

FEDERAL POLICY UPDATE



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MAJOR POLICY CHANGES WILL EMANATE FROM ELECTION RESULTS

With Republicans set to take over the White House and retain control of the Congress, there will be some major shifts in policy next year. Every new President enjoys a brief “honeymoon” period, and President-elect Trump has laid out an ambitious agenda for his first hundred days in office. Although the details of many of those proposals remain to be determined, there are some concepts that will be significant in influencing the scope and timing of the changes that are coming. Moreover, many of the initiatives that will be pursued by the new President and the new Congress will take much longer than a few months to work their way through the legislative and regulatory processes. On all these important issues, ASHA is preparing for what is likely to be the most active legislative and regulatory period in many years.

Changes Expected in First Days of Trump Administration

In the very near term, the new President is expected to quickly rescind a number of President Obama’s Executive Orders. Another area where the new President will be able to act relatively quickly is in the regulatory arena. President-elect Trump is expected to order work stopped on regulations that are not yet in effect or have not yet been published. However, for many regulations that are already in effect, President-elect Trump may need to move cautiously to ensure that any precipitous action does not violate the Administrative Procedure Act (APA).

A separate avenue for challenges in early 2017 of some recently published regulations is the Congressional Review Act (CRA), which allows Congress to stop a regulation within 60 “legislative days” of its finalization. CRA challenges cannot be filibustered in the Senate, and, because there have been very few legislative days in the latter part of 2016, many regulations published in late 2016 will be open to CRA challenges by the new Congress (which will be sworn in on January 3, 2017). CRA challenges that are

passed by Congress early in 2017 can then be signed by President Trump, essentially voiding controversial Obama Administration rules while avoiding potential APA concerns. Still, the CRA will likely only be available in a limited number of cases because each regulation must be challenged separately, and each will consume a substantial amount of limited Senate floor time. The incoming chair of the House Education and the Workforce Committee, Virginia Foxx (R-NC), and Senate Health, Education, Labor, and Pensions Committee Chairman Lamar Alexander (R-TN) have been harsh critics of the Department of Labor’s overtime rule making that rule a strong candidate for a CRA challenge.

Legislative Calendar in the 115th Congress

In contrast to the options for relatively swift executive and regulatory action, the enactment of much of President-elect Trump’s legislative agenda will likely take considerably more time as his transition team works to fill thousands of positions in the new Administration, including about 1,200 that require Senate confirmation. Moreover, the legislative process is cumbersome and Congress is generally not able to deal with multiple issues at the same time. Therefore, the President-elect will need to prioritize his wish list and, even then, the Republican majorities, 52-48 in the Senate and about 240-195 in the House, remain very small and it will take time to hammer out agreements between the party’s various factions.

One key procedural tool available to the President and Republican congressional leaders is the budget reconciliation process, a mechanism that allows tax and entitlement changes to clear the Senate with a simple majority (i.e., with only Republican votes). Because Republicans do not have the 60 votes needed to stop a Senate filibuster, it is very likely that much of the major legislation enacted over the next two years will move under the more advantageous (but much more cumbersome and arcane) reconciliation rules.

Obamacare “Repeal” and “Replace”

Congressional Republicans are considering including Affordable Care Act (ACA) repeal legislation in an early reconciliation bill that could move very quickly through the Congress by resurrecting the partially completed 2016 budget process. This bill could provide the President with an early legislative victory on a signature issue. One drawback to this approach is that Republicans are not yet in agreement on what should “replace” the ACA. As a result, it is probable that early 2017 health care legislation will resemble the 2015 reconciliation bill that passed the Republican Congress but was vetoed by President Obama. That 2015 bill would have immediately eliminated the employer and individual mandates and repealed the other ACA taxes. Popular insurance market reforms would have been left in place, and the ACA premium subsidies and Medicaid expansions would have remained in effect for two years, delaying the need to reach agreement on the details of ACA replacement.

Tax Reform

Comprehensive tax reform will also be front and center in 2017, although the tax reform process will likely have to wait for a second budget reconciliation bill later in 2017. Nonetheless, the congressional tax-writing committees are continuing serious work on the details of tax reform, with the House Ways and Means Committee potentially taking action as early as spring. Although considerable work has been done, many details remain to be determined and consensus will be needed to enact major tax reform. There will also be efforts to win the support of Democrats in the Senate, most notably through the inclusion of new infrastructure spending, but as in the House, bipartisan legislation on comprehensive tax reform will be a challenge unless Republicans move a long way from their starting point.

Housing Reform and Other Initiatives

Outside of the reconciliation process, legislative action could proceed even more slowly because some degree of bipartisanship will be needed (at least in the Senate). That means that the Republican-controlled Congress will need to negotiate with Senate Democrats next year on all government funding legislation and will likely have to compromise if they want to make progress on many other reforms that President-elect Trump and congressional Republicans want to pursue, including policy changes related to housing finance and the GSEs, financial services reform, and tort reform. Those non-reconciliation issues can make progress at the same time as expected budget reconciliation bills, with returning House Financial Services Committee Chairman Jeb Hensarling (R-TX) and new Senate Banking Committee Chair Mike Crapo (R-ID) almost certainly resurrecting GSE reform efforts carried over from the prior Congress. However, the congressional calendar

often freezes out all but the highest priority items. And in early 2017, the most urgent legislative matters are likely to include confirmations of Trump Administration appointees and a Supreme Court appointee; health care reform; tax reform; and government funding.

114th CONGRESS WRAP UP

2016 Year-End Legislation

However, before moving forward on the ambitious long-term agenda described above, the departing Congress and the Obama Administration needed to complete a few time-sensitive matters that needed to be addressed in 2016. Most important, just before adjourning for the year, Congress reached an agreement on a must-pass continuing resolution that will fund the federal government through April 28, 2017. Lawmakers extended the prior funding levels in order to give President-elect Trump’s administration the opportunity to provide input on spending priorities. The funding bill temporarily reauthorizes the EB-5 Regional Center Program (without changes) and also continues funding for the National Institutes of Health for Alzheimer’s disease research and funding for Older Americans Act programs that provide social, nutritional, and caregiver support to seniors.

Congress was also able to clear a few other legislative measures before adjourning. Most notably, the passage of the bipartisan 21st Century Cures Act promises to accelerate the discovery, development, and delivery of new medical treatments and cures. But the package of tax extenders that might have dealt with the expiring seniors’ medical expense deduction proposal did not materialize and will have to wait until next year. In the end, congressional Republicans had no appetite for passing tax legislation ahead of next year’s push for comprehensive tax reform.

House Subcommittee Looks at Rising Long-Term Care Insurance Premiums Costs

A hearing held in the House Oversight and Government Reform Subcommittee on Government Operations on a recent premium increase for enrollees in the Federal Long-Term Care Insurance Program turned into a more general discussion about the long-term care insurance industry and its ability to provide quality coverage at affordable premium prices. Subcommittee members questioned why premiums continue to substantially increase across the board, why more insurers are not offering long-term care coverage, and how these issues can be addressed to make long-term care insurance more affordable and, therefore, more accessible.

Witnesses identified some of the challenges faced by insurance companies (lower than expected investment returns, risk assumptions that missed the mark, and a low



level of uptake) and offered recommendations that included (1) establishing a private sector-public sector partnership such as a public catastrophic insurance program that the private insurance industry could supplement or “wrap around” and (2) an above-the line tax deduction for long-term care insurance premiums. ASHA supports policies that foster the purchase of long-term care insurance, and the Subcommittee’s discussion of this issue is encouraging.

COURTS BLOCK TWO OBAMA ADMINISTRATION LABOR INITIATIVES

Persuader Rule Permanently Blocked

As we reported in July, a U.S District Court in Texas issued a preliminary injunction preventing implementation of the Department of Labor’s (DOL) new persuader rule that was scheduled to take effect on July 1st. That rule would have increased disclosure requirements for employers when they hire consultants to help fight union organizing drives. On November 17th, the court issued a permanent, nationwide order to block the rule. To date, the DOL has not filed an appeal, but even if it does, it is unlikely that the Court of Appeals would issue a decision prior to President-elect Trump taking office, after which the appeal could be withdrawn.

Overtime Rule Temporarily Blocked

A federal district court judge in Texas has issued a nationwide preliminary injunction to block implementation of the Department of Labor’s (DOL) overtime rule that was scheduled to take effect on December 1, 2016. As we reported previously, the rule would have increased to \$47,476 the salary threshold under which workers qualify for overtime pay. The plaintiffs had argued that injunctive relief was warranted because the DOL exceeded its authority in setting such a high salary threshold. The judge agreed, and said that the DOL was not authorized to create a salary test at all. As noted above, the expectation is that this regulation will almost certainly be reexamined through the CRA or by regulatory action taken by the Trump Administration.

On December 1st, the DOL filed a motion for an expedited appeal asking for an expedited briefing. The DOL’s motion requests that opening briefs be due by January 17th, with oral arguments occurring shortly thereafter. The groups who brought the suit oppose the motion.

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