

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

US

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Flurry of Activity, But No ACA or HR Changes Yet

Last week, although Republican lawmakers took steps to advance their agenda to repeal and replace the Affordable Care Act, there have been no legislative or regulatory changes. In the meantime, a second Senate hearing was held to vet nominee Rep. Tom Price as HHS secretary, and appointments were made for key leadership positions at the EEOC and NLRB.

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ACA – Front and Center

There are a handful of issues that Congress and President Trump are focused on, and one of the most important to both is health care reform. As such, we are seeing a flurry of activity in this domain.

Status Quo, For Now

Congress and the Trump administration took actions that could affect the Affordable Care Act (ACA) including:

- Numerous bills and proposals to advance health care reform
- An executive order authorizing actions to minimize the regulatory burdens of the ACA
- A memorandum to effectively freeze regulatory activity

Notwithstanding this, no legislation repealing or replacing the ACA has been passed. The law and guidance thereunder remain intact.

Comment. Unless and until there is a legislative or regulatory change, or official subregulatory guidance is issued granting specific relief from any ACA requirements, employers are encouraged to fully comply with all applicable ACA provisions, as well as its regulations and subregulatory guidance. In particular, they should proceed with the expectation that the law will be enforced and that penalties will be imposed if they fail to (1) satisfy the employer shared responsibility requirements, and (2) timely and, in good faith, complete and submit IRS Forms 1094 and 1095. (For additional information on the executive order and the memorandum, please see our [January 23 Legislate.](#))



Executive Order – Any Impact?

Holding true to his campaign promise, Mr. Trump signed an executive order on the ACA shortly after taking office; however, the beneficiaries and impact of the order are not crystal clear. The order may not trigger any specific relief for employers in their capacity as plan sponsors because it may not be broad enough. Indeed, many stakeholders are specifically identified in the order – including states, “individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance” and others – but, not employers. Moreover, even if the order extends to some employers (perhaps, by way of example, those that provide health insurance under a self-insured arrangement), it is far from certain what “authority and discretion” the administration has – absent legislative or regulatory change – to “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose cost, fee, tax, penalty, or regulatory burden” on an employer. (For additional information on the executive order, please see our [January 23 Legislate](#).)

What to Expect, and When

Last week, House and Senate Republicans retreated to Philadelphia to focus on their legislative agenda and establish a game plan and timeline to achieve it. However, as they emerged from those meetings, two things became clear: change will not happen quickly and the blueprint for moving forward remains uncertain.

Nevertheless, a possible path forward that seems to be gaining support is the following two-step process:

- Partial repeal of the ACA via the budget reconciliation process (for provisions related to revenue, such as the Cadillac tax and the penalties relating to the individual and employer mandates), but only after there is a consensus among Republicans for legislation designed to protect the health insurance marketplace from unnecessary disruption
- Full repeal, during the regular (not budget reconciliation) legislative process, but only after there is a solution for an ACA replacement bill that is likely to garner a sufficient number of votes from both Republicans and Democrats for enactment

Comment. Although Republican lawmakers don’t appear to be focused on protecting the employer-sponsored health insurance system, there is no reason to believe that they will seek to dismantle it. Indeed, House Speaker Paul Ryan’s (R-WI) health care policy blueprint – A Better Way – makes clear that the Republicans’ vision includes preservation of the system. (For additional information, please see our [June 27, 2016 Legislate](#).)

In the meantime, two Republican-sponsored legislative proposals that do not provide for a full repeal of the ACA are as follows:

- The [Patient Freedom Act of 2017](#). Introduced by Sen. Bill Cassidy (R-LA) and Sen. Susan Collins (R-ME). Additional information may be found in this [summary](#) and [section-by-section](#) analysis.
- The [Obamacare Replacement Act](#). Introduced by Sen. Rand Paul (R-KY). Additional information may be found in this [press release](#) and [section-by-section](#) analysis.

In addition, three Congressional Democrats have introduced comprehensive health care legislation.

[Consumer Health Options and Insurance Competition Enhancement Act \(CHOICE Act\)](#), which, as expected, would not repeal and replace the ACA. Rather, it is designed to “increase the choices available to consumers shopping on the health insurance exchanges.” Additional information may be found in this [press release](#).

Comment. While Republicans and Democrats have introduced bills relating to the ACA, four congressional committees missed a self-imposed January 27 deadline (included in the approved budget resolution) to draft legislation repealing the ACA. There are no penalties for missing the deadline. (For additional background, see our [January 16](#) and [January 9](#) issues of *Legislate*.)

Administration – Taking Shape

The vetting of President Trump’s nominees for cabinet positions is moving along at a ragged pace. Although some have been confirmed, his nominees for secretary of DOL and HHS are still in progress. In the meantime, there have been some important appointments for EEOC and NLRB leadership:

- **DOL.** Mr. Andrew Puzder, nominee for secretary of labor, has not yet appeared before the Senate Health Education, Labor and Pensions (HELP) Committee. His confirmation hearing, which has been delayed several times as the committee awaits submission of his paperwork, is currently scheduled for February 7.
- **HHS.** Rep. Tom Price (R-GA) appeared at a hearing held last week by the Senate Finance Committee, providing lawmakers a second opportunity to delve into his qualifications for secretary of HHS, as well as his views on the future of health care reform and President Trump’s executive order to minimize the burdens flowing from the ACA. Notably, when asked to make certain commitments about what actions he would take as secretary if confirmed, including what actions he would take in accordance with the executive order, Rep. Price often responded with a statement that he would “carry out the law of the land.”

Comment. With the Republicans holding the majority in the Senate, Rep. Price is expected to be confirmed along party lines, without any Democrats voting in his favor. (See our [January 23](#) *Legislate* for information relating to the Senate Health, Education, Labor and Pensions (HELP) Committee confirmation hearing for Rep. Price.)

- **EEOC.** Victoria Lipnic was [appointed](#) by President Trump to serve as the agency’s acting chair. She has served as an EEOC commissioner since 2010.

Comment. Acting Chair Lipnic was one of two EEOC commissioners who voted against controversial changes to the annual Employer Information Report EEO-1 (EEO-1 report) that will require employers with 100 or more employees to provide summary pay and total hours worked data starting with the 2017 filing, due on March 31, 2018. It remains to be seen whether, as a policy matter, she will seek to reverse or at least revise the expanded EEO-1 reporting requirements. (See our [October 6, 2016](#) *For Your Information*.)

- **NLRB.** Philip A. Miscimarra was [appointed](#) by President Trump to serve as the Board’s acting chair. He has served as a member since 2013.

Comment. Acting Chair Miscimarra was one of two Board members who dissented in the controversial *Browning-Ferris Industries of California Inc.* [decision](#) that turned upside down the NLRB’s longstanding standard for determining joint-employer status. It remains to be seen whether the Trump Board, once it’s filled, or Congress, will seek to overturn that decision and reinstate the prior standard finding joint-employer status only if each of two or more employers has “actual, direct, and immediate” control over essential terms and conditions of employment. (For additional background on the *Browning-Ferris* decision, see our [March 21, 2016](#) *Legislate*.) Other controversial Board decisions that may be revisited include the *Specialty*

Healthcare ruling that allowed micro-unit organizing and *D.R. Horton* ruling that invalidated mandatory arbitration agreements barring employees from pursuing class or collective claims.

Looking Ahead

This week, the flurry of activity continues with the following House and Senate hearings to examine various aspects of the ACA and the health care ecosystem:

- House Education and the Workforce Committee: “Rescuing Americans from the Failed Health Care Law and Advancing Patient-Centered Solutions”
- House Energy and Commerce’s Subcommittee on Health: “Patient Relief from Collapsing Health Markets”
- House Oversight and Government Reform – Subcommittee on Health Care, Benefits and Administrative Rules: “Fraud, Waste and Abuse under the Affordable Care Act”
- Senate Health, Education, Labor and Pensions Committee: “Obamacare Emergency: Stabilizing the Individual Health Insurance Market”

In addition, congressional lawmakers will continue to introduce bills affecting employer-sponsored plans, and President Trump and the administration may issue additional executive orders. One topic that may be addressed this week is the DOL’s new fiduciary rule. Specifically, executive action may be taken to delay the April 2017 applicability date. (For additional background, see our [January 9 Legislate](#).)

Authors

Allison R. Klausner, JD
Sharon Cohen, JD

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