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Key Legislative Developments Affecting Your Human Resources

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Congressional Spotlight on EEOC and Wellness Programs; Key Budget Report Released

A Senate panel held a hearing this week that examined EEOC enforcement actions of employer wellness programs. Additionally, the Congressional Budget Office released a key report, which includes updated estimates of the cost of federal entitlement programs, tax expenditures for employer-provided health and retirement coverage, and the costs and coverage impact of the Affordable Care Act.

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Senate Panel Calls for EEOC Guidance on Wellness Programs

Yesterday, the Senate Committee on Health Education Labor & Pensions (HELP) held a hearing focused on employer-sponsored wellness programs. These initiatives have been in the spotlight lately because of recent lawsuits brought by the Equal Employment Opportunity Commission (EEOC) — the agency that enforces the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These actions have created uncertainty about the extent to which wellness programs can provide financial incentives or penalties for completing health risk assessments or biometric screenings without triggering employment discrimination concerns — particularly in the absence of EEOC regulations explaining how a wellness plan can operate in a nondiscriminatory fashion. For more information on the recent EEOC lawsuits, please see our November 4, 2014 and October 30, 2104 *FYI Alert* publications.

Throughout the hearing, HELP Committee senators from both sides of the aisle expressed support for wellness programs and concern that the threat of EEOC enforcement actions chills employer interest in adopting and enhancing such programs. Ranking Member Patty Murray (D-WA), however, remarked that wellness programs must not be used to discriminate against individuals with disabilities or pressure individuals to divulge personal health information to their employers.

Most hearing panel witnesses described the successes and benefits of employer-sponsored wellness programs, crediting them with making workplaces healthier (by facilitating early diagnoses, encouraging weight loss, and aiding with smoking cessation, for example) and lowering healthcare costs. In line with many of the senators' comments, several witnesses conveyed concern about the "dampening effect" of the EEOC's recent enforcement actions on employers' interest in sponsoring wellness initiatives.

One witness representing a disability rights advocacy group acknowledged that wellness programs can be useful for promoting early intervention on healthcare issues, but cautioned that these programs can erode workplace protections for people with disabilities. Wellness programs can discriminate against individuals with disabilities, the witness maintained, by requiring participants either to divulge highly personal health information or risk losing thousands of dollars for failing to respond to an employer's intrusive medical inquiries that are neither job-related nor consistent with business necessity.

Differences of opinion notwithstanding, the senators and the entire witness panel agreed on one issue — the need for the EEOC to propose regulations in short order. Senators and panelists relayed frustration about the EEOC's failure to act on this issue for the past several years, and some suggested that Congress act in the absence of forthcoming regulations. It remains to be seen whether the hearing will help hasten the long-anticipated EEOC guidance.

Report on Federal Budget Outlook Released

President Barack Obama is expected to release his proposed budget for FY 2016 next week. (See our March 7, 2014 *Legislate* for employee benefit proposals included in the president's FY 2015 proposed budget.) In advance of that release, the Congressional Budget Office (CBO) released a report this week on the outlook for the federal budget over the next decade. The Joint Committee on Taxation (JCT) assisted CBO in compiling the report.

The report includes the following projections on increased entitlement program spending from 2015 to 2025, which may lead some in Congress to call for entitlement reform:

- Social Security spending is expected to increase over the next decade from 4.9% of GDP in 2015 to 5.7% in 2025
- Spending on major federal health programs — such as Medicare, Medicaid, Affordable Care Act (ACA) subsidies for health insurance purchased in the public marketplaces, and the Children's Health Insurance Program — are expected to increase from 5.1% of GDP in 2015 to 6.2% of GDP in 2025
- In contrast, spending for all other federal government programs — such as loans for college students, building roads and operating national parks, and funding federal agencies — is expected to decline from 9% of GDP in 2015 to 7.4% of GDP in 2025

What is a tax expenditure?

A tax expenditure is a rule in the tax code that allows for a special exclusion, exemption or deduction, or that provides a special credit, tax rate, or deferral of liability.

The report also includes projections of foregone revenue due to tax expenditures. Tax expenditures, for this purpose, include the income and payroll tax exclusion for employer-provided health coverage and the favorable tax rules for employer sponsored retirement plans. CBO reports that the single largest expenditure in the tax code is the exclusion for employer-provided health coverage — which the agency projects will equal 1.6% of GDP between 2016 and 2025. The exclusion of retirement plan contributions and earnings is the next largest tax expenditure — estimated by CBO to equal 1.1% of GDP between 2016 and 2025. President Obama has previously proposed to limit the value of tax expenditures such as employer-provided health and retirement coverage for high earners. (See our March 7, 2014 *Legislate* for more information on the president's proposed 28% cap for certain tax preferences.) His budget that is unveiled next week is likely to include this proposal again. Similarly, the first comprehensive tax reform proposal introduced in Congress within the last year — released last year by retired Ways and Means Chairman Dave Camp (R-MI) — also included a proposal that would limit the value of tax expenditures for top earners. (See our February 27, 2014 *FYI Alert* for more information.)

The CBO report also includes updated estimates on the net cost of the insurance coverage provisions of the ACA — primarily the Medicaid expansion and the subsidies for purchasing coverage in the public marketplaces, reduced by individual mandate penalties, employer shared responsibility penalties, and the 40% excise tax on high-cost plans (often referred to as the “Cadillac Tax”) that is first effective in 2018. CBO and JCT estimate that these provisions will cost $1.35 trillion on net between 2016 and 2025 — which is $101 billion less than the two agencies estimated a year ago. Notably, the report mentions that CBO and JCT expect that “premiums for health insurance will tend to increase more rapidly than the threshold for determining liability for the high-premium excise tax” — with the result that the 40% excise tax will impact an increasing number of employer health plans. The two agencies anticipate that employers will try to avoid the tax by reducing premiums, but that federal tax revenue will still increase over the next decade because employers will pay employees more taxable cash compensation to compensate for a reduction in benefits designed to avoid the excise tax.

The number of uninsured individuals is declining, with CBO and JCT estimating that 12 million individuals received insurance coverage in 2014 because of the ACA. Employer-provided coverage, however, is expected to decline over the next decade — ranging from 7 to 10 million fewer individuals covered by employer plans beginning in 2016 on account of the health reform law. The agencies predict that the losses in employer-provided coverage will be offset by coverage gains through enrollment in the public marketplaces or Medicaid — with enrollment in those programs ranging from 34 to 41 million individuals over the next decade.

Authors
Drew Crouch, JD, LLM
Julia Zuckerman, JD

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