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Workplace Policy under the Trump Administration Begins to Take Shape as “Repeal and Replace” of the ACA Faces Crucial Senate Vote

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Five months into President Trump’s term, his administration’s workplace policy is beginning to take shape. From notable developments at the Department of Labor (DOL), to long-awaited nominations to the National Labor Relations Board (NLRB), the administration’s departure from the labor and employment policies of its predecessor – or at least the steps to do so – accelerated in June.

Health Care Update

Republican senators released their version of a bill to “repeal and replace” the Affordable Care Act (ACA), but failed to meet a self-imposed deadline of voting on the measure, the Better Care Reconciliation Act of 2017, before the July 4th holiday. Like the earlier House-passed bill (the American Health Care Act), the Senate bill eliminates the penalties for the ACA’s employer and individual mandates retroactive to 2016 and further delays the so-called “Cadillac tax” on high-cost employer plans until 2026. However, the fate of these provisions, along with the broader effort by congressional Republicans and the White House to repeal and replace the ACA remain far from certain.

The seven-years-long quest to dismantle the ACA faces a make-or-break Senate vote now that lawmakers have returned from the July 4th recess. The House passed its health care bill on May 4, 2017, after an initial failed attempt to bring the bill to a vote. Last-minute amendments to assuage concerns of both conservatives and moderates proved sufficient for narrow passage in the House. In the Senate, the same fissures are evident and the task of finding common ground appears even more challenging. Congressional Republicans are using the budget reconciliation process to pass the health care bill, which requires only 51 votes in the Senate for passage, thus avoiding a filibuster. With Democrats holding firm in their opposition to the bill, 50 Republican votes are needed for passage, plus the tie-breaking vote of Vice President Pence if needed. Republicans can afford to lose only two members of their caucus, leaving very little margin to pass a bill. The challenge of negotiating a compromise that can secure 50 votes is further complicated by the strict requirements of the budget reconciliation process. The reconciliation process has its limitations because only provisions that impact the budget can be included in the bill to preserve its special procedural status. This constraint makes it more difficult to craft a possible compromise amendment.

The fractures within the Senate Republican caucus became evident upon release of the Better Care Reconciliation Act on June 22. Senators from states opting to expand access to Medicaid under the ACA voiced opposition to the bill's rolling back of those provisions and restructuring of the program. Senate Majority Leader Mitch McConnell's (R-KY) path to 50 votes became even more challenging after the Congressional Budget Office (CBO) released its finding that enacting the Senate's bill would increase by 22 million the number of people who are uninsured by 2026. This compares to an estimated 23 million who would lose insurance during this time under the House bill. The CBO also estimates that the Senate bill would reduce the cumulative federal deficit over the 2017-2026 period by $321 billion – $202 billion more than the estimated net savings for the House-passed bill. The extra savings could be used to make changes that help secure additional votes for the bill. But the inherent tension between reducing premiums by removing some of the ACA's insurance market reforms and preserving access to more robust plans is a difficult divide to bridge.

Should the Republican effort to repeal and replace the ACA through the budget reconciliation process fail, targeted changes to the ACA to shore up the insurance market may come. But any such changes would need Democratic support, and, thus, unlikely to make significant or fundamental modifications to the ACA. Efforts to ease the requirements of the ACA short of changes to the statute itself could come through the regulatory process, which would take on added importance if legislative efforts fail. With the need to pass legislation raising the debt limit quickly approaching and the desire to move on to tax reform, the clock on repealing and replacing the ACA appears to be winding down whatever the outcome of the Senate vote.

Agency Confirmations

In addition to tackling health care legislation after the July 4th recess, senators on the Health, Education, Labor and Pensions Committee will focus on nominations to the NLRB and DOL in a July 13 hearing. The Senate HELP Committee will hold a confirmation hearing for Deputy Labor Secretary nominee Patrick Pizzella and nominees to the NLRB, William Emanuel and Marvin Kaplan. Pizzella, who was the assistant Labor Secretary for Administration and Management under President George W. Bush, is the acting chairman of the Federal Labor Relations Board. Emanuel is a shareholder at Littler Mendelson, and Kaplan is a counsel at the Occupational Safety and Health Review Commission.

Those hoping for prompt action by the Trump administration to reverse the labor and employment policies of the Obama administration have been confronted with the slow pace of the nomination process to fill political positions at the agencies. The nomination of these key positions is no doubt welcome news for those employers seeking a change in direction in workplace policy. Yet, a significant shift in policy may still take time to implement.

Pizzella's nomination to serve as Deputy Labor Secretary comes as the DOL under Secretary Acosta has already taken some important steps to alter the policies put in place by the prior administration. In a June 7 press release, Secretary Acosta announced the withdrawal of two Wage and Hour Administrator's Interpretations (AIs) on independent contractors and joint employment. The controversial AIs issued by prior Wage and Hour Administrator David Weil, a strong advocating for combating what he called the "fissured workplace," were a significant shift in wage and hour law and used to justify taking certain enforcement actions. The withdrawn Administrator's Interpretation No. 2015-1, issued in July 2015, addressed the classification of independent contractors as employees under the Fair Labor Standards Act (FLSA), taking the position that "most workers are employees under the FLSA's broad definitions," essentially creating a presumption of employment for workers. The withdrawn Administrator's Interpretation No. 2016-01, issued in January 2016, similarly established new standards for determining joint employment under the FLSA, adopting the view that "[t]he concept of joint employment, like employment generally, should be defined expansively." For the first time, the DOL differentiated between "horizontal" joint employment and "vertical" joint employment.

The withdrawal of both AIs was welcome news for the business community, but questions about the new administration's ultimate position on independent contractors and joint employment still remain. Clarification of the DOL's position on these two important issues likely will not come until a new Wage and Hour Administrator is nominated and confirmed.

Overtime and FLSA Compliance

Even before the nomination of a Wage and Hour Administrator, Secretary Acosta indicated that that the DOL will reconsider the contentious "white collar" overtime rule defining which employees are exempt from the FLSA's minimum wage and overtime requirements. The rule raised the minimum salary level for exempt employees from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The fate of the overtime rule, which was enjoined by a federal court last year, has been a source of significant speculation and attention. Secretary Acosta's comments on the overtime rule came during a June 7 congressional hearing on the DOL's budget, during which he announced that the Department would soon be issuing a Request for Information (RFI) seeking public input on the rule. The RFI, which has yet to be published, could serve as the first step in the regulatory process to modify the overtime rule, and constitutes the clearest indication yet of what the DOL may do with respect to this issue.

Even as employers await the release of the RFI about the overtime rule, they received some welcome news about FLSA compliance assistance. On June 27, the DOL announced that it will reinstate the issuance of opinion letters by its Wage and Hour Division, and unveiled a new website to guide employers and employees in requesting an opinion letter. In 2010, the DOL stopped its practice of issuing opinion letters, which provide answers to questions from the regulated community. Instead, the prior administration issued more general AIs. The return of opinion letters will provide employers with another tool to help comply with the FLSA and to establish a good-faith defense against FLSA liability. The return of the opinion letters also signals the increased focus on compliance assistance under Secretary Acosta.

Fiduciary Rule

The DOL took steps in June toward modifying the so-called "fiduciary" rule issued by the prior administration to address conflicts-of-interest in retirement investment advice. Certain provisions of the rule become applicable on June 9 after Secretary Acosta determined that the Administrative Procedure Act requirements precluded a further delay. At the time of the announcement that the rule would not be further delayed, Secretary Acosta also signaled that modification to the rule, the subject of challenges in court and Congress, would be forthcoming.

On June 29, the DOL announced it was publishing an RFI related to the fiduciary rule, giving the public an opportunity "to provide data and information that may be used to revise the rule and associated exemptions."

The RFI, published in the *Federal Register* on July 6,

> specifically seeks public input that could form the basis of new exemptions or changes/revisions to the rule and [Prohibited Transaction Exemptions], and input regarding the advisability of extending the January 1, 2018, applicability date of certain provisions in the Best Interest Contract Exemption, the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and Prohibited Transaction Exemption 84-24.

Comments on extending the January 1, 2018, applicability date of certain provisions are due by July 21, 2017. Comments in response to all other questions posed in the RFI are due by August 7, 2017.

Persuader Rule

The DOL also took action in June to begin the process for rescinding the so-called persuader rule governing reporting obligations under the Labor-Management Reporting and Disclosure Act (LMRDA). On June 12, the DOL's Office of Labor Management Standards' (OLMS) published in the *Federal Register* a proposed rule to rescind the 2016 rule. The rule revised the interpretation of the reporting requirements set out in section 203 of the LMRDA, which addressed an employer's use of labor relations consultants that undertake activities to—directly or indirectly—persuade employees regarding the exercise of their rights to organize and bargain collectively. Section 203 states that no report is required for consultant agreements to give "advice" to the employer. The 2016 rule narrowed the long-standing interpretation of the "advice" exemption by requiring the reporting of employer-consultant agreements under which the consultant undertakes activities that do not involve direct contact between consultants and employees. In November 2016, a Texas federal court permanently blocked this "persuader" rule.

In its proposal to rescind the rule, the OLMS explains:

> The Department proposes to rescind the Rule to provide the Department with an opportunity to give more consideration to several important effects of the Rule on the regulated parties. Rescission would ensure that any future changes to the Department's interpretation would reflect additional consideration of possible alternative interpretations of the statute, and could address the concerns that have been raised by reviewing courts. . . . The Department will also consider the potential effects of the Rule on attorneys and employers seeking legal assistance. Rescission would also permit the Department to consider the impact of shifting priorities and resource constraints.

The OLMS explains in the proposed rule:

Although the Department gave some general consideration to concerns that the Rule would have a "chilling effect" on clients' abilities to obtain representation by attorneys . . . the Department believes that the implementation of any changed reporting requirement in this area should include a more detailed and specific analysis of how each of these activities would, as a practical and factual matter, affect the behavior of the regulated community, with regard to furnishing and receiving legal services.

The proposal also justifies its decision to rescind the rule "in light of limited resources and competing priorities" and because its "resource constraints weigh in favor of rescinding the Rule." Comments on this proposal are due by August 11, 2017.

Health and Safety Rules

The DOL's Occupational Safety and Health Administration (OSHA) also took some notable action in June. On June 27, OSHA published in the *Federal Register* a notice and request for comments on reconsidering portions of a final rule setting standards for occupational exposure to beryllium. OSHA proposes to revoke the ancillary provisions for the construction and the shipyard sectors that OSHA adopted on January 9, 2017, but to retain the new lower permissible exposure limit (PEL) of 0.2 μg/m3 and the short-term exposure limit (STEL) of 2.0 μg/m3 for each sector. According to the notice, OSHA will not enforce the January 9, 2017 shipyard and construction standards without further notice while this new rulemaking is underway. OSHA also states that the proposal does not affect the general industry beryllium standard published on January 9, 2017. OSHA is soliciting comments from stakeholders, particularly regarding:

- Whether OSHA should keep any of the ancillary provisions of the January 9, 2017 final rule for construction and shipyards?
- If OSHA keeps the medical surveillance requirements for construction and shipyards outlined in the final rule, but revokes the other ancillary provisions, what would be the incremental benefit, if any?
- Alternatively, should OSHA keep some of the medical surveillance requirements for construction and shipyards but not others?
- Should the compliance dates of the January 9, 2017 final rule be delayed? OSHA is considering extending the compliance dates by a year for the construction and shipyard standards. According to OSHA, this delay would give affected employers additional time to comply, which "could be warranted by the uncertainty created by this proposal."

Comments are due by August 28, 2017.

In another workplace safety development, OSHA is proposing to delay the employer submission deadline under the rule entitled "Improve Tracking of Workplace Injuries and Illnesses." The effective date was January 1, 2017 for the final rule's electronic reporting requirements, but the rule set an initial deadline of July 1, 2017, as the date by which certain employers are required to submit electronically the information from their completed 2016

Form 300A to OSHA. The proposed deadline extension for submitting the 2016 Form 300A data would be December 1, 2017. The proposed rule, issued on June 28, states that the delay "will allow OSHA to provide employers the same four-month window to electronically submit their 2016 Form 300A data" and "will also to provide the new 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 will not be available until August 1." Comments are due by July 13, 2017.

Labor Legislation

House lawmakers are seeking to hasten changes at the NLRB through legislation aimed at reversing some of the NLRB's recent regulatory action and decisions. On June 14, the House Subcommittee on Health, Employment, Labor and Pensions held a hearing on legislative reforms to the National Labor Relations Act. The hearing examined these proposed bills:

- **Workforce Democracy and Fairness Act (H.R. 2776)**: would amend the NLRA with respect to the timing of elections and pre-elections hearings, and the identification of pre-election issues;
- **Employee Privacy Protection Act (H.R. 2775)**: would amend the NLRA to require that lists of employees eligible to vote in organizing elections be provided to the NLRB; and
- **Employee Rights Act (H.R. 2723)**: would modernize the union election process, require periodic union-recertification elections, and give workers more control over how their union dues are spent.

On June 29, the Education and Workforce Committee approved the Workforce Democracy and Fairness Act and the Employee Privacy Protection Act. According to a press release issued by Chairwoman Rep. Virginia Foxx (R-NC), the two bills, along with the Tribal Labor Sovereignty Act, would "restore fairness and balance to federal labor policies by reforming the National Labor Relations Act." These bills may ultimately prove to be "message" bills as their consideration and passage in the Senate seems unlikely.

Lawmakers have returned from their brief July recess with a full plate. June proved to be an important month for workplace policy developments. July may be even more so as the fate of the ACA is decided and critical nominations to the NLRB and DOL are expected to advance.