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Key Legislative Developments Affecting Your Human Resources

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King Response Outlined, Wellness Legislation Introduced, and Resolution Blocking Union Election Rules Advances

Both chambers of Congress focused on the *King v. Burwell* case argued before the Supreme Court on Wednesday. Several Republican committee chairs released op-eds this week that outlined possible legislative responses in the event that the Court rules that tax credits are not available in states that did not establish their own public marketplaces. The Senate passed a resolution to block the NLRB from implementing new union election rules next month. Legislation was introduced in both chambers that would clarify the rules on employer-sponsored wellness programs. A bill was introduced in the House that would prohibit the DOL from issuing new fiduciary rules until after the SEC has issued guidance.

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Healthcare

Republican committee chairs in the House of Representatives (House) and the Senate released op-eds that signaled they are working on legislative proposals to address a possible adverse decision against the federal government in the *King v. Burwell* case. The case — argued before the Supreme Court on Wednesday — challenges IRS regulations that allow residents of states that did not establish their own public marketplace to claim premium tax credits. (Please see our *FYI Alert* from March 5, 2015 for more information on the *King* case.) If the Supreme Court rules against the federal government, residents of those states will no longer be eligible to receive tax credits to help them afford health coverage.

In the House, Energy and Commerce Committee Chair Fred Upton (R-MI), Ways and Means Committee Chair Paul Ryan (R-WI), and Education and the Workforce Committee Chair John Kline (R-MN) released an op-ed ("An Off-Ramp from ObamaCare," published in the *Wall Street Journal*) that described key provisions of a possible legislative response to the *King* decision:

- Advanceable, refundable tax credits would be available to residents of states affected by an adverse decision in *King* to assist them in purchasing health insurance coverage. The credits would increase based on age to offset higher coverage costs. Further details on eligibility for the credits not provided
- New "off-ramp" rules to allow individual states to opt out of certain ACA provisions — such as minimum coverage requirements for insured plans, the individual mandate, and employer shared responsibility
- New rules would allow small employers to band together to purchase health coverage and allow the purchase of health coverage across state lines
- Protections for individuals, such as allowing children to stay on their parent's plan until age 26, banning lifetime limits on benefits, and guaranteed renewability of health coverage along with protections against pre-existing conditions

In the Senate, Finance Chair Orrin Hatch (R-UT), Health, Education, Labor, and Pensions (HELP) Committee Chair Lamar Alexander (R-TN), and Republican Policy Committee Chair John Barrasso (R-WY) released an op-ed ("We have a plan for fixing health care," published in the *Washington Post*) that outlined their response to an adverse decision in *King*:

- Financial assistance would be provided for an unspecified transition period to those who would otherwise lose their subsidy — with no further details on the financial assistance.
- States that do not establish their own public marketplaces would be given more flexibility in designing health insurance markets (no further details are provided on what these new rules would be), and states with their own public marketplaces could continue to be subject to the ACA or could choose the new rules.

Retirement

Legislation (H.R. 1090 — the Retail Investor Protection Act) was introduced last week by Rep. Ann Wagner (R-MO) that would prohibit the DOL from issuing guidance on who is an ERISA fiduciary until 60 days after the SEC issues a final rule on the standards of conduct for brokers and dealers. The bill would also require the SEC, prior to rulemaking, to issue a special report to Congress on the need for a rule and to publish formal findings on whether the rule would reduce confusion or harm retail customers.

Workplace Wellness Programs

HELP Committee Chair Lamar Alexander and Education and the Workforce Chair John Kline introduced legislation this week on workplace wellness programs (**H.R. 1189**/**S. 620** -- the Preserving Employee Wellness Program Act). The legislation is intended to clarify the legality of employer-sponsored programs following EEOC enforcement actions claiming that the programs violate the Americans with Disability Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). (For more details on the enforcement actions, see our **October 30, 2014** and **November 4, 2014** *For Your Information* publications.)

The legislation, which would be retroactive to March 23, 2010, provides that:

- Employer-sponsored wellness programs that comply with the Public Health Service Act (as amended by the ACA) will not violate the ADA and GINA because they provide certain rewards (please see our *FYI Alert* from **May 30, 2013** for more information on regulations issued by IRS, HHS, and DOL on wellness programs under the ACA).
- The collection of information about a disease or disorder of a family member will not be considered unlawful acquisition of genetic information with respect to another family member who participates in the wellness program.
- Employers may establish a deadline of up to 180 days for employees to request and complete an alternative wellness standard.

The DOL is expected to issue a proposed regulation in the next several months that would revise who is an ERISA fiduciary due to giving investment advice. (Please see our February 24, 2015 *FYI Alert* for more information on the expected proposed rule.) Congress is not likely to take up H.R. 1090 until after the DOL issues its proposed regulation.

Labor and Employment

By a 53-46 vote mostly along party lines, the Senate approved S.J.Res.8 on Wednesday — a resolution under the Congressional Review Act to block implementation of the NLRB's so-called "ambush" or "quickie" election rules, currently slated to take effect on April 14. (See our February 13, 2015 *Legislate* for more information on the resolution.) The resolution now heads to the House, where approval is expected if put to a vote. The White House has made clear that it strongly opposes the measure, and that the president's advisors would recommend that he veto the resolution if it reaches his desk. Wednesday's Senate vote disapproving the NLRB's changes to long-standing union election rules suggests that there would not be enough votes to override a veto.

As the Senate was voting on Wednesday, a subcommittee of the House Education and the Workforce Committee held a hearing on H.J.Res.29 — the House version of S.J.Res. 8. Witnesses at the hearing testified on the pros and cons of the recently finalized NLRB rules — one witness advocated for the new rules, while the other witnesses expressed concern that the new rules will leave employers and employees unprepared for union elections, limit employer free speech and employee free choice, and will compromise employee privacy rights. A similar Senate hearing was held several weeks ago on this topic (see our February 13, 2015 *Legislate* for information on that hearing). Wednesday's hearing signals that the House is likely teeing up the resolution for a vote in the next several weeks.

Hearing on Executive Order

Last week a subcommittee of the House Education and the Workforce Committee held a **hearing** on **Executive Order 13673**—the president's Fair Pay and Safe Workplaces executive order.

Among other things, EO 13673 requires federal contractors to self-report whether they or their subcontractors violated any of 14 federal labor laws and executive orders (or equivalent state laws) over a 3-year period preceding a contract award and update the disclosures every six months during the contract term. It also requires federal procurement officers to consider this when awarding government contracts.

Several witnesses expressed concern about the excessive and onerous nature of the order, its workability, and whether it was necessary given existing enforcement mechanisms for labor and employment law violations. One witness, representing an education and advocacy organization, testified in support of the executive order.

Also this week, the House Judiciary Committee approved the Legal Workforce Act (H.R. 1147) by a 20-13 party-line vote. The bill would amend the Immigration and Nationality Act to require that employers use the E-Verify system to check new hires' work authorization status. Under the legislation, mandatory use would be phased in over a two year period, depending on the employer's size, beginning in October 2016. The bill has also been referred to the House Education and the Workforce and Ways and Means Committees — so those committees may hold markups on the bill later this year.

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