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Key Legislative Developments Affecting Your Human Resources

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House passes delay of DOL fiduciary rule while continuing ACA scrutiny; Senate plans ACA hearings with deliberations to begin soon on ENDA

The House of Representatives passed a bill this week that would delay an expected DOL proposed rule on who counts as a “fiduciary” under ERISA. The House also continued its scrutiny of implementation of the Affordable Care Act with two hearings on technology difficulties hampering enrollment in the public exchanges, and also held a hearing on multiemployer pension plans. The House is out of session next week. The Senate in the week ahead will also scrutinize ACA implementation issues, and possibly begin deliberations on ENDA — legislation prohibiting employment discrimination on the basis of sexual orientation or gender identity.

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Week in review

Pensions and retirement

ERISA fiduciary duty. On October 29, the House of Representatives (House) passed [H.R. 2374](#), the Retail Investor Protection Act. The legislation would prohibit the DOL from issuing regulations defining when an individual is a fiduciary under ERISA until after the Securities and Exchange Commission has issued a final rule on the standards of conduct for brokers and dealers under the Securities Exchange Act of 1934. The DOL had issued proposed regulations in 2010 that substantially revised the rules for determining fiduciary status. Those proposed regulations were withdrawn, but new proposed rules are expected to be issued by DOL later this year. The legislation’s prospects in the Senate are uncertain, as the White House issued a statement that President Obama’s senior advisors would recommend he [veto](#) the legislation.

Multiemployer plans. On October 29, a subcommittee of the Education & the Workforce Committee held a [hearing](#) on strengthening the multiemployer pension plan system. The hearing specifically examined private sector views on a [proposal](#) to protect multiemployer retirement security drafted by a commission of the National Coordinating Committee for Multiemployer Plans (NCCMP). Among other provisions, NCCMP’s proposal would permit partial suspension of accrued benefits for certain deeply troubled plans — including benefits for those in pay status — if such suspensions would forestall plan insolvency. Witnesses expressed varying degrees of support for the NCCMP

proposal, with one opposing benefit reductions and others noting that for some plans an orderly scheme of benefit reduction may be the only means of salvaging the plan and avoiding a shifting of liability to the PBGC. Legislation on the NCCMP proposal has not yet been introduced in Congress.

Health care

Two hearings were held this week in the House on the technology difficulties experienced by individuals attempting to enroll online for health coverage through the Affordable Care Act's (ACA's) public exchanges. Marilyn Tavenner, administrator for the Center for Medicare & Medicaid Services (CMS), [testified](#) before the Committee on Ways and Means on October 29. CMS is the entity within the Department of Health & Human Services (HHS) that oversees the public exchanges. HHS Secretary Kathleen Sebelius [testified](#) before the Energy and Commerce Committee on October 30. Tavenner's and Sebelius' testimony was noteworthy because both apologized for the difficulties and also assured the two committees that the technology is fixable and the Obama administration is continuously working to do so. Their testimony also indicated that the problems with online enrollment will be resolved for most exchange applicants by late November. The House is likely to schedule additional hearings on the technology difficulties in the coming weeks. This week's and future hearings are significant as they will be used to build a record for legislation to delay the individual mandate.

Tax reform

The Congressional budget conference committee held its first public meeting on October 30. The committee is comprised of members from both the House and the Senate and is charged with resolving the differences between the House and Senate passed federal budgets. The committee's deadline for issuing its report is December 13, and the federal government is funded until January 15, 2014. The key point made during the public meeting is that most members of the committee are primarily focused on resolving the short-term goal of funding the federal government for the rest of fiscal year 2014 (which ends September 30, 2014), rather than longer-term goals such as tax and entitlement reform. The House-passed budget for fiscal year 2014 was approximately \$90 billion less than the Senate-passed budget. Several members expressed support for tax reform in general terms. However, even if the committee were to include tax reform provisions in its report, the provisions would most likely only establish general parameters for the tax-writing committees in the House and Senate (for example, deadlines for when the tax-writing committees must consider and vote on tax reform legislation) and would not contain the actual tax reform provisions. The committee will meet again on November 13.

Medicare reform

The Congressional Budget Office (CBO) released a revised [estimate](#) of the budgetary effects of increasing the Medicare eligibility age from 65 to 67. CBO and the Joint Committee on Taxation (JCT) originally estimated in January, 2012, that the increase in age would produce savings of \$113 billion over 10 years. CBO and JCT now estimate that the budgetary savings would be a little over \$19 billion over 10 years. The change in the estimate was attributable to two factors (neither of which is related to the ACA). First, CBO determined that Medicare beneficiaries aged 65 and 66 will be substantially less expensive on average for the Medicare program than previously thought because these individuals tend to be in better health. Second, many 65 and 66 year old beneficiaries are workers with employment-based coverage who are less costly to the Medicare program because Medicare is a secondary payer. The revised estimate is significant as it may reduce Congressional support for increasing the Medicare eligibility age.

Week ahead

Health care

The Senate's Health, Education, Labor, and Pensions Committee has scheduled a [hearing](#) for November 5 on the implementation of the ACA's public exchanges. CMS Administrator Marilyn Tavenner will testify at that hearing. The Senate Finance Committee will hold a similar [hearing](#) on November 6 with HHS Secretary Kathleen Sebelius. The hearings will likely focus on the technology difficulties that have hampered enrollment in the public exchanges.

Labor and employment

Senate Majority Leader Harry Reid (D-NV) announced that the Senate will begin deliberations in the next several weeks on [S. 815](#), the Employment Non-Discrimination Act of 2013 (ENDA). This legislation, which is largely modeled after Title VII of the Civil Rights Act of 1964 (Title VII), would extend federal employment discrimination protections to gay, lesbian, bisexual, and transgender (LGBT) individuals. ENDA would prohibit most public and private sector employers from discriminating against applicants and employees on the basis of their actual or perceived sexual orientation or gender identity. Small businesses, certain religious organizations, and the military would be exempt. The legislation expressly prohibits quotas, employment preferences, and EEOC data collection about employees' sexual orientation or gender identity. Unlike Title VII, ENDA would not permit disparate impact claims. If passed, that legislation would be effective six months after date of enactment, and would apply prospectively. ENDA, in some form, has been introduced in virtually every session of Congress since 1994, but has rarely come to a vote in either chamber. Even if the Senate were to pass ENDA in this session, its prospects in the House are uncertain.

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