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INSIDER BRIEFING

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A Taxing Year Races to the Finish Line

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As the Thanksgiving holiday approached, Republican lawmakers in both chambers of Congress made progress toward their singular legislative priority to enact comprehensive tax reform. Facing uncertainty in the 2018 midterm elections, GOP lawmakers are under enormous pressure to pass a tax reform bill before year-end.

Tax Reform and the Affordable Care Act Update

The tax bills that emerged from the House of Representatives and the Senate Finance Committee on November 16 each included some notable employment- and benefits-related provisions, although more controversial provisions impacting retirement savings were not ultimately included. Neither the House-passed bill nor the Senate Finance Committee bill limits permissible 401(k) plan contributions from pre-tax contributions. Earlier versions of both bills would have made employee stock options taxable when vested by replacing Internal Revenue Code Section 409A with a new Section 409B. Also stricken from the Senate bill was a provision aimed at workers in the "gig" economy. This provision would have created a safe harbor for workers meeting a set of objective tests that would qualify them as independent contractors for income and employment tax purposes.

One provision added to the Senate Finance bill took some by surprise because it reignited the Affordable Care Act (ACA) debate. The provision would effectively eliminate the ACA individual mandate by reducing penalties to zero. The provision is not included in the House bill and is sure to generate much debate as Republican leaders seek to send President Trump a bill before the new year. The full Senate will take up the tax bill when it returns from the Thanksgiving holiday, and then seek agreement with the House on a final tax reform package. Even under the expedited budget reconciliation process, Republicans can afford to lose only two votes from their 52-seat caucus.

Bipartisan legislation to shore up the individual health insurance market may move in association with the tax bill to facilitate passage. With open enrollment for the ACA exchanges now underway, Senate Health, Education, Labor and Pensions Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty

Murray (D-WA) have introduced bipartisan legislation to stabilize premiums and access to insurance in individual health insurance markets in the short-term. The Bipartisan Health Care Stabilization Act of 2017 would extend cost-sharing reduction payments during 2018 and 2019 and give states more flexibility to create greater choices among health insurance policies in the individual health insurance market.

While Congress again weighs in the ACA, the regulators continue their implementation of its provisions, including the employer mandate, also known as the Employer Shared Responsibility provision. The Internal Revenue Service recently confirmed that it will indeed begin enforcement of the ACA's employer mandate. The IRS plans to issue IRS Letter 226J to "applicable large employers" if it determines that, for at least one month in the year, one or more of the employer's full-time employees was enrolled in a qualified health plan for which a premium tax credit was allowed (and the employer did not qualify for an affordability safe harbor or other relief for the employee). Letter 226J will itemize the proposed payment by month and include a Form 14764 "ESRP Response." The response to Letter 226J will be due by the response date referenced in the letter, which generally will be 30 days from the date of issuance. If the employer disagrees with the proposed employer shared responsibility payment, the employer may request a pre-assessment conference with the IRS Office of Appeals. If, after correspondence between the employer and the IRS or a conference with the IRS Office of Appeals, the IRS or IRS Office of Appeals determines that an employer is liable for a payment, the IRS will assess the employer shared responsibility payment and issue a notice and demand for payment. With only 30 days for an employer to respond to a 226J letter, employers need to have a procedure in place for promptly processing the letter and have their information reporting Forms 1094-C and 1095-C readily available.

Agency Transitions

While what Republicans see as must-pass tax reform legislation advanced in both chambers of Congress, other notable, but less high-profile, workplace policy developments also occurred. Nominations to fill key slots at the Department of Labor (DOL) advanced toward confirmation, a signal that the pace of change in regulatory and enforcement policy may soon accelerate. After being approved by the Senate HELP Committee on October 18, Pat Pizzella, the nominee for Deputy Secretary of Labor, and Cheryl Stanton, the nominee for Wage and Hour Division Administrator, await Senate confirmation. Meanwhile, on November 15, the Senate confirmed David Zatezalo to be the Assistant Secretary for Mine Safety and Health. Zatezalo, a former coal company executive, was approved by a 52-46 vote.

On the same day as Zatezalo's confirmation, the Senate HELP Committee held a hearing on the nominations of two other important DOL position candidates. Kate O'Scannlain has been nominated to serve as Solicitor of Labor, a position in charge of representing the Department in litigation as well as assisting in the development of regulations and provision of legal advice. In her testimony, O'Scannlain stated she "will work to enforce laws under the Labor Department's jurisdiction fully and fairly" and that the "rules of the road should be clear and compliance guidance ample and easily accessible. Our laws should not be a game of 'gotcha' or involve gamesmanship using novel legal theories."

Once O'Scannlain is confirmed, employers will eagerly await whether she takes the Department's enforcement agenda in a different direction and provides the clarifying guidance she referenced in her hearing.

Preston Rutledge is the nominee for Assistant Secretary of the Employee Benefits Security Administration. Rutledge currently serves as senior tax and benefits counsel on the Majority Tax Staff of the U.S. Senate Finance Committee where his responsibilities include employee benefits, retirement issues, tax-exempt organizations, health tax issues, and the ACA's tax provisions. Among the issues that Rutledge will face upon his confirmation is the fate of the controversial fiduciary rule issued under the prior administration.

Both DOL nominees await approval by the Senate HELP Committee and then the full Senate, the timing of which is uncertain.

Top leadership positions at the DOL continue to take shape. On October 27, President Trump announced the nomination of Scott A. Mugno to be the Assistant Secretary of Labor, Occupational Safety and Health. Mugno, who is currently the Vice President for Safety, Sustainability and Vehicle Maintenance at FedEx Ground, would replace Dr. David Michaels, who left OSHA in January 2017. If confirmed, Mungo will have a full plate, deciding the future of the regulatory agenda pursued by his predecessor. This includes, among other items, OSHA's silica and beryllium rules and new electronic reporting requirements.

OSHA Electronic Recordkeeping Rule Status

On November 22, OSHA released a rule delaying until December 15, 2017, the initial submission deadline for calendar year 2016 data on Form 300A under the Improve Tracking of Workplace Injuries and Illnesses rule. This most recent delay follows a number of earlier delays. By way of background, OSHA published a final rule on May 12, 2016, with an effective date of January 1, 2017, on the electronic reporting requirements. Under these requirements, certain employers were required to electronically submit 2016 Form 300A data to OSHA by July 1, 2017. Just two days before the deadline, on June 28, 2017, OSHA issued a Notice of Proposed Rulemaking (NPRM) proposing to delay the initial July deadline for electronic submission of 2016 Form 300A data to December 1, 2017, which would provide the Trump administration the opportunity to review the new electronic reporting requirements prior to their implementation and allow affected entities sufficient time to familiarize themselves with the electronic reporting system, which was not made available until August 1, 2017.

On August 14, 2017, OSHA received an alert from the U.S. Computer Emergency Readiness Team (US-CERT) in the Department of Homeland Security that indicated a potential compromise of user information for OSHA's Injury Tracking Application (ITA), and the ITA was taken off-line as a precaution. OSHA is invoking the good-cause exception to the Administrative Procedure Act to further delay the effective date. In the June 28, 2017 proposed rule, OSHA had announced its intent to issue a separate proposal to reconsider, revise, or remove other provisions of the prior final rule and to seek comment on those provisions in that separate proposal. This final rule does not address other provisions of the prior final rule, such as its anti-retaliation provisions.

DOL Priorities

As the DOL nominees await Senate action on their confirmations, Secretary of Labor Alexander Acosta is laying out his vision for the Department. During a November 15 hearing before the House Education and Workforce Committee, Secretary Acosta discussd the Department's priorities and future rulemaking.

Testifying during National Apprenticeship Week, Secretary Acosta reiterated the Department's commitment to expanding apprenticeship programs pursuant to the June executive order calling for the DOL to identify strategies and proposals to promote apprenticeship. The Secretary identified apprenticeship programs as a way to tackle the skills gap – "the difference between the skills job creators need and the skills job seekers offer, leaving too many jobs open" and stated that the DOL "is actively engaged to narrow, and ultimately close, the skills gap." On the broader topic of regulatory reform, Secretary Acosta said that "President Trump and I are committed to rolling back regulations that unnecessarily eliminate jobs, inhibit job creation, are unnecessary, or impose costs that exceed benefits. The Department is actively engaged in carrying out the directives in President Trump's regulatory reform Executive Orders."

During the hearing, Secretary Acosta provided some insights on how regulatory reform might be realized at the Department, noting the DOL's "Regulatory Reform Task Force is currently reviewing regulations to identify those that place an undue burden on employers with minimal impact on worker protections." Secretary Acosta discussed and responded to questions about the Department's current rulemaking initiatives, but offered few details.

With respect to the overtime regulation, he said the rule, which has not been updated since 2004, is in need of revision, but the way the final rule was changed created a "shock to the system." On October 30, the Department of Justice, on behalf of the DOL, filed a notice with the Fifth Circuit Court of Appeals to appeal a Texas federal court's decision enjoining the rule. Once this appeal is docketed, the Department of Justice will file a motion with the Fifth Circuit to hold the appeal in abeyance while the DOL undertakes further rulemaking to determine what the salary level should be. Secretary Acosta did not offer any specifics on what direction a new rule might take. He did note that a Request for Information issued last summer generated 200,000 submissions, which will enable the agency to "write a new overtime rule in accordance with legal standards."

On the topic of the persuader rule that was published in March 2016, Secretary Acosta stated, "to allow the Department an opportunity for further consideration of the impact of the rule on regulated parties, the Department published a Notice of Proposed Rulemaking to rescind the rule. The comment period on the proposed rescission of the Persuader Rule closed in August. The Department is finalizing its review of the comments." He also cited the American Bar Association's opposition to this rule, which a federal district court invalidated, based on its concerns that the rule improperly infringed on attorney-client privilege.

Another priority for the Department appears to be a proposal to expand access to Association Health Plans (AHPs). On October 12, 2017, President Trump signed an executive order asking the DOL to consider new avenues to deliver quality, affordable health care to the American workforce. According the Secretary's statement, "Association Health Plans could offer small businesses the ability to pool together and decrease health care costs for their employees. Employers want to expand health care options and consideration of a path forward is one of our areas of focus at the Department." The Department has submitted a proposed rule on AHPs to the White House Office of Management and Budget for review prior to publication.

Secretary Acosta also signaled that OSHA's approach to workplace safety may be under review, and a greater emphasis on compliance assistance and voluntary incentive programs are in the offing. He said that while "enforcement plays a vital role in OSHA's efforts to reduce workplace injuries, illnesses, and fatalities . . . compliance assistance is a large part of OSHA's work to ensure employee safety." According to Secretary Acosta, OSHA is currently examining its Voluntary Protection Program and reviewing public input as it considers changes to the program. This program is expected to garner even greater attention once the new Assistant Secretary is in place.

The day after testifying before the House Committee, Secretary Acosta repeated and expanded upon some of these same themes in a panel discussion sponsored by the Federalist Society. During the panel discussion, Secretary Acosta voiced his opposition to using "administrative fiat" to implement significant policy changes, citing the prior administration's joint employer and independent contractor guidance, which the current DOL has rescinded. In the Department's regulatory reform analysis, he proposed adding a new layer of analysis for rolling back regulations. He said that this analysis, which hinges on whether revoking the rule is necessary to preserve liberty, is in addition to the cost/benefit analysis in which agencies traditionally engage. By way of example, this "liberty" test would have flagged the persuader rule's infringement of the attorney-client privilege.

Employers and others will have an opportunity to offer their input on the Department's priorities and policies. On November 7, the DOL published in the *Federal Register* its draft strategic plan for FY 2018-2022. While short on specifics, the draft strategic plan sets forth the strategic objective for each agency. The Department solicits public comments on the draft strategic plan, affording employers an opportunity to help inform the direction of the DOL's regulatory and enforcement priorities and policies. Comments on the strategic plan are due December 7, 2017.

NLRB Transition

Chairman of the National Labor Relations Board (NLRB), Philip A. Miscimarra, also joined the panel discussion at the Federalist Society. Unlike the EEOC, the NLRB is operating with a full five-member Board controlled by Republican appointees. Miscimarra, whose term will end in December, said that he considers 2017 a "transitional year" for the NLRB. Employers may begin to see that transition begin in earnest with Peter Robb's swearing-in as NLRB General Counsel on November 17. Robb, who replaces Obama-appointee Richard Griffin, was approved by the Senate on November 8. Robb's arrival is expected to launch a dramatic shift from the policies and practices of his predecessor.

EEOC Priorities and Harassment

Also appearing on the panel with Secretary Acosta and Chairman Miscimarra was Acting Chair of the Equal Employment Opportunity Commission (EEOC), Victoria Lipnic. Lipnic said that once the new members of the Commission are confirmed, they will be taking another look at the revisions to the EEO-1 form, which had been amended to require the reporting of compensation data. The revised form has been suspended indefinitely. Of the EEOC's wellness rule, which a federal court remanded for the EEOC's reconsideration but did not vacate, Lipnic said, "the EEOC will be spending another few years on wellness plans." President Trump's nominees to fill vacant seats on the Commission, Janet Dhillon and Daniel Gade, are awaiting a Senate vote.

With national attention focused on workplace sexual harassment, the EEOC is launching a public portal to provide online access to individuals inquiring about discrimination. The EEOC Public Portal allows individuals to submit online initial inquiries and requests for intake interviews with the agency. Initial inquiries and intake interviews are typically the first steps for individuals seeking to file a charge of discrimination with EEOC. In fiscal year 2017, the EEOC responded to over 550,000 calls to the toll-free number and more than 140,600 inquiries in field offices, reflecting the significant public demand for EEOC's services. Handling this volume of contacts through an online system is more efficient for the public and the agency as it reduces the time and expense of paper submissions.

On the legislative front, Congresswomen Rosa DeLauro (D-CT) and Senator Tammy Baldwin (D-WI) introduced legislation that would overturn the Supreme Court's *Vance v. Ball State University* decision and expand the scope of when a supervisor can be liable for harassment in the workplace. The Fair Employment Protection Act clarifies when employers should be held vicariously liable for unlawful harassment. The bill would expand employer liability to include harassment by individuals who are in charge of an employee's daily work activities, as well as supervisors who can recommend employment actions such as hiring and firing decisions. Similar legislation was introduced in the previous two Congresses, but did not advance. With workplace harassment continuing to dominate the headlines, such legislation may gain momentum in the current Congress, though it still faces long odds of passage.

Paid Leave

Also on the legislative front is a long-awaited bill that would create a voluntary federal paid leave proposal. Eight states and more than 30 localities have enacted paid leave requirements. With even more state and local paid leave legislation on the horizon, employers are facing an increasingly complex compliance quagmire.

On November 2, Reps. Mimi Walters (R-CA), Elise Stefanik (R-NY), and Cathy McMorris Rodgers (R-WA), introduced a bill that would exempt employers from state and local leave laws if they choose to offer their employees a minimum number of compensable leave days per year and institute a flexible work arrangement. The call for nationwide uniformity without imposing a federal mandate on employers and greater work-life balance and flexibility prompted the Society for Human Resource Management (SHRM)-backed proposal. The Workflex in the 21st Century Act (H.R. 4219) would give employers a voluntary safe harbor from state and local requirements by amending the Employee Retirement Income Security Act (ERISA). In addition to requiring participating employers to offer a minimum amount of paid leave based on their size, the plan would have to

include compensable time off plus at least one flexible work arrangement or "workflex" option.

The introduction of the bill was significant. With an increasing number of states and localities considering paid leave mandates and the increasing demands of work and family life, the legislation may gain more traction in Congress.

What's in Store for the Remainder of 2017?

Lawmakers return to Washington after the Thanksgiving holiday with a packed and high-stakes schedule.

Passing tax reform is at the top of the list and could help determine which party controls the House and Senate next Congress. With nominations to key agency positions soon to be filled upon Senate confirmation amid a packed Senate calendar, action on these nominations before the end of the year may well determine the direction of the Trump administration's workplace policy agenda in 2018.