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Legislate®

Key Legislative Developments Affecting Your Human Resources

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Employee Benefits Measures Introduced by Recessing Congress

Congress has recessed after completing a two-week legislative session, and is not expected to be back until after the mid-term elections. Several hundred bills were introduced in the Senate and the House of Representatives during the session, including a trio of bills that would impact employee benefits and employment law: nondiscrimination testing relief for frozen defined benefit pension plans; a new savings vehicle for dependent care expenses; and NLRB reform.

Retirement

S. 2855, the Retirement Security Preservation Act of 2014, was introduced by Senators Benjamin Cardin (D-MD) and Rob Portman (R-OH). Under the legislation, a defined benefit plan that provides benefits, rights, or features to a closed class of participants would pass nondiscrimination testing if certain requirements are satisfied. First, the benefits, rights, and features provided to the closed class must have satisfied nondiscrimination testing as of the date the class was closed. Second, any amendments to the class or to plan benefits, rights, and features must satisfy nondiscrimination testing — without regard to the special rule created by the legislation. The legislation would permit a defined benefit plan to test benefit accruals with defined contribution plans (including ESOPs and matching contributions) on a benefits basis subject to similar requirements.

The legislation would also permit a defined contribution plan to be tested on a benefits basis if such plan provides make-whole contributions to participants whose defined benefit plan accruals have been reduced or eliminated, and certain other requirements are met. As with the rule for testing accruals under a closed defined benefit plan, a defined contribution plan that provides make-whole contributions could aggregate ESOP and matching contributions for the benefits based test.

The legislation would also provide that a closed defined benefit plan is deemed to satisfy the minimum participation rule (that is, the rule requiring the plan to cover no fewer than 50 participants or 40% of employees, if less), if the plan satisfied the section as of the effective date that the plan was closed.

Similar legislation had been introduced in the House of Representatives (House) by Richard Neal (D-MA) in May 2013 — H.R. 2117 (section 406) — as part of a much broader bill. Pat Tiberi (R-OH) along with Richard Neal advanced just the nondiscrimination issue this July in H.R. 5381. (Our August 8, 2014 *Legislate* provides details.) It remains to be seen whether Congress will take up nondiscrimination testing for closed pension plans during the lame duck session.

Dependent Care

S. 2806, the Dependent Care Savings Account Act of 2014 — introduced by Senator David Vitter (R-LA) — would amend the Internal Revenue Code to establish a new tax-preferred savings vehicle for qualified dependent care expenses (including long-term care services and amounts paid for qualified long-term care insurance contracts). The maximum individual tax deduction for contributions to the new account would be the lesser of $5,000 per year or the individual's earned income. Employer contributions would be tax excludible from the individual's gross income and would be excludible for payroll tax purposes, and the deduction limit for contributions would be adjusted downwards by the amount of dependent care assistance that an employee received from an employer.

Similar rules to those that apply for employer contributions to Archer MSAs and HSAs would apply to dependent care accounts — which generally require that employers make available comparable contributions for participating employees. The tax treatment of the accounts would be similar to HSAs — no taxation on earnings, and any amounts paid or distributed for qualified dependent care expenses would generally be tax excludible. Amounts or distributions not used for such expenses would be taxable and subject to an additional 20% tax.

S. 2806 is likely to be expensive in terms of revenue loss — which may limit further consideration given recent projections of growing federal deficits. (See our August 29, 2014 *Legislate* for more information on long-term budget forecasts by the Congressional Budget Office.)

Labor and Employment

Senator Lamar Alexander (R-TN) introduced S. 2814 — the National Labor Relations Board Reform Act — with Senate Minority Leader Mitch McConnell (R-KY) and Senators Michael Enzi (R-WY), Johnny Isakson (R-GA), and Marco Rubio (R-FL) as cosponsors. The bill would change the composition of the board by adding a sixth board member, requiring an equal number of Democrats and Republicans on the board (three each), staggering their terms to maintain the balance, and requiring at least four board members to agree on any decision.

The bill would allow respondents to obtain review by a federal district court of the general counsel's decision to issue a complaint, and would authorize the court to prohibit further NLRB proceedings unless it finds substantial evidence of an NLRA violation. The bill would also provide new discovery rights by allowing any party to the complaint to obtain from the general counsel advice or internal memoranda, or other inter- or intra-agency memoranda related to the complaint.

The bill would also reform the appellate review process by allowing any party to a pending board case to appeal a report by an administrative law judge or a decision by a regional director to a federal appellate court if the NLRB does not issue a final order on the report or decision within one year of its issuance.

Finally, the bill would limit funding for the NLRB in the event that certain case backlogs exist. While S. 2814 is not likely to advance in the Senate in this Congress, similar legislation could advance in the House.

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