



SHRM'S 2017 GUIDE TO
**PUBLIC POLICY
ISSUES**

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SOCIETY FOR HUMAN
RESOURCE MANAGEMENT

Leading People.
Leading Organizations.

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.

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.



Council for
Global Immigration
A **SHRM** Affiliate



Creating a 21st Century Workplace

The members of SHRM and CFGI play a critical role in advancing human resource policies that our employers and employees need to compete and win in the increasingly complex global economy. We call on elected representatives and government officials to embrace three core principles that advance a 21st Century Workplace that is innovative, fair and competitive. For more, see www.advocacy.shrm.org/shrm/21CenWork.

INNOVATIVE: The 21st Century Workplace provides employers and employees the flexibility to address how, when and where work is accomplished and allows for the design of employee benefits programs that attract and retain employees while managing the fiscal realities of modern business. To advance this principle, we support policies that increase workplace flexibility and enhance employer-sponsored benefit programs.

FAIR: The 21st Century Workplace provides fair employment practices in hiring, training and compensation, regardless of non-job-related characteristics, and encourages practices that meet the goals of the organization and the needs of its employees. To advance this principle, we support policies that provide fair employment practices and promote effective labor-management relations.

COMPETITIVE: The 21st Century Workplace gives employers the ability to attract, recruit, hire and train talent, as needed, to remain competitive in a global economy. To advance this principle, we support policies that close the skills gap and reform the U.S. immigration system.

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 public-policy 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.

HR POLICY ACTION CENTER

ADVOCACY.SHRM.ORG

When Congress develops workplace policy, HR's voice will be heard. The SHRM Advocacy Team, or "A-Team," represents thousands of HR professionals who actively communicate the needs of the profession to their elected officials. By working together, we can help advance effective workplace public policy and strive to move our profession forward.

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.
- ★ Join SHRM's strong advocacy presence on social media.
- ★ Review critical HR legislation SHRM is actively tracking.



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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: While on the campaign trail, President Donald Trump stated that he wanted to implement a tougher criminal justice system to more effectively fight crime and that criminals should not be allowed to re-enter society so easily. However, he has not stated how that policy might impact the ability of employers to conduct background checks on prospective employees.

Recent action on background checks has occurred primarily on the state level and within the Equal Employment Opportunity Commission (EEOC). Eleven states currently limit employers' use of credit information in employment: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. Twenty-five states plus the District of Columbia have adopted "ban-the-box" restrictions. "Ban-the-box" requires that employers remove from employment applications the check box that asks whether the job applicant has any criminal convictions; these states are California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia and Wisconsin. Nine of these jurisdictions expand the requirement beyond public employers to include private employers. In January, Trump named Commissioner Victoria Lipnic acting chair of the EEOC. With new senior EEOC leadership, we can expect a shift in priorities from the commission.

OUTLOOK: In the last Congress, bipartisan efforts for criminal justice reform and to provide greater employment opportunities for the formerly incarcerated focused on the use of criminal background checks in the hiring process. Senator Cory Booker (D-NJ) introduced the Fair Chance Act, which would prohibit federal agencies and federal contractors from requesting that job applicants disclose criminal history information before receiving a conditional offer of employment. In addition, Senator Elizabeth Warren (D-MA) reintroduced legislation to ban the use of credit reports in the employment process. We anticipate that both pieces of legislation will be reintroduced in the 115th Congress and the efforts to outright ban the use of criminal checks in the hiring process are unlikely to advance. However, we could see action on bipartisan efforts on criminal justice reform that include restrictions on the use of criminal reports. In 2012, the EEOC issued guidance on the use of criminal background checks in employment. Although Lipnic voted for the guidance at that time, she expressed concern that the guidance did not clearly address what employers should do when faced with state laws requiring that criminal background checks be conducted for certain jobs in conflict with the EEOC guidance. Under Lipnic's leadership, we may see clarification on this point.



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 on factors with no bearing on the ability to perform job-related duties.

However, there is a compelling public interest in enabling our nation’s employers to make the best hiring decisions possible. Employers’ ability to conduct background checks for employment purposes helps keep the workplace free of physical, financial, economic and personal identity threats to employees and the general public. 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. They 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 process.
- ★ SHRM believes public policy should facilitate the flow of accurate, truthful and relevant information about job candidates.
- ★ SHRM supports of protections for employees and job applicants that are found in the Fair Credit Reporting Act of 1970 and Title VII of the Civil Rights Act of 1964.



Compensation Equity

BACKGROUND: The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 prohibit gender-based wage discrimination in the workplace. Depending on performance and seniority, jobs that have the same functions and similar working conditions and that require substantially the same skills must be compensated equally.

ISSUE: According to the U.S. Bureau of Labor Statistics, in the fourth quarter of 2016 women who were full-time wage and salary workers had median weekly earnings of \$758, which is approximately 82 percent of the median weekly earnings of male full-time wage and salary workers (\$927). The question is whether this wage disparity between women and men is attributable to discrimination, legitimate pay practices or other workplace dynamics. Equal pay advocates have proposed a “comparable worth” pay system to correct gender-based pay differences. Congress rejected this concept during the original Equal Pay Act debate because it would mandate the same pay for different jobs.

OUTLOOK: President Donald Trump has said that he supports equal pay for equal work, but he has not offered a specific proposal to address compensation equity. While Senate Democrats are likely to reintroduce the Paycheck Fairness Act (PFA), the legislation is unlikely to move forward in this Congress. If reintroduced, the PFA would allow employers to base employee pay differentials only on seniority, merit and production. The PFA would also shift the burden of proof to the employer in discrimination claims, making it easier for plaintiffs to challenge employer pay practices. In addition to the PFA, congressional leaders are exploring alternative approaches to address compensation equity that could gain traction in the 115th Congress.

SHRM chairs the employer-led coalition on compensation equity issues and frequently spearheads efforts to support these alternative approaches while also opposing efforts that limit employer flexibility to reward employees using legitimate pay practices. In September 2016, the Equal Employment Opportunity Commission (EEOC) issued a final rule revising its annual EEO-1 report to include the collection of summary pay data and hours worked by gender, race and ethnicity and sorted into 10 job categories from employers with more than 100 employees. However, the announcement of Commissioner Victoria Lipnic as acting chair of the EEOC coupled with the Trump administration’s regulatory freeze could put the final rules in jeopardy. Finally, Massachusetts and the city of Philadelphia passed legislation to address compensation equity by prohibiting employers from asking prospective employees for their salary history before making a job offer. A growing number of states and local jurisdictions are looking to follow their lead.



SHRM POSITION: SHRM is proud of its record of working to end gender discrimination in the workplace and believes that any intentional misconduct against an employee should be resolved promptly. However, SHRM has opposed efforts to limit employer flexibility to reward employees using legitimate pay practices. As a result, SHRM opposes the requirements outlined in the PFA because the legislation could limit an employer's ability to consider many legitimate pay factors, such as an employee's professional experience and salary history.



TALKING POINTS

- ★ SHRM has worked, throughout its history, to end workplace discrimination based on gender. We vigorously support equal pay for equal work and believe that any misconduct against an employee should be promptly and fully rectified.
- ★ SHRM opposes proposals, such as the PFA, which include provisions that would restrict employers' pay practices and limit the consideration of legitimate factors in making employee compensation decisions.
- ★ SHRM opposes any mandate requiring employers to report compensation data to the federal government or the mandatory disclosure of wage and salary information to the general public.



Employment-Based Immigration

BACKGROUND: In an increasingly global and interconnected world, access to the best and brightest talent is vital for employers to address the skills gap and for the United States to compete. As a result, employers use a variety of existing employment-based visa categories to hire, train and retain employees from around the world. However, the employment-based immigration system is plagued with backlogs, arbitrary caps, inconsistencies and processing delays that can harm employers' workplace objectives. As the world of work rapidly evolves, it is crucial that policymakers create fair, innovative and competitive employment-based immigration policies that benefit employers and employees alike.

ISSUE: Organizations of every shape, size and industry continue to confront challenges in finding the right employees with the right skills to fill specific positions. Sixty-eight percent of HR professionals can't find enough workers with the medical, scientific, math, IT and leadership skills they need. Although there is no single solution for addressing the skills gap, employment-based immigration is a central piece of our country's larger workforce policy, and the need to modernize the U.S. immigration system is critical to ensuring a competitive American workforce.

President Donald Trump has vowed to make a number of changes when it comes to immigration policy, including a focus on national security and interior enforcement and changes to our employment-based immigration system. On January 25, the president signed two executive orders: one focused on a physical wall at the southern border and the other focused on public safety, including cutting off funding for sanctuary cities. On January 27, Trump signed another executive order banning entry for foreign nationals from seven countries, pausing refugee programs and increasing visa interview requirements, among other items. Trump is likely to issue additional executive orders, including broad sweeping changes for nonimmigrant visas (such as H-1Bs) and green cards; expanded E-Verify requirements and incentives; canceling executive actions, memoranda and orders issued by former President Barack Obama, possibly including the Deferred Action for Childhood Arrivals program; and limiting public benefits for undocumented immigrants.

OUTLOOK: The ability of President Trump and Congress to move comprehensive immigration legislation forward is likely to be a challenge given the makeup of Congress and the slim majority the GOP holds in the Senate. Therefore, it is likely that Trump and Congress will pursue targeted approaches that are more likely to garner congressional support, to include border security; interior enforcement; implementation of a mandatory, nationwide E-Verify program; and changes to the H-1B program.



SHRM POSITION: SHRM and its affiliate the Council for Global Immigration (CFG) support policies that ensure America’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 employees alike. Ultimately, our immigration system must support American 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 specifically support enacting a Trusted Employer program that creates efficiencies for low-risk, immigration-compliant employers that saves resources for top government priorities. 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 America’s economy. This will require changes to our employment-based immigration system both for employees seeking permanent residence through 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 foreign-born talent.



TALKING POINTS

- ★ SHRM and CFGI support policies that invest in and develop the U.S. workforce, prioritizing visas for employers who 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 against bad actors, not employers acting in good faith.
- ★ SHRM and CFGI believe that policies must support American employers in their efforts to recruit, hire, transfer and retain the employees they need from around the world to innovate and grow America’s economy.
- ★ SHRM and CFGI support solutions that increase our employment-based immigration system’s effectiveness and predictability, like 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 it is an employer's choice to use this online verification system, it must still complete Form I-9 for every newly hired employee. The E-Verify program has been reauthorized through April 28, 2017.

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 America's borders. While 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 and entirely electronic employment verification system with state-of-the-art tools to accurately authenticate identity to hire a legal workforce, including a safe harbor for good-faith users.

OUTLOOK: President Donald Trump and Congress are very likely to pursue a more targeted approach on immigration legislation, including interior enforcement. Legislation to make E-Verify mandatory for all employers will garner strong support in the 115th Congress. In addition, Trump may pursue executive action aimed at expanding and incentivizing employers' use of E-Verify. Meanwhile, Congress must reauthorize E-Verify before April 28, 2017. 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. While 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. Both 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 job applicant'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 employment eligibility verification system operated by the federal government that provides employers with certainty that new employees are authorized to work.
- ★ SHRM and CFGI believe that the federal government must develop a more efficient approach to employment verification that builds up E-Verify.
- ★ 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, eliminate the current I-9 paper-based system for an integrated electronic one, protect the identity and personal information of legal workers through identity authentication tools, and prevent employment discrimination based on national origin.



Fair Labor Standards Act Overtime Regulations

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.

ISSUE: On March 13, 2014, former President Barack Obama directed the Department of Labor (DOL), through a presidential memorandum, to “modernize and streamline” the FLSA overtime regulations. On May 23, 2016, the DOL published final regulations defining the “white-collar” overtime exemptions. Key provisions of the DOL’s final regulations included:

Updating the Salary Threshold—The DOL increased the salary threshold for overtime pay from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year) as of 2016. This figure sets the salary threshold to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region (currently the South) and represents a 113 percent increase in the salary threshold.

Annual Automatic Updates—The DOL established a new mechanism to automatically update the minimum salary level every three years beginning on January 1, 2020.

More than 290,000 comments were received by the DOL during consideration of the rule. SHRM believes that the salary threshold, last updated in 2004, should be updated. Although SHRM supports a reasonable increase in the salary threshold, it voiced concern that the DOL rule issued on May 23 raised the level too high and too quickly for employers to adapt. SHRM’s comment letter was joined by 50 SHRM state councils, 307 SHRM chapters and the Council for Global Immigration, a SHRM strategic affiliate. SHRM also chairs the Partnership to Protect Workplace Opportunity, which submitted a comment letter signed by 133 employer groups.

OUTLOOK: Just days before the rule’s December 1, 2016, implementation date, a federal court issued a preliminary injunction preventing the rule from becoming effective. In issuing the temporary injunction, the court determined that those challenging the rule—21 states and more than 50 employer groups—stood a significant chance of success and faced a substantial threat of irreparable harm if the rule was allowed to move forward. On December 1, the DOL appealed the preliminary injunction. The courts may ultimately decide the fate of the overtime rule. In the meantime, however, the injunction provides the Trump administration an opportunity to revise the rule through new rulemaking to eliminate the automatic escalator and potentially propose a more reasonable salary update.



SHRM POSITION: SHRM supports an update of the salary level, but one that follows previous methodology to achieve a more reasonable increase. Raising the level 113 percent at one time is too far and too fast and presents 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, such as the Southeast and Midwest.

Of equal concern, SHRM opposes any automatic increase. Automatic increases ignore economic variations of industry and location and make it hard for HR to manage merit increases for those near the salary level. In addition, as more employees become nonexempt due to the dramatic increase in the proposed salary level, the need for those employees to track time to ensure that they are not working overtime will limit their workplace flexibility.



TALKING POINTS

- ★ SHRM agrees that the salary threshold should be raised but believes that a 113 percent increase will have long-term impacts on the workplace, with larger impacts expected in the nonprofit sector, on small businesses and in geographic areas with lower costs of living.
- ★ SHRM opposes automatic increases, which have been considered and rejected in the past. Automatic increases ignore economic variations of industry and location.
- ★ SHRM welcomed the court's injunction of the rule because the salary threshold in the final rule was too high and the increase would be enacted too quickly.
- ★ SHRM supports revising the rule through new rulemaking to eliminate the automatic escalator and propose a more reasonable update to the salary level.



Federal Contractor Employment Practices

BACKGROUND: The Federal Acquisition Regulation (FAR) is the primary statute governing the federal procurement process. The FAR includes information about how to qualify as a contractor and the types of contracts available, as well as policies governing the suspension and debarment process of contractors. Federal agencies currently have the authority to initiate a suspension and debarment proceeding for contractors with labor violations. The 114th Congress and the Obama administration advanced public-policy efforts to limit the ability of employers with labor violations to receive federal contracts.

ISSUE: The Obama administration had focused attention on the federal contracting community as a venue for pursuing its workplace policies. A key component was issuance of the Fair Pay and Safe Workplaces executive order. This order would require prospective federal contractors and subcontractors with contracts valued at more than \$500,000 to report labor violations of 14 different federal labor laws and the equivalent state laws, including statutes addressing wage and hour, safety, collective bargaining, family and medical leave, and civil rights protections, among others.

Furthermore, the final rule would require federal agencies to designate a senior official as a labor compliance advisor to provide guidance on whether contractors' actions rise to the level of demonstrating a lack of integrity or business ethics and to take this information into consideration when awarding new contracts.

The regulation also includes a provision requiring contractors to provide information on how pay is determined on each employee's paycheck.

Implementing regulations and guidance were finalized August 25, 2016, with staggered compliance dates. The rule was challenged in federal court; a preliminary injunction blocked all but the paycheck transparency provisions from going into effect.

OUTLOOK: In January, Congress introduced and passed H.J. Res. 37/S.J. Res. 12, a resolution of disapproval to block the regulation. Pending President Donald Trump's signature, the resolution would prevent future administrations from issuing any rule that is substantially similar to the Fair Pay and Safe Workplaces regulation.



SHRM POSITION: SHRM is concerned that the Fair Pay and Safe Workplaces executive order unnecessarily and unfairly duplicates existing safeguards in the federal contracting process. Legislative attempts to automatically debar federal contractors with a single Fair Labor Standards Act violation circumvent long-standing and proven suspension and debarment procedures under the Federal Acquisition Regulation. The executive order would also create added complexities and challenges for federal contractors.

TALKING POINTS

- ★ SHRM believes that federal agencies already have the authority to initiate a suspension and debarment proceeding for contractors with labor violations.
- ★ SHRM believes that federal contractors are already subject to a myriad of complex and overlapping federal and state laws. While employers work diligently to comply, requirements under federal and state labor laws are subject to frequent changes.
- ★ SHRM is concerned that the Fair Pay and Safe Workplaces executive order unnecessarily and unfairly duplicates existing safeguards in the federal contracting process.



Health Care Reform

BACKGROUND: Since enactment of the Affordable Care Act (ACA), implementation of the law's requirements has remained challenging due to the complexity of the law, delays in effective dates of certain provisions, and coverage and reporting requirements. While the individual and employer coverage mandates and state exchange plans are in effect, the 40 percent excise tax on employers that provide high-value health plans, known as the "Cadillac tax," will take effect in 2020. In addition, although the ACA purports to lower health care costs for Americans, costs continue to rise for employers and employees alike.

ISSUE: As a result of the rising cost of coverage and impending implementation of the excise tax, many organizations are changing health care benefits or turning to other health care design strategies, such as health savings accounts, private exchanges, wellness programs and disease management programs. In addition, some employers have opted to eliminate health care coverage for part-time employees, while others have re-engineered staffing models to reduce employee hours below the 30-hour threshold to avoid triggering the coverage requirement. In addition, complex rules for tracking employee hours to determine eligibility for the 30-hour requirement and compliance with the ACA reporting requirements have proved to be a complicated administrative burden with increased costs for employers.

OUTLOOK: While President Donald Trump and the Republican-controlled Congress have stated a mutual goal to "repeal and replace" the ACA, full repeal will be both procedurally and structurally problematic. To address the procedural issue, Congress passed on January 13 the fiscal 2017 budget resolution, which instructs committees of jurisdiction to draft budget and tax reconciliation legislation to include specific language to repeal the tax provisions of the ACA. The budget reconciliation legislation has special procedural protections that allow the U.S. Senate to pass repeal of the ACA provisions dealing with tax and spending with a simple majority of 51 votes instead of the 60 votes that would be needed to override an inevitable Democratic filibuster of the bill. Tax elements of the ACA likely to be considered in the reconciliation process include the individual and employer mandates for health care coverage, the excise tax on high-value health care plans, the medical device tax and the health insurance tax

Other elements of the ACA, such as guaranteed renewability of coverage, elimination of pre-existing conditions restrictions and coverage of dependent children to age 26 are very popular and widely supported in Congress and, therefore, likely to remain. As a result, Congress could focus on more-significant but targeted modifications to the law to address affordability, coverage and quality of care, delivering on one of the Republican Party's key campaign promises.

Health care reform proposals likely to move forward in the 115th Congress include elimination of the employer-coverage requirements, modification of the definition of a "full-time" employee for purposes of the health care coverage requirement, preservation of employer-sponsored wellness programs, and changes to ease the compliance reporting requirements for employers offering health insurance coverage to their employees. In addition, legislation to further delay, modify or replace the ACA 40 percent excise tax on high-value plans will likely receive considerable attention. SHRM-supported bipartisan, bicameral legislative proposals have been introduced to repeal the tax. Furthermore, as lawmakers seek to reduce the federal deficit,



proposals to limit tax exclusion for employer-sponsored health coverage is likely to receive consideration. Lastly, Congress may also consider legislative proposals to address skyrocketing out-of-pocket health costs and reductions in the quality of care. Such efforts may include medical malpractice reform and proposals aimed at reducing the costs of prescription drugs.

In addition to congressional action, regulatory guidance from the departments of Labor (DOL), Health and Human Services (HHS), and the Treasury, as well as from the Internal Revenue Service (IRS)—the agencies responsible for ACA oversight—is anticipated. On January 20, Trump issued an executive order titled, “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal” directing federal agencies to minimize regulatory burdens of the ACA where possible. These regulatory burdens may include employer reporting requirements, employer pay-or-play penalties, the transitional reinsurance fee, the Patient-Centered Outcomes Research Institute (PCORI) fee, and the 40-percent excise tax on high-value employer-sponsored health plans (absent congressional action to repeal, modify or replace the tax).

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, encourage increased use of prevention and wellness programs, improve quality and transparency to reduce health care costs, ensure that tax policy contributes to lower costs and greater access, and streamline medical liability laws as a component of cost containment.



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, which will protect the health insurance of more than 177 million U.S. employees and their families.
- ★ 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 Employee Retirement Income Security Act (ERISA) pre-emption.
- ★ SHRM believes wellness programs are an integral part of an employer’s health care strategy.
- ★ SHRM believes that medical liability lawsuits contribute to rising health care costs with “defensive” medical practices and increased liability insurance costs.

Labor-Management Relations

BACKGROUND: Private-sector unionization rates continue to decline. According to the Bureau of Labor Statistics, only 6.4 percent of people working in the private sector in 2016 were members of a union. Furthermore, the overall U.S. workforce union membership rate was 10.7 percent in 2016, 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. While 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.

ISSUE: Under the Obama administration, the NLRB as well as union leaders argued that current laws and regulations governing union representation favored management and hindered employees' ability to organize a union. As a result, the Obama administration Department of Labor (DOL) and the NLRB promulgated numerous workplace rules and decisions to make organizing easier, including a focus on nonunion workplaces and increased scrutiny of whether employer policies interfered with employees' right to organize under the NLRA. Key decisions include *Browning-Ferris*, which expanded the definition of who can be a "joint employer"; *Specialty Healthcare*, in which the board made it easier for unions to organize into smaller, micro-bargaining units within the workplace; and *Purple Communications*, which permitted the use of employer-owned e-mail for purposes of organizing and participating in concerted activity. While on the campaign trail, President Donald Trump's labor and employment positions broadly focused on reducing regulations impacting employers and repealing executive orders focusing on the workplace.

OUTLOOK: On January 23, President Donald Trump named Philip Miscimarra acting chairman of the National Labor Relations Board. Trump is able to name two additional members, who will require Senate confirmation, to round out the board. With a Republican majority, the board is likely to reverse many of the previous board decisions on bargaining unit size, definition of joint employer and restrictions on employer handbooks as those cases make their way to the board for consideration. In addition, the 115th Congress is expected to consider legislation to restore the previous joint-employer definition that was redefined in the *Browning-Ferris* case. Similar legislation introduced in the 114th Congress gained some traction but faced a certain veto from former President Barack Obama. National right-to-work legislation has been introduced in the House that would allow millions of workers to opt out of union membership for the first time—essentially granting workers the negotiated protections of the union without them being required to pay dues.



SHRM POSITION: SHRM believes in the fundamental right—guaranteed by the NLRA—of every employee to make a private choice about whether or not to join a union. SHRM is hopeful that the NLRB and the DOL will recalibrate their priorities and approaches under a Trump administration.



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's viewpoint is that the NLRB should protect 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 utilized benefits are employer-provided health care and retirement savings plans. According to the *SHRM 2016 Employee Benefits* research report, 84 percent of employers offered a preferred provider organization (PPO) health care plan, while 50 percent offered a health savings account—up 7 percentage points from 2015. With regard to retirement options, 90 percent of employers surveyed provided a defined contribution retirement plan and 25 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: Any effort to reform the tax code will certainly affect both employers and individuals. Of particular interest to Congress is the tax-free status of employee benefits that account for the largest annual loss in revenue to the federal treasury. As a result, congressional efforts to reform the tax code will involve an examination of employer-sponsored fringe benefits, including retirement plans, health care benefits and educational assistance programs. Eliminating tax incentives could dramatically affect an employer's ability to offer a comprehensive benefits package to its employees.

OUTLOOK: Tax reform efforts are ramping up in the 115th Congress, with House Republicans building on a tax blueprint released by Ways and Means Committee Chairman Kevin Brady (R-GA) in 2016. While full reform isn't expected until 2018, congressional hearings will start later this year and a full legislative proposal is expected no later than the fall of 2017.

House and Senate Republicans, and the Trump administration, will aim to lower the corporate tax rate, consolidate individual brackets and reform the Internal Revenue Service. To achieve these objectives, it is highly likely that efforts will be made to alter the current tax treatment of employer-provided benefits, which will have implications for the workplace. Despite the successes of the employer-provided benefits system, it is anticipated that modifications to the current system, such as capping deductions for retirement or health care benefits, consolidating retirement options, and eliminating exclusions for other benefits such as transit and employer-provided education assistance, will be considered.



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 American employee is given 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. Instead of taxing these valuable benefits, lawmakers should continue to allow employers the ability to provide tax-free benefits to their workforces.

As part of our advocacy efforts, SHRM chairs the Coalition to Protect Retirement, which encourages and supports retirement savings for American 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. Two of the most widely utilized benefits are employer-provided health care and retirement plans.
- ★ SHRM believes tax incentives should be used to expand access to and participation in health care and retirement savings plans.
- ★ SHRM supports efforts that encourage savings, such as increased contribution limits and catch-up contributions for older workers.

Sexual Orientation & Gender Identity Nondiscrimination

BACKGROUND: Federal laws protect employees from discrimination in the workplace on the basis of race, national origin, sex, religion, disability, pregnancy and age, but not on the basis of sexual orientation or gender identity. At the end of 2014, however, the Office of Federal Contract Compliance Programs (OFCCP) issued a rule implementing an Obama administration executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity. In addition, the Supreme Court has ruled that federal bans on workplace sexual harassment apply when both parties are of the same gender. Furthermore, the Equal Employment Opportunity Commission (EEOC) has pursued the theory that discrimination based on sexual orientation constitutes sex discrimination under Title VII of the Civil Rights Act of 1964.

ISSUE: In recent years, many employers have adopted policies barring the consideration of sexual orientation or gender identity in employment decisions. According to the Human Rights Campaign, 89 percent of *Fortune 500* companies include sexual orientation in their nondiscrimination policies and 66 percent include gender identity in their U.S. nondiscrimination policies. Twenty-two states and the District of Columbia have passed statewide laws prohibiting employment discrimination based on sexual orientation, and 19 of those and the District of Columbia also include gender identity.

OUTLOOK: Legislation to address sexual orientation and gender identity nondiscrimination is unlikely to advance in the 115th Congress. However, President Donald Trump announced that his administration will continue to enforce the executive order. It is not clear whether a Republican-controlled EEOC will continue to follow its aforementioned position in cases and Commission guidance involving private-sector employers.



SHRM POSITION: SHRM believes that employment decisions should be made on the basis of qualifications for a job, not on non-job-related characteristics, including sexual orientation and gender identity. SHRM supports public-policy efforts to ban workplace discrimination based on sexual orientation and gender identity and believes that any such legislation should be narrowly drafted to avoid unintended consequences for employers and employees. SHRM also supports the voluntary right of employers to offer domestic partner benefits to their employees.



TALKING POINTS

- ★ SHRM is committed to encouraging fair and consistent employment practices and believes that employment decisions should be made on the basis of job qualifications such as education, experience and demonstrated competencies, not on non-job-related characteristics, including sexual orientation and gender identity.
- ★ SHRM supports efforts to ban workplace discrimination based on sexual orientation and gender identity.



Skills Gap

BACKGROUND: Employers and HR professionals continue to confront persistent gaps between the skills of the existing labor pool and the skills sought by employers to fill specific positions. According to a 2016 SHRM report, *Recruiting Difficulty and Skills Shortages*, 2 out of every 3 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 qualified candidates.

Certain positions have been identified as more difficult to fill than others, including high-skill jobs as well as middle-skill jobs that require education and training beyond high school but less than a four-year degree. At the same time, there are pools of workers who might serve as a source of skilled employees: military veterans and individuals with disabilities.

ISSUE: High- and middle-skilled workers are in demand in many industries, but supply in particular geographic and industry-specific areas is low. Employers consequently are unable to fill key jobs. One opportunity to fix the skills gap may be through expanded apprenticeship programs to help employers address the skills shortages in certain industries and sectors. Additionally, 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 changes and challenges of a global labor market.

OUTLOOK: The Workforce Innovation and Opportunity Act (WIOA) being implemented across the country is designed to help individuals acquire the knowledge and skills necessary for today's economy and to connect employers to the skilled workforce they need. In addition, numerous federal, state and local initiatives are helping to support the training and hiring of displaced workers, veterans and other untapped job candidates.

Understanding the need for skills development and career advancement, we are hopeful Congress will reintroduce legislation aimed at strengthening and improving provisions that incentivize employers to contribute to education and skills development. By annually increasing the amount allowed for tax-free education assistance and expanding the benefit to include student loan repayment, Congress could enable employers to not only attract and retain valuable talent but also empower their employees to expand their skill sets. In addition, SHRM works closely with relevant federal agencies and key veterans organizations to promote the employment of veterans and members of the Guard and Reserve. To learn more, visit www.shrm.org/workforcereadiness.



SHRM POSITION: SHRM believes that the government and employers both 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. Expanding the tax treatment of Section 127 of the IRC to index and increase the annual amount employers are able to provide their employees tax-free, as well as extending the benefit to student loan repayment, would encourage training and skills development. SHRM supports public-policy efforts to expand Section 127 to allow employers to provide up to \$5,250 of student loan repayment per year.



TALKING POINTS

- ★ SHRM believes effective partnerships between employers and education and training providers should be demand-driven and focused on the employment needs of employers.
- ★ SHRM highly encourages the availability of tax incentives, like Section 127 of the IRC, which promote further training, education and skills development.
- ★ SHRM believes more should be done to make it easier for veterans to obtain professional certifications and to strengthen services for transitioning veterans to prepare them for jobs in the civilian world.
- ★ SHRM develops resources and tools to help HR professionals in their hiring and retention efforts to ensure that they are considering skilled workers wherever they might be found, including within the communities of veterans, individuals with disabilities and the long-term unemployed.



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, which improves retention, enhances employee engagement, reduces turnover costs and increases 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, seven states—Arizona, California, Connecticut, Massachusetts, Oregon, Vermont and Washington—have adopted statewide paid-sick-leave laws, joining over 30 localities. In 2018, New York will become the fourth state with a paid-family-leave insurance program, joining California, New Jersey and Rhode Island.

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: Advocates continue to champion the Healthy Families Act (HFA) to require nearly all employers to provide employees with up to 56 hours of paid sick time in a calendar year. In the fall of 2015, former President Barack Obama issued an executive order that similarly requires federal contractors to allow employees to earn not less than 1 hour of paid sick leave for every 30 hours worked, accruing up to 56 hours of paid sick leave per year. Final regulations implementing this order went into effect for new solicitations issued on or after January 1, 2017. It is probable, however, that the Trump administration will target this regulation for repeal and issue new rulemaking to undo its provisions. 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, will likely be reintroduced in the 115th Congress. The HFA and the FAMILY Act are unlikely to advance in the Republican-controlled Congress.

SHRM-supported legislation to allow for compensatory time for nonexempt employees in the private sector is expected to be reintroduced in early 2017 and could see action in the 115th Congress.



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. 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 organizational size. SHRM also believes that private-sector employees should be afforded the same flexibility that public-sector workers have in choosing between compensatory time or pay in overtime situations.

SHRM continues to educate employers about the business benefits of workplace flexibility and to encourage the voluntary adoption of flexible workplace strategies through an initiative known as When Work Works. The When Work Works Award recognizes model employers of all types and sizes for their innovative and effective workplace practices.



TALKING POINTS

- ★ 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. Mandated leave requirements limit an employer's flexibility in designing generous and innovative leave programs for employees.
- ★ SHRM is calling for new dialogue and debate on a workplace flexibility policy for the 21st century. HR professionals have decades of experience in designing and implementing leave benefits and programs that work for both employers and employees.
- ★ SHRM believes that private-sector employees should be afforded the same flexibility that public-sector workers have in choosing between compensatory time and cash wages in overtime situations. As the 21st century workforce and workplace continue to evolve, employees now, more than ever, need flexibility options to manage their work/life responsibilities.



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