CONDUENT

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Key Legislative Developments Affecting Your Human Resources US

Volume 8 | Issue 30 | August 7, 2017

Dealing with Failed Attempts to Repeal ACA

Following Republican Senators' failed attempts to repeal the Affordable Care Act, Senators from both sides of the aisle remained in DC. They focused on the impending threat to the stability of the ACA marketplace should funding for cost-sharing reduction payments cease. They also worked on charting a new, bipartisan path for health care reform.

Fate of the CSR Payments

As discussed in our prior issues of *Legislate*, the continued funding of cost-sharing reduction (CSR) payments are in jeopardy. (For more background on CSR payments, please see our July 31 issue.) Not only has a trial court found an absence of congressional authorization necessary for funding these payments, but President Trump has threatened to stop them (purportedly to hasten the collapse of the Affordable Care Act, or ACA).

That said, certain stakeholders (such as states, insurance companies or participants), with a legal (and economic) interest in the matter, have come forward, cautioning that they would seek judicial intervention should funding dry up. Moreover, following the Senate's failure last month to pass any of the three iterations of an ACA repeal bill (see our July 31 *Legislate* for background), lawmakers from both sides of the aisle are calling on the president to continue the payments while they seek a bipartisan approach to stabilize the ACA individual marketplace and work collaboratively to reform the health care ecosystem. (See Fixing the ACA below for more information on these bipartisan efforts.)

Fixing the ACA

Republicans and Democrats in both chambers seem to have turned a corner and are interested in finding common ground to build a stronger and better health care ecosystem. Indeed, rather than holding firm to their campaign commitments to repeal and replace the ACA, Senate Republicans have agreed to hold bipartisan hearings on health care. Specifically, the Senate Health, Education, Labor, and Pensions Committee, chaired by Sen. Lamar Alexander, R-Tenn., and the

Senate Finance Committee, chaired by Sen. Orrin Hatch, R-Utah, will hold hearings upon return from recess the first week of September.

Meanwhile, dozens of House Republicans and Democrats – the House Problem Solvers Caucus co-chaired by Rep. Tom Reed, R-N.Y., and Rep. Josh Gottheimer, D-N.J., – have joined together and unveiled a proposal to address a handful of ACA issues and concerns. Three of the five provisions in the proposal could affect employers (one directly and two indirectly).

Employer Shared Responsibility (Mandate)

The ACA's employer shared responsibility provisions require certain large employers (known as "applicable large employers" or ALEs) to either offer minimum essential coverage that is "affordable" and that provides "minimum value" to their full-time employees (and their dependents), or be subject to a penalty. Generally, an ALE is an employer with at least 50 full-time (or full-time-equivalent) employees in the prior calendar year. For this purpose, a full-time employee works (or is credited with) at least 30 hours of service per week (or 130 hours of service) during the calendar month.

The bipartisan proposal would decrease the number of applicable employers subject to this mandate. According to Rep. Dan Lipinski's, D-Ill., press release, it would do so by raising the 50-employee threshold "to businesses of 500 or more employees." As such, it appears to be aimed at providing some relief to small employers.

> **Comment.** Under the ACA (and relevant guidance), ALEs are subject to the employer shared responsibility mandate and the information reporting provisions. While the press release outlines suggested changes to the ACA, it does not include specific legislative language and does not mention information reporting. Thus, it's unclear if corresponding reporting relief (e.g., filing IRS Forms 1094 and 1095) would also be granted to these smaller employers.

Under the proposal, "the definition of 'full time' would be revised to 40 hours."

> **Comment.** The ACA provides that a full-time employee is one who has, on average, at least 30 hours of service per week during the calendar month. This 30-hour threshold has been a significant issue for many employers, impacting not only employer-provided health coverage, but also workforce decisions as well as other welfare benefit plans. Raising the hourly threshold for full-time employment presumably would reduce the exposure to shared responsibility mandate assessments for many employers and could be a change welcomed by the employer community. (Note that IRS regulations specify 130 hours of service in a calendar month as the monthly equivalent for a 30-hour work week. Presumably, if the proposal gains traction and becomes law, the IRS would adjust the regulations to incorporate the new statutory threshold.)

Pre-Existing Conditions

The ACA includes a strict prohibition on charging individuals with pre-existing conditions higher premiums. The bipartisan proposal would incent insurance companies to provide them with coverage. As noted in Rep. Tom Suozzi's, D-N.Y., press release, the proposal would "create a dedicated stability fund that states can use to reduce premiums and limit losses for providing coverage—especially for those with pre-existing conditions."

> **Comment.** Providing coverage for those with pre-existing conditions has been a hot button as GOP lawmakers have tried to repeal the ACA. For employers, the outcome of this issue is important as they are

> prohibited under HIPAA from varying coverage and cost for those with pre-existing conditions. If the law permits insurers to charge higher premiums in the individual marketplaces based upon a person's health status, employers may find themselves bearing a greater portion of health care costs.

CSR Payments

The House lawmakers' bipartisan proposal would address the CSR payments issue discussed above. As noted in Rep. Lloyd Smucker's, R-Pa., press release, it would "bring the payments under the Congressional oversight and appropriations process and ensure that they have mandatory funding."

> **Comment.** This proposed provision would be consistent with the BCRA. That bill (which failed to pass the Senate) would have authorized funding from the Department of Treasury (Treasury) for CSR payments through 2019. Presumably, this provision would receive the support from Senate Majority Leader Mitch McConnell, R-Ky., as he remarked that, if the Senate failed to pass an ACA repeal bill, a next step would be to pass legislation to provide stability to the health care exchanges.

For more information on the bipartisan proposal, please see the three press releases noted above.

September Pressure Cooker

After a one-week delay, the Senate has joined the House on summer recess. When lawmakers from both chambers return after Labor Day, they will be under great pressure to pass two significant bills: one to raise the debt ceiling before the Treasury exhausts its borrowing authority (currently thought to be September 29), and another to fund government operations after September 30 and stave off a government shutdown on October 1 (the first day of the 2018 fiscal year). It will be quite a challenge for Congress to accomplish both those action items. With regard to the latter, Congress may fall back on a continuing resolution (or CR), perhaps with a rider authorizing Treasury to fund the CSR payments that are in jeopardy of being discontinued.

> **Comment.** Republicans fought off efforts by the Democrats to include a rider in the current CR (that expires on September 30) to fund the CSR payment. However, given the state of play (e.g., the GOP's failure to repeal the ACA and the pending collapse of the ACA marketplaces along with the damage it would cause to the entire health care ecosystem), Republican lawmakers may agree to such a rider in the upcoming funding bill (which is likely to be another CR). If so, the next challenge for Congress would be to convince President Trump not to veto it or, if he does, to override the veto with support from two-thirds of both chambers. (For background on the current continuing resolution passed to secure funding for the current fiscal year, please see our May 1 *Legislate*.)

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