INSIDER REPORT

Current Events Monthly Newsletter | December 2016

INSIDER BRIEFING

After an election outcome that few expected, Donald Trump will be sworn in as the 45th President on January 20, 2017, with a Republican majority in both Houses of Congress. With Republicans in control of both the White House and Congress, a seismic shift in workplace policy lies ahead for employers. Much of President Obama's labor, employment and benefits policies implemented under the rubric of his "Middle Class Economics" agenda are no doubt on the chopping block. Yet, the timing and format for the change of direction remains unclear. Even with the GOP sweep on election night, not all of the changes implemented by the Obama Administration's Department of Labor (DOL), National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC) can or will be immediately reversed on Inauguration Day. Whether by the courts, Congress or presidential pen, some policy changes could come rather quickly. Others may have to wait for more formal and lengthy rulemaking and adjudicative proceedings. In the interim, employers have much to consider as the workplace policy agenda of one Administration unravels and that of the next begins.

Regulatory Injunctions

The courts have already stepped in to halt some of the Obama Administration's most sweeping and controversial labor and employment changes. In late October, a Texas federal district court granted a preliminary injunction against implementation of key provisions of the controversial Fair Pay and Safe Workplaces Executive Order (E.O.), or "blacklisting" rule, that was set to take effect, in part, on October 25, 2016. The injunction, requested by the Associated Builders and Contractors of Southeast Texas, the Associated Builders and Contractors national organization, and the National Association of Security Companies, will temporarily block

TABLE OF CONTENTS

Insider Briefing	1
On the Move	4
Global Report	7
In Focus	10
Outlook	13

INSIDER BRIEFING (continued)

implementation and enforcement of the blacklisting rule's requirement that federal contractors disclose adverse findings and decisions related to their compliance with federal and state labor and employment laws. The temporary injunction also prevents federal agencies from denying contracts to employers that are deemed to lack a satisfactory record of integrity and business ethics based on the disclosures. The nationwide preliminary injunction also blocks the E.O.'s prohibition on pre-dispute arbitration agreements. A Trump presidency likely spells the end of the blacklisting rule, as well as other mandates imposed on federal government contractors by the current Administration via executive order, as they will be subject to revocation by subsequent Trump-issued executive orders.

The Administration's ambitious labor agenda suffered another defeat several weeks later when, on November 16, a Texas federal court issued a permanent injunction blocking the DOL's persuader rule. The rule would have required many employers that rely on third parties to provide labor advice and services to make certain disclosures about their consultants to the DOL under the Labor-Management Reporting and Disclosure Act. In *National Federation of Independent Business v. Perez*, the U.S. District Court for the Northern District of Texas concluded that the DOL's "persuader" rule was unlawful and made permanent the temporary injunction the court issued in June.

One of the most high-profile items on the DOL's regulatory agenda was finalization of the rule amending the Fair Labor Standards Act (FLSA) white-collar overtime exemption regulations. The rule, which was set to take effect on December 1, 2016, would have more than doubled the minimum salary level for exempt employees from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). Following the election, the fate of the overtime rule under a Trump Administration and a Republican-controlled Congress was the subject of a great deal of attention and speculation. Even before a new Administration and Congress could step in to halt or modify the rule, a federal court in Texas issued a preliminary injunction blocking the rule before its scheduled implementation date. Nevada and 21 other states sued the DOL to challenge the new rule. The Chamber of Commerce and a broad coalition of business associations also sued in the Eastern District of Texas to block the rule. Consolidating the challenges of the states and the business associations, the court ruled on November 22, 2016, that the DOL exceeded congressional authority by raising the salary threshold to such a high level it supplanted the duties test for exempt status. On December 1, 2016, the DOL filed an appeal to the Fifth Circuit. The DOL's filing of this appeal, by itself,

does not change the effectiveness of the preliminary injunction. The litigation will not resolve before the inauguration, thus permitting the new administration to determine whether it wishes to continue with the appeal.

The DOL was more successful in staving off a challenge to another of its signature regulatory accomplishments—the so-called fiduciary rule. The rule amends the definition of "fiduciary" and prohibited transaction exemptions under ERISA to address conflicts of interest in investment advice for retirement accounts. On November 28, a Kansas federal judge denied an effort to block the financial-advice rule. The court ruled against a preliminary injunction, concluding that the plaintiffs failed to demonstrate that the DOL exceeded its authority or was capricious in its treatment of fixed-indexed annuities. This was the second ▸▸

federal judge to rule in favor of the DOL on this issue. Two weeks earlier, a Washington, DC federal district judge denied a preliminary injunction sought by an insurance group and granted summary judgment to the DOL. A decision from a federal district judge in Texas in a third lawsuit against the fiduciary rule is still pending.

Efforts to Block Rules Under the CRA and Appropriations

Even though the DOL has thus far been successful in defending one of its key regulatory accomplishments, the fate of the fiduciary rule lies in the hands of the DOL under the Trump Administration, and a Republican-controlled Congress, the latter of which has already tried to block the rule under the Congressional Review Act (CRA). Under this 1996 law, before a rule can take effect, an agency must submit a report to each house of Congress and, upon receipt of the report, Congress has a specified time period to pass a joint resolution of disapproval to block the rule. If both houses pass the resolution under an expedited process that circumvents a filibuster in the Senate, it is sent to the President for signature or veto. If a joint resolution of disapproval is submitted within the CRA-specified deadline, passes Congress, and is signed by the President, the rule will not take effect or continue, nor can a "substantially similar" rule be issued unless specifically authorized by a subsequent law.

The timing of when a rule is submitted to Congress is critical in determining whether a Congress-passed resolution of disapproval to block a rule will be submitted to President Obama for a likely veto—as was the case with the fiduciary rule—or to President-elect Trump for a likely signature. A final rule submitted to Congress begins a period of 60 "days-of-continuous-session" during which any Member of either chamber may submit a joint resolution disapproving the rule under the CRA. If within that period Congress adjourns its session without assigning a day for further meeting or hearing, the periods to submit and act on a disapproval resolution "reset" in their entirety in the next session of Congress. Therefore, the CRA "deadline" for an agency to have submitted a rule to Congress to ensure that action on the resolution would come under President Obama's watch was in late May 2016. The fiduciary rule, which was submitted to Congress on April 6, 2016, fell well before this deadline. However, rules submitted to Congress after this date are subject to be overturned in the next Congress and signed by President-elect Trump. The CRA has only been used once successfully, overturing a Clinton Administration OSHA ergonomics rule after President Bush took office in 2001. Yet, with Republicans soon to be once again in control of both the White House and Congress, it may be used to block controversial recent regulations and those yet-to-be-released "midnight" regulations in the last days of the Obama Administration.

The appropriations process is another tool to which opponents of controversial Obama Administration actions may turn. Congress is expected to pass a short-term continuing resolution to fund the government until after President-elect Trump takes office. With Republicans increasing their leverage post-election, policy riders embedded in an omnibus appropriations bill face better prospects after President-elect Trump and the new Congress are sworn in. Such riders, if enacted, could give employers relief from enforcement of Obama-era regulations and agency decisions until a new rulemaking process is completed to reverse or revise the prior actions.

Fall Regulatory Agenda

The prospect of legislative or executive action to reverse the DOL's regulatory agenda has not deterred Labor Secretary Thomas Perez from announcing, in its final Fall Agenda, a list of regulatory actions the Department still plans to take. Before Inauguration Day, OSHA plans to issue four final rules. These include final rules on occupational exposure to beryllium; standards for walking-working surfaces and personal fall protection systems; clarification of an employer's continuing obligation to make and maintain accurate records of each recordable injury and illness; and procedures for the handling of retaliation complaints under the employee protection provision of the ⏩

INSIDER BRIEFING (continued)

Moving Ahead for Progress in the 21st Century Act. OSHA recently issued a final rule on walking-working surfaces and personal protective equipment. Those rules at the prerule or proposed rule stages obviously have no prospect for finalization before January 20, 2017, but may be issued nonetheless to serve as a marker for future Administrations.

What is notable about the last Obama-era regulatory agenda is the absence of items once thought to be priorities. For example, the Wage and Hour Division has placed on the back burner its proposed Request for Information regarding the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours. The first regulatory agenda to be issued by the Trump Department of Labor under the new Secretary of Labor will no doubt look very different from the 2016 Fall Regulatory Agenda.

Change at the EEOC and NLRB

The EEOC is attempting to make its mark under the current Commission. For example, on November 21, the EEOC issued updated enforcement guidance on national origin discrimination. Reversing or altering regulations and guidance of independent agencies like the EEOC might take longer than it would for other agencies. The Commissioners at the EEOC are appointed for a set number of years, and can serve the remainder of their terms even after President-elect Trump is inaugurated. Reconstitution of the Commission must await the expiration of the terms and nomination and confirmation of their replacements. However, General Counsel Lopez has already announced his departure, leaving an opportunity for President-elect Trump to appoint a new person to lead the EEOC's enforcement arm.

Change at the National Labor Relations Board may come slower as well. Although President-elect Trump will have an opportunity to fill two vacancies on the Board, a reversal of the dramatic shift in labor law undertaken by the Obama Board may have to wait until cases make their way through the system and are presented to the Board for consideration. The current NLRB General Counsel, Richard F. Griffin, Jr, who was sworn in on November 4, 2013 for a four-year term, will be able to serve until his term expires next year. Thus, it may some take time to change direction.

Whether through executive order, legislation, the confirmation of new leaders to head federal agencies, or new rulemaking, a significant change in the direction of workplace policy is likely to come over the next two years. The regulatory and congressional agendas through the 2018 mid-term elections will no doubt include a reversal of many of the Obama Administration's priorities. Yet, they may also present employers with an opportunity to chart a new forward-looking course in workplace policy for the years ahead. For more information about the impact of the election on workplace policy, see the WPI's Litter Report.

ON THE MOVE

President-elect Trump's stunning upset over Hillary Clinton in this year's long and protracted presidential race will reverberate at the local level over the next four years. Expect some traditionally "red" states to enact—if they have not already done so—preemption laws. These laws typically prevent municipalities from implementing ordinances requiring employers to provide benefits, such as minimum wage or paid leave, greater than those conferred by the state or federal government. States with Democratic legislatures, in turn, might see state or local laws as the only avenue to advance employee-friendly measures now that the U.S. Congress and presidency will be under Republican control.

The independence of local electorates was made clear on November 8, when various states and localities approved ballot initiatives covering a range of employment-related topics. The following discusses the results of notable labor and employment ballot measures, and other state and municipal laws that made headway in November.

Minimum Wage

Several states and municipalities enacted laws in 2016 to raise their jurisdiction's minimum wage.

Boosting the wage floor via ballot initiative was another means of achieving this end. On November 8, voters in Arizona, Colorado, Maine and Washington approved increases to their state's minimum wage. The minimum wage will increase to $12.00 per hour by the year 2020 in Arizona, Colorado, and Maine, and to $13.50 by 2020 in Washington. A related ballot measure that sought to *decrease* the youth minimum wage in South Dakota was rejected.

In non-ballot initiative news, the San Jose, California City Council approved an ordinance that will increase the minimum wage, in increments, to $15.00 per hour by January 1, 2019. The first step increase will be to $10.50 per hour on January 1, 2017. On July 1, 2017, the minimum hourly rate will rise to $12.00 per hour.

Contractors doing business with San Mateo County, California will have to pay their employees a living wage of at least $17.00 per hour by 2019. Under the "Living Wage Ordinance Pilot Program," covered contractors will have to maintain documentation demonstrating every covered employee is being paid the appropriate living wage. The first step increase to $14.00 per hour is slated to begin on January 1, 2017. Six months later, the wage will increase to $15.00 per hour.

Wage Protections

On November 16, 2016, New York City Mayor Bill de Blasio signed a first-of-its-kind ordinance providing freelance workers with certain wage protections. Among other conditions, the measure requires: (1) a written contract if the freelance work is worth at least $800, including multiple small projects over a 120-day period; (2) that payment for services be made timely and in full; and (3) that freelance workers be free of retaliation for exercising their rights under the bill. It also provides penalties for violations of these rights, including statutory damages, double damages, injunctive relief, and attorneys' fees.

In other wage-related news, on November 4, Pennsylvania's governor signed a law that clarifies an employer's use of payroll debit cards is permissible under the Commonwealth's Wage Payment Collection Law, provided certain conditions are met.

Paid Leave

Another ballot initiative approved on November 8, Arizona's Fair Wages and Healthy Families Act, not only raised the state's minimum wage, but also requires that, beginning July 1, 2017, Arizona workers may accrue and use a minimum number of paid sick time benefits per year. Specifically, employees will be eligible to earn up to an hour of paid sick leave for every 30 hours worked. Employees exempt from the FLSA's overtime and minimum wage requirements are assumed to work 40 hours per week. If an exempt employee's normal workweek is less than 40 hours, the sick time will accrue based on the actual number of hours worked in a normal workweek.

On Election Day, voters in Washington State approved Initiative No. 1433, which requires businesses to grant workers an hour of paid sick leave for every 40 hours worked starting in 2018. This has caused employers much headache, as some Washington localities have already enacted paid sick leave measures. The employer community in the City of Spokane, for example, called for the city council to repeal its more stringent measure, which requires that an hour of paid leave be provided for every 30 hours worked starting in 2017. The city council, however, amended its ordinance, but did not repeal it. Among other changes, the city agreed to cap accrual according to employer size.

Meanwhile, lawmakers in the Commonwealth of Virginia have introduced a bill (SB 824) that ⏩

INSIDER REPORT

ON THE MOVE (continued)

would requires private employers to provide full-time employees with at least one hour of paid sick leave for every 50 hours worked in 2018.

A more generous paid leave proposal will soon face a city council vote in the District of Columbia. The nation's capital is considering a bill that would provide workers with 11 weeks of paid leave for

the birth or adoption of a child, and 8 weeks of paid leave to care for an ill family member. This leave would be funded by a .62 percent increase in payroll taxes.

Right-to-Work

Right-to-work ballot initiatives received a mixed reception on Election Day. In South Dakota, voters rejected an effort to roll back its right-to-work law. The initiative would have permitted unions to charge fees to non-union members for efforts made on their behalf.

Although Alabama has long been a right-to-work state, on November 8 voters approved Amendment 8, which reinforces this position by incorporating right-to-work language into the state's constitution. The amendment explicitly prohibits employers from conditioning employment on union membership or non-membership and from requiring workers to pay union dues.

On the other hand, an effort similar to Alabama's failed in Virginia. Voters rejected an amendment that would have amended the Commonwealth's constitution to reflect the existing right-to-work law, prohibited employers and unions from agreeing to condition employment on union membership or non-membership, and prevented a union from acquiring an employment monopoly.The tenor of this year's election might pave the way for additional state right-to-work laws and, perhaps, even a federal law.

Marijuana

Perhaps the most common ballot topic of interest to employers involved the legalization of marijuana. On Election Day, voters in California, Nevada, Massachusetts, and Maine approved measures legalizing the recreational use of marijuana. Voters in Arkansas, Florida, Montana, and North Dakota approved new laws expanding or permitting the lawful use of marijuana for medical purposes. Arizona voters, however, rejected an initiative to legalize marijuana sales for recreational purposes. This patchwork of laws will no doubt increase administrative difficulties for employers that maintain substance abuse policies.

Hiring

Employers in San Jose, California will be required to offer additional work hours to existing qualified part-time employees before hiring new staff under a newly-approved ballot initiative, Opportunity to Work Measure E. The ordinance includes a hardship exemption for small businesses.

Hotel Industry

Voters in Seattle, Washington approved a measure, Initiative 124, aimed at providing increased protections for hotel industry workers. Per the initiative, hotel owners will have to institute ⏩

protections for employees regarding sexual assault and harassment (e.g., panic buttons), take steps to prevent on-the-job injury (e.g., limiting the area per shift to be cleaned by housekeeping staff), offset the cost of health insurance, and retain workers if a change in ownership occurs.

Discrimination

New Jersey's State Senate approved two bills (SB 726, 810) that would amend the state's Law Against Discrimination to include military service and crime victims, respectively, as protected statuses.

In addition, Manhattan, Kansas amended its human rights ordinance to add provisions describing unlawful discriminatory practices on the basis of sexual orientation and gender identity. Similarly, Carmel, Indiana approved an ordinance prohibiting discrimination in employment on the basis of race, color, religion, national origin, gender, disability, sexual orientation, gender identity or expression, family or marital status, ancestry, age, and/or veteran status.

What's Next?

December is expected to be a relatively quiet month at the state and local levels. Lawmakers will use this time to regroup and plan for the year ahead. In the meantime, December is a good time for employers to review their current workplace policies to make sure they consider the changes slated to take effect in 2017.

GLOBAL REPORT

The following is a roundup of international labor and employment news:

Asia/Pacific

Australia – Sharing Economy

The Australian Competition and Consumer Commission (ACCC) released two new publications to provide guidance to participants in the sharing or collaborative economy. The first document, Platform Operators in the Sharing Economy: A guide for complying with the competition and consumer law in Australia, is designed "for sharing economy platform operators to encourage compliance with Australia's competition and consumer protection laws." The second document, The Sharing Economy: A guide for private traders, educates workers in the sharing economy. This guidance explains when Australia's consumer laws apply to the relationships involved in the supply of services in the sharing economy, and outlines the obligations sharing economy workers have to consumers, and the obligations platform operators owe to the sharing economy workers.

A separate sharing economy page focuses on consumer protection rights. In a press release, ACCC's Deputy Chair stated: "The sharing economy provides consumers with increased choice and offers individuals new ways of generating income. The roles of platform operators, consumers, sellers and service providers are all interrelated and it is important that each understand their specific legal obligations under the Australian Consumer Law."

INSIDER REPORT

GLOBAL REPORT (continued)

New Zealand – Arbitration

Changes to New Zealand's Arbitration Act 1996 were recently approved, and are scheduled to take effect on March 1, 2017. The changes expand the definition of "arbitral tribunal" to include arbitral institutions and emergency arbitrators, not just sole arbitrators or a panel of arbitrators. In addition, the Ministry of Justice, rather than the High Court, can appoint a body to help with the arbitration panel selection.

Central America

Costa Rica – Wage Increases

Costa Rica's National Wages Council approved a proposal to change the formula and timeframe for increasing private-sector wages. Under the new methodology, wages in the private sector will increase only once per year, beginning on January 1, 2017. Previously, wages were adjusted every six months in both the public and private sectors. The new yearly increase applies to private-sector employees only. Public employee wage increases will continue to follow the bi-annual schedule.

Europe

European Union – Data Protection

The Article 29 Working Party ("Working Party"), the European Union's top data protection regulatory body, released a statement about the EU-U.S. data protection framework known as the "Umbrella Agreement." The new framework was developed in response to the European Court of Justice's October 2015 invalidation of the EU-U.S. data transfer Safe Harbor agreement that had previously governed transatlantic data transfers. Per the Working Party's statement, this binding Umbrella Agreement "determines the minimum data protection safeguards to be guaranteed by the EU and by the U.S. for future data flows between their law enforcement authorities, without authorizing any data transfer." The Working Party emphasized that the Umbrella Agreement be applied and enforced with the U.S.-enacted Judicial

Redress Act, which was a prerequisite to final adoption of the Umbrella Agreement. The Working Party also cautioned there may be some need for clarifying certain concepts that differ under U.S. and EU law, such as the definitions of "personal data" and "data processing." If the Umbrella Agreement is ultimately adopted, the Working Party notes it will "closely monitor whether it fully satisfies key data protection requirements and whether it is in compliance with Article 7 and Article 8 of the EU Charter."

European Union – Gig Economy

A question submitted to the European Parliament seeks clarification on the ways in which the recently published European agenda for the collaborative economy will address gender issues. According to the submission, while the collaborative economy offers many benefits, it lacks certain protections for gender-based harassment:

> The current legal interpretation does not allow for a clear determination of the nature of the services offered via collaborative economy platforms, and as a result there are problems in identifying which existing regulations should apply to this sector. There is therefore a need to clarify the following: (1) Do the services offered by collaborative economy providers… fall within the remit of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and

services?; (2) What is the liability of service providers within the collaborative economy in incidents of third-party harassment or discrimination?; (3) How does the Commission plan to implement gender mainstreaming as outlined in Article 8 of the TFEU in its upcoming analysis and recommendations for the collaborative economy?

Parliamentary questions are addressed by Members of the European Parliament to other European Union institutions and bodies. Questions presented to Parliament that request a written answer, as the above question does, are typically answered within six weeks.

United Kingdom – Gender Representation

A review commissioned to find ways in which British businesses can improve the number of women in senior leadership positions and on the boards of Financial Times Stock Exchange (FSTE) 350 companies has recommended that companies aim for a 33% female representation goal by the year 2020. The Hampton-Alexander Review —Improving gender balance in FTSE Leadership —includes a "how-to" list for companies to achieve more gender diversity in their organizations.

North America

Canada – Gender Identity

British Columbia's Human Rights Code has incorporated protections based on gender identity and expression. To that end, the province's Human Rights Tribunal has updated its website to include definitions for both terms. Gender expression is defined as "how a person presents their gender. This can include behaviour and appearance, including dress, hair, make-up, body language and voice. This can also include name and pronoun, such as he, she or they. How a person presents their gender may not necessarily reflect their gender identity." Gender identity is defined as "a person's sense of themselves as male, female, both, in between or neither. It includes people who identify as transgender. Gender identity may be different or the same as the sex a person is assigned at birth."

Global

Arbitration

Changes to the International Chamber of Commerce's (ICC) Rules of Arbitration will take effect on March 1, 2017. A key change is the automatic application of an expedited arbitration process for all claims for less than $2 million. The rules will allow parties to opt in to this expedited process for claims involving amounts above that threshold. The rules have also been streamlined, and include measures to increase transparency. The amendments allow parties to ask the ICC Court to provide reasons for its decisions without having to seek consent of all parties.

Gig Economy

The International Labour Organization (ILO) has released an extensive report – Non-standard employment: Understanding challenges, shaping prospects – calling for governments to address individuals who work in non-standard employment (NSE) situations. The report grew out of a four-day ILO Tripartite Meeting of Experts on Non-Standard Forms of Employment held in February 2015. As a result of the meeting, member states and worker organizations were urged to devise policy solutions to address perceived work deficits associated with

NSE. The resulting report analyzes the types of NSE, the demographics of those who partake in NSE, and NSE's impact on the labor market and society.

GLOBAL REPORT (continued)

At the outset, the ILO report categorizes NSE into four types: temporary work, part-time and on-call work, multi-party employment arrangements, and disguised employment/dependent self-employment. The ILO identifies these key trends in NSE:

- In over 150 countries, the average use of temporary employees in registered private sector firms is 11 percent, with about one-third of countries around this mean.
- While NSE makes up less than 40 percent of total wage employment, it represents 57 percent of part-time employees.
- Casual employment is a prominent feature of labor markets in developing countries and has grown in importance in industrialized countries.
- In industrialized countries, the diversification of part-time work into "very short hours" or "on-call" work, including "zero-hours" contracts (with no guaranteed minimum hours), has parallels with casual work in developing countries.
- Data on temporary agency work and other contractual relationships involving multiple parties are scarce.

The report concludes with several policy recommendations. Such measures aim to "plug" perceived regulatory gaps; strengthen collective bargaining; increase social protections; and "institute[e] employment and social policies to manage social risks and accommodate transitions in the labour market."

IN FOCUS

The annual enrollment for the Affordable Care Act (ACA) marketplaces or exchanges began on November 1, 2016, for health insurance coverage during 2017. With Donald Trump's victory on election night only a week later, many are asking if the ACA's fourth open enrollment period will be its last.

Since the law's passage in 2010, congressional Republicans have made criticism of the sweeping health care reform law a rallying cry on the floors

of the Senate and House chambers. President-elect Trump echoed this opposition to President Obama's most significant legislative legacy on the campaign trail. Legislative efforts to repeal the ACA have failed with President Obama in the Oval Office and in control of the veto pen. Now, with President-elect Trump soon to be in the White House and Republican majorities retained in both the House and Senate, the days of the ACA — or at least significant portions of it — may be numbered. As "repeal and replace" moves from political talking point to a reality, important questions about the extent and timing of the ACA's demise and, more specifically, the contents of its replacement, remain.

While concrete plans for repealing and replacing the ACA remain vague, the process is clearer. The most likely path to repeal and replace the health care law is through the budget reconciliation process. Senate Republicans control the Senate's agenda and their committee gavels. However, at 52 seats, Republicans are well below the 60-vote threshold to overcome any potential filibuster. Thus, Senate Democrats will still hold significant power in the upper chamber and are expected to fight vociferously to prevent the dismantling of the ACA and its exchanges.

To circumvent a Democratic filibuster, Republicans are likely to turn again to budget reconciliation and its expedited approval procedures to usher ACA legislation through the Senate. The advantage of using the reconciliation process is that it allows the Senate to pass legislation with only a majority vote, instead of 60 votes. The reconciliation ▸▸

process does have its limitations. Provisions included in a reconciliation bill must have a budgetary impact. The determination of what provisions have a budgetary impact is left to the Senate Parliamentarian to decide, but the Republican's 2016 reconciliation bill to repeal provisions of the ACA serves as a guide. The "Restoring Americans' Freedom" reconciliation legislation, which President Obama vetoed, targeted the key structure of the ACA. The bill sought to repeal the (a) individual and employer mandates; (b) tax credits and subsidies after two years; (c) ACA taxes, including the so-called "Cadillac" tax on high-cost health plans; and (d) Medicaid expansion. Other provisions of the ACA, such as its insurance market reforms and the Independent Payment Advisory Board (IPAB), were deemed non-budgetary and, therefore, outside the scope of reconciliation.

The "repeal" part of President-elect Trump and congressional Republicans' plan is relatively quick and easy to achieve and likely will track last year's reconciliation bill. This means the provisions that have been the focus of employer concerns—the employer mandate and Cadillac tax—can be readily struck through reconciliation. However, the timing and contents of the "repeal and replace" effort is complicated by a number of factors.

First, the specifics of a "replacement" to the ACA have not yet been agreed upon. Republicans may look to Speaker Paul Ryan's healthcare reform blueprint: "A Better Way," for guidance. The blueprint did not offer legislative details, but set forth these key principles:

- Expansion of Health Savings Accounts (HSAs).
- Employer health exclusion cap – targeting the unlimited exclusion from income for employer-sponsored coverage.
- Creation of a healthcare "backpack" providing portability.
- Refundable tax credit for individuals and families.
- Purchasing insurance across state lines.
- Small-employer pooling through association health plans.
- Apply HIPAA's approach to pre-existing condition exclusions to the individual market and one-time national open enrollment.

Rep. Tom Price (R-GA), a physician and President-elect Trump's choice to serve as Secretary of the U.S. Department of Health and Human Services (HHS), previously submitted his own plan, the Empowering Patients First Act, which contributed to the Republican blueprint. Given his selection to serve as the new Secretary of HHS, Price will have a strong influence on dismantling the ACA and creating its alternative. Thus, his legislative proposal and the House Republican blueprint may well form the contours of what comes in the ACA's stead. Other legislation introduced by Republican Senators Richard Burr (R-NC) and Orrin Hatch (R-UT), and Rep. Fred Upton (R-MI), the Patient Choice, Affordability, Responsibility, and Empowerment (Patient CARE) Act, sought to replace the ACA with "sustainable, patient-focused reforms." While the Trump campaign's vision for replacing the ACA included some of these same concepts, his skeletal plan was vague on details. Those trying to ascertain what the replacement to the ACA's mandates, taxes, subsidies and exchanges likely will be, should look first to the legislative proposals and blueprint of congressional Republicans for direction.

The timing and contents of any ACA "repeal and replace" legislation is further complicated by the fact that 20 million Americans are currently enrolled in exchange plans. President-elect Trump and congressional Republicans may be anxious to act on their ACA campaign promises. However, there will no doubt be great political sensitivity to taking away coverage from the millions of Americans insured through the ACA. Legislation of this complexity will take time to implement, making a repeal of the ACA immediately after President-elect Trump is sworn

QUOTE of the MONTH

"This has been an exhausting, stressful, and sometimes downright weird election for all of us."

– President Barack Obama

IN FOCUS (continued)

in very unlikely. Accordingly, a transition period is expected before ACA exchanges and subsidies are repealed. This transition period should allow many, but perhaps not all, of these recently insured individuals and families continued coverage while the Administration and Congress formulate the replacement plan.

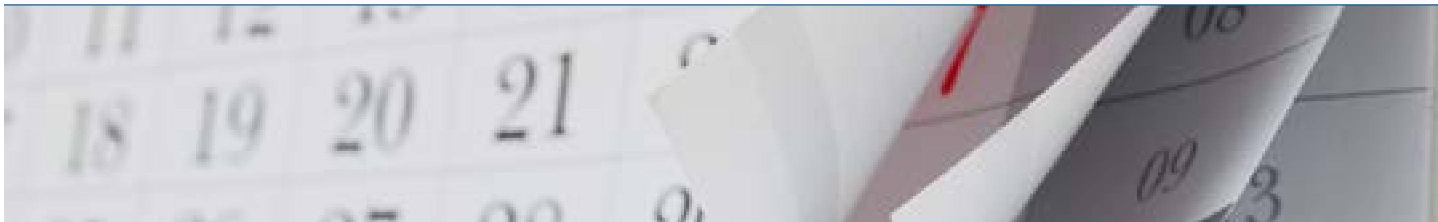
Also complicating the ACA repeal and replace strategy is the fact that not all of the ACA law can be repealed through the reconciliation process, and there seems to be some desire to retain some ACA provisions. After meeting with President Obama, President-elect Trump said that he supported two of the law's widely popular provisions—one that prohibits pre-existing condition exclusions and another that allows parents to keep their children on their health plans until age 26.

The ACA's bipartisan provisions to promote wellness programs are also generally popular. It is difficult to see these provisions, already in place for several years, being repealed. But the ACA is complex and interrelated. The drafters of the ACA hoped that any increase in costs otherwise generated from the insurance market reforms would be countered by the increase in the number of individuals insured by virtue of the individual mandate, subsidies and exchanges. Thus, it may not be feasible to keep only the popular and generally more costly provisions and discard the others. Because certain ACA provisions, such as insurance reforms and changes to the way health care is delivered, fall outside of the reconciliation process means that any changes to such provisions must get through a potential filibuster by Senate Democrats. Therefore, Senate Democrats will still wield some power in the health care reform debate. Indeed, there may be an effort to seek bipartisan support for at least some of the health care reform proposals.

Even before Congress acts on the ACA legislation, the incoming Trump administration can take action to impede the implementation of the ACA and its exchanges within the confines of their statutory authority. Administrative actions could include withdrawing any proposed rules or guidance and embarking on new rulemaking to repeal or modify existing regulations. The Administration could seek to provide more exemptions for the ACA's mandates or ease enforcement of the law's requirements. The new Administration may choose not to defend a lawsuit filed by the House claiming that no funds have been appropriated for ACA's cost-sharing reduction (CSR) program and that the reimbursement payments are thus illegal. In May, a federal district court ruled in favor of the House and enjoined further CSR payments. The Obama administration then appealed the ruling to the U.S. Court of Appeals for the District of Columbia Circuit, and the district court stayed its order. The House has filed a motion to delay the litigation to give the new Administration time to reevaluate its position and change its position on the litigation. Such actions could have a significant effect on the practical running of the ACA.

The ACA will not survive the new Administration and Congress in its current form. These changes will be substantial, but are still uncertain in their specifics. The ACA replacement legislation may include changes that have an even more profound impact on employer-sponsored plans if, for example, it includes a cap on the exclusion from income for employer-sponsored coverage. Other provisions of the ACA may reappear with similar features. Employers should bear in mind that the ACA, and the repeal of parts of it, may have important employee relations implications beyond the changing legislative and regulatory requirements. For example, in the absence of an employer mandate, will employers change plan eligibility requirements to exclude employees working under 40 hours a week instead of the ACA's full-time threshold of 30 hours? Will employers increase employee contributions if they no longer face a penalty for a plan being deemed unaffordable? As policymakers address the logistics of the ACA repeal and replace legislation, employers will need to monitor and respond to these developments in the year ahead.

OUTLOOK CALENDAR



DECEMBER 2016

Enforcement Date Extended for Portions of OSHA Tracking of Workplace Injuries and Illnesses Rule

Thursday, December 1, 2016

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulations to clarify the rights of employees and their representatives to access the injury and illness records. The portions of the final rule that (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibit employers from retaliating against employees for reporting work-related injuries or illnesses, will start being enforced as of December 1, 2016 (extended twice from August 10, 2016 and November 1, 2016). The remaining sections of the rule take effect on January 1, 2017. read more

---

Comments Due on Proposed Revisions to Annual Information Return/Reports – Period Extended

Monday, December 5, 2016

The DOL's Employee Benefits Security Administration has issued a proposed rule to change the Form 5500 Annual Return/Report forms, including the Form 5500, Annual Return/Report of Employee Benefit Plan (Form 5500 Annual Return/Report), and the Form 5500–SF, Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500-SF). The annual returns/reports are filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). The comment period, which was initially scheduled to conclude on October 4, 2016, has been extended until December 5, 2016. read more

---

Comments Due on OSHA's Proposed Amendments to its Respiratory Protection Standard

Tuesday, December 6, 2016

The Occupational Safety and Health Administration is proposing to add two modified PortaCount® quantitative fit-testing protocols to its Respiratory Protection Standard. The proposed protocols would apply to employers in general industry, shipyard employment, and the construction industry. read more

---

New USCIS Immigration Fees Schedule Takes Effect

Friday, December 23, 2016

The Department of Homeland Security (DHS) is adjusting the fee schedule for immigration and naturalization benefit requests processed by U.S. Citizenship and Immigration Services (USCIS). Among other changes, fees will increase by a weighted average of 21%. The fee related to processing the Employment Based Immigrant Visa, Fifth Preference (EB-5) Annual Certification of Regional Center, Form I-924A, will increase to $3,035. Applications or petitions mailed, postmarked, or otherwise filed on or after December 23, 2016 must include the new fee. read more

OUTLOOK CALENDAR (continued)

JANUARY 2017

Final OSHA Rule Governing Tracking of Workplace Injuries and Illnesses Takes Effect

Sunday, January 1, 2017

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The reporting requirements take effect on January 1, 2017. read more

EEOC Final Wellness Rule under GINA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer-sponsored wellness programs. This rule addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. read more

EEOC Final Wellness Rule under ADA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to all wellness programs that include disability-related inquiries and/or medical examinations whether they are offered only to employees enrolled in an employer-sponsored group health plan, offered to all employees regardless of whether they are enrolled in such a plan, or offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. read more

New Minimum Wage Rate Increase for Federal Contractors Takes Effect

Sunday, January 1, 2017

The minimum wage rate that must be paid to federal contractors under Executive Order 13658 will increase on January 1, 2017. The minimum wage rate that generally must be paid to workers performing work on or in connection with covered contracts will increase to $10.20 per hour. The required minimum cash wage that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to $6.80 per hour. read more

Final Rule Providing Paid Sick Leave Benefits for Federal Contractor Employees Becomes Applicable

Sunday, January 1, 2017

The DOL's Wage and Hour Division issued a final rule to implement Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*, signed by President Barack Obama on September 7, 2015. Executive Order 13706 (E.O.) requires certain federal contractors to provide their employees with up to 7 days (56 hours) of paid sick leave annually, including paid leave allowing for family care. The final rule defines terms, describes the categories of contracts and employees the E.O. covers and excludes from coverage, sets forth requirements and restrictions governing the accrual and use of paid sick leave, and prohibits interference with or discrimination for the exercise of rights under the E.O. While the rule takes effect on November 29, 2016, compliance will begin January 1, 2017. read more

OUTLOOK CALENDAR (continued)

JANUARY 2017 (continued)

Paycheck Transparency Provisions of Fair Pay and Safe Workplaces Executive Order Take Effect

Sunday, January 1, 2017

Although a federal court enjoined the implementation of several key provisions of the Fair Pay and Safe Workplaces Executive Order and its regulations, the portion of the so-called "blacklisting" rule that require federal contractors to include information regarding overtime pay and exempt status with each paycheck and to provide certain notices to independent contractors, have not been enjoined and are still scheduled to go into effect in connection with solicitations or contract amendments made on or after January 1, 2017. read more

Rule Governing Excepted Benefits, Lifetime and Annual Limits, and Short-Term, Limited-Duration Insurance Becomes Applicable

Sunday, January 1, 2017

The IRS, HHS, and EBSA have issued final regulations regarding the definition of short-term, limited-duration insurance for purposes of the exclusion from the definition of individual health insurance coverage, and standards for travel insurance and supplemental health insurance coverage to be considered excepted benefits. These final regulations apply to group health plans and health insurance issuers beginning on the first day of the first plan year (or, in the individual market, the first day of the first policy year) beginning on or after January 1, 2017. read more

Extended Comment Period Ends for OSHA's Standards Improvement Project-Phase IV

Wednesday, January 4, 2017

Pursuant to Executive Order 13563, *Improving Regulations and Regulatory Review*, the Occupational Safety and Health Administration (OSHA) is proposing to revise or remove regulations deemed outdated, duplicative, unnecessary, and inconsistent. To that end, under OSHA's Standards Improvement Project-Phase IV (SIP-IV), the agency is considering changes to certain construction standards. The commend period was initiatlly scheduled to conclude on December 5, 2016, but this deadline was extended until January 4, 2017. read more

Final OSHA Rule Governing Walking-Working Surfaces and Personal Protective Equipment Takes Effect

Tuesday, January 17, 2017

The Occupational safety and Health Administration issued a final rule revising and updating its general industry standards on walking-working surfaces. The final rule includes revised and new provisions addressing fixed ladders; rope descent systems; fall protection systems and criteria, including personal fall protection systems; and training on fall hazards and fall protection systems. In addition, the final rule adds requirements on the design, performance, and use of personal fall protection systems. read more

Final DHS RuleRegarding the Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers

Tuesday, January 17, 2017

The Department of Homeland Security (DHS) has issued a final rule amending its regulations related to certain employment-based immigrant and nonimmigrant visa programs. The rule improves the process for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers; provides greater stability and job flexibility for those workers; and increases transparency and consistency in the application of DHS policy related to affected classifications. read more

OUTLOOK CALENDAR (continued)

FEBRUARY 2017

Comments Due on IRS Proposed Rule on Minimum Present Value Requirements for Defined Benefit Plan Distributions

Thursday, February 23, 2017

The IRS has issued a proposed rule that provides guidance relating to the minimum present value requirements applicable to certain defined benefit pension plans. These proposed regulations would provide guidance on changes made by the Pension Protection Act of 2006 and would provide other modifications. According to the IRS, this proposal will impact participants, beneficiaries, sponsors, and administrators of defined benefit pension plans. read more

MARCH 2017

Extension of Due Date for Furnishing ACA Statements

Thursday, March 2, 2017

The IRS has issued Notice 2016-70, which extends the due date for certain 2016 information-reporting requirements for insurers, self-insuring employers, and certain other providers of minimum essential coverage under section 6055 of the Internal Revenue Code (Code) and for applicable large employers under section 6056 of the Code. Specifically, this notice extends the due date for furnishing to individuals the 2016 Form 1095-B, Health Coverage, and the 2016 Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, from January 31, 2017, to March 2, 2017. This notice also extends good-faith transition relief from section 6721 and 6722 penalties to the 2016 information-reporting requirements under sections 6055 and 6056. read more

IRS Public Hearing on Updates to Minimum Present Value Requirements for Defined Benefit Plan Distributions

Tuesday, March 7, 2017

The IRS will hold a public meeting to discuss proposed changes to the minimum present value requirements applicable to certain defined benefit pension plans. The IRS published a proposed rule setting forth these changes on November 25, 2016, for a comment period ending on February 23, 2017. read more

ABOUT LITTLER'S WORKPLACE POLICY INSTITUTE®

Littler's Workplace Policy Institute® (WPI™) was created to be an effective resource for the employer community to engage in legislative and regulatory developments that impact their workplaces and business strategies. The WPI relies upon attorneys from across Littler's practice groups to capture—in one specialized institute—the firm's existing education, counseling and advocacy services and to apply them to the most anticipated workplace policy changes at the federal, state and local levels. For more information, please contact the WPI co-chairs Michael Lotito at mlotito@littler.com or Ilyse Schuman at ischuman@littler.com.