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Legislate®
Key Legislative Developments Affecting Your Human Resources

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NLRB and DOL Rules and Standards Scrutinized, with a Bit of Focus on ACA

Last week, the House primarily focused on budgets and appropriations (spending), although Republicans in the chamber addressed ACA matters, as well as a number of highly charged employment/labor topics arising out of DOL and NLRB activities. It was a relatively light week all around, with the Senate adjourned and the House only in session for a couple of days.

ACA

Six years ago, on March 23, 2010, the Affordable Care Act (ACA) was signed into law. While President Obama took time to reflect on the progress made, Congress considered a couple of ACA issues.

Cadillac Tax

Last week, Rep. Charles Boustany (R-LA) introduced a bill, Health Savings Protection Act of 2016 (H.R. 4832), to exclude salary reduction amounts contributed to a health flexible spending arrangement (health FSA) or health savings account (HSA) from the so-called Cadillac tax. An identical bill, Preserving Consumer Health Accounts Act of 2016 (S. 2698), was introduced in the House earlier this month by Sen. John Thune (R-SD), with one minor exception — its name. (For background on other congressional efforts to minimize the impact of the tax, currently scheduled to be effective in 2020, please see our February 8 *Legislate*.)

Small Employer Health Care Tax Credit

The Small Business Committee's Subcommittee on Economic Growth, Tax and Capital Access held a hearing last week to address the small business health insurance tax credit. As noted in a GAO report released earlier this month and discussed at the hearing, the credit has been used by relatively few companies. According to the report, the credit has proven to be of limited use and value for a variety of reasons — including the eligibility thresholds/requirements, the complex/time-consuming paperwork, and the fact that it can be claimed for only two consecutive

years. To address these concerns, legislation (S. 379 and H.R. 762) was introduced in 2015 that would make a number of changes, including permitting employers with 50 or fewer full-time employees to claim the credit for up to three years.

> **Comment.** Given the renewed focus on the tax credit, the now dormant legislation may gain meaningful attention and traction. Small employers may want to take another look at this tax credit and consider any changes that could make it worthwhile to complete the paperwork.

NLRB and DOL Rules Targeted

Last week, House Republicans continued their focus on numerous employment and labor topics arising out of NLRB decisions and DOL rulemaking efforts, many of which were addressed earlier this month at congressional hearings where DOL Secretary Tom Perez testified. (See our March 21 *Legislate* for more on those hearings.) Most notably, seventy-three House Republicans sent a letter ("House letter") to the Chairman and Ranking Member of the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies urging the committee to address four "drastic" labor law changes by the NLRB and DOL in upcoming government funding bills. These controversial initiatives are discussed below.

Joint Employer. House Republicans want to unwind the NLRB's *Browning-Ferris Industries of California, Inc.* decision that dramatically altered the long-standing joint employer standard. Specifically, they seek to reverse the board's decision that they characterize as an "exceptional deviation" from well-settled law, and restore the board's traditional standard. Their policy rider request is in addition to legislation previously introduced to reinstate the prior standard and make clear that 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 March 21 *Legislate* and our September 25, 2015 *For Your Information* for background.)

Union Elections. In December 2014, the NLRB issued a new union election rule that significantly changed the board's longstanding procedures and, according to House Republicans, "severely restricts an employer's ability to provide employees with the resources required to formulate an educated decision prior to a union election." Although previous congressional efforts to block implementation of the NLRB's new rule were unsuccessful, House Republicans have requested that the prior rule be restored via a policy rider. (For additional background, please see our April 6, 2015 *For Your Information*.)

Micro-Unions. The House letter also seeks to reverse the NLRB's 2011 *Specialty Healthcare* decision that adopted a new standard for determining whether a petitioned for bargaining unit is appropriate, permitting the formation of "micro-unions" or "micro-units" of workers for representation purposes. The decision effectively overturned the board's longstanding practice of not certifying "fractured" units but instead requiring all employees who shared a "community of interest" to be included in the appropriate bargaining unit in a representational election. As stated in the House letter, the decision "has a profound effect" on businesses covered by the NLRA that "now face the possibility of having to manage multiple bargaining units of similarly situated employees with increased chances of work stoppages, and even the potential for differing pay scales, benefits, work rules and bargaining schedules."

Persuader Rule. Last week, the DOL's Office of Labor-Management Standards (OLMS) released the final persuader rule, initially proposed in 2011, that substantially expands certain public reporting and disclosure requirements for employers and their labor relations advisors. The long-awaited final rule identifies persuader activities as "any actions, conduct, or communications that are undertaken with an object, explicitly or implicitly,

directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." Notably, the final rule dramatically narrows the long-standing "advice" exemption that generally allows employers to secure legal and labor relations advice without triggering a disclosure requirement and expands the scope of activities that will be reportable. Under the final rule, even "indirect" persuader activity may trigger a reporting obligation, regardless of whether the labor consultant talks with employees about unionization. Although the House letter speaks to the proposed rule, as the final rule was issued the same day as that letter, the House Republicans are concerned that the rule will "make it more difficult for employers to find and retain expert advice and assistance."

Advice Exemption

According to the DOL OLMS **fact sheet**, "[a]s a general principle, no reporting is required for an agreement or arrangement to exclusively provide legal services. For example, no report is required if a lawyer or other consultant revises persuasive materials, communications, or policies created by the employer in order to ensure their legality rather than enhancing their persuasive effect."

House Republicans are requesting a policy rider that would address the so-called persuader rule from becoming effective. Absent congressional action, the final rule will be effective on April 25 and be applicable to arrangements, agreements and payments made on or after July 1, 2016. (For additional background, please see our August 24, 2011 *For Your Information*, as well as the DOL OLMS press release, employer-consultant reporting page, overview/summary, questions and answers and fact sheet.)

Overtime Bills

Although Republican members of the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor, and Pensions have said that the current *overtime* rules are "outdated" and "need to be modernized," they believe the proposed white-collar exemption rules fail to address the issue in a "responsible way" and want them to be "sent back to the drawing board." As such, and in an effort to nullify the proposed rule and prevent final implementation, Rep. Tim Walberg (R-MI) and Sen. Tim Scott (R-SC) introduced the Protecting Workplace Advancement and Opportunity Act (H.R. 4773 and S. 2707). Among other things, the legislation would require the DOL to conduct a comprehensive economic analysis on the potential impact of the rule on employers before promulgating any substantially similar rule. It would also prohibit any rule that would result in changes to any salary threshold for multiple time periods (including through an automatic updating procedure), require at least a 120-day comment period for any proposed rule, an effective date of any future rule at least one year after its publication, and prohibit changes to the duties tests unless the proposed regulatory text was made available for public comment. (For additional information, including congressional response to the DOL's proposed rule, please see our March 16 *FYI Alert* and February 22 *Legislate*.)

Looking Ahead

The Senate will reconvene for legislative business on April 4 and the House will return from recess on April 12.

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