

# Legislate<sup>®</sup>

## Key Legislative Developments Affecting Your Human Resources

Volume 07 | Issue 05 | February 8, 2016

### Mental Health Parity, HSAs and Gig Economy Share Limelight with Caddy Tax, ACA and Fiduciary Rules

The presidential race is well underway with the Iowa caucuses last week and the New Hampshire primaries tomorrow. Meanwhile, Congress stayed focused on significant employee benefits issues, including attempts to dismantle the ACA and shaping the fiduciary rules. In addition, mental health legislation was introduced, with an eye towards increasing compliance with the parity rules. Finally, the gig (sharing) economy continues to garner increased attention, with steps being taken to guide public policy and legislative activity.

**In this issue:** [Cadillac Tax](#) | [Health Savings Accounts \(HSAs\)](#) | [Mental Health Legislation: Parity and More](#) | [Fiduciary Rules](#) | [“Gig” Economy](#)

#### Cadillac Tax

Despite the country's attention on the presidential election, congressional activity aimed at repealing and modifying the tax on high-cost plans (aka, the Cadillac tax) has not slowed. There continues to be strong bipartisan and bicameral support, even though the tax will be deductible and has been delayed until 2020.

**Cadillac Tax Repeal.** Last week, the House attempted to override President Obama's veto of [legislation](#), often referred to as the reconciliation bill. This legislation would repeal significant Affordable Care Act (ACA) provisions, including the tax on high-cost plans. Although 241 House members (all Republicans except one) [voted](#) in favor of overriding the veto, the vote failed to satisfy the minimum threshold.

**President's Proposed Change.** The White House announced that the president's 2017 budget proposal will request revisions to the tax on high-cost plans to reflect geographic differences and permit adjustments for high-cost regions. The president's proposal may be a direct response to employer concerns (as identified in our [December 21, 2015 Legislate](#)) that the tax will be unfairly imposed on employers with locations where health care is expensive.

#### Cadillac Tax – A Future?

Given the bipartisan focus on the Cadillac tax, the time seems ripe for further amendments. Four pending bills would repeal the tax before 2020 ([H.R. 879](#), [H.R. 2050](#), [S. 2045](#) and [S. 2075](#)). If not repealed, another bill proposes to cut out certain contributions (such as salary reduction contributions to HSAs and FSAs) currently included in the calculation. Finally, the president's 2017 budget proposes to increase the coverage thresholds in certain areas of the country, which would reduce the impact of the tax.

Interestingly, the [December 2015 omnibus spending bill](#) included a mandate to evaluate the suitability of potential benchmarks for age and gender adjustments, but not geographic location. The president's 2017 budget proposal will be released on February 9.

**HSAs, FSAs and Cadillac Tax.** Efforts to modify the impact of the Cadillac tax are reflected in legislation introduced last week. Specifically, the Health Savings Act of 2016 ([H.R. 4469](#) and [S. 2499](#)), sponsored by Rep. Erik Paulsen (R-MN) and Sen. Orrin Hatch (R-UT), would provide that amounts contributed to health savings accounts (HSA) or health flexible spending arrangements (FSA) through salary reduction would not be considered for the Cadillac tax calculations.

**Comment.** Employers that offer HSAs in conjunction with high-deductible health plans (HDHPs) may be weighing the pros and cons of offering HSAs as a way to avoid triggering the Cadillac tax. However, employers may want to pause and reconsider. First, the Cadillac tax has been delayed until 2020 and will be deductible. Second, it may be repealed or, if not repealed, modified to be less onerous. Third, if the Health Savings Act of 2016 bill is enacted, HSAs could have more value for employees and, in turn, become a more valuable tool for employers seeking to help employees be smarter health care consumers and lower total health care spend.

## Health Savings Accounts (HSAs)

As noted above, the Health Savings Act of 2016 was introduced last week. In addition to provisions relating to the Cadillac tax, the legislation would modify several HSA rules. Some key provisions address access, catch-up contributions and use of HSA funds.

**Access to HSAs.** Provided they are otherwise eligible to contribute, the legislation would allow the following individuals to be HSA eligible (i.e., eligible to contribute to an HSA):

- TRICARE eligibles
- Medicare Part A enrollees (not enrolled in any other part of Medicare) who are age 65 or older
- Native Americans who use Indian Health Service or tribal medical services
- Individuals eligible for an employer's on-site medical clinic — so long as the clinic does not provide significant benefits. (Under the legislation, medical services such as physicals, immunizations, allergy injections, tests for infectious diseases (e.g., strep throat), hearing and vision testing, and monitoring chronic conditions like diabetes would not be considered significant benefits)

**Catch-Up Contributions.** Under current law, married individuals who are both age 55 or older and eligible to make extra annual contributions (known as catch-up contributions) to an HSA must deposit such contributions to separate HSAs. The legislation would relax the rules and permit such married individuals to use one HSA.

**Use of HSA Funds.** The legislation would permit HSA funds to be used for items including the following:

- Dietary and nutritional supplements
- Over-the-counter (OTC) medicine or drug without a prescription (current law permits OTCs with a prescription to be reimbursed from an HSA)
- Exercise equipment, costs related to participating in a program of physical exercise, health coaching and gym membership fees

**Comment.** If the legislation is enacted, employers would have greater flexibility in designing their total health care offering. For example, employers may look to expand or modify their on-site medical clinics. In turn, this legislation could help employers lower their health care spend and increase employee productivity.

## Mental Health Legislation: Parity and More

Two comprehensive mental health bills were recently introduced. One is the Comprehensive Behavioral Health

### Nonquantitative Treatment Limitations

NQTLs include standards for determining medical necessity, formulary design for prescription drugs, determination of usual, customary, and reasonable charges, and network standards for provider admission or reimbursement. (For additional information about the MHPAEA, please see our [January 14, 2014 For Your Information.](#))

Reform and Recovery Act of 2016 ([H.R. 4435](#)), introduced by Rep. Gene Green (D-TX), along with other co-sponsors from the House Energy & Commerce Health Subcommittee. The other is the Heroin and Prescription Drug Abuse Prevention and Reduction Act ([H.R. 4396](#)), introduced by Rep. Frank Pallone (D-NJ). In addition to the mental health parity provisions discussed below, the legislation would make funding available, in the form of various grants, to encourage research, screening, diagnosis and treatment of mental illness, as well as integrating physical and behavioral health services. This ultimately could impact mental health coverage and/or preventive care requirements. (Please see this [summary](#) for a detailed list of all the grants that would be made available.)

Both bills would amend the PHSA, ERISA and the Internal Revenue Code. They would build upon the Mental Health Parity and Addiction

Equity Act of 2008 (MHPAEA) and include new mental health parity disclosure requirements for group health plans and health insurers. To strengthen compliance with the quantitative financial requirements and treatment limitations as well as the nonquantitative treatment limitations (NQTLs) requirements, the bills would call for detailed disclosures. Notably, with regard to the NQTLs, the minimum disclosure requirements would include the specific factors the plan or coverage used in performing its NQTL analysis as well as the evidentiary standards relied on to evaluate those factors.

**Comment.** Employers should consider performing a self-audit to determine whether the health plan coverage currently being provided complies with the mental health and substance abuse parity rules. Should this bill be enacted, there will be increased risk of government audits and enforcement activity.

## Fiduciary Rules

On February 2, the House Committee on Education and the Workforce reviewed and approved amendments to ERISA in the Affordable Retirement Advice Protection Act ([H.R. 4293](#)) and amendments to the Code in the Strengthening Access to Valuable Education and Retirement Support (SAVERS) Act ([H.R. 4294](#)). The following day, the House Ways and Means Committee reviewed and approved the tax bill. A key provision

### Timing Issues

The White House Office of Management of Budget (OMB) received a final version of the DOL fiduciary regulation on January 28 and has 90 days to review it. However, OMB could complete its review before the 90 day deadline. Interestingly, members of both the Ways and Means Committee and the Education and the Workforce Committee voiced concern that acting on this legislation to block the regulation is premature. Indeed, prior to approving H.R. 4293 and H.R. 4294, the Education and the Workforce Committee considered and rejected a motion by Rep. Bobby Scott (D-VA) to postpone a vote until after OMB completes its review.

in both pieces of legislation is the requirement that the DOL receive Congress' approval before the DOL's final fiduciary rule can be effective. (For previous reports on this legislation, see our [December 21, 2015](#) *Legislate*. For additional background on the DOL's proposed fiduciary rule, see our [April 21, 2015](#) *For Your Information*.)

**Comment.** These bills have virtually no chance of being enacted. First, they are unlikely to be considered by the full House or the Senate, at least not any time soon. And, time is not on Congress' side with finalization of the regulations coming so soon. Second, it is highly unlikely that President Obama would sign the legislation. Last year, the president's senior advisors stated that they would recommend he veto [H.R. 1090](#), the Retail Investor Protection Act, a bill that would require the DOL to wait to publish a final fiduciary regulation until after the SEC releases its own fiduciary guidance.

## “Gig” Economy

In 2005, the DOL issued a [report](#) on contingent and alternative employment arrangements. Contingent workers were generally identified as those who did not expect their jobs to last or who reported that their jobs were temporary. An alternative employment arrangement was broadly defined to include independent contractors/consultants, on-call workers, temporary help agency workers, and workers provided by a staffing agency. In April 2015, GAO issued a [report](#) about such workers — based on data derived from various sources and using broader definitions of contingent worker and alternative employment arrangements.

Last month, the DOL [announced](#) that in May 2017 it would rerun the Contingent Worker Supplement to its Current Population Survey. According to Labor Secretary Tom Perez's blog post, such data will provide “reliable, credible insight into what's going on across a range of work arrangements — from independent contractors to temporary employees to workers holding multiple jobs at the same time.”

In response to the DOL's announcement, Sen. Mark Warner (D-VA.) sent a [letter](#) to the DOL noting the importance of modifying the survey to reflect the new “on demand” economy. Specifically, Sen. Warner wants the survey to include questions that will help identify who is doing “gigs” or on-demand jobs. Notably, he urges the DOL to leverage the survey to identify the percentage of on-demand workers with “access to health coverage, unemployment insurance, retirement savings, and other benefits typically associated with an employer.”

**Comment.** We do not expect legislation to be introduced any time soon to create or reflect a new worker classification. However, as the contingent workforce becomes a more significant and growing segment of the American economy, such legislation may be introduced in a later Congress.

### Worker Classification

With the “gig” economy becoming more visible, employers may want to review whether workers are properly classified as independent contractors (with wages reported on an IRS Form 1099) or employees (with wages reported on an IRS Form W-2). Proper classification is important for many reasons, including determining overtime eligibility and coverage under an employer-sponsored benefit plan, as well as ACA reporting and calculation of ACA employer shared responsibility penalties. See our [July 16, 2015](#) *FYI Alert*.

**Authors**

Allison R. Klausner, JD

Nancy Vary, 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](mailto:fyi@xerox.com).

You are welcome to distribute *Legislate*® publications in their entireties. 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.