

## Health Care Reform, Fiduciary and Other Agency Rules Impacted by Trump’s Actions and Directives

In this issue, we highlight significant actions taken by the president that have the potential to dramatically alter the employee benefits system or otherwise affect employers.

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### Trump and His Administration

President Donald Trump continues to put his stamp on the presidency – through nominations, executive orders and more. Below are select highlights that may affect employers.

#### Executive Order and Memorandum

Last week, President Trump and his administration issued a handful of directives, including a memorandum about the fiduciary rule and an executive order on regulatory activity across all executive agencies.

#### Fiduciary Rule

On Friday, the president issued a memorandum directing the DOL to examine the fiduciary rule and, if it determines that “it may adversely affect the ability of Americans to gain access to retirement information and financial advice” or that it is “inconsistent” with the Trump administration’s priorities, then the DOL is further directed to take action (in accordance with the notice and comment requirements in the Administrative Procedures Act) to rescind or revise the rule.



**Comment.** Early reports on Friday suggested that the directive would include a 180-day delay in the rule’s applicability dates, but the final memorandum posted on the White House website does not include this instruction. Nevertheless, a delay may still occur. Indeed, the DOL issued a [statement](#) that it “will now consider its legal options to delay the applicability date...” Finally, it is important to note that the fiduciary rule may be permanently blocked by either judicial action (because it is currently being challenged in court) or by Congress (because Republican lawmakers are expected to

introduce – or re-introduce – bills to modify, repeal or block the rule from becoming applicable). For further background on congressional efforts to block the rule, see our [November 28, 2016](#) *Legislate*.

## Regulatory Reform

Last week, President Trump issued an [executive order](#) on agency regulations. The breadth of this order, like that of the [ACA related executive order](#) and the [memorandum on regulatory activity](#) issued by the White House Chief of Staff (both of which are discussed in our [January 30](#) and [January 23](#) issues of *Legislate*), is far from clear.

### Purpose; House GOP Blueprint

The executive order, dubbed the “2-for-1” order, is designed to reduce the number of regulations and the costs associated with them, by requiring that for every one new regulation or guidance issued, two will be eliminated. The order is consistent with the House GOP blueprint – [A Better Way](#) – released by Speaker Paul Ryan (R-WI) and his task forces in 2016. For example, the report makes clear the House GOP’s view that:

#### Two-for-One

In President Trump’s own words, the order makes clear that he aims to ensure that “the only way you have a chance” for a new regulation to be adopted will be “to knock out two regulations.”

- “[a]gencies should write regulations only when necessary, make them minimally intrusive, [and] stay within the legal mandate...”
- “[w]hen regulating, agencies must take into account all costs – direct and indirect ... [and] consider the cumulative impacts of their actions.”

### Scope and Rules of the Road

In time, a fuller understanding of the 2-for-1 order will become known. However, in the meantime, employers will want to consider the following:

**Broad and Narrow.** On one hand, the new executive order appears to be quite broad. In addition to applying to regulations, it may (as determined on a case-by-case basis) apply to other “significant guidance or interpretive documents” – such as subregulatory guidance. On the other hand, the order is somewhat narrow because it seems to permit rulemaking outside the bounds of the order if the rulemaking is specifically directed in a law.

**Executive vs. Independent Agencies.** The order applies to regulations and guidance by “an executive department or agency” – such as the DOL and HHS. And, according to the [interim guidance](#) issued by the Office of Management and Budget (OMB) on Friday, the order does not apply to “significant regulatory actions of independent agencies.” However, the OMB guidance does “encourage independent regulatory agencies” to comply with the order.

**Cost/Guidance Needed.** The order requires, subject to some limited exceptions, adherence to complex cost-related rules that may handcuff executive agencies from taking swift action. The order provides that:

- For 2017 regulatory activity “in progress” – “the heads of all agencies are directed [to ensure] that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero...”

- Beyond 2017, the executive order requires that “any new incremental costs associated with new regulations... be offset by the elimination of existing costs associated with at least two prior regulations.”
- During a fiscal year, “[n]o regulations exceeding the agency's total incremental cost allowance will be permitted ...unless required by law or approved in writing by the Director.”

The interim rules include some implementation guidance. According to the order, more guidance will be issued on measuring and estimating regulatory costs, identifying which regulations the 2-for-1 order covers and would count as new or offsetting, and accounting for and managing costs and savings that occur at different times or relate to more than one agency.

**Comment.** The combination of President Trump’s 2-for-1 order, the ACA executive order, and the regulatory freeze memorandum may (1) thwart President Trump’s objective to reduce the number and cost of regulations, (2) interfere with efforts by the Trump administration to take action to reverse what they view as agency overreach by the prior administration and, as a result (3) cause Republicans to resort to congressional or judicial action to achieve their goals. For example, if the nationwide court-issued injunctions for the overtime rule or the persuader rule are lifted, the Trump administration may have no recourse to withdraw or modify them unless and until the DOL complies with the executive order or Congress passes legislation to interfere with them.

## Supreme Court Nominee

President Trump has nominated Judge Neil M. Gorsuch to fill the late Justice Antonin Scalia's seat on the Supreme Court.

## Process

Absent a change in Senate rules, at least 60 Senate votes in his favor will be necessary for Judge Gorsuch to be confirmed.

**Comment.** Despite Judge Gorsuch’s exemplary qualifications, Senate Democrats might challenge his nomination because Senate Republicans refused to consider former President Barack Obama’s nomination of Judge Merrick Garland. (For background, see our [February 29, 2016](#) *Legislate*.) Thus, unless there is a change in Senate rules – an idea floated by President Trump and one that may be considered by Senate Majority Leader Mitch McConnell (R-KY) – even if all 52 Republican Senators cast a vote in support of his confirmation, a minimum of eight Senate Democrats would need to as well.

## Views

During the Senate confirmation process, Judge Gorsuch’s judicial and other views will be under scrutiny. He is known to be an “originalist” or “strict constructionist” (like the late Justice Scalia) in terms of how he interprets and applies the Constitution. However, what may be less known is his view on the deference accorded government agencies (such as the EEOC, NLRB, and HHS) when carrying out authority delegated by Congress.

Based on Judge Gorsuch’s opinions, it appears that he does not support the so-called “Chevron deference” doctrine that essentially stands for the principle that federal agencies are entitled to deference when interpreting ambiguous statutes. Indeed, in one court opinion, Judge Gorsuch suggested that agency overreach is a violation of the Constitution and that the Chevron deference doctrine permits executive agencies to “swallow huge amounts of

core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”

**Comment.** The NLRB’s *Browning-Ferris Industries of California, Inc.* [decision](#), which dramatically changed the NLRB’s long-standing joint-employer standard and is currently pending before the DC Circuit, may make its way to the Supreme Court. If Judge Gorsuch is confirmed, he may have the opportunity – and be inclined – to overturn the Board’s decision given his reported views on judicial deference to administrative agencies and regulatory overreach. (See our [September 25, 2015 For Your Information](#) for background.)

## Budget

With all the actions taken by the president in his first weeks in office, one due today that he has not taken is to submit a budget request to Congress. Although other presidents have missed this statutory deadline – for which there is no penalty – during their first year in office, Trump’s failure to do so may have a ripple effect.

If President Trump does not submit a budget soon, the delay could jeopardize Congress’ ability to reach agreement to:

- Fund the government after April 28
- Avert a government shutdown on April 29
- Provide protection for certain retired coal miners’ health benefits and retirement benefits

(For background on the continuing resolution that provides government funding, as well as protection for retired miners’ health, but not pension, benefits through April 28, please see our [December 12, 2016 Legislate](#).)

## Congress

Lawmakers in both chambers were very busy – taking, planning and avoiding action!

### HHS Nominee

The Republican members of the Senate Finance Committee voted last week and advanced President Trump’s nomination of Rep. Tom Price (R-GA) as secretary of HHS to the full Senate for consideration. Remarkably, the committee vote took place only after suspending the rule that required at least one member of the minority party (e.g., Democrats in the current Congress) to be present. The full Senate is expected to confirm his nomination without support of any Democrats.

### ACA Hearings; Open Questions

Efforts to repeal and replace the Affordable Care Act (ACA) didn’t advance last week, despite numerous congressional hearings. (See our [January 30 Legislate](#) for background.) Some key yet unanswered questions for which Republican lawmakers cannot agree nor reach a consensus are:

- Will health care reform be part of, or independent from, comprehensive tax reform?
- Will the budget reconciliation process be leveraged to advance repeal of the ACA tax and revenue-related provisions?

- Will the tax exclusion for employer-sponsored health care coverage be capped without a repeal of the so-called Cadillac tax (the deductible excise tax on high-cost plans scheduled to take effect in 2020)?
- Will the ACA be repealed in full, or rather fixed and repaired, as suggested by House Energy and Commerce Committee Chairman Greg Walden (R-OR), Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN), and Sen. Ron Johnson (R-WI)?

**Comment.** Notwithstanding the uncertainty as to what change will occur and the roadmap to get there, lawmakers know that change must be implemented in a manner that will not harm the health care ecosystem. As such, whatever changes are ultimately agreed upon, and whenever they become effective, employers may anticipate a delayed applicability date and a long runway for implementation. In the meantime, employers should plan for, and not abandon, compliance with the ACA.

## Health Care Reform Bills

Lawmakers continue to introduce health care-related legislation – with some designed to serve as vehicles for comprehensive reform and others to protect or change narrow, but significant, ACA provisions.

The American Health Care Reform Act of 2017 ([H.R. 277](#)), introduced by Rep. Phil Roe (R-TN), is a comprehensive bill that provides for a full ACA repeal and is gaining traction among Republican lawmakers. Among other things, it would eliminate the tax exclusion for employer-paid health insurance, replacing it with a standard deduction, and dramatically expand the use of health savings accounts (HSAs). (For additional background on this bill and others, please see our [January 9 Legislate](#).)

One of the recently introduced, narrowly tailored, bills is the Guaranteed Health Coverage for Pre-Existing Conditions Act of 2017 ([H.R. 628](#)), sponsored by Rep. Rodney Davis (R-IL). This legislation would provide coverage protection for individuals with pre-existing conditions.

**Comment.** In all likelihood, health care reform will be done piecemeal – with portions of the ACA being replaced one at a time.

## Looking Ahead

While lawmakers from both chambers will focus on health care and tax reform, Senators will dedicate time to the confirmation process as they still need to vet numerous nominees, including Andrew Puzder, Chief Executive of CKE Restaurants, for secretary of DOL and Judge Gorsuch for Supreme Court justice. In addition, Senate Republicans will likely explore the pros and cons of changing the Senate rules to permit confirmation of a Supreme Court justice with a simple majority (51 votes) rather than 60 votes. At the same time, Senate Democrats will be evaluating whether to cross party lines and support Judge Gorsuch's nomination, perhaps in part, to increase the chance that Democrats will not lose congressional seats during the 2018 mid-term elections.

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