# Employee Benefits Corner

## Employee Benefits in the Trump Administration

*By Elizabeth Thomas Dold and David N. Levine**

With President Donald Trump now in the Oval Office, and both the Senate and House of Representative being now controlled by the Republican party, changes to the regulatory agencies, their mandates and focus and tax reform all come into play to impact employee benefits.[1] Republicans now have the opportunity to set the policy agenda and to move major pieces of legislation that could significantly impact the health and retirement systems, with these being the biggest two expenditures on the books. In the spotlight is the Affordable Care Act (ACA), where Republicans are actively pursuing legislation to roll back and replace key portions of the ACA. The Republications are also focusing on major changes to the Internal Revenue Code ("the Code") and various regulations, which could profoundly impact the retirement system. Set forth below is a brief look at what may be coming in 2017.

### Executive Branch Appointees

President Elect Trump has announced that he will make the following key executive branch appointments (along with the other 4,000 positions that he needs to have filled) that will impact retirement and health policy:

- Secretary of the Treasury—Steve Mnuchin. Mr. Mnuchin is a former partner at Goldman Sachs and the founder of Dune Capital Management.
- Secretary of Labor—Andrew Puzder. Mr. Puzder is the CEO of CKE Restaurants, Inc. (Carl's Junior, Hardee's).
- Secretary of Health and Human Services—Rep. Tom Price (R-GA). Dr. Price is an orthopedic surgeon and currently is the Chairman of the House Budget Committee.

These positions all require confirmation by the Senate after public hearings and debate.

### Regulatory Prospective

President Trump is likely to roll back many of the Obama Administration's regulations and executive orders, and Republican operatives have already begun compiling a list of hundreds of rules that they would like to see repealed. Notably, there are a number of methods used to delay, reissue, repeal or withdrawal regulations. For example, the new Administration can:

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- issue a directive to executive agencies immediately after the inauguration imposing a moratorium on new regulations;
- issue a directive to executive agencies to postpone the effective date of certain rules;
- direct the withdrawal of regulations that have not been published in the Federal Register; and
- issue an order repealing many of President Obama's Executive Orders.

With the new Administration and the Republican-controlled Congress, we anticipate seeing pulling back or amending many of the Obama Administration's regulations that have already been published in the Federal Register. For any regulations that are not yet effective on inauguration date, the Administration can delay and reopen these regulations. And for regulations that are already effective, they can be repealed or amended through the normal rulemaking process under the Administrative Procedures Act, but this process takes a significant amount of time.

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Congress can also get involved to block any Obama Administration's rules, but it is not an easy process as Democrats can still filibuster legislation in the Senate. Notably, recently issued rules can be overturned using an expedited procedure under the Congressional Review Act (CRA), which allows rules to be overturned by a simple majority vote in both chambers. But each vote takes valuable legislative time in the House and Senate, so absent a legislative change, Congress may only be able to consider a handful of rules under the CRA.

One item to watch is the Department of Labor's final regulation to change the definition of a fiduciary, which is technically already effective, just not applicable until April 10, 2017. If the new Administration decides to delay this rule, it may need to effectuate the delay by issuing an interim final regulation, which is subject to notice and comment after release. If delayed, the new Administration will be able to re-evaluate the rule and consider changes to the rule or any of the exemptions. Any changes will need to go through the official notice and comment rulemaking process, so we may be in for some period of uncertainty. There is also ongoing lawsuits challenging this rule, which adds another level of complexity. And then there is Congress, which (as in the past) the Republicans may well consider legislation to replace the fiduciary rule.

## Legislative Prospective

On the top of the list from a legislative prospective for the new Administration would be:

- Repeal and Replace the ACA
- Comprehensive Tax Reform (corporate and individual)
- Repeal and Replace Dodd–Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")
- Illegal Immigration Measures
- Investing More in U.S. infrastructure

The first three items will have a significant impact on employee benefits.

For the ACA, Congressional Republicans have indicated that they intend to begin repealing and replacing the ACA through budget reconciliation legislation early this year, but the transition period between the ACA rules and the new, replacement rules is still unclear (two- to three-year period is being talked about but with President Elect Trump not wanting any lag). For tax reform, Speaker Paul Ryan (R-WI) and Ways and Means Chairman Kevin Brady (R-TX) have both made clear that tax reform is one of their top priorities for the 115th Congress, with the driver being reducing corporate and individual income tax rates, but to be done in a revenue neutral manner.

Tax reform on a revenue neutral manner means Congress will need to reduce tax expenditures significantly. This puts retirement systems at risk because the tax incentives for retirement are among the largest tax expenditures in the Code. Nearly all the tax reform proposals over the last several years have attempted to limit the tax preference for retirement plans.

For example, if we look back to 2014, former Ways & Means Chairman Dave Camp's (R-MI) Tax Reform Act of 2014 would have made a number of significant changes to retirement plans (both qualified and nonqualified arrangements). The proposed changes included the following:

- Reduce the number of tax brackets to three rates (10 percent, 25 percent and 35 percent) and, for taxpayers in the 35-percent bracket, apply a 10-percent surtax to various deductions and exclusions, including employer pre-tax contributions to defined contribution plans, under a new modified AGI definition.
- Freeze indexing of various retirement contribution and benefit limits (*e.g.*, 415, elective deferral and catch-ups).

- Require all defined contribution plans to permit Roth contributions and impose a limit under which no more than 50 percent of contributions can be made on a pre-tax basis.
- Eliminate certain types of plans (*e.g.*, SEPs, SIMPLE 401(k) plans and traditional IRAs) and move toward consolidation and simplification of others (*e.g.*, applying uniform contribution limits to all defined contribution plans by extending 401(k) limits to 403(b) and governmental 457(b) plans).
- Eliminate the performance-based compensation exception to the $1 million annual compensation deduction limit and change the covered employee definition.
- Change the taxation of deferred compensation by requiring taxation to occur at the time there is no substantial risk of forfeiture of the deferred compensation.
- Eliminate the special net unrealized appreciation rules on lump sum distributions of employer stock.

More recently, in the A Better Way report, which the House Republican leadership referenced generally, there is a proposal to consolidate and reform the multiple different retirement savings provisions and consider the creation of Universal Savings Accounts. Also notably, the Senate Finance Committee approved the following two bills in September that should not be forgotten:

- "Retirement Enhancement and Savings Act of 2016" (RESA)—intended to improve the retirement system generally, which has received bipartisan support. The few notable provisions include the following:
  - Permit unrelated employers (*i.e.,* those without "commonality") to pool their resources by participating in a new type of multiple-employer plan referred to as a "pooled employer plan"
  - Require employers to provide defined contribution plan participants with an annual benefit statement that includes an estimate of the amount of monthly annuity income the participant's balance could produce in retirement
  - Create a new fiduciary safe harbor for employers who elect to include a lifetime income investment option in their defined contribution plan
  - Change the post-death required minimum distribution (RMD) rules to generally require that all distributions after death (including to a designated beneficiary) be made by the end of the fifth calendar year following the year of death, with exceptions for certain eligible beneficiaries and for aggregated amounts of $450,000 or less
  - Remove the 10-percent limit on the automatic enrollment safe harbor default rate

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  - Make certain changes to the rules that apply to nonelective contribution 401(k) safe harbor plans
  - Modify the hardship withdrawal rules
  - Extend the period during which a qualified plan loan offset amount may be contributed to an eligible retirement plan
  - Create strict new limits on plan loans made through credit cards
  - Permit rank-and-file employees at certain private companies to defer income taxation for up to five years on amounts attributable to certain stock options or restricted stock units
- "Miners Protection Act of 2016"—intended to shore up the Mineworkers of America's struggling retiree health and pension funds, which are both facing insolvency in the near future.

## Conclusion

As this column highlights, there are many employee benefits-related items on the Trump Administration and Congressional agendas. By the time this column is published, some actions may have already come to pass, others may be pending and whole other avenues may be under exploration. While few future actions in the employee benefits legislative and regulatory landscape are certain at this time, it is certain that the next several years are certain to bring a high level of activity.

### ENDNOTE

[*] Special thanks to Michael Kreps, Rachel Levy and Brigen Winters for their contribution to this column.

[1] This column was written in January 2017 right before the inauguration of President Trump.

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