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After ACA “Repeal and Replace” Effort Fails, What’s Next For Employers on Health Care and Other Workplace Policy Issues?

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Last month began with significant momentum but long odds that Senate Republicans would pass legislation repealing and replacing the Affordable Care Act (ACA). In the early hours of July 28, GOP efforts came to a screeching halt as a last-ditch “skinny” repeal bill failed, all but ending the seven-year quest to overturn the sweeping health care law. Meanwhile, efforts to seat new members to the National Labor Relations Board and the Equal Employment Opportunity Commission slowly moved forward, as did legislative and regulatory attempts to curb the prior administration’s labor and employment agenda. This month’s Insider Briefing explains how health care reform efforts failed, discusses the status of the ACA and how it could still be altered, reviews the latest regulatory efforts to shape labor and employment law in the new administration, and outlines what Congress managed to accomplish before the August recess and what’s in store for it when it reconvenes.

“Skinny” ACA Repeal

In the dramatic 49-51 vote on July 28, Republican Senator John McCain (R-AZ) joined Senators Lisa Murkowski (R-AK) and Susan Collins (R-ME) and all Democrats in opposing the skinny bill amendment, titled the Healthcare Freedom Act. Senate Majority Leader Mitch McConnell (R-KY) had hoped that the amendment repealing only targeted portions of the ACA would be the least common denominator garnering enough support to pass the Senate and initiate a conference with the House to negotiate a final legislative package. The suspense-filled vote at 1:30 a.m. capped a months-long effort by congressional Republican leaders and the White House to find consensus within the party for overhauling the ACA. The gap between conservative and moderate factions of the party ultimately proved to be too wide to bridge.

The Healthcare Freedom Act, which would have

eliminated the penalties on the ACA's employer mandate though 2024, was offered after the Senate rejected a more comprehensive ACA repeal and replace plan as well as a separate straight repeal amendment. The Healthcare Freedom Act was narrower in scope than the House-passed [American Health Care Act](#), which the Congressional Budget Office (CBO) estimated would result in 23 million more uninsured people in 2026 than under current law. The CBO projected that, by contrast, the Healthcare Freedom Act would have increased the number of uninsured by 15 million next year and an additional million by 2026, a number that still undermined support for the proposal.

In the wake of the failed Senate vote, congressional Republican leaders expressed their desire to move on from the ACA to other legislative matters, namely tax reform. However, many uncertainties remain about the ACA and its implementation. ACA-related legislation may still make its way to the legislative calendar in the months ahead. The apparent end of the congressional effort to repeal and replace the ACA through the budget reconciliation process, which would have required only a simple majority vote to pass the Senate, has given rise to discussions about potential bipartisan legislation to stabilize the individual insurance market. Senator Lamar Alexander (R-TN) and Senator Patty Murray (D-WA) [announced](#) that the Senate Health, Education, Labor and Pensions committee will hold bipartisan hearings on shoring up the ACA exchanges.

Health insurers face a September 27 deadline to decide if they will offer individual plans through the ACA exchanges in 2018 and, if so, how much to charge. Complicating this decision is the uncertainty about whether the administration will continue to fund "cost-sharing reduction" payments to insurance companies that participate in the ACA exchange to help cover cost-sharing and deductibles for low-income individuals and families.

Pressure for bipartisan legislation to fund the cost-sharing reductions, currently the subject of a House lawsuit challenging their validity, will likely continue to rise. This could be the vehicle for additional ACA-related changes. But any such changes would require 60 votes to pass the Senate and Democratic support may also be needed for any measure to pass the House. Legislation to repeal or further delay the "Cadillac" excise tax on high-cost plans

and to limit the scope of the employer mandate may become part of the effort.

Although a push for Congress to make targeted changes to ACA provisions of most concern to employers may accompany this broader legislative effort, employers should not bank on a legislative reprieve from the ACA's requirements. With the failure of the repeal effort and the uncertainty of any future legislative action, focus has shifted to the executive branch. Action by the executive branch to shape the ACA's implementation requirements could come in various forms – from regulatory changes and sub-regulatory guidance to enforcement policy aimed at easing ACA's burden. For employers eyeing their ACA obligations, the ACA remains the law of the land. Yet, the shape of their obligations may well change under the Trump administration and its goal, as articulated in President Trump's [executive order](#), to reduce regulatory burdens. Although the Republican effort to repeal the ACA may be at an end, the debate over health care and its impact on employers will no doubt continue.

National Labor Relations Board

Most of the attention in the weeks leading up to the congressional August break was on health care. However, there were some notable labor and employment-related developments during this time. On August 2, the Senate voted 50–48 to confirm Marvin Kaplan to fill an open seat on the National Labor Relations Board (NLRB). Kaplan has served as Chief Counsel for the Acting Chair of the Occupational Safety and Health Review Commission since August 2015. Upon his confirmation, Senate HELP Committee Chairman Lamar Alexander issued a [statement](#) that: "After years of playing the role of advocate, the NLRB should be restored to the role of neutral umpire. I'm hopeful that Mr. Kaplan will help restore some balance to the labor board to ensure stable labor relations and free flow of commerce."

The Senate HELP Committee held a hearing on Kaplan's nomination and that of Littler Shareholder William Emanuel on July 13. The committee favorably reported both nominations on July 19. A Senate vote on Emanuel's nomination is expected after the Senate returns from the August break. Meanwhile, the current Chair of the NLRB, Philip Miscimarra, has announced he is opting out of another term, and will depart when his current term ends in December.

Congressional Activity

Congress will have a full agenda of nominations and legislative activity when it returns after Labor Day. President Trump has called upon Congress to send him a tax reform bill by November, an aggressive timetable. Congress has yet to pass a budget resolution, which is needed if the budget reconciliation process is going to be used to pass tax reform with a simple majority vote in the Senate. In addition, a vote on the debt ceiling looms. Funding bills for FY 2018 are on the list of must-pass legislation, although a final package is not likely until year-end. The House Appropriations Committee [approved](#) the FY 2018 Labor, Health and Human Services funding bill on July 19.

The bill provides a total of \$10.8 billion in discretionary appropriations for the Department of Labor (DOL), which is \$1.3 billion below the fiscal year 2017 enacted level. The bill also includes a new provision prohibiting enforcement of the DOL's controversial "fiduciary" rule. On July 7, the DOL's Employee Benefits Security Administration (EBSA) published in the Federal Register a Request for Information on various questions related to the fiduciary rule, signaling that regulatory changes to the rule are forthcoming. Most recently, in court filings related to an ongoing challenge to the fiduciary rule, the DOL on August 9 indicated that it will propose delaying portions of the rule's implementation until July 1, 2019.

Congressional opponents of the rule continue to seek legislative means to overturn or modify the rule. The Appropriations Committee was not the only House Committee taking aim at the rule. The House Education and Workforce Committee likewise [approved a bill](#) to repeal the rule and replace it with a disclosure-based best interest advice standard. The Affordable Retirement Advice for Savers Act passed out of the Committee on July 19 on a party-line vote and now moves to a full floor vote in the House.

The House Appropriations Committee-approved bill also included a policy rider targeting a controversial NLRB decision. The Committee adopted an amendment offered by Rep. Andy Harris (R-MD) prohibiting the NLRB from enforcing the interpretation regarding "micro unions" in the *Specialty Healthcare* decision. The amendment was adopted on a voice vote. The prospect for these or other policy riders making their way into a final appropriations

bill remain to be seen. Their fate likely will be determined in high-level negotiations among congressional leaders of both parties and the White House.

Joint Employment

Outside of the appropriations process, standalone legislation was recently introduced taking aim at another controversial NLRB decision, the 2015 *Browning-Ferris* ruling. In the 2015 decision, the Board broadened the test for determining joint employment and assessing liability under the National Labor Relations Act (NLRA), upending long-standing precedent and creating uncertainty for the business community. The standard shifted from one where the purported joint employer exercised "direct and immediate" control over the other entity's employees, to a much looser "indirect" control standard.

On July 27, the [Save Local Business Act](#) was introduced in the House by Representatives Bradley Byrne (R-AL) and Henry Cuellar (D-TX), among others. The bipartisan bill would amend two labor and employment statutes to clarify when an entity can be deemed a "joint employer." Introduction of the legislation followed a July 12 hearing held by the House Education and Workforce Committee on the need for legislation to redefine the joint-employer standard.

At the hearing, witnesses from the employer community urged Congress to craft a legislative solution to simplify the law on joint employment. The Save Local Business Act does that by amending the definitions of the term "employer" as used in the NLRA and the Fair Labor Standards Act (FLSA). Specifically, the bill states that a person may constitute a joint employer as to an employee "only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment." At a press conference held with small business owners and workers, Rep. Byrne [stated](#), "under this bipartisan legislation, workers, and the businesses they work for, will be given much needed clarity and certainty."

The bill is notable for its bipartisan co-sponsorship, a rarity for most labor-related bills. Sufficient bipartisan support would be needed to pass the 60-vote threshold in the Senate. If the bill does pass both Chambers of Congress, President Trump is expected to sign it.

Regulatory Agenda

In addition to legislative proposals to reverse the Obama administration's labor and employment agenda, the first [regulatory agenda](#) released by the Trump administration indicated that changes to the prior administration's workplace policy initiatives will move through regulatory channels as well.

The updated 2017 Unified Agenda of Regulatory and Deregulatory Actions lists agency regulatory priorities for the near term and longer term. The latest agenda is not only much less aggressive than the prior agenda in terms of its new rulemaking plans, but also sets forth plans to review and reverse or modify a number of controversial Obama-era rulemakings.

The DOL's latest regulatory agenda seems in keeping with President Trump's signed Executive Order (EO) 13771, *Reducing Regulation and Controlling Regulatory Costs*, and EO 13777, *Enforcing the Regulatory Reform Agenda*. The latter EO provides that federal agencies must decide which of their existing rules are outdated, unnecessary, or ineffective, and take corrective action. Among the rules that the DOL has targeted for review, possible revision, or rescission include the Wage and Hour Division's (WHD) white collar overtime regulation, the EBSA's fiduciary rule, the Occupational Safety and Health Administration's (OSHA) rule setting new limits on occupational exposure to crystalline silica, and the Office of Labor Management Standards' (OLMS) changes to the "advice" exemption of the Labor-Management Reporting and Disclosure Act, otherwise known as the "persuader" rule.

The regulatory agenda indicated that the WHD planned to issue a "Request for Information" (RFI) on the overtime rule in July 2017. On July 25, the Agency did just that, [announcing](#) its request for input from the public before issuing revised proposed overtime exemption regulations to address, most significantly, the minimum salary level required for exempt status.

In seeking public comment, the Department

acknowledges stakeholder concerns that the salary level set in the 2016 regulations "was too high" and invites public comments on the 2016 final rule. The DOL seeks comments on a number of questions, such as: Would updating the 2004 salary level for inflation (which excluded from the exemption roughly the bottom 20% of salaried employees in the South and in the retail industry) be the appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? The RFI also asks for information on the impact of the 2016 rule. Responses to these questions will no doubt be used to shape revisions to the 2016 rule. Thus, employer community feedback is critical. Comments are due September 25, 2017.

The Equal Employment Opportunity Commission (EEOC) is also evaluating its existing regulations pursuant to the White House directive laid out in EO 13777. The EEOC has asked the public to help an agency task force, formed pursuant to the EO, evaluate whether any job bias regulations should be repealed, replaced, or modified. The Regulatory Reform Task Force will try to identify rules that inhibit job creation, have costs that outweigh any benefits, or otherwise are inconsistent with administration objectives, according to a notice recently posted on the EEOC's website.

In other EEOC news, Janet Dhillon's nomination to be the new Chair of the EEOC has been sent to the Senate, although the timing of her confirmation is unclear. A hearing on her nomination has not yet been set. President Trump announced that he would nominate Daniel Gade to fill the other remaining open seat on the five-member Commission. Once these seats are filled, changes to regulations identified by the task force as well as to the agency's guidance are expected.

August may be a relatively quiet month in Washington. But employers can expect an accelerating pace of regulatory changes – and perhaps some legislative ones – when Congress returns in September.

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