle class for the 21st century.” The section entitled “Raise Incomes and Restore Economic Security for the Middle Class” revisits some of the policy positions advocated by the current Administration and congressional Democrats.

Raising the federal minimum wage to \$15 an hour and indexing it to inflation is among the first proposals listed. While the overtime rule was criticized in the GOP Platform, the Democratic policy document vows to defend it, stating “We will defend President Obama’s overtime rule, which protects of millions of workers by paying them fairly for their hard work.”

Strengthening union organizing is another hallmark of the Democratic Party Platform, stating that “Democrats will make it easier for workers, public and private, to exercise their right to organize and join unions.” The document calls for passing the



## IN FOCUS, CONTINUED

tenets of the failed Employee Free Choice Act (EFCA):

We will fight to pass laws that direct the National Labor Relations Board to certify a union if a simple majority of eligible workers sign valid authorization cards, as well as laws that bring companies to the negotiating table. We support binding arbitration to help workers who have voted to join a union reach a first contract.

The Platform also states the Democratic Party's opposition to right-to-work laws.

The "Fair Pay and Safe Workplaces" Executive Order, which has not yet been finalized through implementing regulations, includes restrictions on mandatory arbitration agreements for government contractors. The Democratic Party Platform similarly "support[s] efforts to limit the use of forced arbitration clauses in employment." Indeed, the Democratic Party Platform appears to go beyond the "blacklisting" rule in linking government contracting to a "model employer" standard. Specifically, the Platform calls for a "model employer executive order or some other vehicle to leverage federal dollars to support employers who provide their workers with a living wage, good benefits, and the opportunity to form a union without reprisal."

Equal pay is featured prominently in the Democratic Platform as part of efforts to "support working families." In a theme that mirrors efforts by the Equal Employment Opportunity Commission to amend the EEO-1 report, and by congressional Democrats to pass the Paycheck Fairness Act, the Platform announces:

We will fight to secure equal pay for women, which will benefit all women and their families, particularly women of color who are disproportionately impacted by discriminatory pay practices, and against other factors that contribute to the wage gap.

The Democratic Platform also calls for passing a family and medical leave act that would provide all workers at least 12 weeks of paid leave to care for a new child or address a personal or family member's serious health issue. The Platform also advocates allowing workers to earn at least seven days of paid sick leave.

President Obama issued an executive order requiring covered contractors to provide such paid sick leave. A final rule implementing the executive order, which closely tracks the stalled Healthy Families Act legislation, is expected shortly. These issues are sure to feature prominently on the Democratic campaign trail.

Ending discrimination is a focal point of the Democratic Party Platform. A Democratic White House and Congress would likely advocate strong enforcement and expansion of existing EEO laws. The Platform states: "Democrats will always fight to end discrimination on the basis of race, ethnicity, national origin, language, religion, gender, age, sexual orientation, gender identity, or disability."

The contrast with the Republican Party Platform regarding health care is striking. Rather than advocating for the full repeal of the ACA, the Democratic Platform would go even further, stating: "Americans should be able to access public coverage through a public option, and those over 55 should be able to opt in to Medicare."

The platforms of the two parties differ in fundamental respects in their approach to labor, employment and benefits policy. However, they share a common political goal of engaging voters in a way that will translate to clear choices at the ballot box. With the parties' conventions now over, candidates will be espousing the views articulated in their platforms on the campaign trail. But implementation of the principles and what form they take obviously depends upon what happens on November 8.

*– By Ilyse Schuman and Michael J. Lotito*

# OUTLOOK

## AUGUST

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### **Increased DOL Federal Civil Penalties Take Effect**

**Monday, August 1, 2016**

The U.S. Department of Labor issued an interim final rule to adjust the amounts of civil penalties assessed or enforced in its regulations. Notably, the rule implements the requirement, as set forth in the two-year bipartisan budget President Obama signed on November 2, 2015, that OSHA raise its citation penalties for the first time in 25 years. The new penalty levels are effective August 1, 2016. Comments on the interim final rule are due by August 15, 2016. [Read more»](#)

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### **PBGC Interim Final Rule Governing Adjustment of Civil Penalties Takes Effect**

**Monday, August 1, 2016**

The Pension Benefit Guaranty Corporation is amending its regulations to adjust the penalties provided for in sections 4071 and 4302 of the Employee Retirement Income Security Act of 1974. In essence, plan sponsors that fail to provide required notices and other information required by ERISA will face steeper fines. The maximum amount for noncompliance with the Section 4071 requirements will increase from \$1,100 per day to \$2,063 per day. The penalties assessed under Section 4302 will increase from \$110 to \$275 per day. [Read more»](#)

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### **DHS and DOL Interim Final Rule Providing Penalty Catch-Up Adjustments for Violations of the H-2B Temporary Nonagricultural Worker Program Takes Effect**

**Monday, August 1, 2016**

The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) jointly issued an interim final rule to adjust the amounts of civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H-2B program. This interim final rule took effect on August 1, 2016. The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the Inflation Adjustment Act. [Read more»](#)

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### **Comments Due on IRS Proposed Rule Governing Certified Professional Employer Organizations**

**Thursday, August 4, 2016**

The IRS has proposed regulations relating to certified professional employer organizations (CPEOs). The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 requires the IRS to establish a voluntary certification program for professional employer organizations. The proposed regulations also propose to adopt, by cross-reference, the text of temporary regulations published the same day in the *Federal Register*, which relate to the requirements for applying for, receiving, and maintaining certification as a CPEO. These proposed regulations will affect persons who apply to be treated as CPEOs and who are certified by the IRS as meeting the applicable requirements. In certain instances, the proposed regulations will also affect the federal employment tax liabilities and other obligations of customers of the CPEO. [Read more»](#)

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### **Comments Due on PBGC Proposed Rule Governing Mergers and Transfers Between Multiemployer Plans**

**Friday, August 5, 2016**

The Pension Benefit Guaranty Corporation has issued a proposed rule to amend its regulations governing mergers and transfers between multiemployer plans to implement section 121 of the Multiemployer Pension Reform Act of 2014. The proposed rule would also reorganize and update the existing regulation. [Read more»](#)

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## **Comments Due on Proposed Rule Governing Expatriate Health Plans**

**Tuesday, August 9, 2016**

Federal agencies charged with implementing portions of the Affordable Care Act have issued proposed regulations on the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the Expatriate Health Coverage Clarification Act of 2014 (EHCCA). The proposed regulations also propose standards for travel insurance and supplemental health insurance coverage to be considered excepted benefits and revisions to the definition of short-term, limited duration insurance for purposes of the exclusion from the definition of individual health insurance coverage. These proposed regulations affect expatriates with health coverage under expatriate health plans and sponsors, issuers and administrators of expatriate health plans, individuals with and plan sponsors of travel insurance and supplemental health insurance coverage, and individuals with short-term, limited-duration insurance. In addition, the proposal seeks to amend a reference in the final regulations relating to prohibitions on lifetime and annual dollar limits and proposes to require that a notice be provided in connection with hospital indemnity and other fixed indemnity insurance in the group health insurance market for it to be considered excepted benefits. [Read more»](#)

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## **Final OFCCP Rule Revising Sex Discrimination Guidelines Takes Effect**

**Monday, August 15, 2016**

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has published a final rule revising its sex discrimination guidelines for federal contractors and subcontractors. Covered contractors must comply with Executive Order 11246, which governs nondiscrimination in employment on the basis of sex, and requires contractors to take affirmative action to ensure that applicants and employees are treated without regard to their sex. The OFCCP's guidelines with respect to these requirements have not been amended since 1970. [Read more»](#)

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## **Second Comment Period Ends for EEOC's Proposed Changes to EEO-1 Form**

**Monday, August 15, 2016**

The Equal Employment Opportunity Commission is once again soliciting public input on proposed changes to its EEO-1 form. Specifically, the EEOC is proposing that private employers already required to file the EEO-1 report and federal contractors with 100 or more employees would submit the EEO-1 with pay and hours-worked data in addition to information already required on the EEO-1. [Read more»](#)

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## **Comments Due on DOL Interim Final Rule Providing for Federal Civil Penalties Catch-Up Adjustments**

**Monday, August 15, 2016**

The U.S. Department of Labor issued an interim final rule to adjust the amounts of civil penalties assessed or enforced in its regulations. Notably, the rule implements the requirement, as set forth in the two-year bipartisan budget President Obama signed on November 2, 2015, that OSHA raise its citation penalties for the first time in 25 years. While the new penalty levels are effective August 1, 2016, the agency is accepting comments on the interim final rule until August 15, 2016. [Read more»](#)

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## **Comments Due on DHS and DOL Interim Final Rule Providing Penalty Catch-Up Adjustments for Violations of the H-2B Temporary Nonagricultural Worker Program**

**Monday, August 15, 2016**

The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) jointly issued an interim final rule to adjust the amounts of civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H-2B program. The increased penalty levels will apply to all penalties assessed after the effective date, August 1, 2016, for associated violations that occurred after November 2, 2015. Comments on this interim final rule are due by August 15, 2016. [Read more»](#)

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## **Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans**

**Tuesday, August 23 - Thursday, August, 25, 2016**

The Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) will hold its annual meeting on August 23-25, 2016, in Washington, DC. The meeting will allow members and witnesses to receive an update from the Employee Benefits Security Administration (EBSA). On August 23, the Advisory Council will address participant plan transfers and account consolidation for the advancement of lifetime plan participation. The following day it will focus on cybersecurity considerations for benefit plans. [Read more»](#)

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## **Meeting of the Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO)**

**Wednesday, August 31, 2016**

The ACVETEO will hold an open meeting to discuss the DOL's Veterans' Employment and Training Service (VETS) core programs and services that assist veterans with employment opportunities, and advise employers about hiring veterans. [Read more»](#)

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## **SEPTEMBER**

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### **Comments Due on IRS Proposed Rule Governing Premium Tax Credit under the Affordable Care Act**

**Tuesday, September 6, 2016**

The IRS has issued proposed regulations relating to the health insurance premium tax credit (premium tax credit) and the individual shared responsibility provision under the Affordable Care Act. Although employers are not directly affected by rules governing the premium tax credit, these proposed regulations may indirectly affect employers through the employer shared responsibility provisions and the related information reporting provisions. [Read more»](#)

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### **Comments Due on Potential Alternative Coverage for Contraceptive Services**

**Tuesday, September 20, 2016**

The DOL's Employee Benefits Security Administration has issued a request for information on whether there are alternative ways for eligible organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still adhering the Affordable Care Act's mandate. [Read more»](#)

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## **OCTOBER**

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### **Comments Due on Proposed Revisions to Annual Information Return/Reports**

**Tuesday, October 4, 2016**

The DOL's Employee Benefits Security Administration has issued a proposed rule to change the Form 5500 Annual Return/Report forms, including the Form 5500, Annual Return/Report of Employee Benefit Plan (Form 5500 Annual Return/Report), and the Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500-SF). The annual returns/reports are filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). [Read more»](#)

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### **Comments Due on Proposed Amendments to ERISA Annual Reporting and Disclosure**

**Tuesday, October 4, 2016**

The DOL's Employee Benefits Security Administration has issued a proposal to amend DOL regulations relating to annual reporting requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed amendments would conform the DOL's reporting regulations to proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan. [Read more»](#)

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## NOVEMBER

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### **Enforcement Date of Portions of OSHA Tracking of Workplace Injuries and Illnesses Rule**

**Tuesday, November 1, 2016**

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulations to clarify the rights of employees and their representatives to access the injury and illness records. The portions of the final rule that (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibit employers from retaliating against employees for reporting work-related injuries or illnesses, will start being enforced as of November 1, 2016 (extended from August 10, 2016). The remaining sections of the rule take effect on January 1, 2017. [Read more»](#)

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## DECEMBER

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### **Final DOL White Collar Exemption Overtime Rule Takes Effect**

**Thursday, December 1, 2016**

The DOL's final rule raises the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from the Fair Labor Standards Act's overtime exemptions. The final rule sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region (\$913 per week; \$47,476 annually for a full-year worker); sets the total annual compensation requirement for highly compensated employees subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); and establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption. The rule also amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. [Read more»](#)

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## JANUARY

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### **Final OSHA Rule Governing Tracking of Workplace Injuries and Illnesses Takes Effect**

**Sunday, January 1, 2017**

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The reporting requirements take effect on January 1, 2017. [Read more»](#)

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## **EEOC Final Wellness Rule under GINA Becomes Applicable**

**Sunday, January 1, 2017**

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer-sponsored wellness programs. This rule addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. [Read more»](#)

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## **EEOC Final Wellness Rule under ADA Becomes Applicable**

**Sunday, January 1, 2017**

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to all wellness programs that include disability-related inquiries and/or medical examinations whether they are offered only to employees enrolled in an employer-sponsored group health plan, offered to all employees regardless of whether they are enrolled in such a plan, or offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. [Read more»](#)

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