

2023 Public Policy Outlook

HR public policy issues in play & the
Association's advocacy and practice agenda

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Lights, Camera, Action

- House oversight of aggressive regulatory agenda
- Republican lawmakers to pursue anti-ESG legislative proposals
 - Republican Senators: “ESG movement attempts to weaponize corporations to reshape society in ways that Americans would never endorse at the ballot box”
- Senate hearings to focus on a host of employer-related issues with implications for member companies

Implications for Member Companies

- *Policy actions—from a broader array of agencies—may require updates to internal practices and policies*
- *Companies mentioned by name and or called before Congress to face scrutiny over ESG, health benefits and labor practices*

Vivacious Senate

- Must Pass Bills
- Judicial & Executive Nominees (Kalpana Kotagal to be a member of the EEOC)
- Appropriations
- Oversight hearings

Regulations Oh My!

- Expect more agency regulation, whole of government approach (FTC, SEC, DOL, NLRB)
- Action from agencies with limited knowledge/interaction with employer issues

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Secretary Walsh Breakaway



Hard Labor: Biden Faces Tough Choice

- Deputy Labor Secretary Julie A. Su, a former California labor secretary, is expected to take over as acting secretary
- **Wage theft czar.** As California labor commissioner, investigating and combating wage theft was a top priority for Su. Her leadership led to more investigations and enforcement of wage theft laws.
- If nominated, Su could serve as acting secretary while awaiting official confirmation by the Senate.



Employer Health Care Benefits Will be a Focus

- Congress focusing on affordability and out-of-pocket costs – spotlight could shift to employer plans
- PBMs, drug prices and pharmacy supply-chain transparency will get a lot of attention
- Bipartisan mental health and telehealth legislation may achieve support and pass this Congress
- Highly anticipated mental health parity report and guidance to be issued
- New nondiscrimination rules may create substantial plan design obligations and higher costs

Implications for Member Companies

- *Reputational risks for companies that DOL determines violated their mental health parity obligations*
- *Employer drug prices may increase as a result of Medicare drug pricing negotiations*
- *Companies could be called to Capitol Hill to defend health benefit offerings*

Regulatory Efforts to Ban Non-Competes

- The Federal Trade Commission issued a proposed rule that would prohibit all non-compete agreements between an employer and employee. The proposed rule provides no exceptions except in cases between a buyer and seller of a business.
- The Association is drafting comments for submission by the March 20 deadline.

Implications for Member Companies

- *Companies would have to rescind all existing non-compete agreements in addition to prohibiting any such future agreements.*

Legislative Proposals on the Horizon

- A bipartisan group of senators led by Sens. Chris Murphy (D-CT) and Todd Young (R-IN) introduced the “Workforce Mobility Act,” which, like the proposed FTC rule, would ban all non-compete agreements except in limited cases of business sales.
- The bipartisan “Freedom to Compete Act,” introduced in the previous Congress (and is expected to be reintroduced this Congress), would impose a broad ban on noncompete agreements, with no exceptions, along the same lines as the FTC proposal.
- A separate bill is also expected to be reintroduced this Congress by Rep. Mike Garcia (R-CA), which would prohibit non-competes only for non-exempt employees (employees subject to FLSA overtime pay requirements).

Implications for Member Companies

- *Companies would have to rescind all existing non-compete agreements or adjust internal policies if bills were to pass Congress.*

NLRB: The Implementing Tool of the Biden Labor Policy Agenda

- The Board, and in particular its General Counsel, are operating under the premise that *any employees not represented by a union are inherently being taken advantage of.*
- All policymaking is being created and enforced through that lens, and in furtherance of three overarching goals:
 - Increasing union density, and/or making it extremely difficult for employers to operate without a union
 - Denying employers a voice in union organizing campaigns and in general
 - Punishing employers more severely for unfair labor practices

NLRB: The Implementing Tool of the Biden Labor Policy Agenda

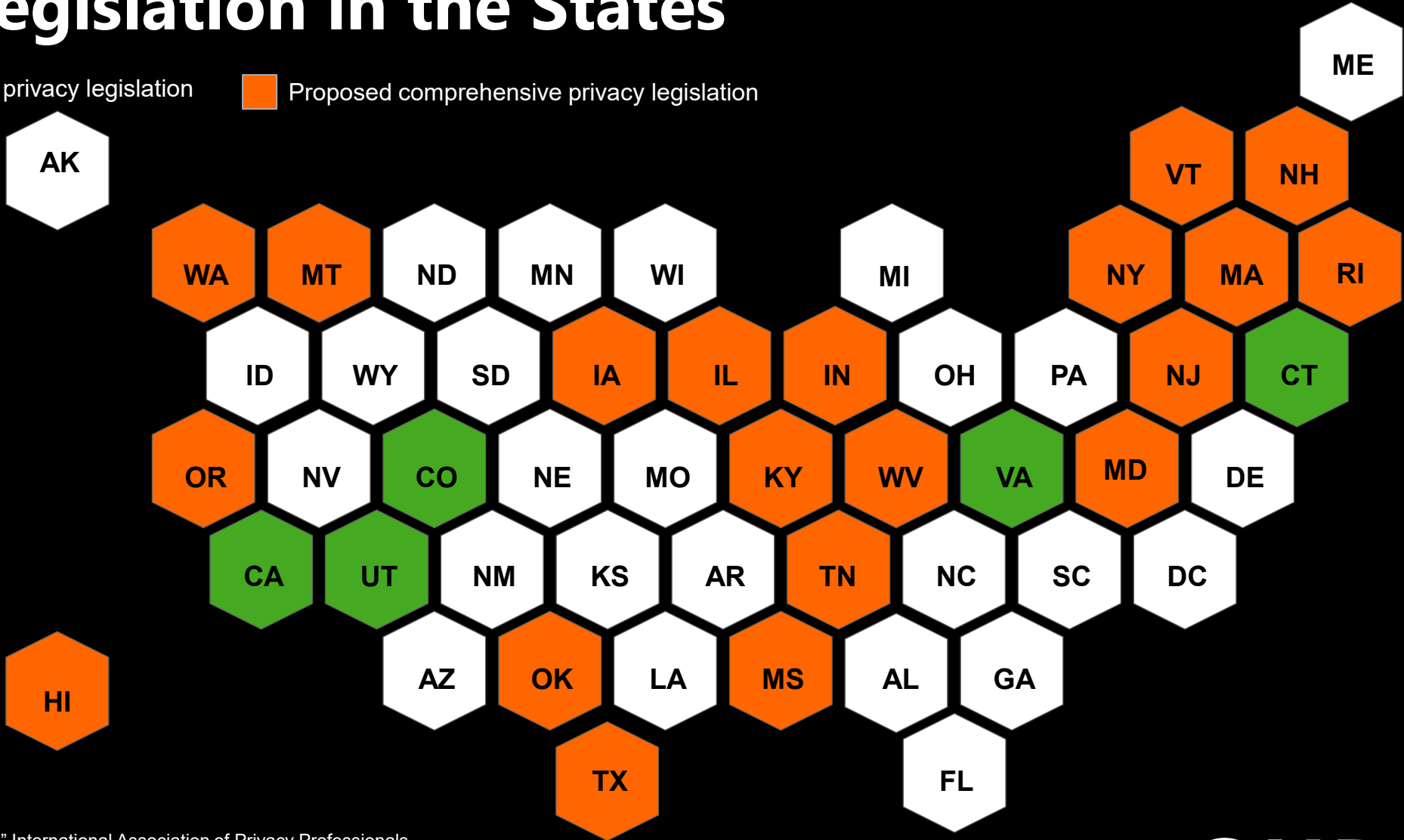
- Recent Board activity:
 - Increased remedies: putting employers on the hook for more than just back pay – paying employees for missed rent/mortgage payments, medical expenses, etc.
 - Bargaining unit sizes: making it easier for unions to win elections through organizing smaller groups of workers
 - Proposed rule expanding joint employer liability
 - Proposed rule making it harder for employees to vote out unions
- Recent General Counsel activity:
 - Pushing the Board to:
 - Allow unionization based solely on signed cards from majority of employees
 - Significantly restrict employers' use of technology in the workplace
 - Make employers who fail to reach a collective bargaining agreement pay employees for what they *might have* made if an agreement were reached
- Coming soon: restrictions on workplace rules, independent contractors, arbitration agreements

Privacy Legislation in the States

■ Enacted comprehensive privacy legislation ■ Proposed comprehensive privacy legislation

• The California Privacy Rights Act, effective Jan. 1 2023, expanded the CCPA to cover HR data

• Current proposals in MS, OK, and NY would cover HR data



Note: Data as of Jan. 27
Source: "US State Privacy Legislation Tracker," International Association of Privacy Professionals

Regulation on HR Technology & Data

- **Alphabet soup of agencies focused on artificial intelligence in the workplace**
- **Initiatives include:**
 - NLRB General Council urges Board to adopt framework finding certain use of employee monitoring, AI management tools to be “presumptive” violation of Section 8(a)(1)”
 - EEOC Initiative on AI, producing technical guidance and assistance
 - Federal Trade Commission consideration of rulemaking focusing on workplace monitoring and AI discrimination
 - OFCCP proposed changes to scheduling letter requiring documentation of “policies and practices regarding all employment recruiting, screening, and hiring mechanisms,” including AI
 - White House OSTP “Blueprint for an AI Bill of Rights”

Implications for Member Companies

- *The HR function will become more technical, cross-functional with IT*
- *Employers could be subject to multiple, overlapping, and potentially conflicting requirements*

Uphill Battle for Congressional Action on Immigration

- GOP focus on border security a factor in any dealmaking
- Employer community urging lawmakers to act this Congress



Implications for Member Companies

- *Absent congressional action companies could face mounting paperwork and backlogs for work visa processing, and ultimately continued worker shortages*

Increased Employer Reporting Requirements

- SEC to draft prescriptive HCM disclosure requirements potentially including workforce composition; turnover; skills and development training; compensation and benefits; and diversity (possibly including independent contractors)
- NY, CA, CO, WA all have laws (in effect or soon to be) requiring employers to provide pay ranges in job postings
- CA will also soon begin its own pay data collection, with reports from large companies to be made public beginning in 2026
- EEOC may pursue collection of pay data with or without a rulemaking once Democratic majority
- EEOC-commissioned National Academies Study: pay data “may be used effectively” in enforcement; outdated job categories; overly wide pay bands; total compensation only partially reflected

Implications for Member Companies

- *Impact on employee recruiting/retention, engagement strategies*
- *Confusion with the SEC diversity disclosure mandate and the EEO-1 Component 2 Pay Data*

DOL Independent Contractor Rule

- Proposed rule from DOL would make it more difficult to classify workers as contractors
- Sen. Tim Scott (R-SC) proposed Employee Rights Act allows workers to self-identify as contractors in the 117th Congress. Likely to reintroduce

Implications for Member Companies

- *Companies will have to reclassify "contractors" as employees, offer benefits*

DOL Overtime Rule on the Horizon

- The Wage and Hour Division to pursue:
 - A proposal to amend the regulations for the Fair Labor Standards Act's minimum wage and overtime requirements, targeted date is May (previously targeted for October 2022)

Implications for Member Companies

- *Employers may have to reclassify employees, be subject to additional reporting requirements and could see an increase in litigation from employees for backpay for overtime worked*
- *Companies will have to reevaluate worker classification, business structure and benefits, including costs, if IC status under FLSA is changed*

Employer DE&I Efforts at Risk?

- Students for Fair Admissions v. Harvard/UNC
- Issue: legality of race-conscious college admissions programs
- The Association filed an amicus brief stressing the importance of diversity-conscious college admissions programs to ongoing workplace DE&I efforts
- Public polling generally does not support race or gender as factor for college admission

Implications for Member Companies

- *Should the Supreme Court invalidate diversity-conscious college admissions programs, company DEI initiatives could be the next to receive Court scrutiny/increased litigation*
- *Looking ahead, how will policies employers use to achieve diversity be impacted by an adverse decision?*

Firewall to Regulatory Action?

- West Virginia v. EPA
- “Major questions doctrine” – increased scrutiny of administrative agency authority and regulatory actions that have great “economic and political significance”
- Where Congress has not explicitly delegated such authority
- Association comments to FTC on surveillance and AI rulemaking effort: “Any significant rulemaking, particularly one with economy-wide impact, should be clearly authorized by Congress after careful deliberation.”

Implications for Member Companies

- *Opens the door for the conservative Supreme Court to invalidate future regulatory action and reflects the Court’s general skepticism towards federal agency actions*
- *This approach could serve as a firewall against the Biden administration’s all-of-government approach to L&E policy*
- *May also allow challenges to longstanding regulations such as affirmative action rules under Executive Order 11246*

Paid Leave Gaining Bipartisan Hill Support

- Representatives Stephanie Bice (R-OK) and Chrissy Houlahan (D-PA) have formed the Bipartisan Paid Family Leave Working Group, made up of six lawmakers: Representatives Colin Allred (D-TX), Julia Letlow (R-LA), Mariannette Miller-Meeks (R-IA) and Haley Stevens (D-MI).
- The Association has met with Reps. Bice and Houlahan's staff and will reach out to other members of the Bipartisan Working Group to further establish the Association as a resource as lawmakers begin to pursue legislative proposals.
- The Association will continue to advocate for a national paid leave standard to ease the current burdens companies are facing as they comply with various state requirements.
- In a divided Congress the odds of passage of a paid leave bill are slim. One likely point of contention for the bipartisan working group is how any paid leave plan would be funded and delivered. While Republicans tend to propose tax-based benefits, Democrats have preferred direct government assistance in previous proposals.

Implications for Member Companies

- *If the bipartisan group can draft legislative text and garner support and pass a bill, employers should weigh current costs of paid leave benefits against the annual fee and compliance with a national paid leave standard.*



Future Workplace Council Council



Join HR Policy Association's Future Workplace Policy Council

The workplace regulation agenda in both the United States and across the globe is undergoing a dramatic transformation. This reflects not only the upheaval caused by the COVID-19 crisis, but also technological and demographic changes within workplaces as well as the economic, political, and cultural landscape within which companies operate.

The Future Workplace Policy Council's mission is to guide the Association's advocacy on the workplace regulation policies of concern to HR Policy Association members.

Chaired by Intel EVP & Chief People Officer Christy Pambianchi, the Council is composed primarily of senior officials and counsel within HR Policy member companies who are directly responsible for employee/labor relations and/or workplace regulation matters, including:

- CHROs
- Employment Counsel
- Labor and Employee Relations Vice Presidents
- Chief Privacy Officers and their key staff members

Issues the Future Workplace Policy Council focuses on include:

- Paid leave
- Gender pay equity
- Data privacy
- Artificial intelligence
- Discrimination (EEOC, OFCCP)
- Labor laws (union organizing; employee voice)
- Scheduling rights
- Joint employer/ independent contractor

Participation in the Program comes at no additional cost. There is no limit to the number of individuals from your company who may participate.

In addition to having the opportunity to serve as the brain trust for the Association on the above issues, Council members will also receive:

- Timely in-depth analysis of policy developments impacting your company
- Networking opportunities with senior-level HRPA member peers
- Policy presentations featuring key government officials and leading experts

If you or a colleague is interested in participating, please contact HRPA Vice President, Workplace Policy Daniel Chasen at dchasen@hrpolicy.org.

Community of senior officials and counsel directly responsible for employee/labor relations and/or workplace regulation matters

Email Daniel Chasen at
dchasen@hrpolicy.org for more info.



Washington Representatives Program

Washington Representatives Program

HRPA HR POLICY ASSOCIATION



Join HR Policy Association's Washington Representatives Program

Workplace topics dominate the policy agenda across all levels of government. Lawmakers rely on the voice of Washington Representatives to inform and shape enduring policy in response to business and employee needs. Together, HR Policy Association and members of its Washington Representatives Program can leverage their collective expertise and maximize impact by advocating for workplace policies that promote job growth, employment security, and competitiveness.

HR Policy Association Member Company government relations professionals are among an elite group of policy influencers in Washington, DC, sitting at the intersection of practice and policy.

Led by HRPA Vice President of Government Relations, Chatrane Birbal, the Program is a network of HR Policy Association Member Company government relations professionals. As a member of the Program, Washington Representatives will receive the following benefits and resources:

- The latest updates on legislative and regulatory workplace policy efforts
- Training and talking points to effectively influence workplace policy
- Policy presentations to inform and engage internal stakeholders
- Support for testimony, leadership updates, and media talking points
- Networking opportunities with likeminded HRPA Member Company peers

Participation in the Program comes at no additional cost. There is no limit to the number of individuals from your company who may participate.

If you or a colleague is interested in joining the Program, please contact Chatrane Birbal at cbirbal@hrpolicy.org for more information.

Working together to leverage collective expertise and maximize impact by advocating for workplace policies that promote job growth, employment security, and competitiveness

Email Chatrane Birbal at cbirbal@hrpolicy.org for more info.