January - February 2020

NEW SESSION OF CONGRESS BEGINS; IMPEACHMENT NOT THE ONLY AGENDA ITEM

As reported last month, Congress finished up 2019 with a bang. Despite a politically charged environment, much work actually got done at year end and in a bipartisan manner. They managed to complete a massive spending and tax extenders package offering something for everyone, including seniors housing interests. In addition to keeping the government open, key among the policy gains included a 2-year extension of the 7.5% medical expense deduction income threshold, an increase in Alzheimer's research funding at NIH of $350 million, retirement savings incentives in the SECURE Act, and program extensions for federal property insurance backstops for flood and terrorism risk. Other key policy changes of interest to the industry include the extension of the EB-5 Visa Program, Medicaid Spousal Impoverishment Protections and a repeal of the Cadillac tax which would have imposed a 40% tax on high cost employer medical plans.

As we begin 2020, there remains much unfinished business such as a bipartisan health care package addressing issues like surprise billing, and a transportation and environmental program reauthorizations that could kickstart interest in a multi trillion-dollar infrastructure package. Of course, there is a Presidential election, 435 House elections, 35 Senate elections and an impeachment which could make this year one of the busiest in recent memory. Nonetheless, ASHA will continue working on issues to improve the business environment for senior living and the lives of our residents and employees.

CONGRESSIONAL WORK ON RETIREMENT CONTINUES

Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019

Enacted December 20, 2019, the SECURE Act was designed to reform a dated retirement savings system that has not kept pace with our booming senior population. The SECURE Act does a number of things to promote better retirement planning such as : 1) increase the age for purposes of the Required Minimum Distribution (RMD) from and employment based retirement plan and IRA to 72 from 70 ½, 2) eliminate the prohibition against making contributions to a retirement plan after the age of 70 ½ , 3) make it easier for employers to offer annuity distribution options from 401(k) or other defined plans thus increasing the chances that more people will take advantage of the guaranteed lifetime income those products provide, 4) incentives to encourage employers to automatically enroll employees in their retirement plans (with employee right to opt out), and 5) generous tax credits for small employers establishing new retirement plans. It also enables small businesses to participate in multiemployer retirement plans and receive tax credits for implementing automatic enrollment for employees to ensure that they're saving for retirement, creates opportunities for part-time workers to become eligible for retirement benefits, depending on how many hours they've worked in a given year, among dozens of other changes to the retirement savings system.

Long Term Care Insurance Incentives

In an effort to revive the declining long term care insurance market, Sen Toomey (R-PA) recently announced a discussion draft bill to allow retirement savers to tap assets held in 401(k) plans and individual retirement accounts to buy long-term care insurance. The Toomey bill would amend the federal tax code to allow the tax-free withdrawal of up to $2,000 of retirement assets annually to pay long-term care insurance premiums and other policy charges. If successful, this will increase sales and lower prices for individuals who may need this coverage for long term care services such as the housing and care offered by senior living. ASHA sent a **letter of support** for this draft bill and are working with his office to advance this measure and gain support. It is estimated that less than 10% of residents living in senior living communities have a long-term care insurance plan in place. As we consider the aging baby boomer generation and their expected care needs, it is critical that policymakers address these needs and the means to pay for it.

Social Security Solutions Under Consideration
Beginning in 2020, Social Security will begin to draw down trust fund reserves to help pay for benefits and absent congressional action to reverse this, it is expected the combined funds will be depleted by 2035. This is not that far off and policy makers have begun to develop a plan to strengthen the program's finances. The Social Security 2100 Act, introduced in the Sente and the House by Senator Richard Blumenthal (D-CT) and Congressman John Larson (D-CT), proposes several reforms to keep the landmark federal program running until at least 2100. The bill would set the minimum Social Security benefit for retirees at a rate of 25% above the poverty line, while raising the income threshold for taxing Social Security benefits. The additional benefits would come through collecting additional payroll taxes, up from the current $132,900 maximum up to a new $400,000. With over 200 co-sponsors of the House bill, it is likely to pass this chamber in 2020. Whether or not the momentum carries over to the Senate remains unclear. ASHA will continue to monitor and report future action.

ASHA ANNOUNCES TWO NEW WEBINARS. MEDICARE ADVANTAGE: NEAR- AND LONG-TERM OPPORTUNITIES FOR SENIORS HOUSING

PART I: Thursday, February 20, 2020, PART II: Thursday, March 19, 2020
Experts predict the Medicare fee for service model is being dismantled by the continued drive to value based care. Recent changes to the Medicare Advantage Program offer seniors an expanding list of supplemental services that creates new opportunities in care delivery for seniors housing providers. ASHA has partnered with Anne Tumlinson Innovations (ATI) to develop a timely and thought-provoking toolkit to help you navigate new Medicare Advantage flexibility and how it may fit into your company's business plan going forward. The materials will be presented in two separate webinars, so we encourage you listen in to both sessions to get the most out of this material. To register for the webinars:

Part 1: **Thursday, February 20**
Part 2: **Thursday, March 19**

DOL REFINES "JOINT EMPLOYER" STANDARD

On January 12th, the Department of Labor issued a **final rule** updating its criteria for purposes of determining joint employer status. First proposed last spring, the rulemaking will roll back 2015 regulations put in place by the Obama administration that critics have argued could make businesses inappropriately liable for labor violations committed by their contractors and franchisees. Specifically, the rulemaking would replace the previous regulation's overly broad definition with a four part test that weighs whether the joint employer: (1) hires or fires the employee; (2) supervises or controls the employee's work schedule or conditions; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.

To learn more about this new rule, on Tuesday, February 25, 2020, at 1:00 p.m. Eastern Time, DOL's Wage and Hour Division will offer a public webinar to provide compliance assistance on the final rule. Detailed information about **new materials and resources** is available on the joint employer final rule website.

NEW OVERTIME RULES EFFECTIVE JANUARY 1, 2020

The final DOL Overtime Rule went into effect on Jan. 1, 2020, increasing the minimum salary level required for overtime pay to $35,308. This will change how 1.3 million Americans are paid and compensated. It's essential that business leaders understand the specifics of the new rule to ensure their policies are up to date and their practices in compliance.

CONGRESS TO CONSIDER MAJOR LABOR ORGANIZING BILL

The House is set to vote by President's Day on H.R. 2474, the Protecting the Right to Organize (PRO Act) of 2019, House Democrats' sweeping labor reform package that would:

- Prohibit state right-to-work laws
- Impose an overly stringent definition of "independent contractor" that would undermine individual rights to contract flexibly
- Codify expansive joint employer standards that could make companies liable for their contractors and franchisees
- Prohibit employment arbitration agreements, opening employers up to frivolous lawsuits

- Distort the organizing process, including by limiting the employer role in union elections and imposing mandatory union contracts when a union and employer do not reach an agreement

While the PRO Act has a few Republican cosponsors, it is expected to pass the House on a largely party-line vote and is highly unlikely to advance in the Republican-controlled Senate. ASHA joined its business industry partners in the Coalition for a Democratic Workforce (CDW) in **letters to Congress** in opposition to this legislation and will continue to discourage support for the bill.

CONGRESS EXTENDS MEDICAID'S SPOUSAL IMPOVERISHMENT POLICY, CMS SETS 2020 AMOUNTS

In December, Congress passed legislation containing several health care "extenders," including a provision to preserve Medicaid's Spousal Impoverishment rules through May 22, 2020. By electing to only include five months of Medicare and Medicaid extenders, Congress set up another must-pass health care package in 2020 just as the election cycle kicks into high gear.

In general, to financially qualify for Medicaid long-term services and supports (LTSS), an individual must meet certain low-income and asset requirements. In 1988, Congress enacted provisions to prevent what has come to be called "spousal impoverishment," leaving the spouse who is still living at home with little or no income or resources. The Affordable Care Act (ACA), changed the spousal impoverishment rules to treat Medicaid HCBS and institutional care equally.

The Center for Medicare and Medicaid Services (CMS) recently posted the **minimum and maximum amount of resources** and income that can be protected for a spouse in the community in 2020.

The provision set to expire in May 2020 would revert to the pre-ACA policy, allowing individual states to determine whether the spousal impoverishment rules apply to HCBS settings.

MEDICAID FISCAL ACCOUNTABILITY RULE (MFAR) CREATES NEW TAX LIABILITY FOR CCRCS

In November, 2019, The Centers for Medicare & Medicaid Services (CMS) issued the proposed Medicaid Fiscal Accountability Rule (MFAR) (CMS-2393-P) to strengthen the fiscal integrity of the Medicaid program and help ensure that state supplemental payments and financing arrangements are transparent and value-driven. Of interest to senior living industry is the proposed tax treatment of CCRCs.

The Medicaid program is jointly funded by states and the federal government. State governments contribute their portion partly through the imposition of provider taxes. Most states have a nursing home tax, however, states can receive a waiver from this tax and in approximately 18 states, CCRCs have a lower tax rate or are exempt altogether. The proposed rule would disallow matching funds for states that generate taxes that impose "undue burden" on Medicaid. Included among circumstances that would pose such a burden include, "not taxing groups of providers with no Medicaid services or taxing those providers at a lower rate compared to other groups." According to Leading Age, if the MFAR were to be finalized as written, life plan communities in the eighteen states that have such an exemption or discount could face new Medicaid taxes at a cost of up to six or seven figures each year, causing serious implications for the sustainability for life plan community nursing home". Almost 3,000 comments have been submitted to CMS seeking revisions to the proposed rule to allow states to continue to have full authority to determine how they administer their own state nursing home provider bed tax program. See **Fact Sheet** on MFAR Proposed Rule.

TREASURY ISSUES OPPORTUNITY ZONE FINAL REGULATIONS

On December 19, the Treasury Department and IRS issued **final regulations** implementing the Opportunity Zone program. Created under 2017's tax reform package, the Opportunity Zone program provides an incentive for investment in any of 9,000 designated low-income areas by providing a deferral of capital gains taxes through 2026 and an up to 15 percent step up on capital gains for investments in qualified opportunity zones, as well as a permanent exclusion from capital gains liability if investments are held for at least 10 years. Despite initial excitement, investors have been relatively hesitant to buy into the Opportunity Zone program thus far, largely due to regulatory uncertainty. December's final rules are seen as an having the potential to address this tepid reception by providing certainty and clarity, as well as flexibility to potential investors. On Capitol Hill, Opportunity Zones retain bipartisan support, but have increasingly come under scrutiny from some Democrats wary of the Trump Administration's management of the program and its potential to benefit already affluent communities—narratives that are likely to shape any ongoing policymaking around the program.

HUD SCALES BACK OBAMA-ERA FAIR HOUSING RULE

On January 7, the Department of Housing and Urban Development (HUD) issued a proposed rule loosening its Fair Housing Act regulations by broadly scaling back the compliance requirements imposed under HUD's 2015 Affirmatively Furthering Fair Housing Rule (AFFH). This 2015 rule which required communities receiving HUD funding to submit hundreds of pages of documentation outlining their efforts to desegregate their communities. Under the new rule, rather than requiring extensive documentation of compliance with AFFH obligations, HUD would move towards a metrics-based approach based on measurements such as a community's fair housing complaints and supply of affordable housing.

Secretary Ben Carson and other senior HUD officials have long raised concerns that the 2015 AFFH rule is overly burdensome on communities and impedes the construction of affordable housing. To this end, this month's proposed rule—as well as a previous suspension of the rule and elimination of a required data access tool—is framed as creating a less burdensome regime for communities that would encourage the construction of affordable housing stock. However, the proposal has received significant criticism from housing advocates and Congressional Democrats, who argue that it would reduce accountability around fair housing obligations and fail to prevent segregation.

AFFORDABLE HOUSING KEY DEBATE IN 2020

Affordable housing is shaping up to be a top priority in Washington this year. Last Summer, President Trump convened a White House Council on Eliminating Barriers to Affordable Housing, which has keyed in on the burden of local regulations as a primary barrier to the development of affordable housing stock. In November, the Council issued a request for information to solicit feedback that will assist the Council in identifying Federal, State, local, and Tribal laws, regulations, and administrative practices that artificially raise the costs of affordable-housing development and contribute to shortages in housing supply, responses to which were due by January 21. Between 2001 and 2017, the number of renter households allocating more than half of their incomes toward rent increased by nearly 45 percent.

Additionally, the House Financial Services Committee dedicated its first hearing of the year to affordable housing and homelessness, where Democrats called for greater federal expenditures in affordable housing and largely hammered the Trump administration's housing and homelessness strategy. In the middle of these at-odds approaches, ASHA has been invited to join housing and financial services industry stakeholders to begin to build consensus on what role industry can play in addressing this critical need.

HHS LAUNCHES PLANNING EFFORT FOR HEALTHY AGING 2020

The Office of Disease Prevention and Health Promotion (ODPHP) of the Department of Health and Human Services (HHS) recently **announced** an opportunity for non-Federal public and private sector organizations to co-sponsor the 2020 Healthy Aging Regional Workshops and/or the 2021 Healthy Aging Summit (HAS). Co-sponsorship of a Workshop involves convening a single or series of meetings or workshops with healthy-aging stakeholders to support regional action planning and dissemination of information on healthy aging, aging in place, and age-friendly public health systems. The HAS opportunity involves organizing a conference and activities focused on health promotion and disease prevention research across the lifespan. The HAS also will help identify critical research needs and highlight the latest science of creating livable communities and improving healthy aging.

SCOTUS VOTES 5-4 IN FAVOR OF TRUMP ADMINISTRATION IMMIGRATION "PUBLIC CHARGE" RULE

In August 2019, the Department of Homeland Security (DHS) published a **final rule** that changes the public charge policies used to determine whether an individual applying for admission or adjustment of status is inadmissible to the U.S. The law previously interpreted a public charge as someone likely to become "primarily dependent on the government for subsistence," and specifically someone who would require "income maintenance or institutionalization for long-term care at government expense." This rule expands the types of assistance that would disqualify an applicant for legal status if used in any 12 months in a 36-month period, such as housing assistance and food stamps as well as apply conditions relative to age, educational level and English proficiency. The new rule was challenged in courts around the country, and five trial judges entered injunctions blocking it. Lawsuits are expected to continue in coming months. The U.S. Supreme Court's decision temporarily greenlights the rule, creating much confusion as attorneys question how to prepare green card applications in the absence of government guidance. Immigration advocates predict a chilling effect that will lead to immigrants not seeking necessary services and drastically curtailing the number of visas. An analysis from the Kaiser Family Foundation reports 42 percent of legal immigrants could see their green card applications weighed negatively as a result of the rule while 94 percent could face extra scrutiny after using at least one of the public programs targeted by the policy.

Noteworthy Quote:

"The real debate we should be having is how do we make it easier for people to get coverage for addiction and mental health? I have a plan for that. And then, finally, what should we do about long-term care? The elephant that doesn't even fit in this room," she added, while discussing her family and their struggles with her father's care. "We need to make it easier for people to get long-term care insurance. We need to make it easier for them to pay for their premiums."

~**Sen Amy Klobuchar (D-MN), Presidential Candidate**
Jan 14, 2020 Democrat Presidential Primary Debate

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To access the links, please refer to the digital version of this Federal Policy Update by logging into the "Members Area" of the ASHA website. For login credentials, contact Meghan at mbertoni@seniorshousing.org

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