

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

Volume 7 | Issue 47 | November 28, 2016

President Obama's Legacy Hangs in the Balance

The federal government's three branches — legislative, executive and judicial — are intended to provide checks and balances amongst each other. However, after power in the executive branch is transferred to President-elect Trump and his administration, there will be some interesting developments that impact President Obama's legacy, serving as an additional check across time. In this issue, we focus on the future of the overtime rule, the fiduciary rule, and the Affordable Care Act, all of which are ensnared in litigation, as well as the recently released unified agenda that identifies regulatory priorities.

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Checks and Balances

The US Constitution created three branches of federal government, each with separate powers, to ensure that none has unfettered power.

Legislative Branch

The power of this branch, which resides in the House and the Senate, is to introduce and pass legislation. In 2017, members of the Republican Party will hold a majority of seats in both chambers and, as such, will be in the coveted position to define the legislative agenda during a Trump presidency. However, as discussed in our [November 14 Legislate](#), the right to filibuster will enable Senate Democrats to influence the agenda and the outcome of introduced legislation.

Executive Branch

The power of this branch is vested in the president. He has the power to sign, or veto, bills passed by Congress and to issue executive orders to clarify existing law. Charged with carrying out the president's responsibilities on a day-to-day basis are members of the Cabinet (heads of 15 executive departments, including HHS, DOL and Treasury, who are appointed by the president and confirmed by the Senate) and leaders of other federal agencies and commissions. These agency leaders help the executive branch direct how laws are interpreted.



Judicial Branch

The power of this branch resides in the Supreme Court as well as numerous lower district and appeals level courts. They provide a forum for the law to be interpreted and for disputes and controversies to be reviewed and decided. In addition to determining whether a law has been breached and, if so, what remedy is appropriate, the courts also address issues related to whether a matter is properly left to the states, and, in certain situations, whether a state law impermissibly encroaches a federal law. For example, the court may determine whether a state law relates to ERISA and is subject to federal preemption.

Potential Impact to Obama Legacy

An incoming Congress and administration has the power to undo the decisions of the outgoing one. Indeed, the framework of all three branches provides opportunity to adversely impact the long-term staying power of actions taken by the prior Congress and administration. By way of example in the employment context, President Obama would be rightfully concerned with whether the newly issued overtime and fiduciary (conflicts of interest) rules, as well as the Affordable Care Act (ACA), are in jeopardy and soon to be undone. Moreover, he and his administration may be appropriately wary of efforts by both the current and newly elected Congress to unravel efforts he views as accomplishments and to impede the completion of work that is scheduled to be done, yet remains unfinished.

Overtime Rule

Earlier this year, the DOL issued a new overtime rule that would more than double the minimum salary threshold for a white-collar exemption from federal minimum wage and overtime pay requirements, as well as automatically adjust the threshold every three years beginning in 2020. (See our [May 18 FYI Alert](#).) Prior to the lame-duck session, efforts were launched to halt the rule from becoming effective on December 1. Legislation to block the rule was introduced and lawsuits were filed by more than 20 state attorney generals, as well as by a large business coalition. (See our [October 20 For Your Information](#).)

Last week, a court issued a nationwide preliminary injunction halting the rule from being effective as scheduled. (See our [November 23 FYI Alert](#).) Whether the rule survives in the long term is yet to be determined. The rule could be permanently undone if the court, upon a review on the merits, determines that the DOL exceeded its authority; Congress passes legislation to block it; or the DOL modifies the current regulation, following a lengthy and arduous notice and comment period.

Fiduciary Rule

After a protracted procedural history, in April 2016, the DOL issued a final rule (effective in June 2016 and applicable starting in April 2017) on ERISA fiduciary investment advice and conflicts of interest. Discontent with the final rule, however, has prompted challenges on many fronts. Republican-sponsored legislation could block the DOL from implementing the rule; and, there are numerous lawsuits to block it. (For background on the fiduciary rule, see our [April 22 For Your Information](#). For background on legislative efforts to block the rule, see our issues of *Legislate* from [September 19](#), [July 11](#), [June 27](#) and [April 25](#).)

Although neither the legislation nor the litigation is likely to stop the fiduciary rule before the newly elected Congress is sworn in, continued efforts to derail the rule, via legislation, regulation or litigation, may be successful. First, the newly elected Congress may reintroduce the bills from the current Congress. Should one advance, the soon-to-be President Trump may indeed sign it. Second, President-elect Trump has made clear his intention to “identify and eliminate unnecessary regulations that kill jobs and bloat government,” and his administration may identify this as one of

those rules. Third, as the litigations proceed, the Trump administration may drop its defense of the regulation, permitting interference of the rule without resorting to congressional or regulatory action.

Comment. Despite the three-prong approach that may be harnessed to stop the rule before the April 2017 applicability date, President-elect Trump may not want to do so in light of his preference for policies that will “rebuild the middle class.” It’s yet to be seen whether he will agree with the [April 2016 White House press release](#), that states the rule will “save affected middle-class families tens of thousands of dollars for their retirement over a lifetime of savings.”

Affordable Care Act

Repealing and replacing the ACA is a top agenda item for congressional Republicans, and President-elect Trump may be inclined to sign any legislation designed to accomplish this. However, the Trump administration could take additional actions to garner support from congressional Democrats to chart a path to dismantle the law in a least disruptive manner. For example, with respect to the House lawsuit alleging misuse of federal money to reimburse insurers for providing cost-sharing subsidies to low-income individuals who enroll in health care coverage on a federal or state exchange, the Trump administration may take a different strategic path than the Obama administration. (At this time, the [lower court’s decision](#) that federal funds are being improperly used for the ACA’s subsidy program is stayed, and the House has requested that action on the appeal be delayed until February 21, 2017.)

Pending Rules and Actions

Earlier this month, the House passed, the [Midnight Rule Relief Act](#) (H.R. 5982), a bill that would simplify and ease the ability of President-elect Trump, after taking office, to overturn regulations that were issued during the last 60 legislative days of the current Congress. Although this bill has not yet been considered by the Senate and would be vetoed by President Obama, the House’s introduction of the bill sends a clear message: agencies should not issue any new regulations during the remainder of the lame-duck session.

To the extent that the agencies heed this message, the activities listed in the [Fall 2016 Unified Agenda](#) (a publication that identifies regulatory priorities) may be sidelined during the lame-duck session. In addition, depending on the Trump administration’s 2017 priorities, the following regulatory activities from the agenda may be derailed or delayed:

- [Revisions of the Form 5500 Series, and related ERISA rules](#): Finalization of the efforts to modernize and improve the IRS Form 5500. (See our [August 4 For Your Information](#).)
- [Amendment to Claims Procedure Regulation](#): Modification of the rule to “strengthen, improve, and update the current disability benefit claims and appeals process” required by ERISA. (See our [February 24 FYI Roundup](#).)
- [Final HHS Rule Related to Expatriate Health Plans and Lifetime and Annual Limits](#) and [Treasury Guidance on Expatriate Health Plans, Qualified Expatriates, and Expatriate Health Plan Issuers](#): Provides guidance related to a variety of matters, including the Expatriate Health Coverage Clarification Act of 2014. (See our [July 21 For Your Information](#).)
- [Excise Tax on High Cost Employer-Sponsored Health Coverage](#): Provides guidance on the so-called Cadillac tax (currently delayed until 2020).
- [Savings Arrangements Established by Political Subdivisions for Non-Governmental Employees](#): Expansion of the DOL guidance for state-run retirement programs to certain cities and counties. (See our [August 29 For Your Information](#).)

- [Nondiscrimination Relief for Closed Defined Benefit Plans](#): Modification of the nondiscrimination requirements applicable to certain defined benefit plans and defined contribution plans that provide additional benefits to a grandfathered group of employees. (See our [September 26 Legislate](#) for additional background on congressional efforts to provide relief.)
- [Use of Lump Sum Payments to Replace Lifetime Income Being Received by Retirees Under Defined Benefit Pension Plans and Lump Sum Payments After a Restriction Period](#). (See our [July 10, 2015 FYI Alert](#) for additional background.)

Two of the above DOL regulations (claim procedures and expansion of savings arrangements) nonetheless have just been submitted to the Office of Management and Budget (OMB) for clearance — leaving the next step in the drama to OMB.

Looking Ahead

As Congress continues its efforts to pass a continuing resolution to fund the government's operations after December 9 and avert a government shutdown, other work will be done behind the scenes to identify legislation to be introduced — or reintroduced — as soon as the newly elected Congress is sworn in on January 3, 2017. Meanwhile, the Trump transition teams are taking steps to secure appointments and determine congressional, regulatory and judicial priorities. Indeed, lest we forget, nominating and confirming a Supreme Court justice is high on the priority list.

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