National Employers Association

The NEA Monthly Lobbyist Report for Members

Lobbyit

NEA January 2023 Policy Report

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Month in Review

Before signing off for the year, the 117th Congress was able to come to a final agreement on an omnibus and funding for FY23. The agreement consists of all 12 FY 2023 appropriations bills that combined provide a total of $1.627 trillion in discretionary spending for the fiscal year. Of the total, $1,602 trillion represents base discretionary spending for the 12 spending measures, while $20.1 billion in disaster funding, $2.6 billion for wildfire suppression, and $2.3 billion in program integrity funding is subject to their own cap adjustments. (Some say the measure actually provides about $1.7 trillion after factoring in certain discretionary spending that is not scored.)

Of the total for base discretionary spending, $858 billion is for defense (budget function 050) programs and activities (10% more than FY 2022) and $743.9 billion is for non-defense programs and activities (8% more).

The $858 billion for defense for FY 2023 is equal to the level assumed in the FY 2023 Defense Authorization bill (HR 7776), which President Biden is expected to sign into law this week. Under budget function 050, the Defense Department (including intelligence agencies) and nuclear weapons activities of the Energy Department usually receives 95.5% of the discretionary funding. Other defense-related spending includes national security funding for the FBI, Coast Guard and other agencies.

Within the total appropriations provided by the agreement, $15.3 billion is earmarked for 7,234specific projects and activities (now known as "Community Project Funding"). In addition, the 12 spending bills continue the vast majority of policy riders that have been included in past appropriations acts, such as the Hyde amendment which prohibits the use of federal funding to pay for abortions except when the pregnancy would endanger the mother or in the case of rape or incest.

Omnibus

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Under the measure, base FY 2023 funding is provided as follows:

Agriculture — $25.5 billion in net discretionary spending, $355 million (1.4%) more than comparable FY 2022 funding

Commerce-Justice-Science — $82.4 billion in net discretionary spending, $6.7 billion (9%) more than FY 2022.

Defense — $797.7 billion in net discretionary spending, $69.3 billion (10%) more than FY 2022.

Energy-Water — $54.0 billion in net discretionary spending, $1.1 billion (2%) more than FY 2022.

Financial Services — $27.6 billion in net discretionary, $2.1 billion (8%) more than FY 2022.

Homeland Security — $60.7 billion in net discretionary spending, $3.2 billion (6%) more than FY 2022.

Interior-Environment — $38.9 billion in net discretionary spending, $850 million (2%) more than FY 2022.

Labor-HHS-Education — $207.4 billion in base net discretionary spending, $10.4 billion (5.3%) more than FY 2022.

Legislative Branch — $6.9 billion in net discretionary spending, $976 million (16%) more than FY 2022 funding.

Military Construction-VA — $154.2 billion in net discretionary spending, $26.6 billion (21%) more than FY 2022.

State-Foreign Operations — $59.7 billion in base net discretionary funding, $3.6 million (6%) more than FY 2022.

Transportation-HUD — $87.3 billion in base discretionary spending, 8% more than FY 2022 (but $164.9 billion in total resources including trust fund releases, 6% more than comparable FY 2022).

Capitol Hill

House Education & Labor

On December 5th, Education and Labor Committee Republican Leader Virginia Foxx (R-NC) blasted the Biden administration for pushing regulations that negatively impact the franchise model.

“The Biden administration’s destructive regulatory agenda is jeopardizing the franchise model. President Biden will stop at nothing to advance Big Labor’s agenda—even if it means harming workers. The Biden administration is working overtime to shove as many workers as possible into unions, regardless of worker preference.

The Biden administration’s proposed rule will fundamentally destroy the franchise model by taking autonomy away from individual franchise owners, depriving them of the ability to run their own businesses.

Being able to own a franchise business, like a fast-food restaurant, is a ticket to the American Dream, especially for women and minorities. Americans who invested their time and energy into building a business do not deserve to have it snatched away—all because President Biden wants to appease Big Labor. To save the American Dream for these business owners and promote better opportunities for our entire workforce, Republicans will oppose this dangerous power grab. Instead, we will support policies that put workers and job creators first.”

Mediation

Additionally, on December 5th, Education and Labor Committee Republican Leader Virginia Foxx (R-NC) and Civil Rights and Human Services Subcommittee Republican Leader Russ Fulcher (R-ID) sent a letter to Equal Employment Opportunity Commission (EEOC) Chair Charlotte A. Burrows to sound the alarm on the agency’s draft Strategic Plan, which misses opportunities for making EEOC more responsive to workers and employers.

Specifically: Mediation and conciliation are vitally important functions of EEOC that lead to just and timely resolutions of cases for workers and employers in lieu of costly litigation. In July 2020, EEOC launched mediation and conciliation pilot programs. However, within the first week of the Biden administration, EEOC discontinued these successful pilot programs with little explanation or justification. The mediation pilot program, or “ACT (Access, Categories, Time) Mediation pilot,” was intended to enhance EEOC’s successful mediation program by expanding the categories of discrimination charges eligible for mediation and by allowing mediation throughout investigations. The ACT Mediation pilot additionally expanded the use of virtual mediation. EEOC received enough positive feedback on the pilot that it was extended through the end of Fiscal Year 2021.

The conciliation pilot was intended to build on a renewed commitment to communication between EEOC and the parties, to increase internal accountability, and to improve existing practices by adding a requirement that the appropriate level of agency management approve offers before they are communicated to employers.

EEOC’s hasty cancellation of these pilot programs and the Strategic Plan’s omission of any plans to reinstate them are missed opportunities for the agency to resolve cases for workers and employers constructively. We believe that Strategic Plan “Goal I” would be better met by reinstating these important pilot programs.

Senate HELP

Proposed Joint Employer Rule Restoring Corporations' Responsibility to Workers

On December 7th, Senator Patty Murray (D-WA), Chair of the Senate Committee on Health, Education, Labor, and Pensions (HELP), led 21 of her colleagues in sending a letter commenting on the Biden Administration's proposal to reinstate the National Labor Relations Board's (NLRB) long-standing joint-employer standard to ensure that all corporations with control over workers' health, safety, hours, pay, and other working conditions are at the bargaining table with workers.

Senator Murray continued: "The NLRB's proposal to reinstate the NLRB's historic standard, which properly allows for a full examination of all relevant facts and circumstances in deciding whether a joint-employment relationship exists, is both good policy and furthers congressional intent motivating the passage of the National Labor Relations Act (NLRA) itself." "Returning to the longstanding principles as set forth in the NLRB's Browning-Ferris Industries decision is an important, and necessary, step in the right direction."

In their letter, the Senators applauded the Biden Administration's proposal to return to the historic standard and protect workers' rights by restoring employers' obligation to bargain with workers for fair pay, betters hours, safer working conditions, and more after the Trump administration weakened the standard, allowing corporations to shirk their responsibility to meet workers at the table.

"Workers from every walk of life are joining together to stand up for their rights and for one another. Accordingly, we strongly support the NLRB's proposed rule and urge thorough and swift action in promulgating the final rule to provide clear guidance to workers and employers."

The comment letter, led by Senator Murray, was signed by Senators Schumer, Markey, Blumenthal, Brown, Casey, Hickenlooper, Booker, Van Hollen, Padilla, Duckworth, Merkley, Baldwin, Reed, Cardin, Sanders, Smith, Durbin, Warren, Whitehouse, Gillibrand, and Wyden.

Independent Contractor

On December 13th, U.S. Senator Patty Murray (D-WA), Chair of the Senate Committee on Health, Education, Labor, and Pensions (HELP), led 11 of her colleagues in sending a comment letter applauding the Biden Administration's proposed employee and independent contractor classification rule, which reinstates the Department of Labor's (DOL) longstanding economic realities test to restore protections for all workers covered by the Fair Labor Standards Act (FLSA) and ensure employers don't misclassify them and deny them workplace rights.

Recall that back in October the NLRB alongside DOL issued a rule that reverted the independent contractor system to it's Obama era rule.

On October 11th, the Labor Department unveiled a set of rules that would make it harder for companies to classify workers as independent contractors. The new rules, scheduled to be adopted on October 13, are a return to Obama-era guidelines on the classification of gig workers. The new rules would:

1. "Align the department's approach with courts" Fair Labor Standards Act (FLSA) interpretation and the economic reality test.

2. Restore the multifactor, totality-of-the-circumstances analysis to determine whether a worker is an employee or an independent contractor under the FLSA.

3. Ensure that all factors are analyzed without assigning a predetermined weight to a particular factor or set of factors.

4. Revert to the longstanding interpretation of the economic reality factors. These factors include the investment, control and opportunity for profit or loss factors. The integral factor, which considers whether the work is integral to the employer's business, is also included.

5. Assist with the proper classification of employees and independent contractors under the FLSA.

6. Rescind the 2021 Independent Contractor Rule.

"By restoring and codifying the longstanding economic realities test, this rule will protect workers against misclassification and even the playing field for businesses that properly classify their workers," wrote the Senators. "Accordingly, we strongly support the DOL's proposed rule and urge the Department to finalize it."

In the letter, the Senators underscored that the Biden administration's proposed rule will help limit employee misclassification, protecting workers' rights and more closely aligning with both congressional intent and Supreme Court jurisprudence after the Trump administration weakened protections against worker misclassification.

"We support DOL's proposal to reinstate the economic realities test to more closely align with congressional intent and Supreme Court jurisprudence," wrote the Senators in their letter. "The return to this test, which was in place for more than seven decades, will help ensure that all workers who are covered by the Fair Labor Standards Act's (FLSA) legal protections, including minimum wage and overtime, are not deprived of its protections by misclassification. The proposed rule will help limit employee misclassification by providing more clarity to workers and employers about their rights and responsibilities under the law."

The comment letter, led by Senator Murray, was also signed by Senators Casey, Schumer, Cardin, Booker, Murphy, Smith, Whitehouse, Wyden, Reed, Blumenthal, and Brown.

Senator Murray has long led efforts in Congress to shield against employee misclassification and protect workers' rights. In 2007, she introduced The Independent Contractor Proper Classification Act to protect against employee misclassification. More recently, she has fought to pass—and is the lead Senate sponsor of—the Protecting the Right to Organize (PRO) Act, which, among other things, would close loopholes that allow employers to misclassify their employees and deny them protections under the law.

However, as we've noted, the U.S. labor supply will likely remain depressed, and the Federal Reserve may attempt to push harder to cool labor demand, thus recession more likely. In other words, policies such as this will increase cost of labor at a time where macro policy is attempting to make money more expensive.

Retirement Package

The new SECURE 2.0 Act of 2022, included in the omnibus legislation just submitted in the United States Congress, builds on the positive retirement plan provisions and momentum contained in the original SECURE Act from 2019. Over the past two years each of the four Congressional Committees with primary jurisdiction over retirement policy – the House Education and Labor Committee, the House Ways and Means Committee, the Senate Finance Committee and the Senate Health Education Labor and Pensions (HELP) Committee – passed with unanimous or near-unanimous bipartisan support – significant retirement-related provisions - demonstrating the importance of workplace retirement savings, and its critical role in providing retirement security for the nation's workers and their families.

Executive Branch

The U.S. Department of Labor, the Office of the U.S. Trade Representative and the European Commission today led the inaugural principals' meeting of the U.S. and European Union tripartite Trade and Labor Dialogue.

The meeting included key U.S. and EU labor and business representatives, and focused on identifying opportunities for governments, labor unions and businesses to collaborate to eliminate forced labor in supply chains.

Launched under the U.S.-EU Trade and Technology Council, the dialogue allows the U.S. and the EU to consult workers' organizations and business representatives on transatlantic trade and labor issues jointly, especially in relation to the work of the council's Working Group on Global Trade Challenges.

The department's Deputy Undersecretary of International Affairs Thea Lee, U.S. Trade Representative Ambassador Katherine Tai, and the European Commission's Executive Vice President and Commissioner for Trade Valdis Dombrovskis hosted the event.

"Our policies must address the challenges today's workers face throughout the global economy," said Deputy Undersecretary for International Affairs Thea Lee. "These challenges include eliminating forced labor in our global supply chains and ensuring the rights of workers in the growing digital economy are protected. Working with our U.S. and EU partners, we hope to realize our shared goals for inclusive trade and economic development with strong support for international labor rights."

"The recently released global estimates of 28 million people in forced labor highlight that the products we trade continue to be tainted by human exploitation," said Ambassador Katherine Tai. "Our partnership with the European Union, and our collaboration with transatlantic labor unions and business leaders, is critical to advancing our work to make trade a force for good and transform the way we treat workers – not just in the United States – but across the world."

In a prior technical level meeting of the dialogue, union and business leaders identified the following priority areas for further discussion and cooperation: combatting forced labor, including in global supply chains, and exploring the impact of digital trade on workers and employers for the future of work in the digital economy as priority areas for further discussion and cooperation under the Trade and Labor Dialogue.

The topics discussed at the principals' meeting included:

- Leveraging trade tools between the U.S. and the EU to eliminate forced labor in the global economy.
- Fostering cooperation between labor unions and businesses, and governments to identify, prevent, address, and reduce the risk of forced labor at every level of the supply chain in line with international standards.
- Incorporating collective worker voice into actions to address forced labor in supply chains.

The U.S. labor and business representatives included the American Federation of Labor and Congress of Industrial Organizations, Communication Workers of America, the Screen Actors Guild- American Federation of Television and Radio Artists, the Solidarity Center, the U.S. Chamber of Commerce, the U.S. Council of International Business, the Information Technology Industry Council and the National Foreign Trade Council.

US DEPARTMENT OF LABOR, IRS RENEW AGREEMENT TO CONTINUE, IMPROVE JOINT EFFORT TO COMBAT EMPLOYEE MISCLASSIFICATION

The U.S. Department of Labor and the IRS today renewed a memorandum of understanding and added a streamlined process for joint referrals and closer coordination to stop businesses from misclassifying workers and denying them their full wages, benefits and protections under the law.

The updated MOU will also help the department's Wage and Hour Division share information and work in concert with the IRS to strengthen enforcement of federal and state laws that protect workers' rights.

"We are determined to identify and resolve labor violations by employers who benefit by misclassifying employees as independent contractors and deprive them of the protections of the labor standards laws we enforce," said Principal Deputy Wage and Hour Administrator Jessica Looman. "Renewing our memorandum of understanding with the IRS strengthens our existing partnership by improving referral processes and information sharing to help us better serve the nation's workers."

In 2011, the Wage and Hour division and the IRS first entered into a memorandum of understanding to enable both agencies to use their resources to promote employer compliance with obligations to pay employees and related employment taxes. Since then, the division and IRS have shared information when an investigation discovered that an employer had misclassified employees. By sharing information, the agencies reduce the illegal use of misclassification and the tax gap while improving compliance with federal labor laws.

Learn more about the Wage and Hour Division, including misclassification of independent contractors and a search tool for workers to use if they think you may be owed back wages collected by the division. Workers can call the Wage and Hour Division confidentially with questions – regardless of where they are from – and the department can speak with callers in more than 200 languages.

FTC: Non-Compete Agreements

The Federal Trade Commission proposed a new rule that would ban employers from imposing noncompetes on their workers, a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses. By stopping this practice, the agency estimates that the new proposed rule could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans.

The FTC is seeking public comment on the proposed rule, which is based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.

“The freedom to change jobs is core to economic liberty and to a competitive, thriving economy,” said Chair Lina M. Khan. “Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC’s proposed rule would promote greater dynamism, innovation, and healthy competition.”

To address these problems, the FTC’s proposed rule would generally prohibit employers from using noncompete clauses. Specifically, the FTC’s new rule would make it illegal for an employer to:

[E]nter into or attempt to enter into a noncompete with a worker; maintain a noncompete with a worker; or
represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The proposed rule would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. It would also require employers to rescind existing noncompetes and actively inform workers that they are no longer in effect.

PWFA & PUMP Act

The PWFA applies to employers with at least 15 employees and becomes effective on June 27, 2023.

Like the Americans with Disabilities Act (ADA), the PWFA includes the obligation to provide reasonable accommodations so long as they do not impose an undue hardship. Many courts have determined that pregnancy alone was not a disability entitled to accommodation under the ADA. Under the PWFA, employers will be required to provide reasonable accommodations to employees and applicants with known temporary limitations on their ability to perform the essential functions of their jobs based on a physical or mental condition related to pregnancy, childbirth, and related medical conditions.

The PWFA adopts the same meaning of “reasonable accommodation” and “undue hardship” as used in the ADA, including the interactive process that will typically be used to determine an appropriate reasonable accommodation.

The PWFA provides that an employee or their representative can make the employer aware of the employee’s limitations. It also provides that an employer cannot require an employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided. Of course, that does not mean the employee gets the accommodation of their choice. The statute provides a defense to damages for employers that, in good faith, work with employees to identify alternative accommodations that are equally effective and do not cause an undue hardship.

Labor Investments

2023 appropriations bills. In total, the regular 12 appropriations bills include $800 billion in non-defense funding, a $68 billion—9.3 percent—over last year. This is the highest level for non-defense funding ever and a larger increase in both dollars and percentage than fiscal year 2022.

U.S. Department of Commerce – $11.2 billion in net discretionary funding for the Department of Commerce, an increase of $1.3 billion above the fiscal year 2022 enacted level.

Manufacturing Extension Partnership (MEP) Program – $175 million, $17 million above fiscal year 2022 to help small and medium sized American manufacturers create and preserve jobs.

Department of Labor (DOL) – The bill provides a total of $13.8 billion in discretionary appropriations for DOL, an increase of $652 million above the fiscal year 2022 enacted level.

Employment and Training Administration - $10.5 billion for the Employment and Training Administration, an increase of $545 million above the fiscal year 2022 enacted level.

• $2.9 billion for Workforce Innovation and Opportunity Act State Grants, an increase of $50 million above the fiscal year 2022 enacted level.

• $115 million for the Reintegration of Ex-Offenders, an increase of $13 million above the fiscal year 2022 enacted level.

• $285 million for Registered Apprenticeships, an increase of $50 million above the fiscal year 2022 enacted level.

• $105 million for YouthBuild, an increase of $6 million above the fiscal year 2022 enacted level.

• $65 million, an increase of $15 million over the fiscal year 2022 enacted level, to continue and expand Strengthening Community College Training Grants to help meet local and regional labor market demand for a skilled workforce by providing training to workers in in-demand industries at community colleges and four-year partners.

• $1.760 billion for Job Corps, an increase of $12 million above the fiscal year 2022 enacted level.

• Worker Protection Agencies - $1.9 billion for Worker Protection Agencies, an increase of $52 million above the fiscal year 2022 enacted level. Within this amount, the bill includes:
• $260 million for the Wage and Hour Division, an increase of $9 million above the fiscal year 2022 enacted level

• $632 million for the Occupational Safety and Health Administration, an increase of $20 million above the fiscal year 2022 enacted level

• $191 million for the Employee Benefits Security Administration, an increase of $6 million above the fiscal year 2022 enacted level.

Looking Ahead

Moving forward, we'll engage with members of Senate HELP. Our goal is to better socialize NEA as a leader in workforce development and labor issues among stakeholder offices.

If you have any questions regarding what is included in this report, please reach out to me directly.
Best,

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