Legislate®

Key Legislative Developments Affecting Your Human Resources

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Congress in Full Swing; Extended Summer Recess on the Horizon

Against the backdrop of the upcoming presidential election, the summer conventions and congressional recesses, House Republicans released a policy document outlining part of their vision for the future. Meanwhile, focus on the DOL's controversial fiduciary and overtime rules continued while House and Senate appropriations committees considered whether policy riders to block them should be included in their 2017 fiscal year funding bills.

House Republicans Promote Retirement Vision

As they approach the final weeks before their extended summer recesses, House Republican leaders are laying out blueprints for future legislation and public policy initiatives. Last week they released a report — A Better Way to Fight Poverty — with recommendations consistent with the mission statement unveiled earlier this year by the House Republican Task Force on Poverty, Opportunity, and Upward Mobility. Recommendations that would affect employer-sponsored retirement plans, contained in the section on "Building Retirement Security through the Private Retirement System," include the following.

- Reform the multiemployer insurance program
- Prevent PBGC premiums from being set without congressional oversight, but set them at levels that reflect PBGC financial needs and protect retirees
- Ensure that pension plans are well funded and that employers remain in the voluntary pension plan system
- Protect access to affordable retirement advice by rejecting the DOL's fiduciary regulation
- Make it easier for unrelated employers (those without a common bond or nexus) to band together to offer open 401(k) multiple employer plans (MEPs)
- Permit greater reliance on electronic communication

Comment. Retirement security is a front and center topic with the current Congress and the administration. As such, it is no surprise that current legislation and congressional activity address these policy recommendations. The Fiduciary section below highlights certain legislative activity addressing the DOL's controversial final rule for retirement advice. Also, see our April 18 *Legislate* for background on The Pension and Budget Integrity Act (H.R. 4955), a bipartisan bill that would move PBGC premiums "off-budget" and ensure that Congress raises premiums only for purposes related to the pension system. Finally, for more on open-MEPs, please see our February 1 *Legislate*.

Fiduciary Rule Stays Alive

CRA Resolution. A resolution disapproving of the controversial rule, which had been introduced in accordance with the Congressional Review Act (CRA) and passed by the both chambers, was swiftly vetoed by President Obama. (See our May 31 *Legislate* for background on the CRA.) In his view, the DOL's fiduciary (conflicts of interest) rule is necessary to "ensure that American workers and retirees receive retirement advice that is in their best interest, better enabling them to protect and grow their savings." (For background on the rule, please see our April 22 *For Your Information*.)

Comment. Whether the rule can be stopped during the current congress and administration remains to be seen. In the meantime, House Republicans continue to lay the groundwork for changing the rule in 2017. Notably, it is reflected in a recommendation set forth in House Republican's report discussed above.

Fiduciary Rule Challenged in Courts

The DOL's controversial rule is not only being challenged in Congress. In addition to legislative efforts to stop it, the rule is being called into question in at least five recently filed lawsuits. Although the allegations in the complaints vary, it is clear that there is dissatisfaction with the rule and a belief that the DOL has taken action outside its permitted domain.

Policy Rider. The House Appropriations Committee's FY 2017 Financial Services and General Government report addresses SEC issues and expresses concern with DOL's fiduciary rule, but does endeavor to prohibit the DOL from using any funding to implement the rule. However, it remains a concern of certain members of the House and a policy rider may be introduced in the House subcommittee with jurisdiction over DOL or as an amendment when the bill goes to the floor. The Senate subcommittee charged with setting DOL appropriations approved its bill last week without including a rider to block the rule.

Overtime Rule Draws More Fire

When the DOL released the final overtime rule last month — significantly expanding eligibility for overtime pay to more than 4 million white-collar workers — Republicans vowed to take action to nullify it.

CRA Resolution. Last week, with the backing of more than 40 Republican senators, Sen. Lamar Alexander (R-TN) and Sen. Ron Johnson (R-WI) introduced legislation to block implementation of the controversial rule. Known as a joint resolution of disapproval, the bill was introduced in accordance with the CRA.

Comment. Although a joint resolution can — and in this case may — be passed by a simple majority of both the House and Senate, it is not likely to be enacted as it would be met with an almost certain presidential veto. And, an override of such veto, which requires a supermajority of both houses, is unlikely to occur.

Policy Rider. Senate Republican committee members had considered a policy rider to the DOL funding bill that would have blocked the use of funds to implement the rule. Nevertheless, last week the Senate committee approved a bipartisan FY 2017 Labor, Health and Human Services, and Education and Related Agencies (Labor-HHS) Appropriations Bill without such a rider. Looking ahead, an amendment to an appropriations bill could include such a policy rider and one is expected to be offered when the Senate bill comes up for a floor vote. In addition, a policy rider may be introduced by the House subcommittee with jurisdiction over DOL. (For background on the overtime rule, please see our May 18 *FYI Alert*.)

> **Comment.** In addition, Republican members in both chambers are likely to continue their efforts to advance legislation introduced in March that would require the DOL to conduct further economic analysis before the new rule can take effect. (See our May 23 and March 28 issues of *Legislate* for additional background.)

Hearing. Last week, the overtime rule was also the subject of a hearing held by the House Education and the Workforce Committee. The committee explored the potential impact of the rule on workers, small businesses, nonprofits, and colleges and universities.

In his opening statement, Chairman John Kline (R-MN) said that the rule "will do more harm than good, particularly for lower-income workers and younger Americans." Several witnesses expressed the same view, one of whom testified that the rule will "have the perverse effect of forcing many employers to take away the benefits, job security, and opportunities for advancement for those employees who will lose exempt status" and another who stated that it "fails to consider geographic and industry differences."

One witness who testified in support of the new rule noted that its cost to employers of $1.5 billion per year represents only "0.03 percent of our $8 trillion total, national wage bill," and predicted that the overtime rule change "will come to be viewed as an important and positive intervention on behalf of middle-class families."

Blocking Rules with Policy Riders

As noted above for the fiduciary and overtime rules, appropriations bills for funding fiscal year 2017, commencing on October 1, 2016, could include policy riders designed to disrupt effective implementation of other regulations and executive orders. A House or Senate appropriations committee could advance this option.

Other DOL Rules. The Senate FY 2017 Labor-HHS Appropriations Bill approved by the Senate Appropriations Committee currently includes provisions that would block portions of the new DOL rules on the H-2B visa program. However, as noted earlier, neither chamber has introduced any policy riders that would block funding for implementation of other controversial DOL rules, including the persuader rule. (For background on the persuader rule, please see our March 28 and May 23 *Legislate*.)

Federal Contractors. Appropriation bills in both chambers include a provision that denies the administration's request to establish an Office of Labor Compliance to implement Executive Order 13673 (also known as the "Blacklisting" initiative). The order would require public disclosure by federal contractors and subcontractors of any violations of 14 federal labor laws and "equivalent state laws" that occurred within three years prior to procurement of a government contract or subcontract exceeding $500,000. The information could be used to disqualify them from performing federal work. If a contract is awarded, semi-annual contractor updates would also be required.

ACA. The Senate FY 2017 Labor-HHS Appropriations Bill includes a provision prohibiting any funds from the bill to be used to operate the Affordable Care Act's risk corridor program.

Comment. This ACA risk corridor funding prohibition was in the Senate's FY 2016 and FY 2015 Labor-HHS appropriations bills and the final legislation. As previously reported, the House's FY 2017 Financial Services and General Government Bill includes provisions that would interfere with enforcement of certain ACA provisions. (See our May 31 *Legislate* for additional information.)

Looking Ahead

Both chambers will continue to try and advance their appropriations bills in an effort to avoid the need for one or more continuing resolutions to fund the agencies after September 30, the last day of the 2016 fiscal year. In addition, House Republicans are expected to release additional reports on blueprints for future legislation.

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