

2022 HR Policy Update and Outlook

As of August 30, 2022

Political Overview

Abbreviated legislative schedule; expect more agency activity

Congress is only in session for the next three weeks, before adjourning for district work period/campaigning during the month of October

Expect Congress to spend most legislative days considering must-past legislation before year-end (funding the government beyond September 30 and a year-end extenders package)

Anticipate more agency regulation, whole of government approach (including from agencies not traditionally involved in labor and employment issues)

If Democrats maintain the majority in the midterm elections, there will be a renewed interest to change the Senate filibuster rules. Changing the rules would allow Leader Schumer to pass legislation with a simple majority (51 votes). If the Senate filibuster rules are changed, and only requires a simple majority we will see many more bills impacting labor and employment passed and ultimately signed by the President.

Fall 2022 HR Public Policy Outlook



Midterm Congressional Elections



USDA Blacklisting Regulation
Could broadly exclude any USDA federal contractor, subcontractor or supplier that has violated any labor law



Potential Rulemaking from DOL, NLRB, SEC
DOL – Overtime and Independent Contractor;
NLRB – Joint employer;
SEC – Human Capital Metrics



Behavioral Health and Telehealth
Possible agreement on new mental health legislation could be accomplished before year end. Congress could also pass bill to extend several COVID-related telehealth flexibilities



Lame Duck Session
Must-pass legislation and year-end extenders bill could be vehicles for workplace provisions

Pending Legislative Issues

The National Defense Authorization Act (H.R. 7900)

The Pregnant Workers Fairness Act (H.R. 1065/S. 1486)

The Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842/S.420)

Paycheck Fairness Act (H.R. 7/S.205)

Forced Arbitration Injustice Repeal (FAIR) Act of 2022 (H.R. 963/S.505)

The Wage Theft Prevention and Wage Recovery Act (H.R. 7701/S. 4174)

The Workforce Mobility Act (H.R. 1367/S. 483)

American Data Privacy and Protection Act (H.R.8152/Senate discussion draft)

Paid leave (White Paper?)

Mental Health/Telehealth

Drug Pricing Transparency, Dialysis Benefits

The National Defense Authorization Act

Passed the House on July 14, by a 329-101 bipartisan vote

FLSA Blacklisting of Federal Contracts, offered Rep. Pramila Jayapal (D-WA)

Would require that federal agencies begin debarment proceedings against federal contractors that have committed two or more violations of the Fair Labor Standards Act within the past five years

Blacklisting of Federal Contracts under the National Labor Relations Act (NLRA), offered by Rep. Mondaire Jones (D-NY)

Would prohibit the DOD from contracting with any company found to have violated the NLRA in the last three years or any company under investigation for violations of the NLRA at the time of the contract award

Forced Union Neutrality/Eliminate Non-union contractors from DOD contracts, offered by Rep. Jan Schakowsky (D-IL)

Would establish a preference for DOD offerors that meet certain qualifications relating to labor relations, including those that enter into union organizing neutrality agreements

OUTLOOK: A vote is pending in the Senate.

HRPA Position: The Association sent a letter of opposition to the labor provisions inclusion in the House version of the NDAA. The Senate will consider its version of the NDAA, and the Association will conduct targeted meetings and send a letter to continue to oppose and voice concerns regarding these provisions.

The Pregnant Workers Fairness Act

Passed the House on May 14, 2021, by a 315-101 bipartisan vote

Would require employers to provide "reasonable accommodations" for pregnant employees and job applicants. Specifically, employers would have to provide reasonable accommodations to employees and job applicants for pregnancy, childbirth, and related medical conditions, unless such accommodations create an undue hardship for employers.

The reasonable accommodation standard and associated protections contemplated by the PWFA largely resemble what employers are currently required to do for employees with disabilities under the Americans with Disabilities Act (ADA). The ADA does not consider pregnancy a disability.

OUTLOOK: A vote is pending in the Senate.

HRPA Position: The Association has been a vocal supporter of the bill as a much-needed update to employment discrimination law that effectively clarifies an employer's accommodation obligations in accordance with already existing law.

The Protecting the Right to Organize (PRO) Act

Passed the House on March 9, 2021, 225-206 (5 R's)

Card check elections
First contract arbitration
Legalization of secondary boycotts
Removal of procedural rights for employers in
Ban on right to work laws
Codification of the ABC test for independent
Personal liability for corporate reps
Ban on class action restrictions in arbitration agreements
Ban on captive audience meetings

OUTLOOK: The PRO Act’s chances in the Senate remain uncertain. It is likely that Senate Democrats may pursue a vote in September on the PRO Act. However, the bill will require 60 votes, including the support of 10 Republicans, which is not likely. Regardless, President Biden could implement several of the PRO Act’s provisions on federal contractors through EO (Biden Labor Task Force), while others could be imposed on all employers through regulation (such as IC status).

HRPA Position: The Association has consistently voiced its opposition to the PRO Act as legislation that does not actually meaningfully update federal labor law, but instead serves merely as a union wish list that tips the labor relations balance towards organized labor.

Paycheck Fairness Act

Passed the House on April 15, 2021, 217-210 (1 R)

Significantly increases employer liability to pay discrimination lawsuits

Under the PFA, “sex” is defined to include “sexual orientation or gender identity”

Severely limits ability to use traditional, legitimate pay factors

Prohibits wage history inquiries and prevents employers from limiting wage

Increases damages for gender pay discrimination lawsuits and increases class

Brings back collection of pay data and other wage-related data by the EEOC

OUTLOOK: The PFA stalled in the Senate, failing to receive a single Republican vote out of the ten needed to overcome the filibuster. The PFA’s failure to get past the filibuster in the Senate means its chances of becoming law anytime soon are doubtful – it is also likely ineligible to be packaged as part of a reconciliation bill. Nevertheless, the pay data collection provisions of the bill are likely to be taken up by the EEOC.

Forced Arbitration Injustice Repeal (FAIR) Act

Passed the House on March 17, 2022, by a vote of 222-209

Would ban mandatory pre-dispute arbitration agreements related to employment, consumer, antitrust, or civil rights matters, with few exceptions.

Contains a stipulation that parties could voluntarily agree to arbitration after a dispute arises. In addition, the legislation would exempt collective bargaining agreements between employers and labor organizations.

OUTLOOK: The FAIR Act awaits action in the Senate, where its prospects for passage are slim. To date, the Senate Judiciary Committee, which has jurisdiction over this issue, hasn't acted on the companion legislation, S. 505.

HRPA Position: The Association will continue to reach out to Senators and their respective staff to educate them about the use of arbitration agreements in employment settings and advocate against enactment of the FAIR Act into law.

The Wage Theft Prevention and Wage Recovery Act

The House Education and Labor Committee passed the bill by a party-line vote of 27-19 on May 18, 2022

Would drastically increase penalties and liquidated damages for FLSA violations—in some cases by as much as 5,000%—and extend the statute of limitations for FLSA claims;

Removes the “opt-in” requirement for FLSA class action claims—workers would be automatically included in class action claims unless they affirmatively opt out; and

Prohibits pre-dispute arbitration agreements in employment contracts.

OUTLOOK: It is unclear when the bill will be given a full floor vote in the House, where it would likely pass. This would fit with the House leadership’s strategy of showing productivity in a number of areas before the election, notwithstanding the gridlock in the Senate preventing such bills from becoming law.

HRPA Position: Prior to the Committee’s vote the Association voiced strong opposition to H.R. 7701, highlighting the practical realities of FLSA compliance and deficiencies of the bill.

The Workforce Mobility Act

No legislative action on proposal (yet)

Would prohibit the use of noncompete provisions in employment agreements except in cases where a business is sold or in partnership dissolution situations.

The bill places enforcement responsibility on the Federal Trade Commission (FTC) and the Department of Labor (DOL) while including a private right of action.

OUTLOOK: The impact of noncompete agreements on competition in the labor market remains a top priority of the Biden administration. Anticipate regulatory action from the FTC, possibly in Q1 of 2023.

HRPA Position: HR Policy Association will continue to inform policymakers on the legitimate business use of noncompete agreements and will advocate against proposals to limit and/or ban such uses.

FTC Non-Compete Agreements

President Biden's Executive Order states non-compete agreements are a "barrier to competition"

Includes a directive to the Federal Trade Commission to issue regulations to "limit or ban noncompete agreements"

Several states and localities have already banned non-competes, including CA, ND, OK, and DC, while others, such as IL, MD, and MA have restrictions on their use for lower income employees

OUTLOOK: FTC Chairwoman Lina Khan said the agency is considering a new regulation via a rarely used FTC authority, a section of the 1914 FTC Act, which says "unfair methods of competition in or affecting commerce" are illegal to restrict the use of noncompete clauses by companies, which she said hurt lower-wage workers and can stifle competition for talent.

HRPA Position: The Association will continue to advocate against an outright ban on the business use of non-compete agreements.

American Data Privacy and Protection Act

The House Energy and Commerce Committee passed the bill by a bipartisan vote of 53-2 on July 20

HR data not covered—for the most part. Applicant data, employee business contact information, emergency contact information, and information related to an employee necessary for administering benefits exempted

Large companies would be required to annually submit to FTC impact assessments of algorithms used in the employment context

PROA: Limited to compensatory damages, injunctive relief, declaratory relief, and attorney's fees and litigation costs

Preemption: Bill would preempt state laws—not including a long list of exemptions

CEOs, chief privacy officers, and chief information security officers to annually and personally certify compliance to the FTC

OUTLOOK: The bill is a significant show of bipartisanship for a federal privacy and data security standard. However, given the limited amount of time left on the legislative calendar, and opposition from some Senate Democrats and a number of business groups, it faces a tough uphill battle this Congress.

Paid leave (White Paper?)

HWM Draft Paper

Reduce compliance burden by allowing multi-state employers to opt-in to a national paid leave standard accessible through a voluntary annual fee; and

Use employer fees to create a grant fund that expands access to paid leave by targeting gaps in coverage, specifically for small businesses and low-wage workers.

Five-year phase-in period to establish a balance in the Trust and determine size of grant program/set-aside based on employer take-up and fees.

OUTLOOK: Likely to serve as a proposal in the 118th Congress. Committee staff is soliciting feedback to help inform the development of a paid leave white paper to be circulated this Fall.

HRPA Position: The Association will continue to engage to provide direct feedback on the concept paper and to help with the development of a white paper and ultimately, legislative text.

Mental Health/Telehealth

Restoring Hope for Mental Health and Well-Being Act of 2022 (H.R. 7666)

Reauthorizes federal treatment and recovery programs and improves integration of BH and primary care (includes HR 5218)

Mental Health Reform Reauthorization Act (S. 4170)

Reauthorizes expiring federal mental health and substance use disorder programs

Excellence in Mental Health and Addiction Treatment Act

Expands funding to every state for Certified Community Behavioral Health Clinics

Mental Health Matters Act (H.R. 7780)

Doubles budget for parity enforcement and creates private right of action for parity claims; HRPAs opposes

OUTLOOK: Lawmakers are under pressure to pass a comprehensive mental health and substance use package but are struggling to reach agreement on combining several bipartisan bills into one package. Provisions that increase parity enforcement are generally not supported by Republicans and could stall movement.

Drug Pricing Transparency, Dialysis Benefits

Tracking several pieces of legislation aimed at increasing drug transparency and competition, and ESRD benefits

Pharmacy Benefit Manager Transparency Act of 2022

Restoring Hope for Mental Health and Well-Being Act (Sec. 602)

FTC investigation into PBM practices, but unclear if Congress will move any legislation re: the FTC's report

Restore Protections for Dialysis Patients Act

OUTLOOK: Bipartisan interest in increasing transparency, but legislation will only move if tied to larger bill or must pass legislation in lame-duck session.

HRPA Position: The Association and EmployersRx coalition focused on provisions which reduce drug costs by prohibiting anticompetitive practices and enhancing price transparency.

Regulatory Agenda

DOL Independent Contractor

DOL Overtime Rule

EEO-1 Component 2 Pay Data

EEOC Wellness Program Incentives

DOL Mental Health Parity Requirements

Other Health Care Rules

NLRB Activities

FTC Non-competes

SEC Human Capital Metrics

SEC Pay for Performance

DOL Independent Contractor

NPRM forthcoming

The DOL [announced](#) that the Wage and Hour Division will be issuing a notice of proposed rulemaking to address the distinction between independent contractors and employees under the Fair Labor Standards Act.

OUTLOOK: The DOL independent contractor proposal is currently at OIRA for review and has been since July 5. Review could finish any day, and the rulemaking will be published in the *Federal Register* shortly afterwards.

HRPA Position: The Association will plan to submit formal comments and will continue to urge the agency to provide employers with clear guidance on a standard for determining independent contractor status.

DOL Overtime Rule

NPRM forthcoming

The Wage and Hour Division is slated to issue a proposal amending the regulations “which implement the exemption of bona fide executive, administrative, and professional employees from the Fair Labor Standards Act’s minimum wage and overtime requirements.”

OUTLOOK: The DOL is targeting October 2022 to publish a notice of proposed rulemaking for interagency review in October, according to the Spring Regulatory Agenda.

HRPA Position: The Association will plan to submit formal comments and will continue to urge the agency to delay any changes to the overtime rules, given the current post-pandemic state of the U.S. economy and its continuing supply chain and inflationary challenges.

The Equal Employment Opportunity Commission



CHARLOTTE A. BURROWS (D)
CHAIR
TERM ENDS JULY 1, 2023



JOCELYN SAMUELS (D)
VICE CHAIR
TERM ENDS JULY 1, 2021



JANET DHILLON* (R)
COMMISSIONER
TERM ENDS JULY 1, 2022



ANDREA LUCAS (R)
COMMISSIONER
TERM ENDS JULY 1, 2025



KEITH SONDERLING (R)
COMMISSIONER
TERM ENDS JULY 1, 2024



GWENDOLYN YOUNG REAMS
ACTING GENERAL COUNSEL

* Dhillon is continuing to serve as a Commissioner past her term deadline pending Kalpana Kotagal full Senate confirmation

EEO-1 Component 2 Pay Data

**Activity expected
late 2022 or early
2023**

The EEOC-commissioned National Academies study examined EEOC's 2018 pay data collection and concluded that while the process is flawed, pay data "may be used effectively." The report noted that job categories are outdated, pay bands overly wide, and total compensation only partially reflected.

OUTLOOK: A Democratic-majority EEOC is likely to collect pay data from employers, whether through a formal rulemaking process or not.

HRPA Position: The Association has an opportunity to influence the EEOC to update its job categories (and inform the Commission on what those categories should be) for a more usable form. The Association will also advocate that the EEOC engage in a formal rulemaking process if it decides to collect pay data.

What is EEO-1 Component 2?

The EEO-1 report consisted of two components:

Component 1, or demographic data (employees broken down by gender, race/ethnicity, job category)

Component 2, or pay data (employees' W-2 income information broken down by gender, race/ethnicity, job category)

EEOC Wellness Program Incentives

**NPRM expected
late 2022 or early
2023**

In January 2021, the Biden administration withdrew proposed wellness rules that would have imposed a “de minimis” incentive limit (such as a water bottle or gift card of modest value) for certain employee wellness programs that include disability-related inquiries and/or medical examinations until EEOC chair, Charlotte Burrows could review issue. GOP appointees currently hold a 3-2 edge at the EEOC until Kalpana Kotagal is confirmed or December 31, 2022.

OUTLOOK: Once Democrat appointees hold a majority on the commission, we expect the EEOC to propose new rules.

HRPA Position: The Association will continue to urge the Commission to work with employers to develop guidance that recognizes both the significant value of wellness programs and Congress' intention to encourage and expand wellness programs under the ACA.

DOL Mental Health Parity Requirements

Proposed guidance expected this year

The Consolidated Appropriations Act of 2021 requires the Labor Department to publish a detailed “compliance program guidance document” for employers that provides examples of compliance and noncompliance with DOL’s parity analysis requirements. A January 2022 DOL report to Congress found none of the parity analyses employers initially submitted to DOL in 2021 contained sufficient information to find compliance. The report also recommended Congress enact civil monetary penalties for parity violations.

OUTLOOK: DOL is expected to release proposed parity guidance in the coming months and ask for public comments on the proposal. The next parity report to Congress, coming early next year, is expected to name companies DOL has determined violated their parity obligations.

HRPA Position: The Association opposes civil monetary penalties for parity violations, which DOL has proposed, and the Strengthening Behavioral Health Benefits Act, which enables plan participants to bring civil actions over parity complaints. It’s unclear if the Senate has 60 votes to enact either measure.

Other Health Care Rules

These are likely to impact employer health plans

IRS Family Glitch Fix: May increase employer reporting requirements under the ACA

Advanced Explanation of Benefits: Will require health plans to provide an AEOB to covered patients for all scheduled services prior to services being rendered, regardless of whether the services are in or out-of-network

Transparency in Coverage: Machine-readable drug pricing file must be publicly available and other pharmacy supply-chain transparency reporting requirements

Provider Directory Accuracy: Will require quarterly review and possible update

Improved Fee Disclosure for Welfare Plans: Guidance regarding service provider disclosure requirements for employer health plans

OUTLOOK: These proposed and final rules (IRS family glitch) are expected to be published over the next 12 months.

National Labor Relations Board (NLRB)



Gwynne Wilcox (D)
Member
Term Expiration – August 28, 2023



Lauren McFerran (D)
Chairman
Term Expiration – December 16, 2024



David Prouty (D)
Member
Term Expiration – August 2026



Jennifer Abruzzo (D)
General Counsel
Term expiration – July 22, 2025



Marvin Kaplan (R)
Member
Term Expiration – August 27, 2025



John Ring (R)
Member
Term Expiration - December 16, 2022

NLRB Activities

5 decisions impacting the workplace pending and joint employer proposed rule

Significant decisions impacting:

1. Workplace rules and policies (Stericycle, Inc.)
2. Bargaining unit sizes (American Steel Construction, Inc.)
3. Independent contractor status (Atlanta Opera, Inc.)
4. Consequential damages (Thryv, Inc.)
5. Arbitration agreements, confidentiality agreements (Ralph's Grocery)

A proposed rule on joint employer status under the NLRA which is likely to return to the Obama-era standard, under which indirect or potential control could be indicative of joint employer status

OUTLOOK: Anticipate increased action by the Board this Fall, especially before Member Ring is set to complete his term by December 31. The Board is expected to issue decisions on the above-mentioned cases before year-end. In addition, the Board will engage in rulemaking on the standard for determining whether joint employer status under the National Labor Relations Act (NLRA).

HRPA Position: The Association submitted amicus briefs in the above-mentioned cases and will submit comments for the joint employer rulemaking. The Association will continue to engage the NLRB to ensure practical employer perspectives on key labor issues are heard.

FTC Non-competes

Proposed rule expected

While the FTC's Spring Regulatory agenda does not include a targeted date for proposed rules for a proposal to prohibit and or limit non-compete clauses in employment agreements, we anticipate that there will be action soon now that the Commission has a full slate of Democratic Commissioners.

OUTLOOK: The FTC could issue a notice of proposed rulemaking this Fall or Q1 of 2023. The Association's Center staff is meeting with the Commissioners in anticipation of a proposed rule.

HRPA Position: The Association continues to educate policymakers, including FTC Commissioners and policy staff on the business utilization of non-compete agreements, especially for executives and for employees with access to proprietary and sensitive data. We will submit formal comments, to be informed by member feedback once an NPRM is published in the *Federal Register*.

SEC Human Capital Metrics

Proposed rule expected this Fall

The Commission will likely produce a more prescriptive set of rules requiring quantifiable data on workforce composition; turnover; skills and development training, compensation and benefits; and diversity (including independent contractors)

A final rule could be implemented as soon as 2024

OUTLOOK: The SEC is expected to issue a Notice of Proposed Rulemaking in October.

HRPA Position: The Association continues to strongly promote a principles-based rule, discouraging overly prescriptive metrics. The Association's Center staff has met with SEC staff working on the anticipated proposed rules to inform them about company disclosures and how data is defined and collected. We will submit formal comments once an NPRM is published in the *Federal Register*.

SEC Pay for Performance Rule

SEC Adopts Pay Versus Performance Disclosure Rules on August 25

Companies will have to provide three years of data for the first disclosure, adding another year of data in each of the following two years until they hit five years of data.

Required information will include:

1. CEO and average NEO pay (both Summary Compensation Table and “Compensation Actually Paid”)
2. Cumulative TSR for the company and its peer group
3. Company net income
4. The “most important financial measure” the company uses to link pay and performance
5. Narrative description of how each financial measure above is tied to CEO and NEO pay
6. Description of the relationship between company TSR and peer TSR
7. A list of 3-7 financial metrics that the company determines “most important” – non-financial metrics may be included if they are deemed “most important”

OUTLOOK: New P4P disclosures must be included in 2023 proxies.

HRPA Position: The Center was cited 69 times in the final rule, an indication that we were influential in the SEC’s decision to omit “pre-tax net income” as a required measure.

Court Decisions

There are several court decisions that will impact labor & employment law & policy

West Virginia v. EPA

“Major questions doctrine” – Increased scrutiny of administrative agency authority and regulatory actions that have great “economic and political significance”

Dobbs v. Jackson Women’s Health Org.

Patchwork of state abortion laws already subject of widespread litigation. State “aiding and abetting” laws that could create liability for employers offering abortion benefits/reimbursements (TX, OK, potential for others), ERISA preemption?

Students for Fair Admissions v. Harvard/UNC

Constitutionality of race-conscious college admissions programs

OUTLOOK: The Courts have and will issue decisions on the above-mentioned cases that may have significant implications for the workplace. A decision in *Students for Fair Admissions v. Harvard/UNC* is anticipated next year.

HRPA Position: The Association did not weigh in on the West Virginia and Dobbs cases. The Association filed an amicus brief in *Students for Fair Admissions v. Harvard/UNC* stressing the importance of diversity-conscious college admissions programs to ongoing workplace DEI efforts.