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Key Legislative Developments Affecting Your Human Resources

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Poor prospects for recently introduced ACA, bankruptcy, and retiree medical legislation

Recent employee benefits measures introduced in the House of Representatives and the Senate stand little chance of becoming law. In the House, the legislation would exempt educational institutions from the Affordable Care Act's employer shared responsibility requirements. In the Senate, the legislation would strengthen participant rights to retiree health coverage and provide other bankruptcy protections. An amendment adopted last week by the House of Representatives would further complicate employer drug-free workplace and substance abuse policies, although companion legislation in the Senate does not currently include similar language.

Tax extenders update

Our May 30, 2014 *Legislate* noted that tax extenders legislation is stalled in the Senate. This week, Senate Majority Leader Harry Reid (D-NV) confirmed to reporters that the legislation is probably deadlocked until after the November 4 mid-term elections.

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Health care

Educational institutions

Representative Luke Messer (R-IN) introduced legislation (H.R. 4775) in the House of Representatives (House) that would exempt certain educational institutions from the Affordable Care Act's (ACA) employer shared responsibility requirement. Under the bill, the employer requirement would not apply to elementary and secondary schools, state and local educational agencies, and institutions of higher learning such as colleges and universities.

The legislation is likely to be considered on the House floor in the next several months, and if brought up for a vote, most likely will pass. The Senate and the Obama administration, however, will probably oppose the measure, so it has little chance of becoming law.

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Retiree health coverage

Senators Jay Rockefeller (D-WV) and Elizabeth Warren (D-MA) introduced legislation this week (S. 2418) that would provide new rules for retiree health coverage. A section-by-section summary has been released. The bill would also change the treatment of employee compensation and benefits in bankruptcies (described below). The legislation has been referred to the Judiciary Committee. Even if the bill could pass the Senate, it is not likely that the House would take it up.

For health coverage, the bill would require employers to include in the summary plan description whether the coverage is vested or whether the plan permits the employer to unilaterally modify or terminate the coverage with respect to employees, retired employees, and beneficiaries. The legislation also would prohibit employers from entering into collective bargaining agreements that would eliminate or reduce retiree coverage for those who retired under the terms of a prior agreement. In addition, the bill would alter the burden of proof in lawsuits challenging a reduction or elimination of retiree health benefits by creating a rebuttable presumption that the benefits are fully vested when an employee retires or completes 20 years of service. To rebut this presumption, the employer would have to show (under a clear and convincing evidentiary standard) that the employer had the right to modify or terminate benefits and the employee was made aware in clear and unambiguous terms of the employer's right to do so prior to becoming a participant in the plan.

ACA oversight

Two subcommittees of the House's Committee on Ways and Means will hold a joint hearing next week on ACA implementation — with an expected focus on allegations that enrollees in the public marketplaces are receiving incorrect subsidy payments (see our May 23, 2014 *Legislate*) and the difficulties employers are having with their health coverage reporting obligations (see our March 6, 2014 *FYI Alert* for more information on the reporting obligations). The House Energy and Commerce Committee is likely to hold a similar hearing in the weeks ahead, with that committee releasing documents that it obtained while investigating reports of incorrect subsidy payments.

Labor and employment

In approving FY 2015 appropriations for the Departments of Justice (DOJ) and Commerce last week (H.R. 4660), the House also approved on a bipartisan basis an amendment (House Amendment 748, page H4982) that would have prohibited DOJ from preventing states that have legalized medical marijuana from implementing their own laws that authorize its use, distribution, or cultivation. The Senate Appropriations Committee approved FY 2015 funding for DOL and Commerce yesterday, but did not include a similar prohibition.

How do incorrect subsidy payments in the public marketplaces affect employers?

Employers are not liable for any incorrect subsidy payments. However, there may be an indirect impact because individual enrollees may be subject to significant and unanticipated tax bills due to the incorrect payments. This type of surprise and associated press coverage may result in negative employee perceptions of the public marketplaces — which is something employers should monitor if they are considering the public marketplaces as a source of coverage for employees.

Corporate and municipal bankruptcies

Senator Rockefeller and Warren's bill — S. 2418 (see the discussion of retiree health coverage above) — would also provide new protections for employee compensation and benefits in corporate and municipal bankruptcy proceedings. For example, corporate employers would be prohibited from reducing compensation and benefits for employees beyond the level necessary for the company to avoid liquidation, and would require equivalent benefit reductions for corporate officers and directors. The limit for employees' priority claims for unpaid wages and benefits would more than double, and certain payments to insiders (such as incentive bonuses) would be prohibited.

Another provision would require employers to continue paying for retiree health coverage for at least two years after a bankruptcy judge's approval of the reduction or elimination of those benefits. The bill would also require companies that file for bankruptcy protection to continue satisfying their minimum funding obligations for any pension plans the company sponsors.

Similar rights would be provided for municipal employees and retirees. Reductions in their compensation and benefits beyond the minimum levels necessary for the municipality to emerge from bankruptcy would be prohibited. In addition, they would be provided a priority claim for unpaid wages and benefits.

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