

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Progress on PBGC Plant Closing Changes; Pension Smoothing up Next in Senate

This week, a Senate committee approved changes to cessation of operation liability rules under ERISA section 4062(e). Next week, the full Senate is expected to consider pension smoothing as a cost offset for transportation spending. Also this week, the House Rules Committee approved a lawsuit against President Obama over ACA implementation. Last week, the estimate for changing the ACA's definition of "full-time employee" for purposes of the employer shared responsibility requirements dropped by almost \$30 billion, and legislation was introduced that would provide tax credits to employers who offer paid leave to employees.

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Retirement

The Senate Health, Education, Labor and Pension (HELP) Committee [approved](#) changes to section 4062(e) of ERISA. This section is one of PBGC's tools for ensuring that plan sponsors are held financially responsible for pension promises and do not escape liability when business operations change. Under section 4062(e), plan sponsors have reporting obligations and may have financial responsibilities when operations are stopped at a facility and more than 20% of the employees participating in a pension plan are terminated as a result—referred to as a "substantial cessation of operations." In such situations, the employer is treated as a substantial employer withdrawing from a multiple employer plan, and the PBGC may require the employer to post bond or place funds in escrow for five years as security in the event of a distress termination of the plan. The PBGC recently announced a moratorium on section 4062(e) enforcement through December 31, 2014. See our [July 9, 2014 FYI Alert](#) for more information.

Extension of pension smoothing?

Next week the Senate is likely to vote on [H.R. 5021](#)—a transportation funding bill passed by the House last week that would partially pay for its cost with an extension of MAP-21 pension interest rate smoothing. If transportation funding legislation is not enacted soon, federal payments to the states for highway construction and other infrastructure projects will be reduced. Senate votes are likely on several transportation funding options: H.R. 5021 as passed by the House; the Senate Finance Committee's transportation funding proposal—which would use a shorter extension of pension smoothing than H.R. 5021 ([S.A. 3582](#) on page S4772); and an amendment filed by Senators Tom Carper (D-DE), Bob Corker (R-TN) and Barbara Boxer (D-CA) which would omit pension smoothing as a cost offset for transportation spending ([S.A. 3583](#) on page S4775). See our [July 11, 2014](#) and [July 18, 2014](#) editions of *Legislate* for more information on H.R. 5021 and the Senate Finance Committee's proposal.

The HELP Committee proposal revises bill language introduced in [S. 2511](#) and would redefine a “substantial cessation of operations” as the permanent cessation of operations at a facility that results in a workforce reduction in the number of plan participants at the facility that is greater than 15% of all plan participants at all facilities of the employer. The measurement takes into account only employees who are eligible to participate immediately before the cessation, excludes participants employed by a buyer that continues the plan, and excludes replaced employees if replaced by other US workers in a US location. Exceptions would apply for small plans (under 100 participants) and well-funded plans (90% or greater). The proposal would allow employers to make additional pension contributions over a seven year period as a means of satisfying section 4062(e).

The language approved by the committee could change when the committee report is filed in September because the committee authorized its staff to make technical modifications and corrections to the legislative language. Consideration of the bill by the full Senate is possible in September.

Health Care

In April, the House of Representatives (House) passed [H.R. 2575](#)—a bill that would modify the Affordable Care Act’s (ACA) definition of “full-time employee” for purposes of the employer shared responsibility requirements by changing it from an employee who averages at least 30 hours per week during a given month to at least 40 hours per week during that month. (For more information about the employer shared responsibility requirements, please see our [April 17, 2014 FYI In-Depth](#)). The Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) [estimated](#) then that the bill would add \$73.7 billion in costs to the ACA. The primary reason for the estimated increase in costs was decreased penalty payments from employers given that fewer employees would meet the 40-hour threshold.

Late last week, JCT and CBO [revised](#) their earlier estimate downward—to \$45.7 billion. New economic modeling data reflects a reduction in the number of workers who work between 30 and 40 hours per week and an increase in the number who work more than 40 hours per week. Accordingly, both entities now believe that H.R. 2575 would impact fewer workers than previously estimated, resulting in a smaller reduction in penalty payments.

The reduction in H.R. 2575’s cost, however, probably does not improve its slim chance of enactment. The White House issued a [veto threat](#) against the bill earlier this year based in part on the shift in costs away from employers to taxpayers. Even at \$45.7 billion, the bill is costly—and the political parties are not likely to agree on a cost offset.

Congressional lawsuit against President Obama?

This week, the Rules Committee approved a resolution ([H. Res. 676](#)) that would authorize the House to file a lawsuit against President Barack Obama and other members of the administration for actions inconsistent with their constitutional duties. The lawsuit would seek “appropriate relief” with respect to the implementation of (or failure to implement) aspects of the ACA. During a hearing last week, the administration’s decisions to delay the employer shared responsibility requirements and associated reporting requirements were discussed as examples of the alleged executive branch over-reach. The House is likely to vote on—and pass—H. Res. 676 next week, in which case a lawsuit would likely be filed in the next several months. The Senate is unlikely to vote on a similar resolution.

Labor and Employment

Senators Deb Fischer (R-NE) and Angus King (I-ME) introduced legislation ([S. 2618](#)) on July 16 that would provide a tax incentive for employers of any size to offer paid family and medical leave. The [Strong Families Act](#) would allow employers that offer at least four weeks of paid leave to claim a 25% nonrefundable tax credit for each hour of paid leave provided to qualified employees, capped at \$4,000 per year for each such employee. Leave could be taken on an hourly basis, and would be separate from other vacation or sick leave. The bill would prohibit retaliation against employees who take leave under this program.

Given the current political climate, the prospects of enactment would seem unlikely especially if the estimated cost of the legislation is substantial.

Authors

Drew Crouch, JD, LL.M.

Marjorie Martin, EA, MAAA, MSPA

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