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FORM 1099

The Senate has passed the Federal Aviation Administration (FAA) reauthorization bill. It now includes a repeal of the Form 1099 expansion, with a rescission of unspecified unspent funds as an offset. The Senate FAA bill is not likely to be the vehicle for the Form 1099 repeal in the House.

The House Ways and Means has approved two bills for consideration by the full House. The first bill is H.R. 4, introduced by Representative Dan Lungren (R-CA), and sponsored by a cast of hundreds. The bill repeals the expansion of the Form 1099 requirement by the Patient Protection and Affordable Care Act. It does not have an offset.

The second bill, H.R. 705, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, would repeal the Form 1099 expansion. It would also repeal an additional Form 1099 expansion that was included in another law late last year, and the proposed bill would offset the cost of both with a reduction in a health care subsidy for premium payments under the new health care law.

The other expansion of the Form 1099 requirement was added by the Small Business Jobs Act in September, 2010. Under prior law, recipients of rental income from real estate who are not otherwise considered to be engaged in a trade or business of renting property were not subject to the same information reporting requirements as taxpayers who are considered to be engaged in a trade or business. The expansion requires these "incidental" rental income recipients making payments of \$600 or more to service providers that provide services for the rental property to issue Form 1099s to those service providers (e.g. cleaning service, maintenance).

(This is where careful readers will note that it says to *service* providers. This incidental landlord expansion takes effect this year. The general expansion does not take effect until next year. So the incidental landlord expansion applies to the law as it now exists so the expansion is to issue Forms 1099 to unincorporated service providers only. So next year, if the general repeal does not happen, incidental landlords would be issuing Forms 1099 for service and goods and to corporations too. If the general expansion is repealed,

and the incidental landlord is not, then they would be issuing Forms 1099 to just the unincorporated service providers.)

The offset is a bit complicated. The new health care reform law provides premium purchase assistance based on a person's or family's income. The premium assistance credit, which is refundable and payable in advance directly to the insurer, will subsidize the purchase of certain health insurance plans through a State exchange. The premium assistance credit will be available for individuals (single or joint filers) with household incomes between 100 and 400 percent of the Federal poverty level ("FPL") for the family size involved who do not receive health insurance through an employer or a spouse's employer.

For purposes of the premium assistance credit, during the open enrollment period for coverage during the next calendar year, exchange participants must provide information from their tax return from two years prior. This is going to create situations in which the premium assistance credit provided is going to be more than what the later financial report demonstrates was the appropriate amount.

A part of a law enacted late in 2010 imposed a recapture mechanism for the extra assistance but with limitations on how much can be recaptured. The liability for the excess advance payment must be reflected on the taxpayer's income tax return for the taxable year subject to these limitations on the amount of such liability.

The offset for H.R. 705 would compress the "brackets" of the limitations on the liability recapture, so that higher income brackets have more of the "excess" assistance recaptured.

The Ways and Means Chairman Dave Camp (R-MI) has indicated he plans to offer H.R. 705 as a substitute amendment to H.R. 4 on the floor.

Under the current House rules, it can pass H.R. 4 without a revenue offset. Ultimately, the statutory PAYGO requirement would catch up with it. Senate rules require an offset. The problem with the H.R. 705 offset is that since it is health care reform related, the Senate Democratic majority will object.

If the House were to pass the substitute version, it would complicate life but it is possible to get a suitable outcome. The Senate Democrats could concede the point on the health care reform offset. After all they did allow the initial recapture provision to make it into law after the health care reform was already law. More likely, however, when the House repeal bill arrives in the Senate, after some procedural sparring, the Senate could substitute their version of repeal with the rescission of unspecified unspent funds as the offset. Then the House could either take up that version or go to conference.

If the House passed H.R. 4 as is, the process would be the same with the Senate adding their rescission offset. The bottom line is the difference is about making a point about health care reform.

Senate repeal leader, Senator Mike Johanns (R-NE) has introduced another bill, S. 359, which mirrors H.R. 705. It is mostly for political symmetry. Given the Constitutional requirement that revenue bills begin in the House, the Senate will most certainly take up the bill the House passes, whatever is contained in it, and then either pass it or amend it as described above.

MEDICAL MALPRACTICE REFORM

The House Judiciary Committee has approved H.R. 5, the Help Accessible, Efficient, Low-cost, Timely Healthcare (HEALTH) Act.

Non Economic Damages

In any health care lawsuit, the amount of noneconomic damages, if available, may be no more than \$250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. For purposes of applying the limitation, future noneconomic damages shall not be discounted to present value.

Punitive Damages

The amount of punitive damages, if awarded, in a health care lawsuit may be as much as \$250,000 or as much as two times the amount of economic damages awarded, whichever is greater.

Punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer.

In determining the amount of punitive damages, if awarded, in a health care lawsuit, the trier of fact shall consider only the following:

- (A) the severity of the harm caused by the conduct of such party;
- (B) the duration of the conduct or any concealment of it by such party;
- (C) the profitability of the conduct to such party;
- (D) the number of products sold or medical procedures rendered for compensation, as the case may be, by such party, of the kind causing the harm complained of by the claimant;
- (E) any criminal penalties imposed on such party, as a result of the conduct complained of by the claimant; and
- (F) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.

Several Liability Only

In any health care lawsuit, each party shall be liable for that party's several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility.

Contingency Fees

In no event shall the total of all contingent fees for representing all claimants in a health care lawsuit exceed the following limits: (1) Forty percent of the first \$50,000 recovered by the claimant(s); (2) Thirty-three and one-third percent of the next \$50,000 recovered by the claimant(s); (3) Twenty-five percent of the next \$500,000 recovered by the claimant(s); and (4) Fifteen percent of any amount by which the recovery by the claimant(s) is in excess of \$600,000.

Periodic Payments

In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding \$50,000 is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments.

Statute of Limitations

The time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health care lawsuit exceed 3 years after the date of manifestation of injury unless tolled for any of the following (1) upon proof of fraud; (2) intentional concealment; or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

Collateral Source

The Committee deleted language regarding collateral source benefits