

Publications

Legislative & Policy Update

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SERVICES

Key Take-Aways

- The House will vote this week on a **Tax Reform 2.0** legislative package that includes a number of retirement-related provisions. The legislation is expected to pass and may pave the way for House-Senate negotiations on compromise retirement legislation in the lame duck.
- The Senate passed **pharmacy gag rule** legislation to end the practice of insurers and pharmacy benefit managers forbidding pharmacies from telling customers if they could get a drug more cheaply if they paid themselves instead of using their insurance.
- The House will vote this week on a **bipartisan spending bill** that fully funds the Departments of Defense, Labor, and Health and Human Services for the entire 2019 fiscal year and funds the other federal agencies that do not yet have a full-year budget into December. If the President vetoes the bill over border wall funding objections, the government will shut down at

midnight on Friday.

Tax Reform 2.0

The full House will vote this week on the package of three bills known as Tax Reform 2.0. The legislation is primarily intended to make permanent the individual tax rate reductions included in the *Tax Cuts and Jobs Act*, which passed last year.

Why it matters. One of the bills in the package, the *Family Savings Act* (H.R. 6757, “FSA”), contains numerous retirement provisions. The FSA contains many provisions that are also in the *Retirement Enhancement and Savings Act* (S. 2526; H.R. 5282; “RESA”), which passed the Senate Finance Committee unanimously in 2016. The House is expected to pass the FSA this week, but it likely will not advance in its current form in the Senate. Instead, the two chambers likely will try to reconcile the differences between the FSA and RESA with the goal of passing a compromise bill in the lame duck.

The details. The key provisions of the FSA are:

- **Pooled Employer Plans.** The FSA would facilitate “open” MEPs by eliminating the ERISA requirement that employers participating in a single plan have a nexus of commonality unrelated to their participation in the plan. It would also direct Treasury to issue regulations to address situations in which one participating employer has a qualification failure that puts the entire plan at risk (*i.e.*, the “one bad apple” rule). RESA includes a similar open MEPs provision, but the legislative language in the FSA is not entirely consistent with RESA as there are some technical modifications. Also, the FSA provision would be effective immediately while the RESA provision has a delayed effective date.
- **Safe Harbor 401(k)s.** The FSA would relax rules regarding electing a safe harbor 401(k) plan. This provision is consistent with a provision of RESA.
- **IRAs.** The FSA would allow taxable non-tuition stipends and fellowship payments to be treated as compensation for IRA purposes. It would also allow older workers to contribute to traditional IRAs by repealing the age 70 ½ maximum age for contributions. These provisions are consistent with provisions of RESA.
- **Plan Loans.** The FSA would prohibit plans from making loans using credit cards. This provision is similar to a provision in RESA, but, unlike RESA, the FSA provision does not grandfather existing arrangements.
- **Portability of Lifetime Income Options.** The FSA permits certain defined contribution plans (*i.e.*, 401(k), 403(b), or governmental 457(b) plans) to make direct trustee-to-trustee transfers to another employer-sponsored retirement plan or IRA of certain lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, if a lifetime income investment is no longer authorized to be held as an investment option under the plan. The purpose of the provision is to allow participants to keep their lifetime income investments and avoid surrender charges. This provision is consistent with a provision of RESA.
- **Terminated 403(b)s.** The FSA provides a method for terminating 403(b) plans to preserve assets that cannot be distributed. Specifically, it deems certain custodial accounts to be IRAs. This provision is consistent with RESA.
- **Church 403(b) Plans.** The FSA would clarify the individuals who may be covered by 403(b) church plans. This provision is consistent with a provision of RESA, except that the effective date is set at 2009.
- **Required Minimum Distribution (“RMD”) Exemption.** The FSA provides an exemption from the RMD rules prior to death if an individual has \$50,000 (indexed) or less of total savings in all of his/her IRAs and qualified defined contribution, 403(b) and governmental 457(b) plans.
- **Governmental Plan Pick-up Rules.** The FSA would allow a contribution to a governmental plan to be treated as a pick-up contribution with respect to an employee even though the employee made an irrevocable election between two formulas with the same or different levels of employee contributions.

- Reservist Deferrals. The FSA would allow Ready Reservists to make contributions to both the Thrift Savings Plan and a private-sector plan subject to separate limits, including separate catch-up contribution limits.
- Plan Adoption Date. The FSA would allow an employer to adopt a new plan by the employer's tax return due date. This provision is consistent with a provision of RESA.
- Frozen Plans. The FSA would provide relief from the nondiscrimination rules for certain frozen defined benefit plans. The provision is intended to address situations where plans are frozen to new entrants but still allow benefit accruals for existing participants. As these participants progress through their careers, certain plans may fail nondiscrimination testing as the participants become more highly compensated. This provision is consistent with a provision of RESA.
- PBGC Premium Study. The FSA would direct the Social Security Administration or another independent agency selected by the PBGC Board to study the PBGC premium structure for single-employer plans and determine, among other things, whether PBGC premium levels are sufficient and whether premiums should be adjusted based on new factors (*e.g.*, the type of plan investments or the creditworthiness of the employer). This provision is materially different than a provision in RESA that would reduce premiums for CSEC plans.
- Universal Savings Accounts. The FSA would create a new type of savings account that permits individuals to make post-tax contributions up to \$2,500 (indexed) but not to exceed the individual's compensation includible in gross income. Contributions for dependents are not permitted. Distributions can be made at any time for any purpose on a tax-free basis. However, distributions generally must be made in cash or property with a readily ascertainable value.
- 529 Plans. The FSA would expand 529 plans to allow tax-free distributions for certain apprenticeship program, homeschooling, additional elementary or secondary school, and student loan expenses.
- Child Birth or Adoption Withdrawals. The FSA would permit individuals to take penalty-free withdrawals from their qualified defined contribution, 403(b), and governmental 457(b) plans and IRAs for expenses related to the birth or adoption of a child. The distributions could also be recontributed to eligible plans, subject to certain requirements.
- Importantly, the FSA does not contain some key provisions in RESA. Specifically, the FSA would not –
 - create a fiduciary safe harbor for plan sponsors electing to include a lifetime income investment option in their plans;
 - require participants' annual statements to include a lifetime income disclosure (*i.e.*, an estimate of the monthly income an individual's account could produce in retirement);
 - limit the use of "stretch" IRAs, which was used to offset the cost of RESA;
 - eliminate the 10 percent cap on automatic enrollment plans;
 - provide an enhanced tax credit for small businesses establishing new retirement savings plans; or
 - eliminate the need for certain small businesses to file duplicative Forms 5500.

Hurricane Florence

The Internal Revenue Service ("IRS") and Department of Labor ("DOL") both issued press releases this week regarding administrative accommodations for persons affected by Hurricane Florence.

Why it matters. After Hurricane Harvey in Texas in 2017, the agencies issued guidance permitting hardship 401(k) withdrawals and other accommodations for persons affected by the storm. We expect to see guidance very similar to that for Hurricane Harvey issued shortly. With frequent natural disasters, the Plan Sponsor Council of America and other groups called on DOL and IRS to issue standardized guidance for administrative relief in the wake of such events.

The details. On Wednesday, DOL [wrote](#), "The Employee Benefits Security Administration (EBSA) is coordinating with other federal agencies, including the U.S. Department of Treasury, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation, on the release of compliance guidance for employee benefit plans, and plan participants and beneficiaries, in the wake of Hurricane Florence." The IRS has so far only [issued](#) guidance regarding the filing of income tax returns.

Pharmacy Gag Rule

On Monday, the Senate passed 98-2 Senator Susan Collins' (R-ME) *Patient Right to Know Drug Prices Act*. The bill would end the practice of insurers and pharmacy benefit managers forbidding pharmacies from telling customers if they could get a drug more cheaply if they paid themselves instead of using their insurance.

Why it matters. There is some [debate](#) over how common the practice is, and 22 states have already outlawed such gag clauses, but lawmakers will tout this as a victory against ever-increasing medical costs on the campaign trail this fall.

The details. Senator Collins' bill would govern the individual market, including exchanges, and plans sponsored by private employers. A similar [bill](#), Senator Debbie Stabenow's (D-MI) *Know the Lowest Price Act of 2018*, which would govern only the Medicare market, passed the Senate by unanimous consent earlier this month. The House has not yet scheduled its version of the [bill](#), the *Prescription Transparency Act of 2018* sponsored by Rep. Buddy Carter (R-GA), for a vote before the full House. If the House passes its version, the bills from both chambers would need to be reconciled in a conference committee or through a "ping-pong" strategy.

Balance Billing

A bipartisan group of senators has circulated a [discussion draft](#) of legislation that would ban the practice of balance billing, which would prohibit healthcare providers from charging patients out-of-network rates for emergency services, among other provisions.

Why it matters. The practice of balance billing is deeply [unpopular](#) with consumers and the issue has broad support among voters. As with Senator Collins' bill above, lawmakers are doing their best to reign in the high cost of healthcare.

The details. The legislation is sponsored by Senator Bill Cassidy, M.D. (R-LA), with co-sponsors Senators Tom Carper (D-DE), Todd Young (R-IN), Claire McCaskill (D-MO), Michael Bennet (D-CO) and Chuck Grassley (R-IA). In addition to emergency room fees, the legislation would also require healthcare providers to notify a patient if follow-up, nonemergency care at the emergency facility would be out-of-network, among other provisions. Senator Cassidy's office is accepting input on the draft now, with plans to introduce the bill in the new year.

Health Savings Account ("HSA") Legislation

On Thursday, September 20, Sen. Ben Sasse (R-NE) introduced [S. 3473](#) to allow participants to move funds from a flexible spending account ("FSA") or health reimbursement account ("HRA") to an HSA.

Why it matters. As many employers move to high deductible health plans, there has been considerable interest from many in Congress in making the rules more flexible. Although it is unlikely Congress will make material changes this year, we expect HSAs to continue to be a subject of intense discussion in the next Congress, regardless of the outcome of the mid-term elections.

Health Insurance Projections Changes

On Friday, the Congressional Budget Office ("CBO") [announced](#) that it will change the way it models health insurance coverage take-up rates.

Why it matters. Earlier this year, the CBO estimated that efforts to repeal the Affordable Care Act would have resulted in 13 million more uninsured Americans than if the law were left in place. Shortly after that announcement, the CBO revised their estimate down to 6 million more uninsured. Lawmakers were upset with what they saw as flawed estimates that harmed their chances of passing promised healthcare reform.

The details. The new simulation model will "incorporate new data into the early stages of modeling; better account for consumers' selection of types of insurance plans; and allow easier simulation of new insurance products." The new model is still under development and is expected to debut in the spring.

Medicaid Work Requirements

Two high-ranking Democrats on the House Oversight Committee sent a [letter](#) last week to Oversight Chairman Rep. Trey Gowdy (R-SC) requesting the committee subpoena Trump Administration documents regarding state efforts to impose Medicaid work requirements.

Why it matters. Expect this issue to be a significant one if Democrats retake the House majority in November. The personal impacts and political consequences of state Medicaid work requirements are not yet known, but states continue to look into the idea.

The details. Reps. Elijah Cummings, ranking member, and Raja Krishnamoorthi, ranking member of the relevant subcommittee, wrote that Centers for Medicare and Medicaid Services Administrator Seema Verma and Health and Human Services Secretary Alex Azar did not respond to their previous letter requesting documents regarding these efforts. The letter cites an example of a single mother in Mississippi as the kind of Catch-22 that work requirements can cause.

The Week Ahead

- Both chambers are in session.
- On Tuesday, the Senate Health, Education, Labor and Pensions (“HELP”) Committee will hold a subcommittee [hearing](#) entitled, **“Health Care in Rural America: Examining Experiences and Costs.”**
- On Thursday, the full HELP Committee will hold a [hearing](#) entitled, **“Reducing Health Care Costs: Improving Affordability Through Innovation.”**
- Also on Thursday, the Senate Finance Committee will hold a [hearing](#) to consider the nomination of Gordon Hartogensis to be Director of the **Pension Benefit Guaranty Corporation**.