



LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION

U.S. CHAMBER OF COMMERCE

2017 LABOR POLICY RECOMMENDATIONS

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I. RIGHTING THE SHIP: CORRECTING THE LABOR POLICY MISTAKES OF THE PAST EIGHT YEARS

This section sets forth the major labor/employment policy mistakes that have been made in the past eight years. These policies should be corrected, repealed or overturned.¹

¹ As when Bush succeeded Clinton, the Trump win opens the door to rolling back many of Obama's employment regulations. The press is much focused on these possibilities, but keep in mind that this effort will vary depending on the underlying regulation in question, a fact lost on the press. Many were issued under executive orders (such as "blacklisting") and thus can be swiftly eliminated through repeal of the relevant executive order by the new president which provided the underlying authority for the regulations, followed by procedural repeal of the regulations themselves. But others, such as the DOL overtime regulations will have to be repealed/modified through notice and comment rulemaking. This can be done relatively quickly, but the courts have made clear that this must be a reasoned and deliberative process and not based simply on a change in the presidency. Another option is repeal through the Congressional Review Act (CRA) depending on when the underlying regulation was issued and when this Congress adjourns. So for example, under Bush, we achieved repeal of the Clinton ergonomics regulation under the CRA, but repealed the Clinton blacklisting regulations through notice and comment rulemaking. Reversing the problems at the NLRB present a much different situation as it is an independent agency and is driven by caselaw. The Board will have to be reconstituted through new appointees and a new general counsel, which will obviously take some time. In sum, we have huge opportunities here, which we are already working, but each has their own nuances. Ongoing court cases must also be calculated into the strategy.



EXECUTIVE ORDERS (EO)/PRESIDENTIAL MEMORANDA

When Congress rejected the administration's policy objectives, the president exercised his executive authority in order to establish new policies in the labor and employment law areas. Relying on the president's procurement power, these executive orders and their implementing regulations apply to federal contractors, but have little to do with encouraging economy and efficiency in the federal procurement process – as required by the Federal Property and Administrative Services Act – and everything to do with the president usurping Congress' role to make labor and employment policy. Indeed, while the Procurement Act provides the president with significant discretion with regard to federal procurement, it does not provide a “blank check for the President to fill in at his will.”² Unless otherwise noted, the following executive orders should be rescinded, along with the corresponding implementing regulations.³

- Nonreimbursement for Labor Relations Costs (EO 13494). The EO prohibits federal contractors from seeking reimbursement for certain labor relations costs for activities that are undertaken to persuade employees to exercise or not exercise their right to join a union or engage in collective bargaining, such as preparing and distributing materials, hiring or consulting legal counsel or consultants, and holding meetings. The Chamber's comments are [here](#).
 - Status: On November 2, 2011, the Federal Acquisition Regulatory (FAR) Council published a final implementing regulation ([48 CFR Part 31](#)) to implement the EO. The regulation took effect on December 2, 2011.
 - Steps Requested: The EO should be rescinded, along with its implementing regulations.
- Non-displacement of Qualified Workers Under Service Contracts (EO 13495). The EO requires federal contractors under the Service Contract Act to offer the employees of a contractor that they displace the right of first refusal for employment. The Chamber's comments are [here](#).
 - Status: The [FAR Council](#) and the [Department of Labor's](#) (DOL) implementing regulations (48 CFR Parts 1, 2, 22, and 52) went into effect on January 18, 2013.
 - Steps Requested: The EO should be rescinded, along with its implementing regulations.
- Notice of Employee Rights Under Labor Laws (EO 13496). The EO requires federal contractors to post a notice of employee rights to unionize and participate in concerted protected activity under federal labor law. While some improvements were made in the

² *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1330-31 (D.C. Cir. 1996) quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir.).

³ These EOs are listed in order of issuance, not impact or priority.



language of the final posters, it still has a very “pro union” slant, in that it does not explain to employees their right to decertify an unwanted union. The Chamber’s comments are [here](#).

- Status: A final implementing rule ([29 CFR Part 471](#)) was published on May 20, 2010, and it became effective on June 21, 2010.
- Steps Requested: The EO should be rescinded, along with its implementing regulations.
- Use of Project Labor Agreements for Federal Construction Projects (EO 13502). The EO encourages agencies to “to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.” This really means that jobs are only available to bidders who are unionized. As the *Wall Street Journal* noted, the EO and implementing regulations “put an end to open, competitive federal bidding, which means higher project costs. They also mean taxpayers must finance the benefits and work rules of union members.”⁴ The Chamber’s comments are [here](#).
 - Status: The FAR Council issued final implementing regulations ([48 CFR Parts 2, 7, 17, 22, and 52](#)) on April 13, 2010, and they took effect 30 days thereafter.
 - Steps Requested: The EO should be rescinded, along with its implementing regulations.
- FAR Human Trafficking (EO 13627). On January 29, 2015, the U.S. Government finalized a rule ([48 CFR Parts 1, 2, 9, 12, 22, 42, and 5](#)) which amends the Federal Acquisition Regulation (“FAR”) to combat human trafficking by placing new reporting and compliance burdens on federal contractors.⁵ The Chamber’s coalition comments are [here](#).
 - Status: The regulation went into effect on March 2, 2015. A separate notice of proposed rulemaking (NPRM) was issued to define “[recruitment fees](#).”⁶
 - Note: Given political sensitivities surrounding this issue, it is recommended that any changes to regulations largely leave intact the new requirements that apply to

⁴ WALL STREET JOURNAL. “Crony Contracts: Want federal business? Better be a union shop.” April 14, 2010, available at <http://www.wsj.com/articles/SB10001424052702303695604575182333308913608?alg=y>

⁵ The final rule implements Executive Order 13627 (“Strengthening Protections Against Trafficking in Persons in Federal Contracts”)(September 25, 2012) and Title XVII of the National Defense Authorization Act for Fiscal Year 2013 (“Ending Trafficking in Government Contracting”).

⁶ As of this writing, that definition has not been finalized. The new administration should ensure that any final definition of “recruitment fees” is not overly broad or ambiguous, but is instead consistent with current U.S. law and lawful business practices.



contracts performed domestically, which are not as controversial (e.g., prohibition confiscation of worker passports), but instead focus on technical changes to the onerous requirements that apply to contracts performed abroad.

- Compensation Data Collection. Pursuant to a memorandum issued by President Obama, on August 8, 2014, the Office of Federal Contract Compliance Programs (OFCCP) issued a proposed rule which would require federal contractors and subcontractors to submit to the Department of Labor summary data on the compensation paid their employees, including data broken down by race and sex. The Chamber submitted comments on January 5, 2015, which are [here](#).
 - Status: As of the date of this document, the OFCCP has not issued a final rule.⁷
- Establishing a Minimum Wage for Federal Contractors (EO 13658). On February 12, 2014, President Obama, citing his authority under the Procurement Act to impose changes that increase economy and efficiency in federal contracting, issued an EO that set the minimum wage for federal contracts at \$10.10 per hour with an annual increase based on inflation. Tipped wages are also addressed. Final regulations implementing the new wage were issued October 7, 2014. The executive order applies to “new contracts” resulting from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. The Chamber submitted strongly [critical comments](#).

The EO applies to all Service Contract Act and Davis Bacon Act contracts if the prevailing wages are not as high as the new specified minimum wage. In addition, the EO applies to employers who merely lease space from the federal government such as fast food franchises in federal office buildings or on military bases, as well as concessionaires at national parks.

- Status: The EO driven minimum wage is in effect and the second increase will set it at \$10.20 per hour beginning January 1, 2017. Also, the required minimum cash wage that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to \$6.80 per hour.
- Steps Requested: The EO should be rescinded, along with its implementing regulations.
- Basic Rationale: This EO overrides wage setting mechanisms set by the Service Contract Act and Davis Bacon Act. It also forces employers who are not normally considered federal contractors, e.g. those merely leasing space from the

⁷ This rulemaking has been eclipsed by the Equal Employment Opportunity Commission’s (EEOC) finalization of changes to the EEO-1 form which will require employers to report employee compensation and hours worked information. A detailed discussion of EEOC’s compensation collection effort is set forth below.



federal government, to have to raise their wages, often putting them at a competitive disadvantage with nearby competitors not tied to federal leases.

- Anti-Retaliation Regarding Compensation (EO 13665). This EO amends Executive Order 11246 to provide that federal contractors shall not discriminate against employees or applicants that share, inquire about, or disclose compensation data. Characterizing this protection as “anti-discrimination” rather than “anti-retaliation,” allows aggrieved employees to only have to demonstrate that their discussions relating to compensation disclosure were a “motivating factor” of the adverse action taken against them. This runs counter to a recent Supreme Court ruling which states that the “motivating factor” analysis does not apply to retaliation claims. The Chamber’s comments are [here](#).
 - Status: On September 11, 2015, the DOL promulgated final regulations ([41 CFR Part 60-1](#)) that went into effect January 11, 2016.
 - Steps Requested: The EO should be rescinded, along with its implementing regulations.
- Executive Order 13673, Fair Pay and Safe Workplaces (a.k.a., Blacklisting). On July 30, 2014, President Obama signed Executive Order 13673, “Fair Pay and Safe Workplaces.” The EO will govern new federal procurement contracts and subcontracts valued at more than \$500,000, and mandate that companies provide information to the federal government if there “has been any administrative merits determination; arbitral awards or decision or civil judgment, as defined in guidance issued by the Department of Labor” with respect to labor law violations under 14 different laws and executive orders (and equivalent state laws) that have occurred within the previous three years. If these violations are determined to be severe, repeated, willful, or pervasive, they are to be factored into the determination of whether the contractor or bidder is responsible. In addition to submitting this information during the bidding process, contractors will be required to submit information every six months during the life of the contract and may have their responsibility determination reexamined accordingly. Final regulations and guidance were published on August 24, 2016. However, no guidance on what constitutes “equivalent state laws” has been proposed or issued. The Department of Labor indicates that will be handled in a forthcoming notice and comment process.

Violations include “any administrative merits determination; arbitral awards or decision or civil judgment.” The Department of Labor has defined, in guidance, administrative merits determinations to mean low level enforcement actions such as Occupational Safety and Health Administration (OSHA) citations, National Labor Relations Board (NLRB or “Board”) complaints, Equal Employment Opportunity Commission (EEOC) reasonable cause letters, and Wage and Hour’s Form WH-56 inquiries. This means companies would have to submit reports on mere citations and other first level enforcement actions, before they have had a chance to contest them or have their day in court.



The Chamber submitted comprehensive comments [found here](#).

Final FAR regulations and DOL guidance were issued on August 25, 2016. Dates for compliance with different provisions were staggered as follows:

- October 25, 2016: The FAR rule takes effect. Mandatory disclosure of labor compliance history begins for all prime contractors (only) under consideration for contracts with a total value greater than or equal to \$50 million.
 - The 3-year disclosure period will be phased in so that no contractor or subcontractor need disclose any decisions regarding labor violations that were rendered against them before October 25, 2015. The reporting disclosure period is initially limited to one year and will gradually increase to three years by October 25, 2018.
 - October 25, 2016: Companies with federal contracts of \$1 million or more are prohibited from requiring their workers to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or from torts related to sexual assault or harassment, except where valid contracts already exist and remain unmodified.
 - January 1, 2017: The paycheck transparency clause takes effect, requiring contractors to provide wage statements and notice of any independent contractor relationship to their covered workers.
 - April 25, 2017: The total contract value above which prime contractors must make disclosures is reduced to \$500,000.
 - October 25, 2017: Mandatory disclosure begins for all subcontractors under consideration for covered subcontracts with a total contract value greater than or equal to \$500,000.
- Steps Requested:
- The Chamber has been leading the effort to get riders into appropriations bills to block this rulemaking or to keep the regulations from taking effect as well as spearheading an effort to get language into the National Defense Authorization Act that would limit the impact this EO will have on Defense Department contracting.
 - The Chamber has made clear from the outset that if final regulations and guidance were issued to implement the EO a legal challenge would be



necessary. Such a challenge has been filed in federal court in Texas and has resulted in a preliminary injunction blocking all but the “paycheck transparency” provisions from taking effect.

- Based on the results of the election, a Congressional Review Act (CRA) resolution is possible. In addition, the new administration should suspend any further implementation of the regulations, including the paycheck transparency provision not blocked by the preliminary injunction, and pursue rescinding the EO and its regulations and guidance.
- Basic Rationale: To preserve their ability to remain federal contractors, companies will be under strong pressure to resolve unadjudicated enforcement actions by accepting “Labor Compliance Agreements” largely on agency-favorable terms as the preferred way to demonstrate that they have come into compliance. The EO exceeds the president’s authority to make changes to government contracting and procurement based on improving “economy and efficiency” under the Procurement Act.
- Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors. The executive order provides for earning up to 7 days of paid sick leave per year, and applies to “contracts,” “contract-like instruments,” and “solicitations” that result from solicitations issued on or after January 1, 2017. The leave could be used for a wide array of conditions, including relief from domestic violence, by the employee or to assist any relative or person who is in the same relationship to the employee as a relative. The executive order applies to contractors and all subcontractors covered by the Davis-Bacon Act, the Service Contract Act, or whose employees are covered by the Fair Labor Standards Act, and any companies that lease space from the federal government or have concession agreements with the federal government such as those selling souvenirs at national parks. The final rule was issued September 30, 2016.

The Chamber [submitted extensive comments](#) on the proposed regulations and the executive order, in conjunction with the International Franchise Association, to Department of Labor. We also submitted [comments](#), on the proposed Information Collection Request under the Paperwork Reduction Act.

Final regulations were issued on September 30, 2016, and go into effect for new solicitations issued on or after January 1, 2017.

- Steps Requested: Revoke the EO and with it the implementing regulations.
- Basic Rationale: This new requirement for providing paid sick leave will create serious problems for many employers, including small businesses and franchise operators who lease space from the federal government. It will also be disruptive to employers who already have generous leave benefits in place who will have to conform those benefits to these requirements.



NATIONAL LABOR RELATIONS BOARD

- **Joint Employer.** In *Browning-Ferris Industries (BFI)*, 362 NLRB No. 186, the Board overturned its clear bright-line test for determining whether an entity is the joint employer of another company’s employees. The old test looked to see which business entity retained direct and immediate control of the workers (e.g., ability to hire, fire, discipline, etc.). The new test will find joint employment even where one company only has the right to exert indirect or potential control over the terms and conditions of another company’s employees. This means, for example, that a company which has a contract with a security vendor to provide guards in its lobby could be considered the employer of those guards, even though the company does not hire, fire, discipline, pay or supervise those guards.
 - **Status:** The Board issued *Browning-Ferris* in August 2015 and the decision became Board policy upon its issuance. The case is currently on appeal at the D.C. Circuit Court of Appeals. The Chamber filed an amicus brief both with the [Board](#), and with the [Court of Appeals](#).
 - **Steps Requested:**
 - *Protecting Local Business Opportunity Act* (S. 2015; H.R. 3459)– this bill would codify the “direct and immediate” control standard that existed for over 30 years prior to *BFI*.
 - A Republican-majority NLRB could overturn *BFI* and return to the prior standard.
 - Appropriations Rider – a prohibition on the NLRB’s (and other agencies’) continuation of its expanded “joint employer” standard would be an effective – but perhaps temporary – solution.
 - **Basic Rationale:** According to the dissent, “the number of contractual relationships now potentially encompassed within the majority’s new standard appears to be virtually unlimited.” By changing its joint employer standard, the Board has opened up a “Pandora’s box” of problems that may now potentially befall almost any employer who enters into a contract for services with another business. If left uncorrected, the NLRB’s new joint employer standard will hold employers responsible for, and require them to bargain over, workers whom they do not control. Indeed, this new standard is really about expanding the universe of potential employers who can be targeted by the NLRB, unions, and plaintiffs’ bar.



- Ambush Elections. Through various changes to the union election process, the NLRB’s ambush election regulation shortens the timeframe between when the employer receives an election petition and when the election actually occurs.⁸ Additionally, the rule requires employers to turn over to the unions personal information about workers such as home addresses, home phone numbers, personal e-mail addresses, shift schedules and work locations. Chamber comments are [here](#).
 - Status: Originally proposed in 2011, the regulation was struck down by the District Court for the District of Columbia in 2012. The NLRB re-proposed the regulation in 2014 and it went into effect in April 2015. To date, the regulation has survived legal challenges.
 - Steps Requested:
 - *Workforce Democracy and Fairness Act* (S. 933 and H.R. 1768)
 - Provides for a fair hearing process by allowing employers at least 14 days to prepare their case for the Board and allows employers to raise issues during the hearing.
 - Prohibits ambush elections by requiring a campaign period of at least 35 days prior to an election. This will guarantee that workers have an opportunity to hear both sides of the unionization debate.
 - Allows employees to choose how they may be contacted by union organizers.
 - A Republican-majority NLRB could rescind the ambush election regulations and return to the prior standard.
 - *Employee Privacy Protection Act* (H.R. 1767) – an incomplete solution, as it addresses employee Excelsior list privacy concerns only, by allowing employees to choose means by which they may be contacted by a union.
 - Basic Rationale: By dramatically reducing the campaign period, the ambush election rule limits employers’ abilities to communicate with their employees about the pros and cons of unionization and employees will hear only one side of the story. Thus, the rule is intended to boost sagging union membership rolls, while depriving employees of information needed to make a rational decision as to whether or not they wish to be represented by a union.
- Union Manipulation of Bargaining Units – *Specialty Healthcare*. In *Specialty Healthcare*, the Board announced a new standard for determining the composition of bargaining units, making it easier for unions to gerrymander the workforce and force their way in to an employer’s business. The Board and its regional directors have

⁸ In practice, the regulation has shortened the average “campaign period” from about 38 days to 28 days.



applied the *Specialty Healthcare* rationale in a variety of workplace settings, including department stores, manufacturing facilities and even a winery.

- Status: *Specialty Healthcare* was decided in 2011 and became effective immediately. To date, the case has survived several challenges before federal courts of appeal. The Chamber filed an amicus brief both with the [Board](#), and with the [Court of Appeals](#).
- Steps Requested:
 - *The Representation Fairness Restoration Act* (S. 801) – codifies the pre-*Specialty Healthcare* community of interest standard for bargaining unit determinations.
 - A Republican-majority NLRB could overturn *Specialty Healthcare* and return to the prior standard.
- Basic Rationale: As noted above, by allowing unions to choose which employees make up the bargaining unit, unions will increase their chances of establishing a beachhead at employers’ places of business. Additionally, the fractured and multiple units that will result will place employers in a perpetual state of bargaining and constant threat of labor disruption. They will also greatly limit an employer’s ability to cross train and meet customer demands via flexible staffing.
- Other NLRB Decisions. Set forth below is a sample of other NLRB cases that negatively impact the employer community. (The Chamber will soon release an additional comprehensive document of NLRB cases which should be reversed). They should be reversed with legislation of appointment of new Board members who prioritize fealty to the National Labor Relations Act (NLRA) over union handouts.
 - *D.R. Horton/Murphy Oil* – To help try to avoid the costs of class and collective actions, many employers have adopted arbitration agreements that include class action waivers. Under these agreements, employees agree that any dispute with their employer will be resolved through arbitration, rather than in court, and they also agree that their claims will be heard only on an individual basis and not in a class or collective action. The Supreme Court of the United States and the federal courts of appeals have issued numerous decisions endorsing the use of arbitration agreements and class action waivers. In *D.R. Horton* and *Murphy Oil* the Board ruled that such waivers violate Section 7 of the NLRA (see Chamber [amicus brief](#)). The Fifth Circuit Court of Appeals has overruled the Board in these two cases, and the Board has appealed the *Murphy Oil* case to the Supreme Court. Two other cases – *E&Y* and *Epic Systems* – have recently endorsed the Board’s view and are waiting for a decision on certiorari.



- *Purple Communications* – permits employee use of employer-owned email systems for purposes of organizing and participating in concerted activity. The Chamber’s amicus brief is [here](#).
- *KYC/Lincoln Lutheran* – NLRB overturned over 50 years of precedential history under *Bethlehem Steel, Co.*, 136 NLRB 1500 (1962), holding that employers could not unilaterally end dues check-off at the expiration or termination of a collective bargaining agreement.
- *American Baptist Homes of the West/Piedmont Gardens* – restricts employers’ abilities to permanently replace striking workers, providing unions with greater leverage during labor disputes.
- *Miller & Anderson* – reversed *Oakwood Care Center*, 343 NLRB 659 (2004), to permit mixed units of solely employed employees and jointly employed employees absent consent of all employers. The Chamber’s amicus brief is [here](#).
- *Babcock & Wilcox* – overhauled longstanding rules governing when the Board will defer unfair labor practice charges to arbitration. As a result, unions can relitigate arbitrated or settled grievances as unfair labor practices before the Board, effectively getting two bites at the apple. This deprives the employer of the prompt and efficient resolution that such procedures are intended to achieve. The Chamber’s amicus brief is [here](#).
- *Nexeo Solutions* – further muddies NLRB successor law, meaning that buyers of unionized operations must take extra precautions if they wish to retain the right to set initial terms and conditions of employment unilaterally.

DOL - OFFICE OF LABOR MANAGEMENT STANDARDS

- **Persuader**. DOL’s “persuader” rule narrows the scope of the “advice” exemption so that virtually all interactions with labor lawyers and consultants will be subject to the disclosure requirements. The Chamber filed [comments](#) in September of 2011.
 - **Status**: Proposed in 2011, the “persuader” regulation was finalized in 2016. On November 16, 2016, the U.S. District Court for the Northern District of Texas permanently enjoined the regulation, preventing the rule from going into effect. Challenges to the rule are also pending in Minnesota and Arkansas.
 - **Steps Requested**:
 - Repeal using the DOL’s rulemaking authority
 - Enact legislation which would codify the previous bright-line standard so that as long as the consultant does not speak directly with the employees



and as long as the employer is free to accept or reject the advice, then the advice is not reportable.

- Basic Rationale: By limiting access to counsel and making disclosure more complicated and detailed, employers will be less likely to exercise their federally protected free speech rights. The new interpretation is designed to limit, particularly in “Ambush” discussed above, employers’ ability to communicate with their employees regarding the pros and cons of unionization.

DOL - OFFICE OF FEDERAL CONTRACTOR COMPLIANCE PROGRAMS.

- Commentary on OFCCP Regulations. During this administration, OFCCP has finalized regulations concerning discrimination and affirmative action requirements for individuals with disabilities, veterans and prohibiting federal contractors from discriminating on the basis of sexual orientation and gender identity. OFCCP also finalized a rule which prohibits federal contractors from retaliating against employees who discuss compensation matters in the workplace. While these final regulations could likely use some improvements on the edges, given the sensitive nature of these issues and the fact that many contractors already had similar policies in place, wholesale revisions or repeal of these regulations is not recommended.
- Issue: The current “Scheduling Letter and Itemized Listing” set forth the documents and information that contractors must supply to OFCCP during the first phase of an audit. The “Scheduling Letter and Itemized Listing” was amended in 2014 to require numerous new reporting requirements, including disclosure of individualized – rather than aggregate – employee compensation data. These new requirements dramatically increase employer compliance burdens.
 - Steps Requested: Amend the current Scheduling Letter and Itemized Listing to reduce employer reporting requirements.
- Issue: Federal contractor affirmative action obligations are triggered for employers with 50 or more employees and a direct federal contract (or certain subcontracts) of at least \$50,000. This low dollar threshold requires small employers – sometimes with an attenuated attachment to the government procurement process – to engage in expensive and time-consuming compliance requirements, such as detailed recordkeeping and adoption of an affirmative action plan.
 - Steps Requested: increase the OFCCP affirmative action and reporting requirement threshold through rulemaking process in order to ease the compliance burden on small business.



- Enforcement Against TRICARE Subcontractors. Despite language in Section 715 of the 2011 National Defense Authorization Act (NDAA), which states that a TRICARE managed care contract shouldn't be deemed “a contract for the performance of health care services or supplies” for determining whether network providers are “subcontractors” under the Federal Acquisition Regulation or any other federal law, OFCCP continued to assert jurisdiction over medical providers that are TRICARE subcontractors.
 - Steps Requested:
 - *Protecting Health Care Providers from Increased Administrative Burdens Act* (H.R. 3633) – would prevent medical providers that receive funds from federal health care programs from being classified as subcontractors subject to the OFCCP's jurisdiction.
 - Alternatively, the five-year enforcement moratorium for TRICARE subcontractors, which is scheduled to expire in 2019 and can be “revoked” at any time, should be made permanent (to the extent possible).
 - Basic Rationale: If OFCCP begins enforcement anew against TRICARE subcontractors, such actions would: (1) ignore clear intent of Congress; (2) expand jurisdiction of the agency; and (3) create great uncertainty for healthcare providers.

DOL – WAGE AND HOUR DIVISION (WHD)

- New Overtime Regulation Defining and Delimiting the Exemptions for Executive, Administrative, Professional Employees. On May 23, 2016, the Department of Labor published its final overtime regulation increasing the minimum salary threshold for exemption from \$23,660 per year, to \$47,476 per year (\$913 per week). The salary threshold will be automatically increased every three years by pegging it to the 40th percentile of the lowest income region of the country (currently the South which includes MD, VA, and DC). Similarly, the compensation requirement needed to exempt highly compensated employees will increase to \$134,004 per year, up from \$100,000 per year and will be indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried employees in the lowest income region. The new regulation is scheduled to take effect on December 1, 2016.

The Chamber’s comments can be [found here](#).

A Chamber led legal challenge, joined by over 50 other business groups, has been filed in the Eastern District of Texas challenging the excessively high salary threshold as undermining Congressional intent to maintain these exemptions, and the automatic escalator as not being authorized by the Fair Labor Standards Act. At the same time, a coalition of 21 states filed a similar challenge and the two cases have been consolidated. On November 11, 2016, a nation-wide preliminary injunction blocking implementation of the rule was granted.



- Steps Requested. Since the court has blocked the regulation from taking effect, revoking and revising the salary threshold increase will be more practical. This will also make a CRA resolution more politically acceptable. Even if the court does not eventually rule against the regulation on the merits, the entire regulation should be revised through new rulemaking and the automatic escalator eliminated.
- Basic Rationale. The new salary threshold doubles the current threshold, and as such is highly disruptive to many employers. The new threshold was set so high as to frustrate Congressional intent to have these exemptions available, and was a clear departure from past DOL methodology. Employees will also be disadvantaged as putting them on the clock will mean that work done outside the workplace will need to be tracked and captured against the 40 hours a week to determine if they qualify for overtime. This will also mean that use of smart phones and travel will have to be tracked or curtailed. Furthermore, the automatic update provision is not authorized by statute and will result in the salary threshold continuously increasing without input from affected parties, or any consideration for whether it makes sense in the current economic conditions.
- Administrator’s Interpretation (AI) on Misclassification of Employees. On July 15, 2015, Wage and Hour Administrator David Weil issued an interpretation detailing how workers are to be classified between employees and independent contractors for purposes of coverage under the Fair Labor Standards Act. Traditionally, the level of control over the workers’ action exerted by the employer was the key issue, with more control resulting in an employee designation. The AI replaces that test with a multi-factor “economic realities” test that includes the control issue but not as the primary concern. As a result, employers will have much less clarity and certainty about whether they have properly classified their workers and the WHD will have more latitude to find misclassification. Indeed, the AI makes clear that the definition of an employee under the FLSA is intended to be very broad and that “most workers are employees under the FLSA.”
 - Steps Requested: Revoke the AI.
 - Basic Rationale: The AI makes a substantive change in the classification process. There was no input taken from affected parties, or notice that this was coming. Employers will be at a disadvantage to have their classifications upheld, and will often be unable to know whether their classifications are valid until the WHD decides whether they are.
- Administrator’s Interpretation on Finding Joint Employment Under the FLSA. Similar to the AI on misclassification, WHD Administrator Weil on January 20, 2016, issued an interpretation detailing when a joint employment relationship would exist under the FLSA such that both employers would be liable for violations. The AI describes two versions of joint employment—horizontal and vertical. Horizontal joint employment exists where there is a connection between the two employers, such as common corporate



ownership. Vertical joint employment would be found where the employee for one employer works under the direction of a second employer, such as with staffing agencies or other outside contractors for workers. The vertical joint employment analysis relies on the “economic realities” concept embodied in the AI on misclassification.

- Step Requested: Revoke the AI.
- Basic Rationale: Like the AI on misclassification, the AI on joint employment was issued with no input from affected parties, or any indication it was coming. It also makes substantive changes to how the FLSA is enforced, most notably in the creation of vertical joint employment relationships. The vertical joint employment relationship will mean that many companies will be vulnerable to being held liable for FLSA violations of smaller contractors they may have employed for specific functions that they no longer wish to handle. The reliance on the economic realities test will also mean great uncertainty about whether such a relationship exists.

DOL - OSHA

- Injury and Illness Reporting Regulation with Anti-Retaliation Provision.
On May 11, 2016, OSHA released its final regulation requiring employers to submit to OSHA electronically their injury and illness records so that OSHA can post these to the Internet. Employers with more than 20 employees who have to keep records will have to submit summary records by July 1, 2017. Employers with 250 employees or more will be required to submit more detailed records annually, beginning July 1, 2018. Others must continue to submit summaries.

In addition, the final regulation included a provision requiring employers to have “reasonable” policies for employees to come forward with their injuries or safety hazards, and not to retaliate against employees who report injuries or safety violations. In preamble commentary to the final regulation, OSHA grants itself the authority to issue citations under the whistleblower protection provision of the statute to enforce this new prohibition. Among the employer policies OSHA will target as being unreasonable are safety incentive programs and certain uses of drug testing that OSHA believes deter employee reporting of injuries. The Chamber’s comments on the original proposed regulation are [here](#), and the comments on the supplemental proposed regulation are [here](#).

- Steps Requested: This rulemaking should be revoked through a subsequent rulemaking.
- Basic Rationale: The statute does not give OSHA the authority to publicize these records. Doing so will expose employers to being mischaracterized as having unsafe workplaces for reporting injuries that had to be recorded but which having nothing to do with their approach to workplace safety. These postings are expected to be used by unions in their organizing and negotiation efforts, which is



why they requested this rulemaking. The “anti-retaliation” provision should be revoked because: 1) The text for this was never actually proposed, instead a series of questions was asked and employers were unable to learn what would be expected of them; and 2) It is so vague as to be meaningless—how is an employer to know when their policy is “reasonable” or whether “a reasonable employee” would be deterred? The only way to understand what is expected is to rely on the preamble commentary which results in backdoor rulemaking; OSHA does not have the authority under the statute to enforce whistleblower protections through citations. The statute is explicit that any whistleblower claims must originate with an employee filing a complaint. OSHA’s approach would result in a whistleblower action without a whistleblower.

- Letter of Interpretation Granting Union Representatives Walk Around Rights. OSHA issued a letter of interpretation, in response to a request from the United Steelworkers, which upended longstanding regulations on whether outside third parties could accompany an OSHA inspector during walk around inspections. The regulations made clear that only employees of the company can accompany OSHA inspectors unless special circumstances (such as unique expertise or language issues) suggest otherwise. OSHA’s letter uses these exceptions to grant union representatives the right to enter non-union workplaces when requested by an employee.
 - Steps Requested: This letter of interpretation should be rescinded.
 - Basic Rationale: This letter was done as a favor to the agency’s union patrons. It disturbs well settled regulations and as such, if this is to be the new policy, it should have been done through a rulemaking so the affected parties could participate, and there would be a way to hold the agency accountable. Instead this letter waits to be invoked, and only if the employer resists will a challenge result.
- OSHA Joint Employer Enforcement Memo. Following the NLRB’s decision in *Browning Ferris*, a memo from OSHA detailing how inspectors could establish joint employment relationships in the franchise setting leaked. It relies on the “economic realities” concepts used by the WHD and seeks to hold the brand name company liable for the OSHA violations of its franchise operators.
 - Steps Requested. The status of this memo is unclear as it was leaked in a draft form and never made public or formalized. It should be rescinded.
 - Basic Rationale. This memo was done in secret, and if this is to be new policy it must be done in a participatory process. More importantly, it would make franchise relationships almost impossible, thus destroying a vibrant sector of the economy. The criteria are so vague that employers will never be able to tell with certainty, but whether or not they are in compliance until an OSHA inspector decides.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- Compensation and Hours-Worked Reporting (EEO-1). Beginning in 2018, the EEOC will require employers with 100 or more employees (both private industry and federal contractors) to submit data on their employee's W-2 earnings and hours worked broken down by ethnicity, race, and sex, and sorted into 10 job categories. The Chamber filed comments with the [EEOC](#) and the White House's [Office of Management and Budget](#).
 - Status: Proposed in February 2016, the changes to the EEO-1 form were approved on September 29, 2016. The 2016 report deadline has passed and employers complied by filing the old form. Employers will be required to file their 2017 report – which will include compensation and hours worked data – by March 2018.
 - Steps Requested:
 - With a Republican-majority commission, rollback using the Paperwork Reduction Act (PRA).
 - Appropriations rider prohibiting EEOC from proceeding with the changes to the EEO-1 form.
 - *EEOC Reform Act (S. 2693)* – would require EEOC to take three reasonable steps before it continues with the proposal: 1) EEOC would have to collect and compile the same employment data information from the executive branch departments and agencies and report this information to Congress, along with the number of staff and staff hours it took to complete; 2) EEOC would be required to develop software and a comprehensive plan regarding how the data will be used; and 3) EEOC would be required to reduce its current backlog of discrimination complaints (which include over 1,000 cases alleging compensation discrimination) by a specified number.
 - Basic Rationale: Time spent by employers reporting on this new form and costs associated with developing information systems to accurately do so will rise dramatically, despite claims by EEOC. Further, because non-discriminatory variables are not accounted for and the job groups and pay bands are arbitrary, this data will provide EEOC with no insight as to whether an employer's pay practices are discriminatory. Finally, the EEOC fails to set forth appropriate safeguards to ensure that this sensitive information remains confidential, and it is anticipated that unions and other interest groups will use this information out of context to publicly promote unfounded allegations against employers.



- Wellness Regulations. On May 17, 2016, EEOC issued final rules under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act relating to workplace wellness programs.
 - Steps Requested: Amend EEOC wellness regulations to smooth out inconsistencies with Affordable Care Act and Health Insurance Portability and Accountability Act (e.g., smoking cessation incentives).
 - Rationale: Inconsistencies between EEOC’s wellness regulations and the Tri-Agency wellness regulations increase compliance costs and discourage employers from offering wellness benefits to employees.
 - The AARP has filed a challenge to the incentives provided in the regulations. The Chamber has filed a [brief](#) countering these arguments.
- Criminal Background Check Guidance. In 2012, EEOC issued guidance relating to employers’ use of criminal background check information when making employment decisions. There are still concerns in the business community about what is required for “individualized assessments” and what employers should do when faced with state laws which require background checks be performed for certain jobs.
 - Steps Requested:
 - EEOC could issue revised guidance.
 - *Certainty in Enforcement Act of 2015* (H.R. 548) - provides a safe harbor for employers who perform criminal background checks as mandated by federal, state, or local law.

NATIONAL MEDIATION BOARD (NMB)

- NMB Representation Rule Change. The National Mediation Board oversees labor-management relations in the railroad and airline industries. Because of the unique nature of these industries, a union could only be certified as a bargaining representative of a group of employees if a majority of all eligible voters cast ballots in favor of unionization. However, in order to make it easier for unions to organize, in 2010 the NMB changed this rule to allow unions to be certified as the bargaining representative if they secure a majority of the votes cast (see Chamber comments [here](#)). For example, under the traditional rule, if a union sought to represent 10,000 airline employees, 5,001 votes would be needed in the election. Under the new rule, a bare majority of votes cast would make the determination regardless of how many employees voted. If only one person voted, and she voted for the union, she and the remaining 9,999 employees would become unionized. In other words, an employer could be required to bargain with a union with no evidence that the union ever enjoyed the support of a majority of employees in the craft or class.



- Step Requested:
 - Enter into rulemaking to reconsider these new voting procedures.

II. CHARTING A NEW COURSE AND PRIMING THE PUMP: ADVANCING POSITIVE REFORMS TO ENCOURAGE ECONOMIC GROWTH

This section details positive policy proposals that go beyond correcting the record of the last eight years. Note that this list will evolve as circumstances dictate and more proposals are vetted by Chamber members. Obviously there will be opportunity to explore more far-reaching proposals, such as preemption of state and local employment laws, as we get a better grasp on what is actually doable. Many of the initiatives discussed below have been acted upon in the past, including through hearings and proposed legislation.

NLRA Reform

1. Union Access – Ensure that an employer has the right to control access to private property and can draw reasonable distinctions between the nature of a union's organizing efforts and the efforts of charitable organizations.
2. Clearer NLRA Preemption – With nothing explicit now in the statute, make something broad and sweeping, also doing away with the market participant exception.
3. D.R. Horton – Protect employers' use of arbitration agreements; language that the Act does not conflict with the Federal Arbitration Act.
4. Employee bill of rights, including issues like:
 - a. Requiring a secret ballot strike vote.
 - b. Prohibiting union fines for activity protected by Section 7.
 - c. Strengthened Beck rights for dues or fees used for political purposes.
(There have been several legislative initiatives and extensive hearings in the past, documenting the need for strengthened Beck rights)
5. Establish a decertification process with no blocking charges. Right now the law provides an easy in, but a hard out.
6. Racketeer Influenced and Corrupt Organizations (RICO) Act - Expand RICO statutes to include coercion by unions and corporate campaigns.
7. Secret Ballot Protection Act or codify *Dana*.



8. Buyers' Remorse / Return of Authorization Cards – Guarantee the right of an employee to have an authorization card returned upon request.
9. Do Not Contact List – Create a national "do not call" list like the one for telephone solicitation that would bar a union (its officers, union organizers and even coworkers) from contacting that individual -- either directly, via telephone or otherwise -- to solicit an authorization card. Make it a unfair labor practice with financial penalties for a union to contact an employee on the "do not contact" list.
10. Strengthen Decertification Rights – Permit the use of authorization cards for decertification and abolish the recognition and contract bars.

EEOC Reform Bills

- EEOC Transparency and Accountability Act (H.R. 4959)
 - Would require the EEOC to post on its website and in its annual report an array of information to promote transparency, including any case in which EEOC was required to pay fees or costs, or where a sanction was imposed against it by a court; the total number of charges filed by an EEOC member or as a result of a directed investigation; and each systemic discrimination lawsuit brought by the EEOC.
 - Would require the EEOC to conduct conciliation endeavors in good faith and such endeavors would be subject to judicial review.
 - Would require the EEOC's Inspector General (IG) to notify Congress within 14 days when a court has ordered sanctions against EEOC. The IG must also conduct a thorough investigation of why the agency brought the case, and submit a report to Congress within 90 days of the court's decision explaining why sanctions were imposed.
 - Would require the EEOC to submit a report to Congress within 60 days of the court's decision detailing steps EEOC is taking to reduce instances in which it is subject to court-ordered sanctions; further, the EEOC would have to post this report to its website within 30 days of submitting to Congress.
- Litigation Oversight Act of 2014 (H.R. 5422)
 - Would require the EEOC to approve or disapprove by majority vote whether the EEOC shall commence or intervene in litigation involving: 1) multiple plaintiffs, or 2) an allegation of systemic discrimination or a pattern or practice of discrimination.
 - Provides EEOC members with the power to require the Commission to approve or disapprove by majority vote whether the EEOC commences or intervenes in any litigation.
 - Requires the EEOC, within 30 days after commencing or intervening in litigation pursuant to such an approval, to post on its public website: 1) information

regarding the case, including the allegations and causes of action; and 2) each Commissioner's vote on commencing or intervening in the litigation.

- Chamber testimony in support of these bills can be found [here](#).

Labor Management Reporting and Disclosure Act (LMRDA)

- Prior Rep. Sam Johnson bills on LMRDA reform (108th Congress)
 - Union Members Right to Know – H.R. 992
 - Labor Management Accountability Act – H.R. 993 (civil penalties)
 - Union Member Information Enforcement Act – H.R. 994

Paperwork Reduction Act Reform

Despite the fact that the EEO-1 proposal clearly violated the PRA, it was ultimately approved by Office of Information and Regulatory Affairs (OIRA). It was no accident that the administration abandoned a similar OFCCP Administrative Procedure Act (APA) rulemaking and instead chose the PRA process to extract this information from employers: unlike the APA, the PRA does not provide for a private cause of action. The administration knows the PRA is ineffective and will continue to use this as a vehicle for driving policy.

- Steps Requested:
 - The PRA should be amended to allow for a private cause of action in certain circumstances.
 - The PRA should be amended to require OIRA to issue a regulatory impact statement (i.e. how it analyzed the PRA criteria, how it calculated burden, etc.) and make this statement reviewable by federal courts.

Procurement Act Reform

To guard against future presidents using the Procurement Act's broad delegation of authority to implement non-procurement related policy, the Act could be amended to define or limit the key term of "economy and efficiency."

Pay Equity

The issue of pay equity was prominent in the November 2016 elections. Though both the Equal Pay Act and Title VII prohibit compensation discrimination based on sex, Democrats favor passage of the Paycheck Fairness Act to combat what they ostensibly see as lingering inequality in wages between men and women. There may be opportunity for Republicans to offer their



own alternatives to address this issue, focusing on anti-retaliation and clarification of employers' defenses.⁹

Pregnancy Accommodation

Many law makers on Capitol Hill remain unsatisfied with the Pregnancy Discrimination Act's (PDA) multi-step balancing test announced by the Supreme Court in *Young v.*

UPS. Consequently, there has been a push on both sides of the political aisle to provide clarity regarding employer obligations to accommodate pregnant workers. Republicans may choose to consider language to clarify the PDA.

Fair Labor Standards Act Reform

The FLSA was passed in 1938 to fit the industrial workplace where jobs and duties had much clearer distinctions. The contemporary workplace bears very little resemblance to that of 1938, since with the advent of technology, work is done in many locations instead of one central workplace. The FLSA needs to be updated to make its protections relevant to today's workers and allow employers to implement more options for flexible work arrangements. Among the updates that are needed are the following:

- Modernize the Computer Employee Exemption by including a 21st Century list of current and future duties, and allow for the option to pay an employee on a salary basis.
- Allow inside salespeople to be exempt, like outside sales, by removing the 'fixed office location' requirement. The distinction should be eliminated since in many cases salespeople work from both a fixed location and a non-fixed location through technology.
- Specify that normal commute time is not compensable, even if work is performed before or after the commute.
- Exclude specific de minimis activity from "paid time" and clarify that non-exempts' de minimis activity does not trigger the start of the work day or signify the end of the work day.

Family and Medical Leave Act Reform

The FMLA provides for 12 weeks of job protected unpaid leave for various reasons. It was enacted in 1993, and while employers have learned how to comply, there are some provisions that continue to create problems and opportunities for misuse. The following concepts give employers the most problems and should be clarified or updated:

⁹ The Lilly Ledbetter Fair Pay Act of 2009 reset the statute of limitations for filing a compensation discrimination claim each time an employee receives a paycheck, benefits, or "other compensation," that resulted from a discriminatory decision or practice. Given the highly-charged political atmosphere surrounding equal pay issues and the limited negative impact of the law, it is probably not worth expending the political capital trying to overturn this law.

- Serious health condition – clarify that the definition of "serious health condition" does not include minor ailments.
- Intermittent leave – permit employers to use larger time blocks in offering intermittent leave rather than the current requirement that could require tracking even a few minutes of time.

Pro-Employer Paid Leave Incentive

Mandates requiring employers to provide various types of paid leave (sick, parental, family based) are proliferating throughout the country on both the state and local levels. Many companies and employers with operations in different locations are struggling to comply with the varied requirements. A federal program that gave employers the incentive of voluntarily implementing a paid leave program in exchange for being exempt from state and local mandates would likely achieve two goals: 1) increase the number of employers providing paid leave benefits for their employees; and 2) give employers with locations throughout the nation relief from the patchwork of requirements that currently exists and are likely to get worse.

Modest Minimum Wage Increase

Similar to the proliferation of paid leave mandates, many states and localities are implementing minimum wages significantly higher than the current federal minimum wage (\$7.25/hour), with \$15/hour being a popular level. Even President-elect Trump signaled during the campaign that he thought the federal minimum wage should be \$10/hour. The last increase in the federal minimum wage was implemented in 2009. Employers could possibly support a modest increase in the minimum wage, if it is coupled with significant beneficial reforms.

OSHA Reforms

Over the years there have been various efforts to update how the OSH Act operates. These are still needed reforms.

- Attorneys' Fees – The FAIR Act (H.R. 742, passed by the House in the 109th Congress) allows small employers to recover attorneys' fees when they successfully defend against an OSHA citation by closing the loophole in the Equal Access to Justice Act that requires the employer to prove OSHA acted with "substantial justification." In addition to being almost impossible to meet, this also requires a second hearing, thus adding cost and burden which further impedes small businesses recovering their fees. This relief is limited to small businesses with less than 100 employees and a net worth of not more than \$7 million.
- Restore Congressional intent that the Review Commission's legal interpretations of OSHA's actions be given deference, thus restoring it as the independent authority on whether OSHA has acted properly. Current case law gives deference to OSHA's legal interpretations of its own actions, thus ensuring that OSHA's actions will be upheld upon

appeal and blocking any chance a small business would have to prevail. (H.R. 741, passed by the House in the 109th Congress.)

- Provide the Occupational Safety and Health Review Commission some flexibility in the application of the 15-day period employers have to contest citations/proposed penalties. The exceptions are based on those available to judges in federal courts, and are intended to preserve an employer's opportunity to make their case on the merits if they can show "mistake, inadvertence, surprise or excusable neglect." (H.R. 739, passed by the House in the 109th Congress.)
- Create incentive for employers to use certified safety consultants to analyze their workplaces to identify areas needing improvement thus bringing workplace safety expertise and assistance to more employers than they will ever be able to get from OSHA alone. Such a bill might also give employers credit for implementing industry-specific safety programs such as those produced by associations. Also, it would have to provide protection for the audit reports, similar to the privilege granted materials generated in an attorney-client relationship. (Previously introduced as S. 2065, "The Occupational Safety Partnership Act", 109th Congress.)

