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Key Legislative Developments Affecting Your Human Resources

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Forecast for the months ahead

With Congress out on its Fourth of July recess, this week's *Legislate* looks at possible employee benefits legislation in the months ahead. The impending depletion of the federal trust fund for transportation spending may be significant for retirement plans and employment taxes as Congress looks for spending offsets. Multiemployer pension plan funding may also be a focus of Congress, with this week's release of the PBGC's FY 2013 Projections Report gaining attention on Capitol Hill. And for health care, October 1 is a key deadline as Congress prepares appropriations legislation for federal FY 2015 — there are early signs that the House of Representatives may seek Affordable Care Act changes as a condition of funding the federal government.

In this article: Transportation funding | Multiemployer pension plans | Health care

Transportation funding

The Congressional Budget Office (CBO) estimates that $8 billion is needed by the Highway Trust Fund to finance highway and other infrastructure construction projects through the end of 2014. Congress is expected to pass legislation that would provide the funding before it leaves for its August recess. As Congress looks for revenue, legislative changes are possible for retirement plans and the worker classification rules for employment taxes.

Pensions and retirement

Last week, the Senate Finance Committee unveiled a transportation spending offset proposal that would modify the required minimum distribution (RMD) rules for IRAs and retirement plans (see our June 27, 2014 *Legislate*). The likelihood that this proposal is actually enacted is highly uncertain at this time. In early 2012, the Finance Committee also proposed changes to the RMD rules as a revenue offset for transportation spending — but that 2012 RMD proposal never crossed the finish line. Instead, the MAP-21 pension interest rate smoothing rules and PBGC premium hikes were enacted in July 2012 to finance transportation funding (see our July 6, 2012 *For Your Information* for more information on MAP-21).

Volume 5 | Issue 27 | July 2, 2014

Currently, the House of Representatives (House) is objecting to using revenue offsets — such as the RMD proposal — to pay for transportation spending. Chairman Dave Camp (R-MI) of the House's tax writing committee would prefer to use spending cuts instead. He and Senators Ron Wyden (D-OR) and Orrin Hatch (R-UT) — the chair and ranking member of the Finance Committee — intend to work together this week and next to identify offsets that would be acceptable to both chambers, with results of their discussions possibly being announced the week of July 8.

The outcome of Congress' search for spending offsets is fluid, with the outcome far from certain. Possibilities in the retirement area include:

- The Finance Committee's RMD proposal — estimated to raise $3.7 billion over ten years.
- An extension of MAP-21 pension interest rate smoothing — estimated to raise $6 billion as proposed in S. 2149 and H.R. 3979 (see our March 28, 2014 and April 11, 2014 editions of *Legislate* for more information on these bills)
- PBGC premium hikes — the amount raised would vary depending on the size of the hike — however, the newly released PBGC report showing improvements in the single employer plan funding levels has led some to comment that further increases to PBGC premiums are simply not needed (see Senator Tom Harkin's statement (D-IA, Chairman of Senate Health, Education, Labor and Pensions Committee)
- A suspension of COLAs for various tax code limits for qualified plans, such as the elective deferral and section 415 limits — a ten year freeze at 2014 levels through 2023 is estimated to raise $63.4 billion over ten years.

Worker classification for employment taxes

When the Senate Finance Committee resumes consideration of spending offsets for transportation spending, Senator Sherrod Brown (D-OH) may propose a modification to the IRS' worker classification rules as an offset. He announced legislation last week that would raise over $5.6 billion over ten years. He also filed an amendment with the Finance Committee that would use a modified version of his proposed bill (S. 1706) as a spending offset (Brown Amendment #1 and Brown/Cardin Amendment #2 to the PATH Act of 2014).

What is section 530?

Section 530 of the Revenue Act of 1978 protects an employer from employment tax liability, penalties, and interest for misclassifying workers if it has a reasonable basis for classifying a worker as an independent contractor and meets certain other conditions.

Senator Brown's proposal would modify section 530 of the Revenue Act of 1978 to:

- Permit the IRS to issue guidance addressing worker classification (currently the IRS is prohibited from issuing regulations and revenue rulings on this matter)
- Permit prospective reclassification of workers by the IRS (currently, employers who satisfy section 530 are permitted to continue to treat the workers as independent contractors)
- Disallow reduced penalties for an employer's failure to deduct and withhold FICA unless the employer has a reasonable basis for classifying the worker as an independent contractor.
- Preserve the section 530 safe harbor for professional services (health, law, engineering, architecture, accounting, actuarial science, consulting, financial services, and insurance)

Senator Brown's proposal is modeled on a bill that he introduced in late 2013 — S. 1706 — that would make some of the above and other changes to the IRS' worker classification rules. For example, S. 1706 would require persons who contract with an independent contractor on a regular and ongoing basis to provide a written statement to the worker providing notice of federal tax obligations for contractors, the employment and labor law protections that do not apply to such workers, as well as the right of the worker to seek a status determination by the IRS.

Multiemployer pension plans

The PBGC released its FY 2013 Projections Report this week. For its single employer insurance program, the PBGC projected that its 2013 deficit of $27.4 billion would narrow by 2023 to $7.6 billion — a huge improvement — with no expectation that the program would run out of money within the next ten years. The projections for the multiemployer program were far bleaker — with the PBGC modeling a $49.6 billion program deficit for 2023 as compared to $8.3 billion for 2013. The PBGC estimates a 59% chance of program exhaustion by calendar year 2022 and a 90% chance by 2025. These estimates are not significantly different from the CBO forecasts earlier this year of exhaustion of the multiemployer program in federal FY 2021, which ends September 30, 2022 (see our April 17, 2014 *Legislate* for more information on CBO's projections).

The PBGC's report prompted press releases from the chairmen of three of the committees with jurisdiction over multiemployer pension plan funding — Senator Ron Wyden (D-OR, Finance Committee), Senator Tom Harkin (D-IA, Health, Education, Labor, and Pensions Committee), and Rep. John Kline (R-MN, Education and the Workforce Committee). The releases expressed concern for the deterioration in the insurance program and pledged to identify solutions.

It is possible that these committees may focus in the months ahead on multiemployer pension plan issues — especially given the sunset at the end of this year of special funding rules for underfunded multiemployer pension plans. (See our January 3, 2014 and April 4, 2014 editions of *Legislate* for more information on the sunset, an industry proposal to address underfunding in multiemployer pension plans, and Senator Wyden's Expire Act legislation that would delay the sunset by a year).

Congressional response to the *Hobby Lobby* decision?

The reaction on Capitol Hill to Monday's decision by the Supreme Court in the *Hobby Lobby* case (see our June 30, 2014 *FYI Alert*) generally followed party lines, with many Republicans expressing support and many Democrats critical. Legislation to mitigate the impact of the decision may be proposed in the months ahead, but is unlikely to cross the finish line given the different reaction of the two parties.

Health care

Last year, disputes among the House, the Senate, and the Obama administration over implementation and funding of the Affordable Care Act (ACA) led to a 16-day shutdown of the federal government. The shutdown began October 1 — the beginning of the federal fiscal year. It is unlikely that a shutdown will be repeated this October 1 since midterm elections are November 4 and both sides will be concerned about the political fallout of such a move.

There are early signs, however, that the House may seek changes to the ACA as a condition of FY 2015 federal funding. Last week, the House's Appropriations Committee approved funding for IRS that includes a prohibition against IRS enforcement of the individual mandate and section 6055 reporting for FY 2015 — section 111 of the approved legislation. (See our March 6, 2014 *FYI Alert* for more information on the reporting obligations of employers under section 6055 of the tax code.) The next step for this legislation is a vote on the House floor — which will likely be scheduled sometime in July.

Volume 5 | Issue 27 | July 2, 2014

Resolution of FY 2015 appropriations to fund the federal government is not likely until September — when Congress returns from its August recess. It is possible that negotiations among the House, Senate, and the Obama administration may continue until right before October 1 if the House insists on changes to the ACA as a condition of funding the federal government. While major changes to the ACA are highly unlikely, the outcome is uncertain at this time.

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