

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

Volume 7 | Issue 45 | November 14, 2016

Election Results: Impact on Lame-Duck Session and the Balance of Power

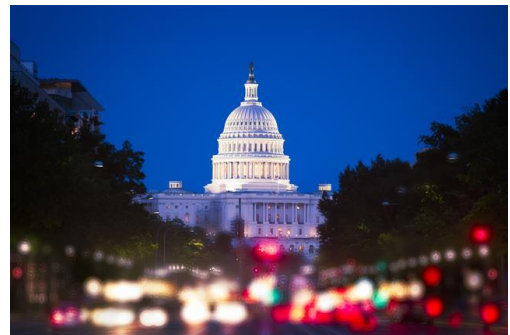
President Barack Obama will pass the reins to Donald Trump in January 2017, and the Republican Party will hold the majority of seats in both chambers of Congress for the next two years. What is unknown at this time is how the election results will affect what transpires during the lame-duck session and beyond. In this issue, we provide insight into both, with focus on a number of matters that hang in the balance, including the Affordable Care Act.

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Lame-Duck Session

Starting today, Congress will focus on passing legislation to keep on the government's lights after December 9. Although Congress passed a continuing resolution earlier this year, it provides government funding only through December 9. (See our [October 3 Legislate](#) for more information.)

During the lame-duck session, some lawmakers may also try to accomplish policy matters. However, they will want to tread carefully. Specifically, they will need to consider whether any such efforts would derail funding discussions and increase the risk of government shutdown. (Our *Legislate* from [September 28, 2015](#) provides information on the potential impact for employers in the event of a government shutdown.) If a filibuster is thrown into the mix, that risk increases exponentially. (Please see [Balance of Power without a Divided Government](#) below for additional filibuster information.)



ACA: Any Changes Now?

President-elect Trump and the congressional Republicans have made clear that a full repeal and replacement of the ACA is one of their top agenda items. However, due to the upcoming balance of power in the newly elected Senate (see [section](#) below), achieving this goal will be quite challenging. And, while President Obama is in office, we can safely say it would be impossible. Nevertheless, there are certain ACA provisions that Congress may try to repeal during this lame-duck session as part of the budget reconciliation process.

Cadillac Tax. The 40% excise tax on “high cost” health care plans is scheduled to be effective for 2020, after Congress and President Obama agreed to a two-year delay. Efforts to fully repeal the tax have been ongoing, with bipartisan and bicameral support. Although a 2016 end-of-year budget bill could include a provision to repeal the tax, if it does, the president is likely to veto it as he did in January 2016. Indeed, it is more likely that Republicans will seek to repeal the tax as part of a 2017 comprehensive tax reform bill that includes, among other things, a cap on the tax exclusion for employer-sponsored health care.

Annual Fee on Health Insurance Providers. The ACA imposes a fee on certain health insurance issuers. The fee was effective starting on 2014, but collection was suspended for 2017. Congress may take steps to extend the moratorium or repeal the provision during the lame-duck session. If no action is taken, the fee will start to be collected again for calendar year 2018.

Excise Tax on Medical Devices. The ACA also imposes a 2.3 percent excise tax on the sale of certain medical devices. The tax went into effect on January 1, 2013, but was suspended for calendar years 2016 and 2017. Congress may seek to extend the suspension or fully repeal it. If no action is taken, the suspension will end and the tax will apply to sales of medical devices beginning January 1, 2018.

Mental Health Parity: Chance to Advance

In the current Congress, there is bipartisan and bicameral support for legislation that would strengthen current mental health parity rules, as well as increase compliance and enforcement. Lawmakers may seek to advance one of the comprehensive mental health bills that include the parity provisions before this Congress recesses or its term ends on January 3, 2017. (Please see our [September 6 Legislate](#) for background on mental health legislation.)

Retirement/Savings: Comprehensive Reform

In late September, the Senate Finance Committee unanimously approved two retirement bills, one that included a plethora of provisions and the other that focused on multiemployer plans for mine workers. Given the bipartisan support for both bills, lawmakers may seek to fast-track these bills, or add certain provisions from them to a funding bill during the lame-duck session:

The Retirement Enhancement and Savings Act. This comprehensive retirement bill addresses many topics, including: nondiscrimination relief for closed defined benefit plans, open multiple employer plans (MEPs), savings limits in automatic enrollment arrangements, lifetime income options, distributions from inherited IRAs and defined

What can/can't be in a budget reconciliation bill?

Drafting a reconciliation bill is not an open invitation to add anything and everything. Indeed, there are restrictions on the type of provisions that may be included in such a bill. Specifically, only provisions that produce changes in federal revenue and spending are permitted. Thus, ACA provisions that do not impact federal revenue or spending cannot be repealed through a reconciliation bill. For example, ACA market insurance reforms, such as the prohibition on eligibility and coverage limitations due to pre-existing conditions, cannot be repealed via this process.

contribution plans, penalties for failure to file plan returns, and the 2026 due date for variable-rate premiums paid to the PBGC. (For additional information on the bill, please see our [September 26 Legislate](#).)

The Miners Protection Act. This bill addresses retirement benefits for mine workers. Like a related bill in the House, the Senate bill would tap federal money to subsidize retiree health care and pension benefits provided under the United Mine Workers of America's multiemployer plan. (For additional information, see our [September 12 Legislate](#).)

Party Leadership

In addition to working on end-of-year legislation, during the lame-duck session Congress will take steps to put leadership plans in place for the 115th Congress that begins in the new year. The speaker of the House, the majority and minority Senate leaders, as well as committee chairpersons and members are yet to be determined. For example, although Speaker Paul Ryan (R-WI) is expected to continue in his current role, some believe he might return to his prior role as chairman of the House Ways and Means Committee to lead the Republican Party's effort for comprehensive tax reform.

Balance of Power without a Divided Government

Although the outcome of the elections will give the Republican Party control of the White House and the majority of seats in both chambers of Congress — the Democratic Party will not be powerless. The Republicans will have leverage to advance their agenda, but senators, both Democrats and Republicans, have tools that can impact whether a bill becomes law. The right to filibuster in the Senate is perhaps the most powerful of all. (Note: House rules do not support the right to filibuster.) The most commonly known form of filibuster is talking non-stop from the Senate floor.

Under Senate rules, 60 votes are necessary to end a filibuster. In the next Congress (which begins on January 3, 2017), Senate Republicans will have fewer than 60 seats. So, for most bills, Republicans will have an insufficient number of votes to pass a motion to end a filibuster launched by the Democrats. It's for this reason that the Republicans will have the majority in the Senate, but will not have what is considered "control" of the Senate.

Comment. Democrats may not need to use the filibuster to thwart Republicans efforts to bring a bill forward. The mere threat of using a filibuster may be enough to discourage Republicans from taking action to advance legislation that is either controversial or does not enjoy bipartisan support. This is because, once a filibuster starts, until it is over Congress is hamstrung and unable to advance other legislation to the floor for a vote.

2017 and Beyond

While congressional Republicans will have more power to effectuate change, there is no expectation that either party will be in a position to achieve all its goals. Reaching across the aisle, compromise and finding common ground will be as necessary in 2017 as it has been in 2016. Indeed, because not all members of each party subscribe to the same viewpoint, to the extent there is some dysfunction in the new Congress, it may be as much about the intraparty division than about the divide between Republicans and Democrats.

Filibuster: It's a Right

For additional information on the right to filibuster, see the Congressional Research Service [report](#); and to learn why the filibuster will forever be connected to Dr. Seuss' children's book *Green Eggs and Ham*, please see our [November 16, 2015 Legislate](#).

In addition to the need for Democrats and Republicans to cooperate for legislation to advance, President-elect Trump's and the Republican Party's visions of change is key to forecasting what's to come. Here are some thoughts and sources to guide plan sponsors:

Trump Objectives. According to his post-election transition [website](#), President-elect Trump intends to “work with Congress to repeal the ACA and replace it with a solution that includes Health Savings Accounts (HSAs).” However, last week he stated that he would consider amending the law, rather than effectuating a full repeal and replacement. Specifically, he noted that he would be in favor of keeping two of the ACA's insurance market reforms: the prohibition on pre-existing conditions limitations and exclusions; and coverage for adult children up to age 26.

Republican Party Platform. As outlined in our [July 25 Legislate](#), the [GOP platform](#) provides insight into the party's potential agenda. In addition to promoting the party's intent to seek full repeal of the ACA, the platform notes its support of health care accounts, both HSAs and health reimbursement accounts. Also called out in the platform is the GOP's desire to implement a cap on the tax exclusion for employer-sponsored health care. As noted above, this would likely accompany efforts to repeal the Cadillac tax.

GOP House Report. Released in six parts and dubbed “A Better Way” — the report is a blueprint for the Republican Party's ideas for the future. Among other things, the report makes clear the party's support of the following:

- Health Care: Continuation of a tax exclusion (subject to a cap) for employer-sponsored health care
- Retirement: Continuation of tax incentives for retirement savings; support for open MEPS
- Fiduciary Rule: Legislation to interfere with effective implementation of rule
- Joint Employers: Efforts to restore labor policy overturned by a recent NLRB decision
- Overtime Rule: Legislation to interfere with effective implementation of rule

Please see our [July 5](#), [June 27](#) and [June 20](#) issues of *Legislate* for additional information on the Republican Party's positions outlined in “A Better Way.”

Compliance – Looking Ahead

Although this is a period of great uncertainty and changes are inevitable, employers should continue to comply with all current rules. For example, plan sponsors should not abandon efforts to timely comply with ACA and other employee benefit plan and workplace reporting and disclosure requirements. Furthermore, employers should prepare to communicate with employees who may be concerned about changes to their company-sponsored benefits in 2017. Employees may wonder, for example, if their employer could modify a health care plan during 2017 to eliminate dependent coverage for adult children or to impose new annual or lifetime limits. Finally, employers should prepare to revisit their 2018 HR and employee benefits strategies as changes in such laws and regulations become clearer.

Comment. After President-elect Trump takes office, there may be a change in agency (including DOL, HHS, EEOC, IRS) enforcement discretion and priorities — even absent legislative or regulatory changes.

Authors

Allison R. Klausner, JD
Sharon Cohen, JD

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