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Legislate®
Key Legislative Developments Affecting Your Human Resources

Volume 6 | Issue 2 | January 16, 2015

2015 Congressional Forecast

This week we provide a forecast of the year ahead in Congress, previewing what 2015 has in store for tax reform, health and retirement plans, and labor and employment.

Overview

This article is your guide to the year ahead in Congress for employment, labor, and employee benefits legislation.

As a result of last November's mid-term elections, Republicans hold the majority in both chambers of the 114th Congress. Their majorities, however, are not filibuster-proof in the Senate or veto-proof in either chamber. Consequently, legislation enacted in 2015 will either have to be supported by both political parties or the result of compromise.

Clashes between Congress and President Barack Obama lie ahead — particularly for the Affordable Care Act (ACA). The president and Congress, however, may seek to find common ground in tax reform — although the gulf between the two is likely too great for reform to be enacted. The year ahead may also see retirement legislation intended to enhance plans — rather than as a revenue raiser for federal spending or deficit reduction.

Key Events in Late Winter

January 20 – President Obama will give his State of the Union address. Last year's address called for raising the federal minimum wage and a new retirement savings vehicle — myRAs — to build retirement savings for those without access to an employer-sponsored retirement plan (see our January 31, 2014 *Legislate*).

February – The president is expected to submit a federal budget for FY 2016 to Congress. Prior budgets have included provisions that would impact employee benefits, such as:

- Automatic enrollment of employees in IRAs if they are not covered by an employer-sponsored retirement plan
- A limit on total tax-preferred retirement savings applied at the individual taxpayer level

(See our March 7, 2014 *Legislate* for more information on the president's proposed FY 2015 budget.)

Tax Reform

Tax reform is likely to be a hot topic in Congress in the coming year. While comprehensive reform is unlikely to be enacted, employers should still pay attention to the debate. The legislative process is often iterative — with proposals made in the year ahead serving as the basis for future tax reform efforts. Individual revenue raising provisions of a tax reform plan may be used outside of reform as cost offsets to pay for increased federal spending or to pay down deficits.

Outlook for Reform

Tax reform is unlikely to cross the finish line because the two political parties do not agree on the fundamental goals for reform. For example, while both sides would agree that tax reform should simplify the tax code, they have very different views on whether tax reform should raise additional revenue or the same amount of revenue — referred to as "revenue neutrality." Republicans generally support revenue neutrality as a goal of tax reform, while Democrats generally prefer that tax reform raise additional revenue. As another example, Republicans generally favor lowering tax rates for all, while Democrats generally favor rate reductions that are targeted to middle and lower-income taxpayers. Without agreement on fundamental goals such as these, tax reform is not likely.

The two parties may reach agreement in the year ahead on the fundamental goals for corporate tax reform. If so, any resulting corporate tax reform plan is not likely to change the tax rules that affect employee benefits — such as the exclusion for employer-provided health coverage and the favorable tax rules for employer-sponsored retirement plans. Even if the parties agree on fundamental goals, either or both sides may not want to press forward without reform of the tax rules that apply to individual taxpayers.

Both tax-writing committees in Congress — the Senate Finance Committee and the House Ways and Means Committee — have new chairmen: Sen. Orrin Hatch (R-UT) and Rep. Paul Ryan (R-WI). Both have expressed an interest in tax reform, and their committees will be the focal point of congressional reform efforts. The year ahead is likely to feature multiple hearings on reform topics, and possibly the release of draft reform proposals and legislative markups of those proposals.

Benefits Provisions

The outlook for employee benefits in tax reform proposals is not good, as the proposals are likely to modify existing tax rules to raise revenue. Even in a revenue neutral reform plan, significant amounts of revenue must be raised to pay for other provisions, such as rate cuts. (See our November 26, 2013 *Legislate* discussing why retirement provisions might be targeted in tax reform by liberals and conservatives alike.) The tax reform plan (HR 1) released last year by retired Ways and Means Chairman Dave Camp (R-MI) lowered top rates and simplified the tax code in a revenue neutral manner. (See our February 27, 2014 *FYI Alert* on the Camp plan.) The plan included the following changes to employee benefits that raised revenue:

Tax Extenders and Mass Transit Benefits

In December, Congress retroactively increased the monthly dollar exclusion for mass transit benefits under a qualified transportation fringe to $250 for 2014. With this increase, the exclusions for parking and mass transit benefits are equal for 2014. The parity lapses for 2015, with parking set at $250 and mass transit benefits at $130. (See our December 1, 2014 *FYI* and January 9, 2015 *FYI Alert*.)

Even if Congress decides to restore parity for 2015, it may not act until late in the year. The mass transit provision is one of several dozen temporary tax provisions, and Congress may wait until after the tax-writing committees have explored tax reform before extending any of the provisions for another year.

- Requiring 401(k) contributions in excess of half of the dollar limit to be made as Roth after-tax contributions, estimated to raise over $140 billion over 10 years
- Freezing various annual COLAs for retirement-related dollar limits on contributions and benefits for ten years, estimated to raise over $60 billion over 10 years
- Requiring nonqualified deferred compensation to be recognized upon vesting, with only service-based vesting permitted as a substantial risk of forfeiture, and additional limits on the deductibility of compensation above $1 million for top executives of publicly traded companies, estimated to raise $25 billion over 10 years

The provisions described above could reappear in reform proposals released this year.

Health Plans

The ACA will continue to be the primary focus of Congress in 2015. With Republicans in the majority in both chambers, efforts to repeal the ACA will intensify, but for the most part are not likely to be enacted. It is expected that the House will repeal the ACA in its entirety early this year; and that the Senate will also try, but fail to reach an up or down vote on full repeal due to a filibuster.

Technical Modifications

Technical modification bills are also likely to be considered in both chambers. Some will be controversial. For example, HR 30 — legislation that would modify the definition of full-time worker for purposes of the employer shared responsibility requirement by raising the hourly threshold for such status from 30 to 40 hours per week — last week garnered a veto threat from the White House. Others, such as HR 26 will receive significant bipartisan support — the legislation modifies how veterans with military retiree coverage are counted as employees for purposes of the employer mandate. (See our January 9, 2015 *Legislate* for further information on both bills, which passed the House last week.)

Key Events in the Spring

March/April — Congress is likely to pass a federal FY 2016 budget resolution in this timeframe. Once this resolution is passed, the appropriations committees will begin work on legislation to fund the federal government for FY 2016. One thing to watch for in the budget resolution is whether there are reconciliation instructions on the ACA, and whether Congress replaces across-the-board sequestration cuts with other measures to reduce federal deficits — retirement provisions have been used in the past.

March/May — Under the **Temporary Debt Limit Extension Act**, the federal debt limit will be reached on March 15, 2015, but due to tax collections in the spring and extraordinary measures taken by the secretary of Treasury, it will not need to be increased probably until May. The president has indicated in the past that he will not negotiate over the debt limit, but some in Congress may seek policy concessions — perhaps over the ACA — as part of increasing the limit.

Even controversial technical modifications to the ACA — such as increasing the 30-hour threshold to 40 hours — could make it across the finish line as enacted legislation. This could happen if the modification is included as part of must-pass legislation — such as appropriations bills funding the federal government for FY 2016, which must be enacted before September 30, 2015 to avoid a government shutdown.

King Decision

One wild card in the year ahead is the Supreme Court's decision in *King v. Burwell* — scheduled to be argued before the Court in March, with a decision expected in June. The case challenges the availability of the tax credits for individuals purchasing coverage in a federally facilitated public marketplace (or a marketplace established under a state-federal partnership). Currently, 34 states are covered by such marketplaces, while 17 states and the District of Columbia established their own. The potential consequences of an adverse decision to stakeholders in those states are significant:

- Lower and moderate income individuals would lose subsidies for purchasing coverage
- Insurance companies could possibly lose significant numbers of customers — according to HHS, over 80% of individuals applying for coverage in the marketplaces last year and to date during the 2015 open enrollment period did so with subsidy assistance — with adverse selection driving up future premiums in the marketplaces of affected states
- Some employers may escape employer shared responsibility assessments, leading some to drop coverage

If the Supreme Court disallows tax credits in the 34 states that did not set up their own marketplaces, the president and Congress may seek a legislative compromise. If a compromise is not reached by the end of the year, a stalemate is then likely — with response to the Court's decision becoming part of the 2016 presidential campaign. (See our November 11, 2014 *For Your Information* for more information on the King case.)

Budget Reconciliation

The Supreme Court's decision will occur after the House and Senate will have passed a budget resolution for the year. The resolution is expected to include reconciliation instructions, so any compromise or legislative response to *King* may take shape as a reconciliation bill. The procedural advantage of a reconciliation bill is that it cannot be filibustered in the Senate. However, outright repeal of the ACA isn't likely under the reconciliation process because of the procedural rules that apply. (See our November 25, 2014 *Legislate* for more information on the reconciliation process and its application to the ACA.) Due to these rules, a reconciliation bill is likely to deal solely with ACA provisions that implicate federal revenues or spending — such as the tax credits that are the subject of the *King* case or the repeal of tax provisions that helped pay for the ACA.

Key Events in the Summer

Two important things for employers to watch for in June:

- The highway trust fund will be nearing depletion — revenue offsets in the past have included retirement provisions.
- The Supreme Court is expected to issue its decision in the *King* case.

The appropriations committees in Congress will likely be marking up legislation in the summer to fund the federal government for FY 2016 – on the watch list are policy riders related to employee benefits, such as changes to the ACA or employment or labor rules.

Even if the King decision permits premium tax credits in federally facilitated marketplaces, the Senate may attempt to repeal portions of the ACA through a reconciliation bill — especially if a full repeal bill is successfully filibustered.

Replacement Legislation

It is possible that Republicans could coalesce around an ACA replacement bill in 2015. On the watch list for such proposals is the treatment of the tax exclusion for employer-provided health coverage. In the last Congress, two ACA repeal and replacement proposals would have raised revenue by trimming this exclusion:

- HR 3121 — Introduced by Rep. David Roe (R-TN) and co-sponsored by 133 other representatives, this ACA replacement bill would have repealed the tax exclusion for employer provided health coverage and replaced it with a capped deduction available for coverage obtained in the individual or group markets — $7,500 individual; $20,000 family.
- Hatch-Coburn-Burr proposal — While never introduced in the Senate as a bill, Senators Orrin Hatch, (R-UT), Tom Coburn (R-OK) (retired), and Richard Burr (R-NC) released a draft ACA replacement proposal last year that would have capped the exclusion for employer-provided health at 65% of the average cost of such plans. The amounts raised would be used to provide tax credits for lower income taxpayers to purchase health insurance coverage.

Labor and Employment

Both the House and Senate are likely to hold oversight hearings and seek legislative changes on a number of labor and employment matters in the year ahead, such as:

- Repealing provisions of the National Labor Relations Act (NLRA) that allow employers (pursuant to a union security agreement) to require employees to join a union as a condition of employment.
- Permitting employers to pay higher wages or other compensation than provided by an applicable collective bargaining agreement without committing an unfair labor practice under the NLRA.
- Allowing private-sector employers to provide compensatory time off to employees in lieu of overtime pay. (See our November 15, 2013 *Legislate* for more information on a bill introduced by Senate Majority Leader Mitch McConnell that would allow this.)
- Reforms to the NLRA's election procedures — such as requiring secret balloting in representation elections and new elections if a bargaining unit's composition changes significantly.
- Reversal (or possibly defunding) of the NLRB's recently finalized expedited election rules.
- Reforms to the National Labor Relations Board (NLRB) — such as modifications to the board's composition and new rules on how the board may conduct business.
- Requiring the EEOC to engage in good faith conciliation efforts before bringing suit and the public disclosure of each case brought by the EEOC in court.
- Requiring the EEOC commissioners to approve all multi-victim and systemic litigation.
- Creating a safe harbor for employers against EEOC claims relating to criminal background checks, and allowing employers to engage in employment practices required under federal, state, or local laws.

Key Events in the Fall

October 1 marks the beginning of federal fiscal year 2016, and appropriations to fund the federal government must be enacted before this date to avoid a government shutdown.

It is possible that ACA and employment and labor policy riders that would be vetoed if separately passed by Congress might be included in this must-pass legislation.

All of the above issues were the subject of introduced legislation in the prior Congress — see our September 19, 2014 and November 21, 2014 issues of *Legislate* for more information on these bills. Stand-alone legislation on these matters is unlikely to become enacted since the White House would probably veto most of them, and enough support in Congress to override a presidential veto is unlikely. Some proposals, however, might make it into law if included in must-pass legislation — such as FY 2016 appropriations.

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Retirement Plans

The last half of 2014 produced significant legislative changes for pension plans in particular. In August, pension interest rate smoothing was extended as part of legislation to fund federal transportation spending (see our August 1, 2014 *Legislate* and August 1, 2014 *FYI Alert* for details). In December, a number of changes were made to the funding rules for multiemployer pension plans — including new rules to allow certain critical status (red zone) plans to suspend benefits and a premium hike for all plans. (See our December 5, 2014 *Legislate* and our January 12, 2015 *For Your Information* for more information on the multiemployer plan changes.)

Key Events in Early Winter

November 8 – 2016 presidential elections will be a year away, and campaign season will be gearing up; look for Congress to shift more sharply to messaging legislation, as opposed to legislation that is intended to become law.

If Congress has not already addressed tax extenders, it will likely do so in November or December.

2015 may bring additional changes, with incoming Senate Finance Committee Chairman Orrin Hatch (R-UT) focused on retirement plan legislation.

Senator Hatch's Retirement Bill

In the prior Congress, Senator Hatch introduced S. 1270, the Secure Annuities for Employee (SAFE) Retirement Act. The bill includes a number of proposals and reforms for retirement plans in the following five areas:

- Creation of a new type of pension plan for governmental employers
- Reforms intended to expand private sector retirement plan coverage
- Simplification of existing rules for retirement plans
- Reforms to enhance longevity protections
- Modifications to ERISA's disclosure rules

Please see our November 14, 2014 *Legislate* for more information on the proposals within the bill. Senator Hatch is expected to introduce another version of S. 1270 in this Congress. The committee he chairs had jurisdiction over the prior bill, and will likely have jurisdiction over the new bill. It is possible that Chairman Hatch will schedule a markup on the bill later this year.

PBGC Premium Increases

December's multiemployer pension plan legislation included a premium hike for such plans, and requires PBGC to report to Congress by June 1, 2016 on whether the premium hike is sufficient to avoid insolvency of the PBGC's multiemployer insurance program or additional premiums are needed. Given PBGC's record deficit for the program (see our November 21, 2014 *Legislate* for more information on the PBGC's deficit), Congress may again decide to raise premiums, but such an increase may not occur until after the PBGC's report is released. A premium increase for single employer plans is less likely given the improving deficit for the PBGC programs that cover such plans and in light of two recent sets of significant hikes.

Multiemployer Pension Plans

December's legislation was enacted very quickly — with less than a week elapsing between the unveiling of the Multiemployer Pension Reform Act of 2014 and its passage by Congress. Given that speedy passage, it is possible that Congress will revisit some of the provisions in that legislation to ensure that they work as intended. (See our January 12, 2015 *For Your Information* for more on the legislation.)

In Closing

2015 will be a busy year in Congress for employment, labor, and employee benefits. Employers should keep in mind that in addition to the issues outlined above, Congress may need to find additional revenue in the year ahead. Congress has used retirement provisions that generate revenue repeatedly in the last several years to pay for additional government spending or to pay down deficits:

- July 2012, MAP-21 — PBGC premium hikes for single and multiemployer plans and interest rate smoothing were used to pay for transportation and education spending (see our July 6, 2012 *For Your Information*).
- January 2013, American Taxpayer Relief Act of 2012 — In-plan Roth conversions were liberalized to pay for a several month delay of federal budget sequestration for FY 2013 (see our January 4, 2013 *Legislate*).
- December 2013, Bipartisan Budget Act of 2013 — A PBGC premium hike for single-employer plans was used to replace federal budget sequestration savings for FY 2014 and FY 2015 (see our December 20, 2013 *Legislate*).
- August 2014, Highway and Transportation Funding Act of 2014 — The extension of pension interest rate smoothing was used to pay for transportation spending (see our August 1, 2014 *FYI Alert* and August 1, 2014 *Legislate*).

In 2015, Congress will again look to replace sequestration budget cuts for FY 2016 and pay for transportation spending. No specific revenue raisers involving retirement or other employee benefits have been proposed yet — this is something for plan sponsors to watch.

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