

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Pressure to Avert Government Shutdown Intensifies as Lawmakers Address Looming Benefits Issues

Congress is focused on fiscal year 2017 funding — despite the ongoing campaigns and upcoming elections — and is considering solutions to deal with the multiemployer pension plan crisis and instability of the Affordable Care Act public marketplaces. Meanwhile, there are renewed efforts to block the DOL fiduciary rule, as well as to change certain elements of the retirement savings landscape.

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Appropriations

The 2016 legislative calendar has been short, condensed and unforgiving. And, although draft appropriations bills have been considered, and in some cases advanced, there is no hope in sight for passing a comprehensive bill to fund the government for fiscal year 2017 (FY 2017) before September 30 — the last day of fiscal year 2016. As such, Congress has turned its attention to passing a continuing resolution (CR) — a stopgap funding measure designed to keep the government operating.

In some ways, 2016 is shaping up to be no different than previous years. Indeed, relying on one or more CRs to keep the government open has become the norm. Since 1977, there have been only four Congresses that did not rely on one or more CRs, the most recent almost two decades ago in 1997. And, since 1997, lawmakers have sent the president an average of six CRs per year to avoid shutdowns.

However, the stakes are high this year with the upcoming presidential and congressional elections. There is little appetite for rushing an appropriations bill through Congress to the president's desk during a lame duck period (i.e., which begins immediately following the November election); however, neither the Democrats nor the Republicans want the next president to focus on government funding issues during the first 100 days in office. As such, any CR for FY 2017 may not extend to mid-December when Congress leaves for recess, as was the case in 2015. Rather, there

Government Shutdown

Please see our [September 28, 2015](#) *Legislate* for guidance on what a government shutdown could mean for employers and employer-sponsored plans. As noted in that issue, the impact — in part arising from furloughs or layoffs — could be extensive, affecting numerous HR operations (such as annual enrollment) and benefit plan operations (such as eligibility to participate and/or to receive a distribution).

is a possibility any CR for FY 2017 will expire (with the passage of a final appropriations bill) before the November 2016 elections or well into 2017 — perhaps to March 2017, but maybe as late as September 2017.

Comment. Please see our [July 11](#) *Legislate* for information on draft appropriations bills for FY 2017. Key provisions for employers relate to the Affordable Care Act (ACA), fiduciaries, overtime, visas, joint employer status, union elections and Indian tribes. Also, our [December 21, 2015](#) *Legislate* contains information on the 2015 year-end legislation, enacted following several CRs, that included provisions impacting employers.

Multiemployer Pension Plans

The pending insolvency of the PBGC's multiemployer pension plan insurance program has been on Congress' radar for many years. The Multiemployer Pension Reform Act (MPRA) in 2014, which permits certain financially distressed multiemployer plans to suspend payment of accrued benefits, was enacted to alleviate some of the concern. However, with the Central States, Southeast and Southwest Areas Pension Plan's attempt to leverage the MPRA and avoid insolvency thwarted by the Treasury Department's rejection of the plan's bid, concern remains at an all-time high. (See our [August 29](#) *Legislate* for background as well as potential options to fix the PBGC's multiemployer program.)

Congress may be ready to address the looming crisis for mining industry plans. Consistent with the commitment made in March by Senate Finance Committee Chairman Orrin Hatch (R-UT), the committee is expected to hold a mark-up later this week of the Miners Protection Act ([S. 1714](#)). It's a bipartisan bill, sponsored by Sen. Joe Manchin (D-WV), designed to save the United Mine Workers of America's multiemployer pension plan benefits and the PBGC from insolvency. Indeed, as the bill provides for funding (considered a bailout by some) from the Abandoned Mine Reclamation Fund — as well as supplemental funding from the Treasury, if necessary — it would not create a financial burden on the PBGC. It may, however, potentially create an expectation for other distressed plans that they too could look to Congress for a "fix" outside of the PBGC insurance system. (For additional information, please see statements prepared by [Sen. Hatch](#) and [Sen. Ron Wyden](#) (D-OR) for the Committee's March 2016 hearing on multiemployer plans.)

Mine Workers: Yesterday and Today

In 1946, President Harry S. Truman brokered an agreement to guarantee miners' lifetime health and retirement benefits, a move that averted a lengthy strike. Last week, in an effort to protect these benefits, the United Mine Workers of America held a rally — "Keep the Promise" — to encourage Congress to pass legislation to preserve their pension benefits.

Composite Plan Legislative Proposal

On Friday, September 9, Rep. John Kline (R-MN), chairman of the House Committee on Education and the Workforce, released a [legislative proposal](#) that would dramatically alter the multiemployer pension plan landscape. The proposal provides a framework designed to reverse, or at least slow, the PBGC's march to insolvency. Specifically, it would authorize a new multiemployer plan structure that combines features from defined benefit and defined contribution plans. Importantly, the so-called "composite plan" — that reflects groundbreaking work done in 2013 by a group led by the National Coordinating Committee for Multiemployer Plans (NCCMP) — would not be eligible for the PBGC insurance guarantee. For additional information on this proposal, please see the [outline](#) and [summary](#). Also, see our [April 30, 2015](#) *Legislate*.

Comment. The House has a related bipartisan bill, the Coal Healthcare and Pensions Protection Act of 2015 ([H.R. 2403](#)), introduced by Rep. David McKinley (R-WV). Like the Senate bill, the House bill would transfer funds from the Abandoned Mine Reclamation Fund, with supplemental payment as necessary from the Treasury, to the United Mine Workers of American Pension Plan. (Please see [Rep. McKinley's press release](#) for additional insights.)

Proposed Overhaul for Retirement Savings

Looking forward to the next Congress that begins on January 3, 2017, Sen. Wyden, ranking member of the Senate Finance Committee, released a draft bill called the [Retirement Improvements and Savings Enhancements \(RISE\) Act](#). This proposal, for purposes of discussion and comment, will serve as a framework for legislation in 2017.

The comprehensive draft bill would affect many aspects of the retirement savings landscape — in both the employer-sponsored plan and individual retirement arrangement spaces. Provisions that would affect employer-sponsored plans include the following:

- Permitting employers to make “matching” contributions to a 401(k) retirement plan on employee student loan repayments — specifically, allow a plan to treat student loan payments the same as elective contributions to a 401(k) plan
- Eliminating Roth conversions for employer-sponsored plans (and IRAs)
- Increasing the required minimum distribution (RMD) age from 70½ to 71 in 2018; to 72 in 2023; to 73 in 2028; and thereafter, adjusting to reflect increases in life expectancy
- Providing an exemption from the RMD rules for those with account balances under \$150,000 as of the date the RMD rules would otherwise apply
- Eliminating lifetime distributions for certain beneficiaries

For additional information, including IRA provisions, please see this [summary](#) provided on the committee’s website and the [explanation](#) provided by the Joint Committee on Tax.

Fiduciary Rule Under Assault Again

On Friday, September 9, Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced legislation that includes a provision to repeal the [DOL’s final fiduciary \(conflict of interest\) rule](#). Specifically, the [Financial CHOICE Act](#) (H.R. 5983), which is focused on replacing the Dodd-Frank Act, would render the DOL’s final rule null and void, causing it to have no force or effect. Furthermore, the bill would prohibit the DOL from publishing a new fiduciary rule until 60 days after the SEC issues one. Next week, the committee is scheduled to consider (and possibly vote) on the bill. (For background on the fiduciary rule, see our [April 22 For Your Information](#). For background on other legislative efforts to block the rule, see our [July 11](#), [June 27](#) and [April 25](#) issues of *Legislate*.)

ACA Individual Mandate Exemption

Although lawmakers are concerned that for 2017 there won’t be enough options available in the public marketplaces, Democrats and Republicans have reacted differently. On one hand, five Democratic senators sent a [letter](#) to Aetna, Inc., questioning the decision to withdraw from 11 of the 15 marketplaces in which they currently participate. On the other hand, Sen. John McCain (R-AZ), along with five Republican co-sponsors, introduced a bill — the Protection from Obamacare Monopolies Act ([S. 3296](#)) — that would exempt from the individual mandate certain individuals who live in a county where no plan, or only one plan, is offered in the marketplace. (For additional background on the bill, please see the [press release](#) on Sen. McCain’s website. For information on exemptions from the individual mandate in place today, see [healthcare.gov](#).)

In addition to legislation sponsored by Sen. McCain, the following bills would broaden the exemption from the individual mandate:

- The Relief from Obamacare Mandate Act of 2016 ([S. 3251](#)) and the Obamacare Tax Relief and Consumer Choice Act ([S. 3297](#))
 - Sponsored by Sen. Tom Cotton (R-AZ)
 - Generally exemption would apply to individuals who live in a state where the average premium for the second lowest cost silver plan (for self-only or family coverage) is more than 10% higher than last year
 - Additional background can be found in this [press release](#)
- The CO-OP Consumer Protection Act of 2016 ([H.R. 954](#))
 - Sponsored by Rep. Adrian Smith (R-NE)
 - Exemption would apply to individuals whose health insurance was terminated due to failure of an ACA co-op (only seven of the original 23 co-ops are currently in operation)
 - Approved last week during a House Ways and Means Committee mark-up
 - Additional background can be found in this [press release](#)



Comment. Even for those (employees) who are exempt from the individual mandate, none of these bills impact the ACA's employer shared responsibility provisions that apply to employers. Specifically, employees exempt from the individual mandate are counted for determining whether an employer is an applicable large employer and subject to a shared responsibility assessment. If an employer does not offer coverage to at least 95% of its full-time employees (and their dependents) and becomes subject to an employer shared responsibility payment, the calculation will be based on the employer's full-time employee workforce, including those who are exempt from the individual mandate.

Time Is Running Out

Congress does not have much time to take action to prevent a government shutdown on October 1 (the first day of the 2017 fiscal year) or advance other legislation before noon on January 3, 2017 (when this Congress finishes and the new one begins). The House is scheduled to be out from October 1 through November 13, and the Senate is scheduled to be out from October 8 through November 13. Both chambers will also be on recess for Thanksgiving and December holiday breaks.

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