

## The Possible Implications for Some HR Laws and Regulations of a President Trump and a Republican Congress

For the next two years (assuming the Electors in the Electoral College vote according to their states' directions on December 19<sup>th</sup>), a President Trump bolstered by majorities in both the House and Senate could be expected to make a large number of legislative and regulatory changes that would impact HR, employers, and employees nationally. Only two days after the election, here are some of the possible changes signaled during the 2016 campaign and in various white papers offered by Congressional staffers.

### *The ACA*

The ACA, also known as Obamacare, was a major talking point during the campaign. Donald Trump states at his website, "On day one of the Trump Administration, we will ask Congress to immediately deliver a full repeal of Obamacare." From a practical standpoint, while he can certainly do so, it might be difficult for Congress to oblige. The Senate majority is not filibuster-proof. However, there are a number of ACA items that could be changed or eliminated via budget reconcilia-

tion, a process limited to items that directly impact revenues and expenditures, without a single Democratic vote. Budget reconciliation is subject to very strict procedural and substantive limits. The ACA list that budget reconciliation would be allowed to address could include the elimination of the individual mandate to purchase coverage; premium tax subsidies on the Exchanges; the employer pay-or-pay rules for Applicable Large Employers; the expansion of Medicaid coverage for adults up to 138 percent of the federal poverty level; the ACA's medical device tax; the reinsurance fees; the Cadillac tax; and the additional Medicare tax on wealthy individuals. However, many parts of the ACA cannot be changed via budget reconciliation, including all of the insurance reform provisions of the Act. These include the bans on preexisting condition exclusions; health status underwriting; caps on annual and lifetime dollar limits for Essential Health Benefits; the metal tiers (*i.e.* bronze, silver, gold, and platinum-level plans); age underwriting restrictions (the age bands), and coverage for children under the age of 26 on their parents' plans. Any of those changes unable to be accomplished via budget reconciliation would require significant negotiation with Senate Democrats in order to avoid a

filibuster, so are unlikely to be immediately repealed.

This could create a difficult dilemma for both the new President and Congress. If the parts of the ACA that can be eliminated via budget reconciliation are in fact trashed, but the remaining parts of the ACA that would require legislation to pass both the House and Senate are not, there will be significant tax and spending distortions that could very significantly add to the federal budget and overall health care costs in this country. If the new Congress continues its policy of “pay-fors,” meaning any increase in spending must be offset by tax increases, it’s hard to discern how this can be accomplished without a very significant tax increase, anathema to many Republicans. Or Congress could just say “never mind” and ignore its “pay-fors” policy.

Further complicating this scenario is that any repeal and/or replace would take months or years to implement, since regulations and guidance would need to be issued to address all of the changes.

Bottom line: Don’t expect the ACA to go away on January 20, 2017. For employers, plan on continuing to do the new annual reporting on IRS 1094s and 1095s for the 2016 calendar year in 2017 (due much earlier than 2016’s transition relief periods). And for now,

continue to follow the law and rules relating to the ACA until further notice.

### *The New DOL Fiduciary Rule*

This one will be interesting to watch. While a senior adviser to the Trump campaign singled out this rule as “the dumbest rule in the last 50 or 60 years,” candidate Trump has never spoken about it, nor is there anything on his website concerning the rule. As you’ll recall, it is scheduled to take effect on April 10, 2017. This regulation is very unpopular with the financial services industry, as many individuals and firms will now become fiduciaries if they service IRAs or qualified retirement plans such as 401(k)’s. In fact there are a number of lawsuits filed in federal district courts around the country seeking an injunction on the regulation’s implementation. On such lawsuit failed earlier this month in the Washington DC district, but at the time of this writing others are still pending.

Bottom line: It is nearly impossible that the DOL could pull the regulation prior to April 10<sup>th</sup> nor could it subject it to changes, a comment and subsequent review period prior to that date. Compounding the difficulty for a new administration is that the enforcement of the rule as written lay not with the DOL but through private legal action. For now, plan on continuing to implement the new fiduciary rule on its April 10<sup>th</sup> effective date.

### *Other Retirement Plan Changes?*

There are many competing proposals in Congress that could either enhance or threaten the existing private retirement system enjoyed by tens of millions of employees. Some of these include an expansion of eligibility to make IRA contributions; rewriting the rules regarding 401(k) automatic enrollment and other safe-harbor notices; and enabling nonrelated employers to form Pooled Employer Plans (PEPs) to lower administrative and plan formation costs. Threatening possibilities include eliminating Roth conversions; eliminating the stretch-IRA enabling an individual to easily pass IRA assets upon death to children and grandchildren; and creating Bush-era proposals for employee and/or employer savings accounts that replace employer-sponsored retirement plans. While candidate Trump didn't specifically address any of these; various staff proposals in this year's Congress have contemplated them. Whether a President Trump would or would not support any of these is a question right now.

### *The FLSA Overtime Rule*

The DOL issued new regulations earlier this year that, among other things, increased the salary levels for white collar exemptions to \$47,476 beginning on December 1, 2016. Since Mr. Trump will not be inaugurated prior

to that date, you can fully expect that barring the success of any of the court challenges now in play, the new regulation will indeed go into effect on that date. Next year, while it is possible that the rule could be changed, it is hard to see how it could be rolled back once individuals are reclassified from exempt to non-exempt status. What a new DOL could do is to amend the rule to eliminate automatic indexing of the minimum salary amount to maintain a white collar exemption (slated to begin after three years). This of course does require a public comment period and would be subject to the Regulatory Flexibility Act provisions, but there is much more time in which to accomplish this amendment.

Bottom line: continue to implement the overtime rule changes in time for the December 1, 2016 effective date.

### *Paid Parental Leave*

One of candidate Trump's proposals was for six weeks of paid parental leave for mothers (not for adopting parents nor for fathers). The proposal also left in doubt whether a single mother would receive paid leave since the plan outlined on the candidate's website only provided paid leave if "the marriage is recognized under state law." Trump's proposal received widespread media attention since out of 41 developed countries in the world, only the US does not provide some form of paid

parental leave for employees with newborns. While President Obama did in fact also call for paid parental leave in his 2014 State of the Union Address along with a request for \$2 billion for the states in order to start their own programs, Congress never took up any legislation to implement such a plan.

### *Summary*

Employers should expect much activity from a President Trump and a new Congress in 2017 on items impacting HR and benefits. Stay tuned.

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