



Bridging the Divide: **SHRM's 2011 Guide to Legislative Issues**

Connecting Washington and What's Next
to the Workplace

Society for Human Resource Management

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Health Care Reform

Background > Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) brought about major reforms in health care coverage in the United States, affecting both insured and self-insured health care plans. While several elements of the law have already gone into effect, additional provisions affecting employer-sponsored plans will be phased into law through 2018. According to a SHRM poll on health care released in February 2011, over 51 percent of employers indicated that they will not be dropping coverage as the result of the law, and almost 48 percent of respondents indicated that they are waiting on regulatory guidance or information on specific provisions of the law to make some health care decisions for their organizations.

Issue > Although employer-sponsored health plans are in the process of implementing PPACA, plans continue to experience increased costs and are encountering implementation barriers. In addition, PPACA has other shortcomings, including inadequate cost containment measures, namely medical liability reform, and other restrictions on employer-sponsored plans that limit employer plan design.

Outlook > Although a full repeal is highly improbable while President Obama wields a veto pen, this year Congress will consider modifying certain provisions of the law. For instance, there is bipartisan agreement that the Form 1099 business reporting provision should be eliminated. Other provisions that may be considered are the constitutionality of the individual mandate, penalties on employer requirements and the enhancement of the medical malpractice provisions.

SHRM Position > SHRM remains committed to comprehensive reform that lowers health care costs and improves access to high-quality and affordable coverage, and believes such reform should:

- 1) Strengthen and improve the employer-based health care system.
- 2) Encourage greater use of prevention, promotion and wellness programs.
- 3) Solidify the Employee Retirement Income Security Act to provide a national, uniform framework for health care benefits.
- 4) Reduce health care costs by improving quality and transparency.
- 5) Ensure that tax policy contributes to lower costs and greater access.
- 6) Reform the medical liability laws as a component of cost containment.



Talking Points:

- SHRM continues to advocate for legislation that lowers costs; strengthens the employer-based system; improves the quality of care and offers access and affordable coverage to all Americans.
- SHRM believes that medical liability lawsuits contribute to rising health care costs with “defensive” medical practices and increased liability insurance costs. SHRM supports meaningful reform of the medical liability system as an important component of cost containment.
- SHRM supports the provisions in PPACA that improve quality, promote transparency and access to health information and reform the current payment system. SHRM recommends that these provisions should be strengthened significantly to reward efficient care.

Workplace Flexibility

Background > As the workforce grows more complex, HR professionals—“people strategists”—are working with senior management to know what’s next, so organizations can remain competitive. Those HR professionals are deploying flexible workplace programs and policies to recruit and retain top talent, enhance employee engagement, reduce turnover costs and increase productivity.

Issue > While a growing number of employers are devising innovative workplace flexibility strategies, employers continue to encounter challenges in designing policies that do not conflict with current federal and state laws. For example, potential conflict with federal and state laws may hinder the adoption of telecommuting and Results Only Work Environment programs. In addition, many employers believe the FMLA and its implementing regulations are not responsive to the evolving needs and lifestyles of today’s workforce.

Outlook > Republican takeover of the House of Representatives in the 112th Congress has likely ended chances of passage for the most significant proposal to expand federal leave benefits, the Healthy Families Act. However, the Obama Administration has promoted the use of flexible workplace arrangements in the private sector through its National Dialogue on Workplace Flexibility.

SHRM Position > SHRM believes that the United States must have a 21st century workplace flexibility policy that meets the needs of both employers and employees. Rather than a one-size-fits-all government mandate, the policy should be a new approach that reflects different work environments, representation, industries and organizational size.

The policy should support employees in balancing their work and personal obligations; provide paid leave to the employee; and provide certainty, predictability and stability to employers. Under this new approach, employers that meet a safe harbor leave standard will be deemed to have satisfied the requirements of all federal, state and local leave requirements. Alternatively, employers that chose not to offer this leave standard would be subject to existing federal leave requirements.



Talking Points:

- SHRM supports efforts to assist employees in meeting the dual demands of work and personal needs, and it believes that employers should be encouraged to voluntarily offer paid leave to their employees. Mandated leave requirements limit an employer's flexibility in designing generous and innovative leave programs for employees.
- SHRM is calling for new dialogue and debate on a workplace flexibility policy for the 21st century. HR professionals have decades of experience in designing and implementing leave benefits and programs that work for both employers and employees. We are eager to share this expertise with policymakers.

Employment Verification

Background > Under the Immigration and Nationality Act, it is unlawful for an employer to knowingly hire or employ someone who is not authorized to work in the United States. Current law requires employers to examine documents presented by new hires to verify identity and work eligibility, and to attest to that examination on Form I-9.

As of 2009, federal contractors must use an eligibility verification system known as E-Verify for employees hired during a contract and employees assigned to that contract. Other employers may participate voluntarily in E-Verify. The program is scheduled to expire in September 2012.

Issue > E-Verify, which relies on Social Security and Department of Homeland Security databases, is a subjective process that lacks proper security features. It uses paper documentation that is susceptible to identity theft, forgery and alteration, and that cannot be verified for authenticity.

Outlook > Although comprehensive immigration reform is unlikely to be enacted in the 112th Congress, legislative efforts to enhance worksite enforcement have gained renewed attention among Republicans in the House. Led by Judiciary Chairman Lamar Smith (R-TX), the House may advance legislation to increase worksite enforcement and build upon E-Verify. Enforcement activity has also increased at the agency level, as the Department of Homeland Security has stepped-up its audits of employers' compliance with the Form I-9, while the Department of Labor has enhanced its oversight over the H-1B program.

SHRM Position > SHRM believes the federal government must provide U.S. employers with a reliable method to confirm work eligibility. A fully electronic system that uses biometric measures would give employers the tools they need to keep illegal workers off their payrolls and to hire legal workers quickly, fairly and with confidence.



Talking Points:

- SHRM and its members share the goal of a legal workforce, which is a key element of any effective immigration policy.
- To achieve this goal, SHRM believes the federal government must develop a more efficient, foolproof approach to employment verification that strengthens E-Verify.
- SHRM calls for an electronic verification system that will eliminate virtually all unauthorized employment; provide security for employers; eliminate the current I-9 paper-based system; protect the identity and personal information of legal workers and prevent employment discrimination based on national origin or related issues.
- Such a system will help employers hire the workers they need with confidence. It also will ensure that legal workers are treated fairly and considered eligible for employment quickly.

Tax Reform and Deficit Reduction

Background > With the current Fiscal Year 2011 budget projected to run a \$1.5 trillion dollar deficit and the U.S. national debt hovering around \$11.3 trillion dollars, tax reform and efforts to lower the deficit are a priority for Congress and the Obama administration. Because of their tax-deferred status, employee benefits such as retirement plans and educational assistance may come under scrutiny.

Issue > Employer-provided retirement plans are a key component of our nation's retirement system and produce significant retirement benefits for America's working families. Also, Section 127 of the Tax Code enables workers to further their education, thus helping their employers remain competitive in the global marketplace.

Outlook > Employee benefits are the largest annual loss in revenue to the federal treasury, due to their tax-deferred status. As a result, it is anticipated that public policy efforts to reform the tax code and bring down the federal deficit will involve an examination of employer-sponsored fringe benefits, including retirement plans and educational assistance programs. Currently, tax-qualified retirement plans hold \$16.6 trillion in assets, of which about \$13 trillion is attributable to employer-provided plans. This pool of capital helps to finance productivity, enhance investments and encourage business expansion. Changes to the tax treatment of retirement plans could have a negative effect on capital markets, which legislators must consider.

Attempts to extend or make permanent Section 127 or other tax treatments of employer-provided benefits will be difficult in the current deficit-focused environment.

SHRM Position > SHRM believes that a comprehensive and flexible benefits package is an essential tool in recruiting and retaining talented employees. Every American employee should be given the opportunity to save for retirement. The government should facilitate and encourage voluntary employer-sponsored plans, as well as individual savings. SHRM also strongly supports the permanent extension of Section 127, to help build a skilled workforce and position the U.S. to compete globally.



Talking Points:

- SHRM believes tax incentives should be used to expand retirement savings. Provisions that encourage savings, such as increased contribution limits and catch-up contributions for older workers, are beneficial. Tax incentives should be provided to employers that sponsor plans and to individual savings accounts on an equitable basis.
- SHRM supports tax provisions that encourage education and training as they are among the most effective tools available for employers to attract the best employees and build a skilled workforce.
- SHRM believes that making Section 127 permanent will demonstrate the government's strong support of employers investing in their employees and promoting the continuous development of skills.

Weapons in the Workplace

Background > A major trend in workplace violence is an increase in gun-related incidents. According to the U.S. Bureau of Labor Statistics, the vast majority of homicides committed in U.S. workplaces are the result of shootings. Homicides involving guns are the fourth leading cause of occupational deaths in the U.S., and the leading cause of workplace deaths for women.

The Occupational Safety Health Act mandates that employers provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” In a SHRM survey of HR professionals, 98 percent of respondents believe employers should be allowed to determine their own worksite policies regarding weapons in the workplace.

Issue > SHRM believes that employers must retain the freedom and responsibility to assess the safety needs of their organizations and establish appropriate policies. This is paramount to the overall success, sustainability and safety of the workforce.

Outlook > Nearly a dozen states have enacted laws that restrict an employer’s right to enforce a no-weapons policy on company property. Other states (particularly in the Midwest and South) are expected to consider similar legislation in future sessions.

SHRM Position > SHRM opposes any restrictions on the right of employers to determine their own worksite policies regarding weapons on company property (including parking lots). SHRM’s position in no way involves the broader issues of gun control or gun ownership.



Talking Points:

- SHRM supports providing employers the flexibility and responsibility to decide which policies are most appropriate for their facilities to ensure a safe workplace for employees.
- SHRM believes its position on this issue is supported by the Supreme Court decision regarding *Buchanan v. Warley*. In that case, the court decided that owners of private property have property and liberty rights that are protected from improper state action by the due process guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution.



Background Investigations

Background > HR professionals ensure that new hires possess the talent, work ethic and character needed for the organization's success. Background investigations, including reference, credential or educational certifications, criminal history, credit checks and drug tests, can play a pivotal role in that process. Information gained can affect critical business concerns such as quality, workplace safety and customer satisfaction. The Fair Credit Report Act of 1970 governs the use of consumer reports and has explicit protections for consumers. Further, Title VII of the Civil Rights Act of 1964 bars employment decisions based on policies or tests, such as credit or criminal background checks, that have a "disparate impact" on protected groups.

Issue > Congress, federal agencies and state legislatures have considered proposals to restrict or prohibit certain background investigations. Hawaii, Washington, Oregon and Illinois have already passed laws barring most employers from conducting credit checks in hiring and promotion activities.

Outlook > It is not likely that efforts to ban or limit the use of credit and criminal checks in the employment process will be successful in the 112th Congress, but there could be actions by the U.S. Equal Employment Opportunity Commission and other agencies. In addition, at least a dozen state legislatures may consider new restrictions on employers.

SHRM Position > SHRM is committed to equal employment opportunity in all employment practices, for all individuals. Employment decisions should be made on the basis of qualifications—education, training, professional experience, demonstrated competence—not on factors with no bearing on the ability to perform job-related duties.

There is a compelling public interest in enabling our nation's employers to make the best hiring decisions. Plus, every employee has the right to work free from physical, financial, economic and personal identity threats. Accurate information on an applicant's previous job performance ensures informed, equitable hiring decisions. Those decisions directly affect such critical business concerns as quality, workplace safety and customer satisfaction.



Talking Points:

- SHRM supports preserving employers' ability to conduct criminal and credit background checks for employment purposes. They serve as an important means to promote a safe and secure work environment for employees, and they benefit the public.
- SHRM believes public policy should facilitate the flow of accurate, truthful and relevant information about job candidates.
- SHRM is supportive of protections for employees and job applicants found in the Fair Credit Report Act of 1970 and the Civil Rights Act of 1964.

Employee Representation

Background > The 1935 National Labor Relations Act (NLRA) states a union can be certified as the exclusive collective bargaining agent for an organization's employees in one of two ways:

- 1) A secret-ballot election.
- 2) Under limited circumstances, a "card check" process, in which a majority of employees in a specific work unit sign a card authorizing a union to represent their collective interests.

Unions view the card check process as an easier, more direct way to secure the approval of a majority of workers in a bargaining unit.

Issue > Union leaders have argued that current laws on union representation favor management and hinder employees' ability to organize a union. Labor's top legislative priority, the Employee Free Choice Act (EFCA), would amend the NLRA's organizing rules by allowing unions to bypass private ballot elections in favor of the card check process, and would impose mandatory arbitration and deadlines for a final contract. EFCA is no longer on the congressional agenda following the 2010 midterm elections. However, regulatory bodies such as the National Labor Relations Board (NLRB) and the Department of Labor (DOL) have become increasingly active on issues important to employee representation.

Outlook > In December 2010, the NLRB issued a proposed rule that would require covered employers to post a notice of rights granted to employees by the NLRA, including their rights related to union representation. Under the proposal, all NLRA-covered employers would be required to post a physical notice in a conspicuous place, disseminate the notice by e-mail and distribute the notice on an intranet site.

SHRM Position > SHRM believes that a government-supervised secret-ballot election is the best process for employees to determine whether or not they want to be represented by a union. The rights of employees to consider representation by a union without threats, interrogation, promises of benefits or coercion by employers or unions must be protected. With regard to the proposed posting rule, SHRM believes the Board does not possess the legal authority to promulgate this posting rule or institute penalties against employers for failure to comply.



Talking Points:

- SHRM believes in the fundamental right—guaranteed by the NLRA—of every employee to make a private choice in whether to join a union. A secret ballot is the best means of protecting employees from coercion or other pressures in making that choice.
- SHRM opposes legislation that would eliminate the use of a secret-ballot election.
- SHRM believes the NLRB does not have the statutory authority to enact a rule requiring nearly all employers to disseminate NLRA provisions to their employees.

Family and Medical Leave Act

Background > Congress enacted the Family and Medical Leave Act (FMLA) in 1993 to provide up to 12 weeks of unpaid leave for the birth, adoption or foster care of an employee’s child, and to deal with a “serious health condition,” including that of a spouse, child or parent, or for the employee’s own medical condition. The FMLA was expanded in 2008 to ensure that workplace leave benefits are provided to families of military service members who are called to active duty or return home following a deployment.

Issue > Employee advocates have previously supported expansion of the FMLA’s coverage to include events like parent-teacher conferences, bone marrow donations, domestic violence recovery and voting in political elections. They have also called for an increase in the duration of leave, as well as the ability to convert some or all of the leave to paid leave through unemployment insurance funds. In addition, some advocates have argued that the FMLA regulations issued by the Department of Labor (DOL) in 2008 have curtailed employee protections and should be reviewed and amended as appropriate.

Outlook > In recent years, congressional labor committees have weighed several proposals to expand the FMLA, but those efforts are unlikely to advance in this Congress. The DOL may revisit the 2008 FMLA regulations before the end of President Obama’s first term.

SHRM Position > Since its enactment in 1993, the FMLA has guaranteed invaluable work and family flexibility for millions of Americans, allowing employees to feel secure in their jobs while attending to important personal and family needs. Although supportive of the FMLA, SHRM opposes its further expansion at this time. Rather, SHRM supports revisions that would reduce leave-related administrative and compliance problems that continue to threaten the integrity of the law.



Talking Points:

- SHRM supports the intent of the FMLA, but its implementing regulations have resulted in significant challenges in the workplace. After 18 years of experience administering FMLA leave, HR professionals know first-hand that modifications are needed to serve the best interests of both employees and employers.
- SHRM strongly believes that any additional improvements to FMLA regulations should reflect the original intent of the statute, and that the law should continue to benefit those employees whose family and medical needs meet the eligibility requirements under the Act.



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