

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Goodbye Summer Recess; Fall Fun Begins as Congress Returns and Faces Funding Challenges

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Congress, just back from its summer recess, is focused on keeping the government from shutting down. A government funding bill — which may be in the form of a temporary funding measure or stopgap spending bill, often referred to as a continuing resolution or CR — must be passed before September 30 for agencies to remain open once the new fiscal year begins on October 1. Pending health care legislation, including a repeal of the medical device tax and the so-called Cadillac tax, remains on the table. Last week, legislation in response to the DOL's proposed rules about fiduciaries and conflicts of interest was considered; a bill was introduced to reverse the NLRB's decision on joint employer status; and the president issued an executive order requiring federal contractors to provide paid sick leave.

Health Care

No doubt, the cost of health care is on everyone's mind as we inch closer to the season of annual/open enrollment, and many Americans must evaluate the offerings available to them through their employers and the government. Likewise, the cost of health care remains a priority for Congress.

It's unlikely that any sweeping health care legislation will become law during the 114th Congress. House Budget Committee chairman Tom Price (R-GA) acknowledged that a repeal of the Affordable Care Act (ACA) is virtually impossible during this administration. Indeed, if any health care legislation is to become law before the end of the year, it would likely be in the form of a rider (an add-on) to a government funding bill, or as part of the budget reconciliation process.

Introducing Allison Klausner

Our new government relations liaison, Allison R. Klausner, has advocated for employer interests throughout her career and is an active voice in the employee benefits community. With a background that includes working as both in-house and outside legal counsel, she has extensive experience on the "Hill" as well as with key agencies, trade associations, and employee benefits industry groups. Allison will be our lead writer for *Legislate* and will be helping our clients with their health and retirement compliance needs.

However, there are a few specific areas where movement on health care legislation is possible. There is bipartisan support, for example, on a repeal of the 2.3% excise tax on medical devices (that took effect in 2013) pursuant to provisions of the ACA. This is true despite estimates that repealing the excise tax would cost \$26 billion over a 10 year period, starting in 2015, and despite the absence of an offset for that loss of revenue. Almost 50 House Democrats joined Republicans in June to pass [HR 160 - Protect Medical Innovation Act of 2015](#), which would eliminate the excise tax. [S.149 - Medical Device Access and Innovation Protection Act](#), a related bill, was introduced in January by Senator Orrin Hatch (R-UT).

Additionally, the so-called Cadillac Tax continues to be a congressional focus. There is bipartisan support — and enormous employer pressure -- to repeal the Cadillac Tax, as evidenced by the two pending bills that would repeal it — [H.R. 879](#), introduced by Rep. Frank Guinta (R-NH) and [H.R. 2050](#), introduced by Rep. Joe Courtney (D-CT). In addition to full repeal efforts, the success of which is not likely, for purposes of the tax, there are efforts to exclude from the definition of “applicable coverage” contributions to Health Savings Accounts (HSAs), Health Reimbursement Accounts (HRAs), Flexible Spending Accounts (FSAs) and on-site clinics. The widespread availability of these accounts and clinics, which are valuable to and valued by employees, is in jeopardy if the accounts will cause employers to trigger the Cadillac Tax. As Rep. Courtney has [stated](#), “As employers seek to avoid the tax — as a significant number plan to do — [they] will first look to trim benefits including FSAs that are counted toward the tax calculation.” H.R. 2050 has gained new co-sponsors, bringing the total to 143 (129 Democrats, 14 Republicans) as did H.R. 879, bringing the total to 85 (0 Democrats, 85 Republicans).

The Cadillac Tax

The Cadillac Tax, which will take effect in 2018, calls for a 40% excise tax on health plans that exceed certain cost thresholds. For more information on the Cadillac Tax, see our *FYI Alert* publications from [August 3, 2015](#), and [February 24, 2015](#).

ACA Subsidies

On September 9, the U.S. District Court of Columbia decided that the House of Representatives has legal standing to sue the Obama administration about the distribution of Affordable Care Act (ACA) subsidies. Specifically, the court determined that the House can proceed with its [lawsuit](#) that alleges that the Obama administration improperly distributed the subsidies without a valid appropriation from Congress. Note that this [decision](#) is one that does not address the merits of the House’s allegation.

On September 9, the Health Subcommittee of the House Energy and Commerce Committee held a hearing on [H.R. 1624](#) — Protecting Affordable Coverage for Employees Act. This bill was introduced in March, and seeks to amend the ACA so an employer with fewer than 100 employees could be considered a “small employer” exempt from compliance with certain more demanding insurance coverage rules applicable to large employers. There is bipartisan support for H.R. 1624, with 40 Democrats among its 218 co-sponsors.

Finally, on September 8, [H.R. 1196](#), Health Savings Act of 2015, gained another co-sponsor. If this bill is enacted, the maximum HSA contribution limit would increase to match the amount of the deductible and out-of-pocket expenses under a high-deductible health plan. Employees and employers alike would welcome this change. However, the bill is unlikely to gain any traction in the near future.

Pension and Retirement

During the week of August 10, the DOL held a four-day public [hearing](#) with 25 panels of witnesses, on the department's proposed fiduciary definition and conflicts of interest [rule](#). On September 9, the DOL extended the proposed conflicts of interest rule [comment period](#) until September 24.

On September 10, the Capital Markets and Oversight and Investigations Subcommittees of the House Financial Services Committee held a hearing focused on [H.R. 1090](#) — the Retail Investor Protection Act, sponsored by Rep. Ann Wagner (R-MO). This bill would require the DOL to wait to issue new conflict of interest rules until the SEC issues its own fiduciary rules. It remains to be seen whether a markup of H.R. 1090 will follow the hearing. Rep. Wagner seeks support of the bill in an effort to stop the DOL from requiring brokers who provide investment advice on retirement accounts to abide by the higher and more stringent requirements that apply to a person acting as a fiduciary under the DOL standards.

Labor and Employment

On August 27, a sharply divided National Labor Relations Board (NLRB) adopted a new standard for determining who is a joint employer under the National Labor Relations Act. For decades, the board has found joint employment status only when a company has actual control over the essential terms and conditions of employment of a separate entity's employees and exercises direct and immediate control over them. In its long-awaited [decision](#) in *Browning-Ferris Industries of California, Inc.*, the board eliminated the requirement to show the actual exercise of such control over a third party's employees. Rather, under the new standard, joint employer status may be established by the exercise of indirect and/or unexercised control of wages and working conditions.

In a [joint statement](#) responding to the NLRB decision, Rep. John Kline (R-MN), chairman of the House Education and the Workforce Committee, and Rep. Phil Roe (R-TN), a member of the committee and chairman of its Subcommittee on Health, Employment, Labor and Pensions, voiced their opinion that "Congress should not stand idly by" and that they "will work to roll back" what they characterized as a "flawed decision."

Furthermore, on September 9, Senate Health, Education, Labor and Pensions (HELP) Committee chairman Lamar Alexander (R-TN) released the [Protecting Local Business Opportunity Act](#) to overturn the Browning-Ferris decision. The measure would reinstate the board's prior standard, requiring that "two or more employers may be considered joint employers for purposes of the [National Labor Relations Act] only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."

Comment. Employers who engage staffing agencies to provide workers should pay close attention to developments arising out of the change to the standard to determine joint employer status.

On September 7, Labor Day, the president signed an [Executive Order](#) requiring federal contractors to offer employees on those contracts or subcontracts up to seven days of paid sick leave per year. The order is effective immediately and generally applies to covered contracts where the solicitation has been issued, or the contract awarded outside the solicitation process, on or after January 1, 2017.

Comment. Companies with federal contracts should evaluate the impact of this Executive Order.

Furthermore, the president renewed his call to have Congress pass legislation expanding paid sick and family leave. Specifically, he seeks to have Congress pass the [Healthy Families Act](#), which would require all businesses with 15 or more employees to offer up to seven paid sick days each year.

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