Legislate®
Key Legislative Developments Affecting Your Human Resources

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Congress Looks Ahead to 2017

Last week, Congress was largely focused on 2017 with appropriation committees concentrating on 2017 fiscal year funding. Other committees advanced resolutions challenging regulations and considered the "gig" economy.

ACA and FY 2017 Funding

The House Appropriations Committee released a draft of its fiscal year 2017 Financial Services and General Government Appropriations bill that would provide funding for various government agencies, including the IRS. The bill would provide less funding than called for in the president's 2017 fiscal year budget proposal, reducing the IRS budget by approximately $236 million. Among the policy "riders" included in the legislation are those that would stop the IRS from further Affordable Care Act (ACA) implementation. Specifically, it would strip the IRS of any funding from HHS for ACA uses and would prohibit funding for the IRS to implement the individual mandate.

> **Comment.** Last year, efforts to include provisions in the Consolidated Appropriations Act, 2016 to stop the practice of transferring HHS funds to the IRS for ACA related purposes were unsuccessful. In addition to using the appropriations process to attempt to dismantle or disrupt the ACA, the Republican-controlled Congress has sought to do so with other levers. ACA repeal and replace bills have been introduced, and more bills are expected after the Republican House healthcare reform task force releases its recommendations. Further, last month House and Senate Republicans introduced bicameral legislation — the World's Greatest Healthcare Plan (H.R. 5284) — as an alternative to the ACA by providing employers with a choice to offer health care coverage outside the ACA. (See our May 23 *Legislate* for background.)

DOL Rules – CRA Challenges Advance

The DOL released a handful of controversial rules earlier this spring. Resolutions to stop two of them from becoming effective continued to advance.

Fiduciary Rule. As discussed in our April 11 *Legislate*, congressional reaction to this rule was swift. While Democrats have generally rallied around it, Republicans have denounced it. Specifically, in an effort to stop it in its tracks, House and Senate resolutions were introduced disapproving it under the Congressional Review Act (CRA). (See our May 2 *Legislate* for background on the CRA.) In April, the House passed its resolution. Last week, the Senate approved the House resolution by a 56-41 vote — with three Democrats joining the Republicans. It will now be presented to President Obama for consideration, with a presidential veto all but certain.

Fiduciary Rule

Please see our **April 22** *For Your Information* for an analysis of the rule.

Comment. Overriding the president's expected veto would need approval by two-thirds of Congress, which is unlikely.

Persuader Rule. Congressional reaction to this rule was mixed, with many Republicans voicing opposition. As noted in our April 25 *Legislate*, a CRA challenge was introduced by House Republicans. The Senate did not introduce a related resolution. Earlier this month, the House Committee on Education and the Workforce voted 22 to13 — along party lines — in favor of the resolution to disapprove the rule that applies to arrangements, agreements and payments in connection with collective bargaining representation made on or after July 1, 2016.

Comment. Although this CRA resolution is unlikely to be signed into law, efforts to stop the rule are being pursued through the courts. Believing that the DOL rule impermissibly narrows the long-standing "advice" exemption by expanding the scope of reportable activities under the Labor-Management Reporting and Disclosure Act, several lawsuits challenging the rule have been filed.

Persuader Rule

Please see our **March 28** *Legislate* for an analysis of the rule.

Gig Economy

The House Small Business Committee held two hearings last week to explore the so-called "gig" or sharing economy. As noted by committee Chairman Steve Chabot (R-OH) in his opening remarks, the current Code is "outmoded" and "not designed to accommodate" these new small businesses. (See our February 8 *Legislate* for additional information and background on the sharing/gig economy.)

Four witnesses at the first hearing each provided suggestions, offered encouragement and cautioned against missteps. Highlights from their testimony include:

- Consideration of a moratorium (or "timeout") during which there is a "limited period of legal and regulatory relief [that] would enable platform economy companies to pursue innovative ways to develop," perhaps narrow in scope and "tied to a specific set of issues, including … [employee] benefits"
- Encouragement to "take great care" to ensure that the Code "enables — rather than stifles — the sharing economy"

- Caution against deeming all sharing economy workers as employees, noting that it "would be detrimental" to small businesses
- Contemplation of a "third category of workers somewhere between employee and independent contractor"

The sole witness at the second hearing was a representative from the IRS' National Taxpayer Advocate (NTA). During her testimony, she noted that there is no consensus as to what or who is a contingent worker or freelancer in the sharing economy and that "non-traditional workers make up a significant percentage of the U.S. workforce."

Among other things, the NTA witness recommended that Congress (or the IRS, to the extent applicable) should:

- Create educational materials and resources to support sharing economy participants to improve compliance with the tax rules
- Develop an electronic tool to determine worker classifications that employers can rely on
- Amend the Code to allow both employers and employees to request classification determinations and seek recourse in the Tax Court
- Require a form of "backup withholding" to improve compliance with the tax laws

Looking Ahead

Congress will not be in session this week, with the Senate returning on June 6 and the House on June 7. As both chambers are scheduled to be on recess for most of July and all of August, the remainder of June will be busy. Legislation for mental health parity, ACA repeal/ replacement, PBGC premiums, and multiemployer plans are expected to be in focus and, in some cases, to advance.

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