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Key Legislative Developments Affecting Your Human Resources

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# Government Funding Bill Includes Benefits and Employment Law Changes

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The House of Representatives passed legislation yesterday that would fund most of the federal government through September, and the legislation heads to the Senate this weekend. The legislation includes changes to pension law, the treatment of expatriate plans under health reform, marijuana laws, and FLSA overtime rules.

## Federal Government Funding

The House of Representatives (House) passed H.R. 83 on Thursday. The legislation would provide funding for much of the federal government until September 30, 2015 — which is the end of FY2015. Funding through February would only be provided to the Department of Homeland Security — setting up a potential funding standoff between Congress and the White House next year over President Barack Obama's recent announcement on immigration enforcement policy.

The legislation includes a number of provisions that would impact employee benefits and employment law — described more fully below. H.R. 83 passed the House 219 to 206, with 162 Republicans and 57 Democrats supporting the measure. The bill heads next to the Senate, with passage by that chamber likely later this evening or tomorrow. President Obama is expected to sign the bill into law.

**Prospects for tax extenders legislation?**

The House passed H.R. 5771 last week, which would extend a number of expired or expiring tax code provisions generally for one year. (See our **December 5, 2014** *Legislate* for more information.) The Senate is not expected to consider that legislation until after it has considered H.R. 83.

## Retirement

H.R. 83 was amended by the House's Rules Committee to add Divisions O and P, which contain a number of pension-related provisions — many relating to multiemployer pension plans. The amendment was offered by Education and the Workforce Committee Chairman John Kline (R-MN) and Ranking Member George Miller (D-CA).

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## Multiemployer Plan Provisions

Division O would make a number of changes to the funding and PBGC contribution rules for multiemployer pension plans. The changes include a PBGC premium hike for multiemployer plans, new rules that would allow certain financially distressed multiemployer plans to suspend accrued benefits, and technical modifications to various ERISA and Internal Revenue Code (Code) rules for multiemployer plans — including special rules created by the Pension Protection Act of 2006 (PPA) for endangered (yellow zone), seriously endangered (orange zone), and critical status (red zone) plans.

**Premiums.** Under section 131 of Division O, premiums for multiemployer plans would rise from $13 per participant to $26 per participant, effective in 2015, with the dollar amount indexed to wage inflation. PBGC would be required to report to Congress whether premium levels — taking into account the newly increased premiums — are sufficient for the PBGC to meet its guaranty obligations, and, if not, propose a schedule for premiums sufficient to meet those obligations.

**Ability to Suspend Accrued Benefits.** The legislation would permit critical and declining status plans to suspend accrued benefits — including benefits of participants and beneficiaries currently in pay status. A “critical and declining status plan” is defined as a critical status plan under the PPA rules (a red zone plan) that is projected to become insolvent within 15 years, or is projected to become insolvent within 20 years if either the plan’s ratio of inactive to active participants is greater than 2 to 1 or the plan is less than 80% funded.

The legislation would give wide latitude to a critical and declining status plan’s trustees to design a benefits suspension — allowing for a temporary or permanent reduction of any current or future payment obligation to any participant or beneficiary, whether or not in pay status. Constraints would be placed on the trustees’ decision to reduce benefits, including the following:

- The plan’s actuary must certify that the plan is projected to avoid insolvency, taking into account the benefit suspension. The benefit suspension in the aggregate must be reasonably estimated to achieve, but not materially exceed, the amount necessary to avoid insolvency.
- For any participant, benefits may not be reduced below 110% of the PBGC’s guarantee for multiemployer plans. Currently, that guarantee is $12,870 annually for a participant with 30 years of service.
- Benefits may not be reduced for participants older than 80, with a phase-in of reductions for participants between ages 75 and 80. Benefits based on disability (as defined under the plan) may not be suspended.
- An application must be made to the secretary of the treasury for approval of a benefit suspension.
- Plan participants must be permitted to vote on whether to approve a benefit suspension and a suspension may not go into effect if a majority votes no. However, the secretary of the treasury is permitted to disregard the results of an election in the case of a “systemically important plan” — defined as a plan that the PBGC projects would need more than $1 billion (indexed) in financial assistance from the agency if the suspension of benefits is not implemented.

The new rules permitting a suspension of benefits would be effective on the date of enactment of H.R. 83.

**Technical Modifications.** Technical modifications (sections 101 to 111 of Division O) would include, for example:

- Elimination of the sunset in the PPA for certain funding rules for multiemployer pension plans (see our December 5, 2014 *Legislate* for more information on the PPA sunset provisions and legislation that would extend those sunset dates by one year).
- Permitting a plan that is not yet in critical status (or the red zone) to elect such status for a plan year if the plan's actuary projects that the plan will be critical status in any of the five succeeding plan years.
- Providing a PBGC guarantee for benefits payable to the surviving spouse of a plan participant who has not yet died as of the date the multiemployer plan became insolvent.

Sections 121 and 122 would also provide new rules relating to multiemployer pension plan mergers and partitions.

### Other Pension Provisions

Division P of H.R. 83 includes several provisions with application beyond multiemployer pension plans:

- **Substantial Cessation of Operations (section 1 of Division P).** The legislation would redefine what is meant by a "substantial cessation of operations" that may give rise to a PBGC enforcement action under ERISA section 4062(e). This provision is the same as S. 2511, which unanimously passed the Senate in September. (See our September 19, 2014 *Legislate* for more information on S. 2511.)
- **Service-Based Normal Retirement Age (section 2).** The bill would permit an "applicable plan" to have a normal retirement age that is the earlier of an age otherwise permitted under ERISA or the age at which a participant completes at least 30 years of benefit accrual service. An applicable plan is a plan that provided for such a normal retirement age on or before December 8, 2014. Generally, the service-based retirement age may be used by an applicable plan with respect to individuals who are plan participants on or before January 1, 2017.
- **Charitable Organizations that Help Children (section 3).** The legislation would extend the application of special funding rules for certain cooperative and charitable employers to section 501(c)(3) tax-exempt organizations with employees in 40 states and whose primary exempt purpose is providing services for children. (See our March 28, 2014 *Legislate* for more information on the special funding rules for CSEC plans that were enacted earlier this year.)

## Healthcare

Division M of H.R. 83 would provide special rules under the Affordable Care Act (ACA) for expatriate health plans. An expatriate health plan would be required to satisfy a number of conditions to receive the special treatment, including:

- Substantially all of the primary enrollees in the plan are qualified expatriates. A qualified expatriate would be defined as (1) an employee transferred to the US for a specific and temporary employment-related assignment who is determined by the plan sponsor to need access to health insurance and is offered other multinational benefits (such as tax equalization); (2) a person working outside the US for a period of 180 days in a consecutive 12-month period that overlaps with the plan year; or (3) a member of a group of similarly situated individuals who are traveling or relocating internationally for amateur sporting competition, social welfare, artistic, literary, educational, or religious purposes.
- Substantially all of the benefits provided are not excepted benefits, such as vision or dental benefits.
- Coverage is provided for inpatient hospital services, outpatient facility services, physician services, and emergency services, with special rules about where those services must be available.
- The plan's share of benefit costs is at least 60%.

- The plan's issuer or administrator satisfies a number of requirements — such as having licenses to sell insurance in at least two countries and processing at least $1 million in foreign currency equivalents each year.
- If the plan covers children, it makes such coverage available until the child reaches age 26.
- The plan complies with the certain requirements of ERISA, the Public Health Service Act, and the Code as in effect before the enactment of the ACA. This includes, for example, compliance with the Mental Health Parity and Addiction Equity Act and the HIPAA portability and nondiscrimination rules.

An expatriate health plan that meets the conditions generally would not be subject to the ACA. Health providers and employers, however, would still be subject to information reporting with respect to coverage provided. Expatriate health coverage would be treated for purposes of the individual mandate as either employer-provided coverage or coverage obtained in the individual insurance market.

## Labor and Employment

The legislation includes changes to marijuana law and FLSA overtime rules.

### Marijuana Legalization

H.R. 83 would add further confusion for employers on the legal status of marijuana. Section 538 of Division B of H.R. 83 would protect state medical marijuana laws by prohibiting the Department of Justice from preventing 32 named states and the District of Columbia from implementing laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Notably, the list does not include New York, which became the 23rd state to legalize medical marijuana earlier this year. (See our July 11, 2014 *For Your Information*.) Section 809 of Division E would block a voter-approved District of Columbia initiative (Initiative 71) that would have legalized recreational marijuana use in the nation's capital.

### FLSA

Section 111 of Division G would amend the Fair Labor Standards Act (FLSA) to exempt claims adjusters from the law's overtime requirements for a two-year period following a major disaster, provided they receive average compensation of at least $591 per week and perform work related to the disaster. The exemption would not affect the FLSA's white-collar exemptions from the minimum wage and overtime requirements.

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