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Spotlight on Health Care and Regulatory Reform Under the Trump Administration

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On February 28, 2017, President Trump delivered his first address to a joint session of Congress, outlining a broad vision of his agenda. The Trump administration is widely expected to chart a dramatically different course on workplace policy from that of the prior administration. Coming less than six weeks after President Trump was sworn into office, the address offered few details on how his administration's labor and employment policy will unfold. Yet, the speech did call for paid parental leave and childcare – a tenet of his campaign platform. Notably, the president stated: "my administration wants to work with members in both parties to make childcare accessible and affordable . . . and to help ensure new parents have paid family leave." Although the White House has not released further specifics on these proposals, their very mention in the address confirms that paid parental leave and childcare will be priorities of his presidency, and likely to gain momentum in Congress as well.

Health Care Reform

President Trump also used the speech to articulate his principles for repealing and replacing the Affordable Care Act (ACA):

- Ensuring that Americans with pre-existing conditions have access to coverage, and providing a stable transition for Americans currently enrolled in the health care exchanges.
- Helping Americans purchase their own coverage, through the use of tax credits and expanded health savings accounts (HSAs).
- Giving state governors the "resources and flexibility they need with Medicaid to make sure no one is left out."
- Implementing legal reforms "that protect patients and doctors from unnecessary costs that drive up the price of insurance – and work to bring down the

artificially high price of drugs and bring them down immediately."

- Allowing Americans to purchase health insurance across state lines.

President Trump's outline of his health reform principles comes as congressional Republicans are fleshing out the specifics of their plan to repeal and replace the ACA, broadly reflective of a number of the president's principles. Facing a fractious GOP caucus and political pressure in their home districts, the task of finding a consensus package that can pass both Houses of Congress will not be an easy task.

House Republicans took a critical first step on March 6, 2017, by publicly unveiling the "American Health Care Act." The House legislation includes provisions under the jurisdiction of the House Ways and Means Committee and under the Energy and Commerce Committee as part of a budget reconciliation package. Both committees plan to move quickly to advance the legislation, with a mark-up scheduled for March 8 and consideration by the full House shortly thereafter. Among other things, the House bill will zero-out the penalties associated with the ACA employer mandate, retroactive to January 1, 2016, and eliminate the individual mandate penalties. The legislation would expand HSAs— nearly doubling the amount of money people can contribute and broadening how people can use it. The legislation would replace the ACA premium tax credits with a refundable monthly tax credit—between $2,000 and $14,000 a year—for low- and middle-income individuals and families that do not receive insurance through work or a government program.

Prior drafts of the House ACA reconciliation bill called for capping the tax exclusion on employer-provided health coverage. Limiting the tax exclusion would provide a source of revenue to pay for other provisions of the legislation, but was met with widespread opposition from the employer community. The American Health Care Act would preserve the existing tax exclusion for employer-sponsored health coverage and would again delay the effective date of the so-called "Cadillac" tax on high-cost employer-sponsored plans. The 40% excise tax on high-cost employer-sponsored coverage is further delayed until 2025.

While the House legislation would remove the employer mandate penalty, it would not remove the onerous ACA health care reporting requirements. A repeal of those provisions would fall outside the scope of what could be included in a reconciliation bill, meaning the legislation would lose its expedited procedural status. Reconciliation legislation needs only a simple majority to pass the Senate, protecting it from a filibuster by Senate Democrats. However, only provisions with a budgetary impact may be included in a reconciliation bill. According to the House Ways and Means Committee's summary, the legislation calls for simplified reporting of an offer of coverage on the W-2 by employers. The summary states, "[r]econciliation rules limit the ability of Congress to repeal the current reporting, but, when the current reporting becomes redundant and replaced by the reporting mechanism called for in the bill, then the Secretary of the Treasury can stop enforcing reporting that is not needed for taxable purposes."

The House is expected to consider a separate bucket of ACA-related legislative proposals outside of the reconciliation process. On March 2, the House Education and Workforce Committee introduced legislation to "promote affordable health care for working families." The "Preserving Employee Wellness Programs Act" (H.R. 1313), introduced by Chairwoman Virginia Foxx (R-NC), would "provide much-needed regulatory clarity to the rules surrounding popular employee wellness programs that help lead to lower insurance premiums and a healthier workforce. The "Self-Insurance Protection Act" (H.R. 1304), introduced by Rep. Phil Roe (R-TN), would "reaffirm long-standing policies to ensure employers can continue to offer workers flexible, more affordable health care plans through self-insurance." House passage of this legislation and other components of the overall GOP healthcare reform proposal that fall outside of the reconciliation process, seems relatively assured with sufficient Republican support. However, such legislation would require some Democratic support in the Senate to reach the 60-vote threshold to overcome a likely filibuster attempt.

The prospect for any bipartisan ACA-related legislation outside of reconciliation in the Senate very much remains to be seen. Indeed, even the prospect of ACA reconciliation legislation in the Senate remains uncertain. Senate Republicans can afford to lose the support of only two members of their caucus to pass an ACA reconciliation bill. Four Republican Senators sent a letter to Majority Leader Mitch McConnell stating that they could not support the version of the House proposal leaked on February 10, 2017, claiming it did not protect people who gained Medicaid under the ACA. Even with Republican control of the White House and both Houses of Congress, the path to "repealing and replacing" the ACA is quite narrow, particularly in the Senate.

Agency Appointments

The Senate floor calendar is already full. The confirmation process for executive branch appointments that the new administration hoped to fill within a few days if not weeks of Inauguration Day now stretches into months. The Department of Labor remains without a secretary, let alone assistant secretaries, to lead its agencies and execute the new administration's agenda. After Andy Puzder withdrew his nomination to be Secretary of Labor, on February 16, President Trump named Alex Acosta to fill the Cabinet position.

Acosta was appointed by President George W. Bush to serve as a member of the National Labor Relations Board, where he served from December 2002 through August 2003. Thereafter, he served for two years as Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, followed by a four-year stint as the U.S. Attorney for the Southern District of Florida, where he expanded that office's focus on white-collar crime and health care fraud. He is currently Dean of the Florida International University College of Law in Miami.

If confirmed as the Secretary of Labor, Acosta will inherit a slew of holdover issues from the Obama administration and will likely revisit the priorities of former Labor Secretary Thomas Perez, who was just elected to lead the Democratic National Committee. Acosta's nomination hearing before the Senate Health, Education, Labor and Pensions Committee has been scheduled for March 15. With three prior Senate confirmations, his confirmation to head the DOL is expected. Once installed, he can begin the process of implementing a new workplace policy agenda for the Department.

Congressional Review Act

With much of the Senate floor agenda consumed with the confirmation process, little time has been left for other legislative items, including consideration of resolutions under the Congressional Review Act (CRA). The CRA gives Congress the authority to overturn recently finalized regulations under an expedited procedure that requires only majority approval in both the House and Senate. Not only does it allow Congress, with the signature of the president, to nullify a rule, it prevents the administration from promulgating a "substantially similar" rule absent congressional action. Specifically, any rule undone through the CRA is "treated as though [it] had never taken effect." Section 801(b)(2) of the CRA prohibits a rule undone through the CRA from being "reissued in substantially the same form."

Thus, the CRA, which was used successfully only once prior to the Trump administration, is a powerful tool lawmakers have to permanently kill controversial regulations issued by the Obama administration. However, the use of this tool is time-limited, and must be pursued within 60 legislative days of the date the agency submits the rule to Congress, which resets at the beginning of a new Congress—meaning the clock for utilizing the CRA in this manner is quickly running out. Although the House has already passed a number of CRA resolutions overturning regulations issued by the prior administration, few have yet to make their way to the Senate floor.

One of the few resolutions that has been considered and approved by both the House and Senate overturns the "Fair Pay and Safe Workplaces" rule (H.J. Res 37). This so-called "blacklisting" rule requires federal government contractors to disclose labor law "violations"—including those that are not even final decisions—as part of the contracting decision-making process. On March 6, the Senate narrowly approved the previously House-passed resolution by a vote of 49-48. The rule's reporting requirements and arbitration restrictions had already been

blocked following a Texas federal district court's grant of a preliminary injunction last year. The CRA resolution nullifies the entire rule, including the paycheck transparency provisions. Upon President Trump's signature, a future administration would be precluded from issuing a rule substantially similar to the nullified blacklisting rule, no doubt very welcome news for government contractors.

It is unclear which other CRA resolutions will make their way to the Senate floor before the 60-legislative-day clock runs out. The House voted in favor of two resolutions to overturn Labor Department rules issued last year that promote creation of auto-IRA programs by cities and states. One (H.J. Res. 66), sponsored by Rep. Tim Walberg (R-MI), pertains to rules governing state retirement programs; the other (H.J. Res. 67), sponsored by Rep. Thomas Rooney (R-FL), pertains to municipalities such as cities and counties. The House has also approved a CRA joint resolution of disapproval to invalidate the Obama administration's OSHA regulation overturning the decision in the *Volks* case regarding the statute of limitations for recordkeeping violations. The rule, which was finalized on December 19, 2016, extends to five years the six-month statute of limitations on recordkeeping violations in the Occupational Safety and Health (OSH) Act.

Executive Orders

Rules that were finalized by the prior administration prior to June 2016 lay outside of the reach of Congress through the CRA. Yet, President Trump has signaled that his administration will take a new approach to rulemaking, with greater consideration given to the regulatory burden imposed on employers. On January 30, 2017, the White House issued Executive Order 13771, requiring that two existing regulations be withdrawn for every new rule issued. The two-for-one order could serve to limit the number of new regulatory requirements imposes on employers and ensure their overall cost neutrality. A subsequent directive from the White House for agencies to carefully scrutinize existing regulations could serve to reduce the regulatory cost and burden of rules that are already on the books. Specifically, President Trump issued an executive order on February 24 entitled "Enforcing the Regulatory Reform Agenda." The order sets forth the Trump administration's goal to "alleviate unnecessary regulatory burdens places on the American people."

Toward that end, the order requires each federal agency to create a regulatory reform task force to identify overly burdensome regulations for potential repeal, replacement or modification. Within 60 days of the order, each agency must designate a "Regulatory Reform Officer (RRO)" to oversee the implementation of regulatory reform activities, including implementation of Executive Order 13771 regarding offsetting the number and cost of new regulations. The regulatory reform task force, chaired by the RRO, must evaluate existing regulations (as defined in Executive Order 13771) and make recommendations regarding their repeal, replacement or modification. The task force is charged with identifying regulations that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary, or ineffective;
- Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- Are insufficiently transparent; or
- Implement executive orders that have been rescinded.

Within these parameters, a number of regulations issued by the DOL under prior administrations could be candidates for withdrawal or revision. The task force is further directed to seek the input of entities significantly affected by federal regulations. The task force is required to report its findings and progress to the head of the agency within 90 days of the executive order, and periodically thereafter. Without a confirmed Secretary of Labor in place, it is unclear how this process will play out at the Department. But, no doubt, the regulatory reform focus of the Trump administration will provide employers with an opportunity to revisit the burden and effectiveness of labor and employment regulations impacting their workplaces.

Regulatory Delays

The Trump administration has already begun to make its mark on workplace policy, signaling further changes to the regulatory agenda pursued by the Obama administration. On March 2, the DOL's Employee Benefits Security Administration (EBSA) published a proposal to extend by 60 days the applicability date of the rule defining who is a "fiduciary" under the Employee Retirement Income Security Act (ERISA). EBSA is also seeking comments

on the issues raised in President Trump's February 3, 2017 memorandum on the fiduciary rule with respect to conflicts of interest in retirement plan advice. The memo called for EBSA to update its economic and legal analysis regarding the rule's impact.

Also published in the *Federal Register* on March 2 was OSHA's proposal to extend by 60 days the effective date of a rule on occupational exposure to beryllium. Pursuant to the White House Chief of Staff's January 20, 2017 memorandum directing agencies temporarily to postpone the effective dates of recent rules to give the new administration a chance to review them, OSHA announced it would postpone the effective date of the beryllium rule until March 21, 2017. The Memorandum also directed agencies to consider further delaying the effective date for regulations beyond that 60-day period. According to the March 2 notice, "[a]fter further review, OSHA has preliminarily determined that it is appropriate to further delay the effective date of this rule, for the purpose of further reviewing questions of fact, law, and policy raised therein." The new proposed effective date is May 20, 2017.

Immigration

President Trump has turned to executive orders and administrative action to advance his immigration policy agenda. On March 6, President Trump released a revised executive order entitled *Protecting the Nation from Foreign Terrorist Entry into the United States* following legal challenges to his "travel ban" issued earlier this year. In addition, on March 3, the United States Citizenship and Immigration Services (USCIS) announced that effective April 3, 2017, it will temporarily suspend premium processing for H-1B petitions, which may last for up to six months.

What's Next?

The contours of the workplace policy agenda of President Trump and congressional Republicans are beginning to take shape. The details and a fuller picture of the new workplace policy landscape and its import for employers will be filled in over the months ahead.