

Legislate[®]

Key Legislative Developments Affecting Your Human Resources US

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Lawmakers Consider Health Care Landscape and Joint Employer Standards

Some senators reached across the aisle to pursue bipartisan solutions to stabilize the health care insurance market while other senators introduced significant, comprehensive bills to overhaul the health care landscape. Meanwhile, House members discussed a bill that would restore a prior standard for determining joint employment.

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Health Care Hearings

Last week, how – and whether – to shore up the small and individual health insurance marketplace was the subject of numerous conversations on the Hill. To some degree, they repeated those that took place the prior week. Indeed, all four September hearings held by the Senate Health, Education, Labor and Pensions (HELP) Committee focused on:

- Cost-sharing reduction (CSR) payments
- A reinsurance program
- Federal standards/guardrails and the push for a streamlined waiver process for state innovations

Please see our [September 11](#) *Legislate* to learn how the outcome of these discussions might impact employers and plan sponsors. For additional information, including statements by the chairman and ranking member, and testimony by witnesses, see these HELP committee Web pages: [September 12 hearing](#) and [September 14 hearing](#).

Comment. Although there is clear bipartisan support for continuing CSR payments – at least on an interim, short-term basis – the senators may have a tough road ahead. On one hand, if a bill provides funding for such payments, Republican backing may wane unless it also includes greater flexibility for the states to secure Section 1332 waivers. On the other hand,



support from Democrats may be lost if the bill includes such flexibility. Indeed, Sen. Lamar Alexander, R--Tenn., has voiced his concerns that a stand-alone bill providing funding for CSR payments is akin to a bailout while Sen. Elizabeth Warren, D-Mass., has made clear that any efforts to relax the 1332 waiver rules would need to be carefully crafted to ensure that the consumer protections achieved via the ACA insurance market reforms are not lost. (For information on Section 1332 waivers, see our [May 30 Legislate](#).)

Comprehensive Health Care Bills

Democrats and Republicans introduced competing bills to radically change the health care landscape.

Medicare for All

Sen. Bernie Sanders, I-Vt., along with 16 Senate Democrats, introduced a bill – [Medicare for All Act of 2017](#) – that would create a national health insurance program by extending the current government-provided insurance to all Americans. Although it would immediately expand Medicare for seniors and certain people with disabilities, the proposed government-run, single-payer program would be implemented in phases with persons under the age of 35 not impacted until the fourth year of implementation.

Comment. Despite having the support of one-third of the Senate Democrats, the bill is unlikely to advance this term. Not only does the GOP hold the majority, the legislation is not backed by two key Democrats: Minority Leader Nancy Pelosi, D-Calif., and Sen. Chuck Schumer, D-N.Y. Nevertheless, Sen. Elizabeth Warren, D-Mass., a co-sponsor of the bill and strong ally of Sen. Sanders, made abundantly clear that support of the bill will not undermine efforts to protect the ACA and “defend it at every turn.”

For additional information, please see Sen. Sanders’ prepared [remarks](#), as well as his [executive summary](#) and [summary by title](#).

Graham/Cassidy ACA Repeal and Replace

Despite Senate Republicans’ three attempts earlier this year to pass comprehensive health care legislation to repeal the ACA, Sen. Bill Cassidy, R-La., and Sen. Lindsey Graham, R-S.C., introduced yet another iteration of a [health care overhaul bill](#). The bill would repeal the cost-sharing reduction subsidy program as of December 31, 2019, but does not include any provision on how to pay for the program.

Many provisions in their bill mirror those seen in the American Health Care Act (AHC), the House-passed bill, as well as the Better Reconciliation Care Act (BCRA) – an ACA repeal and replace bill, the Obamacare Reconciliation Repeal Act (ORRA) – an ACA repeal-only bill, and the Health Care Freedom Act (HCFA), often referred to as a “skinny bill” – all of which failed to garner enough support to pass the Senate.

Taxes

The Graham/Cassidy bill would repeal many of the ACA’s tax-related provisions including:

More on Graham/Cassidy

For additional information on the Graham/Cassidy bill, please see the [summary](#) and [FAQs](#) released by Sen. Cassidy. And, our prior issues of *Legislate* include background on the following bills: [May 8](#) for the American Health Care Act; [July 17](#) and [June 26](#) for the BCRA; and [July 24](#) for the ORRA.

- Penalties associated with individual and employer mandates, but not employer shared responsibility provisions
- Exclusion of over-the-counter medications obtained without a prescription from definition of qualified medical expenses
- Elimination of deduction for expenses allocable to Medicare Part D retiree drug subsidy

The legislation would not, however, provide relief from the 40% excise tax on high-cost plans – known as the Cadillac tax – which is currently delayed to 2020.

HSAs

The legislation would dramatically expand health savings accounts (HSAs). Among other things, it would:

- Raise maximum contribution limits
- Relax rules for spouses seeking to make catch-up contributions to the same HSA
- Permit HSA funds to be used to pay for:
 - Over-the-counter medications without a prescription
 - Primary care services when coverage is restricted to those services in exchange for a fixed periodic fee or payment for such services
 - Qualified medical expenses incurred up to 60 days before an HSA was established

Comment. With no support from Democrats and the lower 51 vote threshold for passage expiring at the end of the month, at least 50 of the 52 Senate Republicans would need to coalesce around the bill for it to pass by the end of September.

For additional information, please see this [summary](#) and Sen. Graham's [press release](#).

Joint Employer Hearing

Last week, two House Education and Labor Committee subcommittees held a joint legislative hearing on the Save Local Business Act ([H.R. 3441](#)). Introduced by Rep. Bradley Byrne, R-Ala., the bill would clarify the treatment of two or more employers as joint employers under the National Labor Relations Act (NLRA) and the Fair Labor Standards Act of 1938 (FLSA). (See our [August 21 Legislate](#).) It would effectively overturn the NLRB's controversial 2015 *Browning-Ferris Industries of California Inc.* ruling by restoring the board's traditional "direct and immediate control" standard for joint employment and codifying it in both the NLRA and FLSA. (See our [September 25, 2015 For Your Information](#) for more detail on the Obama board's *Browning-Ferris* decision.) The bill currently has 63 co-sponsors, including some Democrats.

Comment. The board's composition is shifting to a Republican majority. Once the full Trump board is in place, it is likely to look for opportunities to reverse a number of the Obama board's decisions. If this legislation fails to advance, it will be up to the new board or the courts to keep or roll back the NLRB standards for determining joint employment.

For additional information, please see this [press release](#), [fact sheet](#) and [summary](#).

Looking Ahead

Although the Senate is in session this week, the House is on recess. Whether the Graham/Cassidy bill is put up for a floor vote remains to be seen. Republicans do want to repeal the ACA, but they also do not want a fourth failed attempt.

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