



CUT AND PASTE POST DECEMBER, 2020

Marijuana and HR Management: Round II

First, two corrections: The last *Cut N Paste Post* described 2 ballot measures that were passed by Montana voters, saying both measures were effective October 1, 2021. In fact:

- ☞ **Constitutional Initiative 118 (CI-118):** Is effective January 1, 2021.
- ☞ **Initiative 190 (I-190):** Some Sections related to decriminalization, penalties and limitations are effective 1/1/21; the rest of the initiative is effective October 1, 2021.

Now, here's some "MORE" Information - This month, the U.S. House is expected to vote on a bill decriminalizing marijuana at the federal level. With a lot of similarities to Montana's CI-118, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019 ([H.R. 3884](#)) would remove marijuana from the list of scheduled substances under the Controlled Substances Act.

Among other things, the Bill would:

- Replace statutory references to *marijuana* and *marihuana* with *cannabis*;
- Impose a 5% tax on cannabis products and require those revenues to be deposited into a trust fund to support programs and services for individuals and businesses impacted by the war on drugs;
- Make Small Business Administration loans and services available to entities that are cannabis-related legitimate businesses or service providers;
- Eliminate criminal penalties for an individual who manufactures, distributes, or possesses marijuana; and
- Establish a process to expunge convictions and conduct sentencing review hearings related to federal cannabis offenses.

A companion bill of the same name, [SB 227](#) is making its way through the Senate. Stay tuned for updates on both of these pieces of legislation

Diversity and Anti-Discrimination Training under Executive Order 13950

[Executive Order \(EO\) 13950](#), "Combating Race and Sex Stereotyping," was signed by President Trump on September 22, 2020. EO 13950 prohibits federal agencies, the military, government contractors and sub-contractors, or any recipient of federal aid (including many institutions of higher education and non-profits) from conducting workplace training containing racially "divisive" or "anti-American" concepts.

EO 13950 requires federal executive departments and agencies to identify all contracts or spending related to training on "critical race theory" and "white privilege," and trainings suggesting the United States is an inherently racist or evil country, or imply that any race or ethnicity is inherently racist or evil. According to the Office of Management and Budget, all contracts fitting those criteria must be canceled if it is legal to do so.

EO 13950 also prohibits federal agencies, federal government contractors and federal grant recipients from conducting workplace training that "inculcates" views such as "race or sex stereotyping" or "scapegoating," as those terms are defined in the Executive Order itself. Among other things, the Order prohibits workplace training that "[includes] the concepts that...

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- (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; ...
- (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;...
- (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; ..."

A hotline has been established to receive complaints regarding violations of this Order. Contractors found in violation may have their contracts canceled, terminated, or suspended in whole or in part and may also be declared ineligible for further Government contracts in accordance with the procedures authorized in Executive Order 11246.

For more information, visit the Office of Federal Contract Compliance's [Executive Order 13950 landing page](#).

EO 13950 has left many HR folks questioning what kind of anti-harassment and diversity training is allowed. For example, implicit/unconscious bias training, which is common in anti-discrimination training programs, may violate subparagraph (b) above.

On Oct. 27, SHRM hosted a webcast titled "Navigating the White House Executive Order: 'Combating Race and Sex Stereotyping.'" The webcast featured legal experts from Seyfarth Shaw LLP who explained the provisions and impacts of EO 13950, as well as what it means for impacted federal contractors, subcontractors and grantees. The [webcast is available for on-demand viewing](#) for SHRM members through January 2021.

Professional Pointer: SHRM is working with the DOL to gain clarity on EO 13950 and to identify anti-discrimination and inclusion trainings which may be provided without fear of unfair penalties. It is possible President-elect Biden will overturn this Order but, since at least for now, this is the rule for federal contractors and other covered employers, it may be better for those organizations to delay annual training until more is known.

SHRM Policy Priorities and a Biden Presidency

In the last *Cut N Paste Post*, we looked at what HR professionals might expect from a Montana state government whose executive and legislative branches are controlled by the Republican Party. Now that the general consensus is Joe Biden will be the next President, let's take a look at how a Biden presidency might affect HR management.

On November 12, 2020 the SHRM External Affairs Team hosted a webcast discussing HR policy and 2020 election results. During the webcast, the presenters outlined the changes HR professionals and businesses can expect in workplace policy under the new Administration.

As background, SHRM currently focuses on 5 areas in its legislative advocacy efforts. What follows is a description of each focus area and, based on the campaign record, the changes we will likely see proposed to those areas during a Biden presidency.

Focus Area: Workforce Development

SHRM Issue Statement: More than 80 percent of HR professionals report challenges recruiting suitable job candidates in the past year, an indication of a growing skills gap problem that if left unchecked will leave jobs unfilled, reduce business profitability and stifle U.S. economic growth

Biden Response:

- Spend \$50 billion on workforce training by creating partnerships among community colleges, businesses, unions, universities and high schools, and state, local and tribal governments. These partnerships would identify knowledge and skills which are in demand, and develop or modernize short term (6 months to 2 years) training programs which would lead to an industry-recognized credential.
- Increase portability/reciprocity of training programs by incentivizing states to ensure licenses are transferable from state to state and to reduce licensing requirements.
- Access untapped talent by implementing initiatives which promote hiring from underutilized talent pools such as the formerly incarcerated, older workers, individuals with disabilities, and veterans.

- Support a bill known as the Protecting the Right to Organize (PRO) Act which would weaken ‘right to work laws’ in 27 states, make it easier for workers to organize unions through the signing of authorization cards and impose criminal liability on executives for "interfering with organizing efforts and violating other labor laws."

Focus Area: Workplace Equity

SHRM Issue Statement: Everyone in the workplace deserves fair treatment, yet 1 in 3 Americans still believe their workplace fosters sexual harassment, and pay inequity based on gender and race continues to persist. A challenge in addressing pay disparity is understanding how much is attributable to discrimination as opposed to legitimate pay practices.

Biden Response: On the campaign trail, President-elect Biden made addressing gender-based pay inequality a key plank of his outreach to women. Below are some of the legislative and regulatory actions his administration is expected to support:

- Revisit Trump Era regulatory actions, including EO 13950, the January 1, 2020 White Collar Salary Rule, the Joint Employer Rule, and the recently proposed changes to the Independent Contractor Rule.
- Pass the Paycheck Protection Act, which would provide that only "a bona fide factor other than sex", such as education, training or experience, can justify a pay difference between men and women who perform substantially equal jobs and work at the same establishment. Pay adjustments based on subjective criteria, including managers' subjective evaluations of job performance, could be challenged or provide a basis for class-action litigation.
- Pass the Pregnant Workers' Fairness Act, which would prohibit employment practices that discriminate against pregnant workers and require employers to make reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions. This was passed in the House earlier this year, and is in the Senate's Committee on Health, Education, Labor, and Pensions.
- Make it easier for employees to join together in class-action lawsuits, shift the burden to employers to prove that any gender-based pay gaps exist for job-related reasons and business necessity, and increase penalties against companies that discriminate while expanding funding to increase the number of anti-discrimination investigators, litigators and enforcement actions.
- Enact the Equality Act to end legal discrimination against LGBTQ+ people and to expand economic opportunities for LGBTQ+ people.



Focus Area: Workplace Flexibility and Leave

SHRM Issue Statement: U.S. employers are burdened by a patchwork of state and local paid leave laws that create a fragmented compliance system for them to navigate. At the same time, employers are struggling to balance the needs of their businesses as they offer competitive paid leave programs and flexible work arrangements necessary to attract and retain employees.

Biden Response:

- Pass the **Healthy Families Act**, which would require employers with 15 or more employees to provide their employees with at least one hour of earned paid sick leave for every 30 hours worked, up to a maximum of 56 hours (7 days) of paid sick leave in a year. An employer with fewer than 15 employees could provide the same amount of paid sick leave, but could opt out of that requirement, in which case the employer would be required to provide at least 56 hours of unpaid leave in a year.
- Pass the **Family and Medical Insurance Leave (FAMILY) Act**, which would:
 - Establish an "Office of Paid Family and Medical Leave" within the Social Security Administration.
 - Impose a tax on employers, employees, and self-employed individuals to fund Family and Medical Leave Insurance (FMLI) benefits.
 - Establish the Federal Family and Medical Leave Insurance Trust Fund to hold tax revenues.
 - Entitle every eligible individual to up to 12 weeks of paid FMLI leave.
 - Coordinate FMLI benefit payments with any periodic benefits received under a state or local temporary disability insurance or family leave program.

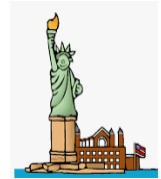
This Act ([S.463](#)), and its companion bill ([H.R. 1185](#)), were introduced in both houses in February of 2019, and referred to Committee with no further action taken. It is felt that, on the heels of the FFCRA (the first bill to required paid leave to U.S. workers), some version of tax funded paid leave may now have a decent chance of becoming law.

Focus Area: Workplace Immigration

SHRM Issue Statement: Today’s workplace immigration system should empower U.S. employers to be competitive and innovative, instead it discourages a world-class workforce and fails to provide employers with the tools to recruit and retain top global talent. Employers lack a modernized, reliable, employment immigration system which allows them to confirm applicants’ identity and work authorization

Biden Response:

- Rescind President Trump's bans on travelers from 13 countries which were issued by executive order and presidential proclamation.
- Undertake new notice-and-comment rulemaking to revise rules that have already been issued in final form.
- Work with Congress to increase the number of permanent employment-based visas to address the high demand for, and long backlogs associated with, these visas.
- Exempt recent U.S. graduates of Ph.D. programs in STEM fields from visa caps.
- Grant foreign graduates of U.S. doctoral programs with a green card with their degree, which will reduce the number of applicants waiting for adjudication of their green card petitions, and would incentivize the “best and brightest” foreign students to pursue their studies in the U.S. and to stay in the U.S. and benefit the economy after they complete their studies.
- Identify a pathway to citizenship for the estimated 12 million undocumented immigrants living in the U.S.
- Reinstate the Deferred Action for Childhood Arrivals (DACA program), which would clarify the legal status of millions of "Dreamers" and their parents already living in the U.S.
- Legalize more than 400,000 people currently covered by the Temporary Protected Status (TPS) program.



Focus Area: Workplace Healthcare

SHRM Issue Statement: Employer-based health care is the foundation of health care insurance in our country. However, rising health care costs, challenges implementing and complying with the Affordable Care Act (ACA) and continued uncertainty of policy action on health care could lead to the erosion of employer-sponsored health insurance.

Biden Response:

- Enact a Public Option under the ACA - This would be a federally run health insurance plan that “sits” on the marketplace exchanges alongside private plans. Individuals who are eligible for the marketplace plans would be able to choose the public option or one of the private plans. Employees who have coverage through their employer would be able to choose a new Medicare-like public option, with the federal government providing enhanced premium subsidies. According to Biden’s website, this would “bring relief to small businesses struggling to afford coverage for their employees” —presumably allowing the employers to stop offering coverage.
- Lower the Medicare-Eligible Age to 60 - [Researchers](#) have found "the strong link between health insurance and employment in the United States may force workers to delay retirement until they become eligible for Medicare at age 65." Supposedly, earlier access to Medicare would allow more employees to enjoy longer retirements, and would open up more jobs for workers entering the labor force.
- Expand ACA Subsidies - Currently, families making between 100 and 400% of the federal poverty level may receive a tax credit to reduce how much they pay for health insurance in the marketplace. Biden’s platform would eliminate the 400% income cap and would lower the limit on the cost of coverage from 9.86 to 8.5% of income, insuring that no family spends more than 8.5% of their income on health insurance premiums.

Lots to be watching for! If you have any ideas for future *Cut N Paste Posts*, let me know.

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HAVE A HEALTHY, HAPPY, HOLIDAY SEASON!