



2016: The Year Ahead for Employers

By Susan Fahey Desmond
© 2016 by Jackson Lewis, P.C.

Contents

| | |
|---|----|
| Economy, Jobs and Unemployment | 2 |
| Affirmative Action and Federal Contractors..... | 3 |
| Background Checks | 4 |
| Drugs and Alcohol..... | 4 |
| Immigration, I-9 Forms and E-Verify | 5 |
| Absences and Paid Leave..... | 6 |
| Discrimination | 6 |
| EEOC | 7 |
| Employment Litigation | 8 |
| Pay and Wage & Hour | 9 |
| Payroll Taxes and Tax Credits | 10 |
| Health and Retirement | 11 |
| OSHA / Safety | 12 |
| Unions and NLRB | 13 |
| More Information..... | 14 |

ECONOMY, JOBS AND UNEMPLOYMENT



Economic Outlook – The U.S. economy is [projected](#) to grow moderately in 2016 (between 2.2% and 2.6%), inflation is expected to rise to 2%, and the unemployment rate is projected to drop below 5%, according to the [Federal Reserve](#).

No Government Shutdown – Congress passed a \$1.1 trillion omnibus spending bill ([H.R. 2029](#)) in December 2015 that averts a government shutdown and funds government agencies – including the U.S. Department of Labor, National Labor Relations Board and U.S. Equal Employment Opportunity Commission – through the rest of the fiscal year (September 30, 2016).

U.S. Debt Limit – Under legislation ([H.R.1314](#)) enacted on November 2, 2015, the \$18.1 trillion federal [debt limit](#) was suspended until March 15, 2017, avoiding a protracted debate over the increase in the debt ceiling until after the next President takes office.

Hiring Projections – One in five (20%) U.S. employers expect to add to their workforces during the first quarter of 2016, while 6% expect a decline in their payrolls, according to the [Manpower Group](#). More than seven-in-ten (72%) employers anticipate making no change to staff levels in the first quarter of 2016.

Hottest Jobs for 2016 – Tractor trailer truck drivers, registered nurses, software developers, marketing and sales managers, and computer user support specialists are among the most [in-demand jobs](#) in 2016, according to CareerBuilder.

7.9 Million are Unemployed – While hiring has increased, 7.9 million people in the United States remain [unemployed](#). A fourth of the unemployed (25.7%) have been jobless for 27 weeks or more. There are about [1.5 workers](#) for each job opening, and the average [duration](#) of unemployment is over 6 months. The labor [participation](#) rate (62.5%) is near a historic 38-year low, with more than 94 million Americans not in the labor force.

Unemployment Rate – The [national](#) unemployment rate remained unchanged, at 5.0%, in November 2015, the lowest in seven years. The unemployment rate is much higher for blacks (9.4%) and Hispanics (6.4%) than for whites (4.3%) or Asians (3.9%), and the teen unemployment rate (15.7%) is nearly triple that of adult men (4.7%) and adult women (4.6%). The Federal Reserve [projects](#) the unemployment rate will decline to about 4.7% in 2016.

State Unemployment – Fourteen states, the District of Columbia, and Puerto Rico had [unemployment rates](#) of 5.6% or higher in November 2015. The unemployment rate in Missouri was 4.7%, the jobless rate in Oklahoma was 4.2%, and the unemployment rate in Kansas was 4.0%. North Dakota (2.7%) and Nebraska (2.9%) had the lowest unemployment rates.

| Highest Unemployment Rates | | | |
|----------------------------|-------|----------------|------|
| State / Area | Rate | State / Area | Rate |
| Puerto Rico | 12.5% | Arizona | 6.0% |
| New Mexico | 6.8% | Mississippi | 6.0% |
| D.C. | 6.6% | California | 5.7% |
| Nevada | 6.5% | Illinois | 5.7% |
| West Virginia | 6.5% | North Carolina | 5.7% |
| Alaska | 6.4% | Oregon | 5.7% |
| Louisiana | 6.3% | Georgia | 5.6% |
| Alabama | 6.0% | Tennessee | 5.6% |

Unemployment Benefits – Emergency unemployment benefits, which were enacted during the recession to provide an additional 14 to 47 weeks of benefits based on state unemployment rates, expired at the end of 2013 and were not extended by Congress in 2014 or 2015. As a result, workers in most states who have lost jobs through no fault of their own generally are eligible for up to 26 weeks of benefits from their regular state-funded [unemployment compensation](#) program. Massachusetts (30 weeks) and Montana (28 weeks) provide benefits for a longer duration, while eight states have reduced the duration of state unemployment benefits: Arkansas (25 weeks), Michigan, Missouri and South Carolina (20 weeks), Kansas (16 weeks), Florida (14 weeks), Georgia (14 weeks) and North Carolina (12 weeks). A bill ([HB 150](#)) that could reduce unemployment benefits in Missouri to as low as 13 weeks was vetoed in May 2015 by Gov. Jay Nixon (D), but the state legislature overrode the veto on September 16, 2015. A constitutional challenge to the veto override was [dismissed](#) by a Missouri state court judge on November 12, 2015.

AFFIRMATIVE ACTION AND FEDERAL CONTRACTORS

OFCCP Audits – The Office of Federal Contract Compliance Programs (OFCCP) [plans](#) to complete 3,840 compliance evaluations of supply and service contractors in FY 2016. OFCCP completed 3,987 compliance evaluations in FY 2014, “resulting in \$11.9 million in back pay to more than 23,000 victims of discrimination and created nearly 1,300 job opportunities.”



Conciliation Agreements – Contractors can no longer avoid publicity when entering into most conciliation agreements with OFCCP. Conciliation agreements involving financial remedies for discrimination are available online in the agency’s [Reading Room](#) and posted by the OFCCP (along with a case summary and press release) on its newly launched [Class Member Locator](#) website. OFCCP will [not agree](#) to a company’s request not to appear in its Class Member Locator.

Evaluation of Hiring Practices – In December 2015, as part of the omnibus spending bill, Congress [directed](#) OFCCP to cease “strict and exclusive use of statistical significance tests” for “evaluating hiring practices” and to report to Congress by July 2016 on “steps it is taking to enforce non-discrimination standards rather than on statistical generalizations and quota benchmarks.”

Updated Sex Discrimination Rule – In 2016, OFCCP [plans](#) to [update](#) its rules that govern how federal contractors and subcontractors prohibit sex discrimination, including in areas such as pay discrimination, sexual harassment, hostile work environments, workplace accommodations for pregnant women, gender identity and family caregiving discrimination.

Sexual Orientation and Gender Identity – Contractors need to comply with OFCCP’s [final rule](#) prohibiting discrimination based on sexual orientation and gender identity on covered contracts entered into on or after April 8, 2015.

Equal Pay Report – In May 2016, OFCCP [intends](#) to finalize its [proposed rule](#) to require federal contractors to electronically submit, annually, an [Equal Pay Report](#) to the agency that would include: (1) the total number of workers within a specific EEO-1 category by race, ethnicity and sex; (2) total W-2 wages, defined as the total individual W-2 wages for all workers in the job category by race, ethnicity and sex; and (3) total hours worked, defined as the number of hours worked by all employees in the job category by race, ethnicity and sex.

Minimum Wage - Federal Contractors – Beginning January 1, 2016, the [minimum wage](#) for workers on Federal construction and service contracts [covered](#) by [Executive Order 13658](#) increased to \$10.15 per hour, a \$0.05 increase over 2015.

Paid Sick Leave – Beginning in 2017, employees working on covered federal contracts will be able to earn “up to 7 days or more of paid sick leave annually, including paid leave allowing for family care,” under an [Executive Order](#) issued by President Obama in 2015. The U.S. Department of Labor (DOL) is [required](#) to issue regulations on the new leave entitlement by September 30, 2016.

Pay Secrecy Policies and Action - Federal contractors may not discharge or discriminate against any employee or applicant because they have inquired about, discussed or disclosed their compensation or the compensation of another employee or applicant, under a [final rule](#) issued by [OFCCP](#) that applies to new or modified federal contracts on or after January 11, 2016. In addition, the new rule requires a prescribed [nondiscrimination provision](#) be included in existing employee manuals or handbooks and the posting of an “EEO is the Law” [Poster Supplement](#).

Fair Pay and Safe Workplaces – President Obama’s controversial Fair Pay and Safe Workplaces [Executive Order](#) may or may not move forward in 2016. The so-called “blacklisting” rule would require contractors to disclose any “administrative merit determination, arbitral award or decision, or civil judgment” in the past 3-years for violation of 14 federal employment and labor laws or their state equivalents before becoming eligible for a contract. While the Administration may [proceed](#) with issuing a final [rule](#) in 2016, Congress [denied](#) the DOL’s FY 2016 budget request to initiate an Office of Labor Compliance to help implement the rule.

BACKGROUND CHECKS



“Ban-the-Box” Laws – Effective January 1, 2016, [Oregon](#) became the seventh state to restrict employers from inquiring about an applicant’s criminal background during the initial stages of the application process (joining Hawaii, Illinois, Massachusetts, Minnesota, [New Jersey](#) and Rhode Island). The District of Columbia and several major cities have passed ban-the-box [laws](#) applicable to both public and private sector employers. Twelve other [states](#) and over 100 cities and municipalities have enacted ban-the-box measures applicable to the public sector.

Fair Credit Reporting Act – The U.S. Supreme Court will [decide](#) in 2016 whether individual consumers have standing to sue a consumer reporting agency for statutory violations of the Fair Credit Reporting Act when no “actual damages” were suffered by the consumer. The [case](#) could have a significant impact on class action lawsuits because those plaintiffs who may have otherwise been excluded for failing to allege actual damages would be included as class members. *Spokeo, Inc. v. Robins*.

DRUGS AND ALCOHOL

Illicit Drug Use – For the second consecutive year, the percentage of workers [testing positive](#) for illicit drugs such as marijuana, cocaine and methamphetamine increased in the general U.S. workforce, to 4.7%, up from 4.3% in 2013. Nearly 1-in-10 full-time workers are heavy alcohol or illicit drug users, according to the latest government [report](#). In addition, there is a growing [heroin epidemic](#) and an abuse of [opioid painkillers](#) by workers following on-the-job injuries. In October 2015, the Centers for Disease Control and Prevention released [draft guidelines](#) for prescribing opioids for chronic pain.



Recreational Marijuana Laws – More than four in ten (44%) Americans have tried marijuana and “about one in ten (11%) say they currently smoke pot,” according to a 2015 Gallup [poll](#). Four [states](#) (Alaska, Colorado, Oregon, Washington) and the District of Columbia have legalized small amounts of marijuana for adult recreational use. In 2015, Ohio voters [rejected](#) a measure that would have granted “a monopoly for the commercial production and sale of marijuana for recreational and medicinal purposes.” A variety of [initiatives](#) to legalize marijuana (for medical, recreational or other purposes) could be on the ballot in 2016 in several [states](#).

Challenge to Colorado Law – The U.S. Supreme Court in 2016 may [consider](#) a challenge to Colorado’s recreational drug law brought by Nebraska and Oklahoma. The [lawsuit](#) alleges that “illegal products from Colorado are trafficked” into Nebraska and Oklahoma, causing a [burden](#) on the neighboring states.

Medical Marijuana – The existing ban that prohibits the U.S. Department of Justice from using federal funds to prevent states from implementing their own medical marijuana laws was continued by Congress through FY 2016. Forty [states](#), the District of Columbia, Guam and Puerto Rico have some form of medical marijuana laws.

Hair Testing – The U.S. Department of Health and Human Services is required by Congress to issue scientific and technical guidelines for the use of [hair testing](#) for drugs for commercial motor vehicle (CMV) drivers by December 4, 2016. Once the agency does so, motor carriers regulated by the Federal Motor Carrier Safety Administration (FMCSA) will be permitted to use hair testing for drugs for pre-employment and random drug tests in certain circumstances.

FMCSA Random Testing – in 2016, Motor carriers subject to FMCSA will have to conduct significantly fewer [random](#) drug tests for drivers of CMVs, and spend less money on that testing. Beginning January 1, 2016, FMCSA [reduced](#) the minimum annual percentage rate for random controlled substances testing, for drivers of CMVs requiring a commercial driver’s license, from 50% to 25%.

IMMIGRATION, I-9 FORMS AND E-VERIFY



Unauthorized Immigrants – “There were 11.3 million unauthorized immigrants in the U.S. in 2014,” [according](#) to Pew Research. “More [Mexican](#) immigrants have returned to Mexico from the U.S. than have migrated here” since 2009. However, “the number of [Cubans](#) who have entered the U.S. has spiked dramatically since President Obama announced in 2014 a renewal of ties” with Cuba.

Apprehensions – The U.S. Border Patrol [apprehended](#) 337,117 individuals between ports of entry in FY 2015, a 30% decline from the previous year, and down 80% (1.6 million apprehensions) from FY 2000.

Removals – In FY 2015, Immigration and Customs Enforcement (ICE) [removed](#) or returned 235,413 individuals, a 25% decline from the previous year. Of those removed, 70% were apprehended while, or shortly after, attempting to illegally enter the U.S. The remaining were apprehended in the interior of the U.S. and most were convicted criminals.

Deportation Raids – ICE [reportedly](#) plans to conduct a series of raids in early 2016 in an effort to remove many of the Central American families who migrated across the southwest border and entered the U.S. since 2014 and who have been ordered removed from the U.S. by an immigration judge.

Executive Action – The Supreme Court will [decide](#) in early 2016 whether to review a federal appeals court [ruling](#) blocking President Obama’s executive actions on immigration from taking effect. The President has sought to expand the Deferred Action for Childhood Arrivals ([DACA](#)) program, and allow an estimated 4 million parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years in a new Deferred Action for Parents of Americans and Lawful Permanent Residents ([DAPA](#)) program.

I-9 Form to be Revised – In 2016, U.S. Citizenship and Immigration Services (USCIS) is expected to [revise](#) the Employment Eligibility Verification [Form I-9](#) to include certain “smart” features to help reduce technical errors and help employers complete the form on their computer. Other changes include requiring an employee to provide only other last names (rather than all other names used), and streamlining the certification for certain foreign nationals. The current I-9 form expires on March 31, 2016, so USCIS will need to extend the expiration date or introduce its new form.

Guidance for Conducting Internal I-9 Audits – The Departments of Justice and Homeland Security on December 14, 2015 [issued](#) joint [guidance](#) for employers conducting internal audits of I-9 forms. The guidance provides employers with information regarding the scope and purpose of audits; considerations before conducting internal audits; details regarding how to correct errors, omissions or other deficiencies found on I-9 Forms and how to cure deficiencies related to E-Verify queries; and guidance regarding the anti-discrimination mandate.

E-Verify Program – [E-Verify](#), the government’s Internet based system that allows businesses to determine the eligibility of their employees to work in the United States is set to expire at the end of FY 2016 (September 30, 2016) unless it is reauthorized again by Congress. E-Verify is used by more than 600,000 employers at over 1.9 million hiring sites.

E-Verify Record Disposal – Effective January 1 2016, E-Verify transaction records more than 10 years old were [deleted](#) from the system, and employers no longer have access in E-Verify to cases created prior to December 31, 2005.

Driver’s Licenses and Real ID Act – The U.S. Department of Homeland Security may begin enforcement of the [Real ID Act](#) in 2016. The law establishes minimum security standards for state-issued driver’s licenses and ID cards. All but five [states](#) have compliant driver’s licenses or have been granted an extension until at least June 1, 2016. However, Illinois, Minnesota, Missouri, New Mexico and Washington are non-compliant or have not received an extension, and “will be subject to enforcement beginning January 10, 2016.” This means that those licenses could be rejected as IDs at military bases and most other federal facilities or, eventually, as IDs for boarding commercial airplane flights.

ABSENCES AND PAID LEAVE

Seasonal Flu – The government’s most recent [FluView](#) report shows “increasing flu activity in the United States,” and further increases in activity are expected in the coming weeks. “Flu activity most often peaks in February and can last into May.” About 61% of employers offer on-site seasonal flu vaccines, according to SHRM.



Paid Sick Leave Laws – National and multi-jurisdictional employers are struggling to develop a paid sick leave policy that meets all the requirements of a [patchwork](#) of state and local laws. Since January 2014, [paid sick leave](#) ordinances have gone into effect in 17 cities and counties. Currently, three states ([California](#), [Connecticut](#), [Massachusetts](#)), the District of Columbia and several cities and municipalities (including New York City, Oakland, Philadelphia, Portland, San Francisco, Seattle, as well as multiple cities in New Jersey, Oregon and Washington) have enacted local paid sick leave laws. In 2016, laws allowing workers to earn and accrue sick leave will go into effect in [Oregon](#), [Montgomery County, MD](#), and [Tacoma, WA](#). Pittsburgh’s paid sick days ordinance was [invalidated](#) in December 2015 by a state court judge.

Paid Family Leave Laws – Currently, only three [states](#) – California, New Jersey and Rhode Island – provide for paid family leave. Connecticut is expected to consider adopting a paid family leave law in 2016.

DISCRIMINATION



Pregnancy Accommodations – Employers should expect more requests for pregnancy accommodations in 2016. The U.S. Equal Employment Opportunity Commission (EEOC) in 2015 updated its pregnancy discrimination [guidance](#), and 16 [states](#), the District of Columbia and four cities have passed [laws](#) requiring some employers to provide reasonable accommodation to pregnant workers.

Religious Discrimination – The EEOC is expected to give increased attention to claims of religious discrimination in 2016, including [grooming](#) and [appearance](#) policies, and requested time off for prayer and religious practices. In December 2015, EEOC released [documents](#) explaining federal laws prohibiting employment discrimination against individuals who are, or are perceived to be, Muslim or Middle Eastern.

Harassment – In early 2016, the EEOC’s [Select Task Force](#) on the Study of Harassment in the Workplace is expected to make recommendations on how to prevent and eliminate harassment in the workplace. The agency’s focus extends beyond sex and race to include harassment on the basis of age, disability, religion, national origin, sexual orientation, and gender identity.

Disability Claims – The EEOC continues to aggressively pursue disability discrimination claims, including inflexible leave policies, failure to engage in the interactive process following requests for a reasonable accommodation, and employee wellness policies.

California Fair Pay Act – Beginning January 1, 2016, California employers may not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for “substantially similar work,” when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, under [amendments](#) to the California Equal Pay Act that are regarded as the toughest in the nation.

Transgender Use of Restroom – In 2015, the EEOC [ruled](#) it was unlawful sex discrimination for the Department of Army to prohibit a male-to-female transgender civilian employee from using her workplace’s common restroom for women because of concerns about employee reaction to the transgender individual. In addition, OSHA published [guidance](#) to employers on best practices regarding restroom access for transgender workers.

Persons with HIV – The EEOC on December 1, 2015 issued [guidance](#) addressing workplace rights for individuals with HIV infection, including the right to be free from discrimination, harassment, and the right to reasonable accommodations.

EEOC

Discrimination Charges – The EEOC [projects](#) that over 90,000 employment discrimination charges will be filed against private sector employers in FY 2016. In [FY 2015](#), 89,385 discrimination charges were filed with the EEOC, a slight increase from FY 2014. Retaliation and race continue to be the most frequent basis of discrimination alleged in EEOC charges, followed by sex discrimination, disability, age, national origin and religious discrimination.

Over \$421 Million Paid to Charging Parties – In [FY 2015](#), the EEOC obtained \$356.6 million in relief for those who work in the private sector through the agency’s mediation, conciliation and other administrative enforcement efforts. In addition, the EEOC obtained \$65.3 million through litigation, and “put new practices in place to prevent future discriminatory conduct in the workplace.”

EEOC Mediation – In [FY 2015](#), the EEOC’s [mediation](#) program secured 8,243 mediated resolutions out of 10,579 conducted (78%), resulting in over \$157.4 million in benefits to charging parties. Mediations were completed in an average of 98 days.

EEOC Hires New Investigators – The EEOC hired a significant number of front-line staff in [FY 2015](#) – including 100 new investigators – as many veteran employees retired.

New EEOC Digital Charge System – In 2015, the EEOC launched the first phase of its new [digital charge system](#) that allows employers, when a charge has been filed against them, to access a secure portal to download the charge, review and respond to an invitation to mediate, submit a position statement and provide and verify their contact information.

- **Online Charge Status** – In early 2016, the EEOC is expected to deploy its “[Online Charge Status](#),” which will provide charging parties and employers the ability to access information regarding the status of their open charges online.
- **Online Intake System** – The EEOC is scheduled to release an “[Online Intake System](#)” in early 2016 that will allow the public the option to perform self-screening, submit a pre-charge inquiry, schedule an appointment for an intake interview, and receive pre-charge counseling via an in-person visit, a phone call or a teleconference.
- **Web/Video Conferencing** – Later in FY 2016, the EEOC plans to allow charging parties to schedule and receive pre-charge counseling via web/video conferencing and to submit information to the EEOC online.

No Testers – Congress has [prohibited](#) the EEOC from using federal funds in FY 2016 for “testers” and instead directed the EEOC to focus on reducing the backlog of charges pending at the agency (which totaled 76,408 as of September 30, 2015).



Charges by State – A fourth of all discrimination charges filed with the EEOC in FY 2014 were filed in just three [states](#): Texas (9.1%), Florida (8.5%) and California (7.2%). Below are the numbers of charges filed in the top 15 states.

| EEOC Charges by State | |
|-----------------------|---------|
| State | Charges |
| Texas | 8,035 |
| Florida | 7,528 |
| California | 6,363 |
| Georgia | 4,820 |
| Illinois | 4,487 |
| Pennsylvania | 4,045 |
| North Carolina | 4,017 |
| New York | 3,611 |
| Tennessee | 3,221 |
| Virginia | 3,051 |
| Ohio | 2,893 |
| Alabama | 2,879 |
| Indiana | 2,700 |
| Arizona | 2,644 |
| Michigan | 2,624 |

All other states accounted for fewer than 3% of EEOC charges, including Missouri (1,808), Colorado (1,803), Oklahoma (1,294), Minnesota (981), Wisconsin (968), Kansas (681), and Iowa (196).

Systemic Discrimination – The EEOC continues to focus on systemic discrimination – pattern or practice, policy and/or class charges where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. In [FY 2015](#), the EEOC resolved 268 systemic investigations and obtained over \$33.5 million in remedies in those resolutions.

EMPLOYMENT LITIGATION

Workplace Lawsuits – While the number of employment discrimination [lawsuits](#) filed in federal court in FY 2014 declined by 10% – to the lowest level in over 15 years – the number of federal wage & hour and overtime pay lawsuits rose nearly 9%, and have soared by 225% over the past decade. In addition, the number of lawsuits alleging a violation of the federal Family and Medical Leave Act rose 26% in FY 2014. Disability discrimination lawsuits brought under the Americans with Disabilities Act dropped slightly in 2014, but have more than doubled since 2006.



EEOC Conciliation – In 2015, the U.S. Supreme Court [held](#) that “a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit,” but that “the scope of that review is narrow.” In [FY 2015](#), the EEOC successfully conciliated 44% of its cases prior to filing a lawsuit, up from 27% in 2010. In the [FY 2016 omnibus spending bill](#), Congress expressed “concern with the EEOC’s pursuit of litigation absent good faith conciliation efforts” and directed the agency “to engage in such efforts before undertaking litigation.”

EEOC Litigation – The EEOC litigates about 5% of discrimination charges where the agency has issued a cause finding. EEOC filed 142 merit lawsuits during [FY 2015](#), including 100 individual suits and 42 suits involving discriminatory policies or multiple victims. EEOC recovered \$65.3 million through litigation in FY 2015.

Filing Period for Constructive Discharge – In 2016, the U.S. Supreme Court will [determine](#) when the limitations period begins to run on constructive discharge claims. The court will decide whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer’s last allegedly discriminatory act giving rise to the resignation, as three other circuits have held. The case involves an employee who was given a choice between retiring or taking a significantly lower-paying job 300 miles away, but who did not formally quit until several months later.

Waiver of Class Claims – Despite contrary decisions by federal [appeals](#) courts, the National Labor Relations Board [continues to rule](#) that employers violate the National Labor Relations Act by maintaining and enforcing an arbitration provision that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Wage and Hour Litigation – Wage and hour lawsuits are expected to continue to rise in 2016, as the U.S. Department of Labor is poised to release new overtime pay exemption rules and increased attention is focused on independent contractors, joint employers and so-called “gig” workers of “on-demand” or “market economy” companies.

Non-Compete and Confidentiality Issues – The law governing non-competition and non-disclosure agreements continues to evolve. Four non-competes and confidentiality [issues to watch](#) in 2016 are: (1) enforceability of choice of law and choice of forum clauses may be questioned; (2) adequacy of consideration in exchange for non-competes agreements with current employees is under increasing scrutiny; (3) the Securities and Exchange Commission’s increasing attack on confidentiality agreements that appear to prohibit employees from discussing internal investigations or participating in a whistleblower complaint; and (4) the circuit court split on whether the Computer Fraud and Abuse Act should be interpreted broadly or narrowly.

Whistleblower Complaints – The number of whistleblower [complaints](#) continues to rise, and has jumped nearly 60% in the past decade. Congress has expanded [whistleblower protection](#) to workers under 22 federal laws. In 2015, the Occupational Safety and Health Administration – which is tasked with investigating whistleblower complaints under all 22 laws – revised its [Whistleblowing Investigations Manual](#); “clarified” the [investigative standard](#) for determining when a violation has occurred; and issued policies and procedures for the agency’s [early resolution process](#).

PAY AND WAGE & HOUR



Federal Minimum Wage – [Legislation](#) that would increase the federal minimum wage from \$7.25 to \$12 per hour by 2020, and then index it to inflation, stalled in Congress in 2015, as did a separate measure that would increase the federal minimum wage to \$15 per hour over four years. In 2014, three million [workers](#) in the United States were paid wages at or below the federal minimum wage, constituting 3.9% of the U.S. workforce.

State Minimum Wage – Fourteen [states](#) begin 2016 with higher minimum wages, and Maryland, Minnesota and the District of Columbia have additional increases scheduled this year (see chart). Eight states that currently tie increases to the cost of living did not increase their minimum wage rates for 2016: Arizona, Florida, Missouri, Montana, New Jersey, Ohio, Oregon and Washington. Nevada will announce in July 2016 whether there will be a cost of living increase to its minimum wage rate.

Local Minimum Wage – Several [localities](#) increased their minimum wage rates January 1, 2016, including Oakland (CA), Portland (ME) and Seattle (WA). About three dozen U.S. [cities](#) have minimum wages higher than the federal minimum wage. Local ordinances to raise the minimum wage in [Kansas City](#) and [St. Louis](#) were blocked in 2015, and did not take effect.

Revisions to Overtime Pay Rules – The U.S. Department of Labor (DOL) [intends](#) to finalize its controversial revisions to the overtime pay rules in 2016, with a likely effective date 60 to 120 days thereafter (and before President Obama leaves office). The DOL has [proposed](#) to more than double the salary basis test for executive, administrative and professional overtime exemptions to \$50,440 from \$23,660. The threshold for highly compensated employees would rise to \$122,148 from \$100,000. Both amounts would be adjusted annually thereafter. Legal challenges to the final rules are expected.

Wage & Hour Enforcement – In FY 2015, the DOL initiated more than 42% of its [investigations](#) (rather than launching them after receipt of a complaint) and found violations in 79% of them. The agency [obtained](#) over \$246 million in backpay for more than 240,000 workers in FY 2015 (an average of \$1,027 per worker). Since 2009, the DOL has recovered nearly \$1.6 billion in back wages for 1.7 million workers.

| New State Minimum Wage | | |
|--------------------------------|---------|-----------|
| State | Minimum | Effective |
| Alaska | \$9.75 | 1/01/16 |
| Arkansas | \$8.00 | 1/01/16 |
| | \$8.50 | 1/01/17 |
| California | \$10.00 | 1/01/16 |
| Colorado | \$8.31 | 1/01/16 |
| Connecticut | \$9.60 | 1/01/16 |
| | \$10.10 | 1/01/17 |
| Dist. Columbia | \$11.50 | 7/01/16 |
| Hawaii | \$8.50 | 1/01/16 |
| | \$9.25 | 1/01/17 |
| | \$10.10 | 1/01/18 |
| Maryland | \$8.75 | 7/01/16 |
| | \$9.25 | 7/01/17 |
| | \$10.10 | 7/01/18 |
| Massachusetts | \$10.00 | 1/01/16 |
| | \$11.00 | 1/01/17 |
| Michigan | \$8.50 | 1/01/16 |
| | \$8.90 | 1/01/17 |
| | \$9.25 | 1/01/18 |
| Minnesota (large employers) | \$9.50 | 8/01/16 |
| Nebraska | \$9.00 | 1/01/16 |
| New York | \$9.00 | 12/31/15 |
| Rhode Island | \$9.60 | 1/01/16 |
| South Dakota | \$8.55 | 1/01/16 |
| Vermont | \$9.60 | 1/01/16 |
| | \$10.00 | 1/01/17 |
| | \$10.50 | 1/01/18 |
| West Virginia | \$8.75 | 12/31/15 |

Use of Electronic Devices After Hours -

In 2016, the DOL [plans](#) to gather information about non-exempt employees' use of electronic devices to perform work outside of regularly scheduled work hours and away from the workplace (e.g. checking or responding to email after work), as well as information regarding last minute scheduling practices.

Home Health Care – Effective January 1, 2016, the DOL will begin enforcing its new [rule](#) that extends the Fair Labor Standards Act's minimum wage and overtime provisions to an estimated two million direct care workers.

2016 Pay Raises – “Pay raises for U.S. employers are expected to hold steady in 2016,” with an average salary increase of 3%, according to separate surveys by [Aon Hewitt](#), [Towers Watson](#) and [WorldatWork](#). Raises generally will range from 0.7% to 4.6% based on work performance.

PAYROLL TAXES AND TAX CREDITS



Social Security Taxes – In 2016, the maximum amount of earnings subject to the [Social Security tax](#) remains unchanged, at \$118,500. The Social Security tax rate of 6.2%, paid by both the employee and the employer, also remains unchanged for 2016.

Medicare Taxes – The [Medicare tax](#) rate of 1.45%, paid by both the employee and the employer remains unchanged in 2016. However, unlike Social Security, there is no limit on the amount of earnings subject to the Medicare tax. As in 2015, in addition to withholding Medicare tax at 1.45%, an employer must withhold a 0.9% Additional Medicare Tax from wages paid to an employee in excess of \$200,000 in a calendar year. There is no employer share of the Additional Medicare Tax.

Work Opportunity Tax Credit – The [Work Opportunity Tax Credit](#) (WOTC) was extended for five years, retroactively from January 1, 2015 through December 31, 2019, as part of a package of [tax extenders](#) passed by Congress in December 2015. Eligible employers who hire and retain qualified veterans and certified individuals from other target groups may claim tax credits of up to \$2,400 (or, in some cases, more) for each eligible employee. Additionally, the WOTC was expanded to employers who hire individuals who have been certified as being in a period of unemployment of 27 weeks or more and who begin work for the employer after December 31, 2015.

Military Pay Differential – When employees are called to active duty military service, some employers voluntarily pay the employee “differential pay” – the difference between the compensation that the employer would have paid to the employee during the period of military service less the amount of pay received by the employee from the military. Beginning January 1, 2016, an employer [of any size](#) is allowed a credit against its income tax liability for a taxable year in an amount equal to 20% of the sum of the eligible differential wage payments for each of the employer’s qualified employees during the year. The credit previously was limited only to small employers.

Qualified Parking Benefit – Beginning January 1, 2016, the monthly limit on the exclusion of [qualified parking](#) benefits is \$255 (up from \$250 in 2015). Qualified transportation fringe benefits provided by an employer are [excluded](#) from an employee’s gross income for income tax purposes and from an employee’s wages for payroll tax purposes.

Transit Pass and Vanpool Benefits – Beginning January 1, 2016, the monthly maximum tax exclusion for qualified mass-transit passes or van pool rides increases from \$130 per month to \$255 per month (the same as qualified parking benefits) as part of the [tax extenders](#) passed by Congress in December 2015. The measure also retroactively increases the 2015 transit pass and vanpool benefit from \$130 per month to \$250 per month.

Mileage Reimbursement – Due to the drop in gasoline prices, beginning January 1, 2016, the Internal Revenue Service’s (IRS) optional [standard mileage rate](#) for the use of a car (also vans, pickups or panel trucks) is 54 cents per mile driven, down from 57.5 cents in 2015.

New Filing Deadlines – Employers must continue to provide employees with their annual Form W-2, Wage and Tax Statement by January 31. In addition, employers must file, in 2016, an information return with the Social Security Administration (SSA) by February 28 (or by March 31 if the information return is filed electronically). However, these filing [deadlines](#) will [change](#) in 2017. Both paper and electronically filed 2016 Forms W-2 and W-3 must be filed with the SSA by January 31, 2017. Both paper and electronically filed 2016 Form 1099-MISC must be filed with the IRS by January 31, 2017.



HEALTH AND RETIREMENT



Health Care Costs – Average premium increases in 2016 are projected to rise by 4.1% to 4.2%, according to separate reports by [Aon](#) and [Mercer](#).

Pharmacy Costs Soar – New specialty drugs and the increased use of compounds has led to a sharp rise in prescription drug spending, according to [Aon](#) and [Towers Watson](#). Some employers are adding new coverage and utilization restrictions for specialty pharmacy, such as requiring prior authorization or limiting quantities based on clinical evidence.

Annual Premiums – The average annual premium for employer-sponsored health insurance in 2015 was \$6,251 for single coverage and \$17,545 for family coverage, with workers on average contributing 18% of the premiums for single coverage and 29% for family coverage, according to [Kaiser](#).

Wellness Programs – In early 2016, the EEOC plans to issue final rules on wellness programs. In April 2015, the EEOC [proposed](#) that, under the Americans with Disabilities Act, companies may offer incentives of up to 30% of the total cost of employee-only coverage in connection with wellness programs. In October 2015, the EEOC [issued](#) a [proposed](#) rule that the Genetic Information Nondiscrimination Act does not prohibit employers from offering limited incentives to employees when their covered spouses provide information about their current and past health status in a health risk assessment.

Smoking and E-Cigarettes – In 2016, the Food and Drug Administration is [expected](#) to finalize its [proposed](#) rule to extend the agency's authority to regulate e-cigarettes, hookah, cigars and pipe tobacco. While the [percentage](#) of adults who smoke cigarettes (15.2%) continues to decline, sales of e-cigarettes in the U.S. have swelled. Although 37 [states](#) and the District of Columbia prohibit smoking in most workplaces, only six states (AR, DE, NJ, ND, OR, UT) include e-cigarettes in their indoor smoking regulations.

Automatic Enrollment – Commencing with plan years after November 2, 2015, employers with more than 200 employees will [not](#) be required to automatically enroll new or current employees in group health plan coverage, as originally required under the Affordable Care Act (ACA).

Information Reporting – Large employers will have two more months – until March 31, 2016 – to provide individuals [2015 forms](#) for [reporting](#) on offers of health coverage and the coverage provided, per IRS [Notice 2016-4](#). The deadlines for reporting the information to the IRS is also extended to May 31, 2016 (or June 30, 2016 if filed electronically).

Maximum Out-of-Pocket – In 2016, the maximum out-of-pocket [limits](#) (including deductible, co-insurance and co-payments – but excluding premiums, non-network providers and non-covered services) – in all non-grandfathered group health plans is \$6,850 for self-only coverage and \$13,700 for other than self-only coverage. Significantly, in 2016, the annual self-only, in network out-of-pocket maximum applies to *each individual*, even those enrolled in family coverage, as explained by [ADP](#).

Transition Reinsurance Program – The annual fee health insurers and certain self-insured group health plans must pay to the U.S. Treasury to fund the reinsurance pool under the ACA will decrease for the [2016](#) benefit year to \$27 per enrollee (down from \$44 in 2015 and \$63 in 2014).

Cadillac Tax Delayed – The controversial 40% excise tax on high-cost health plans (“Cadillac tax”) has been [delayed](#) for two years, until January 1, 2020, as part of the omnibus spending bill.

Medical Device Tax – The ACA’s 2.3% excise tax on medical devices has been [suspended](#) for 2016 and 2017 as part of year-end tax extender legislation.

Defined Benefit Plans – The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation [increases](#) to \$64 for plan years beginning in 2016 (up from \$57 in 2015), and will [jump](#) to \$69 in 2017, \$74 in 2018 and \$80 in 2019.

401(k) Plan Contributions Limits – In 2016, the elective deferral (contribution) [limit](#) for employees who participate in 401(k) plans will remain at \$18,000 (plus a catch-up contribution limit of \$6,000 for those aged 50 and older), the same limitations as in 2015.

OSHA / SAFETY

OSHA Inspections – The Occupational Safety and Health Administration (OSHA) is expected to conduct longer, more complicated worksite [inspections](#) in 2016 – and focus more on significant cases (\$100,000 or more in fines), process safety management, ergonomic hazards, heat hazards, fatalities and catastrophes, workplace violence, and exposure hazards – under its new [weighted inspection system](#) that took effect on October 1, 2015. The agency is also expected to increase its use of the general duty clause in citations (for serious hazards not covered by specific standards). In FY 2015, OSHA conducted 35,820 worksite inspections.



Sharp Rise in OSHA Fines – OSHA fines will soar in 2016, as the agency is required to increase its maximum penalties no later than August 1, 2016, under a [provision](#) included in the Bipartisan Budget Act of 2015. The amount of the [increase](#) in OSHA fines could be as high as 82%. In addition, Congress is allowing OSHA fines to be automatically adjusted for inflation going forward. The changes mean civil penalties for serious and non-serious violations could climb to about \$12,700, from the current \$7,000 maximum, while those for willful and repeat violations could go to approximately \$127,000, from the current \$70,000 maximum. The last time that OSHA increased its maximum penalties was in the 1990 budget reconciliation bill.

Changes to OSHA Recordkeeping – In March 2016, OSHA [plans](#) to finalize changes to its recordkeeping [rule](#) to require employers with more than 250 employees (per establishment) to submit their OSHA 300 Logs to the agency on a quarterly basis. In addition, employers with 20 employees or more will be required to [electronically](#) submit to OSHA on a yearly basis the information provided on OSHA Form 300A. The information submitted would be posted on OSHA's website (absent information that could identify individuals).

Posting OSHA 300A Form – Covered employers must complete their annual summary of work-related injuries and illnesses on the [OSHA Form 300A](#), have it [certified](#) by a company executive, and post it from February 1 to April 30 in a conspicuous place where notices to employees are customarily posted. Employees, former employees and their representatives have the right to review the OSHA Form 300, Log of Work-Related Injuries and Illnesses, in its entirety. They also have limited access to the OSHA Form 301 or its equivalent.

Safety Incentive Programs – In 2016, OSHA may make certain [safety incentive programs](#) illegal and subject to OSHA citations irrespective of any recordkeeping or safety violations, if those programs are deemed to “discourage” employee reporting of injuries and illnesses. While it is unclear exactly what the regulatory language will look like, OSHA [may prohibit](#) employers from disqualifying employees who report two injuries or illnesses from their current job; requiring an employee who reports an injury to undergo drug testing where there was no reason to suspect drug use; and automatically disciplining employees who seek medical attention.

Worker Safety in Hospitals – OSHA on December 1, 2015 unveiled a [new webpage](#) to provide employers and workers with strategies and tools for preventing workplace violence in healthcare settings. The webpage complements the agency's 2015 updated [guidelines](#) for preventing workplace violence for healthcare.

OSHA Silica Rule – OSHA [plans](#) to issue its final rule on crystalline [silica](#) in February 2016. A comprehensive health [initiative](#), the regulation is expected to have far-reaching implications since silica is widely used in general industry as well as the maritime and construction sectors. The rule, which is estimated to cost \$664 million per year, is [expected](#) to require exposure monitoring and assessment; regulated areas or access control plan; engineering and administrative controls; protective work clothing and respiratory protection; medical surveillance; and hazard communication and training.

Whistleblower Retaliation – OSHA in 2016 is expected to finalize its [Best Practices](#) for Protecting Whistleblowers and Preventing and Addressing Retaliation. The [document](#) addresses how to ensure leadership commitment, foster an anti-retaliation culture, respond to reports of retaliation, conduct anti-retaliation training, and monitor Progress and Program Improvement.

UNIONS AND NLRB



Union Organizing – Labor unions are expected to step up union organizing in 2016, in an effort to take full advantage of new election procedures and pro-labor rulings from the current National Labor Relations Board (NLRB or Board), prior to a new administration taking office in 2017, and the potential change and uncertainty that could result thereafter.

- **Electronic Signatures** – In October 2015, the NLRB [announced](#) that unions may now submit electronic signatures from employees to support a petition for a NLRB election (in lieu of signed union authorization cards). For [example](#), a union could send a mass email to employees containing a link to a union website asking if they want to be represented by a union. Those who answer “yes” and give the union their contact information will have “signed up.”
- **Micro Units** – The NLRB continues to [apply](#) its controversial decision in [Specialty Healthcare](#) and direct a representation election of a smaller bargaining unit petitioned for by a union over the objections of an employer who asserts that other employees should be included in the unit and be eligible to vote in the election.
- **Access to Employee Information** – Under the NLRB’s new [election procedures](#) that took effect in 2015, employers must provide unions with employees’ home telephone and cell phone numbers, personal e-mail addresses and other information weeks prior to a NLRB election.
- **Quicker Elections** – Union elections are now held more quickly. Since the NLRB’s new election procedures took effect, the median number of days between the petition filing and the NLRB-conducted election has dropped from 38 days to 23 days – two fewer weeks for employers to respond to union organizing efforts.
- **Union Win Rates** – Unions continue to win about two-thirds of NLRB elections held.

Graduate Assistants – The Board in 2016 will [decide](#) whether to overturn [current law](#) and allow a “unit of students who provide teaching and research-related services to Columbia University,” a private university in New York, to organize. In 2015, the Board [declined](#) to assert jurisdiction in a case involving [Northwestern University](#) football players who received grant-in-aid scholarships, and dismissed the union’s representation petition.

Joint Employers – In 2016, the NLRB is expected to further apply its controversial [new standard](#) for determining joint employer status under the National Labor Relations Act (NLRA). The Board’s decision [significantly](#) broadens the definition of “employer” under the NLRA to include unrelated companies that might share some direct or even indirect control over each other’s workforce. Businesses that rely on independent staffing services, subcontractors, distributors, and franchisees may now be exposed to unfair labor practice liability, collective bargaining obligations, and economic protest activity based on working relationships with other companies with whom they have no ownership ties whatsoever.

Temporary Workers – The Board will [decide](#) in 2016 whether to overturn [current law](#) and allow a union to seek to represent in the *same* bargaining unit employees employed solely by the “host” or “user” employer and employees jointly employed by the host employer and another, “supplier” employer, without the consent of *both* employers.

Handbook Rules and Policies – Expect the NLRB to continue its assault on employer [rules and policies](#). In the past year, the Board has struck down employer policies regarding: (1) employees’ use of company [email](#); (2) [confidentiality](#) of ongoing [investigations](#); (3) use of [camera phones](#) to take photos on company property; and (4) [recording](#) of conversations, phone calls or company meetings without prior approval.

Expansion of Union Rights – The Board in 2015 also ruled that an employee has the right to union representation prior to consenting to a [drug test](#); that a union steward may [show notes](#) to an employee during an investigatory interview with Human Resources (regarding defenses to assert); and that an employer may no longer categorically deny a union’s information request for [witness statements](#).

Picket Line Racism – In 2016, the Board will [decide](#) whether it was lawful to discharge a picketing worker who shouted racist taunts as replacement workers crossed a United Steelworkers picket line.

Persuader Rule – In 2016, the U.S. Department of Labor [plans](#) to publish final rule [changes](#) that would require companies to file public reports if they retain a third party (e.g., consultants or attorneys) to plan or orchestrate a campaign or program to avoid or counter a union organizing or collective bargaining effort. Legal challenges to the new rule are expected.

Right-to-Work Laws – Expect more battles over “right-to-work” laws in 2016. Currently, 25 states have laws that prohibit employers from requiring workers to join a union or pay union dues as a condition of employment. In 2015, the Missouri legislature passed a right-to-work [bill](#), but the measure was [vetoed](#). In 2016, a federal judge will decide whether local right-to-work ordinances in Kentucky are preempted by the NLRA. In addition, unions plan to go to court over Lincolnshire, Illinois’ new right-to-work ordinance.

Public Sector Union Dues – In a case with broad implications for public sector labor unions, the U.S. Supreme Court in 2016 will [decide](#) whether allowing unions to collect agency fees from public sector employees who are not union members violates the employees’ constitutional rights to free speech and free association.



Fewer...But Longer Strikes – Labor strikes continue to be a last resort for unions. There were only 105 [work stoppages](#) in FY 2014 – the lowest in five years and only a third as many as in 2005 (300 work stoppages). In contrast, there were over four times as many work stoppages in 1998 (421 work stoppages). The average duration of work stoppages in FY 2014 was over ten weeks (73 days), up sharply from the past four years (when average work stoppages ranged between 44 to 49 days).

MORE INFORMATION

For more information on any of the issues discussed in this report, please contact:

Jackson Lewis, P.C.

Susan Fahey Desmond

650 Poydras, Suite 1900
New Orleans, LA 70130

Tel. (504) 208-5839
Fax (504) 208-1759

or the Jackson Lewis attorney with whom you normally work

All we do is work. Workplace law. With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis, P.C. sets the national standard, counseling employers in every aspect of employment, labor, benefits and immigration law and related litigation.

| | | | | | |
|-------------|--------------|--------------------|---------------|----------------|--|
| Albany | Dallas | Jacksonville | Monmouth Cty | Pittsburgh | San Francisco |
| Albuquerque | Dayton | Kansas City Region | Morristown | Portland | San Juan |
| Atlanta | Denver | Las Vegas | New Orleans | Portsmouth | Seattle |
| Austin | Detroit | Long Island | New York | Providence | St. Louis |
| Baltimore | Grand Rapids | Los Angeles | Norfolk | Raleigh | Stamford |
| Birmingham | Greenville | Madison | Omaha | Rapid City | Tampa |
| Boston | Hartford | Memphis | Orange County | Richmond | Washington, D.C. Region |
| Chicago | Honolulu* | Miami | Orlando | Sacramento | White Plains |
| Cincinnati | Houston | Milwaukee | Philadelphia | Salt Lake City | |
| Cleveland | Indianapolis | Minneapolis | Phoenix | San Diego | www.jacksonlewis.com |

2016: The Year Ahead for Employers is designed to give general information and is not intended to be a comprehensive summary or to treat exhaustively the subjects and matters covered. The information appearing herein does not constitute legal advice or opinions. Such advice and opinions are provided only upon engagement with respect to specific factual situations. Nothing contained herein shall be considered as an admission in any matter or controversy. This report may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome. © 2016 Jackson Lewis P.C. All Rights Reserved.