Legislate®
Key Legislative Developments Affecting Your Human Resources

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Spotlight on Government Funding and Future of ACA

The House and Senate returned last week to finish one congressional term and prepare for the next. Putting in place a continuing resolution to fund government operations after December 9 and determining a playbook to dismantle the Affordable Care Act took center stage for the Republicans.

In this issue: Government Funding | Future of ACA | Big Picture: Changing Landscape and Priorities | Looking Ahead

Government Funding

The federal government's fiscal year is October 1 through September 30. In September, to avert a government shutdown on October 1, Congress passed a short-term funding bill (known as a continuing resolution, or CR). However, since this bill provides funding for government operations only though December 9, last week Congress considered another CR to provide funding through March 2017. The expectation is that such a bill will be approved by the current Congress which, in turn, would provide the newly elected 115th Congress and President-elect Donald Trump the opportunity to address funding for the remainder of the 2017 fiscal year.

Post-election: What's next for employee benefits?

Last week we presented a webinar on how the election results may affect employee benefits and labor/employment issues. If you missed it, you can review the **slides** and **recording**.

Future of ACA

The Affordable Care Act (ACA) has been, and continues to be, in the spotlight. As is widely known, congressional Republicans have the majority of seats in both chambers and have vowed to dismantle it.

Quiet Lame-Duck Session

This session started immediately following the November elections and will end on January 3, 2017 when the newly elected Congress is sworn in. Although the current Congress could begin the process of dismantling the ACA, no action taken during this period is expected to affect its core. (See our November 14 *Legislate* for additional information.) By way of example, the ACA's excise tax on high-cost plans (the "Cadillac" tax), employer shared responsibility provisions, and the individual mandate will not be repealed during the lame-duck period. Indeed, if this Congress were to pass a bill with such provisions during this period, it would be vetoed by President Obama with no chance of an override.

Robust 2017

When the newly elected Congress is sworn in, the Republican Party will have, as they do today, a majority of seats in both the House and the Senate. After President-elect Trump is sworn in on January 20, the Republican Party will have control of the White House as well. So, should Congress successfully pass legislation to repeal the ACA, in full or in part, it is likely that the bill would become law.

Repeal and Replace

During 2017, the Republicans will keep the spotlight on writing a playbook to repeal and replace the ACA. As we noted in our November 14 *Legislate*, any replacement law would, in all likelihood, maintain some or all of the ACA insurance market reforms. For example, the ACA market reform protections like the prohibition on pre-existing conditions and coverage for children up to age 26 would continue.

The timing and roadmap for any repeal and replacement of the ACA is not yet determined, and employers should not expect such actions to be simultaneous. Discussions with congressional staffers suggest that significant portions of the ACA will be repealed shortly after Trump's inauguration. However, the implementation of any such repeal would not be immediate. Rather, steps to dismantle the ACA provisions affected by any repeal would be delayed and gradually implemented, as will be necessary for an orderly transition from the ACA to the replacement framework.

Employer Reporting Obligations

The employer mandate generally requires applicable large employers (ALEs) to offer affordable, minimum value, health coverage to substantially all of its full-time employees and their dependent children or be potentially liable for one of two nondeductible assessments payments (penalties). (For background on the employer mandate, please see our August 29 *For Your Information*.) In connection with this mandate, ALEs also are subject to certain reporting requirements. (For background on these reporting requirements, please see our December 29, 2015 *FYI Alert*.)

Congress has not taken, and is not expected to take, any action that would affect employers' 2016 reporting obligations. However, the IRS issued a notice last Friday, extending the due date for ALEs to furnish individuals with Forms 1095-C and 1095-B from January 31, 2017 to March 2, 2017. Importantly, the due date for filing the 2016 Forms 1094-B, 1095-B, 1094-C or 1095-C with the IRS has not been extended and remains February 28, 2017, if not filing electronically, or March 31, 2017, if filing electronically. Whether these reporting obligations will continue after this year is yet to be determined. However, it's expected that such reporting will continue for any years that the ACA's employer mandate remains in place. Thereafter, employer reporting obligations may continue, albeit in a different format, to reflect whatever framework is implemented to replace the ACA.

Cadillac Tax

Employers can expect that the Republican Party will make concerted efforts in 2017 to repeal the 40 percent excise tax on "high-cost" plans. Implementing a cap, or eliminating the tax exclusion for employer-provided health coverage, may accompany such efforts. Indeed, numerous Republican-sponsored bills would cap or eliminate this tax exclusion. (See our June 6 *Legislate* for additional information.) Likewise, it would be consistent with the House GOP's blueprint — "A Better Way." (See our July 5 *Legislate* for additional information.) However, President-elect Trump may favor keeping the tax exclusion without modification and leveling the playing field for individuals who purchase coverage outside of an employer setting by providing them with a tax deduction or tax credit.

Big Picture: Changing Landscape and Priorities

After 2016, the employee benefits landscape is likely to change with the Republican Party setting the agenda. Indeed, they will be in a strong position with the majority in the Senate and House, as well as control of the White House and the executive agencies and commissions — including the IRS, DOL, HHS, EEOC and PBGC. The changes are likely to be those outlined in the House GOP's blueprint — "A Better Way." (Please see our July 5, June 27 and June 20 issues of *Legislate*.)

In addition to a changing landscape, we are likely to see a shift in priorities. This is primarily due to the Republican Party's view that:

- Numerous actions taken by the Obama administration reflect agency overreach
- Regulations should be "minimally intrusive"
- The agencies and commissions should respect the "authority of Congress to write legislation and define agency authority"

As such, during 2017 employers can expect:

- Reversal of some of President Obama's executive orders
- Efforts to withdraw, modify, re-propose or delay regulations
- Fewer regulations issued
- Diminished enforcement efforts

> **Comment.** Despite the likelihood for significant change, until it occurs, employers are encouraged to comply with all existing mandates. Compliance efforts should not wane simply because changes may occur or enforcement efforts may diminish in the future. Indeed, although agency priorities may shift, and enforcement efforts may be modified, in certain situations, employers should be aware that individuals may have a private right of action to seek enforcement.

Looking Ahead

Congress is on recess again and will return on Monday, November 28. In all likelihood, a continuing resolution to fund the government's operations through March 2017 will be approved and signed into law by December 9. In such event, Congress will likely adjourn through the end of the year, with no additional activity until the newly elected Congress is sworn in on January 3, 2017.

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