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Legislate®

Key Legislative Developments Affecting Your Human Resources

Volume 6 | Issue 20 | May 29, 2015

Senate Passes HCTC Revival; Highway Trust Fund Replenishment on Horizon; EEOC and NLRB Face Questions

Last weekend, the Senate passed legislation reviving the Health Coverage Tax Credit. The House is expected to consider the legislation in the month ahead. Also last weekend, the Senate passed legislation that would extend spending authority from the Highway Trust Fund until July —when the fund is likely to need additional revenue to finance transportation spending. GAO released two reports — one on Accountable Care Organizations and the other on the contingent workforce. Lastly, we review recent congressional oversight hearings on the EEOC and NLRB.

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Healthcare

Legislation was approved by the Senate last week that would revive the health coverage tax credit (HCTC). GAO released a report examining cost savings achieved by Accountable Care Organizations (ACOs) in the first two years of a Medicare test project.

Health Coverage Tax Credit

The Senate passed international trade legislation last weekend (HR 1314), which includes a provision that would revive the HCTC. The credit, which expired at the end of 2013, assisted certain individuals — including those eligible for Trade Adjustment Act (TAA) benefits (because their jobs were displaced by a trade agreement) or whose pensions had been taken over by the PBGC — with the cost of their health coverage (such as COBRA continuation coverage). HR 1314 would retroactively revive the HCTC for 2014 and extend the credit through December 31, 2019. The legislation would also permit a taxpayer to choose either the HCTC or the Affordable Care Act's premium tax credits — but not both. Although COBRA continuation coverage would continue to be considered qualifying coverage for purposes of the HCTC, the legislation does not extend pre-2014 HCTC special rules that lengthened the COBRA maximum eligibility periods for certain HCTC-eligible individuals.

The House of Representatives (House) is likely to vote on the legislation in the month ahead — whether the legislation passes that chamber is uncertain.

Accountable Care Organizations

The Government Accountability Office (GAO) released a report last Friday on ACOs. An ACO is a group of healthcare providers and suppliers that intend to provide coordinated care to certain specified patients with the goal of reducing costs and improving quality of care. The ACA established the Center for Medicare and Medicaid Innovation (CMMI) within CMS, and CMMI began testing the Pioneer ACO Model in 2012. Under this model, participating ACOs may earn additional payments from Medicare if savings and quality targets are met ("savings"). After the first year, the ACOs must make payments to CMS if spending targets are exceeded ("losses"). During 2012, ACOs had the option of one-sided risk sharing only (i.e., no payments to CMS in the event of losses), and half of the 32 participating ACOs chose this option.

Better outcomes for patients with chronic conditions?

The Senate Finance Committee is seeking **input** from the public on solutions to improve health outcomes for Medicare patients with chronic conditions. Submissions should be made by June 22, 2015 to **chronic_care@finance.senate.gov**. All submissions will be part of the public record.

In reviewing 2012 and 2013 data from CMMI, GAO found:

- 13 of the 32 ACOs (41%) that participated in the Pioneer ACO Model in 2012 earned additional payments from CMS — with $139 million in total savings (approximately 4% of the total expenditures of the 13 ACOs, and 2% of total expenditures of all 32 participating ACOs)
- 11 of the 23 ACOs (almost 50%) that participated in 2013 earned additional payments — with $121 million in total savings (also approximately 4% of total expenditures of the 11 ACOs, and 1.4% of total expenditures of all 23 participating ACOs)
- In 2012, one ACO had expenditures in excess of spending targets that required additional payments by the ACO to CMS (total losses of $5 million), and in 2013, six ACOs produced such losses (total losses of $23 million)

Retirement

Last weekend, the Senate passed legislation (HR 2353) that reauthorized spending from the Highway Trust Fund for two months — the spending authority was scheduled to expire at the end of May. The House passed the legislation earlier this month, and the president is expected to sign the measure into law soon. Of note to employers is that the trust fund itself is expected to require additional funding by the end of July or in August. In the last three years, Congress has used pension interest rate smoothing twice as a revenue offset for additional trust fund spending. Before Congress settled on pension smoothing, the Senate Finance Committee had twice proposed (February 2012 and June 2014) to partially finance trust fund spending by limiting the beneficiaries who may receive lifetime income distributions from tax-qualified retirement plans and IRAs. Information on how this change would have operated under the 2014 proposal is in our June 27, 2014 *Legislate*. It remains to be seen how Congress will finance transportation spending later this year and whether it will involve changes for retirement plans — more details are likely in July.

Contingent Workforce

Last week, GAO publicly released a **report** on the size, characteristics, earnings and benefits of the contingent workforce — generally described as workers in alternative work arrangements (including on-call workers and day laborers, agency and direct-hire temps, contract workers, independent contractors, self-employed workers, and standard part-time workers who regularly work less than 35 hours per week). The report considers workers in the first three categories to be "core contingent workers." Highlights of the report include:

- The size of the contingent workforce ranges from less than 5% to more than one-third of the total employed labor force depending on the definition of contingent work — however, the core contingent workforce described above is estimated at roughly 7.9% of employed workers
- Contingent workers earn less on average than standard workers — nearly 11% less per hour (after accounting for other variables), and almost 50% less per year largely because they are more likely to work part-time and have gaps in employment
- Wide variations exist by industry — while contingent workers in education and transportation, for example, earn significantly less than standard workers by all measures, contingent construction workers generally earn the same hourly wage as standard workers, but less annually
- Contingent workers have less access to work-provided health insurance than other workers, and are 67% less likely to be covered by an employer-sponsored retirement plan

Labor and Employment

Last week the Senate's Health, Education, Labor, and Pensions (HELP) Committee held an oversight hearing on the EEOC's enforcement and litigation programs, with testimony from the EEOC Chair Jenny R. Yang and General Counsel P. David Lopez. Committee members raised concerns about:

- The 75,000 case backlog and the use of resources to pursue investigations that do not involve any claimant
- The focus on cases alleging systemic discrimination (25% of EEOC cases currently involve allegations of systemic discrimination)
- Litigation that has resulted in judicial rebukes and awards of attorney's fees for employers
- The use of enforcement actions to develop novel legal positions, instead of issuing guidance through the regulatory process
- Enforcement actions against employer wellness programs (Please see our FYI Alerts from October 30, 2014 and November 4, 2014 and our March 27, 2015 *Legislate* for more information on these actions, a proposed legislative response, and Buck Consultant's testimony before Congress on this issue; see also our April 17, 2015 *FYI Alert* on recently proposed EEOC guidance on the application of the ADA to wellness programs). Notably, Chairman Yang said that the agency has targeted July for issuing guidance on wellness programs under the Genetic Information Nondiscrimination Act (GINA).

It remains to be seen whether criticisms of the agency voiced during the hearing will result in legislative or other changes to EEOC enforcement activities.

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NLRB and Government Funding for FY 2016

A Senate appropriations subcommittee held a **hearing** on May 14 on the NLRB's FY 2016 budget request, with testimony from NLRB Chairman Mark Pearce and General Counsel Richard Griffin. The agency is requesting a budget increase to create 30 new positions, while its overall caseload has remained the same or declined. Questioning by committee members largely focused on the new joint employment test under the National Labor Relations Act advocated by the General Counsel's recent activity and the pending Board decision in *Browning-Ferris*. Other subjects that came under scrutiny included the "quickie" election rule that took effect last month, policies that promote micro-bargaining units, election delays because of blocking charges filed by unions, and the possible implications for right-to-work states of the Board's recent solicitation of briefs about whether a union can collect a fee from non-union members to file a grievance. (Please see our **February 13** and **March 20, 2015** issues of *Legislate* for more information on the new election rules, our **April 2** and **May 8, 2015** issues of *Legislate* and our **April 6, 2015** *For Your Information* on unsuccessful congressional attempts to block them.) It remains to be seen whether FY 2016 funding for the agency will propose to overturn the election rule. More details will be available later this summer or fall.

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