SHRM'S 2018 GUIDE TO PUBLIC POLICY ISSUES

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SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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The Society for Human Resource Management (SHRM)

The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Council for Global Immigration
A SHRM Affiliate

The Council for Global Immigration (CFGI)

The Council for Global Immigration (CFGI) is a strategic affiliate of SHRM. It is a nonprofit trade association comprised of leading multinational corporations, universities and research institutions committed to advancing the employment-based immigration of high-skilled professionals. CFGI bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

RESOURCES SHRM CAN PROVIDE

ACCESS TO HR CONSTITUENTS who live and work in every congressional district and state.

RESEARCH AND INFORMATION that deliver timely insights on emerging workplace issues.

EXPERTISE ON EFFECTIVE AND FLEXIBLE WORKPLACES through When Work Works, a nationwide initiative that brings research on workplace effectiveness and flexibility into community and business practice.

NONPARTISAN VIEWS on the impact of workplace policy on both employers and employees.

SHRM ADVOCACY TEAM

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Advancing the Workplace Through Public Policy

Join Us!

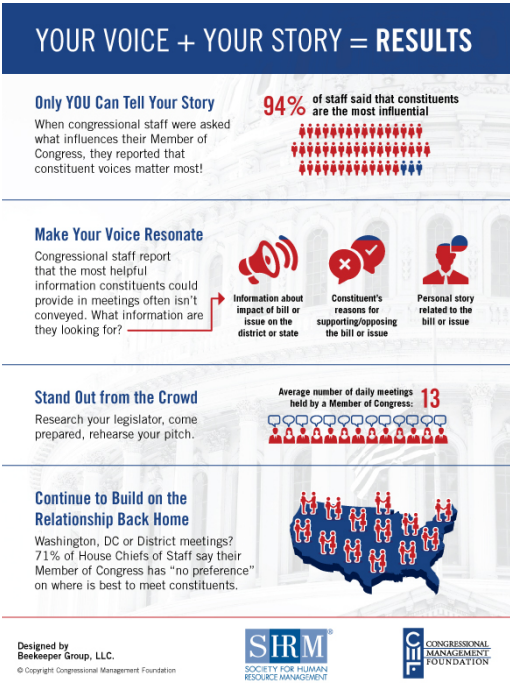
When Congress or state legislatures are developing workplace policy, HR's voice needs to be heard. As advocates for the HR community, SHRM members understand and can communicate how public-policy issues may affect employees and employers. By working together, we can help advance effective workplace public policy and strive to move our profession forward.

What is the SHRM Advocacy Team?

The SHRM Advocacy Team (A-Team) is a critical part of the Society's enhanced member advocacy initiative, working to advance the interests of the HR profession in Washington and state legislatures. Made up of SHRM Advocates in key legislative districts, the A-Team works to advance the HR perspective on workplace issues by leveraging the reach and knowledge of SHRM members through grassroots advocacy.

Lend your voice to driving HR forward!

We invite you to join the SHRM Advocacy Team and raise your voice in support of the HR profession.



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HR POLICY ACTION CENTER

ADVOCACY.SHRM.ORG

When Congress develops workplace policy, HR's voice will be heard. The SHRM HR Policy Action Center offers a way to assist HR Advocates in making their voices heard on public-policy issues impacting the workplace. The Policy Action Center is the best resource for staying informed on HR-related federal legislative proposals that Congress is considering. Most importantly, the Center allows HR's voice—and the voices of employers and employees across the country—to be heard in Washington, DC, by providing HR professionals the necessary resources to communicate with lawmakers and their respective staff.

At advocacy.shrm.org:

- ★ Immediately take action on SHRM's public-policy issue alerts.
- ★ Easily connect to your members of Congress.
- ★ Learn more about and sign up for SHRM's rapidly growing member advocacy army, the A-Team.
- ★ Take advantage of various SHRM-provided advocacy tools and materials, such as the SHRM Advocacy Mobile App.
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BACKGROUND INVESTIGATIONS

BACKGROUND: HR professionals ensure that new hires possess the talent, work ethic and character needed for the organization's success. Background investigations, including reference checks, credential or educational certification checks, criminal history checks, credit checks, and drug tests, can play a pivotal role in the hiring process.

The Fair Credit Reporting Act of 1970 (FCRA) governs the use of consumer reports and has explicit protections for consumers. Further, Title VII of the Civil Rights Act of 1964 bars employment decisions based on policies or tests, such as credit or criminal background checks, that have a disparate impact on protected groups.

ISSUE: In his 2018 State of the Union address, President Donald Trump expressed support for "reforming our prisons to help former inmates who have served their time get a second chance." An integral part of this second chance is a renewed focus on the appropriate use of background checks to evaluate prospective employees.

Recent action on background checks has occurred primarily on the state level. Eleven states and the District of Columbia currently limit employers' use of credit information in employment: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. Thirty states plus D.C. have adopted "ban-the-box" restrictions, which require employers to remove from employment applications the check box that asks about the job applicant's criminal convictions. These states are Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Wisconsin. Ten of these jurisdictions expand the requirement beyond public employers to include private-sector employers.

OUTLOOK: Given the bipartisan interest in criminal justice reform, Congressional action on this issue could advance, including possible restrictions on the use of criminal reports. We also anticipate that Department of Labor's interest in revitalizing apprenticeships will include those individuals who were formerly incarcerated.

SHRM POSITION: SHRM and its members have a long tradition of promoting equal employment opportunity practices for all individuals. Employment decisions should be made on the basis of qualifications—education, training, professional experience, demonstrated competence—not based on non-job-related characteristics.

There is, however, a compelling public interest in enabling our nation's employers to make the best hiring decisions possible. An employer's ability to conduct background checks helps ensure a workplace free of physical, financial, economic and personal identity threats to employees and the general public. For this reason, employment decisions should include a careful analysis of whether a job candidate's convictions are relevant to the job in question based on the Equal Employment Opportunity Commission (EEOC) guidelines. In addition, proposals that "ban the box" on an employment application should not unintentionally restrict an employer's ability to conduct a background check. The FCRA already protects consumers by requiring companies to get written permission from job candidates before conducting a background check. In addition, employers are barred by Title VII from using background checks to screen out job applicants based on protected characteristics such as race, ethnicity or gender.

TALKING POINTS

- ★ SHRM supports preserving employers' ability to conduct background checks for employment purposes. These checks serve as an important means to promote a safe and secure work environment for employees and the general public.
- ★ SHRM believes proposals to "ban the box" on employment applications should not unintentionally restrict an employer's ability to conduct a background check during the employment process.
- ★ SHRM supports public policies that facilitate the flow of accurate, truthful and relevant information about job candidates.
- ★ SHRM supports protections for employees and job applicants that are found in the Fair Credit Reporting Act of 1970, Title VII of the Civil Rights Act of 1964 and EEOC enforcement guidance on the consideration of arrest and conviction records in employment decisions.

CIVIL RIGHTS

BACKGROUND: Title VII of the Civil Rights of 1964, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act and other federal laws prohibit employment discrimination on the basis of race, color, national origin, sex, religion, disability, age and genetics. Despite these legal protections, the Equal Employment Opportunity Commission (EEOC) receives thousands of discrimination complaints each year. In addition, according to the *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* (June 2016), one-third of the total charges received in 2015 included a claim of workplace harassment. To more fully examine these statistics, the EEOC in 2016 established its Select Task Force on the Study of Harassment in the Workplace. The Task Force concluded that sexual harassment training, without an organizational culture change, fails to prevent harassment because it is "too focused on simply avoiding legal liability." In cases that involved sexual harassment, three out of four individuals never raised the issue of harassment with their supervisor, manager or union representative out of fear of retaliation or disbelief of their claim.

ISSUE: The issue of sexual harassment in the workplace has been front and center in our national conversation in 2017. Media attention and the #MeToo campaign, along with the work of the EEOC, have led to an increased focus on the role of workplace culture in preventing harassment. In addition, the U.S. Congress, several state legislatures and other high-profile workplaces are re-examining their harassment policies to ensure fairness for employees at all levels of the organization.

OUTLOOK: Legislation has been introduced in the 115th Congress that would prohibit employers from enforcing mandatory arbitration agreements for sexual harassment and sex discrimination claims. In addition, the House of Representatives recently passed legislation to require annual sexual harassment training for Members of Congress and their staff and to make Members of Congress personally liable for payments of settlement or injury. SHRM is working with the National Conference of State Legislatures to provide training to lawmakers and staff on workplace harassment and resolution. SHRM's CEO Johnny C. Taylor, Jr., also testified before the California Legislature on reforming harassment policies and the importance of healthy workplace culture.

SHRM POSITION: SHRM has a proud record of working to end discrimination in the workplace and believes that any misconduct against an employee should be resolved promptly. SHRM supports a discrimination- and harassment-free workplace. SHRM believes employers should have effective anti-harassment policies that enable thorough investigations of harassment complaints and hold perpetrators accountable. In addition, employers should work toward creating a workplace culture that does not tolerate discrimination or harassment.

TALKING POINTS

- SHRM is committed to encouraging fair and consistent employment practices and believes that employment decisions should be made based on job qualifications such as education, experience and demonstrated competencies, not on non-job-related characteristics.
- SHRM supports employers' efforts to create workplace cultures that do not tolerate discrimination or harassment.
- SHRM believes employers should have effective anti-harassment policies that enable quick and thorough investigations of harassment complaints and hold perpetrators accountable.
- SHRM advocates for public-policy proposals to ban workplace discrimination based on sexual orientation and gender identity.
- SHRM supports public-policy proposals that promote an accessible, prompt and fair resolution of harassment claims in the workplace while protecting confidentiality and due process.

COMPENSATION EQUITY

BACKGROUND: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967 and the Equal Pay Act of 1963 are among the laws that prohibit wage discrimination in the workplace. Generally speaking, jobs that have the same functions and similar working conditions and that require substantially the same skills must be compensated equally with allowable pay differences based on factors such as experience, qualifications, seniority, geographic location and performance.

ISSUE: Despite these protections, the EEOC compensation discrimination compliance manual notes that "pay disparities persist between workers in various demographic groups." For example, 2017 Bureau of Labor Statistics data show women who were full-time wage and salary workers had median weekly earnings of $767, which is approximately 81.9 percent of the median weekly earnings of male full-time wage and salary workers ($937). For policymakers, the challenge is understanding how much of the pay disparity between groups is attributable to discrimination, legitimate pay practices or other workplace dynamics, as well as what policy changes might help address it.

OUTLOOK: Although the White House has not offered any policy proposals, President Donald Trump has said that he supports equal pay for equal work, and Ivanka Trump has been a vocal proponent of pay equality. In Congress, House and Senate Democrats reintroduced the Paycheck Fairness Act (PFA) that would amend the Equal Pay Act and allow employers to base employee pay differentials only on seniority, merit and production and shift the burden of proof making it easier for plaintiffs to challenge employer pay practices. Given Republican majorities in both houses, it is unlikely the PFA will move forward in the current Congress.

Multiple states, including California, Delaware, Oregon and Massachusetts, a growing number of cities and the Commonwealth of Puerto Rico have passed some form of pay equity legislation. Many include a prohibition on asking about a job candidate's salary history. Some include a concept that appears close to or approaching "comparable worth," which requires that jobs with comparable skills and responsibilities or that are of comparable worth to the employer be paid the same. Another emerging trend is the inclusion of a safe harbor for employers that conduct voluntary self-evaluations of pay and are actively working to address any discrepancies.

SHRM POSITION: SHRM believes that employees should be compensated equitably and without discrimination. SHRM vigorously supports equal pay for equal work and believes that any improper pay disparities should be promptly addressed. SHRM believes that in determining pay employers should have the flexibility to reward employees by taking into consideration legitimate pay factors, such as education, qualifications, relevant experience, skills, seniority, geographic location, performance and any collective bargaining agreements.

In addition, SHRM believes that although it does not entirely explain differences in pay, an overreliance on salary history has contributed to perpetuating the wage gap. For this reason, SHRM believes that HR professionals should use alternative ways to engage job candidates to reach an agreement on pay by asking, for example, for a candidate's salary expectation rather than salary history. SHRM also believes providing employers with a safe harbor serves as an effective incentive to conduct proactive pay analyses and identify and address any improper pay disparities. Moreover, SHRM believes flexible workplace policies, the ability for employees to discuss pay, and policies that support transparency in how pay decisions are made are important aspects of pay equity.

TALKING POINTS

- SHRM believes that pay decisions should be made based on bona fide business factors and not based on non-job-related characteristics. Any improper pay disparities should be promptly addressed.
- SHRM supports public-policy efforts that foster a single standard for establishing pay equity, rather than navigating different standards at the federal, state and local levels.
- SHRM advocates for federal standard of equal pay for equal work and opposes efforts to equate different jobs using "similarly situated" or "comparable worth" standards.
- SHRM encourages employers to educate applicants or employees on their compensation practices by sharing compensation for the position, total compensation philosophy, pay structure and the factors taken into consideration in pay decisions.

EMPLOYMENT-BASED IMMIGRATION

BACKGROUND: In an increasingly interconnected world, access to talent is vital for employers to address the skills gap. To remain competitive, many employers use employment-based visas to recruit, hire, transfer and retain employees. However, today's immigration system is plagued with backlogs, arbitrary caps, inconsistencies and delays. As the world of work rapidly evolves, policymakers must create fair, innovative and competitive employment-based immigration policies that benefit U.S. employers and their workforces.

ISSUE: Organizations of every shape, size and industry confront challenges in finding the right employees with the right skills to fill specific positions. According to SHRM's 2016 report *The New Talent Landscape*, 68 percent of HR professionals have difficulty recruiting for full-time regular positions, particularly jobs that require medical, scientific, math, IT and leadership skills. There is no single solution for addressing the skills gap, but employment-based immigration is a central piece of our country's larger workforce policy. A modern immigration system is critical to ensuring competitiveness.

President Donald Trump is adjusting immigration policy, focusing on national security, interior enforcement and employment-based immigration. On April 18, 2017, Trump signed the "Buy American and Hire American" (BAHA) executive order, instructing federal agencies to issue new immigration rules and guidance to protect the interests of U.S. employees, including prevention of fraud or abuse. BAHA also instructed agencies to recommend reforms to the H-1B program to ensure visas are awarded to the "most-skilled or highest-paid" beneficiaries.

OUTLOOK: This year, any immigration changes are most likely to come from the federal agencies, including elimination of work authorization for all H-1B dependent spouses, tightening of H-1B eligibility criteria and reforming the lottery, limitations on optional practical training for graduates of U.S. universities, and restrictions to J-1 exchange visitor programs.

Congress is pursuing a Deferred Action for Childhood Arrivals (DACA) solution, as the Trump administration announced plans to phase out the program as of March 5, 2018. However, legal challenges have allowed individuals to continue filing for DACA extensions, and the litigation is unlikely to be resolved before next year. Any final DACA deal may include elements of the President's proposal, such as border security funding, limits to family-sponsored immigration and elimination of the diversity visa lottery, thereby reallocating green cards to clear backlogs. However, any such legislation would be a challenge to get enacted given the makeup of Congress and the

slim Republican majority in the Senate. The president has called on Congress to find a solution to DACA before it turns to other immigration reforms that could include mandatory, nationwide E-Verify and employment-based immigration.

SHRM POSITION: SHRM and its affiliate the Council for Global Immigration (CFGI) support policies that ensure the U.S. workforce can compete in an increasingly complex and interconnected world. We call on policymakers to create fair, innovative and competitive employment-based immigration policies that benefit employers and the workforce. Ultimately, our immigration system must support U.S. employers in their efforts to fill skills gaps and access the best talent, along with enhanced protections, education and training for U.S. workers.

SHRM and CFGI specifically support enacting a Trusted Employer program that creates efficiencies for low-risk and immigration-compliant employers. In addition, we support enforcement of existing immigration laws against bad actors, not employers acting in good faith. Finally, policymakers must recognize that employers are best-positioned to determine their skills and workforce needs and must ensure that employers have enough visas to recruit, hire, transfer and retain high-skilled foreign national professionals, especially those educated and trained in the United States, to innovate and grow the U.S. economy. This requires changes for employees seeking green cards and for temporary workers in the United States. SHRM and CFGI work with the Compete America coalition as part of our efforts to achieve increased access to top foreign-born talent.

TALKING POINTS

- ★ SHRM and CFGI support policies that invest in and develop the U.S. workforce, prioritizing visas for employers that are growing the U.S. workforce and investing in the education and training of U.S. employees.
- ★ SHRM and CFGI support enforcement of existing immigration laws that allow employers to hire a legal workforce.
- ★ SHRM and CFGI believe that policies must support U.S. employers in their efforts to recruit, hire, transfer and retain the employees they need from around the world to innovate and grow the U.S. economy.
- ★ SHRM and CFGI support solutions that increase our employment-based immigration system's effectiveness and predictability, such as a Trusted Employer program.

EMPLOYMENT VERIFICATION

BACKGROUND: The Immigration and Nationality Act makes it unlawful for an employer to knowingly hire or continue to employ someone who is not authorized to work in the United States. Federal law requires employers to examine numerous documents presented by new hires to verify identity and work eligibility and to attest to that examination on Form I-9. As of 2009, certain federal contractors must use the employment eligibility verification system known as E-Verify for employees hired during a federal contract and employees assigned to that contract. In addition, 21 states and various localities require the use of either E-Verify or a specified alternative by some or all employers. Even if using an electronic verification system, the employer must still complete Form I-9 for every newly hired employee. The E-Verify program has been reauthorized through March 23, 2018.

ISSUE: E-Verify, which relies on the Social Security Administration and the Department of Homeland Security databases to confirm work authorization, lacks sufficient security features to protect employers from persons using fraudulent identities to work. E-Verify continues to rely on paper documentation that is susceptible to theft, forgery and alteration and that cannot be verified for authenticity. Effective worksite enforcement is central to efforts to secure U.S. borders. Although U.S. employers are committed to hiring only work-authorized individuals, today they are confronted with a patchwork of federal and state employment verification requirements that are confusing and that can be defeated by workers presenting stolen identities. U.S. employers need one reliable, national, entirely electronic and integrated employment verification system that uses state-of-the-art technology to accurately authenticate a new hire's identity.

OUTLOOK: The Trump administration announced that the Deferred Action for Childhood Arrivals (DACA) program will be phased out as of March 5, 2018, although court rulings have temporarily allowed renewals to continue. President Donald Trump and Congress are pursuing a bipartisan legislative solution; however, nothing is guaranteed. A final deal could include a solution to provide legal status for DACA recipients and/or those who are DACA-eligible, resources for border security, limits to family-based migration and elimination of the diversity visa green card program, reallocating eliminated green cards for backlog use. Proposals to address these issues could also include proposals to mandate E-Verify for all employers. Alternatively, Trump may pursue executive action aimed at expanding and incentivizing employers' use of E-Verify. Absent congressional

action, additional states and localities could enact measures to require E-Verify as part of the employment verification process.

SHRM POSITION: SHRM and its affiliate the Council for Global Immigration (CFGI) support policies that provide employers with modern tools that eliminate redundancies and build upon E-Verify's success. Although the U.S. Citizenship and Immigration Services (USCIS) should be commended for the improvements it has made to E-Verify, the program requires additional changes to be truly effective as a deterrent to prevent unauthorized employment. SHRM and CFGI believe that congressional reforms should pre-empt the patchwork of state laws with one reliable, national and entirely electronic and integrated employment verification system; use state-of-the-art technology to accurately authenticate a new hire's identity; ensure a safe harbor from liability for good-faith program users; and require employment verification only for new hires. SHRM and CFGI lead an employer coalition aimed at achieving our employment verification goals.

TALKING POINTS

- SHRM and CFGI share the goal of a legal workforce, which must be a key element of any effective immigration policy.
- SHRM and CFGI support a reliable, entirely electronic and integrated employment eligibility verification system operated by the federal government that provides employers with certainty that new employees are authorized to work.
- SHRM and CFGI urge Congress to improve E-Verify to include an electronic verification system that will eliminate virtually all unauthorized employment, provide security for employers, protect the identity and personal information of legal workers through identity authentication tools, and prevent employment discrimination based on national origin.

HEALTH CARE

BACKGROUND: Employer-sponsored health insurance is the foundation of health care coverage in the United States, providing quality, affordable health benefits to more than 178 million Americans. However, since the enactment of the Affordable Care Act (ACA), implementation of its requirements has remained challenging for employers due to the complexity of the law, delays in effective dates of certain provisions, and coverage and reporting requirements. While the employer coverage mandates and state public exchange plans remain in effect, the individual mandate penalty has been reduced to zero and the 40 percent excise tax on employers that provide high-value health plans, known as the "Cadillac tax," is delayed. In addition, health care costs continue to rise for employers and employees alike.

ISSUE: As a result of the rising costs of coverage and the excise tax threat, many organizations are changing their health care offerings to include health savings accounts, private exchanges, wellness programs and disease management programs. In addition, some employers eliminated health care coverage for part-time employees, while others have re-engineered staffing models to reduce employee hours below the 30-hour threshold for coverage under the ACA. Furthermore, employers' efforts to improve employee health, enhance productivity and help control health care costs through voluntary wellness programs have been hampered by an uncertain regulatory environment, particularly with regard to the allowable size of financial incentives.

OUTLOOK: Although "repeal and replace" of the ACA was a priority for President Donald Trump and the Republican-controlled Congress in 2017, it proved to be both procedurally and structurally problematic, halting efforts to fully repeal the ACA. Congress instead will focus on more targeted modifications to the law to address affordability, coverage and quality of care. For example, on Dec. 22, 2017, Trump signed into law the Tax Cuts and Jobs Act, reducing the individual mandate penalty under the ACA to zero, effective in 2019. In addition, on Jan. 22, 2018, Trump signed into law a stopgap government funding bill, which included the delay of several ACA taxes, including the "Cadillac tax," now set to become effective in 2022.

Health care reform proposals likely to move forward in the second session of the 115th Congress include the delay of employer mandate penalty and changes to ease the compliance reporting requirements for employers offering health insurance. Furthermore, as lawmakers seek to reduce health care costs and encourage consumerism, proposals to repeal restrictions on the use of and limitations on contributions

to health savings accounts are likely to receive consideration.

In addition, regulatory guidance from the Department of Labor, Department of Health and Human Services and the Treasury Department, as well as from the Internal Revenue Service—the agencies responsible for the ACA oversight—is likely to be increased. On Jan. 20, 2017, Trump issued an executive order directing federal agencies to minimize regulatory burdens of the ACA where possible. Regulatory guidance may include employer reporting requirements and final regulations on the expansion of "association health plans" (AHPs). Furthermore, the Treasury Department is likely to issue draft regulations to modify the rules on health reimbursement arrangements to cover more out-of-pocket health care expenses. Lastly, the Equal Employment Opportunity Commission's rules regarding the financial incentives employers can offer employees in wellness programs were vacated, and the agency is expected to release new regulations in the fall.

SHRM POSITION: SHRM supports reforms that lower health care costs and improve access to high-quality and affordable coverage. The Society believes that congressional reforms should strengthen and improve the employer-based health care system.

TALKING POINTS

- ★ SHRM supports full repeal of the ACA excise tax on high-value employer-sponsored health plans.
- ★ SHRM supports preservation of the current tax treatment of employer-sponsored health plans.
- ★ SHRM supports defining "full-time" employment for purposes of health care coverage to be 40 hours per week, consistent with the Fair Labor Standards Act's overtime requirement.
- ★ SHRM supports wellness initiatives and public policy that facilitates their adoption.
- ★ SHRM supports efforts to reform medical malpractice.

LABOR AND EMPLOYMENT

BACKGROUND: Under the Fair Labor Standards Act of 1938 (FLSA), employees are to be paid at a rate of at least one and a half times their regular rate for any hours worked over 40 in a week, unless they have been classified as exempt under certain specific statutory categories or meet other requirements in the regulations. Under Section 541 of the FLSA regulations, an employee may qualify as exempt from overtime requirements if he or she satisfies a "primary duties test" (performs specific job responsibilities under the executive, administrative, professional, computer and outside sales regulations); is paid on a salary basis (that is, salary does not fluctuate based on the hours that the individual works); and is paid above a salary threshold set by regulation.

The Trump administration has placed an emphasis on easing regulatory burdens, especially those that impact the workplace. In June 2017, the Department of Labor (DOL) rescinded Administrator's Interpretations on joint employment and independent contractors, two pieces of informal agency guidance that were part of a shift in the interpretation of wage and hour law in the previous administration.

ISSUE: The 2016 overtime rule would have dramatically increased the salary threshold to qualify for overtime pay and would have established a new mechanism to automatically update the threshold every three years. Just days before the final rule's implementation date, a federal district court judge issued a preliminary injunction. This injunction provided the incoming Trump administration an opportunity to reconsider how to best update the FLSA exemptions. In July 2017, the DOL issued a Request for Information (RFI) soliciting input from the public on many of the provisions of the rule, including setting the salary level, analyzing the duties test, varying the test based on the cost of living in different parts of the country, automatically updating the salary level, and including nondiscretionary bonuses and incentive payments to satisfy a portion of the salary level.

OUTLOOK: In its most recent regulatory agenda, the DOL indicated it will review comments it received in response to the RFI, including those submitted by SHRM, and issue a notice of proposed rulemaking by October 2018.

SHRM POSITION: SHRM supports an update of the salary level, but one that follows previous methodology to achieve a more equitable increase. The 2016 rule's salary increase of over 100 percent was too far and too fast and would have presented particular challenges for employers whose salaries tend to be lower, such as small employers, nonprofits, employers in certain industries and employers in certain geographic regions of the country that tend to have lower costs of living.

Of equal concern, SHRM opposes any automatic increases. Such increases ignore economic variations of industry and location and make it hard for HR to manage merit increases for employees near the salary level.

TALKING POINTS

- ★ SHRM agrees that the salary threshold to qualify for overtime should be raised but believes that a more reasonable increase is appropriate to avoid long-term, negative impacts on the workplace, especially for the nonprofit sector, small businesses and employers in geographic areas with lower costs of living.
- ★ SHRM opposes automatic increases, which have been considered and rejected by the DOL in the past. Automatic increases ignore economic variations of industry and location.
- ★ SHRM supports revising the rule through new rulemaking to eliminate the automatic escalator and propose a more reasonable update to the salary level.

LABOR-MANAGEMENT RELATIONS

BACKGROUND: Private-sector unionization rates continue to decline. According to the Bureau of Labor Statistics, only 6.5 percent of people working in the private sector in 2017 were members of a union. Furthermore, the overall U.S. workforce union membership rate was 10.7 percent in 2017, down from 20.1 percent in 1983. The National Labor Relations Act of 1935 (NLRA) states that a union can be certified as the exclusive collective bargaining agent for an organization's employees in one of two ways: a secret-ballot election or, under limited circumstances, a "card check" process, in which a majority of employees in a specific work unit sign a card authorizing a union to represent their collective interests. Although the National Labor Relations Board (NLRB) 2015 data reveal that unions won 69 percent of all representation elections, union win percentage was virtually unchanged from the previous year, even though the "ambush" election rule had taken effect, which drastically shortened the timeframe and changed the process and procedures for union elections.

ISSUE: In December 2017, with a 3-2 Republican majority, the NLRB reversed key workplace rules and decisions that were promulgated under the Obama administration. In *Hy-Brand Industrial Contractors, Ltd.*, the NLRB overturned its standard for determining joint employment status under the NLRA that had been established under the *Browning-Ferris* decision. The Hy-Brand standard re-established that joint employment can only be found where two or more entities actually "share or codetermine those matters governing the essential terms and conditions of employment." In February, however, the NLRB vacated the decision following an Inspector General determination that the NLRB's member, William Emanuel, should have recused himself due to his former law firm's involvement in the original case. In *PCC Structurals, Inc.*, the NLRB reinstated the traditional community of interest standard to be used when determining whether unions have included all necessary employees on a petition for union representation, reversing the *Specialty Healthcare* "micro-bargaining units" decision that required an "overwhelming community of interest" standard. In another crucial decision, *The Boeing Company* decision, the NLRB adopted expanded standards for determining whether facially neutral workplace rules, policies and employee handbook standards unlawfully interfere with the exercise of NLRA-protected employee rights, overturning the *Lutheran Heritage* decision, which solely focused on whether employees could "reasonably construe" a rule to restrict their rights. On the eve of Chairman Philip Miscimarra's term as Board Chair expiring, the NLRB

issued a Request for Information (RFI) soliciting input from the public on the amendments to representation case procedures, commonly known as the "ambush" election rule.

OUTLOOK: Once all President Donald Trump's NLRB nominees are confirmed, we anticipate the Board will review the comments from the "ambush" election RFI and issue a new proposed rule on union elections. In addition, the U.S. House of Representatives passed the Save the Local Business Act by a bipartisan vote that would codify the direct control standard established under the joint employer definition. As a member of the Coalition for a Democratic Workplace, SHRM supports Senate passage of this legislation.

SHRM POSITION: SHRM believes in the fundamental right—guaranteed by the NLRA—of every employee to make a private choice about whether to join a union.

TALKING POINTS

- ★ SHRM believes a secret ballot is the best means of protecting employees from coercion or other pressures in deciding whether to join a labor union.
- ★ SHRM supports public policy that protects an employer's ability to create reasonable workplace policies for labor-management relations.

RETIREMENT SECURITY AND EMPLOYER-SPONSORED BENEFITS

BACKGROUND: A comprehensive employer-sponsored benefits package is a key component that employers use to attract and retain top talent. Employers carefully construct a benefits package that reflects the needs and demands of their specific workforce. Fringe benefits, such as subsidies for parking and transit, tuition assistance for undergraduate and graduate degrees, and wellness incentives, are an important part of a thoughtful, comprehensive benefits package.

Two of the most widely used benefits are employer-provided health care and retirement savings plans. According to the SHRM *2017 Employee Benefits* research report, 85 percent of employers offered a preferred provider organization (PPO) health care plan, and 55 percent offered a health savings account—up 5 percentage points from 2016. In terms of retirement options, 90 percent of employers surveyed provided a defined contribution retirement plan, and 24 percent provided a defined benefit pension plan. Employer-sponsored retirement plans are the main conduit for employees to save for a financially sustainable retirement.

ISSUE: The Tax Cuts and Jobs Act (Public Law 115-97) enacted in 2017 maintained the tax-free status of many employee benefits while modifying others. Although employer-sponsored fringe benefits, including retirement plans, health care benefits and educational assistance programs, were largely preserved, the new law does alter the tax treatment of other benefits, including moving, parking/transit or biking, meals and on-site gym benefits, which are no longer a deductible business expense for for-profit organizations. Employees now must include moving benefits and biking subsidies provided by their employer in their taxable income.

OUTLOOK: Now that comprehensive tax reform has been enacted, federal agencies must implement the law through rulemaking in 2018. Congress will need to act on a "technical corrections" bill to amend specific provisions of the massive new law early in 2018. In addition, a tax "extenders" package will likely see action to address other tax changes that were not included in tax reform. This "extenders" package could include two SHRM-supported bipartisan proposals to expand employer-provided educational assistance under Section 127 of the Internal Revenue Code. H.R. 795, Employer Participation in Student Loan Assistance Act, would expand Section 127 to include student loan repayment, and S.2007 & H.R. 4135, the Upward Mobility Enhancement Act, would expand Section 127 to $11,500 per calendar year.

SHRM POSITION: SHRM believes that a comprehensive and flexible benefits package is an essential tool in recruiting and retaining talented employees. In addition, SHRM believes that a bedrock of sound fiscal and savings policy is ensuring that every U.S. employee has the opportunity to save and plan for retirement and protect his or her family's health.

Public-policy efforts at both the federal and state levels should focus on expansion of and access to benefits, including retirement accounts, health care and employer-provided education assistance. SHRM strongly supports bipartisan legislation to expand Section 127.

As part of our advocacy efforts, SHRM chairs the Coalition to Protect Retirement, which encourages and supports retirement savings for U.S. workers through preservation of tax incentives critical to retirement security. For information, visit www.howamericasaves.com. SHRM also chairs the Coalition to Preserve Employer Provided Education Assistance, which brings together a broad cross-section of more than 80 organizations representing employers, labor and higher education, and which is committed to preserving employer-provided education assistance. For more information, visit www.cpepea.com.

TALKING POINTS

- ★ SHRM believes a comprehensive employer-sponsored benefits package is a key component that employers use to attract and retain top talent.
- ★ SHRM supports tax incentives to expand access to and participation in these plans.
- ★ SHRM supports expansion of Section 127 because this benefit facilitates investment in the workforce and ensures a talent pipeline as employers look to innovate and compete globally.

WORK-BASED LEARNING

BACKGROUND: Employers and HR professionals continue to confront persistent gaps between the skills of the existing labor pool and the skills employers seek to fill specific positions. According to a 2016 SHRM report *Recruiting Difficulty and Skills Shortages*, two out of every three organizations reported difficulty recruiting for full-time regular positions over the past year. One-half of those organizations cited lack of work experience, lack of the right technical skills or competition from other employers as a primary reason for difficulty in hiring. Certain positions have been identified as more difficult to fill than others, including high-skill jobs and middle-skill jobs that require education and training beyond high school but less than a four-year degree. Barriers to entry may include required occupational licenses or workplace certifications. At the same time, untapped pools of workers might serve as a source of skilled employees: military veterans, individuals with disabilities and individuals who were formerly incarcerated.

ISSUE: High- and middle-skilled workers are in demand in many industries, but supply in some geographic and industry-specific areas is low. One opportunity to tackle the skills gap is through expanded or industry-specific apprenticeship programs. Another may be efforts to encourage employers to review and evaluate their qualification and hiring preferences and consider the greater use and acceptance of skill certifications, occupational licenses and competency-based hiring in the employment process.

In addition, employers that offer education assistance under Section 127 of the Internal Revenue Code (IRC) not only provide a valuable benefit to their employees but also invest in their workforce, ensuring that their employees are prepared for the challenges of a global labor market.

OUTLOOK: In 2017, President Donald Trump signed an executive order to substantially increase the number of U.S. apprenticeships from the current 500,000 to approximately 5 million in the next five years. The executive order instructs the Department of Labor (DOL) and other agencies to make efforts to expand apprenticeships and reform ineffective education and workforce development programs. Congress introduced legislation that incentivizes employers to contribute to education and skills development. Specifically, the proposal would increase the amount allowed for tax-free education assistance and expand the benefit to include student loan repayment. This proposal would enable employers to not only attract and retain valuable talent but also empower their employees to expand their skill sets.

SHRM POSITION: SHRM believes that both government and employers play a role in providing training to employees to help them become more productive and better qualified for high- and middle-skill jobs. SHRM believes that such training should be encouraged as a sound investment through incentives, rather than through mandates. SHRM also encourages a revitalized national discussion about hiring from untapped talent groups such as veterans, individuals with disabilities and individuals who were formerly incarcerated—removing barriers to hiring to ensure that all individuals have opportunities for employment. SHRM supports public-policy efforts to expand Section 127 to include student loan repayment as well as allow employers to provide up to $11,500 per year and adjusted for inflation thereafter.

TALKING POINTS

- ★ SHRM supports partnerships between employers and education and training providers that are demand-driven and focused on the workforce needs of employers.
- ★ SHRM encourages employers to review and evaluate their qualification and hiring preferences and consider the greater use and acceptance of skill certifications, occupational licenses and competency-based hiring in the employment process.
- ★ SHRM highly encourages the availability of tax incentives, like Section 127 of the IRC, which promote further training, education and skills development.
- ★ SHRM supports public-policy efforts to foster and expand greater availability of apprenticeships programs, including industry-specific programs.
- ★ SHRM supports efforts focused on facilitating employment pipelines for individuals from within the communities of veterans, individuals with disabilities and individuals who were formerly incarcerated.

WORKPLACE FLEXIBILITY

BACKGROUND: The Family and Medical Leave Act of 1993 (FMLA) and the Fair Labor Standards Act of 1938 (FLSA) are the two federal statutes that generally shape workplace flexibility policies in this country. Workplace flexibility is an important business strategy that helps organizations respond to demographic, economic and technological changes in the workplace. HR professionals tailor flexibility practices such as telecommuting, compressed workweeks, flexible scheduling and part-time work to help employees navigate their work and personal responsibilities, as these practices improve retention, enhance employee engagement, reduce turnover costs and increase productivity.

In 1985, Congress enacted the Federal Employees Flexible and Compressed Work Schedules Act, permanently authorizing compensatory (comp) time for federal employees, while also amending the FLSA to expand coverage requirements to include state and local agencies and their employees.

More recently, nine states—Arizona, California, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont and Washington—have adopted statewide paid sick leave laws, joining over 30 localities. Four states—California, New Jersey, New York and Rhode Island—have enacted paid family leave insurance programs.

ISSUE: Employers continue to encounter challenges in designing workplace flexibility policies that do not conflict with the FMLA, the FLSA, and other federal and state laws. Existing statutes may prevent or discourage employers from adopting flexible scheduling, telecommuting or compressed workweeks. In addition, many employers believe that the FMLA and its implementing regulations are not responsive to the evolving needs and lifestyles of today's workforce. At the same time, interest in and discussion around work/life issues continue to grow.

OUTLOOK: Current law requires federal contractors to allow employees to earn not less than one hour of paid sick leave for every 30 hours worked, accruing up to 56 hours of paid sick leave per year. Advocates continue to champion the Healthy Families Act (HFA) to require nearly all employers to provide employees this same amount of paid sick time. The Family and Medical Insurance Leave (FAMILY) Act, which would provide partial wage replacement funded through a payroll tax for eligible leaves under the FMLA, has been introduced in the 115th Congress. President Donald Trump called for paid family leave in his State of the Union address in January 2018 but has not released any details for the proposal. While the HFA and the FAMILY Act are unlikely to advance in the Republican-controlled Congress, SHRM-developed

legislation, H.R. 4219, the Workflex in the 21st Century Act, could see action. H.R. 4219 allows employers to voluntarily offer employees a qualified flexible work arrangement plan that includes a federal standard of paid time off and options for flexible work arrangements. This plan, covered by the Employee Retirement Income Security Act, would pre-empt state and local paid leave and workflex laws.

SHRM POSITION: SHRM believes that the United States must have a 21st century workplace flexibility policy that meets the needs of both employers and employees. SHRM supports efforts to assist employees in meeting the dual demands of work and personal needs and believes that employers should be encouraged to voluntarily offer paid leave to their employees, as outlined in H.R. 4219. Rather than a one-size-fits-all government mandate, as found in the HFA, policy proposals should accommodate varying work environments, employee representation, industries and organization sizes.

TALKING POINTS

- SHRM believes workplace flexibility—or workflex—is a hallmark of the 21st century workplace. It is about rethinking how, when and where people do their best work. This new workplace can't thrive with the same old, one-size-fits-all approach.
- SHRM believes that mandated leave requirements limit an employer's flexibility in designing generous and innovative leave programs for employees. As the 21st century workforce and workplace continue to evolve, employees now, more than ever, need flexibility options to manage their work/life responsibilities.
- SHRM is calling on Congress to enact the Workflex in the 21st Century Act to provide more paid time off for employees, more predictability for employers and more options for everyone—a responsible solution for government, employers, employees and taxpayers.

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