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Key Legislative Developments Affecting Your Human Resources

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Congress Sprints to the Finish Line

Congress has averted a shutdown with 10 weeks of government funding; presidential candidate Hillary Clinton adds fuel to the Cadillac tax repeal efforts as House Committees seek repeal of a number of ACA provisions; and DOL's proposed fiduciary rule and the NLRB's authority are examined in congressional hearings.

No Government Shutdown (for now)

The government is open — for now. Hours before the midnight deadline of September 30, President Barack Obama was presented with and signed a 10-week spending bill, in the form of a continuing resolution, enabling the government to stay open with agency funding through December 11, including funding for Planned Parenthood, and to renew expiring authorizations for the E-Verify program. Although there is great relief that Congress jumped through hoops to avert it, we remain under the cloud of a possible government shutdown 10 weeks from now.

Cadillac Tax – Going, Going … Gone?

If the Cadillac tax wasn't on your radar, it should be. Indeed, even though the tax won't be effective before 2018, it continues to dominate the news. Presidential candidate Hillary Clinton announced Tuesday that she supports repeal of the 40% non-deductible excise tax on "high cost" healthcare plans. The House Ways and Means Committee advanced a reconciliation bill on Tuesday that included a full repeal of the Cadillac tax. Four pending congressional bills, S. 2045, S.2075, H.R. 879 and H.R. 2050, seek full repeal.

What does the speaker of the House do?

Employers may be wondering if the speaker can have an impact on employer-sponsored plans or does it really matter who is speaker of the House. Some of the speaker's responsibilities may be viewed as purely "ministerial." For example, the speaker administers the oath of office to House members, calls the House to order, is charged with preserving decorum within the House chamber and galleries, and recognizes House members to speak. However, the speaker also appoints members and chairpersons of committees, participates in setting the House legislative agenda, determines which legislation is assigned to each committee, and controls which legislation reaches the House floor for a vote. As such, he or she could very well influence the outcome of legislation impacting employer-sponsored plans.

Who will be the next speaker? Although we won't know for sure until the October 8 elections, House Majority Leader Kevin McCarthy (R-CA) will likely be elected to succeed John Boehner (R-OH). As of today, Rep. Daniel Webster (R-FL) and Rep. Jason Chaffetz (R-UT) are also seeking the seat.

Meanwhile, the Cadillac tax remains law and employers are developing and implementing strategies in an effort to ensure that the tax is not assessed on their health plans. Even with the strong bipartisan support for full repeal, together with the backing of employers and other stakeholders, there's a question whether there's sufficient influence to repeal this provision. Congress is unlikely to do so absent alternatives to pay for the anticipated loss of approximately $87B. Further, should a bill reach the president's desk, he is likely to veto it as it would unravel the ACA.

ACA Repeal Efforts … One Bite at a Time

In addition to various efforts to repeal the Cadillac tax, the House Ways and Means Committee passed reconciliation legislation to repeal the ACA's individual mandate, employer shared responsibility mandate, the Independent Payment Advisory Board (a group tasked to make policy recommendations on Medicare), the medical device tax, and the Cadillac tax. The reconciliation bill also would repeal the requirement to report the cost of employer-sponsored health coverage on IRS Form W-2.

The Ways and Means reconciliation bills will advance to the House Budget Committee. The bills will then be combined with other reconciliation bills, including a bill to repeal the ACA's automatic enrollment provisions. Upon presentation to the president, employers can expect him to veto the bill.

Congressional efforts to repeal or modify portions of the ACA are not confined to the reconciliation bill and process. Indeed, last week the House and the Senate approved H.R. 1624, the Protecting Affordable Coverage for Employees Act, which would rescind the ACA's expanded definition of a small employer. This bill now proceeds to the president, who is expected to sign the bill.

Other Healthcare News

On September 29, another hearing was held to examine the proposed Aetna/Humana and Anthem/Cigna mergers. In his opening remarks, House Judiciary Committee Chairman Rep. Bob Goodlatte (R-VA) noted that the ACA has impacted the health insurance industry, and the consolidation in the industry may be due, in part, to the regulatory burden it has placed on insurers.

> **Comment.** While Congress is exploring the antitrust issues related to the proposed mergers, we remind employers that if one or both of these proposed mergers closes, there will be direct and indirect impact — potentially both positive and negative. Importantly there would be a consolidation of power in the surviving insurance companies, providing them with leverage to negotiate favorable financial and non-financial contractual terms (and less favorable to employers). However, the mergers could prove to be beneficial to employers and their employees as they may have enhanced opportunities to collaborate with insurance companies for services relating to employee/participant engagement, employee wellness and prevention of disease or illness.

Retirement

Reaction to the DOL's proposed definition of fiduciaries and conflicts of interest rule grabbed the attention of Congress and, in turn, the president. Specifically, on September 30, the House Ways and Means Oversight Subcommittee held a hearing on the DOL's handling of the proposed fiduciary rule, "Protecting Seniors' Retirement from the Administration's Overreach." In his opening remarks, subcommittee Chairman Peter Roskam (R-IL) stated that "[t]he current rule is unworkable, and the Administration has done nothing to fix that. The American people,

through Congress, have delegated rulemaking authorities to the Executive Branch, and we will exercise vigorous oversight, and where necessary, move forward with legislative remedies, to rein in abuses."

In addition to the hearing held by House Ways and Means, on September 30, the House Financial Services Committee met in open session to consider and approve H.R. 1090. This bill would require the DOL to halt work on its fiduciary and conflicts of interest proposal and wait for the SEC to proceed with its own fiduciary rulemaking. It's the committee's view that the bill is necessary "to correct the DOL's proposed fiduciary rule that will raise costs, restrict choice and reduce access to investment advice for lower and middle income families seeking financial independence."

In response to the congressional efforts to derail the DOL's proposed rule, the White House has stated that the proposed rule "would ensure that there is no conflict of interest, and the retirement savings of middle-class families is effectively managed." Furthermore, the White House has made clear that the Obama administration takes "a dim view of efforts by Republicans … to block" the DOL's proposed rule.

> **Comment.** We anticipate that the DOL will modify the proposed rule in response to feedback presented at its four day August hearing and the congressional hearings held last week.

Labor and Employment

On September 22, Sen. Kelly Ayotte (R-NH) introduced the Gender Advancement in Pay (GAP) Act (S. 2070) that would amend the Fair Labor Standards Act (FLSA) to provide more effective remedies for gender-based pay discrimination. The bill would require an employer to prove that a pay differential is based on "a business-related factor other than sex including but not limited to education, training, or experience" — rather than any factor other than sex — once an employee shows a violation of the FLSA. The bill would also prohibit retaliation against employees who discuss their pay and job applicants who choose not to disclose their salary history, and would create civil monetary penalties for employers who willfully engage in gender-based pay discrimination.

> **Comment.** Although this bill is not likely to become law, employers may still want to review their current hiring and pay practices and consider whether any modifications may be appropriate. Employers may choose to tweak those practices to reduce any "noise" that could arise if an employee or job applicant thinks that a company's hiring process is unfair.

On September 28, Sen. Mike Lee (R-UT) introduced the Protecting American Jobs Act (S 2084) that would amend the National Labor Relations Act (NLRA) to modify the NLRB's authority on rulemaking, issuance of complaints and unfair labor practices. While the bill would permit the NLRB to continue to investigate unfair labor practice charges, it would transfer authority to prosecute and adjudicate such matters to the federal courts.

To understand its roles, responsibilities and potential exposure to liability under the NLRA, a company needs to know "*Is my business a joint employer?*" After the NLRB's recent *Browning-Ferris* decision, many employers are unsure. (See our September 25, 2015 *For Your Information*.) Indeed, listening to the testimony during a September 29 hearing before the House Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions, one may wonder whether any two business owners or any two experts would agree on how the joint employer standard will be applied to any particular set of facts. The hearing examined the Protecting Local Business Opportunity Act (H.R. 3459) — legislation that would redefine joint employers under the NLRA as two or more employers that each share and exercise "actual, direct, and immediate" control over essential terms and conditions of

employment. The NLRB's joint employer standard is scheduled to be the subject of a Senate HELP Committee hearing on October 6.

> **Comment.** Employers are encouraged to review their contractual relationships to assess whether they may be a joint employer with another company.

Lastly, we note that, on September 30, the House Financial Services Committee approved the Burdensome Data Collection Relief Act (H.R. 414). This bill (as well as a similar bill introduced in the Senate) would eliminate the CEO pay ratio disclosure requirement in the Dodd-Frank Act. (See our August 21, 2015 *For Your Information*.) Most employers are hopeful that the requirement is eliminated before the 2018 proxy season when public companies will have to disclose how much their CEOs are paid relative to their median employees. Employers will want to watch carefully whether this bill is approved.

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