

Status Quo: Obama and a Mixed Congress -- Little Legislation, Heavy on Regulations

After months of suspense, the results are finally in: not much changed. President Barack Obama will continue to face a Democratic Senate and a Republican House of Representatives. Because this is a new Congress (which occurs every two years), any legislation introduced that did not become law in the past two years becomes obsolete. Given the split in Congress and a Democratic president, very little legislation is expected to pass. However, technical corrections to the Patient Protection and Affordable Care Act (ACA) and pension funding relief legislation likely will be introduced and may pass. In addition, the Obama administration is expected to work quickly to implement the remaining provisions of the ACA. This *legislate* discusses possible legislation and regulations relating to employer-sponsored health care, pension plans, and compensation, but it does not address issues pertaining to the fiscal cliff.

Health Care

Legislation

With a Democratic president and divided Congress, it is doubtful that any significant health care legislation will pass in the next two years, including a repeal of the ACA. However, it may be possible that Democrats and Republicans agree on a few issues, such as technical corrections to the ACA, changes to the “use it or lose it” rule for health flexible spending accounts (FSAs), and repealing the prohibition on reimbursement of over-the-counter drugs from account based health plans.

First, the ACA contains a number of technical inconsistencies. Generally speaking, after major legislation is implemented, inconsistencies become apparent, and it becomes clear that the law needs to be modified through “technical corrections” legislation. Technical corrections generally either clarify the law without changing its substance or correct scrivener’s errors.

Soon after the ACA’s enactment, the need for technical corrections became clear. For example, provisions that may be candidates for correction include benefit limits indexed consistently with HSA indexing and the availability of subsidies for qualified individuals purchasing coverage from a federally established Exchange as opposed to a state established Exchange. Although some Congressional staff members acknowledged the need for technical corrections, the general consensus was that many Republicans would not agree to these corrections because agreeing to corrections would acknowledge the ACA’s validity. Given President Obama’s reelection and the Supreme Court’s favorable ruling, the time may be right for the parties to sit down and address the necessary corrections.

Second, many wonder if the new political environment will result in a change to the “use it or lose it” rule for health FSAs. Under current law, any unused amounts in a health FSA are forfeited at the end of the plan year or grace

period, depending on the plan design. This rule was created through regulations rather than statute. During the current Congress, the Senate introduced legislation that would eliminate the rule ([Medical FSA Improvement Act of 2011](#)), and the House passed a bill that would allow for \$500 to be carried over from one year to the next ([Health Care Cost Reduction Act of 2012](#)). In addition, the Internal Revenue Service (IRS) asked for public comment regarding the need for the rule because of the ACA's limit on health FSA amounts to \$2,500 per plan year ([Notice 2012-40](#)). The IRS explained that before the ACA, the rule was put in place to prevent tax abuse. However, the new \$2,500 limit reduces the potential for abuse. Although it would appear that the stars could be aligned to change the rule in the new Congress, the stumbling block could be how to pay for it, if it is changed through the legislative process.

Finally, both parties in the current Congress seemed to agree that the rule prohibiting reimbursement of the cost of over-the-counter drugs without a prescription from an account-based plan (such as a health FSA, health savings account or health reimbursement account) should be repealed ([Health Care Cost Reduction Act of 2012](#) and [Restoring Access to Medication Act](#)). However, the funding mechanism in the House version all but doomed it in this Congress. Specifically, the House bill "paid for" this change by limiting the subsidies in the health insurance Exchanges under the ACA, and the Democratic Senate opposed this. It is hoped that this issue may resurface in the new Congress.

Regulations

According to informal comments from the Obama administration, a number of regulations and other guidance are nearly complete and could be released in the near future. Guidance will likely address, among other things, the amount of the reinsurance fee, notices of Exchanges from employers, and the employer shared-responsibility mandate. Long overdue HIPAA final omnibus regulations also are expected. In addition, the EEOC might move forward with much awaited guidance affecting employment law and wellness programs.

Pension and Retirement

Legislation

Three pension and retirement issues may arise in the new Congress: the tax treatment of retirement plans, pension funding relief, and automatic Individual Retirement Accounts (IRA). First, as a result of tax reform and budget constraint discussions, it is likely that Congress will address the preferential tax treatment of retirement plan contributions. Although it is unlikely that preferential tax treatment will be eliminated completely, it is not improbable that legislation will be introduced to lower the contribution rates for all individuals or change the tax preference for upper-income individuals. Changes to the income tax rules, such as changes in the capital gains rates, could also alter the relative tax advantage of plans as compared to investments outside the plan. With Obama at the helm, increased taxes for highly paid individuals may make plan sponsorship more desirable. However, Obama's suggestion to change the tax treatment to a deduction at the 28 percent level could be counterproductive to the goal of encouraging plan sponsorship in general.

Employers may also reach out to Congress to address pension funding relief issues. Earlier this year, the Moving Ahead for Progress in the 21st Century (MAP-21) was passed. MAP-21 contains pension funding provisions that

address the impact of historically low interest rates on pension funding. (See our July 6, 2012 [For Your Information](#)). On a very high level, MAP-21 calls for averaging interest rates over 25 years and “tossing out” current interest rates that are outside a corridor. For 2012, the corridor is 10 percent on either side of the average. The corridor grows by 5 percent per year, to 30 percent by 2016. As the corridor grows, the relief weakens. Although it is doubtful that this issue will gain immediate attention, the employer community will likely reach out to Congress before 2014 assuming interest rates remain low. Similar to MAP-21, funding relief may come with further increases in Pension Benefits Guarantee Corporation (PBGC) premiums.

Finally, during his first term, President Obama was an advocate of the “auto IRA.” The auto IRA would generally require employers to automatically enroll all employees in a retirement option through automatic payroll deductions that are deposited into an IRA. Although legislation was introduced in this Congress to allow for the auto IRA (see [Auto-IRA Act of 2012](#)), it has not gained much traction. It will likely be reintroduced in the new Congress, but chances of it passing are doubtful.

Regulations

Although we may not see a great deal of retirement-focused legislation, several pieces of regulatory guidance are anticipated in the next year, including guidance relating to the definition of fiduciary, the lifetime income project, and ERISA Section 4062(e) guidance. First, in 1975, the DOL issued regulations that define a fiduciary. Some criticized the definition as outdated and narrow because it excludes many entities that could be considered a fiduciary for purposes of giving investment advice. In 2011, the Department of Labor (DOL) proposed revisions to these regulations, expanding the definition of fiduciary for purposes of providing investment advice. (See our November 11, 2010 [For Your Information](#).) The proposed regulations were criticized as going beyond the DOL’s statutory authority, failing to obtain advance public comment, and failing to include the required financial impact analysis. As a result, the proposed regulations were withdrawn. Given the interest on this issue and amount of time DOL has devoted, it is highly likely that new proposed regulations will be released within the next few months.

In its first term, the Obama administration focused on ways to provide income throughout a person’s retirement years. This is known as the lifetime income project, and it will continue to be a significant project for the administration. The IRS issued proposed regulations and guidance on this issue earlier this year. (See our February 27, 2012 [For Your Information](#).) Proposed regulations on the required minimum distribution rules would allow plans to provide longevity annuity contracts within defined contribution plans. Other proposed regulations on the minimum present value rules for defined benefit plans would clarify how to calculate minimum distributions when offering partial annuity and lump sum distribution combinations. In addition, the IRS issued guidance on the qualified preretirement survivor annuity and qualified joint and survivor annuity requirements when buying annuity products in defined contribution plans and on providing annuity benefits in defined benefit plans from defined contribution rollovers. To round up this initiative, the DOL is expected in the near future to issue regulations mandating the disclosure of the annuity value of defined contribution account balances.

ERISA Section 4062(e) requires a plan sponsor to provide an additional security bond or escrow amount to the PBGC when the sponsor ceases operations at a facility and the shutdown results in the separation of employment of more than 20 percent of participants. In 2010 the PBGC issued proposed regulations that would significantly expand the scope of Section 4062(e) to include many general business decisions such as the sale of a business unit, movement

of operations to another location, or even a temporary shutdown. Due to industry comments that the regulations were overly expansive, the PBGC announced that it would reconsider and repropose them. Late last week the PBGC announced a narrowed enforcement action approach to imposing liability under Section 4062(e). (See our November 6, 2012 [For Your Information](#)). The PBGC says results from this approach will help them to decide what changes to make to the proposed regulations.

Compensation

Legislation

As is the case with the health and retirement issues discussed above, a divided Congress and Democratic president will make it challenging to pass compensation-related legislation, such as executive compensation or minimum wage legislation.

Regulations

Although legislation seems unlikely, it is expected that certain regulations will be issued under the Dodd-Frank Act. The Dodd-Frank Act requires an issuer to disclose the ratio of the total amount of all employees' pay (excluding the CEO's pay) to the CEO's pay. There are a significant number of open issues relating to this requirement. For example, does it apply to all worldwide employees or only to US employees? Does it require disclosure on a controlled-group basis? Finally, how is compensation defined under this requirement? To date, no regulations have been issued addressing these questions. Employers are concerned that final regulations may require worldwide reporting and impose other administrative burdens.

Dodd-Frank also contains a provision known as the "clawback" provision. Under this provision, if an issuer has to reissue an accounting statement because of material noncompliance with financial reporting requirements, the issuer must recover any incentive-based compensation paid during the past three years if it was based on the faulty disclosure. This provision will take effect once regulations are finalized. It is expected that proposed regulations will be issued soon.

Conclusion

Even though the elections are over, the impact on employee benefits and human resources is just beginning. Although it is doubtful that very much legislation will move in this environment, it is certain that significant regulatory action will occur.

This legislate is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.