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Legislate®

Key Legislative Developments Affecting Your Human Resources

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DOL and NLRB Authority Challenged by Congress; Efforts to Repeal Cadillac Tax Continue

There are very few days before December 11, when the current stop-gap funding measures expire and before December 18, Congress' last day in session before it breaks for a two-week winter recess. With tremendous attention devoted to the appropriations process — allocating the budget to fund agencies and programs for the remainder of the fiscal year ending on September 30, 2016 — and recent terrorist attacks in Paris, it remains to be seen whether Congress can pass any significant legislation before the end of the year. Notwithstanding, congressional efforts are afoot to repeal the ACA's Cadillac tax, and address DOL regulatory activity and NLRB practices.

House Leadership – New Appointments

Leadership in the House Ways and Means Committee has continued to change following Rep. John Boehner's (R-OH) resignation from Congress. First, Rep. Paul Ryan (R-WI) became the new speaker and then Rep. Kevin Brady (R-TX) became chairman of the House Ways and Means Committee, a position formerly held by Rep. Ryan. Last week, Rep. Pat Tiberi (R-OH) was named chairman of the Ways and Means subcommittee on health, a position vacated by Rep. Brady. Both Rep. Tiberi and Rep. Brady are expected to continue advocating for the same policy positions espoused by Rep. Ryan during his tenure as chairman.

Cadillac Tax Repeal Efforts

Recent statements by both Rep. Brady and Rep. Tiberi generally referenced repeal of the Affordable Care Act (ACA), with Rep. Brady stating a Ways and Means Committee goal of "replacing the ACA" and Rep. Tiberi stating that he plans to work with colleagues to "dismantle detrimental [ACA] policies." Meanwhile, senators and representatives from both sides of the aisle sent a letter to the president asking for an in-person meeting to discuss repeal of the Cadillac tax (set for implementation in 2018), stressing that repeal is a "bipartisan and bicameral end-of-year priority."

Comment. Notwithstanding strong support, repeal of the Cadillac tax is not likely to happen — at least not before the end of the year. The currently pending reconciliation bill would repeal the tax, but another portion of that bill would defund Planned Parenthood. With that controversial language, the bill is unlikely to garner the necessary 51 votes in the Senate. As such, it has not yet been put up for a Senate vote. See our *Legislate* publications dated October 26 and November 2 for more information about the reconciliation bill.

Fiduciary Rules, IRAs and the Role of the States

What do these have in common? They are all topics currently being addressed by the DOL and the subject of congressional bills introduced last week.

Retirement Choice Protection Act

Rep. Mike Kelly (R-PA) and Rep. Sam Johnson (R-TX) introduced the Retirement Choice Protection Act of 2015 (H.R. 3922). The bill includes provisions about what constitutes fiduciary investment advice for ERISA-governed plans and the DOL's oversight authority for IRAs.

Investment Advice. H.R. 3922 sets forth a different definition of fiduciary for purposes of providing investment advice than the much-debated definition in the proposed regulation DOL issued in April. Compared to DOL's proposal, H.R. 3922 would generally make it more difficult to establish fiduciary status on this basis. (See our April 21, 2015 *For Your Information*). For example, under the DOL's proposed rule, plan asset recommendations for a fee would be deemed investment advice if the advisor acts pursuant to an agreement, arrangement or understanding that the advice is individualized to, or specifically directed to, the recipient *for consideration* in making investment or management decisions about plan assets. On the other hand, under H.R. 3922, such recommendations would not be considered investment advice unless provided pursuant to a *mutual* agreement, arrangement or understanding that the advice is individualized and the recipient intends to *materially rely* on such recommendation. In addition, with certain disclosures, recommendations made in a marketing, sales or educational capacity would not be considered fiduciary investment advice.

Comment. Like H.R. 1090, the Retail Investor Protection Act, passed by the House last month, H.R. 3922 is designed to disrupt the DOL's efforts finalize its proposed fiduciary regulation. Neither bill is likely to become law, though; as the president's senior advisors have already issued a statement that they would advise him to veto H.R. 1090. For additional information on H.R. 1090, see our September 14 and November 2 issues of *Legislate*.

IRAs and DOL Authority. H.R. 3922 would reverse current rules that give DOL authority on "regulations, rulings, opinions, and exemptions" for IRAs, transferring that authority back to the Department of Treasury. Consistent with H.R. 1090, H.R. 3922 would require coordination with the SEC in issuing regulations on fiduciary standards for IRAs. If enacted, in addition to carving IRAs out of DOL's reach under their fiduciary proposed regulation, this legislation could affect the DOL's ability to issue a final regulation on state payroll deduction IRA programs, about which it released proposed rules last week. Specifically, DOL issued a proposed regulation and Interpretive Bulletin 2015-02, both designed to support state initiatives that increase retirement plan coverage for employees of private (non-governmental) employers. The proposed regulation provides a roadmap for states to avoid the application of ERISA for payroll deduction savings IRA programs required and established by a state. The Interpretive Bulletin provides guidance to states that seek to help employers establish ERISA-covered plans.

Comment. This DOL guidance, as proposed, could undermine ERISA's goal of nationwide uniformity by subjecting employers that operate in multiple states to various — and potentially conflicting — state laws, and adding complexity to payroll and other administrative systems. Specifically, employers that don't offer an ERISA-governed savings plan (such as a 401(k) plan), or that sponsor plans with minimum age and service requirements, could be required to comply with more than one state law in connection with the same employee. For example, an employer with operations in both State A and State B, with State A mandating coverage for individuals *residing* in State A and State B mandating coverage for individuals *working* in State B may need to comply with both state laws for the same employee.

SAVE Act of 2015

Last week, Rep. Ron Kind (D-WI) introduced the Small Businesses Add Value for Employees Act of 2015 (or SAVE Act of 2015) (H.R. 4067). The bill has numerous provisions, including ones designed to encourage retirement savings through employer-established IRAs. Other provisions address open multiple employer defined contribution plans, a topic addressed by the DOL in the guidance it issued last week, and lifetime income disclosures. More information on this bill will follow in a future *Legislate*.

Restraining the NLRB

During the past few weeks, the National Labor Relations Board (NLRB) was the subject of congressional activity. One bill was introduced to reform the NLRB and a second was introduced to exempt "Indian tribes" and tribal businesses from the board's jurisdiction.

NLRB Reform Act

Last week, Rep. Joe Wilson (R-SC) introduced H.R. 4022, the National Labor Relations Board Reform Act, together with 14 Republican co-sponsors. It is a companion bill to S. 288, which was introduced by Sen. Lamar Alexander (R-TN) earlier this year on January 28. As stated by Sen. Alexander, the purpose of the legislation is to fix "three problems with the board — its partisanship, its activist general counsel, and its slow decision-making."

The legislation would amend the National Labor Relations Act (NLRA) by:

- Increasing NLRB membership from five to six, with three Democrats and three Republicans
- Requiring a quorum of at least four members and requiring approval of a majority of members present
- Providing independent judicial review of complaints issued or authorized by the Office of General Counsel
- Allowing an appeal to a federal Court of Appeals if the board fails to decide a case within one year

NLRB and "Indian Tribes"

Earlier this year, S. 248 and H.R. 511, the Tribal Labor Sovereignty Act of 2015, was introduced, by Sen. Jerry Moran (R-KS) and Rep. Todd Rokita (R-IN), respectively. Last week, H.R. 511 was passed by the House.

As mentioned in our February 20 *Legislate*, this legislation would amend the NLRA to exclude "any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian land" from its definition of "employer." If the legislation is

Independent from the NLRB?

Prior to the 2004 decision in ***San Manuel Indian Bingo & Casino***, there was a long-standing practice whereby the NLRB did not assert jurisdiction over Native American tribes. Since that decision, court and board decisions have been made on a case-by-case basis, creating confusion and uncertainty as to whether tribes and tribal businesses are subject to the NLRA.

enacted, these tribes and tribal enterprises — like states and their political subdivisions — would not be subject to the NLRA, and the NLRB would not have jurisdiction over them.

S. 248, passed in June by the Senate Indian Affairs Committee, may be considered very soon by the full Senate. Although no date is set, in a written statement issued by the House Education and the Workforce Committee, Chairman Rep. John Kline (R-MN) "urge[d] the Senate to send this bill to the president's desk…."

> **Comment.** According to a statement issued by the White House, the administration does not support H.R. 511 as it is currently drafted. According to the administration, the bill is inadequate as it does not provide for tribal labor standards that are "reasonably equivalent" to those in the NLRA.

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