

Multiemployer Pension, Savings Programs, Overtime and ACA in Focus; Wellness Plan Rules Issued Today

Congress returned to session last week and quickly voiced reaction to the Treasury Department's rejection of the Central States Pension Plan's bid to suspend multiemployer plan payments and the all but certain outcome of Donald Trump as the GOP's presidential nominee. Meanwhile, retirement savings remains in focus with a new GAO report highlighting lackluster savings and Congressmen urging executive action to require more employers to auto-enroll workers in savings programs. EEOC released final wellness plan rules under the ADA and GINA. Finally, House and Senate hearings considered pending overtime rules, the future of healthcare and various tax change proposals — many of which would affect employees, employers and benefit programs, while a federal court issued a significant ruling related to ACA subsidies.

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Republican Leadership

Although Donald Trump is the presumptive Republican presidential nominee, Speaker Paul Ryan (R-WI) initially publicly announced that he is not ready to endorse Mr. Trump and would step down as chairman of the GOP Convention if asked to by Mr. Trump. In an effort to unify the party, they met last week and began the process to “bridge the gaps and differences.” They are now “totally committed” to working together.

Comment. This tug-of-war highlights fractures within the Republican Party that could affect the race for the presidency and the upcoming congressional races. The controversy is absorbing time and attention as House and Senate Republicans consider strategies for winning the White House and maintaining control of both chambers in the 2017 Congress. Moreover, without unity, the Republican Party will be challenged to successfully put forth a legislative agenda (including on

Wellness Plan Rules Published

This morning, the EEOC released two final rules regarding wellness programs under the [Genetic Information Nondiscrimination Act](#) and the [Americans with Disability Act](#). Specifically, the rules address the extent to which employers may use incentives to encourage employees and their spouses to participate in certain wellness programs. Analysis of the rules will be in a forthcoming *For Your Information*. The rules will apply on January 1, 2017.

topics such as minimum wage and healthcare) and a framework for significant legislation to replace the Affordable Care Act (ACA).

Denied Bid to Reduce Multiemployer Payouts

On May 6, the Central States Pension Plan's [application](#) to reduce benefits was [denied](#) because the proposed plan was determined to be insufficient to avoid insolvency as required by the Multiemployer Pension Reform Act of 2014 (MPRA). (For background on MPRA, see our [March 7, 2015](#) *Legislate* and [January 12, 2015](#) *For Your Information*.)

Central States' leadership swiftly released a [statement](#), noting their disappointment and belief that "the rescue plan provided the only realistic solution to avoiding insolvency" and urging Congress to take action to protect the Central States pension plan participants. Indeed, consistent with a [March letter](#) signed by the Senate Finance Committee's democratic members, Ranking Member Ron Wyden (D-OR) [stated](#) that "Congress needs to work harder on a bipartisan basis to develop other solutions" in lieu of MPRA to address the risks currently faced by the multiemployer pension system. Additional support comes from House Republicans. In a [bipartisan statement](#) issued by the House Education and the Workforce Committee, Chairman John Kline (R-MN) and Ranking Member Bobby Scott (D-VA) made clear that "Congress will continue its efforts to strengthen the multiemployer pension system."

Automatic Enrollment: Retirement Savings

Lackluster retirement savings continues to be a problem in search of a solution. President Obama addressed it in his 2017 budget proposal and DOL issued guidance, in the form of a [proposed rule](#) and an [interpretive bulletin](#), in accordance with the [president's directive](#) to encourage states to fill in the gaps for access and portability. (For additional information, please see our [December 4, 2015](#) *For Your Information*). Also: GAO released a [report](#) reflecting on it and House and Senate legislators introduced various bills — such as the American Savings Account Act of 2016 ([S. 2472](#)) and the Women's Pension Protection Act of 2015 ([S. 2110](#) and [H.R. 4235](#)) — to help fix it. Finally, House Democrats sent a letter to the administration [requesting executive action](#) to facilitate increased retirement savings by federal contractors who do not have access to an employer-sponsored plan.

Notably, the GAO Report offered these key points:

- Less than half of all U.S. households had some retirement assets in a 401(k), IRA or other defined contribution (DC) plan in 2013
- Approximately 39 percent of working households lacked access to, or were not eligible to participate in, an employer-sponsored DC plan at their job in 2013
- Simulation models used by GAO to analyze the projected effect of certain employer and participant decisions suggest that universal automatic enrollment (whereby all DC plans have required automatic enrollment with a participant opt-out feature) would increase projected retirement annuities by 5% overall and nearly 10% for low-earning households

The campaign launched by the House Democrats, led by Rep. Joseph Crowley (D-NY), together with more than 65 fellow congressmen, [in their May 5 letter](#) asked the president to "further help remedy some of our nation's savings issues" by issuing an executive order mandating government contractors to automatically enroll their employees in an employer-sponsored pension or savings plan [such as a 401(k) plan] or an IRA, such as a [myRA account](#) (a starter IRA from the Department of Treasury). In addition to suggesting coverage for both full- and part-time employees, they

suggested that the executive order require these retirement savings to be immediately vested in light of the frequency of job changes in our current economy.

Comment. Automatic enrollment is one avenue that may be leveraged to increase retirement savings. Removing barriers to access and portability are others. Our [February 1 Legislate](#) includes a discussion of current efforts, some supported by both Democrats and Republicans, to create a pathway to greater retirement security, including ones that would increase access for part-time workers and others that would remove obstacles for employers without a common bond or nexus to band together to sponsor multiple employer plans (MEPs). In addition, in February, Rep. Crowley introduced the Making Your Retirement Accessible Act or the MyRA Act ([H.R. 4491](#)). Among other things, this bill would require employers to deposit employee contributions in a MyRA account on behalf of each employee who is paid through direct deposit if that individual employee is not offered an employer-sponsored retirement savings plan. Employee contributions would be elective, not automatic, and employers would be required to provide paystub notice of how to set up an account. Failures would be subject to a \$100 per day penalty.

Overtime Rules

Last year, Sen. David Vitter (R-LA), chairman of the Senate Committee on Small Business and Entrepreneurship, sent a [letter](#) to the DOL requesting that the comment period for the proposed overtime rule be extended and noting that the proposal would disproportionately burden small businesses and negatively impact their operations and workers. As businesses await the DOL's final overtime rule that is expected to expand overtime eligibility dramatically, the committee held a hearing to explore the potential impact on small business.

Witnesses testified on the rule's impact on small businesses, non-profits, and small government entities. One witness highlighted the potential for loss of workplace flexibility when workers are reclassified from exempt to non-exempt. As described by the witness, "small businesses cannot afford to increase salaries necessary to maintain the exemption, but also cannot afford to pay overtime — especially when this new regulatory burden is piled on top of Affordable Care Act obligations, state minimum wage increases, and state paid leave requirements." The witness stated that the DOL has grossly underestimated the burden on small businesses, and businesses will have to either reduce staff or hours worked to comply. Another witness testified that changes to the duties test are not needed and should be avoided, but any such changes should be subject to public notice and comment. In particular, the witness expressed great concern that any change to a long duties test which relies on a quantitative analysis as to the percentage of non-exempt work performed by an employee, "would [unnecessarily] impose significant monitoring requirements and recordkeeping burdens" and may lead to "contentious disputes and increased litigation." A third witness requested special exemption from the salary thresholds for non-profit organizations, citing concern that increases in administrative costs caused by expanded overtime eligibility will decrease donations.

Other witnesses supported finalizing the rule as proposed, stating that it is long overdue, will help ensure that employees are not misclassified as exempt from overtime protections, and will protect workers from employers that otherwise may "exploit their employees, work them excessive hours, or deny them time with their families."

(For additional background, as well as congressional efforts to derail finalization of the rule, please see our [February 22 Legislate](#) and [March 16 FYI Alert](#).)

Comment. Employers will need to act, perhaps quickly, to bring their current pay practices into compliance. The so-called "white collar" exemptions from the FLSA's minimum wage and overtime rules will reflect higher

minimum salary thresholds, and may also include changes to its duties tests. Employers are encouraged to review applicable state and local laws, consider ERISA and the Affordable Care Act, and review contracts and other arrangements before making any workforce changes in connection with the final rule.

ACA's Future

Although efforts continue by House Republicans to develop an Affordable Care Act replacement framework based on “market reforms instead of government mandates”, there appear to be some attempts to find common ground and consensus with House Democrats. Indeed, during a [hearing](#) held last week by the House Energy and Commerce Committee’s health subcommittee, Rep. Frank Pallone (D-NJ) stated that a “common goal” of both Republicans and Democrats is to have “a health care system that’s more affordable, accessible and higher quality.” Notably, during his opening remarks, Rep. Fred Upton (R-MI), a member of the Republican task force on health, as well as chairman of the full committee, stated that any ACA replacement should include “guaranteed issue” — a market reform that is part of the ACA’s foundation. Guaranteed issue is when an insurance policy or group health plan is required to issue a health plan to any applicant regardless of the applicant’s health status, such as pre-existing conditions, or other factors, such as age or gender.

ACA Subsidies at Risk

Last week, a federal lower court agreed with House Republicans that the Obama administration acted without congressional authority by using federal funds for ACA marketplace coverage cost-sharing subsidies. These subsidies are used to lower in-network out-of-pocket costs (e.g., deductibles, coinsurance, copayments and similar charges) under the health plan and are generally available for lower-income households eligible for a premium tax credit. The [ruling](#) does not affect the use of federal funds for premium tax credits that help reduce monthly premiums for ACA marketplace coverage. As the ruling is expected to be appealed, the judge stayed the order and it will not be implemented at this time. While the ruling has no direct impact on employers, if upheld it could affect the future viability of the marketplaces.

See our [March 21 Legislate](#) for background on the lawsuit as well as related hearings and reports.

Potpourri of Potential Tax Code Changes

During the House Ways and Means Tax Policy Subcommittee hearing held last week, numerous bills relevant to employers, including the ones mentioned below, were highlighted in statements and remarks.

HRAs. Chairman Charles Boustany (R-LA) [advocated](#) for the Small Business Healthcare Relief Act ([H.R. 2911](#)), bipartisan legislation with 85 co-sponsors, that would permit employees of small businesses (generally those with less than 50 full-time employees) that do not offer a group health plan to use pre-tax dollars to purchase health insurance in the individual market. (For additional background on HRAs, see our [March 31 For Your Information](#).)

Work Opportunity Tax Credit (WOTC). Rep. Tom Reed (R-NY) advocated for bipartisan legislation ([H.R. 2754](#)) that would provide relief for vulnerable working families by making the WOTC permanent. Other bills have been introduced that would allow the transfer of the credit in the case of contracted veterans ([H.R. 145](#)) and provide a credit for hiring older long-term unemployment recipients ([H.R. 4973](#)). (For additional background on the WOTC, see our [April 25 Legislate](#).)

Dependent Care. Rep. Mike Kelly (R-PA) and Rep. Linda Sanchez (D-CA) requested support for the Working Families Relief Act ([H.R. 4867](#)). This bill, and the identical Senate bill ([S. 2879](#)), would assist workers with dependent

care costs and provide employers with tax credits relating to certain matching contributions and start-up costs. (For additional background on these bills, see our [May 9 Legislate](#).)

College Tuition and ABLE Programs. Rep. Lynn Jenkins (R-KS) [spoke](#) about the 529 and ABLE Account Improvement Act ([H.R. 5193](#)), legislation that “would encourage better access to 529 and ABLE accounts — tax incentive savings plans designed to help folks better prepare for the future.” (For additional background on similar bills, see our [May 9 Legislate](#).)

Student Loans. Several House members spoke about repayment of student loans.

- **Higher Education Loan Payments (HELP) for Students and Parents Act.** Rep. Robert Dold (R-IL) discussed his bill ([H.R. 5191](#)) that would provide employer tax credits and employee tax exclusion for employer contributions towards student debt repayment.
- **Employer Participation in Student Loan Assistance Act.** Rep. Rodney Davis (R-IL) advocated for his bill ([H.R. 3861](#)), and the related Senate bill ([S. 2457](#)), that would extend the existing employer-provided educational assistance rules to payments of qualified student loans. (For additional background on these bills, see our [May 9](#) and [January 25](#) issues of *Legislate*.)
- **Student Loan Repayment Assistance Act.** Rep. Scott Peters (D-CA) advocated for his bill ([H.R. 1713](#)), which would also provide an employee tax exclusion for certain amounts provided under an employer-sponsored student loan payment assistance program.

Retirement Savings Accounts. Rep. Dave Brat (R-VA) talked about the need to facilitate greater savings in general — including for retirement — and encouraged the committee to consider and advance the Universal Savings Account Act ([H.R. 4094](#)). An identical Senate bill ([S. 2320](#)) is also pending. Universal accounts would be similar to Roth IRAs, but would allow distributions for any purpose without penalty.

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