



# Legislative Update 2017

# Workplace Safety



## Prop 64: Effect On Your Workplace

- Legalized the *recreational use* of marijuana in California for adults 21 and older
- Legalized growing of up to 6 marijuana plants for personal use (limit does not apply to medical use)
- Retail sales for non-medical use do not begin until 2018



## So...Can Mary Jane Come to Work?

- What Prop 64 does NOT do:
  - Does not supersede right of employers to maintain a drug-free workplace; and
  - Does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace.

## Post-Accident Drug Testing Further Limited By OSHA

- **USDOL:** *“To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is **likely to have contributed to the incident**, and for which the drug test can accurately identify impairment caused by drug use.”*
- OSHA planning to cite employers utilizing mandatory post-accident drug testing policies in cases where it OSHA show a lack of reasonable connection between suspected drug use and the accident.

## Post-Accident Drug Testing

- However, this would not prohibit employers from conducting drug tests after a workplace accident “for cause”
- **Reminder:** in California, employers must have “reasonable suspicion” of impairment to test an employee

## Drivers and Cell Phones (AB 1785)



- Prior law prohibited a person from driving a motor vehicle while using an electronic communication device except under limited circumstances
- Now a driver may only operate a handheld device when:
  - The device is mounted or affixed to the vehicle's windshield or dashboard; and
  - The driver's hand is used to activate or deactivate a feature/function of the device with the "motion of a single swipe or tap of the driver's finger"

## Drivers and Cell Phones (AB 1785)



- Possible consequences for employers:
  - Liability for accidents in which an employee was not following the new restrictions on cell phone use
  - Lawsuits for not providing employees with necessary cell phone mounts when use of cell phone is required by job

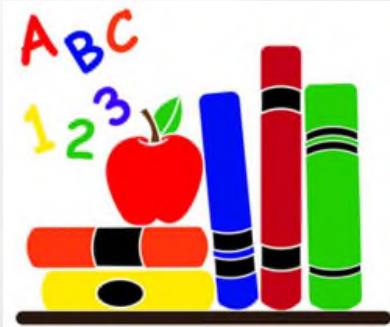


## Wage and Hour

## Update on FLSA Regulations

- New FLSA regulations were blocked approximately a week before their implementation.
- The injunction blocking the regulations is currently up on appeal, but remains in force.
- In California, this case will be a moot issue beginning in January 2019 when our minimum salary will be greater than the proposed federal minimum salary.

## Private School Teachers: Exemption Requirements (AB 2230)



- Lowers the salary necessary for private school teachers to be exempt
- Must earn the greater of:
  - (1) no less than the lowest salary offered by any school district; or
  - (2) the equivalent of no less than 70% of the lowest salary offered by the school district or county in which the private school is located

## Minimum Wage (SB 3)

- Increased to \$10.50 per hour for employers of 26 or more employees on January 1, 2017
- Will remain at \$10.00 per hour through 2017 for employers of 25 or fewer employees
- Local increases apply at county and city levels in various locations throughout California





## Minimum Wage (SB 3)

- Effects of the minimum wage increase for employers of 26 or more employees:
  - Salary threshold for white collar exemptions will increase to **\$43,680** annually
  - “Tool wage” will increase to **\$21.00**
  - Minimum per hour pay for inside sales exemption will increase to **\$15.76**

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## What California Employers Should Look Forward to...

Date	26 or More Employees	25 or Fewer Employees
January 1, 2017	\$10.50	\$10.00 (current rate)
January 1, 2018	\$11.00	\$10.50
January 1, 2019	\$12.00	\$11.00
January 1, 2020	\$13.00	\$12.00
January 1, 2021	\$14.00	\$13.00
January 1, 2022	\$15.00	\$14.00
January 1, 2023	\$15.00	\$15.00

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## California Minimum Wage (SB 3)

- Are you ready for what will be law in 2022 and is it time to start planning now?
  - **\$62,400** annual salary for exempt employees.
  - **\$22.50** per hour in order to be inside sales exempt
  - **\$30.00** per hour for techs required to provide tools
- Remember that this state minimum wage rate, not any city or county minimum wage, governs exempt salary, inside sales and tool rate requirements.

## Wage Statements, Again (AB 2535)



- Clarifies existing law that itemized wage statements (pay stubs) need not include total hours worked for salaried exempt employees, even if provided a bonus or other compensation in addition to their salary



## AB 1506 (2015): Cure Rights Under the Private Attorney General Act

- Provides employers the opportunity to cure paycheck stub violations based on absence of inclusive dates for the period for which the employee was paid, and/or error in the name or address of the employer.
- Limits potential liability and exposure for PAGA claims and disincentivizes plaintiffs' attorneys for minor violations.
- Employer's right to cure limited to once in a 12-month period.

## Agricultural Workers (AB 1066)

- Prior law excluded agricultural workers from certain wage protections and overtime requirements
  - Removes the exemption and creates a schedule to phase-in overtime requirements
  - By January 1, 2022, agricultural workers "shall not be employed more than eight hours per workday or in excess of 40 hours in any one workweek," unless they receive overtime compensation for such work
  - Bill has extended compliance timeline for smaller employers (25 or fewer employees)

## DLSE Bond Requirement (AB 2899)



- Employer challenging a Labor Commissioner citation for failure to pay minimum wages is required to post a bond in favor of the unpaid employee
- Bond must equal amount of unpaid wages, liquidated damages, and overtime compensation owed (penalties excluded)
- Total amount of bond forfeited to employee if employer fails to pay amounts owed within 10 days from entry of judgment



## Employment Agreements

## Choice of Law & Forum Selection (SB 1241)



- Prohibits employers from requiring employees who primarily reside and work in California to agree to either:
  - Adjudicate outside of California a claim arising in California (forum selection clauses); or
  - Deprive the employee of the substantive protection of California law with respect to a controversy arising in California (choice of law and arbitration provisions).
- Does not apply if counsel represents employee
- Employees enforcing their rights under this law may seek any remedy available, including attorneys' fees

## Court Reporter Fees (SB 1007)



- Provides that a party to an arbitration (think: Plaintiff) has the right to have a certified shorthand reporter transcribe any deposition, proceeding, or hearing as the official record
- Party requesting must make the request in a demand, response, answer or counterclaim related to the arbitration or at a pre-hearing scheduling conference
- The party requesting a reporter must incur the expense of the reporter, however, an "indigent" employee can force the employer to cover the cost



## EQUAL PAY LAWS

## Wage Discrimination: Prior Salary (AB 1676)

- Prior law prohibited paying employees at different rates for the same work performed under similar conditions because of sex
- Exceptions for bona fide factors other than sex
- Bill adds that **prior salary cannot, by itself, justify any disparity** in compensation under the bona fide exception
- Includes use of pay history in **current** organization



## Wage Discrimination: Race/Ethnicity (SB 1063)

- This Bill takes all of the rules re: gender pay disparity and adds race or ethnicity with respect to equal pay
- Preserves bona fide exception for disparity based on seniority/merit systems, education, training, experience, or other similar reasons
- Problematic – **enforcement by DLSE**

## EEO-1 Reporting

- Employers, who are required to file EEO-1 reports will have new data collecting and reporting obligations, now based upon the compensation paid to individual races and national origin, as well as gender.



## EEO-1 Report Format Prior to Pay Report Change

**EQUAL EMPLOYMENT OPPORTUNITY  
2016 EMPLOYER INFORMATION REPORT  
CONSOLIDATED REPORT - TYPE 2**

SECTION B - COMPANY IDENTIFICATION  
 SECTION C - TEST FOR FILING REQUIREMENT  
 SECTION E - ESTABLISHMENT INFORMATION

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	NOT HISPANIC OR LATINO														TOTALS	
	*****MALE*****							*****FEMALE*****								
	WHITE	BLACK OR AFRICAN AMERICAN	HISPANIC OR LATINO	ASIAN	AMERICAN INDIAN OR ALASKA NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	HISPANIC OR LATINO	ASIAN	AMERICAN INDIAN OR ALASKA NATIVE	TWO OR MORE RACES				
EXECUTIVE/SUPEROVISOR & MGR	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	10
PROFESSIONAL	5	1	32	1	0	36	0	0	13	0	0	9	0	0	0	159
TECHNICAL	21	7	318	5	0	293	1	1	46	6	0	80	0	0	0	778
SALES/WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ADMINISTRATIVE SUPPORT	0	0	12	0	0	1	0	0	7	1	0	3	0	0	0	24
OPERATIONS	1	3	1	0	0	0	0	0	7	0	0	0	0	0	0	12
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OTHER	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>27</b>	<b>11</b>	<b>431</b>	<b>6</b>	<b>0</b>	<b>333</b>	<b>1</b>	<b>1</b>	<b>73</b>	<b>7</b>	<b>0</b>	<b>93</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>983</b>

SECTION F - REMARKS

DATE OF PAYROLL PERIOD: 08/17/2016 THRU 08/31/2016

CERTIFYING OFFICIAL: [REDACTED] TITLE: [REDACTED]

EEO-1 REPORT CONTACT PERSON: [REDACTED] TELEPHONE NO.: [REDACTED]

EMAIL: [REDACTED] CERTIFIED DATE(TIME): 09/22/2016 08:15 AM

## New EEO-1 Report Format with Pay Reporting (Pay)

**SECTION D - EMPLOYMENT DATA**

Employment of this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces are not considered zeroes.

Number of Employees (Report employees in only one category)

Job Categories	Annual Salary in Thousands	Race/Ethnicity														Total Col A-M
		Hispanic or Latino		Not Hispanic or Latino												
				Male					Female							
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More Races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More Races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers 1-1	1. \$19,239 and under															
	2. \$19,240 - \$24,439															
	3. \$24,440 - \$35,679															
	4. \$35,680 - \$49,079															
	5. \$49,080 - \$69,919															
	6. \$69,920 - \$92,919															
	7. \$92,920 - \$121,079															
	8. \$121,080 - \$161,919															
	9. \$161,920 - \$207,999															
	10. \$208,000 and over															
	11. \$19,239 and under															
	12. \$19,240 - \$24,439															
	13. \$24,440 - \$35,679															

SAMPLE



## SB 358 (2015): “Freedom of Speech” Regarding Wages

- May not prohibit employees from:
  - Disclosing their own wages,
  - Discussing the wages of others, or
  - Inquiring about wages of another employee.
- No obligation on part of employer or other employees to disclose wages of other employees.
- May not retaliate against employees for disclosing or discussing wages.



## FAIR EMPLOYMENT AND ACCESS LAWS

## FEHC Regulations (Harassment)

- FEHC issued new regulations effective April 1, 2016, elaborating on the requirements for a compliant no-harassment policy
- In addition to technical language requirements, the policy must be **translated** into any languages spoken by more than 10 percent of the workforce



## Work Authorization (SB 1001)

- Prohibits employers from:
  - Requesting work authorization documentation not required by federal law;
  - Refusing to honor documents that reasonably appear to be genuine or documents/authorizations based upon specific status; or
  - Reinvestigating or re-verifying an incumbent employee's authorization
- Applicants and employees can file a complaint for enforcement, with penalties up to \$10,000



## Single-Use Bathrooms (AB 1732)

- Applies to all single-user toilet facilities in any business establishment, place of public accommodation, or government agency
- All such facilities must be identified as all-gender facilities
- Authorizes inspections for compliance
- Law effective March 1, 2017



## Bathrooms and Gender

- DFEH continues to take a hard line: "All employees have a right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth."



## Victims of Domestic Violence (AB 2337)

- Employers with 25+ employees must give written notice, effective July 1, 2017 of right to take time off, without threat of termination or retaliation, for domestic violence, sexual assault, or stalking.

## What to Expect From California In 2017

- Legislature is already active
  - “Opportunity to Work Act” (AB 5)
  - Salary history (AB 168)
  - Expansion of CFRA (SB 62 & 63)
- Fisher Phillips California Government Relations practice chaired by former Chief Consultant to the Assembly Committee on Labor and Employment, Ben Ebbink



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## Final Questions



## Significant 2016 Labor & Employment Law Cases



## Discrimination

## Disability Discrimination



- ***Castro-Ramirez v. Dependable Highway Express, Inc.*** (California Court of Appeal)
  - Father requested a modified schedule in order to administer dialysis treatment to his son
  - Employer denied request and terminated employee for refusing to work as scheduled
  - Court found a valid claim for “association discrimination” despite no right to CFRA leave

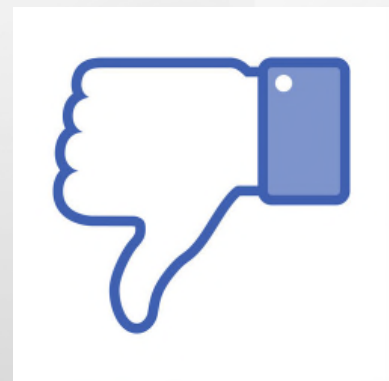


# ARBITRATION



## Class Action Waivers

- ***Morris v. Ernst & Young, LLP*** (9th Circuit)
  - Court decided that class action waiver in arbitration agreement violated the National Labor Relations Act's right to "concerted activity" by employees
  - Draws attention to split of opinions among the federal circuits regarding class action waivers and sets up a potential resolution by the Supreme Court
  - Petition to the Supreme Court filed, but no decision yet on whether Court will hear the case
  - Arbitration agreements should be reviewed and modified – possible check the box opt out



## Arbitration Determinations

- ***Sandquist v. Lebo Automotive, Inc.*** (California Supreme Court)
  - At issue was whether an employer's arbitration agreement permitted or prohibited class-wide arbitration
  - The Court was faced with determining if an arbitrator or a court should decide the question and stated that the answer depends on the language of the agreement according to California state contract law



## Employees' Rights

## Suitable Seating

- ***Kilby v. CVS Pharmacy, Inc.*** (California Supreme Court)
  - Provisions in the California Wage Orders provide that “[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”
  - This decision held that whether the nature of the work “reasonably permits” sitting is a question to be determined objectively based on the totality of the circumstances, including the relevant tasks performed, feasibility of seating, and physical layout of the work area
  - Should an employer deny suitable seating, the employer bears the burden of showing no suitable seating exists

## Wage and Hour



## Vacation Pay and Wage Statements

- ***Soto v. Motel 6 Operating, L.P.*** (California Court of Appeal)
  - Employers need not include the monetary value of accrued paid vacation time in employee wage statements unless and until a payment is due at the termination of the employment relationship
  - Until a vacation benefit is required to be paid, it need not be included in a wage statement under Labor Code section 226
  - “More is More” when it comes to wage statements – consider continuing to provide the info if already providing

## Payment of Final Wages

- ***McLean v. State of California*** (2016) 1 Cal.5th 615
  - Prompt-payment requirements apply to employee retirements:
    - Immediately upon termination;
    - Within 72-hours for voluntary termination (retirement) unless the employee gave 72-hours notice (immediate payment)

# National Labor Relations Board (NLRB)



## Confidentiality Rules

- 3 employer-friendly Board decisions found no NLRA violations when evaluating employer confidentiality policies:
  - **Minteq Int'l, Inc. and Specialty Minerals, Inc.:** Clause prohibiting the release of information "identified as confidential by the Company" would be unlawful, but definition of confidential indicates employee would understand it referred to proprietary information or trade secrets
  - **G4S Secure Solutions (USA) Inc.:** Employer limited disclosure of proprietary information of the company or client, with nothing to suggest the employer considered employee information to be proprietary
  - **Schwan's Home Service, Inc.:** Language in handbook stated employees were "not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons."

## Handbook Disclaimers

- **G4S Secure Solutions (USA), Inc.:** Disclaimer in handbook that “this policy will not be construed or applied in a manner that interferes with employees’ rights under federal law” insufficient to cure other unlawful provisions
- **Chipotle Services LLC:** Disclaimer that “[t]his code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights,” also insufficient to cure other unlawful provisions

# Questions?



## The Immigration Compliance Problem

- New administration hostile towards immigration.
- Total U.S. population: 321 million.
- Estimated undocumented: 11-13 million.
- An estimated 6% of our workforce is undocumented.
- States like California with favorable immigration protection create complex questions for employers.
- High tech industry are particularly hard hit for visa compliance.
- Hospitality, retail, construction, and agriculture tend to have riskier employee bases.

## Balancing the Need for Global Talent with Compliance

- Record demand for professional workers.
- Continued need for unskilled workers.
- Increased scrutiny on petitions.
- Increased cost for immigration.
- Regular post-approval audits.
- Employers caught in the path of immigration reform.

## Changes to the I-9 Form

- New version (11/14/2016) effective 1/22/2017.
- All prior versions no longer valid after 1/21/2017.
- I-9 Handbook for Employers will be updated soon.
- Smart form if completed electronically.
- Might be subject to more frequent or larger audits



## Immigration Enforcement 2015

- ICE made 452 criminal arrests tied to worksite enforcement investigations –
  - 179 were owners, managers, supervisors or human resources employees.
- Charges included harboring or knowingly hiring illegal aliens.
- Employees arrested for aggravated identity theft and Social Security fraud.



## 2015 – Record-Breaking Year

- 3,127 Notices of Inspection and 637 Final Orders, totaling \$15,808,365.00 in administrative fines.
- ICE debarred 277 businesses and individuals for administrative and criminal violations.
- ICE believes utilizing enforcement, compliance, and outreach is an effective approach to deter illegal employment and create a culture of compliance.
- HSI prioritizes investigations involving critical infrastructure and key resources – No industry, regardless of size, type or location is exempt from complying with the law or being the subject of an ICE investigation.

## IRCA Prohibited Acts

### CANNOT:

- Knowingly hire an alien who is not authorized to work.
- Hire any individual without verifying identity and work authorization.
- Continue employing person if you know **or should know** person is not authorized to work.



## Increased Monetary Penalties

- I-9 substantive/uncorrected technical violations (e.g., missing I-9) range from \$216 to \$2,156 per violation.
- Knowingly hire/continuing to employ violations range from:
  - \$539 - \$4,313 (1<sup>st</sup> violation)
  - \$4,313 - \$10,781 (2<sup>nd</sup> violation)
  - \$6,469 - \$21,563 (Subsequent violation)



## Determining Penalty Amounts

- Factors considered for enhancement of fine or mitigation:
  - Good faith effort to comply;
  - Seriousness of violation;
  - Whether the violation involved unauthorized workers;
  - Size of business; and
  - History of previous violations.
- Violation percentage calculated to determine amount of fine for first, second, and subsequent violations.



## USDOJ Discrimination Charges

### Charges of Discrimination:

- I-9 Violations
  - Citizenship Status
  - Immigration Status
  - National Origin
  - Retaliation
- E-Verify Violations



## Why California is Special

- The Election put California squarely in focus as a state which is very pro-immigrant.
- There is a growing battle between states on immigration enforcement that forces different compliance rules on employers.
- Immigration laws in California hit employers in surprising ways.



## California Unified Compliance

California Labor Code Section 2811 – 2813

Effective January 1, 2012:

- Prohibits local governments from making E-Verify mandatory for employers within their borders.

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## California Unified Compliance

- This law prohibits California government agencies from forcing any employer to use E-Verify.
- California employers are free to use E-Verify on a voluntary basis or as required by federal contracts.
- Creates complexity for employers who have locations in multiple states with different rules.

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## Immigration Discrimination

California Labor Code Section 1019  
Effective January 1, 2015:

- Prohibits employers from engaging in “unfair immigration-related practices” against any person/employee to retaliate against any person/employee for exercising their rights under the California Labor Code or other law applicable to employees. Includes threatening to file or filing a false report or complaint with any state or federal agency.

## Labor Code Section 1019

- Engaging in “unfair immigration-related practices” within 90 days of an employee “exercising any protected right” raises a rebuttable presumption of retaliation.
- Violations include the suspension of business licenses.
- Employers may face a penalty of up to \$10,000 per employee for each instance of retaliation.

## Immigration Retaliation

### California Labor Code 1024.6

Effective January 1, 2015:

- An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information. Employer may not take action if an employee updates his or her information based on a lawful change of name, social security number, or federal employment authorization document.

## California Labor Code 1024.6

- Do not take adverse action if an employee asks you to change his or her name, social security number, or federal employment authorization document.
- When updating employee's information do not use E-verify as using E-verify when it is not required by federal law will be considered an unfair immigration related practice.
- Employers may face a penalty of up to \$10,000 per employee for each instance of retaliation.

## Discrimination: Driver's Licensing

California Vehicle Code 12801.9

Update Effective January 1, 2015:

- The DMV must issue a license to people who are not in the country legally if they're otherwise qualified for the license. Those licenses indicate on their face that the holder is allowed to drive, but the license "does not establish eligibility for employment, voter registration, or public benefits."

## California Vehicle Code 12801.9

- Employers may use a driver's license to confirm eligibility to work upon hiring but it would be a violation of the law if the employer required a person to present a driver's license, unless possessing a driver's license is required by law or is required by the employer and the employer's requirement is permitted by law.
- Employers need to review under what circumstances they ask California employees or applicants to show their driver's licenses.

## E-Verify Abuse

### LABOR CODE SECTION 2814

Update Effective January 1, 2016:

- Prohibits employers from using E-Verify to check the status of existing employees or employees who haven't received an offer, unless doing so is required by federal law or as a condition of receiving federal funds. Employer using E-verify must notify the employee as soon as practicable when the employer receives government notice that the information from the employee doesn't match what is in the federal database.

## Labor Code Section 2814

- Employers still need to verify the status of workers they hire. But unless required by federal law or as a condition of receiving federal funds, employers can only check the status of applicants who've received an offer but have yet to start work.
- Employer must notify the worker promptly if the E-Verify system doesn't confirm that an individual is authorized to work in the U.S.
- \$10,000 penalty for each violation.

## Predictions for Immigration Under New Administration

- Mandatory E-Verify nationwide.
- Tightening up/securing the border.
- Increase the size of ICE.
- Increased enforcement actions with focus on employers (e.g., I-9 audits, inspections, and raids).
- Increased removals (aka) deportations.
- Cancellation of DACA.
- Changes in the H-1B Professional Worker Category.



## Final Questions





## The Affordable Care Act: The *Real Fun* is About to Begin

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## Affordable Care Act

Today's agenda:

1. Updated "Employer Mandate" Metrics
2. SSN / TIN Mismatches
3. Exchange / Marketplace Notices
4. IRS Penalty Assessments
5. Reminders...

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# The Affordable Care Act: The *Real Fun* is *was* [?] About to Begin

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## Affordable Care Act

Today's agenda:

1. Repeal / Replace
2. Repeal / Replace
3. Repeal / Replace
4. Repeal / Replace
5. Repeal / Replace

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# Affordable Care Act

## Repeal / Replace

- It's all speculation right now...
- Timing?
- Legislative actions
- Executive Branch actions

# Affordable Care Act

WHITE HOUSE EXECUTIVE ORDER (January 20, 2017)

## MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). In the meantime, pending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

# Affordable Care Act

WHITE HOUSE EXECUTIVE ORDER (January 20, 2017)

MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL (continued)

Sec. 4. **To the maximum extent permitted by law**, the head of each department or agency with responsibilities relating to healthcare or health insurance shall **encourage** the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall **comply with the Administrative Procedure Act and other applicable statutes** in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) **This order shall be implemented consistent with applicable law** and subject to the availability of appropriations.

(c) **This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.**

# Affordable Care Act

## Repeal / Replace

- Some predictions:
  - Repeal timing
  - Targets of repeal
  - Items that may escape repeal (at least initially)
  - Possible replacement concepts
  - What will the states do?



# Affordable Care Act

## Repeal / Replace

- What employers should do now:
  - Hold steady until there is more certainty
  - Do the 2016 Form 1095 and 1094 furnishing and filing
    - March 2, 2017 deadline for furnishing Form 1095 to employees
    - March 31, 2017 deadline for filing Forms 1095 and 1094 with IRS (if filing electronically; February 28, 2017 if filing by paper)
  - Documentation of compliance in prior years should be retained

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# Affordable Care Act

## Repeal / Replace

- What employers should do now (continued):
  - Any future changes will involve a lot of moving parts:
    - Legal requirements
    - Insurance carrier requirements
    - Employee relations issues
    - Insurance market changes
    - New opportunities
    - *Remember when group health plan design was a business decision?*

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# Questions ?

## The Affordable Care Act: The *Real Fun* is *was* [?] About to Begin

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