

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Change to meaning of affordable employer coverage introduced in Senate

Nineteen senators introduced a technical modification to the health reform law that would impact employers by changing what is meant by “affordable” employer coverage. Two committees in the House of Representatives held oversight hearings this week on the reform law — focusing on alleged incorrect payments of subsidies in the public marketplaces, employer reporting requirements, and provider networks. A separate House committee held an oversight hearing on the EEOC’s regulatory and enforcement priorities — largely focusing on the agency’s guidance on criminal background screening by employers, EEOC conciliation obligations, and litigation tactics.

In this article: [Health care](#) | [Labor and employment](#)

Health care

ACA technical modification

Senator Al Franken (D-MN) introduced legislation ([S. 2434](#)) late last week that would modify a key rule for employers under the Affordable Care Act (ACA). While the legislation is currently co-sponsored by 18 senators, it stands little chance of becoming enacted in this Congress. Republicans in the Senate and the House of Representatives (House) are not likely to support the legislation.

The legislation would modify what is affordable employer coverage. An offer of such coverage precludes an enrollee in the public marketplaces from obtaining subsidies to assist with purchasing health coverage. Affordability is currently determined solely on the basis of the cost of self-only coverage, even in the case of a worker with a family. Under S. 2434, the cost of family coverage would be taken into account in determining affordability — and thus affordable coverage with respect to a worker’s family members would be family coverage that costs less than 9.5% of household income.

The cost of the legislation has not yet been estimated by the Congressional Budget Office and the Joint Committee on Taxation. The cost could be substantial — both in terms of lost revenue because more compensation would be shifted to nontaxable family health coverage and because the costs of providing ACA’s subsidies would increase as more families would be eligible.

ACA oversight

In the House, subcommittees of both the Ways and Means and the Energy and Commerce Committees held ACA oversight hearings this week.

Ways and Means. Two subcommittees held a joint oversight [hearing](#) on the ACA on Tuesday. The Obama administration did not testify at the hearing. Witnesses at the hearing included several tax practitioners and advocacy organizations. Some of the testimony focused on the Obama administration's one-year delay of the ACA's employer reporting requirements. One witness noted that this delay hampers the ability of the IRS to verify the eligibility of enrollees in the public marketplaces for subsidies — since an offer of affordable employer coverage precludes eligibility. Another witness commended Treasury for its willingness to work with employers on the reporting requirements, but noted that the rules are still very complex and will involve extraordinary expense. For example, that witness observed that employers will have to redirect resources to build reporting systems that identify employees by full-time status on a monthly basis and collect the Social Security numbers of family members.

Otherwise, much of the testimony centered on the adequacy of subsidy eligibility verification for federally facilitated public marketplaces. Some of the testimony predicted significant problems with subsidy eligibility and cautioned that some enrollees in the public marketplaces may face large, unanticipated tax bills to recoup incorrect subsidy payments. For example, that testimony noted high error rates in a pre-ACA tax credit designed to reduce poverty for low-income workers, and stated that the ACA's premium subsidies are just as complex. Other testimony at the hearing predicted that reports of improper subsidy payments affecting millions of enrollees may be substantially overstated — noting that there is a difference between the flagging enrollees for further verification (e.g., because their current income is different than two-year old income tax data) and the actual determination that an overpayment has occurred. (See our [May 23, 2014](#) *Legislate* for more information on the repayment obligations of enrollees.)

Energy and Commerce. A subcommittee held a [hearing](#) Thursday on the coverage available through the public marketplaces, focusing on whether the provider networks and drug formularies are too narrow. Witnesses included a policy expert, an insurance commissioner, and a physician. One witness testified that narrow networks and drug formularies were an inherent trade-off under the ACA to pay for federal and state mandated benefits while keeping premiums low. Another witness testified that narrow networks and high co-pays were especially problematic for patients with chronic conditions — as they might be tempted to defer routine treatment that might avoid more costly emergency treatment in the future. The insurance commissioner testified that narrow networks — properly done — can bend the health cost curve and cautioned regulators that they must balance three factors when evaluating networks: (1) ensuring adequate access to providers; (2) affordability of coverage; and (3) transparency of networks for consumers when they choose plans.

Transportation funding

The Senate is continuing to look for offsets to pay for federal highway and transportation spending. The federal highway trust fund is nearing depletion. Congress is likely to extend transportation funding before it leaves for August recess, but neither the length nor the source of the funding has been settled. See our [May 9, 2014](#) *Legislate* for more information on Congress' use of pension and retirement provisions in the past to raise revenue to pay for federal spending, including transportation spending.

Labor and employment

A subcommittee of the Education and Workforce Committee held a [hearing](#) Tuesday to examine stakeholder concerns with the EEOC's regulatory and enforcement priorities. Witnesses included employer representatives from the National Small Business Association and the Chamber of Commerce, the founder of a non-profit organization advocating criminal background screening, and the president of the NAACP Legal Defense Fund. The EEOC itself did not testify. Much of the testimony focused on guidance issued by the EEOC in 2012 on the use of criminal background checks by employers in making employment decisions (see our [May 11, 2012 For Your Information](#)). Some witnesses asked for clear and less complex rules and a coherent policy on background screening that takes into account competing federal and state requirements. One witness testified that the guidance is especially difficult for small employers who cannot afford expert legal counsel to follow — and might result in some employers discontinuing background checks out of fear of an EEOC investigation. Other testimony focused on EEOC enforcement policies — raising concerns over the sufficiency of the EEOC's pre-suit efforts to conciliate discrimination claims, the EEOC's position that conciliation efforts are not subject to judicial review, enforcement tactics, overly long and broad investigations, and the Commission's oversight of the initiation of multi-plaintiff and systemic lawsuits against employers.

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