

# Outlook for Legislative and Regulatory Activity in 2014

*An Overview of Policy Related to HR and Employee Benefits Expected in 2014*

*February 2014*

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### 113th Congress—Second Session

#### Current Breakdown and Upcoming 2014 Midterm Elections

The second session of the 113th Congress reconvened during the first week of January 2013. The chambers will meet through January 3, 2015. Beginning in 2014, Congress maintains a Democratic Senate majority (53 Democrats, 45 Republicans, and two Independents who typically caucus with the Democrats) and a Republican House majority (234 Republicans, 201 Democrats, including one currently vacant Republican seat and one currently vacant Democratic seat). However, the upcoming November 2014 midterm elections could potentially change the breakdown of each chamber. All the House seats are up for re-election, and 35 Senate seats will be on the ballot this fall.

Any bill introduced during the first session of the 113th Congress is still considered eligible for debate during 2014. When the next 114th Congress convenes for the first time in January 2015, all previous bills will be considered “dead” and will need to be reintroduced to be considered.

#### Looking Back—Few Laws Enacted, but Some Groundwork Set

Little progress was made in the policymaking area during 2013, especially in the areas of employee benefits and human resources (HR). Legislation enacted during 2013 primarily focused on temporarily extending government funding, temporarily raising the debt ceiling, and ultimately ending the shutdown that halted government operations for two weeks. On December 26, 2013, The Bipartisan Budget Act of 2013 – H.J. Res. 59, a two-year budget deal, was signed into law. The bipartisan agreement sets discretionary spending at more than \$1 trillion for the next two fiscal years and replaces sequester cuts scheduled to begin in January 2014. The budget agreement does not include any new tax increases, nor does it contain provisions to extend emergency unemployment benefits or target the debt ceiling.

During 2013, the Senate passed an immigration reform bill (Border Security, Economic Opportunity, and Immigration Modernization Act – S. 744) and the Employment Non-Discrimination Act (ENDA) of 2013 (S. 815). Among other provisions, the immigration bill would create new paths to citizenship for undocumented individuals who pass an updated eligibility verification process. The ENDA would prohibit employment discrimination on the basis of sexual orientation or gender identity. Both bills are awaiting House consideration, and passage is uncertain.

The House passed a number of bills meant to defund or repeal all or part of the Patient Protection and Affordable Care Act (Affordable Care Act). None of the bills are expected to pass the Senate. Additionally, the House passed the Working Families Flexibility Act (H.R. 1406). The bill, which would amend the Fair Labor Standards Act (FLSA), would allow private employers to offer hourly employees the option of taking compensatory paid time off instead of overtime pay. The Senate is not expected to consider the bill.

## Looking Ahead—Political Climate and Hot Topics

Few measures are likely to pass both chambers in 2014, primarily due to the continued gridlock between political parties, as well as the focus on the upcoming midterm elections. Both parties will be spending a good portion of early 2014 analyzing agendas that may best serve election outcomes. However, even with the possible obstacles, Congress is expected to consider a number of issues related to HR and government operations in the months ahead. A brief overview of some of the major issues is provided below. Please note that priorities could change due to national developments or political events.

**Funding: Omnibus Spending Bill and Debt Ceiling**—When the Continuing Appropriations Act (P.L. 113-46) became law in October 2013, the legislation effectively ended the government shutdown, temporarily funded the government through January 15, 2014, and temporarily suspended the debt ceiling through February 7, 2014.

An omnibus appropriations bill (H.R. 3547 – Consolidated Appropriations Act of 2014) became law on January 17, 2014. The \$1.01 trillion spending measure will fund the government through September 30, 2014. The bill provides \$12 billion in funding for various federal health programs and agencies (e.g., the Department of Labor (DOL), Health and Human Services (HHS), Internal Revenue Service (IRS), etc.). The Senate passed the bill on January 16, and the House approved the bill on January 15. Next on the agenda: the chambers will need to consider another debt limit extension.

**Affordable Care Act**—Instead of trying to repeal all of the Affordable Care Act, the House is expected to pass bills that attempt to change or modify specific provisions of the health care reform law. For example, in January the House passed a bill (Health Exchange Security and Transparency Act – H.R. 3811) that would require HHS to notify individuals within two days of when their data is breached on the federal health insurance Exchange (marketplace) website (Healthcare.gov). The House also passed a bill in January (Exchange Information Disclosure Act – H.R. 3362) that would require the health insurance Exchanges to issue weekly, public reports to include the number of visits, enrollment numbers, and the level of purchased coverage. Neither bill is expected to be approved by the Senate.

**“Doc Fix”/Sustainable Growth Rate (SGR)**—The December 2013 budget deal included a temporary, three-month “Doc Fix,” which delayed a 20.1% reduction in Medicare payments to providers that were scheduled to begin January 1 under the SGR formula. Legislators are hoping to permanently repeal the SGR before the temporary “patch” expires in March 2014.

**Equal Pay**— It was announced in late January 2014 that the Senate Committee on Health, Education, Labor and Pensions will hold a hearing on the Paycheck Fairness Act (S. 84/H.R. 377) in April, with hopes of bringing the legislation to the floor for consideration later this year. The bill, introduced in January 2013, would expand provisions of the Equal Pay Act of 1963 and amend the FLSA to secure equal pay for equal work. Among other items, the bill would ban retaliation against employees who discuss salaries with colleagues. Additionally, the bill would require employers to prove that pay disparities between men and women are due to job-related reasons, and not gender. The legislation has been introduced in two previous Congressional sessions (2009 and 2011) and failed both times.

**Extending Unemployment Insurance**—Congress is considering whether to extend emergency unemployment benefits for the long-term unemployed from three months to one year. These benefits expired at the end of 2013 when they were not included in the December budget deal. At the time of

publication, it was unclear if an unemployment benefits extension bill would pass Congress. In January, the Senate was unable to secure enough votes to pass its version of the legislation (Emergency Unemployment Compensation Extension Act – S. 1845). A proposal is expected to be introduced in the House that would extend benefits for one year. It is possible that this issue could be revisited at a later date, if (and/or when) Congress considers different legislation that would include retraining and service requirements.

**Immigration**—Immigration reform remains in the spotlight, as legislators return to potentially debate the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) passed by the Senate in June 2013. As passed, the bill would create new paths to citizenship, including a merit-based visa policy that would award points based on such factors as immigrants' employment and education. All employers would eventually be required to use an expanded employment verification system, with the largest employers (employers with more than 5,000 employees) having to comply with the mandatory verification system first. Other provisions include raising the caps on visas for highly skilled workers, a new program for farm workers, and additional border security measures. Many of the bill's provisions have provoked controversy, and its future in the House is uncertain.

In January, several House Republicans released their proposal on immigration reform in a one-page statement of immigration principles. The proposal focuses on border security and enforcement measures, while also providing a path to legal status for undocumented immigrants. Passage of immigration reform could be difficult, but not totally impossible, depending upon business support and the 2014 election results.

**Minimum Wage**—Congress is poised to consider raising the minimum wage in 2014. Legislation in the House and Senate (H.R. 1010 – Fair Minimum Wage Act/S. 1737 – Minimum Wage Fairness Act) would amend the FLSA to incrementally increase the federal minimum wage from \$7.25 to \$10.10 an hour, with future increases indexed to inflation. The Senate is likely to consider the bill sometime in February, but House passage is uncertain. If Congress fails to enact a federal minimum wage increase, some states will continue to consider their own minimum wage legislation.

**Privacy/Breach Notification**—Due to recent data breaches, federal breach notice legislation could appear on the 2014 agenda. The Administration has discussed a consumer privacy rights proposal, but the initiative has been met with some resistance. Another bill, introduced in June 2013 (Data Security and Breach Notification Act – S. 1193), would "require commercial entities that acquire, maintain, store, or utilize personal information (covered entities) to take reasonable measures to protect and secure data in electronic form containing personal information." The bill would also allow the Federal Trade Commission (FTC) the authority to create and administer regulations requiring companies to protect vulnerable consumer data (e.g., credit cards, bank account information) and notify consumers of any breaches. Previous Congressional sessions have failed to pass such bills, but in light of increased data security concerns, it is likely that this issue will continue to gain attention and generate discussion.

**Retirement**—As was discussed in the January 28, 2014 State of the Union Address, the Administration has directed the Treasury to create a new program called "myRA." The program is to be offered through employers and targets employees who currently lack access to a workplace retirement saving plan, such as a 401(k). According to a fact sheet released by the White House, the "product will be offered via a familiar Roth individual retirement account (IRA), and savers will benefit from principal protection, so the account balance will never go down in value. The security in the account, like all savings bonds, will be

backed by the U.S. government. Contributions can be withdrawn tax free at any time.” The program will be available to households earning up to \$191,000 a year and be offered through an initial pilot program available to employers who choose to participate by the end of 2014. Employers will neither administer the accounts nor contribute to them. Participants could save up to \$15,000, or for a maximum of 30 years, in their accounts before transferring their balance to a private sector Roth IRA.

On the Congressional front, the Universal, Secure, and Adaptable (USA) Retirement Funds Act of 2014 (bill number unavailable at time of publication) would create a new, privately-run retirement plan that “combines the advantages of traditional pensions—including lifetime income benefits and pooled, professional management—with the portability and ease for employers of a 401(k).” Key features of the new plan would include universal coverage, automatic enrollment, secure lifetime income, lower costs and portability for employees if they change employers. Another bill, S. 1970 – the Retirement Security Act of 2014, would create an additional safe harbor for “automatic enrollment” plans that would allow employees to receive an employer match on contributions of up to 10% of their pay. Among other provisions, employees would also be able to contribute more than 10%, without an employer match.

**Tax Reform/Extenders**—The likelihood of major tax reform passing in 2014 appears low or unlikely. A major tax code overhaul does not appear to be a priority due to opposing interests and the midterm elections.

Almost 60 tax incentives, credits, and other provisions (extenders) expired at the end of 2013. Due to other legislative priorities (i.e., budget, debt ceiling, trade bill, etc.), the likelihood of any lapsed tax extenders being debated (or retroactively renewed) is also unlikely, at least in early 2014.

## Judicial Activity

The U.S. Supreme Court will hear two cases on the Affordable Care Act's requirement of health insurance coverage for contraception and whether corporations may refuse to provide that coverage on the basis of religious principles. These cases will be covered in the Aon Hewitt Washington Report and also included in the 2014 Year in Review.

## The Regulatory Front

Although Congress did not pass many bills during 2013, federal regulators released a number of regulations during the calendar year. This trend is expected to continue during 2014. During 2013 nearly 60 bills were enacted into law. However, regulators issued thousands of regulations. While these regulations were not all HR- and employee benefits-related, the increased regulatory activity best illustrates how government agencies are continuing to take the lead in providing guidance and enforcement.

On November 26, 2013, federal departments and agencies (i.e., DOL, Equal Employment Opportunity Commission (EEOC), IRS, HHS, Department of Homeland Security (DHS), Pension Benefit Guaranty Corporation (PBGC), etc.) released their Fall 2013 Semiannual Regulatory Agendas. The agendas include regulatory plans and priorities for 2014, as well as regulations that were completed during 2013. A variety of regulations are expected to be issued in the upcoming months, impacting health care, retirement, executive compensation, immigration, and employment. A brief summary of these expected 2014 regulations and other guidance is provided below. Due to policy and political delays, the release of these regulations and guidance can change during the course of the year.

## Health Care

The year 2014 will likely include the development of key regulatory information necessary for employers and the health benefits community as they continue to implement the Affordable Care Act. The year 2013 closed with the guidance most eagerly anticipated by employers on the horizon, but not yet issued: final regulations on reporting and final regulations on employer shared responsibility. Other Affordable Care Act guidance in addition to that already planned for may be developed by the relevant agencies in 2014 as they evaluate last year's rollout of the Exchanges and other emerging aspects of the health care reform law. Major regulatory developments expected in 2014 are highlighted below:

**Reporting by Insurers and Employers**—The IRS is expected to issue final regulations under Internal Revenue Code (Code) Section 6055 on the reporting of minimum essential health coverage to the IRS and Code Section 6056 on coverage information that must be filed by applicable large employers with the IRS and furnished in statements to individuals.

**Employer Shared Responsibility**—Employers are also awaiting IRS final regulations under Code Section 4980H on health coverage offered by applicable large employers to their full-time employees.

**Minimum Value**—The IRS plans to issue final regulations on the minimum value of eligible employer-sponsored plans under Code Section 36B.

**90-Day Waiting Period**—The IRS, the Centers for Medicare and Medicaid Services (CMS), and Employee Benefit Security Administration (EBSA) intend to finalize jointly written regulations on the 90-day waiting period limitation. Under the Affordable Care Act, a group health plan or health insurance issuer offering group health insurance coverage cannot use a waiting period that exceeds 90 days. The agencies have stated that the final regulations, to the extent they are more restrictive than the proposed regulations issued in March 2013, will not take effect before 2015.

**Exchange Policies**—CMS intends to issue a proposed rule soon that would update policies related to the health insurance Exchanges based on the experience with the initial open enrollment period that began on October 1, 2013. The updated policies will seek to address evolving needs of states, health care providers, and insurers.

In addition, the IRS plans to issue guidance on the medical device tax under Code Section 4191 in 2014. This excise tax was enacted into law in 2010 in conjunction with the Affordable Care Act.

## Retirement

With many agencies' resources having been tied up with issuing guidance under the Affordable Care Act in 2013, 2014 may be the year in which we see more retirement plan guidance. The IRS, EBSA, and the PBGC are working on the following guidance of importance to retirement plan sponsors, targeted to be issued in 2014:

**Definition of Fiduciary**—EBSA plans to re-propose amendments to its regulations to clarify the circumstances under which a person will be considered a fiduciary when he or she provides investment advice to retirement plans and other employee benefit plans, to plan participants and beneficiaries, and to owners of IRAs. Changes in the ways advisers are compensated and other changes in the investment

marketplace, according to EBSA, often subject advisers to harmful conflicts of interest that can compromise the quality of advice given to plan participants and IRA owners. It should be noted that fiduciary standards for advisers and others are also under consideration at the Securities and Exchange Commission.

**Lifetime Income Options and Selection of Annuity Provider**—EBSA, the PBGC, and the IRS are all engaged in a variety of 2014 regulatory projects involving lifetime income options. In 2013, EBSA published an advance notice of proposed rulemaking suggesting that a participant's account balance be presented as a lifetime income stream of payments in pension benefit statements. In further support of that initiative, EBSA is developing proposed amendments to a safe harbor regulation on the selection of annuity plan providers by plan fiduciaries for individual account retirement plans. The PBGC also has a proposed rule underway to promote lifetime income options by providing guidance on rollovers from defined contribution plans to defined benefit plans, including asset allocation and guarantee limits. Finally, at the IRS, proposed regulations issued in 2012 that would facilitate the purchase of longevity annuity contracts under defined contribution, Section 403(b), and governmental Section 457 plans, as well as IRAs, are in the process of being finalized for expected release in 2014. These longevity annuity contracts could be designed with a fixed annuity starting date at an advanced age and, therefore, could help retirement plan participants hedge against the risk of spending down their benefits too quickly for adequate retirement income in later years.

**Fee Disclosure Guide**—EBSA is expected to release a proposed rule soon that would require service providers to “furnish a guide or similar tool” to help fiduciaries understand disclosure documents provided to them.

**United States v. Windsor Retroactive Effect**—The Treasury is expected to issue guidance on the impact of *United States v. Windsor* and other same-sex marriage developments on retirement plans, especially with regard to any retroactive impact on plan distributions already made.

**401(k) Self-Audit Tool**—The IRS intends to issue a new 401(k) Questionnaire Self-Audit Tool that employers could use to review their plan operations and internal controls in 2014.

**DB Plan Distributions**—Both proposed and final regulations on the minimum present value requirements for defined benefit plan distributions are on the IRS's agenda.

**Hybrid Plans**—Proposed transition rules relating to the market rate of return requirements for statutory hybrid plans (including cash balance plans) and additional final hybrid plan regulations are expected to be issued by the IRS, while the PBGC intends to finalize regulations on benefit determinations and plan valuations for terminating hybrid plans.

**Brokerage Windows**—This regulatory project is still in the early stages (pre-rule) at EBSA, but the agency will be exploring in 2014 whether to issue regulatory guidance on fiduciary requirements and regulatory safeguards for brokerage windows in participant-directed individual account plans.

**Annual Funding Disclosures**—A final rule on the requirement that administrators of defined benefit pension plans annually disclose the funding status of their plan to participants and beneficiaries is on EBSA's regulatory agenda.

**Target Date Funds**—EBSA hopes to finalize amendments to the disclosure requirements applicable to qualified default investment alternatives and target date funds in 2014.

Other retirement guidance to watch for during 2014 includes PBGC final rules on reportable events, additional guidance from the IRS on frozen defined benefit plans and nondiscrimination requirements, and IRS final regulations on minimum required pension contributions.

## Other HR-Related Topics

A number of other HR-related regulatory actions are scheduled to be released during 2014.

### DHS

**Clarification of Violation Regarding Completing I-9 Form**—The DHS is expected to release proposed regulations that would clarify certain I-9 form (Employment Eligibility Verification) paperwork failures and violations set forth in the good faith compliance provision of Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act. Employers are required to use the I-9 form to verify the identity and employment authorization eligibility of their employees. The proposed regulations would define a substantive violation and a technical or procedural failure. The proposed regulations would also revise the current DHS regulations that delineate the circumstances in which an employer may be subject to penalties for substantive violations or may not be subject to penalties for technical or procedural failures, due to the good faith compliance provision when completing the I-9 form regardless of the method of creation, retention, and storage. (These regulations were scheduled to be released during October 2013.)

### DOL

**Plan/Prevent/Protect Compliance Strategy**—The DOL is expected to continue to promote its “Plan/Prevent/Protect Compliance Strategy.” The plan, originally announced in the Spring 2010 agenda, is designed to ensure employers are in compliance with employment law. The strategy is designed to “shift the burden of ensuring compliance from the Department—which cannot and does not want to inspect every workplace—to the regulated entity itself.”

**Definition of Spouse in the FMLA**—The DOL plans to release proposed regulations updating the definition of spouse as defined in the FMLA, in response to the Supreme Court decision in *United States v. Windsor*. The Supreme Court struck down a key section of the federal Defense of Marriage Act (DOMA) that defined marriage as the union of one man and one woman for purposes of federal law in June 2013.

**Persuader Regulations and Reporting Requirements**—The DOL’s Office of Labor-Management Standards (OLMS) enforces most provisions of the Labor-Management Reporting and Disclosure Act (LMRDA). The OLMS published a proposed regulatory initiative in June 2011, which is a transparency regulation intended to provide workers with information critical to their effective participation in the workplace. The proposed regulations would better implement the public disclosure objectives of the LMRDA in situations where an employer engages a consultant in order to persuade employees concerning their rights to organize and bargain collectively. Under LMRDA Section 203, an employer must report any agreement or arrangement with a consultant to persuade employees concerning their rights to organize and collectively bargain or to obtain certain information concerning activities of employees or a labor organization in connection with a labor dispute involving the employer. The

consultant is also required to report such an agreement or arrangement with an employer. Statutory exceptions to these reporting requirements are set forth in LMRDA Section 203(c), which provides, in part, that employers and consultants are not required to file a report by reason of the consultant's giving or agreeing to give "advice" to the employer.

The DOL intends to publish final regulations revising its interpretation of Section 203(c) of the LMRDA, specifically the statutory provision that creates an advice exemption from reporting requirements that apply to employers and other persons in connection with persuading employees about the right to organize and bargain collectively. The revised interpretation would narrow the scope of the advice exemption.

Additionally, the DOL plans to propose regulations that would require filers of Form LM-21 (Persuader Agreements: Receipts and Disbursements Report) to electronically submit the form. The regulations would also review the layout of the Form LM-21, as well as its instructions and detail requirements.

**Veterans' Employment and Training Service (VETS) Regulations**—The DOL is scheduled to release two proposed regulations to assist veterans in finding employment. One regulation would rescind the Part 61-250 regulations which establish the VETS-100 reporting obligation. The second proposed regulation would declare the standards by which the DOL could reduce state funding if an audit finds that disabled veteran outreach program (DVOP) specialists and local veteran employment representatives (LVERs) are not fulfilling their required duties, as outlined under the VOW to Hire Heroes Act. The VETS funds the DVOP specialists and LVERs through the Jobs for Veterans State Grant program. (These regulations were scheduled to be released in November 2013.)

**Wage Garnishment Tool**—The DOL plans to issue interim final regulations that would establish a wage garnishment tool, which is already being utilized by 29 other federal agencies. The regulation would provide procedures the DOL, in conjunction with the Treasury, would use to collect money by means of administrative wage garnishment from debtors to satisfy delinquent nontax debts owed to DOL. The regulations would also outline a notice and hearing process for debtors to challenge garnishment orders. (These regulations were originally scheduled to be released during July 2013.)

**Office of Federal Contract Compliance Programs (OFCCP) Initiatives—Contractor Compliance and Sex Discrimination Guidelines**—The OFCCP, as part of the DOL, ensures that contractors and subcontractors doing business with the federal government provide equal employment opportunity and take affirmative action to create fair and diverse workplaces. The OFCCP plans to propose regulations on construction contractor affirmative action requirements and update regulations setting forth contractors' obligations not to discriminate on the basis of sex under Executive Order 11246. The sex discrimination guidelines have not been updated in more than 30 years.

## EEOC

**Strategic Enforcement Plan (SEP) Continues**—The EEOC is continuing its SEP for fiscal years 2013-2016. The SEP grew out of the EEOC's strategic plan for fiscal years 2012-2016, which was approved in early 2012. The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace. The SEP identifies six national priorities as the focus of this integrated enforcement effort: 1) eliminating barriers in recruitment and hiring; 2) protecting immigrant, migrant, and other vulnerable workers; 3) addressing

emerging and developing employment discrimination issues; 4) enforcing equal pay laws; 5) preserving access to the legal system; and 6) preventing harassment through systemic enforcement and targeted outreach.

**Coordinating Disability Discrimination Enforcement With the Department of Justice (DOJ) and DOL and Complaint Process**—Three items in the EEOC’s regulatory plan are currently under review pursuant to the EEOC’s plan for retrospective analysis of existing rules in compliance with Executive Order 13563. The three proposed regulations include:

- Revisions to procedures for complaints or charges of employment discrimination based on disability subject to the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act;
- Revisions to procedures for complaints/charges of employment discrimination based on disability filed against employers holding government contracts or subcontracts; and
- Revisions to procedures for complaints of employment discrimination filed against recipients of federal financial assistance.

These are joint regulations that the EEOC currently has with the DOJ and the DOL, which provide for coordinated charge and complaint handling procedures. The EEOC plans to propose to amend and revise these regulations so that they conform to each other and to EEOC’s recently revised “Memorandum of Understanding” with the OFCCP. The resulting revisions are meant to make the EEOC’s plan more effective and, according to the agency, will not impose any regulatory costs on employers or complainants/charging parties.

**Revisions to the Federal Sector’s Affirmative Employment Obligations of Individuals With Disabilities**—The EEOC plans to propose regulations related to the revisions to the federal sector’s affirmative employment obligations of individuals with disabilities under Section 501 of the Rehabilitation Act. The EEOC would ask for comments on revisions to the current regulations, which would reflect a more detailed explanation of how federal agencies and departments should give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

## Resources

Due to the evolving nature of this information, the material in this report is subject to change. The report was completed on January 31, 2014. To stay current with the latest HR-related legislative and regulatory updates in 2014, read the Aon Hewitt Washington Report: [2014 Aon Hewitt Washington Report Index](#)

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Aon Hewitt’s Regulatory Guidance Under the Affordable Care Act page, which provides links to Aon Hewitt bulletins on Affordable Care Act guidance and regulations, is available [here](#).

The link to the Current Unified Agenda of Regulatory and Deregulatory Actions (i.e., the Fall 2013 Semiannual Agendas and Regulatory Plans, searchable by agency) is available [here](#).

The U.S. House of Representatives website is available [here](#).



The U.S. Senate website is available [here](#).

The U.S. Supreme Court website is available [here](#).

The White House website is available [here](#).

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