Ohio Conference for Payroll Professionals

Dublin, OH – October 19-20, 2017

Legislative Outlook and APA Lobbying

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AGENDA

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- Internal Revenue Service Issues
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    - Truncated Social Security Numbers
    - Automatic Filing Extensions
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  - Affordable Care Act Information Reporting
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- Immigration (E-Verify)
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ROLE OF THE AMERICAN PAYROLL ASSOCIATION (APA)

One of the core missions of the APA is representing payroll professionals at the federal, state, and local levels. This is done primarily by educating government and community decision-makers about the payroll industry and the best practices associated with paying America's workers.

Led by members with support from APA's government relations division staff, APA's Government Relations Task Force (GRTF) works with legislative and executive branches of government to help payroll professionals with understanding their employers' legal obligations and advocate for more effective laws, regulations, policies, and guidance.

Significant emphasis is placed on minimizing the administrative burden on government, employers, and individual workers, as well as sharing information effectively.

Key Goals

- Ensuring consistent and equitable standards and requirements for withholding income taxes on employees who travel outside of their state of residence for temporary work periods;

- Promoting understandable government forms and associated instructions, regulations, guidance documents, policies, and notices;

- Pushing for uniformity in wage garnishment processes and reasonable requirements for payroll card administration; and

- Providing opportunities for open discussion and networking among members and with agency staff.

Government Relations Task Force (GRTF)

APA has five active subcommittees on the GRTF:

Child Support and Other Garnishments Subcommittee: Participants work to standardize child support and other wage garnishment enforcement notices, improve state electronic reporting and payment systems, and promote efficient wage withholding procedures.

Immigration Subcommittee: With a focus on immigration-related administrative processes that impact payroll functions, participants review federal forms and related instructions, regulations, guidance, and policy.

IRS Issues Subcommittee: All things IRS that impact payroll and payroll professionals are addressed through this subcommittee, including identity theft and tax fraud prevention, filing information reports such as Forms W-2, employment taxes, Affordable Care Act reporting, and income tax rates and withholding.

Payroll Cards Subcommittee: APA promotes new laws and regulations across the United States that provide employers with reasonable options to offer cost-effective payroll cards to their employees.

Retirement Accounts Subcommittee: APA members are focused on reducing the potential for administrative burden in states that are considering mandating auto-enrollment retirement savings plans through payroll.

INTERNAL REVENUE SERVICE ISSUES

Tax Information Reporting

Accelerated Form W-2 Filing

The Protecting Americans from Tax Hikes Act of 2015 (Path Act) changed the dates employers are to file Forms W-2 and W-3 at least a month earlier in 2017 under a new law that deals with several payroll-related provisions – January 31 was the new filing deadline. This is the same deadline as the copies that must go to employees. The federal regulations do not change the filing deadlines for state copies, but more than half the states with income taxes now require state W-2 reporting by January 31.

Penalties for late or incorrect W-2 filing with the Social Security Administration (SSA) or furnished to an employee have increased. The amounts are based on the employer's behavior. The quicker the error is corrected, the lower the penalty amount. Of course, the highest penalty is for those employers that deliberately ignore filing requirements. Penalties include:

- $50 per form for corrected forms filed within 30 days,
- $100 per form for corrected forms filed by August 1,
- $260 per form if no correct form is filed by August 1, and
- $530 per form if employer intentionally disregards filing requirements.

The pressure for earlier filing deadlines is a belief that this can prevent identity theft and tax fraud. The SSA says that the IRS has full access to employer filings within 3 days of electronic file submissions.

In theory, if the IRS can compare employer filed Forms W-2 to individual tax returns before issuing refunds, a significant number of false filings can be caught and individuals pursued for criminal fraud.

Truncated Social Security Numbers

Under the PATH Act, the IRS was given authority to truncate Social Security Numbers (SSN) on the Form W-2 series. However, the IRS has not yet taken that step and the 2017 Form W-2 instructions clearly state that employers may not truncate the SSNs on any copy of the form. The agency is still working through the issues. Truncating employee SSNs on the form could reduce the possibility of identity theft.

Employers may truncate SSNs on Copy B of the following forms:

- Substitute and composite substitute statements (other than the W-2 series)
- Form 1095-C
- Form 1098 series (except Form 1098-C)
- Form 1099 series
- Form 5498 series

Automatic Filing Extensions

The IRS is limiting the filing extensions that employers may request. Covered forms include the W-2 series, 1095, 1098, 1099, the 5498 series, 1042-S, and 8027. For forms other than W-2, one automatic filing extension was allowed for 2016 forms filed in 2017. For Form W-2, only one nonautomatic extension was allowed, and the IRS granted it only for emergencies. Employers needing a nonautomatic extension, can make the request with Form 8809. Under proposed rules, the agency will not offer automatic extensions at all for information returns filed in 2018 and beyond. The IRS claims that filing extensions defeat the purpose of the earlier filing deadlines. In addition, the agency is attempting to prevent employers from using filing extensions as a means to procrastinate.

Affordable Care Act Information Reporting

Wanting to show commitment to his campaign promise and also to pressure Republicans into taking action, President Trump signed an executive order on the same day he was sworn into office. The order first states the Trump Administration's policy to repeal the ACA and directs federal agencies to use their authority to relieve states and individuals from some of the burdens under the act. What does this mean?

Employers should continue to offer coverage and report on that coverage as required by the ACA and the regulations implementing the law. Note that the order does not include employers in the list of parties for whom the "cost, fee, tax, penalty, or regulatory burden" should be minimized. Instead, the order lists "individuals, families, health care providers, health insurers, patients, recipients of health care services, purchasers of health insurance, or makers of medical devices, products, or medications."

The American Health Care Act –

- Would leave intact the more popular ACA provisions guaranteeing coverage of adult children until age 26 and coverage for pre-existing conditions, while repealing or revising many other provisions:
  - Move reporting of the employer's health coverage offer to Form W-2 and make it monthly so IRS knows who qualifies for the new tax credits that replace the ACA's subsidies
  - Insurers, presumably including self-insured employers would still have to report coverage provided to individuals
  - The 0.9% Additional Medicare Tax would be repealed
  - Over-the-counter medicine would be considered qualified medical expenses under HSAs, MSAs, FSAs, and HRAs
  - The limit on pre-tax contributions to FSAs would be repealed (currently at $2,600 for 2017)
  - HSA contribution limits would be increased
  - "Cadillac" excise tax on expensive health insurance would be delayed until 2025
  - Passed House on May 4
  - Bill died in Senate

On October 12, 2017, President Trump signed Executive Order 13813, Promoting Healthcare Choice and Competition Across the United States. The Executive Order paves the way for government agencies to expand allowable health insurance products beyond those allowed under the ACA. The president's plan "prioritizes three areas for improvement in the near term":

- Association Health Plans (AHP)
- Short-term limited-duration insurance (STLDI)
- Health Reimbursement Arrangements (HRA)

Tax Reform

House Ways and Means Committee Republicans have said "…the revised tax filings for most Americans will be simple enough to fit on a postcard."

The Fair Tax Act of 2017 would impose a national sales tax on the use or consumption in the United States of taxable property or services in lieu of the current income and corporate income tax, employment and self-employment taxes, and estate and gift taxes.

The Tax Code Termination Act would eliminate all taxes imposed by the Internal Revenue Code after December 31, 2021, as long as Congress approves a new federal tax system by July 4, 2021.

Self-employment, Federal Insurance Contributions Act (FICA), and railroad retirement taxes would still be collected.

On September 27, the administration and congressional leaders laid out plans for a bill to overhaul the tax code. As of mid-October, no bill has been introduced, and details are sketchy.
Personal taxes:

- Reduce the existing tax brackets from 7 to 3 (12%, 25%, and 35%)
- Increase the standard deduction for married couples filing jointly and single filers
- Increase the child tax credit (in effort to eliminate "marriage penalty")
- Introduce a "more accurate measure of inflation" for tax indexing
- Eliminate
    - additional standard deduction for single filers over 65 or blind
    - personal exemption
    - Alternative Minimum Tax
    - estate tax
    - most itemized deductions (not including mortgage interest, charitable deductions)

Business taxes:

- Lower top tax rate from 35% to 20%
- Eliminate corporate alternative minimum tax
- Limit net interest deductions by C-corporations
- Various other measures

Analyses differ regarding the overall impact of the tax cut. The Tax Policy Center expects that every band of the income spectrum would see their after-tax incomes rise. The bottom four income quintiles would gain from 0.5 to 1.2% in after-tax income in 2018. The top 1% would gain 8.5%, and the top 0.1% would gain 10.2%.

IMMIGRATION

New Form I-9, Employment Eligibility Verification

Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. Both employers and employees have legal responsibilities for completing the form. The U.S. Citizenship and Immigration Services (USCIS) administers the Form I-9 and a new version of the form was issued on July 17 and took effect on September 17, 2017. There are multiple versions of the form and form instructions, including electronic, PDF, and paper versions.

E-Verify

E-Verify is the government Internet-based system that allows employers to confirm that an employee is authorized to work in the United States. The system compares information on an employee's Form I-9 to data from records at the U.S. Department of Homeland Security and Social Security Administration to verify eligibility to work in the United States. The USCIS last upgraded the system in April 2016. With new political pressure to reform immigration, some members of Congress are considering whether to make E-Verify a mandatory program.

Anticipating that Congress may introduce legislation requiring mandatory use of E-Verify, APA wrote to members of both the House and Senate with recommendations to ensure a successful implementation of the program. APA recommended the following:

- **Adequate funding:** The Consolidated Appropriations Act of 2017, which carries the federal budget through to September 30, includes $103.9 million for operations and support of the E-Verify system and another $15.2 million for the procurement, construction, and improvement of the system. Additional funding may be necessary for system upgrades, system interface programs, and employer-employee outreach.
- **Preemption:** A decision by Congress to make E-Verify mandatory should preempt state and local government employment verification requirements. Twenty-three states have passed legislation regarding E-Verify with widely varying requirements.
- **Retroactive application:** Mandatory E-Verify, if implemented, should only apply to new hires and employees requiring reverification and not all current employees.
- **Criteria and training for users and employer agents:** Legislation should require USCIS to establish universal criteria and training requirements for all users processing E-Verify cases as well as all E-Verify employer agents to ensure they are knowledgeable about employment verification requirements.
- **Reasonable compliance grace period:** APA recommends that employers receive at least two to three years after the effective date of legislation to comply with any mandatory E-Verify requirement. Further, Congress should consider a phased implementation approach based on employer size and relationship to homeland security (e.g., a military service contractor, contractor for the State Department, or a federal agency).
- **Notice and time to cure problems:** When mistakes are made in complying with mandatory E-Verify requirements, employers should be provided with sufficient notice and time to make corrections before penalties are assessed.
- **Protections from liability:** If an employer acts in accordance with an E-Verify nonconfirmation and terminates an individual's employment based upon a mistake in the E-Verify process, that employer should be protected from a wrongful termination lawsuit.
- **Increased hours of operation:** Employers deserve 24-hour availability of the E-Verify system. Currently, the E-Verify system goes offline at night because of maintenance and batch processing at the SSA. Limited uptime plus a significant increase in volume because of mandatory use could create a processing bottleneck.

RETIREMENT ACCOUNTS

Employee Retirement Income Security Act

Former President Obama directed the U.S. Department of Labor (DOL) to clear a path for state retirement plans by ordering a rulemaking to exempt states from certain Employee Retirement Income Security Act (ERISA) requirements. The DOL followed the directive when it published a final rule on August 25, 2016, adding an ERISA safe harbor for state savings programs. The rule took effect on September 29, 2016.

Section 3(2) of ERISA defines "employee pension benefit plan" and "pension plan" broadly to include, "[A]ny plan, fund, or program which ... is ... established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program provides retirement income to employees. ..." The purpose of this provision is to protect participants by securing the promised benefits through a multitude of complex federal requirements. When viewed along with requirements that state laws on private-sector employee retirement benefits are preempted, states may be reluctant to establish state payroll deduction savings programs.

The DOL's final rule says that if state plans include certain provisions employers with mandatory responsibilities under a state plan would not be subject to ERISA procedures. These provisions include conditions. The program must be established by state law and be implemented and administered by the state that created it.

A proposed rule offering an ERISA safe harbor to state political subdivisions that meet certain criteria was published in August 2016. The final rule is pending.

In the meantime, under the Congressional Review Act, Congress is looking to kill the ERISA safe harbor rules. H.J. Res. 66, which passed the House on February 15, 2017, would block the final rule for state arrangements. H.J. Res 67, which also passed the House on February 15, would block the rules for state political subdivisions.

Some states, such as California, Connecticut, Oregon, and Illinois, began creating automatic-enrollment, payroll-deduction retirement plans before the ERISA safe harbor rules were proposed. These state are continuing to pursue their plans. Impacts on other states if the ERISA safe harbor rules are blocked is still unclear.

myRA

In July, Treasury effectively killed the myRA program. (MyRA stood for "My Retirement Account.") The program was established under the Obama administration to provide easy access to retirement plans. Initially it was established to help individuals who had no access to traditional employer plans or who were ineligible to participate in those plans. In a letter to Treasury Secretary Steve Mnuchin, Senator Orrin Hatch (R-UT) said, “While perhaps well intended, the scheme has not been a net benefit to savers and American taxpayers, and was set up through executive overreach to sidestep the Congress.”

State Retirement Plans

Both California and Illinois created secure choice savings boards to manage mandatory state-sponsored payroll deduction IRAs. California’s program applies to employers of 5 or more employees that do not offer their own plans. The payroll deduction is 3% and employees may opt out. Neither the state nor employers are responsible for any liabilities.

Employers only role is providing employees with an initial packet of information and taking payroll deductions. Payments go to one place, the Employment Development Department. California is currently working on whether a third party can provide the initial information reducing employers burden further.

Illinois’ law is similar, however, the program is mandatory for employers with 25 or more employees and voluntary for smaller businesses. Program specifics are in the development stage, but may include employers determining the enrollment period and penalties for noncompliance.

Connecticut also created a board, but for the purpose of conducting a market feasibility study and implementation plan. The report to the state legislature this past January included recommendations on program structure, governance and enforcement, as well as financial feasibility. House Bill 5591 to formally adopt the recommendations is pending.

In July, Vermont issued a multiple employer plan for employers of 50 or fewer employers. Essentially, there is one plan with many employers using it. The program is voluntary for employers and employees.

Oregon passed legislation in 2015 to create a retirement board in the office of the state treasurer that would report to a legislative committee. The board first conducted a market analysis and feasibility study, including costs of a state plan on employers and already selected a financial company. Now, the state is in the rulemaking stage to create plan details. A hearing on proposed rules was held on February 15 and a meeting with payroll providers was held on February 21. The plan would cover all employers through phased implementation dates and would operate as a post-tax Roth IRA. Phase 1, for employers with 100 or more employees, starts in November.

Other states are studying whether to create some type of retirement plan. For example, Maryland created a commission on retirement security and savings to figure out how to make citizens financially secure. The commission consists of state legislators and agency heads, which is different than other states that are creating boards with participation from private-sector expects. Governor

Hogan expressed to the legislature and the commission that he will only support a program that does not add a layer of state government bureaucracy or increase the administrative burden on small businesses.

CHILD SUPPORT and GARNISHMENT

Revised Income Withholding Order Form (OMB 0970-0154) and Instructions

On October 4, 2016, the federal Office of Child Support Enforcement (OCSE) published a notice of proposed rulemaking to review the Income Withholding Order (IWO) Form. The comment period closed on December 2, 2016. The APA supported some of the proposed changes, objected to others, and offered some suggested additional changes. Some of the proposed changes are listed below:

- Remove Amended IWO Checkbox – One checkbox will be used for an IWO, without distinction of initial or amended.
- Remove Remittance ID – Child support agencies are instructed to use the Case ID as the payment identifier.
- Effective Date – An IWO is effective the first pay period after the employer/income withholder receives it.
- Consumer Credit Protection Act (CCPA) Limit – The form and instructions clarify that the sender must enter a specific percentage to withhold, not a range of percentages or a maximum percentage.
- Lump Sum IWOs – Amended the language to clarify that child support agencies should send lump sum IWOs only when notified by an employer that an employee is eligible for an upcoming lump sum payment.
- Withholding Limits for Tribal IWOs – Amended language to clarify that the employee's principal place of employment governs the withholding limits. If the employee's principal place of employment is within a state, the employer must apply the state withholding limits, even when a tribal child support agency issues the IWO. If the employee's principal place of employment is on tribal land, employers must apply tribal withholding limits.

Consumer Credit Protection Act and Lump-Sum Payments

New guidance from the DOL establishes that lump-sum payments are covered by Title III of the Consumer Credit Protection Act (CCPA) for purposes of garnishments. The CCPA states that up to 50% of a worker's disposable earnings may be used for child support if the worker is supporting another spouse or child, or up to 60% if the worker is not. An additional 5% may be garnished if the worker is more than 12 weeks in arrears.

The problem is that some states treat lump-sum payments as if the CCPA does not apply. These states are garnishing as much as 100% for child support payments. The states that don't follow the

CCPA are misinterpreting the definition of disposable earnings and placing employers in the difficult position of deciding between complying with state child support orders and the CCPA.

The DOL's revised guidance is in the agency's Fact Sheet number 30.

State Child Support Issues

The majority of problems for payroll departments with state child support programs regard methods of calculating payroll deductions, future-dating of IWOs, new hire reporting, and verifications of employment. For example, in the OCSE's 2016 Employer Symposium Report, payroll professionals and state representatives recommended standardizing state new hire reporting data elements and pursue legislation to allow employer new hire reporting to OCSE, which would then distribute the information to states. Standardizing the verification of employment process also was recommended to centralize and automate reporting for employers.

In **Colorado**, a calculation method was causing problems for child support. Through pressure from APA and the OCSE, the calculation method is changing. The list of unintended consequences associated with Colorado's method includes:

- The amount listed on the IWO is not the amount reflected on the underlying child support order. In most cases, the employer would in fact be withholding more than the amount in the underlying order.
- When prorating for other child support agency's orders, the inflated amount on the Colorado issued IWO causes those other orders to be reduced because the Colorado child support agency artificially inflated the amount to withhold.
- The Colorado child support agency stated that they will issue refunds to the employee when an over withholding occurs if the individual does not owe past-due child support. In cases where the employee has other garnishments, those funds should go to other creditors that may include other Colorado state agencies.
- There is a lack of uniformity across state and tribal child support programs.
- Potential for unintended discrimination because this impacts just the weekly and bi-weekly pay frequencies (employees at the same company may be on different pay frequencies).
- Issuing an IWO that inflates the child support obligation causes employers NOT to withhold for a lower priority order. This is unfair to the other creditors that should receive some payment from an employee's wages to repay their debt.

In **Illinois**, the Department of Healthcare and Family Services (HFS) has decided to lower the maximum withholding for child support to 50% of disposable income. State law corresponds with federal limits and allows up to 65% of disposable income to be withheld. HFS reportedly has no plans to issue amended Income Withholding Orders (IWO) to reflect the new withholding limit. It is unclear whether HFS expects employers to implement the new withholding limit absent an amended order.

State Garnishment Legislation

California Student Loans

Senate Bill 16 would require that the higher of the state minimum wage or the applicable local minimum wage be used to calculate the amount that is exempt from wage garnishment. It also sets the withholding limit for defaulted student loans at the lesser of: (1) 15% of disposable earnings, or (2) 50% of the amount by which the individual's disposable earnings for that week exceed 40 times the state (or local, if higher) minimum hourly wage. Most states tie student loan garnishments to federal and state minimum wages and not local requirements, which would create a significant administrative burden.

In 2016, California enacted a similar proposal to use the local minimum wage for creditor garnishments (SB 501), which payroll professional are finding difficult to apply. California has 21 jurisdictions with higher local minimum wages than the state's, and payroll software providers are so far reluctant to develop programs that will accommodate California's rule. As a result, employers are forced to develop the programs on their own or perform the calculations manually. Manual calculations increase the risk of error, which can lead to penalties for both the employer and the employee.

Applying a local minimum wage also creates a fairness issue for California residents. In local areas with higher minimum wages, residents would benefit from greater exemptions than other localities. Where the minimum wage is based on number of employees (e.g., Los Angeles and Malibu), the disparity is even more remarkable.

APA's opposition to the bill, which included a coordinated letter writing campaign by local chapters in California, helped derail progress for this bill.

Colorado Creditor Garnishments

Senate bill SB 17-080 would have tied garnishment exemptions to the federal poverty level. (The bill eventually died in committee.) Under the bill, employees in Colorado earning at least 250% of the federal poverty level could have had up to 25% of disposable earnings withheld from their pay for a creditor garnishment. Those earning less could have had no more than 10% of disposable earnings withheld. APA noted to state legislators that the federal poverty level is a moving target, updated annually and adjusted for family size. No payroll system or garnishment software currently tracks those figures, and the compliance costs were unwarranted.

APA wrote, "If the goal is to protect more of an employee's wages, this can be accomplished in a streamlined method by increasing the exemption percentage within the calculation (i.e., the amount by which an employee's disposable earnings for that week exceed 40 or 50 times the federal or state hourly minimum wage in effect at the time the earnings are payable)." APA noted that the Uniform Wage Garnishment Act (UWGA) has been introduced in Colorado. APA endorses the UWGA and told Merrifield, "the UWGA is structured in such a way that the additional protections you seek to provide Colorado residents could be realized without causing undo difficulties on the employers responsible for calculating the amount that may be withheld from their employees' wages."

MOBILE WORKFORCE LEGISLATION

States currently have varying and inconsistent standards regarding income taxes for:

- *Employees* to file personal income tax returns when traveling to a nonresident state for temporary work periods; and
- E*mployers* to withhold income tax on employees who travel outside of their state of residence for temporary work periods.

Employees who travel outside of their states of residence for business purposes are subject to onerous administrative burdens because, in addition to filing federal and resident state income tax returns, they may also be legally required to file an income tax return in every other state into which they traveled, even if they were there for only one day.

Employers are required to incur extraordinary expenses in their efforts to comply with the states' widely divergent withholding requirements for employees' travel to nonresident states for temporary work periods.

APA serves on the steering committee of a coalition that has been pushing for the legislation since 2007. In the intervening years it has thrice been passed by the House of Representatives, most recently in June 2017. At this time, there are more than 300 companies and organizations that have signed on to the coalition. More information is available online at www.mobileworkforcecoalition.org.

The **Mobile Workforce State Income Tax Simplification Act** (H.R. 1393, S. 540) provides for a uniform, fair, and easily administered law and helps to ensure that the correct amount of tax is withheld and paid to the states without the undue burden that the current system places on employees and employers.

Provisions include:

- Consistency with current law in which an employee's earnings are subject to full tax in his/her state of residence.
- An employee's earnings would be subject to tax in the states within which the employee is present and performing employment duties for more than 30 days during the calendar year (safe harbor provision).
- A work day is assigned to a nonresident state when any part of the work day is in that nonresident state, but a single day may be assigned only to one nonresident state.

- Certain uncommon types of employees, including professional athletes, professional entertainers, and some public figures are not covered by this bill and remain subject to state withholding laws.
- New exemption added for "qualified production employees."

The version of the bill introduced in 2017 varies slightly from previous years. "Qualified production employees" working on a film or television production would not be eligible for the 30-day safe harbor against nonresident income tax withholding if their work was covered by a state's film incentive program. Under these incentive programs, production companies receive corporate tax credits, which are generally considered to be well worth the administrative burden imposed by the need to comply with state rules for withholding nonresident income taxes.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PAY DATA COLLECTION

For the past number of years, former President Obama's National Equal Pay Task Force along with a National Academy of Sciences panel worked on how to measure and collect pay information from U.S. employers. In September 2016, the Equal Employment Opportunity Commission (EEOC) announced final rule revisions to the Employer Information Report, EEO-1, to include collecting pay data from employers with more than 100 employees. On August 31, 2017, the Office of Management and Budget issued an immediate stay on the rule.

The EEOC had been planning to use the pay data to discover evidence of pay discrimination and also to encourage equal pay. The EEOC will continue to collect data on workplace profiles by race, ethnicity, sex, and job category, but it will not collect data on pay or hours worked.

Aggregate Form W-2 data would have been reported based on 12 pay bands – counting and reporting the number of employees in each band. The 12 pay bands were matched with 10 job categories and reported accordingly. Hours would have been calculated based on the total worked during the year by all employees in each category based on sex and ethnicity or race.

In comments on the proposed rule, APA disagreed with how the EEOC assessed payroll operations in terms of the ease of collecting the information and potential limitations on what the data would indicate. For example, the EEOC suggested that collecting the data would require a simple, one-time fix to human resource information systems. APA pointed out that not all human resource and payroll functions interface in the same manner.

APA said, "[C]ompany decisions on human resource personnel, procedures, and software are different than those that apply to payroll departments…. Anytime an employer makes changes to its processes to collect more data, doors are opened for potential data theft." APA also said that data collection by large, decentralized employers with many divisions or subsidiaries would be much more complicated than the EEOC anticipated, because "payroll and human resource functions may not be integrated at the parent level to easily provide the EEOC with aggregate pay data."

In addition, APA offered information to show that using W-2 data could create false positives in identifying discrimination because the structure of an organization's compensation package can skew the true value of employees' pay. APA said, "[V]ariables exist in the workplace that W-2 data does not fully capture." These include benefits such as health care insurance, retirement plans, profit-sharing contributions, and stock options.

U.S. DEPARTMENT OF LABOR'S OVERTIME RULES

White collar exemptions from overtime apply to employees who work in bona fide executive, administrative, professional, outside sales, or computer professional positions. Since 1949, the DOL has set a salary level that was raised periodically to cover a significant portion of the white-collar workforce. In 1975, 65% of all white-collar workers were eligible for overtime. Overtime was adjusted downward in 2004 such that it covered only 18% of white-collar workers. In 2016, the regulations were adjusted again. They were supposed to go into effect in December to increase the eligibility for overtime to 40% of the white-collar workforce. A federal judge issued an injunction halting the rule nationwide on November 22, 2016.

The final DOL regulations were going to raise the required salary level to $913 per week or $47,476 annually. The current level is $455 per week ($23,660 for a full-year worker). The salary level would have been adjusted every three years starting on January 1, 2020. The highly compensated employee exemption applies to workers earning $100,000 or more in a year. The proposed regulation would have raised that to $134,004 a year, adjusted every 3 years effective in 2020.

Under the Trump administration, the U.S. DOL asked the court for an opportunity to review the rules. In July, it issued a request for information, asking 11 questions to help it "[formulate] a proposal to revise the Part 541 regulations." Comments were due September 25.
(The questions following have been condensed. The complete questions may be found here: https://www.federalregister.gov/documents/2017/07/26/2017-15666/request-for-information-defining-and-delimiting-the-exemptions-for-executive-administrative.)

1. In 2004 the standard salary level excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used?
2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?
3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done between 1963 and 2004?

4. Prior to 2004, the DOL applied long and short tests for salary levels. Should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would changes to the duties test be needed?
5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?
6. To what extent did employers act in anticipation of the 2016 Final Rule's effective date on December 1, 2016? Did employers:
    a. Increase salaries of exempt employees in order to retain their exempt status?
    b. Decrease newly nonexempt employees' hours, or change their implicit hourly rates so that the total amount paid would remain the same?
    c. Convert worker pay from salaries to hourly wages?
    d. Change workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times?
7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?
8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent nonexempt work per week?
9. The 2016 Final Rule for the first time permitted nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?
10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set?
11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective?