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Key Legislative Developments Affecting Your Human Resources

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Senate Procedural Rules Key to Next Year's ACA Legislation

With Congress on its Thanksgiving break, this week we focus on two procedural rules that will likely be hot topics in the Senate next year for Affordable Care Act legislation: cloture and budget reconciliation. Both rules will affect the next Congress' expected efforts to repeal the health reform law — which may begin as soon as January 2015.

Background

As a result of the mid-term elections on November 4, Republicans gained the majority in the Senate and retained their majority in the House of Representatives (House). The next Congress — scheduled to begin in January 2015 — is expected to try to repeal the Affordable Care Act (ACA), probably starting as soon as January. While a full repeal bill would easily pass the House, such a bill faces significant hurdles in the Senate because of that chamber's procedural rules that protect the minority party. In the year ahead, two procedural rules — cloture and budget reconciliation — will have a significant impact on ACA repeal attempts and will be featured prominently in news coverage of those attempts.

Cloture

The Senate generally permits unlimited debate on matters pending in that chamber. The use of unlimited debate to prevent a vote on legislation or presidential executive and judicial branch appointments is referred to as a [filibuster](#). The ability of a senator to filibuster legislation, however, is not absolute — for example, Senate rules limit debate if at least three-fifths of the chamber (usually 60 votes) approve a limiting motion. The process of limiting debate is referred to as “invoking [cloture](#).”

The mid-term elections resulted in at least 54 Senate seats for Republicans — and perhaps one additional seat depending on the results of a December 10 runoff in Louisiana. While this is enough votes to control the chamber's agenda, it is not enough votes to invoke cloture and end a filibuster by Democrats of an ACA repeal bill.



It is possible to change the filibuster and cloture rules, though, with a simple majority. For example, on November 21, 2013, the rules were modified so that a simple majority (51 votes) is all that is required to end debate on certain presidential appointments. This modification was made not by redrafting the Senate's filibuster and cloture rules, but through two precedential votes on interpreting the existing rules. Under those two votes, which were both approved by 52 senators, the existing filibuster and cloture rules were interpreted as requiring a simple majority approval for ending debate on certain appointments. The debate and record of those precedential votes are available in the [Congressional Record](#) (pages S8414 to S8418).

It is unlikely that an ACA repeal attempt will prompt Senate Republicans to make changes to the filibuster and cloture rules, as any outright repeal of the ACA would certainly be vetoed by President Obama. Instead, it is likely that the Senate will begin debate early next year in January or February on a repeal bill, and that the bill will be successfully filibustered by Senate Democrats resulting in no up or down vote on the actual bill itself.

Budget Reconciliation

A [budget reconciliation bill](#) is another exception to the Senate's filibuster rules, with debate on a reconciliation bill limited to 20 hours. Amendments, however, may still be offered without debate once the 20 hours has expired — although amendments must be [germane](#), meaning on the subject of the pending legislation.

Did you know?

The process of determining whether legislation is in compliance with the content restrictions of a reconciliation bill is sometimes referred to as a "Byrd bath" on Capitol Hill.

Senate and House Republicans may try to use budget reconciliation to repeal specific portions of the ACA if Senate Republicans are unsuccessful in invoking cloture on a repeal bill. A reconciliation bill would not be the same as a full repeal of the ACA because of procedural restrictions on the content of such bills — which are intended to focus reconciliation bills on federal revenue and spending and disallow extraneous provisions, and are described more fully below. These restrictions are referred to as the Byrd Rule — named after the late Senator Robert C. Byrd (D-WV) who proposed them. It is not yet clear which provisions might be targeted for repeal in a reconciliation bill.

If the reconciliation process is used, a reconciliation bill is not likely to be brought to the Senate and House floors until early to mid-summer 2015.

Timing

A reconciliation bill is an optional step in the annual federal budget process. The federal fiscal year begins October 1. In the prior February, the president usually submits a proposed budget to Congress, and then the House and the Senate may pass a budget resolution — generally no earlier than mid- to late-spring.

A budget resolution passed by Congress may include reconciliation instructions to various committees to report legislation that changes federal spending or revenues to conform to the budget resolution. The instructed committees would then hold hearings and markups on proposed legislation that would comply with the reconciliation instructions. In the case of reconciliation instructions on the ACA, the instructed committees would likely be the tax writing committees — the Senate Finance Committee and the House's Committee on Ways and Means — and the Senate Health, Education, Labor, and Pensions Committee and the House's Energy and Commerce and Education and the Workforce Committees. The work-product of these five committees would be combined by their respective chamber's budget committee into a reconciliation bill that could then be brought to a vote in that chamber.

Given the many steps and the number of committees involved, a reconciliation bill targeting the ACA likely would not come to the floor of either chamber until early to mid-summer 2015.

Content Restrictions

A budget reconciliation bill is subject to a number of content restrictions that will impact its use to repeal the ACA. For example, such a bill is not permitted to add to the federal deficit beyond the window covered by the budget resolution and its reconciliation instructions. The years beyond the specified window are referred to as “out-years.” The Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) — the official estimators of federal budget deficits and revenues — have not released a recent estimate of the budget impact of a repeal of the ACA. The last time that CBO and JCT estimated ACA repeal was [July 2012](#) — when the agencies found that repeal would increase deficits outside of the ten-year federal budget window.

If CBO and JCT determined that repeal would add to the deficit in the out-years, a reconciliation bill would have to eliminate that out-year deficit. This could be done by including additional revenue or spending cuts to cover the out-years or by “sunsetting,” meaning providing an end date to, all or a portion of the repeal, with the sunset coinciding with the beginning of the out-year period. The Bush-era EGTRRA tax cuts (the Economic Growth and Tax Relief Reconciliation Act of 2001) were passed using reconciliation procedural rules, and those tax cuts included a ten-year sunset date so that out-year budget deficits would not be increased.

Another content restriction is that a reconciliation bill may only contain provisions that produce changes in federal revenue and spending, with a corollary rule that disallows provisions in which the revenue or spending change is merely incidental to the provision. Much of the ACA directly impacts federal revenue and spending, and thus could be repealed through a reconciliation bill — for example, the tax credits and other subsidies for middle- and lower-income Americans, and probably the individual mandate and employer shared responsibility requirement. However, other key reforms made by the ACA — such as protections for individuals with pre-existing conditions in the individual insurance market — may not be viewed as impacting federal revenue or spending; or if they do have a revenue or spending impact, such impact may be viewed as being merely incidental to their underlying non-budgetary policy of regulating the individual insurance market. If this were the case, then repeal of those reforms could not be made through a reconciliation bill.

Provisions that violate the content restrictions of a reconciliation bill give rise to [points of order](#), meaning a claim that a procedural rule has been violated, that may be raised during consideration of the bill — and if sustained by the Senate’s chair, would result in the deletion of the violating provision.

Conclusion

Congress is likely to pursue full or partial repeal of the ACA next year. While those attempts — and the procedural difficulties in the Senate — will absorb a significant amount of Congress’s attention and garner media coverage, actual repeal of the ACA next year is highly unlikely. President Obama will veto any repeal bill that makes it to his desk.

Any changes to the ACA next year are likely to occur after Congress first attempts full repeal or partial repeal through budget reconciliation. Such changes are possible if they are modest in scope and are tied to must-pass legislation — for example, funding the federal government.

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