

2018: The Year Ahead for Employers



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Table of Contents

Economy, Jobs and Unemployment.....	3
Tax Reform.....	4
Background Checks	5
Cybersecurity and Privacy.....	6
Drugs and Alcohol	8
Immigration	9
I-9 Forms, E-Verify and Identity Issues	10
EEOC	12
Discrimination	13
Affirmative Action and Federal Contractors	14
Employment Litigation	16
Pay and Wage & Hour	17
Payroll Taxes and Tax Credits.....	19
Absences, Paid Leave and FMLA.....	20
Health and Retirement.....	21
OSHA/Safety	22
Unions and NLRB	23

In the past year, the Trump administration overturned executive orders, repealed regulations, and reshaped agency priorities. Employers can expect more sweeping changes in 2018 as tax reform takes effect, immigration takes center stage, and agencies continue to shift to a more business-friendly stance. In addition, judicial appointments to the U.S. Supreme Court and other federal courts will have significant and far-reaching implications. What follows is an executive summary of recent changes in workplace law and a look ahead to 2018.

Economy, Jobs and Unemployment



Economic Outlook – U.S. economic growth [strengthened](#) in 2017 and is expected to remain solid in 2018, fueled in part by tax and regulatory reform, business optimism, and

consumer confidence. The Federal Reserve [projects](#) 2.5% growth in 2018, and inflation to remain under 2%.

Federal Budget – Congress passed a short-term continuing resolution in December 2017 that funds the federal government through January 19, 2018. In 2018, lawmakers will need to finalize a budget for the remainder of FY 2018 and pass a budget for FY 2019 (which begins October 1). Congress is also expected to debate immigration policy, health care, new infrastructure spending, and entitlement reform in 2018.

U.S. Debt Limit – A fresh debate over the amount of [U.S. debt](#) will occur in early 2018, as legislation that [suspended](#) the existing federal debt limit (currently \$20.6 trillion) expired on December 8, 2017. The [debt limit](#) is the total amount of money the government is authorized to borrow to meet its existing legal obligations.

Competitive Labor Market – Employers are experiencing high turnover rates, increased labor costs, and difficulty finding

skilled workers in the current competitive [labor market](#), according to Willis Towers Watson. Employers also are taking longer to fill positions and are spending a third more to find a new employee than they did five years ago, reports the Society for Human Resource Management (SHRM).

Retiring Boomers – Ten thousand Baby Boomers turn age 65 every day — a trend that began in 2011 and will continue through 2030, according to an October 11, 2017, [report](#) by SHRM. It is expected that by 2020, 31 million jobs will become available as Boomers retire, and another 24 million jobs will be created.

“The Robots are Coming” – As many as 800 million workers worldwide may lose their jobs to robots and automation by 2030, including as many as 70 million U.S. workers (one-third of the workforce), according to a November 2017 [report](#) by McKinsey & Company. Activities most susceptible to automation include operating machinery, preparing fast food, and collecting and processing data.

Unemployment Rate – The [national](#) unemployment rate dropped to 4.1% in October, November, and December 2017, the lowest level in 17 years. The jobless rate for adult men and

adult women fell to 3.9%. The Federal Reserve [projects](#) the unemployment rate will range from 3.6% to 4.0% in 2018.

State Unemployment – Nearly half of the [states](#) had unemployment rates below 4% in November 2017, including eight states with unemployment rates below 3%: Colorado, Hawaii, Idaho, Iowa, Nebraska, New Hampshire, North Dakota, and Vermont.

Unemployment Benefits – The majority of states continue to provide up to 26 weeks of [unemployment benefits](#); however, Massachusetts (30 weeks) and Montana (28 weeks) provide benefits for a longer duration, while 9 states have reduced the duration of state unemployment benefits: Idaho (21 weeks) ; Arkansas, Michigan, and South Carolina (20 weeks); Kansas (16 weeks); Georgia (14 weeks); Missouri and North Carolina (13 weeks); and Florida (12 weeks).

Tax Reform

Tax Overhaul – Sweeping tax cuts take effect January 1, 2018, as a result of the \$1.5 trillion [“Tax Cuts and Jobs Act”](#) passed by Congress and signed into law by President Donald Trump in December 2017. Following are [highlights](#):

Lower Individual Tax Rates – The new law lowers individual taxes and sets the [rates](#) at 0%, 10%, 12%, 22%, 24%, 32%, 35%, and 37%. The typical family of four earning the median family income of \$73,000 will receive a [tax cut](#) of \$2,059. The lower tax rates expire in 2026.

Increase to Standard Deduction – The standard deduction nearly doubles (from \$6,500 and \$13,000) to \$12,000 and \$24,000 for individuals and married couples, respectively. This expansion expires in 2026.

Child Tax Credit Doubled – The child tax credit is doubled to \$2,000 per child, with up to \$1,400 of it being refundable. Parents must provide a child’s valid Social Security Number in order to receive the credit.

State and Local Taxes – The law continues to allow for the deduction of state and local taxes (property taxes and either income or sales taxes), but only up to a new limit of \$10,000.

Mortgage Interest Deduction – For homeowners with existing mortgages that were taken out to buy a home, there is no change to the current mortgage interest deduction. For homeowners with new mortgages on a first or second home, the home mortgage interest deduction is available up to \$750,000.

Charitable Contributions –

The law continues and expands the deduction for charitable contributions, but denies a charitable deduction for payments made in exchange for college athletic event seating rights.



Medical Expense Deduction – The law allows taxpayers to deduct medical expenses exceeding 7.5% of adjusted gross income, but only for 2017 and 2018.

Child and Dependent Care and Adoption Tax Credits – The law preserves the existing child and dependent care tax credit and the existing adoption tax credit.

Individual Mandate – The law zeros out the penalties for not obtaining health coverage under the Affordable Care Act effective January 1, 2019.

Individual Alternative Minimum Tax (AMT) – The individual AMT is increased to apply only to individuals earning more than \$500,000 or joint filers earning at least \$1 million.

Estate Tax – The estate tax deduction is nearly doubled to about \$11 million for individuals and \$22 million for couples. The exemptions revert to current levels after 2025.

Lower Corporate Rate – The corporate tax rate is cut from 35% (highest in the industrialized world) to 21% beginning January 1, 2018.

Pass-Through Taxation – The law provides a first-ever 20% tax deduction that applies to the first \$315,000 of joint income earned by all businesses organized as S corporations, partnerships, LLCs, and sole proprietorships.

Business Expensing – Full expensing of new and used capital investments is permitted for five years. After 2022, the 100% allowance is phased down by 20% each year.

Repatriation – Overseas profits will be taxed automatically at a 15.5% rate for cash assets and 8% for illiquid assets.

Corporate Alternative Minimum Tax – The corporate AMT is repealed.

401(k) Plans and Tuition Benefits – The law retains existing retirement savings options, such as 401(k) plans and individual retirement accounts (IRAs), and existing tuition benefits.

Meals – The business deduction for employee meal expenses is repealed effective January 1, 2018, but employees can continue to exclude the benefit from income.

Other – The law also creates a paid leave credit for employers, repeals the business tax deduction for onsite gyms effective January 1, 2018, and makes changes to moving expenses and achievement awards (see Payroll Taxes and Tax Credits).



Background Checks

Background Checks – The majority of employers (72%) conduct background checks for every new employee before hire, according to a March 23, 2017 CareerBuilder [survey](#). Depending on the job, employers often check new hires' education, previous employment, criminal record, previous addresses, and driving records. Nearly one in five (18%) employers has made a bad hire because it did not conduct a background check.

State "Ban the Box" Laws – California's [statewide](#) "ban the box" [legislation](#) became effective January 1, 2018. California is the tenth state to prohibit pre-offer inquiries regarding applicants' conviction histories and regulate employers in their decisions to deny employment to applicants based on their conviction history. Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and [Vermont](#) have similar measures.

Local "Ban the Box" Laws – More than 150 cities and counties have adopted "[ban the box](#)" laws covering private or public sector employers. For example, in New York City, it is a *per se* violation to use a standard boilerplate job application across multiple jurisdictions that requires or refers to criminal history, even with a New York City disclaimer, under new [regulations](#) that took effect on August 4, 2017. More than 226 million people in the United States (more than two-thirds of the population) live in a state or locality with some form of "ban the box" policy, according to the National Employment Law Project.

EEOC and OFCCP Guidance on Background Checks – Despite the change in administrations, the previously issued U.S. Equal Employment Opportunity Commission (EEOC) [guidance](#) on the use of arrest and conviction records to make employment decisions, and its [joint tips](#) with the Federal Trade Commission (FTC) on the use of background checks, remain in effect. In addition, the Office of Federal Contracts Compliance Programs (OFCCP) [guidance](#) to federal contractors on criminal record

restrictions and discrimination based on race and national origin also remains in place.

Fair Chance Act – [Legislation](#) that would prohibit *federal contractors* from requesting criminal history information from candidates for positions within the scope of federal contracts until the conditional offer stage was introduced into Congress in April 2017. The Fair Chance Act also would ban the federal government from requesting criminal history information from applicants for most positions until they reach the conditional offer stage. The bill includes exceptions for positions related to law enforcement and national security duties, positions requiring access to classified information, and positions for which access to criminal history information before the conditional offer stage is required by law. The bill is pending in Congress.

Background Check Authorization Form – On an issue of first impression, the U.S. Court of Appeals for the Ninth Circuit on March 20, 2017 [held](#) that it is a “[willful violation](#)” of the Fair Credit Reporting Act (FCRA) for a prospective employer to procure a job applicant’s consumer report (background check) after including a liability waiver in the same document as the FCRA statutorily mandated disclosure. Employers should

review their background check forms to ensure compliance with the FCRA.

Resume Fraud – Three in four Human Resource managers (75%) report having caught a lie on a resume, according to a September 14, 2017, CareerBuilder [report](#).

Credit Checks – In April 2017, the [District of Columbia](#) became the latest jurisdiction to limit employers’ use of credit checks and credit-related information in employment. Eleven [states](#) (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington) and several cities and counties (including Chicago, Cook County (IL), Philadelphia, and New York City) have passed similar measures.

Access to Social Media – Half the states have enacted [legislation](#) to prevent employers from requesting or requiring user names, passwords, or other personal social media account information from job applicants or employees: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

Cybersecurity and Privacy

Ransomware Attacks Expected to Continue – According to [McAfee’s outlook for 2018](#): *The profitability of traditional ransomware campaigns will continue to decline as vendor defenses, user education, and industry strategies improve to counter them. Attackers will adjust to target less traditional, more profitable ransomware targets, including high net-worth individuals, connected devices, and businesses.* This means that organizations need to continue to [take steps to prevent ransomware attacks and be prepared for one should it occur](#).

GDPR – The European Union’s Updated Data Privacy Regime Becomes Effective in 2018 – Although many U.S. organizations

think the European Union’s data protection requirements do not apply to them, organizations that control or process the personal data of EU residents likely are subject to the [General Data Protection Regulation](#) (GDPR),

which takes effect on May 25, 2018. For example, U.S. companies that sell or market products or services over the internet to individuals in the EU need to assess whether they



must comply with GDPR. HR departments, in particular, should be aware of the provisions concerning human resources data, as well as employee monitoring and profiling/analytics activities. Many companies are grappling with the GDPR's numerous privacy and security compliance requirements, which are considered the greatest change to EU privacy and data security law in 20 years. Key changes include a 72-hour breach reporting requirement, the "right to be forgotten," heightened data subject consent, and tougher fines and penalties. Not all organizations in the U.S. will have GDPR compliance requirements, but many will and their executives, human resources, legal, and IT departments should get up to speed quickly.

Use/Regulation of Biometric Information Likely to Increase –

During 2017, the Illinois Biometric Information Privacy Act (BIPA) spawned multiple class action lawsuits concerning the collection, safeguarding, or retention of biometric information. News of the Illinois cases caused many companies with operations in the state to review their compliance with BIPA as well as similar laws in other states, such as Texas and Virginia. See our FAQs. A [Forbes article](#) reported Mark Adams, CEO of Lumileds, stated, "With personal identification and security matters on everyone's minds, the demand for high-performance, reliable biometrics is exponentially growing." The wave of biometric class action suits, together with the growing demand and use of biometric data and devices, seems to have spurred other states to consider similar legislation. For example, in 2017, Alaska, Connecticut, Massachusetts, New Hampshire, and Washington initiated or passed legislation to enhance protections for biometric information. Accordingly, companies that want to implement biometric technology for use with employee or customer applications (e.g., for timekeeping, physical security, validating transactions, or other purposes) need to be prepared.

Safeguards Required to Protect Personal Information – In the wake of recent massive data breaches, there were several data privacy and security legislative proposals introduced on both the federal and state level in 2017. On the federal level, Senate

Democrats [introduced](#) the [Consumer Privacy Protection Act of 2017](#) geared toward protecting Americans' personal information against cyberattacks and to ensure timely notification and protection when data is breached. Shortly after that, three Democratic Senators introduced the [Data Security and Breach Notification Act](#) that would require companies to report a breach within 30 days of becoming aware of it and face a penalty of up to 5 years in prison for concealing a breach.

On the state level, New York Attorney General Eric Schneiderman [announced](#) his proposal of the SHIELD Act, a measure that would heighten data security requirements for companies and better protect New York residents from data breaches of their personal information. Similar legislation has been proposed in Ohio and Vermont and is being contemplated in other states. This follows developments on which we reported last year in California, Illinois, and Connecticut, as well as New York's comprehensive "Reg. 500." Enforced by the New York Department of Financial Services, Reg. 500 is a first-of-its-kind state cybersecurity regulation directed at financial services entities (such as banks, check cashers, credit unions, insurers, mortgage brokers, and loan servicers) and some of their subcontractors. Finally, effective January 1, 2018, Maryland [significantly expanded](#) its data breach notification law. The trend for more demanding mandates to safeguard personal and confidential information continues.

GPS, Analytics, Wearables, IoT – GPS is no longer working alone to track the whereabouts of employees or company equipment and data. Combining GPS technology with IoT, analytics technologies, and smart devices, including wearables, employers are able to significantly facilitate the logging and sharing of information, such as the initiation, completion, or status of critical tasks. These technologies are likely to improve efficiency, productivity, and safety, but the enhanced and ever-increasing connectivity also are likely to raise deeper privacy and security concerns.

W-2 Phishing Attacks Expected in Early 2018 – In February 2017, the [IRS issued a warning](#) to all employers regarding the resurgence of a W-2-based cyber scam. The scam, which targets businesses during tax season, also was “spreading to other sectors, including school districts, tribal organizations and nonprofits.” In August 2017, the IRS renewed its warning to tax professionals and businesses as part of its “[Don’t Take](#)

[the Bait](#)” campaign. Two months later, the [IRS reminded the public about](#) its procedures for reporting successful or failed attempts. With the tax season quickly approaching, it is worth re-visiting how not to fall prey to this scam, take steps to avoid it, and have a response plan in case you become a victim.

Drugs and Alcohol



Support for Legalizing Marijuana – Nearly two-thirds (64%) of Americans now support legalizing marijuana (the highest percentage in a half century) according to an October 25, 2017, Gallup [poll](#). Nearly half (46.2%) of U.S. adults have [tried](#) marijuana, and 24 million (11%)

have [used](#) it in the past month, according to government [data](#).

Recreational Marijuana – In 2018, small amounts of marijuana for adult recreational use will be legally available for purchase in California and Massachusetts, as a result of November 2016 ballot initiatives. Six other [states](#) (Alaska, Colorado, Maine, Nevada, Oregon, and Washington) and the District of Columbia also have legalized the sale and use of recreational marijuana, although Maine has [delayed](#) implementation of certain provisions of its law. Legislation that would have legalized marijuana for recreational use in Vermont was [vetoed](#) by Gov. Phil Scott (R) in May 2017. More than one in five Americans live in a state where recreational use of marijuana is legal under state law. Supporters of recreational marijuana are seeking to put the issue on the ballot in several states for the November 2018 election. In [Canada](#), recreational marijuana is expected to be legalized by July 1, 2018.

Medical Marijuana – A total of 29 [states](#), the District of Columbia, Guam, and Puerto Rico allow comprehensive public medical marijuana and cannabis programs, and 17 states allow

use of “low THC, high cannabidiol (CBD)” products for medical reasons in limited situations or as a legal defense, according to the National Conference of State Legislatures. In March 2017, Congress passed an appropriations bill that barred the U.S. Department of Justice (DOJ) from preventing states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”

Rights of Medical Marijuana Users – In 2017, courts in several states (including [Connecticut](#), [Massachusetts](#), and [Rhode Island](#)) issued rulings addressing the rights of medical marijuana users in the hiring process. Employers in such states should review their hiring processes in view of these decisions.

Federal Marijuana Enforcement – On February 23, 2017, the White House [indicated](#) that the DOJ may seek “greater enforcement” of federal laws prohibiting the *recreational* use of marijuana. In March 2017, a group of 11 U.S. Senators [requested](#) an opportunity to comment on any shift in DOJ policy. On January 4, 2018, the DOJ rescinded the agency’s 2013 “[Cole Memorandum](#),” which articulated the federal government’s (limited) enforcement priorities with respect to marijuana.

DOT Position – State initiatives that permit use of marijuana for [recreational](#) purposes have “no bearing” on the U.S. Department of Transportation (DOT) drug testing program, and [medical marijuana](#) under state law is not a valid medical

explanation for a DOT positive drug test result, according to the agency.

Workplace Drug Tests – Illicit drug use among U.S. employees continues to rise, resulting in the highest positive drug test rates in the last 12 years, according to a May 16, 2017, [report](#) by Quest Diagnostics. Positive marijuana tests have increased dramatically over the last three years, while amphetamines (including methamphetamines) positivity continued its year-over-year upward trend. Positive cocaine drug test results [increased](#) for a fourth straight year.

Opioid Abuse – The misuse of prescription pain relievers is “second only to marijuana as the nation’s most prevalent illicit drug problem,” according to a July 13, 2017, government [report](#). Nearly 11.9 million people in the U.S. [misuse opioids](#), including 11.5 million who misuse pain relievers and 948,000

who use heroin. Over 50% of [drug test results](#) in 2016 showed evidence of misuse of prescription drugs, according to a September 2017 report by Quest Diagnostics.

DOT Drug Testing – DOT [amended](#) its [drug testing program](#) effective January 1, 2018, to add four semi-synthetic opioids (hydrocodone, hydromorphone, oxy-morphone, and oxycodone) to its drug-testing panel, restate the cutoff concentrations for initial and confirmatory tests, and clarify that only urine specimens are authorized to be used for drug testing. The U.S. Department of Health and Human Services (HHS) is considering whether to authorize hair testing, but scientific and technical guidelines have yet to be issued.

Immigration



U.S. Immigrants – The United States has 43.2 million immigrants, more than any country in the world, “accounting for about one-fifth of the world’s immigrants,” according to a May 2017 [report](#) by Pew Research. “Most

immigrants (76%) are in the country legally, while a quarter (24%) are unauthorized.”

Limit on Refugees – Since 1980, about 3 million [refugees](#) have been resettled in the U.S., more than any other country. In FY 2018, the Trump Administration intends to cap the number of refugees allowed into the U.S. to 45,000, the lowest limit in decades.

Refugee Admissions – President Trump’s October 24, 2017, [Executive Order](#) that resumed the U.S. Refugee Admissions

Program is being [challenged](#) in court. The Order imposed new “screening and vetting” procedures and indefinitely blocked part of the program that allowed refugees to bring their spouses and children to the U.S.

Travel Ban – President Trump’s latest [proclamation](#) imposing new country-specific [travel restrictions](#) on eight countries (Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen) took effect on December 4, 2017, after the U.S. Supreme Court ruled that the restrictions may take full effect while legal challenges proceed. Two federal appeals courts (the Fourth and Ninth Circuits) are considering the substantive [legality](#) of the travel restrictions, and their decisions on the underlying merits are expected to be appealed to the Supreme Court in 2018.

Unauthorized Immigrants – From 1990 to 2007, the [unauthorized immigrant](#) population tripled in size—from 3.5 million to a record high of 12.2 million. The number of

unauthorized immigrants declined by 1 million during the Great Recession and has since leveled off to about 11 million, or 3.4% of the U.S. population, according to Pew Research.

States and Cities – About half of the nation’s immigrants live in just three [states](#) (California 25%, Texas 11%, and New York 10%), and two-thirds live in just 20 metropolitan areas (including New York City, Los Angeles, Miami, Chicago, Houston, Dallas, and Washington D.C.).

Language – Half (51%) of immigrants in the U.S. are [English proficient](#), according to Pew Research. Spanish is the most commonly spoken language among immigrants, with approximately 44% of immigrants in the U.S. speaking Spanish at home.

U.S. Workforce – About 8 million unauthorized immigrants are working in the U.S. or looking for work, accounting for 5% of the civilian labor force, according to Pew Research [estimates](#).

DACA – In 2018, Congress is expected to consider legislation to allow 700,000 young adults who came to the U.S. as children, and were granted temporary work authorization and protection from deportation under President Barack Obama’s 2012 Deferred Action for Childhood Arrivals ([DACA](#)) Program to remain in the U.S. In September 2017, the Trump administration [announced](#) it would begin “an orderly transition and [wind-down](#)” of the DACA program and end the program in March 2018, after a group of 10 states threatened to [sue](#) to end the program. On January 9, 2018, a federal judge

in San Francisco ruled that DACA must remain in place while litigation over President Donald Trump’s decision to wind down the program is pending. The judge issued a nationwide injunction directing the Trump administration to re-start the program. This means that any DACA recipients who were unable to submit status renewal applications to the U.S. Department of Homeland Security (DHS) by last fall’s deadline should have that opportunity now.

Temporary Protected Status – In 2018, the DHS will [decide](#) whether 86,000 [Hondurans](#) who have been granted Temporary Protected Status (TPS) may remain in the U.S. or must return to their home country (or adjust their immigration status). Currently, more than 330,000 nationals from 10 countries have been granted [TPS](#) in the U.S. because of disease, natural disaster or conflict in their home country. They are protected from removal and can obtain an employment authorization document to work in the U.S. In 2017, following a review of the conditions in their home country, DHS terminated the TPS designation for [Sudan](#) (effective November 2, 2018), [Nicaragua](#) (effective January 5, 2019), [South Sudan](#) (effective May 2, 2019), and [Haiti](#) (effective July 22, 2019). DHS announced on January 8, 2018, the termination TPS designation for 195,000 [Salvadorans](#) ([effective September 9, 2019](#)).

Immigration Priorities – On October 8, 2017, the Trump administration released a series of immigration principles and policy priorities related to border security, interior enforcement, and a merit-based immigration system.

I-9 Forms, E-Verify and Identity Issues

Revised I-9 Form – Beginning September 18, 2017, employers are required to use the revised (07/17/17 N) version of the [Form I-9](#), Employment Eligibility Verification to verify the identity and work authorization of every new employee hired or for the reverification of expiring employment authorization of current employees. Employers can complete the Form I-9

electronically on a fillable PDF or by hand by downloading the PDF.

Updated I-9 Handbook for Employers – An updated [Handbook for Employers](#): Guidance for Completing Form I-9 was issued by the U.S. Citizenship and Immigration Services (USCIS) in

2017. The web-based resource provides employers with detailed guidance on completing Form I-9, photocopying and retention, and unlawful discrimination. It also includes sample documents and answers to frequently asked questions.

I-9 Form Audits – Acting ICE Director Tom Homan in October 2017 [pledged](#) to “significantly increase” the number of worksite inspections in FY 2018 and to prosecute more businesses that knowingly hire undocumented immigrants.

New California Law – Beginning January 1, 2018, with some exceptions, [California](#) employers must ask for a warrant before allowing federal immigration officials into non-public areas of a workplace under the state’s [new](#) Immigrant Worker Protection Act. The [law](#) also requires, among other things, that California employers to provide notice to employees (and any applicable union) of any inspection of I-9 forms by ICE within 72 hours of receiving notice of the inspection. In addition, under the new law, California employers are barred from sharing employee records (e.g., Social Security Numbers) without a subpoena or judicial warrant, except for I-9s or other documents when a USCIS Notice of Inspection has been provided. They also are prohibited from re-verifying a current employee’s employment eligibility when not otherwise required by federal law.

Redesigned Green Cards – USCIS began issuing [redesigned](#) Permanent Resident Cards (also known as Green Cards) and Employment Authorization Documents (EADs) on May 1, 2017. The redesigns use enhanced graphics and fraud-resistant security features to create cards that are highly secure and more tamper-resistant than the ones currently in use. Both the existing and the new Green Cards and EADs will remain valid until the expiration date shown on the card.

E-Verify – In May 2017, the Trump Administration proposed to make E-Verify mandatory for all employers within three years, a requirement that requires Congressional approval. [E-Verify](#) is

an internet-based system that compares information from an employee’s Form I-9 to data from DHS and Social Security Administration records to confirm employment eligibility. Nine states (Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Utah) require use of E-Verify by most employers, and another 11 [states](#) require E-Verify for most public employers. Two states (Minnesota and Pennsylvania) require only public contractors to use E-Verify. “Nationally, 57% of jobs are screened with E-Verify, up from half in 2015 and about 30% in 2010,” according to [Pew Research](#).

E-Verify Participation Poster – A redesigned [E-Verify Participation Poster](#) (in English and Spanish in one poster) was released by USCIS in September 2017. The new poster can be downloaded when participants log into E-Verify. Employers are also required to display the [Immigrant and Employee Rights](#) (IER) Right to Work posters in English and Spanish.

E-Verify RIDE Program – In July 2017, Arizona, Maryland, and Wyoming became the latest states to join the Records and Information from DMVs for E-Verify ([RIDE](#)) Program. The RIDE Program allows E-Verify to validate the authenticity of driver’s licenses and state identification cards issued by participating state departments of motor vehicles (DMVs) that employees present as Form I-9 identity documents if the employer uses E-Verify. Seven other states (Florida, Idaho, Iowa, Mississippi, Nebraska, North Dakota, and Wisconsin) also participate in the RIDE Program.



EEOC



Discrimination Charges – EEOC [projects](#) that nearly 87,000 employment discrimination charges will be filed against private sector employees in FY 2018. In [FY 2017](#), 84,254 discrimination

charges were filed with the EEOC, 9% fewer than the previous year. Retaliation and race continue to be the most frequent basis of discrimination alleged in EEOC charges, followed by disability, sex, age, national origin, and religious discrimination.

Charges by State – As in prior years, a fourth of all discrimination charges filed with the EEOC were filed in just three [states](#): Texas (10.2%), Florida (8.3%), and California (6.4%).

Allegations – Unlawful discharge continues to be the most frequent [issue](#) asserted in discrimination charges, followed by harassment, discrimination with respect to terms and conditions of employment, discipline and suspension, reasonable accommodation, and wages.

EEOC Digital Charge System – The EEOC continues to roll out its new Digital Charge System in an effort to more efficiently process and investigate charges of discrimination.

Employers – In 2016, EEOC allowed employers against whom a charge has been filed to communicate with the EEOC through a secure portal to download the charge, review and respond to an invitation to mediate, submit a position statement, and provide their contact information.

Charging Parties – In 2017, EEOC launched its online intake system, allowing potential charging parties to submit a pre-charge inquiry for review, schedule interviews online, and

submit and receive charge information over its [EEOC Public Portal](#).

State Agencies – In late 2017, EEOC commenced electronic notification and document exchange of dual-filed charges with state fair employment practices agencies (FEPAs). EEOC has work sharing agreements with 92 state and local FEPAs. FEPAs resolved 36,000 charges in FY 2016.

Charge Resolutions – EEOC offices are deploying new strategies to more efficiently prioritize charges with merit and more quickly resolve investigations once the agency has sufficient information. In FY 2017, EEOC resolved more than 99,000 discrimination charges and reduced its charge workload by 16.2%, to 61,261, the lowest inventory level in 10 years.

Dispositions of Charges – As in past years, fewer than one in five discrimination charges filed with the EEOC were closed with a favorable outcome to the charging party (merit resolution), including through settlement, withdrawal of a charge with benefits, and a finding of reasonable cause. In contrast, about two-thirds of discrimination charges were deemed to have “no reasonable cause,” and nearly one in six were administratively closed.

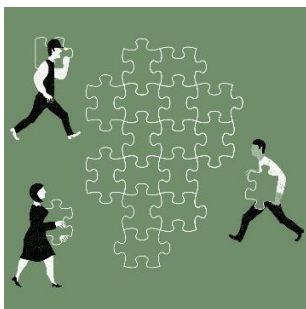
Mediations – In FY 2017, EEOC achieved 7,218 successful mediations out of 9,476 mediations conducted (76%), resulting in more than \$163.7 million in benefits to charging parties. Mediations were completed in an average of 100 days. EEOC continues to increase the employer participation through the use of Universal Agreements to Mediate. Nearly 2,800 employers have agreed with EEOC to mediate all eligible charges filed against the employer, prior to agency investigation or litigation.

Conciliation – EEOC successfully resolved, through conciliation, 40% of charges in the private sector in which the agency

determined there was probable cause to believe discrimination had occurred.

Relief Obtained – In FY 2017, EEOC secured \$355.6 million for victims of employment discrimination in private sector and state and local government workplaces through mediation, conciliation and settlement, and \$42.4 million for charging parties through litigation.

Discrimination



EEOC Members – For the first time in a decade, the [five-member EEOC](#) will swing to a 3-2 Republican majority in 2018, upon Senate confirmation of Trump nominees Janet Dhillon and Daniel Cade. Dhillon, who will become the new chair of the agency, has been general

counsel for three major corporations. Cade, a West Point graduate, is a disabled Iraq war veteran who previously served in the Bush administration. They will join Acting Chair Victoria Lipnic (R), and EEOC Commissioners Chai Feldblum (D) and Charlotte Burrows (D). The Commission is expected to focus on reducing the agency's backlog of cases. It may reconsider EEOC positions on sex discrimination, pay data collection, and wellness programs.

EEO-1 and VETS-4212 Reports – Employers have until March 31, 2018 to [file](#) their EEO-1 Reports for 2017. The controversial pay data collection aspects of the EEO-1 form, which were to be part of the 2017 filing, were [stayed](#) by the White House Office of Management and Budget on August 29, 2017. However, the EEO-1 form that collects data on race, ethnicity, and gender by occupational category remains in effect. The 2017 VETS-4212 reporting was unaffected by the changes to the EEO-1 reporting requirements. However, beginning in 2018, government contractors may use a [single snapshot](#) of data as of December 31, 2018, for reporting on both the 2018 VETS-4212 (to be filed between August 1 and September 30, 2018) and the 2018 EEO-1 (to be filed by March 31, 2019).

EEOC Litigation – EEOC filed 184 merit lawsuits in FY 2017 (more than double the number of suits filed in FY 2016), including 124 suits on behalf of individuals, 30 non-systemic suits with multiple victims, and 30 systemic suits. Disability discrimination was the most common basis for lawsuits brought by the EEOC.

Contactors also must report veterans hiring data on their VETS-4212 for the 12 months preceding their snapshot date.

Sexual Harassment Guidelines – In 2018, EEOC is expected to publicly release new [sexual harassment](#) guidelines for the first time in more than 20 years. The new guidelines were approved by the EEOC in November 2017, but must be approved by the White House Office of Management and Budget before being released.

Anti-Harassment Training – In October 2017, the EEOC launched two new anti-harassment [training programs](#) for employers: Leading for Respect (for supervisors) and Respect in the Workplace (for all employees). Rather than concentrating on legal definitions and standards for liability, the new training programs focus on respect, acceptable workplace conduct, and the types of behaviors that contribute to an inclusive workplace.

California: Supervisory Training – Beginning January 1, 2018, employers subject to California's mandatory sexual harassment [training](#) requirement for supervisors must [include](#) training on the prevention of harassment based on gender identity, gender expression, and sexual orientation.

Extended Medical Leave – A request for a two-to-three month leave of absence is not a reasonable accommodation under the Americans with Disabilities Act (ADA), according to a September 20, 2017, decision by the U.S. Court of Appeals for the Seventh Circuit. Significantly, the Court did not hold that

the ADA never requires leave as an accommodation, noting that a multi-month leave of absence is different than a leave of absence that is “intermittent,” “a couple of days,” or “even a couple of weeks.” *Severson v. Heartland Woodcraft*. On October 17, 2017, the Seventh Circuit reiterated that an “employee who needs long-term medical leave...is not a ‘qualified individual’ under the ADA.” *Golden v. Indianapolis Housing Agency*.

Equality Act – Congressional Democrats on May 2, 2017, reintroduced a bill, the [Equality Act](#), which would prohibit employment discrimination on the basis of sexual orientation and gender identity. The measure also would prevent employers and other covered entities from using the Religious Freedom Restoration Act as a shield against discrimination claims.

Sexual Orientation Discrimination – In 2017, federal appellate courts disagreed on whether discrimination on the basis of sexual orientation is a form of sex discrimination and [unlawful](#) under Title VII of the Civil Rights Act of 1964. An *en banc* panel of all active judges of the [Seventh Circuit](#) ruled that it was unlawful under Title VII, but panels of three judges in the Second and [Eleventh](#) Circuits held that it was not. While the U.S. Supreme Court in December 2017 declined to review the Eleventh Circuit decision, the full panel of active judges in the Second Circuit is rehearing the issue, and that case ultimately may be appealed to the U.S. Supreme Court.

Affirmative Action and Federal Contractors



Agency in Transition – OFCCP remains in a state of transition. In 2017, the agency weathered talk of a possible merger with EEOC, offered “buyouts” to OFCCP personnel ahead of potential budget cuts, and operated without political

leadership for much of the year. In December 2017, Ondray T. Harris, former deputy chief of employment litigation at the Justice Department in the Bush Administration, was [appointed](#) the new [Director](#) of OFCCP.

OFCCP Audits – OFCCP conducted only 1,036 [compliance evaluations](#) of supply and service contractors in FY 2017, the fewest in more than a decade. They represent less than 1.5% of federal contractor establishments. Less than 20% of the audits resulted in a conciliation agreement or consent decree, and only 3.9% resulted in a discrimination violation.

Courtesy Scheduling Letters – OFCCP in February 2017 [resumed](#) the practice of sending [Courtesy Scheduling Announcement Letters](#) to approximately 800 federal contractors, giving them advance notice of potential upcoming OFCCP audits. The courtesy letters do not commence an audit (only a scheduling letter can do that) and do not guarantee an audit. Moreover, OFCCP can audit locations not listed in a courtesy letter.

Record Monetary Relief – Despite conducting fewer audits, OFCCP in FY 2017 obtained a record \$23.9 million in [monetary relief](#) for 11,653 employees and job seekers. Most of the settlements stemmed from audits that began during the Obama Administration. In the past decade, OFCCP has obtained more than \$142 million in monetary relief for more than 200,000 employees and job seekers.

Recommendations for Reform – In the fall of 2017, the U.S. Chamber of Commerce issued a series of [recommendations](#) to reform OFCCP. They included returning to a more neutral enforcement agency approach, encouraging comprehensive

and holistic evaluations of contractors' affirmative action and nondiscrimination efforts (as opposed to overemphasizing statistical analyses), and reevaluating the true burden placed on federal contractors in responding to affirmative action plan scheduling letters and audits.

In November, the U.S. Government Accountability Office (GAO) issued a [report](#) on OFCCP and EEOC's approaches to investigating tech industry employers. The GAO report noted that while the estimated percentage of minority technology workers increased from 2005 to 2015, no significant growth occurred for female and Black workers.

The GAO issued six recommendations, one for EEOC and five for OFCCP:

1. EEOC should develop a plan to clean and improve internal databases on industry identifications to better focus investigations of technology companies.
2. OFCCP should analyze internal process data from closed evaluations to better understand the cause of delays that occur during compliance evaluations and make changes accordingly.
3. OFCCP should take steps toward requiring contractors to disaggregate race data for the purpose of setting placement goals in the AAP rather than setting a single goal for all minorities, incorporating any appropriate accommodations for company size. For example, OFCCP could provide guidance to contractors to include more specific goals in their AAP or assess the feasibility of amending their regulations to require them to do so.
4. OFCCP should assess the quality of the methods used by OFCCP to incorporate consideration of disparities by industry into its process for selecting contractor establishments for compliance evaluations. It should use the results of this assessment in finalizing its procedures for identifying contractor establishments at the greatest risk of noncompliance.
5. OFCCP should evaluate the current approach used for identifying entities for compliance review and determine whether modifications are needed to reflect current

workplace structures and locations or to ensure that subcontractors are included.

6. OFCCP should evaluate the Functional Affirmative Action Program to assess its usefulness as an effective alternative to an establishment-based program and determine what improvements, if any, could be made to better encourage contractor participation.

In response, OFCCP stated the need for regulatory change to alter placement goal requirements.

Outlook for 2018 – In 2018, OFCCP is expected to engage in more compliance assistance, refrain from engaging in any significant regulatory action, and move forward with plans to establish skilled regional centers in San Francisco and New York City to handle complex audits of contractors in specific industries. The agency, which has reduced its staff by more than 200 employees nationwide over the past six years, anticipates further budget cuts and staff reductions in the coming year.

Disability Self-ID Forms – OFCCP's required disability self-identification form, which expired January 31, 2017, was [approved](#) for another three years — until January 31, 2020. An [updated version](#) of the form (in multiple languages) bearing the new expiration date is available on OFCCP's [website](#).

The "Cake Baker" Case

In 2018, the U.S. Supreme Court will decide whether applying Colorado's public accommodation law to compel a cake artist to design a custom cake honoring same-sex marriage violates the baker's sincerely held religious beliefs about marriage violate the Free Speech or Free Exercise Clause of the First Amendment. The [case](#) presents potentially far-reaching implications for issues at the intersection of civil rights and religious freedoms.

Veteran Hiring Benchmark – On March 31, 2017, OFCCP [lowered](#) the [national benchmark](#) for hiring protected veterans from 6.9% to 6.7%. The move is the third reduction of the benchmark by OFCCP since its inception in March 2014. Contractors required by the [Vietnam Era Veterans'](#)

[Readjustment Assistance Act](#) to develop a written affirmative action program also must establish a hiring benchmark for protected veterans each year or adopt the national benchmark provided by OFCCP.

Employment Litigation



Workplace Lawsuits – Nearly 12,000 employment discrimination lawsuits are projected to be filed in federal court in FY 2018, according to recent [trends](#). While federal wage and hour lawsuits have slowed recently, they have

increased 60% since 2007. Lawsuits brought under the ADA have more than doubled in the past decade and continue to climb. Similarly troubling, Family and Medical Leave Act (FMLA) lawsuits have tripled in the past five years.

Sexual Harassment Settlements – Under a provision of the sweeping tax reform [law](#) that became effective January 1, 2018, employers may no longer take a business tax deduction for any settlement or payment related to sexual harassment or sexual abuse (or for attorney's fees related to such a settlement or payment) *if* such settlement or payment is subject to a nondisclosure agreement.

Class Waivers – The U.S. Supreme Court will decide in 2018 [whether](#) arbitration agreements with individual employees that bar pursuing work-related claims on a collective or class basis in any forum are prohibited because they limit employees' right under the National Labor Relations Act (NLRA) to engage in protected concerted activities. The U.S. Courts of Appeals are [split](#) over the issue, with three circuits (Second, Fifth, and Eighth) concluding such waivers do not violate the NLRA, and three circuits (Sixth, Seventh, and Ninth) agreeing with the National Labor Relations Board (NLRB or

Board) that they violate the NLRA. [Reportedly](#), more than half of nonunion private sector employers have mandatory employment arbitration agreements that cover more than 60 million workers.

U.S. Supreme Court – President Trump released an updated [list](#) of 25 individuals he would consider for a future Supreme Court vacancy, should one arise in 2018. [Neil M. Gorsuch](#) was confirmed as Associate Justice to the Supreme Court in April 2017, after Senate rules were changed to make his confirmation subject to a simple majority vote. Of the eight other justices, three of them are at least age 79 years old: Ruth Bader Ginsburg (84), Anthony Kennedy (81), and Stephen Breyer (79). Some say Justice Kennedy may be contemplating retiring from the Court in 2018, which would allow Trump to nominate his replacement.

Federal Judiciary – With approximately 160 judicial vacancies, President Trump could nominate up to 30% of the federal bench in his first four-year term, provided Republicans maintain its Senate majority and the Senate accelerates the pace of the confirmation process. Trump had 12 nominees to the federal court of appeals confirmed in 2017, the most federal appellate nominees ever confirmed during a president's first year in office.

Antitrust Guidance for HR – In 2016, the U.S. Department of Justice (DOJ) and the Federal Trade Commission issued antitrust [guidance](#) for human resource professionals. In his September 12, 2017, [remarks](#), the acting head of the DOJ Antitrust Division quoted that guidance and reiterated that "[n]aked agreements among employers not to recruit certain

employees, or not to compete on employee compensation, are per se illegal” and may be prosecuted criminally.

Whistleblower Complaints – The number of employees filing federal [whistleblowing complaints](#) has risen over 80% in the past decade, and the government [projects](#) 3,400 new complaints will be filed in FY 2018. The Occupational Safety and Health Administration (OSHA) enforces the whistleblower provisions of more than 20 whistleblower [statutes](#), and recently revised its [online whistleblower complaint form](#). In FY 2018, the agency plans to make a number of significant updates to its [Whistleblower Investigations Manual](#) and will

expand the use of Alternative Dispute Resolution (ADR) to alleviate its investigative case load.

Dodd-Frank Whistleblowers – The U.S. Supreme Court will decide in 2018 [whether](#) the Dodd-Frank Act’s protections for whistleblowers are limited to those who report violations to the Securities and Exchange Commission, or whether they also extend to individuals who report alleged securities law violations [internally](#).

Pay and Wage & Hour



Federal Minimum Wage –

Legislation that would increase the federal minimum wage from \$7.25 an hour to \$15 an hour by 2024 stalled in Congress in 2017. The [federal](#) minimum wage was last increased in 2009. As of 2015, approximately 2.6 million

hourly workers in the United States are paid wages at or below the federal minimum wages, representing about 3.3% of all workers.

State Minimum Wages – Many states begin 2018 with higher minimum wages (see chart). Bills that would have increased the hourly state minimum wages in [Illinois](#) (to \$15 by 2022), [New Mexico](#) (to more than \$9 by 2018), and [Nevada](#) (to \$11 or \$12 over 5 years) were vetoed by Republican governors in 2017. Minimum wage hikes are expected to be on the ballot in several states in the November 2018 elections.

Local Minimum Wages – Nearly 40 cities and counties in more than 15 states have enacted [local minimum wage laws](#), and many of those have increased or will increase in 2018. In contrast, nearly half of the [states](#) have enacted laws that

preempt cities from passing their own local minimum wage laws.

Minimum Wage for Federal Contractors – Effective January 1, 2018, the minimum wage for [federal contractors](#) working on or in connection with contracts covered by Executive Order 13658 increased \$0.15, to \$10.35 per hour.

Tip Pooling – The U.S. Department of Labor (DOL) in 2018 [plans](#) to [rescind](#) the current restrictions on tip pooling by employers that pay [tipped employees](#) the full minimum wage directly. Such rule change will permit tip sharing between back of the house and front of the house employees, as long as tip credit is not taken. If a tip credit is taken, then sharing of tips between tipped and non-tipped employees would still be prohibited. State law, however, may continue to prohibit tip sharing even if tip credit is not taken.

Living Paycheck to Paycheck – Over 70% of U.S. workers are in debt, and three out of four (78%) live paycheck to paycheck, according to an August 24, 2017, [survey](#) by CareerBuilder.

New Overtime Pay Rule Coming – The DOL is [expected](#) to undertake new [rulemaking](#) in 2018 with regard to overtime pay. The Obama Administration’s [overtime pay rule](#) (which

would have more than doubled the required salary level from \$23,660 to \$47,476 for a full-year worker to qualify for the Fair Labor Standards Act white collar exemptions) was [invalidated](#) by a federal court. The DOL is expected to set a new salary level for the white collar exemptions in the low-\$30,000 range.

2018 Pay Raises – Pay raises for U.S. employees are expected to remain in the 3% range in 2018, according to separate surveys by [Mercer](#), [Willis Towers Watson](#), and [WorldatWork](#). Raises generally will range from about 1% to 4.5%, based on work performance.

Starting Salaries – The overall average [starting salary](#) for the college graduation class of 2017 was \$51,022, according to the National Association of Colleges and Employers. Starting salaries vary by graduating degree: Computer & Information Science (\$74,183), Engineering (\$64,530), Math & Statistics (\$53,259), Business (\$52,124), Health Professions (\$50,564), Physical Sciences (\$47,026), and English majors (\$40,466).

Negotiating Salaries – The majority of workers (56%) do not negotiate for better pay when they are offered a job, according to an October 27, 2017, CareerBuilder [survey](#). While most job candidates avoid negotiating, the majority of employers (53%) expect a counteroffer and are willing to negotiate salaries on initial job offers.

Salary History – Beginning January 1, 2018, [California](#) employers are prohibited from asking for or seeking salary history of job applicants. Similar bans will take effect in [Massachusetts](#) and in San Francisco on July 1, 2018. [Delaware](#), [Oregon](#), [Philadelphia](#), [Puerto Rico](#), and [New York City](#) have enacted similar measures. More than half of U.S. workers (53%) believe employers should not ask candidates about their current or past salary history when negotiating a job offer, according to a July 12, 2017, [survey](#) by Glassdoor.

Comp Time – [Legislation](#) that would allow private sector employers to offer employees the option of receiving either compensatory time or overtime pay for all hours worked in

New State Minimum Wage Rates

State	Minimum	Effective
Alaska	\$9.84	1/01/18
Arizona	\$10.50	1/01/18
	\$11.00	1/01/19
	\$12.00	1/01/20
California	\$11.00	1/01/18
(rates are lower for employers with 25 or fewer employees)	\$12.00	1/01/19
	\$13.00	1/01/20
	\$14.00	1/01/21
	\$15.00	1/01/22
Colorado	\$10.20	1/01/18
	\$11.10	1/01/19
	\$12.00	1/01/20
District of Columbia	\$13.25	7/01/18
	\$14.00	7/01/19
	\$15.00	7/01/20
Florida	\$8.25	1/01/18
Hawaii	\$10.10	1/01/18
Maine	\$10.00	1/01/18
	\$11.00	1/01/19
	\$12.00	1/01/20
Maryland	\$10.10	7/01/18
Michigan	\$9.25	1/01/18
Minnesota (small and large employers)	\$7.87	1/01/18
	\$9.65	1/01/18
Missouri	\$7.85	1/01/18
Montana	\$8.30	1/01/18
New Jersey	\$8.60	1/01/18
New York	\$10.40	12/31/17
(rates are higher for fast food workers and in New York City, Nassau, Suffolk, and Westchester Counties)	\$11.10	12/31/18
	\$11.80	12/31/19
	\$12.50	12/31/20
Ohio	\$8.30	1/01/18
Oregon	\$10.75	7/01/18
(rates are higher in Portland Metro and lower in nonurban counties)	\$11.25	7/01/19
	\$12.00	7/01/20
	\$12.75	7/01/21
	\$13.50	7/01/22
Rhode Island	\$10.10	1/01/18
	\$10.50	1/01/19
South Dakota	\$8.85	1/01/18
Vermont	\$10.50	1/01/18
Washington	\$11.50	1/01/18
(rates are higher in Seattle, Tacoma, and City of SeaTac)	\$12.00	1/01/19
	\$13.50	1/01/20

excess of 40 hours per week was passed by the U.S. House of Representatives on May 3, 2017. The “[Working Families Flexibility Act](#)” would allow employees, subject to a written agreement, to choose to accrue comp time, up to 160 hours

each year and to “cash out” their accrued comp time at the traditional overtime pay rate at any time throughout the year. The measure heads to the U.S. Senate, where it will require support by some Democrats to avoid a filibuster.

Payroll Taxes and Tax Credits



Social Security Taxes – In 2018, the maximum amount of earnings subject to the [Social Security tax](#) will rise to \$128,700

(from \$127,200). The Social Security tax rate of 6.2%, paid by both the employee and the employer, remains unchanged for 2018.

Medicare Taxes – The [Medicare tax](#) rate of 1.45% paid by both the employee and the employer remains unchanged in 2018. However, unlike Social Security, there is no limit on the amount of earnings subject to the Medicare tax. As in 2017, in addition to withholding Medicare tax at 1.45%, an employer must withhold a 0.9% [Additional Medicare Tax](#) from wages paid to an employee in excess of \$200,000 in a calendar year. There is no employer share of the Additional Medicare Tax.

Work Opportunity Tax Credit – The [Work Opportunity Tax Credit](#) program was extended through December 31, 2019, as part of [legislation](#) passed by Congress in 2015.

Filing Deadlines – Employers are [required](#) to file their copies of Form W-2 with the Social Security Administration by January 31, 2018. The deadline also applies to certain Forms 1099-MISC filed with the IRS to report non-employee compensation to independent contractors. Prior to 2017, employers typically

had until the end of February, if filing on paper, or the end of March, if filing electronically, to submit copies of these forms.

Mileage Reimbursement – Beginning January 1, 2018, the IRS’s optional [standard mileage rate](#) for the use of a car (also vans, pickups, or panel trucks) is 54.5 cents for every mile of business travel driven, up from 53.5 cents in 2017.

Transportation and Parking Benefits – In 2018, the monthly dollar limits for [tax excludable](#) transit passes and van pooling increases to \$260 (up \$5), as does the monthly limitation for qualified parking benefits (up \$5 to \$260), but the business deduction for such benefits is [eliminated](#) effective January 1, 2018.

Moving Expenses – Beginning January 1, 2018, the business deduction and the exclusion from taxable income for recipients of employer-paid moving expenses is [suspended](#).

Achievement Awards – Beginning January 1, 2018, employee achievement awards consisting of cash, gift cards, gift certificates, meals, tickets to theater or sporting events, stocks, and similar items are [not deductible](#) by an employer, and is taxable to the employee.

Absences, Paid Leave and FMLA

Calling in Sick – Nearly three in five workers (28%) say they feel obligated to make up an excuse for taking a day off, even though the majority of employees (54%) work for companies with a paid time off (PTO) program, and 40% of workers have called in sick in the last 12 months when they were not sick, according to a November 16, 2017, CareerBuilder [survey](#).

Paid Sick Leave – State Laws – New state laws requiring employers to provide paid sick leave to employees took effect in [Washington](#) on January 1, 2018, and will take effect in [Rhode Island](#) on July 1, 2018. Six other [states](#) (Arizona, California, Connecticut, Massachusetts, Oregon, and Vermont) and Puerto Rico have similar laws. Bills that would have required employers in [Maryland](#) and [Nevada](#) to provide paid sick leave were vetoed by Republican governors in 2017.

Paid Sick Leave – Local Laws – The patchwork of local laws requiring employers to provide paid sick leave continues to grow. In 2017, laws allowing workers to earn and accrue sick leave took effect in [Chicago](#) and [Cook County](#) (IL), and in [Minneapolis](#) and [Saint Paul](#) (MN). Several other cities and municipalities have enacted paid sick leave laws, including Berkeley (CA), Emeryville (CA), the District of Columbia, Los Angeles, Long Beach (CA), Montgomery County (MD), New York City, Oakland, Philadelphia, San Diego, San Francisco, SeaTac (WA), Santa Monica, Seattle, Spokane, and Tacoma, as well as many cities in New Jersey. The Pittsburgh Paid Sick Days Act remains [blocked](#) by ongoing litigation.

“Workflex” Bill – Under a [bill introduced](#) by House Republicans on November 3, 2017, employers who provide employees with paid leave (between 12 to 20 days a year [including vacation and up to six paid holidays], depending on the business size and the time the worker has been on the job) and offer one of six voluntary “workflex” options (such as telecommuting, compressed schedules, job sharing, and predictable or flexible schedules) would be exempt from the patchwork of state and local paid leave obligations.

Paid Family Leave – On January 1, 2018, [New York](#) became the fourth [state](#) to provide for paid family leave, joining California, New Jersey, and Rhode Island. All four of these state paid family leave programs are funded through employee-paid



payroll taxes and are administered through their state disability program. In 2017, the [District of Columbia](#) enacted a paid family leave program funded by employer contributions (0.62% of employee wages), with contributions to start on July 1, 2019, and benefits to begin on July 1, 2020. In 2020, [Washington](#) will become the fifth state to provide paid family leave (up to 12 weeks of paid leave at 90% of pay, up to \$1,000 a week). The cost of the Washington state benefits, beginning January 1, 2019, will be funded by a premium of 0.4% of wages, with the cost split between the employer (63%) and employee (37%).

Parental Bereavement Act – Legislation that would allow parents grieving the death of their child to take up to 12 weeks of unpaid, job-protected [leave](#) was introduced in Congress on March 16, 2017. The [bill](#) would amend the FMLA to include “death of a child” as a covered life event. Currently, the FMLA provides 12 weeks of unpaid leave for certain family events, such as the birth of a child, but not for the traumatic event of losing a child.

State Family Leave Laws – In addition to the federal [FMLA](#), the District of Columbia and many [states](#) (including California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin) have enacted state family leave laws that expand the amount of leave available or the classes of persons for whom leave may be taken.

Predictive Scheduling – Beginning July 1, 2018, [Oregon](#) will become the first state to regulate employer scheduling practices in the food service, hospitality, and retail industries. Several cities (including San Francisco, Seattle, Emeryville (CA), and [New York City](#)) have passed predictive scheduling ordinances, and two states (New Hampshire and Vermont)

prohibit employers from retaliating against an employee who requests a flexible work schedule. In 2018, the New York State Department of Labor is expected to finalize new [rules](#), statewide, that address employer scheduling practices, including schedule changes and “on-call” time.

Health and Retirement



Annual Premiums – The average annual premium for employer-sponsored health insurance in 2017 was \$6,690 for single coverage and \$18,764 for family coverage, with workers on average contributing 18% of the premiums for single coverage

and 31% for family coverage, according to [Kaiser](#).

Health Care Costs – U.S. employers expect health care costs to increase 4.3% to 5.5% in 2018, according to separate surveys by [Aon](#), [Mercer](#), and [Willis Towers Watson](#).

Prescription Drug Costs – The cost of prescription drug benefits continues to rise, with [Aon](#) and [Mercer](#) projecting 7% cost increases in 2018. Participating in purchasing coalitions, adding a fourth tier copay for specialty drugs, and carving out specialty drugs from medical benefits are among the approaches employers are using to rein in prescription drug costs.

Health FSAs – In 2018, employees can contribute up to \$2,650 to a [health flexible spending arrangement](#) (FSA), a \$50 increase over 2017. FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans.

Health Savings Accounts – In 2018, the annual [limit](#) on contributions to a [Health Savings Account](#) (HSA) for enrollees

covered under a high deductible health plan (HDHP) is \$3,450 for self-only coverage (an increase of \$50) and \$6,750 for family coverage (an increase of \$150), regardless of whether the contributions are made by the employee, the employer, or a combination of sources. HDHP enrollees who are at least 55 years old can contribute an extra \$1,000 “catch-up contribution” to their HSAs

Wellness Programs – The EEOC in 2018 is expected to issue proposed revisions to its [wellness program rules](#), after a federal judge ordered that the existing rules be [vacated](#) on January 1, 2019. While a new final rule is not expected until 2019, the EEOC’s existing wellness program rules remain in effect.

ACA Reporting Deadlines – Self-insuring employers, insurers, other coverage providers, and applicable large employers have an [extra 30 days](#) — until March 2, 2018 — to provide IRS Forms [1095-B](#) or [1095-C](#) to individuals, as required under the Affordable Care Act. In addition, information returns must be filed with the IRS by February 28, 2018, for paper filers, and April 2, 2018, for electronic filers. Employers that file at least 250 information returns with the IRS must file the returns electronically.

Social Security Benefits – Retirees will receive a 2% cost-of-living increase in Social Security benefits in 2018, the largest hike since 2012. The average monthly Social Security benefit for retirees in 2018 is \$1,404, an increase of \$27 from 2017.

401(k) Plan Contribution Limits – In 2018, employees who participate in [401\(k\) plans](#) can [contribute](#) up to \$18,500 (a \$500 increase over 2017), plus a catch-up contribution limit of \$6,000 for employees at least 50 years old.

Defined Benefit Plans – The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation (PBGC) [increases](#) to \$74 for plan years beginning in 2018 (up from \$69 in 2017) and will jump to \$80 in 2019.

Multiemployer Plans – The [deficit](#) in the PBGC’s insurance program for multiemployer plans rose to \$65.1 billion at the end of FY 2017. The increase was driven primarily by the ongoing financial decline of several large multiemployer plans that are expected to run out of money in the next decade.

Absent changes in law, the PBGC’s multiemployer program likely will run out of money by the end of 2025, if not sooner.

Fiduciary Rule – The DOL [extended](#) the transition period for its [fiduciary rule](#) exemptions for financial advisors from January 1, 2018, to July 1, 2019. It plans to decide by 2019 whether to propose changes to the rule.

Disability Claim Rule – The DOL [delayed](#) by 90 days, through April 1, 2018, the applicability date for ERISA plans to comply with an Obama-era final rule amending the [claims procedure](#) requirements applicable to disability benefits.

OSHA/Safety



New Head of OSHA – [Scott Mugno](#), a corporate safety director, is being nominated by President Trump to become the next head of OSHA. Mugno is

expected to favor more business-friendly measures, such as compliance assistance, instead of aggressive OSHA enforcement or new safety regulations.

OSHA Inspections – In FY 2018, OSHA [plans](#) to conduct 31,000 inspections, 5% fewer than in FY 2017. The agency anticipates it will have fewer compliance officers and resources in 2018.

OSHA Walk-Arounds – In April 2017, OSHA [rescinded](#) its [letter of interpretation](#) (issued in 2013) that permitted workers to designate “a person who is affiliated with a union without a collective bargaining agreement at their workplace or with a

community organization” to act as a “walk-around representative during an OSHA inspection.” A [lawsuit](#) challenging the agency’s policy was dismissed after OSHA agreed to [rescind](#) the interpretation letter and remove the guidance from the agency’s Field Operation Manual.

Top Ten OSHA Violations – The [ten](#) most frequently cited OSHA safety and health inspections in FY 2017 were: fall protection, hazard communication, scaffolding, respiratory protection, lockout/tagout, ladders, powered industrial trucks, machine guarding, fall protection, and electrical. Generally, the list does not change much from year to year, with the top three violations historically being fall protection, hazard communication, and scaffolding.

Severe Injury Reporting - Under OSHA’s [severe injury reporting rule](#), employers must notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye. After receipt of a severe injury report, OSHA Compliance Officers make a determination to conduct an inspection or a rapid response

investigation. In 2018, OSHA [projects](#) employers will submit 11,000 severe injury reports, about one-third (36%) will result in an inspection and the remaining two-thirds (64%) will result in a rapid response investigation. OSHA expects a continued shift of compliance officers from targeted programmed inspections to severe injury report review and investigations.

Workplace Fatalities – Fatal work injuries rose by 7% in 2016, to 5,190, according to government [data](#) released on December 19, 2017. More workers lost their lives in transportation incidents than any other event in 2016, accounting for about one out of every four fatal injuries. Workplace violence increased by 23%, making it the second most common cause of workplace fatality. There were 500 workplace homicides and 291 workplace suicides in 2016. In addition, there were 217 overdoses from the non-medical use of drugs or alcohol while on the job in 2016.

Recordkeeping – More than 450,000 employers were [required](#) to electronically submit their 2016 [Form 300A](#) data (summary of work-related injuries and illnesses) to OSHA by [December 31, 2017](#), using the agency's new [Injury Tracking Application](#), under a 2016 [final rule](#) requiring the electronic submission of injury and illness data. While the 2016 final rule requires certain employers to electronically submit [additional data](#) to OSHA from their 2017 Forms 300A, 300, and 301 by July 1,

2018, OSHA [plans](#) to “reconsider, revise, or remove” certain provisions of the rule because of new concerns about the requirements for employers and potential worker privacy issues.

OSHA’s 2018 Penalties, Regulatory Agenda – On January 2, 2018, OSHA released new maximum penalties. (MSHA also release new maximum penalties.) In FY 2018, OSHA [plans](#) to take final action on its [review](#) of the [beryllium](#) rule; reconsider, revise, or remove certain provisions of its [recordkeeping](#) rules; and [address](#) the use of Social Security numbers on OSHA medical and exposure records.

OSHA’s Silica Rule – Full [enforcement](#) with OSHA’s new respirable crystalline silica [rule](#) in the construction industry began on October 23, 2017. The silica rule is one of the most comprehensive health standards ever issued for the construction industry.

Multiemployer Citation Policy – In 2018, the U.S. Court of Appeals for the Fifth Circuit is [expected](#) to decide whether OSHA’s [multiemployer citation policy](#) is valid. OSHA maintains that it has the authority to issue citations not only to the employer whose employees are exposed to a hazardous condition, but also to employers who create, correct, or control the worksite, even if its own employees are not exposed to the hazard.

Unions and NLRB

Drop in Union Members – Only 14.6 million U.S. workers belong to a labor union, down from 17.7 million in 1983. Since 2008, unions have lost more than 1.5 million members, including 240,000 in 2016. The overall [union membership rate](#) in the public sector (34.4%) is more than five times higher than the rate in the private sector, which dropped to 6.4%, a record low. Approximately half of all union members live in just seven states: California, New York, Illinois, Pennsylvania, Michigan, New Jersey, and Ohio.

Impact on Unions – Several unions lost thousands of members in 2016, including the United Steelworkers (-20,139), United Food and Commercial Workers (UFCW) (-14,709), Machinists (-5,500), and Teamsters (-5,369). In 2017, the AFL-CIO [reduced](#) its staff at its Washington, D.C. headquarters, and the Service Employees International Union [announced](#) it would cut 30% of its budget by 2018.



NLRB Elections Decline – The number of union representation [elections](#) conducted by the NLRB declined in FY 2017, to just 1,366, 15% less than a decade ago. Nearly 92% of the elections were held without the need for a NLRB hearing, and the median

number of days from petition to election was only 23 days, down sharply from 38 days in 2014 (prior to NLRB’s “quickie” election rule changes).

Smaller Units – Unions continue to focus on organizing [smaller](#) bargaining units, which generally are easier to organize. In FY 2017, the median [size](#) of bargaining units in NLRB elections was 24 employees, continuing a trend of organizing smaller groups of employees.

Unions Organize Fewer Workers – While unions continue to [win](#) nearly 70% of NLRB representation elections, the number of workers organized in FY 2016 (57,300) [fell](#) to the lowest in four years.

NLRB to Review “Quickie Election” Rules – In December 2017, the NLRB [asked](#) for public input regarding the Board’s “quickie election” [rules](#) that took effect in April 2015. The Board is expected to [decide](#) in 2018 whether to retain, modify, or rescind some or all of the rules’ provisions.

Public Approval of Unions Rise – In the U.S., 61% of adults [approve](#) of labor unions, the highest percentage since 2003, according to an August 30, 2017, [Gallup](#) poll. About 10% of Americans belong to a union, and 16% live in a union household.

Persuader Rule – In 2018, the DOL is expected to formally [rescind](#) the Obama Administration’s controversial “[persuader rule](#)” that would have required employers, their consultants, and attorneys to annually report to the DOL activities undertaken with an object to persuade employees on how to

exercise their rights to union representation and collective bargaining. A Texas federal judge issued a nationwide [injunction](#) in 2016, and the new rule never took effect. The DOL’s proposal to rescind the rule does not affect current disclosure requirements, which have been in effect since 1962.

Right-to-Work Laws – In 2018, Missouri voters will [decide](#) whether to adopt or eliminate the state’s right-to-work [law](#) that was passed in 2017, but has yet to take effect. 27 other [states](#) have passed state right-to-work laws that prohibit employers from requiring workers to join a union or pay union dues as a condition of employment. Since 2012, six states (Indiana, Michigan, Wisconsin, [West Virginia](#), [Kentucky](#), and [Missouri](#)) have enacted such statutes, all of which have faced legal challenge. In March 2017, the U.S. Court of Appeals for the Sixth Circuit declined to vacate its 2016 [ruling](#) that right-to-work ordinances enacted by [counties](#) are not preempted by the NLRA.

Agency Fees – In 2018, the U.S. Supreme Court will decide the constitutionality of a state law allowing public sector unions to require employees covered by a collective bargaining agreement to pay “agency fees” as a condition of employment. [Janus v. AFSCME Council 31](#). In 1977, the Court upheld the constitutionality of such mandatory fees. However, in 2017, following the death of Justice Antonin Scalia, the Court [deadlocked](#) 4-4 in a case involving a similar issue. Since then, Justice Neil Gorsuch was appointment to the Court. A ban on agency fees could result in significant financial losses for public sector unions.

Unfair Labor Practice Charges – The number of unfair labor practice (ULP) [charges](#) filed with the NLRB decline by 10% in FY 2017, to 19,280, the fewest in a decade. Less than 7% of ULPs (1,263) in FY 2017 resulted in a complaint being issued by the agency.

NLRB General Counsel – The U.S. Senate on November 8, 2017, confirmed Republican [Peter Robb](#) to replace Democrat [Richard Griffin](#) as NLRB General Counsel. On December 1,

2017, the new General Counsel [directed](#) NLRB Regional Offices to submit to his Division of Advice for review cases involving “significant legal issues,” including many Obama Board decisions that both overruled precedent and “involved one or more dissents.” This directive [signals](#) that the new NLRB General Counsel intends to ask the Board to overturn numerous hot-button Obama-era Board precedents.

NLRB Shifts Direction – In 2017, President Trump nominated, and the U.S. Senate confirmed, [Marvin Kaplan](#) and William Emanuel to two vacancies on the NLRB, resulting in the first Republican majority on the five-member Board in nearly a decade. They joined Chairman Philip Miscimarra (whose term expired on December 16, 2017) and Democrats Mark Gaston Pearce and Lauren McFerran. In December 2017, the new Republican-majority Board issued decisions [repudiating](#) three of the Obama Board’s most vexing decisions on [joint employer](#) status, employer workplace rules and policies, and [micro-units](#).

Joint Employer Status – In [Hy-Brand Industrial Contractors](#), the Board [overruled](#) [Browning-Ferris Industries](#), a 2015 decision that held two entities are joint employers where the second employer exercises indirect control over another entity’s employees, or where the second employer has reserved rights of control, even if unexercised. In *Hy-Brand*, the Board reversed course, returning to prior precedent finding joint employer status only where the second entity has actually exercised control over the other entity’s employees and has done so “directly and immediately.”

Workplace Rules – In [Boeing Corporation](#), the Board [revised](#) its standard for assessing whether workplace rules and policies interfere with employee rights under Section 7 of the NLRA. *Boeing* overruled [Lutheran Heritage-Livonia](#), a 2004 decision, in which the Board held unlawful rules that employees could “reasonably construe” to prohibit Section 7 activity. *Boeing* replaces this assessment with a two-part analysis evaluating (1) the nature and extent of the potential impact of the rule on NLRA rights, and (2) legitimate justifications associated with the rule. The new test requires scrutinizing rules on several

levels: (1) to determine whether, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights; (2) whether any rules that do have a reasonable tendency to interfere with Section 7 rights have been deemed by the Board to be lawful because the risk of such interference is outweighed by the justifications associated with the rules; and (3) to determine the justification for certain rules that have a potential adverse impact on NLRA activity and whether that outweighs the potential adverse impact on Section 7 rights.

Micro-Units – In [PCC Structural](#)s, the Board [overruled](#) the 2011 [Specialty Healthcare](#) decision, which made it easier for unions to organize “micro-units.” Instead, the Board returned to its prior analysis for assessing “whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees.” Under *PCC*, the Board will no longer shift the burden to employers to establish excluded employees share such an “overwhelming community of interest” with petitioned-for employees that there is “no legitimate basis upon which to exclude [them] from” the petitioned-for unit because the traditional community-of-interest factors “overlap almost completely.” Instead, the Board will not carve out a “micro-unit” unless it finds petitioned-for employees “share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.” The revised standard will make it more difficult for unions to carve out smaller, artificial groups in an effort to disenfranchise employees who are inclined to vote against union representation.

More Changes on the Horizon – In 2018, President Trump is expected to nominate management-side attorney John Ring to fill the NLRB vacancy created by the [departure](#) of Chairman Miscimarra. Once confirmed, employers can [expect](#) the new Board to [revisit](#) and, perhaps, reverse Obama-era rulings on

class waivers, temporary workers, quickie elections, and the status of college/university faculty and student athletes.

Use of Federal Mediators – Despite challenges in collective bargaining, only 23% (2,435) of private sector companies (10,678) utilized a federal mediator to assist in union negotiations in FY 2016, about the same as in previous years, according to the latest [data](#) from the Federal Mediation and Conciliation Service (FMCS).

Fewer and Shorter Strikes – There were only 100 [work stoppages](#) in FY 2016, a historic low. In contrast, there was more than four times as many work stoppages in 1998 (421) and nearly three times as many in 2005 (289). Since 1990,

strikes have declined six times faster than union membership. The average duration of work stoppages in FY 2016 was less than six weeks (40.1 days), among the shortest duration on record.

Fewer and More Expensive Arbitrations – The number of union grievances pursued through an arbitration hearing continues to decline. Although more than 12,250 arbitration panels were requested from FMCS in FY 2016, arbitrators were appointed in less than half of the cases (5,296), the lowest number in more than 15 years. The cost of arbitration continues to soar, with arbitrators [charging](#) on average, nearly \$8,000 in FY 2016, up 80% since 2011 (\$4,429).

More Information

For more information on any of the issues discussed in this report, [please contact the Jackson Lewis attorney with whom you regularly work.](#)

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