

MAKING THE WORKPLACE WORK

**Chief Human Resource Officers on Trends Shaping the Workplace,
the Outdated Policies That Govern It – and the Way Forward**



HR Policy Association is the lead organization representing chief human resource officers of major employers, consisting of over 380 large and influential corporations doing business in the U.S. and globally. Collectively, our members employ more than 20 million employees worldwide and have a market capitalization of more than \$7.5 trillion. In the United States, Association members employ over nine percent of the U.S. private sector workforce.

These senior corporate officers participate in the Association because of their passionate interest in the direction of human resource practice and policy. Their objective is to use the combined power of the membership to act as a positive influence to improve public policy, the human resource profession, and the workplace.

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The Association of Chief Human Resource Officers

ABOUT THE ASSOCIATION



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MAJOR FINDINGS AND RECOMMENDATIONS

FOR AMERICAN COMPANIES, one of the greatest challenges to global competitiveness is a workplace policy regime that was created for a previous era. In fact, the most recent major statute impacting the workplace (not to be confused with regulations implementing the same) is the Family and Medical Leave Act, signed by President Bill Clinton in 1993. By 2020, this law will be 27 years old—modern compared to its counterparts, some of which were passed in the 1930s. Meanwhile, many of these laws and their enforcement are premised on the assumption that employers will not provide the most beneficial policies or treat their employees fairly unless legally required to do so. Yet, contemporary human resource practices are centered on the competition for obtaining and retaining talent, which requires policies that are at least as progressive as most laws and, in many cases, more so. Below

is a brief summary of the views of the most senior HR executives working for America's largest employers on what the workplace looks like today, where it is going, and what can be done from a policy perspective to make the workplace work.

The Contours of the Employment Relationship

Though there have been intensive efforts to impose new restrictions and liabilities on alternatives to traditional employment arrangements, the reality is that existing law already contains significant deterrence to their overutilization, and in many cases impedes positive developments for workers.

Recommendation: 1) Legal definitions of employment relationships which include safe harbors for actions and policies taken by employers that

benefit their own employees and other workers.

2) Increased portability of employee benefits that are not tied to tenure with a single employer.

A New Generation of Workers

To the extent there are discernable trends among Millennials, they are most often attributable to causes other than generational differences. Correspondingly, companies with policies effective in attracting and retaining Millennials often find them to also be well received by employees of other generations. Millennials, however, differ from previous generations in accruing an outsize amount of student loan debt.

Recommendation: A tax-preferred system in the mold of a 401(k) that would help employees to save and pay off student loan debt sooner.

Scheduling and Leave

While large companies are at the forefront of providing generous leave benefits, they are increasingly challenged by a patchwork quilt of varying administrative requirements under state and local mandates.

Recommendation: Companies already providing generous paid leave benefits should have a federal safe harbor from being hampered

by the varying requirements of state and local leave mandates.

Diversity and Inclusion

Large companies are committed to diversity and inclusion as it is the smart thing to do from a business perspective. However, the fixation of government agencies with numerical targets downplays the broader cultural goals companies have, and most would be pursuing diversity regardless.

Recommendation: Meeting a company's diversity goals is more about culture than numbers and, in enforcing the relevant laws, government should bear in mind the spirit of the law in enforcing its specific requirements.

Compensation

Compensation is a vital tool used by every company in the ongoing effort to attract, retain and competitively reward well-qualified and productive employees.

Recommendation: In order to encourage employee stock ownership, the government could give favorable treatment to companies with employee stock purchase plans. For example, the Financial Accounting Standards Board requirement that companies recognize ESPPs as an expense if a

discount greater than 5 percent is provided could be discontinued, or companies could receive tax breaks for subsidizing stock purchase plans.

Health Care

Over 177 million Americans receive health care benefits through employers, and the broad scope of these benefits is a bedrock and one of the few working aspects of the American health care system.

Recommendation: Protect the Tax Exemption of employer-sponsored health insurance (ESI). The employer deduction of ESI and the employees' ability to deduct their premiums on a pretax basis lowers the after-tax cost of health insurance for most Americans.

Workforce Development and Training

As companies far outpace the U.S. government in funding the education, training, and development of America's workforce, career progression—or lack thereof—is the No. 1 retention incentive and the No. 1 driver of turnover, respectively.

Recommendation: Look for ways to more closely align federally funded programs and tax incentives to privately funded education, training and development programs

which result in in-demand skill development. This could include increasing the cap on Section 127 education benefits to incentivize employers to invest more in educating their workers and to encourage workers to take greater advantage of employer-provided tuition assistance programs. Separately, corporate partnerships have proven highly successful in companies' efforts to educate, train and develop the workforce, and have potential to bolster these efforts further.

Employee Representation

The labor laws in the United States assume conflict in the workplace to solve problems, presuming that the existence of economic weapons by both sides is what brings the parties to the negotiating table. However, today, the institution of social media and other mediums has replaced traditional economic weapons without the threat of job loss. The legal model of the past is simply not compatible with an environment of successful employee engagement, where employees prefer cooperation over conflict.

Recommendation: The labor laws and their enforcement need to ensure that, while employees have the option of forming unions and engaging in collective bargaining, they should also be able to make an informed choice in exercising that option by ensuring

that the free speech rights of both labor and management continue to be preserved and respected and that employees have sufficient time to hear all sides of the issue as well as the use of a secret ballot election to determine union representation.

Retirement

We are seeing increasingly more senior employees in today's workforce who have both the ability and desire to have longer careers. However, legal obstacles prohibit employees from collecting a defined benefit retirement check while remaining employed by the same employer.

Recommendation: Federal legislation enabling employees to collect defined benefit plan retirement income earlier while permitting them to continue to work for their employer—ideally, with no required “bona fide” break in service.

Workplace Security

Significant cybersecurity and workplace violence threats, which face all U.S.-based companies, endanger not only workers and company property, but national security and competitiveness as well.

Recommendation: Faster intelligence investigations and more resources are needed to stop intellectual

property theft and cyber crimes.

Immigration

There is a global war for talent at all levels, and countries are competing to attract and retain the human capital essential to a culture of productivity and innovation. Arbitrary and inflexible caps on the number of annual visas ignore these market realities.

Recommendation: Provide foreign students who acquire advanced degrees in STEM disciplines at American higher education institutions a path to U.S. citizenship if they wish to use their talents in America rather than return to their country of origin.

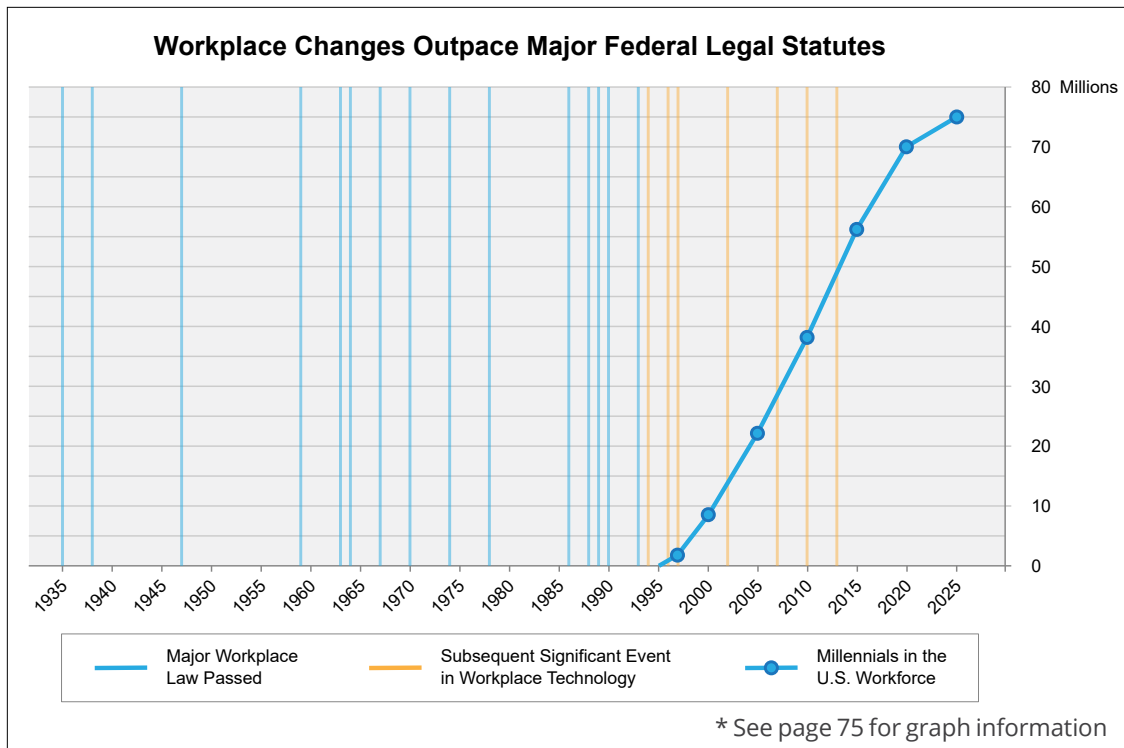
AS AMERICAN COMPANIES strive to keep up with a rapidly changing global economy, they face a serious obstacle: a workplace policy regime that is locked into a previous era. To illustrate, the legal architecture that sets the contours for federal workplace regulation is generally composed of 15 major statutes. As one would expect, each of these laws reflects the assumptions and economic conditions of when they were enacted. The most recent of these—the Family and Medical Leave Act—was signed almost a quarter of a century ago in 1993, with most others going back long before then—in some cases to the 1930s. In too many cases, these well-intended laws and regulations provide conflicting policy directives that reduce the competitiveness of American businesses and hurt American workers.

At the same time, human resource leaders face the formidable challenge of ensuring that their companies'

human resource policies keep up with the changing expectations—and even demands—of new generations of employees. While they face various hurdles in achieving this objective, those conditions do not exempt companies from the market-based imperative to adapt to new realities. This is no less true in human resources than it is for any other aspect of business, where a failure to remain current with marketplace demands can spell failure for the company.

This report generally represents the views of chief human resource officers of major companies doing business within the United States, and, in most cases, also operating globally. It is directed at government policy-makers and, in many cases, corporate decision-makers as well. It seeks to drive a rethinking of employment policy to adapt to new ways of working with the goal of “making the workplace work.” This is not just

INTRODUCTION: WORKPLACE 2020



an administrative or liability concern to our companies—policymakers must recognize that, in too many cases, outmoded and/or impractical regulatory requirements add unnecessary costs to employment, which ultimately reduces employment opportunities. We wish to emphasize that we are not seeking to weaken or dismantle those laws that provide necessary protections to the American workforce. Rather, the report simply calls attention to the need for a modernization of our employment law architecture, which in some cases involves a mere fine-tuning, but in others a broader re-structuring. These

are very complicated issues, so this report by no means seeks to represent a unanimous opinion of our membership, but instead captures a majority view. Nor do we pretend to have all the answers, but our hope is to stimulate a long-overdue dialogue among the various stakeholders concerning the improvements that need to be made.

Twentieth Century Policies for a Twenty-First Century Workplace

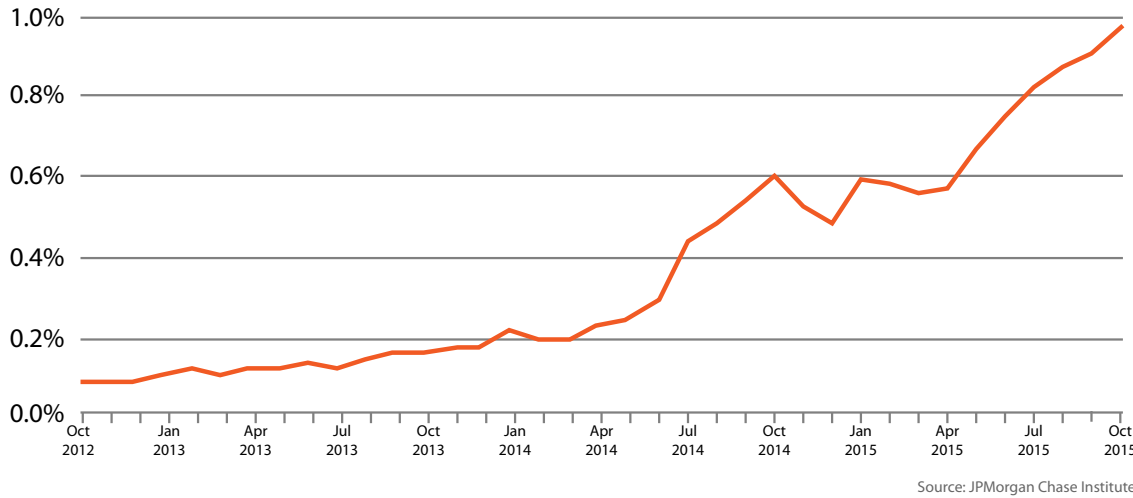
Most of our workplace laws and many company policies are grounded in a traditional employment relationship, which typically includes:

- A paycheck;
- Health and life insurance coverage;
- Retirement benefits, often in the form of a defined benefit plan with a percentage of income replacement upon retirement;
- A fixed schedule with work time and non-work time clearly delineated;
- Procedures for achieving the training and skills development needed to keep up with changes in the performance of work;
- A well-defined promotion structure to advance within the organization; and
- Vacation and other paid and unpaid leave benefits.

Yet, while many if not most of these remain attributes of an employment arrangement, dramatic changes in technology and associated changes in both the domestic and global economy have significantly impacted or altered this construct in a number of ways, including:

- An increased desire and expectation of flexibility on the part of employees, thus weakening or even severing ties to a fixed work location,

Percentage of Adults Working in Gig Economy Via Online Platforms



schedule, or both, or even avoiding attachment to any single employer;

- Working remotely or from home offices;
- Use of technology to remain connected beyond normal working hours;
- Desire for portable benefits and other flexible benefit offerings, particularly in those industries and occupations involving a high level of employee turnover;
- Collaborative working environments; and
- Utilization of personal devices to perform work alongside personal usage.

Changes in Employment Relationships

It is likely that, at least for the foreseeable future, the majority of workers will remain in an employment relationship with a single employer. However, the debate over whether those in the so-called “gig economy” are actually employees or independent contractors has increased public awareness of how difficult it is to reconcile our laws based on traditional employment relationships with new forms of work.

Those laws continue to assume a preference on the part of all workers for a permanent employment relationship along the lines described above. Yet, not all workers prefer this

arrangement. Many workers are more interested in marketing their skills to a variety of entities. Others may have personal or family needs that are more suited to temporary arrangements. The challenge is to find ways to accommodate these workers with greater flexibility in legal definitions of employment relationships.

Changes in Employees’ Needs and Desires

The areas where laws could be made more flexible to accommodate workers’ needs are numerous. For example, most people coming into the workplace with a college degree have large student loan balances that restrict their ability to achieve economic sustainability, let alone start saving for retirement. Many employers would like to help their employees through loan repayment assistance, but tax laws provide no preferences for such assistance. Meanwhile, employer matches to retirement accounts do receive tax preference, even though many of these employees are so strapped after making their monthly student loan payment that they are unable to participate in an employer’s retirement plan and receive their matching funds.

In addition, changes in information technology are having a significant impact on how and where work is

and can be done. Except in those jobs where a physical presence in the workplace is required by the nature of the work (e.g., retail and hospitality locations), a growing number of workers prefer to spend extended time working away from the workplace, often to enable them to meet the conflicting demands of family and work. Historically, there has been a bias in favor of “face time,” which, in a previous era, was typically the only way anyone knew whether someone was actually working. More importantly, the wage and hour laws formulated in the 1930’s discourage work outside the workplace by requiring employers and most workers to “track” all hours worked, even if it is a brief phone call or email exchange with a co-worker where work is discussed after hours.

At the same time, employers and their employees also recognize there is still value in many situations to having the work performed in a single location where the synergies and conveniences of physical proximity result in a better work product. The point is that information technology has allowed more options, but it should not be assumed that this invariably enables the effective or optimal performance of virtual work.

Changes in HR Strategies and Practices—The Competition for Talent

Perhaps more than any other reason, the disconnect between many, if not most, workplace regulations and today’s workplace finds its origin in the assumptions that undergird these regulations. They reflect an arcane perspective that employers’ HR practices are primarily motivated by controlling costs and ensuring that employers get the most from their employees for the least. Yet, in today’s world, the primary challenge for HR is to ensure that the company has the talent that it needs to meet its business goals. More and more, individuals with the skills that can ensure success are selective and willing to “shop around” if a particular employer does not have practices and policies that meet their needs. Total compensation (*i.e.*, benefits included) remains a large part of this equation, but so does culture, flexibility, brand, and providing a place where an employee can maximize her or his career potential.

In this setting, compliance with workplace regulations is often no obstacle because the well-intended purposes of those regulations are already shared by the company as part of the talent attraction and retention equation. That’s the best case. The worst case is when those rules actually stand in the way of doing what is best

for those workers—such as the wage and hour laws—as will be detailed in this report.

The Need for a New Direction

Our members, as the top HR executives for America’s largest companies, are concerned that a failure of both government and corporate leaders to come to grips with the changing needs and demands of today’s workforce—and tomorrow’s—will prevent the United States from achieving its full economic potential. Their companies collectively employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The purpose of this report—and forthcoming separate accompanying reports—is to articulate for government and corporate leaders the direction we see the workplace heading and the need for specific changes in both government and corporate policies. Before getting to those, we will begin with observations about the direction of the global economy, the role large companies play in it, and how changes in the workforce factor into this.

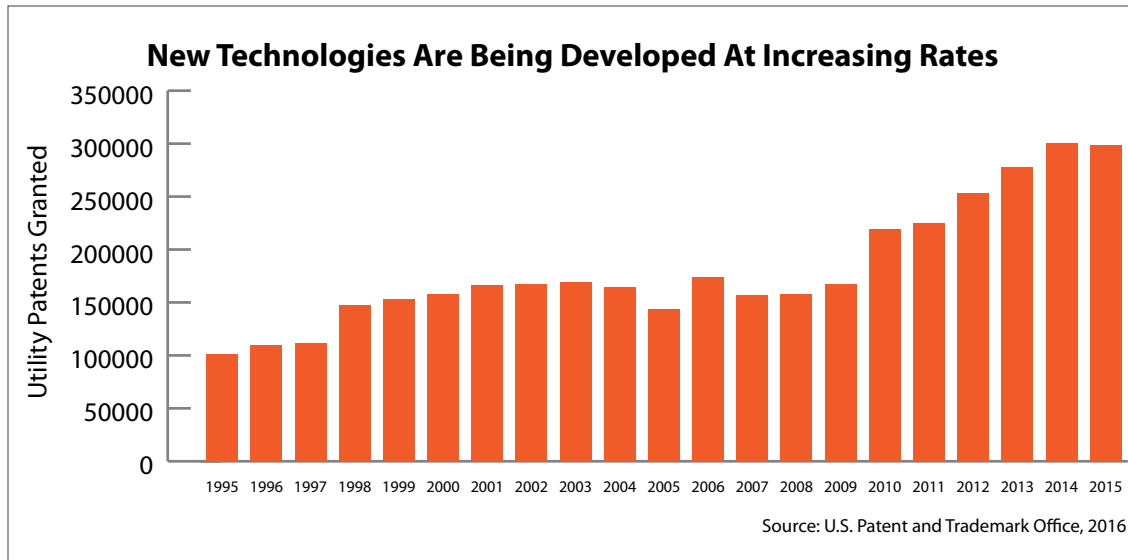
OUR MEMBER COMPANIES operate in a global economy and political realm that is constantly changing in unpredictable ways. This is most recently reflected in the 2016 election, which defied the predictions of virtually every credible prognosticator. Another recent example is the United Kingdom's planned exit from the European Union, which few predicted in January 2016. This unpredictable climate is nothing new. In December of 2007, leading economists claimed in the *New York Times* that we were unambiguously not in a recession.ⁱ Likewise, what may happen between now and 2020 is largely unknown. Due to the high rate of change we see in the broad contextual setting of the workplace, companies must accordingly adjust quickly in order to be competitive, all the while managing to remain compliant with laws passed for the workplaces of the last century,

which implement regulations that are similarly incongruent, and an increasingly tangled maze of various state and local laws.

The Impact of Technology and Foreign Competition

Technological advancements are occurring at an unprecedented and exponentially increasing rate. Near the beginning of the Recession of 2008, a number of ground-breaking technologies entered the market and began to alter the workplace, some with transformative implications for companies and the global and domestic economy. Having been adopted by over two-thirds of American adults, the smartphone has dominated the mobile phone market and has made ventures such as Uber possible. Moreover, 4G wireless speeds that made smartphones truly functional were not commercially available in

THE DYNAMIC CONTEXT IN WHICH OUR MEMBERS OPERATE



the U.S. until 2010.ⁱⁱ Social media platforms such as Facebook and Twitter also rapidly gained popularity. In 2005, only 12 percent of 18 to 29-year-olds used a social media network, along with 8 percent of those in the 30 to 49-year range. By 2008, 63 percent of 18 to 29-year-olds used social media, and 44 percent of those in the 30 to 49-year range did as well. Today, those numbers are nearer to 90 percent.ⁱⁱⁱ These innovations and others have deeply influenced and will continue to influence where, when, and how work is done in the modern workplace—and are already reshaping the employer-employee relationship.

New technologies are driving up productivity rates, resulting in better and less expensive services and products, but these developments have

also changed what is required to have a successful career. A college degree, for example, is still the most significant factor influencing one's earning potential. But a college education no longer guarantees an adequate base of knowledge for entering the workforce, as the skills necessary to build a strong career evolve as quickly as the technologies that enter the marketplace. When American workers do enter the workforce, they must commit to life-long learning if their careers are to continue to grow in tomorrow's economy. Further challenging their adaptability is the increasing sophistication of robotics and other developments, such as 3-D printing, that threaten to supplant or decrease the need for humans in many existing occupations.^{iv} In the past, this has mostly impacted physical work;

rapid advances in artificial intelligence now implicate intellectual work as well.

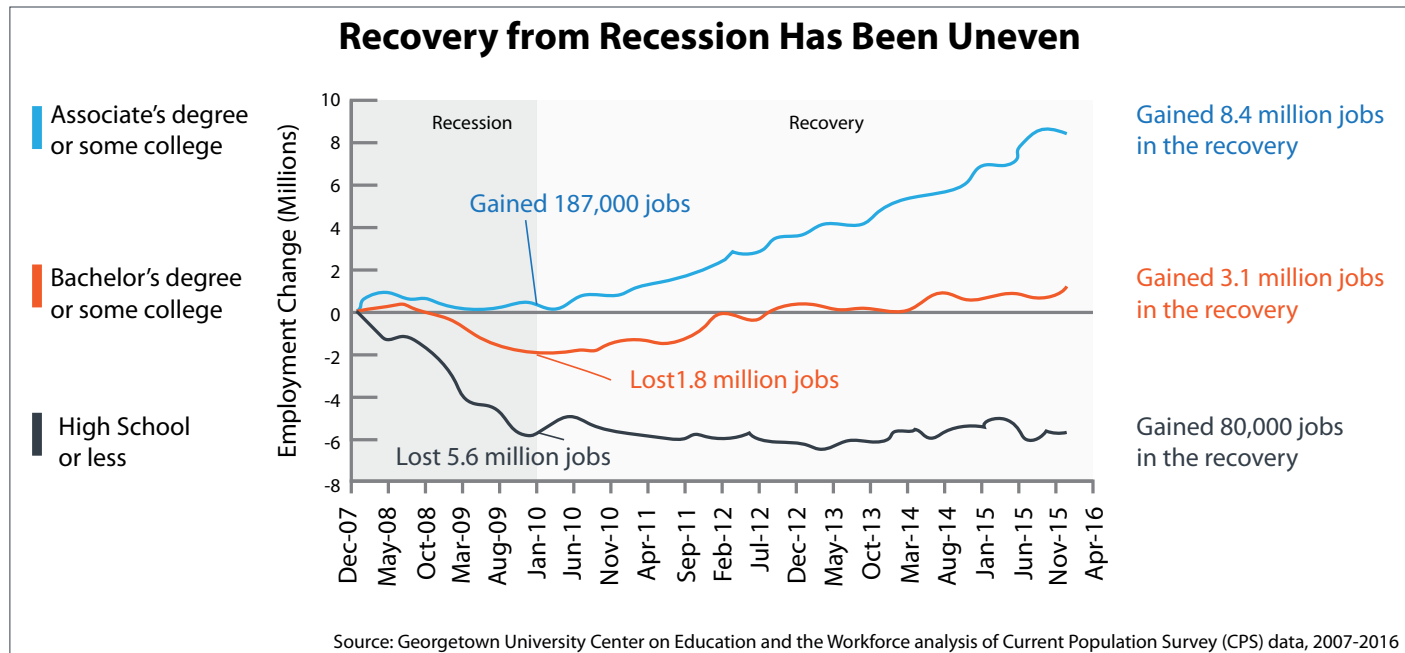
At the same time labor costs in the U.S. are rising, due in part to rising health care costs and in part to the cost of complying with a regulatory and legal regime which is out of sync with today's workplace, among other factors. And, increasingly, the American worker now has global competition for both low and high-skill jobs from foreign workers with governments far more willing to invest in developing their respective workforces and, in some cases, imposing less onerous regulatory burdens.

The Challenges to Job Creation

Indeed, fostering an environment conducive to the creation of new job opportunities in the United States is among our most significant policy challenges. Since the Recession of 2008, large employers have been key drivers in regaining lost jobs and restarting a stalling economy. However, the recovery has been uneven. With some exceptions in some of our companies, the great majority of new jobs have gone to workers with bachelor's degrees. Workers with only a high school diploma have gained back just over one percent of the jobs lost to their demographic. Millions who opted out of the American workforce, and so do not show up in unemployment numbers, have yet

to re-enter. Since 2008, the number of prime-age (25 to 54) Americans who are not in the labor force has increased by almost 2.4 million, or 11 percent, outnumbering those categorized as unemployed by over 300 percent.^{iv} In other terms, the employment to total population ratio in this group is worse than it was in 1940, the tail end of the Great Depression, by two percent.^{vii}

Moreover, the average hourly wages for the 28.6 million Americans in retail trade, durable goods manufacturing, and transportation and warehousing industries have barely kept up with inflation since 2007.^{viii} Meanwhile, the Bureau of Labor Statistics predicts that, through 2020, the labor force will continue to grow older and the participation rates for those aged 16 to 24 will continue to plummet as the overall labor force participation rate also decreases.^{ix} These developments have shaped the campaign platforms of both major political parties, and as the new presidential administration takes office in 2017, will likely lead to significant developments in public policy concerning a number of HR-related



issues.

With regard to the global marketplace, companies are threatened by a wave of protectionism that is gaining support abroad and in the United States. In 2016, both major party candidates for the presidency campaigned with anti-trade messaging central to their respective platforms. The merits of these messages notwithstanding, the fact that both parties took this position in the face of strong business support for open trade policies reflects their reading of the American voters' sentiments, regardless of party. Moreover, it remains to be seen what will be the impact of the United Kingdom's exit from the European Union as the country renegotiates

its economic relationship with its European peers. We may also see shifts in the world economic hierarchy. For example, the International Monetary Fund already shows China's economy is larger than the United States on a purchasing power basis.^x

Despite this wave of protectionism, the global workforce continues to become more connected. The vast majority of companies plan to increase the number of countries in which they have an operational presence and the number of clients or customers located outside of their home country.^{xi} Foreign direct investment (FDI) is skyrocketing in developing nations, accounting for over half of global FDI inflows.^{xii} As workers become

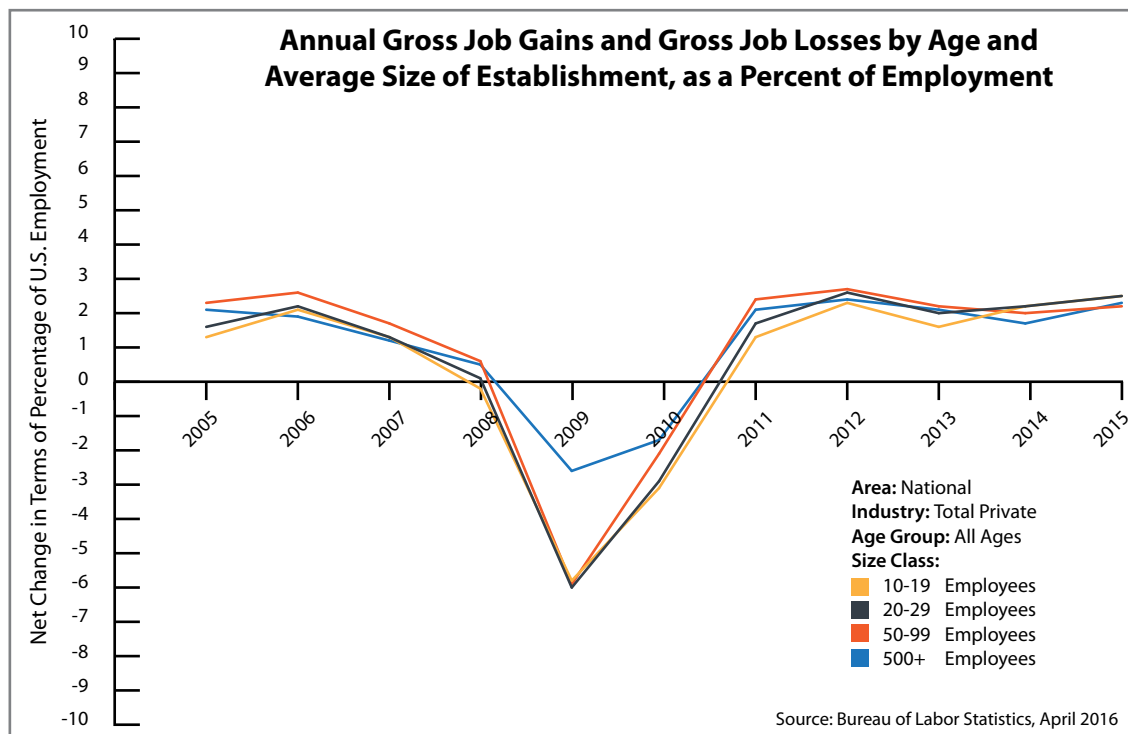
more skilled and educated globally, they are seeking work opportunities across national borders. And while in the past this would have typically required relocation, new technologies have made communication easy and accessible nearly anywhere on the globe.^{xiii}

When considering the workplace of 2020, these and other developments are limited in their usefulness as predictive data. However, they are emblematic of the frequent and unpredictable changes that occur with regard to technology, the domestic economy, and the global economy year in and year out. Employers and employees must constantly adapt if they wish to remain competitive in the global marketplace. America's workplace laws and their enforcement need to recognize that need for adaptability.

THE CRITICAL ROLE OF LARGE COMPANIES IN DRIVING THE NATIONAL ECONOMY FORWARD

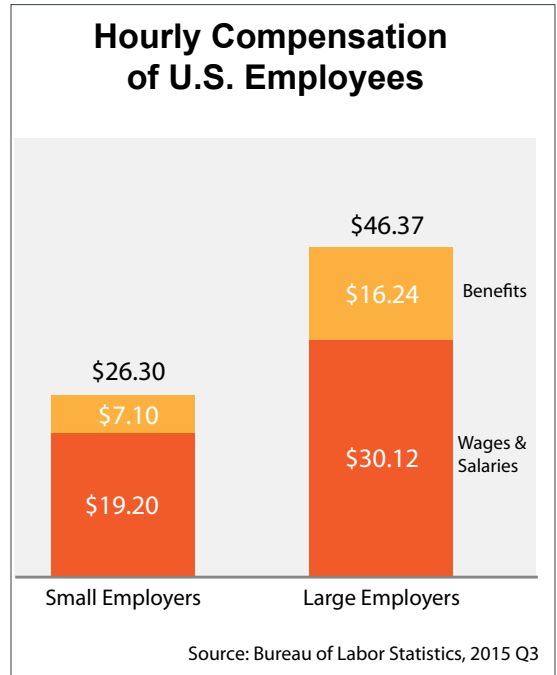
IN THE MIDST of the economic tumult over the past 15 years, large employers have played a critical role in providing employment and economic security not only for their employees,

but also their suppliers and contractors. From 2000 to 2013, large employers accounted for a disproportionate share of the net job creation in the United States. While large employers (500+

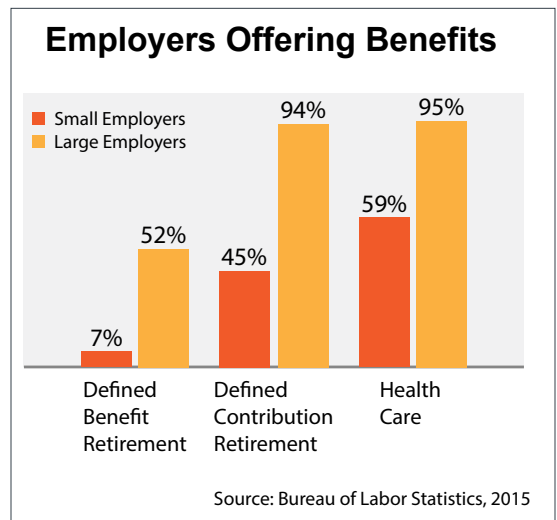


employees) account for just 0.2 percent of all U.S. firms, they account for 19.8 percent of all jobs in the U.S. and have produced 33.3 percent of the net job creation since 2005.^{xiv} Moreover, many small and medium-sized businesses—and new jobs—sprout up to supply and contract with large employers, who provide them a relatively stable source of opportunity in markets that are competitive, evolving, and sometimes volatile. The prosperity and economic stability large employers provide reaches far beyond their brand name establishments and facilities.

In addition to providing millions of jobs, large employers invest heavily in the well-being of their employees' lives and careers. On average, large employers pay higher wages and provide better benefits to more employees than small employers. For example, the average weekly wage paid by large employers (500 or more employees – \$1,595) in 2014 Q1 was 88.6 percent higher than the average paid by small employers (less than 100 employees – \$846).^{xv} Large employers also lead the labor market in providing access to retirement and health care benefits, providing 94 percent of their employees access to retirement benefits and 95 percent of their employees access to health benefits. As a comparison, 51 percent of employees working for small employers are given access to retirement benefits and 59 percent



have access to health care benefits^{xvi} Large employers also lead the labor market in providing access to paid leave benefits, including sick leave, vacation time, holiday leave, and personal leave.



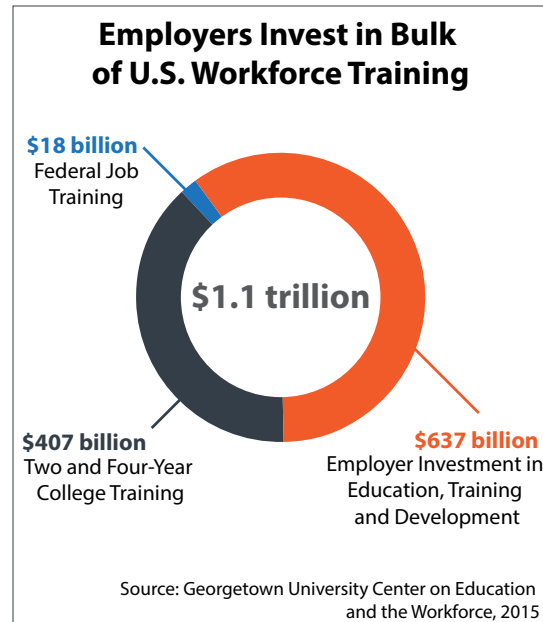
For example, 80 percent of employees working for large employers have access to paid sick leave compared to just 52 percent of employees working for small employers, and 90 percent of employees working for large employers have access to paid vacations compared to 68 percent of employees working for small employers.^{xvii} Moreover, large employers provide this economic security to their employees despite American labor costs that are far higher than many of the United States' foreign competitors, such as Singapore, Brazil, China and India.

As the economic borders between nations disappear, the competition is intensifying between the quality of the skills of the American workforce and that of the many nations now contending for the resources, investments, and economic opportunities that Americans have long enjoyed. It is becoming an imperative that employees learn and upskill throughout their careers as changes occur within the workplace at an increasing pace and companies account for external economic and technological changes. And yet the important role companies play in keeping America competitive in the global marketplace is all too frequently underestimated.

Corporate Investments in Education, Workforce Development and Communities

Each year, employers invest well over half a trillion dollars in education, training and development. This accounts for over half of the total budget for education and training in the United States, which amounts to \$1.1 trillion, including only about \$18 billion in federal spending for job training. Meanwhile, the examples of exemplary individual company efforts in this area are myriad and rarely are taken into account in political debates. Virtually every one of our member companies is engaged in this kind of support to some degree. To provide a few examples:

- General Mills has contributed more than half a billion dollars to K-8th grade education and over 80,000 schools through its philanthropic Box Tops for Education program since its inception in 1996.
- Archer Daniels Midland Company recently organized the Agricultural Diversity and Inclusion Roundtable, a cross-functional council comprised of key leadership from 45 organizations, including agribusinesses, legislative bodies, and academic institutions, in order to



address the critical need for diverse talent in agriculture and related industries.

- ExxonMobil and its employees contributed a total of \$45.4 million to institutions of higher education across the country as part of the ExxonMobil Foundation's 2015 Educational Matching Gift Program. ExxonMobil employees, retirees, directors and surviving spouses contributed \$13.2 million, which was matched with \$32.2 million in unrestricted grants from the ExxonMobil Foundation. Since the Educational Matching Gift Program began in 1962, more

than \$600 million has been contributed to American institutions of higher learning.

- The GE Brilliant Career Lab, a first-of-its-kind interactive mobile technology lab, is designed to prepare students for innovative digital industrial jobs of the future by providing access to skills training in STEM-related occupations. The Lab is a centerpiece of the GE Foundation's \$25 million investment to support Boston students and educators.
- The Coca-Cola Scholars Foundation provides college scholarships to over 1,400 college students each year, with annual scholarships of \$3.4 million through two nationally recognized programs on behalf of the Coca-Cola System.
- AT&T is driving innovation in education to promote student success in school and beyond through its signature philanthropic initiative, AT&T Aspire. Through Aspire, AT&T has donated over \$250 million in education and plans to spend \$350 million between 2008-2017.
- W.W. Grainger's Tools for Tomorrow® Scholarship

Program supports students entering their final year of a skilled trade or public safety program at participating community colleges across the country. Scholarship recipients receive a \$2,000 scholarship award and a Westward® toolkit to jumpstart their professional careers upon graduation. Grainger has awarded more than 900 scholarships and toolkits since the program's inception in 2006. Half of the scholarships are earmarked for veterans of the U.S. Armed Forces.

While companies are motivated by a sense of responsibility to their communities, they also benefit from this investment in a number of ways, enjoying reduced employee turnover, strengthened organizational culture and improved customer service. These benefits ensure that companies will continue to play a strong role in this area. It goes without saying that their employees and other workers also benefit with higher standards of living and enriched careers.

Employers recognize and work toward the benefits of a broad participation in economic growth. They are committed to cultivating a strong and diverse domestic workforce which will enable them to be competitive in the global

economy. They also recognize their vested interest in cultivating healthy communities where they operate and in which their employees live, creating and funding a large number of initiatives toward this end. Many of the education, training and development investments companies make contain no guarantee that the workers who benefit from them will work for the company underwriting the opportunity—as our members can attest, many end up working for the competition.

When compared to the workplaces of the 20th century, today's workplace and the workplace of 2020 will look different, operate differently, have better technologies, and a more diverse workforce, among other changes. The American and global economies have gone through significant changes and will continue to evolve as well. What will not change is the critical role large employers play in supporting not only their employees and dependents, but also the U.S. economy.

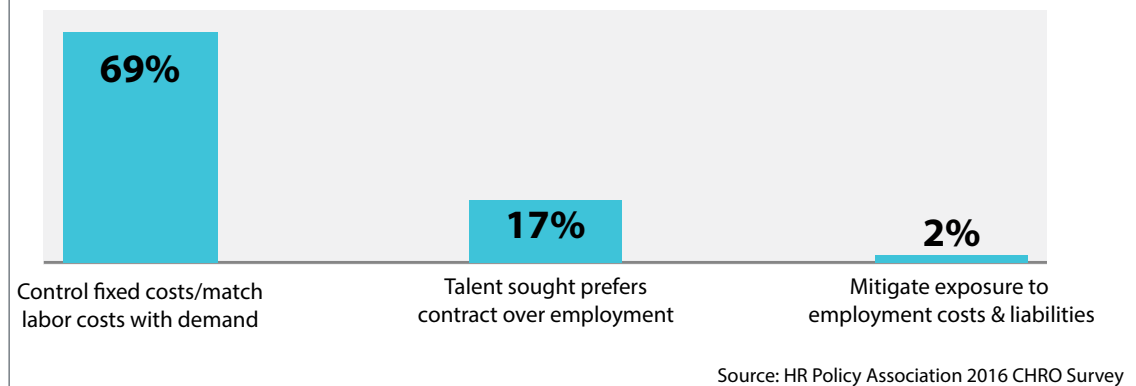
THE CONTOURS OF THE EMPLOYMENT RELATIONSHIP

IT GOES WITHOUT saying that we live in a dynamic economy—both domestic and global—in which companies trying to succeed—or even survive—must be amenable to constant adaptations in their products and services, which often inevitably leads to structural changes to accommodate those that affect the employment relationship. These changes have led to accusations that this development is being driven by a desire by large

companies to shed themselves of their legal obligations and attendant liabilities. This so-called “fissured workplace” theory is currently driving many policy changes and enforcement strategies that effectively seek to “lock in” traditional relationships regardless of the needs and desires of both workers and employers.

Yet, legal and political efforts that confine companies and workers to traditional forms of employment—

Why Members Use Independent Contractors



where those forms do not make sense—create a potential loss of freedom for both employers and workers to construct the kinds of relationships that meet their respective needs and which benefit the economy as a whole. These efforts also ignore the trend—and in some sense, threat—of technology displacing the use of labor, a development that is accelerating but could be further stimulated by attempts to impose additional costs and liabilities on the employment relationship.

“ CHRO Quote: “The whole employee-employer contract has changed. As Millennials become a larger share of the employee base, that will accelerate.”

The Reasons Why Employers and Workers Enter into Alternative Work Relationships Are Widely Varied

The danger is that the debate could also trigger new barriers to the movement of work at a time when flexibility is critical to ensuring that workers find work arrangements best suited to their skills, career development, income and family responsibilities. The reality is that in many instances, workers who possess skills in critical demand seek to be tied to the market, not to individual employers. Recognizing this reality

is not just essential to ensuring that businesses can be at their competitive best but also to empower the workers themselves to ensure that their skills are put to maximum use in a way that serves their own needs and desire for job security.

“ CHRO Quote: “Some contingent workers want to move to full-time relationship. Some enjoy that distant relationship or flexibility. Their mindset is benefit-driven—that is a dynamic that we need to figure out.”

The benefits to workers of non-traditional work relationships are often overlooked. These benefits can derive from a wide variety of motivations on the part of those workers, including:

- Flexibility, which fixed employment with a single employer may for certain workers impede through obligations and a commitment of time to the needs of that employer;
- Marketability, combined with entrepreneurship that provides workers with a special set of skills in high demand that bolster the ability to make more money on their own (or as an employee of a firm specializing in those skills)

and be more selective of jobs that match their interest as a “free agent;” and

- Retirement, in which an individual may choose non-traditional employment because of either or both of the aforementioned motives, or because of restrictions on their ability to work for their previous employer while receiving retirement benefits.

Meanwhile, employers may be motivated by a variety of factors that have nothing to do with avoiding liability, including:

- Managing the ebb and flow of staffing needs, which is necessitated by fluctuating market demands;
- A lack of availability of certain specialized skills, in which case an employer can only acquire those skills from entrepreneurial individuals or companies specializing in providing those skills;
- Focusing on core competencies of the company, and thereby relying on other individuals or companies who may provide better service through its own core competency (e.g., security); or

- Testing the waters through temp-to-hire arrangements to ensure that a permanent employment relationship is a good fit for both the employer and the potential employee.

The Costs and Risks Associated with Alternatives to Traditional Employment Form a Deterrent to Overutilization of Contingent Workforces by an Employer

Efforts to further restrict or eliminate nontraditional forms of employment ignore the reality that there are already inherent limitations and substantial disincentives—both legal and operational—to employers utilizing workers outside the traditional employment relationship. For one thing, the very complicated fact-intensive (and varying) tests under multiple employment and tax laws to determine whether there is an employment relationship are often difficult to apply. Moreover, these tests often vary depending on the purposes of the underlying law. If the employer’s interpretation of the law is successfully challenged by a plaintiffs’ lawyer or government agency, the liability for the employer may be substantial, particularly where large numbers of similarly situated workers are involved. Large companies are aware of these pitfalls and thus proceed with great caution.

However, there is another deterrent that goes well beyond the liability issue. Any competitive enterprise prefers to have a core of committed, engaged employees, who feel a certain amount of loyalty to the company. This is among the highest priorities of any chief human resource officer, who is committed to ensuring that the company’s workforce is devoted to meeting its business needs. Realistically, a company can only expect this degree of commitment from its own employees. Moreover, an over-usage of contingent workers can also pose challenges in terms of turnover and scheduling, since those workers may more readily pursue commitments to other companies as they become available.

The Current Legal Regime and its Enforcement Impedes Positive Developments for Workers

As mentioned previously, a company’s ability to retain workers outside the employment context is severely restricted by broad interpretations of “employer” and “joint employer” under the various tax and employment laws. Moreover, government agencies at all levels have been seeking to broaden these further. Indeed, on a global level, companies are increasingly finding actions of other companies within their supply chain attributable to their own brand.

Ultimately, the application of any definition of “employer” or “joint employer” depends on various “indicia [*i.e.*, indicators] of employment.” Being on a company’s payroll is probably the clearest indicator but regulators look at a variety of other factors, such as control over schedule, work directions, the work performed, and whether a claimed “independent contractor” performs work for other companies. An overly rigorous enforcement of these factors forces companies to minimize these “indicia” in ways that are often harmful not only to those contingent workers but also to their own employees.

“ CHRO Quote: “The fact that folks wear the same uniform and walk on the same tiles... doesn’t mean that we have an employer relationship. I would like to have more of a lever for a brand experience, but at the end of the day the franchisee makes the decisions.” **”**

Thus, a company that has an on-site day care center or physical fitness program that is part of its wellness program may exclude from those benefits anyone who is not an employee of the company. In addition, a host company that contracts with an outside firm to provide physical security to its premises may believe that its employees’ protection will be

best served by certain hiring standards for the security personnel used by that firm. This may include drug testing and background checks, a minimum level of training, pay and/or benefits and so forth. Yet, if the host company seeks to impose those standards on the security firm, it increases the likelihood of being considered a “joint employer” of its employees.

The negative effect of recent governmental actions on companies’ ability to enhance the benefits to non-employees was recently illustrated by a National Labor Relations Board case involving Microsoft. The company had required that its vendors provide at least fifteen days of paid leave to their employees but, shortly after Microsoft announced the new requirement, a union representing employees of one of Microsoft’s suppliers—citing Microsoft’s eligibility criteria for vendors—demanded that Microsoft engage in collective bargaining with the union under the NLRB’s broadened joint employer test. The case was ultimately settled favorably to Microsoft, so it is uncertain how the Board would rule, but the uncertainty underscores the vulnerabilities companies face in trying to do anything that may benefit workers who are not on their own payroll.

Proposal: Legal Definitions of Employment Relationships Should Include Safe Harbors for Actions and Policies Taken by Employers that Benefit Their Own Employees and Other Workers

The challenges to Uber’s utilization of independent drivers—raising the issue of whether they are in fact employees—has exposed the inadequacy of current definitions under the law in dealing with new forms of work arrangements. Various solutions are being offered. For example, the creation of an “independent worker” category has been suggested to accommodate Uber-type situations, enabling “gig” employers to provide certain benefits to workers while avoiding the trappings of an employment relationship. Such proposals are intriguing but raise concerns about replacing one rigid set of constrictions with another when what is needed is greater freedom for workers to pursue their best utilization.

In fact, a surgical approach would be preferable. It is a given that, where employment in some traditional manner exists, the obligations and liabilities imposed on the employer will continue. Instead of seeking to impose a whole new set of restrictions on the use of labor outside that context, it would be far more beneficial to clarify that an employment relationship only exists where there is actual control

over the terms and conditions of employment while also carving out certain areas—“safe harbors” to use the common legal vernacular—that would enable companies to provide certain benefits to both their own employees and their contingent workforce without triggering employer or joint employer status under the law.

“CHRO Quote: “Joint employer could end up hurting our security guards. We want them to be happy, so we insist they get payed 25 percent above market, and we pay it... we think it’s the right thing to do. But we’re not sure we can do that anymore because if you’re influencing how much someone gets paid, that could be an indicia of employment!”

Clearly, employers seeking to avoid liability by constructing sham arrangements with workers should continue to be prosecuted. However, those seeking to provide certain benefits to contingent workers in addition to their own employees should be protected through the creation of specific safe harbors such as:

- Allowing employers to include contingent workers in certain events with employees, such as team-building exercises, thus removing barriers to optimal productivity by maximizing

communications and chemistry between employees and non-employees working toward common objectives;

- Allowing participation—at the contingent workers’ option—in the company’s health care or defined contribution retirement plan;
- Allowing contributions to government insurance programs, such as unemployment insurance, workers’ compensation, and paid family and medical leave insurance;
- Requiring drug testing and minimum levels of training for those involved in sensitive areas, such as security, that affect the safety and well-being of the employers’ own employees;
- Requiring its contractors to provide to their own employees certain minimum pay and/or benefits; or
- Establishing methods to facilitate compliance by their franchisees or contractors with various employment laws.

By thus freeing up employers’ ability to improve the lives of workers—whether their own or those working on a contingency basis—the overall goals of

our employment laws of enhancing the welfare and ensuring the protection of our workforce would be substantially promoted.

Proposal: Given That Employees Will Likely Change Jobs a Number of Times During Their Work Life, Congress Should Strongly Consider Easing the Creation of Multiple Employer Retirement Systems That Are Either Geographically or Industry-Based

These collective retirement programs should contain a number of important features:

- A shared mortality risk across all participants which would allow greater participant payouts;
- Not allowing access to accumulated funds during a participant’s working career;
- Offering professional asset management informed by the participant’s individual age, marital status, and income;
- Providing a guaranteed minimum lifetime benefit, plus a variable (flexible) benefit ‘adder’ that can be adjusted up or down in retirement based on asset performance; and

- Requiring minimal participant paperwork.

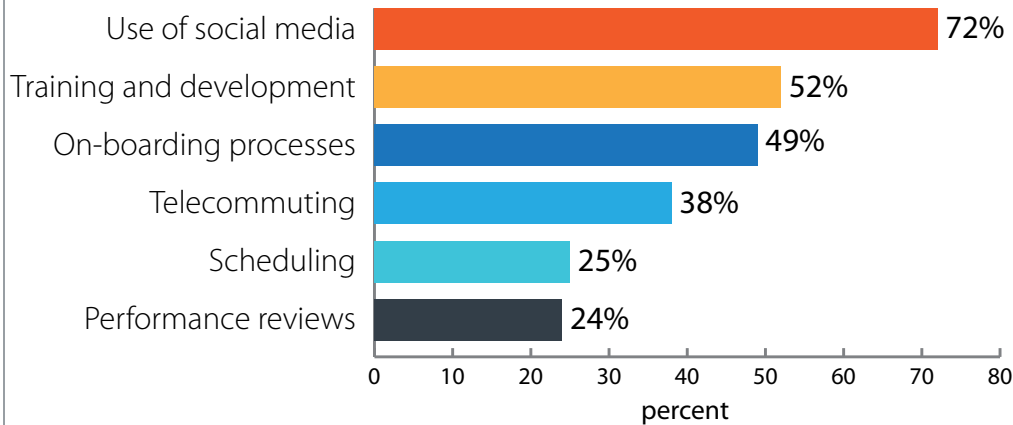
The common plan design would allow for greater and more uniform communications that would increase understanding.

A NEW GENERATION OF WORKERS

THE FACE OF the workplace of 2020 will largely be that of the Millennial generation. Just exactly what characteristics define the generation—let alone what its impact on the workplace will be—is a topic of much debate and little consensus. The regional and international differences

between Millennial workers are significant. Generational biases muddy the waters, and the fact that American Millennials are the most diverse generation in U.S. history makes discerning a clear typology all the more challenging.

Impact of Millennials on Member Policies



Source: HR Policy Association 2016 CHRO Survey

But while Millennials receive perhaps the most airtime, other recent demographic developments have been “dramatic and unprecedented.”^{xviii} For example, the median age in the United States has grown at an exponential rate as people are living longer, healthier lives. To be of typical health at 65 in the United States is to be as healthy as the typical 58-year-old four decades ago. Many are working well past 65, whether by choice or circumstance. As a result, we now see as many as five generations in the workplace, and a workforce that is overall growing older—despite the influx of Millennials.

A variety of other significant demographic changes are being introduced through the incoming Millennial generation. These include diversity regarding gender, sexual orientation, race, ethnicity, nationality, and culture, among others. While there is still much to be done by large companies in achieving diversity in their workforces, the great diversity found among Millennials is moving the needle as they enter the workforce.

Businesses therefore are seeing significant shifts in worker preferences and expectations regarding the workplace. In the HR Policy Association’s 2016 CHRO Survey, senior HR executives listed “Cultural Transformation” and “Talent Management, Including Recruitment and Retention” as among their top three concerns. The vast

majority of large employers plan to introduce or have introduced policies to answer Millennials’ supposed, anticipated, or observed preferences and expectations. Indeed, the same survey showed that 85 percent of Association member companies have changed company policies and programs to appeal to Millennials. Despite this activity, companies have not fully come to a consensus as to what Millennial-specific preferences and expectations are—or whether they exist.

While a Definitive Millennial Typology Remains Elusive, Senior HR Executives Often Observe the Following “Paradoxes” Regarding the Generation:

- “Millennials are hardworking, yet have a reputation of being ‘entitled.’” Few, if any, negative terms are more frequently assigned to Millennials as “entitled” or “coddled.” Yet reports that Millennials are uncommonly hardworking are frequent.
- “Millennials are needy in terms of wanting to have a relationship with management and to give and get feedback from their managers—but are also independent.” In response to this trend, companies

report implementing various policies and practices, such as a more graduated raise and promotion structure, monthly or quarterly feedback rather than annual reviews, and providing more venues of feedback both to and from management, among other changes.

- “Millennials want to ‘do good’ and ‘do well’ at the same time.” Showing strong evidence of being a socially conscientious and civically-oriented generation, many Millennials want to see their work as impactful within their company while also benefiting their local and global community. At the same time, these same individuals often want to do well for themselves in their own careers.
- “Millennials are both ‘high-tech’ and ‘high-touch.’” Expectations regarding the use of technology in the workplace run high with Millennials. This does not mean, however, that they do not want to connect personally.
- “Millennials are committed to where they are when they are there, yet seem to

easily leave.” Millennials—perhaps unwittingly—tend to reject paternalistic work arrangements, along with the expectation that they will have one job for life, in favor of cultivating a skills-based career. For some, this may mean being willing to leave when a path to a desired career is unapparent.

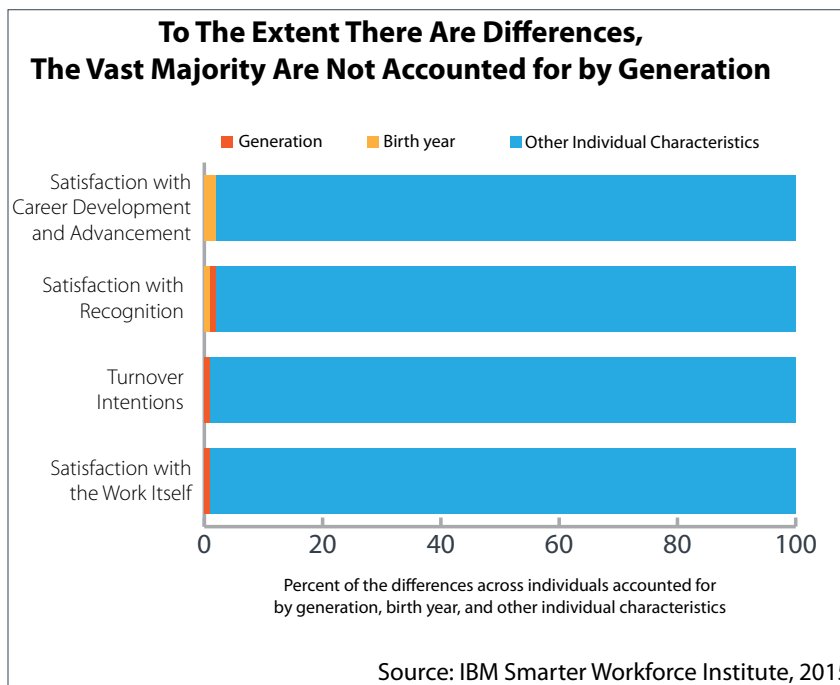
Yet Many Chief Human Resource Officers Believe the Millennial Generation’s Reputed Characteristics Are Overstated

To the extent that there are discernable trends, there is a strong view among many CHROs that, more often than not, these trends are more convincingly attributed to external factors, such as changes in technology and the economy, or to their stage in their lives and/or careers. For example, after the economic downturn, Millennials were late to marry, have children and buy homes, bearing out well-established patterns of behavior observed during times of relative economic hardship in other eras. While other, less tangible, factors may have also influenced Millennial behavior in these regards, the economic downturn is a sufficient cause, which is supported by the data.

Geography also introduces variety to the Millennial population. In the

modern economy large employers’ workforces are rarely fully domestic—many have large contingents of workers in other countries. American Millennials are the most diverse generation in U.S. history, and with the inclusion of Millennial workers overseas, companies now have perhaps the most diverse workforces in history. As a result, many companies are hesitant to cast a definition over a generation with great difference from region to region, industry to industry, and indeed even company to company.

“CHRO Quote: “I can remember being told how different Gen X was from other age cohorts. If you erase ‘Millennial’ and put ‘Baby Boomer’ in there in 1972, it would fit very well. So the question is: is it this generation, or do people between the ages of 20 and 30 have life experiences as such that you view your career a different way?”



Many CHROs observe that preferences and behaviors commonly thought to be particular to Millennials are similar to the preferences and behaviors of previous generations of workers at similar stages in their careers. Complimenting this view, examples of familiar—and often negative—statements regarding younger generations are plentiful. In 1985, for example, *Newsweek* described them as “preening narcissists who have to document every banal moment with their cutting-edge communications technology.”^{xxi} Often, reliable data about new generations can become lost in the noise. Many studies trumpeting major Millennial typologies suffer from a lack of a control group, rely on self-reported

data, or fail to poll individuals across socio-economic lines. Some commit all three errors. On the other hand, more rigorous studies often find that generation accounts for very little of the observed differences.^{xxii, xxiii}

Because Millennials' behavior and preferences in certain areas correspond with those of previous generations, it is reasonable to expect that we may see further changes as Millennials "settle down" and take on greater responsibility both in and outside of the workplace. And indeed, they are already doing so. By 2020, about 60 percent of children who have been born to Millennials will have married parents, up from 45 percent today.^{xxiv} Millennial home buying rates have risen steadily in the past four years and Millennials have led all generations in home buying for the past three.^{xxv} As these trends develop and become more common among Millennials, policies designed to appeal to them based on previous circumstances may not work as effectively.

Companies Find Successful Policies Geared Toward Attracting and Retaining Millennials Are Often Also Popular with Workers of Other Generations

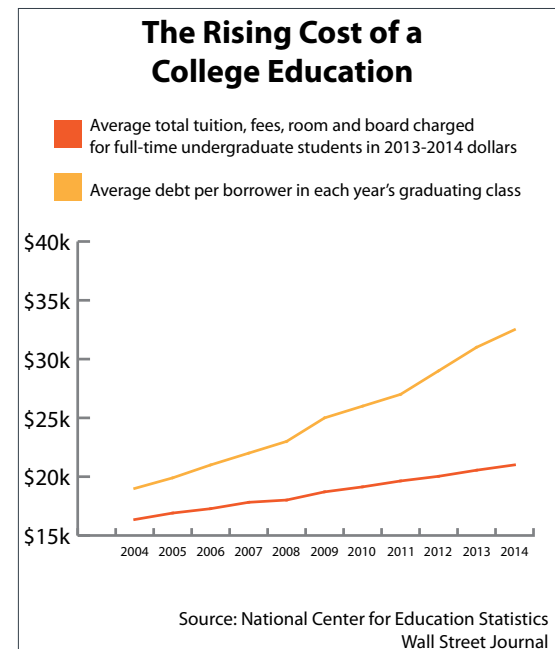
Workers from all generations prefer a work environment where they are able to give and receive feedback, have a relationship with management, find

meaning in their work, or be a valued part of healthy communities in and out of the workplace. Workplace flexibility, often considered a hallmark of the Millennial generation, is highly valued among employees with significant responsibilities outside of the workplace, such as those taking care of elderly family members. Conversely, some companies find that removing the "Millennial label" from workplace policies designed initially to cater to Millennials strengthened workplace culture by removing a possible semblance to favoritism.

“ CHRO Quote: “What is effective for Millennials is even more effective for everyone else. For example, Millennials like to know the reason for feedback—just like anyone else would. When we tried to change things to be more responsive to Millennials, everyone else seemed to respond favorably as well.”

American Millennials Enter the Workforce with One Significant Difference from Their Predecessors: Outsized College Debt

A college degree continues to be the most significant factor influencing one's earning potential. Lowering the cost of a college education would present this opportunity to a greater share of Americans. However, the cost



of college is skyrocketing to historic levels. From 1976 to 2016, the average costs of tuition and fees at a public four-year institution rose 394 percent, and 321 percent at a private nonprofit four-year institution.^{xxvi} Even through the 2008-09 Recession, college costs rose significantly. According to the Department of Education, “Between 2003–04 and 2013–14, prices for undergraduate tuition, fees, room, and board at public institutions rose 34 percent, and prices at private nonprofit institutions rose 25 percent, after adjustment for inflation.”^{xxvii}

Consequently, student loan debt is the only form of consumer debt that has grown since consumer debt's peak in the economic downturn of 2008.^{xxviii}

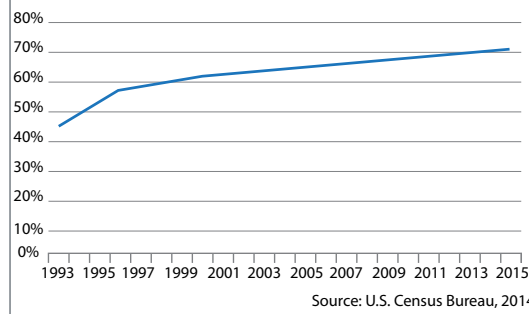
Since then student debt has surpassed both auto loans and credit cards to become second only to mortgages as the largest form of consumer debt. In this relatively short period, the change has been dramatic: Millennials owe 2.2 times as much in student debt in 2016 than in 2005. Meanwhile, starting wages for new college graduates have been in decline for over a decade, making it harder for Millennials to dig themselves out of debt.^{xxx} Surveys suggest that student loan debt is consequently exacerbating patterns of Millennials not marrying, buying homes, having children, or pursuing the careers they want.^{xxx}

Proposal: The Federal Tax Codes Should Facilitate Employers' Assistance to Their Employees in Meeting Their Education and Training Needs, While Also Assisting Employees in Paying Down Their Student Loan Debts

The costs of education at all levels can be prohibitive for many individuals in maximizing their full potential. For this reason, many employers are interested in assisting their employees in addressing these costs, both prospectively and retrospectively.

For example, for so many Millennials entering the workforce, the path to achieving long-term financial and career goals runs through paying down

Percentage of Students with Loans in Each Year's Graduating Class



student loans, while for others the cost of a college education is prohibitively high due to outsized student debt. As a tool to attract Millennial workers, some employers are offering to make student loan payments on behalf of employees as part of their benefits package. However, this benefit is considered taxable income, whereas employer contributions to health care and retirement accounts are not subject to taxation. According to a 2016 survey of HR Policy member companies, only 4 percent are providing student loan assistance to their employees. Yet, if this assistance were provided a tax preference, 74 percent of the others would give strong consideration to providing the benefit.

A tax-preferred system much like a 401(k) into which both employers and employees could pay would incentivize new employees to pay back student loans and save for retirement, and maximize their ability to do both. According to many financial planners, saving for

retirement should get priority over paying more than required for student loans, yet many recent college graduates are so strapped for cash after making their monthly student loan payment they are unable to both participate in their employer's retirement plan and take advantage of the employer's matching funds.^{xxx} In fact, recent college graduates could wind up worse off in the long run if they prioritize rapid college loan repayment over saving for retirement.^{xxxii} A recent study that modeled different scenarios for young workers concluded "workers are most often best served by contributing extra dollars to their retirement plans, and not paying off student loans ahead of schedule, particularly if their employer offers a match on retirement savings."^{xxxiii}

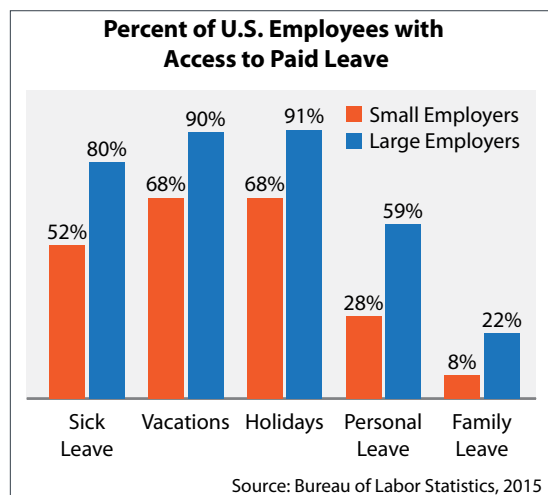
A tax-preferred student loan system would also maximize the ability of employers to structure their benefit plans to accomplish the twin public policy goals of paying down student loans and saving for retirement. It would also enable employers to tailor their benefit plans to the widest number of job seekers, help attract and retain Millennial employees—and those of the next generation—and make it easier for employees to craft their financial plans in such a way that meets their needs.

WORKPLACE FLEXIBILITY

THE NATURE OF when and where work is done has changed dramatically from previous eras, prompting changing expectations by the American workforce. According to HR Policy's 2016 CHRO Survey, nearly 70 percent of Association members find that Millennials expect greater flexibility with regard to scheduling and time off. A number of member companies report that the other four generations

in the workplace share this expectation. Coinciding with this, developments in computing and communications technology and increases in productivity both inside and out of the physical workplace are making flexible work arrangements more possible. Yet, the current orientation of the wage and hour laws towards a traditional nine-to-five work structure interferes with the ability of employers to provide this flexibility to those covered by those laws.

In addition, virtually all HR Policy Members are sensitive to their employees' desires for both paid and unpaid leave, and are in the forefront of providing those benefits to their employees. Yet, recent action at the state and local levels seeking to micromanage how employers provide the benefit is resulting in a patchwork quilt of requirements that prevent large, multi-state employers from providing uniform benefits to their employees. In



Work/Life Balance Critical to Job Satisfaction



According to a SHRM report, over “one-half (53%) of employees reported work/life balance was very important to their job satisfaction, the same percentage as base rate of pay.”

Source: Society for Human Resource Management, 2015

addition to interfering with their ability to provide the leave in a manner that fits the needs of their workforce and the business, this also drives upward the cost of providing such benefits.

Many Companies Use Flexibility to Attract and Retain Talent and Achieve Better Productivity

Extending beyond the Millennial paradigm, flexibility in scheduling and leave is a highly important benefit for the great majority of workers. Family-friendly scheduling and leave policies can be a critical component in retaining and attracting employees seeking a healthy balance in their roles at home and within the workplace.

Companies are experiencing higher productivity and lower costs by offering certain employees more flexibility in their work arrangements. Depending

on the nature of the work, ever-changing technological innovations in the workplace have contributed to employees becoming more capable and efficient, regardless of location. This can lead to lower office costs and, in many cases, higher productivity. Some companies are also hiring employees who may have previously been unattainable due to distance, and maintaining an employer relationship with employees who move.

“CHRO Quote: “It is important as ever for employees to have flexibility in their schedules... Employees have varying needs that require flexibility when and how they work. We also know that meeting the needs of our global customers often requires us to work across multiple time zones to get the job done.”

Technological Advances Are Loosening the Physical and Temporal Confinements of the Workplace and Workday

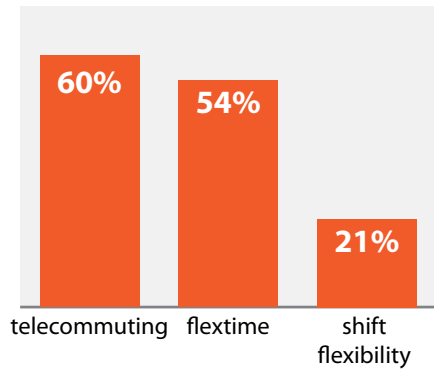
With the help of available technologies, the workplace can now be extended beyond a set location. For many employees, the term “workplace” has already become a misnomer, insofar as it is a “place.” The workday itself is less confined to the traditional nine-to-five schedule.

At the same time, it is important to note that not all employment positions are conducive to this kind of flexibility. Many positions require that the employee be in the physical workplace. Moreover, even in situations where it is technologically possible to perform the work away from the workplace, many jobs and situations require some degree of physical proximity—regularly or occasionally—to ensure the most effective collaboration among several workers. Yet, when the nature of the work allows it, employers and employees alike are finding that flexibility can be a win-win.

Large Companies, at the Forefront of Providing Generous Leave Benefits, Are Increasingly Challenged by a Patchwork Quilt of Varying Administrative Requirements Under State and Local Mandates

Today’s workforce is looking for the ability to provide for their family’s needs by both working for their wages, and being able to care for them when they are ill or disabled. In response to this need, employers are increasingly providing employees with the appropriate level of paid leave that they need to be able to balance their family responsibilities with their job. Generally speaking, large companies are often better-positioned than smaller ones to provide generous leave

Many Companies Are Now Offering Flexible Work Benefits



Source: Society for Human Resource Management, 2015

benefits to their employees because of a larger pool of employees to draw from when filling gaps caused by absences.

Large employers continue to be at the forefront of offering generous benefits to their employees. As guaranteeing a certain amount of paid sick or family leave has become a focal point of state legislatures and political campaigns in recent years,^{xxxiv} many large employers are finding it increasingly difficult to effectively provide this benefit in a uniform manner to all of their employees due to the conflicting requirements contained in many state and local laws.^{xxxv} Many of the state and local statutes that require paid family leave differ drastically in a number of areas—to name a few: the amount of wages that are guaranteed, the minimum and maximum length of leave, and how a family member,

particularly how a “child” is defined under the law. The same is true for paid sick leave laws. Many differ in which family members are covered, when paid leave vests, and when employees can begin to accrue paid leave. The vast majority of large employers have operations in multiple states. These regulatory conflicts are resulting in administrative hardships for companies, many of which are already trying to provide this kind of leave to its employers regardless of their state of residence.

“CHRO Quote: “There are going to be more generations in the workforce now. What differentiates them is their set of needs: do they have kids, are their kids working age, do they need to take care of parents, etcetera. There is a greater need for flexibility for all those reasons, and it’s a good idea to talk about that now and try to adjust corporate policies accordingly.”

Proposal: Companies Already Providing Generous Paid Leave Benefits Should Have a Safe Harbor from Being Hampered by the Varying Requirements of State and Local Leave Mandates

Congress should enact a federal standard that provides a safe harbor for multi-state employers that choose to voluntarily provide paid leave to their employees, regardless of their state of

domicile. The differences between the paid family and sick leave laws in the several states makes it more difficult for these multi-state employers to comply with each facet of the state laws and still provide a desired service to employees residing in states without paid leave requirements. Employers would not be required to meet the standard, but having paid leave policies that are consistent with that standard would shield a company operating in multiple states from prosecution under a particular state or local law for failure to provide the leave in the same manner dictated by that jurisdiction.

The Nation’s Core Wage and Hour Law—the Fair Labor Standards Act of 1938—Grounded in the Year it was Enacted, Inhibits Needed Flexibility in Workplace Policies That Address the Needs and Desires of Today’s Workforce and That of the Future

The regulatory regime created by the FLSA seeks to impose a “punch-clock” mentality in a smartphone world. Employers and employees alike continue to be constrained by wage and hour laws that are out of touch with modern times. In considering how the FLSA regulates today’s workplace, it is important to understand the state of the American workplace when the 1938 law was enacted. The Depression-era workplace was characterized by a fixed

beginning and end to the work day, greater predictability of the location of the workplace, fewer jobs requiring specialized skills or education, more United States-focused business models, and a preponderance of manual labor due to the relative absence of technology and mechanization that has transformed the workplace today. Curiously, the laws that regulated that kind of outdated workplace are still primarily the same that regulate our modern workplace, requiring little guidance on how employers and employees are to track “hours worked” when activity occurs outside the traditional workplace.

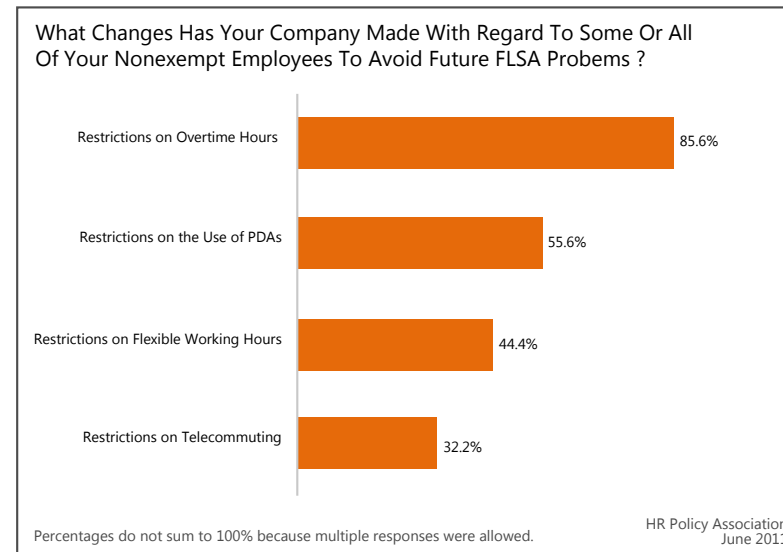
Proposal: The Fair Labor Standards Act and its Regulations Should Be Reformed to Address the Workplace Realities of Today and the Future

In 2016, under the guise of “updating” the FLSA regulations, the Department of Labor simply expanded the coverage of the antiquated and dysfunctional law by extending its requirements to a greater number of employees. It did so by raising the minimum salary threshold for the so-called “white collar” exemptions. This change, however, failed to address the new complexities of providing flexibility to a larger number of hourly employees, essentially creating many more problems under the pretense of fixing them. Moreover, it left intact the

uncertainties of the existing “duties test,” which seeks to define which employees meet the so-called “white collar” exemption (*i.e.*, executive, professional and administrative employees) using definitions tied to the workplace of the 1950s. Fortunately, this misguided and mislabeled effort at “modernization” has been halted by a federal injunction.

In the wake of this failed attempt, policymakers should focus on a true modernization by revising the FLSA and its regulations to provide greater clarity and consistency in a manner that reflects the 21st century workplace. Clarifying the requirements for tracking time worked, including time away from the workplace, clarifying the delineation between exempt and non-exempt workers, and ensuring that the

protections of workplace regulations are focused on the employees who are actually at risk of abuse in today’s workplace, not that of 1938, are key places to start.



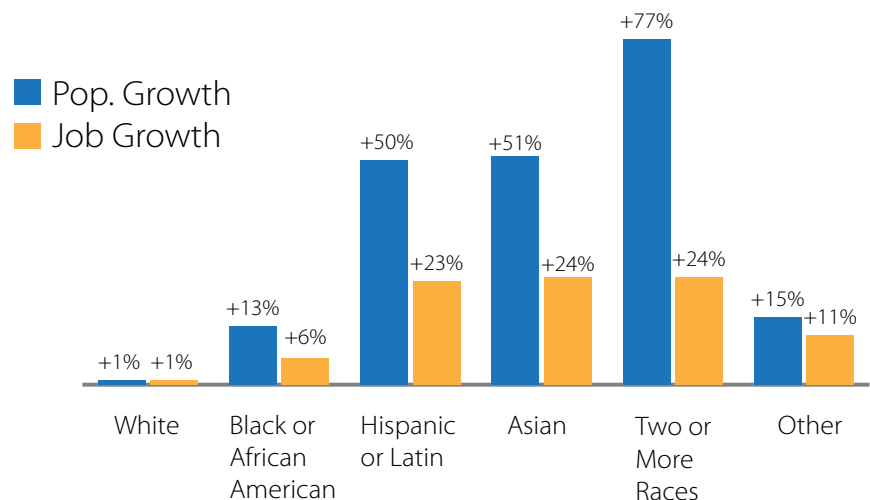
ONE OF THE greatest challenges for companies in the global workplace is dealing with the complex demographics of the workforce. In the United States, this is often categorized in narrow legal and political terms as “affirmative action,” aimed at ensuring that historically under-represented populations are employed in numbers matching their presence in the overall U.S. workforce. While our companies support the mission and goals of the law creating this requirement—Executive Order 11246—the numerical approach to the issue that the enforcement of this law has generated represents an oversimplified view of the realities of both the workplace and the workforce itself. For this reason, the terminology companies more frequently use is “diversity and inclusion,” which goes beyond a legally-mandated numerical approach to encompass a focus not simply on numbers but culture, incorporating both leadership

messaging and practices. The use of the word “inclusion” also underscores the priority of creating a strong sense of unity among the employee population, notwithstanding their differences.

Creating a culture of diversity—and embracing all that means within different contexts globally—gives companies a competitive advantage. Diversity is a critical component of a number of business imperatives, including innovation, attracting and retaining top talent, improving customer orientation and satisfaction, among others. The idea that companies with a culture of diversity are better off from a business perspective is supported by the experience of our members. Jyoti Chopra, global head of diversity and inclusion for BNY Mellon, said in an interview: “We have offices in more than 35 countries, across 100 markets, and a workforce of around 50,000 people. Our employees have to be able to work effectively in cross-

DIVERSITY AND INCLUSION

The Workplace is Becoming More Diverse



Source: CareerBuilder, 2014

border teams, they've got to be able to deliver goods and services... for clients ranging from individual investors to corporate institutional clients. Diversity is an imperative.^{xxxvi} A growing body of research bears out the same: companies able to achieve leading levels of diversity within their respective industries are more likely to outperform those that have not.^{xxxvii, xxxviii}

Though there is still considerable room for more progress, the United States and global companies doing extensive business within the U.S. are in the vanguard of expanding diversity and inclusion of under-represented populations. These companies frequently use the American experience

as a catalyst for progress in other parts of the worldwide business community. This not only reflects the successes of the U.S. legal regime in its continuing attempts to eradicate discrimination and its historical effects, but also a cultural imperative generally embraced within the United States overall and particularly by its corporate community. Meanwhile, large companies are at the forefront in battling discrimination against individuals because of their differences.

The Commitment to Diversity and Inclusion is the Smart Thing to Do from A Business Perspective

A common misconception is that a company's commitment to diversity

and inclusion is purely legal, driven by the need to comply with governmental imperatives, enforced by such agencies as the Department of Labor's Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission, in addition to their state and local counterparts. There is no denying that these laws and their enforcement serve an important purpose, but the reality is that diversity and inclusion go well beyond legal necessity: we are repeatedly told by HR leaders it is the "smart thing to do" in ensuring human resource policies that further a company's business goals. This is driven by both internal and external factors.

From an internal talent retention perspective, diversity and inclusion strengthens the culture and ensures broad engagement within the workforce. With this comes employee satisfaction, commitment and productivity. It also reinforces the ethical basis on which the company operates while also raising consciousness of these issues and diminishing the unconscious biases that can prevent a company from operating at its highest level.

With the recognition by employees that their own advancement is driven by the talents and commitment they bring to the company, their own engagement is much stronger, to the mutual benefit of themselves, the company, and the

nation as a whole. This also provides benefits from an external recruitment perspective, in terms of attracting the right talent to ensure growth and innovation.

For companies with a direct connection to the consumers, diversity is an essential component in connecting with and understanding the needs of the consumers, communities and marketplaces within which the company operates, or seeks to operate.

The Fixation of Government Agencies with Numerical Targets Downplays the Broader Cultural Goals

For the reasons stated previously, chief human resource officers are committed to promoting diversity within their companies regardless of whether they are also required to do so by law. Yet, they are often frustrated by laws and their enforcement that approach diversity as simply a “numbers game” in which the company’s performance is based solely on “hitting its targets.” For example, several companies have expressed frustration with the OFCCP’s use of “job groups” in seeking to detect compensation discrimination. Yet, as one company notes:

“A job group consists of numerous individual job titles that are considered similar based on job

duties, pay rates and opportunities. The job groups are large, enabling the use of statistical analysis, and often times resulting in indicators of potential discrimination. This false positive is simply the result of large data and not sound compensation analyses practice. Our pay decisions are not made at the job group level but at the job title level. Even though we shared our compensation philosophy—pay for performance and market pricing practice at the job level—we still spend countless hours presenting evidence that we pay based on objective job factors and are not discriminating because of this flawed model of analyses.

None of this is to say that numerical targets do not have some value. They can be used internally to raise the level of awareness within the company of the magnitude of the issue and help address and mitigate barriers created by unconscious bias. However, externally set targets without a keen understanding of how a business or industry operates or the longstanding demographic chasms that challenge it can set up a company and new diverse recruits for failure.

“ CHRO Quote: “While we ensure that we are compliant with the OFCCP requirements, they are not a driving factor in achieving our diversity goals. The work we do to achieve our diversity targets is generally above and beyond OFCCP requirements.”

The Commitment to Diversity and Inclusion Applies to the Global Workplace as Well

The U.S. legal regime regarding diversity is very U.S.-centric. Yet, for global companies, diversity also has an international element that seeks to ensure that the workforce reflects the company’s global footprint and customer base.

Not surprisingly, companies operating on a global level face a more complex challenge in ensuring diversity and inclusion. This operates on two levels—one within the country where operations exist and the other involving the company’s global employee population. With regard to the first, there are varying legal requirements in the jurisdictions within which companies may operate. In fact, legal requirements in most countries outside the U.S. often focus exclusively on disability and gender, with little or no attention paid to ethnicity or nationality. Yet, for all the reasons stated previously, the absence of legal requirements typically does not

stop companies from applying their own cultural diversity and inclusion imperatives wherever they have employees.

Companies View Diversity from a Broad Perspective

While companies are committed to achieving their diversity and inclusion goals with regard to under-represented populations, they also take a broader view of diversity in their recruitment, retention and promotion policies. Many companies also view their diversity goals as ensuring cross-functionality among their workforce and moving employees with different skills and experience into different parts of the business. In addition, companies also often seek to ensure generational diversity.

Notwithstanding a Company's High Level of Commitment, Barriers and Obstacles to Diversity and Inclusion Often Exist

Even companies with the strongest commitment to diversity often face challenges that make it very difficult to achieve those goals. These exist in primarily three areas:

- **Skill gaps.** There is often insufficient representation within the pipeline of those

with the skills needed to fill key positions within the company. This is particularly concerning in industries and/or occupations that are traditionally dominated by a certain gender. Similar challenges can exist in regions where certain ethnic groups are under-represented. Government enforcement agencies often fail to give adequate consideration to these shortages. For example, the Office of Federal Contract Compliance Programs has required every federal contractor to establish a goal of seven percent of every position within the company being filled by a person with a disability, despite the absence of any data to indicate the availability of disabled individuals within the workforce or the reasonable pool of candidates who possess sufficient skills in all of these areas. As one human resources executive related:

“In order to be successful as a company we need to be diverse—we need inclusive diversity and global diversity. How do you create new thought?

How do you approach things differently? One of the answers is diversity.... However, the pipeline for our industry is not there. Of the graduates at a school we recruit from, there are only 1.3 percent women. Doing things right on the retention side creates a job lock that gives a problem of diversity. And the economics for the baby boomers is that they aren't retiring as early and people are healthier than ever—there's a confluence of factors here.

- **Internal obstacles.** The lack of availability at entry levels in turn inhibits the company's efforts to promote diverse populations within the company to higher levels where experience and demonstrated expertise in the occupation and industry is essential. For example, in certain old-line industrial operations, entry level jobs may be dominated by males, notwithstanding any efforts by the company to attract women. If this is a company that tends to promote from within, diversity at the higher levels of the company—particularly on the operations

side as opposed to staffing functions such as finance and human resources—will be that much more difficult to achieve. Meanwhile, forcing diversity can backfire. If a company tries to promote individuals who lack sufficient skills and experience, it may be setting up those individuals for failure, which, in turn, may undercut the overall efforts towards achieving greater diversity at the higher levels of the company. Moreover, such promotions may also expose the company to grievances or legal claims by qualified but non-diverse employees.

- **Unconscious biases.** Even the most progressive and successful diversity and inclusion culture must wage a continuing battle against so-called “unconscious bias,” which can be a barrier among hiring managers during sourcing and talent acquisition processes and can negatively impact diversity efforts.

None of these obstacles can be used as an excuse for a failure of a company to make every effort to achieve a culture of diversity and inclusion. Yet, a failure to recognize their existence will

ultimately hinder bona fide efforts to achieve those cultural goals.

“ CHRO Quote: “The OFCCP is just crunching numbers and looking at documentation as to why they didn’t hire a certain candidate. In other words, they’re looking for where they can catch you doing something wrong.”

Proposal: Diversity and Inclusion is Both a Business and Government Imperative That Is Not Simply a “Numbers Game”—This Reality Should Be Acknowledged in Government Agencies’ Enforcement of Diversity Measures

While tremendous progress has been made, particularly in the United States, there is much more to be done in ensuring that diversity and inclusion are embedded within companies’ culture and business model, with a shared commitment among all leaders at the highest levels of the company, and an acceptance of measures to ensure accountability throughout the company.

“ CHRO QUOTE: “Creating a mindset and culture of inclusion must permeate all levels of the organization and the tone must be set at the top.”

Meanwhile, our legal and regulatory architecture generally works in the broadest sense of establishing goals for the American workplace. Our concern is that, in its enforcement, government agencies become overly concerned about the numerical aspects. As with the corporate leadership, those agencies must recognize that meeting a company’s diversity goals is more about culture than numbers and, in enforcing the relevant laws, government should bear in mind the spirit of the law when assessing progress toward specific requirements or targets.

COMPENSATION IS A vital tool used by every company in the ongoing effort to attract, retain and competitively reward well-qualified and productive employees. In most respects, the factors that employers use in determining compensation for employees will continue in the future as an essential component of the company's recruitment and retention goals. These include market positioning for the role and candidate, employee experience, seniority and performance, market trends in the geographical location, and company performance. The modern workplace does not limit itself to a traditional pay scale that provides no consideration for variances in professional output and quality of performance. Rather, cutting-edge companies are focused on "pay for performance" at all levels of the organization. In addition, increasing desire on the part of both employees and employers for different types

of work arrangements may involve increasing flexibility with regard to compensation packages. Companies should not face barriers in delivering compensation strategies that increase flexibility for employees in ways that fit their needs and the needs of their families.

"A great lathe operator commands several times the wage of an average lathe operator, but a great writer of software code is worth 10,000 times the price of an average software writer." – Bill Gates

Compensation policies must remain current with changes in the way work is done as we continue to move towards a knowledge-based economy where differences in value created by individual workers become more pronounced. As STEM and other knowledge-based professions and

COMPENSATION

industries continue to grow, the need for differentiation of employees will be even greater, with companies striving to find ways to attract, retain and reward the very best talent they can. In this environment, there will be many factors that affect pay, not the least of which are key differences in experience, performance and ability between and among employees.

“ CHRO Quote: “Our compensation and talent management programs are very much aligned.”

Many Believe That One Factor in the Income Inequality Debate Has Been the Inability of Employees—Beyond Those at the Highest Levels of the Company—to Share in the Profitability of Their Company Through Access to Company Stock

Over the past two decades, the percentage of equity-based compensation in CEO pay packages has increased significantly, as has the amount of pay that is at-risk (based on specific performance objectives). However, the prevalence of broad-based equity programs (those available to all employees) has declined markedly in the wake of the 2006 accounting requirement that companies recognize an expense for stock options. Companies also scaled

back broad-based equity programs in response to employees who preferred to be compensated in cash. Many HR leaders strongly believe that stock ownership can benefit both employees and employers by giving employees a strong connection to and interest in the long-term value of the company, while also allowing them to share in the profit over a longer period of time. While this approach does not work for all companies, those companies where it does should not be faced with unnecessary barriers when choosing to offer opportunities for stock ownership to employees.

Historically, employees have been offered the opportunity to receive company stock through participation in the company 401(k) plan. However, in times of a downturn in stock prices, companies are increasingly facing lawsuits over offering company stock in their 401(k) plan, so this practice is rapidly decreasing. Instead, many companies make use of an employee stock purchase plan (ESPP) which enables employees to purchase company stock at a discount through regular payroll deductions. Unfortunately, under current U.S. accounting rules, companies must record the value of the ESPP as an expense unless the plan meets “safe harbor” conditions, including limiting the discount to only 5 percent of company stock price. This change,

made in 2006, made ESPP plans far less attractive and effective for employees, and far more expensive for companies to implement if they wanted to provide benefits such as a discount in excess of the safe harbor or a valuable “lookback” provision allowing employees to buy shares at the stock price at the beginning or end of an offering period—whichever is lower.

Proposal: The Government Should Encourage Companies Who Wish to Offer Employee Stock Purchase Plans Rather Than Erecting Barriers

Although it may not be appropriate or useful for every company to offer an employee stock purchase plan, companies that wish to do so should not be inhibited by tax and other government policies from adopting measures that facilitate such ownership. For example, the Financial Accounting Standards Board requirement that companies recognize ESPPs as an expense if a discount greater than 5 percent is provided could be discontinued, or companies could receive tax breaks for subsidizing stock purchase plans. Not all companies will choose to offer this benefit, but the barriers for those who wish to do so should be lowered.

Contemplated Changes in Policy at Both the Federal and State Levels Directed at Eliminating Pay Inequality, While Well-Intended, Should Be Approached Cautiously to Avoid Impacting Legitimate Pay Practices that Benefit Both Employers and Employees

Policymakers at all levels of government are considering significant changes in policies governing pay discrimination and the minimum wage that will have an impact on corporate compensation practices that in many instances could prove to be counterproductive.

While progress has been made since the passage of the Equal Pay Act, gender pay equality remains at the forefront of our national conversation. Advocacy groups argue the Equal Pay Act needs to be strengthened in order to increase its effectiveness as a tool to remedy gender-based wage discrimination.

Others argue, however, that existing protections against pay discrimination are already strong and pervasive, and that most proposals to amend the Equal Pay Act will simply prohibit legitimate, nondiscriminatory pay differences, and increase unnecessary litigation.

The chief human resource officers of major American companies are strongly committed to eliminating pay discrimination based on gender or other factors such as race, religion, etc. and there are broad-ranging laws and regulations already in existence to achieve that policy objective. However, proposals such as the Paycheck Fairness Act go much further than existing law and would allow plaintiffs to challenge legitimate factors that go into establishing pay for individual employees—such as productivity, experience, training, education level and others.

Of additional concern are measures that would seek to prevent companies from requiring job applicants to disclose their pay history prior to a job offer to avoid perpetuating discriminatory pay gaps. A primary reason that companies request candidates to provide their pay history is to ensure that the company makes a competitive offer to the candidate, particularly at more senior levels where there may be a much broader range of potential pay depending on what the individual offers. This may involve increasing or decreasing various components of the pay package such as base salary, variable incentive or long-term incentive in order to make an attractive offer that does not place the candidate in a worse position than his or her current role. Unless the position has a relatively narrow range to begin with, without any idea of the candidate’s pay history, companies will be working largely in the dark, without all the proper tools to make an appropriate decision. To the extent there are restrictions on the ability of employers to ask for salary history, those need to be flexible enough to enable the applicant to voluntarily provide the information or allow a dialogue about her or his salary expectations.

Meanwhile, federal, state, and local laws to increase the minimum wage, though well intentioned, will

Gender Pay Equity Obstacles

Which of the following are the most significant obstacles your company faces in achieving gender pay equity? (Please check all that apply.)



Insufficient pool or inability to attract available qualified women in the occupations leading to higher levels of compensation within our company



Resistance by managers within the company to promoting qualified women to positions involving higher levels of compensation



A predominance of women in positions that generally pay less than others where they are less represented



Inability or unwillingness of women to negotiate higher wages/salaries

Source: HR Policy Association 2016 CHRO Survey

have unintended consequences on employees and consumers. While the aim is to help workers, decades of economic research show that mandated higher minimum wage rates usually end up limiting the job opportunities for low-skill workers, youth, and minorities. After reviewing the research, the bipartisan Congressional Budget Office (CBO) concluded that increasing the minimum wage to \$10.10 per hour would eliminate some jobs for low-wage workers and decrease the real incomes of millions of families who do not have any minimum wage workers, as prices increase to offset the cost of the higher minimum wage. According to the CBO, increasing the minimum wage to \$10.10 per hour would decrease total employment by about 500,000. Employers are also likely to replace their lowest-skilled employees with labor-saving technology and somewhat higher-skilled employees. Rapidly increasing minimum wage rates can also disrupt internal company compensation structures, human resource practices, and operational efficiencies. Instead of increasing the minimum wage, federal and state governments should focus on policies that generate faster economic growth, which would generate rising wages and more opportunities for all workers.

Companies Understand That Attracting and Retaining a High-Quality Workforce, Treating Employees Fairly, and Paying Them Competitively is Key to Business Success

Many companies already employ rigorous methods to ensure that pay is not discriminatory, including statistical analysis and management training on subtle biases and other aspects of pay and employment discrimination. Sophisticated companies know that it is important to differentiate based on performance when building a top-class talent pool. To the extent that new legislation increases litigation liability for companies, they may feel pressured to “flatten out” pay, compensating those with mediocre or even sub-par performance the same as those with top performance, which would be bad for companies and the competitive positioning of the U.S. in general. A “pay for performance” mentality distinguishes employees based on results, and provides a mechanism by which high-performing employees may be rewarded, either through monetary means or through access to privileges such as increased telecommuting, flexible work hours, etc. Requiring that all employees be paid the same removes this key aspect of compensation planning and reduces all employees to the same treatment regardless of their effort and performance.

Meanwhile, employees are increasingly demanding more flexibility in how, when and where they work. Compensation must necessarily play a part in this move toward flexibility. In some circumstances, employees may be desirous of a compensation package that includes less cash in exchange for privileges such as a part-time work schedule or the ability to work at home even when the company’s business model generally requires employees’ physical presence in the workplace. If companies are constrained from creating any differential in pay that could possibly be construed as gender-based, in order to avoid lawsuits, this will hinder their ability to be flexible and creative in terms of helping employees to work in a way that meets their individual needs.

Employers Should Make It a Priority to Avoid Discrimination in Pay Practices by Ensuring Those Policies Are Fair, Competitive, and Transparent

It is important to provide sufficient training to management and decision-makers to recognize and correct problematic pay practices as they occur so that they do not become entrenched. Although not all companies can (or should) use the same types of data analytics to assist in this process, it is critical to maintain a rigorous method of ensuring that systemic pay discrimination does not occur.

Companies Need the Ability to Attract and Retain the Best Talent Possible in Order to Be Successful

To the extent that legislation and regulation artificially alter the labor pool and constrain companies to compensate all employees the same way regardless of business circumstances (due to the constantly looming threat of frivolous lawsuits), this leaves U.S. companies at a competitive disadvantage and limits flexibility for employees. Corrections to the anti-discrimination laws must be approached cautiously. It is more important that Congress focus on ways to improve long-term wealth creation for individuals, which may include, among other possible approaches, incentives to encourage employee stock ownership through employee stock purchase plans.

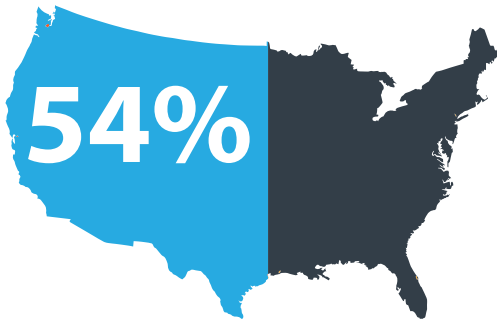
HEALTH CARE

AFTER PASSAGE OF the Affordable Care Act (ACA), many experts predicted that employers would opt out of offering health insurance. The thought was that they would

focus instead on providing defined contributions and directing employees to individual health insurance and the public marketplace. So far, this prediction is not coming to fruition. The majority of Americans still receive coverage via an employer: about 56 percent of U.S. residents—or 177 million people.^{xxxix} Large employers are committed to maintaining employer-sponsored health insurance (ESI) as an essential benefit for employees and agree that the employer-sponsored system is likely to remain in place for the foreseeable future. However, employers realize there are changes that need to be made for ESI to be sustainable in the long-term.

Employer-provided health insurance is valuable. Health insurance is a driving force in employee retention and vital to securing a robust workforce. Employers recognize that health coverage not only attracts employees,

Majority of Americans Receive Employer-Sponsored Insurance



“The majority of Americans still receive coverage via an employer: about **54 percent** of U.S. residents—or 169 million people”

Source: U.S. Census Bureau, 2011

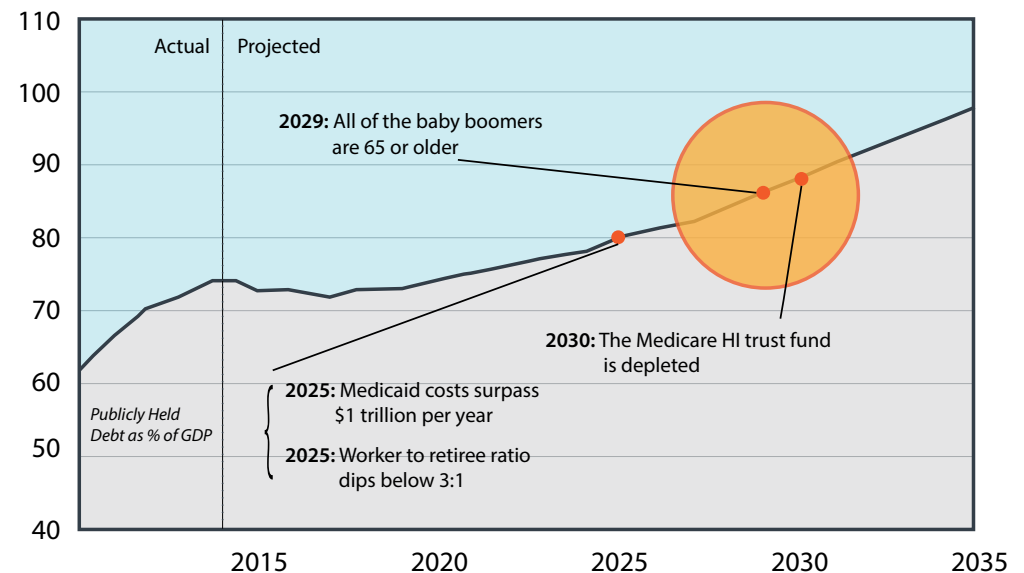
but it also keeps them healthy and productive on the job. Offering health insurance is one way employers show individuals they are cared for within the larger company: a competitive benefit tailored to employees so that they may be healthier and more productive individuals.

ESI is also a financially reasonable and prudent way to administer health coverage to large numbers of people. Employees, by and large, prefer having their employers negotiate on their behalf to secure the best possible health care deal for them. HR executives also stress that they are in a position to seek financially sustainable rates, whereas they would have less control if they were to send employees to the exchanges. Employers have daily interaction with employees, giving them insights needed in order to create the best plans for their specific populations.

“CHRO Quote: “The employer-based health care system is strong. We still see health benefits as a value add in terms of employee value proposition. Employees still want health care. We don’t see ESI going away, given the challenges we see in the exchanges.”

U.S. health care is expected to “hit the wall” between 2025-2030. ESI is also important because of the

Hitting the Wall



Source: American Health Policy Institute, 2015

challenges that will be confronting the government-financed parts of our health care system 10 to 15 years from now. In this period, a variety of pressures on the health care sector will reach a tipping point, presenting significant challenges to both private and public sector health care financing.

- 2025: Medicaid costs surpass \$1 trillion per year
- 2025: Worker to retiree ratio dips below 3:1
- 2029: All of the baby boomers are 65 and older

- 2030: The Medicare HI trust fund is depleted

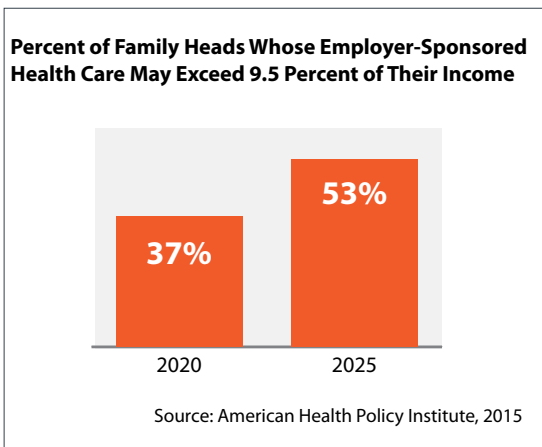
Rising Costs Are the Biggest Challenge Employers Face in Providing Health Benefits

The employer-based system is also facing challenges in the years to come. Research shows that medical expenses for employers are projected to increase 22.6 percent by 2020.^{x1} Employers are frustrated with the high price of coverage and are searching for new ways to hold down costs. Limited choices in the marketplace lead to higher rates, and while employers

see the benefit of offering health care, they must weigh the tradeoff of growing costs. When containing costs come in the form of higher premiums and deductibles, employees bear the consequences, and will likely do so even more in the future.

- 2025: 53 percent of private sector employees who are heads of families will face an average family premium and deductible that will consume 9.5 percent or more of the family's income
- 2031: Cadillac Tax, if implemented, hits average value plan

Further, there is a fundamental lack of quality data and transparency on costs. In the health care market, patients rarely know what they will pay for a service until they receive it and providers bill payers different prices for the same services, so prices for services



vary significantly.^{xli} If employees had the ability to choose higher quality services from more cost-efficient providers, this could encourage competition based on the value of care.

Prescription drug prices also pose a threat: Over the next five years, annual spending on pharmaceuticals is expected to rise 22 percent, climbing as high as \$400 billion in 2020. Using wholesale prices, spending increases to an exorbitant 46 percent, or \$640 billion.^{xlii} Large employers that are self-insured are stuck with paying the bill themselves.

There Is an Inconsistency Around Cost and Quality of Health Care In Part Because the Necessary Technology Is Not Easily Accessible to Patients, Employers, or Providers

Since there is no standardized electronic health record system, the transfer of information between providers becomes complicated and disjointed. As a nation, we are beginning to use big data to inform medical care decisions and benefits design, but we are not where we should be.

Hospitals and physicians may actually be disincentivized to adopt technologies that could lower costs. If a new technology has the potential to reduce patient visits, for instance, this

could cost physicians who are paid fee-for-service.

Employers suffer from the discontinuity of health data and are frustrated about the access to data that could allow them to gain deep insights. Tools are not readily available to give employees the opportunity to compare prices, either. CHROs who offer price comparison services say that although these tools are evolving, health plans remain reluctant to share data.

Technological innovation in health care also lags because there is confusion regarding who is to pay for these new technologies. As Robert Pearl, M.D., CEO of the Permanente Medical Group, writes in *Forbes*, "Patients, physicians, hospitals and insurance companies long for the benefits and value of new technology. However, each thinks someone else should pay for it."^{xliii}

“ CHRO Quote: “...the biggest frustration is the fragmentation. We’re frustrated about the access to data that could allow us to gain really deep insights to be innovative in problem solving. While data won’t solve the problem, it is a ticket to entry to be able to manage health care better and engage everyone in behavior change which is critical to success.”

Consumerism and Employee Engagement Are Persistent Challenges

There is some degree of consensus that employees are suboptimal health care consumers and do little shopping or price comparison; this is, in part, due to the lack of effective consumerism resources at their disposal. Engaging employees to be health care consumers along all stages of an individual's health care continuum is a challenge facing all employers.

Health care is one of the few industries where consumerism does not come naturally. The fragmented health care sector, the lack of transparency in cost and quality, and the complexity of insurance concepts and terms make it difficult and time-consuming for the average employee to be an informed, thoughtful consumer of health care.

Employers see that when employees do shop around, it is typically only during enrollment period. Employees with high deductibles are given little incentive to price shop since they know insurance will not kick in until they have spent a certain amount of money on health care usage. HR executives as a whole believe there is a need to move toward more consumerism and in order to facilitate this, employees must be better educated on how to incorporate transparency and quality data into making specific health care decisions.

“CHRO Quote: “I am not sure how we expect employees and their families to decipher the system and use it well...unless they are a former Health and Human Services employee or HR person.”

The Affordable Care Act is Likely to be Changed in Significant Ways

Republicans have vowed to repeal and replace the law and following the 2016 elections, now have an opportunity to do so. The sustainability of the ACA's exchanges and the affordability of health care are likely to result in amendments to the law that could have a significant impact on employer-provided health benefits. As the U.S. health care system moves closer to the breaking point and policymakers search for revenue to sustain the system, the changes to the tax-preferred treatment of employer provided health benefits could have a profound impact on whether or not employers continue offering such benefits in the future.

Despite All of These Challenges, It Is Clear That the Future of ESI and Health Care Itself Hold Exciting Opportunities

The health care system will become increasingly more technology rich, personalized, high-quality, and efficient. The future of ESI will integrate

evolving technology that will allow employers to invest in the best plans and allow employees to become more adept consumers of health care.

Simple and usable real-time apps will continue to be used to engage employees in wellness initiatives. Employers will also increasingly utilize telemedicine and offsite and near-site clinics to bring wellness consumerism to the forefront.

A survey of large employer Chief Human Resource Officers found that while more than 90 percent of employers currently run employer-managed plans, almost 60 percent of them want—and expect—to move to an employer-facilitated model by 2020. Employers will still play an integral role in providing ESI, but they will not control all aspects of the provision of care. Employers are committed to remaining in the ESI system for a variety of reasons and recognize the changes that need to be made if that commitment is to continue.

In order to realize these exciting possibilities, it is important that the policy world recognizes the importance of ESI and takes steps to maximize its potential. With that in mind, the following policy initiatives will help secure the future of a productive ESI system.

Proposal: Repeal the Cadillac Tax

HR executives list the Cadillac Tax, the ACA's 40 percent excise tax on high cost health care plans, as a specific area of concern. By 2031, the cost of the average family health care plan is projected to hit the excise tax threshold.^{xliv} Employers should not be forced to offer lesser health benefits to employees in order to comply with the Cadillac Tax. The tax should be repealed.

Proposal: Protect the Tax Exemption of ESI

The employer deduction of ESI and the employees' ability to deduct their premiums on a pretax basis lowers the after-tax cost of health insurance for most Americans. 2017 will bring a change in White House leadership, and policymakers often look at the tax deductibility of ESI as a way to generate revenue. Unfortunately, such a change would likely reduce the number of employers offering ESI. One thing we have learned from recent years is that getting people covered is difficult and expensive. Employers, however, already cover most Americans and have been found to be very good at getting people covered. Policymakers should therefore avoid proposals that reduce the tax deductibility of ESI.

Proposal: Federal and State Governments Should Not Dictate What a Plan Should Look Like

Government mandates, regulations, and other policy issues may hinder employers' ability to be innovative in the way they provide health benefits. Policies surrounding health care can make it difficult for employers to promote consumerism. For example, the ACA forcing employers to have plans of equal design has been burdensome because there is no such thing as an "average plan member." Anything that dictates what a plan must look like is problematic because not all patients are equal. Some are sicker and require more care than others.

Proposal: Protections for Employer Plans That Cover Workers in Multiple States Should Be Maintained

Though federal laws get more attention and discussion, employers are also having trouble navigating state laws. Large employers struggle to differentiate how the laws apply in all fifty states because they have employees in many jurisdictions. This goes along with the importance of abiding closely with the Employee Retirement Income Security Act of 1974 (ERISA), telemedicine laws, and data release laws.

Proposal: Federal Policy Needs to Respect Fiduciaries' Rights to Health Care Cost Data

Employers, as health plan fiduciaries, have a duty to verify that the providers offering services under the plan meet the fiduciary's quality standards, and that the fees paid to the plan's service providers, including health care providers, are "reasonable" in light of the quality of health care services provided to the plan. Executing this duty is challenging without access to quality and pricing information from health care providers and carriers that would allow a plan fiduciary to weigh the benefits received under the plan against the cost of services for each particular health care provider. It is therefore in the best interest of plan participants that all fiduciaries have the unfettered right to access, analyze, and compare health care provider pricing and quality data.

WORKFORCE DEVELOPMENT AND TRAINING

IF THE AMERICAN workforce is to share in the benefits of economic growth in a global economy, it is essential that it has the tools to perform the work contributing to and generated by that growth. Yet, nearly 40 million working adults in America do not have a high school diploma—a number that will continue to grow as only 82 percent of high school students graduate. Of the high school graduates that take the

ACT, only 24 percent are “college ready” in Math, Reading, English and Science. Of those in the workforce, around 24 million frontline workers experience little to no upward career mobility, and are half as likely as their higher-ranking coworkers to receive training. With nearly 60 percent of low-skilled adults earn less than \$16,000 per year,^{xiv} the connection between skills and economic success is clear.

Meanwhile, each year employers have great difficulty hiring applicants with the skills they need to fit skilled trades and technical positions. For many of these positions, there is a lack of applicants, technical competencies among the applicants, experience, and/or soft skills. The impact of these skills shortages include, among others: lower productivity, less efficiency, higher expenses, less profit, and a harder time competing.

Low Skills Mean Lower Wages for U.S. Workers

60%

60 percent of low-skilled adults earn less than \$16,000 a year

Source: Department of Education, 2016

In the United States, Employers Pay for the Bulk of Formal and Informal Postsecondary Workforce Education and Training.

Of the \$1.1 trillion spent per year in education, training and development for workers in America, companies spend over \$600 billion. This number includes \$28 billion in tuition assistance, \$177 billion in formal training, and \$413 billion in employer-provided informal training.

This role is becoming increasingly important as the nature of the workplace is developing into one in which continual education is necessary for a strong career. With developments in technology, companies—and workers—must continually evolve in order to remain competitive. Many of yesterday’s skills no longer apply, and new skills are constantly needed. Because of this development, and the already significant dearth of workers for certain positions available, the U.S. is faced with skill gaps, many of which urgently need to be filled.

“CHRO Quote: “Traveling all over the world, talking with other governments and universities, it’s clear they have intense programs that are aligned with those countries’ goals of enabling their employers to compete in a global economy. The only place it doesn’t seem to have that level of commitment is the U.S.”

As Skill Gaps Emerge, Companies Are Faced with the Decision of Whether to “Build” the Skills of Their Existing Workers Through Education, Training and Development or “Buy” Skills by Bringing in Workers from Outside Organizations Through Such Means as Hiring, Contracting, Outsourcing or Offshoring

Employers must take into account a number of factors when considering between these options. For example, a company must discern the size of the span between existing skills and needed skills, the timeframe the company has to bring in the needed skills, how important it is to bring workers in who understand the company culture, and how often the workers’ skills are going to be needed.

Career Progression—Or Lack Thereof—Is the No. 1 Retention Incentive and the No. 1 Driver of Turnover, Respectively

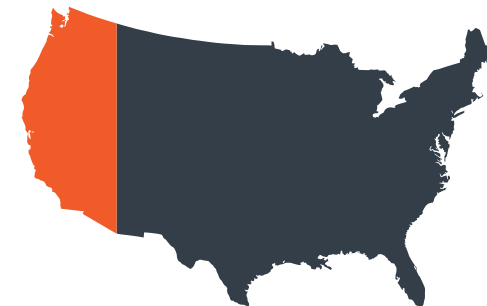
When asked what would keep them with their current employer, 54 percent of employees surveyed cited opportunities for promotion/ advancement over compensation, bonuses, benefits, or any other reason. Conversely, 28 percent cited “lack of career progress” as their top reason for looking for a new job, followed at 24 percent by “lack of compensation

increases,” “lack of job security,” and “lack of trust in leadership.”^{xlvi}

There Are a Number of Concerns with the Current Patchwork of Education and Training Programs Funded by the Federal Government

First, they are federally funded, state governed and locally run, which frequently leads to them being nearly impossible for large national employers to access. They offer little help to working adults because they run in isolation from the education, training and development funded by employers which are much more likely to be focused on in-demand

State of U.S. Labor Force



With a civilian labor force of over 158 million, over **20 percent** (nearly 40 million) of working adults in the U.S. lack a high school diploma and **36 million** have low literacy skills.

Source: Bureau of Labor Statistics, 2016 CLASP Survey of Adult Skills

skills. Lastly, they are run by government employees, who, although well-meaning, have very little experience business experience or experience hiring.

Proposal: Look for Ways to More Closely Align Federally Funded Programs and Tax Incentives with Privately Funded Education, Training and Development Programs Which Result in In-Demand Skill Development.

This could include:

- Increasing the cap on Section 127 education benefits to incentivize employers to invest more in educating their workers and to encourage workers to take greater advantage of employer provided tuition assistance programs.
- Creating ongoing subsidized employment programs with dedicated funding streams. According to a Georgetown University study, subsidized employment has proven over 40 years to be an effective way to get workers jobs because:
 - They provide an important source of income to participating workers.
- A number of experimentally-evaluated subsidized employment programs have successfully raised earnings and employment, with some programs providing lasting labor market impacts.
- Such programs have also decreased family public benefit receipt, raised school outcomes among the children of workers, boosted workers' school completion, lowered criminal justice system involvement among both workers and their children, improved psychological well-being, and reduced longer-term poverty.
- There may be additional positive effects, such as increased child support payments and improved health, which are being explored through ongoing experiments.
- Providing capacity building and expertise to state and local workforce boards to help them understand how they can spend up to 20 percent of Workplace

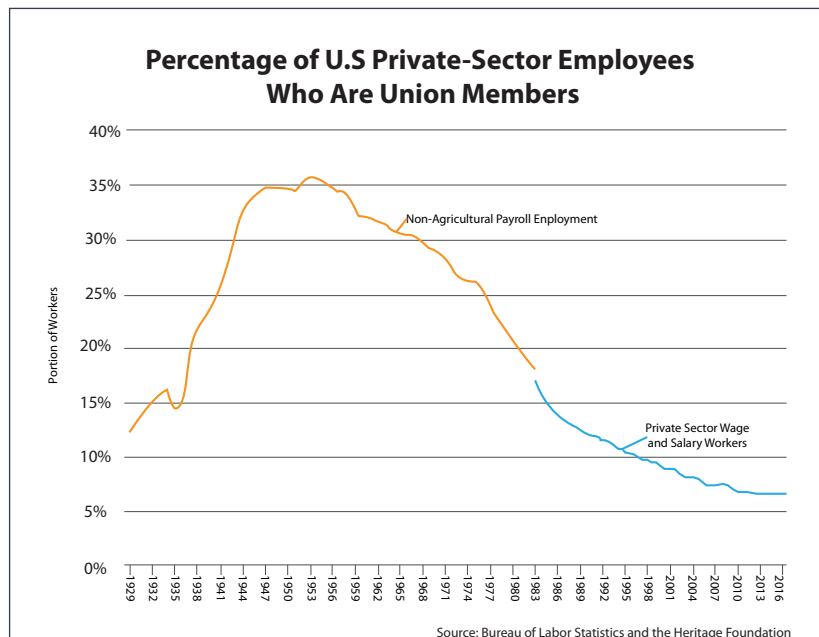
Innovation and Opportunity Act (WIOA) funds on incumbent worker training programs. This is a new opportunity allowed under WIOA that many boards and staff have not yet come to understand.

- Prioritizing the placement of jobseekers in positions with employers that develop the skills of their workers and provide opportunities for advancement.
- Educating students on alternative pathways to rewarding careers such as apprenticeship programs or certifications that do not require a four-year degree. Four-year degrees should not be promoted as the exclusive path to a productive career. With only 59 percent of students finishing a bachelor's degree within 6 years, millions of adults have been left with some college but no degree and in many cases, debt without the earning potential to repay student loans.^{xvi}

EMPLOYEE REPRESENTATION

POLICYMAKERS OFTEN PONDER the decline in union representation and some continue to offer proposals—or, in the case of the National Labor Relations Board, revise interpretations of existing policies—to bolster their numbers. These efforts seek to build upon our existing labor

law regime which, all too often, not only presumes (and dwells upon) conflict between labor and management, but also assumes that employees have only one way for their voice to be heard—through unionization. Yet, today's workplace is far more conducive than in previous eras to individual interactions between management and employees.



The Changes Occurring in the Workplace Are Wide-Reaching, and Are Forcing Employers to Change the Way in Which They Approach the Workplace on a Day-to-Day Basis

These changes are intertwined, presenting a need for an all-encompassing move toward change and modernization. The entering workforce is generally more individualized, focused more on advocating for specific social justice issues through social media platforms than on organizing unions to fight general workplace issues. As a result of this personality and relationship differentiation, employees are proving that they do not want to be “represented” as much as they want to tackle their own problems with their management supervisors. They are much more willing to use mediums such as social media, blogs, chatrooms, etc. to advocate for employment issues, rather than joining a union to advocate for them. This relationship change opens the door to much more interpersonal problem solving, which is changing the way that employers and employees handle problems that arise in the workforce.

Jobs once held by industrial workers needing comparatively little specialized training or education are largely controlled by machinery work, making the fastest growing employment opportunities professional, technical, and

managerial jobs that require specialized education or training. This transition in skill sets that employers need has also come with a desire for more recognition of the individuality of the employee through personalized problem solving and individualized bargaining.

Employers Who Fail to Adjust to New Realities Run the Risk of Negative Results, With Little to No Gain

Social media is increasingly becoming a popular tool of both employees and employers, adding to the repertoire of means with which to communicate with colleagues and subordinates alike. But the effect of this major change, and many others, is having differing impacts on employers. Employers face a fine balance in the use of social media. On the one hand, they have a legitimate need to preserve discipline in the workplace, protect against breaches of confidentiality and employee privacy, and preserve a climate of respect among employees, amid other legitimate concerns. Yet, if they ignore the value and importance of social media to their employees they run a risk of failing to address their legitimate needs. Indeed, employers are increasingly embracing the use of social media as a communication and employee engagement enhancement

More broadly, an employer who fails to achieve a positive level of employee engagement may experience a number of negative outcomes:

- First, and most importantly, employers run the risk of losing the best employees. Employees often place a higher priority on working where they feel that the employer cares about individual employees and are committed to community and global concerns rather than just focusing on their compensation level. If employers fail to adhere to the desired workplace environment of employees, they run the risk of losing their best employees to other businesses, possibly competitors, who choose to pay attention to those concerns.
- Next, employers run the risk of losing buyers and market share. Profits, financial stability, and production are still vital to an employer’s reputation, but how an employer treats its employees is becoming a focal point for not only future employees, but potential buyers of the employers’ products as well.
- Finally, where an employer ignores the need for employee engagement, the



labor laws continue to ensure the ability of their employees to form a union.

Because of the workplace realities employers are facing in these areas, there is no need for the National Labor Relations Board to take the expansive approach it has taken in “protecting” social media and other communications by employees. In many cases, the rulings by the Board have gone too far in protecting behavior that involves profanity, harassment of co-workers and other activity that employers should have the ability to discipline.

“CHRO Quote: “Social media will continue to play a larger role in influencing our employees. Information—whether fact or fiction—is now available 24/7, so our employees have instant access to the news and can readily discuss and share opinions throughout the day.”

Today’s Labor Laws Are Primarily Regulating Yesterday’s Workforce

One reason why fewer workers are interested in forming unions is that the labor laws in the United States assume conflict in the workplace to solve problems, presuming that the existence of economic weapons by both sides is what brings the parties to the negotiating table. The legal model of

the past is simply not compatible with an environment of successful employee engagement, where employees prefer cooperation over conflict. Meanwhile, where there is conflict, the institution of social media and other mediums has replaced traditional economic weapons without the threat of job loss.

“CHRO Quote: “In the area of employee representation, federal policy should promote collaboration and choice, not conflict.”

As the Workplace Changes, the Need for Union Representation is Steadily Declining, Even as Companies with Unionized Workforces Continue to Strive Toward Beneficial Cooperative Relationships

The continuing trend of a union downturn is due in large part to more enlightened and sophisticated human resource practices that view employee engagement as a critical component of business success, leading to less conflict than in previous eras. Meanwhile, where abuses do exist, a proliferation of federal, state, and local employment laws have created less of a need for additional third party protection. The likelihood of unions dissipating into non-existence is not high, but there is plenty of evidence to suggest that unions are not viewed

as a necessity like they once were. Meanwhile, where they are in place, large companies are committed to working with their employees’ unions to find solutions that make sense for both the employees and the business.

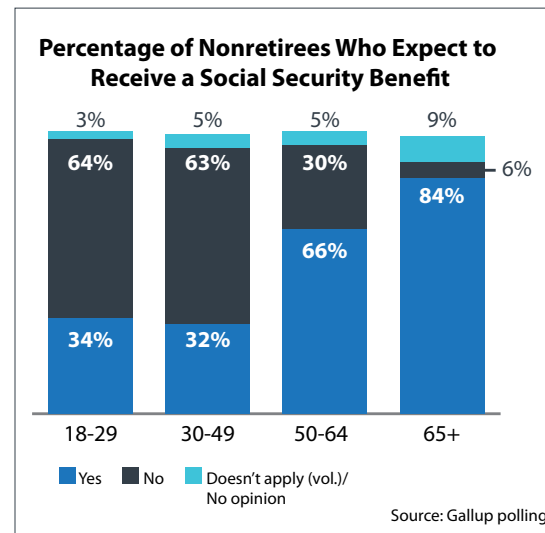
Proposal: Federal Labor Laws Should Be Premised on the Need to Ensure Employee Choice

The National Labor Relations Act has received very little statutory change since the 1959 amendments, despite repeated efforts by both labor and management to amend it. Given the likely political situation for the foreseeable future, the statute itself is likely to continue to remain unchanged for a long time, ensuring that the National Labor Relations Board will continue to play a critical role in applying the mid-Twentieth Century law to today’s workplace. A healthy, bipartisan dialogue regarding ways to update those laws to reflect today’s employees’ needs—if, in fact, a different kind of legal protection is even needed—would be a positive development, particularly if it resulted in greater stability in the law compared to the fluctuations experienced as a result of shifts in power in the executive branch. Moreover, the extent to which the existing law inhibits alternative forms of employee representation that do not involve traditional unions should be closely examined.

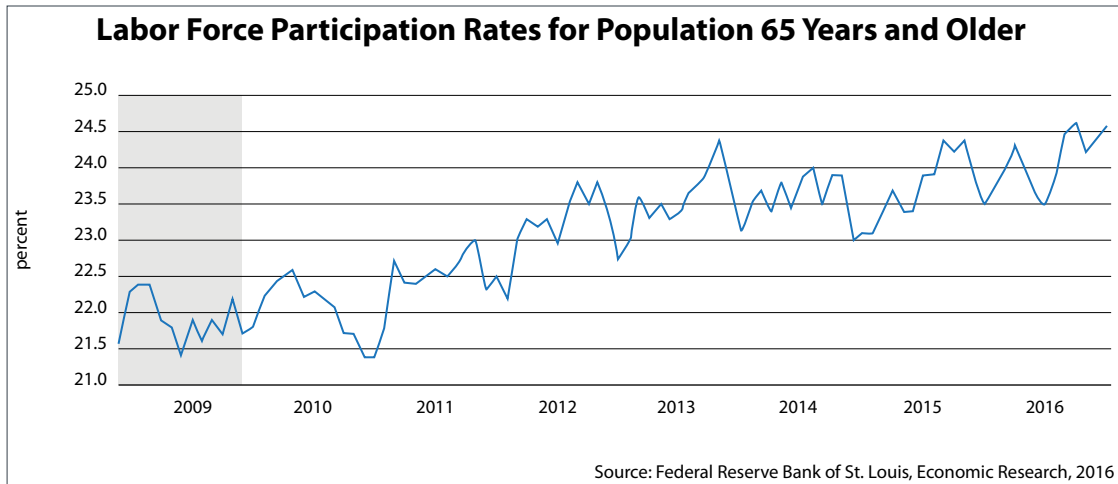
Meanwhile, though its premise of industrial conflict is dated, the existing law does present a legally protected option for those employees who choose to be represented by a union. That option should continue and employees who believe that their employer fails to listen to them—should continue to have the option of union representation. Having said that, efforts to provide an artificial boost to unions by reducing the ability of employees to hear all sides of the unionization issue and balkanizing workplaces into smaller units simply to ensure union victories should be firmly rejected. Similarly, efforts by the National Labor Relations Board to expand its regulatory authority by scrutinizing reasonable workplace policies that have little or no bearing on union organizing activity should also be forsworn. As a result of the 2016 election, there will likely be changes at the National Labor Relations Board providing a different perspective to the interpretation of the law. We are hopeful that this will quickly restore balance to the law, to the extent allowed by the statute. We are also hopeful that the NLRB will recognize that the statute it interprets and enforces does not exist in a vacuum that disregards cultural and economic realities.

AS AVERAGE LIFE expectancy is on the rise in the U.S. and globally, and the health of older employees is improving, workers are now capable of having longer careers—and many are. Additionally, employees are feeling far less financially secure and, as a result, they are delaying retirement, in many cases to an age well past that of their parents and even grandparents.^{xlviii} The Recession of 2008 particularly weakened senior employees' long-term financial stability. Between 2008 and 2011, a quarter of Americans aged 50 or older exhausted their retirement funds, and nearly half had trouble making ends meet. Three quarters of older Americans who are employed or have been in the past three years are afraid of depleting their retirement savings too quickly.^{xlix} The Employee Benefit Research Institute recently estimated that the aggregate national retirement deficit is a staggering \$4.13 trillion dollars.¹

A shift in expectations regarding retirement is not limited to older workers. Millennials tend to be more resigned than Baby Boomers and Generation X to the fact that they will have to financially support their aging parents and/or family members when the latter are retired. About two-thirds of Millennials expect their primary source of income in retirement to



RETIREMENT



be self-funded through retirement accounts or other savings and investments, and nearly none expect a defined benefit pension plan. Over 60 percent of Americans under the age of 50 and the majority of non-retirees do not think social security benefits will be available to them upon retirement.ⁱⁱ

We Are Seeing More Senior Employees in Today's Workforce Who Have Both the Ability and Desire to Have Longer Careers

Given their decades of experience, skills and knowledge, older workers are a valuable part of many companies' workforces. Much of the experience and wisdom they have gathered are best taught peer-to-peer rather than through training programs, the internet or school. Further, many older workers occupy positions for which succession planning is required and

most effectively accomplished through mentoring.

At the same time, many older workers have the desire to reduce their workload or hours, but still wish to contribute to their employer on a part-time basis. Many employers seek to accommodate their older workers through such arrangements.

“ CHRO Quote: “If we could allow a 58-year-old who wants to spend time away [from work] the opportunity to work 50 percent of the time and draw on pension—a lot of people would be doing that.”

Surveys show that Americans are not saving enough for retirement. Surveys also tell us that almost half of employees have less than \$2,000 set aside with many not even having a bank account. With the transition from

defined benefit plans to 401(k) plans for retirement accumulation, it is critical that federal law not inadvertently inhibit retirement savings. Today's IRS non-discrimination rules impose both an administrative burden and savings barrier on employers and employees alike. Especially hard hit are those individuals employed in the service sector, which is America's fastest job-growth area. Does it make sense to continue to impose artificial limitations on tax-advantaged savings when survey data tells us people are not saving enough? Are the artificial limitations embodied in the IRS non-discrimination rules really serving their purpose of increasing retirement savings or actually working to decrease it? We believe it is the latter.

Legal Obstacles Prohibit Employees from Collecting a Defined Benefit Retirement Check While Remaining Employed by the Same Employer

This can only be done in the case of a qualified pension plan where the employee works until at least age 62 or the normal retirement age defined by the plan. For employees eligible for a supplementary pension, IRS Code 409A generally only allows continued employment once the supplementary pension is triggered if the employee is limited to working no more than 20 percent of his prior work schedule.

Some defined benefit plans allow for the continuation of pension payments upon re-employment of a retiree up to certain limits (e.g., 1,000 hours) following a “bona fide” break in service. As a result, many employers require this break to be a minimum of 6 months, if not a year.

“CHRO Quote: “Our approach [to retirement benefits] is both portable and rewards long and short service. It is more flexible for a workforce that is multi-generational with divergent expectations of careers and work.”

By 2020, by far the largest cohort of retirees will be from the baby boomer generation, who will retire at a rate of 10,000 per day until 2029. A break of this duration disrupts the retirees’ most useful working period—that which allows another employee to learn the ropes while the retiree is available and the employer is not compensating two individuals for a single job. This “break in service” requirement is an impediment to getting the best ongoing output from senior employees who wish to step down their working time, vacate their full-time position for one that is more of a mentoring or consulting role, and also collect their retirement income.

Many Employers Have Replaced Defined Benefit Plans with 401(k) Plans for Financial Reasons and in Order to Permit Increased Employee Mobility While Allowing Employees to Save for their Retirement

Since money can be withdrawn from 401(k) accounts after age 59-1/2 if the plan so provides, these retirement arrangements do not present the same legal obstacles to reemployment of retirees as do those under defined benefit plans.

Proposal: The Law Should Be Changed to Enable Employees to Collect Defined Benefit Plan Retirement Income Earlier While Permitting Them to Continue to Work for Their Employer

Ideally, no “bona fide” break in service would be required. From a pay equity perspective, the employer should be permitted to take credit for half of the retirement income in relation to the pay for the post-retirement job rate if such employment is full-time, and no such setoff if the retiree’s position is 50 percent or less per week of his/her prior work schedule.

Proposal: To Re-Invigorate Existing Defined Benefit Programs, Congress Should Repeal the 50 Percent Excise Tax on Asset Reversions and Make Other Legislative Changes That Would Financially Encourage Employers to Overfund Their Pension Plans

For example, public corporations should be able to use excess pension assets to fund their dividend payments tax-free to shareholders provided the pension plan has sufficient assets. Congress should allow commercial insurance carriers to underwrite pension obligation in the event of the plan sponsor’s bankruptcy, which would force the Pension Benefit Guaranty Corporation to be competitive. Congress should also allow private employers to merge their pension programs to gain administrative purposes. A few states are looking at creative IRA-based programs, but the initiative needs to be expanded.

Proposal: Employers Should Be Encouraged to Develop Practices and Policies That Enable Retired Employees to Remain Employed After Retirement or After a Limited “Bona Fide” Break in Service Without Violating the Age Discrimination in Employment Act (ADEA)

The Department of Labor should initiate and facilitate the appropriate regulatory agencies to take action to make sure any regulatory requirements applicable to a phased retirement program strike a reasonable balance between protecting employees and not imposing unnecessary requirements on employers that could undermine the goal of increasing phased retirement opportunities. Amendments to the ADEA, and preemption of similar state and local laws, may be required to provide employers with minimal administrative responsibilities and legal protection against claims for age discrimination. This would be due to the fact that such employees would be rehired after voluntary retirement.

WORKPLACE SECURITY

NEW TECHNOLOGIES, WHICH generally increase productivity and quality of life, are also providing a means through which sensitive information can be stolen or manipulated by threats from all over the world, including from within the United States. Separately, the tragic spate of mass killings in the U.S. and abroad has employers creating strategies to mitigate the harm of the unthinkable. Overlapping with this issue, the borderless nature of

modern international conflict brings international unrest to employers' doorsteps, creating further security challenges. These threats face all U.S.-based companies, and are significant enough to endanger not only workers and company property, but national security and competitiveness as well.

Most Companies Work with Governments and Private Firms to Train Employees for the Unlikely Event of Physical Workplace Violence

Additionally, they are generally eager to share best practices with other companies in order to bolster security within and across industries. Due to the unpredictable nature of these threats, information on how best to proactively protect against them is highly valued. Examples of this include a page on the HR Policy website entitled "Active Shooter Prevention and Preparedness,"

Members Use Variety of Resources for New Workplace Security Measures



28%

State/local/federal law enforcement programs



23%

Outside consulting firms



48%

Programs developed in-house



0%

Other

Source: HR Policy Association 2016 CHRO Survey

where a number of companies offered resources and insights about their specific strategies.

“ CHRO Quote: “I feel like you can never be secure enough. We’re doing everything we can to prevent being hacked, but we’re preparing for the eventuality.”

Companies Are Exposed to Both Internal and External Cybersecurity Threats, Against Which They Are Using a Variety of Tactics

According to the Office of the National Counterintelligence Executive, economic espionage costs the American economy “tens or even hundreds of billions of dollars annually.”ⁱⁱⁱ To mitigate internal cybersecurity threats, some employers have implemented a formal process for auditing removable media activity, email, and cloud activity. Because this can be done using existing technology, resources required for starting such a program are minimal. Companies who have set up these types of programs tend to experience quick success stories that can be used to justify program expansion. Many companies use training programs to inform employees to be aware of cybersecurity threats.

Member Strategies in Mitigating Insider Cybersecurity Threat



Source: HR Policy Association 2016 CHRO Survey

“ CHRO Quote: “Probably the biggest thing for us is changing policy and practice internally. The hygiene people need to go through is going to feel like bureaucracy, even down to prohibitions on putting in unknown thumb drives.”

While Internal Cybersecurity Threats Can Be Formidable, It Is the External Threats Which Can Prove Highly Difficult, If Not Impossible in Certain Cases, to Guard Against

A number of companies have made efforts not only to guard against such attacks, but also to train workers for the eventuality. Given the high level of difficulty in preventing external cybersecurity threats, companies would benefit tremendously from a legal infrastructure designed to aid them in these efforts.

Proposal: Faster Intelligence Investigations and More Resources Are Needed to Stop Intellectual Property Theft and Cyber Crimes

Once potential economic espionage is detected by a company, it can take more than a year for investigations to be conducted by the FBI before the subject is arrested. In the meantime, the subject could leave the U.S., which would leave the company with no recourse for recovering their IP before it can be distributed. While the intelligence community provides extensive training, documentation, and other support to defense contractors in support of efforts to mitigate espionage, all companies in critical infrastructure need assistance as soon as possible in recognizing radicalization behaviors in the workplace, in addition



to technical indicators of employees accessing dangerous groups' recruiting videos, communicating with twitter accounts known to be associated with their recruiters, and so on.

A significant concern is the government's lack of resources when it comes to investigating and prosecuting reported intellectual theft. An FBI agent who recently spoke about the government's anti-corruption crackdown shared that the agency is adding significant personnel resources to investigate allegations of bribery and FCPA violations. However, employers hope and expect that the government would also add resources to stop intellectual property theft and other cybercrimes, which the NSA director concedes are the cause of the "greatest transfer of wealth in history."ⁱⁱⁱⁱ

Proposal: U.S. Government-Facilitated Education of Other Governments on Issue of Employee Privacy Laws

Employee privacy laws in the U.S. facilitate formal insider threat mitigation programs. However, privacy laws in Europe make this extremely difficult for companies that operate globally. Were the EU to recognize the implications of their employee privacy laws, significant threats could be stopped.

WHILE IMMIGRATION REFORM continues to be mired in legislative gridlock, companies face serious challenges as a result of the existing law's inadequacies. Many companies continue to experience difficulty finding sufficient workers to fill both lesser-skilled positions and high-skilled ones, depending on industry, season, and demand, among other factors.

However, the U.S. debate over immigration reform often fails to place immigration policy in the broader context of competitiveness. In recent decades, policymakers have largely failed to adjust immigration rules to admit the manpower—from Ph.D. scientists to unskilled workers—that U.S. companies require to compete and grow. The consequences of inaction negatively affect both our national economy and global competitiveness.

“ CHRO Quote: “We have seen labor shortages particularly when it comes to professionals (that is, software engineers, etc.) due in large part to the fact that the most commonly used visa for such workers, the H-1B, is severely limited.”

Arbitrary and Inflexible Caps On the Number of Annual Visas Ignore Market Realities

The government simply lacks the ability to determine the skills needed to fill the multitude of varied and constantly changing jobs in the U.S. economy. The global labor market, on the other hand, tends to efficiently regulate the flow of workers seeking to enter a new country in times of scarcity or prosperity. Caps only serve to interrupt this self-regulated flow of workers to the detriment of the domestic economy.

IMMIGRATION

The United States Must Avoid Enacting Legislation or Issuing Regulations that Impose Additional Restrictions on Visas

Doing so would only further dampen an already slow economic recovery. Measures that would prove particularly damaging include not only imposing impediments on H-1B visas, but those issued under the L-1 program as well. Proposals that seek to cap the L-1 program, or impose location and unrealistic compensation restrictions on L-1 employees, would do much to unravel what steps the United States economy has taken to recover and strengthen since the Recession.

Proposal: Flexibility Should Be the Lodestar of Immigration Policy Allowing for the Optimal Number of Skilled and Unskilled Workers Traveling to and from the United States

A rational system would allow both workers and employers options to

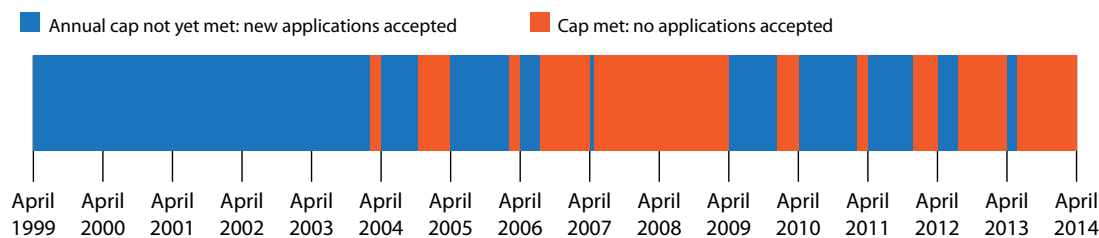
create the greatest value for their companies and their families. This could be achieved in a number of ways, including, among others:

- Providing foreign students who acquire advanced degrees in STEM disciplines at American higher education institutions a path to U.S. citizenship if they wish to use their talents in America rather than return to their country of origin. It is unfortunate, to say the least, that we often send students trained at American universities to other countries to compete against us. Authorizing permanent residency to such students and exempting them from numerical limitations on H-1B visas would be a first step toward fixing this problem.
- Allowing professionals to transition from temporary to permanent status after a

period of contributing to the American economy, which would harness, rather than hinder, labor market forces to the broad benefit of the United States. Although business is now conducted internationally, current immigration policy frustrates American companies' ability to compete. There is a fundamental, structural mismatch between the size of existing temporary programs—including H-1B, H-2B, TN, O, and L-1—and the number of permanent visas available for employment-based immigrants with college degrees.

- Establishing green card reform and the implementation of temporary worker programs for high-skilled and low-skilled workers. Such a system would be more demand driven, reflecting the actual labor needs that employers are facing, while maintaining appropriate protections for U.S. workers. The current system of arbitrary, inflexible caps only impedes the market from filling labor needs, to the detriment of the economy.

Demand Outstrips Supply for H1-B Visas



Source: Brookings Institute, 2014

A NEW BEGINNING

The advent of a new administration creates an opportunity for a fundamental review of American employment policy, with a view towards reshaping it to fit the needs of today's workplace as well as that of the future. We have titled this report *Workplace 2020*, thus tying it to the end of the first term of the new President and the beginning of the third decade of this century. If we were to adjust the title to reflect the existing workplace regulatory regime, we would be hard-pressed to find a date that would not substantially precede the period in which the majority of our workforces were born. As in so many other areas, this poses a challenge for all policy-makers—both governmental and corporate—to allow the development by major companies of the kinds of workplaces that will both meet workers' preferences and ensure a competitive American economy.



The Association of Chief Human Resource Officers



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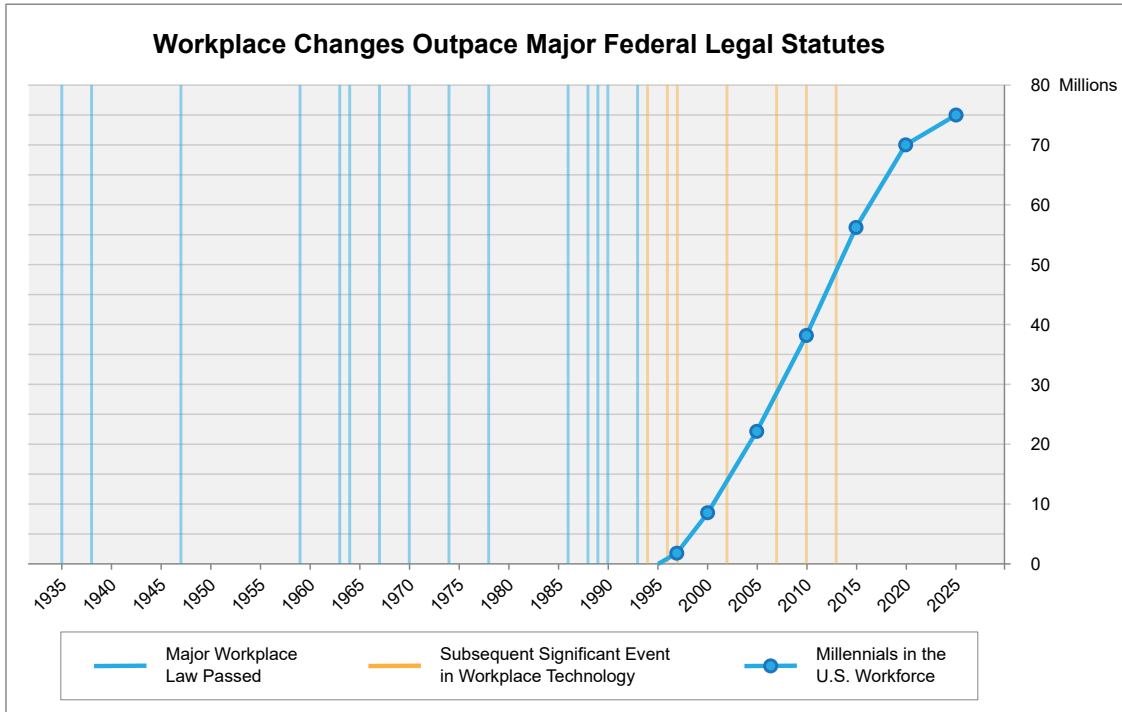
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Workplace Changes Outpace Major Federal Legal Statutes



Subsequent Significant Event in Workplace Technology

- 1994: First Commercial Web Transaction
- 1996: Web becomes world’s biggest online community with 36 million users
- 1997: Broadband begins to make appearance in homes
- 2002: First social networking site launches
- 2007: Apple releases iPhone
- 2010: Two billion people on the Web.
- 2013: Majority of Americans own a smartphone

Major Workplace Laws Passed

- 1935: National Labor Relations Act
- 1938: Fair Labor Standards Act
- 1947: Taft-Hartley Act
- 1959: Landrum-Griffin Act
- 1963: Equal Pay Act
- 1964: Title VII, Civil Rights Act
- 1967: Age Discrimination in Employment Act
- 1970: Occupational Safety and Health Act
- 1974: Employee Retirement Income Security Act
- 1978: The Pregnancy Discrimination Act
- 1986: Immigration Reform and Control Act
- 1988: Worker Adjustment and Retraining Notification Act
- 1989: Whistle Blower Protection Act
- 1990: Americans with Disabilities Act
- 1993: Family and Medical Leave Act