

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

Volume 7 | Issue 01 | January 11, 2016

ACA on Hot Seat as Congress Faces Year with Long Recesses and Focus on Elections

After a long holiday recess, the House returned last Tuesday, and the Senate returns tomorrow. 2015 concluded with Congress enacting significant year-end legislation that provided federal funding for FY 2016, and agreeing to tax extenders — a number of which affect employers. In this issue, we explore issues important to employers that are likely to be on Congress' 2016 radar — with the ACA front and center.

In this article: [2015 Recap](#) | [2016 Legislative Outlook](#) | [Focus on Cadillac Tax, ACA and Wellness Programs](#) | [Responding to DOL Rulemaking](#) | [Reacting to NLRB – Joint Employer](#) | [Retirement Matters](#) | [In Closing](#)

2015 Year-End Recap

On December 18, President Obama signed into law an omnibus spending bill and a tax extenders bill ([2015 Year-End Legislation](#)). For a summary of key provisions affecting employers and employee benefits plans, please see last month's [December 21 Legislate](#). In all likelihood, the changes most celebrated by employers are those that relate to the Cadillac tax.

2016 Legislative Outlook Overview

For a number of reasons, it is unlikely that significant employee benefits or employment-related legislation will be enacted in 2016.

- Congress' schedule includes many long recesses. The House in-session schedule is only 110 days (133 in 2015); the Senate in-session schedule is only 149 days (199 in 2015).
- Congress will be focused on (or perhaps be distracted by) the upcoming November elections, which will include those for president, as well as the House (all 435 districts) and the Senate (34 seats).
- With Congress passing the [Bipartisan Budget Act of 2015](#) and the 2015 Year-End Legislation, there is no "must-pass" legislation that could be a vehicle for employee benefit policy riders until much later this year (when the budget will be addressed again).



Notwithstanding the above, we expect Congress to concentrate in 2016 on health care reform. Other hot topics will include the DOL's efforts to finalize regulations relating to fiduciaries and conflicts of interest, state-run retirement programs, and overtime; PBGC premiums and multiemployer plans; and, perhaps, the NLRB's new joint employer standard.

Focus on Cadillac Tax, ACA and Wellness Programs

With employers in 2016 seeking full repeal of the Cadillac tax, the House is expected to disclose its plan for a full replacement of the ACA. Congress may focus on wellness programs as well.

House Budget. The [House's 2016 FY Budget](#) identifies health care spending as one of the "biggest drivers of the debt." It contains provisions that would fully repeal the ACA, including penalties for the individual mandate and employer shared responsibility.

Reconciliation Package. On Friday, President Obama vetoed the [reconciliation package](#) that includes numerous provisions to dismantle the ACA. A congressional override would mean full repeal of the Cadillac tax and the medical device tax, as well as elimination of the individual mandate and employer shared responsibility penalties by reducing them to \$0.

Comment. Despite tremendous bipartisan, bicameral support for repealing the Cadillac tax, Congress is not expected to have enough votes to override the veto.

Stand-alone ACA Related Bills. Stand-alone bills to repeal or modify certain ACA provisions might be more successful. Two key provisions to watch are the Cadillac tax and the definition of full-time employee.

Cadillac Tax: Momentum is expected to build to eliminate the Cadillac tax by way of a stand-alone bill. Currently, there are four pending congressional bills, [S. 2045](#), [S. 2075](#), [H.R. 879](#) and [H.R. 2050](#), each of which seeks to fully repeal the tax.

Comment. Although a full repeal of the tax is not likely in 2016 during President Obama's last year in office, if a Republican becomes president, legislation focusing solely on this issue may be successful, despite the expected loss of revenue that would occur if the tax is repealed.

Cadillac Tax Revenue

Prior to the two year delay (from 2018 to 2020), CBO estimated \$87 billion in revenue for the 10 year period starting in 2015. Notably, the estimate has been called-out by some employers that question CBO's numbers. This estimate appears to be based on increases in tax revenue that would arise from higher wages provided by employers enjoying reductions in health care spending. These employers are questioning whether this is a realistic approach.

Full-Time Employee Definition: In January 2015, Rep. Todd Young (R-IN) introduced [H.R. 30](#), the Save American Workers Act of 2015. The bill would modify the ACA definition of full-time employee to increase the hours per week threshold from 30 to 40. If enacted, the bill would have an impact on shared responsibility assessments. Employers with employees working less than 40 but more than 30 hours per week would have a lower risk of being subject to the penalties. Employers subject to the ACA's employer shared responsibility provisions potentially would be assessed a smaller penalty.

Comment. Although the bill has 156 co-sponsors — almost all Republicans — if it advances and is passed by Congress, it is unlikely to be enacted during 2016. It would be vetoed by President Obama, and there would not be enough congressional support to override a veto.

Wellness Programs. With the EEOC issuing proposed regulations on the interactions of the ADA and GINA and actively pursuing employee complaints, it's possible Congress will revisit the Preserving Employee Wellness Programs Act ([H.R. 1189](#) and [S. 620](#)), which was introduced in 2015. (See our [March 6, 2015](#) and [March 27, 2015](#) editions of *Legislate* and our [December 9, 2015 FYI In-Depth](#) for additional information.)

Responding to DOL Rulemaking

A number of year-end congressional negotiations and hearings focused on DOL rulemaking activities, including the proposed guidance for state-run retirement programs, the fiduciary definition and the conflicts-of-interest standard, and overtime pay. Although not addressed in the 2015 Year-End Legislation, employers can expect Congress to continue its focus on these topics in 2016.

State-Run Retirement Programs. As discussed in our [December 4, 2015 For Your Information](#), the DOL published a proposed regulation and an interpretive bulletin last year designed to encourage state-based programs that would expand access to retirement savings. Many employers are concerned that DOL's approach will significantly burden benefit plan sponsors — particularly those with operations or employees in multiple states.

Comment. Congress may introduce legislation responding to employer concerns that would substitute a federal solution in place of separate state initiatives. Such legislation might restrict DOL funds from being used to finalize and implement the proposed regulation.

Fiduciaries and Conflicts of Interest. Since the DOL issued its [proposed regulation](#) in April 2015 (See our *For Your Information* from [April 21, 2015](#)), Congress has attempted to influence the DOL as it seeks to finalize the rule before the end of President Obama's term. Stand-alone bills introduced last year have not yet crossed the finish line. (See our [December 7](#) and [December 21, 2015](#) editions of *Legislate* for background.) And, despite efforts to do so, language to stop the DOL from finalizing its rule was not included as a policy rider in 2015 year-end legislation.

Comment. Congress is likely to continue to pursue legislation that would provide it with a say on DOL's guidance. Although support will likely fade for [H.R. 1090](#), the Retail Investor Protection Act that would mandate the DOL not finalize its rule until the SEC issues its rule, Congress is expected to focus on other bills introduced on December 18, 2015. Specifically, Congress is likely to concentrate on [H.R. 4293](#), the Affordable Retirement Advice Protection Act, and [H.R. 4294](#), the Strengthening Access to Valuable Education and Retirement Support (SAVERS) Act. These bills would require DOL to receive congressional approval before implementing a final rule and, if approval is not provided, a new fiduciary standard would become effective — as set forth in the legislation and based on [principles](#) outlined by the Education and Workforce Committee last month. (See our [December 21, 2015 Legislate](#).)

Overtime Pay. In 2015, the DOL proposed regulations that would dramatically expand overtime eligibility under the Fair Labor Standards Act by narrowing the so-called “white-collar” exemptions. (See the following editions of *For Your Information* for additional background: [December 2](#), [June 30](#) and [March 31, 2015](#).) Congress discussed the proposed changes in more than one hearing. (See our [December 14, 2015 Legislate](#) for information on the hearings.)

Comment. There is some concern that the proposed rules may cause employers to hire more part-time employees resulting in fewer hourly workers advancing to managerial and supervisory positions. As such, Congress may seek to defund the DOL in an effort to ensure that the DOL does not finalize rules that would adversely impact workers' ability to secure opportunities for advancement.

Reacting to NLRB – Joint Employer

In response to the new joint employer standard created by the NLRB's decision in [Browning-Ferris Industries of California, Inc.](#), Rep. John Kline (R-MN) and Sen. Lamar Alexander (R-TN) introduced identical bills ([H.R. 3459](#) and [S. 2015](#), Protecting Local Business Opportunity Act), that would reinstate the board's prior standard. Under that standard, two or more employers may be considered joint employers only if each has "actual, direct, and immediate" control over essential terms and conditions of employment. (See our [September 25, 2015 For Your Information](#).) It remains to be seen whether support for these bills will grow. (See our [November 2, 2015 Legislate](#) for additional background.)

Retirement Matters

Independent of addressing the DOL's rulemaking activity (see above), Congress will continue to pay attention to retirement matters that have been swirling around during the 2015. Below are a few highlights likely to remain in focus.

Savings Plans – Enhanced Rights. The Women's Pension Protection Act of 2015 ([S. 2110](#) and [H.R. 4235](#)) was introduced in September and December of last year. It aims to enhance retirement security for women, as well as for spouses and part-time employees without regard to gender. (See our [October 12, 2015 Legislate](#) for details.) Although this is not the first time Congress has sought to enhance retirement security for women, because this legislation seeks to increase access to employer-sponsored savings plans, it may gain momentum in an effort to ensure that the solution is a federal one rather than one governed by a patchwork of states.

PBGC Premiums. PBGC premiums, which are paid directly by employers who voluntarily provide retirement benefits, can be used only to pay benefits to plan participants. However, under the Multiemployer Pension Plan Amendments Act of 1980, premiums are considered "on-budget" and available for general government program spending. Indeed, PBGC premiums have been increased numerous times, including recently in the [Bipartisan Budget Act of 2015](#), for purposes of paying for federal budget items wholly unrelated to pension plans.

Employers have launched an effort to repeal this on-budget treatment. They are hopeful that meetings scheduled in early 2016 will translate into legislation to end the practice of counting increased PBGC premiums as general revenue for purposes of budgetary scorekeeping.

Comment. Employers may wish to participate in efforts to educate members of Congress on the benefits of repealing the on-budget rule. Among other things, such change would likely support the PBGC's mission is to encourage the continuation and maintenance of voluntary private pension plans.

Multiemployer Plans – Suspension of Accrued Benefits. In December 2014, new multiemployer pension plan suspension of accrued benefits rules were enacted with the Multiemployer Pension Reform Act of 2014 (MPRA). (See our [January 12, 2015 For Your Information](#) for additional information.) In 2015, legislation known as the Pension Accountability Act ([S. 2147](#) and [H.R. 4029](#)) was introduced to modify the procedural rules for multiemployer plans

seeking approval to cut accrued benefits. (See our [October 12, 2015 Legislate](#).) Momentum in support of this legislation is likely to build during 2016.

New Composite Plan Design. In April 2015, a new multiemployer “composite” pension plan design developed by the National Coordinating Committee for Multiemployer Plans (NCCMP) was mentioned by Rep. David Roe (R-TN) in his opening remarks at a hearing held by the Subcommittee on Health, Employment, Labor, and Pensions of the House’s Education and the Workforce Committee. (See our [April 30, 2015 Legislate](#) for a full description.) During 2016, we may see congressional efforts to move this proposal forward.

In Closing

In 2016, we anticipate that Congress will make concerted efforts to alter the landscape of employer-sponsored plans. Our weekly *Legislate* will keep you up to date with congressional activities as they occur and as Congress reacts to and is shaped by other events, including President Obama’s State of the Union address and the upcoming presidential and congressional elections.

Authors

Allison R. Klausner, JD
Sharon Cohen, JD

Produced by the Knowledge Resource Center of Xerox HR Consulting

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@xerox.com.

You are welcome to distribute *Legislate*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.