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Lawmakers' Year-End Sprint for Savings, Pension and Multiemployer Plan Changes

Although passing a spending bill remains front and center, legislation aimed at changing the retirement landscape shares the spotlight on Capitol Hill.

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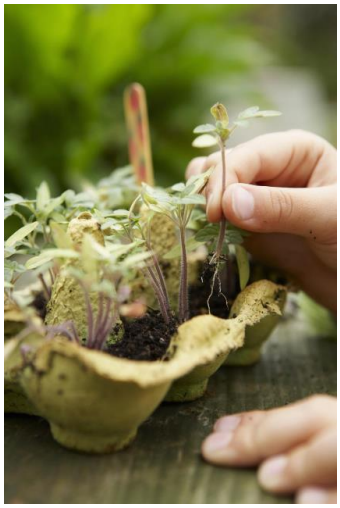
Government Funding



Progress is being made, but oh so slowly, to pass a stopgap spending measure (known as a continuing resolution, or CR) that would avert a government shutdown after September 30 (the last day of fiscal year 2016). Late last week, a CR was released that would provide funding at the current rate of operations for the government through December 9, 2016. If a CR is approved this week, any threat of a government shutdown would be postponed until mid-December, and lawmakers would be able to return to their districts and focus on the upcoming elections.

> **Comment.** The 2015 year-end legislation included a plethora of changes affecting employer plans, including the Cadillac tax delay, permanent transit parity and church plan clarification. (See our December 21, 2015 *Legislate* for more information.) Although we remain in the dark as to whether there will be any last-minute 2016 year-end tax extenders or policy riders to a post-December 9 CR or an omnibus funding bill, we anticipate that there will be one or more. Specifically, we could see congressional efforts to include riders delaying the effective dates of the overtime and fiduciary rules, as well as more substantive provisions that change the landscape of retirement savings, pension and multiemployer plan rules. After the November elections, we will have a better sense of whether the lame-duck session will result in any significant legislation and, if so, what it will be.

Senate Focus on Savings, Pension and Multiemployer Plans

Although it's still September, there are few days left in the 2016 legislative calendar. Nevertheless, Senate Finance Committee Chairman Orrin Hatch (R-UT) is making a push to have savings, pension and multiemployer plan ideas

considered for end-of-year legislation (or, if not this year, for bills introduced in the next congressional term that begins at 12 noon on January 3, 2017). Last week, the committee approved the proposals described below.

Savings Programs. The Retirement Enhancement and Savings Act of 2016 approved by the Senate Finance Committee is quite extensive. For employer-sponsored defined contribution (DC) and defined benefit (DB) plans, key provisions in the bipartisan proposal include:

- **Closed DB plans.** Nondiscrimination relief would be provided for benefit accruals and benefits, rights and features (BRFs) for a closed class of participants under a DB plan; in general, a plan could be combined with the employer's DC plan and permitted to use cross-testing without having to meet any of the necessary thresholds if: (1) for the year the class closed and the two preceding years the plan satisfied the nondiscrimination requirements, (2) either the class was closed before September 21, 2016, or the plan (or predecessor plan) has been in effect for at least five years before the class is closed and, during that five-year period, there has been no substantial increase in the coverage or the BRFs under the plan, other than in connection with certain transactions, and (3) after the class was closed, either no discriminatory amendment is adopted to modify the class or the benefit accruals or BRFs for the closed class, or the nondiscrimination requirements are otherwise met. Importantly, the proposal would provide similar relief for satisfying the minimum participation requirements. (For background on current IRS guidance providing relief for closed DB plans, please see our *FYI Alert* from September 19.)
- **Required minimum distributions.** The rules would be modified for individuals who die with aggregate DC plan and IRA assets in excess of $450,000 (subject to indexing for inflation); specifically, the general five-year after-death rule would apply to the excess unless the designated beneficiary is the decedent's surviving spouse or child under the age of majority, or an individual who is a disabled, chronically ill or not more than 10 years younger than the decedent. Importantly, the change would not apply to DB plans, thus avoiding disruption for typical 10 and 15 year certain and continuous options typically offered by such plans.
- **Automatic enrollment/escalation safe harbor default rate.** The current 10% cap on automatic elective deferrals would be modified so that — after the first year — unless an employee elects otherwise, he or she could be treated as having made an election to defer compensation in excess of 10%.
- **401(k) nonelective safe harbor plans.** The requirement for a written notice of safe harbor status would be eliminated for plans that intend to satisfy the safe harbor with nonelective contributions (as opposed to matching contributions) and plan sponsors would have an extended period to amend a plan to become a nonelective safe harbor plan — including a post year-end period if a 4% nonelective contribution is provided. (For background on mid-year safe harbor plan changes, please see our February 3 *For Your Information*.)

SAVE Act of 2015

The Hatch proposal reflects many provisions included in the bipartisan bill – the SAVE Act of 2105 (**H.R. 4067**) – sponsored by Rep. Ron Kind (D-WI) and Rep. David Reichert (R-WA). For example, this legislation includes provisions that would affect the automatic enrollment safe harbor, the small employer start-up cost credit, the MEP rules, and lifetime income. (Please note that this legislation is not the same as the SAVE UP Act [**H.R. 5731]** that, as described in our **July 25** *Legislate*, would create – and mandate – universal retirement accounts for many employers with employees who lack access to an active workplace retirement savings plan.)

- **Plan loans.** Participants who terminate service with an outstanding loan balance would be eligible to roll over the balance to another qualified plan for an extended period (to the due date, including extensions, for filing the federal income tax return for the tax year in which the outstanding plan loan balance would be treated as distributed by the plan); also, plans would be prohibited from making most loans through credit cards or similar arrangements.
- **Hardship distributions.** The safe harbor rule for hardship distributions would be modified to permit participants to make deferrals and contributions to a plan during the six-month period following receipt of a hardship distribution and to take a hardship withdrawal without first taking any available plan loans; furthermore, hardship distributions could include qualified nonelective contributions and qualified matching contributions (as well as earnings on those contributions and elective deferrals).

Matching Student Loan Repayments

The Hatch proposal does not include a provision permitting employers to make "matching" contributions to a 401(k) retirement plan on employee student loan repayments by treating student loan payments the same as elective contributions to a 401(k) plan. Sen. Ron Wyden (D-OR) has included such a provision in the Retirement Improvements and Savings Enhancements (RISE) Act (a draft bill he released earlier this month); but, he was not successful in having the Hatch proposal amended to include a similar provision. For more information on the RISE Act, please see our **September 12** *Legislate*.

- **Discontinued lifetime income investments.** If a lifetime income investment ceases to be authorized under a plan, it may allow a participant to take a distribution of an annuity contract or make a direct transfer of the investment into an IRA or other qualified retirement plan (even if the participant does not have a distributable event — death, disability, attainment of age 59½, or termination of employment).
- **Lifetime income disclosures.** Benefit statements for DC plans would be required to include an annual lifetime income stream disclosure based on the account balance being paid out as a single life annuity and a qualified joint and survivor annuity; and statements provided in accordance with yet to be published DOL assumptions, guidance and models would not create any risk of liability under ERISA for the plan fiduciary. (In 2015, bipartisan, bicameral legislation — the Lifetime Income Disclosure Act (S. 1317 and H.R. 2317) — was introduced that would require disclosure of such information.)
- **Lifetime income provider selection.** DC plan fiduciaries could assure meeting the "prudent man" requirement when selecting an insurer or a guaranteed retirement income contract under a new safe harbor rule that, among other things, would require the fiduciary to engage in an objective, thorough and analytical search that considers (1) the insurer's financial capability to satisfy the contract obligations, and (2) the contract cost (including fees and commissions) relative to the contract features and insurer's administrative services.
- **Open multiple-employer plans (Open MEPs).** The current DOL nexus requirement would not be a showstopper for a defined contribution MEP so long as the plan for unrelated companies has a "pooled employer provider" (e.g., a person designated as the named fiduciary, the plan administrator and one who would perform all administrative functions to satisfy applicable Code and ERISA requirements) who registers as such and acknowledges fiduciary status; the "one bad apple" rule would be modified so that a tax-qualification failure by one of the employers would not disqualify the plan for all the employers; participating employers would have fiduciary responsibility for selecting and monitoring the pooled plan provider; finally, the DOL would be able to call for simplified reporting for MEPs that cover fewer than 1000 participants as long as no single employer covers more than 100 employees in the plan. The proposal does not cover DB plans.

- **Small employer start-up credit.** The annual nonrefundable income tax credit for start-up costs (permitted for up to three years) for most employers with 100 or fewer employees for adoption of a new plan would increase to the greater of (1) $500, or (2) the lesser of $250 times the number of non-highly compensated employees eligible to participate in the new plan or $5,000 (currently the credit is equal to the lesser of $500 or 50% of the start-up costs). Small employers would also be eligible for an additional annual $500 credit (permitted for up to three years) for adding an automatic enrollment feature to an existing 401(k) plan.

Hatch Proposal – Revenue Effects

The proposal is scored net positive by the Joint Committee on Taxation because the expected costs attributable to its tax and other incentives over a 10 year period would be more than offset by other provisions in the proposal, including those that would increase the minimum penalty for certain late tax return filings. Interestingly, the **estimate revenue effects table of the modified proposal** (but not **the estimate revenue effects table of the original proposal**) includes a line item on accelerating the due date of 2026 PBGC premiums for one month to capture an additional $1 billion of revenue for fiscal year 2026, repeating the trick used in the **Bipartisan Budget Act of 2015** that requires calendar plan year 2025 PBGC premiums be paid no later than September 15, 2025, one month earlier than under current law. (For more information on the Hatch proposal, including the official Joint Committee on Taxation (JCT) summary of the **original** and **modified** proposals, see the **Senate Finance Committee website.**

Coal Miners Multiemployer Pension Plan. The Miners Protection Act (S. 1714) — like the related House bill, the Coal Healthcare and Pensions Protection Act of 2015 (H.R. 2403) — is designed to save the United Mine Workers of America's multiemployer pension plan benefits and the PBGC from insolvency, without creating a financial burden on the PBGC. Specifically, under the bill, federal money would be used to subsidize retiree health care and pension benefits under the plan. The measure was approved by an 18 to 8 vote. (See our September 12 *Legislate* for additional information on this proposal.)

The expected costs attributable to "bailing out" the retired union coal miners would be covered by a provision in the proposal to extend the collection of certain customs user fees for imported goods for approximately 7 months. (For additional information, see JCX-84-16 on the JCT website at www.jct.gov.)

> **Comment.** It is unclear whether successfully clearing the Senate Finance Committee will lead to action on this bill. Although it is thought to enjoy enough support in the Senate to pass, it may not be put up for a vote before the year is over.

House Focus on Multiemployer Pension Plan Reform

The Subcommittee on Health, Employment, Labor, and Pensions of the House's Education and the Workforce Committee held a hearing last week on modernizing the multiemployer pension plan system. The focus was on the "composite plan" proposal, an innovative new benefit structure reflected in a discussion draft provided by Rep. John Kline (R-MN), the committee chairman, and reflected in this summary. (For further background on the composite plan framework, see our September 12 *Legislate*.)

In his opening remarks, Rep. Phil Roe (R-TN), the subcommittee chairman, noted that there has been a focus "on examining and advancing bipartisan reforms" to the multiemployer plan system as the retirement security of many workers is in jeopardy with many plans being "severely underfunded" and the PBGC "headed for insolvency."

Acknowledging that efforts to address the issue are reflected in the Multiemployer Pension Reform Act of 2014, Rep. Roe noted the need to "moderniz[e] the multiemployer pension system for today's workers and tomorrow's retirees" while providing "greater protection for taxpayers." He specifically noted his belief that "further [PBGC] premium increases" are needed.

There were four witnesses at the hearing representing varying perspectives on the strength and weaknesses of the composite plan proposal. Two important issues were raised at the hearing that will need further consideration:

- Limitations on becoming a composite plan: specifically whether composite plan designs should be limited beyond the restriction in the current proposal (that prohibits a critical status plan from electing to become a composite plan) to protect existing underfunded plans from being put in a worse situation due to a reduction of funding
- Premiums: specifically whether they should be increased to shore up and stabilize the PBGC system and whether including a variable component and assessing an exit fee on employers leaving the system would further weaken and threaten the instability of underfunded plans and the PBGC's looming insolvency

PBBC Financial Status

Please see our **August 29** *Legislate* for background on the financial status of the PBGC programs and potential options to fix them.

Looking Ahead

The Senate is scheduled to vote on the CR tomorrow. There is a fair chance that it will advance; but, if not, members of Congress will stay in town to continue negotiating a bipartisan bill with an end goal of keeping the lights on after September 30.

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