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Key Legislative Developments Affecting Your Human Resources

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Changes for Multiemployer Plans Considered Although Focus Is on Elections and Supreme Court Vacancy

The presidential campaigns and elections, as well as the Supreme Court vacancy, continue to be a primary congressional focus. In addition, the Senate Finance Committee held a hearing on multiemployer plans, the Supreme Court decided an important ERISA preemption case that may jeopardize more than a dozen state laws, and presidential candidate Donald Trump released an outline of his health care proposal.

Supreme Court Activity

With the presidential campaign and election season in full swing, filling the Supreme Court vacancy created by the death of Justice Antonin Scalia remains a political hot button. Despite the vacancy and the potential for non-precedential decisions (see our February 29 *Legislate*), the Supreme Court ruled on an important ERISA preemption case last week.

Nomination

Although President Obama has yet to nominate a candidate to be the next Supreme Court justice, Senate Republican leaders have not budged from their previously stated position. Specifically, as noted by Senate Majority Leader Mitch McConnell (R-KY), the Republican-controlled Senate will not take action that would permit the Supreme Court vacancy to be filled in 2016. Efforts to persuade Republicans to modify their stance, including a meeting last week with the president, have not been fruitful. Indeed, immediately following the meeting — attended by Sen. McConnell, together with Senate Judiciary Chairman Chuck Grassley (R-IA), Sen. Patrick Leahy (D-VT), Senate Minority Leader Harry Reid (D-NV) and Vice President Joe Biden — Sen. McConnell affirmed that "Sen. Grassley and I made it clear that we don't intend to take up a nominee or to have a hearing." Furthermore, he noted that the meeting with President Obama "was a good opportunity to reiterate our view that an appointment should be made by the next president."

Comment. Because each justice is charged with interpreting the law, not making law, arguably it should not matter whether the Senate confirms a justice nominated by President Obama or his successor. Indeed, Justice Antonin Scalia, a justice well known for his conservative views and appointed by President Reagan, did not always vote in alignment with the other conservative justices. For example, in a 2013 case, Justice Scalia wrote the dissent on behalf of himself and liberal Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

ERISA Preemption and State Health Reporting Laws

Last week, the Supreme Court struck down a Vermont state law that would have required self-insured health care plans, insurers and third party administrators (TPAs), among others, to report health care claims and eligibility data, as well as other information, to a state health care database (often referred to as an all-payer database). In determining that the Vermont law was preempted by ERISA, the Court noted that it "intrudes upon a 'central matter of plan administration' and 'interferes with nationally uniform plan administration.'" Specifically, the Court found that "reporting, disclosure and recordkeeping are central to, and an essential part of, the uniform system of administration contemplated by ERISA" and that state requirements like those imposed by the Vermont law are inconsistent with the fundamental principles of ERISA.

Employers and TPAs who were subject to the Vermont law should consult legal counsel to determine any next steps concerning the data that was submitted to the Vermont database. Questions include: Are there any security issues? Will the database be dismantled? What happens with the data that's already been collected? Will the state provide further instructions or assurances? Will the group health plan have any further role? Likewise, the contracts by and between employers (plan sponsors) and TPAs should be reviewed to determine if changes are appropriate to reflect this decision.

Comment. Given the Court's ruling, other similar state laws with all-payer databases may also be in jeopardy of being struck down as preempted by ERISA. To date, there are about 17 of them — some of which affect self-insured plans and/or third-party administrators — in various stages of implementation. Some states may modify their laws in response to the Supreme Court decision without waiting for a legal challenge.

Preemption and State-Run Retirement Savings Programs

In November 2015, the DOL issued a proposed regulation and an interpretive bulletin (IB) to facilitate state-run retirement programs for the private sector. Under the proposed regulation, designed to avoid ERISA and its preemption rules, states could require private employers (under specified circumstances) to provide payroll deduction savings programs for certain employees. Under the IB, states could facilitate ERISA-governed voluntary retirement savings sponsored by private sector employers. (For additional background on the DOL guidance, please see our **December 4, 2015** *For Your Information*.) Notwithstanding the DOL's efforts to create a roadmap for states to legislate in the field of employee benefits, DOL Secretary Thomas E. Perez acknowledged that courts may disagree. The Supreme Court's conclusion that Vermont's all-payer claims database interferes with uniform ERISA plan administration suggests that the Court may also find ERISA preempts state laws addressing private employers' responsibilities for their employees' retirement savings.

Multiemployer Plans

Last week, the Senate Finance Committee held a hearing on the multiemployer pension plan system. Recognizing that some of these plans are critically underfunded and in danger of default, the committee sought to understand whether further modifications should be made to ensure the system does not fail. In connection with the hearing, the

Joint Committee on Taxation prepared a report that provides background and descriptions of certain multiemployer plan proposals.

Premiums. The committee heard testimony in support of increasing multiemployer pension plan premiums. As noted in our *Legislate* dated February 15, President Obama's 2017 budget proposal also included a call for increased premiums. Specifically, his proposal seeks revenue through variable rate premiums as well as an exit premium on employers that withdraw from multiemployer plans.

Suspension of Benefits. The Multiemployer Pension Reform Act (MPRA) enacted in December 2014 permits critically underfunded multiemployer pension plans to suspend payment of certain accrued benefits that would otherwise be protected under the anti-cutback rules, subject to notice and other procedural requirements. A key focus of the hearing was whether the MPRA has done more harm than good and, as such, whether it should be modified or repealed. The committee heard sympathetic testimony in support of changing or repealing the MPRA from a widow of a multiemployer plan participant who spoke about scores of individuals at risk of suffering a reduction of benefits. In addition, an impassioned plea came from a union president in support of alternative legislation for miners facing the loss of pension and health benefits due to industry bankruptcies. But, a former PBGC director cautioned Congress not to repeal the MPRA provisions. According to this former director, the MPRA rules are necessary for a critically underfunded multiemployer pension plan to avoid insolvency. Moreover, he testified that if MPRA is repealed, the multiemployer pension plan system will "collapse." (For additional information on the MPRA, as well as proposed regulations under it, and legislation to repeal and modify it, please see our October 12, 2015 edition of *Legislate* and our February 17 and January 12, 2015 editions of *For Your Information.)*

Hybrid/Composite Designs. The committee also heard testimony about "composite" multiemployer plan designs. To read more about these proposed designs that seek to combine attributes of defined benefit and defined contribution plans, please see our April 30, 2015 *Legislate*.

Trump Health Care Proposal

Last week, one day after winning seven out of 10 Republican races held on Super Tuesday, Donald Trump outlined his health care proposals. As expected, Trump's plan calls for full repeal of the Affordable Care Act (ACA). Five key elements of his proposal are:

- No individual mandate to purchase health care insurance
- Any amounts spent by individuals to purchase health insurance would be fully deductible
- Funds accumulated in health savings accounts (HSAs) would be available for "any member of the family"
- Funds remaining after death would be excluded from any estate tax
- Allow access to "imported, safe and dependable drugs from overseas"

> **Comment.** Trump's proposals seem to build on current rules. Today, amounts spent by individuals to purchase employer-provided health coverage are excluded from taxation, but not coverage purchased from the individual marketplace. Likewise, under current law, HSA funds can be used to reimburse expenses incurred on behalf of the individual's spouse and tax dependents, but not "any member of the family." Finally, although current law provides that HSA funds remaining after an individual's death do not become taxable income if the funds transfer to the decedent's spouse, there is no blanket exclusion from "any estate tax." Rather, under current law if the designated beneficiary is the deceased account holder's estate, amounts are includible in the decedent's gross income for the year in which the death occurred and subject to the estate

tax. (For further background on HSAs and information on the similarities and differences among flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and HSAs, please see this chart.)

Looking Ahead

During the next few weeks, President Obama will likely nominate a successor to Justice Scalia, the long-awaited fiduciary regulations may be issued, and more Supreme Court rulings affecting employee benefits, labor and employment may be released. Employers will want to keep an eye on these developments, including any congressional reaction, as any one of them may require employers to re-evaluate future benefit designs and workplace strategies.

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