

The Pro-Employee Tide: Trends in HR Compliance

Manuel Martinez-Herrera
Andy Przystanski

Namely 
HR for Humans

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Employment law has traditionally been a tug of war between employers and employees, and the battle lines are almost indistinguishable from those that divide the country's two major political parties.

The '80s were marked by decisive employer wins, as under the Reagan administration unions lost their influence and a gutted Department of Labor meekly enforced “voluntary compliance.” In the '90s, employees countered with the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). In the early 2000s, the two parties reached a stalemate.

2016 is President Obama's final year in office. With far-reaching reforms to overtime rules and continued pressure on states to act on paid leave and the minimum wage, the president aims to leave his mark.

Even so, the president's authority has limits and there is only so much he can push through a generally pro-employer Congress. Paid family leave and minimum wage increases, two of the president's top pro-employee causes, have been non-starters. Sensing this, certain states and cities have opted to pass their own measures. On subjects ranging from paid leave to criminal background checks, states have passed resoundingly pro-employee laws in 2016. Some, like California, have gone as far as to pass minimum wage laws doubling the federal minimum.

The pro-employee tide is rising—and if the last six months are any indication of what's to come, we have yet to see its peak.





Overtime Reform: 2016's Biggest Employee Win

The Department of Labor's new overtime rules signaled a massive coup for employee advocates—and could leave a lasting mark on businesses for years to come.

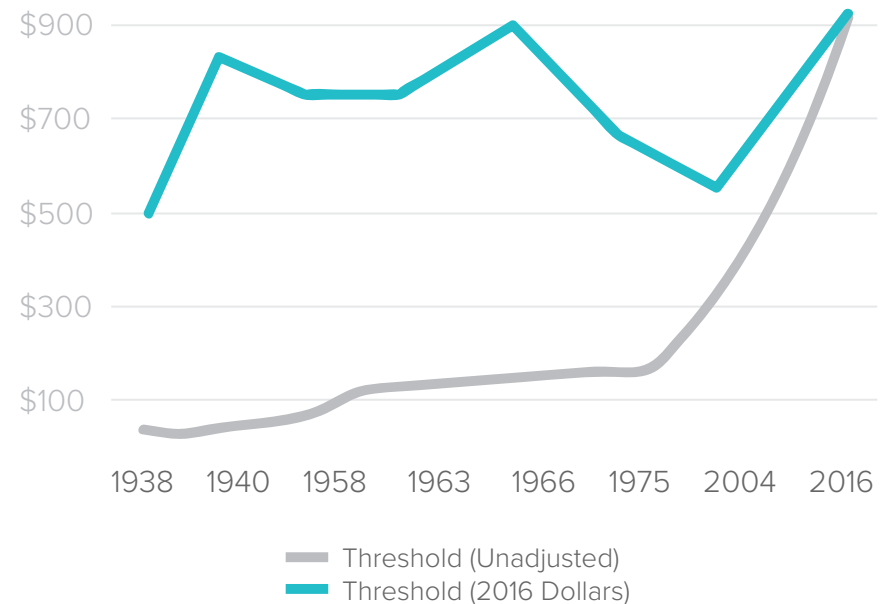
On the president's list of 2016 priorities, it's likely that "overtime reform" sat prominently near the top. Through his two terms, President Obama had urged Congress to increase the federal minimum wage, which has been \$7.25 per hour since 2009. When that push failed, the president searched for other methods to boost wages—ways that would not require congressional approval.

On March 13, 2014, the president instructed the Department of Labor to "modernize and streamline" the country's overtime rules. While his memorandum did not include any specifics, it caught the attention of HR professionals nationwide—and rightfully so. The DOL estimates that over 70 percent of employers are in violation of the existing overtime rules. Some observers have gone as far as to say the number is closer to 95 percent.

When the new rules were finalized, their publication did more than just alert the HR community—it made headlines nationwide. Effective December 2016, the new minimum salary for overtime exemption will be \$47,476—double the current \$23,660. The increase has

the potential to directly impact the wages of 12.5 million workers. President Obama and Secretary of Labor Thomas Perez justified the dramatic change by arguing that the old threshold, last updated in 2004, had fallen behind inflation.

Changes to the Overtime Threshold for Administrative Professionals



The DOL estimates that over **70%** of employers are in violation of the existing overtime rules.

Since 1938, the threshold for exemption has gone through numerous updates. After adjusting historical rates for inflation, however, it becomes apparent that the threshold had actually been in a state of steep decline since 1975. The new minimum enacted by the DOL effectively curbs this trend and brings the threshold closer to the adjusted rate that was in place in the late sixties.

Employer interest groups and Republicans have pushed hard against the rule changes. [The former has argued](#) that the increase will burden businesses and strip employees of workplace flexibility. Some studies support these claims, finding that the updated threshold could cost businesses [up to \\$3 billion](#) and over 2.5 million hours of administrative hassle in the next 10 years. Republican senators have gone a step further by introducing legislation aiming to kill the increase altogether. Ultimately, though, it will be President Obama who has to sign or veto any overtime-blocking measure that makes it through Congress. As the architect of the changes, the chances of him approving such a measure is exceedingly unlikely.

Verdict: The DOL's new overtime rule wasn't just a big win for employee advocates—it's a historic one that bucks a downward trend.





Historic Minimum Wage Laws Sweep the Nation

Over the last six months, the “Fight for 15” movement has had ample cause to celebrate.

When New York fast-food workers first called for a \$15 per hour minimum wage in 2012, some called them extreme. Since then, what began as a modest labor movement has evolved into a legislation-backed cause with a nationwide following. On March 31, 2016, [California](#) became the first state in the union to pass a \$15 minimum wage. Just a day later, [New York](#) approved

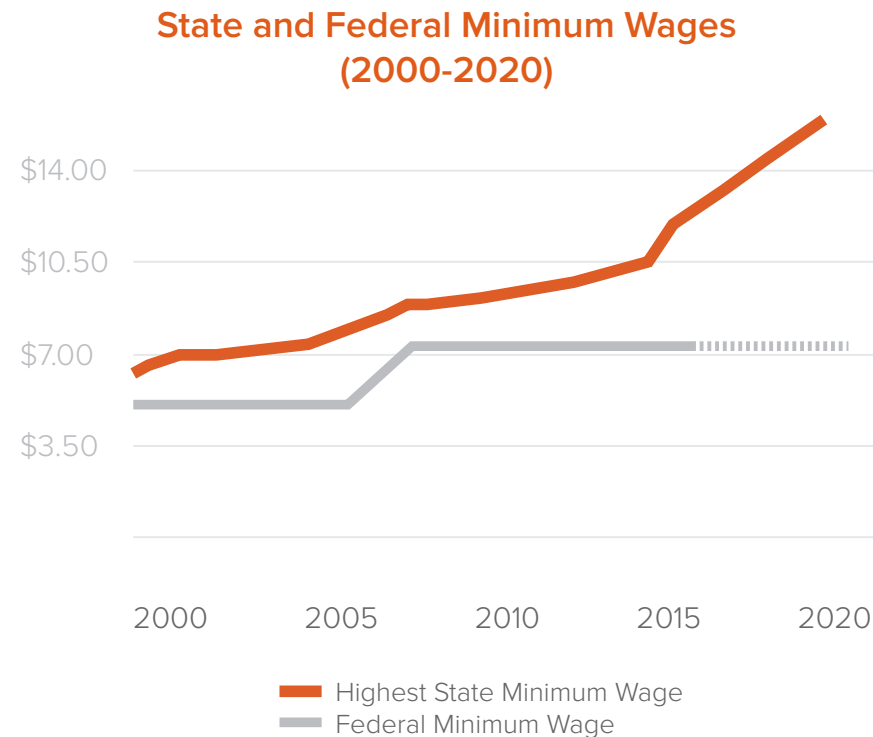
its own increase. Not to be outdone, [the District of Columbia](#) signed off on a \$15 minimum wage this June.

Economists are largely split on whether these historic increases will hurt or help employees in the long run. Even among Democrats, a party that has traditionally skewed pro-employee, there are skeptics. How these increases will actually affect workers remains to be seen—but the momentum behind the cause is undeniable.

In 2016, states approved new minimum wages **double** the federal rate.

Since 2009, the federal minimum wage has remained steady at \$7.25. States have always been permitted to pass their own, higher minimum wages ([as of this year, 29 opted to do so](#)). That being said, prior to 2015 none strayed further than \$3.00 from the federal minimum.

That changed in 2016. The highest minimum wage is now \$11.50—\$4.25 higher than the federal minimum. Next year, with legislation that has already been enacted, that difference will be \$5.25. All of this leads to 2020, the first time in history that any state will have a minimum wage that is double the federal minimum.



While [bills](#) to increase the federal minimum have been introduced in Congress, none have gained any traction. Even calls for a more [modest increase](#) to \$10.10 per hour have been struck down. Meanwhile, [states and city legislatures across the country](#) are debating, voting on, or enacting hikes. The stage is set for the minimum wage gap to continue growing this year and potentially after 2020.

Verdict: The country is seeing an unprecedented rise in state minimum wages, some of which are set to double the federal minimum by 2020.

Note: Post-2016 state wage data is not projections. State minimum wage laws phase in increases annually so future wage data is known. The federal line assumes there will be no change between 2016-2020.

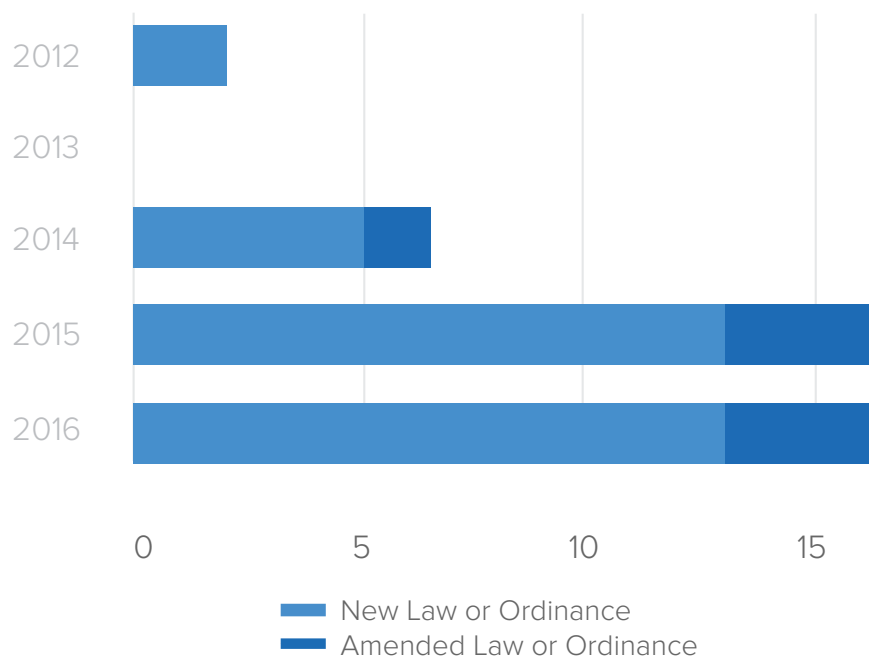


Paid Leave Gains Speed

Paid leave laws are not new to scene, but it was in the last year that they gathered serious momentum and became a topic of discussion nationwide.

In 2004, California became the first state to mandate paid family leave. It was a bold experiment that many predicted would spur a wave of paid leave legislation. It didn't—in the ten years that followed, only Rhode Island, Washington, and New Jersey joined the Golden State.

State and City Paid Leave Laws/Ordinances Enacted Since 2012



Suddenly, things changed in 2015 and 2016. In April, New York State passed [its first-ever paid family leave law](#). Under the new law, which was hailed as a [historic game-changer](#), New Yorkers will be eligible for up to 12 weeks of paid leave for caring for an infant or family member at 67 percent of their wages. Significantly, the measure was able to pass through the state's Republican-controlled Senate. In packaging it with other, unrelated laws, and funding the program entirely through employee payroll deductions, lawmakers were able to make the measure palatable to even the staunchest paid leave opponents.

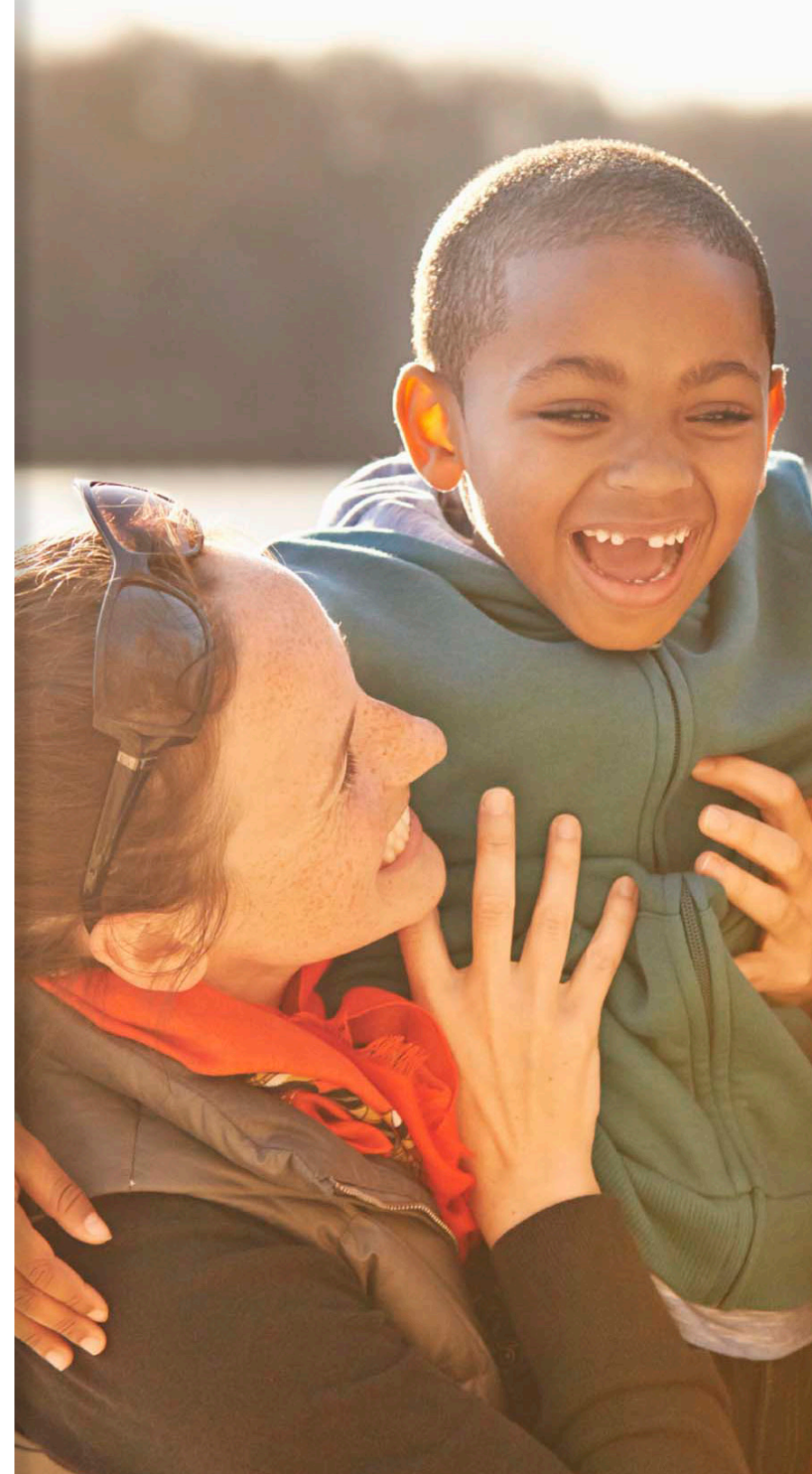
Then [Vermont](#) signed off on a paid sick leave bill. Then [California](#) doubled-down on their existing law, boosting paid leave benefits from 55 percent of regular pay to as much as 77 percent. Then the cities of [Minneapolis](#), [Los Angeles](#), and [Chicago](#) approved mandates. Then [San Francisco](#) passed the country's first-ever full paid family leave ordinance, mandating that new mothers and fathers be paid 100 percent of their regular wages while on leave. In the last year alone, a total of [18 states and several dozen major US cities](#) have actively looked to adopt or revise paid leave laws.

94% of Democrats, **80%** of Independents and **65%** of Republicans favor a paid leave mandate.

In an election year, employment issues manage to break into the public arena and popular conversation. [Paid leave has become a major campaign issue](#), and the debate surrounding its merits is no longer bound to the walls of Congress or state legislatures. [A poll](#) of likely voters found that 81 percent (94 percent Democrats, 80 percent of Independents and 65 percent of Republicans) were in favor of a mandate. Paid family leave was an issue particularly important to women, who [historically](#) show up to the polls in larger numbers than men. With the added attention, emotional potency, and electoral repercussions of paid leave at a high point, state lawmakers have pushed it near the top of their agendas.

This year's legislative developments, coupled with [new findings](#) suggesting that paid leave laws may have little or no impact on businesses' bottom lines, have given employee advocates reason to be optimistic. [While Congress has resisted](#) all attempts to enact a federal mandate, states have more than made up for it this year.

Verdict: After a slow start, paid leave is gaining steam at the state and city level. Public opinion and heightened media attention appear to have made an impact in 2016.





“Ban the Box” Stays the Course, Continues Spread

Reforms to employee background checks have been in the works since the 1990s, but they only gained traction in the last few years. ‘Ban the box’ laws, with bipartisan support, are now being enacted nationwide.

Supporters of the ban the box movement have sought to make it unlawful for employers to ask job applicants about criminal history early on in the interview process. Studies

suggest that interview callback rates for ex-offenders are about [50 percent lower overall](#).

While employment issues are typically divisive, support for the ban the box movement has been largely bipartisan. Last year, 26 Democratic senators signed a letter petitioning President Obama to ban the box for federal jobs—and [they succeeded](#). On the other side of the aisle, Georgia

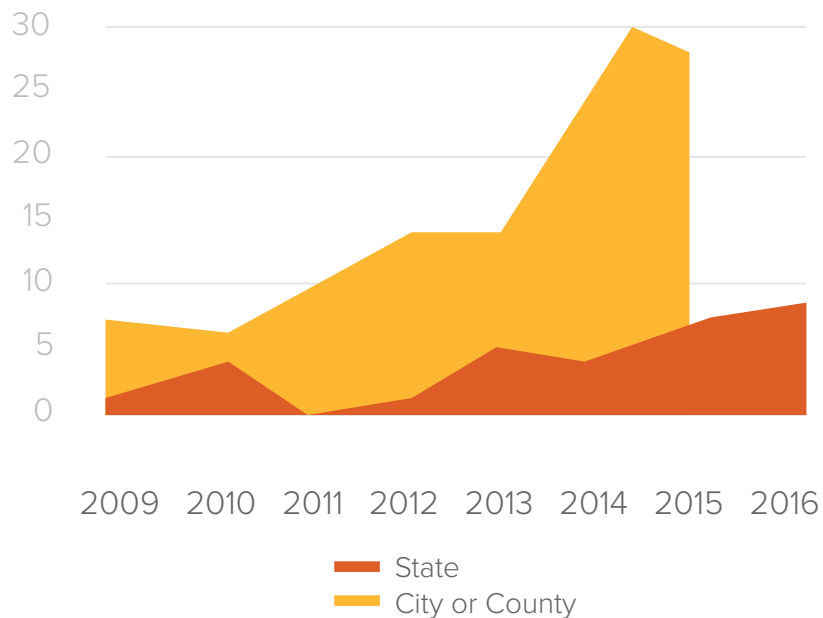
Gov. Nathan Deal and Ohio Gov. John Kasich both signed laws in 2015 barring public employers from asking about criminal history. [As recently as this June](#), lawmakers in Louisiana were able to push a ban the box law through a Republican-controlled state senate.

At the time of this writing, there were 24 states and over 100 cities and counties nationwide with ban the box laws in place, some applying to private employers and others just to state contractors. With these measures, [over 185 million](#)

[people](#)—well over half of the entire U.S. population—now live in a jurisdiction where criminal background checks are restricted.

Hawaii passed the country’s first ban the box measure in 1998, but no states followed until 2009. Between 2009 and 2016, the number of state ban the box laws being passed has averaged just over three per year. Since 2014, it’s been five per year. Seven have already passed as of July 2016. The numbers at the city level are even more impressive.

Ban the Box Laws, Ordinances, and Amendments Enacted by States and Municipalities



(City and state data from [The National Employment Law Program](#). Data does not represent a total of states or municipalities with active laws, but a tally of ban the box laws or amendments passed in a respective year.)

[A 2015 study](#) found that nearly half of employers expressed that ban the box laws were “unfair” and that a job candidate’s criminal history should be available up front. One frequently cited complaint was that the existing patchwork of laws makes it hard for multi-city or state employers to stay compliant. [But for the estimated 77 million in the US with criminal records](#)—roughly a third of all American adults—the steady progress of the laws at the state and city level could signal something more than just another compliance burden for businesses: a second chance.

Verdict: With bipartisan support and momentum from last year, expect to see ban the box laws continue to pass across the country.



The Next Six Months: High Tide or Only the Beginning?

2016 has already been a historic year for HR legislation. So what comes next? The simple answer is likely more of the same.

In spite of opposition from Congress and business interest groups, the DOL's overtime rules will almost certainly go into effect this December, as planned. If the rules are able to establish the same permanence as the Affordable

Care Act—and they will, if Democrats retain the White House—the new \$47,476 threshold will continue to rise well above \$50,000. Buried within the rules is a controversial mechanism that increases the threshold every three years.

The DOL has tied the overtime threshold not to a static number, but rather, a moving target—the 40th percentile of

salaries for full-time salaried workers. While DOL estimates point to the threshold reaching [\\$51,168 in 2020](#), some studies have suggested it will be [as high as \\$70,966](#). The same models suggest it could reach \$98,000 by 2023. If the rule stands, as is likely, increases of that magnitude would effectively make overtime exemption wholly impractical for most businesses. Whether by design or not, the rule may mark the beginning of the end for any exemption at all.

Federal action on issues like paid leave and the minimum wage remains highly unlikely this year. If neither party wins an overwhelming majority in November, that will remain true for the foreseeable future. That being said, the last six months have taught us that in the absence of federal leadership, states rise—and in 2016, state legislators did not shy away from pro-employee causes.

Pro-employee initiatives will continue to thrive at the state level. For some jurisdictions, this is less conjecture and more of a legislative fact—once the minimum wages of [Washington D.C.](#) and [California](#) reach \$15, for example, by law they will increase automatically based on inflation. For others, public attitudes all but confirm it. In a poll last year, eligible voters said they would be [64 percent more likely](#) to support a politician that advocated for a minimum wage increase. The share of the electorate in support of paid leave is even more impressive—[72 percent](#)—with

strong support from both registered Democrats and Republicans.

As an election year, 2016's importance to employment law is hard to overstate. While the gains made by pro-employee advocates this year have been substantial, the momentum could just as easily swing the other way in the wake of November's results. The next president and the Senate will select the successor to Supreme Court Justice Antonin Scalia, and that individual could be the deciding voice [in a number of pending employment law cases](#) shelved until his or her arrival.

From overtime reform to minimum wage increases and beyond, 2016 has already been a crucial year for pro-employee legislation. History suggests employer interests will rebound at some point. This year's election will shape whether that rebound begins or whether we see 2016's pro-employee tide turn into something bigger—a pro-employee era.



About the Authors



Manuel Martinez-Herrera

Manuel is Vice President of Legal & Compliance at Namely. His over 10 years of experience as a lawyer span three continents including positions at large international law firms and multinational insurance companies.



Andy Przystanski

Andy is an HR Content Specialist at Namely. With over five years of experience working at PEOs and HR technology companies, he manages and writes for Namely's compliance newsroom, [HR News](#).