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Key Legislative Developments Affecting Your Human Resources

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Collapse of Health Care CO-OPs Examined; Appropriations and Funding Front and Center

In this issue, we examine congressional activity following the president's signing of the Bipartisan Budget Act of 2015 and the selection of Rep. Kevin Brady as the new chairman of the House Ways and Means Committee. We also look at how, with more health care CO-OPs failing and others in jeopardy, Congress has started an in-depth review of the CO-OP program.

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Week in Review

Last week, President Barack Obama signed the Bipartisan Budget Act of 2015 (Budget Act), which included health care provisions and significant revenue raising pension provisions. (See our November 2, 2015 *FYI Alert.*) Additionally, the Republican Steering Committee selected Rep. Kevin Brady (R-TX) as chairman of the House Ways and Means Committee to replace Rep. Paul Ryan (R-WI), who was elected as House speaker on Thursday, October 29. Brady's appointment, subject to approval of the entire Republican Conference, will mean he must step down as chairman of the Health Subcommittee.

Congress also began considering next steps in the appropriations process to avert a government shutdown when the stop-gap measures for funding government agencies and programs expire in five weeks. (See our October 5, 2015 *Legislate*). Specifically, before December 11, Congress must pass legislation to allocate $1.07 trillion provided for in the Budget Act for the fiscal year ending September 30.

Finally, two House subcommittees held hearings to examine the status and landscape of the Affordable Care Act's (ACA) Consumer Operated and Oriented Plan (CO-OP) Program.

CO-OP Programs — Spiraling Out of Existence

Starting in 2014, the ACA dramatically changed the individual and small group insurance markets by requiring that insurers offer medical coverage to all individuals who apply for coverage, regardless of health status or medical conditions. As part of that reform, the ACA established the CO-OP Program to support the creation of new, consumer-governed, nonprofit health insurance issuers that would compete with private insurers and thereby drive down costs. This program included two types of loans: (1) start-up loans to help cover costs to establish a CO-OP and (2) solvency loans to help meet applicable state insurance solvency requirements.

Funding. Originally, $6 billion was available to fund CO-OPs. However, laws enacted in 2011 and 2013 stripped almost $4 billion from the CO-OP Program and restricted disbursement of any remaining amounts to CO-OPs that had received loans before January 2013.

Loan Repayments. When the CO-OPs were established, full loan repayment was not expected. In 2013, the Office of Management and Budget estimated that taxpayers would lose more than 40 percent of the value of the CO-OP Program loans — half attributable to default.

Premium Stabilization Programs. The individual and small group marketplace changes that became effective in 2014 significantly altered the health insurance landscape and created market and pricing uncertainties for insurers and CO-OPs. The ACA included three "premium stabilization programs" designed to provide insurers with greater payment stability and protect against adverse selection: the reinsurance program, the risk adjustment program, and the risk corridors program.

Many of the CO-OPs were relying on the risk corridor program, in particular, to support their viability and sustainability in the early years of the marketplace. The risk corridor program protects against inadequate insurer rate-setting by sharing gains and losses among the health plans. Effectively, the program helps limit insurer gains and losses. The program is funded by private insurers.

Last month, the Department of Health & Human Services (HHS) announced that the risk corridor program would only pay out 12.6 percent of the 2014 amount requested by carriers and CO-OPs that had losses. This lower payout was due to more carriers having losses than gains. This compounded the stress already levied on CO-OPs from reduced funds in the form of solvency loans, and resulted in eight CO-OPs announcing they would cease operations after the 12.6 percent payout was finalized.

Status. Today, 12 of the 23 CO-OPs have ceased operations or will do so by the end of 2015. Furthermore, except for the Maine Community Health Options CO-OP, none of the remaining CO-OPs are profitable and others are at risk of failing.

Answers Sought. In response to the accelerated pace at which CO-OPs are failing, Sen. Ben Sasse (R-NE) stated that he will block the confirmation of HHS nominees "until the Administration provides a complete and transparent accounting of the systemic failures of the Affordable Care Act's CO-OP program." Furthermore, Sen. Orrin Hatch (R-UT) and Sen. Lamar Alexander (R-TN) sent a letter to Centers for Medicare & Medicaid Services (CMS) requesting information relating to its efforts and plans to:

- Provide guidance and establish criteria to determine when a CO-OP is no longer viable or sustainable
- Recover funds and recoup loan losses from CO-OPs that have or will terminate
- Provide current information to consumers on plan options available from an exchange
- Address situations in which there is only one plan available from an exchange
- Perform performance reviews, develop enhanced oversight, and/or implement corrective action

Proposed Individual Mandate Exemption

In February, Rep. Adrian Smith (R-NE) introduced **legislation** that would exempt individuals from the ACA's individual mandate if they lose coverage under a CO-OP that terminated or was otherwise discontinued. To date, this bill has only two co-sponsors and has gained little attention. As reaction to the accelerated pace of CO-OP failures and the recent focus evidenced by the hearings, we may see increased interest in this bill or other related legislation introduced.

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Hearings. Last week, two congressional hearings examined the status and viability of the CO-OPs, and the ramifications arising out the terminations. The first hearing was held on November 3 by the House Ways and Means Subcommittee on Health. The second hearing was held on November 5 by the House Energy and Commerce Subcommittee. As stated by Rep. Brady, in his former role as chairman of the Ways and Means Subcommittee on Health, there is a need to understand the number of CO-OPs "headed to failure" and how to "bring some stability to those families that have been affected." At the first hearing, Dr. Mandy Cohen, CMS's chief of staff, noted that "every tool available to recover taxpayer dollars" would be utilized.

> **Comment**. There is little direct impact for employers if the financial status of the CO-OP program continues to spiral downward and more cease operations. Although CO-OPs were intended to bring competition to the health insurance plan marketplace and drive cost down for all (not just those who enrolled through a CO-OP), to date there is no clear evidence that this has occurred or will occur.

Week Ahead

Speaker Ryan will continue to set the tone for his speakership. To reduce the risk of a government shutdown, which will occur if Congress fails to pass funding legislation before December 11, he will seek to minimize tension among various groups within his own party. Specifically, there are reports that Rep. Ryan is creating an advisory council with individuals from each of the three major House Republican caucuses: the moderate Tuesday Group, the conservative Republican Study Committee, and the House Freedom Caucus.

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