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Legislate®

Key Legislative Developments Affecting Your Human Resources

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ACA Replacement Plan Released; NLRB Rules Targeted for Congressional Disapproval

Last week, two Republican committee chairmen released a plan to repeal and replace the Affordable Care Act. The proposal would cap the tax exclusion for employer-provided health coverage to pay for tax credits for the uninsured. This week, members in both chambers introduced legislation that would prevent new NLRB election rules from taking effect, and a Senate panel heard testimony on the impact those rules would have on employers and employees.

Healthcare

Last week, three Republican Congressman — including two committee chairs — released a plan to fully repeal and replace the Affordable Care Act (ACA). The Patient Choice, Affordability, Responsibility, and Empowerment (CARE) Act has not yet been drafted as a bill. The proposal was unveiled by Finance Committee (Senate) Chairman Orrin Hatch (R-UT), Energy and Commerce Committee (House) Chairman Fred Upton (R-MI), and Senator Richard Burr (R-NC), and is similar to a proposal released by Senators Hatch and Burr and retired Senator Tom Coburn (R-OK) last year. (See our January 31, 2014 *Legislate* for more information on last year's ACA replacement proposal.)

Under the proposal released last Thursday, the ACA would be fully repealed. The following provisions would be enacted in its place:

Prospects for the Hatch-Upton-Burr replacement plan?

Republicans in the House and the Senate have yet to settle on an ACA replacement plan. Last week's ACA repeal bill in the House (HR 596) included a 180 day delay of repeal — designed to give the House committees of jurisdiction time to develop a replacement plan. Whether members will coalesce around the Hatch-Upton-Burr proposal is unclear. It is, however, noteworthy that the proposal was released by two of the five chairmen of the House and the Senate committees with primary jurisdiction over the ACA — those five committees are the Senate's Finance and Health, Education, Labor, and Pensions Committees, and the House Ways and Means, Education and the Workforce, and Energy and Commerce Committees.

Individual insurance market provisions. Key provisions include guaranteed issue, limited ability of insurers to cancel policies (except for fraud or failure to pay premiums), and no medical underwriting and pre-existing condition exclusions for individuals with at least 18 months of creditable coverage. The ACA's age rating ratio for premiums would be increased from 3:1 to 5:1 during an unspecified transition period — after the transition period, states could adopt a higher or lower rating ratio. Insurers could base premiums on age and geographic location for those with 18 or more months of creditable coverage, while individuals without 18 months of creditable coverage also could be rated based on their health status and could be subject to pre-existing condition limitations. Catastrophic, individual market, and group market coverage would all qualify as creditable coverage.

Individual mandate and employer shared responsibility. The ACA replacement plan does not include an individual mandate or penalties for employers that do not offer coverage.

Rules applicable to group and individual insurance policies. Plans may not impose lifetime limits on benefits. For an unspecified transition period, plans would be required to offer dependent coverage up to age 26. After the transition period, states could decide whether they want to include this requirement. It is not clear if the dependent coverage requirement applies to self-insured group plans.

Tax credits. Similar to the ACA, advanceable, refundable tax credits would be made available to help lower and middle-income individuals purchase health insurance coverage. The credits would be available to individuals who work for a small employer — defined as a business with 100 employees or less. The credits would also be available to individuals who do not work for a large employer and who do not have an offer of coverage — such as through a spouse who has an offer of family coverage through his or her employer. The credits phase out for individuals between 200 and 300% of the federal poverty level (FPL), and eligibility for the credits terminates when income is above 300% of FPL. Although not specified in the proposal, information reporting by employers on offers of coverage would likely be necessary for enforcement of the eligibility conditions for the credits.

Optional rules for states. States would be permitted to auto-enroll individuals who are eligible for the new tax credits into default health insurance options. States would also be eligible to apply for federal funding to pay for high-risk pools to cover those with chronic conditions who do not have health coverage. States would also be permitted to enter into agreements with other states to allow consumers to purchase coverage across state lines, and small businesses would be permitted to band together to purchase group coverage.

Tax exclusion for employer-provided coverage. The new tax credits would be financed by capping the tax exclusion for employer-provided health coverage at $12,000 for self-only coverage and $30,000 for family coverage. The cap would be indexed at CPI plus 1%. Amounts above the cap would be taxable — but would not be subject to the ACA's 40% excise tax on high-cost plans, since that tax would be repealed. The ACA replacement plan describes the unlimited exclusion for employer-provided coverage as a "distortion" in the tax code, and describes the cap "as necessary and important because economists across the political spectrum largely agree that the current distortion in the tax code helps to artificially inflate the growth in health care costs."

Labor and Employment

Legislation was introduced in both chambers this week — Sen. J. Res. 8 and House J. Res. 29 — that would prevent the new NLRB election rules that were finalized in December from taking effect in April. The Congressional Review Act (CRA), which can only be used against a regulation in the first 60 days after it is issued, allows Congress to pass

a joint resolution to disapprove of a federal agency regulation and stop it from being implemented. It also prevents the agency from issuing a substantially similar regulation without congressional authorization.

Because the resolution cannot be filibustered or amended, it only needs a simple majority to pass in both chambers. Since Republicans control both chambers of Congress, the resolution is likely to pass if it is brought up for a vote. Both Senate Majority Leader Mitch McConnell (R-KY) (a co-sponsor of the resolution introduced in the Senate) and House Speaker John Boehner (R-OH) support the joint resolution. A vote is likely to be held before the new regulations' April 14 effective date. However, if passed, the resolution would be subject to a presidential veto. It's unlikely that there are enough votes in Congress to override an expected Obama veto.

CRA Seldom Used

While the CRA process is not employed often, Congress successfully made use of it in 2001 to block the DOL's ergonomics rule. See **Senate Joint Resolution 6** (107th Congress.)

NLRB's New Election Rules

The new regulations — generally effective April 14, 2015, unless Congress disapproves them — would make a number of significant changes to the rules governing union elections including:

• Shortening the median period between a union filing an election petition with the NLRB and the actual election from 38 to as few as 11 days

• Requiring employers to turn over personal employee information, including email addresses, work schedules, locations, and contact information to union organizers

• Requiring pre-election hearings before an NLRB regional office within seven days, by which all contested legal issues must be raised (or else waived)

The Senate's Health, Education, Labor, and Pensions (HELP) Committee held a full committee hearing Wednesday examining the impact that the so-called "ambush election" rules would have on employers and employees. Witness testimony raised concerns that the changes to the union election process — particularly the accelerated timetable — would undermine the employer's ability to communicate its views on unionization to employees, with the result that employees will receive one-sided information on the election. Testimony characterized the new election procedures as "an attempt by the NLRB to put its thumb on the scale in favor of union representation." A witness who represents unions testified that the accelerated schedule is necessary because some employers use the timing of the election as a bargaining chip for concessions on other matters — such as the bargaining unit's composition. Other witnesses testified that employers — particularly smaller employers — will not have adequate time to retain legal counsel and prepare for a representational hearing, including the pre-hearing submission of a position statement that would have to set out every possible legal argument they will ask the NLRB to consider. Arguments that are not included would be waived, and could not be raised at the hearing.

NRLB in the Spotlight

Last week, the HELP Committee held a **hearing** on the joint employer standard and business ownership under the NLRA — focusing on the NLRB general counsel's recent efforts to change the board's long-standing definition of "joint employer" and the board's examination of the current joint employment standard in the *Browning-Ferris* case. The testimony raised concerns about the impact that a new, expanded standard would have on the franchise industry as well as other businesses that use subcontractors. Several witnesses expressed concern that treating a franchisor as a joint employer would result in the franchisor assuming more day-to-day involvement with the franchisee's business and potentially bargaining obligations — with the result that both franchisors and franchisees might become less interested in franchise relationships. The testimony of two other witnesses focused on whether joint employment in a franchise relationship is an appropriate interpretation of the NLRA.

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