

# 2017: The Year Ahead for Employers



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## THE YEAR AHEAD

Employers can expect sweeping changes in the year ahead, as President-elect Donald J. Trump assumes office on January 20, 2017, with a Republican majority in both the U.S. Senate and U.S. House of Representatives. The Trump Administration is expected to overturn several Executive Orders, repeal burdensome regulations, and reshape agency priorities. In addition, judicial appointments to the U.S. Supreme Court and other federal courts will have significant and far-reaching implications. Below is an executive summary of recent changes in workplace law and a look ahead to 2017.

## ECONOMY, JOBS, AND UNEMPLOYMENT

**ECONOMIC OUTLOOK** – U.S. economic growth may strengthen in 2017, as the new Administration begins implementing its policy priorities, including tax cuts and infrastructure spending. However, new restrictions on trade and immigration could affect long-term growth. The Federal Reserve projects 2% growth in 2017 and inflation to rise to about 2%. Inflation has been under 2% a year since 2013.

**FEDERAL BUDGET** – Congress passed a short-term continuing resolution in December 2016 that funds the federal government (including the U.S. Department of Labor, National Labor Relations Board (NLRB), and U.S. Equal Employment Opportunity Commission (EEOC)) only through April 28, 2017, to allow the Trump Administration to weigh in on a budget for the remainder of FY 2017.

**U.S. DEBT LIMIT** – A fresh debate over the amount and increase in U.S. debt will occur in 2017, as current legislation that suspended the existing federal debt limit (currently \$19.9 trillion) expires on March 15, 2017. The debt limit is the total amount of money the U.S. government is authorized to borrow to meet its existing legal obligations.

**HIRING PROJECTIONS** – While U.S. economic growth is expected to rise in 2017, business economists are forecasting a slowdown in hiring. The National Association of Business Economics is projecting that employers will add an average of 168,000 jobs a month in 2017, down from an average of 180,000 a month in 2016.

**ATTRACTING AND RETAINING EMPLOYEES** – “U.S. employers continue to experience difficulty with attracting and retaining employees, as increasing hiring and turnover levels show no signs of abating,” and half of employees “are open to leaving their current employers for new opportunities,” according to separate surveys from Willis Towers Watson and Aon.

**7.4 MILLION ARE UNEMPLOYED** – While U.S. hiring increased in 2016, 7.4 million individuals are unemployed. A fourth of unemployed workers (24.8%) have been jobless for at least 27 weeks. There are about 1.4 workers for each job opening, and the average duration of unemployment is 6 months. The labor participation rate has hovered near a historic low of 62.7%, with more than 95 million Americans not in the labor force.

**UNEMPLOYMENT RATE** – The national unemployment rate fell to 4.6% in November 2016, the lowest in 9 years. The unemployment rate is much higher for blacks (8.1%) and Hispanics (5.7%) than for whites (4.2%) or Asians (3.0%), and the teen unemployment rate (15.2%) is more than triple that of adult men (4.3%) and adult women (4.2%). The Federal Reserve projects the unemployment rate will range from 4.5% to 4.7% in 2017.

**STATE UNEMPLOYMENT** – Eight states (Alabama, Alaska, Illinois, Louisiana, Mississippi, New Mexico, Pennsylvania, and West Virginia), the District of Columbia, and Puerto Rico had unemployment rates of 5.5% or higher in November 2016.

**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 8 states have reduced the duration of

state unemployment benefits: 20 weeks in Arkansas, Michigan, and South Carolina; 16 weeks in Kansas; 14 weeks in Georgia; 13 weeks in Missouri and North Carolina; and 12 weeks in Florida.

## ABSENCES, PAID LEAVE, AND FMLA

**TRADITIONAL LEAVE VS. PAID TIME OFF** – While the use of paid time off (PTO) bank leave systems has continued to increase steadily – from 28% in 2002 to 43% in 2016 – a majority of private sector companies (52%) continue to use a traditional leave system that offers “separate buckets of vacation time, sick time and personal days off,” according to a WorldatWork survey.



Survey results found that

“on average, organizations offer 10 to 22 days of vacation time and 7 to 11 days of sick leave annually.” In addition, the survey showed PTO banks (that aggregate an allotted amount of available days to be used for a variety of absences) “tend to offer fewer total paid days off than traditional systems.”

**PAID SICK LEAVE LAWS** – The patchwork of state and local laws requiring employers to provide paid sick leave continues to grow. According to the National Conference of State Legislatures (NCSL), five states currently require paid sick leave: California, Connecticut, Massachusetts, Oregon, and Vermont (January 1, 2017). They will be joined by Arizona on July 1, 2017, and Washington on January 1, 2018. In addition, the District of Columbia and some cities and municipalities have enacted paid sick leave laws, including Los Angeles, Montgomery County (MD), New York City, Oakland, Philadelphia, San Diego, San Francisco, Seattle, and Tacoma, as well as many cities in New Jersey. In 2017, laws allowing workers to earn and accrue sick leave take effect in Chicago and Cook County (IL), Minneapolis and St. Paul (MN), Morristown (NJ), Santa Monica (CA), and Spokane (WA).

**PAID FAMILY LEAVE LAWS** – Currently, only three states – California, New Jersey, and Rhode Island – provide for paid family leave. In 2016, New York passed a paid family leave law that will take effect January 1, 2018. “All four state programs,” NCSL noted, “are funded through employee-paid payroll taxes and are administered through their respective disability programs.” The District of Columbia is expected to enact a paid family leave law in 2017. President-elect Donald Trump supports a plan that would “guarantee six weeks of paid maternity leave by amending the existing unemployment insurance that companies are required to carry.”

**FAMILY AND MEDICAL LEAVE** – The number of lawsuits filed by employees under the Family and Medical Leave Act (FMLA) are on the rise, having nearly tripled since 2012. In 2016, the U.S. Department of Labor (DOL) revised the FMLA poster and issued both an Employer Guide and Employee Guide to the FMLA. In 2017 and 2018, the DOL intends to survey employees on the need and use of leave and survey employers on their experience managing FMLA leave.

**STATE FAMILY LEAVE** – Several states – including California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin – and the District of Columbia have their own family leave laws that expand “either the amount of leave available or the classes of persons for whom leave may be taken,” according to NCSL.

**SCHOOL LEAVE** – “A small number of states,” NCSL noted, “provide for a limited number of hours annually for parents to attend school-related events and activities for their children,” including California, Illinois, Louisiana, Massachusetts, Minnesota, North Carolina, Rhode Island, Vermont, and the District of Columbia.

**BEREAVEMENT LEAVE** – Illinois employers with at least 50 employees must provide employees who suffer the loss of a child with up to 10 work days of unpaid leave under a new state law that took effect July 29, 2016.

**WORK SCHEDULES** – New Hampshire employers are prohibited from retaliating against an employee who requests a flexible work schedule, under a new law that took effect September 1, 2016. Vermont and San Francisco have similar laws. Beginning July 1, 2017,

large retail and food establishments in Seattle will be required to give their hourly workers advance notice of their schedules and to pay workers extra for being required to work on call, under the city's new Secure Scheduling Ordinance. Two other cities – San Francisco and Emeryville (CA) – have passed similar measures. The New York City Council is considering legislation to reform scheduling and work practices for fast food and retail workers.

## BACKGROUND CHECKS

**“BAN THE BOX” LAWS** – Effective January 1, 2017, Connecticut became the eighth state to require private sector employers to remove criminal history questions as part of the first step in the hiring process and delay criminal background inquiries until later in the hiring process, joining Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island. A similar law in Vermont will take effect on July 1, 2017. In addition, some cities and counties have passed “ban the box” laws covering private sector employers, including Austin, Baltimore, Buffalo, Chicago, Columbia (MO), District of Columbia, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George's County (MD), Rochester (NY), San Francisco, and Seattle. On January 22, 2017, Los Angeles will restrict most private sector employers from asking a job applicant about his or her criminal history during the application process. Many other jurisdictions have passed similar measures applicable to the public sector.

**FEDERAL AGENCIES** – Effective January 3, 2017, under a final rule issued by the Office of Personnel Management, federal agencies are barred from making specific inquiries concerning an applicant's criminal or adverse credit background until the hiring agency has made a conditional offer of employment to the applicant.

**EEOC AND OFCCP GUIDANCE** – The EEOC has online resources to assist employers who conduct background checks, including links to its guidance on the use of arrest and conviction records to make employment decisions and its joint tips (with the Federal Trade Commission) on the use of employment background checks. The Office of Federal Contract Compliance Programs (OFCCP) also has issued

guidance on criminal record restrictions and discrimination based on race and national origin.

**CREDIT CHECKS** – In 2016, Philadelphia became the latest jurisdiction to limit employers' use of credit checks and credit-related information in employment. Ten states (California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington) and several cities and counties (including Chicago, Cook County (IL), and New York City) have passed similar measures.

### ONLINE SOCIAL MEDIA SEARCHES

– According to a 2016 CareerBuilder survey, six-in-ten employers (60%) “use social networking sites to research job applicants,” up significantly from 11%

in 2006. In the new survey, nearly half (49%) of “hiring managers who screen candidates via social media said they have found information that caused them not to hire a candidate,” including provocative or inappropriate photos or videos (46%), information about candidate drinking or using drugs (43%), and discriminatory comments (33%).



**ACCESS TO SOCIAL MEDIA** – As of January 1, 2017, 25 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.

**TYPES OF BACKGROUND CHECKS** – “While most employers (72%) background check every new employee before they are hired, more than 1 in 4 (28%) do not,” according to [CareerBuilder](#). Employers who perform background checks analyze criminal background (82%); confirm employment (62%), identity (60%) and education (50%); conduct tests for illegal drug use (44%); and verify licensing (38%).

**FAIR CREDIT AND REPORTING ACT** – In 2016, the U.S. Supreme Court in [Spokeo Inc. v. Robins](#) held that plaintiffs must show they suffered from an actual injury, not just a “bare procedural violation,” in order to sue in federal court under the Fair Credit and Reporting Act (FCRA). The Court emphasized that, in order to have constitutional standing, a plaintiff must allege an injury that is both “concrete and particularized,” even in the context of an alleged statutory violation. Although Spokeo involved the FCRA obligations of consumer reporting agencies, its holding and rationale are applicable directly to the issues raised in FCRA class actions in the employment context. For more on the case, please see our [online article](#).

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## DRUGS AND ALCOHOL

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**ILLICIT DRUG USE** – About 1 in 10 Americans (10.1%) are current users of illicit drugs, including 22.2 million current marijuana users and 3.8 million who misuse prescription pain relievers, according to the latest government [report](#). There is a growing [heroin epidemic](#) and an abuse of [opioid painkillers](#) by workers following on-the-job injuries. In March 2016, the Centers for Disease Control and Prevention issued new [guidelines](#) for prescribing opioids for chronic pain.

**RECREATIONAL MARIJUANA** – Marijuana use is on the rise. More than 4 in 10 (43%) U.S. adults have tried marijuana and “13% report being current marijuana users, up from 7% in 2013,” according to a 2016 Gallup [poll](#). A record-high 60% of Americans now [favor](#) legalizing marijuana. In November 2016, [voters in California, Maine, Massachusetts, and Nevada approved](#) adult-use recreational marijuana, while voters in Arizona disapproved. Eight [states](#) (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington) and the District of Columbia now have legalized small amounts of marijuana for adult recreational use. More than 20% of Americans now live in states where recreational use of marijuana is legal under state law.

**MEDICAL MARIJUANA** – In November 2016, [voters in Arkansas, Florida, and North Dakota approved](#) medical marijuana initiatives. According to NCSL, “a total of 28 [states](#), the District of Columbia, Guam and Puerto Rico

now allow for 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.”

**MARIJUANA REMAINS UNLAWFUL UNDER FEDERAL LAW** – In 2016, the Drug Enforcement Agency (DEA) [denied](#) two petitions to reschedule marijuana under the Controlled Substances Act. According to the DEA, “marijuana remains a Schedule I controlled substance because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.” [Schedule I](#) drugs are considered the most dangerous and include marijuana, heroin, LSD, and Ecstasy, among others.

**WORKPLACE DRUG TESTS** – “Following years of declines, the percentage of employees in the combined U.S. workforce testing positive for drugs has steadily increased over the last three years to a 10-year high,” according to the latest Quest Diagnostic Drug Testing [Index](#). Almost half (45%) of the positive drug tests showed evidence of marijuana use. Detection rates of amphetamine and heroin use increased for the fifth straight year. The Index also stated, “another notable trend is the rising positivity rate of post-accident urine drug testing in both the general U.S. and federally-mandated safety-sensitive workforces. Post-accident

positivity increased 6.2% in 2015 when compared to 2014 (6.9% versus 6.5%) and increased 30% since 2011 (5.3%).”

**RIGHT TO UNION REPRESENTATION** – In 2016, the NLRB held that an employer unlawfully denied an employee the right to the physical presence of a union representative before consenting to a drug test. It also held the employer unlawfully discharged the employee for refusing to take the test without a union representative present. *Manhattan Beer Distributors LLC v. NLRB*.

**DOT DRUG TESTING** – The DOT continues to take the position that state initiatives that permit use of marijuana for recreational purposes have “no bearing” on the agency’s drug testing program and medical marijuana under a state law is not a valid medical explanation for a transportation employee’s positive drug test result.

**FMCSA DATABASE** – In 2017, the Federal Motor Carrier Safety Administration will establish a drug and alcohol clearinghouse database that will contain information pertaining to violations of the U.S. Department of Transportation (DOT) drug and alcohol testing program. Beginning January 6, 2020, employers will be required to query the clearinghouse for current and prospective employees’ drug and alcohol violations before permitting those employees to operate a commercial motor vehicle on public roads.

**HAIR TESTING** – The U.S. Department of Health and Human Services missed a December 4, 2016, deadline to issue scientific and technical guidelines for the use of hair testing for drugs for commercial motor vehicles drivers. It is unclear when such guidelines, which were required under the 2015 highway funding bill, may be forthcoming.

## IMMIGRATION



**UNAUTHORIZED IMMIGRANTS** – There are an estimated 11.1 million unauthorized immigrants in the U.S., with about two-thirds having lived in the country for at least a decade, according to the latest data from Pew Research. More than

half of all unauthorized immigrants are from Mexico (5,850,000). Other top source countries include El Salvador (700,000), Guatemala (525,000), India (500,000), Honduras (350,000), China (325,000), Philippines (180,000), Dominican Republic (170,000), Korea (160,000), and Ecuador (130,000). Nearly 60% of

### Estimates of Unauthorized Immigrants in Labor Force

State	Estimate	% of Labor Force
California	1,750,000	9.0%
Texas	1,150,000	8.5%
Florida	600,000	6.2%
New York	600,000	5.9%
New Jersey	375,000	7.9%
Illinois	350,000	5.0%
Georgia	250,000	5.2%
North Carolina	240,000	5.0%
Virginia	220,000	5.0%
Arizona	210,000	6.6%
Maryland	190,000	5.9%
Washington	180,000	5.0%
Massachusetts	150,000	4.0%
Nevada	150,000	10.4%
Colorado	140,000	4.9%
Pennsylvania	130,000	2.0%
Connecticut	100,000	5.1%
Oregon	90,000	4.7%
Tennessee	85,000	2.8%
Michigan	80,000	1.7%
Minnesota	80,000	2.7%
South Carolina	60,000	2.6%
Indiana	75,000	2.2%
Utah	75,000	5.4%
Ohio	65,000	1.1%
Oklahoma	65,000	3.4%
Wisconsin	60,000	1.9%
New Mexico	55,000	5.6%
Louisiana	50,000	2.2%
Kansas	50,000	3.4%
Alabama	40,000	1.8%
Arkansas	45,000	3.2%
Missouri	40,000	1.3%
Kentucky	35,000	1.7%
Nebraska	30,000	3.2%
Idaho	30,000	4.0%
Iowa	30,000	1.8%
Hawaii	30,000	4.6%
Rhode Island	20,000	4.0%
Delaware	20,000	4.0%
District Columbia	20,000	4.9%
Mississippi	15,000	1.3%
New Hampshire	10,000	1.0%
Alaska	5,000	1.9%
All Other States	<5,000	Varies

Source: Pew Research

unauthorized immigrants live in six states (California, Texas, Florida, New York, New Jersey, and Illinois).

### UNAUTHORIZED IMMIGRANTS IN U.S.

WORKFORCE – There are “8 million unauthorized immigrants in the U.S. working or looking for work,” making up 5% of the civilian labor force according to new Pew Research estimates. Industries having a higher share of unauthorized immigrant workers, include agriculture (17%), construction (13%), leisure/hospitality (9%), business services (7%), and manufacturing (6%). Among the states, Nevada (10.4%), California (9%), Texas (8.5%), and New Jersey (7.9%) have the highest shares of unauthorized immigrants in their labor forces (see chart on previous page).

### UNAUTHORIZED IMMIGRANTS PERMITTED

TO WORK – According to government data, “about 10% of unauthorized immigrants have been granted temporary protection from deportation and eligibility to work,” including approximately 750,000 young adults who successfully applied for President Obama’s 2012 Deferred Action for Childhood Arrivals (DACA) program, and an “estimated 326,000 immigrants, mostly from Central America, who have been granted Temporary Protected Status because of disease, natural disaster or conflict in their home countries.”

### PRESIDENT’S EXECUTIVE ACTION ON

UNAUTHORIZED IMMIGRANTS – President Obama’s executive actions that would have expanded the existing DACA program, and allow an estimated 4 million parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years in a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, remain enjoined by a federal court. In 2016, the U.S. Supreme Court deadlocked 4-4 over the case and subsequently denied a rehearing request.

### CHANGES IN IMMIGRATION POLICY

– President-elect Trump is expected to significantly alter U.S. immigration policy after taking office on January 20, 2017. Likely changes include termination of President Obama’s executive actions on immigration regarding unauthorized immigrants, stepped-up border security, an enhanced biometric entry-exit visa tracking system at U.S. points of entry, increased deportation of immigrants with criminal records, and a crack-down on “sanctuary cities.” On the business immigration side, the Trump Administration is expected to expand enforcement and compliance efforts, take aim at Obama administration rulemaking meant to clarify and add flexibility to immigrant and nonimmigrant visa programs, and pursue changes to the H-1B nonimmigrant visa program.

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## I-9 FORMS AND E-VERIFY

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REVISED FORM I-9 – By January 22, 2017, employers must use a newly revised Form I-9, Employment Eligibility Verification for all new hires in the United States. The revised Form I-9, published by the U.S. Citizenship and Immigration Services (USCIS) on November 14, 2016, asks for “other last names used” (rather than “other names used”), streamlines certification for certain foreign nationals, and requires employees to affirmatively check a box indicating whether they used a preparer or translator. Employers and employees may choose to complete any or all sections of the revised Form I-9 on paper or using a computer and the a new “smart form” version of the I-9. The new smart form includes drop down lists, calendars for filling in dates, and on-screen instructions for each field – but it still must be printed, and signed and dated by hand. The smart form also

includes a bar code that could enhance the Department of Labor’s audit capabilities. The Instructions have been separated from the form, expanded from 6 to 16 pages, and must be available in paper or electronic format during completion of the form. No changes were made to the List of Acceptable Documents. USCIS also released a new Form I-9 training presentation. Employers may continue to use the old Form I-9 dated 03/08/2013 through January 21, 2017. Employers also must continue to retain and store previously completed forms for existing and former employees in accordance with existing law.

PENALTY INCREASES – Penalties for knowingly employing an unauthorized worker and certain other immigration-related violations rose sharply on August 1, 2016. The minimum and maximum penalties for

unlawfully employing an unauthorized immigrant increased to a range of \$539 - \$4,313 for a first offense, \$4,313 to \$10,781 for a second offense, and \$6,469 to \$21,563 for a subsequent offense (for each unauthorized immigrant). In addition, the minimum and maximum penalties for Form I-9 paperwork violations increased, to \$216 and \$2,156, respectively (for each relevant individual). Penalties for unfair immigration-related employment practices also rose.



**E-VERIFY** – E-Verify, the government’s internet-based system that allows businesses to compare information from an employee’s Form I-9 to data from the U.S. Department

of Homeland Security (DHS) and Social Security Administration records to confirm employment eligibility, must be reauthorized by Congress by April 28, 2017. E-Verify is used by more than 600,000 employers at over 1.9 million hiring sites. In 2017, Congress may attempt to expand the use of E-Verify alone or as part of a larger overhaul of U.S. immigration law.

**STATE E-VERIFY REQUIREMENTS** – Effective January 1, 2017, private employers in Tennessee with at

least 50 employees are required to enroll in E-Verify and use the system to verify employment eligibility for newly hired workers. Eight other states (Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Utah) require use of E-Verify by most employers, and another 11 states (Colorado, Florida, Idaho, Indiana, Michigan, Missouri, Nebraska, Oklahoma, Texas, Virginia, and West Virginia) require E-Verify for most public employers. Two states (Minnesota and Pennsylvania) require only public contractors to use E-Verify.

**DISCRIMINATION** – Under a new rule which will become effective on January 21, 2017, the DHS has clarified that liability for intentional discrimination against individuals must be because of national origin or citizenship status and does not require ill will, hostility or animus.

**REAL ID DRIVER’S LICENSES** – Starting January 22, 2018, passengers with a driver’s license issued by a state that is not compliant with the REAL ID Act (and has not been granted an extension) will need to show an alternative form of acceptable identification for domestic air travel to board their flight. Currently 24 states are compliant with the REAL ID Act. In addition, the REAL ID Act establishes minimum security standards for accessing military bases, federal facilities, and entering nuclear power plants.

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## CYBERSECURITY AND PRIVACY

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**RANSOMWARE ATTACKS EXPLODE** - Ransomware is a type of malware that hackers use to stop you from accessing your data so they can require you to pay ransom, often paid in cryptocurrency such as Bitcoin, to get it back. According to the FBI and the Department of Health and Human Services’ Office of Civil Rights, ransomware attacks have quadrupled, occurring at a rate of 4,000/day. These agencies and the Federal Trade Commission have offered guidance to help curb these attacks. Among other things, the guidance urges organizations to be prepared.

**BREACH NOTIFICATION LAWS** - There are currently 47 states with breach notification laws, and they continue to be updated. For example, beginning in

2017, California businesses and agencies can no longer assume that notification is not required when personal information involved in the breach is encrypted. Illinois also changed its breach notification law, effective January 1, 2017, to, among other things, expand the definition of “personal information” to include medical information, health insurance information, and unique biometric data.

**SAFEGUARDS REQUIRED TO PROTECT PERSONAL INFORMATION** - State laws continue to emerge and expand requiring businesses to protect personal information. Joining states such as Florida, Massachusetts, Maryland, and Oregon, Illinois businesses must implement and maintain reasonable safeguards to



protect personal information beginning January 1, 2017, and [California](#) clarified what it means to have reasonable safeguards. Similar rules go into effect in [Connecticut](#) beginning October 1, 2017, for health insurers, health care centers, pharmacy benefits managers, third-party administrators, utilization review companies, or other licensed health insurance business. And, during 2017 in [New York](#), entities regulated by the state's Department of Financial Services, such as banks, check cashers, credit unions, insurers, mortgage brokers and loan servicers, and some of their subcontractors, likely will become subject to a complex set of cybersecurity regulations many view as the first of their kind in the country.

[BIG DATA, ANALYTICS, AI, WEARABLES, IOT](#) - New technologies and devices continuously emerge,

promising a myriad of societal, lifestyle and workforce advancements and benefits including increased productivity, talent recruiting and management enhancements, enhanced monitoring and tracking of human and other assets, and improved wellness tools. This will continue in 2017, and will require an unprecedented and unimaginable collection of data, very often personal data. Federal agencies, such as the [FTC](#) and [EEOC](#), and others are taking note.

[IDENTITY THEFT](#) – The Internal Revenue Service (IRS) is expanding its ability to notify taxpayers when the agency has reason to believe they may be a victim of employment-related identity theft. “During the period February 2011 to December 2015, the IRS identified almost 1.1 million taxpayers who were victims of employment-related identity theft.”

## EEOC

### EEOC Charges by State

State	Charges
Texas	9,539
Florida	7,158
California	6,199
Georgia	5,234
Illinois	4,581
Pennsylvania	4,420
North Carolina	4,113
New York	3,669
Virginia	2,844
Alabama	2,802
Ohio	2,796
Tennessee	2,726
Michigan	2,551
Indiana	2,545
Arizona	2,396

[CHARGES BY STATE](#) – A fourth of all discrimination charges filed with the EEOC in FY 2015 were filed in just three [states](#): Texas (10.7%), Florida (8.1%) and California (7.0%). See chart for number of charges filed in the top 15 states.

[EEO-1 PAY DATA](#) – Beginning March 31, 2018, employers with at least 100 employees will be [required](#)

to submit annual [EEO-1](#) reports that include W-2 pay and hours worked data for their entire workforces, nationwide, under a final [rule issued](#) by the EEOC. The OFCCP and EEOC will monitor and test employer data and investigate in detail the pay practices of those employers whose data suggests indefensible pay disparities. However, Congress may rescind the changes, or the new administration may revise the reporting requirements to ease the burden on employers, after a new EEOC chair is designated in 2017 and the Commission flips to a 3-2 Republican majority.

[DISCRIMINATION CHARGES](#) – The EEOC [projects](#)

that nearly 92,000 employment discrimination charges will be filed against private sector employers in FY 2017. In FY [2016](#), 91,503 discrimination charges were filed with the EEOC, a 3% increase over FY 2015. 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. Some charges allege multiple bases.

[EEOC DIGITAL CHARGE SYSTEM](#) – In 2016, the EEOC [launched](#) its new, online charge status system, which allows individuals who have filed a charge of discrimination to [check the status](#) of their charge online. The system also provides a [portal](#) for businesses to receive and upload documents and communicate with the EEOC. In addition, the EEOC implemented nationwide [procedures](#) for releasing Respondent [position statements](#) and non-confidential attachments to a Charging Party or his or her representative upon request during the investigation of their charge of discrimination.

[ADMINISTRATIVE RESOLUTIONS](#) – EEOC staff resolved more than 15,800 charges of discrimination in [FY 2016](#) through settlement, mediation, and conciliation. The agency's mediation program achieved a success rate of over 76%. The EEOC also continued its commitment to work with employers to resolve charges

voluntarily in conciliation, maintaining a success rate of 44% for the past two fiscal years.

**RELIEF OBTAINED** – The EEOC secured \$347.9 million in FY 2016 for victims of discrimination in private, state, and local government workplaces through mediation, conciliation, and settlement, and \$52.2 million for workers harmed by discriminatory practices through litigation. The agency filed just 86 merit lawsuits in FY 2016, down from 142 in FY 2015. Disability discrimination was the most common basis for lawsuits brought by the EEOC.

**EEOC SUBPOENAS** – The U.S. Supreme Court has accepted for review a case on the level of deference federal appeals courts must give to district court decisions on whether to enforce EEOC investigative subpoenas. *McLane Co. v. EEOC*.

**STRATEGIC ENFORCEMENT PLAN** – The EEOC updated its Strategic Enforcement Plan for Fiscal Years 2017-2021, stating it intends to focus on: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers, including immigrant and migrant workers; (3) addressing emerging issues, including inflexible leave policies, pregnancy accommodation, protecting LGBT people from discrimination based on sex, issues related to the on-demand or “gig” economy, and “backlash” discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent; (4) ensuring equal pay protections for all workers; (5) preserving access to the legal system, including restricting overly broad waivers and mandatory arbitration provisions; and (6) preventing systemic harassment.

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## DISCRIMINATION

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**NEW GUIDANCE ON RETALIATION** – In August 2016, the EEOC issued new enforcement guidance on retaliation. The guidance addresses the scope of employee activity protected by the law, remedies available for retaliation, and gives detailed examples of employer actions that may constitute retaliation. The agency’s guidance takes an expansive position on protection given to persons who make internal complaints about discrimination – even if made in bad faith.

**LEAVE AND DISABILITY** – The EEOC in May 2016 issued a new resource document on the rights of employees with disabilities who seek leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). The document discusses leave and the interactive process, maximum-leave policies, leave beyond that required by the FMLA, no-fault attendance policies, work restrictions, and reasonable accommodation (including reassignment).

**RELIGIOUS DISCRIMINATION** – In July 2016, the EEOC announced that it will implement changes in the collection of demographic data from individuals who file charges with the agency, including “more

precise data about the religion of the individual alleging discrimination.” The agency has issued publications on religious discrimination, religious garb and grooming, and discrimination against people who are perceived to be Muslim or Middle Eastern.

**NATIONAL ORIGIN DISCRIMINATION** – In November 2016, the EEOC issued updated enforcement guidance on national origin discrimination. Topics include word-of-mouth recruitment, discriminatory customer preference, Social Security Numbers, accent discrimination, fluency requirements, English-only rules, citizenship issues, and harassment.

**WORKPLACE HARASSMENT PREVENTION** – Two EEOC Commissioners in June 2016 called on employers to “reboot” workplace harassment prevention efforts, stating that “merely having effective reporting and response systems in place” is not enough. In addition, they asserted that “much of the training done over the last 30 years has not worked as a prevention tool,” and has “been too focused on simply avoiding legal liability.” They urge employers to “explore new types of training to prevent harassment, including workplace civility and bystander intervention training.

## SEXUAL ORIENTATION

**SEXUAL ORIENTATION DISCRIMINATION** – In a [historic ruling](#), a Pennsylvania federal judge in November 2016 held that the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 extends to sexual orientation. [EEOC v. Scott Medical Health Ctr.](#) In addition, the U.S. Court of Appeals for the Seventh Circuit [vacated](#) a July 28, 2016, decision holding that sexual orientation discrimination is not sex discrimination under Title VII, and the full court agreed to rehear the case. A new decision is expected in 2017. [Hively v. Ivy Tech Community College](#). No federal appeals court has held that discrimination based on gender identity or sexual orientation is per se sex discrimination under Title VII.

**TRANSGENDER RIGHTS** – The EEOC in May 2016 released a [fact sheet](#) explaining the bathroom access rights for transgender employees under Title VII and how employees who believe they may have been discriminated against can file a complaint. The EEOC also updated its [enforcement protections](#) for LGBT workers, including transgender individuals. In 2017, the U.S. Supreme Court is expected to decide whether a school policy that bars a transgender high school student from using the restroom, locker room, and other facilities that match the student's gender identity is unlawful sex discrimination under Title IX of the Education Amendments of 1972. [Gloucester County School Board v. G.G.](#) For more on the case, please see our [online article](#).

## AFFIRMATIVE ACTION AND FEDERAL CONTRACTORS



**OFCCP AUDITS** – OFCCP completed just over 1,800 compliance evaluations of supply and service contractors in FY 2016 – the fewest number in a decade – but obtained more than \$10.5 million in backpay and financial remedies (up

from \$6 million in FY 2015). In recent years, OFCCP has conducted fewer and more comprehensive evaluations and refocused its activities from outreach and compliance assistance to enforcement. As a result, OFCCP [audits](#) only about 2% of federal contractor establishments, and evaluations often last between 6 months and 4 years.

**GAO AUDIT OF OFCCP** – In September 2016, the U.S. Government Accountability Office (GAO) [concluded](#) the OFCCP's methods “may not focus evaluations on contractors posing the greatest risk,” noting that the vast majority (78%) of OFCCP compliance evaluations of federal supply and service contractors since 2010 found

no violations and only 2% had discrimination findings. GAO [recommended](#) OFCCP revamp its audit selection process to better target noncompliant contractors. In addition, GAO suggested OFCCP develop a mechanism to monitor affirmative action programs (AAPs) on a regular basis, including possibly electronically collecting AAPs and contractor certification of annual updates.

**SEX DISCRIMINATION RULES** – OFCCP in 2016 issued updated [rules on sex discrimination](#), including provisions on to compensation discrimination, sexual harassment, hostile work environments, failure to provide workplace accommodations for pregnant workers, and gender identity and family caregiving discrimination.

**CHANGES AT OFCCP** – OFCCP may undergo significant policy and enforcement shifts under a Trump Administration, beginning with the appointment of a new OFCCP director in 2017. Among other [changes](#), the agency gradually may move away from many of its aggressive, controversial enforcement methods; modify its approach to auditing contractors; and focus on reducing the regulatory burden on small and mid-size businesses.

## Executive Orders and Federal Contractors

After taking office on January 20, 2017, President-elect Trump is expected to decide whether to leave in place, rescind, or modify several Executive Orders issued by President Obama, including:

- ▶ Fair Pay and Safe Workplaces – A federal judge in October 2016 issued a nationwide injunction blocking much of the final rule implementing Executive Order 13673, including the labor law violation disclosure requirements and restrictions on use of arbitration agreements, but not on paycheck transparency.
- ▶ Paid Sick Leave – Employees working on certain types of federal contracts and subcontracts entered into on or after January 1, 2017, will be able to accrue up to 56 hours (7 days) of paid sick leave, pursuant to Executive Order 13706.
- ▶ Minimum Wage – Beginning January 1, 2017, the minimum wage for workers performing work on federal construction, service, concession, and other contracts covered by Executive Order 13658, increased to \$10.20 per hour, a \$0.05 increase over 2016.
- ▶ Pay Secrecy Policies – Workers and applicants may share information about their pay without being subject to discipline under Executive Order 13665 and an OFCCP rule that applies to new or modified federal contracts after January 11, 2016. Covered contractors also must include a Pay Transparency Nondiscrimination Provision in employee handbooks and post an EEO is the Law Poster Supplement.
- ▶ Sexual Orientation – Federal contractors are prohibited from discriminating on the basis of sexual orientation or gender identity under Executive Order 13672 and an April 2015 OFCCP final rule.
- ▶ Notice of Employee Rights – Under Executive Order 13496, federal contractors are required to inform employees of their rights under the NLRA by posting a notice in the workplace.

## EMPLOYMENT LITIGATION

**WORKPLACE LAWSUITS** – While there was only a slight uptick in the number of employment discrimination lawsuits filed in federal court in FY 2015 (12,205, up from 11,937 in FY 2014), the number of lawsuits brought under the ADA jumped 9.6% and the number of federal wage & hour lawsuits rose 7.6%. In addition, FMLA lawsuits have soared 30% in two years.



**CLASS WAIVERS** – The U.S. Supreme Court is expected to eventually decide whether employers who require class and collective action waivers as a condition of hire or continued employment violates the NLRA. 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 two circuits (Seventh and Ninth) agreeing with the NLRB that they do violate the NLRA.

**JUDICIAL NOMINATIONS** – In 2017, President-elect Trump will nominate a new Justice to the U.S. Supreme Court to fill the vacancy left by the death of Justice Antonin Scalia. Of the current eight Justices, three are age 78 or older: Ruth Bader Ginsburg (83), Anthony Kennedy (80), and Stephen Breyer (78). In addition, the new President will be able to fill about 100 current federal judicial vacancies, and he is expected to nominate judges who are inclined to preserve strict certification standards for class actions, support arbitration of employment disputes, and rein in novel interpretations of discrimination law.

**CONSTRUCTIVE DISCHARGE** – The U.S. Supreme Court in May 2016 held that the statute of limitations for an employee who was not fired, but resigned in the face of intolerable discrimination – a “constructive” discharge – begins running only after the employee resigns. Green v. Brennan.

**WHISTLEBLOWER COMPLAINTS** – The number of employees filing federal whistleblowing complaints continues to rise dramatically, increasing over 80% in the past decade according to the latest government data. The Occupational Safety and Health Administration (OSHA) enforces the whistleblower provisions of more than 20 whistleblower statutes. In the past year, OSHA released a new online whistleblower complaint form, published a revised Whistleblower Investigations Manual, and issued new guidance designed to protect the rights of whistleblowers who reach settlements approved by the agency. In addition, the Securities and Exchange Commission awarded more than \$57 million to whistleblowers in FY 2016 under its “tip” program.

**TRADE SECRETS** – The Defend Trade Secrets Act, enacted in April 2016, provides companies with a federal private right of action for misappropriation of trade secrets. Under the new law, companies that are victims of trade secret theft will have an alternative to state law to bring a civil action to enjoin violations of trade-secret theft and to seek a remedy for violations that have already occurred.

**ILLINOIS FREEDOM TO WORK ACT** – Effective January 1, 2017, Illinois employers are barred under a new law from imposing non-compete covenants on “low-wage employees” (defined as workers who are paid the greater of \$13 per hour or the minimum wage required by federal, state, or local law).

**NON-COMPETE AGREEMENTS** – In October 2016, as part of a series of initiatives decrying the purported misuse of non-competition agreements by employers across the country, the Obama Administration put out a “call to action” and a set of best practices for state policymakers to enact reforms to reduce the prevalence of non-compete agreements. In addition, the White House released a state-by-state report on key dimensions of current state non-compete policy and urged Congress to pass legislation to eliminate non-competes for workers making below a certain salary threshold. The incoming Trump Administration is unlikely to continue attempts to prohibit non-compete agreements, at least at the federal level.

**“NO-POACHING” AGREEMENTS** – In October 2016, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) issued antitrust guidance for Human Resources professionals asserting that “naked” no-poaching agreements in employment are comparable to fixing product prices or allocating customers, which traditionally have been violations of antitrust laws subject to criminal or civil action. However, the guidance may not continue as a priority for the new administration.

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## PAY AND WAGE & HOUR

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**FEDERAL MINIMUM WAGE** – Legislation that would increase the federal minimum wage from \$7.25 to \$12 per hour by 2020, and then index it to inflation, stalled in Congress in 2016, as did a separate measure that would increase the federal minimum wage to \$15 per hour over four years. An estimated 2.6 million workers in the United States are paid wages at or below the federal minimum wage, constituting 3.3% of the U.S. workforce.

**STATE MINIMUM WAGE** – Many states begin 2017 with higher minimum wages, and Maryland, Oregon, and the District of Columbia have additional increases scheduled (see chart on right). Nevada will announce in

July 2017 whether there will be a cost of living increase to its minimum wage rate.

**LOCAL MINIMUM WAGE** – At least 30 localities in the U.S. have minimum wages higher than the federal minimum wage. Some are scheduled to increase during 2017.

**COURT ENJOINS NEW OVERTIME PAY RULE** – The DOL’s new overtime pay rule was enjoined, nationwide, by a Texas federal judge on November 22, 2016, just days before the new requirements were set to take effect. The rule would have more than doubled the required

**New State Minimum Wage**

State	Minimum	Effective
Alaska	\$9.80	1/01/17
Arizona	\$10.00	1/01/17
	\$10.50	1/01/18
	\$11.00	1/01/19
	\$12.00	1/01/20
Arkansas	\$8.50	1/01/17
California	\$10.50	1/01/17
	\$11.00	1/01/18
(rates are lower for employers with 25 employees or less)	\$12.00	1/01/19
	\$13.00	1/01/20
	\$14.00	1/01/21
	\$15.00	1/01/22
Colorado	\$9.30	1/01/17
	\$10.20	1/01/18
	\$11.10	1/01/19
	\$12.00	1/01/20
Connecticut	\$10.10	1/01/17
District of Columbia	\$12.50	7/01/17
	\$13.25	7/01/18
	\$14.00	7/01/19
	\$15.00	7/01/20
Florida	\$8.10	1/01/17
Hawaii	\$9.25	1/01/17
	\$10.10	1/01/18
Maine	\$9.00	1/07/17
	\$10.00	1/01/18
	\$11.00	1/01/19
	\$12.00	1/01/20
Maryland	\$9.25	7/01/17
	\$10.10	7/01/18
Massachusetts	\$11.00	1/01/17
Michigan	\$8.90	1/01/17
	\$9.25	1/01/18
Missouri	\$7.70	1/01/17
Montana	\$8.15	1/01/17
New Jersey	\$8.44	1/01/17
New York	\$9.70	12/31/16
(rates are higher in New York City, Long Island & Westchester)	\$10.40	12/31/17
	\$11.10	12/31/18
	\$11.80	12/31/19
	\$12.50	12/31/20
Ohio	\$8.15	1/01/17
Oregon	\$10.25	7/01/17
(rates are higher in Portland Metro and lower in nonurban counties)	\$10.75	7/01/18
	\$11.25	7/01/19
	\$12.00	7/01/20
	\$12.75	7/01/21
	\$13.50	7/01/22
South Dakota	\$8.65	1/01/17
Vermont	\$10.00	1/01/17
	\$10.50	1/01/18
Washington	\$11.00	1/01/17
(rates are higher in Seattle, Tacoma and City of SeaTec)	\$11.50	1/01/18
	\$12.00	1/01/19
	\$13.50	1/01/20

Source: NCSL

arts (\$52,074), and health sciences (\$52,074).

**SALARY HISTORY** – Effective January 1, 2017, California employers are prohibited from relying on an employee’s prior salary to justify a disparity between the salaries of similarly situated employees under a new state law. Beginning July 1, 2018, under a tough new pay

salary level, from \$23,660 to \$47,476 for a full-year worker, to qualify for the Fair Labor Standards Act (FLSA) “white collar” exemptions. The DOL has appealed the ruling, but the fate of the rule may be up to the Trump Administration and Congress in 2017. For more on the issue, please see our online articles.

**2017 PAY RAISES** – “Pay raises for U.S. employees are expected to hold steady at 3% in 2017,” according to separate surveys by Willis Towers Watson, Aon, and WorldatWork. Raises generally will range from 1% to 4.6% based on work performance.

**STARTING SALARIES** – “Bachelor’s-degree graduates from the Class of 2016 have seen starting salaries that average \$52,569” – a 3.8% jump from the previous year, according to the National Association of Colleges and Employers. Starting salaries vary by graduating degree, led by computer science (\$71,534), engineering (\$66,121), mathematics and statistics (\$62,985), business (\$53,836), liberal

arts (\$52,074), and health sciences (\$52,074). equity law enacted in 2016, Massachusetts employers will be prohibited from screening job applicants based on their salary histories, requiring applicants to provide their salary history before receiving a formal job offer, and seeking the salary history of prospective employees from current or former employers prior to extending an offer of employment. Other jurisdictions, including Philadelphia, New York City, and New Jersey, are considering barring pre-hire inquiries of salary history.

**ANTITRUST GUIDANCE FOR HR** – New guidance for Human Resource professionals on how antitrust law applies to employee hiring and compensation was issued in 2016 by the FTC and the U.S. DOJ. The agency guidance states that “information exchanges among employers that compete to hire or retain employees may



be illegal,” and agreements with “another company about employee salary or other terms of compensation, either at a specific level or within a range” are among several “antitrust red flags.”

**PAYROLL CARDS** – Beginning October

1, 2017, employers who use payroll cards to pay employees will be subject to new consumer protection rules issued by the Consumer Financial Protection Bureau. The agency already prohibits employers from requiring employees to receive their wages on a payroll card, instead requiring employers to offer at least one alternative to a payroll card.

**NEW POSTERS** – Effective August 1, 2016, employers must post a revised FLSA Minimum Wage poster and revised Employee Polygraph Protection Act poster.

**WAGE & HOUR ENFORCEMENT** – In FY 2016, the DOL found violations in 81% of its investigations and obtained more than \$266 million in backpay for more than 280,000 workers (an average of \$966 per worker). Since 2009, the DOL has recovered nearly \$1.8 billion in backpay for 1.9 million workers. Under the Trump Administration, the DOL is expected to be more business-friendly and to shift its focus to achieving compliance rather than aggressive enforcement. For additional information, please see our online article.

## PAYROLL TAXES AND TAX CREDITS

**SOCIAL SECURITY TAXES** – In 2017, the maximum amount of earnings subject to the Social Security tax will rise to \$127,200 (from \$118,500). The Social Security tax rate of 6.2% paid by both the employee and the employer remains unchanged for 2017.

**MEDICARE TAXES** – The Medicare tax rate of 1.45% paid by both the employee and the employer remains unchanged in 2017. However, unlike Social Security, there is no limit on the amount of earnings subject to the Medicare tax. As in 2016, 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.

**NEW FILING DEADLINES** – Beginning in 2017, employers are required to file their copies of Form W-2, submitted to the Social Security Administration, by January 31. The new deadline also applies to certain Form 1099-MISC reporting non-employee compensation, such as payments to independent contractors. In the past, employers typically had until the end of February, if

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

**MILEAGE REIMBURSEMENT** – Beginning January 1, 2017, the Internal Revenue Service's optional standard mileage rate for the use of a car (also vans, pickups or panel trucks) is 53.5 cents per mile driven, down from 54 cents in 2016.

**TRANSPORTATION AND PARKING BENEFITS** – In 2017, the monthly tax exclusion for employer-provided commuter highway vehicle transportation and transit passes remains unchanged, at \$255, as does the \$255 monthly limitation for qualified parking benefits.

**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.



## HEALTH AND RETIREMENT

**ANNUAL PREMIUMS** – The average annual premium for employer-sponsored health insurance in 2016 was \$6,435 for single coverage and \$18,142 for family coverage, with workers on average contributing 18% of the premiums for single coverage and 30% for family coverage, according to Kaiser.

**HEALTH CARE COSTS** – U.S. employers expect health care costs to increase 4% to 6% in 2017, according to separate surveys by Mercer, Willis Towers Watson, and National Business Group on Health. Adding high-deductible consumer-directed health plans, making telemedicine available, and implementing spousal surcharges are among the many approaches employers are using to rein in health care costs.

**PRESCRIPTION DRUG COSTS** – The cost of prescription drug benefits continues to soar, with Segal

projecting double-digit cost increases in 2017. Specialty drugs, while less than 1% of all medications, now account for 35% of total projected prescription drug costs.

**HEALTH FSAS** – The 2017 limit on voluntary employee salary reductions for contributions to health flexible spending accounts increased to \$2,600.

**WELLNESS PROGRAMS** – Despite legal challenges, the EEOC's employer wellness program rules will become effective on the first day of the first plan year on or after January 1, 2017. The rules apply to all workplace wellness programs, including those in which employees or their family members may participate without also enrolling in a particular health plan.

**SMOKING AND E-CIGARETTES** – While the percentage of adults who smoke cigarettes (15.1%)

continues to decline, use of e-cigarettes has risen significantly. In 2016, the Food and Drug Administration finalized a rule that extends its regulatory authority to all tobacco products, including e-cigarettes, cigars, and hookah and pipe tobacco.

**ACA REPORTING DEADLINES** – The IRS extended the due date for employers and providers to issue health coverage forms to individuals, as required under the Affordable Care Act (ACA). Self-insuring employers, insurers, and other coverage providers now have until March 2, 2017, to provide Forms 1095-B or 1095-C to individuals, which is a 30-day extension from the original due date of January 31, 2017. The due dates for filing 2016 information returns with the IRS remain unchanged for 2017. The 2017 due dates are February 28 for paper filers and March 31 for electronic filers.

**MAXIMUM OUT-OF-POCKET** – In 2017, the maximum out-of-pocket limits (including deductible, co-insurance, and co-payments – but excluding premiums, non-network providers, and non-covered services) for health plans (other than high deductible health plans with health savings accounts) is \$7,150 for self-only coverage and \$14,300 for other than self-only coverage.

**FUTURE OF THE ACA** – Americans continue to be split on their views of the ACA, but a “vast majority” want to see the law changed, according to Gallup. President-

elect Trump has vowed to “repeal and replace” the ACA, but the extent and timing of any dismantlement, and the types of replacements that may be offered remain uncertain. Congressman Tom Price, M.D. (R-GA) has been nominated as the new Secretary of Health and Human Services.

**DEFINED BENEFIT PLANS** – The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation increases to \$69 for plan years beginning in 2017 (up from \$64 in 2016) and will jump to \$74 in 2018 and \$80 in 2019.

**401(K) PLAN CONTRIBUTION LIMITS** – In 2017, the contribution limit for employees who participate in 401(k) plans is \$18,000 (plus a catch-up contribution limit of \$6,000 for employees aged 50 and over), the same limits as in 2016.

**AUTO-ENROLLMENT AND 401(K) MATCHES** – Half (51%) of employers are auto-enrolling new employees in 401(k) plans, up from 28% in 2011, and more employers are setting the default salary deferral rate higher than in the past, according to the Society for Human Resource Management. About 40% of plan sponsors match contributions at a rate of up to 6% of a participant’s pay. Dollar-for-dollar is the most common match formula.

## OSHA/SAFETY



**OSHA INSPECTIONS** – In FY 2017, OSHA plans to “conduct 35,352 inspections to correct workplace hazards,” according to the agency’s Congressional Budget Justification, about the same as in past years. However, under its new enforcement weighting system, the agency is focusing more on significant cases (at least \$100,000 in fines), process safety management

inspections, ergonomic hazards, heat hazards, fatalities and catastrophes, workplace violence, and exposure hazards.

**TOP 10 OSHA VIOLATIONS** – The ten most frequently cited OSHA safety and health violations in FY 2016 were: fall protection, hazard communication, scaffolds, respiratory protection, lockout / tagout, powered industrial trucks, ladders, machine guarding, electrical wiring, and electrical general requirements. In FY 2016, 74% of OSHA inspections found at least one violation.

### OSHA Regulatory Agenda

In 2017, OSHA plans to focus on issuing a final rule on beryllium and a rule on additional respirator fit test methods. The agency also expects to issue three notices of proposed rulemaking, including: infectious diseases, emergency response and preparedness, and an update to the hazard communication standard. Dr. David Michaels, Assistant Secretary of Labor for OSHA, is stepping down as the head of OSHA in January 2017, and Present-elect Trump will appoint a new head of the agency.



**OSHA HIKES MAXIMUM PENALTIES** – The maximum penalties for OSHA violations increased by 78% effective August 2, 2016. For “willful” or “repeated” violations, the new maximum penalty is \$124,709 per violation (up from \$70,000); for “failure to abate” violations, the new penalty cap is \$12,471 *per day* beyond the abatement day (up from \$7,000); and for “serious,” “other than serious,” and posting violations, the new maximum penalty is \$12,471 (up from \$7,000). According to the agency, “OSHA will continue to provide penalty reductions based on the size of the employer and other factors.”

**OSHA WALK-AROUNDS** – In 2017, a federal judge is expected to rule on whether OSHA overstepped its authority in allowing union representatives to participate in OSHA “walk-around” inspections in non-union workplaces. In a 2013 letter of interpretation, the agency asserted that workers can 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.”

**INJURY AND ILLNESS RECORDS** – Certain employers will be required to submit injury and illness data electronically to OSHA annually under a new injury and illness recordkeeping rule that takes effect in 2017. The rule will be phased-in over two years. Employers covered by the rule must electronically submit to OSHA

information from their 2016 Form 300A by July 1, 2017. Certain employers will be required to electronically submit additional data to OSHA, from their Form 300 and Form 301, by July 1, 2018. OSHA plans to post some of the information on its public access website. As in past years, covered employers must post its latest Form 300A in the workplace from February 1 through April 30.

**ANTI-RETALIATION** – Employers must inform employees of their right to report work-related injuries and illnesses; establish a reasonable procedure for employees to report work-related injuries and illnesses (and inform each employee of the procedure); and refrain from retaliating against employees for reporting work-related injuries and illnesses, under a new OSHA rule that took effect December 1, 2016, notwithstanding ongoing legal challenges to the rule. While OSHA has stated that the new rule “does not ban appropriate disciplinary, incentive, or drug-testing programs,” the agency has issued guidance and examples of permitted and prohibited programs.

**DURATION OF RECORDKEEPING** – Beginning January 18, 2017, “an employer’s duty to record an injury or illness continues for the full five-year record-retention period,” under a new OSHA final rule. The new rule increases the statute of limitations from six months to five years, and is intended to reverse a 2012 court ruling that rejected OSHA’s position on the continuing nature of its prior recordkeeping regulations.

## UNIONS AND NLRB

**UNION MEMBERSHIP** – Despite stepped-up efforts by organized labor, only about 14.8 million U.S. workers belong to a union, down from 17.7 million in 1983. The union membership rate in the public sector (35.2%) is more than five times higher than the rate in the private sector (6.7%), and about half of all union members live in just seven states: California, New York, Illinois, Pennsylvania, Michigan, Ohio, and New Jersey.

**NLRB ELECTION RULES UPHELD** – Legal challenges to the NLRB’s revised election procedures were dismissed by a federal appeals court in 2016. The revised rules decrease the time preceding union elections, defer employer challenges to voter eligibility

until after an election is held, and require employers to provide unions with additional employee contact information.

**QUICKER NLRB ELECTIONS** – In the first year of the NLRB’s revised election procedures, unions filed the same number of representation petitions (2,144), entered into election agreements at the same rate (92%), and won about the



same number of representation elections (70%) as the previous year. However, the median days between a union filing a petition for a representation election and the date of the NLRB election were reduced by two full weeks, from 38 days to 23 days. The median size of the bargaining unit sought in union representation petitions was 22, down from 25 a year earlier.

**MICRO-UNITS** – In 2016, multiple U.S. Courts of Appeals upheld the Board’s new approach to voting units in NLRB elections. In *Specialty Healthcare*, the Board held that if a union petitions to represent a group of employees within a workplace and the employer challenges that voting unit as inappropriate, the employer must show that all employees it seeks to add share “an overwhelming community of interest” with the petitioned-for employees in order to prevail. This rule puts the burden on the employer to prove the appropriateness of the voting unit, setting a significant evidentiary hurdle for employers opposing small units.

**JOINT EMPLOYERS** – In 2017, the U.S. Court of Appeals for the D.C. Circuit is expected to decide the legality of the NLRB’s controversial new standard for determining joint employer status under the NLRA. The Board’s decision significantly broadens the definition of “employer” under the NLRA to include unrelated companies that might share some direct or even indirect control over each other’s workforce. *Browning-Ferris v. NLRB*. Businesses that rely on staffing companies, subcontractors, distributors, and franchisees may now be exposed to collective bargaining obligations, economic protest activity, and unfair labor practice liability based on working relationships with other entities with whom they have no ownership ties. Congress may consider legislation in 2017 to overturn the Board’s new joint employer standard.

**TEMPORARY WORKERS** – In July 2016, the Board overturned a decade-long precedent and held that a union seeking to represent in a single bargaining unit: (1) workers jointly employed by a user employer and supplier employer and (2) workers solely employed by the user employer need not obtain employer consent. *Miller & Anderson*. The case is significant for companies that use contingent workers.

**PREVENTIVE STEPS** – Sound preventive practices and preparation can help employers avoid union organizing or (if needed) win elections. These include: (1) conducting an audit of employment practices and HR procedures to ensure legality and best practices; (2) analyzing employee complements with an eye toward establishing supervisory status of all members of the management team and arranging departments to maximize a beneficial unit structure; (3) establishing training protocols for management on the employer’s rights and responsibilities under the law; and (4) implementing employee educational programs on union awareness.

**PERSUADER RULE BLOCKED** – In 2016, a Texas federal judge issued a nationwide permanent injunction blocking the DOL’s controversial new “persuader rule” from taking effect. The rule would have required employers and their consultants and attorneys to annually report to the DOL activities undertaken with an object (directly or indirectly) to persuade employees on how to exercise their rights to union representation and collective bargaining (such as training supervisors, drafting materials, and developing personnel policies), and how much the employer spent on such activities. The Trump Administration likely will decline to further defend the rule in court and may withdraw the appeal.

## Trump Administration and the NLRB

President-elect Trump has the opportunity to reshape the majority and the direction of the NLRB. Currently, the five-member NLRB has a 2-to-1 Democrat (and pro-labor) majority, with two vacancies. The new President is expected to nominate new Board members for a more business-friendly NLRB majority.

The new Board, once nominated by the President and confirmed by the Senate, is likely to revisit several pro-labor NLRB rules and decisions issued during the past few years, including those covering: (1) class action waivers; (2) joint employers; (3) inclusion of temporary workers in bargaining units with an employer’s regular

workers; (4) quickie elections; (5) expansion of protected concerted activity (e.g., its impact on workplace policies and employee conduct); (6) definition of appropriate bargaining units; (7) status of college/university adjunct faculty, graduate students, and student athletes; and (8) extent employees may picket and protest on employer property. For more information, please see our online article.

The new Board also likely will stay the course in areas where the current Board is primed to make additional pro-labor changes, such as extending *Weingarten* rights to non-union workplaces and making misclassification of employees as independent contractors a separate violation of the NLRA. In addition, the new President will be able to nominate a new NLRB General Counsel, as Richard Griffin's (D) term expires November 4, 2017.

**GRADUATE ASSISTANTS** – Reversing longstanding precedent, the Board in August 2016 ruled that student teaching and research assistants who have a “common-law employment relationship” with their private college or university are “statutory employees” under the NLRA and have the right to form unions and engage in collective bargaining. *Columbia Univ.* The Board's decision does not directly affect public colleges and universities, which are not covered by the NLRA.

**BARGAIN OVER DISCIPLINE** – In August 2016, the Board ruled that prior to entering into a first contract, an employer has a statutory obligation to bargain with the union that represents its employees before imposing discretionary “serious discipline” (such as suspension, demotion, or discharge) on any of those employees. *Total Security Management Illinois*. Importantly, the Board held that an employer is not required to bargain to agreement or impasse on such discipline.

**PICKETING AND PROTESTS** – In a groundbreaking expansion of union rights, the Board ruled in August 2016 that off-duty employees have the right to picket on an employer's premises, unless the employer can prove under the NLRA that a ban on picketing was necessary to prevent a disruption of operations. *Capital Medical Center*. In a separate case, the Board held that six employees who stopped work and engaged in an in-store protest over their alleged mistreatment by a supervisor and to secure permanent jobs for temporary employees were unlawfully disciplined. The Board termed the protest a “relatively small, peaceful and

confined work stoppage that did not lose the protection of the NLRA.” *Wal-Mart Stores, Inc.*

**RIGHT-TO-WORK LAWS** – Expect more battles over “right-to-work” laws in 2017, including in Kentucky, Missouri, and New Hampshire. Currently, 26 states have laws that prohibit employers from requiring workers to join a union or pay union dues as a condition of employment. Since 2012, Indiana, Michigan, Wisconsin and West Virginia have passed such statutes, although legal challenges are ongoing in Wisconsin, and West Virginia. In 2016, the U.S. Court of Appeals for the Sixth Circuit ruled that right-to-work ordinances enacted by counties are not preempted by the NLRA. *UAW v. Hardin County, Ky.*

**FEWER AND MORE EXPENSIVE ARBITRATIONS** – The number of grievances pursued through an arbitration hearing continues to decline. Although more than 16,600 arbitration panels were requested from the Federal Mediation and Conciliation Service in FY 2015, arbitrators were appointed in less than a third of the cases (5,415) – the lowest number in more than 15 years. Arbitration costs continue to soar, with the average arbitrator charging \$6,746 in FY 2015, up 52% since 2010 (\$4,410).

**STRIKES...THE LAST RESORT** – Labor strikes continue to be a last resort for unions. There were only 110 work stoppages in FY 2015, down sharply from 421 in 1998. The average duration of strikes in FY 2015 was more than two months (63 days).

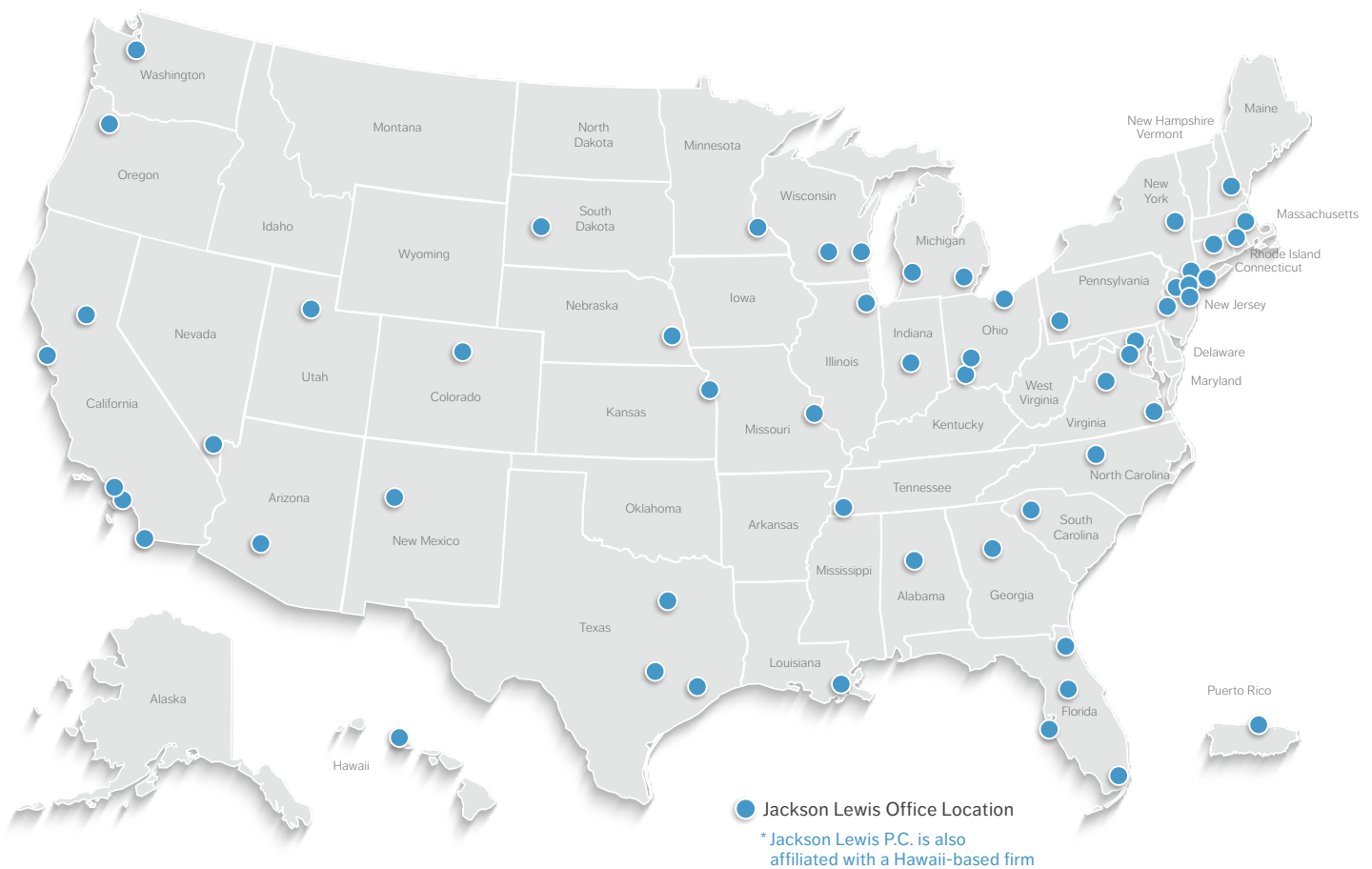
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